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The Exercise of the Presidency of the Council of the European Union by Romania

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Abstract

The rotating presidency of the European Union is part of the democratic mechanism in which the states decisively participate in the adoption of the legislative agenda in the Union. The presentation of the organizational aspects, the attributions and the decision-making methods, and of the internal organization shall be complemented by aspects regarding the political and institutional context in which Romania will, for the first time, take over the European mandate, but also by the priorities and fields of action already announced. In the end, the vulnerabilities and the possible means of action will be presented.

Keywords: The Council of the European Union, Presidency, legislative attributions, legislative agenda, Brexit, political context, national government, working formations.

1 Introductory Aspects

The Council of the European Union is one of the four institutions organized from the very establishment of the European Communities, having a particular role in the European institutional architecture: maintaining a strong implication of national governments in assuming legislative decisions and coordinating policies specific to the Union [1].

The Treaty on the European Union establishes, in article 16, its principles of organization and functioning. Thus, from the perspective of the composition, the Council consists of 28 government representatives of the states[1], usually minsters, authorized by their national governments in order to incur liability and to exercise

[1] the voluntary exit process of the United Kingdom of Great Britain and Northern Ireland, scheduled to end in March 2019, will lead to a diminishing of the number of member states, officially, at 27.

their vote on matters on the agenda. Even if the rule and recommendation are that the presence to be ensured by the ministers with portfolios, in practice it often happens that the working formations unfold in the presence of the secretaries of state with competencies in the European issues, of ministers of the states of Germany, of representatives of the Belgian provinces, or of autonomous regions of Spain, as the case may be. This fact oftentimes determines difficulty in the decision-making process [1], and the working format suffers significant modifications during each Presidency.

2 Attributions and Decision-Making Methods

Alongside the European Parliament, the Council exerts the legislative and budgetary power within the European Union. These attributions, observed within the European institutional evolution and development, denotes a development of two decision-making components, meant to increase the degree of democratic participation in a Europe often accused of having a generalized functional bureaucracy. Thus, while the participation to the decision of the European Parliament leads to a proper connection with the interests of the citizens that have chosen their European Members of the Parliament by general election, participation to a decision of the Council shows the importance that the States continue to have in expressing their sovereignty, in law-making, defining policies and budgetary priorities for the Union in its entirety. Defining policies and coordinating them represents other components of power of the Council of the European Union, by complying with the provisions of the Treaties.

Given the importance of a balanced regulation, in which there are no excesses or dominant positions of certain States with an increased number of votes, the Treaty provides that the rule of decision is ensuring a qualified majority, which from the 1st pf November, 2014, is equal to at least 55% of the members of the Council, coming from at least 15 states and representing at least 65% of the total population of the states composing the European Union [2].

The Council meetings are of a non-public nature, and the secrecy of the deliberations is oftentimes the subject of criticism for accentuating the democratic deficit of the Union. The Lisbon Treaty now permits public access to the voting of a legislative proposal, however non-legislative activities continue to remain a secret.

3 Working Formations

The Council of the European Union assembles, in each working formation usually bi-annually [3]. As specific formations, The General Affairs Council has as its main attribution ensuring the coherency of the works of the different formations of the Council, but also the preparation and execution of the judgment of the assemblies of the European Council while the External Affairs Council elaborates external guidance policies of policies and external interests of the

Union, in accordance with the strategic guidelines established by the European Council.

The activities of the Council concern both the legislative component, consecrated to deliberation, negotiation and voting of legislative acts initiated by the Commission as well as the non-legislative component, specific to strengthening cooperation between States.

In the present moment, the following 10 working formations are in function[2]:

- General Affairs;
- External Affairs;
- Economic and Financial Affairs (ECOFIN);
- Justice and Home Affairs;
- Employment, Social Policy, Health and Consumer Affairs;
- Competitiveness;
- Transport, Telecommunications and Energy;
- Agriculture and Fisheries;
- Environment;
- Education, Youth, Culture and Sport.

4 The Presidency of the Formations

The Presidency of the Council formations, excepting the External Affairs Council, is ensured by the representatives of the Member States within the Council according to an equal rotation system, in the conditions established in accordance with article 236 of the Treaty on the Functioning of the European Union.

The Presidency is exercised by each state, according to the principle of rotation, this being limited to 6 calendar months [4]. In accordance with the Council decision of 1 January 2007 laying down the order for the exercise of the Council Presidency, the order was established by June 2020, with Romania exercising the Presidency in the period of July – December 2019[3]. As a result of initiating the process of voluntary withdrawal from the Union, the Presidency period has been delayed, so that Romania will assume the presidency in the first term of 2019 [5].

The presidency has no attributions established in the treaties, and it must manifest in a neutral and impartial manner. As a moderator of debates, the State that holds the Presidency cannot intervene arbitrarily in supporting the position of a certain state [1], even if practice shows that there are bureaucratic mechanisms by which certain decisions, unwanted or unpopular can be postponed successfully during the exercise of rotational Presidency.

[2] http://www.consilium.europa.eu/showPage.aspx?id=427&lang=ro.
[3] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:001:0011:0012:RO:PDF.

In the specialty literature, it was consecrated that the presidency exercises the following functions [6]**:**

1. the administrative function (establishment of the agenda and timetable, after a consultation with the General Secretariat, and setting the time and order of intervention);
2. the initiative function, which is manifested by actions to support the introduction of concrete topics into the European agenda;
3. the task of coordinating the work of the working groups and the committees;
4. the function of representing the Council in relation to the other institutions of the Union [2].

5 The Context in Which Romania Takes Over the Presidency of the Council of the Union

2019 will certainly represent the year of the first experience of this kind at a European level for Romania. The lack of experience and, in certain places, of skill, will overlap with a busy and sensitive agenda at the level of the European Union.

On March 29, 2019 the United Kingdom should leave the Union voluntarily [7], an exceptional act with major policy and budgetary implications as well as for establishing the future of the Union. Even if until the drafting of the revised version of this article elements of a bilateral treaty resulting from the negotiation process are unlikely to appear, the most important scenarios at European level consider the conclusion of the negotiations and the signing of a voluntary exit agreement, but also the voluntary exit without an agreement between the parties. Each of the scenarios pose an extremely important concern for the agenda of the first term of 2019, the future of economic relations, the positioning of the single market, the labor market, and the budgetary consequences being carefully assessed. Even if now it seems unlikely, I believe that the postponement of the more or less determined exit date from the Union cannot be excluded [8]. It is obvious that Brexit will be a priority on the European agenda, and the informal meeting of the heads of state and government scheduled in Sibiu, Romania, will have to define the priorities and guidelines of development of the post-Brexit Union.

Elections for the European Parliament will take place during Romania's presidency, and the European electoral process will undoubtedly affect the agenda and the visibility of the concrete actions. At the European political level, a doctrinal confrontation between pro-Europeans, whether they are populists, socialists or liberals and populists and Eurosceptics is expected. The national elections organized by states in the years 2016-2018 show an increase in the populist share of voting intentions, a dynamic which can seriously affect the development of the Union in its entirety (significant developments are in Germany, France, the Netherlands, Italy, Sweden).

The legislative agenda approved in 2014 for the 2014-2019 term will be finalized during Romania's presidency. Achieving the compromise within the Council and from the dialogue with the European Parliament, with a view to finalize the legislative acts, will be all the more difficult as the lack of experience can be doubled by a poor understanding of the European decision-making processes by some Romanian dignitaries[4]. The finalization of the ongoing files will be conditioned by the good cooperation between Romania and Austria, which will enter into the trio with Estonia and Bulgaria. Under the motto "a Europe that protects", Austria has set its main topics the policies concerning asylum at a European level, a clearer regulation regarding migration, combating illegal migration and protecting the external frontiers of the Union, protecting the common values and combating terrorism, but also the cyber security policy.[5] A topic developed by Austria, which Romania will have to conclude, is that concerning the future of the Erasmus+ program, in the context in which there is a significant debate regarding the separation of the vocational and technical component from the teacher mobility component. This debate and the completion of the file are all the more difficult as the Brexit budget impact cannot yet be calculated accurately.

The preparation and definition of the new financial cycle 2020-2027 will be achieved, most likely in the first half of 2019, thus the meetings of the ECOFIN Council will have special significance, and the ability to seek compromise and find a solution that is satisfactory for all states will be decisive for finalizing the file. The Presidency of Romania at the Council of the European Union will thus be able to contribute to defining the benchmarks for the next multi-annual financial cycle post-2020.

Recently the proposals of the European Commission for the multi-annual budget have been made public, and the development of the political negotiation will probably take place during January – June 2019. This multiannual budget will need to provide the Union with the necessary resources in order to achieve the objectives of the next seven years. I believe that the optimism of Romanian officials, who are hoping the budget will get a final form in the first half of 2019 is hard to follow by a tangible result. The difficulty of estimating the real cost of Brexit for the internal market, the budgetary impact caused by the exit from the Union of a large taxpayer and the political turmoil caused by the European Parliament elections will cause both the Commission and the States to postpone the moment of some fundamental decisions for the budget.

[4] the lack of knowledge of European procedures and limits of competence may create the impression that the European agenda may be diverted, or that the State may impose an agenda of its own national interests. Even if unforeseen events or European political developments may create favorable prerequisites for discreet state intervention in the European priorities agenda, several studies reveal both the agenda connection between the presidents, taking up previously unfinished topics (Damian Chalmers, *op. cit.*, p. 86-88).
[5] http://www.consilium.europa.eu/ro/council-eu/presidency-council-eu/.

In addition to this priority, the contribution in the negotiations of the 37 sectoral legislation files is important, which must be finalized to allow the use of European funds on the 1st January 2021 for the financial framework up to 2027.

6 Priority Subjects and Areas of Interest

Romania will take over from the Austrian Presidency the files that will not be able to finalized and the term will begin in accordance with the European agenda and with our own vision of European institutional development. The trio formed together with Croatia and Finland will have to propose a long-term agenda, with clear, measurable objectives, and they will have to propose a common agenda with priority subjects that are on the European agenda for the next 18 months. Without contesting the existence of certain preoccupations, especially from the other two states, until July 2018 there were no public presentations of common intentions of the three states. However, this may lead to precarious quality of proposals, insufficient lobbying at institutional and national level and poor perception among citizens.

Until the final revision of this text in August 2018, Romania has not presented a final document that can be analyzed qualitatively and quantitatively. From a presentation made by the Prime Minister of Romania, Mrs. Viorica Dăncilă, it follows that the priorities will concern the legislative and non-legislative agenda of the Council.

The agenda will focus on four main pillars[6]:

(a) ensuring a sustainable and equitable development for all Member States through an enhanced level of convergence, cohesion, innovation, digitization and connectivity;

In this respect, Romania will strive for the completion of the banking union, the development of the union of the capital markets, the increase of competitiveness, including through mechanisms to support innovation, while keeping the social dimension of the Union active.

(b) Maintaining a secure Europe, both through securing external borders, as well as through supporting cyber security policies; the debate on the future space of security, freedom, and justice;

(c) strengthening the European Union's overall role, in particular on the following topics:

- development of the Eastern Partnership, marking the fact that during this mandate ten years since the initiation will be celebrated;
- the extension of the Free Trade Agreements in force or the inter-connectivity with the most advanced countries of the Eastern Partnership;
- consolidating the concrete steps with the European Union offers to the European aspirations of the Republic of Moldova;

[6] http://www.romania2019.eu/tematici-de-interes/.

- the affirmation of the importance of the Black Sea on the agenda of the European Union, the promotion of projects within the Three Seas Initiative;
- supporting the European perspective of the Western Balkans;

(d) the Europe of common values.

All these themes are important in the European debate and can be important areas of national positioning, even if their enunciation is succinct, without concrete actions, without elements of vision and without achievement indicators.

7 Vulnerabilities and Concrete Actions

Romania is at the moment in the middle of the Parliamentary Election Cycle, with a government majority made up of two parliamentary parties affiliated to European Socialists and Democrats. However, the government has been constantly shaken by public accusations of poor professional preparation, by undermining the rule of law and political misunderstandings, which led to the investment of the third executive only 13 months after the parliamentary elections.

Caught in the national political conflicts, many of the dignitaries ignore or do not comprehend the agenda and the European priorities, which gives way to a vulnerability for the term of Romania. The constant efforts of the Minister delegate for European Affairs, Victor Negrescu, cannot always substitute the lack of thematic or linguistic competency of many members of the government cabinet.

Organizing the approximately 1400 meetings in Brussels and Luxembourg where national representatives will have an important role to play in conducting the sessions will represent just as many moments when the national position will be important. At the same time, the effort to organize, in optimal conditions, the 300 technical meetings at high level in Romania is difficult, as long as the infrastructure is not at a European level. The government's decision to organize events in the majority of counties of the country may be uninspired, and participation in meetings may be below expected technical level and below the expected level of representation. Efforts to organize protocol courses, of European agenda or of improvement of the linguistic component are belated, as long as representatives in the working groups and committees should be familiarized and should have sustained activity at the assemblies held under other presidencies.

The political image of the government and its ability to coordinate activities will be constantly under discussion, and the European political debate will not bypass Romania. The imminent initiation of the procedure provided by art. 7 of the Treaty against Hungary, the disputes and the political agenda for 2019 will affect Romania even because the ruling party is the largest, as a voting intention, on the left-wing socialist side.

These aspects can be removed if Romania will make a neutral, efficient and professional subject out of the European term, with smart objectives, with an efficient communication and with involvement in all levels of power. Thus,

Romania will be just a secretariat of the agenda established in Brussels under the close coordination of the General Secretariat.

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The objectives of sustainable development, ways to achieve a better life for current and future generations

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Abstract

Identifying the major problems faced by mankind, states have understood that they need to cooperate in identifying the means to address these issues in order to ensure a better life for present generations and a secure future for the future generations. In this respect, the concept of sustainable development was promoted internationally. The Sustainable Development Summit, held in New York in 2015, has been a historic moment of great importance with the adoption of the Agenda for Sustainable Development 2030, bringing together over 150 world leaders at UNO headquarters to decide and start new ways to improve people's lives. At the United Nations Conference on Sustainable Development in 2015, the participants sought to enshrine the principle of sustainable development, taking into account the features of contemporary international society. Therefore, the 17 Sustainable Development Goals and 169 targets constitute an action plan for people, the planet and prosperity.

Keywords: sustainable development, 2030 Agenda, objectives, social, economic, environment.

1 Historical considerations regarding the evolution of the concept of sustainable development

Identifying the major problems faced by mankind, states have understood that they need to cooperate in identifying the means to address these issues in order to ensure a better life for present generations and a secure future for the

future generations. In this respect, the concept of sustainable development was promoted internationally, a concept of the greatest importance for our days. As stated in the literature, the concept of sustainable development is both a way of understanding the world, but also a way of solving global problems [1]. Looking from a historical perspective, the literature highlights that the starting point in asserting the concept of sustainable development would be the global ecological crisis in 1929-1933, an event that was overcome in time by the measures adopted by the United States (US) as a result of the 1969 oil spill in Santa Barbara. There have been a series of events that have led to the consolidation and promotion of the concept of sustainable development. Thus, the United Nations Environment Conference, held in Stockholm on 5-16 June 1972, was a great opportunity to carry out intense international consultations and exchange of views on the steps to be taken to maintain the quality of the environment and to meet the needs of current and future generations. As stated in the preamble to the Conference Declaration, protecting and enhancing the environment for present and future generations must be a primary objective for humanity, a task whose realization will have to be coordinated and harmonized with that of the fundamental objectives of peace and economic and social development around the world. At the same time, while recognizing the fundamental human right to freedom, equality and satisfactory living conditions, in an environment that allows us to live with dignity and prosperity, our duty to protect the environment is established, so that both present and future generations will enjoy its benefits. From the analysis of the ideas promoted by the United Nations Declaration on the Environment and by analogy with the definition of the concept of sustainable development formulated in the Brundtland Report, it can be inferred that, from an international regulatory point of view, the Declaration adopted in 1972 is the first step in formulating the analyzed concept. In 1983, the United Nations General Assembly adopted Resolution 38/161 on The Environmental Perspective Preparation Process until 2000 and thereafter establishing the World Commission on Environment and Development. As set out in the resolution adopted by the UN General Assembly, the commission had to consider the following objectives: to develop long-term environmental strategies to achieve sustainable development by 2000 and beyond; to recommend ways in which environmental concerns can be achieved through co-operation between all States and lead to the achievement of common goals and mutual support taking into account the relationships between people, resources, environment and development; to consider the ways and means by which the international community was to deal more effectively with environmental concerns; to contribute to defining common perceptions of the long-term environment, identifying the issues and efforts needed to address the objectives of protection and improvement of the environment [2]. Taking into account the objectives and recommendations formulated, the World Environment and Development Commission drafted the Brundtland Report in 1987 entitled "Our Common Future". The Brundtland Commission has identified two issues, namely: development not only means big profits and high living standards for a small percentage of the population, it means raising the standard of living for

all. The development must not lead to the destruction, or reckless use of our natural resources, nor the pollution of the environment. Sustainable development is not a fixed state of harmony, but rather a changing process depending on resource exploitation, investment, technological development and institutional change as well as the needs of the population. [3] In view of the issues discussed, the Commission defines in the report the concept of sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs", a definition consistently used in the literature. The report placed the concept of sustainable development on the global work agenda and determined the adoption of the decision to convene the Earth Summit in 1992. Thus, the preoccupations for the promotion and implementation of the sustainable development concept continued with the organization of the United Nations Development and Environment Conference in Rio de Janeiro in 1992, an event known as the Earth Summit. Twenty years after the first global environmental conference, the Earth Summit was considered an unprecedented meeting on the scale and depth of the concerns. The participating states have tried to rethink economic development and identify effective methods to stop the destruction of natural resources and reduce the pollution of the planet. The two-weekly talks at the summit led to the adoption of an impressive number of documents, namely: "The Rio Declaration on Environment and Development", known as the Earth Charter; "Agenda 21"; "Convention on Biodiversity"," Framework Convention on Climate Change" and "The Forest Principles". The Rio Declaration contains 27 principles that states can rely on for future decisions and policies, taking into account the environmental implications of socio-economic development. Agenda 21 was a comprehensive program that included provisions on all areas of sustainable development. considered a comprehensive plan for a global partnership, Agenda 21 aimed to reconcile the measures needed to maintain a high-quality environment with that of ensuring a healthy economy for all people in the world while identifying key areas of responsibility, as well as preliminary cost estimates for success. Agenda 21 can be considered as an important step towards sustainability that has triggered action at local, national and global level [4]. With regard to the Convention on Biological Diversity, its content focuses on the concept of sustainable use defined as the use of biological diversity components in a way that does not cause long-term decline in biological diversity, thus maintaining its potential to meet the needs and the aspirations of present and future generations. Following the implementation of the concept of sustainable development, the "Framework Convention on Climate Change" sets as a final objective the stabilization of greenhouse gas concentrations in the atmosphere at a level that prevents any dangerous anthropogenic disturbance of the climate system, thus ensuring sustainable economic development. In addition, the Member States of the Convention are guided, as in the activities carried out, to take into account the principles laid down in the Convention, among which the right of states to act for sustainable development and the obligation to effectively deal with it, as well as the obligation of states to protect the climate system in the interests of present and future generations. Considered a valuable international

legal instrument considered a *soft law*, "The Forest Principles" establishes, as early as the preamble, that forest protection occupies an important place in environmental protection strategies, their proper use ensuring a socio-economic development on a sustainable basis. The establishment of principles contributes to the management, conservation and sustainable development of forests and their provision for their multiple and complementary functions and uses. The desertification approach was still a major concern for the United Nations Environment and Development Conference (UNCED), with participating states supporting an integrated approach to the issue, highlighting the action to promote sustainable development at international level. As a result of the recommendations made in Agenda 21, in 1994, the United Nations Convention to Combat Desertification was adopted in Paris.

Taking into account the provisions of Chapter 38 of Agenda 21, the UN General Assembly decided by Resolution 47/191 the establishment of the Sustainable Development Committee to ensure effective monitoring of the implementation of the measures set out in the documents adopted at the United Nations Environment and Development Conference [5]. The United Nations Commission on Sustainable Development was therefore responsible for monitoring the progress achieved through the implementation of Agenda 21 and the Rio Declaration on Environment and Development. In order to make an assessment of the progress made, the States agreed a five-year review of the progress of the Earth Summit by the UN General Assembly. "Earth Summit + 5" assessed how well the countries, international organizations and civil society sectors responded to the challenge of the Earth Summit, UN Secretary General Kofi Annan saying that the main purpose of the reunion was to deepen the commitments made in Rio and stressed that there is still time for achieve all the objectives set.

In September 2000, world leaders gathered at the United Nations headquarters in New York to adopt the Millennium Declaration, engaging their nations in a new global partnership to reduce extreme poverty. Through the Millennium Declaration, participating countries have highlighted the core values essential to international relations, namely: freedom, equality, solidarity, tolerance, respect for nature and solidarity, structuring the content of the document in eight parts, as follows: values and principles; peace, security and disarmament; poverty eradication and development; environment protection; human rights, democracy and fair governance; protecting vulnerable people; addressing Africa's specific needs and strengthening the role of the UN. The eight Millennium Development Goals (MDGs) were developed in 2001 as a roadmap for the implementation of the Millennium Declaration, namely: eradication of extreme poverty and hunger; achieving universal primary education; promoting gender equality and empowering women; reducing infant mortality; improving maternal health; combating HIV/AIDS, malaria and other diseases; ensuring environmental sustainability and developing a global partnership for development. The main difference between the MDGs and the Millennium Declaration is that the following topics in the Declaration have not been included

in the MDGs: peace, security and disarmament; human rights, democracy and good governance; Africa's special needs and the UN reform [6].

The 2002 World Summit on Sustainable Development in Johannesburg was meant to reaffirm Agenda 21 as well as extend the sustainable development debate to encourage partnerships between the government and civil society to improve people's lives and preserve natural resources.

In pursuit of marking twenty years since the organization and conduct of the United Nations Environment Conference held in Stockholm from 5 to 16 June 1972 and the ten-year anniversary of the World Summit on Sustainable Development in Johannesburg, in 2002, the UN General Assembly decided to hold the Conference on Sustainable Development in Rio de Janeiro, Brazil in June 20-22, 2012. The Rio de Janeiro Conference, also known as Rio + 20, resulted in the final document, "The Future We Want", through which states have reaffirmed their commitments to all previous agreements, plans and objectives on sustainable development. At the same time, it was decided to replace the Commission for Sustainable Development with a "high-level political forum" to advance the implementation of the stated objectives. Thus, the work of the Sustainable Development Commission ended on the basis of the UN General Assembly resolution of 2013, replaced by the UN High Level Political Forum on Sustainable Development [7]. The Rio de Janeiro Conference in 2012 was the starting point for the development of the Agenda 2030, States taking the decision to develop global sustainable development goals starting from the Millennium Development Goals.

The Summit on Sustainable Development, held in New York in 2015, has been a historic moment of great importance with the adoption of the 2030 Sustainable Development Agenda, bringing together over 150 world leaders at the UN headquarters to decide and start new ways to improve life. At the United Nations Conference on Sustainable Development in 2015, the participants sought to enshrine the principle of sustainable development, taking into account the features of contemporary international society. Comparing the objectives set in 2000 with Agenda 2030, we find a reformulation of them, a rethinking of the content, as some of them were partially realized, but also because the new objectives were to respond to the requirements, changes and complexity of the situations existing on our planet [8]. As a result, the 17 Sustainable Development Goals and 169 targets constitute an action plan for people, the planet and prosperity.

2 The Sustainable Development Goals

The goals of sustainable development need to be achieved throughout the world by 2030, states being called upon to play their part in identifying common solutions to global challenges. Romania joined the group of countries that adopted the Agenda 2030 for sustainable development, the objectives of sustainable development being for the Romanian state internal mobilization tools and guidelines for international cooperation.

Measures to achieve the first goal of sustainable development (Poverty), namely to eradicate poverty in all its forms and in any context, must cover all the effects of poverty. Poverty is determined by the lack of resources and income, which causes famine, malnutrition, limited access to education and other services, social discrimination and exclusion. In order to eradicate poverty, the following targets are to be achieved by 2030: eradicating extreme poverty for all people everywhere; reducing the proportion of men, women and children living in poverty in all forms according to national provisions; implementation of adequate social protection systems and measures; ensuring for men and women, especially for the poor and vulnerable, equal rights to economic resources, access to services and technologies, and property protection, implementing measures necessary to support people affected by extreme weather events and economic and social disasters, implementing strategies and programs to support poverty eradication actions. Following the implementation of measures to eradicate poverty globally, it is said that progress has been made, which has led to great enthusiasm on the part of the states. However, specialized doctrine shows that progress will become difficult unless there is an emphasis on solutions to promoting peace and understanding between states, increasing employment and social inclusion, and managing shocks and risks [9]. Analyzing measures to eradicate poverty, the UN Secretary-General points out that while extreme poverty has diminished considerably, yet serious forms of poverty persist. Therefore, the end of poverty can be achieved through the implementation of universal social protection systems, the reduction of disaster vulnerabilities and addressing the problems according to the specificity of each less favored area [10].

The second goal of sustainable development (Zero Hunger) has as its focal point the eradication of hunger, but also the main targets needed to achieve the objective of ensuring food security, improving nutrition and promoting sustainable agriculture. In this regard, states must take measures to ensure that everyone has access to safe, nutritious and sufficient food. Emphasis is placed on ensuring food, especially for infants, for the poor, but also for those in vulnerable situations. In addition, it is intended to eliminate all forms of malnutrition. The doubling of agricultural production, but also the incomes of small-scale food producers, the provision of sustainable food production systems and resilient agricultural practices, as well as the maintenance of genetic diversity of seeds, cultivated plants and livestock are the main targets for the realization of the second objective. Agenda 2030 states that we can not separately look at food, livelihoods and natural resources management. Social protection systems accelerate the shift from protection to production, promote sustainable systems and improve the management of natural resources.

The third goal (Good Health and Well-being) to ensure a healthy life and to promote the well-being of all at all ages. The targets to be achieved are: reduction of neonatal mortality and mortality of children under five; stop AIDS epidemics, tuberculosis, malaria and tropical diseases; the fight against hepatitis, water-borne diseases and other communicable diseases; promoting mental health and well-being; prevention and treatment of substance abuse; reducing deaths due to road

accidents; ensuring access to sexual and reproductive health services; access to quality health services; reducing the number of deaths and illnesses caused by hazardous or polluting substances; ensuring control over tobacco consumption; supporting research and development of vaccines and medicines; increased funding for health, recruitment and specialization of the workforce; reduction and management of health risks. Although it can be said that at present a larger percentage of the world's population enjoys a healthy life over the past decades, new situations are emerging that pose challenges for health systems and add to the existing challenges. Changes in the environment have led to an increase in the frequency of some disease categories or the resistance of the diseases to traditional treatments. Air pollution, increases the risk of cardiovascular disease, stroke, chronic lung disease, cancer and acute respiratory infections. From the analyzes carried out at the UN level, some progress has been made, such as the reduction of adolescent births or the reduction of communicable diseases. The measures promoted to achieve the third objective can only be applied to well-organized health systems.

The fourth goal (Quality Education) guarantees quality education and promotes learning opportunities for all. Access to early childhood development, care and education, as well as the provision of free and quality primary and secondary education is envisaged. Ensuring equal access for women and men to technical, vocational and tertiary education, including university, affordable and of quality. Ensuring the acquisition of skills relevant to employment in the labor market, as well as acquiring the knowledge and skills needed to promote sustainable development. Providing modern and safe education for children with issues. Increasing the number of teachers in developing countries and improving them, as well as increasing the number of scholarships for young people in this category of countries. The implementation of the Fourth objective leads to an increase in the performance of future generations and implicitly to the development of states and a decent living for the generations that have emerged from the workforce.

Gender equality is the number five goal of sustainable development that aims at achieving gender equality and empowering all women and girls. The targets for the implementation of Goal Five aim to eliminate all forms of discrimination against women; eliminating all forms of violence, including sexual trafficking; eliminating harmful practices such as early and forced marriage; ensuring equal participation of women in the exercise of their functions at all levels and participation in decision-making in all areas of activity, ensuring access to sexual and reproductive health services and the recognition of women's rights in all fields. Girls and women represent half of the world's population, so half of its potential. However, discrimination against women starts from birth and continues throughout their lives in many countries. Premature marriages, lack of education and access to health affect girls' lives and lead to limited opportunities. Therefore, the measures set out under Objective Five need to be implemented, because gender equality is a fundamental internationally regulated right [11].

Clean Water and Sanitation is in sixth place in the list of sustainable development goals, thus setting out in Agenda 2030 the need to ensure the availability and sustainable water management and sanitation for all. Achieving the sixth goal is to: secure and accessible drinking water for all; access to sanitation and hygiene; improving water quality by reducing pollution and increasing the efficiency of water use in all sectors of activity; implementation of integrated water management; protecting and restoring water-related ecosystems, including mountains, forests, wetlands, rivers, aquifers and lakes; expanding international cooperation for efficient water use activities. Safe drinking water and sanitation are fundamental human rights. Access to fresh water of the population leads to other sustainable development goals, such as health, food security and poverty reduction. Population growth, intensification of agriculture, urbanization, industrial growth and climate change are beginning to affect the ability of nature to provide essential services. Under these conditions, integrated water management, refining recycling and reuse technologies, pollution abatement and cross-border cooperation between countries could lead to the achievement of the sixth objective, although there have been decreases in the funds invested in this area, which could determine difficulties in implementing the measures promoted by Agenda 2030 [12].

Goal number seven (Affordable and Clean Energy) ensures that everyone has access to affordable energy in a safe, sustainable and modern way. To this end, states should increase the share of renewable energy by 2030, improve energy efficiency, enhance international cooperation to facilitate access to clean energy research and technologies, promote investment in energy infrastructure and green energy technology. Although there has been progress in using renewable energy from water, solar and wind sources, the problem is far from being solved. Public and private investment should be geared towards innovative business models to identify new energy sources and transform global energy systems.

Goal number 8 pursues decent work and economic growth by promoting sustained, sustainable, open growth for all; through the full and productive employment of the workforce and by ensuring decent work for all. In order to achieve the goal, the following targets were set: economic growth per capita depending on the economic situation of each state, raising the level of labor productivity through diversification, modernization and innovation; promoting policies that support productive activities; creating decent jobs for women and men, for young people but also for people with disabilities; equality in terms of pay for work of equal value; entrepreneurship; the growth of micro-enterprises; decoupling economic growth from degradation of the environment; to develop strategies to reduce the number of young people who are not educated and trained and to make them available for employment; eradication of forced labor; the protection of workers' rights, especially of migrants; promoting tourism to create jobs; ensuring access to banking, insurance and financial services, strengthening technical assistance in the area of trade for developing countries. Over the last period, according to the International Labor Organization (ILO), the number of

unemployed globally is high, making it difficult to find a decent job. Decent work means work that ensures a fair income in line with work done, workplace security, family protection, prospects for personal development and social integration. Increasing the number of jobs in order to cover the demand in the global market is closely linked to the improvement of working conditions. Fitting people to decent jobs leads to increased productivity, therefore the economic growth of states. Instead, the rise in the number of unemployed people may cause internal disturbances. Therefore, governments can work by promoting people-centered economies, promoting youth, providing decent jobs to foster community cohesion, personal security, boosting innovation and employment [13].

Industry, innovation and infrastructure are the three important aspects of sustainable development under Goal 9. The ninth goal of sustainable development is to build robust infrastructures that provide essential facilities for business and society, promote sustainable industrialization that drives economic growth and job creation and encourage innovation by expanding the technological capacities of the industrial sectors and leading to the development of new skills. Developing a quality infrastructure, promoting inclusive and sustainable industrialization, increasing the access of small and medium-sized enterprises to financial services, modernizing infrastructures and industry are the four ways to achieve the targets of Goal nine.

Reducing inequalities within countries and from a country to another is goal number 10, which has as targets: increasing the incomes of the population; promoting the social, economic and political inclusion of all regardless of age, gender, disability, race, ethnicity, origin, religion or economic or other status, ensuring equal opportunities and reducing result inequalities, adopting fiscal, social and wage policies, regulations and monitoring of global financial markets and institutions; ensuring greater representation of developing countries worldwide, facilitating migration through the implementation of planned and well-managed migration policies. The international society has taken measures to reduce poverty-induced inequalities, yet inequality is still present. As can be deduced from the evoked targets, economic growth must be inclusive and involve the three dimensions of sustainable (economic, social and environmental) development in order to lead to the elimination of inequalities.

Goal number eleven (Sustainable Cities and Communities) of the 2030 Agenda seeks to develop cities and human settlements so that they are open to all, safe, resilient and sustainable. To this end, states must: to ensure everyone has access to adequate, safe and affordable housing and services and to improve neighborhoods; to ensure safe transport services; to promote urbanization and inclusive and sustainable urban capacity; to protect the cultural and natural world heritage; to reduce the number of deaths and people affected in the event of disasters; to reduce the urban impact on the environment; to provide universal access to green and secure public spaces. Population growth in urban areas has led to unplanned urban expansion, which is associated with increased carbon dioxide emissions, high pollution and rising house prices, all of which are seen as impediments to sustainable development. National policies and regional

development plans take into account the specific features of the areas in which they are applied, ensuring their specific character is essential to achieving sustainable development [14].

The sustainable development goal number 12 (Responsible Production and Consumption) on securing sustainable consumption and production patterns, some progress has been made so far, the development of national consumption and sustainable production policies indicating overall positive trends, although the resources used have been insufficient. The achievement of this goal envisages a series of targets, namely: implementation of the 10-year program framework on sustainable consumption and production; sustainable management and efficient use of natural resources; reducing global food waste and reducing food waste, ecologically managing chemicals and all waste, reducing their emissions into the air, water and soil to reduce the negative impact on the environment and human health; substantial reduction of waste generation through prevention, reduction, recycling and re-use, encouraging companies to adopt sustainable practices, promoting sustainable procurement practices, ensuring everyone is aware of sustainable development and lifestyle in harmony with nature. The type of transformation required by Goal 12 follows a shift from economic models that value economic growth to a new set of patterns that respect the boundaries of the planet, recognize the economy as a subdivision of nature, and support the concept of living in harmony with nature. By identifying significant gaps in the implementation of Goal 12, the UN Secretary-General stressed the need to strengthen solid partnerships. In this sense, the One Planet network has been set up, which has the necessary tools for a common approach and makes sustainable consumption visible and concrete and real to everyone [15].

Taking urgent action to tackle climate change and the impact of climate change is the 13th goal of sustainable development. Although the objectives of sustainable development are presented as future aspirations, goal 13 is found in a series of treaties such as the UNO Framework Convention on Climate Change, the Kyoto Protocol with the Doha Amendment, the Paris Agreement, and other multilateral instruments. Therefore, objective 13 reiterates a number of pre-existing obligations of states. With a view to achieving goal 13, the following targets are envisaged: enhancing adaptability to climate-related and natural disaster risks; integration of climate change measures into national policies, strategies and planning; improving education, human and institutional capacity in terms of climate change mitigation, adaptation, impact mitigation and early warning. The doctrine emphasizes that the implementation of objective 13 depends on the implementation of the Paris Agreement. Implementing them will lead to legislative changes, policies and institutional commitments at national level, which would create a framework for state measures to support sustainable consumption and production. States could cut subsidies and tax treatments for the fossil fuel industry by stimulating the development of renewable energy technologies [16].

The goal of sustainable development 14 (Life below water) promotes the conservation and sustainable use of oceans, seas and marine resources. The

oceans, seas and coastal areas are subject to pollution, overexploitation and the effects of climate change, which requires the implementation of concrete measures to change human behavior towards sustainable practices when exploiting marine resources as well as measures to maintain the productivity of seas and oceans. The seven targets are: prevention and reduction of marine pollution of all types; protecting marine and coastal ecosystems, minimizing the impact of ocean acidification; establishing effective regulations to control fisheries; the conservation of coastal and marine areas; a ban on certain forms of fishing subsidies that lead to overfishing or illegal fishing; increasing economic benefits for island states [17].

Life on land represents goal 15 and consists in protecting, restoring and promoting the sustainable use of terrestrial ecosystems, sustainable forest management, combating desertification, stopping and repairing soil degradation and halting biodiversity loss. Terrestrial ecosystems offer goods, raw materials, food and services that help reduce the risks of natural disasters, mitigate climate change and adapt to them, and maintain agricultural productivity. The targets pursued with a view to achieving goal 15 are: conservation, restoration and sustainable use of fresh groundwater ecosystems, implementation of the sustainable management of all types of forests; to combat desertification; conservation of mountain ecosystems; reducing the degradation of natural habitats, halting the loss of biodiversity, protecting and preventing the disappearance of endangered species; fair and equitable distribution of benefits from the use of genetic resources; stopping poaching and trafficking of species protected by flora and fauna; reducing the impact of invasive alien species on terrestrial ecosystems, integrating ecosystems and biodiversity values into national and local planning. The statistics show that the protection of forest and land ecosystems is increasing and the process of forest destruction has slowed down. However, the measures implemented should be geared towards land preservation, biodiversity protection, land productivity and genetic resources, preventing the disappearance of endangered species [18].

Promoting peaceful and inclusive societies for sustainable development, access to justice for all, and the creation of effective, responsible and inclusive institutions at all levels is the 16th goal of sustainable development (Peace, Justice and Strong Institutions). The targets of goal 16 promote: the reduction of all forms of violence; stopping abusive behavior, exploitation, trafficking, violence and torture of children, promoting the rule of law at all levels, reducing illicit arms trafficking, reducing theft and combating organized crime in all its forms; reducing corruption, developing efficient and transparent institutions; ensuring a participative and representative decision-making process; the participation of developing countries in the institutions of global governance, the assurance of the identity of all, as well as the provision of public access to information and the protection of fundamental freedoms. Ensuring constitutional justice is a major objective for states, with most constitutions providing for democratic, effective, accountable and inclusive institutions. Constitutional Courts and equivalent bodies are essential to ensure that the Constitution is respected by all branches of

power. International organizations, but especially those of a regional nature, promote best practice and develop standards to help states legislate to step up the fight against organized crime, reduce crime, improve prison conditions, re-educate offenders, and help families of imprisoned persons. Society development will only be achieved with the highest standards of integrity and accountability. Corruption leads to distrust in the management of public affairs. The population explores the opportunities that information technologies bring to sustainable development, but at the same time society becomes vulnerable to risks, including cybercrime. Through various forms of cooperation, States set up measures to reduce cybercrime. Inclusive societies and sustainable development are not possible without respecting human rights [19].

The last goal, 17 (Partnership for the Goals), aims at strengthening the means of implementation and revitalizing the global partnership for sustainable development. The targets of implementation include strengthening the mobilization of financial resources, ensuring development assistance, promoting investment, strengthening regional and international cooperation, promoting environmental technologies, strengthening international support, promoting the multilateral universal trading system, increasing trade, strengthening macroeconomic stability and sustainable development policies, strengthening the global partnership and promoting effective partnerships etc.

3 Conclusions

Implementation of the 17 sustainable development goals would lead to an increase in the quality of life of future generations. However, the application is quite difficult, given the economic, social, cultural or political differences between countries. The achievement of the 17 objectives depends on the financing of the means of implementation. It is true that after a period of financial effort on the part of the states, the results obtained will cushion the investment. However, at present, there are many states with a low standard of living who make efforts to meet the minimum needs of the population. These countries do not benefit from financial resources to support the implementation of sustainable development objectives. The only chance is to develop international cooperation and provide financial assistance. Investing in achieving sustainable development goals should be motivated by identifying the common interests of states regardless of their level of development. The implementation of sustainable development objectives can not be achieved in part, geographically or limited to specific objectives. Implementation must be done globally to produce the desired effects. The connection between the 17 goals does not allow the partial realization of these, the objectives being linked by common measures and results. In conclusion, states must identify the common interest necessary to the stability of the planet, an interest based on the understanding among peoples, the extinction of armed conflicts, respect for human rights and fundamental freedoms.

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The Law Applicable to Matrimonial Property Regimes From the Perspective of Council Regulation (EU) 2016/1103 of 24 June 2016

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Abstract

This article provides a succinct review of the most recently adopted regulation on civil judicial cooperation in the field of matrimonial property regimes with cross-border implications. After a brief, general and historical overview, the study offers some novelty elements of the regulation, exclusively on the law applicable to matrimonial regimes. Among the issues examined are the autonomy of the parties in choosing the law applicable to the matrimonial regime, the substantive and formal conditions of the election agreement, the law applicable in the absence of an agreement, the connecting factors for determining the applicable law, the public policy, the situation of the territorial conflicts, and interpersonal conflicts of laws.

Keywords: matrimonial regime, scope, enhanced cooperation, public policy, autonomy of will, applicable law, family law.

1 General Considerations

In the process of establishing an area of freedom, security and justice, where the free movement of persons is ensured, the European Union shall adopt measures on judicial cooperation in civil matters having cross-border implications, especially when they are necessary for the proper functioning of the internal market. Such measures, in accordance with art. 81 paragraph (2) (c) of the Treaty on the Functioning of the European Union (TFEU) also include those aimed at

ensuring the compatibility of the applicable rules of conflict-of-law and competency in the Member States.

The start of a project on uniform measures on matrimonial property regimes is being carried out for the first time in 2004 with the adoption by the European Council at the Brussels meeting of the program entitled "*the Hague programme: strengthening freedom, security and justice in the European Union*". In this context, the European Commission was invited to present a Green Paper on conflict-of-law settlement of matrimonial property regimes, addressing judicial competence and mutual recognition. Consideration was given to the need to adopt a European instrument in this area.

In response to this, on 17 July 2006, the Commission adopted the Green Paper on Conflict Matters in Matrimonial Matters, including judicial jurisdiction and mutual recognition.

Subsequently, in 2009, at the Brussels meeting, the European Council adopted the multiannual program entitled "*The Stockholm Programme — An open and secure Europe serving and protecting citizens*", in which it considers that mutual recognition "should be extended to fields that are not yet covered but are essential to everyday life, for example succession and wills, matrimonial property rights and the property consequences of the separation of couples, while taking into consideration Member States' legal systems, including public policy, and national traditions in this area." [1].

The proposal for a legislative instrument to remove obstacles to the free movement of persons and, in particular, the difficulties faced by couples with regard to the administration or division of their property, is carried out by the Commission in 2010 in the "Report on EU citizenship in 2010: removing obstacles to EU citizens' rights". It was the basis for the adoption on 16 March 2011 of two proposals for a Council Regulation, the first on *jurisdiction, the applicable law, the recognition and enforcement of judgments in matrimonial matters,* and the second on *jurisdiction, applicable law, recognition and enforcement of judgments on the patrimonial effects of registered partnerships.*

After long debates in the Council and the European Parliament, two compromise texts were released in November 2014, the content of which still did not seem satisfactory.

In February 2015, the Council decided to freeze the discussions on the proposals for the two legal acts, thus opening a reflection period based on the November 2014 compromise texts [2].

Some Member States voiced their opposition to the adoption of regulations, including the United Kingdom, which expressed its refusal to participate in this form of cooperation, accusing the lack of clarity in the drafting of the law, with multiple references to respect for human rights.

On December 1, 2015, Hungary and Poland issue a joint statement, suggesting some modifications to the proposals, in order to overcome any difficulties caused, in particular, by the recognition and acceptance of some family law institutions unknown to some of the Member States.

On 2 December 2015, the lack of unanimity within the Council [art. 81 paragraph (3) TFEU] prevents the adoption of the Regulations.

Between December 2015 and February 2016 a number of Member States, including Belgium, Bulgaria, Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, the Netherlands, Austria, Finland and Sweden and subsequently Cyprus have communicated to the Commission that they wish to establish enhanced cooperation between them in the field of international couples' property regimes and, more specifically, with regard to jurisdiction, applicable law and the recognition and enforcement of judgments in matrimonial property regimes and jurisdiction, applicable law and the recognition and enforcement of judgments on property effects of registered partnerships, requesting the Commission to submit a proposal to the Council in this sense [3].

On 9 June 2016, the Council adopted Decision (EU) 2016/954 authorizing such enhanced cooperation.

Two regulations are adopted on 24 June 2016, one of which is Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of competence, applicable law and the recognition and enforcement of judgments in matrimonial matters [4] which, according to art. 70 will apply from January 29, 2019.

In accordance with art. 81 of the TFEU, the Regulation is to apply in the context of matrimonial schemes with cross-border implications, to provide married couples with legal certainty about their assets and a certain predictability.

The Regulation brings together provisions on jurisdiction, applicable law and recognition, acceptance, enforceability and enforcement of judgments, authentic instruments and judicial transactions.

The law designated as applicable by this Regulation applies whether or not it is the law of a Member State.

2 Field of Application

The following are excluded from the scope of Regulation (EU) 2016/1103:

– the legal capacity of spouses, with the exception of the specific competences and rights of each spouse or both spouses in relation to the goods, either in their relations or in their relations with third parties;

– the existence, validity or recognition of a marriage, which remain subject to the national law of the Member States, including their rules of private international law;

– maintenance obligations between spouses, regulated by Regulation (EC) 4/2009 [5];

– matters relating to succession to a deceased spouse's patrimony, regulated by Regulation (EU) 650/2012 of the European Parliament and of the Council [6];

– social security;

– the right to transfer or adjustment between spouses in the event of divorce, legal separation or marriage annulment, old-age or invalidity pension rights that were accumulated during the marriage and which did not give rise to income from

the retirement fund during marriage. The exclusion is, however, a strict interpretation, and the regulation will regulate in particular the classification of pension assets, the amounts already paid to a spouse during the marriage and the possible compensation that would be granted in the case of a pension to which common assets were contributed;

– the nature of the rights in rem in respect of a good and any entry in a register of property rights in immovable or movable property, including the legal requirements for such registration. The Regulation states that a Member State should not be required to obtain recognition of a real right in respect of property situated in that Member State if the real right in question is non-existent in its law. However, in order to allow spouses to benefit in another Member State from the rights which have been created or transferred to them as a result of the matrimonial scheme, the regulation should provide for the 'adaptation' of a non-existent real right to the equivalent real right under the law of that other Member State. It is stated in paragraph 26 of the preamble that when such an adaptation is made, the objectives and interests pursued by the specific real right and its effects should be taken into account. Adaptation of non-existent real rights, however, should not exclude other forms of adaptation in the context of the application of the Regulation.

As regards the legal requirements for the registration of a right in immovable or movable property, the Regulation provides that the law of the Member State in which the register is in place (for immovable property, *lex rei sitae*) should be that which determines under what legal conditions and how to enroll as well as the authorities (*e.g.*, cadastral offices or notaries) responsible for verifying that all requirements are met and that the documentation submitted or produced is sufficient or contains the necessary information.

The authorities of the Member States shall have the power to verify that a spouse's right to property in the document submitted for registration is a right entered in the register or otherwise proved in accordance with the law of the Member State in which the register is held. The Regulation provides that, in order to avoid duplication of documents, the authorities responsible for registration should accept such documents drawn up by the competent authorities of another Member State, the circulation of which is provided for in the content of the Regulation. At the same time, it is not excluded that the authorities involved in the registration operation require the person requesting the registration to provide additional information or documents required under the law of the Member State in which the register is held, such as, for example, information or documents relating to the payment of tax liabilities.

The effects of enrolling a right in a register are also excluded from the scope of the Regulation and will be governed by the law of the Member State where the register is held. It is this law that determines whether the record has, for example, a declarative or constitutive effect. For example, the regulation states that "the acquisition of a right in immovable property shall entail entering into a register under the law of the Member State in whose territory the register is kept, to

guarantee the *erga omnes* effect of the registers or to protect legal transactions, place of acquisition should be determined by the law of that Member State".

– the effects of the registration or non-recording of such rights in a register.

At the same time, it provided that it does not apply to tax, customs and administrative matters.

3 The Notion of Marriage

Regulation (EU) no. 2016/1103 does not provide a definition of the notion of marriage. Point 17 of the preamble states that the Regulation does not define the concept of "marriage", as the definition of the national law of the Member States applies. In this context, the most important issue remains that of the law applicable to the classification of a relationship as a marriage within the meaning of the Regulation, since the concept of marriage may vary, particularly as regards same-sex marriages that are admitted in some Member States and prohibited in others. Under these circumstances, for the states where the *lex fori* is applied, the spouse assumes the risk that their marriage will not be recognized and the judge will refuse to settle the case concerning their matrimonial regime. In states where the law of the place of the act (*lex loci actus)* applies, the judge will have the legal duty to accept a foreign status unknown to the law of the forum, in contradiction with even the internal public policy.

On the other hand, the reference to the national law of a Member State leads to the conclusion that marriages celebrated under the law of a third State are to be governed by the law of that Member State. A relevant example for such a situation is the marriage with a minor admitted in the legislation of third countries but prohibited in the Member States, including Romania, in accordance with the case law of the European Court of Human Rights (ECHR) [7]. In such a case, making a claim on the marital consequences of marriage before a court of a Member State will automatically lead to the application of the *lex fori* and, consequently, to the rejection of the application for marriage in the respective Member State.

The solution also does not apply to same-sex marriages, especially if they are celebrated in a Member State. The ECHR has repeatedly affirmed that affective relations between homosexuals are included in the notion of family life, according to art. 8 of the ECHR [8] and although Member States are not forced to allow same-sex marriage within their jurisdiction [9], they can not derogate from the provisions of the Regulation, of which the scope of application also includes same-sex marriages celebrated in the States in which they are recognized. Hence, a number of difficulties arise, especially for the judge in the Member State whose jurisdiction does not allow for same-sex marriages. The court will face an extremely difficult task in which it should recognize a relationship contrary to the Constitution of its state. One of the solutions proposed by the doctrine [10] would be to recognize marriage as a mere fact that determines the legal consequences of a patrimonial regime. The state of the notified court does not recognize the marriage with the status it has acquired abroad but will consider it a mere legal fact that has taken place abroad, to which are attached patrimonial consequences.

The solution is also in line with point 54 of the preamble recalling the principle of non-discrimination as enshrined in the Charter of Fundamental Rights of the European Union. Any refusal to consider homosexual marriage as a fact solely based on sex or sexual orientation is a violation of the principle of non-discrimination.

For states that recognize only same-sex partnerships, another possible solution would be to qualify homosexual marriage abroad as a registered partnership provided by the *lex fori*. Among the countries that have adopted such a solution are Italy, Germany, Austria and Switzerland. It has been shown that such a qualification does not infringe the right to family life as interpreted by the ECHR, although it presents some inconvenience.

Beyond the mandatory nature of the regulation, the risk of refusing to recognize a same-sex marriage, regardless of the solutions proposed, is notable. In the absence of any EU competence in the field of family law, it is difficult to impose an obligation on Member States to accept a foreign family status through rules on matrimonial property regimes. This is even apparent from the provisions of the Regulation (Article 9 on Alternative Competence) which allow the court invested to decline jurisdiction in favor of another State when, under its private international law, the marriage in question is not recognized.

4 The Concept of Matrimonial Regime and Matrimonial Convention

According to the Regulation, all civil matters relating to matrimonial regimes, which cover both the day-to-day management of the property of spouses and the liquidation of the matrimonial regime, are included in the scope of the regulation, in particular as a result of the separation of the couple or the death of one of the spouses.

The term "matrimonial regime" is defined in Article 3 of the Regulation as a "a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution". It is to be interpreted as an *autonomous concept*, which, according to point 18 of the preamble, includes *"not only rules from which the spouses may not derogate but also any optional rules to which the spouses may agree in accordance with the applicable law, as well as any default rules of the applicable law"* and also "not only property arrangements specifically and exclusively envisaged by certain national legal systems in the case of marriage but also any property relationships, between the spouses and in their relations with third parties, resulting directly from the matrimonial relationship, or the dissolution thereof".

"Matrimonial Convention" is to be understood as any agreement of spouses or future spouses through which they organize their matrimonial regime.

5 The Choice of the Applicable Law by Spouses or Future Spouses

Under the Regulation, spouses or future spouses are free to designate or change the law applicable to their matrimonial regime. They may agree on the application of one of the laws listed in Art. 22 of the Regulation. The autonomy of the parties is not complete but limited to one of the following laws:

– the law of the State in which spouses or prospective spouses or one of them have their habitual residence at the time of the conclusion of the agreement; or

– the law of a State of the nationality which is held by any spouse or future spouse at the time of the conclusion of the agreement.

The legislative solution reflects, on the one hand, the principle of the parties' free will in the designation of the law applicable to the matrimonial regime (*lex voluntatis*) and, on the other hand, the need to limit the scope of these laws to those with which the spouses or future spouses, through their habitual residence or citizenship, have the closest links.

The regulation aims to provide spouses with the opportunity to know in advance the law applicable to their matrimonial regime. The introduction of harmonized conflict-of-law rules also has the role of avoiding possible contradictory results.

The choice of the applicable law can be made at any time before the marriage, at the time of the marriage or during the marriage. It can be changed at any time during the marriage, and will only produce effects for the future, unless the spouses agree otherwise. Under no circumstances may the retroactive application of the new law affect the rights of third parties under that law.

For reasons of legal certainty and to avoid fragmentation of the matrimonial regime, the law designated by spouses or prospective spouses applies to the matrimonial regime as a whole, that is to say, it applies to all assets covered by that regime, irrespective of their nature and irrespective of whether they are in another Member State or in a third country.

6 The Substantive and Formal Terms of the Choice of Law Applicable to the Matrimonial Regime

The existence and validity of an agreement on the choice of law or any clause thereof is set by the law which would regulate it, in accordance with the regulation, whether the agreement or clause would be valid [Article 24 par. (1)]. Consequently, the terms of validity of the agreement are governed by the law to which the agreement is addressed.

By way of exception, in order to establish that he has not given his consent, one of the spouses may invoke the law of the country of his habitual residence at the time of the referral to the court if it is apparent from the circumstances of the case that it would not be reasonable to establish the effect of the conduct in accordance with the law to which the agreement refers [art 24 par. (2)].

This regulation only becomes applicable if the following conditions are met cumulatively:

– to consider only consent as a background to the validity of the agreement;

– one of the spouses to invoke the non-existence of consent;

– the lack of consent to be based on the law of the state where the person claiming this defect is habitually resident;

– only habitual residence from the date of referral to the court is concerned;

– the application of the law of habitual residence from the date of referral to the court of law to the detriment of the law to which the agreement refers is made only if it is apparent from the circumstances of the case that it would not be reasonable to determine the effect of its conduct in accordance with the law to which the agreement is addressed. Reasonable character is to be judged on a case-by-case basis by the court.

Formally, the choice of applicable law agreement is concluded in writing, dated and signed by both spouses. The Regulation provides that any electronic communication that allows for a durable record of the agreement is considered equivalent to written form.

If the law of the Member State in which both spouses have their habitual residence at the time of the conclusion of the agreement provides for additional formal conditions for matrimonial conventions, those conditions shall apply. Such a situation exists, as a matter of fact, in Romanian law, where the matrimonial convention must comply with the special formal conditions laid down by art. 330 Civil Code [11].

For the assumption that the spouses have habitual residence in different Member States at the date of conclusion of the agreement, the laws of which provide for different forms of matrimonial arrangements, the agreement will be valid from the form's point of view if it meets the conditions laid down in any of those laws.

If, at the time of the conclusion of the Convention, only one of the spouses has a habitual residence in a Member State and that State provides for additional formalities for the matrimonial arrangements, those conditions shall apply.

At the same time, if the law applicable to the matrimonial regime under the spouses' agreement imposes additional formality, those conditions apply.

7 The Applicable Law in the Absence of a Choice by the Parties

In the event that no applicable law is chosen, according to art. 26 par. (1) of the Regulation, the law governing the spouses' matrimonial regime is determined according to objective criteria established in order to reconcile predictability and legal certainty, taking into account the life of the couple in a concrete way [pt. 49 of the preamble].

The link factors in determining the applicable law are determined on the basis of a hierarchy, the applicable law being determined as follows:

– the law of the State where the spouses have their first common habitual residence after the marriage; or, in the absence thereof [paragraph 1, let. (a)],

– the law of the State of which the joint citizenship is held by spouses at the time of marriage; or, in the absence of [paragraph 1, let. (b)],

– the law of the State where the spouses have the closest connection at the time of marriage, taking into account all the circumstances [paragraph 1, let. (c)].

The regulation also provides solutions to the mobile law conflict that occurs in those situations where spouses have more than one common nationality at the time of marriage. In this case, only the first and third link criteria apply. The solution complies with the jurisprudence of the European Court of Justice, applying the principle that one can not prevail over the other in determining the applicable law [12].

In the absence of a choice of law and of a matrimonial convention, the judicial authority of a Member State may, at the request of either spouse, in exceptional cases – where the spouses have resided for a long period in the State of their habitual residence – to conclude that the law of that state may apply if the spouses have relied on it. In order to do so, the applicant's husband must prove:

– that the spouses have their last common habitual residence in the other State for a significantly longer period than the State designated under paragraph 1 (a); and

– both spouses relied on the law of that other State for the establishment or planning of their patrimonial relations.

This "other state" law will apply from the date of the marriage, unless one of the spouses disagrees, in which case it only takes effect from the establishment of the last ordinary habitual residence in that State. Whatever the situation, the rights of third parties can not be affected.

8 The Scope of the Law Applicable to the Matrimonial Regime

The law, determined to be applicable, governs the matrimonial regime in all its aspects. According to art. 27 of the Regulation, this law establishes among other things:

– the classification of the property owned by each spouse or both spouses in different categories during marriage and after marriage;

– the transfer of property owned by spouses from one category to another;

– a spouse's responsibility for the other spouse's liabilities and debts;

– the prerogatives, rights and obligations of each spouse or both spouses of the goods;

– Termination of the matrimonial regime and division, distribution or liquidation of the goods;

– the effects of the matrimonial regime on the legal relationship between a spouse and third parties;

– the substantive conditions of the matrimonial convention.

For the case where a real right to which the matrimonial regime is entitled under the applicable law, and in the law of the Member State where the real right in question is invoked it does not exist, the regulation provides that if necessary and to the extent where possible, that right shall be adapted to the nearest equivalent right under the law of that State, taking into account the objectives and interests pursued by the specific real right and its effects.

9 Opposability to Third Parties

The law applicable to the matrimonial property regime between spouses can not be invoked by a spouse against a third party in a dispute between a third party and one or both spouses, unless the third party knew or ought to have known of the existence of that law.

According to art. 27 par. (2) of the Regulation, the third party is deemed to have the law applicable to the matrimonial regime under the following assumptions:

– if the respective law is: *the law of the State whose law is applicable to the transaction between a spouse and a third party; the law of the State in the territory of which the spouse and the third party have their habitual residence;* or in situations where immovable property is involved, *the law of the state where the property is located;*

– if one of the spouses has met the applicable advertising or registration requirements of the matrimonial regime provided for by: *the law of the State whose law is applicable to the transaction between a spouse and a third party; the law of the State in the territory of which the spouse and the third party have their habitual residence;* or in situations involving immovable property, *the law of the state where the asset is located.*

Where the law applicable to the marital status of spouses can not be invoked by a spouse against a third party, the opposability of the matrimonial regime to the third party is governed: *by the law of the State whose law is applicable to the transaction between a spouse and a third party;* or in situations where immovable property or property or rights are involved, *by the law of the State in which the goods are located or in which the goods or rights are registered.*

10 Exclusion of Renvoi

Article 32 provides that the application of the law of any State specified by the Regulation means the application of the rules of law in force in that State, with the exception of its rules of private international law.

The renvoi is excluded by removing one of the conditions of this institution, namely that the referral should be made to the entire system of foreign law.

11 Overriding Mandatory Provisions

According to the Regulation, considerations of public interest, such as the protection of the political, social or economic organization of a Member State, it should give the courts and other competent authorities of the Member States the possibility, in exceptional cases, of applying exceptions under the overriding mandatory provisions.

It is stated that 'Overriding Mandatory Provisions' should include mandatory rules such as those relating to the protection of family residence.

In art. 30, overriding mandatory provisions are regarded as those rules the observance of which is considered essential by a Member State to safeguard its public interests, such as its political, social or economic organization, to the extent that such rules are applicable to any situation within their sphere of application, irrespective of the law applicable to the matrimonial scheme under this Regulation.

However, this exception to the application of the law applicable to matrimonial property regimes requires strict interpretation in order to maintain compatibility with the general objective of the Regulation.

12 Public Policy

Public policy, regarded as an exception to the application of the law determined by the regulation, is regulated by art. 31 ["Public policy (ordre public)"] of the Regulation. According to the text, the application of a provision of the law designated under the Regulation may be waived if such application is manifestly incompatible with the public policy of the forum.

The exceptional nature of the application of the public policy of the system of law of the notified court (*lex fori*) is obviously outlined in the negative wording of the text ("may be refused only if") and the use of the phrase "manifestly incompatible". At the same time, according to point 54 of the preamble, the courts or other competent authorities may not invoke the public policy exception in order not to apply the law of another State if they would thereby infringe the provisions of the Charter of Fundamental Rights of the European Union, on the principle of non-discrimination.

From the expression that public policy may remove the application of a "provision" in the law of any country determined by the regulation, results the partial (limited) effect of the public policy exception, which paralyzes the negative effect of foreign law, rather than the effects of that law as a whole. [13]

The public order has a national character, for which, with regard to the content of the public order, the provisions of public order of private international law of each state will be taken into consideration.

In Romania, abstractly, the content of public order in private international law is the fundamental principles of Romanian law, EU law and fundamental human rights, applicable in the legal relations of private international law.

13 Territorial Conflicts and Interpersonal Conflicts of Law

Where the applicable law is that of a State comprising several territorial units, each having its own rules of law on matrimonial property regimes, the Regulation provides (Article 33) that the national rules on conflicts of law of that State are those which establish the territorial unity jurisdiction in which the rule of law applies.

In the absence of such national conflict-of-law rules, the following rules are provided:

- if the connecting criterion is that of the residence, the reference will be interpreted as being made to the law of the territorial unit in which the spouses have their habitual residence;
- if the criterion of linking is that of citizenship, the reference will be interpreted as the law of the territorial unit with which the spouses have the closest connection;
- if other link factors are to be considered, the reference will be interpreted as being the law of the territorial unit in which the relevant element is located.

For the hypothesis where a State has two or more systems of law or sets of rules applicable to different categories of persons in respect of matrimonial regimes, the regulation stipulates in art. 34 that any reference to the law of such a State shall be construed as referring to the legal system or the set of rules determined by the rules in force in that State. In the absence of such rules, the legal system or set of rules with which the spouses have the closest connection will apply.

The Regulation does not apply to internal conflicts of law, for which a Member State comprising several territorial units, each with its own rules on matrimonial property regimes, will not be required to apply a regulation in the event of conflicts of laws concerning only those territorial units.

14 Conclusions

Regulations (EU) 2016/1103 and 2016/1104 complement the European legal system by introducing new rules on marital couples' marriage regimes in terms of jurisdiction, applicable law, recognition and enforcement of judgments and public policies. These regulations represent the final point of a cooperative effort between European states in the process of approximating the laws applicable to matrimonial regimes existing in the various states. The EU has thus succeeded in establishing common conflict rules that can help and simplify the management of matrimonial regimes.

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Recent Jurisprudence of the CJEU on Abusive Clauses: The Andriciuc Ruling

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Abstract

The most recent judgment of the Court of Justice of the European Union on abusive clauses, the Andriciuc judgment, once again demonstrates the substantial contribution of the Court to ensuring uniform application and interpretation of legislation across the European Union. The main issues of law to which the Luxembourg Court will give in the Andriciuc case concern: the *ratione materiae* scope of application of Directive 93/13, namely the exclusion of clauses which reflect 'statutory or mandatory administrative rules' provided for in Article 1 (2) of the Directive; the conditions for applying the exception to the substantive control mechanism of unfair terms, where they fall within the scope of the concept of "the main object of the contract", the exception provided for in Article 4 (2) of Directive 93/13; the meaning of the phrase "clearly expressed and understandable contractual clause"; the time at which the significant imbalance which an abusive clause is causing between the rights and obligations of the parties must be reported.

Keywords: credit agreement, abusive clauses, currency risk clause, pre-contractual information, significant imbalance.

1 Introductory Considerations

The Andriciuc Ruling [1] brings to the fore a wide range of legal issues circumscribed to such a field, not only in our country, but also at European level, that of abusive clauses. The most recent judgment of the Court of Justice of the European Union on abusive clauses furthermore demonstrates the substantial contribution of the Court to ensuring uniform application and interpretation of legislation across the European Union. About Directive no. 93/13 /EEC [2], the

normative act that establishes at European level the legal regime of abusive clauses in contracts concluded with consumers, stated in the doctrine that it is living a kind of "second youth", being, metaphorically said, "awakened to life by the Court". [3] It is also right to assume that 'at least in the light of the preliminary questions, mobilization demonstrates, if necessary, its relevance to responding to certain contemporaneous stakes'. [4]

In the following, we will first quote the main points of law deduced from the questions referred to the Court of Justice in the Andriciuc case and we will then examine each of them; at the same time, we will try to outline the possible solutions that the national judge can make regarding the classification of one or more clauses as abusive, by applying the Court's judgments.

A first issue of law on which the Luxembourg Court will rule in the Andriciuc case concerns the *ratione materiae* scope of Directive 93/13, namely the exclusion of clauses which reflect 'statutory or mandatory administrative rules' provided for in Article 1 (2) of the Directive. The second question of law to be referred to the Court concerns the conditions for applying the exception to the substantive control mechanism of unfair terms, where they fall within the concept of 'the main object of the contract', the exception provided for in Article 4 2) of the Directive 93/13. The third legal issue that the Court will unravel refers to the meaning of the phrase "contractual clause expressed in a clear and comprehensible way". A last issue to which the Court will refer concerns the timing of the existence of the significant imbalance which an abusive clause provokes between the rights and obligations of the parties.

Before making an analysis of the issues raised, some clarification is needed as to the circumstances in which they arise and which gave rise to the preliminary questions. Andriciuc is the result of the request for a preliminary ruling by the Oradea Court of Appeal in the context of a dispute over the allegedly abusive nature of some contract terms inserted in several credit agreements in foreign currency between a professional (bank) and a consumer. It is relevant for the proposed analysis that the clause inserted in such a contract stipulates that the repayment of the credit is to be made in the same foreign currency in which it was granted, a clause which had not been individually negotiated with the consumer. In fact, during the 2007-2008 period, the applicants, who received their salaries in Romanian lei (RON), concluded credit agreements with the bank in a foreign currency, namely Swiss francs (CHF), and according to Article 1 (2) of each of these contracts, the borrowers were required to repay the monthly installments of the loans in the same currency in which they were granted – Swiss francs respectively, with the consequence that the foreign exchange risk, which implies an increase in the monthly rates in the case of the lowering of the exchange rate exchange of the Romanian leu against the Swiss franc remained exclusively for them. The claimants in the main proceedings brought an action before the Bihor Court seeking annulment of the clauses providing for the repayment of the Swiss francs, considering that they constituted abusive clauses. Since the Bihor Court dismissed the action, the applicants lodged an appeal against the court's decision at the Oradea Court of Appeal, the referring court. In order to have a complete

picture of the facts, we should also add the finding of the referring court that, in the present case, the value of the Swiss franc has increased significantly since the granting of the loans in question. That is the context in which the Oradea Court of Appeal decides to suspend the proceedings and to refer the questions to the Court for a preliminary ruling. [5]

2 The *Ratione Materiae* Scope of Application of Directive 93/13

The first question of law referred to above therefore concerns the *ratione materiae* scope of application of Directive 93/13, namely the exclusion concerning clauses which reflect "Statutory or mandatory administrative rules" as provided for in Article 1 (2) of the Directive [6]. Although that first question is not found in the questions referred for a preliminary ruling, the Court will address it in the light of its previous case-law [7], given that the Romanian Government and the bank have stated that the question arises whether the clause inserted in a credit agreement in foreign currency, which stipulated that the repayment of the credit should be made in the same foreign currency in which it was granted, reflects the principle of monetary nominalism enshrined in Article 1578 of the Romanian Civil Code so that it may not fall within the scope of Directive no. 93/13, on the basis of Article 1 paragraph (2).

With regard to this first issue, which seems to have been clearly resolved by the Court, we consider it useful to make a few points when there are already different interrelations in the doctrine. The Court's answer may be susceptible to two interpretations which are derived from the possible meanings of the phrase 'statutory instruments' in Article 1 paragraph (2) of that directive. With regard to this exclusion from the scope of the Directive of clauses reflecting statutory or mandatory administrative rules, the Court had already ruled [8], first, that exclusion having the character of an exception is a strict interpretation [9], and, on the other hand, the other part involves the cumulative fulfillment of two conditions: the contractual clause must reflect a law or administrative rule, and that act or rule must be mandatory [10]. Next, in order to determine whether a contractual clause is excluded from the scope of Directive 93/13, *it is for the national court to ascertain* whether that clause reflects the provisions of national law which apply between the Contracting Parties independently of their choice or those which are of suppressive nature [11]. Specifically, the question is whether this term refers only to the rules that are mandatory or facultative in character. Ambiguity is also maintained by the different linguistic versions of the phrase in question contained in the text of the Directive and used equally by the Court in its rulings. It's about using the terms "impératif" (Fr.), "mandatory" (Eng.), "imperativo" (Sp.), as synonyms of the term "obligatory". A first possible interpretation would be that the phrase "mandatory binding acts" refers only to clauses that reflect imperative normative acts. [12] This appears to be the view of Attorney General Nils Wahl as well, that in paragraph 58 of the conclusions of

the case it is shown that "given the restricted scope of the exclusion in Article 1 paragraph (2) of Directive 93/13, it is not certain that this (exclusion) is applicable, since Article 1578 of the Civil Code may be considered as a facultative rule". The other possible interpretation would be that the syntax in question includes both imperative and facultative rules. The arguments in support of that interpretation can be deduced, first, from the analysis of the Court's response, paragraph 29, and, on the other hand, from the additional terms relating to the meaning of that phrase which can be found in the 13th point of Directive 93/13. First of all, it is clear from the logical and grammatical interpretation of paragraph 29 of the judgment that a clause is excluded from the scope of the Unfair Terms Directive if that clause reflects provisions of national law which apply between the independent parties of their choice – that is, reflecting imperative legal rules – and, if the clauses reflect supplementary provisions applicable *ope legis* in the absence of a different agreement between the parties in that regard – that is, reflecting legal rules which are binding only if the parties did not agree otherwise Secondly, it argues in favor of that interpretation, paragraph 13 in the preamble to the Directive, which, on the assumption that "the laws or regulations of the Member States (...) do not contain abusive clauses", states, at the end of the third sentence, that "*the wording of the mandatory laws or regulations* of Article 1 par. (2) also refers to rules which, in accordance with the law, apply between the Contracting Parties, provided that other agreements have not been established.".

However, in my view, in assessing whether the clause according to which the credit is to be repaid in the same currency in which it was granted reflects the mandatory acts or rules of national law, the national court must also take account of other evidence relied on by the Court in the opinion in points 30 and 31. Thus, the *a quo* court must take into account both the "legal and factual context" in which the loan contracts in question are entered into and the fact that the exception set out in Article 1, paragraph (2) is a strict interpretation, with particular regard to the objective of the Directive, namely to protect consumers against abusive clauses inserted by professionals. Therefore, the national court should take into account, *inter alia*, the fact that the supplementary provision [13] in Art. 1578 The Civil Code, which is supposed to be reflected by the clause according to which the loan must be repaid in the same currency in which it was granted, is a provision of common law (civil law), applicable only in the absence of provisions in the special law, consumer law. As is well known, civil law rules are enacted for legal relationships where the parties are in a position of legal equality, so they are very likely not to provide an adequate level of protection to consumers whose position is characterized by inferiority from the legal, informational, economic and psychological point of view. It is therefore appropriate, in the present case, for clauses which reflect rules of a supplementary character, to which the Court refers, rules referred to in point 13 in the preamble to Directive 93/13 only if they are special rules of consumer law, as only these are designed to provide at least a minimum level of consumer protection.

It should be noted that the exclusion in question is not taken over by the French legislator in the law transposing Directive 93/13 [13], given the level of

minimum harmonization of the Directive. Accordingly, according to French law, a clause inserted in a consumer contract may be subject to control of the potentially abusive nature, even if it reflects legal provisions, considering that Member States may adopt rules different from those of the Directive, rules to ensure a higher level of consumer protection.

3 The Conditions for Applying the Exception to the Background Control Mechanism of Abusive Clauses

If the national court finds that the clause according to which the credit is to be repaid in the same currency as that in which it was granted falls within the scope of Directive 93/13, it will be confronted with the second question of law which is the subject of the analysis. It concerns the conditions for applying the exception to the substantive control mechanism of unfair terms in so far as they fall within the scope of the concept of "the main object of the contract", the exception provided for in Article 4 par. (2) 93/13. According to that article, "the assessment of the unfairness of the clauses does not concern either the definition of the subject-matter of the contract or the appropriateness of the price or the remuneration, on the one hand, of the services or the goods supplied in exchange for them, given that these clauses are clearly and comprehensibly expressed". As pointed out in the doctrine, the extent of clause control is an issue as delicate as controlling the "essence of the contract". [14] However, the Court's response will be categorical regarding this matter. Starting from the already established premise [15], that Article 4 (2) of Directive 93/13 provides for an exception to the substantive control mechanism of unfair terms and that, consequently, those provisions must be given a strict interpretation, the Court finds that in the present case several items in the file tend to indicate that a clause according to which the loan must be repaid in the same currency as a credit agreement in a foreign currency between a professional and a consumer without having been the object of an individual negotiations fall within the concept of 'main object of the contract' within the meaning of Article 4 (2) of Directive 93/13. As Attorney General Wahl pointed out in his Opinion, that provision is based on the idea that the core of the contractual relationship (*essentialia negotii*) must not, in principle, be affected by an external intervention and, in particular, by the court's intervention. [16]

In its response to the reply, the Court will recall at the outset its previous case-law, according to which the contractual terms of the concept of 'main object of the contract' within the meaning of Article 4 (2) of Directive 93/13 are to be understood as "which define the very essence of the contractual relationship", which "establishes the essential benefits of this contract and which, as such, characterize it". [17] Observing that the main benefits of a credit agreement relate to an amount to be defined in relation to the currency of payment and reimbursement stipulated, the Court, in agreement with the Advocate General, comes to the interim conclusion that the fact that a credit must be reimbursed in a given currency does not, in principle, concern an ancillary payment method but

the very nature of the debtor's obligation, thus constituting an *essential element* of a loan agreement. Accordingly, a contractual clause under which the loan must be repaid in the same foreign currency in which it was contracted, inserted in a loan agreement concluded in foreign currency which was not the subject of an individual negotiation, is included in the concept of "the main object of the contract" since that clause establishes an essential service which characterizes that contract. Finally, the Court will conclude that this clause can not be regarded as abusive in so far as it is expressed in a clear and comprehensible manner. In other words, the requirement of a clear and comprehensible wording of a clause is necessary even if that clause falls under the concept of the "main object of the contract".

4 The Meaning of the Phrase "Clear and Understandable Contractual Clause"

This response, also evoked in the rulings of Caja de Ahorros y Monte de Piedad de Madrid [18] and Kásler and Káslerné Rábai [19], will be the binder and the introduction that the Court will take to answer the following preliminary question. In essence, the referring court asks whether Article 4 (2) of Directive 93/13 must be interpreted as meaning that the requirement that a contractual clause must be **clearly and comprehensibly** expressed implies that the clause contained in a contract which stipulates that the loan must be repaid in the same foreign currency in which it was contracted, must provide only the reasons for the inclusion of this clause in the contract and its implementation mechanism **or whether** it must also mention *all its possible consequences* according to which the price paid by the consumer may vary, *such as exchange rate risk*, **and whether**, in the light of that Directive*, the obligation of the borrowing institution to inform the borrower at the time of the credit also includes the possibility of appreciating or depreciating a foreign currency*. In sum, the Court is therefore called upon to answer whether the contractual clause whereby the consumer is required to repay the credit in the same foreign currency in which it has been granted must be accompanied by exhaustive information on the economic consequences of that clause.

In drawing up its answer, which leaves no room for divergent interpretations, the Court will make a wide-ranging analysis of the meaning of the phrase "clear and comprehensible clause", constructing its reasoning on the basis of its previous jurisprudence. As a preliminary point, it must be observed that, according to its settled case-law, *pre-contractual information* on contractual terms and the consequences of concluding a contract is of *fundamental importance* to a consumer and presupposes that the consumer has an effective examination of all the clauses. The consumer will decide, *in particular on the basis of that information*, whether he wishes to make himself obligated according to the conditions previously established by the professional. [20] Next, under that same case-law, since the system of protection implemented by that directive is based

on the idea that, inter alia, as regards the level of information, the consumer is in a situation of inferiority to the professional, *the requirement for the wording to be clear and intelligible in the clauses of the contract* and, therefore, the transparency required by the same directive *must be understood extensively* and can not be reduced only to their formal and grammatical intelligibility. [21] Only in this way will the consumer be able to assess, on the basis of precise and comprehensible criteria, the resulting economic consequences (such as, among others, the total cost of the loan). [22]

In other words, the requirement for a clear and comprehensible wording of the contractual clauses requires the professional to communicate *all the elements* which may have an effect on the extent of his obligations and which also allow the consumer to assess the economic consequences of those clauses on his financial obligations. [23] In that context, the Court states that, in its approach to assessing whether all those elements have been communicated to the consumer, *a quo* court must take into account the level of attention that can be expected of an *average consumer* [24], who is reasonably well informed and sufficiently observant and advised. [25]

It follows from the considerations presented by the Court that the requirement of a clear and intelligible nature of the contractual clauses must be understood by reference to three other subsidiary requirements:

a) the requirement that the clause be drafted in a clear and comprehensible manner so as to be understood by the consumer not only formally and grammatically, but also as regards the concrete effects of the clause, such as the possibility of appreciating the foreign currency and assessing the economic consequences of that appreciation;

b) the requirement for pre-contractual information to be given by the bank on the terms of the contract and the consequences of its conclusion;

c) the need to assess the first two requirements to the average consumer standard.

Finally, the Court will apply this line of case-law to the specific case of the foreign currency loan agreement at issue in the main proceedings. It will emphasize that, in relation to foreign currency loan contracts, financial institutions must provide borrowers/consumers with sufficient information to enable them to make prudent and informed decisions, which must include at least the impact that a severe depreciation of the legal means of payment of the Member State in which the borrowers have their domicile or headquarters and what impact the increase in interest rates on foreign currency loans have on their interest rates of the loan. [26]

In particular, the Court will establish that the obligation to inform the consumer of all elements which may have an effect on the extent of its obligations and which enable it to assess the total cost of the foreign currency loan consequently implies two principal obligations for the professional, respectively the bank. Firstly, it is the obligation to make clear that, by concluding a loan agreement in a foreign currency, the consumer is exposed to a foreign exchange risk that may be economically challenging, to overcome it in case of devaluation

of the currency in which he receives the income. Secondly, the banking institution *must present possible variations in foreign exchange rates* and the risks inherent in contracting a foreign currency loan, especially if the borrower does not receive income in that currency.

In conclusion, it will state, in the light of the considerations set out above, that "Article 4 par. (2) of Directive 93/13 must be interpreted as meaning that **the requirement that a contractual term must be clearly and comprehensibly stated,** *presupposes that* in the case of credit contracts *the financial institutions must provide borrowers with sufficient information to enable them to take prudent and informed decisions.* In that regard, that requirement implies that a clause according to which the loan must be repaid in the same foreign currency in which it was contracted to be understood by the consumer both formally and grammatically and in terms of the concrete effects thereof, in the sense that *an average consumer who is reasonably well informed and reasonably observant and circumspect can not only know the possibility of appreciation or depreciation of the foreign currency in which the loan was contracted but also assess the potentially significant economic consequences of such a clause on its financial obligations*. It is for the national court to carry out the necessary verifications in that regard."

5 The Moment of Assessing the Existence of "the Significant Imbalance"

A last issue on which the Court will be asked to rule on concerns the timing of assessing the existence of a "significant imbalance" that an abusive clause provokes between the rights and obligations of the parties. More specifically, it is questionable whether the *significant imbalance* between the rights and obligations of the parties should be considered solely at the time of the conclusion of the contract, or whether *during the course of a contract with successive execution* the performance of the consumer becomes overly burdensome when compared to the moment of conclusion of the contract significant changes in the exchange rate. The answer to this last question will be complex and nuanced and will give the Court the opportunity to demonstrate once again the refinement in constructing an irreproachable legal reasoning. Thus, for the beginning, the Court will resume the aforestated in the Cause of Bucura [27] in the sense that, in assessing the unfairness of a contractual term, the national court must refer, at the time of conclusion of the contract, to all the circumstances surrounding the conclusion of the contract. In extending that idea, the Court will hold that the assessment of the unfairness of a contractual term must be made in the light of all the circumstances which the professional might have known at the time of the conclusion of the contract and which *were likely to influence his subsequent performance* by admitting that a contractual clause may imply an imbalance between the parties that occurs only during the performance of the contract. [28] In particular, the Court will find that, in the present case, the clause stating that the monthly

repayment rates of the loan must be made in the same foreign currency in which the credit was made places the currency risk for the consumer in the event of devaluation of the national currency in relation to the foreign currency. So, we can deduce from this that the currency risk established by the consumer *at the moment of conclusion of the contract* by the said clause has the potential to generate a significant imbalance that *will be manifested later in the execution of the contract*. The Court will continue with the principle of non-disclosure as to what features a contractual clause must meet in order to be considered abusive. Thus, on the assumption that the clause in question has not been negotiated and having regard to the provisions of Article 3 (1) of Directive 93/13, the Court will point out that the national court must assess, first, the possible non-compliance with the requirement in good faith and, secondly, the existence of a material imbalance between the rights and obligations of the parties to the contract, to the detriment of the consumer. We consider it *essential* that the Court make a reference to the need for the national court to take into account the abusive nature of the clause, in particular the expertise and knowledge that the professional possesses about possible fluctuations in exchange rates and the risks inherent in the contracting of a foreign currency loan. It is well known that in European consumer law, unlike other Member State legislation such as France, the unfairness of a clause inserted in a contract between a professional and a consumer implies the fulfillment of the three conditions, namely the *sine qua non* condition of the lack of negotiation, the breach of good faith and the existence of a significant imbalance between the rights and obligations of the parties to the detriment of the consumer. The Court will recall its case-law on Aziz, from which transpires the relationship of interdependence that must exist between the notion of *significant imbalance* and the *good faith* in order to be in the presence of the abusive nature of the contractual clause. In order to ascertain whether a clause proves, in contradiction with the requirement of good faith, a significant imbalance between the rights and obligations of the parties to the contract, to the detriment of the consumer, the national court must verify *whether the professional, by acting fairly and equitably to the consumer could reasonably expect the latter to accept such a clause following an individual negotiation*. [29] So, good faith must be related to the professional's conduct, as they must act fairly and fairly towards the consumer, only in this way it could reasonably be expected to accept the clause assuming it had been negotiated. We therefore consider that the breach of good faith could result from the breach of the professional's obligations to draft a clear and comprehensible clause and breach of the pre-contractual information obligation by inserting the foreign exchange risk clause into the contract without informing the consumer, for example, information at least about the impact that a severe depreciation of the national currency has on the rates of the loan.

Finally, the Court will rule that "Article 3 (1) of Directive 93/13 must be interpreted as meaning that the assessment of the unfairness of a contractual term must be made in relation to the time at which that contract was concluded, taking account of all the circumstances which the professional could be aware at that

time and was likely to influence the subsequent performance of the contract in question. It is for the national court to assess, in the light of all the circumstances of the case in the main proceedings, and in particular the expertise and knowledge of the professional, in this case the bank, as regards the possible fluctuations in exchange rates and the risks inherent in contracting a loan in foreign currency, the existence of any imbalance within the meaning of that provision."

6 Conclusions

The Andriciuc Ruling substantially enriches CJUE's case law on unfair terms, in particular by expressly laying down the steps the national judge must take in the case in which he has to resolve such a litigation. First of all, the national court must verify whether the allegedly abusive clause falls within the material scope of Directive 93/13, in accordance with Article 1 par. (2). If it comes to the conclusion that that clause falls within the material scope of the directive, the national judge must verify, in a second stage, whether the clause is circumscribed to the concept of 'main object of the contract'. Irrespective of the outcome reached at this stage, the analysis of the case will continue, because even if the judge determines that the clause under analysis falls under the "main object of the contract", it will have to examine whether this clause is expressed in clear and comprehensible terms. Finally, if the clause is found to be unclear and incomprehensible, the judge will assess its abusive nature by checking, in addition to the lack of negotiation of the case, the existence of a significant imbalance between the rights and obligations of the parties to the detriment of the consumer, in violation of good faith.

It remains to be seen how this ruling will be applied by our courts, and if this will lead to a change in national case law in the matter, given the particularly important stake in cases concerning the potential abuse of the clause stating that the repayment of monthly installments of a Swiss franc loan will be made in the same currency in which the credit was granted, hence the currency risk clause, i.e. the possibility of "freezing" the Swiss franc rate.

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[1] ECLI:EU:C:2017:703, C-186/16.
[2] Directive 93/13/EEC of the Council of April 5 1993 on abusive clauses in contracts concluded with consumers (JO 1993, L 95, p. 29, Special edition, 15/vol. 2, p. 273).
[3] Micklitz, H.-W., Reich, N. (2014). The Court and the Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD), Common market law review, Vol. 51, no. 3/2014, p. 771.
[4] Toader, C., Lecomte, F. (2015). *Ultimele evoluții în materia dreptului consumatorului în jurisprudența Curții de Justiție* (The latest

developments in consumer law in the case law of the Court of Justice), in The Romanian Journal of European Law no. 3/2015, p. 36.

[5] **1)** Article 3 paragraph (1) of Directive 93/13 must be interpreted as meaning that the significant imbalance between the rights and obligations of the parties arising from the contract must be examined solely by reference to the time of conclusion of the contract in which during a successive contract, the consumer's benefit becomes excessively onerous compared to the moment of the conclusion of the contract due to significant changes in the exchange rate?; **2)** Under Article 4 (2) of Directive 93/13, the clear and comprehensible nature of a contractual clause must be understood as meaning that that contractual clause must state only the reasons for the inclusion of that clause in the contract and its mechanism or it must also provide for all its possible consequences according to which the price paid by the consumer may vary, such as exchange rate risk, and, from the perspective of Directive 93/13, it may be considered that the bank's obligation to inform the customer at the time of the granting of credit exclusively concerns credit conditions, such as interest, commissions, guarantees placed on the borrower, the possibility of appreciation or depreciation of a foreign currency not being included in this obligation?; **3)** Article 4 (2) of Directive 93/13 must be interpreted as meaning that the terms' main object of the contract 'and' the appropriateness of the price or remuneration, on the one hand, and on the other hand of the services or goods provided in exchange for them» covers a clause contained in a credit agreement entered into in a foreign currency between a seller or supplier and a consumer and which has not been the subject of an individual negotiation according to which the loan will be repaid in the same currency?"

[6] According to this article of the Abusive Clause Directive, "The provisions of this Directive do not apply to contractual clauses *reflecting mandatory statutory or mandatory administrative provisions* or the provisions or principles of international conventions to which the Member States or the Community are parties, particularly in the field of transport."

[7] Referring to the Kušionová Rulings (C-34/13, EU:C:2014:2189, point 71) and W and V (C-499/15, EU:C:2017:118, point 45). The fact that a national court has formally formulated the question referred for a preliminary ruling by reference to certain provisions of European Union law does not prevent the Court from providing that court with all the elements of interpretation which may be of use in adjudicating on the case before it, regardless of whether the court referred to it or not in the statement of its questions.

[8] See in this sense, Ruling RWE Vertrieb, C-92/11, EU:C:2013:180, point 26, The Kušionová Ruling, C-34/13, EU:C:2014:2189, point 79, The Asbeek Brusse and Man Gabarito Ruling, C-488/11, ECLI:EU:C:2013:341, The Schulz and Egbringhoff Ruling, joint cases C-359/11 and C-400/11, EU:C:2014:2317, point 40, The Barclays Bank Ruling C-280/13, ECLI:EU:C:2014:279, points 30 and 31.

[9] The Kušionová Ruling, C-34/13, EU:C:2014:2189, point 77.

[10] The Kušionová Ruling, C-34/13, EU:C:2014:2189, point 78.

[11] In this sense the RWE Vertrieb Ruling, C-92/11, EU:C:2013:180, point 26, The Kušionová Ruling, C-34/13, EU:C:2014:2189, point 79.

[12] In this sense, Piperea, Gh. *Francul elvețian. Concluzii după cazul Andriciuc* (The Swiss Franc. Conclusions after the Andriciuc case), http://www.piperea.ro/articol/francul-elvetian-concluziile-dupa-speta-andriciuc/.

[13] It refers to law no. 95-96, of February 1, 1995 on unfair terms and the presentation of the contract.

[14] Toader, C., Lecomte, F. (2015). *Ultimele evoluții în materia dreptului consumatorului în jurisprudența Curții de Justiție* (The latest developments in consumer law in the case law of the Court of Justice), in The Romanian Journal of European Law no. 3/2015, p. 37.

[15] Kásler and Káslerné Rábai Ruling, C-26/13, EU:C:2014:282, point 42 and van Hove Ruling, C-96/14, EU:C:2015:262, point 31.

[16] See point 34 of the Conclusions and the Conclusions in the Case of Kásler and Káslerné Rábai, C-26/13, EU:C:2014:85, point 33.

[17] The Caja de Ahorros y Monte de Piedad de Madrid Ruling, C-484/08, EU:C:2010:309, point 34, The Van Hove Ruling, C-96/14, EU:C:2015:262, point 33, The Kásler and Káslerné Rábai Ruling, C-26/13, EU:C:2014:282, point 50.

[18] C-484/08, EU:C:2010:309, point 32.

[19] C-26/13, EU:C:2014:282, point 68.

[20] In this sense see the RWE Vertrieb Ruling, C-92/11, EU:C:2013:180, point 44, The Kásler and Káslerné Rábai Ruling, C-26/13, EU:C:2014:282, points 66-70, as well as The Gutiérrez Naranjo and others Ruling, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, point 50.

[21] In this sense see The Kásler and Káslerné Rábai Ruling, C-26/13, EU:C:2014:282, points 71 and 72, as well as the Bucura Ruling, C-348/14, unpublished, EU:C:2015:447, point 52.

[22] In this sense see The Kásler and Káslerné Rábai Ruling, C-26/13, EU:C:2014:282, point 75, as well as The Van Hove Ruling, C-96/14, EU:C:2015:262, point 50.

[23] The lack of mention in the credit agreement of the information considered essential plays a decisive role in assessing the professional fulfillment of the obligation to communicate all these elements. In

this sense see the Bucura Ruling, C-348/14, unpublished, EU:C:2015:447, point 66.

[24] For a doctrinal analysis of the concept of the *average consumer,* see Toader, C., Lecomte, F. (2015). *Ultimele evoluții în materia dreptului consumatorului în jurisprudența Curții de Justiție* (Latest developments in consumer law in the case law of the Court of Justice), in The Romanian Journal of European Law no. 3/2015, p. 34.

[25] See in this sense The Kásler and Káslerné Rábai Rulings, C-26/13, EU:C:2014:282, point 74, as well as The Matei Ruling, C-143/13, EU:C:2015:127, point 75.

[26] According to the Recommendation of The European Systemic Risk Board, ESBR/2011/1 of 21 September 2011 regarding the granting of foreign currency loans (JO 2011, C 342, p. 1, Recommendation A – Awareness of risks by borrowers, point 1).

[27] C-348/14, unpublished, EU:C:2015:447, point 48.

[28] The distinction which Attorney General N. Whal makes in paragraph 82 of the Opinion is well received, in the event that a contractual clause implies an imbalance between the parties which manifests only during the performance of the contract of the situation in which, although there is no abusive clause, the consumer's obligations are perceived by the consumer as a change in circumstances after the conclusion of a contract which is independent of the parties' will as more onerous; the latter hypothesis reflects the situation of unpredictability and is therefore not covered by the protection afforded by Directive 93/13.

[29] In this sense see The Aziz Ruling, C-415/11, EU:C:2013:164, points 68 and 69.

The Relations Between the European Union and the Council of Europe in the Field of Human Rights: Analytic Paradigms

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Abstract

The duality of human rights standards circumscribed at the regional-European level imposes the requirement of a rigorous conceptualization. Acknowledging the peculiarities of each of the two European systems of human rights protection, the logical argument advanced in the present paper resides in the demarche of conciliation through compatibility. We placed in homologated relations the two most representatives' juridical instruments for our subject-matter – the European Convention for The Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union. Taking into account the main dispositions of the two juridical instruments and considering the position upheld by the Court of Justice of the European Union by reference to the possibility of the European Union to adhere to the European Convention, we developed two theoretical approaches having explanatory value: (1) the paradigm of interaction by means of highlighting the peculiarities of each juridical system; (2) the paradigm of rendering compatible the two systems in the hypothesis of the European Union's adhesion to the system of human rights protection created by the Council of Europe.

Keywords: human rights protection at the regional-European level, the Charter of Fundamental Rights of the European Union, the European Convention for The Protection of Human Rights and Fundamental Freedoms, explanatory paradigms, juridical peculiarities, compatibility.

1 The European Union and the Council of Europe: The Paradigm of Interacting Through Underlining Their Peculiarities in the Field of Human Rights

The crystallization of an autonomous European logic in the field of human rights is a necessity that mainly derives from the conciliation of the two regional plans of action advanced under the guidance of the European Union, respectively under the guidance of the Council of Europe. If we apply the common denominator of human rights to the relations developed between the two organisations, it is obvious that the sole relevant action would be the conciliation practice – the latter enabling both the conservation of the peculiarities that are intrinsical to each organization and the promotion of a dialogue oriented towards convergence and compatibility. In their evolutionary process, the two European structures oriented towards human rights protection have known different roadmaps, thus underlining ab initio their peculiarities. In reference to the Council of Europe, its concerns regarding human rights protection essentially derive from activities that have statutory recognition. The subsequent developments of human rights through the wording of a catalogue of first-generation rights and freedoms represented by the European Convention for The Protection of Human Rights and Fundamental Freedoms and also through the articulation of a broad case-law under the Convention are natural consequences of the statutory recognition of human rights. Within the European Union, the respect for human rights is not a primordial aspect, being derived by means of case-law; as a consequent of the Spinelli project, the Single European Act is the hallmark of the first references made in the field of human rights protection that were comprised in the primary law of the European Union. The entering into force of the Lisbon Treaty has produced an essential reconfiguration in the field of human rights, hence the Charter of Fundamental Rights has become the main binding instrument of the Union. The peculiarities of the two regional juridical sub-systems are remarkable inclusively by means of the analysis of the rights circumscribed by the two most representative juridical instruments.

The previously invoked analysis brings into discussion some difficulties of conceptualization that we will elaborate in the following paragraphs. By approaching an individualist perspective concerning human rights, the European Convention contains rights and freedoms of civil and political nature, highlighting the duties that concern State Parties in ensuring the granted prerogatives. On the other hand, the Charter of Fundamental Rights reunites civil, political, economic, social and cultural prerogatives as well as third generation rights. Unlike the European Convention that suggests through its title the conceptual distinction between two main juridical categories: rights and freedoms, the Charter of Fundamental Rights states in the last phrase of its Preamble the idea according to which it contains three essential juridical categories: rights, freedoms and principles.

The differentiation between rights and freedoms is manifested through the application of the criterion of the manner of establishing the relation between the individual and State power, due to the fact that the sphere of rights prescribes, by reference to State power, some obligations (both positive and negative). On the contrary, the sphere of freedoms imposes a non-intervention conduct from the State, as freedoms represent, by means of their essence, actions undertaken by individuals in absence of any formal constraints. The juridical category of principles is more complex, their signification resulting as a consequence of correlating the dispositions of article 6 (3) of the Treaty on European Union with the dispositions of article 52 (5) of the Charter of Fundamental Rights of the European Union. The first cited provisions illustrate the system of principles applicable to human rights within the European Union law through the following wording: Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to Member States, shall constitute general principles of the Union's law. The provisions of article 52 (5) of the Charter indicates the manner of applying the framework of juridical principles – through legislative or executive acts of the Union and its structures as well as through the acts of Member States only when they apply the law of the European Union. The Explanations relating to the Charter of Fundamental Rights [1] underline the conceptual distinction between rights and principles in the sense that subjective rights must be respected whereas principles must be observed – the latter are not grounds for promoting a positive action by the Union or by Member States. As noted by doctrinaire studies [2] the mechanism that elaborated the content of the Charter was receptive to the influences of Spanish constitutional law and French constitutional law which mark the distinction between rights-as prerogatives that are likely to be defended by means of juridical actions and principles – as constitutional values according to which can be evaluated the action of State officials. The preservation, at the constitutional level, of the distinction between rights and principles has the utility of reducing the divergences between the constitutional traditions of Member States thus highlighting the vocation of the European Union law – that of harmonizing and, finally, of standardizing the legal framework in the field of human rights. Exempli gratia, within the sphere of principles stated into the Charter are identified the provisions of articles 25, 26 and 37 that establish, in order, the rights of the elderly, the integration of persons with disabilities, environmental protection. Likewise, the Explanations of the Charter advance a hybrid juridical category – representing a mixture of elements that pertain to the category of rights and elements that are included in the category of principles. Hence, it is highlighted the hybrid character of articles: 23 – equality between men and women, 33 – family and professional life, 34 – social security and social assistance.

The framework rights-freedoms-principles that synthesizes the content of the Charter is applied, according to article 51 (1) of the Charter, by the institutions, bodies, offices and agencies of the Union and by Member States under two essential conditions: (1) subsidiarity in the first hypothesis and (2) the application

of Union law in the hypothesis that refers to Member States. The latter condition implies the correlation of two different categories of norms – the norms of the Charter and other norms of the Union (regardless of the legal level where they are identified). More plainly, the condition according to which Member States must act in the application of Union law is ought to be understood according to the following reasoning: the invocation of a provision of the Charter does not constitute a sufficient reason for converting a situation intended for domestic regulation in a situation intended for Union law regulation. [3] In the process of applying the Charter it is mandatory the conjugation of a Charter disposition to another Union law disposition – whether the latter is conceptualized as a principle of the primary or secondary law of the European Union. [3] Also, it is worth mentioning the fact that the Charter's application is directly dependant on the *in concreto* applicability of a disposition of Union law and not on the vocation of *in abstracto* application of that norm. [3]

2 The Paradigm of Interaction and the Pattern of Divergences Between Principles

The standards of human rights protection promoted by the two regional organisations are found in relations that are difficult to qualify. The divergences of conceptualization and the divergences of perspective are noticeable (inclusively!) by reference to the level of guarantees established through the two European instruments. Article 53 of the European Convention enunciates the guarantees stipulated within its content under the configuration of a minimal standard – that is likely to be perfected by means of actions undertaken at the domestic or at the international level by each State Party: Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party. The counterpart article of the Charter of Fundamental Rights imposes a *sui-generis* standard of protection that grants preeminence to the Union law: Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all Member States are parties, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Although similar by means of wording, the two articles determine different manners of understanding the level of protection granted to the rights they circumscribe. Construing through case-law the provision of article 53 of the Charter, the Court of Justice of the European Union concludes that the application of national standards of human rights protection cannot compromise the level of protection regulated by the Charter nor the supremacy, the unity and the effectiveness of Union law. [4] Concerning the Charter, the expression *as*

recognised, in their respective fields of application evokes the placement of the protection of human rights and fundamental freedoms within the context of the European Union law, underlining at the same time, the condition of conserving untouched the competences of the Union – a request that is compatible with the provisions of article 6 of the Treaty on the European Union and with the dispositions of article 51 (2) of the Charter. In the same token, we observe that the protection standard formulated within the Charter refers also to the rights and freedoms provided by the constitutions of Member States meanwhile the European Convention refers inclusively to the rights and freedoms recognized by the laws of the State Parties to the Convention. [5] In addition, article 52 (3) of the Charter clarifies the level of protection offered by the Union in the field of those particular rights that are common to the two regional instruments, establishing their binding understanding in compliance to the provisions of the European Convention, allowing to Union law the possibility of granting a more extensive protection. The limitations and restrictions of the rights and freedoms provided by these European instruments constitute a convergence point between the two regional systems, being applied in both cases the proportionality argument according to article 52 of the Charter, respectively according to articles 16-18 of the European Convention.

On the previously established coordinates, it is clear that the provisions of article 6 (2) of the Treaty on the European Union – according to which – The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms without affecting the Union's competences as defined in the Treaties – represents a compromising situation, that is bound to create the legal premises to question the Bosphorus doctrine applied to the relations between the Union and the Council of Europe in the field of human rights. The establishment, at the level of the European Union, of a parallel system of human rights protection, has generated a pseudo-correlation of the perspectives of the two regional organisations given the fact that, although Member States of the European Union have benefited from an articulated system of human rights protection by means of adopting the Charter, they also hold the quality of Member States of the Council of Europe, being thus subjected to the jurisdiction of the European Court of Human Rights in regard to respecting the duties that derive from the undertaken commitments. The correspondence between the rights consecrated by the two legal systems determined procedural difficulties in the process of fulfilling the prescribed juridical guarantees. The Bosphorus doctrine constitutes the response formulated by the European Court of Human Rights in order to assess the compliance of the acts of the European Union with the rights provided by the European Convention. In the Bosphorus cause, the European Court establishes the assumption by virtue of which the European Union assures a level of protection that is compatible to the level of protection offered by the European Court of Human Rights. The purpose of the Bosphorus doctrine is highlighted on two levels: on one hand, the European Court pursues to maintain intact the peculiarities of the legal system of the Union (with regard to its preeminence and applicability); on the other hand, the European Court does not

promote an impunity culture with regard to coordinating the actions of the European Union with the provisions of the European Convention in the sense in which the Union (as an entity that has not yet acceded to the European Convention) must present procedural and substantial guarantees that will be subjected to a continuous evaluation in order to respond to the evolution of the European Convention. [6]

In the process of clarifying the standards of protection advanced by the two legal systems, we observe a different modus operandi. The Preamble of the Charter reiterates the subsidiarity principle and article 52 (1) mentions the principle of proportionality in defining the sphere of restricting the rights and freedoms enshrined in the Charter. The system of protection established under the patronage of the European Convention is built on the doctrine of margin of appreciation of States and according to the consensus doctrine. Both the principle of subsidiarity and the margin of appreciation of States grant freedom of action in favour of Nation States; nevertheless, the sphere of action of the subsidiarity principle is more rigorous determined, allowing the intervention of the supranational level where Member States cannot reach in a satisfactory manner an objective stated in a field of action that is not in the exclusive competence of the European Union. The States' margin of appreciation corresponding to the European Convention – constitutes a principle that presents a definition-deficit as it is an undetermined rule. The margin of appreciation doctrine underlines the main position of national Courts – which, being positioned at a level that is closer to national reality, can better assess the necessary measures that must be applied to a given situation. The flexibility of the doctrine of margin of appreciation resides in the fact that its applicability is conditioned by multiple aspects: the nature of the rights protected by the Convention, the nature of the restrictions imposed upon the rights of the Convention, the nature of the purposes derived from the restrictions concerning a category of rights, the importance of the protected rights for individuals. [7] The consensus doctrine is different from the margin of appreciation doctrine because if the first one pursues the self-restraining of States and the reflection of the scope of the Convention in the practice of State Parties, the margin of appreciation gives the decisional prerogative to Nation States, allowing the conservation of the cultural and traditional peculiarities. Taking into consideration the peculiarities of the Council of Europe based on inter-State cooperation (of inter-governmental and inter-parliamentary source) in the relation between the consensus doctrine and the margin of appreciation doctrine, the latter prevails inclusively in conflictual situations. *Exempli gratia*, in the cause Goodwin vs. United Kingdom, the European Court has approached an innovatory position vis-a-vis the recognition of the right of transsexuals to marry according article 12 of the European Convention, establishing that this possibility exists even in the absence of a consensus between Member States. [7]

Proportionality orientates the limits and the restrictions of the rights and freedoms contained in the Charter and in the Convention but its legal status is shaded by the legal system to which we refer: the proportionality principle benefits from legal consecration in the primary law of the Union by means of the

Maastricht Treaty whereas the proportionality principle represents a case-law construction within the legal system of the Council of Europe. It is also true the fact that the text of the European Convention is not entirely devoided of dispositions of principle nature, given the fact that, through Additional Protocol no. 15 to the European Convention is established, within article 1, the reformulation of the dispositions comprized in the Preamble with the scope of including the principles of subsidiarity and the doctrine of margin of appreciation. In the practice of constitutional law [8] the proportionality principle has a multifarious content, reuniting aspects of rule of law and peculiarities of justice-making. The European Court of Human Rights establishes that proportionality implies justice and fairness given the fact that it prefigures a balance between measures and purposes. By consequent, the only possibility of limiting individual rights by virtue of proportionality consists in achieving the supreme goal of Public Good. [8] Proportionality is the source of justice and lawfulness being the optimal mechanism that limits States' actions in order to ensure an adequate exception from the benchmark of individual rights and freedoms.

3 The Conciliation of Divergences and the Possible Compatibility of Standards in the Field of Human Rights: The Union Accession to the European Convention

The compatibility process between the standards of human rights protection developed by the two regional legal subsystems has acquired concrete valencies through the wording of the legal basis that allows the accession of the European Union to the European Convention. The legal basis provided by the Union law resides in article 6 (2) of the Treaty on the European Union whereas the legal basis provided by the norms of the Council of Europe consists in the dispositions of article 17 of the Additional Protocol no. 14 that amends article 59 of the European Convention. Legal actions that are bound to consolidate the compatibility process of the two sub-systems are the natural reaction to Opinion no. 2/94 [9] through which the Court of Justice of the European Union has analysed the accession of the Community to the European Convention underlining, inter alia, the insufficiency of the normative framework as a limit of the accession demarche.

Once solved the problem of the legal basis by virtue of which may be undertaken the accession of the Union to the European Convention, the difficulties that issue from the peculiarities of this process have suffered transformations oriented towards the institutional and principled compatibility of the two regional systems of human rights protection. Opinion no. 2/13 [10] analyses the aspects that derive from the accession of the Union to the European Convention – with special reference concerning the compatibility between the Draft Agreement regarding the Union Accession to the European Convention and the Treaty on the European Union respectively the Treaty on the Functioning of the European Union. The legal framework of the Draft Agreement regarding the

Accession of the Union to the European Convention is reunited under the provisions of Additional Protocol no. 8 referring to article 6 (2) of the Treaty on the European Union. Additional Protocol no. 8 establishes the juridical coordinates for achieving *in concreto* the possibility provided by article 6 (2). We refer to the preservation of the peculiarities of the Union and of Union law especially with regard to two aspects: (1) the special mechanisms of the possible participation of the Union to the control authorities of the European Convention; (2) the mechanisms that will necessary guarantee that the actions formulated by non-member States and by individuals are correctly guided against Member States and/or against the Union.

The process of the Union's accession to the European Convention recognizes as legal benchmark the Draft Agreement. Article 1 of the respective document circumscribes its scope under the wording of an explanation developed in manifold directions. First, paragraph 2 advances the re-wording of article 59 paragraph 2 of the European Convention establishing two working hypotheses: (a) the accession of the European Union to the European Convention is a demarche fulfilled inclusively by reference to the provisions of the Additional Protocols to the Convention; (b) the Agreement regarding the Accession of the Union to the European Convention is an integral part of the Convention. For explanatory purposes, paragraph 4 states the scope of the duties established for the Union during the post-accession period. Thus, the act, measure, omission of the organs of a Member State or of persons that act on its behalf shall be attributed to the Member State including the hypothesis in which the act, the measure or the omission intercedes in the application of Union law or in the application of decisions that have as legal basis the dispositions of the Treaty on the European Union, respectively the dispositions of the Treaty on the Functioning of the European Union. Likewise, paragraph 4 final thesis reconfigurates the proceedings framework that is attributed to the Union, allowing it to participate, as co-respondent in causes that have the object of violations resulted from a measure or from an omission.

Article 3 of the Draft Agreement completes the provisions of article 1 (4) constituting the main legal framework for the co-respondent mechanism. The essential innovation introduced by means of article 3 of the Draft Agreement concerns the dispositions of article 36 of the European Convention – that will be amended by adding paragraph 4. Within the re-worded legal framework, the European Union or a Member State have the vocation of acquiring the quality of co-respondent thus being a *party* within the disputed cause. Paragraphs 2 and 3 undertake the distinction between the possibility of the Union to become co-respondent within the proceedings that refer to pretenses of human rights violations retained by the European Court and the possibility granted to Member States. The co-respondent quality implies a dynamic position within the proceedings, hence being regulated in paragraph 4 the possibility of modifying the respondent or the co-respondent status if a request is simultaneously directed against the Union and against one or more Member States. Acquiring the status of co-respondent implies a relation of cooperation between the European Court

and the High Contracting Party – the latter manifesting its will in the following sense: The High Contracting Party becomes co-respondent either by accepting an invitation from part of the European Court (in this case, the manifestation of the will is subsequent), either by the decision of the European Court as a consequent of the request formulated by the High Contracting Party itself.

The main aspect retained by the Court in assessing the substantial granting of a request of opinion worded by the Commission resides in underlining the necessity of respecting the peculiarities resulted from the Union law and from the participation of the Union to the control mechanisms created by the Council of Europe. The Union's accession to the European Convention is a demarche that is subjected to a double *suis generis* character: (1) by means of its nature, the European Union expresses a complex structure that establishes a new autonomous juridical order at the regional level, thus distinguishing itself from Nation-States; (2) the High Contracting Parties of the European Convention are Nation-States members to the Council of Europe so, the accession of the European Union to the European Convention implies modifications of the juridical framework established by virtue of its Convention and Additional Protocols. It is safe to state the fact that the accession of the Union to the European Convention constitutes a limited demarche in two ways: (1) by means of the request of conserving the peculiarities of the Union law and (2) through the request of substantially modifying the European Convention (the Draft Agreement anticipates some problems generated by the possible accession of the Union to the European Convention thus advancing the amendments of this juridical instrument, in principle, in relation to articles 29, 33, 36, 54, 57, 59). The peculiarities of Union law are resumed by the Court on 3 coordinates: (1) the cvasi-constitutional structure of the Union given by the principle of attribution of competences according to which the Union acts within the limits of the powers conferred by Member States through Treaties with the aim of achieving the objectives established in Treaties, in compliance with the principles of subsidiarity and proportionality; (2) the Union constitutes a juridical entity that is different from Member States and that establishes relations by virtue of recognizing equality between Member States and also by virtue of mutual respect and assistance in fulfiling the tasks that derive from Treaties; (3) the legal framework of the Union (article 267 of the Treaty on the Functioning of the European Union) ensures, by instituting the procedure of preliminary rulings, the coherent and unitary interpretation of Union law, this being a necessary premise of conserving the features of a superstate juridical order.

Although accepts the fact that the possible compatibility between the two systems of human rights protection at the European level directly depends on the identification of the Union as a High Contracting Party to the European Convention, the Court identifies a limit: The Union and its Member States will interact as High Contracting Party in relations generated by the European Convention as well as in relations that will be created according to Union law. In the given conditions, a Member State of the Union may act as a control mechanism within relations developed with another Member State in the field of

respecting fundamental rights thus affecting the principle of mutual trust between States and impairing, as a consequent, the peculiarities of Union law. In the same token, the Court observes that the Draft Agreement does not solve another major consequence trained by the possible accession of the Union to the European Convention: correlating the preliminary procedures established by Additional Protocol no. 16 to the European Convention to the procedure established by article 267 of the Treaty on the Functioning of the European Union. The most obvious manifestation of the peculiarities of Union law is visible within the framework of exerting the Court's competences in relation to conflicts that concern the interpretation and application of Union law in compliance to the dispositions of article 344 of the Treaty on the Functioning of the European Union. The possible accession of the Union to the European Convention is connected to the possibility of extending the scope of Union law so that the European Convention would become part of the Union law; as a consequent, there will be an inconsistency between article 344 of the Treaty and article 32 of the European Convention – this inconsistency remains pending within the framework of the Draft Agreement.

4 Conclusions

The compatibility between the two European systems of human rights protection represents a difficult demarche – whose success is placed under two coordinates: (1) the unification of actions undertaken in the sphere of common values and (2) the preservation of the peculiarities of each system. The Union's accession to the European Convention constitutes a juridical premise situated under a pending status. The adoption of the Charter of Fundamental Rights as the prim juridical instrument in the field of human rights that, in essence, reaffirms rights stated in the European Convention represents an important stage in the process of consolidating the dialogue between the two regional organizations; the accession of the Union to the European Convention designates the actual attempt of twinning the two systems of human rights protection. Through Opinion no. 2/13 the Court of Justice of the European Union gives preeminence to the act of conserving the *suis generis* character of the Union in the context concerning the relation between the intrinsical framework of institutions and principles and the framework of another legal system. In this point are clear the consequences of the mix between federal elements and intergovernamental elements comprized in the structure of the European Union. The compatibility between the Union and the Council of Europe in the field of human rights in the context of undertaking the process of the Union's accession to the European Convention is a difficult task that is susceptible of two sides: through the Union's lenses, the stake of compatibility consists of demonstrating transparency in the field of human rights under the reserve of conserving its defining features; from the Council of Europe's perspective, the stake of compatibility consists in maintaining and promoting the statutory values by virtue of which it has inaugurated its work.

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Principle of the Rule of Law in the Recent Design of the European Union. Challenges Regarding the National Sovereignty

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Abstract

The rule of law has become, in recent years, a symbol of the democratic States of the European Union. The symbol of the rule of law began to represent a paved road with complementary principles such as the fight against corruption to achieve economic and social prosperity. In the struggle of highlighting the consequences arising from the alleged violation of the rule of law, the legal conceptualization of this process appears to be topical. In light of recent developments at European Union level, we are wondering whether the concept of the rule of law must be rethought at national level.

In this study we aim to analyze at the legitimacy and legality of the European Union's 'rule of law' vision and to observe whether the national constitutional regulation of the rule of law reflects in its contents and values of the European Union's understanding concerning this topic. We aim to find out whether the rule of law is the faithful reflection of the strict and severe application of the law, of the independent justice, of total transparency, of economic stability.

Keywords: rule of law, conceptualization, sovereignty, European Union.

1 Conceptualizing the Content of the Rule of Law

The rule of law, at its beginnings, was a concept created by the legal doctrine. The whole scientific approach started from the English Rule of Law, in which the rule of law was a guiding principle in defense of property rights and

other citizens' rights. The English model was the basis of the French and German doctrinal approach [1].

The fund of doctrinal debates covers the separation from the police state form, the refusal of monarchic absolutism, totalitarianism and the establishment of superlegality, which must be the basis of relations between the State authorities and the subjects of legal relations.

The German doctrine of Rechtsstaat asserted itself in the second half of the nineteenth century. In 1798, Johan Wilmen Placidius used the term Rechtsstaat, inspired by the English Rule of Law concept. In Germany, the dominant doctrine for the definition of the Rechtsstaat intended the submission of the state to the law, being different from the polisatist. Under this concept, the state administration is self-limiting, the legality is underlying this phenomenon.

In France, the rule of law was born amid theoretical controversy with German doctrines. This concept is based on the ideals of the French Revolution of 1789 and aims to protect individual rights, respecting the hierarchy of legal norms, the supremacy of the Constitution and the law. The rule of law is no longer limited to subordinating the administration to the law, but extends to the entire law enforcement process. [2]

The "rule of law" is reflected by different terminology, which attract specific aspects, "Rule of Law", "Rechtsstaat" and "L'État de droit". The constitutional conceptualization of this concept, "validates the imperative of rule of law in relations between the state and the citizen" [3]. The contents of the concept "Rule of Law" is ranked in doctrine as follows (1) a law-based government, which opposes to the discretionary manifestations, (2) a connection of the basic concept to the precepts of fairness and justice, which are inherent to the notion of law, (3) the law must be regarded in its social dimension [4].

"L'État de droit" is characterized by (1) the subordination of power to law, (2) the pyramidal structuring of power and its dissemination to a large number of bodies, (3) guaranteeing the fundamental rights and freedoms of the individual, (4) participation of the citizens in the exercise of power, (5) the limitation of each of the three powers: legislative, executive and judicial by the other two, (6) the hierarchy of executive power and judicial power in order to exercise inner control [5].

According to Ion Deleanu, the rule of law is "spotted or expressed from different perspectives, thus suggesting the premise and mechanisms of the state phenomenon, which this concept identifies" [6].

Ioan Vida also arguments the rule of law as a general principle of law [7], which, "establishes the rule of law as a guide, to be pursued in the entire process of organization and operation of the Romanian State, to create and enforce the law" [8]. In this respect, the Constitutional Court of Romania has also ruled that "the requirements of the rule of law (...) concern the major goals of state activity, prefigured in what, usually, is called the rule of law, the phrase implying the subordination of the state to law, the provision of those means to allow the right to censor political options and, within that framework, to share any abusive, discretionary requirements of the etatic structures. The rule of law ensures the

supremacy of the Constitution, the correlation of laws and all normative acts with it, the existence of the regime of separation of public powers, which must act within the limits of the law, namely within the limits of a law expressing the general will" [9].

Also, the determination of the content of the principle of the rule of law is linked to the autonomy of the law, the predictability of the legal norm, the separation of powers in the state, the constitutional regime and the promotion of human rights.

As far as we are concerned, we support the opinion of Professor Ioan Vida, according to which the rule of law is, "the content of a principle, which is to stand at the basis of the targeting of state activity, before the rule of law becomes a characteristic of the Romanian state" [10].

In our country, Article 1 paragraph (3) of the 1991 Constitution establishes that, "Romania is a state of law, democratic and social, in which human dignity, citizens' rights and freedoms, the free development of human personality, justice and political pluralism are supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and are guaranteed".

2 The European Union's Vision of a Violation of the Rule of Law

The content of the concept of the rule of law emerges from the corroboration of art. 2 TEU with art. 49 TEU, as well as from the Charter of Fundamental Rights of the European Union. Under the preserve of the protection of fundamental Rights. The protection of the rule of law is a task undertaken by the European Commission, on the basis of the role of guardian of the Treaties and promoter of the general interest of the Union.

In 2014, the European Parliament adopted a resolution on the assessment of justice in respect of criminal justice and the rule of law [11], urging the Commission to propose an effective mechanism for regular evaluation of the Member States' compliance with the EU fundamentals. As a result, the European Commission adopted the communication, a new EU framework for strengthening the rule of law, in order to complement the provisions of the Treaties, which do not cover this issue. The Commission document concerned situations representing systemic threats to the rule of law, namely, jeopardising the political, institutional or legal order of a Member State, its constitutional structure, the principle of separation the powers, independence or impartiality of the judiciary or its judicial control system [12].

The new framework is carried out by step: a Commission assessment, a Commission recommendation and the follow-up to the application of the recommendation. The principles underlying this process aim at: developing a dialogue with the Member State concerned, objective and thorough evaluation of

the situation, equal treatment of Member States and identification of concrete and rapid actions to avoid of the mechanisms referred to in article 7 TEU. [13].

This framework for monitoring the rule of law was recently applied in the supervision of constitutional and legal developments in Poland. The structured dialogue procedure with Poland ended with a recommendation by the European Commission to the Council for the activation of Article 7 of the Treaty of Lisbon [14]. The European Commission's proposal was adopted by the European Parliament on 1 March 2018 and the Council is to determine whether there is a clear risk of breaching the values of the European Union.

On the other hand, at the Brussels General Affairs Council Meeting of 27 February 2018, Konrad Szymanski, the Deputy Foreign Minister of Poland, said that EU Member States should form their own views on the situation in Poland. Shortly before this declaration, the Hungarian National Assembly adopted a resolution on 20 February 2018, expressing its solidarity with Poland. Thus, it is shown that the Hungarian people do not want "that the national sovereignty to be ignored when it comes to issues relating to shared competences" (with the EU – n.n.). The Hungarian Parliament has asked the Government of Hungary to support Poland and not to allow "an action to violate the rights of the Polish state-rights guaranteed by the EU treaties-and to oppose any proposal that would limit Poland's rights as a member of the European Union". [15].

With regard to these recent developments, we ask ourselves to what extent the European Union will continue and whether a consensus will be reached with Poland, especially if the Member States do not appear to be keen to sanction each other.

3 Constitutionality Issues

In the following, starting from the situation in Poland, we aim to discuss what is the report of force resulting from the sharing of national sovereignty with the European Union and which is, in fact, the role of the rule of law in this context. Furthermore, we aim to answer the question of whether the rule of law creates, in turn, a matter of sovereignty in the context of the European Union. The case of Poland is a manifestation of the relations between national sovereignty and the sharing of their powers with those of the European Union. This phenomenon is debatable and it was revealed by the content of the Commission Recommendation [16] calling on the following Polish authorities:

- amending the law of the Supreme Court, not applying a reduced retirement age to current judges, the removal of the President's discretionary power to extend the mandate of the Supreme Court's judges and the abolition of the extraordinary appeal procedure, which includes a power to reopen the judgments taken years ago;
- modification of the Law on the National Council of Justice, the termination of the mandate of the members of the Court and ensuring that the new appointment regime continues to guarantee the choice of members of judges by their peers;

- the amendment or withdrawal of the Law on the organization of ordinary courts, in particular with a view to eliminating the new retirement regime for judges, including the discretionary powers of the Minister of Justice to extend the mandate Judges and to appoint and dismiss the presidents of the courts;
- restoration of the independence and legitimacy of the Constitutional Court, ensuring that the judges, the President and its Vice-President are legally elected and ensuring that all of his judgments are fully published and applied;
- to refrain from public actions and declarations that could undermine the legitimacy of the judiciary.

The repeated intervention by the European Commission through recommendations to the Polish authorities is the direct consequence of the adoption of the communication on consolidation of the rule of law in 2014 and which opened a Pandora's box in terms of exercising Member States' sovereignty in matters relating to the functioning and organisation of the state and legal systems.

On the basis of the Commission's premise arguing the need for a framework to strengthen the rule of law in the Member States, we raise a few issues of constitutionality:

a) "the measures adopted by the Commission for the start of finding procedures failure to fulfil obligations under article 258 TFEU has proved to be an important instrument in addressing certain concerns concerning the rule of law";
(b) "infringement procedures may be launched by the Commission only if such concerns are, at the same time, a violation of a specific provision of EU law";
c) "there are preoccupying situations that do not fall within the scope of EU law, and therefore cannot be considered a breach of the obligations incumbent upon Member States under the Treaties, but which nevertheless represent a systemic threat to Address of the rule of law";
d) "the preventive mechanisms in article 7 (1) TEU may be triggered only in the case of a "clear risk of serious infringement" and the sanctions mechanisms in article 7 (2) TEU only in the case of "serious and persistent infringement by a Member State" of the values laid down in article 2 TEU. The conditions for triggering both mechanisms in article 7 TEU are exceptional and underline the nature of the "last resort" of these mechanisms";
e) "there are situations in which threats to the rule of law cannot be effectively resolved by means of existing instruments";
f) "in addition to infringement proceedings and the mechanisms of article 7 TEU, a new EU framework for the consolidation of the rule of law is needed as a common value of the European Union. The framework will be complementary to all existing mechanisms already at the Council of Europe level to protect the rule of law".

We see that we are in a situation where the Commission has added to the Treaties a competence which is not foreseen by them. In my opinion, the reasoning of this action is not justified by prorogating material competence unless there is a legal basis for it. In this context, the question arises how can the European Commission's gesture which addresses Member States opinions and recommendations be qualified when situations that violate the rule of law are seised?

In view of the fact that the Treaty of Lisbon establishes, through the prism of art. 258 TFEU, that only infringements of specific provisions of EU law can be sanctioned, we appreciate that, in the absence of an express provision of EU primary law, we are facing a situation where the European Commission can establish discretionary the content Principle of the rule of law. In addition, we draw attention to the fact that the rule of law has not been set out as a union objective, for the purposes of the limiting enumeration of art. 3 TEU.

Last but not least, the reference to art. 7 TEU and the cataloguing of situations as a "serious breach of the values referred to in article 2 TEU" may prejudice at a declarative level the constitutional image of a state within the constitutional landscape of the other Member States, but from a legal standpoint it does not create any effect, because opinions and recommendations do not oblige Member States. However, we must not neglect the corelative consequences that may arise and which may adversely affect the economic and financial environment of that State, as well as public space and legal stability and security.

Accession to the European Union requires a restriction of state sovereignty, but within certain limits. In this context, the rule of law, in its application as a principle of the organization and functioning of the State, is an imperative of national sovereignty. National sovereignty has a strong internal character that implies the right of the state to manage public power within society. The organisation of Public Power integrates, under the dome of national sovereignty, the right to legislate, the right to implement laws and to administer the representative bodies of central and local public administration and to conduct justice. National sovereignty has as a consequence, direct and immediate, the supremacy of state power, under which legislative power works with executive power, under the possible sanction of judicial power, in an economic, political and in accordance with the ruling political form established by the Constitution. In the literature, national sovereignty is identified by five prerogatives: (1) appointing senior magistrates and defining the function of each, (2) promulgation or repeal of laws, (3) declaring war or ending peace, (4) right of judgment, last appeal, (5) right of life and death (or pardon) [17]. The prerogatives identified by the doctrine are seen as mirrored in the fundamental law of the States, on the grounds that it reflects the powers by which the State acts as a promoter of public power. The exercise of popular sovereignty is modular. In other words, state institutions are called upon to represent the people, are created to legislate, have the role of consecrating sovereignty and defending this fundamental principle at any time in the exercise of national sovereignty. In other words, the modules cannot have a standalone existence, but must act together, correlate, collaborate.

In the context of the accession of States to the European Union, much has been discussed about the principle of inalienation. In my view, national sovereignty cannot be passed on to the representative bodies of the people, because they operate under national sovereignty or exercise powers and powers that pertain to sovereignty. With regard to competences shared with the European Union, they do not entail a transfer of sovereignty, as the Union does not become sine qua non sovereign. The Constitutional Court of Romania has cut this controversy and established that it is "sharing the exercise of these sovereign attributes with the other constituent states of the international organism" [18]. As regards European affairs, the principle of indivisible sovereignty is put in a controversial light on the situation of sharing competences between national institutions and institutions of the European Union. The fact that sovereignty is indivisible results in the normative unit of the State, as a whole, and of public and local administration (as a subsequent element) which is entitled to guarantee the prerogatives of the former. In other words, the legal order is not divisible. The controversy in the field of European affairs was resolved by the Constitutional Court of Romania, which acknowledged that this situation is an exception to the rule:, it is evident that in the current era of globalisation the problems of mankind, of developments Interstateal and inter-individual communication on a planetary scale the concept of national sovereignty can no longer be conceived as absolute and indivisible, without the risk of unacceptable isolation" [19]. This controversy is also addressed in a similar manner in the opinion of the Luxembourg State Council of 10 April 1956 showing that sovereignty belongs to the nation and not to the State; the nation freely cedes the exercise of power to both national organs and international organs.

4 Conclusions

As a consequence, institutional competencies result from constitutional and legal prerogatives attributed to public power in the state and the principle of separation of powers in the state, which limits and controls the exercise of these duties. In conclusion, national sovereignty is required under national law by the Triad source of sovereignty, its holder and its exercise. The relationship between sovereignty and the rule of law should not be called into question because it is intrinsic in the fact that the latter is an instrument regulating the abovementioned modules.

On the other hand, it is true that the interpretation of the rule of law outside the principle of national sovereignty can lead to other results. The European Union places the concept of the rule of law outside the idea of national sovereignty, turning it into a European key concept, around which it revolves democracy and fundamental rights. Thus, the valences of the rule of law are varied, from legality to a transparent, responsible and democratic process of implementing the law, from judicial certainty to the prohibition of arbitrariness, from access to justice before courts independent and impartial judicial control of administrative acts, from respecting human rights to non-discrimination and

equality before the law. At European level, the rule of law is understood as a law enforcement system, in which no State authority, administrative authority, agency or company is above the law, which would prevent abuse of law and from which no State could derogate.

In our view, it is useful to take the state concept of law from the constitutional traditions of the Member States, but it should be used in good faith and reported to the sovereignty of the Member States, their national constitutions, respecting their spirit and their letter. Of particular importance in applying this principle is respect for the hierarchy of laws, primarily the subordination of normative acts to the provisions of the fundamental law and respect for the Treaties of the European Union. The guarantee of the rule of law understood by the European Union and fundamental rights can only be achieved under the conditions of applying the principle of equal treatment of Member States, respect for the Constitution and national identity.

This European vision of the State of law should not undermine national sovereignty.

The correlation of the European concept with the national rule of law implies, in my view, the observance of the constitutional procedures in the Member States and the Treaties of the European Union. Under these circumstances, the rule of law is a universal guide to state activity which is the major objective of social security, the protection of human rights and fundamental freedoms. The principle of the rule of law remains valid also under the conditions of the accession of the States to the European Union.

The Polish problem is not singular in Europe. The Member States of the European Union have the benefit of sovereignty, by virtue of their constitutions. By joining the European Union, these states have asserted their right to exercise some prerogatives of national sovereignty together with other Member States within the framework of the European authorities. These limits between the powers of the Union and the exercise of national sovereignty are not sufficiently drawn, which makes the claim of sovereign rights by the Member States a complex problem, which remains still unclear. The most obvious example, in this context, is not Poland, Romania or Bulgaria, but England, which is in the process of achieving the Brexit.

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The European Defence and Security Integration – From Politics to Reality

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Abstract

Never in the last decades, has Europe faced a more complex set of challenges to its security. Mutations of geopolitical nature, the economic realities and political arguments justify now more than ever, the need for a united Europe for security and defence. The notion of European security integration is extremely difficult to define, not only theoretically, but also in a practical sense. It can be best described as the synergy between institutions, policies, mechanisms, commitments, obligations and expectations of the European states. With the signing of the December 2017 Declaration regarding the Permanent Structured Cooperation, the security and defence integration issue has come to the attention of the European officials, generating divergent views on the viability of such a project. But, beyond the political rhetoric and debates in Brussels, Europe has a commitment to its own citizens to protect them from any internal or external threats – and this should be the real objective of the security and defence integration.

Keywords: European Union, integration, cooperation, security, common defence.

1 Introduction

Today, European security and defence integration should no longer be seen only as a part of the political rhetoric, but as a strategic necessity. The last decade has proved to the European Union (EU) that it needs to develop capabilities that allow it to navigate through an increasingly more complex and volatile security landscape. The radical restructuring of security in Europe has been the result of

the events that have taken place in recent years: the on-going military conflict in Ukraine, the terrorist attacks in France, Belgium, Germany or Great Britain (UK), that have revealed the brutal potential of jihadist groups to both recruit and exploit the vulnerabilities of Europe, the "hot" conflicts at the EU borders, the growing exposure of Europe to the hybrid war [1], the increasingly blurred distinction between external and internal threats [2], information terrorism (cyber terrorism) or the import of the so-called "foreign fighters" [2]. Then, the British's decision to leave the European Union, the advent of Donald Trump to the White House, along with the tensions caused by leaders such as Vladimir Putin or Kim Jong-Un, all created the perfect "strategic cocktail" that will either unite or divide Europe. Of course, there is no quick and easy solution to the challenges that the EU is currently facing, but a step in the right direction is the development of a more comprehensive policy approach, and thus, of an effective set of political and legal instruments. Such an approach, should take into account the assessment of the internal and external aspects of the European security, from the centre to the periphery of the continent, as well as the impact they have on the legal construction. Above all, cooperation between actors in the field should be improved in order for them to assume greater responsibility and, in the end, to identify more effective ways to increase the added value of the European law in ensuring the security of its Member States.

The summary of the last 15 years has revealed many shortcomings of the EU's activity in the security and defence field. Since the adoption of the European Security Strategy in December 2003, the EU has carried out an ever-growing number of military and civilian actions and operations both in Europe and beyond its borders – in the Middle East, Asia and Africa – and is currently carrying out 16 missions and joint security and defence policy (CSDP) operations. The majority of these missions are of civilian nature, more exactly ten (in Kosovo, Ukraine, Georgia, Niger, Mali, the Occupied Territories of Palestine, Iraq, Libya and Somalia) and only six of them are of military nature (in Bosnia and Herzegovina, Central Mediterranean, Somalia – on land and on the coast, Mali, and the Central African Republic) [3]. For the first time, in July 2017, a regional co-ordinating cell that consisted of both civilian and military personnel, operating in every G5 Sahel country (Chad, Mauritania, Burkina Faso, Niger, Mali) was established [3]. Therefore, the full variety provided through the "Petersburg tasks" – a register of different possible military operations, including peace-building operations, remained only at the level of theoretical construction. Another negative example is the EU Battle groups, fully operational since 2007, but which for political reasons, lack of initiative or financial solidarity have never been carried out [4].

Considering an increasingly unstable security environment in the strategic neighbourhood of the Union, amplified by the division between the European states regarding the military crisis management and the distribution of the financial burden for supporting such missions and operations, developing a European collective force, independent from other international structures, it is not just a challenge but a reality and a practical necessity.

2 Deficiencies of the Current European Defence System

From a statistical perspective, collectively, the European Union should be the second largest army in the world. [5] However, from a practical perspective, Europe is not even remotely close to being the second largest military power in the world – in fact, it does not have a collective army at all. The causes are multiple – from the reshaping of the security environment, to the political changes within the Member States, to the cost inefficiency, and lack of interoperability – caused by the fragmentation of the defence markets.

But even more worrying are the smaller defence budgets of the Member States, with the total EU-28 military spending falling from 3.3% of GDP in 2002 to 2.9% in 2016. Against 2005, last year spending dropped by 9% [6]. One of the main objectives of the EU Global Strategy, adopted in June 2016, referred to the "Union funds for supporting defence research and technology and multinational cooperation", which are "essential conditions for the European security and defence efforts, sustained by a strong European defence industry" [7]. But if we were to look at Europe's defence capacities at the moment, in reality, we will discover aging technologies, growing deficits and the absence of new development and innovation programs.

Previous military operations, such as the ones in Libya in 2011 and Chad in 2008, have revealed Europe's inability to conduct large-scale military operations. The frustration caused by the EU's failure to act in the Libyan crisis even led French Foreign Minister at that date, Alain Juppé to declare that "the EU's defence policy is dead" [8]. Although its statement has not proven to be true, at the moment, the EU is equipped, including technically, to develop only small-scale military operations. At a first glance, there is the opinion that the determinant factor for this situation is the ever-smaller budgets allocated by Member States for defence spending. However, strictly from a practical point of view, the allocated expenditure level is not an indicator in itself as to how ready a country is to use its capacities, and it shows less the actual power that it can project on the battlefield. Although a state has all the resources needed to maintain an efficient army, it does not necessarily mean it has the ability to use it. And, as surprisingly as it may seem, this problem is not only distinctive to small states, but is also an issue to countries such as Germany, France, Italy, or UK, for which, for example, the level of training for combat planes and military helicopters is under 50% [9].

A problem highlighted by many scholars and even by the reports published by the EU is the extremely costly duplication of military equipment purchases. The absence of coordination between the 28 European armies limits the Union's ability to intervene as a collective agent in its military missions where European values and interests are endangered. At the same time, the continuous drop in Research and Development (R&D) spending, which represents only 20% or 25% of the total European defence investments, has led to the aging of military programs. It has to be said that, as a result of the resolution made by the European

states at the 2014 NATO summit to increase defence budgets, between 2013 and 2015, the R&D spending of the Member States increased, especially in 2014 when it grew by 16%, reaching € 9.2 billion in 2015, while recording a decline of 4% in 2016 [10]. Therefore, integrating its defence capabilities would not only increase efficiency and promptness, but could lead to significant savings. Given that new capacities and technologies and cooperation programs take time to develop and to be integrated, the European Union should take now all needed measures to prevent compromising its defence in a nearer future than could be expected.

3 Common Defence, Divergent Interests

Since the signing of the Paris Treaty and up until 1954, the political debate aimed primarily at attenuating national sovereignty and independence in the field of security, as well as creating an international or supranational security structure [11]. If the French Prime Minister, René Pleven's idea of a broad-based defence integration – a plan that included a European army and a European defence minister – would have survived the political disputes, Europe would have benefited from a joint army made out of 40 divisions and 13 000 soldiers, a common budget and common institutional structures [11]. The refusal of the French National Assembly to ratify the Treaty establishing the European Defence Community (EDC) ended the idea of a common European defence for the next half of century. Today, at least at a theoretical level, the concept of a European army, which has a common budget and benefits from the assistance of common defence institutions, is more and more recurrent, although in practice not too many attempts have yet materialized in this regard. An impulse in this direction should be the latest statistics, which shows that around 7 out of 10 European citizens support the European common security and defence policy [12]. This security trend in Europe has prompted a number of officials, such as President Jean Claude Juncker, to make a strong lobby for creating a European army [13], bringing back this debate on Europe's agenda.

However, in order to understand the direction of evolution in the European security and defence field, it is necessary first of all to understand that each Member State has its own traditions in addressing defence issues. It goes without saying that, for example, the UK, which has never shown a special interest in an integrated European defence, and considering that its departure from the EU is only a matter of time, it will not support the idea of creating a European army. On the other hand, Europe's driving force, as are often called Germany and France, seconded by the Benelux, Spain, Italy and, more recently, Poland, are more open to the idea of an integrated European defence system, but even in their case there are many reservations caused by their different historical experiences or even different military traditions. If French President Emmanuel Macron is advocating for a common European defence budget, a common intervention force and a common doctrine – beyond the collaboration with the UK, Germany is more reluctant to deploy its soldiers in European operations, especially in high-risk

missions [14]. On the other hand, we must also take into consideration the geopolitical aspects. If for the countries in Northeast Europe the main objective of national security is to defend their territory against Russia, the Southern European states take precedence over the possible challenges in the Middle East or North Africa. Another cause of inefficiency is the divergent interests of the Member States in terms of defence industries and implicitly the fragmentation of the European defence market. Without a consensus at a European level, it is impossible to develop a competitive and innovative defence industry. The EU understood this, and in 2009 it adopted two directives – one on defence procurement [15] and the other on intra-Community transfers of defence goods [16]. Despite these attempts, states continue to support national industries to the detriment of common security interests, bypassing Community rules in the field. Although there is cooperation and support for the development of a joint defence industry, given the limited investment budgets, there are currently almost no effective operational programs.

Despite these independent interests, in many situations divergent – of the European states, if we talk about effective joint security and defence, "everyone knows that even the big European countries are too small to deal with it. They have to work together" [17].

4 Integration, Not Just Cooperation

Since the creation of the Common Foreign Security Policy (CFSP), through the Maastricht Treaty, the Union's number one objective was to maintain and expand the European cooperation in the field of security and defence. But the steps were small and uncertain, so today the number of achievements is as modest as possible. This cooperation often took the form of joint development programs, such as the Organisation for Joint Armament Co-operation (OCCAR), whose role was to share and manage a range of defence equipment programs [18].

An initiative of the Defence Ministers from Denmark, Finland, Norway, Iceland and Sweden in 2009 led to the creation of the Nordic Defence Cooperation (NORDEFCO), which in fact represents an "umbrella mechanism" for regional defence co-operation. NORDEFCO identifies five key areas for strengthening regional cooperation, each being coordinated by one of the signatory states: strategic development and operational cooperation – Sweden, capacities – Finland, human resources and education – Denmark, training and exercises – Norway [19]. Other examples of regional initiatives are represented by the Visegrad Group or the Benelux Group. In 2010, the Netherlands, Belgium, France and Germany set up the European Air Transport Command (EATC). The group was joined in 2012 by Luxembourg and in 2014 by Spain and Italy [20]. On November 2nd, 2010, France and the United Kingdom signed the Lancaster House Treaty that laid the groundwork for a defence co-operation program with the objective of improving collective defence capacity, and ultimately contributing to the improvement of NATO's collective capabilities and of the European

Defence [21]. All these examples of initiatives define the essence of the European defence cooperation, that is – a complex of multilateral or bilateral agreements.

The existing cooperation, not very convincingly so far, has demonstrated the weaknesses of the European association and sharing plan in the field of defence and security. Given the mutations in the contemporary security environment, where threats are getting closer, a change of optics on European defence is imperative. The past has shown that European defence will continue if, and when there is political will to do so. The signing of the Franco-British Agreement in Saint-Malo in 1998 was an important step in the development of the Common Security and Defence Policy (CSDP) and, the defence provisions contained in the Treaty of Lisbon are in fact the outline for the development of the common security and defence. The extent to which Europeans have translated the treaty's prerogatives into practice is a matter that we are going to discuss in the following.

4.1 *NATO – A "Reflex" in European Security*

After the failure of the EDC, and with the signing of the Paris Agreements through which the German Federal Republic (GFR) became a member of the North Atlantic Treaty (NATO), the concept of European security became synonymous with NATO. In the context of consolidating the Euro-Atlantic relations during the Cold War, the objective of creating an autonomous security for Europe has long been ignored, precisely for the purpose of strengthening the defence community and strategic and industrial interests between NATO and the EU. It is true that this has changed significantly over the last decades. Despite the considerable efforts made by both European officials and their American allies, Europe's security and defence independence is still at a project stage.

With Donald Trump taking the sit at the White House, who has proclaimed NATO to be an outdated structure even since his campaign [22], and being very elusive in his support for Article 5 of the Treaty – the Alliance's cornerstone – according to which "an attack against an ally is considered an attack against everyone" [23], the EU has had to consider a scenario where Europe's security will no longer be ensured by the North Atlantic Treaty. Throughout the voice of President Trump, the United States expects a fair distribution of the financial burden of the alliance, "(...) twenty-three of the twenty-eight Member States are still not paying what they should pay and what they are supposed to pay for their defence" [24], but also a greater involvement of Europe in ensuring the security of its own citizens.

Transatlantic cooperation has become the core of Europe's defence, especially after the adoption of the so-called "Berlin Plus" agreements, which provide for interoperability and sharing of the control structures [24]. Up to now, the NATO-EU Strategic Partnership has been since 2014 in a deep cooperation phase determined by the worsening of the European security situation (the conflict in Ukraine and Russia's involvement). Measures to strengthen defence capabilities were also taken at the most recent NATO summits, in September 2014 in

Wales and in July 2016 in Warsaw. The 2014 Summit raised the issue of allocating larger budgets for defence spending, and it was decided to extend the provisions of Article 5 to apply to cyber-attacks [25]. In Warsaw, a new set of measures to strengthen defence was approved, while the EU emphasized Europe's internal security needs rather than the management of external crises, as it has been in previous years [26]. Therefore, even for the EU, the existence of a military power has become *volens nolens* a necessity, and not just a theoretical debate. However, it should be borne in mind that, after the completion of the Brexit, Europe's contribution to NATO's defence budget will drop to a law 20%. Although there is a reaffirmed commitment towards joint efforts within the North Atlantic Alliance, in terms of effective capabilities, the NATO Intelligent Defence Program and the EU Sharing and Pooling Program have long been questioned by the conservatism of national states that have made possible integration only up to a certain point. In conclusion? As long as national standards and national defence interests remain a priority for Member States, creating an autonomous collective defence will only remain a possibility on paper.

4.2 *Permanent Structured Cooperation. "A New Era" in Common Security*

Although the progress in integrating European security and defence has been and still is a slow and tortuous process, the EU has had since the signing of the Treaty on the European Union (TEU) the necessary legal means to make the transition from the current bilateral or multilateral military agreements towards more effective defence structures. Thus, Article 42 paragraph (6) of the TEU explicitly states that those "Member States whose military capabilities meet higher criteria and which have made a stronger commitment in this area to meet the most demanding missions will be able to establish permanent structured cooperation within the Union" [27].

The "sleeping beauty" of the Treaty of Lisbon, as President Jean-Claude Juncker called the Permanent Structured Cooperation (PESCO), was "revived" by the Joint Declaration of December 11th 2017 through which 25 of the 28 EU Member States have expressed their willingness to work together to "progressively develop a common defence policy that could lead to a common defence" [27]. With the Declaration of December 11th, the participating Member States also adopted a decision that identified a list of 17 initial projects – in areas such as staff training, capacity building and operational training in the field of defence – to be carried out under PESCO [27]. Therefore, PESCO would allow the group of participating countries to adopt systematic measures that would help European integration in the field of common security and defence policy. Regarding participation in the PESCO initiative, in accordance with the provisions of Article 46 of the TEU and Protocol no. 10, any Member State wishing to make a stronger commitment to defence is free to join. According to the statement, the participating Member States are the ones that will impose the pace of action within the framework of PESCO, as well as the areas in which

projects are to be initiated [27]. As stated in the declaration of the 25 states, the objectives of PESCO are to conduct operations and develop capabilities, which would gradually solve the EU's defence gaps. Among the first projects proposed is the one advanced by France and Germany, which aim to develop a common combat aircraft that could replace the German Air Force Eurofighter and the French Air Force Rafale [14]. PESCO also wants to address the issue of the defence budget inefficiency through the development of several large-capacity projects that could be grouped together with the Commission's defence industry plans. Thus, the 20% assigned for research funding will increase up to 30% for PESCO projects, thus addressing the issue of renewing defence technologies. With regard to the operations that will be carried out under PESCO, the December Declaration has set a high level of ambition, with participating states "acting autonomously when and where necessary, and with partners whenever possible" [27]. Until now, the majority of the Member States have only a symbolic representation in the military operations of the Union – a few soldiers or only a few detached officers. But even more than military participation, the financing of operations has been a major obstacle to the integration of the European defence. And this issue is addressed among the twenty commitments made through PESCO.

Apparently, the European officials have understood the shortcomings of the current common security and defence system. But, if Europe can make a difference in its security policy, it depends on the extent to which the Member States can, and will fulfil their obligations. And it is really vital for Europe to do so. The failure of integration at this time and in this geopolitical context has the negative potential to block the evolution of the European security and defence policy for several decades from now on.

5 Conclusions

By conducting a cold analysis of Europe's results over the years in the defence field, the most critical of us could say that we are dealing with the same set of ideas, overused and overly discussed, repeated too often and too little implemented. A more critical approach would even lead us to affirm that Europe's common defence is only a *mirage* successfully used by the European political rhetoric, revived periodically to justify a series of vague, unrealistic and insufficient actions to ensure the *de facto* security and defence needs of Europe. Even against the backdrop of this scepticism, recent developments in the security environment have pushed the debate on European cooperation and independence in the field of security and defence in a new context – hopefully – more favourable. Threats to European security are real and will not disappear in the near future, and if the security and defence integration will be a success, it is still difficult to say, but the premises are favourable, and the involvement of the Europeans is the one that will have the final say.

As seen in this previous presentation, the European security integration is by no means a new idea; it is the expression of a long tradition in promoting

cooperation and European independence in security matters. For Romania in particular, the project of establishing a common European defence was a response to the efforts to become part of the international security structures and overcome the blockage in which the country had been ever since 1989. Today, more than a decade after its accession to the European Union, fallowing to the EU Council presidency in 2019, Romania must define, now more than ever, its own security priorities and the role it wishes to assume in the alliances it is part of. From a military point of view, Romania is actively participating in two EU battle groups, namely HELBROC BG, consisting of Greece, Bulgaria, Romania and Cyprus and ITROT, together with Italy and Turkey [28]. After the signing of the PESCO Declaration, President Klaus Iohannis reiterated Romania's support by announcing the country's participation to the EU's new military research and cooperation fund, wanting to re-launch the country's defence industry – a problem that Bucharest has faced since the 1990s. Another step taken by Romania towards the integration of its armed forces was the participation with the Czech Republic, at the German initiative in 2017 – The Framework Nations Concept – in which a Romanian brigade was integrated into the German armed forces. Its EU and NATO membership, as well as its position to the Black Sea can turn Romania into a key factor in the European security and defence integration, especially in terms of maintaining stability in the Balkan region and in the Southeast Europe, as well as beyond the borders of the Union, in the South Caucasus or the Middle East.

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Issues Relating to the Refusal of Recognition in Romania of a Judgment Pronounced in Another Member State of the European Union Contrary to Public Policy

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Abstract

The principle of mutual recognition of judgments, enshrined in Article 81 of the Treaty on the Functioning of the European Union, is justified by the mutual trust between the Member States in the administration of justice and a judgment given by the courts of a Member State should be treated as if would have been pronounced in the requested Member State, according to the relevant recitals in the European Union Regulation 1215/2012, also called the Brussels I recast Regulation.

But the fact that judgments given in a Member State are recognized in the other Member States without the need for any special procedure does not mean that the requested State would not be able to refuse to recognize those judgments. From this point of view, the European legislator has regulated and the Court of Justice of the European Union has rigorously explained the cases in which, at the request of the interested party, a judgment is not recognized.

One of the cases of refusal that we have come to analyse in the present study is the one in which the recognition of a judgment given in a Member State of the European Union is manifestly contrary to the public policy (ordre public) of the requested Member State.

Keywords: recognition of a judgment, civil and commercial, refusal of recognition, public policy.

1 General Considerations

The phenomenon of globalization, developed by intensifying trade and liberalizing people's movements, has led to the formation of increasingly complex legal relationships, characterized by one or more elements of foreign affairs, in which the need for the creation of specific judicial instruments, capable of facilitating international judicial cooperation. Inevitably, as in the case of national legal relationships, in the birth, execution or termination of legal relationships with a foreign element, disagreements arise between the parties involved, and the court are called to resolve them. Once a judgment is enforceable, the question arises of its execution and the assumed premise is that the judgment will be enforced in a state other than the one in which it was handed down. However, obtaining a judgment in a Member State of the European Union, in the absence of the possibility of initiating execution proceedings of the assets held by the debtor and located in the territory of another Member State, would itself deprive the right of access to a court, transforming this right from concrete and effective to theoretical and illusory.

The principle of mutual trust, implemented at the Tampere European Council in 1999, is the basis for the recognition and enforcement of a judgment given in one Member State in the other Member States, and the European Union has made a priority for judicial cooperation, giving it a whole chapter in the Treaty on the Functioning of the European Union (TFEU), stipulating in Article (art.) 81 paragraph (para.) 1 from TFEU that the Union shall develop judicial cooperation in civil matters having cross-border implications based on the principle of mutual recognition of judicial decisions and extrajudicial cooperation, and such cooperation may include the adoption of measures to approximate the laws and regulations of the Member States.

In this regard, the Union has set itself the objective of maintaining and developing an area of freedom, security and justice, facilitating, among other things, the access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in the matter civil and commercial matters, and for the gradual establishment of such a space, the Union should adopt measures in the field of judicial cooperation in civil matters with cross-border implications, in which the European Union (EU) Regulation 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, also known as the Brussels I recast Regulation.

The main merit of Regulation (EU) 1215/2012 is the abolition of the exequatur procedure. It has been rightly pointed out that the adoption of the Regulation in question has been imposed on the grounds that it is impossible for the Member States to achieve satisfactorily the objective of free movement of judgments, so that, considering that such an objective can be better achieved at the Union level, appropriate measures have to be adopted in accordance with the principle of subsidiarity and in respect with the principle of proportionality.

The Brussels I recast Regulation is the common law on the recognition and enforcement in one Member State of judgments given in another Member State in civil and commercial matters. On the other hand, it must be pointed out that the general provisions applicable in the field of the international civil process, including the issues concerning the recognition and enforcement of foreign judgments, can be found in Book VII of the Civil Procedure Code (CPC), and the scope refers to private law processes with foreign elements insofar as the international treaties to which Romania is a party, by European Union law or by special laws do not stipulate otherwise, according to art. 1065 CPC. At the level of the European Union, there are sources of law that regulate the matter of private law processes with elements of foreign affairs, including the field of recognition and enforcement of judgments, sources directly applicable in national law and which have a special character in relation to the common law established by the provisions of art. 1065-1133 CPC. Subsequently, according to the principle of *specialia generalibus derogant*, referred to in art. 1065 CPC, the legal norms enacted by the European legislator apply to the civil proceeding with foreign element within the European Union.

In the specialized doctrine, it was mentioned that the recognition of the foreign judgment represents the operation of establishing the existence and acceptance of the effects of a judgment rendered in another state. In a different way, it was highlighted that recognition is the legal mechanism by which a judgment pronounced abroad acquires in Romania the res judicata authority. On the other hand, it has emerged from the case-law that, by recognition, a foreign court ruling can no longer be ignored, enjoying res judicata authority.

From the point of view of EU law sources, as deciphered by the case-law of the Luxembourg Court, the notion of "judgment" must be interpreted autonomously. Thus, according to art. 2 lit. Regulation (EU) no. 1215/2012 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court. For the purposes of Chapter III, 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement.

Through art. 36 of the Brussels I recast Regulation are determined the guidelines on the recognition of the judgment given in the European Union, being stipulated in para. 1 that a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required, while para. 2 and 3 govern an application for refusal of recognition and a finding of absence of grounds for refusal of recognition.

From the procedural point of view, a request for refusal of recognition and a request for finding the absence of grounds for refusal of recognition on the territory of Romania for judgements delivered by another Member State of the

European Union, formulated according to the provisions of Regulation (EU) no. 1215/2012, are within the material jurisdiction of the County Court (Tribunal), pursuant to art. I[4] art. 1 of Government Emergency Ordonnance no. 119/2006. Secondly, as regards the territorial jurisdiction concerning the request for refusal of recognition and the request for finding the absence of grounds for refusal of recognition on the territory of Romania, the national legislature did not make any special mention. In such circumstances, the general provisions in the matter stipulated in art. 1099 par. 1 and 2 CPC, pursuant to the request for recognition is solved by the County Court of which the person who refuse to recognize the foreign judgment has his domicile or headquarter, and in the case of impossibility to determine the court according to par. 1, jurisdiction lies with the Bucharest County Court (Tribunal). Thus, I consider that, from a territorial point of view, jurisdiction lies within the County Court (Tribunal) in whose jurisdiction the person has his domicile or headquarter against which recognition is sought.

The interested party seeking recognition in a Member State of a judgment given in another Member State is required to comply with a number of conditions and, depending on the criteria of the aspect to which it relates, we distinguish between:

a) formal conditions provided by art. 37 of Regulation (EU) no. 1215/2012: submit a copy of the judgment which satisfies the conditions necessary to establish its authenticity (mandatory condition); to submit a certificate issued in accordance with art. 53 (mandatory condition); a translation of the certificate or, as the case may be, of the judgment, and if it cannot proceed without the translation, the court or authority may request the party to provide a translation of the judgment instead of translating the content of the certificate (condition left to the discretion of the court);

b) background conditions: inexistence of a refusal case of those covered by art. 45 of the Brussels I recast Regulation.

2 Public Order of the Requested State. Reason for Refusal to Recognize a Judgment Given in Another Member State of the European Union

The fact that judgments given in a Member State are recognized in other Member States without the need for any special procedure does not mean that the requested State would not be able to refuse recognition and, implicitly, enforcement of those judgments. From this point of view, the European legislator regulated by art. 45 of the Regulation (EU) no. 1215/2012, and the Court of Justice of the European Union explained and rigorously clarified the cases in which, at the request of the interested party, the recognition of judgement is refused. Thus, the Luxembourg Court has consistently held that the list of cases of refusal is exhaustive and must be interpreted restrictively. As a consequence, Member States may not refuse to recognize and enforce a judgment given in

another Member State for cases other than those referred to art. 45 of the Brussels I recast Regulation.

At the same time, the principle governing the institution of refusal of recognition is that under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed, pursuant to art. 52 of the Brussels I recast Regulation, as confirmed by both the Luxembourg Court and the national courts. In this regard, the judge in the requested State will not be able to control the substance of the matter, that is, the solution reached by the judge who rendered the judgment or the law applied, in which context the judge's rulings or interpretations in the requested Member State cannot be reviewed or corrected by the judge which is required to recognize the judgment. Last but not least, although they are mandatory, in the sense that when the incidence of a case of refusal is established, the requested court has the obligation and not the faculty to refuse to recognize the decision, the reasons for refusal cannot be invoked ex officio by the requested court, but only by the request of the interested party.

In this respect, according to art. 45 par. (1) letter a) of the Regulation (EU) no. 1215/2012, on the application of any interested party, the recognition of a judgment shall be refused if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed.

First of all, the notion of "public policy" is not defined by the European legislator, and such an approach is extremely difficult to achieve because the national systems of law within the European Union, although having multiple common elements, are different. It is therefore up to each Member State to define public policy (public order), such an approach being in line with the specificity of each Member State. In this respect, pursuant to the provisions of art. 2564 par. 2 Civil Code (CC), the concept of public order of Romanian private international law includes the fundamental principles of Romanian law, European Union law and fundamental rights of Romanian law. In line with the opinion already expressed in the legal literature, both the "public order of private international law" and the "public order of national law" belong to Romanian law, but whereas the first is applicable to private relations with an element of foreign affairs, the second has an impact on domestic legal relations.

Also, it was rigorously highlighted that the public policy of domestic law is wider than the one of international private law, so that not everything that is of public policy in domestic law is the same in private international law. Moreover, the explanation for this difference lies in the fact that the state regulates more firmly the legal relations of domestic law than those of private international law, because in the latter case, the law system of the forum correlates with a system of foreign law, and reciprocal incompatibilities should be removed as far as possible in order to enable normal legal relations between the legal subjects of the two countries and to facilitate the mutual enforcement of judgments.

Similarly, in a particular case, it was held that public policy in domestic law and the one of international law are based on domestic law, with only a difference in content or intensity with which they intervene, explained by the way in which

are appreciated the fundamental interests of the state from which it cannot be derogated from either in internal legal relations or in those containing foreign elements. However, in order to achieve the goal of unity in diversity, namely to ensure the free circulation of judgments, the limits of the notion of "public policy" (ordre public) can and must be interpreted by the Luxembourg Court, so that the Member States do not enjoy an unlimited margin of appreciation.

In that regard, the Court of Justice of the European Union has ruled that, while the Member States remain in principle free to determine, according to their own ideas, what public policy requires, the limits of that concept are a matter of interpretation of the Regulation. Therefore, while it is not for the Court to define the content of the public policy of a Member State, it is nonetheless required to review the limits within which the courts of a Member State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from a court in another Member State.

Likewise, the recourse to the public-policy clause may be envisaged only where recognition of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which recognition is sought, inasmuch as it would infringe a fundamental principle. In order for the prohibition of any review of the substance of a judgment of another Member State to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which recognition is sought or of a right recognised as being fundamental within that legal order.

In essence, the concept of public policy refers to fundamental principles, that is, essential rules and generally common to the Member States, which contribute to the creation and maintenance of an area without internal borders.

In this respect, the disregard for the right to a fair trial, resulting from the constitutional traditions common to the Member States, reaffirmed in art. 47, para. 2 of the Charter of Fundamental Rights of the European Union and enshrined in art. 6 para. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, could constitute a case for refusal based on public policy as to the grounds of lack of reasoning or the principle of contradictory. For example, the court of the requested State may, having regard to the public policy clause, take account of the fact that the court of the State of origin ruled on the applicant's claims without hearing the defendant who had lawfully participated but which was excluded from it by an order on the ground that it had failed to fulfil obligations imposed by an order previously made in the same proceedings where, following an overall assessment of the procedure and in the light of the circumstances as a whole, that that exclusion measure constituted a manifest and disproportionate violation of the defendant's right to be heard, having regard to the principle of contradictory law and the full exercise of the rights of the defence.

On the other hand, the fact that a judgment given in a Member State is contrary to European Union law does not justify the non-recognition of that judgment in another Member State on the ground that it infringes the public policy of that State if the alleged error of law does not constitute a manifest infringement

of a rule of law considered to be essential in the legal order of the Union and, therefore, in the Member State addressed or of a right recognized as fundamental in those legal systems. In the same sense, neither the detailed rules for determining the amount of the sums which are the subject of the provisional and protective measures granted by a judgment in respect of which recognition and enforcement are requested, in the case where it is possible to follow the line of reasoning which led to the determination of the amount of those sums, and even where legal remedies were available which were used to challenge such methods of calculation, nor the mere invocation of serious economic consequences constitute grounds establishing the infringement of public policy of the Member State in which recognition is sought which would permit the refusal of recognition and enforcement in that Member State of such a judgment given in another Member State.

Moreover, the court of the State in which enforcement is sought cannot, without undermining the aim of Regulation, refuse recognition of a judgment emanating from another Member State solely on the ground that it considers that national or Community law was misapplied in that judgment. On the contrary, it must be considered that, in such cases, the system of legal remedies in each Member State, together with the preliminary ruling procedure, affords a sufficient guarantee to individuals. Thus, the public-policy clause would apply in such cases only where that error of law means that the recognition or enforcement of the judgment in the State in which enforcement is sought would be regarded as a manifest breach of an essential rule of law in the legal order of that Member State.

Also, the test of public policy may not be applied to the rules relating to jurisdiction, according to art. 45 para. 3, second sentence of the Brussels I recast Regulation, this exclusion being unequivocal. Therefore, in line with the opinion expressed in the legal literature, it is certain that the rules of international jurisdiction do not refer to the "public policy" of the State in which recognition is sought, and the court to which recognition is sought does not have, as a rule, the right to verify the jurisdiction of the court which delivered the judgment, pursuant to art. 45 par. (1) letter a) of the Regulation. Therefore, the rule that the jurisdiction of the court of the Member State of origin is not subject to the censorship of the court seised with an action for refusal of recognition cannot be circumvented. On the other hand, there are exceptional situations in which the court of the requested State has the right to verify the jurisdiction of the court which delivered the judgment, but these cases are expressly and strictly foreseen and form a case of self-denial.

3 Conclusions

Both the principle of mutual trust between the Member States and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. From this point of view, it has been well established that the objective of free circulation of judgments given by the courts of the Member States in civil and

commercial matters, which was established more than 40 years ago by the Brussels Convention, was finalized by Regulation (EU) no. 1215/2012. Under the Brussels I recast Regulation, the principle of mutual trust between Member States and the principle of mutual recognition are translated into the execution and enforcement of judgments of the courts of a Member State as if they had been pronounced in the Member State in which enforcement is sought.

Regulation no. 1215/2012, the legal basis of which is art. 67 para. 4 TFEU aimed at facilitating access to justice, in particular through the principle of mutual recognition of judicial decisions, thus seeks, in the field of cooperation in civil or commercial matters, to strengthen the simplified and efficient system for rules of conflict, recognition and enforcement of judicial decisions, a system established by the legal instruments of which that regulation forms a continuation, in order to facilitate judicial cooperation with a view to contributing to the attainment of the objective set for the European Union to become an area of freedom, security and justice, founded on the high level of confidence which should exist between the Member States.

Undoubtedly, the abolition of the exequatur procedure by the Brussels I recast Regulation facilitates the achievement of the objective of free circulation of judgments in a common area based on mutual trust in the administration of justice. Nevertheless, the European legislator has stipulated that the person against whom enforcement is sought has the possibility of opposing the recognition of the judgment, regulating strictly the cases of refusal of recognition, including the one when the recognition is manifestly contrary to the public policy of the requested State.

However, as the Court of Justice of the European Union has repeatedly held, the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. It follows therefrom that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. It is no less true that the specific circumstances which may justify recourse to the concept of public policy may vary from one Member State to another and from one era to another. In that regard, it is therefore necessary to accord the competent national authorities a certain discretion within the limits laid down in the Treaty.

At the same time, the exception to public order was considered as pivotal importance, while the European Commission has been working to abolish the exequatur proceedings and the public policy exception. However, there is a clear difference between the political concept of mutual recognition and its application in the case law of the Luxembourg Court: while the former is aimed at the comprehensive abolition of exequatur proceedings (including the public policy exception), the latter is only applied within the framework of art. 45. According to the case law of the Court of Justice of the European Union, mutual recognition implies that the grounds for non-recognition, especially the public policy exception must be construed narrowly. This case law is supported by the wording of art. 45 para. (1) letter a) from the Brussels I recast Regulation where the adverb

"manifestly" was used to qualify the contradiction between the free movement of judgments and public policy.

Under such circumstances, it is imperative to ensure a fair balance between the right of the creditor to see his judgment pronounced in his favour in a Member State recognized and enforced in another Member State, namely the debtor's right to respect for his fundamental rights, which may be protected by the refusal of recognition. Therefore, the court of the requested State must examine with the utmost vigilance and within the limits of the European legal provisions, also in accordance with the Luxembourg Court case law, if the recognition of the judgment would be manifestly contrary to its public policy.

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Opportunity and Gender Equality in Romania and in the European Union. Feminist Perspectives

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Abstract

In contemporary society, the issue of equal opportunity between women and men raises many issues, both theoretical and practical. The principle of equal opportunity is analysed and transposed in a series of international, community and national regulations that complete each other and this present study makes a short history of these regulations showing that today, legislation regarding equal opportunity is one that tries to keep up with the permanent social changes. However, statistics still show inequalities especially regarding the presence of women in the highest decisional bodies. In this regard, reporting to our country, perpetuating the patriarchal mentality is still an issue.

Keywords: equal opportunity, gender equality, European Union, integration, non-discrimination.

1 Introduction

Non-discrimination and the issue of equal opportunity are concepts used in contemporary society both on the international and community and national level. Over time, equality was and has remained to this day, one of the most analyzed concepts both by philosophers and by legal experts and politicians [1].

When we report to equality regarding women's rights, we have in mind among others, discrimination according to sex and the issue of equal opportunity between men and women and today, if we believe in appearances, we could say that the fight for women's rights is over and sex and gender equality is a wish that has been fulfilled by contemporary society. Nowadays a whole new legislative system regulates this issue, at least theoretically and, sometimes, we forget that

there are still countries in which equal opportunity is just an ideal to which many women still dream about [2].

Today the issue of opportunity equality between men and women is no longer just an issue in the attention of feminist policies. The principle of opportunity equality is still one of major interest and one that continues to be a problem to contemporary society. This is also due to the fact that society doesn't stay put, it is in constant change and women's equalities also change constantly, permanent appropriate strategies are necessary in order to eliminate all forms of discrimination [3]. Thereby, at the beginning of the 21st Century we can appreciate the fact that human rights are also women's rights and non-discrimination and equality between men and women are central principles of the human rights law. However, women all over the world are still suffering from a series of violation of their right [3].

2 Opportunity and Gender Equality: Conceptualization

Opportunity and gender equality is a central principle of human rights law. But what do each of these concepts represent?

Equal opportunity assumes that no one can be stopped from taking part in an activity due to the existent inequalities, because individuals are not identical, they distinguish each other by natural endowment, by sex, by culture, by their capacity to use their possibilities they possess. Therefore, equal opportunity, comes to put in balance the natural inequalities between people, these have the natural possibility to carry out any kind of activity.

The term "opportunity" can be defined as a set of favorable circumstances that lead to the achievement of a goal, as a consequence of one person's decision and action. The situations in which equal opportunities are violated are in fact discriminatory situations and the actions involved in this case are discriminations and these discriminations can be made according to sex, race, nationality, religion, age, disabilities, etc.

With regard to the word "gender" it has become a fashionable one today, by replacing the word "sex" in official texts and The International Court of Justice. In the past, the word "gender" was only used in grammatical analysis of nouns and adjectives related to them, the feminine gender and masculine gender respectively. Nowadays the concept of gender comes from the English word "gender". The word "sex" in English defines just the anatomic (biologic) sex and "gender" defines the social meaning [4]. The term "gender" was first used in the '50s by psychologist John Money in connection with children that suffered ambiguities of the genital organs, hermaphrodite children who couldn't be qualified as boys or girls. Thereby, Money introduced a fundamental distinction between genders psychologically, socially and sexually related that was connected only with the biological [4]. Subsequently, feminist groups have assumed the term reporting it to the social role of women.

Gender, the basic concept of modern feminism, brings to attention the fact that the biological, pshychological and economic factors form/model the

women. Thus, differences of sex are the biological ones, with which we are born and gender differences are those usually acquired [5] by education or socialization. Gender roles represent attitudes and behaviors that we associate to women and men. Gender roles prescribe how we should be not how we actually are [6]. Since the mid-20th Century, the feminist movement has criticized the biological determinism of gender roles and the way in which a hierarchy is created, one that is based on sexes in which usually women are subordinate to men. The conclusion would be that gender and its characteristics are not native but are taken through socialization [7].

Over time, the word "gender" in English has impose itself in all international court of justice and gradually, the word "gender" was used in official texts. For the first time the (United Nations) UN used in official texts the concept of "gender" upon the occasion of the World Conference on Women from Beijing, in 1995. Subsequently, The European Council or The European Parliament has taken the term "gender" which, will mostly be used alternatively with that of "sex" in official texts such as Conventions, Resolutions, or European Directives [4].

Equality as a concept appears in different formulations at the enlightenment philosophers (Montesquieu, Rousseau and others) and in programmatic documents of the Bourgeois Revolutions. Any retrospective of the main documents and legislative instruments that marked the evolution of the concept of "equality of opportunity" should make reference to the first declarations and conventions, such as the Declaration of the Rights of the Man and of the Citizen from France in 1789, where for the first time it was emphasized the necessity for universal recognition of human rights as natural and irrevocable rights [8]. The road to equality between women and men, a long and sinuous road, begins with the Charter of the United Nations from June 26th 1945, where the preamble states that the nations of the United Nations reaffirm their belief in the "fundamental human rights (...) in equal rights for women and men" [9]. Subsequently, the rules/norms regarding the condition of women are developed in a series of instruments adopted at the United Nations, such as the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in 1948, the International Covenant on Economic, Social and Cultural Rights, and The International Covenant on Civil and Political Rights, adopted by the General Assembly in 1966. The right to vote for women in equal terms with men is provided in the 1952 Convention on Women's Political Rights, the first treaty that defines the legal status of women in society [8]. The most important step towards promoting equality between men and women and the elimination of discrimination is the Convention on the Elimination of All Forms of Discrimination against Women adopted by the UN General Assembly in 1979. The United Nations has, since its inception, supported the principle of equal opportunities for men and women, and in over 70 years of activity has played and continues today to play a decisive role in achieving this equality by implementing an appropriate legal framework when it comes to discriminatory acts against women.

The promotion of equal opportunities in the workplace was assumed by the International Labor Organization (ILO), founded in 1919 and that became a

specialized agency of the UN. The first conventions of the ILO were concerned with the protection of women against manual labor, night work, job security, maternity, and after 1950 equal access to work and equal treatment became priorities [11].

3 The Principle of Equal Opportunity Within the European Union

Part of social politics, sex and gender equality and sex-based non-discrimination were in permanent relation with social, political or economic changes. The introduction of this principle in community law was based on economic reasons. Therefore, the roots regarding European reglementations in matter of, go back to the mid-20th Century when the French introduced in their constitution Equal Pay, meaning equal work – equal pay. Subsequently, France has supported the necessity of adopting a legislative act at the European level in order to regulate this principle [12]. This fact has been materialized by The Treaty of Rome from 1957, which is a constitution treaty of The European Economic Community (TCEE), It is about the famous article 119 TCEE which stipulates that "Each Member State in the first phase ensures and subsequently maintains the appliance of the equality principle between workers of masculine and feminine sex for the same work" [13].

At the beginning this provision has remained included in the treaty without being implemented. However, in the early 70's, this principle begins to gain visibility, equal opportunity between men and women becoming an important part of the European Union social policy. In this regard in 1982 it was even created an Advisory Committee whose purpose was to help the Commission in implementing some clear policies regarding the promotion of o equal opportunity for women at their workplace [14].

Subsequently the area of equal opportunity extended exceeding the economic sector of equal pay and in this context feminist movements had an important role, all their actions resulted in knowing the issues women have to deal on the social, political and economic level. It should also be noted the role of The European Court of Justice (CEJ) in implementing gender policies at the European level, CEJ being the legal authority of the European Union that ensures the equal appliance and interpretation of the Union's right [15]. Therefore, from one analysis to another, the courts of law had to extend the protecting area of women's rights.

In the history of equal opportunity at the European level, an important stage represents The Treaty of Amsterdam, signed in 1997 [16] which brought again into attention The European Union's concern over gender equality and its legal basis was strengthen. Therefore, by this treaty, The European Community member states are allowed to adopt any kind of necessary means for fighting against non-discrimination on the grounds of sex, race, ethnicity, religion, beliefs, disabilities, age and sexual orientation [17]. Therefore, if for almost four decades

the European Union's actions regarding the combat of discrimination firstly took into account sexual discrimination at the workplace, art. 19 from the Treaty on the Functioning on the European Union, introduced by the Treaty of Amsterdam, has regulated a legal basis regarding combating discrimination on a series of other grounds besides sex [18].

In 2007 the Lisbon Treaty has completed the previous treaties regarding the guaranties offered relating to the compliance of equal treatment principle, showing that the European Union promotes equality between men and women and combats social exclusion [16].

In 2010 the European Commission has adopted the Women's Charter "a commitment consolidated in favor of equality between women and men" In this charter it is outlined the fact that, although in the last two decades Europe has registered progresses regarding equality between women and men, "there still are obstacles in the way of real equality" and these are to be removed by consolidating gender equality in all policies, by proposing five action dimensions: real economic independence, equal pay for similar work or for work of equal value, decisional equality, dignity, integration and stopping gender-based violence, equality between women and men in external policies [19].

The Charter of Fundamental Rights of the European Union, an important document regarding human rights, has established equality as a fundamental and universal value of the European Union, in the preamble it was shown that "the Union is based on indivisible and universal values, of human dignity, freedom, equality and solidarity" [16]. The Charter has a chapter entitled "Equality" in which a series of concept are defined as well as the principle of non-discrimination, of equality between men and women and of diversity (art. 21-23).

Based on the primary legislation (fundamental legal acts of community law), over time, community institutions have adopted regulations, decisions, directives, the so-called secondary sources [20]. Therefore, based on the stated treaties, in order to better define equal opportunity, the community institutions have elaborated a series of documents, such as: the Directive regarding equal treatment between men and women activity in a self-employed capacity (Directive 2010/41/UE), the Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Directive 2006/54/CE) Notice of Assessment of the European Year Equal Opportunities for All (771/2006/CE) or Regulations regarding the foundation of an European Institute for opportunity equality between women and men [21]. And these are just a few examples.

Today, in the European Union's policy a different number of themes cover the field of equal opportunity between men and women and namely: gender non-discrimination, sexual harassment, equal opportunity at the institutional level, social protection, equal access at work and vocational education [18].

Although there is a sufficiently wide and well-established legislative framework, statistics still show inequalities between men and women starting with work payment, the number of women employees in senior management or representing women in decisional process namely the political area. However,

statistics show a gradual increase regarding the representativeness of women in general [22].

Problems such as those regarding equal pay, sexual harassment, cases of multiple discrimination, gender-based violence, human trafficking still appear on the European Commission's worktable. Nevertheless, it can be noticed the massive involvement of NGO's that offer a valuable communication channel with official equality promotion bodies.

4 The Implementation of Opportunity and Gender Equality in Romanian Legislation

Having community legislations landmarks, the European Union member states have achieved a national legislation but also policies and institutions that will follow and implement the gender equality principle.

In its way towards European Union integration, Romania has tried the harmonisation of internal law with Community Acquis. Therefore, notions such as "equal opportunity" and "gender equality" have been used in Romania starting with the mid 90's.

The European legislation regarding opportunity and gender equality has been largely transposed in the national legislation. Today, the principle of equality is acknowledged in the Romanian Constitution at article 4, entitled "Unity of the people and equality among citizens" according to which, "Romania is the common and indivisible homeland of all its citizens, without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin" [23]. Also, according to article 16 paragraph (3) "the Romanian Stare guarantees opportunity equality between men and women regarding occupying public, civil and military functions and dignities" and according to article 41 paragraph (4) "for equal work, women have equal pay as men do" [23].

Romanian Labour Code states in article 5 the principle of equal treatment for all employees and employers, any kind of discrimination according to conditions provided by the Constitution shall be prohibited [24].

The framework law that establishes the landmark of gender equality is Law no. 202/2002 (republished), regarding equal opportunity and treatment between women and men which according to article 1 "regulates measures to promote equal opportunities and treatment between men and women, to eliminate all forms of discrimination based on gender in all spheres of public life in Romania" and paragraph 2 of the same article defines equal opportunity and treatment between men and women in understanding this concept we take into account the capacities, needs and aspirations of different males, respectively, women and their equal treatment. Article 2 of the same law lists the domains in which equal opportunities measures are applied namely: labor, education, health, culture and information policy, participation in decision making, supply and access to goods and services and other areas regulated by special laws [25]. According to this law, in Romania,

The National Agency for Equal Opportunities Between Men and Women (ANES) is the agency responsible for promoting o equal opportunity by elaborating and implementing various gender policies, it is a public institution of national interest which besides promoting the principle of equal opportunity also ensures the integration of gender equality in all national policies and programs. The institution began to function in 2005 [26].

The main normative acts that regulate today the issue of opportunity and gender equality appear, in Romania, on the ANES official site. Among those normative acts, there are: The Law of Parental Leave 210/1999 [27], Government Ordinance no. 137/2000 regarding the prevention and sanction of all forms of discrimination [28]; Government Emergency Ordinance 67/2007 regarding the appliance of equal treatment principle within social security professional outlines [29] or Law no. 23/2015 for declaring May 8 as Equal Opportunity Between Women and Men Day [30]. These are just a few examples. The complete legislation in this field can be consulted and analysed of the ANES or Ministry of Labour sites.

From these few examples we notice that on the legislative level, Romania has aligned herself at the European standards regarding gender equality. However, the principle is not completely respected, a series of issues still persist such as: keeping wage differences [31], the inequity regarding the representation of women in the decisional process [31], inefficient development of social services and not least, maintaining patriarchal mentalities [32] which sometimes determine perpetuating a misogynistic/sexist attitude regarding the approach of women's rights issue [33].

Nevertheless, the fact that our country's legislation is in harmony with the community acquis, represents a great step forward. Another step will be the popularization of the fact that this legislation exists and can be used. Generically speaking, this could be taken care of by equal opportunity experts, however, although they are specialists in the equal opportunity field, in Romania, in the last 20 years, the function of "gender equality expert" is still forming and should be included in the COR (in Romanian Classification of Occupations). The open letter from February 14, 2018, regarding the formation of equal opportunity experts was put into the attention of Romanian President Klaus Iohannis, Romanian Prime Minister Viorica Dăncilă and ANES President Secretary of State Graţiela Drăghici. This letter underlines the need to provide a legal framework to ensure the training of gender equality experts according to European standards [34] necessary for implementing the European principle "gender mainstreaming", which these experts should be dealing with.

In conclusion, we can say that although there is an equal opportunity agency, many Women's NGOs, there are Women's Organizations of the main political parties, we have book collections regarding gender studies at Polirom Printing Company, we have master's degree programs in this field within the Faculty of Political Science of Bucharest but also in Cluj and Timişoara, as Laura Grunberg said "more does not mean better and better does not necessarily mean enough" [33].

Therefore, although at first sight we have the tendency to appreciate that equal opportunity represents normality nowadays, if we look a little at the statistics [35] we find out that in 2017 (based on the information from 2015), Romania occupies place no. 26 from a total of 28 states. Nevertheless, changes are taking place and one example could be a situation regarding the position of judge (position attributed to the male if we have in mind the feminine defective name) at Constanta Court of Appeal and of the assigned courts, from March 2018, in which we observe that the number of women judges is 2-3 times bigger than men judges (Court of Appeal Constanţa – 27 women/12 men; Constanţa County Court – 51 women/8 men; Constanţa District Court– 41 women/15 men; Tulcea County Court – 8 women/3 men). Therefore, Romania is taking small steps forward but there is still room for better.

5 Conclusions: The Need for Real Equality Not Just a Conceptual One

Equal treatment and opportunity were promoted by the European Union since its inception having firstly in view the elimination of any discriminatory situations on the work market dealing with economic interests at the beginning.

Equality between men and women represent not only a fundamental right but also a common value of the European Union and a social cohesion condition. Although we have in mind the statistics, there are still a series of inequalities, the European Union and Romania as its member state, have made important progresses for women and men to have equal chances.

The principle of equality considers preventing discriminations regardless of age, sexual orientation, ethnicity, disabilities or religion. Also, it presumes the necesssity of changing behaviours or attitudes that affect human dignity. At the EU level, at present, the issue of equal opportunity between women and men implies: the principle of gender non-discrimination, equal access to work, social protection, sexual harassment, equal opportunity between women and men at the institutional level.

In Romania, although women's conditions have greatly improved, differences between men and women still persist in many sectors, as it is shown by many studies made in this sense. Although today in our country there is a legislation aligned according to the European Union's requirements, there are also institutions for combating discrimination the need for mentality change is still felt. With all the existence of the normative framework in force, Romania as member state of the European Union should have more efficient and proactive approaches, regarding the equality issue.

This is not just an approach of the complex issue of opportunity and gender equality. This study contributes to an understanding from a rather theoretical perspective of opportunity and gender equality principle. Another approach could have in mind a parallel between the concept of equality and the one of non-discrimination, concepts between which there is a direct link.

As a conclusion, gender issue remains a major theme at the European Union level but it is also a goal hard to reach by the community policies of our country. Therefore, the opportunity and gender equality issue still remains an open one, in the attention of Women Organisations and not only, from all over the world. Feminism had an important role in bringing to public knowledge the terminological difference of sex/gender even if in the Romanian legislation, as well as in the community one, there is no clear difference, the two terms appear in official text alternatively.

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The Citizens' Right to Information on Environmental Issues, in the Context of Sustainable Development

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Abstract

The focus on the sustainable development in the international society is not new; it has been taken up globally as people have become aware of the fact that a thoughtless exploitation of natural resources, with no care for tomorrow's society, may endanger the very existence of this society. Economic and social progress must not endanger the natural balance of the planet; for this reason, policies ensuring better life quality must be promoted, but this is not enough. A changed mindset on how resources are used is also needed, along with establishing a set of values that each citizen should adopt. All this cannot be performed without pertinent information. Citizens should be educated and informed on the deployment of these policies on sustainable development and should receive the environmental information authorities hold so that they may protect their rights and take part in decision making.

Sustainable development still is a challenge for the society, as ways have to be found to reconcile the needs of the current generation with those of future generations. It is a challenge also because relevant policies envisage ambitious and interdependent goals: economic growth, social inclusion (along with eradication of poverty) and environmental protection.

Keywords: right to information, sustainable development, environmental information, decisional transparency.

1 General Considerations. International Policies on Sustainable Development

Natural resources are not inexhaustible, which is why all social actors must be aware that environmental issues are a joint focus for all states of the world, for the authorities, population, non-governmental organizations, etc. Efforts for environment protection must be combined.

The United Nations Conference on the Human Environment, Stockholm, 1972 [1] established the need to set joint principles for environment conservation and improvement, which is a major issue for the entire world. Thus, 26 principles were set, that would guide future environment conservation and improvement actions. Principle no. 19 establishes the need for education in environmental matters, for the younger generation as well as adults, and encourages the media to disseminate information on the need to protect the environment. The information of the community reinforces their "feeling of responsibility for environment protection and improvement".

A range of recommendations were made for the achievement of the primary goal of environment protection. Recommendation no. 96 aims at creating educational programmes at the level of UNESCO [2], preparing the youth and the adults for the management of environment-related issues, interdisciplinary programmes covering all levels of education. Likewise, Recommendation no. 97 aims at informing the audience. The following recommendations are made: creating an audience information programme on environmental issues, encouraging participation in environmental decision making and active involvement of non-governmental organisations. At the same time, the establishment of an International Day of Environment is recommended. [3] Public information should also be deployed through a dissemination of Conference documents in as many languages and as widely as possible, and relevant environmental information should be included in official UN communications.

In 1983, the United Nations decided to set up an independent body, the World Commission on Environment and Development (WECD), whose mission was to join the countries across the world with a view to reaching the sustainable development goal. In 1987, WECD, known as the "Brundtland Commission" [4], completed the consistent report "Our Common Future", also referred to as the Brundtland Report. [5] The report defines sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". Economic and social development should be defined in terms of sustainability, i.e. meeting the basic needs of everyone should be correlated to the aspiration to a better life.

The United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992, adopted the document "Agenda 21" [6], which sets the long-term directions of action for environment protection, with an integrated approach, being aware that ecosystem protection and sustainable development can only take place within a global partnership. This is a political commitment, and, in terms of right to information, governments aim at improving

the dissemination of relevant documents, at improving the participation of the public, non-governmental organisations and other stakeholder groups in decision-making, at facilitating access to information and the presentation of adopted decisions. Furthermore, Agenda 21 starts from the assumption that the participation of the wide public in decision making processes is fundamental for sustainable development and aims at educating the children and the youth and at raising their awareness of environmental issues, as not only their present, but also their future is involved.

Upon its 70th session, on September 25, 2015, the General Assembly of the United Nations passed the resolution "Transforming our world: the 2030 Agenda for Sustainable Development". [7] 17 sustainable development goals, with 169 associated targets, were established with that occasion. For their proper commissioning, an on-line platform was proposed, that will "establish a comprehensive mapping of, and serve as a gateway for, information on existing STI initiatives, mechanisms and programmes, within and beyond the UN". This will facilitate access to information, scientific publications, good practices, knowledge and experience. Moreover, under goal 12, target 8 is to ensure that people everywhere have the relevant information and awareness for sustainable development by 2030, and under goal 16, target 10 is to "ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements".

The 17 sustainable development goals [8] are not legally binding, but the participating countries formally commit that they will make every effort to reach them, being aware that they can only be reached through concerted efforts, aiming at harmonizing "three fundamental elements: economic growth, social inclusion and environment protection".

The business environment also became aware of the fact that the environment and climate changes can affect economy. Thus, more than 250 organisations declared their support for the Task Force on Climate-related Financial Disclosures (TCFD) of the Financial Stability Board (FSB) [9], which draws up information on financial risks related to climate changes. A guide was drawn up for the dissemination of financial information [10], so that the information needed to understand the impact of climate changes may be provided to investors, creditors, insurers and other stakeholders. Improved information is the key goal, with the following motto: "Due to enhanced transparency, markets are more efficient and economies are more stable and resistant" [11]. These companies have aimed at cooperating to accelerate transition to a sustainable world, becoming associated to the World Business Council for Sustainable Development (WBCSD) global network. [12]

2 European Policies on Sustainable Development and the Citizens' Right to Information

As noticed, United Nations policies are generally based on volunteering, i.e. the states and other stakeholders voluntarily adhere to and comply with the declared principles in terms of sustainable development.

At a European level, policies in the field of environment protection, the public right to information and sustainable development have been established in documents with a legal status (conventions, directives, etc.).

On 25 June 1998, with the occasion of the Fourth Ministerial Conference "Environment for Europe", the United Nations Economic Commission for Europe (UNECE) [13], adopted the "Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters", also called the Aarhus Convention.

The Convention is a legal instrument of international law, not just an environmental agreement, dealing with "three pillars": access to information, public participation and access to justice. The approach of the Convention is based on the public's right to information and the authorities' correlated obligation of transparency and dissemination of information. The legal act stems from the "need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development"; all this is only possible with the involvement of all stakeholders. The Convention establishes the authorities' obligation to "promote environmental education and environmental awareness among the public", as well as the information of the public regarding its way to access information.

The Aarhus Convention has been ratified by UNECE member states, as well as the European Union, through its Decision 2005/370/EC [14], so that the provisions of the Convention apply to EU institutions as well [15].

Concerns regarding public information on environmental issues have also been seen at the level of the European Union. Council Directive 90/313/EEC on the freedom of access to information on the environment was adopted in 1990. [16] The regulation starts from the assumption that, if the public has access to environmental information held by public authorities, this will result in improved environment protection. Authorities should provide the environment with the requested information, without having justified any interest. At the same time, the Directive included provisions that may limit the right to access information on environment: the confidentiality of public authorities' debates, of international relations or national defence secrecy; public safety; cases which are or were pending in a court or which are or were subject to an investigation (including a disciplinary investigation) or a preliminary inquiry; commercial and industrial secrecy, including intellectual property; confidentiality of data and/or personal files; data supplied by a third party without having the legal obligation to do so; data whose disclosure would rather affect the concerned environment.

In 2001, the European Commission drew up a communication [17] for the European Council of Göteborg, representing a draft European strategy for

sustainable development, based on the Brundtland Commission conclusions and providing proposals to complete the Lisbon Strategy 2000-2010 [18], for the achievement of sustainable economic growth. It proposes to encourage the wide scale participation to the achievement of goals, the stimulation of natural persons and legal entities for changing their preferences, behaviour and technology, as well as invest in science and innovative technology. Another direction of action is "improving communication and involving citizens and the business environment", with the belief that the policy making process should become more transparent, so as to earn the citizens' trust and enhance the feeling of individual and collective responsibility.

2010 brings a new strategy to the panorama of European policies, i.e. "Europe 2020"]19], whose main priorities are: smart growth (a knowledge and innovation-based economy), sustainable growth (a more environmentally friendly economy) and inclusion-friendly growth.

The concern for sustainable development has also been established by art. 11 of TFEU (ex-article 6 TEC) [20], and Title XX is devoted to "Environment", as the Union policy on the environment shall contribute to pursuit of the following objectives [21]: preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

Directive 2003/4/EC [22] aims at aligning EU law to the Aarhus Convention, with a focus on "public access to environmental information and the dissemination of such information". The public needs information for a free exchange of opinions, so as to take part in the decision-making process on environmental issues and in order to become aware of such issues. The new legislative act aims at redefining information on environment, extending its area, "so as to encompass information in any form on the state of the environment, on factors, measures or activities affecting or likely to affect the environment or designed to protect it, on cost-benefit and economic analyses used within the framework of such measures or activities and also information on the state of human health and safety, including the contamination of the food chain, conditions of human life, cultural sites and built structures in as much as they are, or may be, affected by any of those matters".

Moreover, in order to implement the principle stated under art. 11 TFEU, Directive 2003/4/EC also extends the scope of the notion of public authority, so that provisions apply to larger categories of holders of environmental information.

The directive establishes that the right to information is a rule, and its limitation must be an exception, "in specific and clearly defined cases". Another element of novelty is the regulation of the dissemination of authority-held information. The previous provisions only refer to providing the public with on-demand access to information. Article 7 of Directive 2003/4/EC mentions "active and systematic dissemination" of relevant information of environment, which shall be provided to the wide audience by means of public telecommunication networks. Likewise, minimal standards on the categories of information to be

provide automatically, as well as regarding the quality [23] of information on environment shall be established.

In 2005, the European Commission draws up a Communication to the Council and the Parliament, the draft Declaration on Guidelines for Sustainable Development [24], establishing the primary objectives in the field and the principles to focus European sustainable development policies. These include: promoting and protecting fundamental rights, promoting an open and democratic society, involving the citizens, the social partners and the business environment. These principles are enacted by guaranteeing access to information, through citizen consultation and participation in decision-making, by reinforcing social dialogue and the social responsibility of business agents, by educating and raising public awareness on sustainable development.

After adopting these principles, in December 2005, the European Council proceeded to the review of the Sustainable Development Strategy [25], establishing the directions of action for the implementation of sustainable development guidelines. As for informing the citizens and the business environment, the strategy in its new form guarantees that sustainable development cannot be undertaken without involving the audience and the private sector, and they have to be mobilized and actively involved, as well as consulted and provided with the required information to participate in decision making.

3 National Implementation of Principles and Practices on Sustainable Development and Citizen Information

As for public information in terms of environment, the Aarhus Convention has been ratified by Romania [26], that is, it is already included in the national law, according to constitutional provisions.

As for the transposition of Directive 2003/4/EC into Romanian law, it took place by means of Government Decision 878/2005 [27]. The document guarantees access to information on the environment, as well as the dissemination of this information to the authorities, as stipulated by the Aarhus Convention.

The person requesting information on the environment does not need to justify any interest on such information and is entitled to receive it within one month from the date when the application is filed. If the request is complex, the information may be provided within two months, and the applicant will be informed on the decision to extend the term for the supply of information and the reasons of such decision.

Any refusal of public authorities to provide access to information on the environment must be motivated. Moreover, the fact that the information cannot be provided in the requested format also has to be motivated.

The legislative document stipulates the cases when access to information on environment is limited. Exceptions are stipulated in the third chapter and refer to several circumstances. A situation is the one under art. 5, when the applicant files a request that is "general, unclear" or which "does not allow the identification of

the requested information" and does not provide data on the scope of his/her request. Also, if the authority does not have the requested information, the requested data is not in a final form, the application cannot be solved or refers to the internal communication system.

If the application refers to data or materials that are not complete, though the authority may reject the application, it still has the obligation to inform the applicant on "the name of the authority drawing up the material and the estimated date of completion thereof".

Art. 12 of Government Decision 878/2005 includes the cases when access to information on the environment may be limited, i.e. when the disclosure of information is likely to affect: the confidentiality of public authority procedures, international relations, public security or national defence, the course of justice, the confidentiality of commercial or industrial information, intellectual property rights, the confidentiality of personal data, the interests or protection of any person voluntarily providing the requested information, the protection of the environment such information refer to (such as the location of rare species).

Jointly with ensuring the public's access to information, the authorities shall also have the obligation of an "active and systematic" dissemination of information on environment. Such information must be relevant, permanently updated and disseminated in an accessible form (preferably in an electronic format). Information that must be provided to the public *ex officio* include (at least): the legislation applicable in the field (including international legal acts Romania is a part of); environmental policies, plans and programmes; progress reports; reports on the state of the environment; the data or data summaries resulting from the monitoring of activities affecting or likely to affect the environment; the approvals, agreements and permits for activities with a significant environmental impact, as well as the conventions entered by public authorities and natural persons and/or legal entities on environmental objectives or the indication of the place where such information may be requested or found; environmental impact studies and risk assessments on environmental elements or the indication of the lace where such information may be requested or found.

Public authorities for environment protection also have the obligation to publish reports on the state of the environment, on an annual basis (including information on environmental quality and environmental pressure).

Another category of information to be disseminated "immediately and without delay" is information allowing the public to take damage prevention or improvement measures, in case of imminent threats on human health or the environment, due to human activities or natural causes.

Even though the legislation on public access to environmental information establishes obligations for public authorities, considering the importance of environment protection for sustainable social development, Government Decision 878/2005 establishes some obligations to disseminate information on the environment for business operators as well (irrespective of the capital ownership form). Thus, "business operators who develop their activity based on an (integrated) environmental permit shall inform the public on the environmental

consequences of their activities and/or products, on a quarterly basis, by posting them on their webpage or by any other means of communication". [28]

Regarding sustainable development, "The National Strategy for Sustainable Development of Romania. Horizons 2013-2020-2030" was drawn up in 2008. [29] The strategy established goals for a timely and realistic transition to the global model of sustainable development. Furthermore, the document was drawn up starting from the assumption that Romania is significantly behind other European Union member states and it has to acquire and implement the principles and practices of sustainable development.

In its third part – "Target objectives and means to act in the 2013, 2020, 2030 horizon, according to EU strategic guidelines" – the Strategy includes a chapter titled "Communication, involvement of actors and multiplication of success factors". The chapter aims at informing the public, at communicating and disseminating information, so as to raise awareness of the notions related to sustainable development, as well as the objectives of the National Strategy and European Strategy on sustainable development. Moreover, the information and communication process aims at "ensuring the full and consistent implementation of the provisions of the Aarhus Convention in Romania on access to information, public participation in decision making and access to environmental justice, through concrete measures".

4 Conclusions

The information and education of citizens in the spirit of environment protection and sustainable development is a challenge and an objective for authorities, the business environment, non-governmental organizations. The behaviour and preferences of consumers have to change, and they have to be informed on the benefits of accepting more environment-friendly products and services.

We may say that legal provisions have been established at a national level, guaranteeing the access of public to information on environment; this is a rule. Exceptions from free access to information must be interpreted restrictively, analysed on a case-by-case basis against the essential criterion on the right to information, i.e. public interest. In each case, it should be analysed whether the interest met by keeping confidentiality is more important than public interest in the dissemination of such information.

Moreover, it is important that the law stipulates that information on emissions, discharges or other release of environmental pollutants cannot be exempted from free access, in order to avoid the secrecy of important information on events with an effect on the community.

Efforts to inform and educate the public in terms of environment protection and sustainable development should continue at a national level, and information provided to the public should be up-to-date, accurate and comparable.

Citizens can only participate in the decision-making process in an efficient manner if they have useful information, accurate and up-to-date data, as well as European and international good practice models. Thus, an efficient harmony may

be obtained between the need to improve people's life quality and the need to live in respect of the natural environment.

Given the existence of a satisfactory legislative framework, the efforts of national authorities should be focused on disseminating as many information *ex officio* as possible (not just in terms of minimal standards), so that Romanian citizens become acquainted with sustainable development concepts, policies and measures, and are able to come up with solutions on environment protection themselves.

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Aspects Regarding the Recognition and the Enforcement of Decisions of Foreign Courts in Romania, as Stated in Some European Regulations

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Abstract

The Romanian Civil Procedure Code stipulates that the term *foreign decisions* refers to "the contentious or uncontentious jurisdiction documents of the courts, notarial documents or documents of any other competent authorities of *member state* of the European Union". When it comes to the jurisdiction the Article 1103 of the Code stipulates that foreign decisions that are not willingly abidden by those obligated to execute them can be enforced on Romanian territory, based on the acceptance and at the request of the person of interest, by the *district court where the sentence is to be carried out*. In various spheres, such as civil, trade, succession, contract divorce or parental accountability, there were created European regulations that include both similar and domain-specific dispositions.

Keywords: foreign decisions, authentic documents, recognition, enforcement, enforcing law.

1 Introduction

In the context of the diversification of the patrimonial, trade or family relations between natural and/or legal persons from the European and extra-European space, the necessity of the clarification and facilitation of the recognition and enforcement of the court decisions. Given the numerous situations in which the European citizens have personal or professional connections with more than just 1 member state, tighter bonds with a state where they live or work or they reorganize their life and profession on the territory of

another state, using decisions of European courts, both through the internal Romanian legislation, and European one, a more efficient approach has been tried regarding the problem of the decisions made in a state and carried out on the territory of another state.

The Romanian Civil Procedure Code stipulates that the term *foreign decisions* refers to "the contentious or uncontentious jurisdiction documents of the courts, notarial documents or documents of any other competent authorities of *member state* of the European Union". In the specialty dogma, it was concluded that the draft of the text is not enough because of the discarding of the decisions coming from the member states of the European Union and it was questioned if the intention of the law-maker was to exempt them from the procedure of recognition and enforcement agreement. Given the fact that, according to the Article 1065 of the Code, these rules apply only if international treaties of which Romania is part of, Communitarian Law or special laws don't stipulate otherwise, it can be considered that the dispositions regarding the recognition are applicable to the decisions from member states, too [1]. When it comes to the jurisdiction, the Article 1103 of the Code stipulates that foreign decisions that are not willingly abidden by those obligated to execute them can be enforced on Romanian territory, based on the acceptance and at the request of the person of interest, by the *district court where the sentence is to be carried out*. There can be no enforcement on Romanian territory of the foreign decisions taken with precautionary measures or decisions with provisional enforcement. Hence, we can say the rules of international procedural civil law include rules of competence (in which the rules that establish the international competence of the Romanian courts are included) and procedural rules per se (that regard the trial during the procedure of recognition and acceptance of the foreign decisions) [2].

2 The Acceptance and Enforcement of the Court Decisions in Civil and Trade Spheres

In civil and trade spheres, the Regulation no. 1215/2012 regarding judicial competence, acceptance and enforcement of decisions in civil and trade spheres [3] was adopted based on the reason that the *Regulation no. (EC) no. 44/2001 of the Council of 22nd of December 2000 regarding the judicial competence, the acceptance and enforcement of the decisions in civil and trade spheres* [4] need improvements in its applications, in the sense of the facilitation of free circulation of the decisions and in the sense of the access to justice. So, giving up the *exequatur* procedure has as an effect the mutual recognition of court and extra-court decisions taken in the civil sphere. According to the Reason (10) of the Regulation no. 1215/2012, its applicability sphere *should include* main aspects of civil and trade law, with certain *exceptions*, like the ones in the sphere of maintenance obligations, given the fact that they are object to the *Regulation (EC) no. 4/2009 of the Council of 18th of December 2008 regarding the*

competence, the applicable law, the recognition and the acceptance of the decisions and the cooperation in the sphere of maintenance obligations [5].

The novelty element brought by the Regulation (EU) no. 1251/2012 is that the *exequatur* procedure was removed, this consisting in procedure that a creditor that held an executor title obtained in a member state had to follow in order to get the execution done in another member state [6]. According to the Article 36 of the Regulation, given the fact that the court decisions are mutually recognized by the states in the absence of a special procedure, in case that recognition is denied and the denial is incidentally invoked, the appealed court is competent to decide in the matter.

The Regulation also shows the requirements that a part must meet when invoking in a member state a decision made on territory of another member state of the EU. When in the decision there are measures unrecognized in the legislation of the solicited member state, this will have to be adapted, "if possible", into measures that have equivalent effects, measures that, of course, can be object for contestation by any of the parts (according to the Article 54 of the Regulation).

The Article 58 of the Regulation assimilates the *authentic documents and judicial transactions* to court decisions. It is necessary that the authentic documents be executory in the member state of origin and to respect on its territory the authenticity requirements. These are enforced in the other member states, without the necessity of a decision of acceptance of enforcement. A barrier for accepting the enforcement of the authentic act can be the breaking of the public order in the solicited member state. The same rules apply for the judicial transactions as well. As rule, the decision given in a member state can be invoked in front of another court/authority of another member state without any previous procedure [2]. As enforcement issue, the Regulation no. 1215/2012 includes however the interdiction of application for bail or judicial guarantees, when a party asks the member state for the enforcement of a decision made in another member state, on the ground of being a foreign citizen.

3 Aspects of Recognition and Enforcement of Court Decisions Included in the European Regulation no. 650/2012

In *the matter of succession, the Regulation (EU) no. 650/2012 of 4th of July 2012 regarding the competence, the applicable law, the recognition and enforcement of court decisions and the recognition and enforcement of authentic documents, and regarding the creation of an European Certificate of Inheritance* [7] has as general objective "the mutually recognition of the decisions given in member states in matters of succession, regardless of whether these were given in the frame of a contentious or uncontentious procedure". The Regulation includes more aspects of judicial nature that regard the causes of succession, such as the competence of the authorities that debate the successions and the applicable law, the recognition and enforcement of court decisions, of authentic documents

and judicial transactions in the matter, and also the issuing of a European Certificate of Inheritance. Since the Regulation is included in private law regulations of the European Union, its dispositions are not applicable in matters such as the administrative, the fiscal or the custom, which are part of the public law, therefore, for example, they don't refer to matters regarding the taxes related to successions [8].

In what regards the *notarial documents* issued by European notaries, in succession sphere, the Regulation 650/2012 stipulates, in Reason (22), these should move according to the dispositions of the Regulation, dividing however the notarial documents in judicial and non-judicial, according to the notaries' type of attributions. Hence, in the situations when the notaries exercise judicial attributions (such as, in Romania, the debating and resolving of the succession matters), we are in the field of laws in matter of *competence*, and the issued documents (equivalent to the decisions given in courts, for example certificates of inheritor/certificates of inheritor status/certificates of legatee), should be recognized and enforced according to the rules of *recognition and enforcement* of the court decisions. When the notaries don't exercise judicial attributions, The Regulation stipulates that these don't fall within the rules of competence and the authentic notarial documents they issue must move under disposition regarding authentic documents (such as, in succession matter, the succession acceptance or waiver declarations, or the wills, documents that can be made separately of the succession debate. So, the latter will have to meet the authenticity requirements of the state where they were issued and accepted in the state where they are shown by the parties.

It must also be taken into consideration the states which Romania has treaties of bilateral agreements in civil matters, because some of those include dispositions regarding the full recognition of some decisions given in the signing countries [9]. The Reason (60) of the Regulation stipulates also the fact that, since the ways of resolving successions are different in the member states, The Regulation should ensure "the recognition and enforcement, in all member states, of the authentic documents in matters of succession".

The Regulation refers to the "authentic character" of a document in the sense that this should refer to: the authenticity of the document, its form requirements, the competences of the issuing authorities, the carry out procedure, the de facto elements enlisted in the authentic document, the submission of the parties to the issuing authority at the indicated date and the mention that these have given the indicated declarations. If a party wishes to contest the character of authenticity of an authentic document, they can do it in front of the competent court in the origin member state of the document and under the law of that state. There are enumerated, as examples, the judicial documents registered in an authentic document, which can be: the agreement of the parties regarding the succession partition, a will, a pact on a future succession or another declaration of intent, while the judicial reports could be: the quality in succession of the inheritors/other beneficiaries, the establishment of the succession quotas, the existence of the reserves and others.

In Reason (60), it is brought to discussion the special situation in which two authentic incompatible documents would be presented to an authority. The solution proposed by the Regulation would be that the said authority should evaluate the possibility of granting priority to one of the documents, taking in consideration the circumstances of the particular case. If by doing so it would result that the priority is necessary, the issue should be solved *under the Regulation* by the *competent* judicial courts or, if the said issue was invoked through accessory way during the action, the settlement should be made by the *courts referred to*. If there is incompatibility between an authentic document and a decision, an important rule is established, the one that it should be taken into consideration *the reasons for unrecognizing the decisions* under the Regulation.

It should be said that the European Court of Justice adopted the procedure Regulation, in 2012, meant to offer practical instructions to the parties of the cases that are brought to its attention, with the purpose of better understanding the content of the dispositions and to have a more precise image of the progress of the procedures in front of the Court, especially related to the examination and translation of the procedural documents, in the context of the increment of the number of cases and their complexity [10].

With the purpose of fast resolving the succession with international elements inside the European space and so that the inheritors/ the legatees/ the testamentary executors/ the administrators of the succession from a member state, for example, where the succession goods are located, the Regulation no. 650/2012 stipulated the creation of a *European Certification of Inheritance*, but which not to replace the internal documents issued with similar purposes in the member states. The use of the certificate is not mandatory, in the sense that the parties that can solicit it have only the freedom, but not the obligation as well to do so, being able to use the other tools, too, available under the Regulation (decisions, authentic documents and judicial transactions). An important rule is that the certificate should be issued in the member state whose courts are competent under the Regulation. The internal legislation of each state must stipulate the competent authorities that can issue the certificate, those being the courts or other competent authorities (in the Romanian law, the competence is given to notaries, under the 2nd article of *the Law no. 206/2016 for the complementation of the G.E.O. no. 119/2006 regarding some measures necessary for the application of some communitarian regulations from the date of the accession of Romania to the European Union and for the modification and complementation of the Law of the public notaries and notarial activities no. 36/1995* [11].

The recognition of the decisions given in a member state happens in the other member states without the necessity of a special procedure, according to the Article 39 of the Regulation. If the recognition is invoked in front of a court of another member state through an accessory way, the latter has solving competence. Regarding *the executory force of the authentic documents*, the Regulation makes some clarifications. Under the Article 46, paragraph (3) letter (b) [12], at the solicitation of any interested party, the issuing authority of the authentic document releases *a certificate* using the form elaborated in conformity

with the consultation procedure stipulated at the Article 81, paragraph (2). The court notified with an appeal rejects or revokes the decision of the enforcement acceptance only when the enforcement of the authentic documentation is *manifestly contrary to the public order from the enforcing member state*. *The executory force of the judicial transactions* is stipulated on similar grounds. The judicial transactions in the origin member state are considered executory in another member state at the request of any of the parties.

4 The Enforcement and Recognition of Decisions in Contractual Matters

In contractual matters, the Regulation no. 593 of 17th of June 2008, regarding the law applicable to the contractual relations (Roma I) [13], is applied, according to the 28th article, to contacts signed starting the 17th of December 2009 – except for the Article 26, which is applied since the 17th of June. The Article 26 refers to the list of conventions: "(1) Until the 17th of December 2009, the member states inform the Commission in regard to the conventions mentioned at the Article 25, paragraph (1). After this date, the member states inform the Commission in regard to possible denunciations of the said conventions". By the Regulation, if there is no choice, *the law applicable to the contract* should be evaluated considering the rule stipulated for the specific type of contract. If the contract cannot be included in none of the defined types or it belongs to several defined types, the contact should be regulated by *the law of the country where the party obligated to perform the characteristic provisions of the contact has their regular residence.* In case of a contract that consists in a series of rights and obligations that fit in several categories of defined contracts, the characteristic provision within the contract should be determined *by its centre of gravity*. In case of contracts closed with parties considered to be in a disadvantageous contractual position, the latter should be protected by rules that regulate the conflict of laws, rules that have to be more advantageous to their interest than the general rules. Based on the principle of freedom of choice, the Regulation puts in place that the law chosen by the parties rules over the matter of contract, choice that has to be expressed or to result, *in a reasonable grade of certainty*, from the contractual clauses or from the circumstances of the cause. The applicable law can be chosen for a full or partial contract. It can also be changed by the parts at any moments, without however affecting the validity of the contract of the rights of third parties.

The public order is an aspect also stipulated by this Regulation, in the Article 21, in the sense that the application of a disposition from law of any country, determined under the regulation "cannot be removed unless such application is manifestly incompatible with the public order of the addressed court". For that matter, all the rights referring to individual liberties in the field of professional activities, economic or ownership matter must be considered as civil rights, even

though, for reasons of public interests, the states have a control over them through the requirement of licenses [14].

5 The Judicial Divorce Under the European Regulation no. 1259/2010

In *the matter of divorce, the Regulation (EU) no. 1259/2010 of the 20th of December 2010 of applying a consolidated cooperation form in the field of laws applicable to the divorce and body separation* [15], is applied, as the first Article states, to the divorce and body separation, in the situations where there is a conflict of laws. It is also stipulated that the dispositions of the Regulation must comply the ones of the Regulation (EC) no. 2201/2003 and, case accordingly, a court should consider itself addressed complying the Regulation (EC) no. 2201/2003.

According to the Civil Procedural Code, it should be mentioned that, in the matter of divorce, if the defendant doesn't have a home in the country and the Romanian courts have international competence, the court that has to solve the divorce is the one that is in the circumscription where the house of the complainant is [16].

The Regulation no. 1259/2010 does not apply to marriage cancelation, but only in the cases breaking or disrespecting the matrimonial bond. Given the differences between the national legislations, the provisions of the regulation do not force the courts of a participant member state, whose law doesn't have dispositions on divorce or that does not consider the said marriage valid with the purpose of the divorce procedures, to sentence a divorce as a consequence of the application of the regulation.

6 The Parental Responsibility – Rules Regarding the Enforcement of the Court Decisions

In *the matter of parental responsibility, the Regulation no. 2201/27th of November 2003 regarding the competence, the recognition and the enforcement of the court decisions in matrimonial matter and in the matter of parental responsibility, of abrogation of the Regulation (EC) no. 1347/2000* [17] stipulates all the court decisions in this matter, including the measures of child protection, independent of any tie to a matrimonially procedure. Regarding the competence of the courts, the Regulation stipulates that the courts of the member state where the child *usually resides*, with the exception of some situations of changing the residence of the child or as consequence of an agreement between the holders of the parental responsibility, should have the first competence.

The recognition and enforcement of the court decisions given in a member state should be based on the principle of mutually trust, and the reasons for the refuse of the recognition should be reduced to the strict minimum. The authentic documentations and the agreements between parts that are executory in a member state will be assimilated to the "court decisions". The Reason (23) of the

Regulation stipulates the estimation of the European Council of Tampere, that the court decisions given in litigations belonging to the family law should be "automatically recognized in the entire Union without intermediary procedure or denial reasons of enforcement". There are mentioned in this sense the decisions regarding the right to visit and those of child returning, that have been certified in the origin member state under the regulation.

It is desired the facilitation of the recognition also by the fact that the certification issued for the facilitation of the enforcement of the court decision should be not under the incidence of any remedy, and only to constitute, when needed, in the object of a rectification action in case of material error. An aspect of interest would be the one that the recent jurisprudence of the European Justice Court gave a special importance to the protection of the fundamental liberties, with the purpose of obstacle eradication on the path of the free movement of the persons [18].

Regarding *the recognition and enforcement of the court decisions*, the Regulations has similar dispositions to those of the Regulation no. 650/2012, but also special dispositions, like the decisions given in a member state in regard to the use of the parental responsibility, which are executory in that state and which have been notified or communicated, are to be enforced in another member state *after the enforcement at the petition of any of the parts has been approved*. The enforcement procedure is established by the law of the member state where the enforcement takes place.

7 Conclusions

The analysis of the aspects mentioned above sprung from the necessity of a new approach, where the prevalence of the Community and international rules over the national legislation should be taken into consideration, like also the international elements, through the verification of their existence, and once that is confirmed, of the applicability of the legislation together with the reference rules and, if necessary, the re-reference to the national law. We also consider of great importance the procedures that the beneficiaries of the decisions and the documents issued by the Romanian authorities must ask for, so that these are recognized in other countries (for example, the filling in of the forms that are annexes of the European regulations, the issuing of the European Certificate of Inheritance, the debate of a succession where the law applicable to the succession has been chosen through a will). After establishing these components and solving the causes, the next phases come in, of recognition and enforcement of the court decisions and the documents assimilated to them on the territory of other states than the ones where they were issued. The time applicability is also relevant, like when a court decision given before the elimination of the *exequatur* procedure will become the base of the redaction of a civil judicial document on the conventional way.

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[4] This Regulation replaced the Convention of Brussels of 1968 regarding the territories of the member states that fall under the Treaty for the Functioning of the European Union (TFUE), between the member states, except for Denmark, country that the Community signed an agreement in regard to the application of the Convention.

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Brexit – The Regulation of Free Movement in Upcoming Reports of the United Kingdom to the European Union, Model of the Swiss Confederation

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Abstract

In an international political, social and economic context in which everyone wants to move freely, to circulate unchecked and unhindered, to emigrate or work in a state other than the one in which he was born, the question arises as to how to achieve this in the future in reports to the United Kingdom, which on 29 March 2017 notified the Council of Europe of its intention to withdraw from the European Union. We believe that the example of the Swiss Confederation, a country characterized throughout its history by neutrality and non-membership, can be a model for the current and much controversial BREXIT. This can be a significant starting point in the negotiations for the future relations between the United Kingdom and the European Union, so that the citizens of the United Kingdom continue to enjoy from the benefits of free movement within the European Union.

Keywords: BREXIT, EU, free movement, migration.

1 Brexit Premises

Appeared as a necessity to resolve the economic problems of the European states after the crisis period determined by World War II and originally created to regulate different areas of common interest, such as resource exploitation and the environment, the European Union became an association of the 28 European countries that have aimed to cooperate both for development and economic

progress and for the creation of a European identity and the abolition of restrictions on the movement of persons, goods, services and capital. The 28 Member States of the European Union are still: Austria (1995), Belgium (1958), Bulgaria (2007), Cyprus (2004), Croatia (2013), Denmark (1973), Estonia (2004), Finland (1995), France (1958), Germany (1958), Greece (1981), Ireland (1973), Italy (1958), Latvia (2004), Lithuania (2004), Luxembourg (1958), Portugal (1986), United Kingdom (1973), Czech Republic (2004), Romania (2007), Slovakia (2004), Slovenia (2004), Spain (1986), Sweden (1995), Hungary (2004) and the candidate countries Albania, Macedonia, Montenegro, Serbia and Turkey.

The goal behind the formation of the European Union was to confer equal rights and reciprocal advantages to the citizens of the Member States and the main advantage of the citizens was the right to free movement. Thus, starting from the 1992 the Treaty of Maastricht, which brought together the European Community organizations, laid the foundations for the European Union, introduced the concept of the Single European Market, enshrined the free movement of persons, goods, capital and services and mentioned as an objective of the Union European "strengthening of the protection of the rights and interests of the citizens by establishing a citizenship of the European Union"[1] has now reached the legislative consecration of European citizenship in art. Article 20 of the Treaty on the Functioning of the European Union (formerly Article 17 TEC), which provides: "Union citizenship shall be established. Every citizen of the Union is a citizen of the Union. Citizenship of the Union does not replace national citizenship but is added to it".[2]

The United Kingdom became a member of the European Economic Community in 1973 and at a first referendum of 5 June 1975 decided with 67% to keep its membership in the EEC.

By the referendum on 23 June 2016, however, the UK citizens decided to cease the membership of the European Union, the effects of this vote being reflected on the freedom of movement of both UK citizens and citizens of other EU Member States, but also nationals of third-part countries which have concluded bilateral agreements with the European Union.

Unprecedented in the history of the European Union, on 29 March 2017 the United Kingdom officially notified the European Council of its intention to leave the European Union, triggering a series of negotiations to establish the future relations between them.

The prerequisites for this decision were primarily the discontent of the UK citizens about excessive immigration from both Union citizens and third-country nationals arriving as waves of refugees in 2015, the year before the referendum.

Thus, in a study on immigration in the United Kingdom, it appears that in the year before the third quarter of 2015 net immigration was 323,000 of which

[1] The Treaty of Maastricht, http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=LEGISSUM%3 Axy0026.
[2] Consolidated version of the Treaty on the functioning of the European Union http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT.

of the EU 172,000, only slightly lower than the 184,000-record immigration in the year before the 1st trimester of 2015 (Goodwin [1] pp. 20).

Relevant in this regard is also the speech by Minister David Cameron of 10.11.2015, prior to the Referendum, on immigration in the UK as a result of EU policy showing that more rigid control over immigration in the Union is necessary even if the right to free movement is a part of the Treaty:

"I appreciate that at a time when other European countries are facing huge pressure from migration from outside the EU, this may be hard for some other EU countries to understand. But in a way these pressures are an example of exactly the point the UK has been making in recent years. For us, it is not a question of race or background or ethnicity – Britain is one of the most open and cosmopolitan countries on the face of the earth. People from all over the world can find a community of their own right here in Britain. The issue is one of scale and speed, and the pressures on communities that brings, at a time when public finances are already under severe strain as a consequence of the financial crisis. This was a matter of enormous concern in our recent General Election campaign and it remains so today. Unlike some other member states, Britain's population is already expanding. Our population is set to reach over 70 million in the next decades and we are forecast to become the most populous country in the EU by 2050. At the same time, our net migration is running at over 300,000 a year. That is not sustainable. We have taken lots of steps to control immigration from outside the EU. But we need to be able to exert greater control on arrivals from inside the EU too. The principle of the free movement of labour is a basic treaty right and it is a key part of the single market." (Cameron [2])

But it was precisely how Prime Minister David Cameron failed to tell the British people, during the referendum campaign, the UK's advantages as a member of the European Union, and the negative consequences of withdrawing from the Union brought him a lot of political criticism in the literature as well – this would attract the legitimacy of organizing a new referendum on the United Kingdom's withdrawal from the EU (Welfens [3] pp. 6, 281).

2 Possible Solutions after Brexit

Analyzing chronologically the history of the formation of the Union, it is easy to conclude that the main objective was the idea of economic cooperation, economic support, and that at the basis of any relations there must be some principles, the values of these collaborations, peace, well-being, freedom, security, justice and the area of application of these values was established as a common area without internal borders and within which the free movement of persons is ensured, developing in time towards the idea of the Union.

Here is the determinant role of the free movement of people in what is the European Union today, a right which has been said to be "a reality within the European Union" (Popescu, Voiculescu [4] p. 211).

But the withdrawal from the Union of the United Kingdom of Great Britain and Northern Ireland (Brexit) demonstrates that the Union formula and the free

movement currently reached is not necessarily what is desired by all the Member States of the Union and, as expected, it has given the opportunity to many contradictory opinions, criticism and speculation about the future of the European Union.

On the one hand, we hear more and more opinions of the doctrinal and pessimistic politicians who believe that the European Union's era has passed, now the division being expected. It is appreciated that at the level of the European Union there is a "European society" still missing as the first condition for a sustainable democracy and only with its construction can the future of the Union be saved (Kühnhardt [4]). In the same note of pessimism in the presentation of possible scenarios of what is to follow after Brexit, Brexit appeared to be the starting point of a spiral of the disintegration of the European Union, and it is expected that over the next two decades, just like the United Kingdom also other states should turn their backs to the Union (Welfens [3] pp. 292).

On the other hand, most authors who address the theme of Brexit and the future of the Union seem optimistic in solving and finding a functional formula of relations between the United Kingdom and the European Union after Brexit, with even more possible solutions being proposed.

A first solution is to analyze how to organize the referendum and inform the electorate about the UK's withdrawal from the EU and refers to the organization of a new referendum, legitimated by the fact that the electorate was not properly informed about the benefits of remaining an EU which are primarily of economic nature, nor about the long-term adverse effects of the retreat from the EU. It can be hoped that in the knowledge of all aspects of the Union's participation, the British people will vote for membership (Welfens [3] pp. 281).

It is estimated that all the negative consequences that began immediately after Brexit will be taken into account by the electorate in a second vote. Since just a few months after Brexit, the first economic and financial effects have already been felt and many financial analysts have begun to present with figures and graphically the disadvantageous financial effects of withdrawing from the Union (Kern [6]). Thus, the pound sank to the lowest level in relation to the dollar after 1985, the investments stagnated and the banks and concerns began to move their headquarters to other European countries – Frankfurt, Dublin and Paris (Blockmans [7] p. 5). These include the negative effects of the loss of international relations of the Union, the loss of trade agreements, sectoral agreements and the need to renegotiate the position in relation to the European Free Trade Association (Blockmans [7] pp. 5-6).

Another solution emerges from the current analysis and criticism of the European Union that it is currently believed to be in a state of instability and that it is also held responsible for the disappointing outcome of the UK referendum. Thus, it is appreciated that the European Union was a good historical response to the economic policy of 1957, but in relation to economic development, it has not become enough strong and attractive, being a mix of governmental agreements between Member States and policy elements the European Commission, the Court of Justice of the European Union and the European Parliament. The solution

proposed is a reform at the level of the European Union, the creation of a European Neo-Union to respond to these criticisms, to show more flexibility in relation to the Member States – including the issue of free movement (a.n.) – and to solve these problems before it comes to disintegration (Welfens [3] p. 9).

The most agreed solution, however, results from the analysis of the premises that led to Brexit, and it is concluded by some authors that it is the time of negotiations with the EU, negotiations based on the provisions of Art. 50 of the Treaty on the Functioning of the European Union. Can be an international agreement concluded by the EU only, or by the EU and its Member States together, or by Member States themselves (Wessel [8] p. 3). The outcome of the negotiations is to materialize in an agreement that should be completed by October 2018, before the European Parliament elections of June 2019, taking into account the four basic principles laid down by the Union: *"(1) preserving unity and the interests of the 27 EU Member States; (2) a non-member State cannot enjoy the same advantages as Member States; (3) no negotiation will take place before the notification; (4) the four fundamental freedoms are indivisible"* (Armstrong [9] p. 257).

In the same spirit of the negotiations, other authors appreciate that from the position of the United Kingdom, four other principles should be at the basis of the negotiations: (1) you get what you give, the gain being greater when the parties are disposed to concessions and political control; (2) when negotiations start on certain issues and take as reference point the most disadvantageous situation if negotiations would fail; (3) must be negotiated from a power position, greater power leads to better results – here the author acknowledges that the UK starts negotiating from a weaker position than the EU and recommends a transitional arrangement for the period between leaving the EU and the conclusion of a long-term agreement; (4) invests in negotiation capacity, better informed negotiators and get better results – here the author shows that the UK currently has very little negotiating ability and recommends investing in negotiating lawyers, diplomatic and business intelligence and economists. It is concluded that the British Government should obtain an agreement before the retirement comes into practice when it will be in a weaker position, and by applying these four principles is likely to obtain the best win from an unsatisfactory win (Sampson [10]).

We share the view that establishing the basis for future negotiations between the UK and the European Union is now the most realistic solution. Nor do we fight the idea of the advantages of a second referendum by the United Kingdom, but consider it less feasible in relation to the current political situation. Regarding the criticisms made to the European Union, we also appreciate that the Union formula and the free movement that have been achieved today cannot be the one unanimously desired by all the Member States of the Union, because each state has an own mentality, formed over time based on the national tradition and the historical events that he has undergone or which he has been subjected to and who have formed his personality. Just as in the individual also states have different personalities, some are more expansive, some more withdrawn, some stronger and others weaker. And the idealistic universal universe cannot find materialization at

all levels, in all fields and for all of them. But as history and present demonstrate it, when there are principles and laws, there is the premise of the solution, and the solution can only be the regulation of the new situation.

Also from the comparative analysis of the four principles formulated by the European Union with those proposed by the United Kingdom, we conclude that both parties agree that negotiations will be held, but that both parties are aware that the United Kingdom positioned as a third country will no longer be able to take advantage of the advantages of the relations with the Union in the same measure as it has so far, of which only members of the Union can take advantage.

The solution proposed by us already at the beginning of the paper is the Swiss model, namely the Bilateral Agreements whereby the Swiss State as a third country can participate in the projects and programs of the European Union (Lazowski [11] p. 859). However, it should be noted that the Bilateral Agreements between the Swiss Confederation on the one hand and the European Union and the Member States on the other hand also focus on the Agreement on the Free Movement of Persons, which Switzerland currently wishes to restrict.

3 The Model Offered by the Agreement of the Swiss Confederation With the European Union

The Swiss Confederation remained neutral both during the Second World War and in terms of joining the treaties on which the founding of the European Union was based.

On 4 January 1960, Switzerland joined the United Kingdom of Great Britain and Northern Ireland, Denmark, Norway, Sweden, Austria and Portugal at the European Free Trade Association (EFTA) set up in Stockholm for the elimination of customs duties between Member States. Later also Finland (1966), Iceland (1970s) and Liechtenstein (1991) joined the European Free Trade Association (EFTA). At present, only Iceland, Liechtenstein, Norway and Switzerland are part of EFTA, and the rest of the countries withdrawn to join the European Union.

On 2 May 1992, the EFTA countries and the Member States of the European Union signed an agreement establishing the European Economic Area (EEA) which provides for the establishment of a single market subject to common rules and which enshrines the free movement of persons, goods, services and capital within the European Economic Area. Unlike the other EFTA Member States, Switzerland voted by referendum against participation in the European Economic Area and chose to establish relations with the European Union by concluding bilateral agreements.

Adept of the continuation of the neutrality policy, through a new referendum in 2001, the Swiss people voted against the start of accession negotiations with the European Union.

Since December 12, 2008, Switzerland has joined the Schengen free movement area, which has removed border control between Member States.

With all the isolationist tendencies, the Swiss State has become aware of the need and importance of maintaining relations of cooperation with the European states, most of them nowadays in the European Union, but wanted the implementation of the norms of the European law in the national law to be done through the conclusion of bilateral agreements, thus adapting the European norms to the specific realities of Switzerland.

Analyzing the political history of Switzerland, we can say that this type of European foreign policy based on bilateral agreements seeks primarily to ensure that the rules contained in bilateral agreements are consistent with internal rules and less that European rules are implemented in national legislation. We can bring as argument, the Schubert's judgment of the Swiss Federal Court of 2 March 1973. In this case the Swiss Federal Court was called upon to rule on the right of the Austrian citizen, Ernst Schubert, to whom the Swiss authorities of Ticino did not authorize to buy land by invoking a federal decree of 1970 that such a purchase was subject to a license. Schubert, in turn, invoked an 1875 agreement between Switzerland and the Austro-Hungarian Monarchy, which provided for equal treatment for nationals of the Contracting States. In the analysis of the case, the Swiss Federal Court established the following principle: "When a federal law is contradicted by an older international treaty and the legislator has expressly accepted the contradiction between the State Treatise and the national regulation, the Federal Court must apply the Federal Law". This case law made the Austrian citizen unable to acquire immovable property and annulled the 1875 state treaty between Switzerland and Austria without the agreement of the other contracting party – Austria.[3]

Thus, at the level of the domestic legislation of Switzerland, a non-EU member state, one-third of the votes were for the amendment of the rules of public international law, an expression of both Swiss democracy (Thürer [12]) and the desire to align with European norms which regulate areas of interest.

And since in Switzerland, a federal state, together with the national legislative body, legal norms are also issued by the cantonal legislative bodies, the Constitution of Switzerland comes to establish in art. 5 that "the federation and cantons will consider the rules of public international law".[4]

Relations between the Swiss Confederation on the one hand and the European Union and the Member States on the other hand have been governed by bilateral agreements. Relevant in terms of the free movement of persons are the seven agreements concluded under the title Bilateral I on 21.06.1999 and which came into force on 01.06.2002 referring to the free movement of persons, air transport, land transport, public procurement, trade in agricultural products, the

[3] Decision Schubert of the Swiss Federal Court of 2 march 1973, http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F99-IB-39%3Ade&lang=de&type=show_document.

[4] Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999, Stand am 12 Februar 2017.

removal of technical barriers to trade and cooperation in the field of research.[5] By a guillotine clause, the Swiss Confederation and the European Union set out that the seven agreements concluded under the title Bilateral I apply only together and the abolition of one cancels the other six. For the countries of the European Union that have joined later, Enlargement Protocols have been concluded every time, which entered into force only after the Swiss people have expressed themselves by referendum in favor of extending the provisions of the Bilateral Treaties and the new Member States of the European Union.[6]

The free movement agreement between the Swiss Confederation on the one hand and the European Union and the Member States on the other hand is considered to be the most important of these seven agreements but is, just like in the United Kingdom, one of the most controversial political themes in relations with the European Union. Under this agreement, Swiss citizens can live and work in the Member States of the European Union without any limitations and Union citizens can live and work in Switzerland under the same conditions as Swiss citizens.[7]

For the gradual access to the labor market and the avoidance of dumping prices on the internal labor market, a provision was made for each category of country, respectively EU 17, EU 8, EU 2 and Croatia, for transitional periods during which restrictions on access to the internal labor market were regulated. These limitations refer to the national priority of host state nationals in employment, the establishment of contingents for foreign workers, and the control of wages and employment conditions at the employment of foreign nationals.[8] Though often interpreted as discriminatory, these transitional arrangements have been designed to ensure a gradual and controlled opening of the labor market. After the transition period, the citizens of each category enjoyed the right to freedom of movement. The agreement also includes a safeguard clause providing for the possibility of reintroducing the contingents for a further two years in case of excessive emigration, after which the free movement will be complete and unrestricted by any limitations.

Just like the Union Directives on free movement, also the Agreement with Switzerland includes provisions on family members. The residence rights of people who do not work, for persons who have material facilities for maintenance or who wish to study or to undergo medical treatment in Switzerland have also

[5] The first Bilateral concerned the citizens of the European Union member states at the time respectively Germany, France, Italy, Austria, Spain, Portugal, Belgium, Holland, Luxembourg, Denmark, Sweden, Finland, United Kingdom, Ireland, Greece, plus the future member states Cyprus and Malta.

[6] EU 8/2004: Estonia, Latvia, Lithuania, Czech Republic, Slovakia, Slovenia, Hungary, Poland; EU 2/2007: Romania and Bulgaria; 2013 Croatia.

[7] Agreement between the Swiss Confederation, of the one part, and the European Community and its Member States, of the other, on the free movement of persons/21 June 1999, (Abkommen zwischen der Schweizerischen Eidgenossenschaft einerseits und der Europäischen Gemeinschaft und ihren Mitgliedstaaten andererseits über die Freizügigkeit/21 Juni 1999), https://www.admin.ch/opc/de/classified-compilation/19994648/index.html.

[8] *Idem*.

been provided. Other important regulations are those for companies wishing to send their workers for periods determined to work in another contracting state or to call for specialists from another contracting state.

The Free Movement Agreement regulated also the mutual recognition of diplomas, professional qualifications and professions, but also the coordination of social security systems so that employees do not lose their social rights acquired from work in another country, taking into account the periods of time worked on the territory of other states.

In the regulation of the free movement of persons, the Agreement between Switzerland and the European Union takes over the right to free movement provided for by European law and applies it to citizens of the Member States of the European Union and extends it to Swiss citizens, on conditions which have been agreed and adapted to the realities of the state Swiss, non-Member State of the European Union.

As expected, the Agreement on Free Movement of Persons also sparked controversial views in Switzerland, at the same time criticizing and appreciating. The entry into force of the Enlargement Protocols of the Agreement to the new Member States of the European Union has been subject to a referendum every time, which has led to controversy and to the presentation of pro and contra opinions in the assessment of the situation subject to the national vote.

One of the main concerns is that EU workers will call for and benefit from social services and assistance, but it has been established that this can be regulated and controlled through a "unitary administration" and an exchange of data and information across all institutions involved, taking into account the provisions on the protection of personal data (Zünd [13] p. 210). It has also been established that between European law and the bilateral law established by the Agreement there is an essential difference granted by citizenship of the Union that the Agreement does not grant. Therefore, a differentiated treatment of EU workers looking for a job in Switzerland by not granting social benefits has no discriminatory aspect (Tobler [14] p. 70).

Another widely analyzed retention relates to the fact that EU workers will accept to work with lower wages than those on the labor market in Switzerland, which will implicitly lead to an increase in unemployment amongst domestic workers. In this regard, it has been appreciated that, for example, an economic crisis with implications for rising unemployment in southern European countries will necessarily lead to an increase in emigration and a fall in wages in the northern countries. As a solution to this situation, we see first the European economic policy and only then the national emigration policy (Zünd [13] p. 212).

We agree that when it comes to legal regulation of the free movement of persons under the Agreement between Switzerland and the European Union, it has almost been impossible to cover all the practical aspects that have arisen in the implementation and enforcement of these regulations. But at the same time, we think that the ideal formula can only be reached on the one hand on the path of continuous negotiations and on the other by establishing national regulations that do not contradict the priority of the international regulations.

4 Conclusions

Analyzing comparatively the current political relations of the European Union with the United Kingdom and the Swiss Confederation, on the other hand, we cannot fail to observe the resemblance between these two states both in terms of the conservative nationalist spirit and the current political context in relations with the European Union.

Thus, through the Referendum of February 9, 2014, the Swiss people decided with a 50.3% change of Art. 121 of the Swiss Constitution – Bundesverfassung der Schweizerischen Eidgenossenschaft of 18.04.1999 on the control of immigration, establishing that the number of residence permits will be limited, and will limit residence rights, family reunification and social services for foreigners, that priority will be given to that national employment and no international agreements that conflict with these provisions will be concluded.[9]

According to the Swiss Constitution, Parliament has at its disposal a maximum of 5 years for the legislative implementation of the result of this referendum. The Swiss Government would like in the negotiations with the European Commission for amending the bilateral agreement on the free movement of persons concluded in 1992, to obtain the European Union's agreement on the setting of quotas and the principle of national priority, which were only foreseen for the transitional periods. EU however is not willing to grant this compromise.

The failure of the negotiations between the Swiss Confederation and the European Union could lead to the collapse of the Free Movement Agreement and, together with it, the six other agreements signed under the title Bilateral I on 21.06.1999 and which relate to air transport, land, public procurement, trade in agricultural products, the removal of technical barriers to trade and cooperation in the field of research.[10] The guillotine clause stating that these agreements will all apply together and the fall of an agreement brings to abolish the other agreements makes the modification of any of them a very sensitive issue with decisive implications for other agreements.

Similarly, in the United Kingdom referendum on June 23, 2016, voted by 51.89%, the British people decided to leave the United Kingdom of the European Union – Brexit.

According to art. 50 paragraph 2 of the European Union – Lisbon Treaty, the withdrawal procedure takes place by communicating the intention of the British Government to withdraw from the European Council and the notification was already made in March 2017. Based on the provisions of paragraph (3) of the same Article, the Treaties shall cease to apply on the date of entry into force of

[9] Bundesverfassung der Schweizerischen Eidgenossenschaft/18. April 1999, art. 121, https://www.admin.ch/opc/de/classified-compilation/19995395/index.html#a8.

[10] Fact Sheets on the European Union, The European Economic Area (EEA), Switzerland and the North, http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=F-TU_5.5.3.htm.

the Reconciliation Agreement or in the absence of the Agreement two years after the notification, unless the term is extended.[11]

The United Kingdom had already announced in July 2017 through a spokesman of the Prime Minister Theresa May that the freedom of movement of citizens between the UK and the European Union would only be maintained until March 2019 on the assumption that negotiations with the EU free movement will be completed (Press [15]).

In December 2017, the European Council together with the European Commission established that enough progress has been made in the negotiations on the UK's withdrawal from the European Union, in order to establish the legal framework for future relations (O'Neil [16] chap. 3).

As a result of these negotiations, on 28.02.2018, the first draft of the UK and EURATOM Withdrawal Agreement was made public by the European Commission. The draft agreement includes the legal transposition of the negotiations and is structured in six parts concerning common provisions, citizens' rights, separation and transition provisions and financial and institutional provisions.[12]

In a recent communique from the British Secretary of State for Exiting the European Union David Davis on 19 March 2018 and the European Union negotiator Michel Barnier, an agreement was reached on a 21-month transition period following the withdrawal of the United Kingdom from the European Union March 2019, a transition period that will last until the end of 2020. Until March 2019, the UK will continue to comply with all Union rules, pay its financial

[11] Consolidated versions of the Treaty on European Union, Article 50:
(1) Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
(2) A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
(3) The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
(4) For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
(5) If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Art. 49.
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT.

[12] European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, https://ec.europa.eu/commission/publications/draft-withdrawal-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community_en.

contributions to Brussels, remain part of the customs union, and retain access to the internal market (Press [17]).This allows us to say that no extension is intended of the two-year term provided by art. 50 par. 3 of the Treaty of the European Union, as the deadline for terminating the application of the Treaty to the United Kingdom.

Analyzing the regulations contained in Part 2 of the Agreement on the United Kingdom's Withdrawal from the Union on citizens' rights, it is noted that in regard to the free movement of persons, the citizens of the Union and of the United Kingdom and their family members will continue to benefit from rights acquired until the application of the provisions of the Union Treaty has ceased. At the same time, there are stated as principles in art. 11 "prohibition of discrimination" and in art. 21 "equal treatment" for the nationals of the contracting parties.

As well as the Agreement concluded by the European Union with the Swiss Confederation, also the Agreement on the Withdrawal of the United Kingdom from the Union contains regulations on reciprocal rights to enter and leave the country, to pursue gainful activities as an employee or as a private entrepreneur, gainful activities border areas as well as the right to acquire domicile and to acquire permanent residence after a 5-year residence period. To these rules there are, like in the agreement with Switzerland, also the provisions on the recognition of professional qualifications and the coordination of social security systems.[13]

Criticizing further the pessimistic views that there will be no signing of an agreement between the European Union and the United Kingdom, and in favor of finalizing and signing this agreement, we believe that the Swiss model given by the sectoral agreements, of which an important role is the one on the free movement of persons, can also be a good example because in relation to the European Union also the Swiss state is right now in a process of renegotiation of free movement following the referendum against excessive emigration.

Starting from the analysis of statistical data according to which the Swiss Confederation holds the highest percentage of foreigners among the Central European countries, respectively 24% with a migration rate of 0.76% compared to the United Kingdom with a percentage of foreigners of 7.7% and a migration rate of 0.7% – at the level of 2014 – it is no accident that the solution regarding the realization of the free movement in relation to the European Union is applicable to both states (Man [18] p. 69).

The difference lies in the fact that the United Kingdom negotiations will take place from another position within the Union, unlike the Swiss Confederation that was and remains a third country, but will have the same main theme of negotiation – the free movement of persons (Man [18] p. 70).

However, for Switzerland, there is no more time for negotiation because, on the one hand, after the referendum, domestic legislation had to be adapted until

[13] European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Part two, Art. 10-31, https://ec.europa.eu/commission/publications/draft-withdrawal-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community_en.

February 2019 and, on the other hand, the provisions of the new constitution modified by the 2014 referendum contradict the rules of the Free Movement Agreement with the European Union within the Bilateral I.

We believe that by voting against mass immigration, the Swiss people simply wanted to show that Switzerland's internal policy is a protectionist policy and that, as it promotes and protects its national products, it also wants to protect its internal labor market and its own citizens. Both politicians and the Swiss people are aware that the effects of this vote could mean denouncing other bilateral agreements with the EU and losing the economic benefits of these agreements. At the same time, however, Switzerland relies on the fact that the EU's continuation of the Agreement on the Free Movement of Persons, even with the acceptance of certain protectionist clauses, is more advantageous than its denunciation. For the Swiss Confederation it is very important for economic reasons related to the implementation of the other Bilateral Agreements I to continue to apply the Free Movement Agreement but wishes to renegotiate it in order to introduce clauses that protect the internal labor market, workers in the internal market and limiting the number of workers in the EU by setting contingents.

Taking into account the particularities presented by the United Kingdom as a Member State withdrawing from the European Union, we believe that the solution to future relations between them can be the model of the Bilateral conventions established by the Swiss Confederation in relations with the European Union, both in general as regards all the relationship between them, but also particularly in relation to the much controversial Agreement on the Free Movement of Persons.

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Human Dignity – A Right or a Principle of Human Rights?

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Abstract

Human dignity was unequivocally the underlying principle of the most important documents adopted internationally in the field of human rights after World War II. Nevertheless, a series of confusions have arisen with regard to the concept of *human dignity* and the definition which should be given to this concept especially that, at national level, constitutions of states qualify human dignity as being a right or a principle. This article is intended to offer a short description regarding the evolution of the content of the human dignity concept and the important points in time which marked its evolution, especially in the light of international and regional legal instruments adopted in the field of human rights, and to present several aspects referring to the valences of the human dignity concept and how it is perceived and understood today and the important role it plays in granting and protecting the rights that are inherent to the human being.

Keywords: human dignity, principle, evolution of the concept, human rights, international regulations.

1 Evolution of the Human Dignity Concept

1.1. Human dignity is a natural fact, a fundamental principle of social existence characterising humanity in the course of its evolution and development. The complex nature of the human dignity concept and the predisposition of this concept to change in the context of the evolution of society as a whole, a society which has been in a continuous change or transience, as the American sociologist and futurologist Alvin Toffler described and qualified it in his book "Future Shock" [1], have created the social and historical conditions for the term *dignity* to acquire new social and legal meanings and occupy a central place in many legal instruments adopted both at international level and at regional and national level in the fundamental laws of states.

The concept of dignity is the foundation of a significant number of international and regional declarations and conventions, and also one of the fundamental principles or rights of national constitutions. At international level, we can see the ongoing concern of the United Nations (UN) [2] for placing the concept of human dignity among the principles governing the human rights and conferring to it an important role within the legal instruments adopted by the organisation. In the documents adopted at regional level, in geographical areas like Europe, America or Africa, human dignity is presented as an inherent principle of the human being.

At the same time, most law systems in the world have picked up human dignity as a fundamental value within the regulations they adopted. Both in common-law and the Roman-Germanic system, and in the law systems of the Far East, India or Africa, or in the religious law systems (Christian, Islamic, etc.), the role of human dignity is remarkable in protecting the status of the human being and its inherent rights.

1.2. The evolution of the content of the human dignity concept helps us understand the multiple meanings assigned to this concept by great philosophers, politicians or authors from all ages, and the meaning dignity has today in the multiple legal instruments where it is mentioned.

The origins of the concept of dignity date back to the Antiquity and the concept/dignity has been written down in the pages of history for more than 2500 years, with multiple meanings attributed to it by different sages in their adages, phrases, aphorisms or expressions. For both the Romans, and the Greek, it was a social value which required respect between people and for certain people. [3]

The notion of dignity comes from the Latin word *dignitas* [4], which in the Roman period was considered an attribute of the human being, which was specific to the function they occupied in society. We should point out that the Latin *dignitas* has not an express translation in Romanian or English, but it means "merit", "honour" or "respect". The term *dignitas* is also mentioned in the writings of the great philosopher Marcus Tullius Cicero and refers to the status of an individual within their community. [5] According to Cicero's thinking, the way people act is based on the dignity of each individual, as every man is equipped with reason and superiority to differ from and rise above the animals, and due to reason, people are like God. [6]

A range of thinkers showed concern for dignity in their writings. So, there is the concern of the Italian philosopher of the Renaissance Giovanni Pico della Mirandola, who in his work "*Oratio de Dignitate Hominis"* (*About Man's Dignity)* [7] said that dignity was based on the ability of every single individual to choose what they wanted to become. To the socialist thinker Karl Marx *"dignity is what raises man most, what confers supreme nobility to his activity and to all his aspirations"*. In the French literature, Gustave Flaubert said that *"a writer's main dignity is that he knows what he should not write".* The German poet Goethe compared, in *Ifigenia in Taurida*, human dignity to the greatness of gods –

"*human dignity is in no way lower than the greatness of gods".* The German poet and playwright Friedrich Schiller affirmed that "*dignity expresses the resistance of spirit to instinct".*

Nevertheless, we can say beyond any doubt that the philosophy of Emanuel Kant was the one that influenced the contemporary conception of dignity, which served as a basis for the link between dignity and the human being. In his work, "*Groundwork of the Metaphysics of Morals",* published initially in 1785, the philosopher of German origins said that "*every man should be respected as a purpose in himself, and to use him as a means to achieve any goals that are external to him is a crime against his dignity which pertains to him in his capacity of human being*". Therefore, in Kant's view, dignity presents itself as a value which is absolutely inherent to the human being [8], and this view is accepted even today.

However, dignity has not always been considered an essential attribute of the human being. Hence, the 1689 *Bill of Rights* of England referred to the Crown and "royal dignity" [9], and the 1938 Romanian Constitution mentioned the dignity of the Homeland.

1.3. Despite this, the notion itself of "dignity" [10], such as perceived and accepted today in various disciplines of science and generally, in society, was first used in the legal international texts that were adopted after World War II. The atrocities of the war, which attempted directly on the life and integrity of the human being, especially the Holocaust of the Jewish people, determined changes in the collective legal conscience and required governments to include new valences of the concept of dignity in the regulatory work.

In this context, we note the first international legal instruments that established, in their content, the notion of "dignity" and laid therefore the historical bases of the new legal meaning of the term "human dignity".

We thereby refer to the Charter of the United Nations (1945) and the Universal Declaration of Human Rights (1948). Although we can say there was a legal concept of human dignity as early as 1789, at the time of the French Revolution, the Charter of the United Nations and the Universal Declaration of Human Rights are the starting point for understanding the legal concept of human dignity that we use today.

More precisely, immediately after the end of World War II, in 1945, the Preamble of the Charter of the United Nations [11] referred to a reaffirmation of the faith "in the dignity and worth of the human person". Three years later, on 10 December 1948, with the adoption of the Universal Declaration of Human Rights [12], its Preamble stated that the "*recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".* The Declaration goes further and states in the content of Article 1 that *"All human beings are born free and equal in dignity and rights*".

Even if the Declaration is not legally binding, unlike the Charter, the principles and the rights it establishes have been taken over in the international

instruments adopted subsequently by the UN. At the same time, we can say, without doubt, that both the Charter of the United Nations and the Universal Declaration of Human Rights were a source of inspiration for a series of international or regional documents in respect of the meaning of the term human dignity used in the context of human rights [13], and, certainly, they will be a source of inspiration to future documents.

Both the UN Charter and the Declaration had a powerful international echo and activated a new vision and a constant concern among the competent authorities for stipulating human dignity in the numerous international and regional legal instruments, and also in national constitutions. In this respect, we mention the activity of the United Nations, that ever since their establishment in 1945, have shown an interest and commitment to the protection of and respect for the human rights and to ensuring peace in the world by including the term of dignity in the conventions or covenants adopted by its General Assembly. [14]

1.4. Besides the conventions adopted by the United Nations General Assembly, the specialised agencies of the organisation, like the World Health Organisation (WHO), the United Nations Education, Science and Culture Organisation (UNESCO), or the International Labour Organisation (ILO), have adopted conventions dealing with some particular issues in areas such as humanitarian law, medical law or bioethics, where human dignity plays a central role as a fundamental principle demanding full respect. In this regard, Article 3 of the Universal Declaration on Bioethics and Human Rights (UNESCO 2005) places *human dignity on equal terms with human rights and fundamental freedoms*, its content providing that human dignity, human rights and fundamental freedoms are to be fully respected. Moreover, human dignity has been incorporated and plays a central role also in regional documents, like those adopted by the Council of Europe, such as the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Oviedo 1997), or those adopted by the European Union, such as the Charter of Fundamental Rights of the European Union, where human dignity is mentioned in the first article.

The concept was easily and quickly taken over in the national constitutions adopted in the period following World War II [15], and dignity, just as it was analysed in the relevant literature [16], was absorbed in some constitutions like a *fundamental right* from which no derogation is possible, in other words a constitutional right among other rights or like a constitutional value.

2 Is Human Dignity a Principle or a Right?

2.1. It is unquestionable that human dignity has been a constant concern for philosophers, jurists, authors generally, so, in the light of the aforesaid, a series of questions have inevitably arisen in connection with the concept of human dignity and its importance in relation to human rights. Therefore, a question comes up

whether dignity is a fundamental right alongside other rights or a fundamental value underlying them? Can human dignity be both a principle underlying the inherent rights of the human being and at the same time a fundamental right?

In the course of time, and especially in the period following World War II, many doctrine makers tried to give a definition to human dignity. Therefore, dignity was assimilated to a *useless concept* which represented nothing more than the respect for the principle of a person's autonomy [17], an *unsubstantial concept* [18] which might have multiple meanings [19] or an *ethical concept* with no regulatory force in international law [20]. On the other hand, human dignity was said to have a *great symbolic power* and to be a potentially useful concept [21] and that it was a *fundamental value underlying human rights* [22], being at the heart of the most important international instruments regarding human rights [23]. Some authors perceive dignity as a right of the human being [24] or the right to have rights [25], while other doctrine makers say that there cannot be a right to dignity, because this notion would be incompatible with the fact that human dignity is the very fundamental principle underlying the protection of human rights [26]. Moreover, it has been said that human dignity, besides being a fundamental right, is the actual basis of fundamental rights [27], a source of all rights [28] or the foundation of all laws, rights and freedoms which affects the sphere of human existence [29].

2.2. Even if dignity enjoys broad legal recognition in the context of contemporary society and there is international consensus among states (informal consensus we could say) about the importance of this concept, there are however different and sometimes divergent opinions with regard to its *meaning and use, especially within the human rights sphere*. So, we find assertions in the literature that human dignity is perceived as *a principle, a norm* or *a right*. [30] Another opinion says that human dignity is first a "mere declaration", secondly it is a "norm of objective law" and not last a "subjective right [31], a fundamental one" [32]. In the realm of constitutional law, some authors [33] say that human dignity, such as perceived today, requires to be looked at in three perspectives, namely: dignity as a *social value,* as a *constitutional value* or as a *constitutional right*.

Dignity perceived as a *social value* refers to the place it occupies among the values of society at a particular point of its development; it can be represented in the prose and poetry of that time, in philosophical or religious texts and, of course, in legal texts. Dignity seen as a *constitutional value*, i.e. a constitutional principle, acquired this valence especially after the end of World War II, with the adoption of the UN Charter and the Universal Declaration of Human Rights and the consecration of human dignity in these two international documents of great importance as a fundamental value. Subsequently, human dignity was mentioned as a constitutional value in the fundamental laws of countries around the world. For example, the Constitution of Romania [34] establishes, in Article 1 para. (3), "human dignity" as a supreme value that must be granted. The Constitutional Court of Romania stated in a series of decisions [35] that human

dignity accounted for an "intrinsic value of the human being" being a veritable general principle of the rule of law. This high court that reviews the constitutionality of laws has surely not defined the concept of human dignity in the decisions it pronounced, but it provided clarifications of this concept as a general principle of the state, and not as a distinct right. Human dignity has the same clarification of fundamental principle also in the Constitution of Spain. [36] Despite that human dignity appears like a constitutional value, it also presents itself as a constitutional right in some constitutions like those of Germany [37], Israel [38], Switzerland [39] or South Africa [40]. The consecration of human dignity as a *constitutional right* has been criticized in the literature [41], the affirmation being that the notion of "right to dignity" cannot be in accordance with the appeal to human dignity as a fundamental principle justifying the legal protection that needs to be granted to human rights, an opinion to which we adhere.

2.3. Now, considering the morality of the regulatory use of the human dignity concept, in the specific doctrine, R. Brownsword [42] says that there are two ethical approaches to the current concept of dignity in the international human rights jurisprudence, *a liberal approach* and *a conservatory approach*; the first approach qualifies human dignity as a foundation of human rights, and the second one refers to the fact that one of the fundamental obligations of an individual is not to prejudice human dignity. In other words, according to the liberal approach, any person is free to act and to make their own choices with regard to their actions, provided that they do not prejudice the rights and freedoms of other people, dignity being therefore ensured and respected by every single individual, while according to the conservatory approach, human dignity needs to be seen as a central value establishing certain limitations to the fundamental freedoms of the individuals of a society. [43] A useful example in this regard is the liberal approach to medically assisted suicide. So, as long as the decision of a person to put an end to the natural course of his or her life does not infringe on the rights and freedoms of any other person, then, according to the liberal approach, this is possible, but in the conservatory view this contravenes the dignity of the human being and implicitly affects society as a whole. [44]

2.4. We consider that human dignity is a fundamental principle which defines the content of human rights and underlies their provision both in international legal instruments, and in national legislations, and implicitly guarantees their protection. Even if the legislation of some countries qualifies human dignity as a fundamental right, we say that its quality of being a foundation is found in the content of other fundamental rights, such as the right to life, the right to physical and mental integrity, the right to privacy, etc. The content of these rights that are inherent to the human being cannot be analysed and applied beyond the consideration of human dignity as a supreme value.

The value of principle is unquestioned in the texts adopted at international level in the field of human rights. In the Universal Declaration of Human Rights,

the five mentions referring to human dignity, two in the Preamble and the remaining in Article 1, Article 22 and Article 23, consecrate human dignity as a principle underlying human rights. And this is so much the more as we can see that human dignity is the foundation [45] for a wide range of principles which are specific to human rights, such as the principle of universality, the principle of inalienability, the principle of indivisibility, etc. and even the foundation underlying the content of the rights that are inherent to the human being.

Moreover, an important mention we vehemently support is that included in the Preamble of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [46] (1984), where the State Parties recognize that *"*the equal and inalienable rights of all members of the human family *[...] derive from the inherent dignity of the human person."* We think that this affirmation is a confirmation that human dignity underlies human rights. Similarly, in the Preamble of the Convention on the Elimination of All Forms of Discrimination against Women [47] of 1979, we can see the particular importance assigned to the respect owed to human dignity, as any form of discrimination against women and not only against them violates the "principles of equality of rights".

Also, in the three declarations in the field of bioethics adopted by the United Nations Education, Science and Culture Organisation (UNESCO), namely the Universal Declaration on the Human Genome and Human Rights (Paris 1997), the International Declaration on Human Genetic Data (Paris 2003) and the Universal Declaration on Bioethics and Human Rights (Paris 2005), human dignity is presented as a veritable principle which underlies the rights of the human being. More precisely, in the 2005 UNESCO Declaration, the principle of human dignity is the first one in the list of principles which should guide biomedical activity.

At regional level, in the Charter of Fundamental Rights of the European Union, human dignity is stipulated in the first article, being in close connection with a series of rights, such as the right to life or the right to integrity of the person, and even if in the European Convention on Human Rights, human dignity is not expressly mentioned, the Convention recognizes, in its Preamble, the Universal Declaration of Human Rights and implicitly the principles and the rights it enunciates.

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[2] The United Nations was founded in 1945, after the end of World War II, with the signing of the Charter of the United Nations by the founding states (51) in San Francisco, on 26 June 1945. At present, the United Nations brings together 193 member states, Romania being one of them. For further information about the UN structure and the role of the bodies through which it operates, see: http://www.un.org/en/about-un/, Corlățean, T. (2015). *Protecția europeană și internațională a Drepturilor Omului* (European and International Protection of Human Rights), 2nd edition, Bucharest: Universul Juridic Publishing House, p. 85 and the following.

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[5] In this regard, Cicero, M.T. De Inventione: De Optimo Genere Oratorum: Topica, p. 323, quoted in A. Barak, *ib.* p. 17.

[6] Barak, A., *ib.* p. 18.

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[11] The United Nations (1945), Charter of the United Nations, 1 UNTS XVI.

[12] Adopted by the United Nations General Assembly on 10 December 1948 by Resolution 217 A (III); signed by Romania on 14 December 1955.

[13] See more, Voiculescu, N. (2017). *Protecția internațională a drepturilor omului* (The International Protection of Human Rights), 2nd edition, Bucharest: Hamangiu Publishing House, pp. 5-6.

[14] Here we mention, as examples, the most relevant legal instruments adopted at the UN level, which either in their Preamble or in their

articles refer to dignity: the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Convention on the Rights of the Child (1989), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), the Convention on the Rights of Persons with Disabilities (2007).

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[33] Barak A., *ib*. p. 12 and the following.
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national referendum of 8 December 1991, updated and republished in the Official Gazette of Romania, no. 767 of 31 October 2003.
[35] Decision no. 1109 of 8 September 2009 published in the Official Gazette of Romania, Part I, no. 678 of 9 October 2009; Decision no. 1576 of 7 December 2011, published in the Official Gazette of Romania, Part I, no. 32 of 16 January 2012. In this regard:
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[42] See in this regard: R. Brownsword (2014), Human dignity from a legal perspective, in The Cambridge Handbook of Human Dignity, Cambridge University Press, p. 7.
[43] *Ib.* p. 11.
[44] On this topic, we need to mention the activity of the not-for-profit organisation Dignitas, in Switzerland, which provides assisted suicide services to the members of the organisation who suffer from terminal illnesses or serious mental diseases. http://www.dignitas.ch/?lang=en.
[45] In this regard: Butrymowicz, M., *ib.* p. 90.
[46] Adopted by the United Nations General Assembly on 10 December 1984, 1465 UNTS 85.
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The Establishment of the European Prosecutor

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Abstract

The idea of creating a European Prosecutor's Office to protect the financial interests of the European Union has long appeared to be a utopia, which has been presented since 1997 through the Corpus Juris paper and has been reiterated in the European Commission Green Paper in 11 December 2001, which refers to the criminal protection of community financial interests and the creation of the European Prosecutor. The Treaty on a Constitution for Europe also provided for the establishment of the European Prosecutor's Office. The Union has not given up the objective of setting up the European Prosecutor's Office, so that by amending the founding Treaties of the Treaty of Lisbon, at the primary legislation level, the European Prosecutor's Office has found regulation in Article 86 of the Treaty on the Functioning of the European Union. We will look over several issues related to the competence of the European Union to establish the European Prosecutor's Office from its first proposal of establishment by the European Commission in 2013. The proposal has undergone numerous changes over three years of negotiations, as a mean to in 2017, after a number of 17 states, including Romania, have notified the EU institutions about establishing a form of enhanced cooperation, having as a result the granting of the consolidated form on April 3rd, 2017. The regulations established by Regulation (EU) no. 2017/1939 of the Council implementing an enhanced form of cooperation regarding the establishment of the European Public Prosecutor's Office were also examined as well as some issues concerning its implementations by Romania.

Keywords: European Public Prosecutor's Office (EPPO), proposal, Europol, European Prosecutor, Deputy European Prosecutor, OLAF, protection of the financial interests of the Union, Treaty on the Functioning of the European Union (TFEU), Treaty of Lisbon, art. 86 Treaty on the Functioning of the European Union, enhanced cooperation.

1 The Competence of the European Union to Create the European Prosecutor's Office

According to the Treaty on the Functioning of the European Union (TFEU), Article 86 (1), the Council, in order to combat crimes affecting the financial interests of the European Union, starting from Eurojust it may establish a European Public Prosecutor's Office.

We consider that the Union has a non-exclusive competence regarding the establishment of a European Public Prosecutor's Office (EPPO) and the provisions of Art. 20 of the Treaty on European Union (TEU) on enhanced cooperation. Thus, it is stated in the art. 20 of the TEU that: *"Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 326 to 334 of the Treaty on the Functioning of the European Union."*

Given that criminal regulations, incidents in the regulatory procedures of the European Public Prosecutor's Office, are a basic attribute of state sovereignty, we believe that the achievement of this institution through the enhanced cooperation technique provides a more solid perspective over this body.

2 Enhanced Cooperation or Generally Valid Action?

In 2013, the Commission put forward a proposal on the establishment of the European Prosecutor's Office, a proposal that was not accepted by the Member States of the European Union. We therefore observe that it has been referred to the provisions of Article 86 (1), paragraphs 2 and 3 of the TFEU, laying the foundations for an enhanced cooperation. Furthermore, on 3 April 2017 Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia and Spain notified the European Parliament, Council and Commission, their intent to establish a form of enhanced cooperation regarding the establishment of the European Prosecutor's Office. Accordingly, according to the third subparagraph of Article 86 (1) TFEU, the authorization to establish a form of enhanced cooperation referred in Article 20 (2) of the Treaty on European Union (TEU) and Article 329 1) of the TFEU shall be deemed to be granted and, from 3 April 2017, the provisions on enhanced cooperation arrangements shall apply.

According to the definition the *enhanced cooperation is a procedure where a minimum of 9 EU countries are allowed to establish advanced integration or cooperation in an area within EU structures but without the other EU countries being involved. This allows them to move at different speeds and towards different goals than those outside the enhanced cooperation areas. The procedure is designed to overcome paralysis, where a proposal is blocked by an individual country or a small group of countries who do not wish to be part of the initiative. It*

does not, however, allow for an extension of powers outside those permitted by the EU Treaties [1].

In order to answer the question, we believe that the 16 member states have met the most important conditions to use the enhanced cooperation procedure. First of all, we have 16 member states out of the minimum of 9, we consider that the competences allowed by the EU Treaties have not been extended, and moreover, the authorization to initiate the enhanced cooperation has been granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament.

3 The Reason for the Fall of the Old Proposal

A "yellow card" [2] was issued in October 2013 by 14 Member State Chambers of 11 Member States (18 votes) for the European Commission's proposal for the establishment of a European Public Prosecutor's Office. The procedure involves a review by the Commission of the proposal, which may be maintained, amended or withdrawn, with the reasons for the choice made.

This procedure took place and the Commission, on 27 November 2013 concluded that the proposal complies with the subsidiarity principle, which is why it is not necessary to amend or withdraw the proposal. After examining the reasoned opinions received from the national parliaments, the Commission decided to maintain the proposal, indicating that it was in line with the principle of subsidiarity [3].

Such an opinion was also issued by Romania, claiming by the President of the Chamber of Deputies that the Commission's proposal is inconsistent with the principle of subsidiarity [4]. According to point 9 of the reasoned opinion, the Chamber of Deputies recognizes the importance of effectively combating fraud against European financial interests and yet holds that the phrase "Union's financial interests" is not provided for in, so that, especially in complex cases, it might be difficult to prove what offences affect only the Union's financial interests, and what offenses that clearly affects the Union's financial interests affect also national legislation. For that reason, the Chamber of Deputies considers that it is possible that the extension of actions performed by the European Prosecutor's Office beyond the object of Article 86 TFEU becomes possible, and the risk of overlapping the powers of national prosecutor's office and the European Prosecutor's Office, along with the risk of hindering the criminal prosecuting offences carried out at national level is significant.

We also appreciate the opinion of the Senate of Romania on the proposal for a Council regulation establishing the European Prosecutor's Office, in which the Committee of European Affairs and of the Juridical Committee of Nomination, Discipline, Immunities and Validation found that the act submitted to the debate respects the principle of subsidiarity, with the exception from the third thesis of Paragraph 2 of Article 10 – *Appointment and dismissal of prosecutors European* delegates where it is proposed to delete the phrase "... if at the date of appointment as a delegated European Prosecutor he will not already have this status". The two

committees consider that automatically acquiring of European public prosecutor delegate quality, would represent an interference with the judicial organization of the Member States, in violation of the principle subsidiarity [5]. Regarding this last objection, we agree with the opinion of the Prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice *Gheorghe Bocşan*, who considers that although it is fully justified from the perspective of the national model of organization and functioning of the magistracy, it has absolutely no connection with the principle of subsidiarity or proportionality.

4 Council Regulation (EU) 2017/1939 of 12 October 2017 Implementing Enhanced Cooperation on the Establishment of the European Public Prosecutor's Office ('the EPPO')

By making a brief analysis of Article 4 of Regulation no. 2017/1939 (hereinafter referred to as the Regulation), where we find the attributions of the European Prosecutor's Office, we note that he has been assigned competence in investigating, prosecuting and sending to court the perpetrators and accomplices, which with and without action have brought criminal offences affecting the financial interests of the Union. In this regard the rule to which we refer to makes a direct reference to offenses covered by Directive (EU) no. 2017/1371. We note that the provisions of Article 4 do not regulate some forms of criminal participation, such as the case of co-authors or instigators, which is worth mentioning, even more so as we refer to a strict procedural norm [6]. However, the forms of participation are set out in Article 5 of the Directive. 2017/1371, a normative act which according to Article 22 of the Regulation regulates the material competence of the European Public Prosecutor.

In order to carry out its general duties, the European Prosecutor's Office operates on the basis of the principles enshrined in Article 5 of the Regulation, the investigative activities being carried out in compliance with the rights enshrined in the Charter of Fundamental Rights of the European Union [7] and the principles of the rule of law and proportionality. Investigations shall be conducted in accordance with the principle of impartiality and within a reasonable timeframe as understood by European case law [8].

The European Union, through the implementation of the European Public Prosecutor's Office, pursues certain objectives that are established around the fundamental principle of establishing an area of freedom, security and justice [9]. In order to realize these ideals, EPPO has the following tasks: a) to contribute to the strengthening of the protection of the financial interests of the Union's institutions and thereby to increase the confidence of European citizens in the sound administration of public money; b) creating a coherent investigation and prosecution mechanism for offenses under its jurisdiction; c) to carry out more effective investigation and prosecution than has been done by the competent bodies of the Member States so far; d) increasing the number of criminal

prosecutions and referrals, and thereby achieving greater efficiency in recovering damages caused by tax frauds; e) streamlining cooperation between Member States through direct cooperation between delegated European prosecutors; f) discouraging cross-border tax frauds over the European Union budget.

The decentralized structure [10] that will operate "according to the principle of indivisibility and solidarity" [11] of the European Prosecutor's Office is composed of: The College, the Permanent Chambers, the European Prosecutor and his deputies, the staff supporting them in the performance of their tasks, Delegated European Prosecutors based in the Member States.

Delegated European Prosecutors exercise their powers in those Member States that have agreed on the idea of enhanced cooperation with a view to implementing the European Prosecutor's Office. Investigations and prosecutions of the European Public Prosecutor's Office are undertaken by European Delegated Prosecutors, under the direction and supervision of the European Prosecutor [12]. There will be at least two delegated European prosecutors in each Member State, who will be part of the European Prosecutor's Office. The status and structure of EPPOs are governed by Section 1 of Chapter III of the Foundations Regulation.

In order to establish material competence, the Explanatory Memorandum accompanying the Regulation, paragraph 11 establishes that *TFEU provides that the material scope of competence of the EPPO is limited to criminal offences affecting the financial interests of the Union in accordance with this Regulation. The tasks of the EPPO should thus be to investigate, prosecute and bring to judgment the perpetrators of offences against the Union's financial interests under Directive (EU) 2017/1371 of the European Parliament and of the Council (2) and offences which are inextricably linked to them. Any extension of this competence to include serious crimes having a cross-border dimension requires a unanimous decision of the European Council*.

Regarding territorial and personal competence, they shall be determined by reference to the principles of subsidiarity and proportionality. According to Article 23 of the Regulation, there are three criteria for identifying territorial and personal competence according to how the offenses: a) were committed in whole or in part within the territory of one or several Member States; b) were committed by a national of a Member State, provided that a Member State has jurisdiction for such offences when committed outside its territory, or c) were committed outside the territories referred to in point a) by a person who was subject to the Staff Regulations or to the Conditions of Employment, at the time of the offence, provided that a Member State has jurisdiction for such offences when committed outside its territory.

5 How Romania Implemented the Regulation (EU) 2017/1939

Romania is one of the initiating Member States of this enhanced form of cooperation and participates in the European Prosecutor's Office.

The Regulation on the European Prosecutor's Office entered into force 20 days after its publication in the JOE, and the European Parliament will carry out the first investigations three years after the entry into force of the Regulation, beginning with 20 November 2020. Until that time, EPPO must be fully operational. In this regard, it should be borne in mind that it is estimated that the European Chief Prosecutor would be appointed in 2018, while European prosecutors and delegated European prosecutors would be appointed in 2019. Although regulations of the European Union are directly and immediately applicable, this regulation, like others of this type, requires several legislative and institutional measures for effective implementation in Romania. The most urgent of these is to establish internal procedures for nominating candidates for European Public Prosecutors and Delegated European Prosecutors [13].

In this respect, the Ministry of Justice has been debating the draft law on some measures for the application by Romania of Council Regulation (EU) 2017/1939 of 12 October 2017 for the implementation of enhanced cooperation concerns the establishment of the European Public Prosecutor's Office (EPPO). The purpose of this draft law is the internal procedure for appointing candidates for the positions of European Prosecutor and European Delegated Prosecutors and its content consists of 7 articles as follows: Article 1 refers to the nomination of candidates for Romania as European Prosecutor, Article 2 refers to the number and organization of the European Prosecutors Delegated in Romania, Article 3 to the designation by Romania of the candidates for the position of European Delegated Prosecutor, Article 4 to the Rights and Status of the European Prosecutor on behalf of Romania, Article 5 presents the rights and status of prosecutors Europeans delegated to Romania, Article 6 sets out the applicable criminal procedural rules and Article 7 establishes other provisions.

According to Article 1 (1), the Minister of Justice shall appoint three candidates on behalf of Romania for the appointment by the Council of the European Union as European Prosecutor under Article 16 of Regulation (EU) 2017/1939 and paragraph 2, the selection board chaired by the Minister of Justice shall be composed of a member of the Superior Council of Magistracy designated by its Plenum, a representative of the Prosecutor's Office attached to the High Court of Cassation and Justice designated by the General Prosecutor, a specialist in the field of international judicial cooperation in criminal matters and a human resources specialist who will be appointed by the Minister of Justice.

According to Article 3 of the draft law, prosecutors or judges with at least 15 years seniority in their perspective field and having relevant experience in the Romanian legal system, prosecution or prosecution of financial crimes and international judicial cooperation in criminal matters may apply to the interview. Also, on the date of appointment as European Prosecutor, the person is dismissed as a prosecutor or judge. The European Prosecutor on behalf of Romania is entitled, upon termination of office, to return to the post of judge or prosecutor previously held under Article 5 of the draft law under discussion.

The same procedure will be applied to the selection of the European Prosecutors Delegated, except that they are required to be at least 12 years old as

prosecutor or judge. The explanatory memorandum states that the age proposed by the project is intended to cover the requirement to hold the necessary qualifications [14] for appointment to the highest judicial functions in Romania. In addition, Article 7 stipulates that the European Prosecutor appointed on behalf of Romania, including the Deputy European Chief Prosecutor and the European Chief Prosecutor of Romanian Citizenship, shall be entitled to a diplomatic passport.

Following the nomination of candidates at national level, a selection panel (consisting of twelve former members of the Court of Justice and the Court of Accounts, former Eurojust national members, supreme national judges, high-level prosecutors or legal practitioners whose competences are recognized) will give a reasoned opinion and the Council selects and appoints one of the candidates for the post of European Prosecutor in the Member State concerned for a six-year term that cannot be renewed.

6 Conclusions

The need for judicial cooperation on the European Union level, between Member States which are required to protect the Union's financial interests against crimes which cause from year to year increasing financial damage, has led to the application of Article 86 of the Treaty on the Functioning of the European Union and the establishment European Prosecutor's Office.

In the literature [15] it was considered that the establishment of the European Public Prosecutor's Office will ensure the accomplishment of two objectives, first establishes the basis for the prosecution, and secondly, concretises the criminal protection instrument, both preventively and sanctioning, offenses affecting the Union budget.

We believe that the establishment of the European Prosecutor's Office is a positive attitude towards the obligation of the Member States to protect the financial interests of the European Union, and we are in the same opinion with Jean-Claude Juncker as regards to the existing dynamics in relation to the establishment of the European Prosecutor's Office which stipulates one thing: the continuation of the European integration process – even in sensitive areas such as justice – is one of the realistic options.

REFERENCES

[1] See, https://eur-lex.europa.eu/summary/glossary/enhanced_cooperation.html?locale=ro, accessed on 13/08/18, 2:28.

[2] The yellow card means that when the Commission introduces a new legislative proposal, it is sent to national parliaments. If a third of them find the draft legislation does not comply with the subsidiarity principle, the Commission has to review the proposal and decide

whether to keep, amend or withdraw it and to justify its decision. Therefore, the sine qua non condition for a legislative proposal from the Commission to be accepted by national parliaments is to respect the principle of subsidiarity.

[3] Initial appraisal of a European Commission Impact Assessment European Commission proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office.
The exercise of the powers of the European Union is subject to the principles of subsidiarity and proportionality. In areas which do not fall within the exclusive competence of the European Union, the principle of subsidiarity provides for the protection of the Member States' decision-making and action capacity and legitimizes the Union's intervention if the objectives of an action can not be sufficiently achieved by the Member States. better achieved at Union level "due to the scale and effects of the envisaged action". Its inclusion in the European Treaties also aims to ensure that these competences are exercised as closely as possible to citizens, in accordance with the principle of proximity and Article 10 (3) of the EU Treaty.

[4] http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/romania/2013/com20130534/com20130534_deputatilor_opinion_ro.pdf, accessed on 08/08/18, 11:54.

[5] http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/romania/2013/com20130534/com20130534_senat_opinion_ro.pdf, accessed on 08/08/18, 12:56.

[6] For a similar presentation, see Matei, G.D., Dragne L. (2014). *Parchetul european – elemente de noutate și controversă în construcția europeană* (European Prosecutor's Office – Elements of Novelty and Controversy in the European Construction), in Dreptul Magazine no. 1/2014, p. 198.

[7] OJ 2012/C 326/02.

[8] The concept is based on Article 6 (1) of the European Convention on Human Rights: Everyone has the right to a fair, public and reasonable hearing of his case by an independent and impartial tribunal and Article 47 (2) of the EU Charter of Fundamental Rights: Everyone has the right to a fair, public, and reasonable trial. See ECHR jurisprudence: Boddaert v. Belgium, judgment of 12 October 1992, C.P. and Others v. France, judgment of 1 August 2000, Lavents v. Latvia, judgment of 28 February 2003.

[9] See also Popescu, R.-M. (2015). *De la "Cartea Verde privind protecția penală a intereselor financiare comunitare și crearea unui Procuror European" la "Propunerea de Regulament de instituire a Parchetului European"* (From the "Green Paper on Criminal-Law Protection of Financial Interests of the Community and the Establishment of a European Prosecutor" to the "Proposal for a

Regulation Establishing a European Prosecutor"), in Legislative Information Bulletin, no. 1/2015, pp. 3-7.

[10] The idea of a centralized structure of the European Prosecutor's Office has presented many disadvantages, including: the need for constitutional reforms, the need for investigative services at the level of the European Prosecutor's Office, the need for court cases to be brought before a European court, and the decision either recognized by the Member States. To this end, see N° 203 Senate session ordinaire de 2012-2013, Rapport d´information fait au nom de la commission des affaires européennes (1) sur la création d'un parquet européen, Par Mlle Sophie Joissains.

[11] Costea, I.M. (2010). *Combaterea evaziunii fiscale și frauda comunitară* (Fight Against Tax Evasion and Community Fraud), Bucharest: C.H. Beck Publishing House, p. 274.

[12] Costea, I.M. (2016). *Fiscalitate europeană. Note de curs* (European Tax. Lecture Notes), Bucharest: Hamangiu Publishing House, p. 85.

[13] According to the Explanatory Memorandum submitted by the Ministry of Justice.

[14] Article 16 1 lit. c) of the Regulation.

[15] Costea, I.M. (2010). *Combaterea evaziunii fiscale și frauda comunitară* (Fight Against Tax Evasion and Community Fraud), Bucharest: C.H. Beck Publishing House, p. 270.

FRANCOPHONE DEVELOPMENT OF ROMANIAN LAW

The Parliamentary Character of Romania's Republican Regime *(Romania – Parliamentary Republic)*

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Abstract

The issue of defining Romania's government form, mainly concerning the type of republican regime adopted through Romania's Constitution, becomes the more important with the proliferation of inter-institutional controversies. The latter are submitted for resolution to the Constitutional Court, which, it must always be reminded, is not a part of the judicial power, but a purely political institution, whose minimal objectivity is defended by the appointment of its members by various state institutions; the more or less fragile and symmetrical balance of powers is reflected by its decisions, which are compulsory, according to the social contract, but not sacrosanct.

That is why it is necessary to have a scientific opinion, which would answer to the question: "what kind of republic is Romania?" This does not only express a theoretical curiosity, but synthesizes the conflict of competencies between institutions created by Constitution and the need for solving them in accordance with national interest, as it was reflected in the logic of our fundamental law.

A recent poll undertaken among members of parliament demonstrated that most of them believe Romania is a semi-presidential republic. However, respondents did not know to define with a minimal precision such a republic.

In what concerns media, both the one regarding general politics and the one with a special emphasis on the field of justice, constantly reflect a similar conviction: "Romania is a semi-presidential republic". It does not matter what the Constitution provides, but what is believed it reads. Prejudices concerning the meaning of the constitutional text, built around partisan arguments as early as the first debates of the Constitutional Assembly and its collateral negotiations, during 1990 and 1991, have become a real custom, following continuous use.

What is very concerning is the fact that within several law faculties (of the numerous created after 1990), professors tell the same things and students/alumni, unaccustomed to think critically, are repeating the error over and over, reaching in fact to a modification of the state's constitutional order. Obviously, these theories dominate the specialized literature, as nobody has the courage of contradicting them.

In their shadow, a politico-scientific (in fact, pseudo-scientific) discourse has developed, which, on one hand purports historical untruths (such as the one that Romania would have followed the model of the French Constitutions, which it would have partially and unskillfully copied, which is simply not true; the main model, at least in what concerns the government regime, can be found on the German, Italian and Portuguese constitutions), and, on the other hand, launches unfounded criticism (especially in what concerns the hybrid character of the governing regime) which is used in order to call for changing the fundamental law, before extracting from it, by a correct interpretation, all necessary solutions.

The present study was elaborated under the empire of these considerations, covering three main areas: a) *defining general terms in a doctrinal manner*; b) *resorting to a historical and teleological interpretation*; c) *directly evaluating correlated constitutional texts, so that the logic of the fundamental law is preserved*. The general conclusion is: ***Romania is a parliamentary republic***.

Keywords: Constitution, governing regime, republic, semi-presidentialism, presidentialism, parliamentarianism, representation, mediation, parliamentarized semi-presidentialism, rationalized parliamentarianism.

1 About Concepts

1.1. Romania's Constitution provides, in Article 1 (1) that **"the Romanian state's form of government is the republic"**, without mentioning what kind of republic this is.

In Romanian specialized literature, as well as in the practice of the Romanian Constitutional Court (CCR), the initial consideration is that the form of republic concerned by the constitutional text is the semi-presidential republic, hence generating the conclusion that the President is a part of the executive, a situation in which the executive power would be two-fold. The reasoning resists only with the condition of demonstrating the hypothesis.

If every hypothesis is correct, not any demonstration must be the same. Or, the argument which is brought forth refers to the election if the President through direct, equal and universal ballot. This is only a necessary, but not a sufficient condition in order to talk about a semi-presidential republic. The real distribution of power between the head of state and the head of government in a semi-presidential republic and, thus, the definition of this system cannot be based solely on the legal manner of electing the President; more important are the attributions which the Constitution confers to this office. The more so, as indirect election is

not related to the essence, but only to the nature of the parliamentary republican order.

Of course, direct election has a heavy political weight. (It is the same weight which is invoked by the presidents of authoritarian republics, of the so called illiberal, sovereign or controlled democracies.) In spite of these, elections are performed for the purpose of giving/getting some mandates whose limits are provided for within the law (Constitution). Thus, the procedure of getting the mandate is subordinated, in terms of effects, to the mandate's legal content. This mandate is additionally not imperative (under the aspect of the concrete content regarding policies to be applied); the only obligation is to remain within the attributions to which it is circumscribed.

1.2. The legal dictionary [1], which we refer to for its synthetic and informational value, defines the republic with its species as follows:

"A republic is the form of government in which the body performing the state function is elected, usually for a certain period of time. Republics can be parliamentary, presidential and semi-presidential".

A parliamentary republic is mainly characterized by the *election of the head of state by the parliament*. The classic examples of European parliamentary regimes are Germany and Italy and, from among former communist countries, the Czech Republic, Slovakia, Hungary, Croatia, Slovenia and Albania.

In **Germany**, according to the 1949 Fundamental Law, *the President represents the federation and concludes treaties, accredits and receives diplomatic envoys.* Among the President's attributes is also *appointment of judges, of federal officers, exercise of the right to pardon.* For serious abuses, *the Constitution establishes the procedure of impeachment against the President*.

In **Italy**, the President, according to the 1947 Constitution, is elected by both Chambers of Parliament, for a 7 years term, being the *head of state* and *representing national unity*. He *can send messages to the two Chambers, fixes the date of elections and schedules the first meeting of the Parliament, promulgates laws and issues decrees with value of law* etc.

In a ***presidential republic***, the president is *directly elected by the people*, having, as a result, a broad popular legitimacy, resembling that of the parliament. The most significant example is the United States, country in which the President has important attributes concerning leadership of executive-administrative issues, as well as important competencies in the field of the country defence, of foreign affairs, of appointing senior civil servants; he does not have the right of legislative initiative and cannot dissolve *the legislative forum – the Congress – which has the possibility of dismissing the President* and holding him accountable for criminal offences through a complicated procedure called impeachment.

A semi-presidential republic has features of both the parliamentary regime and the presidential regime. Thus, *the President is directly elected by citizens*, as in presidential republics, enjoying the same legitimacy as the parliament; the executive power belongs in fact to the government, led by the Prime Minister; a

common element of presidential and semi-presidential regimes is the possibility of impeaching the president in certain serious situations, but, while *in semi-presidential regimes, the president can dissolve the parliament*, this can never be done by the President in a presidential regime.

The classic example of the semi-presidential regime is the French political regime, consecrated by the **French Constitution** of 1958. In the French system, *the President of the Republic can pronounce the dissolution of the National Assembly*, but not of the Senate; he *leads the sessions of the Council of Ministers*, is the supreme commander of the army, has the right to pardon, addresses messages to the two Chambers of Parliament, *appoints the Prime Minister* etc." (my underlines).

Some quick remarks can be made:

i. The specific difference used by the abovementioned definitions, in order to distinguish between various types of republic, emphasizes the manner of electing the President (premise), out of which the model of sharing executive power with the Government is deduced (consequence). As a result, the dogmatic criterion of the definition is the election procedure, but the functional criterion of distinction between types is the legal relation between President and Government. When we refer to the legal text, though, we notice that it regulates at the same time the election procedure and the attributions, the attributions' distinction being made not simply following the election procedure. ***Following the normal logic of things, the election procedure is established according to the attributions which the constitutional legislator wishes to entrust to the President in the constitutional order and not the other way round, the attributions to be fixed according to the election procedure which was chosen.*** *(The path is defined according to the destination and not the destination according to the path; much like the instrument is used according to purpose and not the purpose according to the instrument.)*

ii. The President's attributions in the two typical parliamentary republics (Germany and Italy) are almost identical to those of the president of Romania, often invoked in our country in order to support its semi-presidential character (for example, state/federation representation, conclusion of treaties, receipt and accreditation of diplomatic envoys), which implies that the same attributions could change their content following the election procedure for the office to which they are entrusted. Or, ***the content of attributions defined and expressly limited by the Constitution cannot be change (only) according to the manner in which those attributions were acquired.***

iii. In a presidential republic, the integral executive power attributed to the president is counterbalanced by the power of the parliament to dismiss the former, although it did not elect him (unlike the situation in Romania, where the president cannot be dismissed but by referendum, therefore in the conditions of symmetry between election to and

dismissal from the office). It result that ***the constitutional logic has three supporting points which have to be correlated: first of all, the attributions the constitutional legislator considers convenient to entrust to the President for the purpose of ensuring, in the context of the entire institutional architecture, the good governance of the state; secondly, the election procedure, established according to attributions, so that, during their exercise, the President to enjoy sufficient political legitimacy, also avoiding political blocking in appointing him (which sometimes happen in the case of election by the Parliament); finally, third of all, the warranties for limiting power excess and sanctioning attributions abuse. The last two derive from the first and not vice versa.***

iv. In a typical semi-presidential republic (France), the president can dissolve parliament (for reasons of opportunity which he appreciates and, not as in Romania, for objective constitutional reasons concerning the extreme situation of blocking governance following the impossibility of forming the government) and leads (not only presides) government sessions, which he attends whenever he considers necessary.

v. ***Direct elections do not lead, where it is the case, to an equal legitimacy for the President and the Parliament, as the Parliament also represents (even in majority kinds of electoral systems) minority options, while the President is elected only as a result of a majority vote (which can also be circumstantial/partially negative in the case of two rounds ballot). The declaration according to which he is "the president of all citizens" is often the product of a circumstantial rhetoric, politically correct but without a correspondent in reality.***

1.3. After this short analysis of comparative positive constitutional law, it is necessary to **review the doctrine**.

1.3.1. One must clarify that standard definitions of the presidential, parliamentary and semi-presidential regimes are not so much the work of legislators, which only describe constitutional arrangements without giving them particular names, but of the doctrine, which constantly tried to raise those arrangements to the rank of legal categories. The utility of this effort resides in the very delimitation of attributions among constitutional actors (the only aspect having a practical outcome), according to the chosen form of government and not the simple description of procedural forms which are specific to them.

In specialized literature the issue of type of the governing regime has determined the research (including that in comparative law) of the relations between legislative and executive, as well as of the intra-executive ones (between president and prime minister or/and prime minister and members of government).

Politics is related to the distribution and exercise of power. Without power, there is no politics. In its turn, any kind of order depends on the power relations (which express the interest game). The normative esta-

blishment of power relations between institutional actors representing the executive power and institutional actors representing the legislative power is therefore essential for the organization of the political power within the state, as a form of government disciplined by law. "The process of choosing a form of government by a state is circumscribed to the broader framework of issues concerning relations among the three state powers, as much as these relations are circumscribed to the broader issue of democracy functioning and democratic consolidation" [2].

The doctrine has subtly noticed that ***the presidential forms of government are "dividing" power between legislative and executive***, which means that they practically separate their attributions, each one having its own lane, while ***parliamentarianism is based on "sharing" power between legislative and executive,*** meaning that attributes that are specific to both power (the power to generate norms and that of concretely applying the norm) are exercised by both, according to a division of labour established through the Constitution [3]. In the first case, abuse of power is avoided by means of effective counterbalancing; in the second case, it is avoided by means of limitations resulting from the division of labour.

As a consequence, **what is essential for distinguishing between various types of republics is the substance – power and its division.** In spite of all these, the same authors continue by saying that "parliamentary systems are constitutional monarchies and republics in which presidents are elected by Parliament" [4]. As if this would be the only criterion, or at least the most important one.

In what concerns presidentialism, according to Giovanni Sartori [5], a system is presidential if it fulfils at the same time three conditions: a) the head of state (president) results from a popular vote; b) during his mandate, the president cannot be subject to a confidence vote in the parliament; c) the president presides or leads governments appointed by him. The three criteria are cumulative and it can be notices that two of them don not characterize the Romanian republican system.

Semi-presidentialism, as a form of government, was analysed as an alternative to both presidentialism and parliamentarianism, taking something of each, in the hope of optimizing the chances of reaching the objectives of all constitutional order: consolidating democracy, increasing political stability, ensuring social harmony and maximizing governmental efficiency [6].

1.3.2. **Defining semi-presidentialism in the specialized literature** was the most controversial aspect, as is expected when we refer to hybrid systems.

For Maurice Duverger "a political regime is considered semi-presidential if the constitution establishing it combines three elements: the president of the republic is elected by universal suffrage; the president has considerable powers; the president is assisted by a prime minister and ministers which have executive power and can remain in office only if the parliament does not manifest its opposition towards them" [7].

Linz and Valenzuela consider that the "dual executive system has a president that is elected directly or indirectly by the people and is not appointed by the parliament, and the prime minister needs the parliament's confidence vote". These features are complemented by the fact that the president appoints the prime minister and can dissolve the parliament" [8].

Giovanni Sartori considers that "The only feature which any type of semi-presidentialism must have … is a dual structure of authority, a configuration with two heads, that can be identified following two criteria, the second having three main features, as follows: a) the head of state is elected by popular vote – directly or indirectly – for a predefined period; b) the head of state shares the executive power with a prime minister and is part of a double authority structure, which is characterized by three defining elements: 1. the president is independent from parliament, but cannot govern alone, his directives have to be accepted and mediated by his government; 2. the prime minister and his cabinet are independent from the president, to the extent that they are dependent to the parliament (they are subject to confidence votes and need the support of a parliamentary majority); 3. the double authority structure allows for various balances and mutual power arrangements within the executive, so that the 'potential autonomy' of each unit or executive components subsists" [9]. These criteria and features are cumulative.

Robert Elgie and Sophia Moestrup define semi-presidentialism as "a regime in which there is both a president elected by the people for a determined period of time and a prime minister with his cabinet, which are accountable before the legislative" [10]. This definition absolutizes the election procedure, ignoring the powers conferred to the president by the Constitution. It rather describes than prescribes.

Finally, some authors claim that semi-presidential systems are not a synthesis between presidentialism and parliamentarianism, but an "alternation between parliamentary and presidential phases" of exercising power [11].

All these definitions use too many metaphors and preserve too many ambiguities to acquire legal rigour able to make them fully usable. Their uselessness also derives from the circumstance that, in practice, the usual path does not go from concept in order to identify competencies, but starts from competencies out of which theoreticians deduce concepts. Or, ***what is truly interesting is not the manner in which republics are classified, but what concrete attributions are entrusted to each state's institutions, according to the Constitution, in order to find out within what limits, how and when they are exercised. Taking a concept as starting point, the risk is to read in a Constitution certain things which are not really written in it and which were not in the mind of the constitutional legislator either.***

1.3.3. **Romanian authors** notice that "*the constitutional prerogatives of the President of Romania are limited when compared with prerogatives of other president of European semi-presidential republics (France, Finland, Poland)*" [12]. They can be grouped in six categories [13]:

a) ***attributions concerning legislation enactment*** – he promulgates laws, being able to ask only once for their parliamentary re-examination and he can call for the Constitutional Court in what regards the laws' unconstitutionality or related to legal conflicts of a constitutional nature;
b) ***attributions concerning organization and functioning of public powers*** – presenting messages to the Parliament; consulting the Government concerning urgent and especially important issues; participating to some meetings of the Government and presiding them when he participates; organizing referenda of national interest, following a previous consultation of the Parliament;
c) ***attributions concerning election, formation, formation approval, appointment or revocation of some public authorities*** – dissolution of Parliament when certain very restrictive conditions are fulfilled; appointing a candidate for the office of prime minister, taking into account election results and the reality of existing political alliance at a certain moment; appointment of Government on the basis of the investiture vote given by the Parliament; revocation and appointment of some ministers in case of governmental reshuffle or office vacancy, following proposals of the prime minister; appointment of three judges at the Constitutional Court; appointment of magistrates into offices, following a proposal of the Superior Council of Magistracy (CSM); appointments into other public offices (for example, he appoints two members of the National Audio-visual Council); awarding the ranks of marshal, general and admiral.
d) ***attributions in the field of country defence and ensuring public order*** – declaring, with the previous approval of the Parliament, a partial or general mobilization of armed forces; taking measures for facing any armed aggression against Romania; establishing the partial or total state of siege or state of emergency; presiding the Supreme Council of National Defence (CSAT); proposing directors of the intelligence services, which are then appointed by the Parliament.
e) ***attributions in the field of foreign policy*** – concluding, on behalf of Romania, treaties negotiated by the Government and submitting them for ratification to the Parliament; accrediting and recalling diplomatic representatives of Romania, at the Government's proposal; approval of establishment, dissolution or changing the rank of diplomatic missions; accreditation of other states' diplomatic representatives in Romania.
f) ***other attributions*** – conferring decorations, honorary titles; granting individual pardons.

Most of these prerogatives are subject to restrictions and control from other public authorities.

We refer here to the Parliament and the Government. For this reason, in the Romanian constitutional law doctrine, the governing system regulated by the 1991 Constitution was considered a "***parliamentarized***" or "***softened semi-presidential system***". It could have been as well called a "***presidentialized***" or

"***softened parliamentary system***" [14], although, as we will see, ***there is not presidentialization or softened version of Romanian parliamentarianism; its only non-specific relation to semi-presidentialism is the direct universal suffrage election of the President***.

Supporters of the thesis of Romanian semi-presidentialism or dual executive have identified several normative arguments (included in constitutional texts) that would prove the "un-softened character". Below are the most important [15]:

a) Both the Parliament and the President are elected by universal, equal, secret and freely expressed ballot, being national representative bodies. ***However, only the Parliament is the supreme representative institution of the Romanian people.***

b) The right of the President to dissolve the Parliament involves the cumulative fulfilment of no less than six objective conditions. These conditions define, however, ***a situation of political jam (impossibility of forming the Government) which the President cannot take into consideration subjectively.*** He can only ascertain the situation, proceeding in consequence to applying a technical procedure. During the exercise of this procedure, his political consideration margin is insignificant. ***This is no match to the right of the head of state to dissolve the Parliament, which exists in semi-presidential republics.***

c) The Constitution consecrates two forms of the President's accountability: political accountability for serious deeds breaching the Constitution and criminal liability for high treason [16]. The first is initiated by the Parliament, which means that ***if the President cannot dissolve the Parliament, the latter can suspend the President from office, thus beginning the procedure of his dismissal.***

d) The Government's investiture, although initiated and finalized by the President, mandatory involves a vote of confidence from the Parliament. In other words, ***the political majority formed in the Parliament is essential for the birth of a new Government***.

e) ***The Government in its entirety and each of its members, in solidarity with the other members, is politically accountable only to the Parliament.***

f) Not only the President, but also each Chamber of the Parliament can request the criminal prosecution of members of the Government, for deeds committed during the exercise of their office; ***the President can only order their suspension from office, if criminal prosecution was requested.***

g) ***The President has no right of legislative initiative,*** as this belongs to the Government, the members of parliament or to a certain number of citizens.

h) The President's refusal of promulgating a law can be exercised only one time after receiving it. In this situation, ***one cannot speak about refusal, but only about an urge for additional reflection addressed to the legislative, which is included in the "right to warn".***

i) ***The President's attributions in the field of foreign policy and exceptional circumstances are conditioned either by the Government's intervention or by the Parliament's.***

j) ***The President's Decrees (his legal acts) issued in the exercise of his most important attributions must be countersigned by the Prime Minister.***

All these arguments, together with our comments, lead to the conclusion that the ***President of Romania has even more limited powers than some presidents of parliamentary republics.*** As a result, any reference to them should be followed by the conclusion that Romania's governing system is a "***consolidate parliamentary***" one and not a "***softened semi-presidential***" one. How softened? Softened until being outright parliamentary?

At this point, other two aspects need to be mentioned. On one hand, the fact that **within Romanian specialized literature, which we referred to earlier and from which we had some citations, there are arguments in favour of "parliamentarization of semi-presidentialism", but not also some that would prove the existence of the limit from which parliamentarization or semi-presidentialism departs.** There is only mention why the semi/presidential character of the republic is softened and not why the republic has a semi-presidential character.

On the other hand, **among reference elements which are mentioned in order to describe attributions of the President and, starting from them, the nature of the governing regime, there is no reference to Article 80 (2) of the Constitution, and to the President's position of mediator.** This article (unique in comparative constitutional law) seems to be non-existent. Why? Because any reference to it completely overturns, as we would further show, the thesis of semi-presidentialism.

1.4. But until reaching there, we should briefly **review constitutional jurisprudence,** with a special mention to CCR decisions pronounced for solving the constitutional conflict concerning the representation of the Romanian state abroad. What does jurisprudence clarify and what confusions does it amplify?

1.4.1. By the **CCR Decision no. 683/2012** the Constitutional Court essentially considered that *the political regime consecrated by Constitution must be qualified as being a semi-presidential one and, as, according to Article 80 (1), the president represents the Romanian state, it means that in the field and of foreign policy, he leads and engages the state*. (sic!) This constitutional text allows him to "draw the future lines that the state will follow in its foreign policy, practically to determine its orientation in the field of foreign affairs, of course taking into account national interest. Such a view is legitimized by the representative character of the office, the president being elected by citizens by universal, equal, direct, secrete and freely expressed ballot".

Indeed, according to Article 80 (1), the President represents the state, but the fundamental law does not say what is the content of these attributions (especially what are the rights and obligations of the President in its exercise) and it does not

distinguish between state representation in internal affairs and representation in foreign affairs.

In its **Decision no. 784 of 26 September 2012**, referring to that text, the Constitutional Court states that: "Article 80 alignment 1 of the Constitution is constitutional text of principle. Therefore, it must not be interpreted in a restrictive manner, but in the spirit of the Constitution, corroborated with Article 91 and Article 148 alignment 4 of the Constitution; this latter text expressly provides that the Parliament, the President of Romania, the Government and the judicial authority must guarantee 'obligations resulting from the European Union accession document'. Or, one of these obligations is the representation of Romania at the highest level within the European Council, by the public authority that has the competence of engaging Romania at state level. Otherwise the provisions of Article 148 alignment 4 of the Constitution, concerning the President of Romania, would be emptied of content; or, it is generally accepted that any norm is elaborated for the purpose of producing legal effects." By this interpretation, on one hand, the Court does what it in fact says that should not be done, restricting the meaning of the respective text to representation abroad (although, speaking about the right of the President of representing Romania to the European Council, it exits the sphere of foreign policy to enter that of European policy; which, as long as the EU is not an inter-governmental organization, but a con/federation, belongs to internal affairs), and, on the other hand, it adds to the law, by stating that the President "has the competence of ***engaging*** Romania, while in fact he only has the competence of ***representing*** the country.

The President, according to the Constitution, "represents the state" (Article 80.1), without a distinction between the internal and the external levels. If the interpretation were rigorous – not restrictive, not extensive – it would have been noticed that ***the lack of distinction between the internal and the external levels is self-telling and clarifying.*** As the President cannot be at the same time mandator and mandatory, represented and representative, which would determine that, as mediator between the state he represents and society (Article 80.2), to negotiate/mediate with himself, or, that, in foreign affairs, to give himself a mandate in order to represent another (the state), it results that the word "***represents***" cannot be understood but as "***symbolizes***", "***personifies***", "***shows***", "***embodies***"; all these are known meanings of that word.

As the nature of representation does not change when internal and external relations are concerned, because *ubi lex non distinguit nec nos distinguere debemus,* if, through absurdity, it were true that the President is the protagonist (the decision-maker) of Romania's foreign policy, for an identical reasoning he should also be the protagonist of internal policy (which would mean that the Government should follow the President's decisions both in the field of foreign and internal policies); it would mean that: a. the Government no longer fulfils the programme approved by the parliament, but the President's instructions, which is not under the control of the Parliament; b. the Government is politically accountable to the Parliament for fulfilling the instruction of another body; c. even if a Government is dismissed by the no-confidence vote of the Parliament, his

successor would continue to apply the presidential policy for which the previous Government had been dismissed; parliamentary censorship would no longer be political, but only technical, managerial. ***This would make Romania an absolutist presidential republic.***

Also, if between the President and the state there would be a relation of representative mandate, it would mean that the "representative", the President, received the mandate from the state and not from the citizens, not from the society. After which, he would have to mediate, according to Article 80 (2), between the state he represents and the society which empowered him. That means executing again his obligations in a relation with himself. Such an absurd reading, which cannot be attributed to a normal constitutional legislator, cannot be avoided unless ***the term "represents" is given the meaning attached in all Constitutions of democratic republics, of "symbolizes". The President does not have two roles with equal legal value, one of "representation" of one of the parties into legal relations (the Romanian state) and one of "mediation" between the part he represents and the others (society), but a non-legal statute, with exclusively psycho-political effects, that of "symbol" of the whole and a legal statute (rights and obligations) on the basis of which he has the competence of "mediating" between the parties of the whole in order to preserve political balance and social peace. Society is also a part of the state, which is the political organization of society, materialized in and functioning through the state's institutions.*** One could, eventually, also speak about two roles of the President with same nature, but then the first is only procedural (formal) and the other is substantial.

1.4.2. Without going so far (mainly without referring to internal affairs), **Decision CCR no. 683/2012**, followed by **Decision no. 784/2012** and **Decision 449/2013** and by others, clearly states that **"*the Government's role in foreign policy is a rather technical one, as it has to follow and fulfil obligations which Romania engaged at state level. On this occasion, the Court notices that this is an execution role, therefore a derived and not an original role, as is the case of the president of Romania."***

As a result, the President gives himself a mandate, then, the Government executes the President's foreign commitments. This would supposedly also solve the issue of Article 102 (2), according to which the Government has the constitutional competence of ensuring the achievement of the country's foreign policy. According to CCR (**Decision no. 683/2012**) this "means that ***according to the orientation established by the state's representative at external level, which is the president of the state, the Government, through its representative, is called to implement correspondingly the measures to which the state*** (the President – author's note) ***engaged.*** While **Decision no. 449/2013** makes the position even clearer as, because "the President is, according to the Fundamental Law, the holder of the Romanian state's representation right in international relations", he "***establishes the content and limits of the mandate he is to present*** during the European Council reunion. The representation attribution can be delegated by the President expressly to the Prime Minister. In such a situation, what is delegated is

exclusively the right of representation, the right to participate to the European Council reunions; the President preserves ***his original right of deciding upon the content and limits of the attributed mandate." Thus, the Government becomes the "President's technical apparatus", without any parliamentary limitation. This exceeds even the classical American model in terms of presidentialism.***

"As it is not a delegated power, but one belonging to the President of Romania, the state's representation can be delegated by him, through an express act of will, when he considers necessary." – CCR further states (Decision no. 683/2012). In other words, the President's right of formulating his mandate alone and outside any *ex ante* or *ex post* control, is based on the circumstance that the right is original, while the Government has a sort of second hand right, obtained only through delegation. However, ***the President's attributions (and not rights) are established by the Constitution, no matter how original they were, while the Government is delegated its attributions by the Parliament and not by the President***.

1.4.3. CCR seems to be afraid that, if Romania's foreign policy were elaborated/led by the Government, the President would thus remain without a role and the dispositions of Article 148 (4) would be emptied of content. That is why it restrictively interprets the dispositions of Article 102 (1). However, it seems not to be afraid that, in this way, the dispositions of Article 109 (1) are emptied of content; according to them, *"the Government is politically accountable* ***only*** *to the Parliament, for its entire activity".* ***The three texts (80.1, 148.4 and 102.1) could be well reconciled if the attribute of presidential representation were interpreted in the meaning of formal engagement of the state by protocol, solemn and symbolic procedures which would make opposable, certain and credible the international law instruments and acts of the Government, based on the parliamentary mandate and subject to parliamentary control, according to each case, with the corresponding legal guarantees.***

The Court stated, as a principle, that "In the exercise of his constitutional attributions, the President of Romania participates to European Council reunions as head of state." This happens while ***the phrase "head of state" can be found nowhere in the Romanian Constitution.***

In **Decision no. 449/2013** CCR states: "It is a major principle that a normative act cannot add to the Constitution, cannot change competences established by the Constitution. The political will must be subordinated to constitutional principles, values and requirements, regardless of relations, be they tense, between public authorities." ***But this exactly what the cited CCR decisions are doing: they are adding to the Constitution, not being subordinated to "constitutional principles, values and requirements", but adapting texts to momentary political interests, responsible for tensioning relations between public authorities.***

1.4.4. This explains why the abovementioned CCR solutions were adopted by a (political) majority of only five judges from a total of nine. Four judges issued a **separate opinion** in which they reject "the exclusive right of the

President of the Republic to engage the state during European Council reunions and the Government's competence to concern only execution of what is decided", because in this logic "the President of the Republic can delegate the exercise of an exclusive attribution, without any consultation with the authority to whom the attribution is delegated" and "***such an orientation puts the Government in a subordination position towards the President, which is unacceptable***". That such a consequence would be or not unacceptable remains to be discussed. But it is unconstitutional, as Romania is a parliamentary republic.

Unfortunately, even the authors of the **separate opinion to Decision no. 683/2012** recognize the "semi-presidential" character of the republic. This is, however, only stated and not justified through references to Constitution. For them, **as the semi-presidential governing regime in Romania is axiomatic, it results that the executive is dual and this dualism does not lead to subordination of the governmental branch of the executive to the presidential branch, but imposes cooperation of the two.** This is a perfect recipe for constitutional conflicts and jams.

The position is nuanced in the **separate opinion to Decision no. 784/2012**, in which it is stated that: "in order to qualify the political regime of Romania, we can take into consideration the notion of ***rationalized parliamentary regime*****,** a regime in which the emphasis is placed upon avoiding institutional conflicts and ensuring a parliamentary majority for supporting the Government, therefore, upon avoiding governmental instability. This 'rationalization' involves a complex and sophisticated regulation of relations between Government and Parliament and limits the game of the main parliamentarianism elements for the purpose of avoiding the system's drift and governmental instability" [17].

What does "rationalized" mean in this context, which makes reference to relations between Parliament (legislative) and Government (executive) and not to relations between Government and President, on which depends the qualification of a regime as semi-presidential, presidential or parliamentary, is not clear. The authors, nevertheless, deplore the fact that "**such decisions of the Constitutional Court represent significant steps achieved – by means of a constitutional instance – for turning a semi-presidential republic into a presidential one.**" which is the same with acquiescing to the idea that the initial situation is that of a semi-presidential republic. The consideration closes with an appreciation concerning constitutional opportunity and not legality/constitutionality: "**none of the two alternatives represents the best solution for countries which were governed by a totalitarian regime**" [18]. We subscribe to this appreciation, with the observation that ***the issue had already been solved, including taking into consideration this argument, by the acting Romanian Constitution, through the option in favour of the parliamentary republic.***

What deserves to be underlined related to the presented jurisprudence is the fact that ***the supporters of majority opinions or the adepts of minority opinions, the partisans of "softened semi-presidentialism" and those loyal to "rationalized parliamentarianism" are equally not using, for telling what kind of governing regime Romania has, the dispositions of Article 80 (2) of the Consti-***

tution, with the title "The Role of the president", which is the main indicator of substance concerning his statute, namely the statute of mediator.

1.4.5. We will come back upon this essential text, but not before making a short incursion in comparative legislation and jurisprudence, as can be found presented in the **separate opinion to CCR Decision no. 784/2012** and which shows that the texts used by constitutional judges in order to demonstrate the semi-presidential character of the Romanian republican regime are identical to those which, in the Constitution and jurisprudence of other countries, are starting points for defining parliamentary republic.

Thus, the representation to which Article 80 of the Constitution refers can be found in most constitutions of the European Union Member States – for example, Article 59, alignment 1 of Germany's Fundamental Law; Article 65, alignment 1 of the Austria's Federal Constitution; Article 120 of Portugal's Constitution; Article 126, alignment 1, corroborated with Article 133, alignment 1 of Poland's Constitution; Article 9, alignment 3, letter (a) of Hungary's Fundamental Law; Article 63, alignment 1, letter (a) of the Czech Republic's Constitution; Article 36, alignment 1 of Greece's Constitution etc. – without leading to the conclusion that those republics are otherwise than parliamentary or that their presidents would have an exclusive representation right concerning the state in foreign affairs. All the above-mentioned states are represented (engaged) in the European Council and in international relations by the prime minister.

In this regard, one can also make reference to the practice of the Polish Constitutional Tribunal which concluded, by a decision pronounced in 2001, that the "President's systemic role of 'supreme representative of the Republic of Poland' does not empower him to lead the state's foreign of European policy". Starting from provisions of Article 126, alignment 1 and Article 133, alignment 1 of the Polish Constitution, according to which the President of the Republic is the supreme representative of the Republic of Poland and the state's representative in foreign affairs, the Constitutional Tribunal drew the conclusion that these provisions confer to him a "systemic role", amounting to **"a systemic position as participant to the leadership of foreign policy within the limits of provided by the Constitution and the law"**. According to this reasoning, *mutatis mutandis,* ***the President of Romania has a role that includes him in an institutional system having distinct attributions, in which his main attribution is that of representation (in a formal-symbolic meaning) and mediation (Articles 80.1. and 80.2.), to which other attributes provided expressly in the Constitution can be added, whose nature and limits are established so that there are compatible with his main role and ensure balance, coherence and efficiency of the entire governing regime/system.***

1.5. On the basis of elements analysed above, we can present a **general point of view concerning the meaning attached to the main concepts** which we are using.

1.5.1. **The presidential republic** is a form of organization of the state in which *the President – elected by the citizens through direct ballot – is the head of the executive power (Head of Government)* without the existence of a prime minister. The classical example of such a republic is the United States of America.

In a presidential republic, the President-premier (the person who does not only preside, but also governs) has broad prerogatives, whose manifestation can be restrained by the Parliament (Congress) through law, but only within limits strictly determined by the Constitution. In the balancing mechanism between executive and legislative (*checks and balances*), the President has, on one hand, in certain fields, the full decision power, being able to even legislate by the so-called executive orders, and, on the other hand, the latitude of postponing enactment of some laws or even block them by veto. Obviously, the Parliament can also stop some of the presidential initiatives by using a system in which powers are not so much divided in terms of competences, but rather opposed, mutually weighting each other by keeping the balance between them.

1.5.2. **The parliamentary republic** is based on the *principle of separation of powers (legislative, executive and judicial), the elected representatives of the nation, reunited in the Parliament, having the exclusive competence of legislating and, thus, limiting the moving space of the executive.* When the executive legislates, it does so only on the basis of a delegation of attributions and under the reserve of further confirmation by the Parliament.

In this system, the President (erroneously or only metaphorically called "head of state") fulfils ***three roles***: *a) symbol of national identity under all forms and expressions; b) administrator of some constitutional procedures (such as the initiation of the government formation or the beginning of popular consultation in crisis situations); c) good offices and facilitation of inter-institutional and intra-social dialogue.* In all these situations, he is bound to proceed in the light of values upon which the Constitution is based, to constantly remind them to the nation and personify them.

As he is not part of any of the state's powers (and, thus, being unable to be head of the executive), the President is not part of their mutual control system. Such a control over the exercise of the presidential office is not even necessary because: a) ***when he invests with enforceable power, through his signature, the manifestations of legislative will (laws) or executive will (international treaties negotiated by the government), he does not approve but only authenticates and formalizes***; b) ***when he refuses promulgation of normative acts, ratification of international agreements or consecration of administrative decisions (for example, appointment of some ministers or proposals to appoint heads of the main prosecution offices), he does not decide, but only warns by initiating a procedure of reflection limited, in order not to become abusive, to one attempt***; c) ***when he participates to sessions of some institutions (for example, CSM) or other inter-institutional coordination structures (for example, CSAT), he does not lead (them), but only presides (them), ensuring the order and discipline of the session***. That is why the

President cannot be dismissed for a faulty exercise of his functions (as the Government can be dismissed following a no-confidence vote), but only for breaching the Constitution by exceeding competences it confers, by assuming a role he is not attributed or by refusing to exercise competences he is entrusted.

The election by the Parliament of such a President is of the nature and not of the essence of the parliamentary republic. Thus, ***in parliamentary republics, such as Portugal or Austria, presidential elections take place by universal and direct ballot, without changing the state's governing form as a result.***

1.5.3. **The semi-presidential republic** is a hybrid, whose model was born in France, in special historical conditions influenced by the personality of General Charles De Gaulle. In essence, ***such a system is characterized by the dualism of the executive power.*** There is a President, who is undertaking his activity completely separated from the Parliament (the Parliament cannot dismiss or question him, but the President cannot stop the Parliament from legislating, as he does not even have the right of entering the headquarters of the legislative bit he can dissolve it), and a Prime Minister which is, at the same time, under the President's control (he appoints him, approves his cabinet, supervises his decisions and can dismiss him, following the case) and under the Parliament's control (which gives him a mandate through a confidence vote and can dismiss him by a no-confidence vote).

In this case, the President and the Prime Minister are both members of the executive power, dividing roles in its leadership. Although he can intervene in any field of interest for the country's administration, the former mostly has reserved foreign policy, defence and national security, and the latter the economy and social assistance. As European policy (within the EU) includes both spheres, when the two executive leaders have different opinions and priorities (the so-called ***"co-habitation"*** situation), both take part to the European Councils.

The president of a semi-presidential republic is always elected by direct and universal ballot.

2 Call to History

2.1. From concepts, let us pass to history, as historical interpretation can often shed light where confusions are usually made.

The first post-communist Constitution of Romania was written, debated and adopted during the second part of 1990 and until the end of 1991, when the people were called to consecrate it by referendum. As Minister of Reform during most part of this interval, I have intensely participated to its elaboration. A new fundamental law was naturally the object of the main reform of the state and of the social organization system. That is why I can testify upon what was, what was wanted and what was achieved.

2.2. From the very beginning ***the hypothesis of a presidential republic was excluded.*** Everybody agreed that after an authoritarian regime, with a very powerful president, there is a need for a more decentralized, more pluralistic and more representative regime for a society with a complex structure.

A dispute emerged concerning the choice between a parliamentary and a semi-presidential republic; at an early stage, the idea promoted by the government, favourable to a parliamentary republic, was more successful. However, this idea entered into conflict with the option of President Iliescu (and especially of circles close to him) who pleaded for semi-presidentialism.

In fact, presidential circles were contemplating the possibility of an iron presidential fist, dressed in a semi-presidential velvet glove. The president – head of state would have been a prime minister with full executive powers and without political parliamentary control; the role of the Parliament was to be limited to adopting laws initiated by the Government.

2.3. The Government's point of view concerning the President's role and, consequently, the type of republic for which it would have to make an option, was presented in the very plenary of the Constitutional Assembly. Then, it was stated that the Government and the governing party (whose leader was the prime minister) supported ***"the parliamentary republic", as an equivalent of constitutional monarchy, with a President much like a monarch elected every four years"*** (sic!). To this, it was added that the President had to have the exact rights established for the "head" (not the "chief") of the state during Queen Victoria of Great Britain, mainly including ***the right to be consulted, the right to encourage and the right to warn***.

This proposal received the applauses of the frail opposition of that time, but divided in three the governing party's majority: enthusiasts (Roman group), revolted (Iliescu group) and perplexed (the rest).

In order to get out from the dispute's vortex, as representative of the Government, I immediately wrote, together with the national-liberal leader Dan-Amedeo Lăzărescu, an erudite historian and fine connoisseur of the British monarchy, a compromise text, in substance analogous to the Government's version, but less provocative in form, which became Article 80, the first article from the chapter dedicated by the Constitution to the institution of the President. Thus, it remained written that ***"the President represents the state"***, but without specifying where, when or in relation to whom, which shows that ***"representation" has the meaning of "symbolization"***, as well as that ***"the President mediates between the state powers and between state and society"***.

During informal discussions that followed, the Government's representative in the Constitutional Assembly's Experts Committee, Dr. Mihai Constantinescu, considered that, by using this formulation, Romania adopted

the parliamentary republic, ***as long as the President was outside the executive and, obviously, could not either legislate or be a judge, he remained without decision power, being confined to administrating procedures. All other attributions that the Constitution would have given to him had to respect these limits and be interpreted within them.*** As a result, ***the inspiration model for the Romanian Constitution in what concerns establishment of the role of the president was the British one and not the French.***

2.4. Then, during talks with the President of the Constitutional Committee, Professor Antonie Iorgovan, and with some of its members, among which Mr. Valer Dorneanu and Mr. Florin Vasilescu, it was agreed that, while in content the institutions were built according to the model of the parliamentary republic/democracy, it was no use to mention in the proper text of the Constitution the type of the republic, as it was sufficient to indicate that the state's form of organization was republican. Especially since the hybrid type of semi-presidential republic was not theoretically stabilized, witnessing several subtypes which make it closer sometimes to the presidential republic, some other times to the parliamentary republic. Therefore, ***without a clear and unanimously accepted definition of semi-presidentialism, any reference to this concept would have been useless; the important thing was the manner in which state institutions were built and how their competences were divided, how the coherence of the competences attributed to each of them was ensured, as well as that of the entire system.*** This led to the text of Article 1 (1) from the Constitution of Romania, which sounded simple: "The form of government of the Romanian state is the republic".

2.5. A new crisis in the process of elaborating the Constitution was to emerge in relation to the way in which the President had to be elected. The Government and the governing party wanted an indirect election, by the parliament, typical to the parliamentary republic. The Presidency wanted a direct election, by universal suffrage. The formula of direct election was accepted after it was noticed that it was also practiced in parliamentary republics (for example, Portugal, Austria); it was true, those were the exceptions. Only in presidential and semi-presidential republics, taking into account the extended powers entrusted to the President, direct elections are essential.

At that time, as holder of the Reform portfolio, I have also elaborated a theoretical justification of the compromise which was reached, a justification to which nobody refers today. Thus, it was shown that, ***having no executive instruments at his disposal in order to accomplish his office of mediator, an office used and becoming active especially in crisis, dispute and tension moments, the President should have a broad moral authority. Such an authority cannot be conferred but by direct election by the people. The more***

executive powers are missing, the more popular trust is needed as a factor to support authority.

Formulating these theses, I had always in mind the fear that ***the discrepancy between the President's constitutional (strategic) competences and the political power obtained through the popular vote (offering tactical temptations) would create tensions consecutive to the desire of the office holders to bring their authority to the level of legitimacy in real political terms***. In other words, that the mentioned holders would exceed their constitutional competence limits, in an attempt of turning from Mediator-Presidents into Player-Presidents. Unfortunately, all the four post-communist holders of the presidential mandate until now did this, to various degrees, the maximum level being reached by Mr. Traian Băsescu. The closest to the "job description" were President Iliescu, during his last mandate and President Emil Constantinescu. President Iohannis firmly steps on the path opened by his predecessor.

2.6. In what concerns ***special thematic competences of the President, each time it was mentioned that they occur only following the Parliament's or Government's decisions; for any interpretation in good faith, this excluded a presidential censorship right and involved only a right to an opinion.*** Regarding the attribute of presiding meetings of some institutions, when he occasionally participates to them, it was agreed as common sense to confer such a role, for simple politeness reasons (as it was argued eloquently by constitutional expert and presidential advisor Florin Vasilescu) and nothing more. The argument indeed concerned common sense but, unfortunately, common sense cannot be legislated; you either have it or not. Or, ***the laws, including the Constitution, no matter how well written they are, address to the honest and reasonable people and not to those led by malignant intension and a taste for abuse.***

2.7. Ultimately, there is no law which cannot be abused. However, additional prudence would have been necessary in order to avoid sideslips in interpreting the constitutional text. On the other hand, it is also true that any attempt of writing more detailed/explicit texts would have most probably failed, in the context of forces ratio imposing the compromise.

Anyway, all the compromises accepted at that moment could not compromise the principles set at the bases of our Constitution. They were compromised by abuses which were too easily tolerated by political parties, by the great majority of the population, by media and by academic circles, some of their representatives even deciding to offer a twisted lecture to the fundamental law, hoping to thus procure some personal advantages or, at least, wishing not to indispose some of the temporary holders of power.

3 Comeback to the Constitution

3.1. Remembering ideological debates and political fights that accompanied the process of elaboration and adoption of Romania's Constitution is important for understanding what the fundamental law of the country reads by using "historical interpretation".

There are some, of course, who would cite from the adagio of the great jurist Mihail Eliescu, saying that "the confidences of the legislator do not concern me". In other words, I could not care less about what the authors of the Constitutions had in mind or secretly discussed. What matters is what publicly emerged, what is written on the paper and what was adopted by vote. If, by putting together constitutional dispositions, institutions and power distributions result which are outlining a semi-presidential republic, all testimonies according to which what had been desired was different are of no consequence.

It might be so. Only that, objectively speaking, ***the positive constitutional law norm indicates without possibility of denial that Romania is a parliamentary republic and not a semi-presidential republic.***

3.2. I am underlining again that the essential fact in order to qualify a republic as being "semi-presidential" is the dualism of executive power, one of its heads being more important as he is directly elected by the people and does not answer but to the people during elections (President), while the other is less important, as he is appointed by the first and confirmed by the Parliament, acting under the control of both and being under the threat of dismissal by both (Prime Minister). As a result, ***in order to have a semi-presidential republic, it is necessary, among others, for the President to be part of the executive power. Or, in Romania, it is not the case***.

Article 80 (2) of the Constitution is as clear as possible: "The President exercises the office of mediation between state powers, as well as between state and society". You don't have to be very smart, not exceedingly logic, not even expert in law, in order to understand that ***a person/institution having the role of mediator between the three powers of the state (legislative, executive and judicial), cannot belong to either of them; therefore, neither to the executive one.***

Article 80 must be corroborated with Article 102, which reads: ***"The Government, according to its governing programme approved by the Parliament, ensures the achievement of the internal policy and the foreign policy of the country***." Thus, not a word is mentioned about the President.

At any given moment, a country cannot have two internal and foreign policies. According to the cited constitutional text, the only governing programme including both the internal and the foreign policy, is approved by the Parliament (and not by the President) and is executed by the Government (and not by the President or under his guidance or supervision). Therefore, (only) the Parliament exercises political control over the Government, being ultimately able to dismiss it by the procedure of no-confidence vote.

We are speaking of the same Parliament which can initiate the procedure of dismissal concerning the President, by suspending him, and which cannot be dissolved by the President but when a major political jam is reached, which makes impossible the formation of any Government in a reasonable period of time established by the Constitution. ***When the Parliament can no longer produce a Government and the country no longer has a legitimate executive, somebody must press the button to reset the game. This is, therefore, a simply procedural and subsidiary role of the President.***

As a consequence, we cannot speak of a dualism of the executive. ***Romania's executive is unitary and under a single command.*** We could at most speak about a sort of pluralism in relation to the National Bank, which has full decision power in what concerns the monetary and credit policy.

Any other competence conferred by the Constitution to the President must be interpreted in such a manner that is compatible with his main quality of mediator and with his statute of person situated outside the executive (as, in fact, outside any other state power).

3.3. According to Article 80 (1) of the Constitution, "the President of Romania represents the Romanian state", meaning the state within whose power he does belong and whose functions he does not exercise. One cannot deduce that this representation – at the same time in relations with Romanian and foreign citizens, as the law does not discriminate – has a symbolic character. As well as, only symbolic can be his quality of "guarantor of the country's national independence, unity and territorial integrity". ***How could the President actually guarantee these values, while he does not have at his disposal any executive instrument, but by symbolically embodying them and exalting them in his discourse?***

3.4. Also ***symbolic is the President's office of supreme commander of armed forces*** (Article 92.1). The text is taken over from the Constitution of the Kingdom of Romania, according to which the King was "head of the army". Obviously, it was a symbolic command, the effective head of the army being the General Chief of Staff. ***Symbols are, however, important, especially when the country goes through hard times and elements like the national anthem, the flag, the coat of arms, the President, are signs around which the people gather regardless of temporary interests or party politics.***

Even as "supreme commander", the President cannot mobilize the army unless he gets the "previous approval of the Parliament" (Article 92.2), and the urgent measures that he takes during armed aggression against the country, must be noticed to the Parliament without delay (Article 92.3); the Parliament is convened by law in maximum 24 hours from the beginning of the aggression in order to approve the President's measures.

3.5. An important indicator of the presidents' power is their capacity of dissolving Parliament. In the case of Romania, ***the President cannot proceed to***

dissolve the Parliament and call for new elections for reasons of political opportunity which he can appreciate. The Romanian Constitution allows him to do that only for procedural reasons, when it becomes obvious that the forces ratio between parliamentary parties does not lead, after several attempts, to the creation of a majority that would generate a Government (Article 89). As the country cannot remain without government, the only solution is to come back to the people and to set again the players at the start line. This is not a prerogative specific to semi-presidential republics, being witnessed in all parliamentary republics.

Precisely for avoiding such a jam situation, Article 103 (1) obliges the President to initiate the procedure of forming the Government by ***appointing a candidate for the office of Prime Minister, only after consultations that would notice the existence, or at least the probability of existence, of a parliamentary majority ready to support him.*** When a party got the absolute majority of parliamentary following elections, "consultations" will take place only with this one. In the absence of a unitary majority, "consultations" will try to identify a plural majority. This is, therefore, ***the role of "consultations" and not giving the President the possibility of imposing a Prime Minster he likes.***

The Constitutional Court established that ***the President would have the possibility of rejecting once the candidate of the winning party/parties*** making an analogy (be it also forced) with the presidential prerogative of sending back a law to the Parliament only once before promulgation. In the line of the same analogy, winning parties can also resend the same proposal of prime minister, which cannot this time be rejected, as well as the Parliament can resend the law returned by the President without amending it in the light of his suggestions. In both cases ***this does not concern a right of censorship, but "the right to warn" regarding general alleged vulnerabilities or weaknesses of the decision taken by parliamentary parties and the Parliament as a whole***.

A proof that things are like that is also the **application of the symmetry principle** backwards. Article 107 (2) states that "the President of Romania cannot revoke the Prime Minister". Or, according to the mentioned principle, if he cannot revoke him, he also cannot appoint him. ***The appointment emerges, thus, not as an opportunity decision in which the President would have the freedom of choice, but as a procedural formula which allows the beginning of the constitutional game with the purpose of forming the government, on the basis of assessing the reality of popular options resulting from elections.***

3.6. The Prime Minister appointed following this procedure must appear before the Parliament with the list of ministers and the Government Programme, in order to get the confidence vote. Only after getting this vote, the appointed Prime Minister becomes in office/operational/effective Prime Minister. ***The programme adopted through the confidence vote is to be put into execution without any interference of the President. By virtue of his mediator role, he can warn the Government concerning eventual deviations from its own programme or can encourage the latter to apply it.***

The President has no possibility of rejecting the appointment of ministers on the list submitted to the parliamentary confidence vote. Nevertheless, the ministers are taking their oath of faith in front of the President, which is a formal condition for the entry into force of their mandate. ***This apparently useless ceremony confers solemnity to the investiture act and at the same time allows the symbolic commitment of the ministers in relation to the state, represented by the President.*** *Mutatis mutandis* ***the President has the same role when he represents the state in relation to other countries or with the European Union, without having for this to decide on the content of the act whose form he fulfils in order to confer it effectiveness.***

According to Article 85 (2), "in the event of a governmental reshuffle or office vacancy, the President revokes and appoints, following a proposal from the prime minister, some of the Government's members". In consequence, ***the President can neither dismiss nor appoint a minister without the prime minister's consent.*** The Constitutional Court established that, in the case of appointments consecutive to revocations or office vacancies, the President can also refuse the appointment once, in a similar analogy with the procedure of law promulgation, without forcing the prime minister to change the proposal. Although the analogy is quite forced, because when the constitutional legislator wanted to adopt such a procedure, he expressly mentioned it, we consider that the solution is compatible with the President's mediator role. The more so, as, this time, he is called to supplement the Parliament's political control function, while the latter no longer gives a confidence vote to those ministers. (This is a pragmatic constitutional formula but less democratic and deficient under a logical aspect, while it is unequivocal under the aspect of material law, if the provisions of Article 85.3 of the Constitution are taken into account.)

3.7. Concerning **the President's attributions in the field of foreign policy** it was already discussed above, when related Decisions of the Constitutional Court were analysed [19]. We will not resume the discussion regarding the consequences of the President's direct election at constitutional level (related to the nature of the republic) and at the level of political practice (concerning the apparent imbalance between legitimacy and authority). We have already underlined the necessary arguments.

Against the widely spread thesis, in and by Romanian media, according to which the President is the protagonist of Romania's foreign policy (as, in fact, also of the national defence and security policy), we must enlist in forgery.

The Constitution calls on President to express himself in relation to this field and, at the same time, to fulfil a protocol (representation) function and a procedural function (of signing documents negotiated by the Government or authenticating the Government's "proposals"). This is all and nothing more. ***The laws that extended these attributions are unconstitutional and do not change anyway the parliamentary character of the republic. They are also largely ineffective, as their breach by constitutional holders of foreign policy (Parliament and Government) cannot be sanctioned.*** (The fact became obvious on the

occasion of the crisis generated by the initiative of moving Romania's embassy in Israel to Jerusalem or in the case of Romania's vote in the EU Foreign Affairs Council against the declaration of condemning recognition of Jerusalem as Israel's capital by the US. The President could not react but by demanding consultations, as could a moderator demand according to the Constitution.)

3.7.1. The dispute around the issue of the one called to represent Romania in the world brings into discussion **the relation between the elaboration and application of foreign policy, first of all, the accountability for the foreign policy, secondly, and the state's representation in foreign affairs, thirdly.** In an era of global interdependences, rightfully called post-Westphalian or post-national, to separate the elaboration and execution of internal policy from that of foreign policy would be a mistake; a mistake that the Constitution of Romania does not make.

In Article 102 the Constitution reads: "**the Government,** according to its government programme approved by Parliament, **ensures the achievement of the country's internal and foreign policy**". Hence, the Government, under the political supervision of Parliament, as directly empowered representative of the nation, "supreme representative body of the Romanian people and single legislating authority of the country" (Article 61) conceives and executes, programs and achieves both the internal and the foreign policy of the country. Each of them has to be coherent and, thus, unitary, also in what regards their entirety.

The consequence is that accountability for achievement of foreign policy also belongs to the Government. It is accountable before Parliament (permanently – art 109.1) and before the electorate (effectively during elections). It could not be otherwise. ***The one that executes is also the one called to answer for what he is doing.*** Nobody denies that.

To the extent to which there can be no separation between achievement of foreign policy and accountability for it, representation itself cannot be separated from achievement and accountability.

At logical level, the question is: what represents the one that does not conceive and does not achieve foreign policy? Can he represent the person (the mandator state) in an abstract manner, without any relation with the latter's action; an action representing its vital interests? It would be absurd; and a proper interpretation of law cannot lead to absurd solutions.

At legal level, the question is: can there be a right of representation without the corresponding accountability? Obviously, not! In order to be accountable, the representative must previously receive a specific mandate which he has to fulfil and according to which he will be held accountable. Such a mandate cannot be received but from the one that conceives and concretely achieves the represented policy.

Additionally, the law also has to provide a procedure of accountability. Such a procedure has to ensure coherence between the accountability of the decision-maker and that of the representative. Or, the President does not answer before the Parliament – the **supreme** representative of the Romanian people, the single and

main holder of an original right of representation, situated by the Constitution above the President – for the country's representation abroad but in case that, following committed irregularities, he is submitted to the procedures of suspension or dismissal for high treason. However, these are exceptional cases. What are we doing about smaller errors that can be corrected through less dramatic methods? Can the Government be accountable for its foreign policy but not for his representation abroad, on which achievement of the former depends? Also, can the Government answer for a representation act that it did not mandate? Finally, let us add, that, as the Parliament cannot control the President in what concerns his current activity (there are no constitutional provisions to this end), it cannot offer him a mandate. The only one with a mandate and controlled by the Parliament is the Government. Its application must be the same. ***Thus, the Government has the capacity of achieving foreign policy also in what concerns representation abroad. In this manner the coherence of foreign policy as a whole is ensured.***

At practical level, the question is: with whom do foreign partners prefer to negotiate and who do they trust more? The decision maker (Government) or the representative (the President as a simple intermediary)? The answer is self-evident: ***Romania's representation abroad cannot be separated from the need for efficiency.***

3.7.2. The conclusion does not change (on the contrary) after reading the Constitution article concerning the President's attributions concerning foreign policy. Thus: Article 91 (1) provides that "the President concludes international treaties on behalf of Romania, **which were negotiated by the Government**, (…)." Article 91 (2) provides that "the President, **following the Government's proposal,** accredits and recalls ambassadors (…)"; and Article 91 (3) provides that "diplomatic representatives of other countries are accredited by the President of Romania". That is all! The job is done by the Government. The President finalizes it with a governmental mandate. Only in this way the citizens can currently supervise, by means of Parliament, the path of Romanian policies. Because only the Government is accountable before the legislative – and only before it – for its policy; more precisely for political opportunity decisions.

From all the above, it results that ***anytime there is not a simple ceremony of signing a treaty, but political negotiations, Romania's representation abroad is the task and within prerogatives of the Government, specifically of the Prime Minister.***

3.7.3. In time, some tried to extract for the President decision powers in the field of foreign policy, from the legislation that conferred to him the role of presiding CSAT (Article 92.1 second thesis). However, this is not a decision forum, but a coordinating platform between institutions that are not hierarchically subordinated to each other. That is why it does not even directly and nominally answer to someone, but only component institutions do. Moreover, ***presiding (a meeting, a forum) does not also mean to decide or to lead.*** That is why **the Government (and no one else, including the judicial authority) cannot hide**

from accountability before Parliament invoking decisions of the abovementioned Council.

The fact that CSAT has become, from a system of coordination and collaboration of institutions lacking a common leader, a second Government or even Parliament of the country, with a semi-occult character, is not the fault of the Constitution, but the consequence of breaching its letter and spirit. It is the same kind of breach that led to the death of the "Mediator-President" and the birth of the "Player-President".

3.8. Article 100 (2) of the Constitution provides that, in fulfilling his attributions tangent to the executive sphere, the President acts through presidential decrees which have to countersigned, in order to produce effects, by the Prime Minister. Therefore, ***although, unlike the Premier, he is directly elected, the President cannot do anything in the field of foreign policy (Article 91), of defence (Article 92), of public order and national security (Article 93), as well as of awarding medals, advancements in military ranks and appointments (Article 94) without the agreement of the Government and, according to each case, the Parliament's approval.***

Legitimacy and authority seem to be misbalanced, but the fact can be explained by the fact that the President is legitimized only for the execution of a mediator mandate. This and only this is mentioned in the article "The Role of the President", the rest being only special applications of this role in limited fields. It is the conclusion that we also reach by a systematic interpretation of the Constitution. Even if the special norm derogates from the general one, they cannot contradict each other. It is impossible that the President receives special attributions that would put him in conflict of interest with his main role, thus preventing him from fulfilling his general attributions.

3.9. The Constitution is relevant, from the perspective of establishing the parliamentary character of the Romanian republican system, also by what it does not provide. Thus, even partisans of the idea according to which Romania would be a semi-presidential republic notice that "in case when a constitutional legal conflict between the two authorities (Government and President) occurs, the (Constitutional) Court could not but take act of the existence or non-existence of this kind of conflict. The Court cannot, though, establish who is right. In such a situation only the Parliament can decide, either by a no-confidence vote against the Government, or by suspending the President for breaching the Constitution." [20]. Hence, it can be deduced that the solution lies in collaboration among the two ends of the executive. Cooperation is, though, only a pious desire, which cannot be legally regulated with the necessary rigor.

In fact, the situation is quite different. The Constitutional Court does more than taking act of the existence of a constitutional legal conflict. In the very process of elaborating a conclusion that such a conflict would exist, it shows who and how it provoked this conflict; therefore, it also shows who is right and who is not, as well as in which aspect it is right or not. What indeed the Court cannot do

is to force conflicting parties to change their behaviour. Or, this is an essential aspect.

The constitutional legislator did not empower the Constitutional Court with the competence of pronouncing a final decision, as it happens in the case of the unconstitutionality of laws, because he had in mind another mechanism for solving constitutional conflict among state powers. After the motivated appeal to the Court, mediation follows – the mediating President – who brings conflicting powers into dialogue and facilitates compromise solutions. With the legitimacy conferred by his direct election and with a reputation unimpaired by partisan disputes, the President has great possibilities for solving the dispute, avoiding the radical solution of the no-confidence vote (an illusory solution, as long as the Government enjoys parliamentary majority) or suspension of the President (traumatizing from a psycho-political point of view). Multiplication and perpetuation of constitutional conflicts between state powers (especially between the judicial authority and the Government) are the precise result of the absence of a Mediator-President. The Player-President, in the context of a Constitution offering stability guarantees specific to a parliamentary republic, only amplifies conflicts and fuels the subsequent political instability.

The competences of a Constitutional Court in a parliamentary regime are insufficient in order to solve constitutional conflicts occurring in a (semi)presidential regime. However, the Constitution is not wrong; those applying it are wrong.

Therefore, ***being unable to guarantee collaboration among protagonists of the dual executive, it is preferable not to tackle the issue of collaboration, giving up an utopian mechanism exclusively dependent on the subjective attitude of power holders, in order to use a mechanism of "checks and balances", of separation and mutual limitation concerning single powers, which are mutually controlling each other in an objective manner, by counterweights, with the safety net of the Constitutional Court – President binomial. This is the meaning of the current Constitution of Romania.***

4 Conclusions

Romania is a parliamentary republic! The entire analysis above proves it.

How can we then explain the legend of the "semi-presidential republic"? A legend offering the alibi of the "common error" to an authentic pearled coup d'état by which ***republican democracy was converted into a "controlled" or "illiberal" democracy – an alternative name for oligarchy.***

After the fall of the Roman Government, in the autumn of 1991, some of the people which took part in the writing of the Constitution under the guidance of the same government and knew very well its nature, but who, in order to lessen the concerns of President Ion Iliescu, ensured him that he was offered a semi-presidential governance, noticing they were without political support, defined in their works (memoirs or scientific papers) the constitutional product otherwise than they knew it was in reality. This is partially the source of errors from

specialized literature, committed by professionals who could not be wrong, but who considered that a small formal deceit could ensure them a broad substantial comfort. (They did not forget, however, to launch "***scientific safety formulas***" such as "***softened semi-presidentialism***" or "***rationalized parliamentarianism***".)

On the other hand, the mistaken interpretation of the Constitution was perpetuated by the media. In some cases, for reasons of superficiality and incompetence. In other cases, for reasons related to interests of media moguls. ***If scientific errors have confused the elites, the media ones have intoxicated the masses.***

On such a basis, political leaders with neo-Caesarist inclinations used prerogatives offered by a so-called semi-presidential republic in order to take over the lead over the executive and the legislative and govern in an authoritarian manner. Their ambitions were served by ***partisan decisions of the Constitutional Court, which, without significant arguments or starting exclusively from the President's election procedure, decided that Romania's governing regime was semi-presidential; ultimately so, neither softened nor rationalized, but absolutized.*** We are noticing today that an interpretation error – spontaneous or provoked – led to the throwing-way of a democratic Constitution, with all the institutional guarantees it offers.

Things have gone so many years along a path parallel to the Constitution that, after its adoption, Romania had either "shadow premiers", which by the character vacuum created at the helmet of Government forced almost all Presidents to also become heads of the executive, assuming the office of head of state, as in (semi)presidential systems or "premiers without country" – without party or a real support of political parties forming the parliamentary majority – forced to divide government attributes with the President, in order to ensure stability at the helmet of power. Society accepted the situation in the context of the political culture deficit, but especially following our authoritarian communist and pre-communist traditions, which include the need for a "father of the nation", called to take over both all responsibilities and all turpitudes of citizens.

That is why the current controversies concerning the President's relations with the Government and the Parliament, or of the Government and the Parliament with the judicial authority, in reality expressing more than a total constitutional conflict and a generalized institutional jam, have at the same time a legal, political and cultural character. This makes their resolution the more important and difficult.

"If the President is elected by universal direct ballot it means that the republic is semi-presidential; if the republic is semi-presidential, it means that the executive is dual; if the executive is dual, it means that the President has precedence in the decisional process, as he is directly elected, while the Prime Minister/Government is indirectly elected." The premise of semi-presidentialism would thus be the President's direct election and the consequence, a dual executive. This is the key according to which we are supposed to read and interpret all specific attributions/competences offered by the Constitution to the President in certain concrete fields. This is a reasoning which may be seductive by its clarity and simplicity, but which does not hold in the light of interpreting constitutional texts in a correlated manner, which would allow a full and non-

contradictory application of each provision; mainly avoiding to put the President in the situation that, by exercising a competence, to become unable to exercise another. This happens when, claiming that the President is a decision-maker, the possibility of mediating among deciders of powers which are usually limiting each other is eliminated; stating that he is a player, he is disqualified as a mediator; insisting that he is one of the powers in the balance, his capacity of being the warrant of the balance (called in the last instance, when the balance is broken and self-regulating mechanism cease to function) is denied. In fact, the word "mediator" represents the key; the key according to which the President's attributions must be defined, as well as his relations with the state and society.

The current constitutional deadlock, having one of its causes also in the lack of respect for the parliamentary character of the state's governing regime, threatens Romania's stability and security. Fighting this threat involves restoring the constitutional order by coming back to the 1991 Constitution (revised in 2003), to the "parliamentary republic".

On this path, ***an essential step would be a revision of the Constitutional Court decisions that have adopted Romanian-semi-presidentialism as axiomatic, followed by a re-constitutionalization of laws that consecrated in time a (semi)presidential conception.*** Although changing constitutional jurisprudence is not an easily acceptable step from the point of view of the legal stability principle, no legal norm opposes it and ***the price paid in the case of preserving current interpretations is higher than that of changing them and coming back to constitutional normality and coherence.***

In a difficult moment for the country, the doctrine is called to support the recovery of a constitutional legal practice and of the political life. This text is only a modest attempt to this end.

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Financial Employees Participation in Enterprises and the Requirements of a Real Democracy at Work

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Abstract

The participation of employees in their own enterprises took three forms of manifestation, namely social dialogue, participation in the decision-making process and financial participation. If the first two directions were structured from a normative and institutional point of view, the way in which financial participation is materialized is still the subject of discussion.

The author presents a series of international practices regarding the financial participation of the workers in enterprises as well as the preoccupations for their promotion at the level of the European Union. At the same time, he notes that in Romania the advantages of such employee involvement are ignored despite the not very happy market situation labor force and low quality of life.

Keywords: employee financial participation, worker cooperatives, employee stock ownership plan.

1 Introduction

Nowadays, business relations within businesses are increasingly complex, taking into account the high-competitive, globalized and technological labor market characteristics.

As a result, they manage to perform economically and financially those economic agents who make the most of their growth paths, or, in particular, the human factor.

The traditional economic model based on pursuing maximization of profit by making decisions in a narrow managerial circle proves to have a number of limits in this context.

In recent years, there has been a growing need to involve employees in various forms at the global and European level in the businesses in which they operate as a way to increase their involvement in making their work more efficient, as well as the increasing of personal self-interest.

This is a desideratum of urgency also for the Romanian economic space, characterized by the presence of many multinational enterprises which through their property and economic characteristics have problems in ensuring the participation of the Romanian workers.

But even among enterprises with domestic capital one can not speak of systematic practices of engaging their employees, in any form, in organizing specific activities and taking managerial decisions.

2 International Standards and Practices on Employee Participation

At the international as well as the European level, the participation of employees in their own enterprises took three forms of manifestation, namely social dialogue, participation in the decision-making process and financial participation.

If the first two directions were structured from a normative and institutional point of view, the way in which financial participation is materialized is still the subject of discussion at Union level as well as that of the Member States [1].

More coherent and structured regulation of employee financial participation is considered imperative since "There seem to be a widespread sense that capitalism is in critical condition, more so than any time since the Second World War. One way to describe this problem is the growing influence of Capital over Labor" [2].

A solution to this problem is the promotion of worker ownership and profit-sharing in a new capitalist model ("*shared capitalism*"). The benefits of such policies that would establish a real democracy in the workplace would be the following [3]:

1. Increasing workers share of capital income is necessary to arrest the upward trend in inequality, spread the benefits of technological change widely, and prevent market capitalism from turning into an economic feudalism dominated by a small super-wealthy elite.
2. The economics of worker-ownership and profit sharing make it an efficient form of business for capitalism and way to increase workers' incomes.
3. The financial risk to workers from combining capital assets and employment in the same firm is manageable.
4. By taking a leadership role in campaigning for workers' ownership and profit-sharing unions will shift debates over labor reforms, build new expertise and union services to workers, and win allies in reforming today's capitalism.

5. The solidaristic policies and worker mobility from less productive to more productive workplaces complement shared capitalist incentives and ownership.

Employee financial participation *aims to directly engage in business growth. This can be achieved through three main models: profit sharing (in cash, staggered or in shares), individual employee share participation (shares or share options) and employee participation plans* (***ESOP*** [4]).

Also, at international level, *a number of standards* promote the creation of cooperatives in all economic sectors.

In this respect, in 2001, the United Nations published a set of guidelines "aimed at creating a supportive environment for the development of cooperatives, "citing as the impetus for the guidelines "the significance of cooperatives as associations and enterprises through which citizens can effectively improve their lives while contributing to the economic, social, cultural, and political advancement of their community and nation" [5].

A year later, *the International Labor Organization (ILO)* adopted the "*Promotion of Cooperatives Recommendation*" (ILO Recommendation no. 193 of 2002), which states that "Measures should be adopted to promote the potential of cooperatives in all countries", given the "importance of cooperatives in job creation, mobilizing resources, generating investment and their contribution to the economy" [6].

More recently, the *United Nations General Assembly* declared 2012 the International Year of Cooperatives, highlighting "the contribution of cooperatives to socioeconomic development, particularly their impact on poverty reduction, employment generation and social integration" [7].

In the United States *worker cooperatives* are most commonly incorporated as cooperative corporations, a business entity available in approximately half of the states. The rules of cooperative corporation statutes vary from state-to-state, but all have fundamental principles in common. All cooperative corporations are membership organizations where members own and control the business on a one-member-one-vote basis. All cooperative corporations contain internal capital accounts for members, where their investment in the business accumulates over time. Some states have statutes specific to worker cooperatives, like in Massachusetts, while others have more general cooperative statutes, including producer cooperatives (like Organic Valley), consumer cooperatives (like REI), and other cooperative forms [8].

Worker-cooperatives are owned and run by their members – the individuals who are also their workers. There are two foundational characteristics of worker-cooperatives: (1) worker-members invest in and together own the business, which distributes surplus to them; and (2) decision-making is democratic, adhering to the general principle of one member-one vote [9].

Worker-cooperative businesses exist in many countries throughout the world, and span a diverse range of industries. Individual worker-cooperative

businesses may include anywhere from several worker-owners to tens of thousands.

Within Europe, 1.5 million workers are co-owners of worker-cooperatives, specifically. For example, the *Mondragón federation of cooperatives* – the world's largest worker-cooperative, with over 74,000 employees [10].

Various authors have highlighted the importance of such economic and financial solutions. Thus, it has been shown that "Sharing a larger portion of company profits with employees holds significant benefits for individual workers and for the economy at large. For low-income workers, profit-sharing combats poverty by increasing workers' take-home pay. And in a broader sense, more equitably distributing income amongst workers promotes economic inclusion and increases workers' capacity to participate in the economy.

In addition to reducing income inequality by more equitably distributing earnings among workers, worker-ownership is a valuable way for workers to build long-term wealth (...). Worker-cooperatives provide a major new portion of the population the opportunity to move from rank-and-file wage worker to business owner, and to gain access to the wealth-building potential of business ownership. In this way, worker-cooperatives open a channel for wealth-building that rarely exists for low-wage or lower-skilled workers in conventionally-owned businesses" [11].

Concerning the *employee stock ownership plan (ESOP) schemes*, in United States, some studies conclude that employee ownership appears to increase production and profitability and improve employees' dedication and sense of ownership. ESOP advocates maintain that the key variable in securing these claimed benefits is to combine an ESOP with a high degree of worker involvement in work-level decisions (employee teams, for instance) [12].

At the *European Union* level, the **European Parliament resolution of 14 January 2014 on financial participation of employees in companies' proceeds [**2013/2127(INI)] there have been mentioned a number of positive aspects of stimulating such an economic policy.

For example, whereas if employees obtain from their company's owners a priority buy-out right, and are thus able to take over companies in financial difficulty, they may seek to safeguard their own jobs and this procedure may reduce uncertainty about their continued employment when there is the possibility of buyouts by other companies. Employee ownership may address company succession problems, as a company is often closed down or sold off for possible rationalisation or closure when succession is not possible. This procedure may be helpful in particular for SMEs and micro enterprises in securing the continuation of sustainable commercial operations (Preamble lit. G).

Also, employee financial participation reduces short-termism, promotes sustainability and long-termism in strategic decision-making by managers and may increase employees' interest in long-term commitment and in seeking innovative solutions in the production process. Employee financial participation can thus bring stability, development and growth while reducing risks of over-expansion leading to job losses (Preamble lit. J).

Particularly important is that workers' financial participation in their company's proceeds and, where appropriate, the associated participation of workers in decision making, can contribute to improvements in employees' job satisfaction and overall performance and motivation. It can also encourage employees to develop a sense of ownership and a better understanding of their company as well as enhance mutual respect between employers and employee (Preamble lit. L).

The European Parliament resolution calls on the Commission and the Member States to consider appropriate measures to encourage companies, acting voluntarily, to develop and offer Employee financial participation schemes, open to all employees on a non-discriminatory basis, taking into account the specific situation of SMEs and micro-enterprises (pct. 11).

Likewise, Employee Financial Participation (EFP) can also be a form of bonus for the employee, through capital participation or specific bonds, depending on the financial product used and the type of company in question (pct. 12).

But any measure relating to the financial participation of employees in company income should be sustainable in the long term and be based on the principles of voluntary participation, equality among workers and due diligence, especially for SMEs (pct. 13).

However, it is stressed that, despite the EU's recognition of the usefulness of EFP systems, *this area is not a Union competence*.

The conclusion in the resolution is, however, critical. As mentioned, the two other components of employee participation in labor relations (social dialogue and participation in decision-making) have been regulated at the level of directives and regulations. It is desirable that the financial participation of the employees should be structured at the level of a European normative act as European Unions itself promotes the social market economy.

There is also the opinion that "A European Framework Directive would establish the minimum mandatory requirements to be implemented by Member States within a certain period of time. Being a hierarchical approach the flexibility for national actors to deviate from these requirements would be relatively law. By defining only basic aspects-e.g. general European guidelines-European Directives may provide flexibility to follow previously agreed standards. This could be a first move towards a common European fiscal treatment of EFP not previously available at EU level" [13].

3 Financial Participation of Employees in Romania

In Romania, there is no strategy regarding the involvement of workers in the shareholding of the enterprises in which they operate. Also, in the literature no opinions or debates on this subject were launched, a paradoxical situation since the country faces a labor shortage, low productivity, and a quality of life level of the lowest in the European Union.

Also disadvantaged by the common mentality that cooperatives are associated with former forms of production existing in Romanian agriculture

before 1990, the number of these associative structures in the various economic branches is insignificant.

The historical experience after the change of political regime in December 1989, reflected in the *Law on the privatization of commercial companies no. 58/1991* [14]. and which provided for the distribution of ownership certificates for use in the change of shares of commercial companies proved to be a failure due to the imperfections of the law, insufficient economic education of the population and corruption that prevented the effective application of the normative principles.

Emergency Ordinance no. 88/1997 on the privatization of commercial companies stipulated, at art. 16, that in order to acquire the right to own property for shares issued by a commercial company to which the state or a local public administration authority is a shareholder, the employees, the members of the board of directors or the retired persons with the last job at that company may form associations.

The current economic and financial realities, as well as the numerous legislative amendments, make the present normative framework not in line with the real requirements of the Romanian society.

In this respect, stimulating the self-interest of the workers from the local economic units through multiple levers, including by direct participation in the ownership schemes of the enterprises where they operate by taking over the good practices existing in other states, would be able to contribute to both the diminishing of the labour force crisis is already manifested, but also in the increase of the motivation at the workplace, that of the productivity, an indicator to which Romania does not excel at European level.

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Trade Fund and Affected Patrimony

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Abstract

The interest, utility of the concept of "fund of commerce" is based on general aspects, but especially on specific economic, legal considerations, in which there are natural or legal persons qualified as professional-traders. Thus, the fund of commerce, an essential element of the professional-trader's patrimony, is a reality that cannot be ignored, even though the legislator did not set up a special normative framework that corresponds to the traits of commerce, features that are mainly celerity and security transactions.

Keywords: fund of trade, good will, patrimony of affection, competition, customers.

1 Introduction

The uniqueness of private law on the basis of monistic theory and, as a consequence, the abandonment, the abandonment of the separation between civil law and commercial law, has affected some of the concepts, traditional institutions of commercial law, including the "commerce fund".

The interest, utility of the concept of "fund of commerce" is based on general aspects, but especially on specific economic, legal considerations, in which there are natural or legal persons qualified as professional-traders. Thus, the fund of commerce, an essential element of the professional-trader's patrimony, is a reality that cannot be ignored, even though the legislator did not set up a special normative framework that corresponds to the traits of commerce, features that are mainly celerity and security transactions.

On the other hand, in the context of the free movement of goods, services, persons and capital within the European Union, the concept of a 'trading fund' is necessary in the context of the European Union, which requires the exercise of economic/commercial activity by natural and legal persons under conditions of competition law loyal (honest).

However, under the competition rules an important role is played by the protection of the whole trade fund and its elements (company, emblem, customers, etc.). In fact, the Romanian legislature, in Law no. 11/1991, on the fight against unfair competition, amended, provides the facts of unfair competition referring to the firm, the reputation of the trader, the goods (products) of a trader, the trader's customers. [1]

Although the legislator, through the adoption of the Civil Code [2] and its Implementing Law [3], wanted to remove any link with commercial law and, implicitly, with commercial matters, however, commercial relations and some specific legal institutions are realities that the legislator himself cannot ignore them. The common regulatory framework, i.e. the Civil Code, cannot fully cover the particularities, specificities of the commercial matter, so that sometimes they cannot be applied to your legal status of the professionals or the legal relations between them, whether they are professionals -traders, whether they are non-traders.

The research we are making specifically refers to the legislative and doctrinal dilemma with a judicial project on the necessity of the concept of "trade fund" in the context of the current Civil Code defining the patrimony, the patrimony of affection, the individual professional patrimony.

In other words, is the concept of "trading fund" necessary or is the notion of "patrimony of affection" sufficient?

In order to answer this question, it is obviously necessary to consider the following aspects:

2 The Legal and Conceptual Framework of the Trade Fund. Retrospective and Actual Review

Under Romanian law, the concept of "trading fund" was used by the legislator in the Commercial Code (Article 861 applicable to the bankruptcy procedure, repealed by Law no. 64/1995), in art. 21 and art. 42 of the Law no. 26/1990, republished, regarding the Trade Register, as well as in Title VI of Law no. 99/1999 on measures to accelerate economic reform [4].

At the same time, the concept of "trading fund" was defined by the legislator in Law no. 11/1991, amended, on combating unfair competition [5]. Thus, according to art. 11 lit. c), currently abrogated, "shall constitute a trading fund all the movable and immovable property (tangible assets, trademarks, patents, patents, commercial documents) used by a trader for the purpose of carrying out its business". So, for the first time in our legislation, the legislator defined the fund of trade, even though, in our opinion, the definition was not complete.

The "fund of trade" concept [6], however, exists in the accounting regulations that provide that it is part of the "goodwill", a goodwill in which the so-called "goodwill" [7] of the Anglo-Saxon law or the French-, is substantially influenced by the trade fund, in its entirety.

Consistent with the rules of European law, particularly with the 4th European Directive on the annual accounts of 25 July 1978 [8], there is no distinction between the "trading fund" and the goodwill from the economic, accounting point of view.

Under Romanian law, from an accounting point of view, the embedded goodwill is recorded in the asset's balance sheet, elements that are related either to the client, such as: fidelity, number, customer quality of the traders, prospects for its development; elements relating to the quality of suppliers, delivered products or services rendered; elements related to the employees and the quality of the relations between the employees (employees/workers) and the management of the enterprise; elements related to the enterprise heritage: real estate, mobile, reputation of trademarks and products, in general, intellectual property rights.

These elements of goodwill are not homogeneous, some are specific to the notion of enterprise (such as the human factor), others are specific to the notion of patrimony, i.e. immovable, movable goods that are affected by the trader's activity), so that the fund of commerce as part of goodwill, appears as a complex, autonomous concept that cannot be confused with the enterprise or the patrimony of affairs or other legal or economic concepts.

Under French law, the Law of March 17, 1909 contains trade fund regulations, provisions which are limited to laying down a few rules relating to its sale, warranty and traceability. The legislator uses the expression "fund of trade", especially in tax matters [9].

Consequently, from a conceptual point of view, the trading fund consists of a totality of movable and immovable, tangible and intangible assets used by a professional for the purpose of carrying out his business.

The existence of intangible assets: the company, the emblem, the customers, the commercial vendor, the intellectual property rights (lato sensu), the industrial property right (stricto sensu), goods with a particular special legal regime determine us to say that it is necessary to conceptualize the fund trade distinct from the patrimony of affection.

Thus, both in commercial law and in business law, the legal aspects of the customer base (as a component of the commodity fund) are generally known, especially in the case of collective shops in which it is absorbed by commercial vendors, or where there is legal and material dependence on a trader's customers for the existence and customers of another trader (such as shops located in stations, petrol stations, parks, etc. where it is clear that there is a legal dependence of a merchant's customer on another merchant who exploits his activity in that space).

Also, from a legal point of view, it cannot be argued that the professional (trader) would have a subjective right over the customers, even if it is based on some stable customers reflected in the turnover and assessed if the fund is being leased or leased of trade.

The existence of these peculiarities, specificities of some elements of the trade fund impose the notional existence of the trade fund, distinct from the patrimony of affection.

3 The Legal Nature of the Trade Fund

In the Romanian and French specialty doctrine, the commerce fund is qualified as a universality with an independent identity that does not reduce itself to its elements.

Establishing that the fund of commerce is a universality, which means that it has an identifiable identity and does not reduce itself to its component elements.

By establishing that the fund of commerce is universality, the following consequences can be explained automatically [10]:

a) the fund itself may be the subject of contracts for consideration or free of charge, may be the object of a security, etc. Such contracts are different from those which affect the elements of the commodity fund (i.e. contracts for the transfer of industrial property rights).

b) qualifying the fund as a universality, its component parts can be sold, transformed, destroyed, etc. Thus, the goods can be replaced, the emblem can be modified or completed, etc.

The trading fund exists at all times in the existence of the enterprise as a stand-alone entity.

However, the fund is not regarded as a patrimony, it remains as a component of the patrimony, together with its other elements.

c) the commerce fund is a factual universality and not a legal universality.

In this respect, there are two theories in French doctrine.

According to the first theory, the trade fund is a juridical universality, constituting a distinct, distinct patrimony. The Trade Fund consists of a mass of goods united by a common affair. It is not a simple accounting or fiscal patrimony, but a patrimony of affection. According to this theory, the trader has two heritages: a civilian patrimony and a commercial patrimony, represented by the trade fund.

The consequences of this theory consist in the fact that the asset will be affected by the payment of the commercial liability. In case of assignment, it will be passed to the transferee at the same time as the passive. The Trade Fund will be subject to traceability by "commercial" lenders, who will be satisfied with priority (preference) towards civilian creditors.

This theory is criticized, first of all, on the grounds that, for now, the positive French law enshrines the theory of heritage uniqueness. A natural or legal person may have only one patrimony.

However, in French law there are arguments in justifying the theory of the universality of the law of the trade fund. The right of bail (use on the space in which the fund is exploited), export licenses, labour contracts, all can be transmitted. Also, the transmission of tax debts, the existence of financial and fiscal autonomy expressed in the balance sheet, the creation of a limited liability company with a sole associate, are examples on which the theory of the existence of a patrimony separation is based.

According to the second theory, the fund of commerce is only a factual universe of goods brought together by a de facto connection, in order to affect their common purpose: the exercise of a definite trade. Thus, each element retains its own individuality.

This theory is consistent with both French and Romanian law (Article 541 C. Civil). Thus, according to this legal text, universality actually represents the whole of the property belonging to the same person and having a common destination established by its will or by law. The goods that make up the universality in fact can, together or separately, be the subject of separate legal acts.

Moreover, the fund of commerce is actually a universality. This conclusion is based on the legal argument that the trading fund does not have an asset and its own liability, the debts and receivables being components of the merchant's patrimony and, in no case, of the commodity fund [11].

However, in practice, given the immediate interest in exploiting the goodwill, the transferee has an interest in taking over the contracts concluded by his predecessor without, however, being obliged to do so. Thus, the contract can be taken over by the transferee with the object of supplying electricity and water supply, telephone calls, employment contracts, etc.

Therefore, the transmission of such contracts does not operate ipso facto by simply transferring the fund of commerce.

The idea of universality is in fact shared by the legislator and results from the interpretation of art. 541 civ.c. ["(1) In fact, the universality of goods belonging to the same person and having a common destination established by its will or by law is constituted by the universality of fact. (2) The goods which make up the universality in fact may, jointly or separately, be the object of acts or separate legal relationships."], art. 745 civ.c. ("Unless otherwise stipulated, the usufructuary of a fund of commerce cannot dispose of the assets that make up it. If it has these goods, it has the obligation to replace them with similar ones and of equal value."), Art. 2368 civ.c ("The conventional mortgage on the universality of movable or immovable property, whether present or future, tangible or incorporeal, may be agreed only in respect of the assets affected by the business of an undertaking."), Art. 2391 par. (4) civ.c. ("When the mortgage carries on a universality, the contract must describe the nature and its content."), Art. 2393 civ.c. ("A purchaser of a good in the ordinary course of business of an enterprise which alienates goods of the same kind acquires the good free of mortgages constituted by the alien, even if the mortgage is perfect and the acquirer knows its existence."), Art. 2638 par. (2) civ.c. ("It is considered that there are such links with the law of the state in which the debtor of the characteristic benefit or, as the case may be, the author of the act has, at the conclusion of the act, as the case may be, the habitual residence, the fund of commerce or the registered office. 340 lit. (c) ('Goods intended for the exercise of the profession of one of the spouses if they are not part of a commodity fund which is part of the commodity community').

d) The Trading Fund is also considered as an integral mobile asset, subject to legal regulations specific to movable goods.

Although the legal qualification is "good mobile", however, some rules of the commerce fund are inspired by real estate techniques. For example, the provisions regarding the guarantees on the trading fund, respectively the mortgage. Under Romanian law, the legislator provides for real movable securities, including the goodwill, considering it in this respect a movable asset.

Because it is qualified as an embedded mobile asset, the fund of commerce does not exist by itself in itself. It lasts only as long as it is exploited, its existence being less stable than that of a corporeal asset.

The legislator, through Law no. 11/1991 modified by Law no. 298/2001, has somewhat solved the controversy in the specialized doctrine regarding the inclusion of immovable assets in the real estate market, with the undeniable possibility that the buildings are part of the trade fund.

Even though this definition is not complete with regard to the elements of the fund of commerce, however, the indisputable merit of the legislature is, on the one hand, to provide for the first time a legal argument with regard to the concept of 'trading fund' and, on the other hand, to definitively settle the existing controversies over time, both in the specialized doctrine and in the judicial practice, regarding the inclusion or exclusion of real estate from the trading fund [12].

The inclusion of real estate in the trading fund does not fully solve the problems that arise in practice with regard to dispute settlement competence: if it belongs to commercial courts in all cases, specialized courts now resolve disputes between traders, irrespective of the subject matter of the action, or of the civil courts (the clerks dealing with other civil litigation).

In our opinion, whenever the buildings are affected by the activity of the professional-traders, the resolution competence should belong to specialized courts or "specialized" courts of law in the settlement of disputes between professional traders.

Although the real estate is part of the trading fund, however, it is qualified as "embedded mobile good" to be subject to the general regulations on movable assets, plus the provision in Art. 21 of Law no. 26/990 republished, with the subsequent amendments and completions, regarding the making of the mention in the trade register of the operations of donation, sale, hiring or establishment of real movable collateral.

If the proprietor alienates the fund to a person and the real estate in which another person has virtually been lent, there is no regulation by which the acquirer of the fund will keep the site and exploit it. On the other hand, if the landlord sells the property the fund holder uses under a tenancy agreement, this contract is opposed to the new acquirer until the expiration of the term if the contract was concluded in a bad form.

4 The Trade Fund and the Affectation Patrimony

As I have said, the fund of commerce is not confused with the patrimony of affection even though elements of the trade fund (movable, immovable) may be components of the patrimony of affection.

The general legal framework, common to the concept of "patrimony of affection" is art. 31 civ.c. [13] (NCC) text which enshrines the principle of the uniqueness of the heritage composed of rights and obligations assessed in money (with economic, pecuniary, s.n.) (paragraph 1); the possibility of dividing the patrimony into patrimonial masses, as well as the possibility of an affiliation under the law (paragraph 2); definition of the patrimony of affection, rights, obligations and goods of economic value those affected by the exercise of an authorized profession, as well as fiduciary property treasuries.

For authorized professions, the legislator stipulates in art. 33 par. 1 civ.c. the concept of "individual professional heritage" composed of the patrimonial mass of the individual exercise of an authorized profession, constituted by the act concluded by the holder (which may be a statement) in the form stipulated by the law.

The special legal framework for professionals – natural persons (traders) is represented by Government Emergency Ordinance no. 44/2008 [14], in which the legislator defines the patrimony of affection in the case of the authorized individual, individual enterprises and family enterprises as "patrimonial mass within the patrimony of the entrepreneur representing all the rights and obligations affected by written declaration or, as the case may be, by the constituent agreement or by an addendum to it, to the exercise of an economic activity" [Article 2 (j)].

Analysing the content of the legal tests quoted there is only one conclusion, namely: the commerce fund does not contain rights and obligations even if some contracts are transmitted (to the transferee of the trade fund) while the patrimony of affection is characterized by the presence of valuable rights and debts (with economic value).

In other news, there may be commodities, goods that can be included conceptually in the patrimony of affection (for example, an office building).

Even if the legislator renounced the definition of the commerce fund, in the sense that the concept of patrimony is sufficient, however, this is not enough.

Moreover, the existence of the concept of "trading fund" is relevant from the point of view of the constituent elements, mainly of the customers, of the commercial vendor, of the trader's reputation, elements that are influenced by the entire trading fund, in its complexity.

Under these circumstances, one cannot claim that a so-called customer (its own customers) is influenced only by the patrimony of affection.

Also, the customers, the commercial vendor or the "achalandage" that is the capacity of the entire trade fund to attract customers, which depends both on objective and subjective elements, from a notional point of view, are not elements of the patrimony of affection.

Thus, by analysing the concept of commercial vat, the real estate in which the activity is exploited may at the same time be an element of the patrimony of affection and of the commerce fund, but the quality of the products, the quality of the services provided by the employees (professional) trader or non – are part of the patrimony of affection. These are specific to the trading fund.

5 Operations on the Trading Fund

5.1 *General Aspects*

In Romanian legislation, there are currently two provisions that expressly refer to legal transactions on the trading fund.

First, the provision in Art. 21 of Law no. 26/1990, republished with the subsequent amendments and completions, text in which the inter-vivos legal acts are laid down on the fund of commerce: "in the trade register shall be entered the terms referring to the donation, the sale, the locality or the real security on the fund trade, as well as any other act by which changes are made to the records of the trade register or that stops the company or the fund of commerce".

Thus, the legal transactions that can be made on the trading fund are mainly: the sale, the donation, the rental and the real security collateral. Although the law does not expressly provide for it, however, there is another legal operation, namely the contribution of the fund to the company (as a private sale).

These legal acts may have as their object the trade fund in its entirety or only tangible or intangible elements (with the exception of the company that can only be alienated with the trade fund).

Secondly, the transfer of the trading fund, according to art. 41 of the Law no. 26/1990, is made by will or legally inheritance. Thus, according to this legal text, "the acquirer of any title of a trading fund may continue to work under the earlier firm, which includes the name of a natural person trader or an associate, a family association, collective or simple partnerships, with the express consent of the previous holder or his successors in title and the obligation to mention the successor in that company. The retention of the previous firm is permissible for the joint stock company, the limited partnership or the limited liability company, without the requirement of mentioning the succession report. "Where the firm of a limited liability company includes the name of one or more associates, the provisions laid down for the natural person, associate of the family business, collective partnerships, limited partnerships, the provisions of art. 41 contain not only an advertising obligation but also certain conditions that the acquirer of the fund must fulfil, namely a condition of form, advertising and two substantive conditions, one related to the commercial name (firm) which must include the "successor" of the acquirer of the fund of commerce and the second, the express consent of the previous holder or of his heirs.

Formality of publicity is required to ensure the legality of the juridical act against third parties and, in particular, to protect the rights of the creditors of the trade fund transferor.

Regarding the conditions of validity of the substantive and legal form of the completed legal acts, these will be subject to general regulations in the matter, as up to now, the Romanian legislation does not contain provisions of a special nature, which will only concern the fund of commerce.

5.2 *Selling the Purchase of the Trading Fund*

In the absence of special regulations, derogations from the common law, the sale is subject to the rules governing the sale of movable property, provided that the advertising is carried out, provided by Law no. 26/1990.

If the real estate (building) in which the fund is exploited is alienated with the fund, it will, of course, be subject to the rules of the Civil Code on the sale of immovables, including publication in the land register.

If the sale includes land belonging to the building where the commodity is exploited, according to the Civil Code, the act of selling the purchase must end in authentic form.

If the trade fund is sold in its entirety, receivables and debts are not passed on to the acquirer (the buyer), because they are not components of the trading fund [15].

Conversely, in practice, labour contracts concluded by the seller with his employees, electricity supply contracts, etc., necessary for the continuation of the buyer's business, as well as other contracts necessary for the continuation of the activity by the acquirer of the trading fund, may be communicated to the buyer.

The seller's obligations, namely, the surrender of the sold asset and the collateral against eviction, materialize in the handing over of the titles relating to the intangible elements of the fund of commerce, the delivery of the tangible elements and the obligation the seller undertakes not to disturb "The buyer through a personal fact of competition qualified as unfair".

As a rule, in the contract, the parties provide for a non-compete clause by which the acquirer (the buyer of the fund) commits itself to the seller not to engage in the same activity in a neighbouring space, because he would be deprived of customers who, they are usually supplied with merchandise or benefit from the services in the store (the trading fund) sold.

The warranty obligation for eviction (if a third-party claim to have a trade mark right), an obligation on any seller exists also in the case of the sale of the trading fund; an eviction that may stem from a personal fact of the person who claims to have a right over the trading fund (in its entirety) or only with regard to certain elements of it.

According to art. 1695 C. Civ., The vendor is legally obliged (by virtue of law) to guarantee the buyer against the eviction that would totally or partially prevent him from mastery of the sold asset. Regarding the moment when the

eviction occurs, the legislator distinguishes between the act of eviction coming from a third person and the one from the vendor himself.

As regards the third party, the guarantee is owed by the seller only if the claims are based on a right born prior to the date of sale and which was not brought to the attention of the buyer by that date.

Instead, if the eviction comes from the vendor itself, it also responds to the facts that arose after the sale.

The seller, as the case may be, also has the obligation to guarantee the "useful" use of things. If there are corporation assets in the trading fund that is the subject of the sale, the guarantee for the defects of these things operates under the provisions of the Civil Code (Articles 1707-1718), and in particular Art. 1716 – 1718, which provides for a guarantee for proper functioning.

As regards contractual liability for non-performance, both the seller and the buyer are subject to the provisions of the Civil Code on the sales contract, supplemented by those relating to contractual liability in general (Article 1350 et seq.). Regarding the effects specific to syntagmatic contracts, obviously, the provisions regarding the termination or termination of the contract, the exception of non-execution, the contractual risk will apply.

If one of the parties fails to perform its obligations while the other party has executed its obligations, the latter may request that the contract be terminated or terminated or terminated.

As a novelty of the Civil Code is the institution of direct execution, regulated by art. 1726, by taking over from the Commercial Code of the co-operating enforcement institution. According to art. 1726 of the Civil Code, if the purchaser of a movable item does not fulfil its obligation to take over or pay the price, the seller has the ability to deposit the paid work in a warehouse, at the disposal and at the purchaser's expense, or sell.

The terms of sale are detailed in art. 1726 par. 2 Civil Code. Highlighting this provision is important when selling with the fund or separate tangible movable property.

5.3 *The Contribution of the Trade Fund to Society*

The Fund of Trade may be a contribution to the share capital of a trading company, being a contribution in kind of embedded good. The holder of the trade fund, who associates with another person or other person to form a commercial company, undertakes, by the constitutive documents of the company, to transfer the right of ownership or only the right to use the fund of commerce and, obviously, to hand it over to the company.

The company's share of the fund is different from its sale because, in the case of the contribution, the shareholder receives shares or shares instead of the fund, as long as the sale is received from the buyer (acquirer) the price of the fund of the merchandise sold.

5.4 *Placement of the Trading Fund*

Another legal transaction involving the fund is the lease (lease).

The placement of the trading fund is governed by two categories of legal rules:

– the legal provisions of the common law, respectively of the Civil Code (Article 1777 1823);

– the legal provisions of a special nature, stipulated in art. 32 of the Law no. 15/1990 on the reorganization of the state economic units as autonomous production and commercial companies and the provisions of GD no. 1228/1990 on the methodology of concession, lease and location of management [16].

A special application for the leasing of a trading fund is the management location that may have as its object sections, factories, factories or other subunits of an autonomous corporation or a state-owned company [17].

If the lessor is not at the same time the owner of the real estate in which the fund is exploited, a lease shall be concluded for the immovable property distinct from the contract on the lease of the fund of commerce.

Obligations specific to the lessee of a trade fund consist in using it according to the economic purpose or specialization of the respective trade fund and, obviously, the prohibition of any fact or act of competition that would damage the rights of the lessor.

5.5 *The Real Security Guarantee on the Trading Fund*

The fund of commerce, either as a universal universe or as an embedded mobile asset, may be subject to a real security guarantee, currently governed by the provisions of the Civil Code, repealing the provisions of Law no. 99/1999 on measures to accelerate economic reform [18].

Analysing the provisions of the current Civil Code, we notice, as legislative novelty, that the fund of commerce – as a universal universality, but also as an incorporeal asset, irrespective of its qualification (legal nature) may be the subject of a mortgage.

This conclusion is based on the provisions of the Civil Code on the mortgage, on the one hand, and on the pledge, on the other. Thus, the visible difference in regulation between the mortgage and the pledge relates to the subject matter of the guarantee. If the pledge can only concern tangible movable or negotiable securities issued in materialized form, the mortgage may have as its object the universality of goods. An important explanation regarding the formation of the mortgage is based on Art. 2368 Civil Code, according to which the conventional mortgage on the universality of movable or immovable property, whether present or future, tangible or incorporeal, can be constituted only in respect of the assets affected by the activity of an undertaking. But the fund of commerce, by definition, is constituted for the conduct of business.

Thus, according to art. 2350 par. 2 C. Civil "mortgage" can strike determined or determinable goods or universality of goods. According to the

opinion expressed in the specialized doctrine [19], to which we are rallying, the cited law refers to the factual universality and not to the juridical universality, knowing that the universality actually contains only goods and, in no case, debts (rights) and debts obligations). With regard to the real subrogation, although it is claimed to be inoperative in the case of the universality of the mortgage [20], however, in the case of the fund of commerce, if the goods (fund components) are alienated, the mortgage is shifted over the price obtained from the sale. The legal basis of this conclusion is Art. 2392 C. Civil, the text according to which "the mortgage extends to the fruits and products of the mortgaged mobile property, as well as to all the assets received by the constituent following an act of administration or disposition concluded on the mortgaged property. It is also considered to be a product of the mortgaged mobile asset that replaces it or in which its value is passed ".

This provision of principle is corroborated with that contained in art. 2393 in which the legislature specifically refers to the acquisition of a good in the normal course of business of an undertaking which alienates goods of that kind and the mortgage is shifting to the price or other property resulting from the alienation of the mortgaged property (Article 2393 paragraph 2). To the mortgage, which deals with universality, the mortgage contract must also describe the nature and its content. Concerning the form of the mortgage contract art. 2388 C. Civil stipulates that it must be concluded in authentic form or under private signature, under sanction of absolute nullity. Genuine form is an "ad validitatem" condition whenever real estate is also found in the mortgage market. This conclusion results from the interpretation of Art. 2378 par. (1) C. Civil. 4.5.1. Publicity of the mortgage on the commercial fund According to art. 2413 C. civil, registration of real estate mortgage operations is performed only in the Electronic Archive of Real Securities Guarantees. If the fund of commerce on which the mortgage is constituted, it also contains immovable property, it must be entered in the land book 2377, paragraph 2) [21]. As with other legal acts (transactions) in relation to the trading fund (sale, donation, lease), the real security deposit must be mentioned in the Trade Register [Article 21 letter a) of Law no. 26/1990, republished, as amended previous and subsequent additions].

6 Conclusions

The concept of "trading fund" is necessary under current regulations that enshrine the uniqueness of private law.

There are current existential legal certitudes about the trade fund highlighted in the study's content.

As uncertainties – the lack of a legal concept, of a legal institution on the trade fund, which is why we consider that it is necessary to regulate the concept of "trading fund", highlighting a definition for the trade fund.

The actual existence of the independent trade fund for the establishment of the patrimony of affection.

Existence in the patrimony of the trade or non-commercial professional (liberal) of the trade fund: company, emblem, customers, etc. even if it was not the patrimony of affection.

Existence of particular regulations regarding the operations on the trading fund, including its publicity by mentioning in the Trade Register.

The existence in the patrimony of the professional trader, nonmerchant of some goods, in particular, real estate, which are not intended for the current, ordinary activity of the activity.

The competence to settle disputes, courts or specialized departments to settle disputes between professionals or civil law courts is another problem that would be solved if there was a legal concept of a "trading fund".

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sality of movable goods, including a content fund and its characteristics will be determined by the parties up to the date of the actual collateral, in which case it is not necessary for the parts constituting the assets affected by the collateral to be in a state of functional interdependence.".

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The New Regulation of the RST[1] in Romania – Comparative Analysis Between RST and Micro-Entrepreneur

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Abstract

The entrance into force of the Law no. 186/2016 recently modified the legal status of the Registered Sole Traders of Romania. The new regulation wishes to clarify the legal status of such companies and furthermore distinguish it from the Sole Proprietorship status. The present study also wishes to underline the resemblances and differences between the legal status of the RST in the Romanian legislation and the legal status of the Micro-Entrepreneur defined by the French legislation, given the possibility of the European citizens to establish their economic activity anywhere on the territory of the European Union.

Keywords: Registered Sole Trader (RST), economic enterprise, Micro-Entrepreneur, legal status in Romania and France.

1 Introduction

Given the necessity of regulations that do not bring prejudice, but encourage the business environment in Romania, both by reducing the administrative procedures of incorporation and by simplifying the methods by which to undertake economic activities without having to incorporate a company, as they are regulated by the Law no. 31/1990, and thus not resorting to creating a self-standing legal entity with its own assets, legal personality and an activity different from the natural person whom is actually operating the activity of economical substance, the legislator created the institutions of Registered Sole Trader, Sole Partnership and Family Owned and Operated company, thus regulated for the first time in the Emergency Ordinance and Government Resolution 44 of 2008.

[1] Registered Sole Trader.

Mainly, the legal status of Registered Sole Traders (herein after RST) of Romania, concept which makes the point of the present study, is regulated by the Emergency Ordinance and Government Resolution 44 of 2008 regarding the operation of economic activities by Registered Sole Traders, Sole Partnership and Family Owned and Operated companies. This regulation has been subjected to many amendments throughout time, but the most recent and significant was brought by the Law no. 182/2016 (entered into force in January 2017) which aimed to firstly better define RSTs with regards to the other economic activities regulated by the Government Resolution no. 44/2008 (especially with regards to the Sole Partnership), but mostly to harmonies the present regulation with the Civil Code entered into force in 2011. Thus, although the present regulation does not resolve all of the issues raised by theoreticians and practitioner regarding the legal status of RST, it does bring a great step forward into the harmonization of the Romanian legislation.

The concept of RST is regulated throughout the entire European Union, and each state has its own legislation of the matter. Given the possibility of European citizens to settle and work on the hole territory of the Union, the member countries have leavened the possibility for the citizens to undertake economic activities under these forms of organization, regardless of their citizenship. Thus, we find it appropriate to analyze the regulation in Romania and France regarding the possibility to incorporate and undertake economic activities through RST, respectively Micro-Enterprise in French law.

In the following development, we shall firstly analyze the main amendments made to the legal status of RST in Romania in 2017 and later we shall analyze the main differences and resemblances in between the Romanian and the French regulations.

2 Main Amendments Made to the RST Regulation

One of the changes brought by the Law no. 182/2016 to the Emergency Ordinance and Government Resolution no. 44/2008 regarding the operation of economic activities by Registered Sole Traders, Sole Partnership and Family Owned and Operated companies, refers to the express defining of the legal status of RSTs. Thus, by amending article 2, letter i), the legislator states expressively that the Registered Sole Trader is an economic enterprise *without* juridical personality. This clarification was necessary in order to allow all interested parties to foresee and understand the consequences of the legal standing of such enterprises, thus complying with the general principal of the precision of the legislation. Although the old regulation made no reference, however we believe that the lack of juridical personality emerged by the non-compliance by the RST to all of criteria needed in order to acquire juridical personality – according to art. 187 Civil Code, these are: the existence of sole standing organisation, own assets and a licit, moral purpose, in accordance to public interest. Taking into account that RSTs do not function independently from the entrepreneur himself, the only legal requirement met was that of a lucrative purpose.

In order to underline this idea, the legislator redefines art. 2, letter j), the patrimony of affection, in order to better define its character of a division of the general patrimony of the entrepreneur. It is mainly a juridical universality constituted by rights and obligations affected to undertaking economical activities, and having as sole ground the expressed will (by written declaration, articles of constitution or addendum) of the entrepreneur. Although conceptually there is identity between the new and old regulation of the definition, we must stress out that the old one accentuated the limitation of the unsecured creditors rights to the fraction of the patrimony that was not meant to undertake economic activities.

Remaining in the same area of nuance adjustments, we may observe that the notion of "economic activity", regulated by art. 2, letter a), has changed. By the new regulation, the legislator reduced – but only formally – the definition of economic activity to "an activity with lucrative purpose, consisting of producing, administrating or alienating goods or providing services". The economic activity that RSTs can undertake can still be one of commerce, or production or providing services or any other nature that is not forbidden by special legal acts or is not attributed to liberal professions. [1]

By the Law no. 182/2016 as a novelty, in art. 2 is introduced the letter j^1), where the legislator clearly defines the concept of "registered office". If the original form of the Government Resolution only defined operational offices and the legal requirements in order to establish a place as a registered office, in the current form, it is defined by letter j^1) and is regulated as being the main office of the enterprise, such declared with the Trade Registry, in order to register and allow functioning. We consider that such regulation was needed in order to define very clearly the notions of "operational offices" and "registered offices", given that the latest is a genuine element in order to identify the enterprise in the legal relationships that it undertakes.

The notion of "economic enterprise" was not substantially modified in the new regulation – we may see that the legislator removed from the expression "attracted work force", the word "attracted". We consider that the modification doesn't bring major differences or it doesn't change the meaning of the regulation.

Another major amendment is brought to the number of classes of activity that an RST can undertake in the same time, for the same commerce. Thus, if the old regulation did not impose a maximal number of classes of activity, with the entrance into force of Law no. 182/2016, to a registered sole trader can now only be attributed 5 types of economic activities regulated by CAEN (Classification of National Economic Activities). As regards to RST having more than 5 CAEN codes, registered before the amendments brought to the Resolution, they are legally bound to modify their incorporation act as to comply to the limit stated, in 2 years from the entrance into force of the Law. In lack of such compliance, they risk radiation after the expiry of the said term. We consider that such amendment is of good standing as it clarifies the differences between RSTs and Sole Partnerships and furthermore it restrains the activities of RSTs to a group of

activities that can be carried out together, thus helping to clarify the main activity of an RST.

Moreover, the new regulation imposes a limitation to the number of employees that an RST can have in order to undertake economic activities, limitation that did not exist under the old regulation. According to art. 17 al. 1 modified, an RST can conclude individual work contracts, as an employer, with no more than 3 individuals. This amendment helps again to distinguish between RSTs and Sole Partnerships and also helps clarify the statute and legal nature of RSTs, in order for them to not represent an alternative to commercial companies, thus complying with the statute and reason for which the legislator created it.

In regards to the incorporation procedure of an RST, it mainly stayed the same, the only notable difference being the time limit for the release of the mention certificate, which was 5 working days in the old regulation. By the new regulation, a unique 3 working days time limit is instituted, both for the release of the article of registration of the RST and for the release of an eventual mentions certificate.

As regards to the amendments made to the liability of the RST, regulated in art. 20 of the Resolution, the new regulation references the Civil Code pertaining the patrimony of affection and pursue of assets in the patrimony of the RST. Thus, although there was an obligation in the old regulation for the creditors to pursue firstly the assets in the patrimony of affection (if there was one), and only after pursue the natural persons assets, we consider that the new regulation clarifies such proceedings, as it references provisions pertaining to patrimony of affection and the rules referring to transfer from a natural persons' patrimony to his patrimony of affection. Also, the legislator replaces the phrase "merchant" from the old regulation with "professional". We assert that this new phrasing is not the most suited as it doesn't resolve the confusion which may occur in between a professional merchant and a nonprofessional. This confusion is also sustained by the Civil Code (art. 3), which does not clearly delimit the two types of activities that can be undertaken by professionals – with or without lucrative purpose – delimitation which was much clearer under the Commercial Code.

As regards to the means to terminate RST we don't stress substance amendments but of phrasing – we support such changes as we think that a phrasing concerning "the death of the holder of the RST" is more adequate than the old phrasing which mentioned "the death". This amendment brings clarity and fluency in expression, even though it did not risk confusion, as the death of an enterprise isn't possible.

3 Resemblances and Differences Between RST and Micro-Entrepreneur

RST in the Romanian legislation is the equivalent of Micro-entrepreneur (herein after ME) in the French legislation. The Law aiming to modernise the economy in 2008, entered into force in The 1st of January 2009, fundamentally

changed the legal status of ME mainly, as it creates the possibility for natural persons who form or own a Sole Partnership to practice their activity whiten an ME, under the limits defined by the fiscal laws. The activity undertaken in an ME can have a principal role or a complementary one, either commercial, artisanal or liberal (excepted the ones forbidden by the law). Among the advantages in owning an ME, we may count the simplification of incorporation and creation formalities as well as a simpler way to calculate social charges and income taxes.

The main resemblance between RSTs and MEs is the quality of the persons whom can undertake their activities in such form. In both cases, we are considering natural persons, with full legal competence. These persons can cumulate the legal statute of RST or ME with other qualities provided by the Labour Code, as employee, unemployed or retired. Moreover, none of the regulations grand legal capacity to the enterprise – as opposed to legal persons (companies) who are granted own legal capacity from their incorporation, both RSTs and MEs is meld to the personality of their constitutor. [2]

Among the similarities of MEs and RSTs we must mention the obligation to register in the Trade Registry. Before the entrance into force of the Law "Pinel", the 19th of December 2014, ME had a waiver to register in the Trade Registry for merchants and Directory of Crafts for artisans, but such waiver was cancelled. [3] ME have the obligation to register in the Trade Registry according to art. L123-1 in the French Commercial Code, even if they are registered in the Directory of Crafts [4], in the same way that RST must require the registration according to art. 7 of the Resolution 44/2008. The difference between the two is that RST must require such registration "before the commencement of economic activities" and ME must require it "in 15 days from the commencement of economic activities" (art. L123-8 Commercial Code).

A notable difference between the two is the legal status acquired by registration: as regards to RSTs, the merchant status is granted by the sole incorporation of the RST, as the Resolution 44/2008 defines RST as "economical enterprise, without legal personality, organized by a natural person who uses mainly its force work". The economic enterprise is defined as "economic activity <activity with lucrative purpose, consisting in producing, administrating or alienation of goods or providing services>, undertaken in an organized matter, permanently and systematically, combining financial resources, work force, prime matters, logistical means or information, at the entrepreneurs risk, under the cases and conditions stated by the law". Thus, the legislator grants RSTs by art. 3 of the Civil Code and Resolution 44/2008 the status of professional merchant, status that only grants RST the possibility to undertake an economical activity, with lucrative purpose and the intention to obtain profit. In the MEs case, the registration in the Trade Registry grants the "presumption of the quality of merchant", as it is not opposable to third parties or the administration that may bring contrary proof (art. L123-7 Commercial Code). In other words, o natural person in France may choose to undertake other activities than commercial ones in an ME.

Another substantial difference between RSTs and MEs is linked to the nature of the activities that can be undertaken in such forms of enterprises: if in the RSTs case the person can only undertake economical or commercial activities, in the MEs case, he can undertake either commercial, artisanal or liberal non-regulated activities (such as advising), or liberal regulated activities (by which we may announce: architects, engineers in construction or site managers, psychologists or psychotherapists, osteopaths, certain types of artists, experts in front of courthouses or majors persons' tutors, ski monitors or mountain guides). Nevertheless, both in Romania and France, some professions can't be undertaken in RSTs or MEs such as liberal professions as doctor, lawyer or accountant. [5]

The French legislation imposes certain financial limits over which a person shall no longer be considered an ME fiscally, limits that the Romanian legislation doesn't regulate. Thus, an entrepreneur may undertake his activity in an ME and benefit from the tax limitation if his annual turnover from the year before or the year before that doesn't exceed 170.000 euros for activities of sale of merchandise, objects, alimentation which can be consumed in location or take away or supply of accommodation services (hotel, hotel rooms or rooms destined for tourists) and 70.000 euros for the other professionals whom supply services that reveal industrial or commercial benefits or liberal professions that reveal non-commercial benefits. The turnover is calculated excepted taxes and levies and takes into account only the annual turnover. When the activity is mixed, as per example sales of merchandises and supply of services, the annual turnover must not surpass 170.000 euros, and within it the party pertaining the supply of services must not surpass 70.000 euros. In the event that ME surpasses such limitations, for two consecutive years, he shall be excluded from the tax scheme and the ME activity scheme and shall remain the holder of a Sole Partnership.

There are numerous resemblances between the RST and ME regimes. Among them, we wish to stress out that both regimes allow natural persons to work within the enterprise with their spouse and in both cases the enterprise shall be held accountable firstly with the patrimony of the enterprise and afterwards with the patrimony of its constitutor. Also, both legislations impose a limitation in regards to the accumulation of the legal status of RST or ME with the status of holder of a Sole Partnership. The French legislation goes forward in imposing a limitation in cumulating of the status of ME with a social activity with independent statute (such as the quality of administrator in a company). Both legislations allow at any moment for the RST or ME to change its legal status and transforming it in another type of activity (such as the holder of a Sole Partnership or a Limited Liability Company).

Also, pertaining to resemblances in regulations we may state that both RST and ME are ensured in the public pensions service and benefit from other social rights, and also that they have the right to social security and unemployment. In France, an ME has the right to the same social coverage as other independent professions and benefits from illness, maternity compensations and family allowances as employees. The only distinction in France is made in regards with the nature of the activity undertaken by the entrepreneur: if he has a commercial,

artisanal activity or a non-regulated liberal profession, his pension shall be calculated in the same manner as an employee, but if he has a regulated liberal profession, he has a complementary and mandatory pensions regime. In all cases, the person benefits from insurance for death or invalidity.

As regards to the possibility of employing a person to work with the holder of the enterprise on the grounds of a labour contract, both legislations allow it. The Romanian legislation in regards to the new amendments entered into force in 2017, restraints the possibility of the RST to hiring a maximum of 3 persons with a labour contract. In theory, the French legislation does not impose such limitation, but in practice, an ME can't employ a lot of persons with a labour contract on an undetermined period because of the financial limitations imposed upon the turnover. In this respect, most of the times in France, the ME shall higher persons with a labour contract of a defined period of time, or shall employ trainees.

A nuance difference is made in regards to the collaboration of RSTs and MEs with third parties. Both RSTs and MEs may establish contractual relationships with natural or judicial persons, in the purpose of exercising the activity they were accredited for, without altering the juridical status of the entrepreneur. The differences occur regarding the possibility to accumulate the status of RST or ME with the status of employee of a legal entity that works in the same field as the RST or ME. If the accumulation of said qualities doesn't raise issues if the employer has a different field, the French legislation poses limitation if the field is the same – thus rising issues of disloyal competition and exclusivity regarding the employer. Furthermore, the French legislations impose that ME should obtain the consent of the employer if he wishes to provide the same kind of services to the employer's clients. Moreover, the French legislation clearly states, what the Romanian legislation only implies, that the ME activity shall be provided outside of the work schedule defined by the employer, thus accentuating the employees' obligations of fidelity, discretion, reserve and non-compete towards his employer.

The main difference in between the two regulations is linked to the possibility of collaboration if such collaboration is exclusively linked to a third party. Thus, the Romanian regulation allows RST to work exclusively with a third party and doesn't consider that the RST is the employee of the third party, whereas the French legislation formally forbids such procedure. Such practice is known as "employee in disguise" and brings risks both to the ME and the employer (risks pertaining the payment of penalties and social contributions retroactively). French doctrine and case law underline that there are two criteria to determine if we are in the case of an "employee in disguise": an economic criteria, linked to the fact that the ME only acts for one client, and his turnover depends of said client and a judicial criteria where it is stressed that there is a subordination link between the ME and the employer, which consists in practicing under an employer that has the prerogative to give orders and directions, to control the activity and to sanction the lack of subordination [6]. In the event that the fiscal authorities discover such link, they may re-qualify the legal status of the ME.

4 Conclusion

In conclusion, we may state that the amendments brought to Resolution 44 are in good standing, both in order to clarify the phrasing but also to give the right juridical value to certain concepts of law that are used in order to define the activity and organisation of RSTs. What we could upbraid to the new regulation is the lack of clarity regarding the fields in which an RST can work – in other words, if it can have a liberal activity, without lucrative purpose, or not.

As regards to this aspect in the French legislation we consider that it is better treated and regulated. Thus, a person wishing to exert his activity in an ME is better informed in regards to the types of activities he can undertake.

In regards to the succinct comparative analysis in between the two regulations, we may see that they both submit advantages and disadvantages. Concerning the financial limitation, we don't think that this is a positive regulation for entrepreneurs and it doesn't necessarily help develop the economy. Also, we believe that any limitation brought to the possibility of association and/or working alongside between two persons, even if such association is exclusive, is not favourable for the person who is actually working. In Romania, the possibility to work exclusively as RST with another person, more often than not legal, offers certain fiscal advantages to the said legal person and thus even if the taxes paid to the state are smaller, the difference will automatically go towards the RST and thus directly into the income of the person who is actually undertaking the economic activity.

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CRIMINAL LAW

From the National Public Prosecutor's Office to the European Public Prosecutor's Office

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Abstract

In a European Union trying to establish a common market, the differences between the legal systems of the Member States can be potentially damaging; the economic integration must be followed by a legal integration, "at least to one point" [1]. Despite the disputes which place the nature of criminal law in the area of the core national sovereignty, the regulation of the European Public Prosecutor's Office demonstrates that it becomes more and more difficult to identify in this area issues that would not fall within the regulatory competence at the European Union level. The present study illustrates developments, current concerns and institutional perspectives determined by the regulation and the necessity to operationalize the European Public Prosecutor's Office.

Keywords: European Public Prosecutor's Office (the EPPO), European Prosecutor, criminal law, cross-border crime.

1 Opening Remarks

We therefore named our study as, beyond the itself presentation of the European Public Prosecutor's Office history, regulation and perspectives, it is meant to highlight an evolution from national to supranational/European level regarding the organization of some institutions with a role in the research and prosecution activity as, in general, of criminal law, an evolution in which the

establishment of the European Public Prosecutor's Office represents an expected and of consolidation moment.

Thus, regarding the developments at national level, the doctrine, mentioning that "*the Public Ministry represents within the jurisdictional system, a singularity of the Romano-Germanic law countries, having as archetype the French model"* [2], identifies its emergence, in a modern sense, in close connection with that of the Supreme Court, by the Law for the Establishment of the Court of Cassation and Justice of 1861. [3] The period up to 1945, marked by inherent developments in what concerns the changes of the judicial organization laws and the Criminal Procedure Code, is followed by the stage called by the same doctrine "from the Public Ministry to the Prosecutor's Office of the Republic of Romania", marked by "the process of transforming the judicial institutions into Soviet structures". By the Laws no. 6/1952 and no. 7/1952, it had been regulated the organization and functioning of the Romania People's Republic Prosecutor's Office and by the Law no. 60/1968 it had been regulated the organization and functioning of the Socialist Republic of Romania Prosecutor's Office. We would say that, the peak concerning the distortion of the role of this institution was its endowment with the attribution of "general supervision". Of course, as the doctrine pointed out, the independence of the judge excludes *de plano* the idea of "supervision" of his judicial activity [4].

The first step on the path of institutional reform, after the fall of the totalitarian regime, was made by Decree – Law no. 2/1989 on the establishment, organization and functioning of the Council of the National Salvation Front and of the territorial councils of the National Salvation Front, published in Official Journal of Romania no. 4 of December 27, 1989. The 1991 Constitution established the Public Ministry in Chapter VI – *The Judicial Authority*. According to Article 131 of the Constitution, the Public Ministry comprises the prosecutors, set up in prosecutor's offices, and is leaded by the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice. The role of the Public Ministry is to represent, in the judicial activity, the general interests of the society and to defend the rule of law and the rights and freedoms of the citizens. The Law no. 304/2004 on judicial organization, foresees the following organization of the Public Ministry: The Prosecutor's Office attached to the High Court of Cassation and Justice, 15 prosecutor's offices attached to the appeal courts, 42 prosecutor's offices attached to the court, 188 prosecutor's offices attached to the law court, the military prosecutor's offices. Within the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice function, as structures with legal personality, the National Anticorruption Directorate, by reorganizing the National Anti-corruption Prosecutor's Office set up by the Government Emergency Ordinance no. 43/2002, as a prosecutor's office specialized for fighting against corruption offences [5]", as well as the Directorate for Investigating Organized Crime and Terrorism, prosecution specialized in fighting against certain categories of offences" [6], established by the Law no. 508/2004. According to Article 132 paragraph (1) of the Constitution, "the prosecutors develop their activity in accordance with the legality, impartiality and

hierarchical control principles, under the authority of the Minister of Justice." Thus, are distinguished the guarantees of the functional independence of the prosecutors established by the constituent legislator, as well as the consecration as a distinct judiciary from that of the judges, a natural distinction given that, according to the Constitution, justice is carried out through the High Court of Cassation and Justice and the other courts established by law. In other words, the judicial power is exerted by the courts, not by the prosecutor's offices, the latter having a distinct role, clearly detailed by the constituent legislator, within the judicial authority. We consider that these distinctions are useful, also from the perspective of the discussions on the concept of national sovereignty and its dimensions, in the context of the regulation of the European Public Prosecutor's Office.

At the European level, having as main milestones the Maastricht Treaty (1992/1993), where the criminal field was circumscribed to Justice and Home Affairs, then the adoption of the Convention on the Protection of the European Communities' Financial Interests in 1995 [7], the development, together with The Amsterdam Treaty (1997/1999) of an extensive regulatory framework for crime control and for building an area of freedom and justice, the establishment of Eurojust by the Council Decision no. 2002/187/JHA [8], the system of the framework decisions [9], this evolution created the right ground for making the European Public Prosecutor's Office (hereinafter referred to as EPPO) and, with it, a closer integration at legislative level into the European Union, in the field of criminal law. The space of freedom, security and justice represents a domain where to apply the competences divided between the Union and the Member States, with the implication of the subsidiarity principle, mentioned in the very preamble of Council Regulation (EU) 2017/1939 of October 12, 2017 concerning the implementation of a consolidating form of cooperation in what concerns the establishment of the European Public Prosecutor's Office (hereinafter called "EPPO Regulation"): "combatting crimes affecting the financial interests of the Union can be better achieved at Union level by reason of its scale and effects. The present situation, in which the criminal prosecution of offences against the Union’s financial interests is exclusively in the hands of the authorities of the Member States of the European Union, does not always sufficiently achieve that objective. Since the objectives of this Regulation, namely, to enhance the fight against offences affecting the financial interests of the Union by setting up the EPPO, cannot be sufficiently achieved by the Member States of the European Union, given the fragmentation of national prosecutions in the area of offences committed against the Union’s financial interests but can rather, by reason of the fact that the EPPO is to have competence to prosecute such offences, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. "

As a result of joining the European Union, both institutions, the Ministry of Justice and the Public Ministry, have become more and more connected with the European institutions, actively participating at the cooperation in criminal matters. Romania is, in fact, among the first states that on April 3, 2017, notified

the European authorities about the intention to launch a consolidating cooperation for the establishment of the European Public Prosecutor's Office. Romania will also have the chance, but also the great challenge, of a leading role in the process of the European Prosecutor's Office operationalization, which is one of the fundamental themes of the Council of the European Union Presidency that Romania will hold in the first half of 2019.

In the following, we will examine the regulation of the European Public Prosecutor's Office, the consequences/challenges for the Member States, especially at this stage, of the institution operationalization.

2 The European Public Prosecutor's Office Regulation

2.1 *Brief History. Legal Ground*

The EPPO is certainly the result of a long-term reflection over the creation of some instruments which could strengthen the fight against cross-border crime. The idea has been developed since the mid-1990s, based on an in-depth study, *Corpus Juris* [10], containing criminal provisions for the protection of the Union's financial interests" [11]. We find the same concern regarding the European Commission which published the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor on December 11, 2001 [12]. Later, in 2010, even Eurojust mentioned the institution as a potential solution for the cross-border crime issue in the European Union and despite the opposition shown by some Member States which felt that their national sovereignty would be affected, the analysis and popularization of this idea continued. Following the Commission's 2013 proposal to set up the EPPO, which met the resistance of 14 national parliaments of the European Union, the year 2017 was a decisive one. During the meeting on February 7, 2017 the Council registered the absence of unanimity on the draft Regulation, on February 14, 2017 a group of 17 Member States requested for the draft regulation to be sent to the European Council, followed by the request of Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Germany, Finland, France, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia and Spain, by which they notified the European Parliament, the Council and the Commission on April 3, 2017 about their wish to establish a type of enhanced cooperation on the basis of the draft regulation, the subject was constantly on the agenda of the Justice and Home Affairs Councils, being adopted at the end of the year the Council Regulation (EU) 2017/1939 of October 12, 2017 on implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (the EPPO).

As for the basis of the EPPO establishment, this is given by Article 86 TFEU, according to which "(1) In order to combat crimes affecting the financial interests of the Union, the Council by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor’s

Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament. (2) The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph (1). It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences". The EPPO was therefore conceived as a form of enhanced cooperation, a tool which allows to the participating States to organize more extensive cooperation in the policy than the one originally foreseen in the treaties, in order to accelerate the European construct for the most ambitious Member States, letting open the access for the other Member States which would like to join them later.

2.2 *Overall Characterization*

The EPPO has been set up as an independent body of the Union, with legal personality. The prosecutors in its structure act in the interest of the Union as a whole, do not seek or accept instructions from any person outside the EPPO, from any Member State of the European Union or institution, body, office or agency of the Union, in exercising their attributions in conformity with the Regulation. The EPPO is answerable to the European Parliament, the Council and the Commission for its general activities and shall submit annual reports on its general activities, in the official languages of the Union institutions, which are sent to the European Parliament and the national parliaments and to the Council and the Commission. The European Chief Prosecutor goes, once a year, before the European Parliament and the Council and before the national parliaments of the Member States at their request, to report on the general activities of the EPPO, without prejudicing the EPPO's obligation for discretion and confidentiality regarding individual cases and personal data.

2.3 *The European Public Prosecutor's Office Competence*

From a material point of view, the EPPO has competence in what concerns the offenses affecting the financial interests of the Union which are foreseen by Directive (EU) 2017/1371 as implemented by national law, no matter if the same criminal behaviour might be framed as another type of offense under national law. As regards the offenses referred to in Article 3 (2) (d) of Directive (EU) 2017/1371, as implemented by national law, the EPPO shall only be competent when the intentional acts or omissions defined in that provision are connected with the territory of two or more Member States and involve a total damage of at least EUR 10 million. The EPPO shall also be competent for offences regarding participation in a criminal organization as defined in Framework Decision

2008/841/JHA, as implemented in national law, where the main criminal activity of such a criminal organization is to commit any of the above-mentioned offenses. The EPPO shall not be competent for criminal offences in respect of national direct taxes including offences inextricably linked thereto. The structure and functioning of the tax administration of the Member States shall not be affected by the provisions of the EPPO Regulation.

As set in the Preamble to the Regulation, any extension of this competence to include serious crimes having a cross-border dimension requires a unanimous decision of the European Council. Now the discussions are currently targeting this issue, meaning the extension of the EPPO's competence over terrorist offenses. In terms of territorial and personal competence, the Article 23 of the EPPO Regulation establishes that the EPPO is competent for the abovementioned offenses, if these offenses: have been committed in whole or in part within the territory of one or several Member States, were committed by a national of a Member State, provided that a Member State has jurisdiction for such offences when committed outside its territory, they have been committed outside the territories previously foreseen by a person who is the subject of Staff Regulations or the Conditions applicable at the time of the offence, provided that a Member State has jurisdiction for such offences when committed outside its territory.

2.4 *The European Public Prosecutor's Office Structure*

According to Article 8 of the Regulation, the EPPO shall be an indivisible body of the Union, operating as a single office with decentralized structure. The central level shall consist of a Central Office at the seat of the EPPO, consisting of a College, the Permanent Chambers, the European Chief Prosecutor, Deputy European Chief Prosecutors, the European Prosecutors and the Administrative Director. The decentralized level shall consist of European Delegated Prosecutors who shall be located in the Member States.

The European Chief Prosecutor shall be appointed by the European Parliament and the Council, shall be selected from among the candidates who are active members of the public prosecution service or judiciary of the Member States, or active European Prosecutors, provide the independence guarantees, possess the necessary qualifications and have managerial experience and the required qualifications for this position. The College shall appoint two European Prosecutors to serve as Deputy European Chief Prosecutors for a renewable mandate period of 3 years, which shall not exceed the periods for their mandates as European Prosecutors. At the proposal of the European Chief Prosecutor, the College appoints the European Delegated Prosecutors assigned by the Member States. Their independence must be beyond any doubt and they must have the necessary qualifications and the relevant practical experience in what concerns their own national legal system.

2.5 *Rules of Procedure. Interinstitutional Reports*

The Regulation develops the EPPO procedure rules, the basic principles of its activity, the relations with the European institutions, the Member States, other specialized bodies in the field, third countries as well as those who are not in enhanced cooperation. Among the principles, we mention that the investigations and the prosecutions developed on behalf of the EPPO are governed by the EPPO Regulation, the national law being applied to the extent that an issue is not regulated by the Regulation. Unless the Regulation does not foresee otherwise, the applicable national law is the law of the Member State whose European Delegated Prosecutor is dealing with the case.

When one aspect is regulated by both national law and the Regulation, the latter prevails. We also mention that the issues related to the judicial review, foreseen in Article 42 of the Regulation, in conformity with which the procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law. The same applies to failures of the EPPO to adopt procedural acts which are intended to produce legal effects vis-à-vis third parties and which it was legally required to adopt under this Regulation. The text expressly defines the areas of competence of the CJEU.

We note well-defined relationships of hierarchical subordination, being clear the connection of the central component with the European Delegated Prosecutors and the national authorities, as well as the obligation of the latter to follow the instructions of the European Delegated Prosecutor. As the preamble of the EPPO Regulation establishes, the intention was that the EPPO's organizational structure and internal decision-making process to allow the central prosecutor to monitor, to direct and to supervise all investigations and prosecutions of the European Delegated Prosecutors. We also note a careful sharing of the national/European authorities' competences, including judicial review, which also raises the issue of the relations between the national courts and the Court of Justice in exercising these competences. Lastly, we note the "complementarity" vision of the actions of the EPPO, Eurojust, OLAF, Europol in establishing and maintaining a close collaboration and an inter-institutional cooperation. From this perspective, at least the phrase "starting from Eurojust" in Article 86 of TFEU could now be "with the support of Eurojust", and in the future by joint actions, in line with the EPPO Regulation.

3 Operationalization of the European Public Prosecutor's Office. Challenges and Perspectives

3.1 *General Considerations*

The EPPO regulation has direct application, but, of course, it does not provide all the practical solutions for the functioning of a prosecutor's office

which, as we have shown, will have to apply both EU and national legislation. Likewise, it cannot solve the correlation issues of the internal regulations, from this perspective being necessary to take structured steps in more stages/directions. We are considering, in particular, the procedure for candidates selection for the positions of European Prosecutor and European Delegated Prosecutor, taking into account their status from the perspective of the Romanian legislation on the status of judges and prosecutors and the incompatibilities regime; the modification of secondary legislation; the amending of the criminal procedure rules to the extent that such an approach will be considered necessary depending on the developments determined by the EPPO operationalization.

3.2 *The Selection and the Appointment of the Staff, the Status of the European and European Delegate Prosecutor*

In relation to this issue, the main concerns aim at the selection procedure in itself and the status of the European Delegated Prosecutors. As it has been shown, the latter have a "double hat" [13], while they shall be both EPPO members and shall remain active members in the prosecutor's offices or in the Member States judiciary system which have appointed them. European Delegated Prosecutors, as opposed to European Prosecutors, who will be the EPPO employees, as temporary agents, will be contracted by the EPPO as special consultants, because this has been the formula found by the European legislator in order for them to keep also their quality of national prosecutors. However, the European Delegated Prosecutors will work as EPPO prosecutors, not being compulsory to handle cases, in parallel, as national prosecutors.

In order to address these issues, a draft law was elaborated at the Ministry of Justice level, which is currently under public debate [14], by which it is proposed that the assignment of the three candidates on behalf of Romania, for the appointment, by the Council of the European Union, as European Prosecutor, to be carried out following a transparent selection procedure, involving the Ministry of Justice, the Superior Council of Magistracy, the Prosecutor's Office attached to the High Court of Cassation and Justice, specialists in the field of international judicial cooperation in criminal matters and human resources. The draft law is in the process of being finalized and the principles on which it is based are: advertising the selection procedure, full transparency, wide institutional participation, taking into account the role of the Minister of Justice as it is established by the Romanian Constitution. The obligation to motivate the official record drawn up following the selection procedure of the candidates and the setting of the content of the candidates list represents an additional guarantee for ensuring the compliance with the EPPO Regulation, the national law, the guarantees imposed by them for the selection, mainly the competence and the independence.

As regards the European Delegated Prosecutors, taking into account the fact that the national authorities that will be consulted by the European Chief Prosecutor for establishing their number and organization in each participating state depends on the system in each country and taking into account the constitutional role of the Minister of Justice in Romania, it is proposed that the European Chief Prosecutor to approve the number of the European Delegated Prosecutors in Romania and the way in which they are organized, after consulting and reaching an agreement with the Minister of Justice. At internal level, taking into account the decision of the European Chief Prosecutor, the Minister of Justice establishes by order the territorial organization of the European Prosecutors delegated to Romania. The selection of the European Delegated Prosecutors is organized in the same way as that of the European Prosecutors, respecting the same principles and adapting accordingly the seniority and the relevant experience conditions.

According to the proposed draft law, the European Prosecutor on behalf of Romania benefits of the rights provided in the EPPO Regulation and, at the date of his appointment as European Prosecutor, the person is relieved from the position of prosecutor or judge, with the right, at the end of his mandate, to return to his former position of judge or prosecutor. As regards the European Delegated Prosecutors, we consider that, their status, as defined in the draft law, requires a series of adjustments, taking into account both the regime of incompatibilities set by the Romanian Constitution for magistrates, in the light of the recent jurisprudence of the Constitutional Court [15], which gave a more restrictive interpretation to the incident constitutional norms, but also to the obligations imposed by the Article 148 of the Constitution. Of course, that the organization of the EPPO shall also involves technical staff and, since December 2020, the EPPO will already deal with the first causes, the number of positions in the structure must match to this need.

3.3 *Adapting the National and European Legislation*

The EPPO Regulation refer to the EPPO "internal rules of procedure". For knowledge and for compliance with the domestic law it is necessary as these to be public, obviously, with the exception of those related to the cause's investigation. Insofar as the EPPO internal rules of procedure will involve legislative interventions at national level, proposals for a corresponding change should be advanced. Until their adoption, the general framework, for the offenses falling within the competence of the European Public Prosecutor's Office (the EPPO), under the provisions of the Council Regulation (EU) 2017/1939 of October 12, 2017 concerning the implementation of an enhanced cooperation on the establishment of the European Public Prosecutor's Office (the EPPO) is completed with the provisions of the Law no. 135/2010 on the Criminal Procedure Code, as subsequently amended and supplemented, and the Law no. 302/2004 on International Judicial Cooperation in Criminal Matters, republished, as subsequently amended and supplemented.

We consider that, in this regard, it is necessary a reflection on several levels, not just on the one concerning criminal law and criminal procedural law, but also on special laws to which the EPPO Regulation refers to. We have into account, for example, the waiver of privileges or immunities under the terms of Article 29 of the EPPO Regulation, which refers in this regard to the "procedures established by the national law". It is even more necessary that, at national level, to have a clear and coherent legislation in this sensitive area.

The cooperation with the national members at Eurojust and with national authorities it also represents a matter to be regulated taking into account the three areas that should be covered: operational cooperation, institutional cooperation and administrative cooperation. Establishing a link between the EPPO-OLAF, meaning between an administrative and a judicial body, is also a challenge in order to ensure a maximum complementarity, as it can be seen in the EPPO Regulation. Overlaps, but also undesirable gaps, should be avoided, being already foreseen regulatory changes of Eurojust and OLAF.

4 Conclusions. Perspectives

The adoption of the EPPO Regulation represents a crowning of the efforts to make the first European judicial institution with attributions in criminal matters. We would say, however, that the difficult part has just begun, the operationalization of this structure and its link with national prosecutor's offices and courts is a long process. Already, the way in which some institutions are regulated, such as the one of the European Delegated Prosecutor, raises serious problems from the perspective of constitutional compatibility, at least in Romania. The task of the States Parties in the enhanced cooperation in general and of Romania, in particular, won't be easy, and ultimately the joining of all Member States is desirable for making it more facile and for the standardization of the regulations/procedures/way of action at the level of the whole European Union.

The development of the European Public Prosecutor's Office institution will certainly lead to the development of the European criminal law, this being, in fact, a by-product of the European integration. As it has been shown [16], in a Europe striving to establish a common market, the differences between the legal systems of the Member States can be potentially damaging; the economic integration must be followed by the legal integration, "at least to one point". Since the nature of the criminal law is related to the core of the national sovereignty, it has been disputed the option for any part of the criminal law to fall within the exclusive competence of the European Union, the judicial cooperation related to the shared competence between the Member States and the Union, with the implication of the subsidiarity principle. However, the regulation of the European Public Prosecutor's Office demonstrates that, at least in the field of criminal law, it is more and more difficult to identify issues that would not fall within the European Union's regulatory competence.

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The Notion of Imputability in Criminal Law

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Abstract

The New Criminal code has introduced imputability as an essential trait of the crime. In its current meaning, imputability includes as well. However, the legislator mentions guilt as well as an essential trait of the crime, together with imputability. The author analyzes the measure in which the two notions complete or exclude each other.

Keywords: imputability, guilt, essential trait of crime.

1 The Notion of Imputability

This notion is not easy to define because from one author to another the definitions differ in a considerable way, some authors talking about, for example, "causes of non-culpability" while other authors speak of causes of " non-imputability ".

In the criminal legal doctrine, it is recognized that the existence of an objectively sanctionable offense and the finding of the perpetrator's guilt are not sufficient to engage the criminal liability of the active subject. It is necessary for the active subject to have the ability to respond criminally to the consequences of his or her criminal behavior. [1]

Under the pressure of militant criminology, authors like V.V. Stanciu, R. Merle and A. Vitu introduced the concept of criminal capacity, a criminological notion that consists of the offender's ability to receive a post-judicium sanction. [2]

From the definitions given by doctrine and jurisprudence, imputation implies discernment or lucidity, the freedom to act and the knowledge of factual or legal reality. [3]

We have to distinguish between guilt and imputability. A culpability or guilt means committing an intentional mistake, imprudence or negligence, which is the moral element of the offense. If there is no guilt, there is no offense, nor are issues of responsibility put in place.

Article 85 of the Italian Criminal Code identifies imputability with the ability to understand and to wish, the possibility of putting the crime on the perpetrator. There is no imputability in case of constraint or mental disorders, because imputation involves consciousness and free will. In other words, if guilt is the moral element of the offense, the relationship between the subject and his conduct, the imputation is a state, a qualification of the subject itself. For the existence of responsibility, the offender must have committed a misconduct and this mistake can be imputed to him. [4]

2 Criminological Concept of Criminal Capacity

While imputability is a legal concept that involves seeking the sanction deserved by the offender on the day he committed the crime, criminal capacity is a criminological concept that focuses on the offender's ability to benefit from legal sanction. [5] Starting from this thesis, two different concepts emerged.

A first doctrinal stream aims to replace the concept of imputability with that of criminal capacity. This conception raises questions about the ineluctable character of the traditionally established link between the legitimacy of the criminal sanction and the free will. Starting from the idea that, in the family environment or school, children are subject to moderate sanctions, whose good intentions are not challenged, that sometimes sanctions for the violation of the internal regulations are applied to mentally ill persons, in the context of the decriminalization of the modern criminal law, the link between responsibility and free will no longer appear to be strictly necessary. What is important in the view of the supporters of this concept is not so much knowing whether the offender had free will on the day he committed the crime, but rather how to determine on the day of judgment whether he is likely to understand the usefulness of the sanction, whether he can withstand it and to take advantage of it in order to turn into a responsible person. Responsibility is no longer the starting point of re-socialization, but the assumed goal of rehabilitation treatment. The merit of this analysis is to draw attention to the relativity of responsibility and abuse of legislative dogmatics. [6]

A second doctrinal tendency is not intended to abandon the concept of imputability, with which the notion of criminal capacity is not at all inconsistent.

Imputability must be the condition for any responsibility when it comes to a crime, even if this responsibility does not expose the offender to anything other than safety measures. Imputability and criminal capacity play distinct and complementary roles. Imputability allows to check whether a sanction can be applied, criminal capacity guides the judge in choosing a type of sanction. [7]

The French criminal doctrine clearly distinguishes between imputability or guilt [8], given that between these notions there are frequent confusions. Guilt involves committing a misnomer in the broad sense of the term, either intentionally or imprudently or negligently, which is the moral element of the offense, while the imputation is the possibility of committing the misconduct to

the perpetrator. If the subject actively accuses mental disorders or a constraint, the act is not imputable.

Lack of imputability means lack of responsibility. For the existence of criminal liability, the active subject has commits a mistake (guilt), and this mistake can be imputed to him (imputability). [9] We could conclude that the French criminal doctrine, which considers guilt as a moral element of the offense and imputability as an assimilation of the person of the perpetrator, regards imputability not as an element of guilt but as a condition of the perpetrator's responsibility. [10]

The same concept we also encounter with the Italian authors, who have rallied to the dominant doctrine which considers imputability as an element of guilt and which rejected the thesis that the imputability must be separated from the culpable will and should be considered as a pre-condition of the offense. [11]

From the perspective of the psychological conception of guilt, the Italian doctrine considered imputation as a mere personal status of the perpetrator of the offense, which only concerns submission to punishment. [12]

In agreement with the Italian authors, the Romanian inter-war criminal doctrine links the imputability of the ability to understand and to you.

When the natural and legal presumption of the existence of the volitional factor was not disputed or could not be removed, then, based on it, the material fact will be attributed to the will of the person who performed it. In this hypothesis it is said that the imputation has actually been established, that is, it has been established that the fact was wanted by the offender and therefore that fact belongs to him (imputatio facti). [13]

In order to commit a crime, the volitional element is not sufficient, a subjective element that can not be conceived without the intellectual factor, is also necessary. "The presence of the intellectual factor marks the guilt of the person who performed the physical activity, because while the volitional factor shows us that the propulsive energy of the actor's will is at the basis of the physical activity, and therefore the fact belongs to that perpetrator (fact imputation), the intellectual factor indicates the attitude of the perpetrator's consciousness in relation to his physical activity, an attitude that allows us to see if we can find any fault of the perpetrator (mental imputation or culpability). [14]

This is the link between imputability and guilt in the view of Professor Vintilă Dongoroz.

Prof. Traian Pop notes that the doctrine, with all the old and continuous attempts, has failed to determine precisely this notion. Starting from the meaning of the verb "imputing", which is to assign someone a deed, the author of the comparative criminal law treaty shows that by imputability we understand the totality of the attributes that the author has to bear in order to be charged with the committed act.

After analyzing several opinions expressed in the European doctrine, Professor Traian Pop reaches similar conclusions to the Italian authors, namely that the two faculties necessary for imputability are intelligence and will. In the light of these considerations, he considers that there is imputability when the agent

has the capacity or ability to discern the ethical and social value of his or her act, to appreciate the reasons which determine or render him or her offended and determined according to that appreciation. [15] The contemporary Romanian criminal doctrine, based on the above-mentioned opinions, concludes that the imputability expresses the idea that a deed was attributed objectively and subjectively to the author, in other words, the deed belongs to him, being an act committed with the will of the author. In this case, however, imputability is a notion that is more of criminal responsibility than crime, as the Italian and French authors point out. [16]

If "in the conception of German doctrine the offense would be defined by essential traits, namely: action/inaction, concordance of the crime with the rule of criminalization but only in objective terms, anti-justice and guilt" and "in the opinion of the Italian authors, a formal consistent vision must conclude that the offense could be characterized only by the existence of a fact and a subjective attitude [17] "why does the Romanian Criminal Code include imputability among the essential traits of the offense?

Another author, after finding that, according to Italian authors, "imputability is a quality, a way of being of the individual, that is, a state of person", and according to French authors, "imputability understood as the ability to understand and it is the quality of the perpetrator not of the act, confusing himself with the criminal legal capacity "concludes that" defining the imputability as the essential feature of the crime together with guilt involves examining the relations between imputability and guilt, because if the two terms have the same meaning, the text is redundant, containing an unnecessary repetition in a definition that is synthetic. [18]

In fact, the German authors treat imputability within the broader framework of the legal institution of guilt [19] and then what arguments would we have to maintain imputability as the essential feature of the distinct offense of guilt.

The superfluous character of this legal provision is also noted by other authors who appreciate that "as long as the notion of imputation of an act expresses, on the one hand, the idea that a person committed the act objectively and, on the other hand, and subjectively (with guilt), the enumeration of the imputable content of the crime among the essential features of the offense appears as a tautology, because the guilt has already been passed among the features of the offense and the objective imputability is already defined by the content of the material element, between action (inaction) and immediate action. [20]

Finally, the Romanian criminal doctrine also expressed the opinion that the imputability has nothing to do with the guilt, a fact confirmed, according to the author, on the one hand using different terminology, and on the other hand by the distinct regulation of the causes of impropriety, and art. 23 The Criminal Code provides that the offense provided for by the criminal law is not a criminal offense if it was committed under any of the causes of impropriety. [21] However, the same author points out that the verification of the fulfillment of the general condition of imputability implies the existence of sub-conditions of imputability: the responsibility, the knowledge of the antitrust of the deed and the exigibility of

a conduct according to the legal norm. The first of these sub-conditions is the responsibility that is defined, according to most of the works in foreign doctrine, as the ability of the person to realize his deeds, their social significance, and to be able to determine and manage knowingly the will in relation to these facts. Responsibility therefore presupposes the existence of two factors: an intelectual factor and a volitive factor. [22]

In the Romanian criminal doctrine, it is unanimously admitted that the presence of the two factors inherent in the person's physical life, consciousness or the intelectual factor and the will or the volitional factor, is decisive for the existence of the guilt. [23] "The intelectual and the volitional process must be merged when the action (inaction) and the result are produced. This condition is required by the correct determination of the existence of guilt in one of its forms." [24]

Synthesizing, imputability means free will and lucid intelligence. [25]

Under these circumstances, we can not fail to fully credit the findings made by Professor Fr. Antolisei: the dominant doctrine considers imputancy as an element of guilt. [26]

3 Conclusions

But if imputability is an element of guilt, can it be considered an essential feature of the crime? The answer must be formulated taking into account the content of art. 15 (1), which provides that the offense is the deed stipulated by the criminal law, committed with guilt, unjustified and imputable to the person who committed it "and taking into account the fact that in the third chapter of the title on the offense the causes of impropriety are regulated. Paraphrasing a rule of interpretation used in civil law, *actus interpretandus potius ut valeat quam ut pereat*, we could say that a normative act must be interpreted in the sense that it can produce effects, and not in the sense that it would not produce any. The legislator, by introducing this institution, wanted to have effects in the context of the notion of crime. As Italian authors have taken into account the provisions of art. 85 of the Italian Penal Code, even if it concerns the author's personal status rather than the features of the offense. [27]

Referring to the intelectual factor and the voluntary factor, the imputability is indissolubly linked to guilt, and our opinion is that, although it appears in art. 15 (1) The Criminal Code, the last of the four essential features of the offense, should be treated, at least didactically, immediately after the offense has been provided for in criminal law and anti-law. Only in such a sense would the imputation of the offense as the essential feature of the offense separate from guilt be meaningful in the sense that it would refer to an act provided by the criminal law objectively attributable to a person, and that the subjective guilt or imputability would then be analyzed by the judiciary.

This conclusion comes from the detailed analysis by Professor V. Dongoroz in 1939: the volitional factor shows us that the fact belongs to that perpetrator

(fact imputability) and the intelectual factor allows us to see if we can find any fault of the perpetrator (psychological imputability or culpability). [28]

We consider that the essential feature of imputability provided by art. 15 (1) C. Pen refers to factual or objective imputability, while guilt refers to psychic or subjective attributability.

For an accurate and correct understanding of the notion of offense we consider that the text of art. 15 (1) should be reworded as follows:

"The offense is the act provided by the criminal law, objectively imputable to the person who committed it, committed with guilty and unjustified."

In order to avoid semantic confusion, Law no. 24/2000 regarding the normative technical norms for the elaboration of normative acts [29] requires that the writing of the texts be done by using the words in their current meaning in the modern Romanian language, avoiding regionalisms (Article 36 paragraph 4) and if a notion or term does not it is consecrated or can have different meanings, its significance in the context is established by the normative act that establishes them... (Article 37 paragraph 2).

The term "imputability" is not defined in the Criminal Code, which obliges us to seek its common meaning. The explanatory dictionary of the Romanian language defines imputability as the situation in which a person is found to be attributed to the intentional misconduct of a crime provided by the criminal law. [30]

Thus, the current meaning of the imputational notion includes both objective imputability and subjective imputability, that is to say imputability, unless otherwise stated, includes guilt.

In these circumstances, in order to avoid any confusion, we consider that the legislator has to choose between two versions of the text of art. 15 par. (1) C. pen: either states that it refers exclusively to objective imputability or abandons guilt as the essential feature of the offense, since it is included in the general notion of imputability.

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Some Aspects Regarding the Use of Classified Information as Evidence in Criminal Trials

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Abstract

In respect of the need to find out the truth in a criminal case, the judicial bodies have the obligation to ensure, based on evidence, that the truth is discovered with regard to the acts and the circumstances of the cause and with regard to the person of the suspect or the defendant, which is why we intend to look at how the Constitutional Court, admitting the unconstitutionality exception to the provisions of Article 352 para. 11 and 12 find that they are contrary to the right to a fair trial and to the principles of unity, impartiality and equality of justice for all, provided for in Article 16, paragraphs 1 and 2, and Article 124, paragraph 2, of the Constitution.

Keywords: criminal trial, evidence, issuing authority, classification of information, declassification of information.

1 General Considerations

Both judicial theory and judicial practice unanimously consider that if a crime is committed, a conflict arises between the will of the law, contained in the judicial rules of criminal law, and the will of the addressee whose conduct manifested against the indictment rule. This conflict creates a *substantial legal relation* within which the state exercises its right to hold the lawbreaker accountable, with the latter being expected to suffer the consequences for breaking criminal law [1].

So, it becomes obvious that the entire activity of the judicial bodies which is aimed at holding those who committed a crime criminally accountable can only be accomplished through criminal justice, in the framework of a criminal trial.

In these conditions, the *criminal trial* appears as being that activity governed by the law, held by competent bodies, with the participation of the parties and of other people, for the purpose of ascertaining, in a timely and complete manner, the acts which are crimes, so that any person who committed a crime is punished as appropriately for their guilt and no innocent person is held criminally accountable [2]. The course of the criminal trial is governed by certain principles, which direct the procedural actions of the judicial bodies for the purpose of finding the truth in a criminal cause.

Our assertion is based on the existence of the rules of criminal proceedings law which, in the Code of Criminal Proceedings, bring under the regulation the principle of presumption of innocence in a criminal trial. Therefore, pursuant to Article 4 paragraph (1) of the Code of Criminal Proceedings, "Everyone is considered innocent until his guilt is established by a final criminal judgment", the presumption of innocence being both a procedural guarantee, and a subjective right which requires that, with regard to the burden of proof, the judicial bodies prove the charges they claim, and any doubt to be interpreted as favourable to the person who is charged and who cannot be subjected to the rigour of the law unless there are indubitable proofs of guilt (*in dubio pro reo*).

The presumption of innocence is the basis for the right of defence and other procedural rights which the law grants to a suspect or a defendant, the judicial bodies having the obligation to ensure, based on evidence, that the truth is discovered with regard to the acts and the circumstances of the cause, as well as with regard to the person of the suspect or the defendant.

As a matter of fact, in order to ascertain the existence of the acts and the factual circumstances which make the object of a criminal cause, as well as the guilt of the wrongdoer, it is necessary that the judicial bodies carry out a complex *evidence taking* activity, so that from the time the criminal trial is initiated and until the cause submitted to judgment is finally settled, all the problems pertaining to the merits of a cause are solved with the help of evidence, and, given this fact, some authors [2] said that the entire criminal trial is dominated by the issue of evidence taking, i.e. collecting, checking and corroborating the evidence in the course of the criminal trial.

We need to specify that the freedom of evidence must be accompanied by the freedom of the types of evidence, which must be understood as meaning that the actual situations which account for evidence in a cause can be submitted to the judicial bodies through any legal types of evidence, as the legislator provided according to the provisions of Article 97 paragraph (2) of the Code of Criminal Proceedings, the evidence resulting in a criminal trial from the following types of evidence: the suspect's or the defendant's statements; the statements of the aggrieved person; the statements of the party claiming damages or of the responsible third party; the statements of witnesses; deeds, expertise reports or reports on the findings, records, photographs, physical evidence; any other type of evidence which is not forbidden by law.

2 The Use of Classified Information as a Type of Evidence in a Criminal Trial

It is possible, in a criminal cause, to take classified information as essential evidence for the settlement of that cause. For such situations, the legislator provided in Article 352 paragraph (11) of the Code of Criminal Proceedings that it is necessary that the court requests urgently a complete declassification, a partial declassification or the re-assignment to a classification degree, as appropriate, or to allow the defendant's attorney to have access to the information which is classified.

According to the provisions of Law no. 182/2002 on the protection of classified information [3], there are two classes of secrecy: state secrets, concerned with national security, which, if disclosed, may affect the national security and the defence of the country, and professional secrets, meaning the information which, if disclosed, may determine damages for a legal person of public or private law.

The levels of secrecy assigned to the information included in the class of state secrets are: top secret of a special importance; top secret and secret. Public authorities draw up their own lists with the categories of state secret information in their areas of activity, which are approved and updated by a Government Decision and are communicated to the Romanian Intelligence Service, the Foreign Intelligence Service, and, as appropriate, to other structures concerned with information which have, under the law, duties related to the organisation of specific protection measures.

With regard to the access to classified information which is state secret and professional secret respectively, this is granted, subject to the validation of the choice or appointment and the taking of an oath, under Article 7 paragraph (4) of Law no. 182/2002 on the protection of classified information, to judges, prosecutors, as well as to assistant-magistrates from the High Court of Cassation and Justice.

In respect of "allowing the defendant's attorney to have access to classified information", the legislator of the Code of Criminal Proceedings considered it righteous to mention that "if the issuing authority does not allow the defendant's attorney to have access to classified information, this information cannot be used to pronounce a conviction solution, a solution for renouncing the application of punishment or for postponing the application of the punishment in that cause", according to the provisions of paragraph (12) of the same article, mentioning here also the requirement that the evidence taking in a criminal cause is not against the law.

The Constitutional Court admitted and gave its opinion, with the Decision no. 21 of 18 January 2018 [4], on the exception of unconstitutionality raised by the Prosecution Office attached to the High Court of Cassation and Justice – the National Anticorruption Directorate, in a criminal cause in the procedural stage of preliminary chamber, in connection with the provisions of Article 352 paragraph (11) of the Code of Criminal Proceedings, and found that the phrase

"the court requests" in relation to the phrase "to allow the defendant's attorney to have access to the information which is classified" is unconstitutional, finding at the same time that the phrase "issuing authority" in the content of Article 352 paragraph (12) of the Code of Criminal Proceedings is unconstitutional, the Court considering that the provisions of Article 352 paragraphs (11) and (12) of the Code of Criminal Proceedings contradict the right to a fair trial, as well as the principle of uniqueness, impartiality and equality of justice for all.

The Court shows in its motivation that because the evidence is the central element of any criminal trial, and the classified information has the value of evidence in such trial, the conclusion that can be drawn is that the defendant must have access to the classified information which is evidence in a criminal cause and on which the document instituting the proceedings is based.

The Court also criticises in its motivation the legislative solution which conditions the use of classified information by the permission of the public authority which classified the information (the issuing authority) with regard to the access to this information, considering that the protection of classified information cannot be a priority compared to the defendant's right of information and compared to the guarantees of the right to a fair trial for all the parties of a criminal trial, except when this is expressly and restrictively provided by law.

We can see for that matter that with the provisions of Article 352 paragraph (11) of the Code of Criminal Proceedings, the legislator allows that the access of the defendant's attorney to classified information is given by the court, therefore by the judge who is a member of the panel, in the judgment phase, although the defendant's attorney is entitled to request to consult the file at any time in the course of a criminal trial, a right which cannot be abusively restricted.

Therefore, if the issuing authority does not allow the defendant's attorney to have access to classified information, this information cannot be used to pronounce a conviction solution, a solution for renouncing the application of punishment or for postponing the application of the punishment in the cause.

Considering that the provisions of Article 352 paragraph (11) of the Code of Criminal Proceedings are contained in Title III "Judgment", this confirms once more that the legislator considered it necessary that the court, through the judge who is a member of the panel, requests, urgently, when the file of the case includes evidence in the form of classified information, a complete declassification, a partial declassification or the re-assignment to a classification degree, or to allow the defendant's attorney to have access to such classified information.

Apart from this, both the legislator of the Code of Criminal Proceedings, and the motivation in the Court Decision converge towards the same idea, namely that this procedure for a complete declassification, a partial declassification or the re-assignment to a classification degree, or for allowing access to this information shall take place in the judgment phase, more precisely, pursuant to the point 32 of the Court motivation "The issue of classified information, which is essential to the settlement of the cause, and the verification of the lawfulness of taking such evidence, should have been already settled in the preliminary chamber, so before going to the procedural phase of judgment on the merits, because, in this phase of

the criminal trial it is not possible to have evidence as classified information which is inaccessible to the parties without infringing on the provisions of Article 324-347 of the Code of Criminal Proceedings and the jurisprudence of the Constitutional Court in the matter of the preliminary chamber procedure".

Examining the aspects above and considering that in a criminal trial finding the truth is limited to the facts and the circumstances which are the object of evidence taking, we can draw the conclusion that "finding the truth in a criminal cause" means to achieve a full correspondence between the actual events, as they happened materially, and the conclusions drawn by the judicial body with regard to those circumstances [6].

And this is nothing but the need to respect a fundamental principle of criminal trial, namely the principle of finding the truth in a criminal trial.

This means that *in the criminal prosecution phase* the gathering of evidence by the judicial bodies is concerned with the existence of a crime, the identification of the people who committed a crime and determining their criminal liability, so as to see whether an arraignment is indicated or not.

Moreover, *in the judgment phase*, the court settles the cause brought for judgment while guaranteeing the observance of the rights of the subjects of the proceedings and ensuring that the evidence is taken so as to fully clarify the circumstances of the cause for the purpose of finding the truth, in full compliance with the law, and if the defendant so requires and fully admits to having committed the acts with which he or she is charged, and the court considers that the evidence is sufficient for finding the truth, the court may settle the case by applying the simplified judgment procedure, except when the criminal action is for a crime punished with life detention.

So, it becomes obvious that if the judicial bodies have the obligation to ensure that the truth is found out in a criminal trial with regard to the facts and the circumstances of the cause, as well as with regard to the person of the suspect or the defendant, this can only be accomplished in the course of criminal prosecution, while in the course of judgment, the court settles the cause based on the evidence taken in the file for a complete clarification of the cause, for the purpose of finding the truth, in full compliance with the law, however, we can ask the question what happens in the criminal prosecution phase with the evidence gathered in the file, the evidence which is classified information? We are justifying this question having regard to the fact that the legislator refers in the content of Article 352 paragraph (11) to the court which must request a complete declassification, a partial declassification or the re-assignment to a classification degree, or to allow the defendant's attorney to have access to this information, and the Constitutional Court considers in the motivation of its Decision that this activity must be carried out by the judge of the preliminary chamber, within the preliminary chamber procedure, both cases being about the need to have some methodical and efficient control in order to find out the truth.

As a matter of fact, we can also see that the Decision refers only to the right of the defendant to have access to classified information which accounts for evidence, however, there is no reference to the fact that by excluding the classified

evidence with the application of Article 352 paragraph (11) and paragraph (12) of the Code of Criminal Proceedings, the right of the plaintiff claiming damages to propose evidence and to have its request for evidence taking admitted for the criminal side of the cause is also affected, as the concerned procedure does not take into consideration the observance of the rights of the other parties in the trial, besides the defendant, although according to Article 100 paragraph (1) of the Code of Criminal Proceedings, in the course of criminal prosecution, the prosecution body gathers and takes evidence which is both favourable and against the suspect or the defendant, at its initiative or upon request, while in the course of judgment, according to paragraph (2) of the same article, the court takes evidence at the request of the prosecutor, of the aggrieved person or of the parties, and, secondarily, at its own initiative, when it considers that this is necessary in order to form an opinion, and in the course of the criminal trial, the court settles the cause brought for trial while guaranteeing the observance of the rights of the subjects of the proceedings and ensuring that the evidence is taken so as to fully clarify the circumstances of the cause for the purpose of finding the truth, in full compliance with the law.

To complement this enouncement, we also mention the provisions of Article 99 paragraph (3) Code of Criminal Proceedings, which stipulate that, in a criminal trial, the aggrieved person, the suspect and the parties are entitled to propose to the judicial bodies to take evidence, and that the attorney of the parties and of the subjects of the criminal proceedings is entitled to request to consult the file throughout the criminal trial.

Therefore, we can see that both the provisions of Article 352 paragraphs (11) and (12) of the Code of Criminal Proceedings, and the motivation of the Decision have not taken into consideration the need to observe the rights of the other parties in a criminal trial, infringing in this way on the right to a fair trial, especially since the provisions of Article 24 paragraph (5) of Law no. 182/2002 forbids the classification as state secret or professional secret information of any information, data or documents for the purpose of concealing law breaking, administrative errors, limitation of access to public information, illegal restraint of the exercise of a person's right or impingement on other legitimate interests.

3 Conclusions

In our opinion, the activity of the judicial bodies, both in the criminal prosecution phase and in the judgment phase, is not limited to gathering evidence for the purpose of evidence taking, nevertheless finding the truth in a criminal cause is a fundamental principle of the criminal trial, and holding those who committed a crime criminally accountable depends on it. Indeed, there are some causes brought for trial where the evidence taken in the cause is classified information under Law no. 182/2002, a situation when it becomes obvious that without the operation of complete declassification, partial declassification or re-assignment to a classification degree, or allowing the defendant's attorney to have access to the classified information, in case that the issuing authority does not

authorise this operation, this information cannot be used to pronounce a conviction solution, a solution for renouncing the application of punishment or for postponing the application of the punishment in that cause.

Therefore, the Decision of the Constitutional Court to pronounce on the unconstitutionality of the provisions of Article 352 paragraphs (11) and (12) of the Code of Criminal Proceedings becomes a beneficial one in relation to the criticisms that have been made, however given the fact that in its motivation the Court considers that the verification of the lawfulness of taking such evidence must be settled by the judge of the preliminary chamber, we think that it is necessary to reanalyse the opportunity of carrying out these activities ever since the phase of criminal prosecution, by the judge for rights and liberties, having regard to the fact that evidence is taken also in this phase of the criminal trial and part of this evidence may be classified information, and that, at the same time, the right to a fair trial also involves the right of the plaintiff claiming damages to propose evidence and to have the requests for taking this evidence admitted, even if it is classified information in a criminal trial.

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Considerations Regarding the Judges' Investigation in Appeal

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Abstract

Remedies (in the present case, the appeal) are the means by which, at the request of the prosecutor or the persons legally authorized by the law, judicial control is initiated in order to abolish unlawful or non-criminal criminal decisions and to replace them with decisions in accordance with the law; truth. Their existence is based on the idea that justice, not infallible, should not close the way to a new judgment, assuming that, for some reason, it could lead to finding out the truth in question. We conclude that they are a remedy, a procedural remedy (susceptible of being used on a voluntary basis) through which a legal and thorough settlement of criminal cases is carried out.

Keywords: trial, preliminary investigation, appeal, first court trial, judge's investigation, judge's investigation procedure, judge's investigation closing.

Challenging means are certain modalities by which, upon request of the prosecutor or any other legally entitled parties, the judiciary control court begins the procedures of dismantling the illegal or unfounded penal resolutions [1].

1 Preliminary Investigation

The appeal begins, just as in the case of the first court trial, with some preliminary investigations, aimed to find out if the trial is – as stipulated by art. 420 PPC [2] – "in state of trial".

The first aspect that the appeal court must investigate is the regularity of its own formation: composition of the panel of judges, presence of the prosecutor and the court clerk. The judges panel is found to be legally formed if, being allocated with the number of judges stipulated by law, there are no incompatible judges in its composition; also, if the defendant is a member of the military, the

court must find that the rank of the President of the judges panel is not inferior to the military rank of the defendant, and if the defendant is under age, it should be found that the President of the court made all the special representation designations. The prosecutor's participation is mandatory for judging the appeal, as stipulated by art. 420 § 3, PPC, irrespective of the case merits.

After finding the regularity of its formation, the appeal court shall verify the presence of the parties involved, the completion of the summoning procedure regarding the absent parties, and, if mandatory juridical assistance has been granted. It is worth mentioning that the parties can be present even if, in their own respect, the summoning procedure has not been completed in conformity with the law, as their right to stand in court derives from the previous proceedings on the case and, therefore, the only thing that has to be verified by the appeal court consists of identifying the respective parties. The presence of the arrested defendant in open court is – as presented in other places – mandatory, as well as her legal assistance by a defender: if upon calling the case, the defender – in spite of the having recorded her power of attorney with the court clerk – does not answer, the court must delay the calling of the case and, if the same circumstances remain unchanged until the end of the session, the court shall order the delay of the hearing on the case; in case the defendant was not granted the mandatory legal assistance, the court is obliged to take the necessary measures to provide it. According to art. 364 §1, bringing the arrested defendant in front of the Court is obligatory. The Court shall also verify the presence of the defendant whenever the detained defendant, with her agreement, and in presence of her chosen or designated defender, takes part into the court proceedings by videoconference from her detention place.

The judgment proceedings can take place in absence of the defendant in the following circumstances: if she has disappeared, if she avoids judgement, if, even though legally summoned, she is absent without justification at the hearing of the case, or, if she changed her address without informing the judiciary agents of such change and, following duly run investigations, her new address remains unknown; when the detained defendant requests to be judged in absence – the court can dispose, upon request or by its own will, that the defendant is allowed to participate in the debates and to take the stand by means of videoconference, in presence of her chosen or designated defender. When the court finds the presence of the defendant to be necessary, it can order that she is brought to court by mandate.

When the result of all these verifications is positive, the appeal court shall verify the regularity of its own intimation with the case. For this purpose, the Court shall investigate that the appeal application comprises the data required for the promotion of the judicial control phase, if it is signed or, as the case is, confirmed and if it has been submitted within the due term; afterwards – if the appeal application is verified to fulfill these requirements – the court shall examine the appeal request from the point of view of its acceptance in principle, meaning that the Court shall verify if the challenged court resolution can be appealed and if the person that promoted this challenge procedure has the right,

according to the law, to promote it (art. 409 PPC, Persons who can promote the appeal).

After finding with regards to the legality of its intimation with the case, if the defendant is under arrest – irrespective of who ordered his arrest, the criminal preliminary investigation agents or the first court – the appeal court is kept to verify, without other intimations, the legality of taking and maintaining the measure of preventive arrest and to order either maintaining or ceasing the detention of the respective party, if the court finds that the measure of the arrest was irregular or it finds that the conditions of a case of rightful cease of the arrest are accomplished. For checking the regularity of the preventive arrest, it is necessary, but sufficient, that the intimation of the appeal court be legal, without any other previous verification of the court's legal competence and intimation; therefore, the checking has to take place even when the court realizes that the intimation requests refers to a case that is not under its own competence of judging [3].

Besides all that, during the preliminary investigations, the court shall resolve all the exceptions or requests that may impede the continuation of the appeal judgement proceedings (for instance, challenges of judges, requests of delay, etc.).

2 Appeal Judgement Proceedings

In conformity with art. 420, art. 421 PPC, the Court, while judging the case, verifies the challenged resolution basing its judgement on the material objects and documents present in the case docket and any other new documents that are presented to the appeal court; in order to solve the appeal, the court can order – as shown in § 5 of the same article – the reevaluation of the evidence and can consider any other new evidence it finds necessary (under art. 100, Consideration of evidence and art. 101, Principle of loyalty of evidence consideration).

The content of the mentioned legal dispositions results into judging the appeal, regularly, on basis of the evidence considered by the first court and, eventually, on new documents presented to the appeal court. It is possible, however, that while verifying the motives of the intimation request, or even *ex officio*, the court to find that new evidence is necessary and, in order to resolve the appeal, to order a judge's investigation, which is in many respects similar to the one made by first courts.

In the first case, when new evidence is not requested or such request is rejected, the appeal trial consists of debating – while rejecting the sustaining of the appeal motives by the appealing party and their challenge by the opposite party, as well as discussing in contradiction eventual factual or lawful errors found *ex officio* – without proceeding with the consideration of evidence. The whole appeal procedure is reduced to a confrontation in front of the appeal court, focused, in respect of the factual aspects, exclusively on the evidence presented in front of the first court, and, eventually, on some new documents [4], of the divergent positions of the appealing party and the opposite party, in order to find

the truth (with regards to the reality of the committed crime and its gravity, the guilt of the defendant etc.) and the correct application of the law with regards to the committed crimes.[5]

This confrontation has an order rigorously established by art. 420 §6 and §7 PPC. This text shows that, if at the established hearing term, the appeal is in state of trial, the President of the court hears the appealing party, afterwards the intimated party and at the end the prosecutor; if any of the intimating appeal requests is the appeal submitted by the prosecutor, the latter shall be the first to speak, the prosecutor and the parties being entitled to reply afterwards with regards to the new aspects appeared during the debates.

The appealing party shall present their appeal motives, irrespective of showing them in the appeal application or in a separate memo, or if they are invoked directly by the court. The intimated party, who is interested to maintained the appealed resolution, shall reply to the motives presented by the challenging party and, regularly, shall try to prove that they are not founded; if such motives are verbally presented for the first time, as part of the debate, the intimated party may ask for a new hearing term in order to prepare her defense.

The prosecutor, who is always aiming to a solution of the case in conformity with the law and the truth, is not bound by the position of any of the parties, being entitled to ask the court, according to her own conviction, either to reject or to admit the appeal, in full or in part.

When the resolution is challenged by more than one party, including the prosecutor, these shall take the stand in order each to sustain their appeal, in the following order: the prosecutor, the damaged party, the civilian party, the responsible civilian party and the defendant (art. 420 PPC).

If new issues arise during the debates – arguments or exceptions other than those implied by the appeal motives and not only simple argumentations – the prosecutor and any of the other parties or the damaged party can present their position with respect to such issues, after all the parties took the stand, as enforcement of their right to reply.

The last word must always be granted to the defendant, irrespective of the quality of challenging or intimated party in the appeal; last stand, as a distinctive procedure act, cannot be considered to be a reply in case that, in her capacity of appealing party, the defendant took the first stand (art. 420, §7, second thesis) [6]. In the appeal court – different from the first court – the right to take the last stand can also be exercised by defender [7].

The trial procedure in appeal expands when the appeal court proceeds to judge's investigations. This phase takes place when, in sustaining or opposing the appeal motives, the prosecutor or the parties invoke the necessity of considering new evidence and the appeal court, after discussing this aspect with the interested parties, appreciates that the requested evidence is acceptable, conclusive and useful to the case, and orders that such shall be presented [8].Such a measure can be taken even *ex officio* – of course, after it being discussed with the present prosecutor, parties and damaged parties –, if it is appreciation of the court that investigating the new evidence can contribute to finding the truth.

The juridical literature has shown that new evidence means such pieces of evidence that have not yet been considered in the case (during the criminal investigation or in the first court) [9]. However, although art. 420 of PPC refers to "considering new evidence", we believe that there is no impediment for the appeal court to order, upon request, or *ex officio*, to repeat or reverify certain pieces of evidence (to hear the defendant or some of the witnesses once more, to have certain information or circumstances researched again by an expert, etc.), when such are obviously incomplete or when an irregularity appears in their previous consideration.

"The appeal court is kept, in conformity with art. 420 PPC, to proceed to hearing the defendant whenever she is the appealing party, as well as when she is the intimated party. Unlike the previous law, hearing the defendant in appeal is mandatory, irrespective of the resolution of the first court. Provisions of art. 420 §4 PPC are meant to assure observing the right to a fair trial stipulated by art. 6 of the European Convention, considering the Decisions of the European Court for Human Rights of 27 June 2000 in the case *Constantinescu vs. Romania*, of 8 March 2007 in the case *Dănilă vs. Romania* and of 29 March 2007 in the case *Mircea vs. Romania.*

It has been shown in this respect that, in accordance with the most recent jurisprudence, the hearing of the defendant by the appeal court is obligatory not only when the former was acquitted in first court, and her conviction is asked for in appeal, but also when the defendant was convicted in first court, irrespective of the motives invoked in appeal.

Not hearing the defendant who is present in court, whenever such hearing is legally possible, constitutes a case of recourse in annulment, stipulated by art. 426 letter h) PPC; the defendant being the one taking the last stand in front of the court is the equivalent of being heard by the court during the trial.

The appeal court can reconsider the evidence presented in first court and can consider new evidence in conformity with art. 100 PPC, that is, upon request of the prosecutor, the damaged party or the parties and, in subsidiary, *ex officio*, whenever it finds such to be necessary in order to get a firm opinion of its own. The new pieces of evidence are considered in appeal following the same rules followed in first court.

According to stipulations of art. 421, letter a), second thesis, PPC, introduced by the Urgency Ordinance of the Government no. 18/2006, the appeal court shall reconsider the statements on which the first court based its resolution of acquittal; accordingly, the dispositions of art. 374 §7 to §10, regarding the lack of reconsideration of the evidence that was previously considered during the criminal investigation and not contested (by the parties or the damaged person), except when the court appreciates that reconsideration is necessary in order to find out the truth and justly solve the case and consider the new evidence (*ex officio* or upon request of the prosecutor, the damaged party and the parties), as well as those of art. 383 §3 and §4 PPC, regarding the wave of evidence and the impossibility of considering evidence.

Although the law maker imposes the obligation of reconsideration in the appeal phase of all the statements on which the first court based its acquittal resolution, the jurisprudence of the European Court of Human Rights in the matter results into the necessity of hearing again the main witnesses of the accusation as well, in order to enable the court of control to convict the defendant, after her acquittal in the first court; however, it is quite improbable that the first court based its acquittal solution on the statements of the main witnesses of the accusation" [10].

The proceedings of judge's investigation in appeal. The judge's investigation in appeal is not performed by exclusive, special rules, specific to this challenge means, but, in general, it is performed according to evidence rules that regulate similar judiciary activities in the trial in the first court.

The activities of investigation made by the judge in first court are regulated by the dispositions of art 374-378 PPC; these legal provisions are added with the derived norms from the General Part of the Penal Procedure Code, especially with those referring to evidence consideration. The same legal frame also serves to regulate the judge's investigation in the appeal. We are, in other words, in front of common norms, stipulating the modality of performing the investigation made by a judge both in first and in appeal courts. Since during the trial both in first court and in appeal, whenever an investigation is made by the judge, in general, the same acts are performed, which here appear, therefor, to be common to both phases of the trial, it is normal that they are regulated by common legal procedural norms. Such norms are to be applied both in first and in appeal courts, except when the law expressly provides for special derogatory rules or when the general norm is inapplicable in relation to the nature of the appeal trial [11]. Without exceeding the above, it has been shown in the literature that, by the generality of the formulation and the restrained frame of the investigation made by the judge, the trial in the first court is the fundamental scheme that models, with certain variations, the trial in the recourse phases [12].

A certain sequence of the acts of investigation by judge is stipulated by the law for such activities performed made in first court. Provisions of art 374 PPC and other legal provisions that regulate the investigation by judge, present the norms stipulating the sequence of the acts to be performed during the investigation made by the judge, as follows: initiation of judge's investigation, hearing the defendant, hearing the co-defendants, hearing other parties, hearing the witnesses, the expert and interpreters. The court, however, can, as shown in art. 376 § 5, PPC, order certain changes in this sequence, when such modifications are deemed necessary for the proper performance of the judge's investigation.

In principle, the above presented order is valid, also, for the investigation made by the judge in the appeal phase. The complementary nature of the judge's investigation performed during this trial phase and the nature of the trial in appeal, has as a consequence that, in appeal, the judge's investigation can be reduced to certain or only to one of the acts of the referred sequence of events. The appeal court is not obliged to perform all the investigation acts shown in art. 375 and the following in PPC, reiterating the judge's investigation in the first court, but only

those acts that, in reference to the stage of evidence presentation, are deemed necessary to complete the evidence material that is indispensable to solve the case in a just and correct manner. It is possible, therefor, to wave, from case to case, subject to each matter's specifics, some of the investigation acts that, being complete and made in conditions of full legality by the first court, do not need to be repeated. The appeal court thereby limits its activity of judge investigation to those acts that are necessary, that either were not done by the first court judges, or were lacunary done or by breaking the law, which imposes on completing or remaking them.

It is obvious that the trial in appeal and the order of the investigation acts performed by the judges can be modified as needed.

– In the first court, the start of the investigation by judge is done by the president of the panel who reads the intimation act and clarifies with the defendant that the latter is aware of her right to address questions to the co-defendants, the other parties, the witnesses, the expert, as well as of giving explanations whenever she finds it is necessary.

In the appeal court, where the judge's investigation is ordered after the presentation and debate on the appeal motives, the start of the judge's investigation is reduced to the second step, in other words, to the clarifications offered to the defendant in respect of her rights above shown.

– In the case of the judge's investigation made in the first court, the evidence considerations start, mandatorily, with the hearing of the defendant, when she is present; only after that, if needed, there can appear modifications on the order stipulated by law for performing the judge's investigation [13]. The priority of hearing the defendant is explained by her position in the judiciary proceedings, as the main subject of the criminal case [14].
– the performance of the judge's investigation depends in great measure on her attitude in front of the court, by configuring, from the very beginning, the direction such investigation will take, in defense, in the evidence identification process. In the appeal court, the hearing of the defendant, within the process of judge's investigation, is obligatory (art. 420, § 4 PPC).

With regards to the procedure of hearing the defendant, certain clarifications have to be made:

Within the frame of the investigation of the judge in the first court, the defendant is requested first to show everything she knows with regards to the facts for which she is taken to court, or to be read or reminded the content of her previous statements and without being interrupted in her exposition (art. 378 §4 PPC); only afterwards, she can be asked questions by the President and the other members of the panel, by the prosecutor and by the other parties, as well as by her defender.

If the statement of the defendant in front of the appeal court is in contradiction with the one during the judge's investigation in the first court, the President of the panel must – as stipulated in art. 378 § 4 PPC – demand

explanations and, contextually, read in full or in part to the defendant those previous statements.

After explaining and answering the questions, in conformity with provisions of art. 378 § 6 PPC, the defendant can be heard again, as many times as necessary.

If there are more defendants – art. 379 PPC stipulates – hearing each of them is done in the presence of the others; however, when it is in the interest of finding out the truth, the court can order the hearing of any one of the defendants to be done when the other defendants are not present; separate statements shall be read, however, obligatorily, to the other defendants, after they are heard. These rules are valid also for the investigation by judge made in the appeal. It is, however, possible that finding out the truth does not impose that all of the defendants be heard, but only one or some of them; such situations can arise, for instance, in case of connex incriminated facts that are not all retained against all defendants, or when the statement of only one or some of the defendants is incomplete, imprecise or ambiguous. In such circumstances, the appeal court does not hear only that or those defendants whose hearing is necessary, but the court will adjust the above described rules in order to fit the concrete circumstances.

During the judge's investigation in the first court, after hearing the defendant, the court shall hear the other parties: the damaged party, the civil party and the responsible civil party. Hearing these parties shall take place – according to art. 380 PPC – in conformity with the provisions of art. 119-129 PPC regarding the hearing of the defendant.

The above-mentioned rules referring to the hearing of other parties in first court are also valid for the hearing of such parties during the judge's investigation made by the appeal court.

It is hereby mentioned that, although the first court, in performing the judge's investigation, is obliged to hear the statements of the damage party, the civilian party and the responsible civilian party, when they present in court, during the appeal, the court does not have such an obligation; it will do it only when such hearings are necessary for clarifying the case. These parties will express however their opinion on the accusations brought against the defendant and will plead for their own interests in the debates following the judge's investigation.

The procedure of hearing the **witnesses, experts and interpreters** by the appeal court is the one regulated by dispositions of art. 381 PPC, regarding their hearing during the judge's investigation made in first court. Also, the rules stipulated by art. 114 and the following of PPC with regards to the statements of the witnesses and the provisions of art. 373 PPC shall apply, because, even if heard by the first court or by the appeal court, it not possible to proceed with hearing witnesses, experts and interpreters before fulfilling the preliminary conditions for their hearing.

The witness – as well as the defendant – must be allowed first to show everything she knows regarding the alleged crime and its circumstances, without interruption and without being read previous statements or being reminded any of the facts and circumstances (art. 381 § 6 PPC); afterwards, she can be asked questions in a certain order: first the President and the other members of the judges

panel, then the prosecutor and the party that called the witness, and at the end the other parties (art. 381 § 2 PPC). The witness cannot read a statement previously written, but can use notes to get details; if she is in possession of a written document with regards to the given statement, she will be allowed to read it in front of the court, who, after examination, can retain it for the docket (art. 381, § 5 PPC).

If the witness gave other previous statements in the case and cannot expose some of the facts or circumstances, or if there are contradictions between her previous statements and those given by him/her in front of the appeal court, the court can order her to be read in full or in part, those first statements (art. 381 § 6).

During the judge's investigation, the appeal court, as well as the first court, can order, *ex officio* or upon request, if so considers to be necessary, to bring and present in the session the existing material pieces of evidence of the case, comprising those objects that contain or bear any trace of the committed crime/s, as well as any objects that might contribute to finding the truth (art. 384 PPC). The need of presenting the material evidence – appreciated from case to case by the appeal court – may arise when, for instance, the objects bearing traces or the delictual instruments contain evident proof of the crime, but contradictory statements have been heard or any doubts appear with respect to such object [15].

Closing the judge's investigation. Just as in first court, the judge's investigation in the appeal is considered closed once the whole evidence inventory is checked through. In conformity with art. 387 PPC, this moment of the trial must be declared and recorded as such by the President of the panel, in order to avoid the return to new evidence administration and in order to pass, in full knowledge of the factual circumstances, to the debates on the merits.

Before calling the closing of the judge's investigation, the President of the panel of judges of the appeal court shall address the prosecutor, the parties and the damaged party (art. 387, § 1) asking them to formulate any other explanations or requests, if any, in order to complete the judge's investigation.

If no other requests are submitted or if the submitted requests are rejected, or if the requested completions are done, the President declares the closing of the judge's investigation and gives the stand to the parties to debate the appeal.

REFERENCES

[1] Theodoru, Gr. (1998). *Drept procesual penal. Partea specială* (Criminal Procedure Law. Special Part), Iasi: Cugetarea Publishing House, p. 297.

[2] Throughout the article, "PPC" stands for "Penal Proceedings Code" (translator's note).

[3] Dongoroz, V. and others (1976). *Explicații teoretice ale Codului de procedură penală* (Theoretical Explanations of the Criminal

Procedure Code), Vol. II, Bucharest: Academiei Publishing House, p. 144.

[4] In the literature, the delimitation of the concept of "new documents" – and more even when this concept comprises the statements (authenticated or not) of certain witnesses or experts' reports obtained by extra judiciary means submitted by the parties to the court of control – gave rise to certain divergences of opinion. In civil matters it has been found that witness statements, as well as experts' reports on special issues are not to be considered as new documents [see Supreme Court Directive Resolutions 1960 CD, p. 17; Stoenescu, I., Porumb, Gr. (1966). *Drept procesual civil* (Civil Procedure Law), Bucharest: Didactică and Pedagogică Publishing House, p. 312; Paşca, M. (1984). With regards to "written evidence" that can be produced as new evidence in front of the court of recourse, in RRD nr. 7/1984, p. 11]. In criminal matters, some authors plead for a large, extensive interpretation of the concept, as a means of finding out the real truth, but sustain that, in considering such 'written proof' the appeal court cannot establish a state of fact different from the one retained by the first court, but it can find as necessary to order the hearing of the witnesses who offered those statements or a new expertise research as part of the judge's investigations made by the court itself [Papadopol, V., Turianu, C. (1994). *Apelul penal* (Criminal Appeal), Bucharest: Publishing and Press House "Şansa", pp. 202-205]. Other authors consider that "new written evidence" are also documents classified as written materials, as evidence means, in the sense given to it by the penal procedure law (certificates, advisory certifying documents, charts, descriptions, etc.), authenticated or privately signed deeds issued by the parties (letters, receipts, records, etc.) that were not known by the first court at the moment of giving its resolution [Volonciu, N. (1994). *Tratat de procedură penală* (Criminal Proceedings Treaty), vol. II, Bucharest: Paideia Publishing House, p. 267].

[5] Papadopol, V.V., Turianu, C., *Idem*.

[6] Dongoroz, V. and others (1969). *Noul Cod de procedură penală şi Codul de procedură penală anterior – prezentare comparativă* (New Criminal Procedure Code and Previous Criminal Procedure Code – A Comparative Presentation), Bucharest: Politică Publishing House, p. 311.

[7] Dongoroz, V. and others (1976). *Explicații teoretice ale Codului de procedură penală român* (Theoretical Explanations of the Romanian Criminal Procedure Code), vol. II, Bucharest: Academiei Publishing House, p. 232.

[8] The newly proposed new evidence must comprise such evidence (new facts and circumstances that are to be proven) and the proof means that can be considered, indicating the place where such are

located [Mateuţ, Gh. (1998). *Procedură penală. Partea specială* (Criminal Proceedings. Special Part), vol. II, Bucharest: Lumina Lex Publishing House, p. 257].
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[13] Nistoreanu, Gh. and others (1996). *Drept procesual penal* (Criminal Procedure Law), Bucharest: Europa Nova Publishing House, p. 238.
[14] Neagu, I. (1997). *Tratat de procedură penală* (Criminal Proceedings Treaty), Bucharest: Pro Publishing House, p. 499.
[15] Dongoroz, V. and others, *Explicații teoretice...* (Theoretical Explanations...), vol. II, cit. supra, p. 178.

State of Necessity

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Abstract

According to current Criminal Code, state of necessity is no longer deemed to be a cause removing the criminal nature of the act by the removal of guilt. The opinion of many authors of legal literature, according to which whenever state of necessity is present the unlawful nature of the act is removed, is thus taken over. In this regard, current Criminal Code includes state of necessity in the category of grounds of justification. Therefore, Article 18 (1) of current Criminal Code stipulates that the act provided by criminal law is not an offence if one of the grounds of justification provided by law exists, and Article 20 (1) of the Criminal Code stipulates that the act provided by criminal law is justified when committed in a state of necessity.

Having regard to the amendments made to the state of necessity by current Criminal code, this article is a thorough analysis of the state of necessity by reference to the regulation contained in previous Criminal Code.

Keywords: state of necessity, ground of justification, danger, rescue operation, social values.

1 State of Necessity – Ground of Justification

Under Article 18 (1) of current Criminal Code "*the act provided by criminal law is not deemed to be an offence if one of the grounds of justification stipulated by law exists"*. Although this article regulates a new institution, called grounds of justification, two of the grounds of justification, i.e. the self-defence and the state of necessity, could also be found in previous Criminal Code, but they were part of the causes removing the criminal nature of the act by the removal of guilt.

The state of necessity is a ground of justification, taking into consideration Article 20 (1) of the Criminal Code, which provides that "*an act stipulated by criminal law is justified when committed in a state of necessity"*. There is no offence if the act was committed in the presence of one of the grounds of

justification provided by law. Practically, according to current Criminal Code, in the presence of a ground of justification, the act provided by criminal law is justified, being permissible under the legal order, therefore is not unlawful and, furthermore, cannot be deemed to be an offence. The grounds of justification are those cases when an act committed in objective reality, although stipulated by criminal law, is not an offence if permissible under the existing legal order following the fulfilment of legal requirements. In the presence of a ground of justification, the offence is ruled out, and criminal liability and applicability of any criminal penalty are therefore excluded [1].

The grounds of justification are not to be confused with the causes removing the criminal nature of the act by the removal of guilt. Thus, in the presence of a cause removing the criminal nature of the act by the absence of guilt the unlawful objective nature of the act is not removed, the act continuing to be prohibited by law and having an unlawful nature, only the guilt being removed, as one of the essential requirements of the offence. Conversely, the act provided by criminal law becomes a permitted act by reference to any area of law, having thus a lawful nature.

2 Notion

According to Article 20 (1) of the Criminal Code, "***an act provided by criminal law is justified when committed in a state of necessity".***

Article 20 (2) provides that "***A person is deemed to be in a state of necessity when they commit an act in order to save life, physical integrity or health of their own person or another's from an immediate threat which cannot be removed otherwise or in order to save an important asset of their own or another person's or a general interest, where the consequences of the act are not clearly more serious than those that would have occurred had the threat not been removed".***

Having read the legal text, one may conclude that the state is necessity is a ground of justification consisting in an act provided by criminal law, committed by a person in order to save life, physical integrity or health of their own person or another's from an immediate threat which cannot be removed otherwise or to save an important asset of their own or another person's or a general interest, where the consequences of the act are not clearly more serious than those that would have occurred had the threat not been removed.

The state of necessity is therefore a plurality of circumstances which an actor must find himself in when committing the act provided by criminal law. These circumstances are practically conditions an actor must comply with when committing an act in order to be permitted to invoke the presence of the state of necessity.

As a concept, a state of necessity is the existence of circumstances in which certain social values protected by law are threatened, and the rescue thereof is only possible by committing an act provided by criminal law.

3 Brief Comparative Overview Between Previous and Current State of Necessity Regulation

From a comparative review of the provisions of Article 20 of current Criminal Code and the provisions of Article 45 of previous Criminal Code, a few significant distinctions can be made:

a) As in the case of self-defence, according to current Criminal Code the state of necessity is a ground of justification operating *in* rem, its effects extending to the participants as well, unlike previous Criminal Code, according to which the state of necessity had effects *in personam.*

Under current regulation, the state of necessity is based on the concept that the state of necessity does not disturb the peace, the act committed in a state of necessity being consistent with the rule of law [2]. Thus, the state of necessity requires the existence of circumstances endangering the social values protected by law, and such values can be saved only by committing an act provided by criminal law [3]. According to current Criminal Code, the state of necessity is no longer deemed to be a cause removing guilt, which is also justified by the fact that it can be invoked not only by a person in danger, who would act as a result of moral restraints, but also by a third party, who acts without being physically constrained, where no immediate danger threatens their own person or assets. We should recall that under previous Criminal Code, the state of necessity had effects *in personam*, the act being deemed to be committed as a result of moral restraints, therefore without guilt, the will being affected [4].

b) Under these circumstances, the state of necessity was logically removed from the category of causes removing the criminal nature of the act by the removal of guilt and was included in the distinct category of grounds of justification, along with self-defence, exercise of a right or fulfilment of a duty and consent of the injured party.

c) If in previous Criminal Code the state of necessity was built on the idea of moral restraints, meaning that a person in a state of necessity acted without being able to freely make a decision, under current Criminal Code the act committed in a state of necessity does not disturb the peace and is therefore not unlawful.

d) In Article 20 (2) the term "public interest" was replaced by "general interest", the term "other" by "person", and the term "imminent" by "immediate". My opinion is that these amendments have no legal relevance.

e) The circumstance in which, by an act committed in a state of necessity, the actor, who at the time of committing the act did not realize he was causing consequences that were clearly more serious than those that would have occurred had the threat not been removed, is regulated by Article 26 (2) of current Criminal Code in the category of non-imputability causes, under the name of non-accountable excessiveness.

4 Conditions Regarding State of Necessity

We shall detail herein below the conditions to be met in order for the ground of justification regarding the state of necessity to be applicable:

The review of the provisions of Article 20 of the Criminal Code reveals the conclusion that in order for a person to be in s state of necessity, certain conditions regarding **danger**, on the one hand and the **rescue operation**, on the other hand, must be met:

4.1 *Conditions Regarding Danger*

The conditions regarding danger can be drawn from Article 20 (2) of the Criminal Code, as follows:

a) The existence of a peril situation;
b) The danger is immediate;
c) The danger threatens the social values referred to in Article 20 (2) of the Criminal Code;
d) The danger can be removed only by committing an act provided by criminal law, being therefore inevitable [5];

a) The existence of a peril situation

The peril situation may have different sources. Thus, it may be caused by natural phenomena, such as flood, earthquake, fire caused by drought or landslide. The hazard may be also caused by the action of animals or even by the action of people, regardless if they act with or without guilt, or even intentionally. The doctrine shows that danger may be caused even by the conduct of the victim who is about to be rescued [5].

The danger must be real, not only a hunch or feeling of the actor, because in such a case one can say that the actor made an error about the existence of the danger, the non-imputability cause of the error of fact being applicable [6]. Where the danger was intentionally caused by the person invoking it, the state of necessity clearly cannot be invoked. I believe that the state of necessity can be invoked by the person causing immediate danger by fault, taking into consideration that he neither aimed at nor consented to the likelihood of occurrence such a peril situation.

Immediate danger cannot consist in an attack by another person, as the self-defence provisions will be applicable in this case [7].

b) The danger is immediate

The danger is immediate when it has an imminent nature, i.e. it is about to happen. In other words, the imminence of the danger requires that it is actual, i.e. ongoing, but without having stopped or being ended. The doctrine [5] sets out that immediate danger means that it is not instantaneous, since no act for its removal is possible in such a case. Therefore, immediate danger means that several measures for its removal may be taken.

The immediate nature of the peril is assessed by taking into consideration the circumstances existing at the time the act determined thereby is committed.

The state of necessity cannot be invoked for future danger, as in such a case the actor can also take other measures to remove the threat, without being forced to infringe criminal law. Likewise, a finished peril situation does not allow the state of necessity to be invoked.

c) The danger threatens the social values referred to in Article 20 (2) of the Criminal Code

The social values a danger must threaten in order for a state of necessity to exist are listed in Article 20 (2) of the Criminal Code: life, physical integrity or health of a person, an important asset or a general interest. Whether these values are of the actor himself or of another person is of no relevance. At the same time, these values may belong both to a healthy or valid person or to a suffering or invalid person.

An important asset means an asset which, by its particular artistic, scientific, historic or emotional value, justifies the rescue operation by committing an act provided by criminal law [5]. We include buildings, works of art, machines, plants, etc. therein.

Most part of the doctrine [8] reveals that physiological needs, such as hunger, thirst, protection in cold weather, etc., cannot be regarded as important assets, so as to create a state of necessity justifying an act provided by criminal law, because this would lead to cases generating abuses. Nevertheless, specifically, a situation like the ones mentioned above might justify a state of necessity where it could be proven in Court that it was determined by extraordinary circumstances, which could neither be foreseen nor removed. If the circumstances in which the actor found himself were not extraordinary, could have been foreseen and if there were other methods to remove the danger, the state of necessity cannot be invoked. To this end, legal practice shows that no state of necessity can be held where the actor invoking it stole several fodder bags, justified by the fact that he was in a state of extreme poverty, being sick and providing for a big family, as his act could not solve the financial difficulties he faced and there were certainly other methods to cover the family needs [9].

d) The danger can be removed only by committing an act provided by criminal law

This condition requires danger to be inevitable. In order to assess the inevitable nature of the danger, one must take into consideration, on the one hand, all circumstances in which the actor acted under the pressure of immediate danger, and, on the other hand, the particularities of the person who acted, in order to determine whether he could have foreseen another method to remove danger, with lesser harm eventually.

4.2 *Conditions Regarding the Rescue Operation*

The conditions regarding the rescue operation follow from the provisions of Article 20 (2) of the Criminal Code and are as follows:

a) The rescue operation has taken place by committing an act provided by criminal law;
b) The rescue operation has been required for saving the social values listed in Article 20 (2) of the Criminal code;
c) The rescue operation was the only modality to avoid or remove danger;
d) The rescue operation has not caused consequences that are clearly more serious than those which would have occurred had the danger not been removed;
e) The act has not been committed by or for saving a person who was legally required to bear the risk.

a) The rescue operation has taken place by committing an act provided by criminal law

The state of necessity cannot be invoked unless an action is taken for saving from immediate danger one of the social values listed in Article 20 (2) of the Criminal Code *by committing an act provided by criminal law*. Therefore, a precondition for the existence of a state of necessity is for the rescue operation to consist in an act provided by criminal law, since the rescue operation which is not an act provided by criminal law has no relevance from the criminal law perspective.

b) The rescue operation has been required for saving the social values listed in Article 20 (2) of the Criminal Code

We say that the rescue operation was required only if the act was committed since the danger become immediate until the peril situation stopped, passed at the latest [10]. Beyond the moment the peril situation stopped, the rescue operation can no longer be deemed as taking place in a state of necessity.

c) The rescue operation was the only modality to avoid or remove danger

The doctrine accurately reveals that in the case of immediate danger threating the social values protected by Article 20 (2) of the Criminal Code, the rescue operation must imply the rescue methods which are the most appropriate for the case, but must also generate the lesser possible harm to other values protected by criminal law. Therefore, it must be assessed if there was objectively no other way to remove the immediate danger. If a conclusion is reached that there was another less expensive way to remove danger, in order for the state of necessity to apply, it must be proved that at that time and considering his personal situation and the state he was in, the actor could not identify another rescue method. When assessing the actor, one must take into account both his personal

characteristics and his state and the circumstances he was facing at the time the rescue operation took place [4].

Consequently, when analysing the condition for the rescue operation to have been the only method to avoid or remove danger, one must take into account both an objective, abstract criterion concluding whether the rescue operation was in the abstract the only method to remove danger and a subjective criterion, taking into consideration the actor himself, his mental state and the circumstances he was facing at the time the act was committed, in order to specifically determine whether the actor could foresee another rescue method or not [11].

d) The rescue operation has not caused consequences that are clearly more serious than those which would have occurred had the danger not been removed

This condition requires the existence of a proportionality between the outcome generated by the rescue operation and the outcome avoided. The condition of proportionality requires for the actor to be aware both of the gravity of danger and its consequences, and the consequences of the act he committed for removing danger [12]. As a result of such representation, the actor must analyse whether the consequences of his rescue operation are not obviously more serious than those that would occur if the danger was not removed. The assessment of this proportionality condition cannot be made only based on the assessment in the abstract of the two social values, but actual elements of the two consequences, such as: the economic value of the assets concerned (the one in danger and the sacrificed one), the social relevance of the assets, the remediable or non-remediable nature of the damage caused, etc., must be taken into account.

If, by the rescue operation, the actor caused consequences that are more serious than those that would have occurred had the danger not been removed, then the limits of the state of necessity have been exceeded.

If the actor failed to realize that the consequences of his rescue operation would be clearly more serious than those that would have occurred had the danger not been removed, the conditions for the state of necessity are not met, but the non-imputability clause of non-accountable excessiveness provided by Article 26 (2) of the Criminal Code would be applicable.

If the actor realized that the consequences of his rescue operation would be clearly more serious than those that would have occurred had the danger not been removed, his act is unjustified and imputable to him, only the mitigating circumstance of exceeding the limits of the state of necessity, provided by Article 77 (1) c) of the Criminal Code, being applicable in his favour.

e) The act has not been committed by or for saving a person who was legally required to bear the risk

This condition, although not expressly provided in the Criminal Code, implicitly follows from the legal acts imposing upon certain categories of persons the obligation to bear certain risks by virtue of their office. Doctors, firemen, mountain rescuers, military, have such duties. Nevertheless, if the danger is

inevitably lethal for the person professionally bound to bear it, he may refuse to fulfil it, invoking the state of necessity [13].

5 Effects of the State of Necessity

The act provided by criminal law, where committed in a state of necessity, is not deemed to be an offence since it does not have an unlawful nature. Thus, if an act is not unlawful, it means it is permissible under the existing legal order.

Despite the aforesaid, if the act committed in a state of necessity caused damage, which is highly likely most of the time, civil liability is not removed, because most often the damage is caused to a person who has no fault for the occurrence of the danger that triggered the rescue operation causing such damage.

If the peril situation was created by the person suffering the damage as well, then the actor's civil liability shall be removed.

In this regard, we refer to the provisions of Article 1361 of the Civil Code, according to which "*the person who, found in a state of necessity, has destroyed or damaged other person's assets in order to protect themselves or their own assets against imminent damage or danger must make good the damage caused, according to the rules applicable to unjust enrichment*". Likewise, according to Article 1362 of the Civil Code, "*if, in the cases provided by Article 1360 (2) and Article 1361, the detrimental act was committed in the interest of a third party, the injured party shall pursue remedies against such party based on unjust enrichment*".

From the interpretation of Article 107 (2) of the Criminal code it follows that if an act provided by criminal law is committed, *no security measures may be taken in the presence of the state of necessity.*

Article 18 (2) of the Criminal Code stipulates that the "effects of the grounds of justification extends to the participants as well", therefore the effects of these causes operate *in rem*, being extended to co-authors, instigators or accomplices as well. Consequently, the effect of the state of necessity also extends to the participants to the act, the latter being not compelled to prove fulfilment of the conditions of the state of necessity in their case as well. From this point of view, we can say that, in what concerns the application of the more favourable criminal law, the provisions of the state of necessity of current Criminal Code are more favourable than those contained in previous Criminal Code.

6 Conclusion

We can say that current regulation of the institution of the state of necessity is not substantially different from the one contained in previous Criminal Code. The institution has been more clearly defined by the lawmaker, there being a few differences from the former regulation.

The main amendment refers to the inclusion of this institution in the category of the grounds of justification, which rule out the existence of the offence, as a

result of eliminating the causes removing the criminal nature of an act by the absence of guilt. This amendment is due to the new design of current Criminal Code, which took over the opinions in the legal literature, according to which not all causes removing the criminal nature of the act, as they were regulated by Articles 44-51 of previous Criminal Code, were causes removing guilt, since some of them remove the unlawful nature of the act, which renders the act lawful in the presence of such causes.

Under current Criminal Code, if the act provided by criminal law is committed in the presence of a ground of justification, the act has a lawful nature, and the security measures provided by Article 108 may therefore not be taken. Conversely, the security measures provided by Article 108 may be taken if the act provided by criminal law has been committed in the presence of a non-imputability cause, because in such a case the act has an unlawful nature and is therefore consistent with the objective content of the incrimination rule.

Furthermore, as shown above, the state of necessity operates *in rem*, its effects being extended to the participants as well, unlike previous Criminal Code, according to which the state of necessity had effects *in personam.*

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Certain Viewpoints on Compliance With the Principle of Presumption of Innocence in Criminal Proceedings

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Abstract

The principle of presumption of innocence represents the basis of the right to defence and of the other procedural rights which the law grants to the suspect or defendant, being a way in which the court can establish the guilt of the defendant beyond any reasonable doubt.

However, a breach of the presumption of innocence may arise in the course of the criminal proceedings, either by a prosecutor, a judge, a court or a public authority, through their statements or their deeds concerning commission of an offense or anticipating the commission of an offense by a person, as well as guilt thereof.

Keywords: principle of presumption of innocence, judicial bodies, evidence, suspect, defendant.

1 General Viewpoints on the Fundamental Principles of the Romanian Criminal Trial

Referring to the current requirements, such as accelerating the length of criminal proceedings, simplification thereof and creation of a unitary jurisprudence in line with the jurisprudence of the European Court of Human Rights, we find the existence of new principles regulated by Law no. 135/2010 on the Code of Criminal Procedure [1], including: the principle of the right to a fair trial carried out during a reasonable timeframe, the principle of separation of judicial functions

in the criminal proceedings, of incumbency of the criminal action closely related to the subsidiary one of opportunity, of the right to freedom and security, *ne bis in idem*, and in matters of evidence, the principle of loyalty in obtaining the evidence.

Moreover, the fundamental principles of the criminal trial have a special value in both the creation of substantive law, in interpretation thereof as well as in its practical application, the functionality of the entire system of fundamental principles being ensured by the inherent interaction and convergence of these principles, the finality of which is the criminal trial by means of its very purpose [2].

These principles become applicable during the criminal proceedings, yet in the process of activity of the judicial bodies, which aims to bring to justice those who have committed an offense, it is necessary to also observe the classical principles established by the provisions of the Criminal Procedure Code of 1968, including the principle of legality, of timeliness, of fairness of the criminal proceedings, as well as the principle of discovering the truth and of guaranteeing the right to defence, although we agree with opinion [3] according to which the principles of criminal procedure established by the Code of Criminal Procedure are not restrictive, reason for which there are not many systems of law which enumerate the fundamental principles of criminal proceedings in an introductory headline as the same are listed in the Romanian Criminal Procedure Code, the obligation of procedural systems to be permanently open to new rules, some even with principle characteristics, is even established by the provisions of the European Union.

2 Observance of the Principle of Presumption of Innocence During the Course of Criminal Proceedings

Observance of the principle of the presumption of innocence is a basic rule of the criminal trial and, at the same time, one of the fundamental human rights.

In fact, the concept of "presumption of innocence" implies ensuring the protection of individuals during the criminal proceedings against arbitrariness in the determination of guilt and criminal liability, so that, in the absence of evidence proving guilt, no person can be sent to trial and convicted. In this respect, regulation of the principle of presumption of innocence is also found in the Universal Declaration of Human Rights [4], adopted in New York in 1948, but also in the European Convention on Human Rights (E.C.H.R.) [5] adopted in 1959.

Thus, according to provisions of art. 6 point 2 of E.C.H.R., any person benefits of the presumption of innocence until determination of their guilt by final judicial decision, the Court deciding that these provisions must be interpreted in such a way as to guarantee actual and concrete rights of the suspect or defendant in a criminal case.

For that matter, the principle of presumption of innocence is also listed in the Constitution [6] of Romania, where, art. 23 par. (11) provides that "Until the conviction decision is final, the person is deemed innocent".

The Code of Criminal Procedure establishes a wider set of rules than the constitutional provisions on the principle of presumption of innocence, so that, according to Art. 4 par. (1) CPC, "Any person is considered innocent until the determination of their guilt by a final criminal judgment", the presumption of innocence representing both a procedural guarantee as well as a subjective right.

The presumption of innocence also constitutes the basis of the right to defence and of the other procedural rights which the law grants to the suspect or defendant.

Furthermore, the principle of the presumption of innocence also implies that, *in point of the burden of proof*, the judicial bodies shall prove the accusations they claim, based on the evidence submitted both in favour and against the suspect or defendant, so that each judicial body shall have to solve a criminal case starting from the principle of presumption of innocence, but to take into account that any doubt is beneficial to the defendant (*in dubio pro reo*), as consequence of the fact that the presumption of innocence is relative and may be removed based on clear evidence concerning the deed and the person being investigated.

As regards to the *scope of the presumption of innocence*, it is considered in an opinion [7] to which we adhere, that it depends on the legislator's view of criminal procedure matters concerning the penal repression, in the sense that, if the legislator pursues in particular the protection of social values by means of the criminal procedural provisions, the scope of the presumption of innocence will be narrower, since the interest of society is considered more important, and if the emphasis is on protecting the rights and freedoms of the suspect or defendant during the criminal proceedings, then the application of the principle of presumption of innocence will be more extensive, the interest of society in bringing criminal charges against the persons who have committed crimes following to be carried out in compliance with their rights. Analyzing the two trends, the authors of the same opinion point out the need to combine the two aspects, namely the application of the presumption of innocence which makes it possible, however, to prosecute the persons who have committed offences but which does not violate their fundamental rights and freedoms.

Outside the scope of the principle of presumption of innocence, the issue of *the persons bound to observe the principle of the presumption of innocence* has also been raised.

On this point, at the same time, the doctrine [8] of criminal procedure matters also considers that violation of the principle of the presumption of innocence may arise either by a prosecutor, a judge or a court, through their statements or their deeds, which denote the fact that a person has committed an offense or which anticipate the valuation of the commission of a crime by a person, but also the ECHR jurisprudence, which demonstrates that the presumption of innocence can be infringed not only by a judge or a court but also

by other public authorities (matters of Allenet de Ribemont v. France [9], Butkevičius v. Lithuania [10], etc.).

In these circumstances, the question arises as to whether the Public Ministry is allowed to make public, through press releases or public statements, concrete data or conclusions on the criminal prosecution activity conducted by judicial bodies in a criminal case which concerns the commission of an offense, as well as on the guilt of the suspect or the defendant? Furthermore, in the same criminal case, is the prosecutor entitled to publicly comment or to inform the public about the criminal prosecution activity, either by issuing public statements or by providing mass media with certain evidence collected during the prosecution? Moreover, we ask ourselves to what extent is it possible that other public authorities may also provide opinions by means of mass media on the guilt of persons in relation to whom judicial bodies are carrying out procedural steps or issuing procedural orders in a criminal case? Of course, these questions were not formulated by chance, but their source is found in the very public statements made by representatives of public authorities through media [11].

In order to answer these questions, we must start from provisions of art. 31 par. (2) of the Constitution, which stipulates that in fulfilling their obligations regarding the right to information, "the public authorities, according to their competencies, are obliged to ensure correct information of citizens concerning public affairs".

In this respect, according to provisions of art. 3 of the Law no. 544/2001 on free access to information of public interest [12], public authorities and institutions are obliged to ensure access to information of public interest, ex officio or on request, through the public relations department or the person designated for this purpose.

Regarding this aspect, we reiterate the obligation of the Public Ministry, as well as of the other public authorities, to bring information of public interest to the public. Moreover, as regards to the Public Ministry, according to provisions of Art. 116 par. (1) letter d) of Law no. 304/2004 on judicial organization [13], within all prosecutor's offices there is an information and public relations office, which ensures the links of the Public Prosecutor's Office with the public and with mass media, in order to guarantee the transparency of the judicial activity, under the conditions established by the law. Also, according to the provisions of art. 10 of Law no. 303/2004 on the status of judges and prosecutors [14], neither judges nor prosecutors can publicly express their opinion on the ongoing trials or on cases brought before the prosecutor's office.

It is thus obvious that public information must be done with due respect to the rights and freedoms of the suspect or defendant in a criminal case. In fact, in a constant jurisprudence, the Court has determined that the provisions of Art. 6, both in terms of necessity of observing impartiality as well as of the presumption of innocence, require that the state's representatives refrain from suggesting to the public, either by direct communication of their opinion on guilt or by the use of a language that suggests guilt, that the person being prosecuted or sued would be

guilty of committing an offense, before their guilt is determined by a final criminal judgment [8].

We recall, in this regard, the judgment of the Court dated February 12th 2008 in the matter of Samoilă and Cionca v. Romania [15] concerning the media statements of the military prosecutor who investigated the case and those of the police commander, in which they claimed that the applicants were guilty of committing crimes, before their guilt was established by a court of law.

We also support the assertions of the provisions of art. 1 point 2 of Protocol 12 to E.C.H.R., which prohibit the discrimination of any person by a public authority, as well as the 2016/343 U.E. Directive [16] on guaranteeing the presumption of innocence.

In addition, they are relevant to the obligation of authorities to inform the public while observing the citizens' rights and freedoms and the provisions of Art. 12 letter f) of Law no. 544/2001, according to which "the information on court proceedings, if advertising of such is detrimental to ensuring a fair trial or to the legitimate interest of any of the parties involved in the trial" can not be subject to free access by the public.

3 Conclusions

We consider that the principle of presumption of innocence implies an objective trial in each phase, the presumption of innocence acting throughout the entire criminal trial and, in point of the burden of proof, it is required that the judicial bodies prove their accusations so that, during the criminal proceedings, the judicial bodies have the obligation to submit the evidence, both that which supports the guilt of the suspect or the defendant, as well as that which supports his/her defence. Under these circumstances, the interpretation of any doubt is in favour of the investigated person, the latter not being subject to the rigors of the law unless in case of certain evidence of guilt (*in dubio pro reo*).

Thus, in connection with the above-mentioned arguments, we consider that the press releases or public standings taken by prosecutors, judges or other representatives of the public authorities, invoked by means of mass media as alleged evidence of guilt of the suspect or defendant in a criminal case, are conspicuously illegal.

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The Continuing Offence in the Context of the New Penal Code

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Abstract

One person has been driving a car during a year without possessing a driving licence, so how many offences has he committed? Only one, but under a continuing form, thus a natural unit of crime. The existence of the continuing offence derives not only from the need to complete the image of the offender's operation, but also from the legislator's intention to create a mechanism that will fairly punish a certain kind of criminal behaviour. This type of offence has shown particular stability over time, but it cannot be ignored the way it interacts with the new social realities, the decisions of the Constitutional Court and the other norms.

Keywords: continuing offence, new penal Code, legal object, penalty rules.

1 Introduction

According to a definition that has become classic in doctrine and legislation within the framework of criminal law, the continuing offence, a form of criminal unity, without being defined in the General Part of the Penal Code, is characterised by the natural extension of the action or inaction that constitutes the material element of the objective side, after consumption, until the intervention of a counter-force [1].

In this field, examples of continuing offence may be given: illegal deprivation of liberty (Article 205 of the Penal Code), the theft of electricity (Article 228 of the Penal Code), marital abandonment [Article 378 paragraph (1) letter c) C. pen.], illegal possession of weapons and munitions [Article 342 paragraph (1) of the Penal Code], desertion (Article 414 of the Penal Code), escape (art. 285 Pen. C.), possession of tools used for the counterfeit of securities (Article 314 of the Penal Code), usurpation of official capacity, under the form of

unlawfully wearing uniforms or insignia of a public authority (Article 258 C. pen), unlawful arrest (Article 266 Pen. C.), slavery (Article 209 Pen. C.). The essence of this offence and its necessity of a natural extension may be deduced from its specificity. And with its prolongation, the offence will reach the degree of social danger which is necessary to incriminate and sanction it [2].

Continuing offence has a specificity that influences its placement among offences in the category of natural unit offences. This placement is easy to understand and results from many characteristic features, mentioning that its continuity **does not influence its characteristic as a unique act.** Continuing offence is identified in criminal law by **the material element of the objective side, which implies an action or inaction that lasts over time such as:** possession, detainment, remain/staying, behaviour. Continuing offence is also identified by the nature of the material aspect of the offence object, such as the crime of theft, which has as stealing object, an energy that has economic value.

Establishing the existence of a continuing offence is made in the Romanian criminal law on the basis of a **formal criterion**. If an offence fulfills all the conditions to be continuing is determined by applying an analysis on *verbum regens* from the perspective of the formal criterion in the context of the observation of the indicated nature. **The nature of the action shown by *verbum regens* must be one of long duration.** The state of the action to be lasting is decisive for such a finding.

The way in which the continuing offence evolves leads to the conclusion that it must meet certain **conditions that are intrinsic to it.** To be in front of a continuing offence, it has to be characterised by **a single criminal resolution**, but also by **a unit of active subject**. At this point, from all the above-mentioned facts, the differences in simple or continuing offence cannot be deduced, so there is a need of going a step further to present extra information. It is essential to assign to this type of offence the characteristic that differentiates it from others: it has an action or inaction that constitutes the material element of the offence **preserving its unity throughout its course and which, of course, has a "course", a continuation or extension of time.**

There is only **one reference in Art. 154 par. (2)** where it is stipulated that the statute of limitations of criminal liability for this type of offences runs as of the date the action or inaction is ceased which constitutes the material element of the objective side. [3]

Recently, the RCC plenary has ruled on the exception of the unconstitutionality of the stipulations of art. 155 par. (1) from the Penal Code, which reads as follows: "The statute of limitations for criminal liability is interrupted as a result of the performance of any step in the lawsuit."

The Court held that the interruption of the limitation term of criminal liability becomes effective, producing its effects completely, **only if there is legal leverage to notify the person concerned of the beginning of a new limitation term. The state of responsibility of a person implies, according the RAC, that the person who has committed an act provided by the criminal law to have the possibility to know the aspect of the interruption of the course of the**

limitation term of the criminal liability and the beginning of the new prescription term. [4]

Furthermore, the continuing offence does not have a special punishing regime, the punishment that may be applied is the one stipulated by the law for the typical offence, depending on the manner of committing, the duration of the criminal activity, as well as other criteria provided by art. 74 NPC, the court may apply a punishment aimed at the special maximum.

If the various offences in this category are examined from a structural point of view, they usually have the same structure as the simple offences. It may also be mentioned that the continuing offence is not defined by the penal code, making reference only to it whilst discussing the treatment of the limitation terms of the criminal liability.

Emphasizing the various aspects of the continuing offence leads to the idea that it can be **both a crime of result (the continuing offence of electricity theft) and a dangerous crime** (for example, consider the illegal possession of dangerous objects discussed in article 372 N. pen).

The participation in the continuing offence is possible in all forms: co-author, instigation, complicity.

There is a single judgment or criminal resolution, a single action or inaction, **a single injured legal social object, a single pursuit and the same perpetrator.** It is also important to mention that the continuing offence produces **a single immediate consequence**, and **subjectively, it is committed under form of guilt required by criminal law.** Thus, in order to clarify its subjective side, the continuing offence may be committed as a deliberate offence. Recognizing the characteristics of the continuing offence, it is possible to identify the legal territory in which this type of offence should have been committed with a criminal intent. When analysing the general conditions for the existence of a continuing offence, the following conclusion was reached: it is important to note that the offence must be under the sign of the constitutive content unity. In the case of this form of offence, the unity at the pre-existing conditions level must be also preserved, that is the unity of active subject and the unity of legal object. **The material element, the immediate effect, the causal link, the form of guilt are elements under the sign of unity.**

From the analysis on the concept of continuing offence, it results that from a constitutive point of view, this type of offence has a typical basic pattern. From the review of the case and considering the objective reality characterised by complexity concerning the criminal phenomenon, its existence may be easily represented under a derived form of legal content, either as an aggravated or mitigating content offence. For example, as regulated in art. 335 par. (3) Pen. C., which is a continuing offence, and the legal provisions of Article 335 para. (2) Pen. C., the offence of driving a vehicle without a driving license is a mitigated form of the respective offence.

According to the criterion of extension, continuity, which is a decisive indicator for the existence of the continuing offence, it may be stated that the continuing offence should not be confused with the simple offence. It follows that

an offence is either simple when naturally, it does not present an intrinsic extension of time, or it is continuous when naturally it is characterised by an extension of time, situation in which it is neither simple nor common nor complex because of this extension.

Regarding the typical manifestation of the material element, it is necessary to know that the continuing offence may exist **either as a commissive offence, when it may be noticed that it is provided by a prohibitive criminal norm, or as an omissive offence, provided by an onerative criminal norm.** In the first case, it may be distinguished this type of offence either as a personal commissive offence or as a commissive-omissive offence.

2 Modalities of Continuing Offences

Depending on how the execution act is fulfilled, the continuing offence may be permanent or successive. Dividing offences in permanent and successive is important because any interruption in the case of permanent offences has the value of exhaustion of the offence and the resumption of criminal activity means the commission of a new continuing crime.

Continuing offence is compatible with interruptions as long as these interruptions are naturally part of the way the offence is committed. For example, in the case of committing an offence of illegally wearing a uniform, it may be underlined that such criminal activity continues to be charged as a continuing offence when the illegal wearing of the uniform was interrupted at night. When it is acknowledged that the continuing offence has been interrupted at night only to be resumed in the morning, there is in fact a continuing successive offence. If there is a successive continuing offence, it will continue to fulfil the requirement of existence as long as the interruption is natural, and the extension of the activity requires the offender's intervention. In the example presented above, the offender must resume the activity of illegally wearing the uniform after the moment when he interrupted the criminal activity as a result of the rest period overlapping with the night. The successive continuing offence is defined by reference to the permanent continuing offence. Both are viewed from the perspective of continuity, extension of criminal activity beyond the moment of consumption, the difference being the compatibility or incompatibility with interruptions. Unlike the successive continuing offence, the permanent continuing offence is incompatible with any kind of interruption. In the event of an interruption, there is an exhausted continuing offence, and if the person resumes the activity, there will be a crime offence consisting of several crimes in their continuing aspect. The dominant feature of the permanent continuing offence is the continuing criminal activity and the author should not have direct intervention in order to extent the criminal activity. As a rule, a continuing offence is successive when two realities are met, on the one hand, there is a necessary extension in time, which must exceed the duration of a moment, as long as it is sufficient for simple offences, for example, and on the other hand, successivity does not operate automatically, but the offender's intervention is needed. In the example, the offender continues the

offence by repeated acts, wearing a uniform, appearing with it in public, and changing it with other clothes. One may witness the extension of the action in this case, but equally easily it may be a constitutive inaction, so there are present all the conditions necessary to determine a successive continuing offence.

In practice, practitioners in law often encounter a situation that involves a permanent continuing offence. Being in the paradigm of permanent continuing offence, it may be mentioned that for its existence it is necessary that its extension, its continuation not be essentially related to an intervention by the author of the offence. Permanent continuing offence does not even require an intervention from the offender. In the category of permanent continuing offences, it is included the theft of electricity where the offender could at any time disconnect, but he/she prefers to maintain the facility by which it steals electricity.

One witnesses the extension of the process of producing the result, without this extension affecting its unity. False imprisonment is a continuing crime because, inter alia, the extension in time no longer requires intervention from the offender and *verbum regens*, the objective element of the offence shows a lasting activity. The False imprisonment, formally presented, will be a permanent continuing offence.

The distinction between them is not relevant in their legal nature, but only in terms of material activity.

3 Commentaries on the Continuing Offence and the Recurrent Offence

Continuing offence, as a single offence, differs from the recurrent offence. A first aspect to be mentioned is related to the act of execution. **The number of consummation acts differentiates them.** Furthermore, from the point of view of the legal nature, there is a different charge from the legislator because the recurrent offence is a form of the legal unity of the crime, and the continuing offence is a form of the natural unity of the crime. From the perspective of the effects produced, the recurrent offence is submitted to other rules because de facto it means a state of aggravating the punishment. The continuing offence consists of a continuing action without which the existence of this situation cannot be imagined. In the paradigm of the recurrent offence, there are situations when continuity is present, but it is either accidental or deliberately undertaken, yet it is always considered as adjacent, not necessary for the recurrent offence. Recurrent offence may be committed instantly or over a period, whilst the continuing offence may be committed only for a certain period. It is important to distinguish these two types of crimes to be able to distinguish correctly the penalty rules. The recurrent offence is submitted to more severe penalty rules, occupying a higher hierarchical degree compared with the continuing offence if the level of social danger is taken into consideration.

As for the structure, the recurrent offence includes an accent on *verbum regens* that reveals actions, inactions with a strong continuity character such as deprivation, restraint, possession, leadership, whilst the continuing offence has a special emphasis on the repeatability of criminal activity. In both cases the criminal resolution remains the same, being in the presence of a resolution unit. Also, both types of offences are directed against the same passive subject, being characterised by the continuity of the passive subject. [5] Potential delimitation issues may occur only if the two types of offences are analyzed from the perspective of the passive subject and the criminal resolution unit. This problem disappears when the duration of the crime and its aspect of extension of the criminal action or inaction are analysed. Continuing offence shows a total incompatibility with its immediate form. On the other hand, the recurrent offence is not incompatible with committing it for a longer period.

Unlike the recurrent crime, in the case of successive continuing offence, the criminal resolution may be indefinite, it is not the essence of the crime to determine it. The continuing offence is stated in the criminal doctrine in relation to the norms of incrimination and it is sanctioned with the punishment stipulated by the law. It is not the object of some express regulations at the level of the General Part of the new Penal Code, whilst the recurrent offence has a specific regulation by art. 36 pen. C.

4 Remarks on Continuing Offence and on the Penalty Rules

It is believed that a clear demarcation must be made between the time of consumption and the consequences of the offence. To ensure clarity in understanding this type of offence, there should be emphasised that what is being extended, is lasting or continuing is the moment of consuming the offence, and not its consequences. There is a lack of autonomy of the offence in relation with the duration, continuity, extension of the moment when the offence is consumed. The necessary condition is that the moment when the offence is consumed to be extended beyond the moment when the simple commission has taken place, reaching a later moment in which an element that prevents further consumption takes place. Although this form of natural unit offence is characterised by the extension of the moment when the offence is consumed, this extension is not affected by the presence of interruptions, as long as they are absolutely necessary. The criminal resolution unit is not fragmented if interruptions are necessary. Continuing offence implies a long-term confrontation between society and the offender in which the offender manifests a single criminal resolution. At the time of consumption, the continuing offence is fulfilled in all its elements, except the element of duration and continuity that will occur after the moment when the offence is consumed by continuing the moment when the offence is consumed until its exhaustion. The extension of constitutive action or inaction

will occur until the moment of exhaustion, synonymous with an intervention that will efficiently prevent the subsequent consequences after this moment. Noteworthy that at the time of exhaustion there is an offence that produces results and the continuation of subsequent results is also blocked by the intervention of the offender or even by the will of authorities, to consider the pronouncing of a non-final judicial decision. Pronouncing a non-final decision is likely to be considered as an interference by the authorities that will stop the continuing offence.

Starting from the necessity to establish the essence of the continuing offence, an organic link is found, and it is realised between the material element of the offence and the determination of the duration or continuity of the illegal activity. Although the offence appears once the illicit activity has been committed, establishing the existence of the offence may only be determined by analysing the ratio between the material element of the offence and the duration or continuity of the action or inaction. Once a material element exists, consisting of an action or inaction that extends in time after the time of consumption, until the criminal activity ceases, an analysis concerning the close links between the time of consumption and the moment of exhaustion may be started. Consequently, the continuing offence is characterised by the factual reality of the existence of an action that is extended over time, by its very nature, and by the presence of the indispensable requirement of being in the presence of an action or inaction that overlaps the moment of consuming that offence. In this situation, to determine a continuing offence, two moments must be distinguished, one referring to the time when the offence was consumed and the other one when the offence was exhausted. Distinguishing exactly the continuing offence amongst other types of offences is of practical interest and is related to the identification of the consumed offence, the moment of consuming the offence, the moment of exhaustion of the offence, the counter-force which ends the duration or continuity of the illicit activity and the presence of the duration or continuity of an illicit activity.

As a modality of committing a crime, with a certain duration, the continuing form is characterised both by a moment of consumption, the date of the first criminal action or inaction, and by a time of exhaustion, the date of the last action or inaction, which raises the question of fixing the date problem on which the offence shall be deemed to be consumed and the date on which it is deemed to be exhausted. Establishing the ending point of the execution of the continuing offence is of particular interest to practitioners, since the question of applying the criminal law in time and space will be raised in relation to this moment. Furthermore, the plurality of institutions such as clemency, prescription of criminal liability, establishing criminal liability for an incriminated offence begun when the offender is under the age of 18 and finished after turning 18, will be reported when the crime is exhausted. In close relation with the previous allegations, if the ongoing criminal activity takes place under a resolution unit of one person at various stages of its development, it is important to establish that person's age to apply the criminal rules. The principle governing, for example, the establishment of criminal liability for an offence committed by a juvenile and

becoming continuing before the age of 14, makes it lack criminal relevance. Thus, if the criminal activity is not continued after the age of 14, the criminal law cannot be applied, and public force cannot be invoked in the sense that criminal activity can have no relevance although it is continuing. From the content of these provisions, one may realise that if the continuing offence was started when the juvenile was under the age of 14 but it was still in progress after the person reached the age of 18, the entire criminal activity will be considered to have taken place as long as the offender was an adult. Concerning the enforcement, it is important to mention that in the case of a continuing offence the applicable law will be the law in force at the time of the criminal action or inaction end. The moment of exhaustion may be considered as very important, the continuing offence is placed in the same register as the recurrent offence and in one different from the progressive offence. The institution criminal liability will be given efficiency by making reference to the time of exhaustion when criminal action or inaction has ceased to be marked by continuity or extension, being ended by a contrary event. The exhaustion of the continuing offence is given by the moment of the intervention of a counter-force which may have as source the will either of the offender, or of a third person or the intervention of an authority. [6] It is also important to state that a continuing offence is susceptible to being interrupted by a court order, even though it is not definitive. If there is a person who commits a continuing offence during the term of attempting suspension of the execution of a previous penalty, but this new offence is exhausted after the expiry of such period, the legal stipulations from the repeat offence institution will not be applied after execution. When the continuing offence is committed within the suspension period, it means that it is an offence which will be considered as related to post-conviction recidivism. The time when it is consumed is relevant because at that right moment the offence has already been committed and satisfies all conditions to exist.

It may be noticed the exacerbation of the importance that is given to continuity, duration, extension of the consuming moment for the correct identification of the continuing offence. If the duration plays a primary role to establish its existence, when it comes to determining when it is considered to be committed, one may refer exclusively to the moment when the action or inaction of the offence ceases. The duration or intensity of the criminal action or inaction cannot influence the time the offence is considered as committed, but only the cessation of such extension. The moment of exhaustion overlaps the moment when the offence is considered to have occurred. If the initial moment is represented by the moment when the offence is consumed, this later moment is the date one refers when talking about the legal consequences of the concrete act. The incidence of an amnesty act, the age of the offender, the limitation term of criminal liability, are only a few examples of institutions that depend on the date the continuing offence is completed. The continuity of the offence beyond the moment when there is intervention from the pardon or amnesty law will not be interrupted by them. Moreover, the person who continued the continuing offence beyond these moments will not benefit from their application. The

compatibility of the continuing form of offence with the institutions of pardon, amnesty must be considered from this point of view. It is not to be seen differently because all these institutions produce legal effects in relation to the moment when the offence is exhausted. Thus, for example, as long as the continuing unity of the offence is preserved, beyond the moment of a pardon law interference, a person will not benefit from this leniency act.

It ceases through intervention. A first example would be the situation in which it stops by the will of the offender. Consider the case of the offender who resumes maintenance payment or who releases the seized person. Another example is the intervention of the authority: catching a deserter by the police, catching the electricity theft by the Enel employees. There is also the case of another person's intervention.

The Romanian criminal law shall applicable to the continuing offence and if only an act of execution has been committed on the Romanian territory or if the result of the offence has occurred in this territory.

5 Conclusions

Continuing offence is achieved when the action or inaction is committed and lasts enough to have a criminal legal significance. For example, if extended over time, the offence of disturbance of possession becomes a continuing offence. It is achieved when the offender penetrated and remained without right in the building illegally acquired, unless the offender continues to stay in the property thus illegally occupied. **The final moment is important because in relation to it, the period when the preliminary complaint must be filed is reported.**

The other consequences of the continuing offence, such as those related to repeat offence, the revocation of the execution of the punishment under supervision, the removal of the benefit of the pardon, the interruption of the statute of limitations term of the criminal liability and of the rehabilitation terms, occur from the moment when the constitutive elements of the offence are met and when according to the law, the offender may be held criminally liable.

If the continuing offence started whilst the offender was a minor, is also performed after he/she turned 18, according to the rule of the unicity of the criminal offence, it will be considered that the entire criminal activity took place whilst the offender was of age.

The doctrine emphasized that what characterises the material element of the continuing offence is the fact that these are accomplished through a dual attitude of the offender, namely: a commissive one, which creates a criminal state, for example the illegal deprivation of freedom of a person, or the theft of electricity and another which is omissive, and allows the crime to last in time and it does not end, for example, the non-payment of the maintenance payments in the case of the offence of family abandonment.

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The Preliminary Chamber

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Abstract

The preliminary chamber represents a new stage in the Romanian criminal trial introduced by the legislator in the Code of Criminal Procedure adopted by Law no. 135 of July 1st, 2010 in order to reduce the length of the proceedings that earlier led to the conviction of Romania by the European Court of Human Rights for the breach of the reasonable duration The subject of the proceedings before the preliminary chamber is to examine, after being sent to trial, the jurisdiction and lawfulness of the court's referral, as well as the examination of the lawfulness of the administration of the evidence and the execution of the prosecution by the criminal prosecution authorities. Once the preliminary chamber stage has been completed, if the commencement of the trial is ordered, it is no longer possible to criticize as to the lawfulness of the indictment, of the criminal prosecution and of the evidence administered during the criminal prosecution. Consequently, the criminal proceedings can no longer be further delayed by invoking those issues on which the preliminary chamber judge has the power to decide, the decision pronounced by him having the authority of a final decision on the issues under consideration.

Keywords: preliminary chamber, exclusion of illegal or ineligible evidence, equitable criminal procedure.

1 Introductory Notes

The criminal proceedings consist of four stages: the prosecution (regulated under Articles 285-341 of the Code of Criminal Procedure), the preliminary chamber (Article 342-348 of the Code of Criminal Procedure), the trial (art. 349-4771 of the Code of Criminal Procedure) and the enforcement of criminal judgments (Articles 550-6011 of the Code of Criminal Procedure).

The preliminary chamber represents a new stage in the Romanian criminal trial introduced by the legislator in the Code of Criminal Procedure adopted by Law no. 135 of July 1st, 2010 in order to reduce the length of the proceedings that earlier led to the conviction of Romania by the European Court of Human Rights (hereinafter referred to as C.E.D.O.) for the breach of the reasonable duration, stipulated by art. 6 paragraph 1 of the European Convention on Human Rights and Fundamental Freedoms, and the separation of the judicial functions.

The subject of the proceedings before the preliminary chamber is to examine, after being sent to trial, the jurisdiction and lawfulness of the court's referral, as well as the examination of the lawfulness of the administration of the evidence and the execution of the prosecution by the criminal prosecution authorities (Article 342 of the Code of Criminal Procedure).

Once the preliminary chamber stage has been completed, if the commencement of the trial is ordered, it is no longer possible to criticize as to the lawfulness of the indictment, of the criminal prosecution and of the evidence administered during the criminal prosecution. Consequently, the criminal proceedings can no longer be further delayed by invoking those issues on which the preliminary chamber judge has the power to decide, the decision pronounced by him having the authority of a final decision on the issues under consideration.

It is precisely in order to ensure the rapid settlement of the requests and exceptions which are the subject of the preliminary chamber that the legislature provided for in Art. 343 of the Code of Criminal Procedure, a maximum of 60 days in which this stage of the criminal proceedings must be completed. The term is nonetheless a recommendation, and there is no procedural sanction in case it is exceeded.

The stage of the preliminary chamber must be carried only when the court is seized with indictment, not in the case of an agreement for the recognition of guilt or when the preliminary chamber judge, ruling the complaint against the prosecutor's decision not to sue, according to art. 341 (7) of the Code of Criminal Procedure, when the criminal action is exerted, admitting the complaint, abolishes the contested solution and orders the commencement of the trial against the persons for whom the legally administered evidence is sufficient.

At the same time, in the case of the complaint against the prosecutor's decision of not to sue, if the court commences the trial, the preliminary chamber judge also checks the lawfulness of the administration of the evidence and of the criminal prosecution and excludes the unlawfully administered evidence, respectively punishes according to the provisions of art. 280-282 of the Code of Criminal Procedure the criminal prosecutions committed in violation of the law, and the prosecutor, the petitioners and the respondents may object to the way of solving the exceptions regarding the lawfulness of the administration of evidence and the execution of the criminal prosecution.

2 The Procedure in Preliminary Chamber

2.1 *Preliminary Measures*

The indictment accompanied by the case file and a necessary number of certified copies of the indictment, to be communicated to the defendants, shall be sent to the competent court to rule the substance of the case.

The certified copy of the indictment and, where appropriate, the certified translation of the indictment, shall be communicated to the defendant at the place of detention or, where appropriate, to the address where he or she lives or to the address where he requested the communication of the procedural documents.

The defendant, the other parties and the injured party shall be informed of the subject matter of the proceedings in the preliminary chamber, of the right to appoint a defence counsel and of the period within which, from the date of the communication, they may formulate in writing requests and exceptions with regard to the lawfulness of the court's referral, the lawfulness of the administration of the evidence and the lawfulness of the investigation ran by the prosecution authorities. The term is determined by the preliminary judge, depending on the complexity and particularities of the case, but cannot be shorter than 20 days.

In the cases provided by art. 90 of the Code of Criminal Procedure concerning the obligatory legal assistance of the defendant, the preliminary chamber judge shall take measures for the appointment of a public defender and shall determine, depending on the complexity and particulars of the case, the period within which he may formulate in writing requests and exceptions subject to the preliminary chamber.

I consider that exceeding the time limit set by the preliminary chamber judge for the purpose of formulating the requests and the exceptions does not result in the parties or the injured party being deprived of the right to plead before the preliminary chamber judge from the court of first instance, the judicial term established according to art. 344 (3) of the Code of Criminal Procedure having the purpose of ensuring that participants in the proceeding are able to take cognizance of the requests and exceptions invoked before the meeting deadline set for their discussion, without any procedural penalty under the Criminal Procedure Code.

Requests and exceptions may be invoked before the judge of the preliminary chamber from the court of first instance also at the trial date, and those concerning the absolute nullity may be invoked until the closure of the preliminary chamber procedure.

2.2 *Requests and Exceptions That May Be Formulated at the Preliminary Chamber Stage*

The defendant, the other parties, the injured party and the preliminary chamber judge may invoke exceptions and requests through which they may

invoke the material or territorial lack of jurisdiction of the court, the unlawful referral of the court by indictment, unlawfulness or disloyalty of the evidence taken during the criminal investigations and criminal prosecution.

Thus, in the preliminary chamber procedure, an unlawful referral of the court by way of indictment may be invoked in terms of the terms which it must contain in accordance with the provisions of Art. 328 of the Code of Criminal Procedure (name of the court and issue date, name and position of the person who completed the data relating to the facts incriminating the accused and their legal classification, data about the person accused, evidence and the means of evidence, legal expenses, the indications referred to in Articles 330 and 331, the indictment and other indications necessary for the settlement of the case), as well as the examination of the indictment as to the legality and the rightness by the hierarchically superior prosecutor.

With regard to the evidence administered during the criminal prosecution, the judge, the defendant, the other parties and the injured party may invoke the incidence of absolute nullity or relative of any evidence or parts of these (*e.g.*, the invalidity of the technical-scientific report issued with the non-compliance of the provisions of Article 172, paragraph 9 of the Code of Criminal Procedure, the invalidity of the expert's report drawn up by an expert in one of the incompatibility cases provided by Article 64 of the Code of Criminal Procedure, the nullity of the declaration given by the defendant held in detention without being assisted by the attorney). The penalty of the nullity of the evidence administered during the criminal prosecution is exclusion, so that it can no longer be considered in the settlement of the substance of the criminal case.

By decision no. 22 of January 18th 2018, the Constitutional Court upheld the exception of unconstitutionality of the provisions of Article 102 (3) of the Code of Criminal Procedure and found that they are constitutional inasmuch as the term "exclusion of evidence", in their wording, is also understood as eliminating the evidence in the case file.

The Constitutional Court concluded that the exclusion of the legal evidence obtained unlawfully in criminal proceedings, in the absence of their physical removal from the criminal records constitute at the level of the courts, is insufficient for an effective guarantee of the presumption of innocence of the defendant and the right to a fair trial of it. Thus, maintaining the evidence in the files of the criminal cases, after exclusion of evidence thereon, following the finding of their invalidity, is likely to influence the perception of the judges, invested with the deciding upon those cases, over the guilt/innocence of the defendants and encourage them to seek to develop judicial judgments in one sense or another, even in the absence of the possibility to invoke, in a concrete manner, of such evidence in the reasoning of solutions, in such a manner as to breach the right to a fair trial and the presumption of innocence of the persons judged.

Therefore, the penalty of excluding evidence found to be unlawful in the preliminary chamber has two dimensions: a legal and a physical one, removal from the criminal file of the means of evidence also.

Regarding the criminal prosecution, the trial actions and procedural actions performed by the criminal prosecution bodies or by the judge of the rights and freedoms can be criticized in terms of lawfulness (*e.g.*, unlawful initiation of the criminal prosecution in the absence of an act of referral, unlawful criminal proceedings for committing an offense for which criminal prosecution has not been extended, illegality of technical surveillance mandates or search warrants issued by a judge of rights and freedoms from a lower rank court of the competent authority etc.).

Upon the expiry of the time limit set by the preliminary chamber judge, if any requests or exceptions have been made, or if it has raised exceptions ex officio, the preliminary chamber judge shall fix the trial date by summoning the parties and the injured person and the prosecutor's participation is mandatory.

At the deadline established according to art. 344 (4) of the Code of Criminal Procedure, the Preliminary Chamber judge resolves the appeals and exceptions made or the exceptions raised *ex officio* in the council chamber on the basis of the works and material in the criminal prosecution file and any new documents submitted, after hearing the parties' conclusions and of the injured person, if present, as well of the prosecutor's.

By Decision no. 802 of December 5th 2017, the Constitutional Court upheld the exception of unconstitutionality and found that the legislative solution contained in Article 345 (1) of the Code of Criminal Procedure, which does not allow the preliminary chamber judge, in dealing with the requests and exceptions made or the exceptions from his own initiative, to administer other means of evidence other than "any new documents" is unconstitutional.

Therefore, the evidence that can be handled at the preliminary chamber stage to determine the circumstances relevant to solving the requests and the exceptions is not limited to new documents submitted by the parties, but all the evidence as provided in art. 97 of the Code of Criminal Procedure.

Bringing the defendant in state custody or in detention is mandatory unless he asks the case to be tried in his absence.

If the preliminary chamber judge finds irregularities in the referral or if he/she penalizes according to Art. 280 – 282 of the Code of Criminal Procedure the criminal acts carried out in violation of the law or if it excludes one or more of the evidence administered, within 5 days from the notification of the decision, the prosecutor remedies the irregularities of the indictment and informs the preliminary chamber judge if he maintains the indictment or demands the return of the case back to the prosecutor.

The correction of the irregularities of the indictment is done by an ordinance, according to art. 286 (1) of the Code of Criminal Procedure. By remedying the irregularities of the indictment, the subject matter of the original accusation cannot be altered in essence, and this can only be clarified in this procedure. On the other hand, the other shortcomings of the indictment can be complied with by the ordinance issued by the prosecutor within 5 days of receiving the decision of

the preliminary chamber judge (*e.g.*, the determination of the legal expenses established for each defendant in part for the criminal prosecution, etc.).[1]

2.3 *Solutions That Can Be Pronounced by the Preliminary Chamber Judge*

If no requests and exceptions have been made within the terms provided in Art. 344 (2) and (3) of the Code of Criminal Procedure, nor did he raise objections of its own motion, upon the expiry of these time-limits, the preliminary chamber judge ascertains the lawfulness of the court referral, the administration of the evidence and the execution of the criminal prosecution and orders the commencement of the trial. The preliminary chamber judge shall pronounce in the council chamber, without summoning the parties and the injured party and without the participation of the prosecutor, by decision, which shall be immediately communicated to them.

When requests or exceptions have been made, the preliminary chamber judge shall pronounce by decision in the council chamber with the summoning of the parties and of the injured person and the participation of the prosecutor. The decision shall be immediately communicated to the prosecutor, the parties and the injured person.

If he rejects the requests and the exceptions invoked or raised ex officio, by the same decision, the preliminary judge of the court shall declare the lawfulness of the court referral, the administration of evidence and the execution of the criminal prosecution and order the commencement of the trial.

The preliminary chamber judge shall return the case to the Prosecutor's Office if:

– the indictment is irregularly drawn up and the irregularity has not been resolved by the prosecutor within the 5-day period stipulated in art. 345 (3) of the Code of Criminal Procedure, if the irregularity results in the impossibility of establishing the object or limits of the judgment;[2]

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[1] By decision of no. 275 of April 14th, 2015, pronounced by the Preliminary chamber judge from the High Court of Cassation and Justice – the Criminal division in file no. 828/1/2015, it was stated that "With regard to the deed by which the case prosecutor will repair irregularities and will communicate the above-mentioned issues, the preliminary chamber judge concluded that he, integral with the indictment, must comply with the same formal requirements laid down by law as for the referral, respectively he must be verified as to the legality and merits by the hierarchically superior prosecutor, in accordance with the provisions of art. 328, paragraph 1, sentence II of the Code of Criminal Procedure. "

[2] By decision no. 138/C of May 20th, 2015 pronounced by the preliminary chamber judge from the High Court of Cassation and Justice in criminal case no. 1634/1/2015, it was stated that in the preliminary chamber procedure, "the court also checks the clarity of the accusation (the description of the fact with sufficient elements to show compliance with the criminal norm and to understand the object of the judgment). The accusations must be formulated in a sufficiently clear manner to enable the defendant to understand, even with the support of law specialists (lawyers, legal counsellors) what he is being accused of by the authorities, and what is the criminal significance of his conduct (legal classification and respectively punishment treatment)."

– has excluded all evidence administered in the course of the criminal prosecution;

– the prosecutor requests the restitution of the case, under the conditions of art. 345 (3) of the Code of Criminal Procedure, or does not respond within the time-limit laid down by the same provisions.

In all other cases in which he found irregularities in the referral, he excluded one or more evidences administered or sanctioned according to art. 280 – 282 of the Code of Criminal Procedure criminal prosecutions carried out in violation of the law, the preliminary chamber judge shall order the commencement of the trial.

As regards to the evidence excluded in the preliminary chamber stage, they can no longer be taken into account when the substance of the case is settled.

If he considers that the court referral is not competent, the preliminary chamber judge shall refuse jurisdiction to adjudicate in the final case in favour of the preliminary chamber judge of the competent court.

The preliminary chamber judge who ordered the commencement of the trial exercises the function of the court to decide upon the case.

2.4 *The Appeal*

Within 3 days from the communication of the decisions provided in art. 346 (1)-(42) of the Code of Criminal Procedure, the prosecutor, the parties and the injured party may appeal. The appeal may also look into the manner in which to handle the requests and exceptions.

The appeal shall be settled in the council chamber, with the summoning of the parties and the injured party and with the participation of the prosecutor, the provisions of art. 345 and 346 of the Code of Criminal Procedure concerning the procedure of the preliminary chamber at first instance being applicable.

In the settlement of the appeal, no other requests or exception may be raised ex officio other than those invoked or raised ex officio before the judge of the preliminary chamber from the first instance, except in cases of absolute nullity.

Although Article 347 (3) of the Code of Criminal Procedure provides that in the appeal procedure the provisions of Art. 345 and 346 of the Code of Criminal Procedure apply accordingly, in practice this has not been done frequently.

By decision no. 138/C of May 20th, 2015 pronounced by the preliminary chamber judge from the High Court of Cassation and Justice in criminal case no. 1634/1/2015, it was stated that "the preliminary chamber judge does not check whether the allegation of the facts in question is real and whether there is sufficient evidence to lead to the determination of the guilt. The preliminary chamber judge checks whether the court has been referred with an act that attracts the jurisdiction of that court and not the merits of the allegation (...) The preliminary chamber judge does not check the suitability of the evidence to lead to a conviction or lack of clarity of the evidence or the fact that the indictment does not mention the administered evidence during the criminal prosecution but which are in the file sent to the court. The preliminary chamber judge does not assess the relevance, usefulness or conclusiveness of the evidence, as is the case with the judicial inquiry. The preliminary chamber judge merely ascertains whether the evidence is legal or illegal, if it has been administered under the law, and when it finds a violation of the provisions on the administration of evidence, it assesses its impact on the evidence.

Thus, if the preliminary chamber judge invested in the resolution of the appeal, considers that some evidence is unlawfully administered, he does not communicate a decision to the prosecutor through which these solutions are to be communicated so that the prosecutor to state whether or not he maintains the indictment or not.

According to the majority court practice, if the preliminary chamber judge invested in the resolution of the appeal considers that some evidence is unlawfully administered, it is pronounced by a final decision, which also marks the end of the preliminary chamber so that the prosecutor no longer has the possibility to make a decision as to whether or not the indictment is to be maintained.

I am of the opinion that the legislator has pursued by provisions of art. 347 (3) of the Code of Criminal Procedure to ensure a double degree of jurisdiction also in the proceedings of the preliminary chamber and, implicitly, the prosecutor's right to assess, after chamber the decision of the preliminary chamber judge, of the evidence administered during the criminal prosecution stage, whether or not he maintains the indictment.

In this way it can be avoided that, after the settlement of the appeal in the proceedings of the preliminary chamber, to go through the trial phase in the absence of essential evidence that led to the accusation by the prosecutor, thus avoiding unnecessary waste of time and money.

I therefore consider that it is necessary for the legislator to intervene and expressly stipulate that, if the preliminary chamber judge who was invested in the resolution of the appeal considers that some evidence is unlawfully administered, to regulate the prosecutor's right to communicate, after the decision of the preliminary chamber judge, whether or not he maintains the indictment.

The same necessity also arises if, in the appeal phase, the indictment is found to be illegally drafted, in which case the prosecutor's right to eliminate the indictment irregularities should be acknowledged within 5 days of the communication of the decision.

I consider that the legislator's intervention is required to regulate the above-mentioned situations, whether we are in the situation where the preliminary chamber judge invested with the resolution of the appeal, considers that the appeal should be admitted and finds for the first time the irregularity of the indictment, the illegality of the criminal prosecution or the administration of the evidence, whether we are in the situation where the preliminary chamber judge considers that the prosecutor's appeal against the decision of the preliminary chamber judge of the first instance is unreasonable.

3 Other Measures That May Be Ordered at the Preliminary Chamber Stage

During the time at which the case is at this procedural stage, the preliminary chamber judge shall rule on the preventive measures under Art. 348 of the Code of Criminal Procedure, on restoration of things according to art. 255 of the Code

of Criminal Procedure, on the taking and revoking of the temporary insurance measures and of the temporary enforcement of medical treatment, respectively the temporary medical hospitalization, on the taking of the preventive measures, on the appeal against the manner in which the preventive measure taken by the preliminary chamber judge and respectively on the protective measures on the threatened witnesses.

4 Conclusions

The preliminary chamber is a new institution in the Romanian criminal procedure, innovative, which aims to create a modern legislative framework that aims to meet the demands of legality, celerity and fairness of the criminal process.

Being a new institution in the Romanian criminal proceedings, jurisprudence in preliminary chamber area is still in the process of crystallization, but this process was prolonged as a result of the multiple decisions of the Constitutional Court to admit the exceptions of unconstitutionality and the decisions of the High Court of Cassation and Justice through which some legal issues were cleared.

It is clear from all the provisions of the new Code of Criminal Procedure that the legislator sought to establish the competence of the preliminary chamber judge in verifying the compliance of the evidence administered during the criminal prosecution with the guarantees of fairness of the procedure. In this respect, the lawfulness of the administration of evidence is closely related to ensuring the fairness of the criminal trial, but we are still not guided by the jurisprudence of the Romanian courts, so that in practice there are numerous situations in which there are difficulties in solving some exceptions subject to the preliminary chamber.

We have found that there is a tendency on the part of the defence of the respondents to invoke aspects of the inequitable way (often using the term "disloyal") in which the judicial proceedings have been carried out until then, in the procedural stage of the trial of the case, such as the fact that, before some witnesses were heard, they were first brought to their attention by the criminal prosecution bodies that a certain person (who at that time or later acquired the status of defendant) committed the offense or other similar facts in relation to which the witnesses are called to make statements.

A jurisprudential benchmark for solving the exceptions to the unfairness of the evidence administration could be the jurisprudence of the European Court of Human Rights, but also that of the courts from Anglo-Saxon judicial system (common-law systems), the latter having a tradition in respecting the principle of finding the truth with ensuring the fairness of the procedure.

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Protection of Fundamental Rights in the Light of the Directive Regarding the European Investigation Order

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Abstract

In Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014, regarding the European Investigation Order, the newest instrument for judicial cooperation in criminal matters was created, designed to replace the existing fragmented framework which allowed for the obtaining of evidence in the procedures with cross-border implications. Based on the principle of mutual recognition, the European Investigation Order attempts to solve some of the issues raised by the previous instruments, which are founded upon the same principle. To this end, we note the European legislator's concern for the creation of mechanisms intended to provide high protection of fundamental rights of the persons involved in the criminal procedures in which such an order is used. In this context, the purpose of this work is to analyse this new instrument in terms of protection of fundamental rights, to identify the protection standard offered by the Directive, as well as to emphasize the aspects that will require improvement as a result of the implementation of its provisions.

Keywords: European Investigation Order, principle of mutual recognition, fundamental rights.

1 General Framework for the Adoption and Operation of the European Investigation Order

The opening up of borders within the European Union represented a factor of evident economic and social progress, but it also provided an extraordinary opportunity for the perpetrators to exploit to their benefit the free movement of

goods, of capital, of services, and of persons. In this complex social and criminological reality, the territoriality principle, in its roles pertaining to substantial and procedural law, has become obsolete, as have, for that matter, the traditional instruments for judicial cooperation in criminal matters, which have proven to be ever more inadequate with reference to their complexity or to the long period of time over which they were carried out.

In this context, the Tampere European Council of 1999 introduced into the paradigm of judicial cooperation in criminal matters [1] between Member States of the European Union the principle of mutual recognition, designed to become "the cornerstone of judicial co-operation in criminal matters" [2]. In essence, according to this principle, a judicial decision issued by a judicial authority of a Member State of the Union is recognized and/or enforced by another Member State, having the same value as a decision issued by the latter itself. The principle of mutual recognition was designed as being also applicable to the obtaining of evidence in criminal procedures, as also indicated by point 36 of the Programme of measures of the Tampere Council, which provides that it "should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there."

Subsequently, within the Stockholm Programme, adopted by the European Council in 2009, it was appreciated that the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition, should be further pursued and, as the existing instruments in this area constituted a fragmentary regime, it was believed that a new approach was needed, based on this principle, but also taking into account the flexibility of the traditional system of mutual legal assistance [3]. Therefore, the European Council encouraged the implementation of a new comprehensive system, to replace all the other mechanisms for the obtaining of evidence across borders, to cover all types of evidence and to limit the grounds for refusal [4].

Thus, a single instrument arose – the European Investigation Order (EIO), set up by Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [5] (hereinafter – "The Directive"). According to the definition given in Article 1 paragraph 1 of the Directive, a European Investigation Order (EIO) is a judicial decision which has been issued or validated by a judicial authority of a Member State to have one or several specific investigative measure(s) carried out in another Member State to obtain evidence or to transmit evidence which is already in the possession of the competent authority from the executing State.

2 Fundamental Rights and the Principle of Mutual Recognition

However, obtaining evidence in criminal proceedings constitutes a sensitive issue from the point of view of fundamental rights, in particular by reference to the limitation of the suspects' or accused' rights to be informed on the prosecution, and it is all the more visible where evidence is obtained across borders. This issue has also been a concern of the European legislator, which was materialized in the Directive in provisions which infer the idea of establishing a balance between the need to respect the fundamental rights, on the one hand, and the importance of obtaining evidence in the criminal proceedings, on the other hand. However, critical opinions are encountered in the literature, concerning the level of protection for the fundamental rights provided by the Directive, or even some which consider the European Investigation Order to be a risk to the fundamental rights [6].

We must mention that maintaining this balance is not an easy task, particularly having regard to the fact that the Member States offer different standards for the protection of fundamental rights, which aspect may represent a major barrier in the way of judicial cooperation between the involved authorities. Equally, the other instruments for judicial cooperation in criminal matters within the scope of mutual recognition have given rise to controversies concerning the level of protection of fundamental rights in the Member States. Thus, particularly in the matter of the European Arrest Warrant, concerning the fact that the Framework Decision which sets it up does not contain grounds for refusal, which allow for the non-execution of such a warrant when the infringement of fundamental rights is determined in the issuing State, there have been discussions, which is also indicated by the case law of the Court of Justice of the European Union (hereinafter referred to as "CJEU"). Thus, in the case *Radu [*7], the CJEU was vested to respond whether the judicial enforcement authorities may refuse to execute the European Arrest Warrant issued for the purpose of conducting the prosecution on the grounds that the issuing judicial authorities infringed the fundamental rights, the infringement of Article 6 of the European Convention for Human Rights being claimed in this case. In the analysis from this case, the CJEU gave its judgment in a rather prudent manner [8], emphasizing the fact that the enforcement of the Framework Decision must be achieved in a strict way, refusing to decide concerning the incidence of fundamental rights in the procedures involving the principle of mutual recognition. In the case *Melloni [*9], the CJEU concluded that, although Article 53 of the Charter of Fundamental Rights of the European Union (hereinafter "the Charter") allows the national courts to remain free to apply the national standards of protection of fundamental rights, but this possibility is subject to the condition that the primacy, unity and effectiveness of EU law are not thereby affected. The Court emphasized that the aim of the Framework Decision is to reflect a consensus of the Member States and a harmonisation of the procedural rights of persons convicted in absentia [10], however, allowing a State to claim its own constitutional version of the right of

defence, to the purpose of imposing an additional condition upon surrender, would cast doubt on the uniformity of the standard of protection of fundamental rights [11]. Although, in the two cases, the CJEU defended the principle of mutual recognition, crediting it to the detriment of the possibility to refuse the execution of a European arrest warrant for the infringement of fundamental rights, however, the principles derived from them represented the source of inspiration upon drawing up the Directive on the European Investigation Order [12].

3 Equality of Arms in the Directive Regarding the European Investigation Order

The European Investigation Order is intended to ensure rapid and effective cooperation between the Member States in criminal cases with cross-border implications, which aspects are favoured by the mutual recognition mechanism, under which a judicial decision of a Member State is recognised and executed by an authority from another Member State without any further formality being required.

In this context, the reserve has been expressed that there is the risk for a procedure in which an investigation order is issued for the obtaining of evidence to be marked by inequality of arms between the prosecution and the person concerned by the procedure [13]. This is not a new issue, but it is also specific to other instruments for judicial assistance in criminal matters, based on which evidence can be obtained beyond the borders of the State where the respective procedure is carried out, as there are legitimate doubts concerning the capacity of the person concerned by the procedure to know whether the procedure for obtaining evidence in another State conforms to the procedural rules.

To comply with the principle of equality of arms, the Directive introduces the possibility for the issuing of an EIO to be requested by a suspected or accused person, or by a lawyer on his behalf, within the framework of applicable defence rights in conformity with national criminal procedure [14]. Thus, the authorities of the issuing Member State are under the obligation to provide to the person concerned the possibility to request the issuing of a European Investigation Order, however, whether the request is complied with or not is left to the issuing authority. Nevertheless, the Directive does not provide a clear solution concerning the possibility for lawyer of the suspected or accused person to participate in the execution of the measures decided in the European Investigation Order [15] nor does it contain provisions on the protection of the fundamental rights of the other parties or of other persons involved in the procedure (such as witnesses). However, recital 15 of the Preamble provides that the Directive should be implemented taking into account Directives 2010/64/EU, 2012/13/EU, and 2013/48/EU of the European Parliament and of the Council, which concern procedural rights in criminal proceedings. Additionally, we must highlight that in the Romanian national legislation – Law nr. 302/2004 concerning international judicial cooperation in criminal matters, the right to request the issuing of a

European Investigation Order is given also to the other parties in the trial (art. 268^3 para. 1).

4 The Test of Respect to Fundamental Rights in the Issuing State of the European Investigation Order

From the Preamble of the Directive, we can encounter provisions which emphasize the European legislator's concern for the protection of fundamental rights. Thus, recital 18 emphasizes that, as in other mutual recognition instruments, the Directive does not have the effect of modifying the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union (hereinafter referred to as "TEU") and in the Charter of Fundamental Rights. However, what is, indeed, an element of novelty within the European Investigation Order is the explicit setting up of a relative presumption that the area of freedom, security and justice within the Union is based on mutual confidence and on a presumption of compliance by other by other Member States with Union law and, in particular, with the fundamental rights [16]. Consequently, if there are substantial grounds for believing that the execution of an investigative measure indicated in the European Investigation Order would result in a breach of a fundamental right of the person concerned and that the executing State would disregard its obligations concerning the protection of fundamental rights recognised in the Charter, the execution of the European Investigation Order should be refused [17].

The Directive does not leave the test of fundamental rights to the executing state, instead it contains provisions which compel the issuing State to avoid abuse of such measure, as well as the infringement of the rights of persons concerned by the procedure. Thus, according to recital 12 of the Preamble, "when issuing an EIO the issuing authority should pay particular attention to ensuring full respect for the rights as enshrined in Article 48 of the Charter of Fundamental Rights of the European Union." In particular, it is noted that the presumption of innocence and the rights of defence in criminal proceedings are a cornerstone of the fundamental rights recognised in the Charter within the area of criminal justice and that any limitation of such rights by an investigative measure ordered in accordance with the Directive should fully conform to the requirements established in Article 52 of the Charter with regard to the necessity, proportionality and objectives that it should pursue, in particular the protection of the rights and freedoms of others."

Equally, recital 11 of the preamble also introduces a control of proportionality upon issuing a European Investigation Order: "The EIO should be chosen where the execution of an investigative measure seems proportionate, adequate and applicable to the case in hand. The issuing authority should therefore ascertain whether the evidence sought is necessary and proportionate for the purpose of the proceedings, whether the investigative measure chosen is necessary and proportionate for the gathering of the evidence concerned, and

whether, by means of issuing the EIO, another Member State should be involved in the gathering of that evidence."

One of the ideas behind proportionality check is that not only the consequences upon the rights of the persons concerned by the criminal case need to be taken into account, but also those of other persons involved, such as witnesses. Consequently, upon issuing a European Investigation Order, the issuing authority should assess whether in the respective case the order is necessary and whether its purpose is proportional by reference to the person's rights, and also whether such measure can be used under the same conditions in a similar internal case.

5 The Test of Respect to Fundamental Rights in the State Executing the European Investigation Order

From the perspective of the executing State, the directive contains provisions which can be deemed as effective in allowing it to protect fundamental rights. The most important reference point in this regard is the fact that a ground for non-recognition and non-execution of the European Investigation Order based on the failure to comply with fundamental rights is introduced. Thus, under Article 11 para. 1) letter f), the recognition or execution of a European Investigation Order can be refused in the executing State if there are substantial grounds to believe that the execution of the investigative measures indicated in the European Investigation Order would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter.

The ground for refusal represented an important requirement of the European Parliament within the negotiation of this instrument, also in a symbolic manner, as it intervened for the first time as a co-legislator in an instrument that is on the repressive side of criminal justice and not in the sphere of protection of the rights of the persons concerned by the criminal procedures [18]. Equally, note should be made of the fact that the Directive represents the first instrument based on mutual recognition which introduces a ground for explicit refusal, based on the failure to comply with the fundamental rights of the individual, but the ground for non-execution, as all the grounds provided in the Directive, is optional, the judicial execution authority having the faculty to decide whether it complies with the execution if it is found that fundamental rights are breached. Moreover, before deciding not to recognise or not to execute an EIO, either in whole or in part, the executing authority shall consult the issuing authority, by any appropriate means, and shall, where appropriate, request the issuing authority to supply any necessary information without delay [19]. Consulting the issuing authority is, in this case, mandatory, and the decision on the execution of the order can be made after receiving the information from the issuing authority. Concerning this aspect, also worth mentioning is another important decision of the CJEU given in the matter of the European arrest warrant, *Aranyosi and Căldăraru [*20], whereby the obligation was established for the authority executing a European arrest warrant

which determined infringements of fundamental rights (in this case Article 3 of the European Convention on Human Rights), to start a procedure to request information from the issuing authority and only afterwards to start the surrender procedure. Even though it is subsequent to the adoption of the Directive, the judgment given in the cases *Aranyosi and Căldăraru* marks the trend existing at the level of cooperation instruments within the sphere of mutual recognition to increase the role of the prior consultation upon putting them into practice.

Concerning the analysed ground for refusal, the identification of the standard for the protection of fundamental rights recognized by the Directive is due. As we indicated, even in its Preamble, the need to respect fundamental rights is emphasized in recital 18; "As in other mutual recognition instruments, this Directive does not have the effect of modifying the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union (TEU) and the Charter." Whereas all instruments in the matter of mutual recognition emphasize from as early as the Preamble the fact that mutual recognition cannot be achieved to the detriment of the fundamental rights of the person concerned by the decision whose execution is requested, by reference to Article 6 of the TEU and/or the Charter, instead, the Directive also extends in the Preamble the reference to the rights and principles recognised in "international law and international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in Member States' constitutions in their respective fields of application."

However, the regulation contained in Article 11 para. 1) letter f), indicates that the reference level in appreciating the incidence of this ground for refusal is Article 6 TEU and the provisions of the Charter, which is intended to prevent Member States from imposing their own standards for protection of fundamental rights. In this context, it is found that the ground for refusal does not reproduce the references from the Directive's Preamble to the rights and principles recognised in international law and in international agreements and in the constitutions of Member States.

Within the system of the European Investigation Order, the role of the executing State is extremely important, as it puts into practice the measures requested by the issuing State on its territory, which, most times, target its own citizens, and thus they have a legitimate interest to respect the fundamental rights. Therefore, upon recognizing and executing the order, the executing State must conduct the test of protection of fundamental rights, but not by reference to its internal standards for their protection, instead to those of Article 6 TEU and of the Charter, thus reiterating the principles developed by the CJEU in the *Melloni* case.

Recital 39 of the preamble provides that "nothing in this Directive may be interpreted as prohibiting refusal to execute an EIO when there are reasons to believe, on the basis of objective elements, that the EIO has been issued for the purpose of prosecuting or punishing a person on account of his or her sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions, or that the person's position may be prejudiced for any of these reasons."

Obviously, the executing authority shall also take into account these potential grounds for discrimination in appreciating the conformity of the European Investigation Order with the respect to fundamental rights.

6 The Right to Privacy

The Directive also conveys the idea of concern for an area which is quite sensitive: the right to privacy. To this end, we encounter express references concerning the mode in which information is acquired by methods which interfere with private life, such as the interception of telecommunications (Articles 30 and 31) and the information on bank and other financial accounts (Articles 26 and 27). Undoubtedly, the right to privacy is particularly vulnerable during the course of a criminal investigation, but among the criticism to the Directive is also the fact that it grants disproportionate importance to this right, to the detriment of other rights, such as the right to defence, the right to freedom and security, the importance of avoiding hearings over a very long period, or the suspect's right to a lawyer, when necessary [22].

At the same time, the Directive contains provisions intended to protect individuals concerning the processing of personal data, emphasizing that this is a fundamental right, Therefore, it is established that Member States should, in the application of the Directive, provide for transparent policies with regard to the processing of personal data and for the exercise of the rights of data subjects to legal remedies for the protection of their personal data [23].

7 Conclusions

The idea behind the Directive – creating a single cooperation instrument, which allows for fast and smooth obtaining of evidence beyond the borders of Member States – is definitely an important step in the area of mutual recognition. Marked by the discussions referring to the low protection level provided to the fundamental rights of persons in the previous cooperation instruments adopted at EU level, the Directive expressly emphasizes the commitment to create protective standards within criminal procedures.

Obviously, the most important aspect is the regulation of a ground for non-execution of a European Investigation Order, if it is determined that fundamental rights are breached. At the same time, the Directive does not leave this appreciation to the exclusive discretion of the executing State, instead it also requires control upon issuing such an order.

However, this Directive also conveys the limits of protection of fundamental rights: the ground for refusal is optional, protection standards differ between Member States, and equality of arms, as well as the rights of the parties or of third parties, are not sufficiently defined. However, as in the case of the other cooperation instruments in criminal matters, the impact can be assessed upon implementing and putting into practice the provisions of the Directive.

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The Evidential Value of Scientific and Technical Statements of Findings Drawn Up by the Anti-Fraud Inspectors

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Abstract

An important aspect of the right to an equitable trial is that in penal matter, including the elements pertaining to the proceedings, should take place in a contradictory manner; there must be an equality of arms between prosecution and defence. In the same way, the necessity of ensuring the equitability of the proceedings carried out in a penal trial supposes that the judicial bodies have the obligation to carry out the penal prosecution and the trial respecting the procedural guarantees and the parties' and procedural subjects' rights.

Keywords: scientific and technical statement of findings, anti-fraud inspector, failure to respect the right to defence, the principle of equality of arms, partial invalidity, documents of penal prosecution, evidentiary hearing, Prevention of Fraud Department.

1 Notion

Taking into consideration, among others, the necessity to consolidate the legislative framework regarding the fight against tax evasion by G.E.O. 74/2013 regarding several measures to improve and reorganize the activity of N.A.F.A. (The National Agency for Fiscal Administration), as well as to modify and complete certain normative documents, it was ordered the setting up of The Directorate General of Fiscal Anti-fraud (D.G.F.A.) within N.A.F.A. According

to art. 3 paragraph 1 in G.E.O. 74/2013, to provide technical support to the prosecutor in order for him to carry out the penal prosecution in the cases which focus on economic and financial crimes, in was ordered that the latter Directorate be set up, along with The Directorate to prevent fiscal fraud (D.P.F.F.). For this purpose, the anti-fraud inspectors with The Directorate to prevent fiscal fraud were transferred to prosecutor's offices, according to the law, as specialists. As seen in the provisions of art. 4 din G.E.O. 74/2013, to perform the job requirements, the anti-fraud inspectors with D.P.F.F. carry out, by prosecutor's disposition: a) scientifical and technical findings which stand as evidential means, according to the law; b) financial investigations in order to freeze assets; c) any other fiscal investigations ordered by the prosecutor. In the same way, according to art. 4 paragraph 9 in G.E.O. 74/2013, to carry out with celerity and thoroughly the activities of finding and prosecuting economical and financial crimes, to clarify some technical aspects in the activity of penal prosecution, the anti-fraud inspectors with D.P.F.F. will perform their activity in prosecutor's offices, by means of transfer.

2 The Conditions Under Which a Financial-Accounting Technical-Scientific Finding May Be Ordered

Taking into account the legal framework presented above, this article aims at analyzing, on the one hand, the legal conditions in which the penal prosecution bodies can order a scientific and technical financial accounting finding carried out by the transferred anti-fraud inspectors, in detriment of ordering in the case an accounting expertise and, on the other hand, the consequences of the failure to meet the provisions of the penal proceedings when using these evidential procedures.

The issue of the legality of the scientific and technical statements of finding drawn up by the specialists who work within the judicial bodies is not a new one in the judicial practice. In this way, we consider that the status of anti-fraud inspectors transferred at the departments of the Public Ministry is similar to that of the specialists from The Directorate for Investigating Organized Crime and Terrorism (DIOCT) and The National Anticorruption Directorate (NAD), and the conclusions which were reached in jurisprudence regarding the latter can be retained as well for the formers.

Thus, the practice of the constitutional litigation is relevant in the sense of rejecting the exceptions of unconstitutionality of art. 11 in G.E.O. no. 43/2002, in the form previous to the abrogation of paragraphs 3 and 4 by Law no. 255/2013 ["(3) The scientific and technical finding drawn up by the specialists provisioned in paragraph 1 at the written order of the prosecutor constitute means for evidence, according to the law. (4) The scientific and technical findings and expertize can be carried out by other specialists or experts from public or private institutions in Romania or from abroad, organized according to the law, as well as by individual specialists or experts authorized or acknowledged according to the law"], The

Court stating, among others: "(...) A component of the guarantees of an equitable trial is the principle of the equality of arms, which signifies treating the parties equally throughout the procedure before a court of law, without one party being disadvantaged in comparison to the other. This being the case, one cannot hold that the principle of the equality of arms is broken when the contested procedure, on the whole, met the exigences of the right to an equitable trial. At the same time, the principle of contradiction, another component of the right to an equitable trial, supposes in essence the possibility that the parties of a trial be aware of all the evidence and observations presented to the judge, which can influence his decision and can be discussed. Yet, the Court holds that in this case the party could have been informed on the existence of the scientific and technical finding – a means of evidence carried out by the specialists from NAD – concurrant with the presentation of the penal prosecution material, according to art. 250-254 Code of Penal Procedure [from 1968 – a/n]. Therefore, the party can object to the findings statement or can contest before the court, in contradictory conditions, the respective means of evidence".

Also, the Court found that a similar regulation to the one criticized is comprised in art. 112 in the Old Code of Penal Procedure, according to which, in certain cases, the penal prosecution body can use the knowledge of a specialist or technician, ruling, ex officio or on request, a scientific and technical finding which is usually carried out by specialists or technicians who perform within or near the institution to which the penal prosecution body belongs, but can also be carried out by specialists or technicians who work with different authorities. Conversely, the Court noticed that "in the process of deliberation the judge verifies and assesses the evidential material and bases his solution on the entire evidence administered in the case, corroborating and assessing evidence and not by exclusive reporting to the scientific and technical findings drawn up by the specialists provisioned in the criticized texts of law. Thus, the trial is carried out by an independent and impartial court, in conditions of publicity, orality and contradiction, and the judge bases his solution on the whole administered evidence, verifying, assessing and corroborating the evidence, therefore the information from the scientific and technical findings cannot actually create the risk of a procedure abuse.

In this way, The Constitutional Court ruled in Decision no. 524/2006: "During the debates there was a reference to the fact that – and in accordance with the ECHR jurisprudence (Borcea vs. Romania case, Decision from 22nd September 2015, paragraph 48) – solving the case based on these findings statements does not violate the right to an equitable trial.

Thus, leaving aside the aspects pertaining to the specialists' affiliation or status when it comes to the administrating legality during the penal prosecution, in the cases dealing with economical and financial crimes, of a findings statement drawn up by an anti-fraud inspector we observe that, as can be concluded from the provisions of art. 172 paragraph 9 in the Code of penal procedure, it can be ordered only if there is a danger of means of evidence gone missing, a change of the de facto situation or the urgent clarifying of certain facts or circumstances of

the case is necessary. Taking these dispositions into account, we consider that the legality of administering this evidence procedure during the penal prosecution cannot be contested if these expressly stipulated conditions were met *ad litteram*, respectively the condition of the existence of a danger of means of evidence gone missing, a change of the de facto situation or the urgent clarifying of the de facto situation. As for the specifics of the penal prosecution carried out in the files dealing with the tax evasion crimes stipulated by Law no. 241/2005 regarding the preventing and combating tax evasion, we consider that in practice only the condition of urgent clarifying of the de facto situation is covered, taking into account that at the moment of ordering a scientific-technical accounting and financial finding by the anti-fraud inspectors the evidence means were collected and are in the possession of the judicial bodies. To sustain the statement, we demonstrate that in a court resolution on 26th February 2015, while judging an appeal against the ruling of the preliminary hearing judge at the Court of Sălaj, The Appeal Court Cluj ordered, among others, according to the provisions of art. 102 paragraph 2 in the Code of penal procedure, the removal of the scientific and technical statement of findings drawn up by the DIOCT specialists as being unlawful, therefore the right to defense being violated. To motivate the decision, it is shown that in relation with the factual circumstances of the case, the penal prosecution being onset even since 2001, there was no danger of evidence means gone missing or changing of de facto situations and, also, no urgent clarifying of certain facts or circumstances of the case was necessary. The Court showed that the respective file was presented to the penal prosecution bodies even since 2012. The documents made available to the DIOCT specialists in order for the scientific and technical finding to be drawn up were collected during the home search or the search done at the headquarters of the companies administered by the defendants, thus the risk of evidence means gone missing being basically non-existent. According to the Code of penal procedure, the rule is that when the judicial bodies need an expert's opinion in order to find, clarify or evaluate certain facts or circumstances which are important to discover the truth of a case, an expertise is necessary, according to art. 172 paragraph 1.

In the same way, we consider that the motivation regarding the necessity of urgent clarifying of the de facto situation in tax evasion cases must be in relation with the stage of the penal procedure at the moment of ordering the finding by the penal prosecution bodies (respectively in a stage when immediately after obtaining the evidence means which are to be subject of analysis for the anti-fraud inspectors it is imperative that a finding is drawn up in order to solve with celerity the case in detriment of an expertise which would suppose prolonging the procedure) as well as with the duration of the administration of this evidence means which, from the dispositions mentioned previously, must be reasonable and certainly much shorter than that necessary to draw up an expertise report.

We therefore consider that administering this evidence means in detriment to an expertise with the same goal in the cases of tax evasion is unlawful, in the situation where either the penal prosecution bodies, although having at hand all the documents necessary to clarify the de facto situation, delayed administering

this evidence means, or administering this evidence means supposes a relatively equal or longer period of time than that necessary to draw up an expertise report. These affirmations are particularly important taking into account the non-contradictory character of the procedure carried out during the administration of the findings statement by the anti-fraud inspectors, as well as the limitation of the principle of the equality of arms during the penal trial, when nor the suspect nor the defendant is allowed to participate, directly or by means of defenders or, moreover, by appointing an expert as a party. Thus, the lawmaker allows for using this evidential means only if there is a legal justification, backed up by de facto elements pertaining either to previous or subsequent periods of the evidence administration, the measure being necessary to discover the truth and to solve the cause with celerity, without the possibility of ignoring the lawful rights in favour of the parties or the main litigants in the stage of penal prosecution, being imperative that the procedure on the whole is equitable and the equality of arms is ensured.

This is because, as drawn from the provisions of art. 172 paragraph 8 in the Code of penal procedure, as opposed to the procedure carried out by the anti-fraud inspector when drawing up the scientific and technical/financial and accounting findings statement, when the expertise is carried out independent authorised experts can participate, experts who are appointed at the request of the parties or the main litigants and, according to art. 173 paragraph 4 in the Code of penal procedure, the parties and the main litigants have the right to demand that when the expertise is carried out, and expert on their behalf should participate. In the same way, according to art. 177 in the Code of penal procedure, the penal prosecution body or the court, when ruling an expertise, set a deadline when the parties, the main litigants and the expert, if appointed, are called. At the respective deadline, the prosecutor, the parties, the main litigants and the expert are made aware of the subject of expertise and the questions to which the expert must answer, and are informed that they have the right to make observations regarding these questions and that they can request the modification or completion or such questions. Also, as is the case, the expert is informed on the subjects he is to analyze. He is also informed on the fact that he has the obligation to analyze the subject of the expertise, to indicate with precision any observation or finding and to present an impartial opinion regarding the evaluated facts or circumstances, according to the rules of professional science and expertise. The parties and the main litigants are informed that they have the right to request the appointment of an expert recommended by each of them, who will participate when the expertise is carried out. After examining the objections and the requests made by the parties, the main litigants and the expert, the penal prosecution body or the court presents to the expert the deadline for the expertise, informing him at the same time if the parties or the main litigants will participate when the expertise is carried out. Thus, from the dispositions mentioned above, the rights of the parties and of the main litigants are acknowledged and effective in the hypothesis of ruling an expertise, the equality of arms and equitability of the procedure on the whole being ensured, aspects which cannot be found in the procedure of drawing up a

finding, reason for which the lawmaker admits this modification of the proceedings framework only in exceptional situations and with meeting demands strictly and limitatively provisioned by the law.

Another extremely delicate issue in the practice of the judicial bodies is represented by violation of the provisions of art. 92 paragraph 1 in the Code of penal procedure in the hypothesis where previous to carrying out a scientific and technical findings statement by the anti-fraud inspectors an ongoing penal prosecution or initiating criminal proceedings was ruled in the case, and the defender of the suspect or of the defendant requested to be present when any act of penal prosecution is carried out, being by no means allowed for them to participate at the drawing up of the findings statement, either by omission to inform on the evidential procedure which is to be carried out in the case, or by granting the possibility to state a point of view on the established objectives or even on personal objectives. Thus, from the interpretation of the penal procedures disposition, during the penal prosecution, the suspect's or defendant's lawyer has the right to assist at any act of penal prosecution, except the situation where special methods of surveillance or research are used, as found in chapter IV in title IV, as well as in the case of body search or vehicle search in the case of caught-in-the-act crimes. Taking into consideration these two cases expressly and limitatively provisioned by the law where it is possible to censor the right of the suspect's or defendant's defender to assist at any act of penal prosecution, as well as that the scientific and technical statement drawn up by the anti-fraud inspectors is in essence an act of penal prosecution, we consider that the right to defence is obviously violated in this hypothesis.

As to the consequences of violating the dispositions of penal proceedings when using this evidential procedure, we hold that in the first hypothesis, respectively in the case of ignoring the conditions of ruling the scientific and technical finding, the sanction can only be partial invalidity, there being, without a doubt, a prejudice of the parties' and main litigants' rights by violating the principle of loyal administration of evidence and the principle of equality of arms. In the second hypothesis, respectively in the case of violating the right of the suspect's or defendant's lawyer to assist at any act of penal prosecution by ruling a scientific and technical finding without his participation or at least him being informed about it, we consider that the sanction is full invalidity of the statement, based on art. 281 paragraph (1) letter f) in the Code of penal procedure. This is because the suspect or the defendant being assisted by their lawyer involves the possibility of the lawyer's assistance at the acts of penal prosecution on the behalf of the parties or the litigant whom he represents in order to accomplish an effective defence.

3 Conclusion

In conclusion, the technical-scientific report drawn up by the anti-fraud inspectors is a useful tool put to the prosecutors by the legislator with a view to

speedily settling the criminal cases regarding the crimes committed against the state budget.

We consider that the principle of equality of arms is not being respected and the sanction that can intervene can only be absolute nullity in the situation where this procedure is used to the detriment of an accountancy expertise, i.e. when either the stage of the criminal proceedings allows it to comply with the reasonable period either the exercise the right to defense was not fully respected, the unfounded character of the administered sample being obvious.

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Considerations on Competence Norms Provisioned by the Procedural Penal Legislation

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Abstract

The competence is the aptitude, accepted by the law, of a judicial body to investigate, respectively to judge a certain penal cause or to address petitions, proposals, complaints, appeals or any other aspects pertaining to a penal trial. In the procedural penal matter, the main forms of competence are: functional competence, matter competence, personal competence and jurisdiction.

Keywords: matter competence, personal competence, nullity, judge, prosecutor.

1 Notion

The competence is the aptitude, accepted by the law, of a judicial body to investigate, respectively to judge a certain penal cause or to address petitions, proposals, complaints, appeals or any other aspects pertaining to a penal trial.

The Code of penal procedure, at art. 30, defines and restrictedly enumerates at the same time the state judicial bodies as follows: penal prosecution bodies, the prosecutor, the judge of rights and liberties, the judge of preliminary hearing and the courts. Concurrently, according to art. 55 in the Code of penal procedure, the prosecution bodies are: the prosecutor, the prosecution bodies with the judicial police and the special prosecution bodies.

2 The Main Forms of Competences Regulated by the Law

In the procedural penal matter, the main forms of competence are: functional competence, matter competence, personal competence and jurisdiction.

The functional competence is that form of competence which is established by comparison to the activity of judging or prosecution which can be carried out by the court or the prosecution bodies. In the same sense, this form of competence is also established in terms of activity provisioned by the law to be carried out by the judge of rights and liberties or the judge of preliminary hearing.

This form of competence is regulated by mandatory regulations, thus violating them by the judicial bodies incurs the sanction of absolute nullity.

The matter competence is the form of competence which is determined by the object of the penal cause, respectively the crime which is the object of that particular cause, by comparison to which is established which of the judicial bodies of different rank can investigate or judge that particular cause.

According to art. 281 paragraph (1) letter b) Code of penal procedure, violating the matter or the personal competence of the courts of justice when the judgement was carried out by an inferior court to that which is legally competent always incurs the sanction of absolute nullity. From the per a contrario interpretation of the article mentioned above, it is obvious that violating the norms of matter or personal competence by the prosecution bodies is sanctioned with partial nullity. Nevertheless, the Constitutional Court, by no. 302 in May 4th 2017, published in The Official Gazette with no. 556 in July 1st 2017, admitted the exception of unconstitutionality and ascertained that the legislative solution comprised in the provisions of art. 281 paragraph (1) letter b) in the Code of penal procedure, which does not regulate in the category of absolute nullities the violation of the dispositions referring to matter competence and by the quality of the person of penal prosecution body is unconstitutional. [1]

In the reasoning, the Court basically acknowledges that proving that the violation of a person's rights exclusively by the prosecution body's failure to comply with the dispositions referring to the matter and personal competence turns into evidence which is difficult to achieve by the one who is interested, which, in fact, amounts to a veritable probatio diabolica and, implicitly, determines the violation of the fundamental right to an equitable trial. This is why the lawmaker of the previous codes of penal procedure provisioned under the sanction of absolute nullity the failure to comply with the norms of matter and personal competence by the quality of the person of penal prosecution body, the procedural violation being, in this situation, presumed *iuris et de iure*.

Concurrently, according to the provisions of art. 281 paragraph (3) Code of penal procedure, violating the legal dispositions referring to competence can be invoked at any stage of the trial. Alternately, according to art. 342 paragraph (1) Code of penal procedure the object of the preliminary hearing procedure is, among others, to check if the prosecution bodies carried out the paperwork. Taking into consideration the texts presented and the ruling of the Constitutional Court

mentioned earlier, one can raise the following issue: which is the moment until one can invoke the violation of the norms of matter or personal competence by the prosecution bodies. As far as we are concerned, we hold that the interested persons have the possibility to invoke absolute nullity no later than the debates in the appeal stage in the preliminary hearing are closed. To support this point of view, we shall put forward several arguments supported by legal texts. Thus, according to art. 347 paragraph (4) Code of penal procedure "when solving the appeal, one cannot invoke or make ex officio other petitions or exceptions apart from those invoked or made before the judge of preliminary hearing in the procedure carried out before the court notified with committal proceedings, except for the cases of absolute nullity". Moreover, the court has no competence to rule the referral of the cause back to the prosecutor's office in order for the prosecution to be carried out by the prosecuting body.

The personal competence is the form of competence determined by a certain quality of the active subject of the crime, which is established by derogation from the matter competence, through which it is established which of the judicial bodies can investigate or judge a certain penal cause, respectively which is the court where the judge of rights and liberties or the judge of preliminary hearing who is to rule a solution according to the competences provisioned by the procedural penal legislation functions.

The dispositions which regulate the personal competence of judicial bodies are mandatory regulations, therefore their violation by the judicial bodies incurs the sanction of absolute nullity. As far as we are concerned, we hold that violating the norms referring to the personal competence of the penal prosecution bodies can be invoked by the persons interested or by the judge of preliminary hearing no later than the debates in the appeal stage in the preliminary hearing are closed.

Concurrently, violating the norms regarding the matter or personal competence of the courts of justice represents grounds for cassation, according to art. 438 paragraph (1) point 1 Code of penal procedure.

The jurisdiction is the form of competence determined by the place where the crime was committed, the place where the suspect or the defendant was apprehended, the residence of the suspect or defendant as a natural person or, as the case may be, the headquarters of the suspect or defendant as a legal person, at the moment they are assumed to have committed the deed, respectively the residence or the headquarters of the injured person.

Violating the procedural dispositions regarding the jurisdiction can incur partial nullity if the conditions provisioned by art. 282 paragraph (1) Code of penal procedure are met, respectively the failure to meet the legal petition caused violation of the parties' or main procedural subjects' rights, which cannot otherwise be removed unless the document is annulled.

3 The Analysis of the Personal Competence Which Regulates the Penal Liability of the Magistrates

As to the competence to judge the crimes done by judges and prosecutors, the Code of penal procedure stipulates a personal competence determined by the professional rank. Thus, according to art. 38 paragraph (1) letter c) and f) Code of penal procedure "The Court of appeal judges in first instance the crimes done by the judges from the district and county courts, and by the prosecutors from the prosecutor's offices attached to these courts; the crimes done by the judges from the courts of appeal and The Military Court of Appeal, as well as the prosecutors from the prosecutor's offices attached to these courts".

We hold that assigning personal competence to judge the crimes done by the judges from the Court of appeal to the court where they function is objectionable and, at the same time, we hold back on the constitutionality of this law text because judging a cause by a judge who works for the same court or is even office colleague with the one accused of doing a crime can raise great question marks regarding the independence and impartiality of the court, in the sense of art. 6 paragraph 1 in The European Convention on Human Rights.

The European Convention on Human Rights stated in essence that "taking into consideration the very important role of the courts in a democratic society, these must inspire a certain degree of trust. Article 6 compels the courts to be impartial. Impartiality can be defined as the absence of any prejudice or bias. From then on, the Court distinguishes between a subjective approach, in other words the subjective position of the judge of the cause, and an objective approach, in the sense that the judge offers enough guarantees regarding his impartiality. As to the second test, in the situation where it is applied to a panel of judges who are also colleagues, it is necessary to establish if, apart from the personal conduct of each one of the judges of the panel, there is a series of deeds which can be ascertained and can lead to some doubts concerning the impartiality. From this perspective, even some appearances have a certain importance. When it is decided that in a certain cause there are several legitimate reasons to suspect that a particular panel does not ensure effectively a serious guarantee regarding the impartiality, the point of view of those who claim it is not impartial is important, but not decisive. What is decisive is represented by the fact that the respective suspicion can be objectively considered legitimate. [2]

Also, in another cause, The European Court of The Human Rights distinguished between a subjective approach which attempts to establish what exactly was each judge thinking in his inner forum or what was his interest in a certain cause, and an objective endeavour which aims to establish if it offers enough guarantees to exclude any legitimate doubt in this respect. As to the second endeavour, when a colleagues panel is involved, this situation leads to the question if, independently from the personal attitude of some of its members, certain verifiable deeds authorizes the challenge of the impartiality of the court itself. In this field, even appearances can have a certain importance. In order to pass judgement on the existence, in a certain cause, of legitimate grounds

regarding the lack of impartiality of a certain body, the opinion of the one who challenges the impartiality enters into the discussion, but is not decisive. The determinant element is to know if we can consider the suspicions of the person concerned as objectively justified. Within the subjective endeavour, the Court has always considered that a magistrate is considered impartial until proven otherwise. As to the type of evidence requested, the Court has tried, for example, to check the validity of the accusations according to which a judge turned out to be hostile or malevolent towards the defendant or, on personal grounds, arranged that a cause be assigned to him. The principle according to which a court must be considered as non-biased has been established for a long time by the jurisprudence of the Court. It reflects an important element of the supremacy of the law, namely that the verdict of the court is final and mandatory, on condition that it is not rejected by a higher court for inaccuracies or inequity. This principle must be applied in the same way to all types of courts, including to those which involve members of the jury. Even if in some cases it can be difficult for one to bring evidence which invalidate the presumption, the condition of objective impartiality offers, and must remind this, another important guarantee. In other words, the Court acknowledges the difficulty to establish the existence of a violation of art. 6 for subjective partiality. For this reason, in most of the cases which involve partiality issues, the Court had access to the objective endeavour. However, distinguishing between the two notions is not hermetic because it is not only the conduct of a judge which can, from an external observer's point of view, generate objectively justified doubts regarding his impartiality (objective endeavour) but can also target the issue of personal opinion (subjective endeavour). For example, the Court stated that judicial authorities are requested maximum discretion when having to pronounce a decision, since it is inherent from their image of impartial judges. This discretion must make them not use the media, even to meet some challenges. These are provisioned by the superior imperatives of the justice and the grandeur of the judicial function. Thus, when a magistrate uses in public phrases which denote a negative appreciation of the plaintiff's cause before presiding the court which must solve the cause, his statements objectively justify the fears of the plaintiff regarding his impartiality. On the other hand, in another cause, the Court considered this issue from the perspective of the subjective endeavour, in a situation where a judge criticises the attitude of the defence and expresses astonishment regarding to the fact that the plaintiff pleads not guilty. An analysis of the jurisprudence of the Court allows for the identification of two types of situations which can imply the judge's lack of impartiality. The first one, of a functional order, includes the cases when the conduct of a judge is not necessarily challenged but where the exercise of the same person of different functions in the judicial process, or the hierarchical liaisons or otherwise with another actor in the procedure raises objectively justified doubts regarding the impartiality of the court, which thus violates the standards of the convention according to the objective endeavour. The second type of situations is of personal order and targets the judges' conduct in a certain cause. From an objective point of view, such a conduct can be enough to generate legitimate and objectively justified fears, but

can also obstruct the subjective endeavour and even emphasise judges' prejudices. In this regard, the answer to the question of knowing if we must use the objective endeavour, the subjective one or both depends on the circumstances of the conduct in the litigation [3].

Taking into consideration the principles of the European Court of the Human Rights mentioned above, we hold that judging a crime done by a judge to another judge who functions in the same court does not meet the exigencies imposed by art. 6 paragraph. 1 in the European Convention of the Human Rights, in the sense that the tight liaisons which can exist among members of the same court or certain affinities on a professional level can raise many question signs regarding the impartiality of the judge assigned to judge on the merits, and it would also lead to a violation of art. 6 paragraph. 1 in the European Convention of the Human Rights, from the perspective of the objective test.

In the same sense, the Constitutional Court, by Decision no. 558 from October 16th 2014, published in The Official Gazette at no. 897 from December 10th 2014, admitted the exception of unconstitutionality regarding the provisions of art. 142 paragraph (1) thesis I Code of civil procedure, stating that this legal disposition is constitutional in the measure in which the grounds for legitimate suspicion does not compare to the quality of judge at the appeal court of one of the parties. [4]

In the reasoning, the Court showed that the principle of justice impartiality from art. 124 paragraph (2) in the Constitution is violated and, implicitly, so is the right to an equitable trial stipulated in art. 21 paragraph (3) in the Constitution, insofar as the grounds for legitimate suspicion is reported to the quality of a judge party at the court of appeal in whose circumscription is the court which will judge the cause.

Therefore, considering those mentioned before, we hold that a legislative alteration is necessary, when it is possible, in the sense of going back to the approach from the old Code of penal procedure and judgement of the penal causes which have as object crimes done by the judges from the Court of appeal, by a panel from the High Court of Cassation and Justice.

At the same time the dispositions of art. 38 paragraph (1) letter c) and f) Code of penal procedure were distinctly interpreted in the judicial practice, in the sense that some courts interpreted these dispositions by reference to the professional rank of the magistrate who is accused of committing a crime, and other courts ascertained that these legal dispositions refer to the court or the prosecutor's office where the magistrate functions. As far as we are concerned, we hold that these dispositions should be interpreted only with reference to the court or the prosecutor's office where the magistrate functions, without taking into consideration his professional rank. To support this opinion, we bring as an argument the way the legal disposition regarding the competence is written, in the sense that the lawmaker used in the legal text the phrase "judges from county courts, district courts, respectively prosecutors from the prosecutor's offices which are attached to these courts", without referring to the professional rank. Moreover, the legal dispositions which regulate the organisation of the

judicial system do not stipulate a subordination of the judges and prosecutors according to professional rank.

4 Conclusions

Taking into consideration the arguments presented in this article, we hold that it is necessary, when possible, to intervene legislatively in the sense of altering art. 38 paragraph (1) letter f) in the Code of penal procedure, namely to assign competence to investigate, respectively to judge the causes regarding these magistrates, to the Prosecution Service, respectively to The High Court of Cassation and Justice, in order to meet the exigencies imposed by art. 6 in the European Convention of the Human Rights regarding the semblance of impartiality and at the same time to increase the trust of the citizens in the judicial system.

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The international repeat offense through the framework Decision no. 2008/675 JAI of the Council and the Judgment of the Court of Justice of the European Union in Case C-171/16 Trayan Beshkov

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Abstract

In order to make a consistent interpretation of European Union law, in the light of the outcome of the adoption of Framework Decision 2008/675/JHA and of the interpretation given by the judgment of the Court of Justice of the European Union in Case C-171/16 Trayan Beshkov, Romanian law should interpret national law in order to give direct effect to a conviction order pronounced in a Member State of the European Union in respect of which information has been obtained on the basis of the applicable instruments available with regard to mutual legal assistance or trade information extracted from the criminal records, without going through the main or incidental recognition procedure provided by Law no. 302/2004.

Keywords: international repeat offence, Case C-171/16 Trayan Beshkov

1 International repeat offence in domestic law

International recidivism is enshrined in the current Criminal Code in Article 41 para. 3 stipulating that "to establish the existence of a repeat offense, consideration shall also be given to a conviction judgment returned in another country, for a violation that is also included in Romanian criminal law, if that conviction has been recognized under the law".

By this option, the Romanian legislature, taking away the previous legislative solution, adopts the mandatory international recidivism, incidental when the

first term constitutes a final conviction passed abroad recognized according to the procedure provided for by Law no. 302/2004 on international judicial cooperation in criminal matters.

The Romanian courts have been consistent in applying the provisions on the effects of a conviction handed abroad, other than the execution of a punishment in Romania, only as a result of the recognition procedure provided by Law no. 302/2004. As the High Court of Cassation and Justice has recently ruled, by resolving RIL decision no. 1/2018, in the recitals of that judgment, the sentence executed abroad can not be deduced as a result of a conviction issued by a foreign court as a result of the legal merger operation if that judgment was not previously recognized as a result of the crossing the procedure provided for by the special law. In other words, a conviction decision passed abroad can not have legal effect on the convicted person who is the subject of criminal proceedings before the Romanian court, unless it has previously been recognized under the special law. [1] [2] [3] [4] [5] [6]

Case C-171/16 Trayan Beshkov v Sofiyskaya rayon Prosecutor's Office

By judgment of 21 September 2017, in Case C-171/16 Trayan Beshkov v Sofiyskaya rayonna Prokuratura, the Court of Justice of the European Union has ruled:

– Council Framework Decision 2008/675/JHA of 24 July 2008 on the taking into account of convictions in the Member States of the European Union in the framework of a new criminal proceeding must be interpreted as applying to a national procedure for the purposes of enforcement, of a total custodial sentence which takes account of the penalty imposed on a person by the national court and that applied in the context of an earlier conviction handed down by a court of another Member State against the same person for different acts;

– Council Framework Decision 2008/675 must be interpreted as precluding that taking into account in a Member State of a conviction by a court of another Member State is subject to the application of a national prior authorization procedure of that judgment by the competent courts of that first Member State, such as the procedure laid down in Articles 463 to 466 of the Nakazatelno protsesualen kodeks (Criminal Procedure Code);

– Article 3 (3) of Framework Decision 2008/675 must be interpreted as precluding national legislation which provides that a national court hearing an application for enforcement in order to enforce a total custodial sentence which takes into account inter alia, the penalty applied in the context of an earlier conviction by a court of another Member State, amends to that end the arrangements for the execution of the latter.

Similar to Romanian law, the Bulgarian Code of Criminal Procedure provides for a procedure for the recognition of a conviction ruled by a foreign court. Without this procedure, the conviction decision rendered abroad, being a Member State of the European Union, can not take effect in the rule of law of the

Bulgarian state and it is necessary to recognize it in accordance with the provisions of the Code of Criminal Procedure.

In order to rule on the aforementioned judgment, the CJEU makes an analysis of the Bulgarian legislation which provides for a special procedure for prior recognition by the competent Bulgarian courts of the final convictions handed down by foreign courts for the judgment recognizing these convictions the effect a conviction handed down by a Bulgarian court. This procedure involves an examination of the foreign conviction to verify the fulfillment of the conditions provided by the Bulgarian criminal procedural law.

In analyzing the compatibility of Bulgarian national law with EU law, the CJEU starts from evoking the content of art. 1 para. (1) of Framework Decision 2008/675/JHA which states that this regulation is intended to establish the conditions under which previous convictions handed down in one Member State against a person are taken into account in a new criminal proceedings in another Member State against the same person and for different facts. The Framework Decision seeks to implement the principle of mutual recognition of judgments and judicial decisions in criminal matters, enshrined in Article 82 para. 1 TFEU, which replaced Article 31 TEU, on which the adoption of the Framework Decision is based.

By recital 36, the CJEU states that Article 3 para. (1) of that Framework Decision, interpreted in the light of recital 5 thereof, requires Member States to ensure that, in that framework, previous convictions handed down in another State Member State in respect of which information has been obtained on the basis of the applicable instruments available with regard to mutual legal assistance or the exchange of information extracted from criminal records on the one hand are taken into account to the extent that previous national convictions are taken into account under national law, and, secondly, equivalent effects to those conferred on those convictions according to the specific law, irrespective of whether those effects are matters of fact or are matters of procedural or substantive law.

In interpreting the Framework Decision, the CJEU also states that the national court must be able to take account of the convictions handed down in the other Member States, including to determine the means of enforcement that may be enforced, and that the effects of such convictions should be equivalent to the effects of judgments delivered at national level in each of these stages of the procedure.

In the light of the evidence presented in the recitals, the CJEU's judgment is unequivocal, stating that Framework Decision 2008/675/JHA opposes that taking into account a conviction decision previously taken by a court of another Member State is conditional on the implementation of a national recognition procedure. [7]

As regards the applicability of Framework Decision 2008/675/JHA and the interpretation given to it by the CJEU's decision in Case C-171/16 Trayan Beshkov, several considerations have to be made in the Romanian criminal proceedings.

2 The principle of consistent interpretation of framework decisions

Framework Decision 2008/675/JHA is devoid of direct effect. This Framework Decision was adopted on the basis of the former third pillar of the European Union, in particular under Article 34 para. (2) letter (b) of the EU (in its version prior to the Treaty of Lisbon). That provision stated that the Framework Decisions can not have direct effect (Ognyanov, C 554/14, EU: C: 2016: 835, paragraph 56).

It should be added that, under Article 9 of Protocol No. 36 on transitional provisions, the legal effects of acts of the institutions, bodies, offices or agencies of the Union adopted on the basis of the EU Treaty before the entry into force of the Treaty of Lisbon are maintained as long as they have not been abrogated, the basis of the Treaties.

Although the provisions of Framework Decision 2008/675/JHA can not therefore have direct effect, it is equally true that, under Article 34 para. (2) letter (b) of the EU, it commits the Member States to the result to be achieved, and methods are left to the discretion of national authorities (Ognyanov, C 554/14, EU: C: 2016: 835, paragraph 56).

However, the principle of consistent interpretation has some limitations, as they have often been stated in the constant jurisprudence of the CJEU:

– the obligation on the national court to refer to the content of a Framework Decision when interpreting and applying the relevant rules of national law is limited by general principles of law, in particular those relating to legal certainty and non-retroactivity (Ognyanov, C 554/14, EU: C: 2016: 835, paragraph 63, Pupino, C 105/03, EU: C: 2005: 386, paragraph 44, Lopes Da Silva Jorge, C 42/11, EU: C: 2012: 517, paragraph 55);

– the obligation of the national court of interpretation to comply must not lead to the establishment or aggravation, under a framework decision and independently of a law adopted for its implementation, of the criminal liability of those acting in violation of its provisions (Ognyanov, C 554 / 14, EU: C: 2016: 835, paragraph 64, Lopes Da Silva Jorge, C 42/11, EU: C: 2012: 517, paragraph 45);

– the provisions of the Framework Decision can not be used as a basis for a national law interpretation (Pupino, C 105/03, EU: C: 2005: 386, paragraph 47, Lopes Da Silva Jorge, C 42/11, C: 2012: 517, paragraph 55).

Applying the principle of consistent interpretation by the Romanian judicial bodies to Framework Decision 2008/675/JHA and the interpretation given to it by the decision of the CJEU in Case C-171/16 Trayan Beshkov.

Framework Decision 2008/675/JHA was not transposed into Romanian law, since, under Article 5 of that Framework Decision, such transposition should have taken place before 15 August 2010. Under these conditions, the Romanian court is required to comply with the principle of consistent interpretation from the date of expiry of the transposition period of the Framework Decision, 15 August

2010. (Ognyanov, C 554/14, EU: C: 2016: 835, paragraph 61, Adeneler and Others, C 212/04, EU: C: 2006: 443, paragraph 115, and paragraph 124)

As we have seen before, the judicial practice is unanimous in the application of the provisions of Law no. 302/2004 on the recognition of a conviction issued abroad to constitute a ground for detention of international repeat offence. In the same sense, the High Court of Cassation and Justice, most recently in the recitals of RIL decision no. 1/2018.

By the judgment in Ognyanov, C 554/14, the Court of Justice of the European Union held that European Union law must be interpreted as meaning that a national court is required to take account of all the rules of national law and interpret them to the fullest extent in accordance with the Framework Decision, in order to achieve the result sought by it, leaving it unnecessary if it is necessary, ex officio, to interpret the national court of last instance, since that interpretation is incompatible with European Union law.

According to that interpretation, the principle of consistent interpretation, taking account of the limitations imposed by the European court, requires the national court to interpret the rules of national law as far as possible in accordance with the Framework Decision in order to achieve the result sought by it, even the interpretation given by the national court of last instance is not applicable.

It is for the national court to interpret national law in order to achieve the objective set out in Article 3 of Framework Decision 2008/675/JHA - to ensure that, in criminal proceedings against a person, previous convictions against the same person for different acts committed in other Member States in respect of which information has been obtained on the basis of the applicable instruments available with regard to mutual legal assistance or exchanges of information extracted from criminal records shall be taken into account to the extent that previous convictions national are also taken into account and that such convictions are given equivalent effects to those given to previous convictions at national level, in accordance with national law.

It is, of course, questionable whether the principle of interpretation in this case can be mitigated by the application of a constant limitation in the practice of the CJEU - the establishment or aggravation, on the basis of a framework decision and independent of a law adopted for its implementation, the criminal liability of those who act in violation of its provisions, as well as a contra legem application of national law.

We consider that the provisions of the Framework Decision are not intended to establish or aggravate the criminal responsibility of a person who is the subject of the judicial proceedings, being within the scope of the procedural aspects of restraining the situation of aggravating international re-offending. The form of aggravation of criminal liability and its conditions are not regulated by the text of the Framework Decision, they are provided by the Romanian Criminal Code. The Framework Decision obliges the judicial body to interpret national law so that the effect of a conviction order handed down in another Member State of the European Union has a direct effect without a recognition procedure in order to

comply with the principle of mutual recognition of decisions in criminal matters, as it was stated at the Tampere European Council.

Consequently, in order to make a consistent interpretation of European Union law in the light of the outcome of the adoption of Framework Decision 2008/675/JHA and of the interpretation given in the judgment of the Court of Justice of the European Union in Case C-171/16 Trayan Beshkov, the Romanian judicial authorities must interpret national law in order to give direct effect to a conviction handed down in a Member State of the European Union in respect of which information has been obtained on the basis of the applicable instruments available with regard to mutual legal assistance, or to the exchanges of information extracted from the criminal records, without going through the main or incidental recognition procedure provided by the Law no. 302/2004.

3 Conclusion

The mere mention in the criminal record and attachment to the case file of the conviction order issued in another EU Member State should be sufficient to withhold the state of relapse if the conditions laid down in the Criminal Code are met without the procedure for the recognition of the judgment provided by Law no. 302/2004.

In order to make a consistent interpretation of European Union law, in the light of the outcome of the adoption of Framework Decision 2008/675/JHA and of the interpretation given by the judgment of the Court of Justice of the European Union in Case C-171/16 Trayan Beshkov, Romanian law should interpret national law and give direct effect to a conviction order pronounced in a Member State of the European Union in respect of which information has been obtained on the basis of the applicable instruments available with regard to mutual legal assistance or trade information extracted from the criminal records, without going through the main or incidental recognition procedure provided by Law no. 302/2004.

This interpretation of national law can be made without prejudice to the limitations on the principle of consistent interpretation, not being rules to establish or exacerbate criminal liability, the provisions of which are found in domestic law (the Criminal Code), and without being interpreted *contra legem* the domestic criminal law provisions, rather constituting an alternative procedure, much simplified, to the one stipulated by Law no. 302/2004.

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Application of the *ne bis in idem* principle in accordance with the latest case law of the Court of Justice of the European Union

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Executive summary

By extending the scope of the final judgment and the acts issued by the prosecutor, we appreciate that in a criminal trial that is started after a solution has already been ordered for the prosecutor's case closure, for the same deed as the same person, the case closure or termination of the criminal proceeding under Art. 16 par. 1 letter i of the Criminal Procedure Code. even if the two criminal trials were carried out on the territory of Romania, by the application of the Romanian criminal procedural law. This should be the effect of the constant jurisprudence of the CJEU, by interpreting Art. 54 CISA and Art. 50 of the Charter, giving an extended effect to the act issued by the prosecutor by which the criminal action is extinguished after conducting an effective investigation into the substance of the case.

Keywords: ne bis in idem, CJEU, art. 54 CISA, art. 50 of the Charter of Fundamental Rights of the European Union.

1 General considerations

The ne bis in idem principle is set forth in Article 6 of the Code of Criminal Procedure and provides that no person can be prosecuted or tried for committing an offense when that person has previously given a final criminal judgment on the same offense, and under another legal classification.

This principle is enshrined in Article 4 of Protocol 7 to the European Convention on Human Rights, art. 50 of the Charter of Fundamental Rights of the European Union and Art. 54 of the Convention implementing the Schengen Agreement.

In order for the incidence of the *ne bis in idem* principle to be invoked, several conditions must be met cumulatively:

– the existence of a final judgment on the substance of the criminal case;
– launching a new sanction procedure (bis);
– Identity in respect of the person prosecuted or sanctioned (*eadem personae*);
– the identity of the facts inferred from the judgment / prosecution (*idem factum*). [1] [2] [3]

The jurisprudence of the Court of Justice of the European Union has revealed a number of important and novel elements distinct from those in the Romanian doctrine and the ECtHR case-law regarding the application of the ne bis in idem principle, in particular as a result of the broad interpretation offered the notion of final judgment on the substance of the criminal case.

2 The ne bis in idem principle in the CJEU case law

In Gözütok and Brügge, Joined Cases C-187/01 and C-385/01, 11 February 2003, para. 29-31, the CJEU considered that the ne bis in idem principle, provided by art. 54 of the CISA, also applies to a procedure whereby the Public Ministry decides to stop the prosecution of an accused after he has fulfilled certain obligations and in particular has paid a certain amount of money. [4]

As regards the character of "final judgment", within the meaning of Art. 54 of the CISA, of the proceedings before the national judicial authorities, the Court proposes two criteria for identification:

– by means of that procedure, the public action must be discontinued by issuing the decision of the competent public authority in the administration of justice under the national legal order, and
– such a procedure to penalize the wrongful conduct complained of to the accused and its effects to be subordinated to the commitment of the accused to fulfill certain obligations imposed by the Public Ministry. [5]

If these two conditions are met, the person concerned has been "finally judged" and the sanction imposed by the proceedings for the closure of public action has been "enforced".

The Court has also ruled upon the criminal prosecution finalized by an act of extinction of criminal proceedings issued by the prosecutor, establishing that the non-intervention of a court in such a procedure, without a court judgment, is not such as to deny such an interpretation.

By judgment of Miraglia, Case C-469/03 of 10 March 2005, para. 30, the Court's case-law has evolved by stating that an act issued by a public prosecutor by which public action is discontinued, in the absence of any assessment on the merits, can not constitute a decision by which a person is "definitively judged" 54 of the CISA. This decision represents an important step in the nuance of the final

decision on the merits of an act issued by the representatives of the Public Ministry when the criminal proceedings are discontinued without the intervention of the court, establishing the need for the solution to be ordered by a broad appreciation of the merits of the case, not as a result of the intervention of a cause that prevents an effective procedure. This principle is often set out in the constant jurisprudence of the CJEU by the judgments: Van Straaten, Case C-150/05, Case C 398/12, Piotr Kossowski, Case C-486/14. [6].

By the judgment in Van Straaten, Case C-150/05, of 28 September 2006, para. 61, the Court extends the scope of the ne bis in idem principle to the judgment of acquittal to an insufficient amount of evidence for the examination of the merits of the case by continuing the case-law of the Miraglia judgment. The CJEU considered that Article 54 of the CISA does not refer to the content of the final judgment, and may also apply to an acquittal, which evoked the fund and was not applicable only to conviction decisions. The Court also found that if the criminal proceedings were allowed to be opened in another EU Member State for the same facts for which an acquittal decision was ruled in another state, the principles of legal certainty and legitimate expectations would be compromised. In fact, the person involved in court proceedings should be afraid of new criminal proceedings against her/him, although the same facts have been previously finally judged. [7]

In the case of Vladimir Turanský, C 491/07, of 22 December 2008, par. 34-45, the Court stated that the principle of ne bis in idem, enshrined in Article 54 of the CISA, is not applicable to a decision whereby, after examination of the substance of the case before it, an organ of a Contracting State orders the termination of criminal proceedings in a stage prior to the commencement of criminal proceedings against a person suspected of having committed a criminal offense if that decision of termination, under the national law of that State, does not definitively cease the criminal proceedings and does not constitute an impediment to a new criminal prosecution for the same acts in this state. In the case in question, it was a police decision, ordered before the criminal action was launched, which led to the prosecution being closed. Under the Slovak criminal procedural law, this decision to terminate criminal proceedings at a stage prior to the commencement of criminal proceedings against a particular person did not prevent a new prosecution for the same acts on the territory of the Slovak Republic. [8] [9]

By means of that judgment, the Court nuanced the concept of final judgment defining it as a decision by a competent judicial authority which constitutes an impediment to a new criminal prosecution for the same acts in that State.

Klaus Bourquain's judgment in Case C 297/07 of 11 December 2008 allowed the Court to rule on the final judgment of a decision where there is a possibility of reopening the proceedings in domestic law. In that judgment, paragraphs 33-52, the Court held that the principle of ne bis in idem enshrined in Article 54 of the CISA is applicable to criminal proceedings brought in a Contracting State for facts which have already been the subject of a final judgment against the defendant in a case in which the conviction was handed down in

absentia. The fact that the criminal proceedings of the issuing State permit the reopening of proceedings following a default judgment does not preclude the classification of such a judgment as final within the meaning of Art. 54 CISA. (paragraph 40) [10]

Case M, C 398/12, dated 5 June 2014, parag. 26-41, is an opportunity to continue the process of defining the notion of final judgment by reference to the possibility of reopening the judicial investigation as a result of the emergence of new evidence. [11]

The Court considers that Article 54 of the CISA must be interpreted as meaning that an order for extinguishing the criminal action which prevents a new prosecution in the Contracting State in which that order was given for the same acts against the person to whom the ordinance was given, in the case of new evidence against that person, it must be regarded as a final judgment within the meaning of that article which prevents a new prosecution against the same person for the same acts in another Contracting State. In this case, the ordinance was not an act issued by the prosecutor, being a judgment of the Mons Tribunal (Belgium), confirmed by the judgment of the Court of Appeal, Mons.

In that judgment, the Court noted that the possibility of reopening the judicial inquiry as a result of the emergence of new evidence can not render the definitive nature of the injunction order unsubstantiated. This option does not constitute, in the Court's opinion, a real extraordinary remedy, but rather the exceptional triggering and on the basis of different evidence of a separate procedure and not merely the continuation of the already closed procedure. The Court also attaches an essential role to the issuing State in analyzing the novelty of the elements relied on to justify a reopening and can not be a condition judged by the judicial authorities of the Member State in which a criminal proceeding is taking place after the extinguishing the criminal action for the same facts.

Continuing the jurisprudential evolution of the final judgment of some acts issued by the prosecutor, the Court develops its position in Piotr Kossowski, case C 486/14, dated 29 June 2016. Here, ruling on a decision of the Kołobrzeg District Prosecutor's Office the Court established that the principle of ne bis in idem set out in Article 54 of the CISA, read in the light of Article 50 of the Charter, must be interpreted as meaning that a decision of the prosecutor's office for the definitive closure of prosecution, subject to its reopening or annulment, without having been applied a punishment, can not be qualified as a final decision within the meaning of those articles if the statement of reasons for that decision shows that the criminal proceedings in question have been closed without a thorough criminal investigation being carried out, the absence of a hearing of the victim and of a possible witness indicating a lack of in-depth criminal procedure pursuit.[12]

This judgment gives the Court the opportunity to specify the conditions to be met by a decision of a representative of the Public Ministry to meet the merits of the final judgment, associating the condition of carrying out a thorough criminal prosecution, by continuing and extending the interpretative criteria set out in Miraglia, Case C- 469/03 of 10 March 2005. In the same vein, the settled

case-law emphasizes the fact that the decision has to examine the merits of the case, whether it be a conviction or acquittal, as it was in the cases of Van Straaten and Turanský.

3 Conclusion

As regards the final decision of judgments given by the judicial authorities of the Member States, the Court of Justice of the European Union has identified criteria that can be used in criminal proceedings in Romania to benefit from the protection of the *ne bis in idem* principle, by interpreting art. 54 CISA and Art. 50 of the Charter of Fundamental Rights of the European Union:

- the judgments and court orders of the prosecutor are included in this concept, even if they were adopted without the involvement or control of the court;
- the decision (judgment or ordinance) to be considered final and binding within the meaning of the national law of the issuing State;
- the decision to have examined the merits of the case, even if it is a conviction or acquittal;
- the decision of the prosecutor to close the criminal action (the solution ordered by ordinance or indictment) must be taken as a result of the conduct of the in-depth criminal prosecution;
- the existence of extraordinary ways of attack does not affect the final character of the decisions issued;
- the possibility of reopening the procedure for the appearance of new evidence or as a result of a shortage of judgment does not affect the final character of the judgment.

In the application of the *ne bis in idem* principle, as a result of the interpretation given by the CJEU, if a person is prosecuted or tried in Romania for a deed which has been finally judged on the territory of a Schengen Member State (including acts issued by the prosecutor) the court must order the case to be closed and the court must order the closure of criminal proceedings for the incidence of the case of preventing the commencement of the motion and of the criminal action provided by art. 16 par. 1 letter i of the Criminal Procedure Code – double jeopardy (*res judicata*).

Article 50 of the Charter of Fundamental Rights of the European Union guarantees the protection of *ne bis in idem* in all Member States of the European Union. In view of the application of this Article as a result of the interpretation given by the rulings given by the CJEU, in particular in the light of recent jurisprudence, I consider that it is possible to extend the scope of the case to preventing the commencement of the motion and the prosecution provided for by art. 16 par. 1 letter i of the Criminal Procedure Code - double jeopardy (*res judicata*).

By extending the scope of the final judgment and the acts issued by the prosecutor, we appreciate that in a criminal trial that is started after a solution has already been ordered for the prosecutor's case closure, for the same deed and the

same person, the closure or termination of the criminal proceeding should be ordered, under Art. 16 par. 1 lit. i, even if the two criminal trials were carried out on the territory of Romania, by the application of the Romanian criminal procedural law. This should be the effect of the constant jurisprudence of the CJEU, by interpreting Art. 54 CISA and Art. 50 of the Charter, giving an extended effect to the act issued by the prosecutor by which the criminal action is extinguished after conducting an effective investigation into the substance of the case.

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Remarks regarding the active subject in child pornography offense

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Executive summary

This article aims to bring into question relevant aspects of the active subject of child pornography in terms of the way it is commonly encountered in practice. The article presents a number of arguments for inclusion in the sphere of active subjects of child pornography and juvenile offenders who are criminally responsible.

Keywords: child pornography, active subject.

The regulation of the offense of child pornography provided by art. 374 C.c. unifies the rules of the previous criminal law which were contained in three distinct laws, Law no. 161/2003 regarding certain measures for ensuring transparency in the exercise of public dignities, public functions and business environment, prevention and sanctioning of corruption, Law no. 196/2003 on the prevention and combating of pornography, Law no. 678/2001 on preventing and combating human trafficking. It also aimed at harmonizing national legislation with that of the European Union by transposing Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse, sexual exploitation of children and child pornography and replacing Council Framework Decision 2004/68/JHA. [1]

With the exception of the aggravated form presented in article 374 par. 3^1 C.c., the active subject of the offense is not qualified.

In practice, certain assumptions may be encountered which may raise questions about the living conditions of the active subject of child pornography. There is no doubt about the quality of the active subject of the offense in the case of a adult or minor person who is criminally liable and produces a pornographic material with another minor. Instead, the following question arises: The action of

a minor person who is the subject of the pornographic material produced, who satisfies the conditions of criminal responsibility and acts with unintentional consent, to be immortalized in pornographic situations, thus participating in the production of material of a character pornographic, will you be criminally liable? If the answer is positive, then in what capacity will it respond as an accomplice or co-author of the offense?

In practice, there are cases where the minor who is the subject of the pornographic material has produced the material of a pornographic nature himself, which he possibly transfers also through a computer system to other people. For example, a 15-year-old minor girl photographs herself in pornographic situations and then sends the images via the phone/computer to her boyfriend. This person, in turn, owns pornographic material and even distributes it to others.

If, in the case of the producer and third parties aware of the age of the minor, there is no discussion that the offense of child pornography is being held, the question arises whether the minor, subject to the protection of the law, is the author of the offense of child pornography by producing the pornographic material.

In order to clarify this issue, we consider it is important to determine what the legal object of this crime is. An indication of the will of the legislator is also the way of disposing of this crime in Chapter I of Title VII - Offenses against public order and tranquillity.

It is unanimously accepted that the main legal object of this crime is the social relations whose good conduct is conditioned by the defense of public morality and, in the alternative, the defense of the right to image and the dignity of the minor. [2] [1]

The passive subject of the offense is the state, as a guarantor of public morality. A part of the criminal doctrine considers that subsequently, the secondary passive subject of the offense is the minor who appears in the pornographic material.

In the memorandum of the EGO 18/2006 it is stated that the amendment of Article 374 of the Criminal Code is made precisely following the initiation of the infringement procedure against Romania for delays in transposing the Directive no. 2011/93/EU. [3]

Romania did not choose to benefit from the option provided by art. 8 par. 3 of the Directive no. 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse, sexual exploitation of children and child pornography and replacing Council Framework Decision 2004/68/JHA. [4]

Article 8 par. 3 of the Directive no. 2011/93 / EU provides that Member States are to decide whether the provisions of Article 5 par. (2) and par. (6) apply to the production, purchase or possession of material displaying children who have reached the age of sexual consent, providing that those materials are produced and held with the consent of those children and only for the private use of the persons involved, to the extent that the actions did not involve any form of abuse.

Article 5 referred to concerns precisely offenses related to child pornography.

The European Commission's report COM (2016) 871 of 16.12.2016 assessing the extent to which Member States have taken the necessary measures to comply with Directive 2011/93/ EU of 13 December 2011 on combating child sexual abuse, sexual exploitation of children and child pornography, specifies that Romania did not understand to apply Article 8 par. 3 of the Directive. This article would have allowed our country to opt for non-criminalization of the child pornography when pornographic materials were produced with the consent of the minor, without any form of abuse. Understanding not to opt for non-criminalization of this kind of deed, as our country has done for sex offenses (regarding sexual life), the legislator has understood to criminalize child pornography also when there is a valid consent from the minor presented in pornographic materials. [5]This option is an indicator of the Romanian legislator's view on the importance of defending public morality, even going over the juvenile's will. Also, Article 5 par. 7 provides for the possibility for Member States not to opt for criminalization of child pornography in which the pornographic material presents a adult person who appears to be a child. As stated by the European Commission, through the Report on the implementation of the Directive, by GEO 18/2016, Romania also agreed to incriminate this form of crime by amending paragraph 4 of Article 374 of the Criminal Code in which the definition of pornographic material is presented as follows: "child pornography means any material that presents a juvenile, or a adult person as a juvenile, displaying a sexually explicit behavior or that, even if not presenting a real person, simulates a juvenile with such behavior in a credible manner."

By Article 5 Article 8 of the Directive it is offered to the Member States the possibility not to criminalize the act of producing a pornographic material by the person who made it, when it contains realistic (not real) images of a child involved in sexually explicit behavior or realistic images of the sexual organs of a child, mainly for sexual purposes, if the pornographic material is owned by the producer for his private use.

As can be seen from the European Commission's report COM (2016) 871 of 16.12.2016, assessing the extent to which Member States have taken the necessary measures to comply with Directive No. 2011/93/EU, Romania did not opt for non-criminalization of this form, being thus incriminated, according to the modifications brought to art. 374 C.c. through GEO 18/2016, including pornographic material consisting of animations featuring imaginary characters, depicting juveniles with explicit sexual behavior.

By this legislative option, adopted precisely to transpose Directive no. 2011/93/EU, it has been included in the child pornography notion any material that presents a adult person as a juvenile, having sexually explicit behavior or who, while not presenting a real person, credibly simulates a juvenile having a such behavior.

Due to the legislative evolution determined by the amendments introduced by the EGO 18/2016, the offense of child pornography moves further away from

the sphere of social relations regarding the protection of the minor as an identifiable/identified person, including the right to image and dignity of the juvenile, rather into the sphere of relations regarding public morals.

It is obvious that in these new assumptions introduced as a result of the amendment of the criminal law, that when a adult is represented as a juvenile or a person who is not real, the rule of criminality, as amended by OUG 18/2016, can not protect the rights to the image and the dignity of the minor, being the fact that the instances present an adult person or an imaginary character.

We believe that the offense of child pornography was properly set forth in Chapter I of Title VII - Offenses against public order and peace. Unlike offenses against the person, the existence of child pornography does not depend on the identification of the minor or juveniles that are the subject of pornographic material.

In some cases (when we talk about adults who simulate being minors or graphic representations of imaginary characters) this is not possible anyway. However, there are cases where, even though pornographic materials represent juveniles involved in explicit sexual actions, the identification of juveniles can not be done in fact. For example, in the case of committing the offense of purchasing pornographic material with juveniles on the internet, where the origin of the material could not be established, and the producers could not be reached or the juveniles could not be identified, this situation that does not affect the existence of the offense.

Contrary to the category of crimes against the person, the legal framing of the detention of several films, regarding different persons/the distribution of these films, constitutes a single offense provided by art. 374 par. 1 and 2 C.c., in the simple or continuous form and not in multiple offences form, the number of minors not being taken into consideration in this case. [6]

As the judicial practice has consistently held on the delimitation of unity or plurality of offenses, the number of films (pornographic material) and the number of persons present in them is not relevant, only the uniqueness of the criminal resolution being important to distinguish between the legal unit of the continued offense and multiple offences. (ICCJ Criminal Decision No 1732/2014)

Regarding all these aspects, we appreciate that a juvenile who produces a pornographic material with himself/herself commits an offense of child pornography if the elements are met so that he/she is criminally accountable.

We consider that the protected minor can not validly have these social values in order to be in the presence of a justifiable cause and the law does not provide for any cause of non-punishment of minors subject to such material.

There is no text of the law that allows in practice to leave this type of actions without any criminal penalties.

In the same vein, we believe that the juvenile is also criminally responsible for knowing that she/he is being filmed of photographed while having explicit sexual behavior or participating voluntarily and knowingly in the production of pornographic material. In this case, she/he will be an accomplice to the child

pornography offence because she/he helps the offender in committing child pornography.

A contrary solution would be to create a situation of unjustified discrimination between a juvenile who produces a pornographic material with another juvenile or otherwise helps to produce such material and is criminally responsible and the situation of the juvenile who produces/accepts the production of pornographic material regarding the images of her/his own body and that would not be criminally responsible.

All these elements, the protected social value, the recent transposition of Directive no. 2011/93/EU – whereby the offense is criminalized even if the minor's consent for the production of pornographic material is obtained, or even if no real persons are presented, the delineation of the crime offense by the offense without the relevance of the number of juveniles presented, the placement of this offense in Chapter I of Title VII – Offenses against public order and peace are arguments for including in the sphere of active subjects of child pornography the juvenile offenders who are participants to the crime and who are criminally liable, not regarding social values which they can dispose of.

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Obtaining Traffic and Localization Data Processed by Public Communication Providers of Communications or by Providers of Electronic Services for the Public

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Abstract

This paper aims to present an analysis in the field of obtaining traffic and location data processed by the providers of public communications networks or by the providers of publicly available electronic communications services, according to the Romanian criminal law.

In today's society, almost every person has access to electronic communication and information systems, and those who commit criminal offenses can be traced by the criminal investigation authorities using this special method of research, the data thus obtained being extremely important in preventing, investigating, discovering and prosecuting offenses.

Keywords: traffic data, location data, communications, public networks, research.

1 Legal Framework

The procedure for obtaining traffic and location data processed by the providers of public electronic communications networks or by the providers of publicly available electronic communications services is presented in art. 152 of the Code of Criminal Procedure in conjunction with Art. 138 of C. Proc. Pen. and completes with the provisions of Law no. 506/2004 on the processing of personal data and the protection of privacy of the electronic communications sector [1], modified by Law no. 235/2015 [2].

The Romanian legislator transposed into national law the European directives, Directive 2002/58/EC on the processing of personal data and the protection of privacy in the public communications sector and Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 [3], Laws no. 298/2008 [4] and no. 82/2012 [5]. One year after the adoption of the first and two years after the adoption of the second Law, they were declared unconstitutional by the Constitutional Court of Romania (CCR), the elements of unconstitutionality referring to the access and use of retained and stored data, that these laws "do not provide the guarantees necessary for the protection of the right to privacy, family and private life, the secrecy of correspondence and the freedom of expression of persons whose stored data are accessed" [6], rights guaranteed by art. 7 and art. 8 of the Charter of Fundamental Rights of the European Union.

The CCR has stated that the interference in fundamental rights is "large-scale" and should be considered as "particularly serious" given the continuing nature of data retention. Regarding data retention and storage, the CCR considers that "neither the Constitution nor the case-law of the Court of Justice prohibits preventive storage without a specific occasion of traffic and location data, provided access and use of data, accompanied by guarantees and respect the principle of proportionality" [6].

At present, according to Law no. 506/2004, the retention and storage of data is the responsibility of the providers of public electronic communications networks and services.

Directive 2006/24/EC was annulled by the judgment of the Court of Justice of the European Union on 8 April 2014 in Joined Cases C-293/12 and C-594/12 Digital Rights Ireland Ltd, which noted that "the interference in fundamental rights concerning intimate, family and private life, the secrecy of correspondence and freedom of expression is of great magnitude and must be regarded as particularly grave, and the fact that data retention and its subsequent use are made without the registered subscriber or user is likely to imply in the conscience of the data subjects the feeling that their private life is subject to constant supervision" [7].

In addition to the above, Regulation (EU) 679/2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC is relevant.

The provisions of Regulation 679/2016 will not apply to processing performed for the purposes of the criminal prosecution, investigation and prosecution of the offender or the execution of the criminal sanction. In their case, the provisions of a national regulation on the applicability of Directive (EU) 2016/680, which lays down, rules on the protection of individuals with regard to the processing of personal data by competent authorities for the purpose of preventing, detecting, investigating or the prosecution of criminal offenses or the execution of sentences, including protection against threats to public security and prevention.

Directive 680 provides a homogeneous and high level of protection of the personal data of individuals and facilitates the exchange of personal data between

the competent authorities of the Member States and is essential to ensure the effectiveness of judicial cooperation in criminal matters and the cooperation of bodies court. To that end, the level of protection of the rights and freedoms of individuals with regard to the processing of personal data by competent authorities for the purpose of the prevention, detection, investigation or prosecution of criminal offenses or the execution of sentences, including protection against threats, public security and prevention, should be equivalent in all Member States. The effective protection of personal data throughout the Union requires not only the strengthening of the data subjects' rights and the obligations of those who process personal data, but also equivalent competences to monitor and ensure compliance with the rules on the protection of personal data in the Member States Member States [8].

Romania has two years to transpose the provisions of Directive (EU) 2016/680 into national law, with Regulation 679 to enter into force in domestic law on 25.05.2018.

2 The Definitions

Obtaining traffic and location data processed by providers of public electronic communications networks or providers of publicly available electronic communications services is a method of special surveillance and is procedurally a probative process within the meaning of Art. 97 paragraph (3) C. Proc. Pen.

Art. 152 C. Proc. Pen. can only be applied in relation to Law no. 506/2004, as some terms are defined in this law or in other special laws.

The object of special investigative measures is to obtain by the criminal prosecution bodies the traffic and location data processed by the providers of public electronic communications networks or the providers of publicly available electronic communications services.

In art. 4 (1) of O.U.G. no. 111/2011 we find transposed the terminology used in the Directive 2006/24/EC regarding the providers of public electronic communications networks and the providers of electronic communications services for the public, from which we can say that art. 152 of C. Proc. Pen. sets obligations only for Internet services providers (ISP) or for telecommunications (Orange, Vodafone, Telecom etc.), which means that there are not included those entities that provide the content of the transmitted information (legal entities providing e-mail services, hosting social media platforms such as Facebook, Twitter, offers WhatsApp or Messenger messaging services and simple calls) and can not be imposed the obligation to data retention [9].

Traffic data is any processed data for the purpose of transmitting a communication over an electronic communications network or for the purpose of invoicing the value of the transaction. It follows from the definition that the computer data are processed for the purpose of transmitting a communication, and not the actual content of that communication [10]. By computer data reference it means the telephone number from which the call is made, the phone number dialed, the date and the beginning and end time of the communication, the name

and address of the telephone or internet service user, the IP address, IMSI (International Mobile Subscriber Identity), IMEI (International Mobile Equipment Identity), MAC address (physical address of the network card).

By **equipment identification data**, as defined in the art. 2 par. (1) lit. b^1) of Law no. 506/2004 strictly understand the *technical data of the providers of publicly available communications services and of the provider of public electronic communications networks that allow the identification of the location of their communication equipment processed for the purpose of transmitting a communication through an electronic communications network or for the purpose of invoicing the value of this transaction*. With regard to traffic data, they do not fall within the scope of Art. 152 recurring in other probative proceedings. Art. 152 C. Proc. Pen. does not refer to these data, being found in law no. 506/2004.

Location data is defined as any *data processed in an electronic communications network or by an electronic communications service* that indicates the latitude, longitude and altitude of the terminal equipment of the user of an electronic communications service to the public. Terminal equipment means any computer system used to communicate through certain network cells corresponding to a communications relay (mobile phone, tablet, laptop, smartwatch, etc.).

The user is defined by art. 2 par. (1) lit. a. of Law no. 506/2004, *as any natural person who benefits from an electronic communications service for the public, without necessarily having the quality of subscriber to this service*. The user definition helps us delineate the right user to the person who actually accesses the service, with or without the right, because data retention may concern the activity of another person [10].

3 Competence

The competence to dispose of this special measure belongs to the prosecutor with the prior authorization of the judge of rights and freedoms, although it is not specified in the article which would be the competent court to judge the request for the issuance of the supervision mandate, the judge of competent rights and liberties being the one from the court having jurisdiction to hear the merits of the case or the appropriate court in its grade, in whose district are the headquarters of the prosecutor's office of which the prosecutor who submitted the application is located.

The judge of rights and freedoms decides within 48 hours on the prosecutor's request, solving the case through a reasoned statement that is not subject to any appeal. The analysis of the request is made in the council chamber, without the condition of participation of the prosecutor, subject to the conditions of confidentiality.

In the content of the application we have to find the concrete, individualized data, which is to be transmitted by the service providers and the time limits related to the date of their generation.

In the art. 152 alin. (1) C. Proc. Pen. the limitation of competence is limited to the criminal investigation bodies in obtaining the traffic and localization data, without mentioning the ones regarding the identification of the equipment, which are found in the art. 12 paragraph (1) of Law no. 506/2004 with the possibility to be requested by the court.

Providers of public electronic communications networks and providers of publicly available electronic communications services who cooperate with the criminal investigating authorities have the obligation to keep the secret of the performed operation and immediately to make available to the judicial authorities the requested data but not later than 48 for hours.

4 Terms

In order to obtain the judge's authorization of rights and freedoms, the conditions in art. 152 C. Proc. Pen. are:

a) **There should be a reasonable suspicion regarding the commission of an offense** mentioned in art. 139 par. (2) [an offense against national security provided by the Penal Code or special laws, in the case of drug trafficking offenses, illegal operations with precursors or other products susceptible to psychoactive effects, offenses concerning non-compliance with the regime weapons, ammunition, nuclear materials and explosives, trafficking and exploitation of vulnerable persons, acts of terrorism, money laundering, counterfeiting of coins, stamps or other values, forgery of electronic payment instruments, in the case of offenses are committed through computer systems or electronic means of communication, patrimony, blackmail, rape, unlawful deprivation of liberty, tax evasion in the case of corruption offenses and crimes assimilated to corruption offenses, crimes against the financial interests of European Union *or in the case of others offenses for which the law provides for imprisonment of 5 years or more*] or an offense of unfair competition, escape, forgery in documents, offense of non-compliance with the provisions on the introduction of waste and residues in the country, an offense concerning the organization and the exploitation of gambling or of a crime related to the legal regime of drug precursors, and offenses relating to operations with products susceptible to psychoactive effects similar to those caused by narcotic or psychotropic substances and products.

We note that obtaining traffic and location data can only be made after the start of the "in rem" criminal prosecution. To be able to be applied to the offenses under art. 139 paragraph (2) C. Proc. Pen. the condition of the sentence provided by the law must be 5 years or more, and for the offenses under art. 152 alin. (1) C. Proc. Pen. this requirement does not apply, since the interference with the right to private life may be justified given the generic danger of the offenses.

b) ***There are reasonable grounds for believing that the data requested is evidence.***

It will be analyzed by the judge of rights and freedoms if the data resulting from the authorization of this measure can lead to establishing factual elements that will serve to solve the case fairly.

c) ***Samples could not otherwise be obtained or obtaining them would entail particular difficulties that would prejudice the investigation or there is a danger to the safety of persons or valuable goods.***

The condition of *necessity* and *subsidiarity* of the use of this special method is required, in relation to other evidential procedures that could lead to the obtaining of evidence, emphasizing the exceptional nature of the interference with the right to private life.

d) ***The measure should be proportional*** *to the restriction of fundamental rights and freedoms, taking into account the particularities of the case, the importance of the information or evidence to be obtained or the seriousness of the offense.*

The principle of proportionality of the measure of obtaining traffic and localization data with the restriction of the right to private life is regulated in relation to the result obtained by the disposal of the measure, the legislator providing guarantees that will provide effective protection against the abuses that may come from the state authorities.

5 Conclusions

Obtaining traffic and location data processed by providers of public communications networks or by providers of publicly available electronic communications services is a special method of research, a probative process by which judicial bodies can gain ownership of traffic data, location data and equipment identification data.

Concerning particularly serious issues such as organized crime and terrorism, this method is both a necessary and effective investigative tool for law enforcement purposes, and it is important to ensure that retained data is made available to the authorities, subject to compliance provided in art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In conclusion, I believe that national legislation should provide for as clear and precise rules as to the content and the application of such a measure, while imposing a minimum of requirements which, in order to prevent possible abuses, guarantees to persons whose data has been retained.

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Use of Undercover Investigators or Investigators With a Real Identity and Collaborators

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Abstract

In this article, the author analyzed some important aspects and regulations brought by the new Criminal Procedure Code related to the use of undercover or real identity investigators and collaborators. Since one of the most important aspects of this subject is the motivation behind the desire of a person who aspires to collaborate with other law enforcement persons in order to collect the necessary evidence for the case, the nature of the undercover investigators, their past and how they are recruited are some of the aspects that will always be taken into account.

Also, there are mentioned the conditions that a person must cumulatively meet in order to become an undercover investigator, as well as the procedure that is followed for disposing the measure.

The conclusion was that no abuse is wanted in order to use this measure, this being necessary only in cases where evidence cannot be obtained in any other way, and while the principle of proportionality is respected, there is no reason to think about an excessive or abusive use of it.

Keywords: undercover investigator, investigator, criminal prosecution, criminal trial.

1 Regulation

The use of undercover investigators is regulated in Article 148 of the new Criminal Procedure Code, an article identifying the special procedures and cases that require the use of such persons, the persons who order the measure, its duration or other exceptional situations.

The diversification of the procedures used for committing or preparing offenses, and the fact that they have become more difficult to discover, represented the main reason why the introduction of the "covered investigator"

institution was under discussion. This was introduced in Article 21, Law no. 143/2000 on Trafficking and Drug Use Control. According to Article 1 (k) of the Law no. 143/2000, the investigator is defined as the special police officer designated to carry out with the authorization of the prosecutor investigations aimed to collect data about the existence of the offense and identifying the perpetrators, under another identity than the real one attributed for a specified period[1].

2 Conditions

Analyzing the definitions above, we can outline the conditions that a person has to cumulatively meet in order to be an undercover investigator:

A first condition is related to the quality of the person, more precisely, it has to be the policeman. This is of a major importance since according to the legal text the prosecutor may authorize the conduct of investigations under a different identity than the real one, using only designated police officers. One conclusion that can be drawn is that an undercover investigator will be an absolute mandatory member of the Romanian Police, being also a beneficiary of special training, with the help of which the police agents and officers can form, developing the skills necessary for the infiltration in a criminal organization.

The special designation for performing such activities complements the list of terms that we have spoken about. Thus, the specialized structure's police worker must be specifically designated for that mission, gathering evidence, or perform other activities to solve the case. At the same time, the capacity of the police officer needs to be appointed, his negotiating skills and teamwork will be discussed, while at the same time his professional training is being analyzed. Once the undercover investigators have been appointed for a given cause, they will be trained, while the technical means and equipment that are to be used need to be established and well chosen.

What characterizes the activity of the undercover investigator is the fact that he acts under a different identity than the actual one, so his designation is mandatory [1].

As an exception to the rule that undercover investigators are part of the Romanian Police, they can also be recruited from other institutions such as the Romanian Intelligence Service[2], the Foreign Intelligence Service[3], the Ministry

[1] They also receive a second definition under Article 148 (4) the new Criminal Procedure Code, according to which undercover investigators are operative law enforcement officers.

[2] According to art. 1 of the Law no. 14 of 24 February 1992 on the organization and functioning of the Romanian Intelligence Service, published in M. Of. no. 33 of March 3, 1992: "The Romanian Intelligence Service is the state body specialized in the field of information regarding the national security of Romania, a component part of the national defense system, its activity being organized and coordinated by the Supreme Council of Defense of the country."

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of Internal Affairs through the Directorate for Intelligence and Internal Protection, The General Anticorruption Directorate and the General Directorate for Combating Organized Crime[4], the Ministry of National Defense through the General Department of Defense Information[5], the Protection and Guard Service[6].

A third condition detached from the Article 1 (k) of Law no. 143/2000 relates to the compulsory authorization of these undercover investigators. As a rule, this authorization is given by the prosecutor dealing with the case, with a few exceptions to situations where the undercover investigator needs to access a computer system or copy the data discovered in a computer after the access. In these situations, in addition to the authorization given by the prosecutor, an authorization by a judge dealing with human rights and freedom is required for both the investigator and the required measure [2]. For each authorization, the prosecutor issues an ordinance and, as a result of the data and information gathered, the undercover investigator draws up a report, thus providing the prosecutor with evidence for criminal prosecution.

3 Private Life and Other Human Rights

Given the work nature of these police workers, the extent to which they affect the privacy and other human rights is questioned. As an opinion on this matter, we mention that a measure of this kind will always be taken only after the detailed analysis of the investigated deed and there needs to be established that there is no major disproportion between it and the measure that is about to be taken. Article 11 of the new Code of Criminal Procedure refers to these aspects regarding one's privacy, stating that "Restricting the fulfilling of these rights is only admissible under the law and if it is necessary in a democratic society" (al. 2, sentence 2, article 11 of the new Code of Criminal Procedure). Violation of such a principle of criminal procedural law can bring serious problems to the credibility of the law in a state, so that a perfect match between this complex activity by which the perpetrators are held accountable and the respect for their rights is of a major importance.

Foreign Intelligence Service is the state body specialized in foreign information on national security and the defense of Romania and its interests."

[4] According to art. 3 (b) (2) and (16) and Article 10 (3) of GEO no. 30 of 25 April 2007 on the organization and functioning of the Ministry of Interior and Administrative Reform, republished in M. Of. 309 of 9 May 2007.

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[6] According to art. 1 of Law no. 191 of 19 October 1998 published in M. Of. no. 402 of October 22, 1998: "The Protection and Guard Service is a state body with responsibilities in the field of national security, specialized in ensuring the protection of Romanian dignitaries, foreign dignitaries during their visits in Romania, their families, within the legal competencies, as well as to ensure the guarding of the working places and their residences, according to the decision of the Supreme Council of Defense of the Country."

4 Deciding Upon the Measure and Its Duration

The mere presence of robust indications about committing or preparing to commit a crime is a substantial reason for authorizing an undercover investigator, and there is no need for evidence to do so. The notion of "solid evidence" is not defined by the special law, so that these may be represented by any existing data from which the reasonable assumption that the commission of such an offense has been committed or is being prepared [1].

Therefore, if the measure is tactical and meets the requirements of the law, the prosecutor may order, as mentioned above, by ordinance, the authorization of undercover investigators or collaborators for a maximum of 60 days. By the period for which the measure was authorized, we mean the time span determined in absolute terms for which it was authorized, indicating the date and time from which it begins and expires [3].

However, the duration of the measure may be extended for duly justified reasons, as presented in Article 148 (9) of the new Criminal Procedure Code, if the conditions in paragraph (1) are fulfilled, each extension not exceeding 60 days. The total duration of the measure, in the same case and regarding the same person, may not exceed one year, except for offenses against life, national security, drug trafficking offenses, non-compliance with arms, ammunition, nuclear material and explosives, and the exploitation of vulnerable persons, acts of terrorism or assimilated to them, the financing of terrorism, money laundering, and crimes against the financial interests of the European Union[7]. On this last aspect, I consider that the decision of the legislature not to specify a certain period of enforcement for the offenses covered by the above exception leaves room for abuses and, possibly, violation of the rights mentioned in this paper. However, by analyzing the Article 144 (3) in the new Criminal Procedure Code, the duration of the technical surveillance measures regarding the same person and the same act may not exceed 6 months in the same case, except for the video surveillance, audio, or photography in private spaces, which may not exceed 120 days[8].

Thus, these operations can be spread over different timeframes and can be categorized as follows: short-term undercover operations, medium-term undercover operations, undercover operations and deep undercover operations [3].

Short-term undercover operations are the category in which surveillance measures can be taken by an officer in the judicial police without being given a new identity or other protection, as they often do not even have direct contact with potential perpetrators.

Underlying undercover operations imply the existence of a new identity for the involved investigator, but no other changes of a different nature (for example, physical appearance changes) are required, and the interactions with the supervised persons will rarely take place.

[7] According to art. 148, par. 9 of the New Criminal Procedure Code.
[8] According to art. 144 par. (3) of the New Criminal Procedure Code.

With regard to long-term operations, they require much greater involvement from the investigator by his infiltration into the suspect group. In addition to changing identity, there will also be other changes that need to be made, such as changes in terms of physical appearance, behavioral habits, they will eventually change the circle of acquaintances, or will stop communicating with their closest friends. Given that the operation will take place over a period of at least 6 months, it is important for the investigator to have a meticulous training so that he can maintain some sort of independence from the group in which he has infiltrated, in order to arouse no suspicion of their real identity, his meetings with the group achieving their goal of gathering information.

In addition to all the above, an investigator or collaborator taking part in a deep undercover operation will infiltrate even deeper into that organization, even reaching the position of working in a commercial company or a particular[9] organization owned by alleged perpetrators, thus automatically linking directly with other persons close to the organized criminal group.

5 Limits to Undercover Investigators or Investigators With a Real Identity

In relation to the activities that investigators or collaborators have to undertake, there are certain well-defined tasks so that they cannot be overcome. An example of this can be found in Article 148 (7) the new Code of Criminal Procedure [3], which means a legal way whereby such an investigator can be provided with different documents supporting his newly acquired identity, documents to be mentioned in the ordinance issued by the prosecutor. Conversely, this could be an offense for all people involved.

Referring to the nature of the activities the prosecutor will authorize in his Ordinance, the use of evidentiary procedures, especially technical surveillance measures, cannot be included[10]. Firstly, it will be necessary for the judge dealing with human rights and freedom to issue a technical supervision warrant, and the only methods of surveillance that can be used by investigators or collaborators can be found in Article 138 (1) lit. c) as video or audio surveillance.

As Article 150 (1) of the new Code of Criminal Procedure describes, committing an act similar to the one investigated, while it is a corruption offense, transactions, operations or any arrangement relating to a good or a person suspected to be missing, victim of trafficking or kidnapping, drug operations and the provision of a service[11] may be ordered by the prosecutor who supervises or conducts the prosecution for a maximum period of 60 days.

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[9] Mihai Suian, *Unele aspecte privind folosirea investigatorilor sub acoperire și a colaboratorilor*, p. 17.

[10] Mihai Suian, *Unele aspecte privind folosirea investigatorilor sub acoperire și a colaboratorilor*, p. 14.

[11] According to art. 138, par. (11) the new Criminal Procedure Code.

Therefore, with the simple authorization of the competent person, the investigator may legally participate in the activities described above, the only purpose being to obtain the means of evidence that are needed for the case.

As we have already mentioned in the paper, in exceptional circumstances and if the conditions of Article 148 (1) of the New Criminal Procedure Code are met and the use of the undercover investigator is not enough in order to obtain the data or the information that are needed, Article 148 (10) of the new Criminal Procedure Code has the solution, meaning that a prosecutor supervising or conducting a criminal investigation may authorize the use of a collaborator who may be assigned a different identity than the real one[12].

The regulation of collaborators' work coincides with that of undercover investigators, but the reasons why they decide to risk their lives are totally different from those of police workers or other compatible structures. From money rewards to the fear of punishment, or simply the desire to help the authorities (here we can talk especially about denunciators), these collaborators have a wide range of reasons. In addition, the advantage of using them is that most of them come from criminal environments, where they may already be known, appreciated, and much more credible than a new person entering such an organization. Always use criminal and possibly notorious abilities, and under the strict coordination of the law enforcement agencies they will gather the necessary information.

6 Collaborators

Collaborators are usually criminals who have been identified by criminal investigation agencies and are determined to provide support through different methods [3]. While such persons are still in detention, the criminal investigation agencies test them in order to check the possibility for them to become collaborators, while searching the relations that criminals in this position have with different criminal organizations.

The most common is the case of the collaborating drug user; the most appropriate is the situation in which they are arrested because they are found with small amounts of drugs, and in exchange for reduction or even non-punishment, they agree to participate in various activities previously authorized to gather evidence in other cases. The motivation for cooperation will fall into one or more categories, including money, civic duty, fear, revenge, ego, or special consideration during its incarceration [4]. Most of the time, a collaborator will prove that he or she has more than one of the reasons mentioned above, or that the reason will change over the course of the collaboration. A successful investigator will always be mindful of these changes, while developing a

[12] According to art. 148 par. (10) of the new Criminal Procedure Code, "In exceptional circumstances, if the conditions set out in paragraph (1), and the use of the undercover investigator is not sufficient to obtain the data or information or is not possible, the prosecutor supervising or conducting the criminal investigation may authorize the use of a collaborator to whom a different identity may be attributed".

relationship with him. It is absolutely essential that its motivation is known to ensure that its activities are well monitored and that it is controlled in the most optimal way possible. The motivation resulting from money earnings is probably the easiest to understand. This activity can be a source of income for a person who more than likely, has never had a job or other earned income.

7 Conclusions

Last but not least, we can say that it is not encouraged in any way, nor is it desirable to use this method of investigation in absolutely any situation, but only in the cases where the necessary evidence or the location of the perpetrators cannot be obtained otherwise. The regulation of this institution is in constant change and refinement so that it cannot at any time be a violation of human rights. An undercover investigator will never be able to instigate criminal offenses in order to subsequently use the evidence obtained in this way for the purpose of criminal prosecution, its role being to identify, observe the ways in which that the group realizes the facts and the gathering of the evidence through the means available to them (Pătrașcu against Romania, an ECHR decision that creates justifiability towards the limits under which undercover investigators can act). Moreover, by striking a balance between the act and the right way to investigate, I believe that the use of such persons cannot harm human rights, while the principle of proportionality is strictly observed, and also being able to maintain a balance between the interests of justice and the rights and fundamental freedoms of the citizen.

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ROMANIAN CIVIL LAW

The Social Dimension of Insolvency Versus Its Economic Dimension

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Abstract

Law is a dynamic social phenomenon reconfigured and redimensioned by the continuous and complex changes in the society, and the multidisciplinarity and especially the interdisciplinarity of the scientific research provides the dynamics of the norms of law outlined in the light of an integrative knowledge and analysis so necessary in the post-modern age.

Consequently, law cannot escape interferences, imposing a multitude of perspectives, such as the philosophic perspective as an answer to the need of deepening and knowing the human condition, the sociologic perspective, since law reflects the social needs and the moral condition in general, and the politological perspective, and the administrative and political system leaving their own mark on the law system, outlined in a democratic state that promotes the principle of the separation of powers, democratic values, rights and liberties, law being a phenomenon that manages to preserve its specificity and autonomy, being invaded, at the same time, by multidimensional realities, which adumbrate the legal norm full of social, political, philosophical, moral, cultural contents, in which the legal actors, such as the legislator, the prosecutor, the judge, etc., play an essential role in its actual application into a given context. [1] Therefore, the new social valences of insolvency are claimed, requested by the society due to its self-adjustment and self-defence needs.

Keywords: insolvency, social dimension, economic dimension, second chance, European Union.

1 Context

Insolvency emerges in its evolution as an increasingly integrative, interdisciplinary institution which occupies a progressively visible and controversial position in the social and economic environment, with an expanded interest in the European Union and international context. The insolvency law is undoubtedly a result of the approach of the interdisciplinary research and analysis in the context of the branches related to the interdisciplinary research and analysis in the context of the branches pertaining to the sphere of economy, sociology, psychology, but also to the branches of law, through the interference with domestic and international normative acts, as well as regulations in the labour field, criminal law, civil law, civil procedural law, administrative law, public procurement, etc., which have left their mark on the evolution of the insolvency institution, and have created new analysis perspectives, new legal visualisations, outlining, why not, a new law, a special, special, peculiar, autonomous law, namely the insolvency law, which has exceeded the boundaries of commercial law and has expanded on the natural persons and the administrative and territorial units. [2]

The new vision is somehow detached from the purely economic dimension of insolvency, as it was configured in the past, by integrating in its structure the social side, its dimension and by gradually eliminating the personal stigma connected to the bankrupt, whether honest or dishonest. Of course, the insolvency institution, due to its specificity, involves a close and balance intertwining of the social and economic dimensions, in compliance with the principles of business ethics, without destabilizing the legal civil and commercial circuit. Focusing on a "second chance" given to debtors in distress is a new reflection of the recent communications of the European Union through which the member states are urged to give a second chance to a debtor, by granting support with the purpose of restructuring its business, in an incipient moment, and by facilitating the adoption of a reorganization plan for honest and viable debtors. We are talking about a new vision due to the fact that, unlike the correlative provisions of art. 2 of Law no. 85/2006 ("The purpose of this law is to establish a collective procedure for covering the liabilities of an insolvent debtor"), the provisions of Insolvency Code establish, in art. 2 that: "The purpose of this law is to establish a collective procedure for covering the liabilities, by granting the debtor the chance to recover when this is possible". The legislator highlights the acknowledgement and recognition and support of the debtor’s chance to recover, at legislative level, the main purpose of the procedure being indeed to cover the liability, which becomes exclusive if and only if the debtor cannot be recovered and reinserted in the economic circuit, in which case the legal regime of the liability is subject to the rules provided for the prevention or reorganization procedures respectively, as the case may be.

2 Focusing on "the Second Chance"

The essence of the modern normative purpose of insolvency for all the subjects of law to which it is addressed remains the identification of a balance between the debtor's interests and the creditor's ones, through their constructive harmonization, which is reflected in the *judicial reorganization* regulated by Law no. 85/2014 on prevention insolvency procedures and on insolvency procedure, *the financial recovery* according to the norms of Government Emergency Ordinance no. 46/2013 regarding the financial crisis and the insolvency of territorial and administrative units, approved by Law no. 35/2016, as well as the well-deserved *fresh-start* granted to natural persons, as regulated by Law no. 151/2015 on the insolvency of natural persons [3], passing through the current social and economic filter the importance and need of approaching these mechanisms promoted in the national, European Union and international context. [4]

The insolvency prevention procedure as well as the judicial reorganization procedure are vital levers of economic recovery, by concrete and effective normative support that gives debtors a real reorganization chance, with a positive impact at national level and at other levels. The judicial reorganization remains a "win-win"-type tool, which gives the debtor the chance to stay in the business, while giving the creditors the chance to recover more than in the case of bankruptcy, and the employees the chance to keep their jobs, with the perspective of relaunching old jobs and creating new jobs, thus also taking into account the social side implied by the insolvency procedure.

De lege ferenda, we believe that it is absolutely necessary to give a second chance to the self-employed, sole proprietorships or to family-owned companies, by reorganization or insolvency prevention procedures, as for such debtors the legislator only provides the possibility of initiating the simplified insolvency procedure, according to art. 5 item 54 of Law no. 85/2014. This sector of the economy, more specifically self-employed, sole proprietorships or to family-owned companies, has been remarkably expanded, cu all the more so that we are taking into account the category of liberal professions as well, also excluded, which automatically implies hundreds of thousands of employees. Moreover, these categories of persons are also excluded from the application of Law no. 151/2015 regarding the insolvency of natural persons. Nevertheless, these provisions are in contrast to the projects of the European Directives in this field, which recommend a second chance both for corporations and for small and medium-sized enterprises, and for natural persons, regardless whether they are professionals or not. Given the systematic exercise of an organized activity consisting in the provision of services by the category of liberal professions, it would seem more normal to include this category of professionals in the contents of the Insolvency Code as regulated by Law no. 85/2014, by eliminating the exception from art. 3 and the mention of the special law regarding the insolvency of natural persons as a legal regime applicable to consumers, taking into account the specific differences between consumers' over-indebtedness in business, whether commercial or not.

In this context, we believe that it is necessary to accept and enhance the activity of harmonization and adjustment of the national insolvency based on the model reconfigured through the Recommendations made by the European Commission, by including, at domestic level, the suggested minimal standards, in order to provide a predictable and consistent framework, as a decisive factor for the increase of the confidence of the participants to the circular flow of income, who will be willing to expand their business on the territory of several member states. As a matter of fact, the alignment, compatibility and homogenisation of the norms that govern the insolvency procedure are required by virtue of improving the operation of the domestic market, which factors have triggered a process of reviewing the national legislation in the matter of insolvency, through a modern view, for the improvement of companies' rescue framework and giving them a second chance, focusing on the judicial reorganization procedure, as a result of approaches coordinated at European level for the harmonization of insolvency. According to a survey carried out under the aegis of the European Parliament, the discrepancies between the national insolvency laws create obstacles, competitive advantages or disadvantages, as well as problems for the companies carrying out business or owning properties in the European Union area [5]. Thus, the divergences between the national systems related to restructuring, reorganization and granting a second chance may generate difficulties in the assessment of investment risks in another member state [6].

De lege ferenda, we believe that it is useful to have a more flexible judicial reorganization procedure, by limiting the formalities before courts, with the purpose of accelerating the procedure and reducing costs, focusing on placing in the central position of this "chess game" the debtor, allowing it to keep the control on the assets and decisions that have an impact on the society, because the debtor knows best what mistakes have led to the current failure of its business, the macro and microeconomic disturbing factors, and is the most interested to eliminate them, and thus the proposal of a reorganization plan reflects that "checkmate" that is required for the restoration of the economic balance in the society. Reorganization as proved to be very expensive in many cases, the period during which it is relieved from its obligations being long and associated to the business failure stigma, which has led to avoiding the integration/reintegration of the professional trader in the economic market by being eliminated from the circuit by the other professionals, which is why the only viable alternative was bankruptcy. Consequently, the advantages of outlining a new image of what insolvency means, by facilitating the adoption of the reorganization plan, by balancing interests, and reducing the negative impact that might be triggered by the procedure on the future recovery chances, will be reflected in a number as large as possible of companies saved from bankruptcy through preventive measures or through successfully implemented judicial reorganizations [7].

In fact, the implementation of the Commission Recommendation of 12 March 2014 on the second chance was assessed [8] twice, in 2015, and in 2016 respectively, and the conclusion was that it had not reached the intended impact in terms of uniform changes in all member states in relation to the facilitation of

rescue and granting the second chance to debtors in distress. Currently, there is a directive proposal [9] in relation to the preventive restructuration frameworks, the second chance and measures for increasing the efficiency of the restructuration, insolvency and debt remittance procedures, which is designed to amend Directive 2012/30/EU, to consolidate the Commission Recommendation of 2014 and to supplement Regulation 2015/848. The proposals are mainly addressed to entrepreneurs, natural persons or legal entities, with the possibility to expand the application of the debt remittance mechanisms to individual consumers. The Directive proposal was communicated to the Council of the European Union and to the European Parliament in December 2016, and the JUSTCIV Working Party on civil matters held its first meeting in this topic on 16 January. The proposal remained under the reserve of being reviewed, while still maintain the hope that it was still on the list of priorities and strategic initiatives of the EU bodies and other bodies, as can be noticed by accessing their websites [10].

Focusing on the new vision of economic recovery promoted at the level of the European Union by European Union harmonization tools, we can notice that this policy on "second chance" is also reflected on the rehabilitation of natural persons, as consumers, who also have the possibility to develop and implement a plan for the repayment of debts and in order to eventually benefit from a well-deserved *fresh-start.* From the point of view of the positive side, more specifically devising a law meant to support the individual debtor's reinsertion into the social and economic circuit, *de lege ferenda*, we believe that it us useful to supplement it with concrete rehabilitation measures for the bona fide debtors who face problems beyond their control, in order to provide the revival of their situation, by access to financing, loans, reinsertion into the labour market, professional reconversion, specialised counselling in areas of interest, etc., which measures can also be inferred and implemented, nevertheless, from the perspective of other normative acts. Thus we take into account the unpredictability expressly regulated by the New Civil Code, Government Ordinance no. 38/2015 regarding the alternative settlement of disputes between consumers and traders [11], whose purpose is to establish a procedure for the alternative settlement of individual disputes voluntarily submitted by consumers versus traders, in order to provide a high level of protection of the consumers and a good operation of the market, as well as Law no. 77/2016 on the discharge of mortgage-backed debts through title transfer over an immovable property [12], which gives the consumer the right to settle its debts arising from credit agreements, by the transfer of title of the mortgaged immovable property to the lender unless the contracting parties expressly agree otherwise (there was an attempt to create such a tool through Government Emergency Ordinance no. 52/2016 regarding the credit agreements for consumers relating to residential immovable property, as well as for the amendment and completion of Government Emergency Ordinance no. 50/2010 regarding the credit agreements for consumers, which was, however, declared unconstitutional by Decision no. 62 of 7 February, 2017 of the Constitutional Court, due to the fact that it was considered that the law subjected to the constitutionality control regulated an unpredictability applicable ope legis, which

expressly provided the obligation of the creditors that concluded credit agreements granted in Swiss Francs to convert in RON the balance of the credit expressed in Swiss Francs at "the exchange rate of the National Bank of Romania valid on the day when the credit agreement/convention in Swiss Francs was concluded"). Being faced with a complex legislative consumer protection system, which can become difficult to access by the consumer, practical counselling mechanisms would be required, designed to turn such normative "offers" for the rescue of the debtor in distress into insolvency prevention tools, or even into strategic measures meant to become a basis for the financial recovery plan when in the company's liability, the banking loan has a significant position, because the premise of this loan consumer protection system itself is the debtor's state of financial distress.

A sensitive and controversial regulation in this respect was and still is Government Emergency Ordinance no. 46/2013 regarding the financial crisis and the insolvency of territorial and administrative units, approved by Law no. 35/2016 [13], representing, as a matter of fact, an application and a necessary continuation of Law no. 273/2006 on the local public finance. The aforementioned regulations target both the relationship between financial normality state and the financial crisis state, as well as the insolvency state of a territorial and administrative unit, based on the single criterion of the exceedance of the payment obligations undertaken by such unit towards third parties, a certain percentage threshold of the general budget of these territorial division units of the state. From the perspective of the remedy and recovery philosophy reflected in the financial recovery plan that can be developed at the level of the territorial and administrative unit, Government Emergency Ordinance no. 46/2013 can be approached in an integrative vision with the provisions of the Insolvency Code from the point of view of certain success strategies and reorientation and restructuring measures.

Lato sensu, the new concept related to granting a second chance aims at encouraging the approach of the insolvency prevention procedures and also sporting the reorganization, recovery and reinsertion procedure of the debtor into the social and economic circuit, especially in favour of honest and viable, bona fide debtors, but in a rational manner and in a perfect economic and social balance.

3 The European Union Closer to Citizens. The Convergence Between the Economic Dimension and the Social Dimension

The current legislation on insolvency, still incomplete, we might say, at domestic level, was not just a mere anchoring of the domestic law in the European patterns, it was substantiated following an actual impact study carried out with the involvement of certain strategic bodies established at the EU and international level, due to the fact that it was considered that the development of this institution is an essential pillar in the substantiation of a competitive economy, in agreement

with the social side however, by making the law compatible with the objective reality.

Globalization [14] and its effects have become a source of concern for Europeans, especially in relation to its repercussions for the increase in the social inequalities and the unemployment related to the economic crisis found under the pressure of a globalized world. Following countless series of debates organized in 2017 by the members of the European Commission, which debates opened the gates for both the citizens in all regions of the European Union and the governments, national parliaments and local and regional authorities, focused on "Europe's future" [15], an idea emerged in relation to the fact that the European Union is the one that plays an essential role in combating these issues, assuming the protection of its own citizens. Obviously, the European Union seeks to be closer to citizens too, not just the member states, and the social dialogue has increasingly mentioned the need for solidarity between the member states and the focus on the social dimension, because the citizens face the feeling of instability in all fields, more specifically the political, economic, social and cultural one as well. Consequently, within this dialogue, the European citizens pleaded for a much more social Union, deeming that convergence was needed between the economic side and the social side within a joint integrative legislative system "Nous devons parvenir, dans la zone euro, à une convergence non seulement économique, mais aussi sociale" *("We need to achieve, in the European area, not only to an economic but to a social convergence as well.")* [16], since an economic and monetary Union cannot become complete unless it is accompanied by a complex integration, approaching fields such as security and social rights. [17]

In this context, insolvency should not be viewed only as a strictly protection method provided to the debtor (natural person, legal entity, or territorial and administrative unit) in distress, but also as a phenomenon with a strong social impact, that drives a joint acceptance, empathy, sacrifice and interest effort, in the creation of an attractive and well-balanced economic and social space.

The social dialogue proves the need to assume an integrative vision in the creation and substantiation of a complex final "product", such as in the case of the insolvency institution, which has exceeded the boundaries of the traditional law branches, by including social, economic, administrative and management factors, the law proving a flexible legal dimensioning and management, adapted to the needs required in times of economic crisis, conflicts and global problems. We support the idea of the convergence of the economic dimension, a traditional characteristic of insolvency, with a social dimension, taking into account not only the interferences with the domestic and international normative acts regarding the labour law, the criminal law, the civil law, the civil procedural law, the administrative law, the banking law, the public procurement law, etc., topics with a strong interdisciplinary nature which are strongly promoted in the approach of the legal research, but also the need of devising an integrative concept of the branches pertaining to the sociology field.

In fact, law is a phenomenon dynamized by the social, historical, cultural, moral, political and economic context, a phenomenon that gradually abandoned

the hypostasis of autonomous, closed system, in order to inevitably move towards an open" flexible, integrative, interdisciplinary, complex system, characteristics that are, as a matter of fact, specific to our century, a century of complexity. This vision matches the actual reality, and its complexity is a "state of the natural, social and human world". [18]

4 Between Sacrifice and Benefit. Effects and Impediments

In relation to the mission and purpose outlined by the Insolvency Code, through which the legislator mainly sought to maintain the company based on a judicial reorganization plan, preferring the solution of continuing the business through the joint sacrifice of the creditors, hoping that this measure would create an advantage not only for the community, but also for creditors, the doctrine [19] has recently appreciated that the insolvency procedure has, in addition to the characters expressly highlighted in the content of the law (the legal, collective and competitive, unitary and general, egalitarian, remedy or enforcement character), a "sacrificial" character as well. It is essential that insolvency sacrifices certain rights and interests in a very small proportion, with a low impact, compared to the much higher finale purposes, due to the fact that insolvency mechanisms only create a consistency in the economic and legal circuit, and all participants to the procedure can have a benefit (win-win). This advantage is outlined precisely due to the fact that it comprehends an equitable division of the risk of losing the receivables, a cessation of the individual enforcements and legal or out-of-court actions, as an effect of the initiation of the insolvency procedure, implying not only a protection of the debtor from the enforcements of its individual creditors, but only from the community of creditors who benefit from an orderly and egalitarian recovery.

Nevertheless, we need a collective awareness of the benefit that can be achieved through the insolvency procedure, especially from the key-factors, which have, many times, a decisive role in safeguarding the debtor or not, more specifically, the Romanian tax authority and the banks. A rather delicate problem that disturbs the economic circuit is the excessive pressure often exercised by the Romanian tax authority *(ANAF – the National Agency for Fiscal Administration)*, which for every current debt requests the fast movement towards bankruptcy or becomes extremely reticent in relation to the ability of a debtor in distress to recover through the judicial reorganization procedure, and especially in relation to agreeing to approve rescheduling applications. Nevertheless, until the actual moment of the initiation of the insolvency procedure, when the running of the interests, penalties and increases is suspended, the debts to the tax authority are increased artificially. On the other hand, based on an objective analysis, the bankruptcy aimed by budgetary creditors leads to the disappearance of these professionals and also to many jobs, which also implies the disappearance of large taxpayers and tax generators (on salaries, VAT, social security contribution,

health insurance contribution, etc.) [20]. Consequently, we believe that it is much more advantageous for budgetary creditors to support and accept the procedure of reorganization of debtors in distress to the detriment of bankruptcy, the later involving, eventually, a reduced recovery, taking into account the priority of the securities in the recovery of the amounts, while the recovery of current debts is out of the question in such cases. Moreover, in the insolvency prevention procedures, the fiscal debt acquires a distinctive regime, given the principle regulated by art. 4 item 10 of Law no. 85/2014, more specifically, "favouring, in the insolvency prevention procedures, the amicable negotiation/renegotiation of debts and the conclusion of an agreement with the creditors", as the budgetary creditor has to negotiate the debt, to grant exemptions, payment rescheduling, etc. Moreover, both in the prevention phase as well as in the reorganization phase, the budgetary creditor would have to resort to the possibility of the assessment allowed by the law, namely "the private creditor test", [21] through which it can be determined whether, by the debtor's preventive or reorganization procedure, it can obtain more than it would have through bankruptcy. The business environment needs the debtors' survival, not only in the latter's interest, but also in the interest of the stakeholders, whose category includes the creditors and the employees. This is why the insolvency law becomes a special law compared to the countless regulations, among which the Fiscal Procedure Code, and all individual actions against the debtor, initiated for the recovery of debts, among which the fiscal and criminal ones cease on the day the procedure is initiated, by virtue of the collective character of this procedure [22]. The fiscal insolvability procedure is not a collective procedure, it is an individual one and it is carried out exclusively by the tax authority, which is why it needs to be suspended during the insolvency procedure, the state being entitled to recover its receivables either by using the fiscal procedure or by using the procedure provided in the Insolvency Law, but not always in an alternative manner, and the association of the joint liability according to the fiscal procedural regulation can only be applied before the moment when the insolvency proceedings are initiated. [23]

In relation to the quality of creditors in the insolvency procedure of the banks, we believe that the judicial reorganization should be considered an economic business economic recovery tool, given the own advantage the banks benefit from in their turn, as entities of systemic importance, compared to the other professionals. The main actors in the insolvency proceedings, such as, for example the debtor and the creditors, should choose the honesty, transparency, negotiation procedures, reorganization procedures which might involve a *"controlled" insolvency arrangement* [24], with the possibility of having an agreement entered to between the debtor and the main creditors such as the banks, the big suppliers, and also the budgetary creditors, right before the formal declaration of insolvency, where the agreement should come into force immediately after issuing the court decision for opening the proceedings. As a matter of fact, given that a big part of the small and medium-sized enterprises have been developed based on bank loans, we are taking into account the version that, without the agreement of the banks, there will be no judicial reorganization, and

the debtor will not successfully achieve the majority of 30% of the total debts, and will thus move towards an accelerated bankruptcy. Nevertheless, this is the idea founded at the European Union and international level. It is very interesting how, in Great Britain, where a genuine culture of "rescue" has been developed, given the priority granted to the objectives related to rescue according to the Enterprise Act of 2002, banks are increasingly concerned with solving the company problems, subjecting to an external control the risk management and control systems used by companies. Thus, they are looking for quantifiable quality from management teams, making increasing use of independent specialized professionals in order to assess and support those that have poor performance and jeopardise their company, ensuring, at the same time, the management of the insolvency risk. Banks mainly focus on three aspects: the early warning signals related to the company problems; the quality of a company management (especially its capacity to find a way out of difficulties), and the company performance in managing the commercial risks it faces. Moreover, their system promotes co-opting specialists, such as, for example, in the recovery field, company doctors, turnaround professionals, risk consultants, solution providers, debt management companies and cash flow managers whose role is to support banks and companies to successfully carry out turnarounds and recoveries [25]. *De lege ferenda*, the adoption of such mechanisms in the domestic legislation would be auspicious in changing the approach perspective of the insolvency institution by banks and non-bank financial institutions, in their quality of creditors.

In this context of impediments, the current law was outlined in relation to the insolvency of natural persons, among others, consumer protection in general, which was faced with the opposition of the banks, due to the fact that they claimed a systemic risk might appear that could affect the entire economy, despite the fact that they initiated the development of an economic model in which loans, and especially mortgage loans became available at large scale. Nevertheless, the idea of outlining social responsibility in the regulation of economic approaches at national level, by supervised rehabilitation, the financial education and social support are the current and future focal points of the EU and international bodies, which speak of a joint awareness, not only an abstract one seen from diametrically opposed perspectives and interests, oscillating between the idea of profit which ensures the sustainability of the economy and the need for decent survival of the de bona fide consumers who become, in their turn, *stakeholders* for large entrepreneurs. Moreover, taking into account the direction of the expansion of the "insolvency" phenomenon, we can say will all certainty that it can become a tool for the achievement and implementation of the European Union strategy – the Europe 2020 Strategy [26], which corresponds to the priorities of creating competitive industry and jobs, and reducing poverty. In relation to the awareness of the size and social responsibility, at the level of the European Union, many normative acts have been adopted so far which are mandatory for the member states, such as, for example, Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings,

which directive requires large and medium-sized companies, a category that includes banks, to report their non-financial results, representing socially-responsible results [27]. Therefore, social responsibility naturally supplements the law norms based on the moral and ethical side, becoming a strategic regulatory measure within the European and international legislation and conventions, which is also unavoidably reflected at the level of national legislations.

In fact, in an integrative view of an interference area between the labour law field and the insolvency field, the measures meant to guarantee salary rights and social security rights are, within certain limits, in the foreground, a more advantageous one, benefiting from the adoption of a special directive. The social nature is thus prioritized in situations such as the protection of workers' rights in the case of a company or business transfer, and dismissal, taking into account the fact that the insolvency procedures can involve activity reductions and reorganizations, the sale of assets or parts of enterprises, or the suppression of jobs due to the termination of the employment relationships. [28]

5 Conclusions

Through this scientific approach, we aim at identifying, in an integrative concept, the interaction between the economic area and the social area that characterises insolvency as well, identifying, at the same time, the need to balance the two sides that supplement and also reject each other in certain circumstances, which balance is set by the ethical harmonization of divergent, polar interests, such as for example the employees' and the entrepreneurs', the citizens' and the government's, the consumers' and the professionals' interests. We cannot deny that all these social categories, although polar, benefit from interests and values that become common and intertwined at one point in time, where, beyond the competitive relationships, there are also cooperation relationships, which should promote the regulation of a harmonious and social stable climate, through joint sacrifices, through the development of, and awareness related to the need for social responsibility, exceeding the economic barriers established, most often, for profit only. As a matter of fact, we believe that a stable and balanced social climate also promotes the social expansion of a company. In relation to a favourable social climate, our attention has been drawn by a recently completed survey carried out by psychologists and researchers in Europa and the United States concerning the secret of the extraordinary longevity of the Sardinian inhabitants, most of whom reach the age of 100 years. Although it is not directly related to the topic of this research, it has suggested and strengthened the idea of the need for an economic climate perfectly balanced with the social one, with the fundamental human rights, with the moral values and principles concerning the social protection, which eventually underlie the normative construction that reflects the society as a whole, in perfect interdisciplinary harmony. Thus, the specialists of Oxford Institute of Population Ageing drew the conclusion that the longevity of these inhabitants should be analysed in a multidisciplinary manner, the final result dismissing previous studies based exclusively on genetic factors,

as longevity was, in fact, due to the social context in which they lived [29]. Consequently, the socio-economic environment we choose to build, by joint empathy and awareness efforts and just sacrifices defines our way of living as a whole.

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Comparative Law Survey on the Innovations of the New Romanian Civil Code in the Matter of Errors as Vice of Consent

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Abstract

In the new Civil Code, the consent, along with capacity, subject matter and cause, is regarded as one of the prerequisites for the valid conclusion of an agreement (art. 1.179 NCC, which reiterates the provisions of art. 948 of the Civil Code of 1864). The consent means the agreement of the parties on the conclusion of a certain contract; therefore, it is also called an *agreement of will*, and it is often used under this name in the legislation. One of the essential and fundamental conditions of consent is that it *should not be flawed* and that it should be *freely* expressed, in other words, it should not be affected (altered) by any of the vices of consent and that it should be expressed following documentation, that is the party giving their consent for the conclusion of a contract should have full discernment and be correctly informed concerning all the contractual clauses.

Validly expressed consent is an essential concept in contract law, as only such consent may be the grounds for the legal relationship of the parties signing a covenant, whereas the *vices of consent* are those circumstances affecting the agreement of a party upon the conclusion of a contract.

It is our intention herein to deal with one of such vices of consent, from the perspective of comparative law, as well as from that of a comparison with the former regulation; however, we will approach only the novelties that are worth being highlighted in order to provide a full clarification on the actual innovations of our civil code.

Keywords: consent, vice of consent, error, essential error, excusable error.

1 Introductory Remarks

Obviously, our main source of inspiration in the matter of the validity conditions of contracts is the Civil Code of the Canadian province of Québec (Québec Civil Code, abbreviated C.C. of Q.) [1], as this document is considered the most modern, for it combines the Roman law (more exactly, the present-day aspects of the French law) with elements of common law (in fact, it gives case-law solutions). For these reasons, the law of Québec has been more or less taken over by many countries of the world, including Romania. The rationale of the Romanian Civil Code itself mentions that the legislators had the support of the authors of the Civil Code of Québec; furthermore, upon a closer read, any reader may notice the influence of this North-American code on our current civil code, as there are entire sections that were simply copied from it into its Romanian counterpart. The discussions on this Canadian code are vast, but we will limit ourselves here to mention that the essence of the codification lies in a new concept of the ample matter of private law, namely *the monist* regulation (legal relations are legislated from a single perspective, that of the actual civil law, and the former distinction civil law/trade law is eliminated); we will highlight below our considerations concerning the texts in question of the Civil Code of Québec, as this is currently the main topic of debate in comparative law (just as before the new Civil Code was adopted, the Romanian civil law was compared mainly to the French Civil Code).

However, besides the Civil Code of Québec, we must mention other codes that have influenced – to a lesser extent, it is true – the current framework ruling of the Romanian civil law, namely, in order of their importance, the codes of Italy, France, Spain, Switzerland, Germany and Brazil. Finally, we must not forget the major importance of the recently adopted European codes in the matter of civil law and, particularly, contract law, the most important of which are the *Principles of European Contract Law* [2] and the Guidelines of the *Draft Common Frame of Reference* [3] (the codes whose implementation is to be ensured by the passing of the work instrument *Green Paper for European Contract Law* [4]). Moreover, we should not overlook the *UNIDROIT Principles of International Commercial Contracts*, which were a significant source of inspiration in the passing of the new Civil Code, especially and as its name shows, in the matter of commercial agreements (concluded by professionals).

2 Novelties in Errors as Vices of Consent and Their Sources of Inspiration

2.1 *Introductory Remarks*

A first and interesting absolute novelty of the new Civil Code lies in the nature of error that may entail contract nullity. The new Civil Code expressly regulates the *mistake of law* as a case of contract rescission, obviously, under strict

circumstances. Another novelty (this time, relative in our opinion, as it existed under the previous regulation as well), is the regulation *de lege lata* of the *inexcusable mistake*. Then, what is also very important is that for the first time the Civil Code delimitates accurately and restrictively the circumstances in which an error is considered *essential,* and which may lead to the cancellation of the transaction; it is also of interest that, although essential, this type of error can be confirmed. It is also worth mentioning here the concepts of *assumed error* and *calculation error*, which were not ruled upon in the previous civil code. Finally, of novelty in terms of error is the *adjustment* of contract in case of an error, a measure that was impossible under the former Civil Code, where the error could entail the nullity of agreement under certain circumstances.

2.2 *Mistake of Fact and Mistake of Law*

Therefore, the current legal regulation recognizes expressly the mistake of law. A party who had a false representation of a legal norm, which such party was not familiar with, is deemed to have made a mistake of law. There have been and still are discussions and controversies regarding such error, namely whether it may be regarded as a vice of consent, and the internal regulations of various states differ significantly on such matter. In our former code, the mistake of law could not be a vice of consent, because the legislation applied the Roman law principle of *nemo censetur ignorare legem* (nobody can be exempted from liability on the grounds of ignorance of the law), including in terms of contract liability; obviously, an absolute application of this principle used to lead to absurd solutions, as no person, irrespective of their excellent legal education, can be familiar with all the laws passed in a certain country at a given time.

Currently, as a result of a trend in the legal practice and of the influences from other legal systems where the mistake of law is deemed as a vice of consent (for example, our main source in the matter of error, namely the Italian Civil Code [5], as well as Principles of European Contract Law [6]), as well as of the decisive influences from the generally accepted regulations of international trade law [7], the mistake of law (*erreur de droit*) is correctly acknowledged as a vice of consent; on the contrary, we must mention that the other (main) source of inspiration of our Civil Code, namely the Civil Code of Québec, regulates only the mistake of fact and deliberately excludes the mistake of law from the class of vices of consent [8] (under the obvious influence of the French Civil Code).

2.3 *Essential Error and Non-Essential Error*

The old Civil Code, although extremely concise and lacking in terms of error, gave rise for more than a century to a number of theories regarding the determining or, on the contrary, non-determining nature of errors, which were fortunately put into practice in consistent doctrine and case-law resolutions. In the last few years it has been noted that error, in terms of its importance, of the serious effects it entails, has three types: error as obstacle, error as vice of consent and

neutral error (although there have been debates concerning when errors may be deemed as obstacles or, on the contrary, vice of consent).

However, it seems that such doctrine theory is no longer in existence after the new Civil Code was adopted. For the first time, the new Romanian Civil Code refers to the concept of *essential error*. The rule applying in the matter under our Civil Code is that the rescission of a legal transaction may be requested only for an essential error, that is an error aiming at a decisive, determining element for the formation of the contract.

One first remark is that the old Civil Code (the Civil Code of 1864) did not use the concept of essential error. On the other hand, the wording of the current legal text leads us to conclude that the party being in an essential error *may* request rescission, which makes us think about relative nullity, not absolute nullity, unlike the previous Civil code, which made express reference to absolute nullity. Finally, in order to claim error, another condition must be fulfilled in terms of the other contracting party, this time a *subjective* element, namely it is required that the other party knew, or if applicable, had to know that the fact affected by error was essential for the conclusion of the contract. To clear any doubts, the new Civil Code lists expressly and restrictively the cases of essential errors in art. 1.207 par. (2) [9]. Thus, an essential error occurs when:

- it bears on the nature (*error in negotium*) or the subject-matter of a contract (*error in corpore*);
- it bears on the identity of the object of performance or on one of its qualities or on another circumstance deemed as essential by the parties and in whose absence the contract would not have been concluded (*error in substantiam*);
- it bears on the identity of a party or on one of its capacities and in whose absence the contract would not have been concluded (*error in personam*).

After seeing the circumstances considered by the Civil Code as the hypotheses of an essential error, it is easier to define the concept of *non-essential error;* thus, we may infer that any type of error other than those mentioned and listed by the law as essential errors is a non-essential error. According to the law, an error as to the simple grounds of a contract is not essential, unless by the will of the parties such grounds were considered as determining. The non-essential error is inspired by the Canadian law; the Civil Code of Québec excludes the cases of "*error of lesser importance*", such as errors of calculation (but also errors as to the economic value, however not in case of lesion), errors of form or the so-called errors on personal grounds [10].

2.4 *Inexcusable Error and Assumed Error*

Obviously, when we speak about error, we have in mind the cases where a party had a false representation of reality (a false representation of either factual circumstances or the legal circumstances or of a legal provision), and such false representation could not be avoided by such party. In other words, the party in

question, although having been very careful when concluding the transaction, was not able to notice the erroneous circumstance; therefore, the error in which such party found itself was an *excusable error* and it cannot be considered that such error was assumed by such party and that it could be avoided with reasonable diligence. This is also the justification of regulating error as a vice of consent, for, otherwise, any party may excuse itself from performing an obligation claiming a so-called error having affected its consent upon the signing of the contract.

Our Civil Code does not define the concept of excusable error, but it defines that of *inexcusable error*, stating that such error cannot flaw one's consent [11]. Therefore, unlike the old civil code, the current one marks this aspect by defining the concept of inexcusable error. Thus, according to art. 1.208 NCC, a contract cannot be rescinded if the fact upon which an error bore could have been known with reasonable diligence. The same principle applies for the mistake of law, which, as we have already seen, according to the law, cannot be claimed for the legal provisions that are accessible and predictable. Hence, an inexcusable error occurs when the party claiming it was *grossly negligent* – art. 3.5 par. 2 of the UNIDROIT Principles) upon the conclusion of the contract; nevertheless, our Civil Code preferred to use the wording reasonable diligence, taken over approximately from the Italian Civil Code (art. 1.431 referring to la *normale diligenza*). Obviously, it will be extremely difficult in practice to determine accurately how excusable the contracting party's error has been or how diligently has the party alleging such error acted. It will certainly be the task of the legal courts to settle this aspect taking into consideration the particular circumstances of every case in order to apply a concrete pattern of assessment of the "reasonable diligence" shown by a certain party [12].

Likewise, we can mention here the concept of *assumed error*, which is given a distinct definition by the law, but which bears the same effects as the inexcusable error. Thus, according to art. 1.209 NCC, an error as to an element whose risk of error was assumed by the claiming party or, where applicable, had to be assumed by such does not entail the rescission of contract. In our opinion, for this purpose it is important to note that the Principles of European Contract Law (the code of international contract law to which our country also adheres) approaches the two types of error – inexcusable and assumed error – together. Consequently, there is no possibility for a party of alleging it was in error, irrespective whether it was an inexcusable or assumed error [13].

3 Conditions to Claim Error

Therefore, in order to claim error as a vice of consent, two conditions must be fulfilled, namely: the error must be *essential*; the error must be *excusable*. Under certain circumstances, a third condition may be required, that is the other party must know of the error. The legal literature of Québec on this matter distinguishes between an essential and personal element; in the first case, the essential element does not have to be known by the other party, as it is about an essential element for any party, whereas, in the latter case, the personal element

must be communicated to the party, otherwise it cannot be considered an essential element that leads to contract nullity.

4 Effects of Error

When speaking about the effects of error, the significant difference between the new Civil Code and the Code of 1864 is noteworthy.

As we may infer from all the above, at a first glance, the two types of error in our current Civil Code (essential and non-essential error) have the same effects, that is each of them flaw the consent to a greater or lesser extent (even if only the essential error may actually lead to the rescission of a contract); in the same way, unlike the old Civil Code, which provided for absolute nullity in case of an error as obstacle and for relative nullity in all other cases, the new Civil Code gives the same resolution, irrespective whether there is an *in negotium*, *in substantiam*, *in personam* or *in corpore error* (however, the error must be essential in all cases in order to foresee a rescission of a contract). Consequently, the new regulation is not about an error as obstacle or destroying the will, as, unlike the previous code, it is considered that no error can destroy beyond repair the will of the parties.

The specific and generally true sanction that is currently applied to error according to the law is the *relative nullity* of a contract. In fact, such sanction is an application of the provisions on nullity of the current Civil Code, which are in their turn an element of novelty in our private law. We hereby mean the rule as principle provided by art. 1.251 NCC, according to which any vice of consent leads to the relative nullity of a legal transaction concluded under such circumstances, as well as to the assumption of relative nullity instituted by 1.252 NCC. What is essentially noteworthy here is one of the core criteria that distinguishes the relative nullity from absolute nullity, namely that relative nullity may be always confirmed or ratified by the parties; in this matter of error, the possibility of confirmation means the right of the parties of readjusting the flawed contract. The possibility of adjustment/confirmation of the contract applied previously and applies currently to relative nullity, as in the case of error as vice of consent.

What is really new here is the fact that an adjustment of the contract is currently possible for *any* type of error, even for an essential error; furthermore, the law offers a separate procedure of *adjusting* a contract in case of error (although relative nullity can be confirmed by definition). That means that it is possible to remove the cause of nullity by executing the transaction under error, which was not possible under the old Civil Code, when the error was deemed as destroying the will of the parties. More concretely, the law states that, if a party is entitled to claim the possibility of rescission of a contract on grounds of error (for example, the buyer of goods), such party will not be allowed to do it if the other party (seller) states he wishes to execute the contract or executes the contract as it was understood by the buyer. In such a case, the contract is considered to have been concluded according to the understanding of the party entitled to claim the possibility of rescinding the contract (the buyer in our example). However, in order to perform the adjustment of the contract, a certain procedure must be

carried out, which is meant to ensure the completion of the contract in good conditions [14]. Thus, the party entitled to claim the possibility of contract rescission, if it does not wish to request the cancellation of such contract and wishes to execute it, must inform the other party about the manner it understood the contract; no later than 3 months from notification, the other party must state it agrees with such performance or must execute the contract without delay as it was understood by the party in error. If such statement was made and communicated to the party in error within this period or if the contract was executed, the right of cancellation is terminated and the notification by the party in error bears no effects. This possibility of contract adjustment occurs also when the party in error requested the contract rescission in court. The notification to the other party must comply with the same requirements, including the period of 3 months.

5 Conclusions

As one may notice, the vices of consent are regulated differently by the new Civil Code as compared to the previous one, namely they are considered as elements flawing the consent: lack of discernment, error, deceit, duress and lesion (as we showed above, art. 953 of the Civil Code of 1864 ruled only on error, deceit and duress as vices of consent, whereas lesion was admissible in limited circumstances). Our old civil code was inspired in this matter by the French Civil Code, where, likewise, the three vices of consent were regulated restrictively (art. 1.109 Napoleon Civil Code), with the possibility (almost theoretical and actually utopian) of admitting lesion as a vice of consent, but "*only in certain contracts and concerning certain parties*" (art. 1.118 Napoleon Civil Code). On the contrary the Civil Code of Québec, the main source of inspiration of our new Civil Code and as the current Romanian Civil Code, rules that vices of consent are the following: lack of discernment, error (which also includes deceit), duress and lesion (art. 1.398-1.408 C.C. of Q.).

Taking into consideration all our remarks and reservations herein, we believe that the new ruling is welcome within the ample regulation of the Romanian private material law.

REFERENCES

[1] The Civil Code of Québec was completed in 1991 and entered into force in 1994 and, as its name states, it is applied only in the Canadian province of Québec, which has also the highest population in Canada. Although the official language of the province of Québec is French, one has to mention that the legislator approved the English version as well as an official variant, and that is why we will quote both French and English versions of the legal

texts of the code. The rest of Canada applies the common-law, which does not have a code and which is also in force in the USA (except for the state of Louisiana).

[2] Principles of European Contract Law (PECL) is a set of simple, succinct and, in our opinion, reasonable rules adopted in several stages, whose final and official version is that published in 2002. PECL aim at codifying the general rules that may be applied to contracts in the member states of the EU and, finally, once the matter of contract law is fully implemented in the member states, they are aimed at creating an actual unitary European private law by means of a European Civil Code.

[3] Draft Common Frame of Reference (DCFR), passed in 2009, is based on the rules of PECL and represent, in fact, their detailed presentation, as well as principles applicable to any types of civil obligations. It has been criticized by some member states, but a review of such rules is not foreseeable, on the contrary there is a tendency of implementing these rules as they are as soon as possible in the law systems of the member states.

[4] Green Paper for European Contract Law was adopted by the European Commission in 2010 and is aimed at speeding and ensuring the enforcement of the two codifications, particularly of DCFR, which is extremely vast and difficult to approach. Mainly, this document seeks to create a common legal framework for contract law which is to be used throughout the EU in the field of business law and consumer protection.

[5] Art. 1.429 point 4 of the Italian Civil Code, which defines the essential error of law (*errore di diritto*).

[6] Art. 4.103 PECL, called "Fundamental Mistake as to Facts or Law", refers to the conditions and effects of nullity, with no distinction of whether it is about an error of fact or of law.

[7] In international trade law and, generally, in international private law relations, the mistake of law has been accepted traditionally as a vice of consent, as it has been considered that a party residing in a certain state cannot know (and cannot be required to know) the legislation of another state. The principles UNIDROIT applicable to international trade contracts are extremely relevant for this purpose; the principles define error as a false representation of certain factual aspects or of law upon the conclusion of a contract (art. 3.4 – Definition of Mistake).

[8] L'erreur de droit n'est pas une cause de nullité de la transaction. Sauf cette exception, la transaction peut être annulée pour les mêmes causes que les contrats en général (art. 2.634 C.C.Q.). We should remark that the legal literature of Québec considers the error as to the nature of contract as a mistake of law, as such error leads to "an inaccurate legal opinion" unlike the mistake of fact, "which

bears on the factual circumstances". On the other hand, the Canadian common law applicable in the other provinces of Canada, by means of the resolutions passed in case-law, acknowledges the mistake of law as a vice of consent, which has had an impact also on the resolutions of the courts of Québec [for this purpose, see M. Tancelin (2009). Des obligations en droit mixte du Québec, Montreal: Wilson & Lafleur, p. 137].

[9] The content of art. 1.207 par. (2) NCC is almost identical to the content of art. 1.429 of the Italian Civil Code.

[10] An Error as to personal reasons is in the Canadian contract law an error pertaining solely to the personal reasons why a party concludes a certain contract, which, at the same time, should be completely neutral to any other party. For instance, a collector wishes to buy a work by Picasso made between 1920 and 1930. If such collector discovers later that the painting he bought, although deemed a Picasso, was painted in 1918, such collector cannot request rescission unless he expressly indicated (by means of a contractual clause) he was interested only in certain paintings by Picasso, namely those made between 1920 and 1930 (Collection du droit 2011-2012, Obligations et contracts, Québec: Y. Blais, 2011, p. 42).

[11] L'erreur inexcusable ne constitue pas un vice de consentement (art. 1.400 par. 2 C.C. of Q.).

[12] In our opinion, for an ample and relevant debate on the excusable or inexcusable nature of error, see M. Tancelin, D. Gardner, Jurisprudence comentée sur les obligations, Montreal: Wilson & Lafleur, 2010, p. 67. We summarize hereby only the criteria (which we find extremely interesting and relevant) applied in the case Legare v. Morin Legare, which made the judge to consider that a contracting party may claim an excusable error, namely: he was not familiar with the business field (in this case, company law); he had previously consulted with an accountant of the company issuing the shares that were the subject matter of the transaction, as well as with a lawyer; he had requested a draft of the covenant one week before the signing; he had participated in the discussions leading to the conclusion of the transaction; he had faith in the other contracting party (namely, his brother-in-law).

[13] Art. 4.103 par. (2) PECL: "However a party may not avoid the contract if: (a) in the circumstances its mistake was inexcusable, or (b) the risk of the mistake was assumed, or in the circumstances should be borne, by it".

[14] The Italian Civil Code, on which this matter is based, in art. 1.432 states the possibility of maintaining the altered contract, but it does not make any reference to any notification and no deadline of execution.

Comparative Law Survey on the Innovations of the New Romanian Civil Code in the Matter of Lesion as Vice of Consent

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Abstract

Lesion is a vice of consent bearing on the validity of a legal transaction because of the obviously disproportionate performances by the parties under the legal transaction. Lesion may entail the nullity of a legal transaction following a legal suit filed by the party claiming it, namely an action for annulment for lesion (also called action in rescission for lesion or, more simply, action in rescission).

In the Canadian law (the main source of inspiration of our new civil code), lesion is a consequence of breaching the so-called *principle of contract morals*, along with abusive clauses and the failure to observe the good-faith obligation; for these reasons, the Canadian authors show that, although beyond the scope of consent, the matter is still treated as vices of consent [1]. But lesion is not recognized as a vice of consent by all law systems; some countries exclude it expressly or restrict its hypotheses so much that we may say it becomes inapplicable. For instance, the French Civil Code acknowledges lesion only in certain circumstances (extremely restrictive); on the contrary, along with the Civil Code of Québec, the Italian Civil Code recognizes lesion as a vice of consent. In terms of the principles described in the European contract law, the Guidelines of PECL expressly regulates the case of the so-called hypothesis of "*excessive benefit or unfair advantage*" (art. 4.109 PECL).

In Romania, the old Civil Code (the Code of 1864, abolished in 2011) restricted the claiming of lesion to underage children (art. 951), who, as it is the case with the French Civil Code, could exercise their right of action in rescission for lesion for any agreement (art. 1.157). Nevertheless, unlike the old ruling, our current civil code recognizes lesion both for underage children and for full-aged

people; therefore, what is new is the right of full-aged individuals of claiming lesion as a vice of consent.

As far as we are concerned, we are skeptical regarding the legal consequences of the enlarged circumstances when lesion may be claimed in the Romanian law and we believe that the regulation of actions in rescission should be limited, as it is now, to the extraordinary circumstances when the damaging legal transaction is made with a minor; at the most, lesion should have been recognized in case of full-aged people but in certain situations clearly set by law. We believe that our society is just not ready for such a regulation (as it is not ready for the ruling of frustration in contracts) and we fear that, unfortunately, we will witness frequent situations where lesion will be unlawfully claimed, under the excuse that contractual performance was disproportionate. In this context, the contractual balance will suffer and, consequently, the efficiency of the binding and irrevocable nature of legal transaction will be under doubt. For this purpose, in our opinion, the regulation by the Civil Code of Québec is more correct, more coherent and clearer and it offers more predictable and fairer case-law solutions than the regulation of our Civil Code. Moreover, we believe that the Canadian ruling reflects better the economic realities of our country [2].

Keywords: consent, vice of consent, lesion, lesion to full-aged parties, lesion to minors.

1 Novelties in Lesion as a Vice of Consent and Its Sources of Inspiration

1.1 *Lesion to Full-Aged Persons. Concepts. Conditions*

According to art. 1.221 par. (1) NCC, there is lesion between people of full age when one of the parties, taking advantage of the other party's need, lack of experience or lack of knowledge stipulates in its favour or in favour of a third party a performance that has a significantly higher value than the value of its own performance upon the conclusion of a contract.

One must note that, in order to claim lesion, certain conditions required by law must be fulfilled, which are welcome in our opinion, as they are meant to prevent violations of law and, at the same time, to set lesion apart from other legal hypotheses, such as frustration. Hence, three conditions are to be met in order to have lesion in case of full-aged people:

– one of the contracting parties should take advantage of the psychological conditions of the other party (*subjective* requirement of lesion);
– there should be disproportionate performances, that is one of the performances (that of the damaged party) should be significantly higher than the other (*objective* requirement of lesion);

– such disproportionate performances should have been in existence since the conclusion of the contract (requirement regarding the *time* when lesion should occur).

1.2 *Subjective Condition*

As shown before, this condition of lesion for full-aged persons refers to the psychological state of one party, of which the other party takes advantage, namely it is required that one of the parties be in one of the following three cases: to be in need, to lack experience, to lack knowledge.

Need is a subjective element relating strictly to a person who, under specific circumstances, needs some goods or service. Lack of experience is also an element that can be actually assessed in a person, although, in our opinion, one can also speak about an abstract type of person lacking experience. Lack of knowledge is a specific element, as we cannot give it a general applicability to any person. Thus, although two people are of the same age, have the same education and the same experience, one of them may not have knowledge in a particular field, such as contracts on copyright or other intellectual property rights etc.

It is worth noting that any of the psychological states mentioned above may lead to the annulment of the transaction for lesion provided that the other party *has taken advantage* of this state. This remark is important as, in the absence of this element, namely when the person was in one of the states provided by the law and the other party either was not aware of such state or it was aware but did not take advantage of it (more difficult to believe and to prove) there is no lesion. In our opinion, in such circumstances, because the subjective element in the form of the *intention* of the contractor of *taking advantage* of the other party's state is not met, lesion cannot be accepted. Taking into consideration the definition of the verb "*to take advantage*", that is "*to use an opportunity to achieve results, sometimes in an unfair way*" [3], it excludes the situation in which the party was not aware of the psychological state of the other contracting party.

1.3 *Objective Condition*

The second requirement has an objective nature and it is easier to assess it, even if some difficulties may arise. The law requires that one of the performances be *significantly* higher than the other. The concept is ambiguous, fortunately our civil code provides a certain element of assessment of this significant difference of performances in case of lesion to persons of full age, namely the promised or executed performance by the injured party should be *half* of its value at the conclusion of the contract [4]. For this purpose, it is important to state that our ruling was apparently inspired by the Italian Civil Code, which defines the disproportion between performances as half of the performance value [5].

Two important distinctions should be made here between lesion and two other particular cases of a sale agreement which may entail its nullity as a result of a defect of an important element of the sale, namely the contract price. What

we mean is the fictitious price and the giveaway price, two concepts defined by art. 1.665 NCC, which also sets the sanctions applicable for them. The *fictitious price* is a price set without the intention of being paid, which means that the parties, although they have stipulated such price in the contract, have secretly agreed on not paying it. A fictitious price is different from a damaging price by the fact that in terms of value, it meets the performance (namely, the value of the sold goods), but the parties have never intended to pay it. *The giveaway price* is a price that is so disproportionate as to the goods value that it is obvious the parties have never intended to consent to a sale. Furthermore, the difference between a damaging price and a giveaway price is that the first is imposed by a party taking advantage of a particular state of the other party, while the latter is agreed upon by both informed parties. They are similar in that both the fictitious and the giveaway price, as well as the damaging price, may entail the rescission of the transaction in question.

Finally, our last remark in this matter is that, according to the law, the objective existence of lesion is assessed based on *the nature and purpose of* the contract.

1.4 *The Condition Regarding the Time of Lesion*

As we have said above, the third element refers to the moment when there should be a disproportion of prestations. It is certain that, according to the law, the significant disproportion of the two performances should be in existence upon the *conclusion* of the contract. Furthermore, such disproportion must *remain* until the date of action for annulment.

For this purpose, it is important that we hereby make a distinction between *lesion* and the doctrine of *frustration*. Lesion, just like frustration, is an obvious disproportion between the performances the signing parties are bound to, so there is an important similarity between these two legal circumstances. The essential difference is the *moment* when such disproportion between performances occurs: for lesion, such disproportion occurs upon the formation of the agreement of will (upon the signing of the contract), whereas for frustration, such disproportion arises when the contract is executed. In other words, when we speak about frustration, it means that there was no disproportionate prestations when the contract was concluded, rather such disproportion occurs during the performance of the contract.

1.5 *Lesion of Minors. Concept. Scope of Application*

The law has a distinct regulation for lesion in case of minors, which requires different conditions from lesion in case of full-aged persons and which is naturally easier to claim. As shown above, in the Canadian law, lesion for minors also means a circumstance where an individual, although of full age, is under a type of protection (curatorship) and concludes an allegedly damaging contract; we do not understand why the Romanian legislators did not include such cases in our

Civil Code, particularly because art. 1.221 par. (3) NCC is almost identical with its source of inspiration, namely art. 1.406 par. 2 C.C. of Q., the only difference being that the Romanian ruling, unlike the Canadian one, does not include protected full-aged individuals [6]. *De lege ferenda*, we believe it would be appropriate that art. 1.221 NCC should also apply to full-aged people who are under some type of supervision, such as curatorship.

Concretely, according to the Romanian Civil Code, lesion may also occur when a minor binds himself to *an excessive* obligation as compared to his patrimonial circumstances, to the advantages incurred by such minor from the contract or to his global circumstances [art. 1.221 par. (3) NCC]. This is the only condition required by law for lesion to minors, unlike lesion to individuals of full age, where the requirements are more numerous and stricter. However, so that one can have a better understanding of the lesion to minors, we believe it is useful to compare it with the lesion to full-aged persons.

1.6 *Similarities and Differences Between the Two Types of Lesion*

There are similarities and differences between lesion to minors and lesion to individuals of full age.

Therefore, it is worth noting that, unlike lesion to adults, it is no longer required that a minor be in a special psychological state (caused by need, lack of experience or lack of knowledge) and, implicitly, there is no taking advantage of such a state. The mere capacity of *minor* allows for the possibility of claiming lesion (nevertheless, we do not agree with the doctrine of the legal literature according to which the law sets a relative assumption of lesion in case of minors [7]). Likewise, it is no longer required that the performance be significantly higher, but it has to be *excessive* as compared to certain elements, which, as we will see, means something completely different. Finally, such excessive obligation refers not only to the time of contract conclusion (as it is the case with lesion to adults, where the disproportion must exist at least upon the conclusion of the contract), but also to any moment of contract performance, the essential aspect being that of an excessive obligation.

Therefore, what is most important in this matter is the excessive obligation as compared to the global circumstances, as well as to the two concrete elements, namely a minor's patrimonial situation and the advantages a minor incurs from the contract.

We will hereby not deal with *the global circumstances*, as it is a rather ambiguous concept (we would have preferred that such phrasing have been avoided by our ruling); on the contrary, the other two situations based on which the excessive nature of an obligation is determined are sufficiently relevant. Thus, a minor's *patrimonial situation* is affected if, following the conclusion of a contract, he will be in material difficulty, that is he will be no longer able to acquire basic goods and services. For instance, as the Canadian judicial practice shows, the purchase of luxurious electronic equipment by a minor may cause

lesion provided that such purchase results in a poor financial status for the minor, even if the price was fair [8]. In terms of the *advantages* such minor may gain from the contract, they must also be real and certain, that is, by concluding the contract, the minor will actually be in a winning situation. The Canadian case-law (as such case-law in our civil law is absent) provides a clarifying solution in this matter in a case where it has been considered that the minor did not have any actual advantage; namely, the court rescinded the sale contract of a ship to a party who lived far from the sea, was unemployed and could not afford such luxury [9].

2 Effects of Lesion

We will deal herein firstly with the factual consequences of lesion, with the legal sanction to be applied in case of lesion and with the conditions under which such sanction operates.

In terms of sanction, we will note from the onset the right of the damaged party. According to art. 1.222 NCC, the party whose consent has been flawed by lesion may request, at will, the *rescission* of the contract or the *diminishing of* his obligations by the value of damages he would be entitled to. Therefore, depending on what he considers to be appropriate, the party claiming lesion may request a court either to rescind the contract (by means of an action for annulment or an action in rescission) or to diminish his performance (by means of a prosecution of claims or an estimative action). The damaged party cannot request both the rescission of transaction and damages, as it is the case according to the Civil Code of Québec, which allows for it expressly (art. 1.407 C.C. of Q.). However, a common feature of the two types of actions is the time of prescription, which is *one year*, as calculated from the *date of contract conclusion* both for the action as to the diminishing of performance and for the action for annulment (in case of lesion, prescription freezes the right of action by way of principle, as well as – by derogation from the general regime of nullity [10] – the right of claiming annulment by way of exception).

Obviously, the action for annulment is aimed at a relative nullity (with all the characteristics such nullity implies [11]) and at the retroactive rescission of the concluded contract, potentially requiring the return of prestations already carried out, if such prestations have been executed (for example, if the damaged party has sold goods, such party will be entitled to a return by the other party of such goods, and the damaged party will have to give back the amount received). The action for annulment in case of lesion to minors is admissible in any circumstances, whereas the action for annulment in case of lesion to persons of full age is admissible, as already shown, only if the two objective conclusions are met, that is the so-called admissibility requirements of an action for annulment in case of lesion to adults [12] (the disproportion of the performances exceeds half the value the performance of the damaged party had upon the conclusion of the contract; such disproportion should remain until the time of the request for the rescission of the contract).

However, it is worth noting that, as the law stipulates also for contracts flawed by error, in case of lesion the principle of safeguarding the legal transaction is of the most importance. What we mean is the possibility of *adjusting* the contract affected by lesion so that it reflects a fair balance between the parties' performances, which is applicable to both lesion to full-aged persons and lesion to minors. Hence, in all cases, even when the damaged party requested the rescission of the contract and the admissibility conditions are met, the court may maintain the contract as valid provided that the other party offers a *fair* reduction of its own receivables or, where applicable, an increase of its own obligation [13]. In our opinion, the fair nature of the offer made to the damaged party refers to the party affected by lesion so that the other party must execute the contract under the terms set by the damaged party; as the law makes reference to the provisions of art. 1.213 NCC on the adjustment of the contract in case of error, we hereby conclude that all the provisions of this ruling will be applied appropriately [14].

In our view it is of interest to deal with the matter regarding the damaged party's possibility of ratifying the contract when such party has reached full age. The old Romanian Civil Code expressly ruled that the minor can no longer file for an action in rescission against his commitment when he was under age if he ratified such contract when reaching full age, both when such commitment is void in its form and when it causes lesion (art. 1.163 Civil Code of 1864). The current Civil Code has no stipulation in this matter, which makes us conclude that, even after reaching full age, the damaged party (allegedly a minor at the time of lesion) may request the rescission of the contract for lesion (in this case also applying the legal provisions concerning the possibility of the court to adjust the contract under lesion).

In terms of the second action recognized by the law in case of lesion (along with the action for annulment), the prosecution of claims allows the damaged party to request that the other party be forced to pay an amount that is equal to the differential between the actual value of his performance and the value of the executed performance (for instance, if the damaged party has sold goods, such party will be able to request that the other party pay the amount representing the differential between the actual value of such goods and the price stipulated in the contract).

Finally, there are cases when lesion, although expressly recognized by law as a vice of consent cannot be admitted as grounds for rescission or reduction of performances. For such contracts, the judicial action based on lesion will be overruled as inadmissible. Our new Civil Code lists the contracts that cannot be appealed for lesion, namely aleatory contracts and transactions (art. 1.224 NCC).

3 Conclusions

Although it recognizes the possibility of claiming lesion under certain circumstances by all individuals, irrespective whether they are of full age or under age, the new legal Romanian ruling approaches the matter significantly differently in each of the two cases.

Therefore, according to the new Civil Code, there are two distinct situations: lesion to persons of full age (absent in the old civil code [15]) and lesion to persons under age (that may be claimed only under certain conditions, unlike the old Civil Code, where it could be invoked on the grounds of "*simple lesion*" [16]).

Taking into consideration all our remarks and reservations herein, we believe that the new ruling is welcome within the ample regulation of the Romanian private material law.

REFERENCES

[1] *Collection de droit – Obligations et contracts*, p. 47. The Canadian law also states that lesion is an economic error between the parties caused by a contractual imbalance, a mathematical calculus meant to determine whether the fair value of a performance has been stipulated. We agree with this opinion and consider that contractual lesion is connected rather to contractual good faith (in the form of contractual loyalty) and not to consent.

[2] According to art. 1.406 C.C. of Q., there are two types of lesion: subjective lesion, caused by the exploitation of one party by the other, and objective lesion, which applies only to full-aged under age persons under protection (tutorship, curatorship).

[3] DEX, Bucharest 1998, p. 856.

[4] According to art. 1.222 par. (2) of the Civil Code., "Except for the case provided by art. 1.221 par. (3), an action for annulment is admissible provided that lesion exceeds half of the value of the promised or executed performance by the damaged party at the conclusion of the contract. The disproportion must remain as such until the date of the action for annulment".

[5] "L'azione non è ammissibile se la lesione non eccede la metà del valore che la prestazione eseguita o promessa dalla parte danneggiata aveva al tempo del contratto" [art. 1.448 par. (2) Italian Civil Code]. On the contrary, the Civil Code of Québec states that Lesion results from the exploitation of one of the parties by the other, which creates a serious disproportion between the prestations of the parties; the fact that there is a serious disproportion creates a presumption of exploitation" – art. 1.406 par. 1 C.C. of Q, which means that, unlike our ruling, which also requires subjective conditions, such disproportion is enough to qualify as lesion.

[6] In order to explain our reasoning, we believe it is useful to quote the two rulings. According to our civil code, "Lesion may also occur when the minor undertakes an excessive obligation as compared to his patrimonial circumstances, to the advantages he may obtain from the contract or to his global circumstances" [art. 1.221 par. (3) NCC]. According to the Civil Code of Québec, "Elle (la lésion – n.n.) peut aussi résulter, lorsqu'un mineur ou un majeur protégé est en cause, d'une obligation estimée excessive eu égard à la situation patrimoniale de la personne, aux avantages qu'elle retire du contrat et à l'ensemble des circonstances (art. 1.406 par. 2 C.C. of Q.).

[7] C.S. Ricu ş.a., *Noul Cod civil. Comentarii, doctrină, jurisprudență* (The New Civil Code. Comments, Doctrine, Jurisprudence), Bucharest: Hamangiu Publishing House, p. 483.

[8] Case Drouin c. Lepage, in Collection de droit, *op. cit.*, p. 47.

[9] Case of Gareau auto Inc. v. Banque canadienne impériale de commerce, idem.

[10] Art. 1.249 par. (2) NCC. Relative nullity may be claimed as action provided it meets the time of prescription set by law. Nevertheless, the party being requested to execute the contract may oppose at any time the relative nullity of the contract, even when the time of prescription concerning the right of action for annulment has lapsed.

[11] Relative nullity may be claimed only by the party whose interest is protected by the violated legal provision; relative nullity cannot be claimed by default by a legal court; a cancellable contract is subject to confirmation (for this purpose, see the provisions of art. 1.248 NCC).

[12] The conditions are taken over from the Italian Civil code, art. 1.448 par. 2 and 3: "L'azione non è ammissibile se la lesione non eccede la metà del valore che la prestazione eseguita o promessa dalla parte danneggiata aveva al tempo del contratto. La lesione deve perdurare fino al tempo in cui la domanda è proposta".

[13] In our opinion, the solution was taken over accurately from art. 1.408 C.C. of Q.

[14] It is important to recall the provisions of art. 1.213 NCC, which we elaborated on when we dealt with error: *"(1) If one party is entitled to claim the rescission of a contract on grounds of error but, at the same time, the other party states it intends to execute or executes the contract as it was understood by the party entitled to claim rescission, such contract is deemed to have been concluded as understood by the latter party. (2) In this case, after being informed on the manner the party entitled to claim rescission understood the contract and before such party obtained rescission, the other party, shall, no later than 3 months from the day of notification or the day of communication of suit, declare it agrees with the execution or executes the contract without delay, as it was understood by the*

party in error. (3) If such statement was made and communicated to the party in error within the time span set in par. (2) or if the contract was executed, the right of obtaining rescission is terminated and the notification provided by par. (2) is considered to bear no effects".

[15] In terms of lesion, a person of full age cannot carry out an action in rescission (art. 1.165 Civil Code of 1864).

[16] An underage person may carry out an action in rescission for simple lesion against any agreement (art. 1.157 Civil Code of 1864).

The Insolvency Procedure Based on a Debt Repayment Plan, According to the Provisions of Law no. 151/2015 and the Methodological Norms

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Abstract

An element of absolute and long-awaited novelty, Law no. 151/2015 on the insolvency procedure of natural persons has the natural person in the focus, who does not carry out commercial activities, in particular, the over-indebted consumer but with good faith.

Law no. 151/21015 is not only a normative act of novelty in the national legislation, but also a normative act which can no longer be lacking in view of the European legislative context and the insolvency regulations.

Even if it has given rise to a whole series of criticisms, the insolvency law of natural persons is an important step towards a reform of the legislative system on the possibilities for recovery made available to the debtor, the over-indebted natural person in good faith.

Let's not forget that in the case of the procedure for professionals it took a long time for the law to reach its current form. Judicial practice is the main promoter of changes in legal matters and, at the same time, the adaptation of the normative act to practical situations, in the application of the law.

Keywords: insolvency, debtor, natural person, good faith, consumer, creditor, insolvency committee, insolvency proceedings, debt repayment plan.

1 The Request of the Debtor to Open the Insolvency Procedure on the Basis of a Debt Repayment Plan

The first insolvency procedure governed by Law no. 151/2015 [1] is the insolvency procedure based on a debt repayment plan, regulated in Chapter III of Law no. 151/2015 (Articles 13-43).

Provisions regulating this form of procedure are also found in the Methodological Norms for the application of Law no. 151/2015 [2] which governs this procedure in the first three sections (art. 3-26) of Chapter II *Rules on the administrative procedure on the basis of a debt repayment plan.*

Unlike the provisions of Law no. 85/2014 [3], the law of professionals, the opening of the insolvency procedure on the basis of a debt repayment plan may be requested only by the debtor. Thus, creditors or other institutions are not in a position to request the opening of proceedings. Moreover, in the procedure regulated by Law no. 151/2015, the debtor has the power to request the opening of the insolvency procedure on the basis of a debt repayment plan, which is not an obligation.

According to the provisions of Law no. 151/2015, the individual debtor shall submit the application for opening the insolvency procedure on the basis of a debt repayment plan to the insolvency panel in whose constituency he has his domicile, residence or habitual residence at least 6 months prior to the filing of the application. The request to open the proceedings may also be made by both spouses, and the procedure will be common to them, with only one reimbursement plan or, where appropriate, two correlated reimbursement plans.

Independently of the applicable matrimonial regime [4], if the spouses also have joint goods or obligations or are co-debtors of the same obligation, the request to open the insolvency proceedings may be filed by the debtor only with the consent of the other spouse. [5] The same provisions apply to the fiancée or the person with whom the debtor is living together if they have property acquired in co-ownership or are the co-debtors of the same obligation.

According to art. 3 point 17 of the Law no. 151/2015, the debt-reimbursement insolvency procedure is the collective, egalitarian and concurrent insolvency procedure – which applies to the natural person debtor in good faith in order to restore his financial situation, to adequately manage income and expenses in order to cover the liability as much as possible, through a debt repayment plan followed by the release of residual debt.

From the analysis of this legal definition, it is possible to deduce the character of this form of insolvency procedure for individuals: it is a concurrent, collective and egalitarian procedure; this applies only to the natural person debtor in good faith; the purpose of this procedure is to redress the financial situation of the natural person debtor in good faith; this procedure seeks to cover as much as possible the debtor's liability through a debt repayment plan; the debtor has the possibility of being discharged by residual debts at the end of the procedure; is an administrative procedure, given that the decision-making, control and supervisory powers belong to the insolvency commission.

As a result, according to the provisions of Law no. 151/2015 if the debtor is insolvent and has no cash flow for the payment of outstanding debts, and the payout period has been exceeded by more than 90 days but its financial situation is not irreversibly compromised, he may ask the insolvency panel to open the insolvency procedure on the basis of a debt repayment plan.

At least 30 days prior to the date of filing the application, the debtor will notify his/her intention to request the opening of the procedure to any known creditor by any means of communication that confirms receipt.

The application for the opening of the insolvency proceedings is a standard form to be filed by the debtor within the County Commission for the Protection of Consumers at the insolvency commission at the territorial level in whose constituency his usual domicile or residence for at least 6 months prior to filing the application for insolvency proceedings. The standard application form is approved by ruling of the chairman of the insolvency committee at central level and must be made available free of charge to the insolvency boards as well as on-line on the website of the Central Insolvency Commission.

With the submission of the form, the debtor must attach all other necessary documents specified in the standard form [6]: the reasons which led to insolvency; creditor identification data, value and type of claim: Certain or conditional claim, mature or non-matched, showing the amount and, if applicable, the right or preference; legal actions against the debtor's assets, including forced execution procedures/applied safeguards; extrajudicial renegotiation of certain debts, civil and professional status; the amount of revenue earned over a period of 3 years prior to the submission of the application, as well as the expected revenue changes over the next 3 years; the goods held by the debtor; bank accounts; amounts to be recovered from bad payers; free of charge papers, as well as transactions of more than 10 minimum economical salaries concluded in the last 3 years prior to the application; the names of the persons to whom the debtor normally provides maintenance and the title with which it is performed; disputes in progress or finalized in which the debtor is or was a party that might affect in any way the patrimony of the debtor; the existence of convictions for tax evasion, forgery or intentional crime against patrimony through lack of confidence; the fact that it has not benefited from a release of residual debt in the last 5 years preceding the filing of the application, namely that it has not been the subject of insolvency proceedings on the basis of a debt repayment or liquidation plan which has been closed for reasons attributable to him/her during the last 5 years prior to the submission of the application; the name of the companies to which the debtor had the status of sole associate, manager or associate in the last 2 years prior to the filing of the application and the holdings held; the status of authorized individual, holder of an individual enterprise or member of a family enterprise held in the last 2 years prior to the filing of the application.

At the request of the debtor, the documents stipulated in art. 13 par. (6): Evidence of the professional situation of the debtor who is employed or who carries out a revenue-producing activity or, as the case may be, documents proving his/her lack of/ability to work; and if he is unemployed, proof that he was

not dismissed for imputable reasons and that he has taken all the specific steps of a diligent person to get a job, documents stating the earnings obtained during a period of 3 years prior to the filing of the application, as well as an indication of the expected changes in income over the next 3 years, the tax returns for the last 3 years prior to the application, an extract from the criminal record and the current tax record, a full report from the Credit Bureau issued no more than 30 days before the date of the application, and a proposal for a debt repayment plan containing at least the amounts the borrower believes will be able to pay periodically to its creditors.

2 The Admittance/Rejection of the Application by the Insolvency Board. The Appeal Against the Ruling of the Insolvency Panel

Upon filing the application, the Territorial Insolvency Commission will within 30 days verify its own territorial jurisdiction, analyze the claim and the supporting documents, and listen to the debtor and inform him about the effects of the procedure.

Following the examination of the application, the Territorial Insolvency Commission will issue a ruling to accept the application in principle or a ruling to reject it and/or to ascertain that the debtor's financial situation is irreparably compromised and only after obtaining the agreement, it will notify the court to initiate the insolvency proceedings by winding up the assets if the debtor has traceable goods and/or income.

The Insolvency Commission will reject the application for the opening of the administrative procedure if the debtor has valuable assets, the price of which can cover all receivables, or the amount of unpaid debts is lower than the threshold of 15 salaries on minimum wage [7].

If the application for the opening of insolvency proceedings on the basis of a debt repayment plan is admitted in principle, the ruling will be communicated to the debtor, the known creditors and the administrator of the designated procedure, who is to present to the committee within the time limit 3 days after the communication, to take over the file. The ruling shall also be published immediately in the Insolvency Proceedings Bulletin – the section "Debtors – natural persons with obligations not arising from the operation of an enterprise".

Within 7 days from the date of communication of the ruling, the creditors or, as the case may be, the debtor may appeal to the competent court with an appeal. The appeal suspends the execution of the ruling of the insolvency panel. The sentence is not enforceable and may be appealed against within seven days of communication, which will be judged by the court, urgently, and above all.

If the appeal against the ruling to reject the application to open the insolvency proceedings is admitted, the court also decides to accept the debtor's application in principle and sends the file to the insolvency panel. The insolvency Commission, receiving the file, shall immediately appoint by ruling an

administrator of the procedure and shall make the communication and publication of the ruling to admit in principle the debtor's application and the ruling to appoint the administrator of the procedure.

At the date of the admission ruling, in principle, the application for the opening of the insolvency procedure on the basis of a debt repayment plan, the lawful enforcement of the forced execution initiated against the debtor's property is temporarily suspended, for a period of three months, with the possibility of extension by the court for a further three months if, in the absence of this measure, the debtor's financial situation would become irreparably compromised, and there was a clear risk that the debt repayment plan could not be achieved. The ruling shall be immediately communicated to the bailiff.

3 The First Steps of the Administrator of the Procedure

After taking over the file, the administrator of the procedure will notify the creditors of his appointment by requesting information on the claim and the type of claim against the debtor's assets, an assessment of the asset against a preference if the lender has such an assessment, also estimating the restructuring measures for the claim they could accept. The notification will be published in the Insolvency Proceedings Bulletin.

Within 30 days of the publication of the notice in the Insolvency Proceedings Bulletin, creditors shall provide the administrator of the procedure with information on the amount and type of claim, an assessment of the good of a preferential claim if the lender has such an assessment, also estimating the restructuring measures for the claim they could accept.

Within 60 days of the publication of the notice in the Insolvency Proceedings Bulletin, the administrator of the procedure will draw up the preliminary debt table, which he will notify to the creditors and the debtor. The preliminary debt table will include all outstanding or non-matched debts, whether conditional or disputable, incurred before the date of the opening of the procedure, recognized by the debtor and/or accepted by the administrator of the procedure following their verification. Within 7 days of the date of communication of the claim table, it may be appealed against by the creditors or the debtor. In the absence of appeals, the preliminary table becomes a final table of debts, the debtor and the creditors being notified of this, the administrator of the procedure being obliged to lodge with the insolvency board.

4 The Debt Repayment Plan. The Elaboration, Conciliation, Voting and Confirmation of the Plan. The Suspension by Law. The Modification of the Plan

Within 30 days of the notification of the creditors and the debtor regarding the preliminary debt table that remains as a final table of claims as a consequence of its non-contestation in court or as a result of a final settlement of the complaints, the debtor and the administrator of the proceedings will develop a debt repayment plan.

The debt repayment plan should be designed in such a way that the coverage ratio of the claims is higher than the cover amount that could be obtained by the creditors in the insolvency proceedings by liquidation of assets and also it should be higher than the value of the debtor's tradable assets, represented as a percentage of the debtor's total value of the tradable assets and income.

The execution time of the plan is no longer than 5 years from the date of the final ruling to initiate the insolvency proceedings on the basis of a debt repayment plan and the debtor and its creditors may also foresee the possibility of extending the execution by up to 12 months, under the conditions set out in the plan.

The plan, together with an assessment made by the insolvency committee, regarding its feasibility, will be notified to the known creditors.

The administrator of the procedure will analyze the debtor's housing situation and propose measures for family housing during the proceedings. If the reimbursement plan provided for the capitalization of the dwelling, the debtor could stay in the building for a maximum of 6 months after the sale, having the obligation to pay a rent in the amount set by the insolvency commission. After the asset has been acquired, the debtor has a preferential right to the conclusion of a tenancy agreement or part thereof, at a rate of rent determined under market conditions.

In order to reach an agreement on the reimbursement plan, the administrator of the procedure will invite the creditors and the debtor to conciliation within 30 days of the notification of the creditors. Conciliation meetings will also be attended by the debtor and the creditors, and the duration of the conciliation process may not exceed 60 days from the date of the invitation, unless the insolvency committee extends the deadline, for good reasons, for a further 30 days. Conciliation sessions are usually held at the Administrator's office and, in certain situations, may take place in other places agreed by the administrator, debtor and creditors.

According to art. 28 par. (1) of the Law no. 151/2015, the plan will be approved if creditors, representing at least 55% of the total amount of claims and 30% of the value of preference claims, vote in favor of it. The majority provided by the law will not be deemed to have been met if it was not carried out without the vote of the creditors related to the debtor. Creditors who have been notified and who have not voted shall be deemed to have voted in favor of them. The

record of the vote, drawn up by the administrator of the procedure, shall be filed with the insolvency board within 3 days from the date of the vote.

If the reimbursement plan is approved by the creditors, the insolvency board will find by ruling the opening of the insolvency procedure on the basis of a debt repayment plan. The ruling shall be communicated to the debtor, the creditors and the administrator of the procedure and shall be published immediately in the Insolvency Proceedings Bulletin – the section entitled "Debtors – natural persons with obligations not arising from the operation of an enterprise". If the repayment plan is not approved by the creditors, the debtor may request the court either to confirm the plan or to open the court proceedings for insolvency by liquidating assets. Within 7 days from the date of the communication of the ruling to initiate the procedure, it may be appealed against by the creditors who voted against the plan by the competent court.

For the insolvency court to be able to confirm the reimbursement plan, it is necessary to cumulate more than one condition, namely that the debtor is in insolvency, without his financial situation being irreparably compromised and not being found in one of the cases in which he cannot benefit from the procedures provided by the Law no. 151/2015; the administrator of the procedure has retained in the non-approval of the plan that the measures proposed in the repayment plan are equitable to the creditor and achievable by the debtor; the repayment plan has obtained the favorable vote of the claim holders representing at least the majority of the total amount of the claims; it must be held that the opposition of one of the creditors with the agreement of which the majority could be reached was based solely on the satisfaction of the percentage of its claim and other unrelated creditors, representing at least 30% of the total receivables, expressed agreement on the proposed reimbursement plan; the debt repayment ratio should be higher than what could be obtained by creditors in the insolvency proceedings through asset liquidation, but not less than 50% of the total amount of receivables, and higher than the percentage represented by the value the trailing assets of the debtor in relation to the total value of the debtor's goods and income.

The court's ruling on the application for confirmation of the insolvency plan is communicated to the debtor and the creditors, and within 7 days of the communication, it may be appealed to the court, which is required to resolve the request for an emergency appeal and priority.

If the plan has been confirmed, the court will communicate ex officio the final ruling and the plan confirmed to the insolvency committee for the purpose of conducting the insolvency administrative procedure. The Insolvency Commission has the obligation to communicate the final judgment to the debtor, the creditors and the administrator of the procedure. Moreover, the final court ruling will be published immediately in the Insolvency Proceedings Bulletin – the section "Debtors – natural persons with obligations not arising from the operation of an enterprise".

If the plan has not been approved and the debtor has not submitted a request for confirmation of the plan within the time limit set by the law, the insolvency panel will issue a ruling to discontinue the application for the opening of the

procedure based on the debt repayment plan. And, if the plan has not been confirmed, the court will automatically announce the final court ruling to the insolvency commission, which, taking notice of it, will issue a ruling to deal with the debtor's request. The ruling to notify the insolvency commission will be communicated to the debtor and the creditors and will be published in the Insolvency Proceedings Bulletin – the section "Debtors – natural persons with obligations not arising from the operation of an enterprise". It can be challenged by the debtor only for reasons of illegality. On the date of the final ruling to suspend the insolvency commission, the term administrator of the procedure shall also cease.

From the date of the approval of the repayment plan by the creditors, all enforcement measures for the settlement of claims on the debtor's assets are lawfully suspended.

Suspension shall operate as appropriate: until the final ruling on the release of debt is settled; until the closure, for reasons attributable to the debtor, of the insolvency procedure based on a reimbursement plan; until the closure of the insolvency proceeding through the liquidation of assets, if all the creditors express their consent to enter the insolvency procedure by liquidation of assets, under the conditions of art. 43 par. (6) [8]. Legal enforcement measures against co-debtors and/or third-party guarantors are not subject to lawful suspension.

From the date of the final maturity of the claim table and until the final ruling on the application for debt relief, the interests, penalties, late payment increases and any other such accessories of the payment obligation are legally suspended from the debtor, except for receivables from preferential cases whose interest and other accessories are calculated according to the documents from which the claim arises, up to the value of the property of the preferential cause. The limitation of the right of creditors to demand the forced execution of their claims against the debtor is also suspended.

In the event of non-confirmation of the debt repayment schedule, the suspension of interest, penalties, late payment increases and any other such accessories of the payment obligation do not operate and the prescription of creditors' right to demand forced execution of their claims against the debtor continues to run from the date of the final ruling that the plan was rejected.

The debt repayment plan establishes the status of the contracts in progress, these being considered as maintained, art. 1417 of the Civil Code is not applicable. Any contractual clauses to terminate the contracts in progress, to cancel the benefit of the time limit or to declare the anticipated exigibility due to the opening of the procedure are null and void.

If a significant change in the income or value of the debtor's assets occurs during the debt repayment schedule, the administrator of the procedure, the debtor or one or more creditors may file an application to the insolvency panel to modify the debt repayment plan. The request made by the administrator of the procedure and/or the debtor must be accompanied by any documents and information showing that the changes that occurred in the debtor's financial situation are such as to justify a modification of the debt repayment plan, and by a proposal to amend

it. If the request for a modification of the plan is made by the creditor, the commission will check the existence of the notified changes, requesting in this respect also the opinion of the administrator of the procedure. For the purpose of settling the claim, the insolvency panel may request additional information from the debtor and/or administrator of the procedure. Within 15 days of the date of filing the application, the insolvency panel either accepts the request for amendment, notifying the debtor and the administrator of the procedure about the need to draft a proposal to modify the plan, or reasonably rejects the request, in which case the ruling is communicated only to the person who filed it.

Should the insolvency commission find ex officio, as a result of the biannual audits of the public registers carried out, or at the request of one or more creditors, following the analysis of the situations or information received from the debtor, that in the income or value his assets have changed significantly to justify a change to the plan, he will notify the debtor and the administrator of the procedure of the need to prepare a proposal to amend the debt repayment plan as well as the creditor/creditor if the application a modification of the plan was made by them.

The proposal to amend the debt repayment plan must be drafted by the debtor, together with the administrator of the procedure, within 30 days of notification, be notified to creditors and approved by them under the same conditions as the original plan. If the proposed amendment modifies the duration of the plan, it may not exceed a period of up to 12 months.

5 The Closing of Insolvency Proceedings

If the debt repayment plan was executed, the insolvency panel, notified by the administrator of the final report, uncontested or definitive, as the case may be, will observe the fulfillment of the measures and the payment of the obligations according to the terms of the plan and will order the closure of the insolvency procedure of the debt repayment plan, by ruling, issued within 30 days of receipt of the final report. The ruling to close the insolvency procedure on the basis of a debt repayment plan will be published immediately in the Insolvency Proceedings Bulletin – the section "Debtors – natural persons with obligations not arising from the operation of an enterprise".

If, for reasons beyond the control of the debtor, the plan can no longer be executed, the debtor and/or the administrator of the proceeding may address the insolvency panel a request to close the insolvency proceedings on the basis of a reimbursement plan and to open the insolvency proceedings by liquidation of assets. If they find that the plan can no longer be executed, the insolvency panel will submit the debtor's application to the competent court. Creditors may request the opening of insolvency proceedings by liquidation of assets if, for reasons not imputable to the debtor, the payments provided for in the repayment plan have not been made at least 6 months after maturity. And, current creditors whose claims have not been paid out for reasons not imputable to the debtor for at least 90 days from maturity may require the opening of judicial insolvency proceedings by liquidation of assets. If it finds that the plan has not been fulfilled for reasons

not attributable to the debtor, the court will terminate the insolvency procedure on the basis of a reimbursement plan and will order the opening of the insolvency proceeding by liquidation of assets.

If the plan was not executed, it was executed late or partially, any creditor, the administrator of the procedure or the insolvency commission may immediately request the court to close the insolvency proceedings. By the same application, the creditor may also request the opening of insolvency proceedings by liquidation of assets. The same provisions apply to the current creditor if the claim has not been paid for at least 90 days from it becoming definitive.

If it finds that the plan has not been executed for reasons attributable to the debtor, the court will close the procedure and if all the creditors agree and make a request to that effect, it may order the opening of the insolvency proceeding by liquidation of assets.

The sentence passed by the court will be communicated to the debtor and creditors and may be appealed to the court within 7 days of communication. The final court judgment closing the insolvency proceeding on the basis of a reimbursement plan will be published immediately in the Insolvency Proceedings Bulletin – the Debtors – Individuals with Obligations not arising from the Operation of an Enterprise".

If the court considers as unfounded the request to close the insolvency plan on the basis of a reimbursement plan for non-execution of the plan, it will automatically send the final ruling to reject the application to the insolvency panel, which, taking note of it, takes, if necessary, the measures needed to continue the implementation of the plan.

6 Conclusions

The first of the three forms of the insolvency procedure applicable to natural persons, in the order regulated by the provisions of Law no. 151/2015 *is the insolvency-based debt repayment plan.* By simply checking the provisions of the law, it can be observed that the first principle provided in art. 2 (1) is to *give goodwill debtors a chance to recover their financial situation by means of a debt repayment plan.* Moreover, in art. 3 *Definitions*, the three procedures provided by law are defined in the order in which they are regulated by the law: *the insolvency procedure based on a debt repayment plan,* the insolvency procedure by asset liquidation and the simplified insolvency procedure.

The importance given by the legislator to this procedure is obvious, the procedure seeking to restore the financial situation of the goodwill debtor and to reintegrate it into the social and economic environment, and the coverage of the liability as much as possible.

The new regulation in Law no. 151/2015 gives priority to the financial recovery of the individual debtor, aiming at granting a second chance to all those who for improper reasons have reached a situation of financial over-allocation. It should also be noted that this procedure is a remedy in nature because it seeks the financial recovery of the debtor and the erasure of the claims entered in the table

when the insolvency procedure is closed which exceeds the coverage level agreed in the repayment plan.

REFERENCES

[1] Law no. 151/2015 on the insolvency procedure of natural persons, in force since January 1, 2018, was published in the Official Gazette. Nr. 464 of 26 June 2015 and comprises 93 articles.

[2] By H.G. no. 419/2017 the Methodological Norms for Application were approved, which were published in the Official Gazette. Part I no. 436 of 13 June 2017, and comprises 47 articles.

[3] Article 65 of Law no. 85/2014 provides as follows: "*The proceedings shall be commenced on the basis of an application lodged with the debtor by the debtor, by one or more creditors, or by the persons or institutions expressly provided for by law. The Financial Supervisory Authority shall file an application against the regulated entities and supervised by it, which, according to the data available, meet the criteria provided by the special legal provisions for initiating the procedure provided by the present law. "*

[4] According to art. 312 Civil Code., *"(1) Future spouses can choose as a matrimonial regime: the legal community, the separation of goods or the conventional community. (2) Regardless of the chosen matrimonial regime, the provisions of this section may not be derogated from, unless otherwise provided by law ".*

[5] Where one spouse (or both spouses) has contracted a bank credit but where the other spouse is a guarantor and the principal debtor or debtors did not pay the bank rates, the insolvency procedure based on a reimbursement plan of the debts may be accessed only with the express consent of the other spouse.

[6] Par. (5) of art. 13 of Law no. 151/2015.

[7] According to art. 3 Definitions pt. 24 of Law no. 151/2015: "The threshold value is the minimum *amount of debtors' due debts required to enable the application for the opening of insolvency proceedings on the basis of a debt repayment or insolvency proceeding through asset liquidation; this is 15 minimum wages."*

[8] According to art. 43 par. (6) of law no. 151/2015: "By noting the failure to fulfil the plan for reasons imputable to the debtor, the court closes the insolvency procedure on the basis of a reimbursement plan and, if all the creditors agree and file a request to that effect, they may order the opening of the insolvency proceeding by liquidation of assets."

The insolvency law of natural entities. Some aspects with regard to the detriments and benefits of the law

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Abstract

Romania finally has a law regulating the insolvency of individuals.

The stated purpose of the law is to assist debtors as individuals in good faith, over-indebted and over-burdened.

Law no. 151/2015[1] regulates three forms of proceedings, which apply to a debtor natural person in good faith, subject to certain conditions, and which, in certain situations, strictly regulated by law, may result in a discharge of residual liabilities.

Despite the fact that the stated purpose of the law is to support debtors in good faith, the bureaucratic procedure, gaps and inactions of the law, along with the lack of part of the law enforcement infrastructure, have led to an unusual situation, given the lack of recorded cases pending territorial commissions and courts.

Although it is a long-awaited law by the consumers, having a history of decades in other European countries, and not only, it is obvious that the law in its present form is not of interest and trust for over-indebted Romanian consumers.

As a result, since the law is largely inoperable, it is indisputable that it is necessary to amend the law in order to achieve the purpose for which it was created.

Apart from the fact that the law must be of interest to debtors, it must also provide confidence, both for debtors and creditors, to become a real social protection law.

Keywords: insolvency, debtor, natural person, insolvency based on debt repayment plan, insolvency proceeding through asset liquidation, simplified insolvency procedure, threshold value.

1 The emergence of Law no. 151/2015. An overview of consumer law

The economic crisis, the European Union legislation and the tendency at the level of the European Union to modernize the legislation on insolvency, the various proposals of the civil society, and in general the current socio-economic context, have also imposed a legal norm in Romania regulating the insolvency of the individual.

In this respect, several normative act drafts have been submitted to Parliament since 2009, the current normative act being based on a legislative initiative submitted in 2014 by a group of senators and deputies. The Explanatory Memorandum stated that it is necessary for Romanian citizens to have the same rights and duties as other EU citizens in declaring insolvency procedures for individuals. Thus, the intention of the project initiators was to align Romania's legislation with the European one in the field of insolvency of natural persons.

Although the text proposed for the public debate has suffered enough criticism, the Senate tacitly adopted the bill without amendments. Following the proposals from Members, various institutions and authorities involved and professional organizations, the bill has undergone several modifications by the Legal, Discipline and Immunities Committee of the Chamber of Deputies, in which a Subcommittee was established, with the participation of as experts of the Ministry of Justice, the National Bank of Romania, the National Union of Bailiffs, the National Union of Insolvency Practitioners, the Romanian Banking Association, the National Authority for Consumer Protection, the Foreign Investors' Council, the National Agency for Fiscal Administration, the Superior Council of Magistracy and, last but not least, consumer representative associations, with a view to formulating comments and proposals on the text of the draft law. Certain amendments were also dictated by the commitment to the International Monetary Fund to avoid adopting legislative initiatives: *"(24) ... We remain committed to sustaining financial stability by refraining from promoting legislative initiatives that undermine discipline in terms of credit"*[2]. Subsequently, the non-refusal clause has undergone certain changes.

Thus, the Letter of Intent signed by the Romanian authorities in Bucharest on March 5, 2014[3] provided at point 37: *"(37). Given that the maintenance of payment discipline among debtors significantly contributes to strengthening financial stability, we will make every effort to avoid adopting legislative initiatives on insolvency of individuals that would create moral hazard and which could generate frequent abuses by debtors, because it would undermine payment discipline."* That document was ratified by Law no. 89/2014 [4].

An important argument in adopting a law on consumer insolvency proceedings was also the fact that Council Regulation (EC) 1346/2000 on Insolvency Proceedings[5] also regulates natural persons. The normative act is directly applicable in Romania, and paragraph 9 of the Preamble states that *"this Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or a private individual"*.

Moreover, the Recommendation on a new approach to business failure and insolvency, adopted by the European Commission on 12 March 2014[6], invited the Member States of the European Union to implement the principles set by the Commission until the date of 14 March 2015. And paragraph 15 of the Recommendation states that: "*Although consumer over-indebtedness and bankruptcy are also not included in the scope of this Recommendation, Member States are invited to examine the possibility of applying these recommendations also to consumers as some of the principles pursued in this Recommendation may also be relevant to them*". The Romanian legislator also complied with these provisions and through Law no. 85/2014 on insolvency and insolvency prevention procedures.

The bill on insolvency of individuals with the amendments was voted in the plenum of the Chamber of Deputies on 20 May 2015 and the law was promulgated on 18 June 2015 and published in The Official Gazette of Romania no. 464 of June 26, 2015.

According to art. 93, the law was due to enter into force on 26 December 2015, ie 6 months from the date of its publication, but it had no implementing rules at that time.

Subsequently, through G.E.O. no. 61/2015[7], the date of entry into force of the law, provided in art. 93, first paragraph, was extended until 31 December 2016.

On 22 January 2016, Government Ruling no. 11/2016[8] was published in the Official Gazette of Romania, on the establishment of insolvency commissions at central and territorial levels provided by Law no. 151/2015. The Government Ruling provides for the establishment of insolvency commissions at central and territorial levels, as a stage preceding the implementation of Law no. 151/2015 on insolvency procedure of natural persons.

However, the insolvency law of individuals did not enter into force on 31.12.2016, so that through G.E.O. no. 98/2016[9], the application of the normative act was postponed until August 1 2017.

However, a further step has been taken, so that by G.R. no. 419/2017 the Methodological Norms for Application were approved, which were published in the Official Gazette of Romania. Part I no. 436 of June 13 2017, comprising 47 articles[10].

Subsequently, the law came into force again, so that in The official Gazette of Romania no. 614 of July 28, 2017, G.O. no. 6/2017[11], to extend the deadline for the entry into force of Law no. 151/2015: the entry into force of the first sentence of Article 93 was extended until January 1 2018, the date on which the law entered into force.

Law no. 151/2015, structured in 10 chapters and comprising 93 articles, regulates three forms of procedure applicable to individuals in good faith:

- The insolvency procedure based on a debt repayment plan (Articles 13-43);
- Insolvency proceedings through asset liquidation (Articles 46-64);
- Simplified insolvency procedure (Articles 65-70).

The first form of the procedure governed by the law, the insolvency procedure based on a debt repayment plan is an administrative procedure, regulated in Chapter III of the law - *"Administrative Procedure Based on a Debt Repayment Plan*", which includes a number of 31 of articles.

As a matter of absolute novelty for Romanian law, this procedure has given rise to a number of criticisms and comments, including the opinions that argue that the procedure will affect the free access to justice provided by art. 21 of the Constitution of Romania [12].

The Constitutional Court of Romania regulated this by means of Ruling no. 1 of 8 February 1994 and the procedure was also accepted in the case law of the European Court of Human Rights.

Thus, in the case of *Le Compte, Van Leuven şi De Meyere c. Belgiei* (1981)[13] The European Court of Human Rights has accepted that reasons of flexibility and efficiency that are fully compatible with the protection of human rights may justify prior interference by administrative or professional bodies or judicial bodies which do not fully meet the requirements imposed by Article 6 paragraph 1 of the ECHR.

However, in another case, *Albert şi Le Compte c. Belgiei* (1983), The Court established the following: "*in such circumstances, the Convention requires at least the application of one of the two systems: either the judicial bodies themselves are subject to the requirements of Article 6 (1) or do not meet these conditions but are subject to subsequent scrutiny by a judicial body with full jurisdiction and respects all the safeguards of Article 6 (1)."* Consequently, if an appeal against an administrative act is addressed, according to the law, to an administrative body, the provisions of Article 6 (1) are not violated, provided, however, that, in a final phase, there is the possibility of submitting the case to a court which meets the above conditions of the Convention.

According to the provisions of art. 17 par. (1), in the administrative procedure regulated by Law no. 151/2015, the debtor and the creditors may lodge complaints against the rulings of the insolvency commission, which are within the competence of the court in whose jurisdiction the debtor has his domicile, residence or usual residence at least 6 months before the date of the court's referral. The court's ruling is not enforceable and can be appealed by appeal, which is judged by the tribunal, urgently, and above all.

The administrative procedure is recognized at the level of the European Union, so that in Paragraph 20 of Regulation (EU) 848 of 2015 states the following: "*(20) Insolvency proceedings do not necessarily involve the intervention of a judicial authority. Therefore, the term 'court' in this Regulation should, in certain provisions, be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings. In order for this Regulation to apply, proceedings (comprising acts and formalities set down in law) should not only have to comply with the provisions of this Regulation, but they should also be officially recognised and legally effective in the Member State in which the insolvency proceedings are opened.".*

In Romanian legislation, the provisions regulating this form of procedure are also found in the Methodological Norms for the application of Law no. 151/2015, in the Chapter II *Rules on the administrative procedure on the basis of a debt repayment plan*, in the first 3 Sections, art. 3-26.

The insolvency procedure based on a debt repayment plan, like the other two forms, is a concurrent, collective and egalitarian procedure. Applying to the debtor a natural person in good faith, with a view to redressing his financial situation and adequately managing revenue and expenditure. This procedure also seeks to cover the liability as much as possible.

In order to achieve the proposed goal, the debtor and the administrator of the procedure will draw up a debt repayment plan, the duration of which shall be no more than 5 years from the date of the final ruling to open the procedure. The debtor and its creditors may also foresee the possibility of prolonging the execution by up to 12 months, under the conditions set out in the plan.

Upon completion of the plan approved under the law, the debtor may obtain the release of residual liabilities. Thus, as from the date of publication in the Bulletin of insolvency proceedings of the court order for debt relief, the debtor can no longer be subject to any prohibition or limitation of his rights related to insolvency.

The insolvency procedure based on a debt repayment plan is an administrative procedure that is under the supervision and control of the insolvency board. The court has jurisdiction to settle disputes that are not within the competence of the Territorial Committee, and in appeals.

The second form of procedure regulated by Law no. 151/2015 is the judicial procedure of insolvency by liquidation of assets, as defined by art. 3 point 18. And this form applies to the debtor, a natural person in good faith, being the same as the first, concurrent, collective and egalitarian procedure. Unlike the first procedure, which is an administrative procedure, this second form is a judicial procedure, with the court having jurisdiction to open the proceedings.

After the proceeds and/or receivables are capitalized, the good faith debtor may benefit from the deletion of part of the amounts due under the law.

If in the first form of proceedings only the debtor can formulate the request to open the procedure, in this second form, the claim may also be made by creditors in certain situations. Thus, if the repayment plan can not be executed for reasons beyond the debtor, the insolvency procedure by liquidation of assets may be opened at the request of any of the creditors. And if the plan was not completed for reasons attributable to the debtor, the procedure can only be opened at the request of all creditors.

The third form of procedure regulated by Law no. 151/2015 is the simplified insolvency procedure. According to the provisions of art. 3, point 19, the simplified insolvency procedure is applicable to the categories of debtors mentioned in the provisions of art. 65. Thus, the simplified insolvency procedure is designed as a social protection measure for certain categories of individuals in good faith who are in a special situation: those above the standard retirement age or have lost their full or at least half of the work capacity, do not have any traceable goods or

income and the total amount of the obligations is at most 10 minimum wages. The debtor's request for release of residual debts, together with the ruling of the insolvency board to terminate the application of the procedure, form the basis of the ruling on the issuance of residual debts issued by the court, provided that the conditions laid down by law are fulfilled. This procedure is also useful for creditors because it allows them to adjust their accounting status by passing their respective amounts to losses.

In order to achieve the goal stated by Law no. 151/2015 it is necessary for the procedures regulated by the law to be applied and supervised by the bodies empowered by this normative act. Thus, the provisions of art. 7 stipulate that the insolvency bodies are: the insolvency commission, the administrator of the procedure, the courts of law and the liquidator, who are obliged to ensure that the acts and operations provided for by law are carried out as a matter of course, as well as the fulfillment, under the law, of the rights and the obligations of the debtor and the creditors.

The bodies that apply the procedure are regulated by the legislator in the order in which they intervene during insolvency proceedings: the insolvency commission, the administrator of the procedure, the courts and the liquidator.

The first body applying the procedure is the insolvency committee, because if the debtor wishes to be subject to the administrative procedure on the basis of a debt repayment plan, he will file the application with the insolvency panel.

The central insolvency commission consists of one representative of each of the following institutions: the National Authority for Consumer Protection, the Ministry of Public Finance, the Ministry of Justice, the Ministry of Labor and Social Justice and the National Trade Register Office – the Bulletin of Insolvency Proceedings Directorate. It is supported in its work by a technical apparatus that functions as a department within the National Authority for Consumer Protection and is headed by a president.

According to art. 92 para. (6), the central insolvency panel shall develop the criteria for determining the reasonable standard of living and those for assessing the housing needs of debtors and their families.

In order to determine the criteria for determining the reasonable standard of living, the insolvency commission at central level will also include the following items:

- The value of the minimum monthly consumer basket established on the basis of information received from competent bodies, such as the National Institute of Statistics and / or the Institute for Quality of Life;
- Financial peculiarities, structure of the labor market;
- The minimum amount of professional tuition fees;
- The price of utilities, food and commodities;
- The composition and structure of the debtor's family by including the dependents of the debtor, the persons to whom the debtor provides

maintenance and the persons living with the debtor or contributing to the maintenance;

- The existence of special situations of health, physical integrity, disability, in the case of the debtor or the persons to whom he or she maintains or in the case of the person with whom he / she cohabits;
- Minimum expenses related to the operation and maintenance of an indispensable vehicle;
- Minimum expenses caused by raising, caring for and educating the child under the maintenance of the debtor or in respect of which the debtor provides maintenance, by reference to its various stages of development;
- Minimal requirements of a convenient home.

The insolvency commission at central level issues, by decision of the chairman, the general criteria for determining the reasonable standard of living and publishes them annually.

The territorial insolvency commission consists of representatives of the deconcentrated structures in the territory of the National Authority for Consumer Protection, the Ministry of Labor and Social Justice and the Ministry of Public Finance. Its works are prepared by a technical apparatus operating within the territorial structures of the National Authority for Consumer Protection and consisting of experts specialized in insolvency of natural persons.

The organization and functioning of the insolvency commission, at central and territorial level, are established by Government Ruling, at the proposal of the National Authority for Consumers Protection, through the Ministry of Economy.

According to the provisions of art. 9 of the Law no. 151/2015, the administrator of the procedure administers the insolvency procedure on the basis of a debt repayment plan, under the control of the insolvency commission.

The administrator of the procedure is appointed randomly by the insolvency board, by the decision to admit the application for the opening of proceedings in principle. The Insolvency Commission at territorial level designates and, if necessary, replaces the administrator of the procedure in the List of administrators and liquidators for the insolvency procedure of individuals, on a random basis. According to the provisions of art. 27 par. (2) of the methodological norms: "*In order to ensure the random designation and the replacement of the administrator of the procedure in the same way, the central insolvency panel makes the necessary efforts to develop and implement an IT application for this purpose".*

Claims/actions in insolvency proceedings through asset winding up, appeals against insolvency commission decisions and debt relief requests are within the jurisdiction of the court in whose jurisdiction the debtor has his or her domicile, residence, or habitual residence at least 6 months prior to the date of the court referral. The legal court invested with a request to open the insolvency proceedings remains competent to settle the case, irrespective of subsequent changes of domicile of the debtor.

The fourth organ that applies the procedure is the liquidator, who administers the insolvency procedure by liquidation of assets under the control of the court. The liquidator also performs supervisory duties for the post-trial insolvency period through the liquidation of assets under the control of the insolvency commission.

Both the liquidator and the administrator of the procedure are appointed by the court between insolvency practitioners, bailiffs, lawyers and notaries enrolled in the List of administrators and liquidators for insolvency proceedings of natural persons.

2 Some Issues Concerning the Detriments and Benefits of the Law

2.1 *The exclusion from the category of law subjects to liberal professions and, by implication, self-employed*

If Law no. 85/2014 applies to professionals, i.e. former commercial companies, current companies, plus the authorized natural persons, Law no. 151/2015 aims at establishing a collective procedure for the recovery of the financial situation of the debtor, a natural person in good faith – whether simple, private or consumer, so whose obligations do not arise from the exploitation of an enterprise within the meaning of Art. 3 of the Civil Code.[14].

It follows that professionals are excluded from the application of this law, whose insolvency is regulated by Law no. 85/2014[15], but also liberal professions, i.e. self-employed persons. They can not apply for insolvency proceedings, being expressly excluded from the scope of Law no. 85/2014 and are not covered by the law applicable to natural persons.

As a result, none of these normative acts protect the liberal professions.

In the practice of the courts that have faced an application for the opening of insolvency proceedings, promoted by a creditor against a self-employed debtor, it was correctly stated that "*according to art. 11 of Law no. 51/1995 republished, an individual law office is only a legal form of exercising a profession without legal personality, and the exercise of the lawyer's profession is incompatible with the direct exercise of material deeds of commerce. Consequently, such an individual law firm does not carry out an economic activity within the meaning of the provisions of Art. 1 of the Law no. 85/2006, but an activity of public interest, even if it involves a pecuniary component. Under no circumstances is the determining purpose of setting up an individual cabinet to be a profit, but to provide a specialized service...*"[16].

A law firm does not carry out an economic activity in the sense of the provisions of art. 3 of the Civil Code even if the activity involved also involves obtaining income from the collection of fees. The purpose of setting up an

individual cabinet is not to make a profit, but to provide a specialized service (eg law, notary, family medicine, etc.).

However, there are freelancers with a prolific activity and substantial income, VAT payers, but who record not only important incomes but also extremely high debt to the consolidated state budget.

As a result, a change in the consumer insolvency law would be useful, in the sense of including the self-employed in the category of law which Law no. 151/2015 addresses, so that this category also benefits from the protection of the law.

2.2 *The legal definition of "insolvency"*

The term insolvency has been legally established in Romanian law starting with Law no. 64/1995 regarding the procedure of judicial reorganization and bankruptcy, republished[17], modified by O.G. no. 38/2002[18], which stated that: "*Insolvency means the state of the debtor's patrimony, characterized by the apparent incapacity to pay the debts due with the amounts of money available"*. Prior to these regulations, the notion of "cessation of payments" was used [19].

According to the provisions of art. 3 point 12 of the Law no. 151/2015, insolvency is that state of patrimony that is characterized by insufficient funds available for payment of debts as they become due. The insolvency of the debtor is presumed when, after a period of 90 days from the due date, he has not paid his debt to one or more creditors. The assumption is relative.

And, according to the provisions of art. 5 point 29 of the Law no. 85/2014, insolvency is the state of the debtor's patrimony characterized by insufficient funds available for the payment of certain, liquid and due debts, as follows:

a) the insolvency of the debtor is presumed when the debtor, after 60 days from maturity, has not paid his debt to the creditor; the assumption is relative;
b) insolvency is imminent when it is proved that the debtor will not be able to pay the due debts incurred at maturity with the funds available at maturity date.

In order to define the term of insolvency, the Romanian legislator opted for the liquidity test, both in the case of insolvency of the professionals and in the case of consumer insolvency[20], but the two legal definitions are different. According to the doctrine, the definition of consumer insolvency had to be taken from the Law no. 85/2014[21].

2.3 *The Legal Definition of the "threshold value"*

The procedures provided by Law no. 151/2015 shall apply to a debtor, a natural person whose obligations do not result from the exploitation of an company within the meaning of Art. 3 Civil Code, but which must cumulatively fulfill several conditions, including the "threshold value" condition.

The threshold value is a condition that must be fulfilled by the debtor, a natural person in good faith, along with other conditions established by law in order to be able to adhere to a procedure governed by Law no. 151/2015. As a result, the debtor can not request the opening of the procedure if the total amount of its outstanding obligations is below the threshold of 15 minimum wages.

Unlike the provisions of art. 5 point 72 of the Law no. 85/2014, which stipulate that the threshold value is 40.000 lei, both for creditors and for debtors, within the provisions of art. 3 point 24 of the Law no. 151/2015, the legislator does not set a fixed amount from which the insolvency procedure may be requested. As a result, the threshold value is determinable, and not determined [22].

There are opinions in the doctrine that argue that in order to determine the amount of the threshold value, the gross minimum wage in Romania must be taken into account, this being a fixed one, which is periodically updated by the Government [23].

In the initial phase, the Consumer Insolvency Law was due to enter into force on 26 December 2015, and the country's gross minimum wage guaranteed in that period amounted to 1.050 lei[24]. As a result, in the event of the entry into force of the law, the threshold value at the end of 2015 would have amounted to 15.750 lei. Subsequently, the minimum guaranteed pay wage increased, so it currently amounts to 1.900 lei[25]. The threshold value calculated at the current minimum guaranteed salary is 28.500 lei.

It should be stressed that, in the simplified insolvency procedure, there is a maximum threshold of claims, which is 10 minimum wages as per the economy.

Regarding all these aspects, we consider that it is necessary to amend the provisions of art. 3 point 24, under the point of specifying that the threshold value is 15 gross minimum wages as per the economy.

3 Conclusions

Until recently, Romania had one of the most restrictive laws in dealing with over-indebtedness of individuals, with Romanian consumers not having the legal protection means brought by a normative act that regulates personal bankruptcy, and the cancellation of debts that can not be covered.

Law no. 151/2015 was long awaited, the moment of entry into force being delayed during the years 2015-2017 three times, so that the law came into force only in early 2018. After a difficult journey, even if the law came into force, it practically does not apply, since until the middle of 2018, about seven months after the entry into force of the law, a single insolvency procedure was opened by the liquidation of assets. Thus, on 20 June 2018, the National Trade Register Office announced that in the "*Insolvency Proceedings Bulletin*" in the section "*Debtors – natural persons with obligations not arising from the operation of an enterprise*", the first insolvency case to a natural person in Romania had been published, registered with the Constanţa Court. And with regard to the other two forms of the procedure, the insolvency procedure based on a reimbursement plan

and the simplified insolvency procedure, there is no information that any of these procedures would have been opened.

Of course, in this context, the question is justified: why has a social protection law expected by consumers generated in only a few months only one case in which an insolvency procedure was opened? Is not the law attractive? Or do individuals have no confidence in such a law? Regardless of the correct answer, it is beneficial, however, that the law has entered into force, even if it is obvious that the law needs to be amended, in order to transform the present law into a functional law that benefits individuals in good faith, their families and finally the entire Romanian society.

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[12] The Plenum of the Constitutional Court decided by Ruling no. 1 of 8 February 1994 on free access to justice for persons in defense of their legitimate rights, freedoms and interests, the following: "*1. The establishment of an administrative-judicial procedure is not contrary to the principle provided by art. 21 of the Constitution, regarding free access to justice, while the ruling of the administrative body may be appealed before a court. 2. Access to judicial structures and procedural means, including appeals, shall be subject to the rules of jurisdiction and the law of procedure laid down by law. 3. Free access to justice is achieved only in respect of the equality of citizens before the law and the public authorities, so that any exclusion that would have the significance of the violation of equal treatment of legal treatment is unconstitutional*".

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exploit an enterprise are considered to be professionals. (3) The exploitation of an enterprise is the systematic exercise by one or more persons of an organized activity consisting in the production, management or disposal of goods or in the provision of services, whether or not it has a lucrative purpose".

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wage shall be fixed at 1,050 lei per month, for a full working schedule of 168,667 hours per month in 2015, representing 6,225 lei / hour".

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Particularities regarding the beginning of the extinctive prescription in the light of the new regulations

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Abstract

Starting from the new vision of the lawmaker of the institution of extinctive prescription, the present article presents the particularities regarding the beginning of the extinctive prescription, emphasizing the observed novel aspects. Thus, after a general presentation of the institution of the extinctive prescription, on the one hand the general rule regarding the beginning of the prescription, and on the other hand the special rules in the matter will be subject to analysis.

Keywords: right of action in a material sense, extinctive prescription, legal rules of public order, legal rules of private order, the beginning of the extinctive prescription.

1 General considerations regarding the extinctive prescription

According to the new regulation, the legal rules regulating the institution of the extinctive prescription are no longer public order rules but rules of private order.

Thus, if in the old regulation [1] the extinctive prescription could be invoked also *ex officio,* at present, **the jurisdictional body can no longer apply the prescription period *ex officio*** [2], including in the hypotheses in which it were in the interest of the state and the administrative territorial units [3].

Moreover, by the provisions of art 2514 of the Civil Code, the moment up until which the statute of limitations can be opposed is established, by those in favor of which the prescription acts, their creditors, the co-debtors of a joint or indivisible obligation, the guarantors, as well as any other interested person.

Thus, the statute of limitation can be invoked, either by injunction, at the latest until the first day of the hearing. Thus, the acknowledgment of the right made in writing, as well as the constitution of guarantees, made after the fulfillment of the prescription term, by those in whose benefit the statute of limitation acted, is valid, the rules of discarding the statute of limitations becoming applicable in both situations.

The positive nature of the rules [4] in this subject, permits the parties to modify by express agreement, the moment in which the extinctive prescription begins, the suspension and interruption terms regarding the course of the statute of limitation, as well as the prescription terms, with the exception of the right to action which the parties cannot dispose of, as well as actions derived from contracts of adhesion, insurance, and those subject to Consumer protection law [5]. However, according to art. 2515 par. 2 of the Civil Code, the parties cannot declare an action not subject to the statute of limitations, if according to the law it is subject to it, and they cannot declare an action subject to the statute of limitations if it is not subject to it according to the law. Failure to observe this provision is sanctioned with absolute nullity [6]. At the same time, the conventions regarding the modification of the clauses of the statute of limitation are subject to the restrictions regulated by the provisions of art. 2515 par. (4) of the Civil Code [7].

Extinctive prescriptions are regulated in Book VI of Extinctive Prescription, loss of rights, and the calculation of terms, Title I – Extinctive prescriptions (art. 2500 2544) and Title III – The calculation of terms (art. 2551 2556 of the Civil Code).

The provisions regarding the extinctive prescription provided in other subjects of the Civil Code, as well as those provided for in other normative acts are complemented with the ones in the matter, from the aforementioned title. For the limitations begun and unfulfilled, before the entry into force of the new Civil Code, the legal provisions instituting them remain applicable [8].

1.1 *Notion*

The extinctive prescription is the extinction of the right to action in a material sense, not exercised within the prescription period prescribed by the law.

From a terminological point of view, the expression "extinctive prescription" is susceptible to two meanings:

- in the first sense by extinctive prescription is the civil law institution of that name, that is to say, all the rules of civil law governing the extinction of the right to action in a material sense, in the field of civil legal relations;
- in the second sense, it is the essence of it, i.e. the extinction of the right to action in a material sense, not exercised within the limitation period provided by the law/established by the parties. By right of action in a material sense is therefore meant the right to compel a person with the help of the public force to execute a certain action, to

comply with a certain legal situation or to bear any other civil sanction, as the case may be " [9].

The substantive right to action or the right to action in a material sense is distinct from the procedural right to action or the right to an action in a procedural sense, the latter representing the right of any person to make a claim for legal action. If the right to material action can be prescriptive, in the sense that its exercise is limited in time to the applicable limitation period, the right to action in a procedural sense is imprecise. In other words, a person can file a lawsuit, even if the statute of limitations period is met.

1.2 *The legal nature of the extinctive prescription*

Establishing the legal nature of the extinctive prescription means answering the question: For civil law what is the prescription of the right to action? In order to answer this question, it is necessary to determine what effects the extinctive prescription exposes on subjective law and correlative obligation.

As it results from its definition, the extinctive prescription extinguishes the right to action in a material sense, which means that the action brought by the active subject after the limitation period will be rejected as prescribed, which is equivalent to the refusal to contest the state's coercive force, requested by the holder of the subjective right whose action is subject to prescription.

For the passive subject, the limitation period means the inadmissibility of the obligation to execute the obligation by obtaining a court decision liable to be enforced. Thus, the passive subject has the right to defend itself by invoking, by way of exception, the extinctive prescription.

However, the fulfillment of the prescription period is not a barrier to the voluntary execution of the obligation by the debtor. Such execution is perfectly valid, and the return of execution is not allowed, which equates to the protection of subjective right only on the defensive path, of the objection of inadmissibility of the restitution.

In conclusion, the extinctive prescription does not extinguish either the civil subjective right or the correlative civil obligation. However, there is a change in the sense that, on the one hand, the subjective civil right can no longer be defended by means of legal action, but only on the defensive path of the exception, if the debtor has voluntarily executed his obligation, and on the other hand the civil correlative obligation can not be accomplished by way of enforcement, but the willing enforcement is allowed.

Thus, the extinctive prescription transforms the subjective civil right and the correlative obligation, from perfect (ensured both by action and by way of exception) into imperfect, assured only by the defensive way (during the defense) of the exception.

In conclusion, we can remember that, as far as its legal nature is concerned, the statute of limitations of the right to action is both a way of transforming the contents of the civil legal relationship and a sanction [10].

1.3 *The course of the extinctive prescription*

The extinctive prescription is marked by a statute of limitation, the time from which the limitation period begins to run and the moment when it is fulfilled. During the prescription, its course may be influenced by a cause of suspension, interruption, by the intervention of the renunciation of prescription and, last but not least, by the reopening of the statute of limitation period. So, to determine whether the right to material action has not been prescribed, the following steps should be taken:

- identifying the applicable prescription period;
- determining the moment when the extinctive prescription begins to run;
- verifying whether or not there are any grounds for suspending the prescription;
- verifying the existence or otherwise of interruption of the prescription;
- if the waiver of prescription intervenes;
- whether or not the reimbursement occurred within the limitation period;
- determining the moment of the limitation period according to the rules of its calculation provided by the legislator.

2 The beginning of extinctive prescription

Determining the time from which the statute of limitations begins is perhaps the most important step in analysing the extinctive prescription course. The Civil Code, through its regulations in this field, sets the general rule on the beginning of the extinctive prescription as well as a series of special rules. Applying these rules is subject to the principles: *specilia generalibus derogant*, respectively *generalia specialibus non derogant.*

The general rule on the beginning of prescription is regulated in art. 2523 of the Civil Code, According to which "the extinctive prescription begins from the date on which the holder of the right to action knew or, in the circumstances, had to know its birth". The general rule applies only if the law does not provide otherwise. Starting from this text on the one hand, and in view of the legislator's new vision of the institution of extinctive prescription, on the other hand, we observe that the general rule implies two alternative moments from which the statute of limitation may begin. A *subjective* main *moment*, consisting of the date on which the right holder was granted the right to action, and an *objective*, subsidiary *moment*, which is the date on which, as the case may be, the owner had to know, the birth of his right to action. Under the new regulations, the legislator adopted the principle of effective knowledge by the holder of the subjective right to the birth of his right to resort to the coercive force of the state if his right was violated [11].

Special rules on the start of prescription, regulated by the provisions of art. 2524 2531 of the Civil Code Are the following:

- in the case of the obligation *to give and to do*, the prescription starts to run from the date on which the obligation became enforceable [12];
- if the right is affected by a standstill period or a suspensive condition, the prescription period begins to run from the time of the deadline or, as the case may be, from the date of renouncing the benefit of the time limit set up in favor of the creditor or from the date when the condition was fulfilled [13];
- in the case of the right to action for the return of benefits as a result of the annulment or cancellation of the civil legal act due to a cause of ineffectiveness, the prescription period starts from the date of final stay of the decision which abolished the act or at the date of the order of resignation or termination has become irrevocable [14]. In the case of amicable nullity, the prescription begins to run from the date of the parties' agreement that they have declared it null and void;
- in the case of successive civil legal acts, the prescription period starts to run for each benefit in part from the date on which it became due. If the benefits are successive, they form a whole, the prescription starts to run from the date of the last unenforced benefit [15];
- in the case of contract insurance, the prescription period starts from the expiry of the time limits provided by law or set by the parties for the payment of the insurance premium, indemnity or compensation owed by the insurer [16];
- in the case of the right to action for damages caused by an unlawful act, prescription begins to run from the date when the injured person knew or ought to know both the damage and the person responsible for it [17], the rule also applies to the licit acts of legal entities [18]. In the case of this special rule regarding the beginning of the extinctive prescription, we observe that there are two moments according to which the beginning of the prescription is established, namely a *subjective moment*, namely the date when the injured person knew of the damage and the one who is responsible for it and an *objective moment*, namely the date on which the injured should have known the damage and the person responsible for it. The determination of the objective moment is made by the court according to circumstances and obviously only if the subjective moment can not be determined;
- in the case of the right to an action for annulment of the civil legal act [19], the prescription begins to run differently depending on the cause of relative nullity as follows:
- in the case of violence, from the date of its cessation;
- in the case of the fraud, from the date on which it was discovered;
- in the event of an error, as well as in the other cases of annulment, from the date on which the person entitled, his legal representative,

or the lawyer appointed by him to approve the documents, found the cause of annulment, not exceeding 18 months after the legal document was concluded. We note that for the causes of annullability, other than violence and fraud, there are two alternative moments according to which the beginning of the prescription is established, that is, the *subjective moment,* ie the date when the person entitled, his legal representative or his or her appointed representative to approve or authorize the acts has been aware of the case of the annulment and the *objective moment* marked by the 18 months since the conclusion of the legal act, which applies only if the subjective moment can not be determined. In the event that the action for annulment could be requested by third parties, the limitation period starts to run from the date on which the third party noticed the existence of the nullity. We note, therefore, that the third-party is no longer applying the objective deadline of 18 months from the date of conclusion of the legal act;

– in respect of the right of action for liability for apparent defects, in cases where the law or contract obliges the guarantee, the prescription shall begin to run from the date of the final delivery or receipt of the good or work or from the date of the lapse of time or from the date of fulfillment of the term stipulated by the law or established by the report of the vices, for the removal of the established vices by the debtor [20]. This rule also applies in the case of lack of agreed quality or quantitative deficiencies, but only if they could be discovered without special knowledge through a normal check [art. 2530 par. (2) of the Civil Code].
– in the case of hidden vices, the prescription of the right to action [21] begins to run either from the date of their discovery or from the date of the fulfillment of the warranty period.. The warranty term for hidden defects is 1 year in the case of an asset or a work done other than a construction, namely 3 years in the case of a building. For the execution of current works, the warranty terms are one month in case of an asset or a work executed, namely 3 months in the case of a construction [22]. These rules also apply in the case of lack of agreed quality or quantity deficiencies only if these deficiencies can not be discovered without special knowledge through a normal check [art. 2531 par. (3) of the Civil Code]. We note that in the case of this special rule on the beginning of the prescription, two alternative moments become incidental, according to which the material right to action is born, namely, a subjective moment represented by the date of discovering the vices (which finds its application whenever the vice has been discovered within the warranty period established by law) and an objective moment marked by the fulfillment of the term of guarantee established by the legislator, evidently if the vice was not discovered.

3 Conclusions

The institution of extinctive prescription has an important role in civil law, given the link between it and the subjective right the protection of which is ensured and by promoting legal action whenever there is a violation of it. Obviously, only extinctive prescriptive actions, that is, only those actions for which the legislator has established a term within which they can be exercised. Moreover, the New Civil Code delineates the prescription of the substantive right to action of the right to request enforcement, in this latter case the provisions of the Code of Civil Procedure becoming incidental, provisions which, to the extent that they are insufficient, will be supplemented by the regulations in the matter by the Civil Code. The point taken by the legislator in the regulation of this institution, different from the old regulation, by qualifying the legal norms regulating it as private, is also reflected in the novelty aspects raised in the approach to this study on the beginning of the extinctive prescription. The beginning of the extinctive prescription remains one of the most important moments concerning the prescription and hence the need to deepen all aspects of the general rule and special rules established by the legislator in this area.

REFERENCES

[1] Extinctive prescription matter was provided by: Decree no. 167/1958 on the extinctive prescription, published in The Official Bulletin No. 19 of 21 April 1958, currently abrogated by Law no. 71/2011 for the implementation of Law no. 287/2009 on Civil Code, Civil Code, Book III, Title XX, art. 1837-1911, Family Code, in Art. 21, art. 52, art. 55 and art. 60 as well as other normative acts.

[2] In this respect, Art. 2512 par. (2) of the Civil Code provides: "The competent jurisdiction body may not impose the prescription ex officio".

[3] In this respect art. 2512 par. (3) of the Civil Code provides: ″The provisions of this Article shall apply even if the invocation of the prescription period would be in the interest of the State or of its administrative-territorial units".

[4] In this respect, art. 2515 par. (3) of the Civil Code provides: "However, within the limits and under the conditions provided by law, parties with full exercise capacity may, by express agreement, modify the length of prescription periods or alter the prescription period by setting the beginning of the limitation or by modifying the legal grounds for suspension or interruption as appropriate".

[5] In this respects art. 2515 par. (5) of the Civil Code provides: "The provisions of par. (3) and (4) does not apply to the rights of action

that the parties may not have, nor to actions deriving from the adhesion, insurance and consumer protection laws”.
[6] In this respect art. 2525 par. (6) of the Civil Code
[7] Art. 2515 par. (4) of the Civil Code provides: "Prescription periods may be reduced or increased by express agreement of the parties, but without their new duration being less than one year and not more than 10 years, with the exception of 10-year or longer prescription periods, which may be prolonged to 20 years”.
[8] Art. 201 et seq. of Law no. 7/2011 for the implementation of Law no. 287/2009 on the Civil Code.
[9] Art. 2500 par. (2) of the Civil Code
[10] Boroi, G., Anghelescu, C.A. (2011). Civil law course, general part, Bucharest: Hamangiu Publishing House, p. 270.
[11] Țăndăreanu, N., The extinctive prescription in terms of the provisions of the new civil code - novelty aspects, p. 5/ http://www.inm-lex.ro/fisiere/d_1214/Prescriptia.pdf
[12] Art. 2524 par. (1) of the Civil Code provides: "Unless otherwise provided by law, in the case of contractual obligations to give or to make, prescription begins to run from the date when the obligation becomes due and the debtor must thus enforce it”.
[13] Art. 2524 par. (2) and (3) of the Civil Code provides: "(2) If the right is affected by a standstill period, the prescription period begins to run from the time or, as the case may be, from the date of renouncing the benefit of the period set exclusively for the creditor. (3) If the right is affected by a suspensive condition, the prescription begins to run from the date when the condition was fulfilled”.
[14] Art. 2525 of the Civil Code provides: "The prescription period of the right to action for the refund of of the benefits made on the basis of an annulable document or that could be dissolved for rescission or another cause of ineffectiveness begins to run from the date of final stay of the judgment annulling the act or, as the case may be, from the date on which the statement of opposition or termination has become irrevocable”.
[15] Art. 2526 of the Civil Code provides: "In the case of successive benefits, the prescription period for the right to action begins to run from the date on which each benefit becomes payable and if the benefits form a unitary one from the date on which the last benefit becomes due”.
[16] Art. 2526 of the Civil Code provides: "In the case of successive benefits, the prescription period for the right to action begins to run from the date on which each benefit becomes payable and if the benefits form a unitary one from the date on which the last benefit becomes due”.
[17] Art. 2528 par. (1) of the Civil Code provides: "The prescription of the right to action for damages caused by an unlawful act begins to run

from the date when the injured person knew or ought to have known both the damage and the person responsible for it".

[18] Art. 2528 par. (2) of the Civil Code provides: "The provisions par. (1) also apply in the case of an action for repayment based on unjust enrichment, undue payment or business management".

[19] Art. 2529 of the Civil Code provides: "(1) The prescription of the right to an action for the annulment of a legal act begins to run: a) in the case of violence, from the day when it ceased; b) in the case of fraud, from the day on which it was discovered; c) in the event of an error or in other cases of annulment, from the day when the entitled person, his legal representative or the lawyer authorized by him or her to approve or authorize the documents, has known the cause of the cancellation, but not later than 18 months from the day of the termination legal act. (2) In cases where the relative nullity can be invoked by a third person, the limitation begins to run, unless otherwise provided by law, from the date on which the third party found the cause of the nullity."

[20] Art. 2530 par. (1) of the Civil Code provides: "(1) Unless otherwise provided by law, the limitation of the right to action stemming from the transmission of goods or the execution of works, with apparent defects, in cases where the law or contract warrants and for such vices, begins to run from the date of the final handover or receipt of the good or work or, as the case may be, from the date of completion of the period prescribed by the law or established by means of a report of the deficiencies, for the removal of the established deficiencies by the debtor".

[21] Art. 2531 par. (1) of the Civil Code provides: "Unless otherwise provided by law, the prescription of the right to action for hidden vices begins to run: a) in the case of a good or a work done, other than a construction, one year after the date of the delivery or final receipt of the good or work, unless the vice was discovered earlier, in which case the prescription will begin to run from the date of discovery; b) in the case of a building, from the completion of 3 years from the date of the final delivery or reception, except if the vice was discovered earlier, the prescription will start to run from the discovery date".

[22] Art. 2531 par. (2) of the Civil Code provides: "For the execution of current works, the terms provided in par. (1) shall be one month in the case referred to in let. a) and 3 months respectively, in the case referred to in let. b) ".

The Prescription Right to Obtain Enforcement

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Abstract

The prescription right to obtain enforcement is an institution of major legal interest, since, as a result of its incidence, the creditor's right to obtain forced enforcement against the debtor is extinguished. If, in the plan of material law, we meet the prescription of the material right to an action that seeks to extinguish the right to obtain an enforceable title against the debtor, a new limitation period (the right to obtain forced execution of the debtor) to enforce the obligation in the executing title.

Keywords: prescription, enforcement, interruption, suspension, execution title.

1 Notion

The prescription right to enforce forced execution is the way of extinguishing the right to obtain, by constraint, the execution of an enforceable title due to its non-exercise within the limitation period [1].

The institution of the prescription right to obtain the forced execution regulated by art. 706 710 C. Proc. civil, is complied with, to the extent of its compatibility, with the provisions of art. 2500 2544 C. civ. regarding the extinctive prescription of the material right to action.

2 The Preliminary Principle of the Right to Obtain Forced Execution. The Term From Which the Prescription Term of the Right to Obtain a Strong Execution Begins

Article 706 (1) C. Proc. Civil Law establishes the 3 years general term of the right to enforce enforcement applicable to any enforceable title relating to debt or non-pecuniary obligations [2].

As far as the real rights are concerned, the right to obtain forced execution is prescribed within 10 years. These deadlines will find their applicability whenever there is no normative text of a special nature which establishes another limitation period (such as the one-month deadline provided for in Article 14 of GO no. 2/2001 on the regime legal of contraventions [3].

A special situation is the case of the eviction request, which is a personal real estate application, in which case, if it is formulated in the main case, regardless of whether the common law or the special procedure is based, the term of enforced enforcement is the general one for 3 years, and in the event of a claim for revocation, the right to enforce enforcement, respectively, possession and eviction, is prescribed within 10 years [4].

Regarding the moment when the limitation period of the right to obtain forced execution starts to run, according to art. 706 par. (2) C. proc. the limitation period begins to run from the date when the right to enforce forced execution arises. The natural question, however, is: when the right to obtain forced execution is born and the answer must be nuanced depending on the nature of the title on the basis of which forced:

a) if the enforceable title is a court or arbitration award, as a rule, the limitation period begins to run from the date on which the enforcement order is final [5]; by way of exception, in the case of enforceable judgments (as defined by Article 634 of the Civil Procedure Code), the right to obtain forced execution was born prior to the final lapse of the judgment;

b) if the enforceable title is not a court or arbitration award, the limitation period for the right to enforce enforcement shall arise from the time of its enactment or issue, or at a later date if it results from its content.

3 The Effects of Prescription

If, in the old regulation, the prescription was governed by public policy rules of absolute character, which make it possible for the court to invoke it ex officio at any time in the new law, the prescription of the material right to action has acquired a character of private order, so that it can be invoked only by the defendant by means of a grievance, or, in the absence of invocation, at the first term of the trial to which the parties are legally cited (article 2513 C. Civil). Therefore, the prescription must be invoked by the person concerned, which does not work which does not work outright.

Regarding the prescription of the right to enforce forced execution, it is obvious that this can not be invoked by the party by chance, but by the way of contesting the execution. Compared to the provisions of art. 707 par. (1) C. Proc. which stipulate that the prescription does not operate in full, but only at the request of the person concerned, the court can not reject the application for a declaration of enforceability on the basis of a title against which the prescription term is fulfilled [7], in the absence of a summoning of the parties, a breach of the parties' contradictory and of the rights of defense of the parties, which can and must conclude that the right to enforce enforcement is enforced in the context of the

procedure for the declaration of enforced enforcement, on this issue and on possible causes of interruption or suspension of.

As such, prescribing the right to enforce forced execution may be the subject of a challenge to enforcement where this can be put into the contradictory discussion of the parties. Equally, the executor can not reject an application based on such a title at the registration stage of the enforcement file, since both proceedings are non-contentious, and the limitation may be relied on only by the person in whose favor the application is made. Moreover, according to art. 2512 par. (3) C. civ., the prescription can not be invoked ex officio even if it would be for the benefit of the state or of its territorial administrative units. For these reasons, the intervening third party or creditor can not rely on the limitation period for enforcement, much less on the defendant's defense in connection with the validation of the attachment.

The exclusion of the limitation of the right to request enforcement is a substantive defense of the enforcement itself and can therefore be invoked only within the 15-day time limit within which an appeal may be lodged against the execution of the enforcement in accordance with art. 715 CPC. Subsequent invocation of this exception requires the judge of the case to find the delay in invoking this defense, with the consequence that it is not analyzed [9].

From the point of view of the effects of the prescribed prescription, the text of art. 707 par. (2) CPC provides that it extinguishes the right to enforce forced execution and any enforceable title loses its enforceable power, which is equivalent to the impossibility for the lender to use the right found by the executory title whose executive power is extinguished.

However, if the enforceable title is a court or arbitration award, if the right to obtain the defendant's obligation is impracticable or, if not, not prescribed, the creditor may obtain a new enforcement order by way of a new trial, without you could oppose the exception of the court of appeal. As a result, the new regulation eliminates the doctrinal and practical discussions in the old regulation on this aspect, giving the creditor the possibility to start a new process in order to obtain a new enforceable title against the debtor, that his right to be imprecise or even prescriptive is still within the limitation period of the right to obtain the conviction of the defendant, without thereby opposing the authority of the trial in its negative aspect (in the sense that it does not a new cause can be solved with the same parts, object and cause).

The interested party will rely on the positive aspect of the judgment given in the first case, namely that in the second case the application will not be rejected but, on the contrary, it will be admitted on the basis of the decision-making authority of the court or arbitral tribunals pronounced in the first trial. In this sense is Art. 707 par. (2) and II and CPC, which assumes that the negative aspect concerns exclusively the substance of the legal relations between the parties. Instead, as stated in the doctrine, in the new process, the debtor will be able to oppose the creditor's defense of the obligation, such as payment, legal compensation, etc. occurring after the final judgment or arbitration has ceased to exist [10].

4 The Cases in Which the Prescription is Suspended

Article 708 CPC stipulate the cases in which the prescription of the right to obtain forced execution of the debtor is suspended, as follows: In the cases established by the law for the suspension of the limitation period of the right to acquit the defendant. This case of suspension refers to art. 2532 C. civ., in relation to which the prescription does not start to flow, and if it started to flow, it is suspended:

- between husbands, how long does marriage last and are not separated in fact;
- between parents, guardians or curators and those with little or no exercise capacity or between curators and those they represent, for as long as the protection lasts and the accounts have not been given and approved;
- between any person who, by virtue of the law, a court decision or a legal act, manages the assets of others and those whose property is so administered, while the administration has not ceased and the accounts;
- in the case of a person with little or no capacity to practice, as long as he or she does not have a legal representative or protector, except where there is a contrary legal provision;
- in the time in which the debtor deliberately conceals the existence of the debt or the exigibility of the debt to the lender;
- for the duration of the negotiations conducted for the amicable settlement of misunderstandings between the parties, but only if they have been held in the last 6 months before the expiry of the limitation period;
- if the person entitled to the action must or may, according to law or contract, use a certain prior procedure, such as administrative complaint, reconciliation, or the like, for as long as he has failed and he did not have to know the outcome of the proceedings, but no more than three months after the commencement of the proceedings, if no other term was set by law or contract; – if the right holder or the person who violated it is part of the armed forces of Romania, while they are in a state of mobilization or war. Also considered are civilian persons in armed forces for reasons of service imposed by the needs of the war;
- if the person against whom the prescription is flowing or would run is prevented from a case of force majeure to interrupt, for as long as this obstruction has not ceased; force majeure, when temporary, is not a cause of suspension of prescription unless it occurs within the last 6 months before the expiry of prescription time;
- in other cases, provided by law.

At the same time, the prescription of the right to request the execution of an enforceable title is suspended for the situations stipulated in the art. 2533 C. civ., respectively:

- the prescription does not flow against the deceased's creditors in respect of the claims they have on the inheritance as long as it has not been accepted by the successors or, in the absence of acceptance, as long as no curator has been appointed to represent them;
- the prescription does not flow against the heirs of the deceased as long as they have not accepted the inheritance or have not been appointed a curator to represent them;
- the prescription does not flow against the heirs in respect of the claims they have on the inheritance from the date of the acceptance of the inheritance to the date of its liquidation.

While the suspension of enforced enforcement is provided by law or has been determined by the court or other competent jurisdiction. Forms the content of this case of suspension of the limitation prescription, as well as those which were ordered by the court on the occasion of the resolution of the contestation of execution, as well as those ordered by the bodies with jurisdictional activity. According to art. 708 par. (3) CPC, it is not included in this category the support to the creditor's request, under art. 701 par. (2) CPC.

As long as the debtor has no traceable or unreachable assets, or he/she can steer away his proceeds and goods from the pursuit. In such a situation, when the forced execution occurs, during the period when the debtor has no traceable goods or could not be recovered or he/she is evading the proceeds and goods from the prosecution, is incident the suspension of the limitation period of the right to request the execution forced. This suspension will last until the debtor's assets appear or the existing ones can be capitalized; if the creditor does not request the resumption of forced execution, although the debtor's assets have been discovered, the case of suspension ceases and the prescription continues the course. We appreciate that the application of these aspects in practice will pose evidence of probity, especially as regards proof of the date when the lender learns of the existence of other traceable goods or of the reasonable time that can run between that date and the resumption of forced execution.

After the cause which led to the suspension of the creditor's right to obtain the forced execution of the debtor, the prescription resumes its course, also counting the time elapsed before the suspension.

5 The Interruption of Prescription

Another cause which has the effect of preventing the creditor from exercising his right is the interruption of prescription, art. 709 C. proc. civil cases, listing the cases in which it occurs, namely: On the date on which the debtor, before or during the execution of the forced execution, fulfilled a voluntary act to execute the obligation laid down in the title or to otherwise acknowledge the denial. The text envisages, on the one hand, the fulfillment by the applicant of an

act of execution on his own initiative, on the other hand, the recognition of the debt entered in the enforcement order.

On the date the application was filed, accompanied by the enforceable title, even if it was addressed to an incompetent enforcement authority. As with the extinctive prescription regulated by Art. 2500 et seq. C. civ., The filing of the enforcement request together with the enforceable title to another county executor than that which would be competent in relation to the legal provisions has the effect of interrupting the prescription; this interruption is provisional and conditional upon the approval of the request and the continuation of the forced execution by the creditor, 709 par. (3) C. Proc. Civil Law expressly states that the prescription is not interrupted if the forced execution has been rejected.

On the date of submission of the request for intervention in the context of forced enforcement initiated by other creditors. Submission of the request for action by third party creditors constitutes another case of interruption of the limitation period which runs to its detriment; as in the above-mentioned case, the limitation period shall not be interrupted if the request for intervention is rejected, or canceled.

On the date of execution in the course of enforced execution of an act of execution. The enforcement actions that are carried out during the enforced execution (for example, the appointment of the administrator under the conditions of art. 831 par. (2) C. proc. civ.]. Although the Civil Procedure Code does not provide a definitive definition of a forced execution act, it is nevertheless to be considered as such an act any legal operation or document found by the bailiff or organs or persons performing tasks in this sense.

Such an interpretation is also justified by the legal nature of the institution of prescription, which constitutes a way of extinguishing a right to action by failing to do so within the time limit prescribed by law. Or, in order for the right not to be extinguished, an active conduct of its owner is necessary in order to achieve the right.

On the date of filing the application for resumption of execution, formulated in accordance with art. 705 C. proc. civ. In other cases provided by law. In the normative acts of special character, there may also be other cases in which the interruption of the prescription of the right to obtain forced execution occurs.

From the point of view of the effect of the cessation of the cause of interruption, a new limitation period begins to run, the time elapsed before the interruption is not taken into account.

6 Representation in the Terms of Prescription. Conditions. The Solution Procedure

If the creditor was prevented from executing the forced execution, he has the possibility to file a request for reimbursement within the limitation period of the

right to obtain forced execution of the debtor if the following conditions, which result from the article 710 CPC are fulfilled cumulatively:

- the limitation period was met – otherwise, such an application being rejected as irrelevant;
- the creditor was prevented from requesting enforcement on sound grounds – given that the legislator does not explain the phrase "sound reasons", they are left to the sovereign appreciation of the court before which this request was made, which, on a case-by-case basis, assess whether the plea relied on by the creditor entitles him to obtain a limitation within the limitation period;
- the request for repayment to be filed within 15 days from the date of the cessation of the impediment, exceeding this term attracting the sanction of the rejection of the application as late, so that it will no longer be investigated on the merits.

The request for repayment shall be filed with the competent enforcement instance within 15 days of the cessation of the impediment. The judgment of the application is made with the parties quoting, and the ruling is subject only to the appeal within 10 days from the date of its communication.

If the request for repayment is admitted, the creditor may file a request for enforced execution within 30 days from the date of the final decision.

As regards the active legal process, it is recognized only by the creditor (or the other persons acting on his behalf, namely the prosecutor in the cases provided for by law or the creditor's successors, for example), and the stamp duty related to the application will be that provided by art. 9 lit. c) from O.U.G. no. 80/2013, respectively 20 lei. The debtor will be quoted, however, in the context of this dispute, he will not be able to make representations as to the lawfulness of the future enforcement action, but only on the reasons for requesting a retrial.

Unlike the joint-law regulation of the institution of time-limitation, in the special case provided by art. 710 C. proc. civil, it is not necessary to file a request for enforced execution with the request for repayment in due time. This can be formulated within the special 30-day time limit stipulated by art. 710 par. (3) C. Proc. civil, which is calculated from the date of the final decision on the return of the court within the time-limit [11].

7 Conclusions

The limitation of the right to enforce forced execution has as its main effect, on the one hand, the extinction of the right to obtain forced execution of the debtor, on the other hand, the loss of the enforceable force of the enforceable title. However, nothing prevents the debtor from executing the obligation voluntarily after the limitation period, in which case he makes a valid payment, without having the possibility to subsequently claim the undue payment, since the prescription of the right to enforce forced execution ceases to obtain enforcement through coercion, but not the substantial right.

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[2] "By civil decision, the caller contestants were compelled to contradict the intimate with the release of the dryness (...) of the building. (...) We are in the presence of a three-year limitation period, as it is not a title issued in respect of real rights. The 10-year limitation period is a special term to the 3-year limitation period, which is the general one, the real rights being limited, so the interpretation of the provisions of art. 706 par. (1) second thesis C. proc. civil must be restrictive. The obligation to do so, namely, to release a space in common and forced joint ownership and to return that space to the original form, concerns aspects of the common use of space, and not matters of ownership, so that this obligation is an obligation in the field of real rights, but it is an obligation in respect of personal entitlements". [Trib. Timiş, s. I civ., dec. civ. nr. 1365/A of 14 November 2016, in Dinu, M., Stanciu, R. (2017). *Executarea silită in codul de procedură civilă. Comentariu pe articole* (Forced Execution in Civil Procedure Code. Comment on Articles), Bucharest: Hamangiu Publishing House, p. 272].

[3] M. Dinu, R. Stanciu, *op. cit.*, p. 271.

[4] Pop, P. (2016). *Despre termenul de prescripție a dreptului de a obține executarea silită în cazul acțiunii de evacuare* (About the limitation period of the right to obtain forced execution in case of evacuation action), in *Executarea silită. Dificultăți și soluții practice* (Forced Execution. Difficulties and Practical Solutions), vol. I (coord. Oprina, E.; Bozeşan, V.), Bucharest: Universul Juridic Publishing House, p. 381.

[5] The late drafting of the judgment is an exceptional situation and does not have any legal derogations in relation to the calculation of the limitation period for forced execution. In other words, as long as the provisions applied in this case make the decision of the High Court enforceable from the date of its pronouncement and there are no grounds for suspending and/or suspending the limitation between those expressly and legally stipulated, the first instance solution is legal and sound basis. Moreover, the delay of almost one year in the drafting did not significantly affect the rights of the creditor, who even had a two-year period to obtain the enforcement, voluntary or enforceable, of that judgment, but did not steps in this direction" (Bucharest Tribunal, IVth civ. sect., dec. nr. 2862/R of 24 September 2014, in Dinu, M., Stanciu, R., *op. cit.*, pp. 271-272).

[6] For example, the document drawn up by the notary public, which establishes a clear and liquid claim, at the date of its exigibility, becomes enforceable title.

[7] For more details, Zidaru, G.L. (coord. Oprina, E.; Bozeşan, V.) (2016). *Prescripția dreptului de a cere executarea silită* (Prescription of the Right to Demand Forced Execution)*,* in *Executarea silită. Dificultăți și soluții practice* (Forced Execution. Difficulties and Practical Solutions), vol. I, Bucharest: Universul Juridic Publishing House pp. 364-372.

[8] According to art. 2512 alin. (1) C. civ., "the prescription may be opposed only by the person for whom it flows, either personally or through a representative, and without being forced to produce any contrary title ".

[9] The decision of the meeting of the representatives of the C.A. Brasov on December 9, 2016.

[10] Boroi, G., Stancu, M. (2017). *Drept procesual civil,* ed. a 4-a, revizuită şi adăugită (Civil Procedure Law, 4th revised edition), Bucharest: Hamangiu Publishing House, p. 1115.

[11] Dinu, M., Stanciu, R., *op. cit.*, p. 284.

Nullity and Clauses Considered Unwritten

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Abstract

The current civil code gave nullity, as a specific sanction to civil legal acts, a broad regulation that helps shape a legal regime for each form of nullity in kind. At the same time, the contemporary legislator refers to what he calls "clauses considered unwritten". This present paper aims at attempting to establish a relationship between nullity and the clauses considered unwritten, starting from the legal provisions in force, the views expressed in the doctrine and the existing jurisprudential solutions in the analyzed subject matter.

Keywords: nullity, clauses considered unwritten, sanctions of the civil legal act.

1 Nullity – A Sanction Specific to Civil Law

In the specialty literature, nullity was defined as representing the sanction that deprives the legal act of the effects contrary to the legal norms enacted for its valid conclusion [1]. In a different opinion [2], the nullity of contract is seen as a civil law sanction which intervenes, unless otherwise provided by the law, after the moment of non-compliance with the validity requirements necessary by law for the valid conclusion of a contract, the concluded contract thus being devoid of the specific legal effects. The French doctrine refers to the nullity of the contract as a cause of its disappearance, the nullity being either the irregularity of the contract or the absence of its training conditions [3]. In any of the above-mentioned views, nullity is therefore a sanction that deprives the civil legal act of its effects on causes that exist at the time of conclusion of the act.

1.2 *Nullity – Forms and Applicable Legal Regime*

As a sanction specific to the civil legal act, nullity can be classified according to several criteria. Although the forms of nullity may be regarded as lacking importance, we consider that in relation to the purpose of this work to

establish a relationship between nullity and the clauses considered unwritten, it is also necessary to address this issue. Thus, according to the provisions of the current Civil Code, according to the nature of the protected interest, the nullity may be absolute or relative. Whilst the absolute nullity cases are regulated for the protection of a general interest, the causes of relative nullity protect particular, individual interests. Apart from the interests that are protected by establishing the grounds for nullity, the substantial differences between the two forms of nullity consist of the distinct legal regime, a legal regime that will be analyzed in this article.

Depending on the mode of legal consecration, there is a distinction between express nullity and virtual nullity. Nullity cases governed by the provisions of the Civil Code and related legislation represent express nullity, while virtual nullity occurs when, although the sanction of nullity is not expressly provided for, the contract must be terminated in order to achieve the purpose of the disregarded legal provision at the conclusion of the civil legal act. In other words, virtual nullity occurs if, although the unlawful legal rule does not expressly provide for the sanction of nullity, the contract is to be abolished in order to protect the violated rule.

Depending on the extent of the nullity, we distinguish between total nullity and partial nullity. Total nullity abolishes the entire act committed in violation of legal provisions, while partial nullity only affects a part of the contract, which is only partially omitted from the effects it would cause if the cause of invalidity had not occurred.

Depending on the condition of validity violated at the conclusion of the act, the nullity may be of substance or form, so that when a substantive condition is no longer fulfilled at the conclusion of the act, the nullity, relative or absolute, occurs, while non-compliance with the form required by law for the valid conclusion of an act, will draw the corrective sanction of nullity.

In any form it intervenes, the effects of nullity are the same, but before discussing the effects that nullity produces, the applicable legal regime must be considered. We have to make it clear that when we talk about the legal regime of nullity, we are to refer to relative nullity and absolute nullity, the other forms of nullity falling either in the sphere of absolute nullity or in the relative nullity.

According to art. 1247 of the Civil Code," (1) the contract concluded in breach of a legal provision established for the protection of a general interest is null and void. (2) absolute nullity may be invoked by any interested person, by way of action or by exception. (3) the court is obliged to invoke the absolute nullity of its own motion. (4) the contract of absolute nullity is not susceptible to confirmation except in the cases provided for by law". The aforementioned legal provision outlines the legal regime applicable to absolute nullity, in addition we will corroborate with art. 1249 par. (1) on the applicable extinctive prescription. Since the general interest is protected by imposing absolute nullity, the legal regime of this nullity is more flexible than the legal regime of relative nullity. As the above cited legal provision speaks, absolute nullity can be invoked both by way of action and by exceptional means by any interested person; the sphere of

the persons concerned is represented first of all by the parties to the act of nullity, those entitled to them, the persons outside the act, the court, under the conditions stipulated by the law of the prosecutor and other persons with authority [4]. As regards third parties, they can invoke the absolute nullity of the civil legal act insofar as the act was rendered opposable, since only when the opposing requirements are drawn up, the third party is protected by the law to justify the quality of the act hit by absolute nullity [3]. The provisions of art. 1247 The Civil Code establishes an obligation for the court to invoke of its own motion the absolute cause of nullity; that obligation obviously arises when the court is seised with an application having a subject-matter other than a finding of absolute nullity, such as an action for annulment, a rescission/termination action, etc. and the entitled party does not invoke in its defense the cause of absolute nullity; otherwise, the court has no incentive to automatically invoke the absolute nullity of the act. Regarding the term in which the action for the declaration of absolute nullity can be promoted, art. 1249 par. (1) The Civil Code states that "unless otherwise provided by law, absolute nullity may be invoked at any time, either by way of action or by way of exception"; in order to derogate from the rule of statutory limitations of the action for the declaration of absolute nullity, the law must expressly state the period to be observed. Also, with regard to absolute nullity, it should be noted that the legal provisions speak of the impossibility of confirming the null legal act, unless the law provides distinctly. Confirmation generally addresses the causes of relative nullity and only by exception the causes of absolute nullity, which is also supported by the specialty literature and the comments of the current Civil Code [5]. As far as we are concerned, we endorse the opinion expressed in the literature by referring also to the legal provisions, because art. 1247 par. (4) establishes that, in the matter of absolute nullity, confirmation may not lead to the validation of the act except to the extent that there are legal provisions to that effect. The reason for which the legislator institutes only as an exception the possibility of confirming an absolute null act is precisely the difference in the legal regime existing between absolute nullity and relative nullity, but also the nature of the interest protected by the regulation of the nullity, so that, seeing that through the causes of absolute nullity the general interest of society is protected, in principle the protection of this interest would be defeated by granting the parties the possibility to confirm, as a rule, the absolute nullity of the act.

Regarding the legal regime of relative nullity, art. 1248 The Civil Code establishes *"(1) the contract concluded in breach of a legal provision established for the protection of a private interest is null and void. (2) Relative nullity may be invoked only by the one whose interest is protected by the legal provision infringed. (3) the relative nullity cannot be invoked ex officio by the court. (4) the canceled contract is susceptible to confirmation"*. The provisions of the cited article must be considered together with the provisions of art. 1249 par. (2) on the applicable limitation on the relative nullity. Thus, the legal regime applicable to the relative nullity is different from the rules applying to absolute nullity in view of the interest protected by establishing the causes of relative nullity. Thus, with

regard to persons who can rely on relative nullity, the legal provisions establish that only the person whose interest has been injured by the violated legal provision may request the annulment of the act. In the sphere of persons whose interest is protected by the violated legal provision, we include first the contracting party directly concerned by the disregarded norm at the conclusion of the civil legal act, the legal representative of those lacking exercise capacity, the chirographic creditors through the oblique action, excepting the rights that are strictly personal of the debtor whose interests are protected by the rule violated at the conclusion of the legal act, the successors of the party protected by the disregarded rule at the conclusion of the act, provided that the right to action is not strictly personal or by a prosecutor under the conditions of Art. 46 par. (3) Civil Code. Regarding the legal regulation, we ask ourselves whether a third party to the annulment of a civil legal act can invoke a relative cause of nullity in the circumstances in which the act concluded would have violated an interest. We appreciate that although art. 1248 par. (2) uses the phrase "one whose interest has been injured" to the detriment of "the party whose interest has been injured" to be interpreted in the context of the particular interest protected by the establishment of the relative nullity cause. By supporting this reasoning and continuing to analyze the causes of relative nullity, we can only conclude with regard to the possibility of invoking the relative nullity of the act rather than the part whose interest is protected by the legal disposition that was. Cases of relative nullity cannot be invoked on ex officio by the court precisely in view of the sphere of the above-mentioned persons that can protect the private protected interest by establishing the causes of relative nullity. However, although the court is stopped by the provisions of Art. 1248 par. (3) to invoke ex officio the causes of relative nullity, we consider that no legal provision forbids the court to bring such a case to the parties, by virtue of the principle of the active role of the judge, and that the entitled party can invoke the applicable limitation period. The contract hit by a cause of relative nullity is susceptible to confirmation, the confirmation representing, as above, as a rule, a way of validating the annullable civil legal act. With regard to the issue of extinctive prescription, we must distinguish as relative nullity is invoked by way of action or by way of exception. By way of action, the invocation of the relative nullity is subject to the extinctive limitation prescribed by law for the incident nullity; by contrast, the party to whom the contract is requested may at any time invoke the relative nullity of the contract even after the limitation period for the right of action for annulment has expired. Regarding this rule, it should be pointed out that the law may also establish cases in which the action for annulment is subject to the limitation period both when the plea of nullity is invoked in the course of action, and when the plea of invalidity invokes by way of exception; an eloquent example in this respect is regulated in the matter of lesion, in art. 1223 par. (2) Civil Code which establishes that " *the annulment of the contract cannot be exceptionally opposed when the right to action is prescribed".*

2 The Clauses Considered Unwritten

Clauses considered unwritten, unlike the cases of nullity, do not enjoy proper regulation from which to establish their own legal regime, the character of self-imposed sanctions or merely the form of nullity. In national law, these clauses, which were considered unwritten, were first regulated in the area of consumer protection by the law on combating abusive clauses in the relationship between professionals and consumers [6]. Taking into account the consumer's right to these clauses, opinions have been drawn up in the specialty literature in considering clauses regarded unwritten as a species of nullity [7] and in considering the opinions regarding unwritten clauses as a stand-alone sanction [8], applicable in cases where the law expressly provides for it. As stated above, the contemporary legislator did not regulate separately the clauses considered unwritten, but merely referred to these clauses in art. 1255 Civil Code, regulating the following: "*clauses contrary to law, public order or good morals, and which are not considered unwritten, nullify the contract in its entirety only if they are by their very nature essential or if, in their absence, the contract has not been concluded".* The legal text cited above gave rise to new contradictory views on the legal nature of the terms considered unwritten, some authors believing that the legal regulation uses an outdated term to call a form of nullity [9], other authors have considered that these unwritten terms would be null and void, absolute and partial [10], according to another opinion it was stated that in the case, according to another opinion it was stated that in the case of clauses considered unwritten the nullity needn't be noted or pronounced [11], while other authors have considered that this unwritten character of a clause does not constitute a new sanction, unrelated to nullity, but a special case of nullity: the nullity of law, so that unwritten clauses may be ignored by the parties as if they didn't exist under the contract [12]. The latter solution is contradicted even by the legal provisions, because if we were in the presence of a "nullity by law" we would be in the hypothesis that this sanction would automatically intervene, *ope legis,* without the intervention of the court and without the parties' declaring, an aspect contrary to the provisions of art. 1246 par. (3) and par. (4) according to which, in the absence of any contrary provision of the law, the nullity of the contract can be ascertained or declared by agreement of the parties; by agreement of the parties there can be neither established nor suppressed causes of nullity. Thus, if we consider the unwritten clauses of nullity, we would interpret against the legal provisions mentioned.

In order to try to define the clause considered unwritten in the attempt to establish a legal and juridical nature, we will attempt to exemplify some of the situations that the contemporary legislator regulates as unwritten clauses in contractual matters. Thus, non-written clauses are considered, according to the legal provisions in force: the provisions that require the donor to report in kind (art. 1151 par. (1) Civil code), the clauses by which the parties institute or suppress the causes of nullity (art. 1246 par. (4 Civil code), clauses prohibiting the party from being denied the possibility of unilaterally terminating a contract

of indefinite duration, subject to a reasonable period of notice, or to stipulating a benefit in return for the termination of the contract (art. 1277 Civil code), clauses providing for an impossible condition, contrary to law or good morals, unless the condition itself is the cause of the contract and its absolute nullity (art. 1402 Civil code), stipulations that the creditor is not required to prove the cases in which the debtor is by law late [art. 1523 par. (4) Civil code], the reduction of the amount of the criminal clause is only made under the Civil Code, any contrary provision being considered unwritten [art. 1541 par. (3) Civil code], the stipulation that a claim embedded in a title to the bearer is not transmitted by remittance of the title [art. 1588 par. (3) Civil code], the provisions according to which the subrogation operates with the consent of the debtor [art. 1594 par. (2) Civil code] etc. whenever the legislator intended to regard a clause as unwritten, he explicitly stated this so that, on the basis of the legal provisions, we can conclude that like such nullities, unwritten clauses must also have a legal regulation.

In the doctrine, it was noted that these clauses considered unwritten are totally assimilated to null or annullable clauses based on the provisions of art. 1255, according to which the rules applicable to null or annullable clauses also apply to terms considered unwritten, the author arguing that these clauses are merely a convenient means of designating unlawful clauses that produce no effect [13]. We cannot rally for the above quoted opinion in view of several aspects that we will highlight in the following: first of all, if these reportedly unwritten clauses were forms of nullity, this aspect should have been expressly regulated. Another argument which in our opinion contradicts the aforementioned opinion is that the lawmaker itself regulates with a general aspect a difference between nullity and the clauses considered unwritten establishing in art. 1255 par. (1) that those clauses contrary to the law, public order and good morals and that aren't considered unwritten bring unto themselves the nullity of the contract…;thus, in our opinion, even though the provisions of the Civil Code are incomplete in the matter under consideration, it can be concluded that the legislator's intention was to regulate a distinct nullity sanction. If we interpret the clauses considered unwritten as a form of nullity, we ask ourselves what is the reason why the legislator deviates from the notion of nullity and uses this phrase of the clauses considered unwritten? For the reasons given and to the legal provisions in force, we appreciate, supporting the opinion of other authors [6] that the intention of the legislator was to create a distinct legal regime of the clauses considered unwritten with respect to the nullity. As the author quotes, there are several articles in the Civil Code that support the abovementioned; an example in this respect is represented by the provisions of art. 1932 par. (2) Civil Code stating that *"any contractual clause contrary to an imperative provision of the present Chapter whose violation is not sanctioned by the nullity of the company is considered unwritten."* If the intention of the lawmaker were that these clauses considered unwritten would in fact represent forms of nullity, the rules to which I referred would no longer have legal effect and, on the contrary, would make it difficult to apply them in a matter where both nullity and the terms considered unwritten are mentioned as sanctions applicable to civil legal acts.

Seeing the provisions of art. 138 of the European Contract Code bill according to which "the non-existence determines the total absence of any effect on the contractual level, abstracting by the restitution obligations contained in art. 160 and those regarding aquiline responsibility..." and the provisions of art. 139 of the same bill according to which the aforementioned provisions apply in equal measure, when the rule requires that a clause or an expression in a contract are considered unwritten, we appreciate that at an European level, through the adoption of these regulations, the regulating of a theory is attempted, based on considering these clauses considered unwritten as nonexistent, otherwise said the clauses considered unwritten are differentiated as a sanction different from nullity. Among other authors we consider that the regulation given by the contemporary Romanian lawmaker to the clauses considered unwritten is inspired by the European Contract Code bill and represents an autonomous sanction unlike both the sanction of nullity as well as the sanction of non-existence [14].

Thus, in our opinion, although the regulation of unwritten clauses is indeed lacking, we cannot interpret the legal provisions in the sense of considering unwritten clauses as forms of nullity because, as we have seen above, there would be an interpretation contrary to the legal provisions in force. In view of these aspects, we strongly believe that these clauses considered unwritten are distinct penalties from nullity, even if they also show similarities with nullity. We must not forget that the resolution also presents common aspects with nullity, without the two notions ever being identical.

Clauses considered unwritten can be shaped by some legal regime, based on the legal provisions invoked during this work, namely: a clause considered unwritten does not lead to the abolition of the entire act in which it is provided for but is legally replaced by the applicable legal provision; there is no text in the Civil Code that would impose the sanctioning of a clause considered unwritten for violation of the conditions of validity (exception being art. 1402 of the Civil Code referring to the impossible, illicit or immoral condition that would represent the cause of the contract); the unwritten nature of a clause can be invoked both when a provision protecting a general interest is violated, as well as it can be invoked in the situation in which a provision protecting a private interest is violated; as opposed to nullity, the clauses considered unwritten are not subject to remedies for the salvation of the act [14] precisely because it does not affect the validity of the act as a whole unless it is essential and the clauses considered unwritten are legally replaced by the applicable legal provisions.

All of these aspects lead us to a clear distinction between nullity and unwritten reputable clauses, so we conclude that the legislator intended to regulate a new, self-imposed sanction in areas where he explicitly provided which clauses are considered unwritten. As a lege ferenda proposal, we consider that it is necessary that the regulation by the legislator is done in a separate section of the Civil Code, in the 5th volume, of the legal regime applicable to clauses considered unwritten and implicitly in the establishment of certain coordinates to establish to what extent the clauses considered unwritten represent a distinct sanction, which are the rules applicable to these clauses considered unwritten, and mainly the

regulation of the delimitation from the sanction of nullity of the civil legal act. An additional argument for the need to complete the provisions of the Civil Code with provisions on unwritten clauses is also the outline of several opinions in the specialty literature, divergent opinions that need to be cut through legal regulation. This solution is desirable to avoid a non-unitary practice of the courts in the area under consideration.

3 Conclusions

As we have seen above, a true delimitation between nullity and the clauses considered unwritten can only be made through a proper interpretation of the legal provisions adopted in the nullity by using the rules of legal interpretation. However, considering that the contemporary legislator chose to speak only tangentially about the clauses considered unwritten, we appreciate that, in relation to the problems that a legislative vacuum might generate, it would be appropriate to proceed to an appropriate regulation of these clauses, in order to ensure genuine legislative consistency and to avoid non-unitary practices of the courts.

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Non-performance of civil obligations. Specific remedies of synallagmatic contracts

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Abstract

The analyzed issue represents a real challenge both for the creditors of the unenforced obligations, as well as for the courts called upon to enforce the legal provisions in the matter in the case in which the creditor of the non-fulfilled obligation chooses to apply the remedies specific of synallagmatic contracts in the case of failure to fulfill. Taking into account the fact that the law grants the creditor of the unfulfilled obligation multiple possibilities for the enforcement of the obligation or for the dissolution of the contract, we will essay to establish what the conditions in which these remedies operate are, with the effects thereof being analyzed in a subsequent study of the analyzed issue.

Keywords: civil obligations, non-performance of civil obligations, remedies specific to synallagmatic contracts.

1 The non fulfillment of contractual obligations. Legal regulations

The *pacta sunt servanda* principle or the principle of the binding force of the contract, is expressly regulated by the provisions of the present Civil Code[1]. During the course of the contractual relation, there is the possibility that the obligations undertaken validly by the parties in concluding the contract will not be fulfilled, will be fulfilled with delay or inadequately, this being the moment in which the remedies for the non-performance of contractual obligations become incident.

[1] The Romanian Civil Code of 17 July 2009, adopted by Law 287/2009, regulates in Art. 1270 the principle of pacta is servanda or the principle of binding force of the contract, stating that "the valid contract concluded has the force of law between the contracting parties".

To protect the interests of the creditor of the unfulfilled civil obligation, the present Civil Code regulated several potestative rights or possibilities that could be exercised, however, as was appreciated in the specialized literature, the creditor has a wide spectrum of legal means, being able to choose specific instruments considered the most adequate for themselves, however without the possibility of choosing at any time any of the remedies, as he cannot cumulate all the remedies provided by the legislator [1].

Regarding the legal provisions applicable at present, the Civil Code regulates the following remedies available to the creditor in order to obtain the fulfillment of the obligations that the debtor fails to fulfill, delays the fulfillment thereof, or fulfills inadequately:

– the right to enforcement in kind of the obligations, instituted by art. 1.516 of the Civil Code, which is considered by the doctrine to be a fundamental principle of civil law obligations [2] and which opens, in principle, the right to the other specific mechanisms of synallagmatic contracts;
– the exception of non-performance of the contract that is regulated by art. 1556 of the civil Code and determines a suspension of the effects of the contract when one of the parties is deprived of the benefits they are entitled to, as a consequence of the non-performance of the obligation;
– rescission/termination of the contract is a clause for the dissolution of the contract validly concluded, as a consequence of the non-performance thereof, and if the creditor does not have the right to invoke the rescission, he will have the possibility to ask for the reduction of the performance, both being regulates by art. 1549 – 1554 of the Civil Code;
– contractual risk which is a standalone remedy at the disposal of the creditor, which entails bearing the injurious consequences of the termination of the contract for a cause of the inadvertent inability to fulfill the obligation of one of the parties. The provisions applicable to contractual risk are art. 1274, art. 1557 and art. 1634 of the Civil Code.

In relation to these legal means, it has been appreciated in the specialized literature that the basis of the specific effects of the synallagmatic contracts is based on the idea of the underlying purpose of the concept, which means that if a party fulfills its obligation, the other party must also fulfill its obligation [3].

Unlike the 1864 Civil Code regulation which focuses on the culpability of the debtor, the new regulation that justifies invoking the remedies of the contract lies in the existence of a non-execution that, as we shall see below, must have certain characters to justify the application of remedies. The regulation of remedies involves both the means available to the lender in the event of an "unjustified" failure to fulfill its obligations, as well as the means at its disposal in the case of justified non-performance of the contractual obligations. Also, the new regulation includes in the same chapter all creditor's means in case of non-performance, regardless of whether the non-performance is due or not to the

debtor's fault. Thus, in view of the above-mentioned legal provisions, in the present study we will analyze all these legal means covered by the provisions of the current Civil Code.

Regardless of the name under which the remedies to which we shall refer are present in the specialized literature or in the practice of the courts, during this study we shall analyze the legal provisions adopted in the matter of the exception of non-performance of the contract, the rescission, the termination and the contractual risk.

2 The exception of the non-performance of the contract

Article 1555 of the Civil Code exclusively regulates the principle of simultaneity in the fulfillment of the performances, providing that if the obligations can be conducted simultaneously, the parties are held to perform them as such if the agreement of the parties or the circumstances do not state otherwise. Paragraph (2) of the same article establishes that if the fulfillment of the obligation of a party requires a period of time, that party is held to fulfill its obligations first, with the exception of the situation in which the parties establish otherwise or if the circumstances do not show the otherwise [4]. Given the statement of the principle of simultaneous execution of synallagmatic contracts, the exception to non-performance of the contract becomes incidental and may be invoked by the party concerned at the time when one of the Contracting Parties is requested to execute it without the party requesting enforcement to carry out its own obligations. As far as the basis for the exception to non-performance of the contract is concerned, the opinion to which we are aligning is that of the application of the principle of good faith and fairness in the execution of civil obligations [5].

In essence, the non-performance exception of the contract can be invoked to the extent that the conditions established by the Civil Code are cumulatively fulfilled. According to the legal provisions in force so that the invocation of the exception for non-performance of the contract is justified, the following conditions must be fulfilled: the reciprocal obligations of the parties to find a basis in the same contract; that there is a non-performance of the obligations from the other contractor, even if partial, but sufficiently important to justify suspending the obligations of the party invoking the exception; the mutual obligations must be enforceable; the non-performance must not be due to an act of the party invoking the exception of unfulfillment; the parties have not agreed an execution time for one of the reciprocal obligations. In the following, we will briefly review these conditions, highlighting the most relevant issues that may arise in applying the provisions on the non-performance of the contract.

2.1 *The reciprocal obligations of the parties to find a basis in the same contract*

For a full appeal of the exception for non-performance of the contract, it is not sufficient for two persons to be at the same time creditor and debtor, one to the other. This condition is not met if, for example, the buyer refuses to pay the price on the grounds that in another contract the seller has not fulfilled his obligation to repay a loan. In synallagmatic contracts, in view of the mutual and interdependent nature of the obligations assumed by the parties at the conclusion of the contract, the parties are held under simultaneous execution of the obligations by the principle enshrined by the Civil Code. Thus, in order to fulfill this condition and to justify the invocation of the exception for non-performance of the contract, the obligations specific to the synallagmatic contracts must have their basis in the same contract. There are also situations in which, by the will of the parties, there is established interdependence and reciprocity of obligations arising from different contracts, in which case the exception for non-performance of the contract may be invoked [6], but here we are not in the classical situation regulated by the provisions of the Civil Code, but we are in the presence of the *pacta sunt servanda* principle, by virtue of which the parties are held by a validly concluded convention, just as by law. Of course, when the complex problem arises of the emergence of reciprocity and interdependence involving two different contracts, the legitimate question of the need for regulation as an exceptional situation arises when *exceptio non adimpleti contractus* could also apply if that synallagmatic nature arises from two different contracts as a result of the will of the contracting parties..

It has been well established in the literature that the exception can be invoked also even if the obligations stem from the law or from a court decision, taking as an example the situation in which the reciprocal reimbursement of the benefits rendered under a contract declared null and void [7] or annulled. Although these theories are only momentary creations of the doctrine, as we have mentioned above, as a lege ferenda proposal, we consider that the legislator could supplement the legal provisions on the non-execution of the contract with regard to substantive law. The civil procedural law includes a legal provision according to which *"When execution is dependent on a performance arising from the same executory title and is to be made by the creditor at the same time as the debtor's performance, enforcement may only be made after the creditor has offered the debtor his or her own performance or after having provided evidence that the debtor has received it or is late in receiving it*"[2].

[2] Art. 676 Civil Procedure Code adopted by Law 134/2010.

2.2 *That there is a non-performance of the obligations from the party against whom the exception is opposed*

From the wording of the provisions of art. 1.556 par. (1) of the Civil Code, and especially of par. (2), which contains the expression: "taking into account the small significance of the unfulfilled benefit", it follows that, in order to rely on the exception for non-performance of the contract, there must be a sufficiently significant non-performance, even if it is partial. Thus, a minor non-performance does not entitle the party to rely on this remedy, moreover, the refusal to fulfill is considered to be contrary to good faith. The good faith of the one who invokes the exception is also appreciated by reference to art. 1.170 Civil Code. In this matter, good faith essentially means that non-execution is not due to the deed of the party invoking the exception [8]. Determining the importance of non-execution is a matter of fact which, when the exception is invoked, is appreciated by the person who invokes it. Subsequently, at the request of the interested party, the court can verify whether the requirements for invoking the non-performance exception have been met. From the debtor's perspective, the cause of non-execution may be his guilt, or even the force majeure or fortuitous case that prevents the debtor from fulfilling his obligation. However, when the impossibility of fulfilling is total and definitive, the contract will cease for the fortuitous impossibility of fulfillment, the moment at which the theory of contractual risk will be analyzed and not that of the remedies of non-performance. From the creditor's perspective, the condition of non-performance is deemed to have been met if the creditor, before invoking the non-performance exception, understands to make an offer to execute the obligation. This means precisely that he is ready to fulfill his obligation to prove this fact [9]. Another opinion expressed in the literature on this point is that the person who invokes the exception may, but is not required to make the offer of performance of his own benefit [10].

2.3 *The mutual obligations must be enforceable*

The requirement of enforcement of obligations implies that non-performance may be invoked only when the reciprocal obligations have matured or must be enforced immediately. In the case of obligations affected by a standstill period, that is to say, the term which, until it is fulfilled, postpones the maturity of the obligations, the question arises whether the non-execution exception may be invoked by the party whose obligation is due, against the party having a term of execution. The solution to the above problem consists in the provisional or anticipated invocation of the non-performance exception, recognized in Romanian law [9], although not explicitly regulated, there are regulations in the new Civil code in support of invoking the anticipated exception of non-performance. Thus, according to the provisions of art. 1.522 paragraph (4), second sentence of the Civil Code, the creditor is entitled to rely on any remedy in advance if the debtor informs him that he will not execute the obligations within

the stipulated term. At the same time, the cases of the debtor's withdrawal from the benefit of the term stipulated by art. 1.417 Civil Code[3] gives the claim the character of being immediately enforceable and therefore grants the possibility of invoking the non-performance exception.

2.4 *The non-performance must not be attributable to the party invoking the exception of non-performance*

The existence of this condition is given by the provisions of art. 1.517 Civil Code, regarding the non-performance on the account of the creditor. In applying the principle of good faith, the legal provisions prohibit invoking non-performance of obligations by the other party if non-enforcement is due to its own deeds. The act of the creditor that causes the debtor's non-performance represents an impediment to invoking any remedy for the realization of the creditor's right, implicitly for the operation of the exception for non-performance of the synallagmatic contract. In order to invoke the exception for non-performance of the contract, there must be no causal link between the non-performance of the obligation by the debtor and the deed of the creditor (for example, if the creditor unjustifiably refuses to issue a receipt, the debtor may suspend payment; or when the buyer can not pay the price by bank transfer because the seller did not provide the information about his account).

2.5 *There is no order of fulfilling the obligations*

The exception for non-performance is is inapplicable in the synallagmatic contract that is not characterized by simultaneous execution of the obligations. This remedy can not be invoked if the parties have agreed on an order for the execution of the obligations, when, in circumstances, habits, or practices established by the parties, it is clear that the obligations do not have to be

[3] Article 1417 of the Civil Code. Disqualification from the benefit of the term. (1) The debtor is disqualified from the benefit of the term if he is insolvent or, as the case may be, in insolvency declared under the law, and when, with intent or gross negligence, he diminishes by his deed the guarantees constituted in favor of the creditor or does not constitute the promised guarantees. (2) For the purposes of the provisions of paragraph (1), the state of insolvency results from the inferiority of the patrimonial asset that can be subjected, according to the law, to foreclosure, for the total value of the seizable debts. Unless otherwise provided by law, this state is found by a court which, for that purpose, may take account of certain circumstances, such as the inadvertent disappearance of the debtor, non-payment of due debts, triggering a foreclosure procedure against him and the like. (3) Disqualification from the benefit of the term may also be required when the debtor fails to fulfill a condition deemed essential by the creditor at the date of the conclusion of the contract. In this case, it is necessary to have expressly provided for the essential character of the condition and the possibility of the sanction of the denial, and there was a legitimate interest for the creditor to regard that condition as essential.

performed simultaneously or if one of the parties benefits from a term in which to fulfill the obligation.

In what concerns the application of the exception of non-performance of contracts, the following hypotheses, expressly provided for by the Civil Code, can be shown. Thus, as for applications of the exception of non-performance of a contract, we can showcase the following hypotheses expressly regulated by the provisions of the Civil Code. Thus, according to the provisions of art. 1693 of the Civil Code, the seller is not forced to give the sold goods in the situation in which the buyer does not pay the price and the parties did not provide a deadline in the contract for performing the obligation of payment. Thus, by virtue of the legal provisions, the seller may suspend the performance of his own obligation until the buyer has given him the performance of the obligation assumed at the time of the conclusion of the contract. Another eloquent example supported by the provisions of the Civil Code is represented by art. 1722 The Civil Code, according to which the buyer who did not know the danger of eviction at the conclusion of the contract has the possibility to suspend the payment of the price until the end of the disturbance or until the seller offers a suitable guarantee. A third example of a practical application of the exception of non-performance of the contract concerns the situation of the seller who, according to law, has the right to suspend the execution of the delivery obligation as long as the buyer does not provide sufficient guarantees that he will pay the price within the specified term, unless the seller was aware, at the time of the conclusion of the contract, of the buyer's insolvency and the insolvency did not substantially deteriorate. The Civil Code also offers other applications of the exception for non-performance of the contract, but we will only limit ourselves to the above assumptions.

As regards the suspension of the performance of its own obligation by invoking the exception for non-performance of the contract, can the question arise as to how this exception is invoked? Is it invoked between the parties or is court intervention required? In the doctrine it was argued that the exception to the non-performance of the contract is invoked between the parties without the necessity of the formal notice of the debtor of the unexecuted obligation and without the intervention of the court [3]. The above view is also supported by the provisions of the Civil Code, which do not contain any contrary provisions, so that I support the view that, in principle, the exception to the non-performance of the contract is invoked between the contracting parties by the party choosing to suspend its obligation until the contractual partner ready to perform his obligation. However, there is also the possibility of invoking the non-performance exception in a dispute. In this situation, in principle, the action taken by the court will have the character of an infringement proceeding [11].

3 Rescission and termination of the contract

As with the exception of the non-performance of the contract, the rescission and termination of contracts is based on reciprocity and interdependence of obligations stemming from synallagmatic contracts. In the case in which one of

the contracting parties fails to perform their contractual obligations, the other party has, as previously stated, several possibilities by which to obtain the performance of the obligations of the other contracting party, these possibilities being subject to the idea of remedy for the non-performance of a contractual obligation.

For these remedies of civil law to be enforceable, first of all there must be an unfulfilled synallagmatic contract the performance of which is sufficiently important to justify its rescission or, as the case may be, its termination. The fundamental difference between rescission and termination lies in contracts to which these remedies may apply in case of non-performance. Thus, the rescission operates on simultaneous execution synallagmatic contracts, whereas termination applies only to synallagmatic contracts with successive execution.

In principle, the rules applicable to rescission also apply to termination, so in the following we will refer to the remedy of the rescission and only when there will be regulatory/enforcement differences, we will show the specificity of the termination.

With regard to the scope of application of the rescission, in the doctrine the opinion was born that the rescission would also apply to certain unilateral contracts; this hypothesis was considered an exception to the application of the rescission, being justified on how to regulate the current Civil Code [3]. It was taken as an example the pledge contract, a unilateral contract involving the obligation to keep the asset, to preserve it and to restitute it at the time of the end of the pledge; in support of the application of the sanction of the resolution, arguments such as the transformation of the contract, during its execution, from a unilateral contract into a synallagmatic imperfect contract. In my view, given that this pledge contract may be affected by the rescission only after its transformation into an imperfect synallagmatic contract, it should not be regarded as an exception where the rescission affects a unilateral contract, but should be seen as a reaffirmation of the application of the remedy of the rescission of synallagmatic contracts that are perfect, having a reciprocal and interdependent nature of the benefits, or become synallagmatic during the execution of the contract. This principle was also retained in the French doctrine [12], supporting the idea that the rescission is also admissible in the case of unilateral real contracts if mutual obligations exist or arise between the parties. Also regarding the scope of the rescission, we note that there are also synallagmatic contracts that are exempted from the application of the provisions on the rescission, in this respect we mention the game and betting contract [4].

4 The forms of rescission

According to the provisions of the Civil Code, the rescission of the contract may be ordered by the court upon request or, as the case may be, may be declared unilaterally by the entitled party. Also, in specific cases provided by the law or if the parties have so agreed, the rescission may be fully effective. In the following,

we will briefly review all the forms of the rescission as they are governed by the legal provisions in force.

4.1 *Judicial rescission*

If one of the parties does not fulfill its obligations, the creditor of the non-executed obligation is entitled, as indicated above, to invoke, according to his interest, a remedy to penalize the non-performance of his obligations by his contractor. As we will see in analyzing the conditions in which the court pronounces the rescission of the contract, not all non-performance is likely to "endanger the contract". In the event of a judicial rescission, the court, after examining the conditions laid down by law, is to deliver a judgment ordering the rescission of the contract [11], rescission action being an action in exercising a right.

The first condition to be met is the existence of non-performance. The Civil Code does not contain a definition of non-performance of contractual obligations, but the content of the contract must always be taken into account, as the parties have determined it at the time of the concluding the agreement of will. For the soundness of an application made to a court it is necessary that the non-performance of the obligations not only exist, but also must be sufficiently important to justify the dissolution of the contract as an effect of rescission. If there is a non-execution but it is not significant, the creditor of the unfulfilled obligation may rely on the reduction of benefits as a remedy for non-performance of the contractual obligations. With respect to successive contracts, given the way in which contractual obligations are executed over time, termination may also occur if non-performance is of minor importance but is of a repetitive nature.

A second condition to be considered is the fault of the debtor of the unperformed obligation, which translates into the possibility of imputing him the non-performance. The provisions of the current Civil Code determine where the debtor's situation cannot be attributed to the non-performance and, implicitly, in what circumstances this condition of request for a lawsuit would not be fulfilled. Thus, according to the legal provisions in force, ”*the debtor is discharged when the obligation cannot be performed due to force majeure, of fortuitous circumstances or of other events assimilated to them, produced before the debtor was notified”*[4]. Thus, in order for the debtor of the unfulfilled obligation to be able to obtain the dismissal of the action, he will have to prove that, in circumstances beyond his will, non-performance has not been achieved or cannot be achieved. It is also worth mentioning the last sentence of the aforementioned legal provision, that the intervention of external events must take place before the debtor is notified.

In the doctrine, some authors also analyzed the condition of notifying the debtor of the unfulfilled obligation[3], bearing in mind that the institution of the notification has the legal significance of marking the moment of the debtor's refusal to perform the contractual obligation. The notification will be done under

[4] Art. 1634 of the Civil Code.

the conditions of Art. 1521 of the Civil Code, whenever the debtor is not legally late in failing to fulfill the obligations assumed at the conclusion of the contract[5]. Other authors [7] have embraced the view that the notification is not a condition in itself, because in all cases the request for a summons is a notification in which the debtor becomes aware of the fact of non-performance; in this situation, however, the debtor will be given a reasonable time to execute his obligation, a term which, if the notification would be made prior to the referral to the court, would no longer be granted. As far as we are concerned, we consider that with regard to the legislation in force at the time of the present study, the condition of notification is not provided as a condition for the action in rescission to be taken. However, there are several legal texts that refer to a certain need for prior existence of a notification[6] [4], which is why we claim that the notification can be seen as a condition for bringing an action in rescission, but if this requirement has not been met, the action will not be dismissed, but the debtor will receive from the court a reasonable period for the fulfillment of the unfulfilled obligations.

4.2 *Unilateral rescission*

This form of the rescission appears to be an apparent exception to the principle that a common will expressed at the time of the conclusion of the contract can not be defeated by the unilateral will of one of the contracting parties. The provisions of the Civil Code have established, however, that in certain circumstances, by the unilateral will of one of the Contracting Parties, the effects of a synallagmatic contract may be terminated. If the unilateral rescission is declared, if the debtor addresses the court, its role is limited to verifying the validity of the statement of termination and the consequences of abusive exercise of potestative right to rescission. So, in the context of the unilateral rescission, the referral of the court is only a debtor's faculty for a posteriori judicial control of the resolution mechanism, and not for its effective operation.

The unilateral resolution implies, in addition to the unified condition of significant non-performance, a series of formal conditions with a distinct physiognomy of this type of termination of the contract: the notification and the granting of a time-limit, the unilateral declaration of termination and the notification of the unilateral declaration of rescission.

The notification of the debtor is a formal condition by which the creditor must grant an additional term of execution to the debtor, according to art. 1.522 of the Civil Code. The debtor is notified either by written notification or by the request for a summons. As stated in the analysis of the judicial rescission, the condition of notification is no longer necessary if the debtor is in default by operation of law.

[5] Cases in which the debtor is in default by operation of law are governed by Art. 1523 of the Civil Code.
[6] In this sense, see art. 1516 par. (2) of the Civil Code and art. 1522 par. (5) of the Civil Code.

The declaration of rescission is the central act of the unilateral resolution mechanism [9]. It is a unilateral legal act subject to communication and is irrevocable from the date of its communication or from the expiry of the time allowed by the notification. Thus, the creditor of the unperformed obligation can return to the declaration of rescission only until it is communicated to the debtor. Regarding the moment of issuing the declaration of rescission, according to art. 1.552 par. (2) of the Civil Code, the creditor who makes use of the declaration of rescission must comply with the statutory limitation period for the appropriate action. It must therefore be made within the limitation period of the action which falls within the legal scope of the creditor's entitlement to the unfulfilled obligation. If the statement of resignation is made by the creditor after the limitation period has expired, the debtor may defend himself before the courts by invoking the non-intervention of the rescission/termination following the expiration of the extinctive prescription[4]. Notification of the declaration of rescission must be based on the communication of the declaration of rescission to the debtor and must not be confused with the notification of the debtor of the unfulfilled obligation, the one against whom the resolution is unilaterally declared.

For enforceability regarding third parties, the legislator imposes the requirement for the filing of the declaration of rescission or termination in the land book if the derived object of the contract is an immovable asset, or in other advertising registers, if the derived object of the contract is a movable asset. If the advertising formalities are not fulfilled, the subcontracting third parties may ignore the dissolution of the contract.

4.3 *Conventional rescission. Lex commissoria*

Lex commissoria or termination clauses are express contractual terms which provide, right from the moment of the conclusion of the contract, the non-performance of which obligations entails the rescission of the contract. The usefulness of *lex commissoria* consists of the complete freedom of decision the parties have right from the moment of concluding the contract. Establishing a termination clause is of very high practical importance because the parties can foresee what constitutes a major non-performance that justifies the application of the *lex commissoria*.

To be valid and produce legal effects, *lex commissoria* must contain, according to the provisions of art. 1553 of the Civil Code, the non-performance of which obligations entails the rescission of the contract.

In notifying it must be expressly indicated which are the conditions in which the *lex commissoria* operates, otherwise it will not produce legal effects.

In the absence of clear insertion of such clauses, they will not have the efficiency for which they have found their regulation in the legal provisions in force. As with the other forms of rescission, and in the case of the *lex commissoria*, it is necessary to notify the debtor or the contractual provision according to which the debtor is notified simply by failing to fulfill his obligations, without fulfilling other formalities. In the event that the requirements of Art. 1553 of the

Civil Code are met, the creditor of the unperformed obligation will have the right to request the court to issue the rescission of the contract, but on the basis of the judicial resolution and not on the basis of the *lex commissoria*, the latter acting by law on the basis of those established by the parties at the time of the conclusion of the contract.

5 Contractual risk

The fortuitous impossibility of performance is considered to be one of the premises of the theories of risk in contractual matters; the fortuitous impossibility of performing determines two general effects: the impossibility of enforcing the obligation in kind – with consequences on the existence or performance of the contract and the exoneration of the debtor of liability for the consequences of non-performance[10]. The effects presented represent some nuances depending on the type of derivative object of the contract (individual, determined or general goods), as well as the effects of notifying the debtor. On the other hand, in order to solve the risk of the contract on the realm of remedies, the provisions of art. 1634 Civil Code which regulates the forced impossibility of performance, with reference to the conditions to be fulfilled for the settlement of obligations impossible to perform due to force majeure or fortuitous case. Article 1634 of the Civil Code regulates both the permanent impossibility of execution as well as the temporary one. The definitive fortuitous impossibility to perform is defined thus: ,,The debtor is released when his obligation can no longer be enforced because of a major force, unforeseeable circumstances, or other events assimilated to them, produced before the debtor is given notice". In this case, the fortuitous impossibility of performance is a case of release of the debtor and thus extinguishing its obligation.

Under contractual obligations, the impossibility of non-performance leads to the rightful termination of the contract, the termination of the contract becomes inevitable and necessary if the impossibility of performance concerns an obligation in the absence of which the contract would not have been concluded. The right to terminate the contract is applicable *ex tunc*, from the moment of the unforeseeable event occurrence, and the debtor of the unperformed obligation will not be liable for any damages caused to the creditor by not performing.

For situations where the impossibility of the enforcement of the obligations by the debtor is only temporary, the law confers on the creditor the choice between suspending his or her own obligations, terminating the contract by rescission as a result of the temporary impossibility to execute or reducing benefits by deducting the part that can not be executed.

Concerning synallagmatic contracts of property transmission, the contractual risk entails bearing the consequences of one of the Contracting Parties in case of fortuitous impossibility of execution. The theory of contractual risk in the subject analyzed by us finds the regulation in the provisions of art. 1274 Civil Code and refers to the situation in which, between the moment of manifestation of will and the moment of the actual handing over of the good, the good

unexpectedly perishes. Under the above-mentioned legal provisions, the contractual risk is borne by the debtor of the obligation that cannot be performed; therefore, the risk of loss of the asset is borne by the transmitter, unless the parties have agreed that the risk is borne by the creditor of the surrender obligation or when he has been notified. If the creditor of the surrender obligation who is the current owner of the good is delayed on the ground that he refuses to take over the purchased asset, the risk of the contract will be borne by him according to the *res perit creditori* rule.

The problem of the risk of the contract differs in the case of synallagmatic contracts for transferring ownership, having as a subject goods of a general nature, the ownership being transferred in the moment of individualisation of these goods, and not in the moment of expressing consent for concluding the contract. Thus, in the case of goods of a general nature, the debtor of the obligation to fulfill remains under the obligation to procure other goods of a general nature, and the buyer will pay for the value of these goods, without the obligation to increase his own performance, specifically taking into account the specifics of the goods of a general nature.

Another problem regarding the contractual risk is the sale of the goods in installments since a special situation is regulated here; thus, if in a sale with the payment done in installments, the payment obligation is guaranteed by the retention of the property, the buyer becoming the owner at the date of the payment of the last installment of the price, however the risk of the asset is transferred to the buyer from the moment it comes in their possession.

6 Conclusions

The issue of the remedies the creditor has access to in the case of the non-performance of the contractual obligations is a matter that has become regulated under the provisions of the present Civil Code. Independently from the new regulation, taking into account the fact that the opinions expressed in the doctrine regarding certain aspects continue to be divergent, we take the liberty to conclude that the decisive role regarding the conditions in which these remedies operate belongs to the courts that are referred to with actions having as an object finding the occurrence of these remedies, or pronouncing said remedies. Far from being put an end to, disputes about these remedies can be clarified, starting from the legal provision and going on interpretations of reasoning when the rule is not very clear.

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Protection of the natural individual through civil right norms

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Curatorship represents the institution of civil law through which protection is granted for natural individuals who, being in certain special circumstances specified by the law, cannot exert their rights and protect their interests. It is regulated by art. *178-186 N.C.C.*

I. According to the extent of power conceded to the curator:
a. **special curatorship**, where the curator is empowered to close one single deed (e.g. curatorship for sale of a building);
b. **general curatorship**, where the curator is empowered to take care of the individual and the patrimony thereof, closing conservation an administration deeds (e.g. curatorship of the mentally disabled up to judgment of court for placing under interdiction).

II. According to the extent of time:
a. **provisional curatorship**, established for a short period of time (e.g. curatorship of the minor until appointment of legal guardian);
b. **permanent curatorship**, established for an unlimited period of time (e.g. curatorship for elderly individuals).

III. According to the capacity of the individuals placed under curatorship:
a. **Curatorship of capable individuals (proper)**, intended for the protection of individuals with complete capacity of exerting their rights in special situations;
b. **Curatorship of incapable individuals (special)**, intended for the protection of individuals lacking or with restricted capacity of exerting their rights.

1 Curatorship of capable individuals

This type of curatorship is established *for the protection of individuals with full capacity of exerting their rights*, who are in the impossibility to protect their interests on their own and to administer their patrimony.

Curatorship **is established with the consent of the protected individual and has no effect on the capacity of the individual to exert his/her own rights**, according to art. 181-182 N.C.C.

Cases:

1. curatorship of elderly individuals, physically ill or disabled, who, although capable, cannot, due to the special situation they are in, to administer their own goods and to satisfactorily protect their interests. Based on valid reasons, these individuals cannot appoint a representative or general trustee, according to art. 178 section a N.C.C.

2. curatorship for emergency cases, when, due to illness or for any other reasons, an individual, while capable, cannot, neither in person or through a representative, take the necessary measures in situations whose solution cannot be delayed, according to art. 178 section b N.C.C.

3. curatorship of the individual who is absent from their home, established when an individual is forced to be absent from his/her home, without leaving a trustee or general administrator, according to art. 178 section c N.C.C.

4. curatorship of missing person, of whom there is no information and who did not leave a trustee or general administrator, according to art. 178 section d N.C.C.

5. curatorship established in the civil-law succession procedure, when there is the risk of alienation or loss of succession goods, the civil-law notary designating a curator/trustee, to whom he/she will entrust with the succession goods for keeping, conservation and administration, until the division of the inheritance, according to art. 1117 N.C.C. and art. 72 from Law no. 36/1995 of civil-law notaries.

2 Curatorship of incapable individuals

This type of curatorship follows the rules for guardianship and is established for the protection of individuals lacking or with a limited capacity to exert their rights, the curatorship temporarily replacing the parents or the legal guardian.

Cases:

1. curatorship established for the minor lacking parental protection, until appointment of legal guardian, according to art. 159 N.C.C.;

2. curatorship established for the mentally impaired or disabled, during the process of placing under court interdiction, until appointment of legal guardian, according to art. 167 N.C.C.;

3. curatorship established for the minor or the court interdicted, when parents or legal guardian are temporarily unable to fulfill their attributions;

4. curatorship established in the case of competing interests between parents or legal guardian and minor or court interdicted, according to art. 150

N.C.C. (e.g. in succession matters, when the surviving spouse and the minor offspring of the deceased come into contradiction for the heritage).

3 Establishment of curatorship

According to art. 179 N.C.C., *the court of guardianship competent for establishment of curatorship is:*

- in the case referred to in art. 178 section a of N.C.C., the tribunal at the domicile of the represented individual;
- in the case referred to in art. 178 section b of N.C.C., either the tribunal at the domicile of the represented individual, or the tribunal at the place where the emergency measures have to be taken;
- in cases referred to in art. 178 section c-d N.C.C., the tribunal at the last domicile in the country of the missing or disappeared individual.

On the basis of art. 180 N.C.C., *when the interested party designed, by unilateral or agency relationship contract, closed in authentic form, an individual to be appointed as curator, he/she will be appointed in preference*. The appointment can be removed only for solid reasons.

Any natural individual with full capacity to exert their rights can be appointed as curator and who is entitled to fulfill this responsibility.

According to provisions of art. 180 paragraph 1 of the Civil code, any natural individual can be appointed as curator with full capacity to exert their rights and entitled to fulfill the responsibility of curator. If the interested individual nominated a specific individual, either by unilateral act or agency relationship contract, closed in authentic form, to be appointed as curator, this person is to be appointed in preference. This appointment can be removed only for solid reason. If the curatorship was established without the consent of the protected individual, when consent collection was possible, the actions of the thus appointed curator will not be opposed to the represented party.

Curatorship can be established *at the request of the individual that is going to be represented, of his/her spouse, of relatives or of those referred to in art. 111 N.C.C., with the consent of the represented individual,* with the exception of the cases where consent cannot be given.

Appointment of the curator is performed by the family court judge through a ruling communicated in writing to the curator and displayed at the location of the family court, as well as at the city hall at the domicile of the represented party, according to art. 182 N.C.C.

4 Contents of curatorship

Contents of curatorship is governed by the principle established in article 181 of the Civil code which stipulates that establishment of curatorship for an individual in cases referred to in article 178 “does not prejudice the capacity of

the person that the curator is representing". Since establishment of curatorship does not prejudice the capacity of the person placed under curatorship, then the person protected by this measure keeps the right to personally close any legal deed, even if this was enclosed by the sphere of attributions of the curator. Moreover, the person placed under curatorship may empower by mandate a different individual than the curator to close legal deeds in his name.

In the exertion of rights and attributions of the curator, provisions of art. 183 paragraph 1 of the Civil code will be taken into account, according to which "in cases where curatorship is established, rules of the entrustment may apply, with the exception of the case when, at the request of the interested individual or by default, the family court judge will decide that it is necessary to invest the curator with rights and obligations of an administrator responsible for the simple management of another person's goods". The application of rules of entrustment represents the second principle that guides the exertion of rights and obligations by the curator. Consequently, the curator is in a similar situation, with respect to representation power, as the trustee.

If rules of entrustment will be applied, the family court may establish itself limits of entrustment and may instruct the curator, instead of the represented, in cases where the latter is in no ability to do so.

The third principle at the basis of contents of curatorship consists in the requirement that the exertion of rights and obligations of the curator must be performed with the aim of achieving the purpose for which curatorship was established. Only by following this principle, curatorship fully justifies its existence and represents a measure for the protection of the natural individual.

The curator is obligated to personally exert the power of attorney granted to him/her and to answer for exertion of curatorship to the person placed under curatorship. He/she is also obligated to turn over to the person under curatorship everything he/she has received in exertion of curatorship (money or other goods). with respect to rights, the curator has the right, among others, to remuneration if it has been ascertained by the court when curatorship was established. If the amount of remuneration was not determined, it will be settled according to the law of users or, if absent, according to the value of the services provided by the curator. Furthermore, the curator is entitled to restitution of expenses caused by the fulfillment of his/her attributions.

5 The attributions of the curator

The attributions of the curator are the following:

a) in the case of *curatorship for capable individuals, rules from the agency relationship contract will be applied*, according to art. 183 N.C.C., with the exception of the case where, at the request of the interested person or by default, the family court will decide that it is mandatory to invest the curator with the rights and obligations of and administrator responsible for the simple administration of other person's goods.

If rules from the agency relationship contract apply, the family court may establish the limits of the entrustment and may instruct the curator, on behalf of the represented individual, in all cases where the latter is in no ability to do so.

The curator represents the individual within the limits of the power entrusted by the represented, who has the right to revoke at any moment.

b) in the case of *curatorship of incapable individuals,* according to art. 186 N.C.C., *all rules presented for guardianship will be applied* regarding appointment of curator, his/her attributions (regarding administration of goods – inventory and accounts) and responsibilities, except that in this case *the curator may not close disposition deeds*, only conservation and administration ones.

6 The cease of curatorship

Curatorship may cease due to the following causes:

a) causes regarding the protected individual

The curatorship may cease if the protected person dies, if the diseased individual gains back his/her health or if the missing person has resurfaced.

b) causes regarding the curator

Curatorship ceases at the death or placement under court interdiction of the curator, in the case of his/her removal from curatorship as sanction or in the instance of replacement by request, usually after three years from appointment, according to art. 184 N.C.C., or by desire of the represented person or of the individual who requested curatorship, when the causes determining its establishment have ended.

7 Liability of curator

Curator must settle all accounts of curatorship, obtaining discharge from the family court which appointed him/her, with the maintenance of his/her liability towards damages caused to the person represented by administration of patrimony.

8 Family council

According to art. 124-132 N.C.C., **the role of the family council is to supervise the manner in which the legal guardian exerts his/her rights and fulfills his/her duties with respect to the person and goods of the minor**. In the case of protection of the minor through parents, by placing into foster care or, according to the case, through other measures of special protection referred to by the law, family council will not be instituted.

The family court may establish a family council, consisting of three relatives or next of kin, considering the level of kin and the personal

relationship with the family of the minor and two deputies. The guardian cannot be a member in the family council. In the absence of relatives or next of kin, other individuals may be appointed who had friendship relations with the parents of the minor, or who display interest for his/her situation. The husband and the wife may not be together members of the same family council.

The composition of the family council cannot be modified during guardianship, except for the cases were the minor's interests require such a modification or if, by demise or disappearance of one of the members, completion is necessary.

Dispositions of N.C.C. regarding individuals who cannot be guardians, who can refuse the guardianship burden and interdictions regarding closure of legal deeds between the guardian and the minor are also applicable to the members of the family council.

For the establishment of the family council, the individuals who fulfill the conditions to be members are summoned to the domicile of the minor by the family court, by default or at the referral of the minor, if he/she has turned 14 years old, of the appointed guardian or of any other individuals who have knowledge on the situation of the minor. The appointment of the members of the family council is performed with their consent and with the hearing of the minor who has turned 10 years old.

The family council is summoned at least 10 days before the date of the meeting by the guardian, at his/her own initiative or at the request of any of its members, of the minor who has turned 14 years or of the family court.

With the consent of all members of the family council, the summons can be performed earlier than the 10 days deadline before the date of the meeting. In all cases, presence of all members of the family council covers the irregularity of the summons.

The summoned are compelled to be present in person at the place indicated by the summoning act. If they cannot be present, they can be represented by individuals who are related or next of kin with the minor's parents, if those persons are not appointed or summoned in their own name as members of the family council. Spouses may represent each other.

Meetings of the family council are held at the domicile of the minor. If the summoning was performed at the request of the family court, the meeting is held at its location.

The family council gives advisory opinions, at the request of the guardian or of the family court and makes decisions in the cases referred to by the law. Advisory opinions and decisions are validated by the vote of the majority of members, the council being chaired by the eldest individual, and with the hearing of the minor who has turned 10 years old.

Deeds closed by the guardian in absence of the advisory opinion of the family council may be annulled and draw the liability of the guardian.

The decisions of the family council will be motivated and recorded in a special registry, kept by one of the members of the council, designated for this purpose by the family court.

The guardian may request the establishment of a new family council, if in the prior complaints, the family court has ruled definitively at least twice against the decisions of the family council. **If establishment of a new council is not possible, as well as in the case of conflicting interests between the minor and all members and deputies of the family council, the legal guardian may request to the court the authorization to exert guardianship on his/her own.**

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Limits of the Private Property Right. The Refuse of the Owner to Give His Consent in Order to Change the Destination of the Neighbour's Property

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Abstract

In case of a market economy such as the Romanian economy, private property must represent the dominant form of property. The goods which are in someone's private property are not only a part of the civil circuit, but their speedy circulation is likely to ensure the strength of a competition-based economy. As a result, the analyze and exercise of the private property right is extremely important within a state based on a healthy market economy. However, the sovereign exercise of the private property right by its holder can't be abusive and cause prejudice to other citizens.

Keywords: private property, abusive exercise, limitation, civil circuit, respect of rights.

1 General Notions Regarding Private Property Right

Private property is equally protected by law, regardless of who is the holder of this right. These aspects are clearly stated and guaranteed by the fundamental law of the state, in article 41 second alignment of the Constitution. As a general rule, private property may belong to any subject of law, whether the state, territorial or administrative units, associative subjects of law, religious cults or individual people [1].

Property right is a subjective right, however its exercise is compatible with the existence of some limitations imposed by law, as it is exercised by its holder

within some social relations, which entails the fact that certain people who are, in their turn, holder of subjective rights and can be affected by the free exercise of the subjective right. As a result, the exercise of the attributes of the property rights must be performed in such a manner as not to impair on other subjective rights which belong to different holders. In this article, we propose to deal with the limitation of ownership in neighborly relations, the limit between the natural exercise of ownership of a real estate and the abuse of rights in the case of the owner's unjustified refusal to consent to the change of purpose on the property neighboring.

Thus, one normal question arises: what happens when such a subjective right (such as the private property right) is exercised in such a manner as to impair on other subjective rights held by different people? The answer to this question is provided by judicial practice which we will mention in the case study which follows, as well as by doctrine, which believes that we are in the presence of an abuse of law.

Judicial practice frequently sees situations in which the abusive exercise of property right is seen in case of immobile joint property, when neighbor owner, each of them holder of their own right, is freely exercising his right is such a manner as this exercise impairs the property right of the owner neighbor.

Any subjective right has an economic and social destination which can't be changed or transformed. The abuse of right is defined as the deviation of the property right from its own purpose; in other words, the abuse of right is the deviation of the right from its purpose by using this right for other purposes than those considered by the text of law which regulated it. The abuse of right is not an institution specific to our civil law. On the contrary, it is an institution regulated on a European level. Article 17 of the European Convention on Human Rights states that

"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and 14 15 freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention" [2].

Common property is seen as a means of the private property right, characterized by the fact that the property right over the same good belongs to several holders at the same time. They exercise, at the same time, all the attributes provided by their property right over the good which is the subject of their right. Whether property is held in parts or in common, both forms are widely applied in practice, the most common ones are those which result from neighboring relations, in which case, by the nature and position of immobile goods, the neighbors, each holding their own property right, are still co-owners over the common use parts, needed for the peaceful use of common spaces.

2 Enumeration of Legal Limitations to Private Property Rights

In the current regulation of the new Civil Code (herein as NCC), the limits of the property right are regulated in Title II, Chapter III of the Book on Goods. In the concept of the new fundamental civil law, these limits can be legal, conventional or judiciary. Their common, essential characteristic is that judicial limits are imposed by judicial will [3] expressed either by the lawmaker or the holder of the property right, or the judge on the occasion of solving a judicial conflict regarding the exercise of the prerogatives of this right, as neither the provisions regulating legal limits not those regarding conventional limits apply in this matter; thus, by his decisions, the judge establishes the potential limitations of the property right, usually, between the holders of neighboring rights, all this with the purpose of ensuring good cohabitation, thus "overcoming" the "normal inconveniences of neighboring relations" (art. 630 NCC).

On a general level, the legal regulations of this chapter ensure a good systematization of the matter, as the judicial and conventional limitations of the property right are of novelty character within Romanian fundamental law.

We must state that the "novelty" we mentioned considers only the regulation of these limits in NCC, and not their existence in Romanian law before the current regulation. Even under the 1864 Civil Code, this was a controversial issue in doctrine and judicial practice, thus regulating clauses which prohibit sale based on the principle of the freely expressed will which was not to be excluded, as long as these clauses were not contrary to public order and the rules of social cohabitation.

These provisions of article 602-625 of the NCC regulate the **legal limits of the exercise of this right**. We must notice that the first two articles of this section – article 602-603 – form a distinctive paragraph, named "common provisions". Article 602 first alignment of the NCC states a general principle, according to which **the law can limit the exercise of property right whether for public interest or private interest**. We believe that this principle dominates the entire matter of exercising the prerogative of the property right; however, we can't set aside this principle **when the material limits of exercise of the property right are determined**. **The second alignment of this text states that the legal limits of the property right established for private interest can be temporarily modified or terminated by the parties' agreement,** stating that, in order for this action to be opposed to third parties, it is necessary that the modification or termination meet the publicity formalities stated by law. Article 612 of the NCC states, as we are about to see, a certain "minimal distance of construction" but allows "any derogation" from this rule "by the parties' agreement expressed in an authentic document". The object of such an agreement can be the creation of an encumbrance right by the parties' consent by which they regulate that fact that no party is allowed to build at a distance of more than 60 cm from "the border line which separates properties, except if stated otherwise by law or by the urban regulations" for that particular area. In order to be opposed to third parties, the

authentic act by which the neighboring owners have agreed differently must be registered in the cadastral register.

Article 602 second alignment of the NCC also states the resolution, by the parties' agreement, of the legal limits established for private interest, but only of temporary character, by meeting the form and publicity conditions stated above. By respecting the principle of article 44 seventh alignment of the Constitution, article 603 of the NCC stated that property right obliges the owner to respect the environmental conditions and to ensure good neighboring relations, as well as all other duties which, according to the habit of the place or according to the law, must be respected by the owner.

The environmental duties are extremely complex, and the set of legal regulations in this domain are "a major objective of public interest", as they are adopted based on the "strategic elements and principles which lead to durable development" [article 1 first alignment of the Government's Emergency Ordinance no. 195 of December 22nd, 2005 regarding environmental protection] [4].

According to article 6 of this ordinance, environmental protection is the obligation and responsibility of the public central and local administrative authorities, as well as all people and companies. Government's Emergency Ordinance no. 195/2005 establishes the obligations of all people and companies pertaining to: the legal regime of dangerous substances, the regime of chemical fertilizers and products which protect plants; the preservation of biodiversity and natural protected areas; the protection of waters and aquatic ecosystems; the protection of the atmosphere and the management of the ambient noise; the protection of the soil, subsoil and terrestrial ecosystems; the protection of all human collocation and so on [5]. In regard to ensuring "good neighboring relations", in certain situations the vicinity relations can form real duties. Thus, at the limit between these two categories, there is the real obligation to do – propter rem obligations – which result from ownership, under any title, of certain goods. We have seen that they can result from law, can be established by the parties' will and are transmitted along with the goods. Sometimes, fulfilling these conditions entails the consideration of the vicinity relations between lands.

The "substance" texts of this chapter from the NCC regulate three categories of legal limits of the exercise of the private property right:

a) the limits regarding the use of waters, namely: rules regarding the natural flow of waters (article 604); rules regarding the provoked flow of waters (article 605); expenses regarding irrigation (article 606); the obligation of the owner who has an exceeding amount of water (article 607); the use of springs (article 608); the damages owed to owner of the land where the spring is located (article 609). All these provisions will be interpreted in relation with the special regulation in the matter of the regime of waters (article 610);

b) the limits which are likely to ensure, in regard to immobile goods, good vicinity relations: the drop of the gutter (article 611); the distance and intermediary works required for certain constructions, works and plantations (articles 612-613); the view over the neighbor's property (article 614-616); the right to cross land (articles 617-620);

c) the limits which apply to special situations: the right to cross land for utilities and performance of certain works (articles 621-622); the right to cross in order to regain possession (article 623); the owner's right to obtain damages in case his good was destroyed during a situation generated by a state of necessity (article 624).

We must notice that the first two categories of limits contain, with some exceptions, the border right (article 584 of the 1864 Civil Code) and the enclosure right (article 585 the 1864 Civil Code), about the wall and common ditch (article 590-609), situations which were regulated by the 1864 Civil Code as natural or legal encumbrances. In the conception of the legislation mentioned above, natural encumbrances were considered those which arose "from the situation of things". The categories of legal limits of the exercise of the property right regulated by the NCC do not form the entire matter in this domain. Article 625 of the NCC states that these "restrictions" are completed with the provisions of special laws regarding the legal regime of certain goods, such as lands and constructions of any kind, forests, goods of national cultural patrimony, sacred goods of religious cults, as well as other similar goods [6].

However, in the present paper we propose to analyze a small part of the legal limitations of the property right, especially the situation of the neighboring owner who refuses to agree to the change of destination regarding the neighboring building with his/her own. We appreciate that the theme chosen and treated in the paper is important, on the one hand, due to the large number of situations in judicial practice and on the other hand because the judicial practice is unified with regard to the categorization of the refusal as an "unjustified refusal" different interpretations of both the unjustified refusal and the possible abuse of.

3 The Abuse of Law

In order to be in the presence of an abuse of law and correlative civil liability, we believe we must analyze and fulfill multiple conditions. **First of all**, there must be a disrespect of the economic and social purpose for which private property right was acknowledged. Article 3 of Decree no. 31/1954 (at present abolished by art. 230 lit. N chapter X from the Law no. 71/2011) regulated the fact that subjective civil rights must be exercised **according to their economic and social purpose**. Thus, the holder of a subjective right who violated this legal obligation overpasses the formal limits, thus illegally exercising the attributes of property law, by overturning the purpose of such a right. The economic and social purpose of the property right, in out conception, is that of satisfying certain private interests, in accordance with its nature. Or, the subjective rights are acknowledged only for satisfying a **legitimate interest**, as it is an abuse of law to overpass this interest and exercise a property right without justifying legitimate interest.

We believe we are also in the presence of an abuse of law **when the rules of social cohabitation and good morals are disrespected, and not only in the case of objective rule of law.** Our conclusion is supported by the current regulation, which, **in article 5 of the Civil Code,** states that all conventions

concluded with the violation of the imperative provisions of law and good morals are void. Thus, good morals have the same legal force as the imperative provisions of law, as both entail the respect of public and not private interest.

The abuse of law is strictly connected to the existence of an attitude based on bad faith, as bad faith is a concept which originated in psychological facts in antithesis with good faith. As a result, although it is not directly or expressly defined, we are able to easily analyze bad faith starting from the definition of good faith, regulated in article 14 first alignment of the Civil Code which states that "*any person or company must exercise his rights and obligations in good faith, in accordance with public order and good morals*".

The usual means of sanction of the abuse of law is the loss of the coercive force of the state, as the judicial organisms, namely the courts of law, by acknowledging the abuse of law, will not admit the demands of the plaintiff who used abuse as grounds for his demand, or will admit the claims of the plaintiff against the defendant who used abuse of law. Certainly, in case the abuse of law results in a fact which caused material or moral prejudice, the lack of the states' coercive force will be accompanied by civil tort liability. Thus, the repression and sanction of the abuse of law can either be passively achieved under the form of the refusal to protect a right which is abusively exercised, or actively in admitting a complaint for civil tort liability against the holder who abusively exercised his right.

4 Case Study

According to Civil Decision no. 533 of October 24th, 2007 of Arges Appeal Court, civil section, for causes regarding work and social security conflicts and for causes regarding minors and family, *in the abusive exercise of the owner's association and the neighboring owners to express consent in order to change the destination of the living space, property of the plaintiffs, the courts must consider the provisions of articles 1 and 3 of Decree no. 31/1954 regarding people and companies, the provisions of article 723 of the Civil Procedure Code, those of article 480 of the Civil Code, as well as those of article 44 of the 1991 Romanian Constitution.*

According to these legal provisions, ***the civil rights are acknowledged and exercised in good faith and according to the purpose for which they were regulated by law.***

As there is no reason of legal prevention in the exclusive and absolute right of the plaintiffs to dispose of their own property, including in regard to its use, the mere desire of the defendants to oppose this change can't result in the limitation of the plaintiff's property right, thus the defendant's refusal is an abuse of law [7].

In order to reach this decision in the appeal phase, as the first court rejected the plaintiff's complaint, Arges Appeal Court stated that, in analyzing this claim, the courts of law must consider the provisions of *article 1 and article 3 of Decree no. 31/1954 regarding people and companies, the provisions of article 723 of the*

Civil Procedure Code, those of article 480 of the Civil Code, as well as those of article 44 of the 1991 Romanian Constitution.

According to article 44 of the Constitution, property is the right of a person to enjoy and dispose exclusively and within the limits imposed by law of a certain good. The plaintiff's right to dispose of the apartment which was their property, **including in regard to its use** by changing its destination from living space to office space, is opposed by the defendant's right to express their agreement in order to change the destination of the space.

In case there is a legal reason which prevents the exclusive and absolute right of the plaintiffs to dispose of the good which is their property, the mere desire of defendants to oppose this change **can't result in the limitation of the property right of the plaintiffs, thus the other parties' refusal is an abuse of law**. The other aspects considered by the court of law regarding the perturbation of silence, discomfort and other such situations which derive from changing the destination of the living space can justify the parties' position and can't lead to the limitation of the exclusive and absolute property right of the defendants.

These aspects represent, in judicial practice, the essence of the exercise of the private property law in good faith, as well as the protection provided by the state to this right, as opposed to the exercise of a correlative right in bad faith. As a result, the solution and argumentation of the appeal court is normal under the conditions stated by the current regulation, as the Romanian lawmaker aimed to protect the private property right and limit the abuse of law by unified judicial practice.

The above considerations can be found in other final court judgments, for example civil judgment no. 6622/10.12.2013 pronounced by the Sibiu Court of Appeal, final by rejecting the appeal, finds the abuse of law of the neighboring owner who systematically refuses to give his consent, so that the owner of the neighboring real estate can change the destination of his own immovable property, from a building with the purpose of living space in real estate with the purpose of commercial space – offices. In analyzing the unjustified refusal, the court of first instance analyzed all of the defendant's arguments, which concerned, on the one hand, the quiet use of his own building, which would have led to a lack of security in his own building. However, systematically analyzed by the court of first instance, it has come to the conclusion that the mere invocation of such arguments by the defendant owner is not sufficient for him to justify in this manner, the just manifestation of his own property right.

In order to acknowledge that the defendant has committed an abuse of his attitude and actions, the court of first instance has held that the following principles govern the exercise of subjective rights: (1) civil subjective right must be exercised with due respect for law and morals; 2) the civil subjective right must be exercised within its external boundaries, both material and legal, (3) the civil subjective right must be exercised within its internal boundaries, that is to say only for its economic and social purpose for which it has been recognized by law, (4) civil subjective right must be exercised in good faith. These four principles are cumulative in the exercise of subjective civil rights, and only one or some of them

is not enough. Only if the subjective civil law is exercised in compliance with all four principles mentioned above will it prove its accuracy the adagio *qui suo iure utitur, neminem laedit* (who exercises his right will not harm anyone) [8].

Since all the defendant's arguments, which would have justified his refusal to give his consent, have not been proved and/or were considered by the court to be groundless, the court concluded that this exercise of the right to property is an abusive one and the defendant's refusal is unjustified. The abusive exploitation of the property right by the defendant had as a direct consequence the attainment of the applicant's property right which, on the one hand, is unable to change the destination of its space, is unable to capitalize on this space by renting it to a company which is to carry out economic activity in space and to pay the applicant an amount called rent.

Similar judgments containing important considerations for the subject dealt with in this paper are also the civil judgment no. 237 of 22.01.2015 of the Focşani Court or the civil sentence no. 4317 from 16.06.2009 issued by the Sibiu Court.

Thus, I consider that the exercise of the right to property must always take into account, on the one hand, its pursuit of the economic and social purpose for which it was provided for and regulated by the legislature, and, on the other hand, that exercise must be carried out without damaging the rights of other owners. In the case of the unfounded refusal of the agreement to change the destination of the neighboring building, we are in the presence of an abuse of law sanctioned by the majority judicial practice by obliging the owner refusing to give his consent, to do so as long as his refusal it is not based on strong arguments, closely related to good faith, to the non-harm of the other owners through this refusal, to respecting the property rights of neighboring owners.

We conclude that whenever a property right is exercised otherwise than by observing law and morality, by overcoming its internal or external boundaries, with respect for good faith, we are in the presence of an abuse of law that can justify the courts on the one hand to find abuse of rights and, on the other hand, to oblige the owner concerned to act differently in order to limit the abuse of the right to property.

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Common Indivisible Ownership

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Abstract

Joint ownership is a means of property right, which is extremely present in the Romanian legal scenery, as, traditionally, marriage is governed by the regime of legal community. Knowing the rules which apply to the relations between spouses is extremely important, as their patrimony is a living element and the spouses can enjoy it, by respecting the imperative regulations of law. They are meant to ensure the integrity of the community of goods and the protection of the spouses' rights, with the final purpose of protecting and supporting family. However, knowing these rules is also important when devaluation does not arise in family relationships, as, according to art. 668 C. Civ the provisions regarding the system of the legal community are also properly applied if this form of property is born by legal act. Therefore, the present paper seeks to analyze mainly the general legal regime applicable to ownership, irrespective of its source.

Keywords: patrimony, goods, co-ownership, indivisible ownership.

1 Introductory Issues Regarding Property Right

Property right is a subjective right characterized by the fact that it provides the holder with the possibility to exercise possession, use and disposition over a good, in a direct manner, without the intervention of other people. As it is a real right, all other members of society are under the general and abstract obligation to refrain from any act which is likely to impair the exercise of these attributes of property right.

The judicial attributes of property right are possession, use and disposition over a good, which must be exercised within the limits established by law. Of these, the right to dispose of the good represents the essential attribute of property right, which provides the holder with the prerogative to decide the faith of his good, both from a material and a legal point of view [1].

Property can be public or private. State is the holder of public property, as well as the administrative-territorial units, the goods are usually out of the public circuit, as expressly stated by law. On the other hand, private property is a vast domain in regard to its subjects and object. Thus, holder of the private property

right can be the state, administrative-territorial units, people, companies; in regard to the object of this right, any goods which are not out of the civil circuit can be subject of private property.

In regard to the holder of the property right, he is usually unique and exclusive. However, there is the possibility of a good seen as ut singuli or a universality of goods to belong to several people, at the same time, without them forming a company. In this case, we are in the presence of *joint ownership.*

The forms of joint ownership are: co-ownership, which can be regular or forced, and indivisible co-ownership.

According to article 633 of the Civil Code, if the good is held in common, co-ownership is presumed until proven otherwise. According to article 634 of the Civil Code, in case of regular co-ownership, each co-owner is the exclusive holder of a part of the property right and can freely dispose of it, if not stated otherwise. The parts of property right are believed to be equal, until proven otherwise. Thus, what characterizes regular co-ownership is the fact that each holder has an exclusive right over an ideal and abstract share of the property right; he cannot freely dispose of the good, but neither of the co-owners has an exclusive right over a material part of the good. The common regular property right usually arises by the will of the parties, expressed by convention or can arise from inheritance or end by acquiring the entire property right by one of the co-owners or a third party, by divorce settlement.

Forced co-ownership represents that form of co-ownership which is characterized by the fact that it exists independently from the will of the parties, arising from the situation of goods, which by their nature or destination, can only be used in common by several people. These goods are usually an accessory to the main good which is held in exclusive ownership or even in regular co-ownership. In regard to the legal regime of forced co-ownership, it is characterized by the fact that each holder has an exclusive right over an ideal, abstract share of the property right, but neither will be able to freely dispose of his share, unless along with the property right over the main good which is held in exclusive ownership [1]. Unlike regular co-ownership, forced co-ownership can't end by voluntary judicial division.

2 Indivisible Ownership – A Form of the Common Property Right

According to article 667 of the Civil Code, we are in the presence of indivisible ownership when, by the effect of law or based on a legal act, the property right belongs to several people at the same time without any of them being the holder of a determined part of the property right over the good or common goods.

By considering the legal provisions, we can define indivisible ownership as *that form of the property right, arose form law or a legal act, which entails the simultaneous exercise of all attributes of the property right over one or more*

goods or a universality of goods by several people at the same time, without the division of the good from a material perspective and without any of the co-owners to be able to determine an ideal, abstract share of the property right.

The source of joint ownership can be the law or the will of the parties, unlike shared co-ownership which can arise from law, a legal act, succession, usucaption and so on.

Unlike the Family Code [3] which regulated a single form of indivisible joint property, namely that of the spouses (who could only be married under the regime of legal community, a legal regime which was unique and immutable), the new Civil Code is innovative and, as a response to the actual social demands, acknowledges the possibility of joint ownership by legal act.

The provisions of the Civil Code regarding the possibility of indivisible ownership by legal act only apply in the hypothesis of legal acts concluded after the coming into force of the Civil Code. Although the lawmaker does not expressly state this, a legal act is the convention of parties, thus excluding the possibility of joint ownership by unilateral act. In case the source of indivisible ownership is a legal act, the provisions regarding the regime of legal community apply accordingly.

In the current legislative background, a legal form of indivisible co-ownership is that of the spouses' married under the regime of legal community. Also, a form of indivisible co-ownership is found in the matter of composes orates, regulated by the provisions of Law no. 1/2000 in order to reconstitute the property right over agricultural and forest lands [4] or in the Forest Code [5]. Although the law regulated the possibility of arising by legal act, doctrine and practice have shown that this form of the property right is mainly found within marriage.

The holders of the indivisible co-ownership are, in regard to the way by which it arose, the spouses married under the regime of legal community or other people who have become indivisible co-owners based on law or another legal act. If this from of indivisible co-ownership arises by law, it is not wrong to state that, under the new civil law, indivisible co-ownership, unlike regular co-ownership, can have an *intuitu personae* character, thus closely connected to the personal qualities of the holders, namely the spouses married under the regime of legal regime or associates in composes orates, for example. However, the *intuitu personae* character is not absolute and is not found in case the source of co-ownership is the legal act; this is why we believe that this character is only of the nature of indivisible co-ownership, and not of its essence.

The object of indivisible co-ownership is represented by one or several goods or even a universality of goods held in co-ownership [6]. From this point of view, indivisible co-ownership is similar to indivisibility but, whereas co-ownership is a means of property law, indivisibility is a means of patrimony which contains a universality of rights and obligations. From the same point of view, co-ownership is similar to regular co-ownership which in turn, can have one or more goods as an object or even a universality of goods. Property law must not be confused with patrimony which contains an ensemble of real or debt rights, but

also the corresponding obligations, which can be evaluated in money [7], while the subject of property law is a certain good, corporal or non-corporal, which is the object of a patrimonial right (real or of debt).

In regard to the *legal regime* of co-ownership, without containing other provisions, article 634 of the Civil Code, states that if it arises by the effect of law, indivisible co-ownership is subject to the provisions of that law, accordingly completed with the provisions of legal community regime.

Thus, regardless of its source, what characterizes indivisible co-ownership is the enforcement of the rules of the legal community regime.

Traditionally, by "matrimonial regime" we mean the entirety of legal provisions which regulate the relations between spouses, as well as the relations between spouses and third parties in regard to the goods and debts of spouses [8]. Depending on their source, secondary matrimonial regimes are classified in legal regimes and conventional ones. They are subordinated to a primary imperative regime. The regime of legal community is an alternative regime to conventional matrimonial regimes. Conventional matrimonial regimes apply on the basis of a matrimonial convention and to the extent the future spouses' wish to derogate form the legal regime, thus, the regime of legal community governs the relations between spouses, from the time the marriage was concluded, except for the case in which the spouses concluded a matrimonial convention.

The regime of legal community is characterized as legal, alternative and mutable. His object is matrimonial community. Matrimonial community is a community of patrimonial interests containing real rights, corporal and non-corporal goods [9]. Within this regime, the spouses' goods are divided into three categories: common goods, the husband's private goods and the wife's private goods. The debts are divided the same way. Much like the Family Code, the spouses' goods are presumed to be common [10], unless proven to be private goods; thus, matrimonial community entails indivisible co-ownership over all goods acquired during marriage to the extent in which it is not proven that these goods are private goods of one of the spouses. Unlike the Family Code, in the concept of the new Civil Code, the debts of the spouses are presumed to be their own, as the common ones are expressly stated by law. Considering all these aspects, doctrine justly stated that the regime of legal community is also a regime of partial community [11].

The judicial regime which applies to the regime of legal community is that of parallel management, in which each of the spouses is allowed to perform a series of material or legal acts pertaining to common goods, without consent from the other spouse.

Thus, in regard to material acts, according to article 345 of the Civil Code, each of the spouses has the right to exclusively use the good without express consent from the other spouse. The same regulation is found in the case of regular co-ownership, as article 636 expressly states that each co-owner has the right to use the common good to the extent in which he does not change its destination and does not impair on the rights of the other co-owners. Unlike the former regulation of the Family Code, which stated a relative presumption of tacit mutual

mandate between spouses, under the current regulation, the presumption of the tacit mutual mandate no longer exists thus, passing from the mechanism of collective management (or co-management) to the mechanism of parallel management, according to which consent from the spouse who concludes the act is not only necessary, but sufficient for the act to be valid.

By exception form the provisions of article 345 of the Civil Code, neither of the spouses, even if he is the exclusive owner, can't conclude acts which would affect the use of the residence, as the rules regarding the family residence are rules which regulate the primary imperative regime from which the spouses can't derogate.

Also, changing the destination of the common good can only be achieved by spousal agreement. Thus, neither of the spouses can rent nor provide for free use the family residence without express consent from the other spouse. Necessity of express consent of the co-owners is mandatory in case of free use, as stated by the provisions of article 641 third alignment final thesis of the Civil Code, as in the matter of co-ownership, any free act is considered to be a disposition act, thus requiring consent from all co-owners.

In regard to the products of common goods, according to article 550 of the Civil Code, they belong to the owner if the law does not state otherwise. In case of indivisible co-ownership, they products will be acquired by the co-owners indivisibly, as their share of the property right over the good is not known.

Possession is the tenure exercised by each of the co-owners over a certain good as an owner. The possession of the co-owners can be protected by means of possession complaint [12].

The material disposition over a good entails the change of its qualities, form, structure, which result either in the increase or in the decrease of its value, as are for example, the works for renovation of the common residence.

In regard to legal acts, article 345 of the Civil Code regulates that each spouse can conclude, on his own, conservation acts and administration acts regarding any of the common goods, as well as acts by which he acquires common goods.

Conservation acts are those by which the preservation of the good is achieved or the prevention of its loss, as is ending the statute of limitation. These acts can be performed by any of the spouses, individually, without consent from the other spouse, as they profit co-ownership.

The administration acts are those meant to ensure the upkeep of the good, such as the conclusion of a rental contract, the performance of some repairs, the evacuation of a person from the immobile which is held as common property or even the exclusive property of the other spouse [13]. The domain of administration acts entails not only the acts in regard to the effective administration of the good, such as the rental of the good, but also the acts which are of administrative nature by their purpose, seen from the perspective of patrimony, namely those which pertain to the normal exploitation of the patrimony, such as the sale of goods which are subjected to timely loss and which have the value of a disposition act. The definition considers the purpose and the result of the legal act in regard

to the patrimony in its whole, as the legal nature of the act itself is less relevant. This is the reason why a disposition act, seen from the perspective of the patrimony to which it belongs, can have the significance of an administration act [14].

In regard to the disposition acts, several acts can be concluded without express consent from the other spouse, such as acquiring mobile or immobile goods, the selling of mobile goods if the sale is not subject to certain publicity formalities according to the law. Thus, the express consent of both spouses (or all indivisible co-owners) is needed in case of all sale or mortgage acts of mobile or immobile goods which are subject to certain publicity formalities. The promise to sell does not transfer property right over the good, but merely creates the obligation to perform as obliged, namely to conclude the authentic act. As they do not transfer property, both doctrine [11] and practice [16] stated that the agreement of both spouses when concluding a promissory contract regarding a common good is not necessary. The spouse who did not consent to the conclusion of the promissory contract can't request the annulment of the act [17], as the good exited the common patrimony and his complaint would lack interest.

Practice expressed the contrary opinion, based on the impossibility of the court to replace consent from the seller in solving such a complaint, as to pronounce a decision which replaces the authentic selling contract, which is the main effect of the good exiting the spouses' community of goods.

Specifically, if this complaint were to be granted, an act which transfers property would be concluded in regard to an immobile good, although one of the spouses did not express consent, thus violating the legal provisions and such an interpretation can't be correct [18]. In our opinion, starting from the premise that the bilateral promissory sale contract does not ensure the transfer of property, thus it would not require the express consent from the other spouse when concluding the act, as the spouse who did not provide consent has other means to repair the damage he suffered. However, in case the act is concluded in authentic form, as the main obligation of the public notary is to avoid litigation, it is prudent and recommended that both spouses sign the bilateral promissory sale contract. Consent can be previously expressed, for example, in a sale mandate, which is authentic, special and of predetermined content (in which one spouse expressly mandates the other spouse to conclude a sale contract), at the same time or subsequent, by confirming the act. Talks regarding the necessity or not of the presence of both spouses exists only in case they are the sellers, not when they are the buyers, as in this case, the Civil Code unequivocally states that the validity of the act depends on the exclusive will of one of the spouses.

An exception from the necessity of consent from both spouses when concluding sale or mortgage acts are regular gifts [19].

In regard to the *sanction* which applies in case of indivisible co-ownership, the Civil Code states in the art. 345 that, to the extent in which his interests regarding the community of goods were not prejudiced by a legal act, the spouse who did not participate in the conclusion of the act can only claim damages from the other spouse, without affecting the right acquired by good will third parties.

By exception, according to art. 347 C.civ. the act concluded without express consent from the other spouse when it is required according to the law, is subject to annulment. By this, indivisible co-ownership is different from regular co-ownership, in which case the sanction stated by law for the disrespect of the provisions regarding the unanimous consent of co-owners is the impossibility to oppose the act to third parties. However, nothing prevents the spouse who did not consent to the conclusion of the act to waive his right to request the annulment of the act, in the case provided by art. 347 C.civ., and merely invoke the fact that the act is not opposed [11].

Thus, any of the spouses can conclude material or legal acts in regard to the common goods, under the conditions stated by law. In regard to each spouses' share of the property right, it is not determined in indivisible co-ownership. It will only be individualized on the occasion of divorce settlement (if it is performed during marriage) or on the occasion of the liquidation of legal community (performed during marriage or on the occasion of the dissolution of marriage). As none of the indivisible co-owners has an ideal determined share of the property right, neither of them will be able to dispose of it, thus able to sell or mortgage his share of the indivisible property.

Indivisible co-ownership *ends*, much like regular co-ownership, by settlement. Co-ownership will not end as a result of dissolution of marriage, as, until the liquidation act is drafted, post marital community will exist, as expressly stated by article 356 of the Civil Code.

Settlement is the judicial operation by which co-ownership is ended, thus the goods are separated and acquired by each or the co-owners corresponding to their share of the good. As in the case of indivisible co-ownership the share of property is not precisely determined, it is presumed that the spouses had equal contribution. The share of each spouse is established on the occasion of settlement or on the occasion of the liquidation act. If the settlement of common goods is performed during marriage, the share of each spouse can no longer be subsequently modified even if the settlement does not pertain to all the common goods of the spouses [21]. The rules which apply to settlement are those stated in articles 669-686 of the Civil Code. Without going into details, we must state that settlement entails the effective division of goods, and not just a mere regularization of each spouses' share. Thus, whenever the performed operation results in maintaining co-ownership, but with different shares, it will not be a settlement, but an entirely different legal operation which can eventually be qualified as exchange or sale. Also, as the previously stated regulation represents common law in this matter, we believe that in case the spouses only hold a share of the property right over a good along with a third party, the presence of the third party co-owner is required on the occasion of the settlement, under the sanction of absolute annulment, even if the settlement pertains to the indivisible share of the spouses and not the right of the third party.

As shown from the very beginning, the rules which apply the spouses married under the regime of legal community generally apply to indivisible co-ownership, regardless of the source of co-ownership and the quality of the holders.

3 Conclusions

Joint ownership is a means of property right, which is extremely present in the Romanian legal scenery, as, traditionally, marriage is governed by the regime of legal community. Knowing the rules which apply to the relations between spouses is extremely important, as their patrimony is a living element and the spouses can enjoy it, by respecting the imperative regulations of law. They are meant to ensure the integrity of the community of goods and the protection of the spouses' rights, with the final purpose of protecting and supporting family.

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The Limits of the Special Rules for Construction Contracts in the New Civil Code

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Abstract

The Romanian legislator defines the contract for the construction works through art. 1874 NCC as *the contract that where the contractor undertakes to execute works which, according to the law, require the issuance of the building permit*." In order to determine whether or not the legislator intended to subordinate the provisions of the Civil Code to those in the field of administrative law regarding building permit, is necessary to analyze the main doctrinal opinions. The theme of this study is precisely the initiative of the legislator to define the contract for the construction works through an apparent subordination of the provisions of the Civil Code to the field of administrative law regarding building authorization.

Keywords: construction works, construction contract, New Civil Code, art 1874 NCC, FIDIC contracts, National Contract for construction works 2018.

1 Introduction

The Romanian integration in the European Union along with other Member States, which are at a certain level of development in the field of construction law, require our country to be at least equal in terms of development and reforms in this field. After more than a decade of continuous use of FIDIC contracts for construction works in major investment Projects in Romania, in the domestic legal landscape a new national contract for construction works emerged in January 2018, especially designed by the Romanian legislator to replace the well-known

but also controversial FIDIC standard contracts. The topic approached in the paper is up to date, and fully applicable to both standardised forms of contracts, in the context of the society concerns to ensure a unitary and efficient framework for the implementation of construction works contracts, the ultimate goal being the success of the projects by preventing any kind of litigation as far as possible, especially those from the different interpretations of the legal provisions regarding construction.

2 Identification of the Issues Being Treated

2.1 *The Subject of Research*

At the basis of this scientific approach, it was the interest of the author, theoretician and practitioner of construction law, to study the legal controversy over the limits of the special provisions for the construction works, as compared to the definition given by the legislator through art. 1874 NCC "Under the construction contract, the contractor undertakes to execute works that, according to the law, require the issuance of the building permit."

In order to determine whether or not the legislator intended to subordinate the provisions of the Civil Code to those in the field of administrative law regarding building permit, the author proceeded to analyze the main doctrinal opinions. Unanimously, the doctrine has established that from a global space-time perspective "*the contract is undoubtedly the most important legal phenomenon of the contemporary age*." [1] The investigated documentary material revealed the complex character of the entrepreneurial contract, which included "heterogeneous service species" but, from the multitude of entrepreneurial contracts it was confirmed the specialization of certain entrepreneurial contracts that "became so common and have acquired such a peculiar feature that within the entrepreneurial contract genre became autonomous; a branch detached from the tree " [2], the author granting a special attention to the construction contract.

2.2 *Research Methodology*

Regarding the methodology of scientific research used in the paper, the study of the chosen topic is based on the use of a set of methods and procedures to achieve the proposed goal, the scientific approach of the author attempting to harmonize the quantitative and qualitative research in a conceptual-applied perspective.

During the study, the author used the deductive method involving theoretical documentation, starting from the applicable normative material and from the literature, analyzing and synthesizing the legal issues involved in the process of establishing the application limits of the special rules for the construction works, in order to reach the ultimate goal of drawing a conclusion on this legal controversy.

The author used during the research the inductive method to investigate the concrete situations and to identify the problems of applying the special rules regarding the construction works, but also the comparative method that was used for the purpose of capturing the similarities and the differences between the way of the entrepreneurial regulation in general and the construction works in particular.

During the use of the comparative method, the necessity of approaching the historical method emerged, the author investigating the legal institution subject matter in the context of their historical evolution. The logical method was frequently used by the author in this research, reasoning that in order to prove a deductive argument, it is necessary to resort to previous principles. Another method used by the author in this scientific approach is the analogical method based on the logical reasoning that the individual can lead to the particular, or, in certain situations, the general to general, the result being different from both the induction method and the deduction method where the results fall in cascade.

2.3 *The Results of the Research*

The theoretical and practical interest of the work lies in the intellectual contribution of the author to the enhancement of the research carried out and presented up to today in the field of construction works and by the obtained results it is desired to resize the existing information regarding the scope of the special rules for the construction works in the national legal landscape. The author's effort to elaborate this paper wanted to be a genuine intellectual contribution in the effort to increase the degree of notoriety of the new rules implemented in the field of construction through the New Civil Code, which may inspire other points of view and open up new perspectives on the research topic.

3 Scope of Works

3.1 *Definitions*

In order to determine the limits of the special provisions for the construction Works in NCC, a brief overview of the entire enterprise institution in general is necessary.

About the definition of the works contract, on the one hand, the New Civil Code (NCC) establishes the conditions of this specific contract through art. 1851 para. (1) *"Under the works's contract, the contractor undertakes, at his own risk, to execute a particular work, whether material or intellectual, or to provide a particular service to the beneficiary in return for a price."* On the other hand, the doctrine [3] defines the works contract as the will-based agreement on the basis of which one of the parties, called an entrepreneur, undertakes to execute, at his own risk, a certain work for the other party, called the client, for a price which is

set in relation to the outcome of his work, and he must fulfill the conditions of validity of any convention regarding capacity, consent, object, cause and form.

In another approach, the literature [2] defined the works contract by comparing its defining elements with those of the sale-purchase contract, establishing unanimously that "*If the sales contract is the transfer of ownership from seller to buyer, for a price in cash, in the case of a works contract, the contractor undertakes, at his own risk, to execute a work or to provide a service for beneficiary in exchange for a price*."

From the perspective of this study, it is important to mention that not all the varieties of the works contract provided by art. 1851 Civil Code have a specific name and their own rules, the legislator granting only the construction works contract sufficient importance to have a distinct regulation deriving from the general rules. Thus, the legislator defines the contract for the construction works through art. 1874 NCC as follows: "*Under the construction contract, the contractor undertakes to execute works which, according to the law, require the issuance of the building permit*." The theme of this study is precisely the initiative of the legislator to define the contract for the construction works through an apparent subordination of the provisions of the Civil Code to the field of administrative law regarding building authorization.

The legislator's wording was largely debated, and was not sheltered from criticism because the doctrine [4] sanctioned this condition for applying the special rules of the contract for construction contracts to the legal necessity of issuing the building permit, both in light of the uncertainties created at the practical level regarding the object of the works contracts as well as the stability and predictability of the legal relations in the field.

In the view of the author, the construction contract is the agreement of concordant wills, concluded in compliance with the legal conditions of validity applicable to any convention, under which one of the parties, called the contractor, undertakes to execute at its own risk, for the other party, named beneficiary, construction works, in exchange for a price that is set in relation to the works executed.

3.2 *Competition Between the General Rules for Works Contract and Particular Rules for Construction Works Contracts*

The author initiated this scientific approach in a broader study of FIDIC-standardized contracts, which are mandatory in Romania for construction works related to major infrastructure projects. The FIDIC contracts have been investigated by the author from the point of view of the Civil Code legal regulations on the works contract, respectively in terms of common rules applicable to all the works contracts and of specific rules applicable only to construction works contracts, taking into account the fact that the general rules develop "*the*

principles applicable to any type of business contract, when it is necessary to determine its identity and its formation, its effects and its extinction." [2]

For a fair interpretation of the research results, it was *a priori* to clarify the concurrence between the general rules on works and the specific rules applicable only to the construction works contracts. The jurisprudence [5] stated that "the removal from the application of the general law whenever there is a special provision in a given matter must not be express, being understood as it is, because it is the direct consequence of the principle *specialia generalibus derogant*. As a consequence of this principle, the parties' consent imposing the application of the general law and removing the more restrictive special provision, is not aloud "*the parties being bound to fall within the limits established by the law, in which their freedom to contract manifest"*. In the specific case of the works contract, the subject of the competition between the general rules on works and the special rules on the construction works is not an issue, because the legislator himself regulated the competition through art. 1851 par. 2 of the NCC in favor of the special rule, the general provisions being also applicable to the construction works if they are compatible with the particular rules laid down for this contract.

3.3 *The Limits of the Special Rules for Construction Works*

Compared with the old regulation, which has become insufficient once the construction field has been "emancipated", the new landmarks introduced by the legislator in article 1874 of the New Civil Code lay down the legal framework for the application of the special provisions for the construction works as follows: "*Under the construction contract, the contractor undertakes to execute works which, according to the law, require the issuance of the building permit."*

For a good understanding of the research results, a critical analysis of the legal controversy created by the legislator by means of the expression, perhaps not the most appropriate one, is required, from which it can be concluded that the element distinguishing between construction works and any other works is represented by the legal obligation of the construction permit.

Through the project titled "Technical Assistance on Preparing for the Implementation of the New Civil Code, Criminal Code, Civil Procedure Code and Criminal Procedure Code", Interim Report I elaborated by Ţucă, Zbârcea & Asociaţii, the elaborating team considers inadequate the qualification of some closely related works for the construction enterprise, even if it is not necessary for them to obtain a building permit, as being the object of a simple works or services, stating that due to the specificity of the construction works, the rights and obligations of the contractor, including the liability for defects, must necessarily be circumscribed to statutory regulations on the construction business. The author considers the subject matter of the limits of the scope of the special rules for the construction works to be of interest, not only for reasons of "aesthetics" of expression, but also because there are preconditions for a possible limitation of the rights and obligations of the parties deriving from the special rules – such as

those relating to the moment of transfer of risks to the beneficiary, liability for defects and the prescription of liability for defects – only to contracts for works for which the issuance of the building permit is required.

In order to be able to analyze whether there was the intention of the legislator to establish a genuine restriction in this regard, or we were only in a situation of unreasonable expression, we proceeded to interpret the legal text by means of consecrated interpretation methods.

3.4 *The Literal Interpretation Method*

By means of the *literal interpretation* method, based on the methods of morphological and syntactic analysis of the text, starting from the grammatical meaning of the words used, the expression "*By the contract for construction works, the contractor undertakes to execute works which according to the law require the issuance of the authorization construction*" does not require further clarification, the meaning of the terms and expressions used being the same as in the usual language.

In this case, the legislator explains clearly in the text the type of works that may be the subject of a construction works contract, i.e. only those for which a construction permit is required, thus excluding from the scope of the special contract rules dealing with demolition works, requiring only a dismantling permit as well as all construction works for which no authorization is required under the law.

The conclusion drawn from the research of the legal norm by the literal interpretation method is that the scope of the particular rules for the construction works is restricted only to those works requiring the issuance of a construction permit.

3.5 *The Method of Historical and Systemic Interpretation*

Given that the results of the literal interpretation were criticized both by practitioners and by theoreticians, and thus not shared by the author, the legal provisions were interpreted from the historical and systemic perspective, which are based on the establishment of the meaning of the rule of law on the research of the historical conditions which determined the adoption of the normative act (*occasio legis*), but also by setting the purpose pursued by the legislator (*ratio legis*).

From a historical perspective, the construction works contract did not benefit from its own regulation in the 1864 Civil Code, but a definition of this contract was found in the old regulation in Article 1413, paragraph 5 of Title VII, in the context of the relevant provisions regulating the lease operations. "*Antrepriza, luarea săvârşirii unei lucrări drept un preţ determinat, când materialul se dă de*

acela pentru care se execută o lucrare (C. civ., 1416 și urm., 1447 și urm., 1470 și urm.)."

"*Although the legislature of 1864 represented the construction contract as a variety of the lease contract (Article 1470 (3) C. 1864), the construction contract differs substantially from the rent contract, since the provision of services forming its essence is not remunerated in the ratio of as long as it lasts, but in relation to the final result. In the case of the placement of services (the employment contract), the object of the contract is the work itself, whereas in the construction contract the scope of works is represented by the final work*" [6]

The construction contract, being a well-known "type" of the business contract, is not novel in domestic law, being a legal institution with tradition, constantly approached at the doctrinal and jurisprudential level in its entirety, without having any delimitation in terms of its scope, depending on the type of construction works covered by the contract. The global approach to construction works is established at the jurisprudential level and results from the systemic intercession of the Civil Code of 1864, the legislator establishing, for example, in the art. 494 paragraph (1) that "*If plantations, constructions, and works were made by a third person with its materials, the landowner has the right to keep them for him, or to ask that person to take them away.*"

Including at the doctrinal level it was established that "*The construction activity includes reconstruction, consolidation, modification, extension, etc. and may include constructions other than buildings (such as communication routes, underground facilities, fencing, etc.), as well as installation and repair works on buildings (including construction works design activities)*" [7]

From the historical and systemic interpretation it is concluded that the legislator did not intend to limit the private rules regarding the construction business only to the contracts that deal with works requiring authorization, the more so as the distinctive element, namely the obligation to obtain the building permit, is so volatile, the specific legislation on the authorization of construction works, namely Law no. 50/1991, suffered only fifteen changes in the last three years.

3.6 *Teleological Interpretation Method*

However, in order to be able to formulate a consistently substantiated conclusion, the author was required to proceed to the teleological interpretation of the controversial norm, using the established logical reasoning. Using the "*a pari*" logical reasoning that allows the deduction of consequences following the analogy between two similar situations, it emerged that if the literal sense of the new regulation were to be effective, in order to carry out construction works, the parties could be put in the situation to have concluded different contracts for the same works, depending on the time of the contract, namely construction works contract before the date of entry into force of the NCC and a simple contract under the new regulation.

This situation is unlikely because after researching the substantiation notes underlying the amendment of the Civil Code of 1864 it was concluded that the legislator intended by the new regulation to update the legal system to the current economic realities and not to create confusion or to modify irrationally the stability of law-based institutions established at the level of society, depending on such easily altered landmarks, such as the categories of works subject to authorization.

Using the "*ad absurdum*" reasoning, it would be absurd that in identical situations it would be possible to conclude different contracts. However, by interpreting the controversial rule in a restrictive way, it would be a paradoxical situation in which, for the same type of work, there would be a delimitation of the rules applicable to the contract, for example, of the materials used or the form of works.

In order to be able to exemplify it, it is necessary to specify in advance that by Law no. 50/1991 on the authorization of constructions, there are listed both the works that require authorization and those for which there is no such legal obligation. By exemplifying, in the first case, as per article 11 (a), it is not necessary to have a building permit for fence and roof repair works "*when their shape and materials are not changed*", in which case the parties apply only the general rules of contract; in the second situation, for the execution of the same type of work, applying the reasoning *per a contrario*, under the same provisions of Article 11 (a), it is necessary to obtain the building permit for fence and roof repair works when changing the shape or materials from which are being executed. In this case the parties shall apply the special rules of construction contracts.

4 Conclusion

In conclusion, through the example of corroboration of art. 1874 NCC with art. 11 letter a) of Law no. 50/1991, the author proved that in the case of identical works, the parties would be subjected to different legal regulations depending on the materials used for the edification of the work, we are convinced that the legislator's expression is not the most appropriate one, but his intention was not to make the applicability of the special rules for the construction works conditional upon the legal obligation to obtain the building permit.

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The Civil Law Remedies Available for the Purchaser of a Car With a Reprogrammed Odometer

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Abstract

Nowadays, a significant number of buyers of used cars find themselves in the situation of finding out that the real number of kilometres of their automobile is far different than the one displayed on the dashboard. Some choose to solicit the termination or the reduction of price with the aid of the civil court, by utilising the institutions mentioned in the Civil Code. The present article deals with analysing the courses of action which may be undertaken in order to prove that the conditions for the actions are fulfilled and potential practical which may arise and how to properly address them.

Keywords: legal options, used automobile sale, hidden flaws, modified odometer readings.

1 Introduction

The purpose of the article is to establish a useful course of action for both practitioners and claimants in navigating this legal issue and properly exercising their rights by utilising the evidentiary arsenal that may be available. The practice of modifying the number of kilometres displayed on the car's dashboard has to be discouraged and among the legal remedies are in the provisions of the Civil Code. In this respect, the jurisprudence of the courts is rather different. Usually, the courts have admitted the action of the buyer to annul the sale or to reduce the price, but there are some cases in which the buyer has failed in his legal endeavour.

The current analysis of the problem at hand shall try to identify potential solutions for any incidents which may inhibit the buyer in soliciting the intervention of the court.

2 The Relevant Legal Texts

The Romanian Civil Code[1] is the legal basis of the institution. Thus, Article no. 1707 outlines the main conditions which are to be proven by the claimant in order to successfully present his opinion to the court: "*The seller guarantees the buyer against any **hidden vices** that make the sold asset improper for its intended purpose or **which diminish its use or value so much that, if they knew them**, the buyer would not have bought or **would have given a lower price**. (2) It is hidden that defect that, at the time of handover, could not be discovered without specialized assistance by a prudent and diligent purchaser. (3) The guarantee is due if the vice or cause exists **at the time the good is handed ove**r. (4) The seller is not liable for any vices that the buyer knew of at the conclusion of the contract."*.

At the same time, Article no. 1709 of the Civil Code deals with the obligation of the buyer to inform the seller regarding potential defects encountered right after the sale: "*(1) The purchaser who has discovered the hidden defects is obliged to inform the seller **within a reasonable time**, determined according to the circumstances, under the sanction of **losing the right to request the measure provided by art. 1.710 par. (1) let. d)**. (2) If the buyer is a professional and the good sold is a moveable item, the term stipulated in par. (1) is two business days… (4) The seller who has concealed the defect **cannot invoke the provisions of this article**."*

Finally, Article no. 1710 of the Civil Code "*Under the vendor's liability for defect, the buyer can obtain, as appropriate: a) removal of defects by the seller or at his expense; b) replacing the good sold with a good of the same kind, but free from defects; c) **appropriate price reduction**; **d) the termination of the sale**. (2) At the request of the seller, the court, having regard to the severity of the defects and the purpose for which the contract has been concluded, as well as other circumstances may decide upon another measure provided for in paragraph (1) than that requested by the buyer*."

3 The Opinion of the Legal Authors

Article 1707 which mentions the concept of apparent vices, has been analysed [2] and they have been defined as the ones which can be noticed at the moment of sale by a prudent and diligent buyer without any specialised assistance. The examination of the good must fall within the limits of a normal inquiry in the moment of the sale, without being the case of a thorough investigation regarding the substance of the item [3].

The buyers have been placed into two important categories [4]:"*casual or professional. Occasional buyers are considered those who do not have the technical competence to recognize the hidden vices of the work, while professional buyers have the technical competence to notice them, especially if they operate in the same specialty with the seller. "*The distinction is a very

[1] Law nr. 287/2009, republished in the Official Monitor, Part 1, no. 505/15.07.2011.

important one, as it can allow the judge to analyse the legal situation of the buyer, in deciding if the party is obligated to take certain steps in ensuring his protection when engaging in contractual relations. The distinction is very important also because it would be relevant to establish the application of either paragraph 1 or paragraph 2 of article 1709 of the Civil Code, which deals with the term in which the vices may be presented to the seller. Should he fail to notify the seller of the vices of the sold goods, he may not employ the use of article number 1709 of the Civil Code, in regards to the termination of the sale as stated in paragraph 1.

Article 1710 grants a multiple option right [5] for the buyer in terms of deciding the best course of action in this legal situation in accordance with paragraph 1.

The burden of proof lies onto the buyer, who has to prove that the conditions for the seller's liability for the hidden vices are met [3].

One of the conditions requires a certain gravity of the vice, which is to be decided upon by the court, but it is to be noted that it should not necessarily affect the substance of the item [6].

4 The Viewpoint of the Author

In regards to Article no. 1707 of the Civil Code, in ascertaining on whether or not the vices are hidden, it is of great importance to note that in order to establish the real number of kilometres of the car, a special type of analysis is needed by the use of diagnosis equipment. Only with the use of a special device can any alterations to the odometer be identified. Thus, the condition of "*specialized assistance*" is usually met in this type of situation. However, should the vehicle pose a service history in which the number of kilometres is mentioned and there are discrepancies between it and the displayed kilometres on the dashboard, the conditions are no longer met, since the vice is in this case apparent. Any "*prudent and diligent purchaser*" would have noticed the discrepancies without the use of "*specialized assistance*" and thus the conditions are not met for the liability of the seller.

Also, of great importance are the conditions that the sold asset is "*improper for its intended purpose* ***which diminishes its use or value so much that, if he knew them****, the buyer would not have bought it or would have given a lower price*". This presents a rather acceptable burden of proof for the buyer, given the fact that any significant difference in the actual number of kilometres has a bearing on the price of the automobile. Also, in practice, the differences are usually large enough to justify the position of the buyer of offering a much lower price should he had known the truth. Thus, an action regarding the reduction of the price, under Article no. *1.710 par. (1) let. c)* of the Civil Code becomes a practical course of action.

However, in terms of annulling the sale, it can be very difficult to prove to the court that should he had known the real number of kilometres, the buyer would have refrained from purchasing the car. Usually, the number of kilometres is no more than 100000, which may render the action quite difficult for the claimant.

The number may be very high, but given the fact that a car may run up to 1 million kilometres without any incidents, the modification of the number is far from decisive in terms of convincing the buyer to refrain from closing the deal.

Another aspect which is troublesome in terms of soliciting the court to annul the sale or to lower the price is to prove that the modification has been done before the moment of the sale. Most often than not, old automobiles lack an advanced computer which can record the date and time of the modification. Thus, it becomes very difficult for a *bona fide* purchaser to prove that the modification has been made during a specific moment in time. A specialized expertize may shed some light on the matter at hand in cases when the car is more modern but the problem remains when it comes to more antique automobiles. In these cases, proving that the modification has been made during the period when the seller was in possession of the vehicle may incur certain difficulties. And since Article no. 14 par. no. 2 of the Civil Code institutes a legal relative presumption that the seller himself is of *bona fide*, the burden of proof for the buyer may prove far too difficult to overcome. In these particular cases, usually the action is rejected, because of the technical limitations of establishing the exact moment the odometer has been tampered with.

This aspect is also relevant in terms of Article no. 1709 par. 4 of the Civil Code[2] which states that "*The seller who has concealed the defect* ***cannot invoke the provisions of this article***.". In the cases in which an expertise is unable to ascertain the exact moment of the modification, the buyer is obligated to invoke the vices in the allotted periods indicated in par. no. 1 and 2 of the same article – "***within a reasonable time****, determined according to the circumstances…* ***two business days***". Especially in the cases in which the buyer is a legal person these drastic limitations can greatly impede the exercise of the right to call for the termination of the contract. Thus, the only remaining option may be to solicit a price reduction, upon another expertise which may determine the reduction in value suffered in accordance with the actual number of kilometres of the car.

However, the danger for the buyer is far more alarming, given the fact that sometimes it cannot be clearly established when the modification has occurred, let alone by whom has it been performed. He may find it impossible to convince the court that the alterations were actually committed during the time when the car was in the possession of the seller. On such occasions, he ought to resort to the technical expertise in order to endeavour to establish the key aspects of the case: that the vices have occurred before the moment of the sale. Failure to do so may mean a dismissal of his case.

In relation to Article no. 1710 of the Civil Code[3], he should decide on whether or not to solicit a termination of the sale or on a price reduction. The first course of action, as previously indicated, can sometimes prove rather difficult to implement. The court can sometimes decide on another more appropriate measure such as a price reduction, but only at the request of the seller. The task of

[2] Law nr. 287/2009, republished in the Official Monitor, Part 1, no. 505/15.07.2011.
[3] *Ibidem*.

convincing it that had he known about the difference in kilometres, he would have never purchased, may be realised with the help of witnesses which may testify on the negotiations conducted between the two parties prior to the sale. Should they mention the adamant frame of mind of the buyer in clearly expressing his disapproval with any tampering with the odometer, the court may rule in his favour. However, such cases are rare and underline the necessity to ensure that at all negotiations potential witnesses must be present.

The other course of action would be to call for a price reduction. Usually, after a technical expertise in establishing the actual value of the vehicle, taking into consideration the true number of kilometres, the endeavour may prove achievable. Any reduction in value may permit the court to rule in the favour of the claimant. In this case, the buyer need only formulate the action within the term of the statute of limitations as stated in Article no. 2531 of the Civil Code[4].

In terms of analysing the opinion of the other legal authors regarding the buyer's obligation of verifying the car prior to the sale, the lack of necessity of analysing the very substance of the good can be interpreted in the sense that he need not prove that the overall functionality of the vehicle is affected. Even though the performance of the car may suffer from the many kilometres it has in actuality been driven, for the court it is only necessary to address the issue from the perspective of price reduction or a strong enough reason to annul the sale. Should the conditions of Article no. 1707 of the Civil Code be met, it is not necessary for the buyer in order to solicit de implementation of this article to previously conduct an inquiry into the substantial characteristics of the vehicle.

The difference between professional buyers and casual buyers is a very significant one. Normally, the actual contract is indicative of the quality of the buyer. Should he be a natural person, a relative presumption may be drawn by the court in terms of the applicability of article 1709 of the Civil Code[5] par. 1. It relies on the seller to prove that the buyer is actually a professional one, who has experience in such matters. For instance, witness testimony may indicate to the judge that the professional occupation of the buyer is the purchase and resale of automobiles. Thus, the term for this particular buyer to inform the seller of the hidden defects of the car is only two business days, as stated in Article no. 09 of the Civil Code[6] par. 2.

However, the distinction is more difficult to ascertain in the example of a consensual contract, as stated in Article no. 1174 par. 2 of the Civil Code[7] which states that "*The contract is consensual when it is formed by the simple agreement of the parties*.". Should the buyer purchase the car for both personal and professional use at his firm, then the nuance between the professional and casual party is less evident. For the court it would seem rather problematic to distinguish between the two categories, in deciding upon the time granted by the Civil Code to inform the seller regarding the hidden defects. In this endeavour, again, witness

[4] *Ibidem*.
[5] *Ibidem*.
[6] *Ibidem*.
[7] *Ibidem*.

testimony would provide a much-needed clarification. So can the legal classification of the car as established in relation to the local tax authority. Should taxes for the car be paid by the firm of the purchaser, then the presumption that he is a casual buyer should be considered as overturned by the court.

Finally, analysing the gravity of the defect in terms of deciding whether or not the vices are significant enough to justify the claim of the buyer should take into consideration the actual number of kilometres the car has in relation to the number indicated in the contract at the moment of the sale. Any differences of over 10 per cent should normally be acceptable for the court in order to rule in favour of the buyer. Indeed, there are no legal provisions to aid the judge in clearly establishing that the conditions are met but the margin of appreciation is reasonable enough to permit a correct decision. Regularly, the seller, in cases in which he chooses to modify the odometer bearings, chooses to alter a significant figure, in greatly reducing the number of kilometres in order to be able to ask for a much higher price. The task of the court in these instances is thus simplified. Only rarely have alterations been insignificant and have posed problems in the application of the legal provisions regarding the extent of the defects.

5 Conclusions

The enterprise of bringing before the court the claim of soliciting a termination or a price reduction in the situation previously analysed can pose a great deal of problems. The articles involved offer some guidance for the parties involved. Ultimately, the role of the Civil Code of rewarding the *bona fide* of the subjects of law can be clearly seen in this respect. The seller is protected by the institution of the two days term or reasonable amount of time offered to the buyer to inform him of the defects of the good. This in fact should be interpreted in accordance with the necessity of maintaining a certain security or predictability of the contractual relations between the parties. Too much ease in exercising the right to annul may pose more problems than it solves. Maybe the buyer has himself subjected the good to unwarranted hardships which could have generated other vices. There is no legal reason why the seller should be obligated to receive the car back in every situation. Thus, the institution of price reduction is a far more convenient and ultimately equitable method of sorting out the legal conflict.

However, in order to be able to call upon it, if falls within the obligations of the buyer to prove that the alteration has occurred during the period when the car was in the possession of the seller. Another problem would be that of the modifications made by a previous seller. The final seller may not even know of the vices. In this particular situation, the solution offered by Article no. 72 of the Civil Procedural Code[8] can prove crucial in protecting the bona fide of the last seller. Should he be obligated to pay for eventual damages, it is his legal right to solicit the previous seller to suffer the burden of the price reduction. However, all

[8] Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Gazette of Romania no. 247 of April 10, 2015.

these aspects are inapplicable if the buyer cannot prove to the court the exact moment of the alterations to the odometer. The obligation is imposed on him by Article no. 249 of the Civil Procedural Code[9] which states that "*The person who makes a statement during the trial must prove it, except for the specific cases provided by the law.*". In this particular case, the buyer may seem that his protection against any malevolent actions of the part of the seller is severely limited, but we must bear in mind that Article no. 14 par. 2 of the Civil Code[10] clearly mentions the fact that "*Good faith is presumed until the contrary*". To interpret his obligation in a different manner would no doubt come in opposition with these most important legal provisions which ultimately provide a most important framework regarding how legal relations between parties should occur.

Thus, the action should mandatorily require a technical expertise in order to determine the moment of the modifications to the odometer. Should the buyer be unable, for the various reasons which have already been analysed, to solicit the termination of the contract, another expertise would be necessary to establish the value of the car at the moment of sale according to the market in order to solicit the reduction in price. However, this indeed may pose certain problems, given the possibility that the parties may have failed to mention the exact number of kilometres at that particular moment. Thus, again, the buyer is placed in a difficult situation, as he may not be able to prove how many kilometres did the car have at that time.

Another issue transpires from the analysis, regarding whether or not the buyer is a casual or a professional one, in terms of establishing the application of either paragraph 1 of Article no. 1709 of the Civil Code or paragraph 2 in determining the legal time allotted to inform the seller of the defects under the sanction of losing the right to solicit the termination of the contract. The role of the judge in this respect is crucial. He, or the parties for that matter, should solicit proof from the local tax authority regarding the tax payer that is the owner of the car. Should the tax payer be a legal person, then the judge may establish that it is the will of the buyer to subject the sale and the good to the regime intended for legal persons. Thus, the buyers enjoy a two days term to inform the seller of the discovery of the alterations. Failure to do so, as we have already analysed, may mean that he shall only be able to request a price reduction.

There should be noted that some *de lege ferenda* proposals should be indicated.

Firstly, the term stated in par. 1 Article no. 1709 of the Civil Code[11] "***within a reasonable time*** "should be changed with an actual, express deadline as stated in paragraph 2. It would save a lot of difficulties encountered by the buyer in proving to the court that he informed the seller within a reasonable amount of time. The main efforts regarding the trial should focus on proving the moment of

[9] Idem.
[10] Law nr. 287/2009, republished in the Official Monitor, Part 1, no. 505/15.07.2011.
[11] Law nr. 287/2009, republished in the Official Monitor, Part 1, no. 505/15.07.2011.

the alterations, not on how long a time should be provided for the buyer to inform the seller regarding the defects.

Finally, Article no. 1710 of the Civil Code[12] should also be changed, in terms of establishing a percentile value needed to be proved by the buyer regarding the price difference that may justify the termination of the contract. Such a value, for example, is stated by the legal provisions in Article no. 1222 par. 2 of the Civil Code[13]: "*Except as provided in Art. 1.221 par. (3), the action for termination is admissible* ***only if the damage exceeds half of the value at the time the contract was concluded****, the promised or executed benefit of the injured party…*". Providing a clear value would conserve the principle regarding the security of the legal relations and would greatly simplify the task of the court in establishing if the termination is justified as stated in Article no. 1710 of the Civil Code[14] par. 2.

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[12] *Ibidem*.
[13] *Ibidem*.
[14] *Ibidem*.

Currency – The Means by Which the Obligation to Pay the Price in the Sales Contract is Realized. From Leu to Bitcoin

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Abstract

The present study describes the evolution of the national currency as a legal mean of achieving the obligation to pay the price from the moment of its appearance until now. Also, the social evolution and the dynamism of the economic activities made possible the fulfillment of the obligation to pay the price by other means besides the actual remittance of money in the form of banknote or metal coin as a traditional mean. Therefore, the legal regulation of the electronic money as a legal instrument of payment, as well as the emergence of virtual coins/cryptocurrency, allowed the acceleration of the obligation to pay the price. In regards with the realization of the obligation to pay the price under the sales contract, we can see that this is possible by the remittance of a classical coin but also by the remittance of the electronic currency, but it can not be achieved by using the virtual currency due to the specificity of the price that must imperiously consist in a sum of money. However, virtual currency may in fact substitute a currency-payment instrument, recognized by the lawmaker, to achieve the object of the obligation under the legal rules of the exchange contract, thus changing the legal nature of the original contract from the sale contract into an exchange contract.

Keywords: contract, sale, price, evolution, coin, electronic coin, virtual currency, Leu, bitcoin.

1 Brief History on the Emergence of the Leu – The National Currency of Romania

At the end of the 19th century, on 17/29 April 1880, in the "Official Gazette" no. 90, the Law on the establishment of a discount bank and circulation was published. Thus, thanks to the new law the National Bank of Romania was established, a credit institution, which had the exclusive privilege to issue banknotes. "The capital of the bank was entirely Romanian and one third belonged to the state and two thirds of the individuals" [1].

Regarding the normative act that realizes the implementation of the national monetary system, we recall that this was achieved on April 22/May 4, 1867, by the adoption from the National Legislative Forum of the Law on the Establishment of a New Monetary System and Production of National Coins. [2]

The establishment of the first domestic banknotes was made on November 28, 1880, when the first banknotes of the National Bank of Romania were put into circulation. The first banknotes were made by transforming the mortgage tickets issued under the Law from June 1877 by applying a yellow or black overprint containing the name of the National Bank of Romania, the date of September 9, 1880, the signatures of Governor II Câmpineanu, the cashier D. Bilcescu and of censor S. Ioanide. [3]

In 1867, the Leu, as the national currency, was established, and over time it would support various denominations, modifications and changes of concept; Thus, in 1947, the first denomination of the national currency took place followed by, in a short period of time, by a second denomination carried out in 1952, under the influence of the communist regime.

Subsequently, by Law no. 348/2004, the legislator established that on July 1, 2005, the national currency will be denominated in such a way that 10,000 old lei, present in circulation on that date, will be converted to 1 new Leu, as it results from Article 1, paragraph 1 of the normative text previously noted.

Also, according to Article 1, paragraph 2 of Law no. 348/2004 "*denomination represents the action of reducing the nominal value of the monetary symbols*" [4]

Regarding the current legal regulation of the national currency, according to Article 12 of the Law no. 312/2004 The National Bank of Romania is the only institution authorized to issue monetary symbols in the form of banknotes ***and coins as legal means of payment on Romanian territory***, and according to Article 13 of the same legal norm, the Romanian currency is "Leul", having its subdivision "Ban". [5]

2 Currency – The Means by Which the Obligation to Pay the Price is Made in the Sales Contract

As we know, social developments have led to the emergence of several coin typologies. Thus, if at the beginning of the 20th century, the economic market recognized the currency in the form of paper banknotes and metal coins as a

payment instrument, today these payment instruments are becoming less and less used; in the case of transactions of considerable value, their use being completely excluded even by the legislation.

In present, we are witnessing a gradual disappearance of physical payment instruments, such as banknotes and coins, their place being taken by scriptural money, by electronic money and, more recently, by "virtual currency".

Regarding the currency as a way of realizing the payment obligation under the sales contract, from the extensive interpretation of Article 12 of Law no. 312/2004 shows that the currency, regardless of its form, is a legal means of payment.

According to Article 1091 of the Civil Code of 1864 [6], likewise Article 1469 of the Civil Code [7], the payment is a way of extinguishing civil obligations if performed voluntarily. The legislator also reminds us in Article 1469 paragraph 2 that the payment consists mainly in the remittance of a sum of money. Thus, we can contravene the idea that, as a rule, the extinction of an obligation by means of payment is made by the remittance of a currency.

With regards to the legal operation of sale, according to Article 1650 of the Civil Code, this is the way the seller transmits or undertakes to give the buyer the property of a good for a price that the buyer pledges to pay. It is important to note that the legislator imposed essential conditions for the validity of the price. Thus, paragraph 1 of Article 1660 of the Civil Code provides that the price in the case of a sales contract should consist of a sum of money.

Therefore, the essence of the sale contract is that the payment of the sale price is only made by remitting an amount of money, that is, only by remitting the *lato sensu* coin. Consequently, the currency is the main instrument for achieving the obligation to pay the price and an important reference element, regarding the individualization of the economic value of a good.

It can be observed that civil law does not distinguish between currencies as a means of achieving the obligation to pay the price but merely states that the price of the contract needs to be expressed in a sum of money.

It follows that, no matter what sort of classification, the coins are divided into two categories, cash and currency.

The cash currency (actual) is in the form of bank notes or metal coins, and real money payments and receipts are extremely rarely used in international exchange relations due to the very high risk of loss or theft. This is why large amounts of currency transmission require special security measures.

The *currency in the account* is in an available form, in an account, whether bank or not, and can be used by the account holder. At the request of the holder, it can be converted into cash (effective currency).

The first expression of the cash currency is the banknote and the metal coin, payment instruments which according to Article 12 of Law no. 312/2004 may be issued only by the National Bank of Romania, which is the only institution authorized to issue monetary symbols in the form of banknotes and coins as legal means of payment on the territory of Romania.

2.1 *Electronic Currency*

Through Law no. 127/2011 Romania's legislative forum regulated by law the activity of issuing electronic money.

Even from Article 1 of Law no. 127/2011, the lawmaker states the purpose for which such a law has been adopted, as well as the conditions of accessing the activity of issuing electronic money and carrying out this activity, the conditions for carrying on the activity of providing payment services by the issuers' electronic money, the prudential supervision of electronic money institutions, and the electronic money redeeming regime. [8]

The aforementioned normative act states in Article 4 (f) the definition of electronic money by stating that electronic money is an electronically stored, including magnetic, monetary value, representing a receivable on the issuer, issued upon the receival of funds for the purpose of performing a payment transaction and which is accepted by a person other than the issuer of electronic money.

Thus, electronic money is in fact a materialization of monetary value in a fictitious space unit, but stored on a medium that has the nature of a claim on the issuer. It follows from the definition that electronic money must be accepted by a third party as a means of payment, otherwise its basic function can not be achieved.

In practice, to make an electronic money payment, it is necessary for the third party to accept the currency as a means of payment (acceptance may be conventional or result of *ope legis*) but also the issuer to guarantee the conversion of electronic money from an account currency into cash.

From Articles 7 and 8 of Law no. 127/2011 it follows that only the National Bank of Romania is the only body that can authorize a company for the issuance of electronic money on the territory of Romania. Therefore, the issuance of electronic money is closely monitored by the sole issuer of the national currency.

Moreover, by Law no. 70/2015 for the strengthening of the financial discipline regarding cash collection and payment operations and for the modification and completion of the Government Emergency Ordinance no. 193/2002 on the introduction of modern payment systems, the possibility of persons performing money collection and cash payment activities was limited.

According to Article 1 paragraph 1 of Law no. 70/2015, receipts and payments made by legal persons, authorized natural persons, individual enterprises, family businesses, self-employed persons, self-employed individuals, associations and other entities with or without legal personality from/to any of these categories of persons **will only be made through *cashless payment instruments***. However, although it imposes a general and imperative ban, the legislator also allows a derogation from this ban, being forced by social dynamics and avoiding the creation of an economic imbalance. Thus, Article 3 of the Law sets out the conditions under which the persons concerned may make cash payments.

It is interesting to observe the content of paragraph 2 of Article 1 of Law no. 70/2015 which exempts institutions that issue electronic money from the ban of making payments without cash. Thus, we can see that the legislator builds an environment conducive to the smooth running of e-money institutions, indirectly guaranteeing them and encouraging people to use the electronic money issued by them. Another reflection of the attitude of the legislator to encourage electronic money is also apparent from Article 5 paragraph 1 (a) of Law no. 70/2015, which provides that the following operations are exempted from the limit-ceilings: the deposit of cash in the accounts opened with credit institutions or institutions providing payment services which are authorized by the National Bank of Romania, including cash registers.

Regarding achieving the obligation to pay the price within the sale contract, as I affirmed, the essence of the contract of sale is to pay the price of this will be achieved only by delivering a sum of money or only by delivery of *lato sensu coin.* Thus, article 1660 of the Civil Code the legislature does not distinguish a way of doing obligation to pay the price, so by default to payment instruments.

Therefore, according to the Latin adage *ubi lex non distinguit nec nos distinguere debemus,* since the legislature has not made a distinction between the modalities of payment of the price that the payment will be considered valid if they are made through electronic money.

Thus, electronic money is a means that can achieve the obligation to pay the price in the contract of sale.

2.2 *Virtual Currencies – Cryptocurrency – Bitcoin*

In the last decade the human society has seen extensive developments, so that in the dynamics of social relationships cryptocurrencies – virtual currencies have made their presence.

Therefore, the virtual world starts to produce consequences in the real world, thus achieving new conception on the notion of social relation and social stability.

To not depart from the subject of our study we demonstrate that this new mean of payment may borrow, in a flexible way, but without substance, important features of electronic money.

Thus, we see that virtual currency has no physical existence, like electronic currency, is emitted in units that allow storage. But unlike electronic money we observe that virtual currency does not have specific regulations and the issuance of virtual currency is not under strict control of the authorities.

Currently the most popular virtual currency is Bitcoin, which has seen a large and rapid appreciation since the first emissions. Although this coin presents a clear and continuous appreciation of many renowned analysts believe that fulminant expansion of this virtual currency will shortly know a dramatic depreciation *"without a physical existence, costing just a few cents in 2009 when it was launched, rests on a payment system based on blockchain technology". "It's*

like a bubble with lots of foam. it will be the biggest bubble of our lives," warned Mike Novogratz expert at a hedge fund ". [10]

In regards of the use of virtual currency as a means of payment the National Banking Romania issued important guidelines that essentially conclude the use of schemes of virtual currency for making payment obligation as alternative currency pose a substantial risk to the financial system whereas this system is the lack of regulation and supervision.

Moreover, the European Central Bank issued a warning that by using these systems virtual currency facilitates money laundering operations, it increases the funding of terrorism phenomenon, consequences favored by the volatility of the virtual currency price, lack of control and adequate security. Basically, the virtual currency does not show stability and transparency.

Massive use of virtual currency schemes as a means of payment will lead eventually to interconnection cryptocurrencies to the global financial system, thereby creating a gap in the stability and predictability, leading ultimately to the destabilization of the financial system and the entrance in new global economic crisis.

Both in Romania and in the EU space, competent authorities have launched extensive public information campaigns about the risks of purchasing, trading and the possession of cryptocurrency by people. Thus, the National Bank of Romania issued on 11.03.2015 a public communication *"in the context of usage of virtual currency schemes (Bitcoin and others), the National Bank of Romania makes the following statements about risks associated with them.* ***Virtual currency is not national coin or a currency*** *and the acceptance of payment is not legally binding. More so,* ***the virtual currency is not a form of electronic money****, in the meaning of Law no. 127/2011 regarding the activity of issuing electronic money.*

In regards of achieving the obligation to pay the price present in the sale contract, we believe that this cannot be achieved by using the virtual currency as a payment instrument, because the essence of the contract is paying the price that consists in a sum of money or amount of money can be materialized only by means of payment recognized and regulated by the legal system.

However, if the parties of a contract of sale stipulate that virtual currency will serve as a means of achieving price paid as we believe that this will change the legal nature of the sales contract into a contract of exchange. European cases repeatedly say that any entity having an economic content falls within the notion of good. However, under Article 1763 of the Civil Code "exchange is a contract by which one party, called «copermutanţi», transmit or, where appropriate, undertake to deliver a good to get another."

Therefore, we believe that the virtual currency can be the object of the requirement under a contract of exchange since it has an economic content and circumscribe the European acceptation of the concept of good.

3 Conclusions

The virtual world undoubtedly has an impact on the real world, interfering even with concrete legal relations between the parties, with direct consequences on security and their stability; virtual world begins to produce visible consequences in the real world affecting security and stability.

If in the late twentieth century, it was unthinkable the realization of payments without submitting a material payment instrument or without remittance currency as banknote or coin metal at the beginning of the XXI century it is possible to perform the obligation to pay the price in under a contract of sale by delivery of electronic money, money without a physical state, method recommended and sometimes even required by the legislature.

Regarding the achievement of the obligation to pay the price of a sale through virtual currency, we judge that its implementation is not possible, it does not benefit of express recognition and regulation being not recognized by the state as money or currency.

But Romanian legislature does not restrict the use of virtual currency in conducting its obligation under a contract of exchange, virtual currency is assimilated to the concept of good economic value.

Finally, we say that although it is not recognized as a national currency or exchange currency as to be considered legal means of making payment, virtual currency, under the umbrella of legal regulation of the exchange contract, can be used to achieve in fact the payment price, with the consequence of non-recognition of *the de jure* payment.

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Invalidity of the Credit Agreement With the Consumer – Consequence of the Unfairness of the Contractual Terms. Theoretical and Practical Aspects

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Abstract

In the current context of numerous litigations concerning credit agreements between seller or supplier and consumers, and given the need to permanently protect the citizen as a consumer, an analysis of the consequences of the unfair nature of the contractual terms is required. The main effect of the unfair contractual terms governed by Directive 93/13/EEC is the invalidity of the terms and the possibility of continuing the contract which, after eliminating the significant imbalance created to the detriment of the consumer, continues to engage both parties. The goal is to improve the consumer's contractual position by preventing its engagement against an unfair term.

Keywords: unfair terms, credit agreements, terms drafted in 'plain and intelligible language', significant imbalance, main-subject matter of the contract, invalidity of the contract.

1 Union and National Legislative Benchmarks on Unfair Terms in Credit Agreements With Consumers

At European Union level, Council Directive 93/13/EEC on unfair terms in consumer contracts was adopted on 5 of April 1993 [1]. The necessity of adopting such a regulatory act has arisen in the context of significant divergences between

Member States' legislation on unfair terms in contracts concluded with consumers. These states have the duty and responsibility to protect the citizen, in his capacity as consumer, and it is essential to abolish the abusive clauses in such conventions. Only through uniform regulation of unfair terms can the consumer be given greater protection.

Also, according to the principle of protecting the economic interests of consumers, "acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts"[1]. At the same time, this Directive establish the principle of good faith, according to which the consumer must manifest his willingness to contract expressly and knowingly and the seller must act in a fair and balanced manner with regard to the other party whose interests must be taken into account. Thus, an essential requirement is required, namely the use of a plain and intelligible language when drawing up contractual clauses. In this situation, the consumer should have the opportunity to analyze all the agreed terms, and the unclear provisions or susceptible to different meanings would be interpreted in favor of the consumer. Moreover, for the purposes of the Directive, when consumers enter into abusive clauses in consumer contracts, they do not create obligations for the consumers but, to the extent possible, the contract will continue to exist, maintaining its validity and producing legal effects between the parties, with the exclusion of unfair terms.

The above-mentioned Directive refers only to contract terms that have not been negotiated individually, *per a contrario* Member States of the European Union will provide consumers, by stricter national provisions, a higher level of protection in the case of individually negotiated terms. In this situation, it is necessary to establish the criteria for assessing the unfairness of the contractual terms in a general manner.

Another European Union-wide protection instrument that relies on credit agreements for consumers is Directive 2008/48/EC of the European Parliament and of the Council [2]. The need for a uniform regulatory in this field has been born with considerable evolution and ongoing development of consumer credit types. It is essential that the market provides them with a sufficient degree of consumer protection to ensure their confidence. Thus, the free movement of credit offers should be able to take place in optimal conditions, both for those who offer them and for those who require them, taking into account the specific situations in each Member State.

According to the European legal act, both before and at the time of conclusion of the credit agreement consumers should receive adequate and complex information in order to make decisions in full knowledge of the facts. This information should include, for example, the conditions and cost of the credit, the annual effective interest rate on the loan and the obligations borne by the borrowers. In order to ensure the highest degree of security of the agreement concluded with the consumer and for the latter to know his rights and obligations,

[1] See the recitals of the Directive 93/13/EEC.

the loan contract should include all necessary information in a plain and comprehensible manner. Also, throughout the contractual relationship, the consumer should be informed about the changes in the borrowing rate and changes to the payments.

The legal basis of litigations in national courts where the abusive conduct of banks in concluding credit agreements with consumers is claimed is Law no. 193/2000 on unfair terms in contracts concluded between professionals and consumers [3]. Through this normative act, the provisions of Directive 93/13/EEC on unfair terms in consumer contracts have been transposed and implemented.

Given the need to transpose and implement legislation on consumer credit agreements and the Directive 2008/48/EC into national law, and to enable them to benefit from the rights under the European legislation in question, it was adopted on 9 of June 2010, the Emergency Ordinance no. 50 [4]. According to Article 1 of Emergency Ordinance no. 50/2010 the normative act "establish the rights and obligations of the parties regarding the consumer credit agreements".

Following the changes made at European level by Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 and in order to create a unitary framework based on clearly defined legal concepts regulating certain aspects of contractual relations between sellers or suppliers and consumers within the European Union, the adoption at the national level of the Emergency Ordinance no. 52/2016 on credit agreements for consumers to real estate, as well as for the modification and completion of the Emergency Ordinance no. 50/2010 on credit agreements for consumers [5].

2 Invalidity of the Credit Agreement in the Context of the Insertion of Unfair Contract Terms – Relevant Case-Law of the Court of Justice of the European Union

The theory of abusive clauses is based on the abuse of contractual law. The unfair terms are most often found in consumer contracts. For the purposes of Article 2 (a) in conjunction with Article 3 of Directive 93/13/EEC on unfair terms in consumer contracts, a contractual term is considered unfair if it has not been individually negotiated and if, in the absence of good faith, causes a significant imbalance at the expense of the consumer, between rights and obligations arising under the contract. In all cases where the consumer has been unable to influence the content of the term because it was previously written, it is considered not to have been negotiated individually. This is most often the case with adhesion contracts. In fact, these requirements were also set out in the judgments of the Court of Justice of the European Union in Cases C-137/08, *VB Pénzügyi Lízing Zrt. v. Ferenc Schneider*; C-421/14, *Banco Primus SA v. Jesús Gutiérrez García*; C-415/11, *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* and C-453/10, *Jana Pereničová, Vladislav Perenič v. S.O.S. financ, spol. s.r.o.*

According to Article 6 (1) of Directive 93/13/EEC, where the contract between a seller and a consumer cannot survive the abolition of unfair terms, it does not produce any effects, the national courts may remedy the invalidity of that term by replacing it with a provision of national law of suppressive character. In this regard, the CJEU ruled in the Case C-26/13, *Árpád Kásler, Hajnalka Káslerné Rábai v. OTP Jelzálogbank Zrt*[2].

2.1 *Examination of the Unfair Nature of the Terms Contained in Contracts Concluded With Consumers*

Considering that, the review of the unfairness of the contractual terms falls within the jurisdiction of the national courts, the European legislator provided for general criteria in that regard to determine them in Article 3 (1) and Article 4 (1) of Directive 93/13/EEC[3] of the recitals in the CJEU judgment of the recitals in the CJEU judgment of the recitals in the CJEU judgment.

From the interpretation given by the CJEU in Cases C-137/08, *VB Pénzügyi Lízing Zrt. v. Ferenc Schneider* and C-421/14, *Banco Primus SA v. Jesús Gutiérrez García*, Article 3 (1) of Directive 93/13, it is clear that, in order to assess whether a clause in a contract between a seller or supplier and a consumer is unfair, it must be determined whether it causes a significant imbalance between the rights and obligations of the parties to the detriment of the consumer as a result of the lack of good faith on the part of the seller. European regulatory defines in an abstract way the elements which mislead a contractual term which has not been individually negotiated, namely, the notion of "good faith" and "significant imbalance", and the Annex referred to Article 3 (3) of the Directive contains only an exemplary and non-limitative list of terms which may be considered abusive.

As is apparent from the Opinion of Advocate General in Case C-453/10, *Jana Pereničová, Vladislav Perenič v SOS financ, spol. sro*, in order to know if a contractual term provokes a "significant imbalance", it must be examined in the light of the applicable national rules in the absence of agreement between the parties, by the means available to the consumer under the national legislation, in order to bring that type of use to an end clauses and the nature of the goods or services covered by the contract in question, at the time of conclusion of the contract, in all the circumstances which accompany it. Due to this wording in a broad sense, the national court is required to take into account the actual content of the contract and numerous other relevant factors[4].

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[2] Paragraph 85 of the recitals in the judgment of the Court of Justice of the European Union of 30 April 2014 in Case C-*Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, C-26/13, available at http://curia.europa.eu.

[3] Paragraph 40 of the recitals in the judgment of the Court of Justice of the European Union of 9 November 2010 in Case C-137/08, *VB Pénzügyi Lízing Zrt. v. Ferenc Schneider*, available at http://curia.europa.eu.

[4] References to the case law of the CJEU, Opinion of Advocate General Verica Trstenjak delivered on 29 November 2011, the original language: German, in Case of C-453/10 *Jana*

Compared to another decision of the Court, namely Case C-415/11, *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa),* an essential factor in assessing the unfairness of a contractual term, is the way in that the trader has acted, namely with or without violation of the requirement of good faith established in Article 3 (1) of Directive 93/13. If the imbalance is created in contradiction with the principle of good faith, it is important to find out whether that seller or supplier acting fairly and equitably with the consumer could reasonably expect the latter to accept such a clause after an individual negotiation[5].

2.2 *The Meaning of the Phrase Drafted in "Plain and Intelligible Language"*

The requirement that the contractual terms be drafted "in a plain and intelligible language" is, in the Court's view, a prerequisite for the validity of contracts concluded between a seller or supplier and a consumer. As can be seen from the recitals of the CJEU judgment of 3 June 2010 in Case C-48 4/08, *Caja de Ahorros y Monte de Piedad de Madrid*, this must also be observed in the case of the application of Article 4 (2) of Directive 93/13. However, the clauses covered by that rule are exempted from the assessment of the unfair nature only if the competent national court considers, on a case-by-case basis, that they were drafted in a plain and intelligible language[6].

From the conjunction of Article 5 of Directive 93/13 and the 20th recital[7] of the same act, the consumer is required to effectively analyze all the terms of the contract, and ultimately will bind to a seller on the basis of the information provided by him. The intelligible character has to be interpreted extensively[8], as the Court held in Case C-348/14, *Bucura*, both formally and grammatically, and taking into account the level of information that can be expected from an average consumer who is reasonably well informed and reasonably observant and circumspect, given that he is in a position of inferiority to the professional[9] (CJEU judgment of 22 February 2018, Case C-126/17, *Erste Bank Hungary Zrt. v. Czakó Orsolya)*. Consequently, it is of fundamental importance to specifically and transparently expose the mechanism covered by that term and, where appropriate,

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Pereničová, Vladislav Perenič v SOS financ, spol. s.r.o., p. 29, available at https://eur-lex.europa.eu.

[5] Paragraph 69 of the CJEU judgment of 14 March 2013 in Case C-415/11, *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, available at http://curia.europa.eu.

[6] Paragraph 32 of the recitals in the CJEU judgment of 3 June 2010 in Case C-484/08, *Caja de Ahorros y Monte de Piedad de Madrid*, available at http://curia.europa.eu.

[7] This recital states that "contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail".

[8] Paragraphs 51, 52, 55 and 60 of the recitals in the CJEU judgment of 9 July 2015 in Case C-348/14, *Bucura*, available at http://curia.europa.eu.

[9] CJEU judgment of 22 February 2018 in Case C-126/17, *Erste Bank Hungary Zrt. v. Czakó Orsolya*, available at http://curia.europa.eu.

the relationship between that mechanism and that provided by other terms, so that the consumer is sufficiently informed to be able to assess, on the basis of precise and intelligible criteria, the economic consequences resulting from the contract. Among other things, the consumer has to understand the total cost of his loan and the potential consequences for a certain level of risk if he engages in exchange for financial advantages, such as a low interest rate. In that case, it is for the referring court to verify the relevant facts, including advertising and the information provided by the financial institution in the negotiation of a loan agreement.

In line with the Recommendation of the European Systemic Risk Board of 21 September 2011 on lending in foreign currencies, the average consumer who is reasonably attentive and aware that is able to understand that an exchange rate is subject to fluctuations must be clearly informed, by the bank, that by concluding a loan agreement in a foreign currency it expose to a foreign exchange risk that would be difficult to assume in case of devaluation of the currency in which it receives revenue[10]. In particular, where the borrower does not receive the proceeds in the currency in which the loan was made, the financial institution is required to present, taking into account its expertise and knowledge in this field, the possible exchange rate fluctuations and the risks inherent in the contracting of a borrowing in foreign currency. By judgment of the CJEU of 20 September 2017, in Case C-186/16, *Andriciuc and Others v Banca Românească S.*[11], the Court also decided that is it for the national court to verify that the bank communicates to the borrower the relevant information to allow them to assess the economic consequences of a clause on their financial obligations.

Accordingly, the Court has held in its jurisprudence that the requirement that a contractual term must be expressed "in a plain and intelligible language" implies that, in the case of credit agreements, banks should provide borrowers with sufficient information to enable them to adopt prudent decisions knowingly. It requires a term to be understood by the consumer both formally and grammatically, and in terms of its concrete effects, in the sense that an average consumer, normally informed and reasonably observant and circumspect, may know the possibility of appreciation or the depreciation of the foreign currency in which the loan was contracted and to assess the economic consequences of such a clause on its financial obligations.

[10] Recommendation A – Risk awareness by borrowers, paragraph 1 according to which "require financial institutions to provide borrowers with adequate information regarding the risks involved in foreign currency lending. Such information should be sufficient to enable borrowers to take well-informed and prudent decisions and should at least encompass the impact on instalments of a severe depreciation of the legal tender of the Member State in which a borrower is domiciled and of an increase of the foreign interest rate".

[11] CJEU judgment of 20 September 2017, Case C-186/16, *Andriciuc and Others v Banca Românească SA*, available at http://curia.europa.eu.

2.3 *Assessment of the Significant Imbalance in the Parties' Rights and Obligations*

In that regard, the Opinion of the Advocate General in Case C-415/11, *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*[12] that, we can say that there is a significant imbalance and unjustified between the rights and obligations of the parties, to the detriment of the consumer, only by comparison with the legal situation provided for by national law where the parties have not agreed a contractual provision to that effect, and only by a full analysis of all the individual circumstances in which it was concluded the contract, as listed in Article 4 (1) of the Directive. Such a clause causes a potentially abusive discrepancy between the rights and obligations of the parties if they are so reduced that the one proposing the contractual terms in good faith should not assume that the consumer would have accepted in the negotiations a such a provision and if the consumer's situation is less favorable than that provided for by the legal provisions.

However, even if a contractual term generates a disadvantageous position for the consumer compared to the position recognized by the law, it does not necessarily create a contractual imbalance, so that it qualifies as unfair within the meaning of Article 3 of Directive 93/13. The principle of contractual freedom being guaranteed and acknowledged by the fact that the parties often have an interest in organizing their contractual relations in a way that differs from the situation provided by the law.

Also, in order to establish the meaning of Article 3 (1) of Directive 93/13 it is necessary to consider the time at which the "significant imbalance" between the rights and obligations of the contracting parties must be assessed, that is to say, the moment of conclusion of the contract or a subsequent moment due to its evolution. First of all, it should be emphasized that this analysis makes sense only in so far as it would be concluded that the clause in question is not covered by Article 4 (2) of the Directive and that it lends itself to an examination of the substance of the abuse. Otherwise, this analysis appears to be irrelevant.

Secondly, as to the point at which the existence of a "significant imbalance" must be assessed, it follows from the wording of Article 3 (1) and the nature of the protection that Directive 93/13 confers. Thus, the assessment of the imbalance must be made according to the circumstances and the information available at the time of conclusion of the contract. In addition, the Court has already ruled in Case C-348/14, *Bucura*[13] that, in order to assess the unfair nature of a contractual term, the national court must refer to "at the time of the conclusion of the contract" in all the circumstances surrounding its conclusion. It is therefore for the referring court to assess the existence of any imbalance.

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[12] Paragraphs 71 to 76 of the Opinion of Advocate General Kokott of 8 November 2012 in Case C-415/11 *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, available at http://curia.europa.eu.

[13] Paragraph 48 of the Recitals of the CJEU judgment of 9 July 2015 in Case C-348/14, *Bucura*, available at http://curia.europa.eu.

2.4 *Terms Defining the Main-Subject Matter of the Contract*

In order to be able to examine whether a term falls within the definition of "the main subject-matter of the contract" within the meaning of Article 4 (2)[14] of Directive 93/13, it must first be considered that it should not be included in the exception referred to in Article 1 (2)[15] of the same normative act. That obligation of review lies with the national court.

Although the CJEU is entitled to set the criteria for such an examination. Thus, in Case C-143/13, *Matei,* the Court held that Article 4 (2) of Directive 93/13 must be strictly interpreted[16], as it introduces an exception to the substantive control mechanism of unfair terms established by the Directive and the interpretation must be given an autonomous and uniform[17].

The contractual terms defining the essential services and which, therefore, are covered by the term "main-subject matter of the contract" within the meaning of Article 4 (2) of the Directive. To distinguish what is "essential" to what is "accessory" in a particular contract, the European Court of Justice ruled in the judgment in Case C-96/14 *Van Hove* that it is necessary to take into account "the nature, general scheme and the stipulations of the contractual framework of which it forms part, and to its legal and factual context"[18].

It is clear from the judgment of the Court in Case C-186/16, *Andriciuc and Others v Banca Românească SA*[19] that capital and interest repayment is, in fact, the price of the credit and is indissociably linked to the currency in which the credit is granted, only the specified amounts are considered part of the main-subject matter of the contract, with the exclusion of the reference currency. In addition, the term inserted in a credit agreement entered into in a foreign currency between a seller or supplier and a consumer without having been the subject of an individual negotiation, according to which the loan must be repaid in the same currency, falls within the concept of "the main-subject matter of the contract", being an essential element of the borrower's performance, its very nature.

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[14] Article 4 (2) of Directive 93/13 reads as follows: “Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language”.

[15] Article 1 (2) of Directive 93/13 provides that “the contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive”.

[16] Paragraph 49 of the Judgments of the CJEU of 26 February 2015, in Case C-143/13, *Matei*, available at http://curia.europa.eu

[17] Paragraph 50 of the Judgments of the CJEU in Case C-143/13.

[18] Paragraph 33 of the Judgments of the CJEU of 23 April 2015, in Case C-96/14, *Van Hove*, available at http://curia.europa.eu.

[19] The Judgment of the CJEU of 20 September 2017, in Case C-186/16, *Andriciuc and Others v Banca Românească SA*.

On the other hand, following the analysis in Case C-143/13, *Matei*[20], the Court considered that the collection of risk/management fees is not essential benefits under a credit agreement. In this case, the referring court will have to take account, in particular, of the essential aim pursued by the "risk commission", which is to guarantee repayment of the loan, which may also constitute an essential obligation incumbent on the consumer in return for the provision of the amount of the loan.

Therefore, terms allowing the creditor to modify the interest rate unilaterally do not fall within the scope of the exclusion provided by Article 4 (2) of Directive 93/13. In addition, it may be an indication of the accessory character of such terms they comprise in essentially a mechanism for adjustment which cannot be separated from the clause fixing the interest rate, which may be part of the main-subject matter of the contract.

2.5 *Invalidity of the Credit Agreement Containing Unfair Terms*

Having regard to the consumer protection mechanism established by Directive 93/13 and interpreting Article 4 (1), we understand that the circumstance which led to the assessment of the unfairness of a contractual term must also have effect on the validity of the agreement concluded by the parties.

From the analysis of Article 6 (1) first part of the first sentence of Directive 93/13[21], relies on the legal effects established by the Union legislator in the use of unfair terms, namely: the individual clauses of the contract will be declared void in favor of the consumer and the trader's obligations will remain valid. In addition, the second part of the thesis first includes an explanatory statement that Member States are obliged to ensure that "the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms". Thus, the consequence of an unfair contractual term is its invalidity and the possibility of continuing the existence of the contract which, after eliminating the imbalance created to the detriment of the consumer, continues to engage both parties. Accordingly, the regulation must be understood in the light of its legislative objective, namely to improve the consumer's contractual position by preventing its engagement against an unfair term, in which case the protection of the seller or supplier is not sought.

In the case of unfair terms in a contract, member states are usually not required to provide in national legislation the invalidity of the entire contract, according to the provisions of Article 6 (1) of Directive 93/13. Moreover, the consequence of invalidity may be limited to that term, while the contract as such continues to exist. Therefore, the contract will still be valid for both parties

[20] Paragraphs 57, 62, 64, 67 of the Judgments of the CJEU in Case C-143/13, *Matei*.
[21] "Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer [...]".

without the unfair term in so far as possible, *per a contrario* in cases where the contract can not continue to exist without the unfair term, all obligations of the parties are extinguished.

Interpretation of Article 6 (1) of Directive 93/13/EEC must be interpreted as meaning that, as regards the question of the continued existence of a contract containing unfair terms, it is irrelevant whether it would be more favorable to the consumer. However, that provision does not prevent Member States from providing in the national legal systems, the legal consequence of the invalidity of the entire contract.

For example, in the optics of Spanish Government, the mistaken mention of the annual interest rate is, according to Article 4 (1) and Article 6 (1) of Directive 93/13, the effect on the validity of the entire consumer credit contract, in so far as this is more favorable to the consumer[22].

3 Conclusions

In the light of the analyzed cases, the Court has outlined the main criteria that allow qualifying terms in consumer contracts as unfair, while also establishing the remedies for safeguarding such contracts, as well as the situations where the insertion of such terms entails the invalidity of the contract.

Consequently, in the absence of a genuine negotiation of the contract and in the event of a significant imbalance due to the lack of good faith on the part of the co-contractor, the unfair nature is to be assessed by the national courts, the European legislator being solely responsible for laying down the general criteria of determination.

The jurisprudence of the Court is also relevant to the purpose of determining the main-subject matter of the contract. Thus, among the clauses constituting the main-subject matter of the contract are, for example, the clauses requiring repayment of the loan in the currency in which it was granted or the clauses involving the repayment of capital and interest, which in fact represents the price of the loan. The collection of risk or administration fees and the clauses that allow the creditor to unilaterally and in certain circumstances modify the interest rate are circumscribed to the secondary object of the contract.

The use of unfair terms in contracts between seller or supplier and consumers has the following effects in the light of Directive 93/13/EEC, namely: the invalidity of the individual clause in favor of the consumer and the possibility of continuing the contract if it can exist without the unfair terms. The aim of this remedy is to improve the consumer's contractual position by preventing its engagement against an unfair term.

[22] References to the jurisprudence of the CJEU, Opinion of Advocate General Verica Trstenjak delivered on 29 November 2011, Original language: German, in Case C-453/10, *Jana Pereničová, Vladislav Perenič v SOS financ, spol. s.r.o.*, p. 10.

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[2] Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers and repealing Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, as amended by Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998, published in the Official Journal of the European Union (JOCE) L133 of 22 May 2008. Directive 2008/48/EC was amended by Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers in respect of residential immovable property published in the Official Journal of the European Union, L series, no. 60 of 28 February 2014.

[3] Law no. 193 of 6 November 2000, published in the Official Gazette of Romania, Part I, no. 560 of 10 November 2000, subsequently republished in the Official Gazette of Romania, no. 305 of 18 April 2008. It was amended by Law no. 161/2010, published in the Official Gazette of Romania, Part I, no. 497 of 19 July 2010 and republished under the provisions of Article 80 of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Code of Civil Procedure, published in the Official Gazette of Romania, Part I, no. 365 of 30 May 2012, giving the texts a new numbering.

[4] Emergency Ordinance no. 50/2010, published in the Official Gazette of Romania, Part I, no. 389 of 11 June 2010.

The Limit for Bringing an Action for Annulment of the GMS Decision

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Abstract

The time limit for bringing an action for annulment of the GMS decision as well as the theoretical and practical aspects are of particular relevance since the annulment of the decisions of the General Meeting of Shareholders is the change/modification of the company's will, expressed by the shareholders' decision, and the appeal against it can be lodged only by this way, it cannot be incidental in other applications.

Keyword: claim of annulment, the term for the introduction of the claim of annulment.

1 Introduction

The first part of Article 132 paragraph 2 of the Law on Commercial Companies stipulates that "Decisions of the general meeting that are contrary to the law or the articles of association may be appealed against within 15 days from the date of publication in the Official Gazette of Romania, Part IV".

It is important to address the issue of the nature of the 15-day deadline, namely whether it is a limitation period or a time-limit. Practically, the limitation period is subject to suspension or discontinuation, as well as to the relief from effects of expiry, as opposed to that of the time-limit[1]. The doctrine and case-law have unanimously established the nature of the deadline as being a limitation period[2].

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[1] Beleiu, G., Nicolae, M., Truşcă P. (2007). *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil* (Romania Civil law. Introduction on the Study of Civil Law. Subjects of the civil law), Bucharest: Universul Juridic Publishing House, p. 242.

[2] Scheaua, M. (2000). *Legea societăţilor comerciale nr. 31/1990. Comentată şi adnotată* (Commercial Law No. 31/1990, Comments and Ammendment), Bucharest: All Beck Publishing House, p. 294; Catană, R. (2007). *Dreptul societăţilor comerciale. Probleme*

What is extremely beneficial is that the deadline is one related to the procedural law, so it is calculated on days off.

In practice, it is relevant the fact that a decision of a general meeting of shareholders cannot be challenged incidentally, that is by way of objection within other proceedings. In this respect, Bucharest Court of Appeal stated in judgment no. 791 of May 20, 2009[3] that in an action seeking the withdrawal from the company of an associate for misunderstandings with the other associates, although the applicant disputes that she had been summoned to the general meetings of that company, she could not prove it by final judgements given following actions for annulment of those decisions of general meetings. In other cases, the High Court of Cassation and Justice, referring to a judgment rendered by Timişoara Court of Appeal, stated that the objection to the invalidity of the decision of the general meeting of shareholders can be analysed only within the procedural framework established by the mandatory provisions stipulated in Article 132 of Law no. 31/1990[4].

In that case, this objection was raised before Bucharest Court of Appeal in an action for annulment of an arbitration award. Thus, in order to obtain the sanction of the invalidity of the GMS decision under Article 132 of the Law on Commercial Companies, the procedure established by this article must be followed. Violations of the rules regarding the adoption of a GMS decision do not lead only to a sanction or to the possible annulment of this decision. In the case decided by Bucharest Court of Appeal, the applicant was not seeking to invalidate the decisions of the GMS to which she claimed she had not been summoned but asserted that right in support of her claim that there were serious misunderstandings between the associates and that she was excluded from participation to the social life, in order to obtain the right to withdraw from company. Thus, she did not claim that those decisions were invalid legal acts, but rather invoked them (notably, she invoked that she had not been summoned to the GMS meetings) in order to obtain another legal effect, namely withdrawal from the company (a limited liability company).

I believe that it should be reiterated the idea that, within the procedural framework, it was not legal acts (GMS decisions) that were appealed against, but facts were stated that, according to the provisions of the Code of Civil Procedure, could be proved by any means of evidence.

It is worth noting that reaching the 15-day deadline does not extinguish, "as in the case of time-barring, the subjective right to compensation, if a damage was

actuale privind societăţile pe acţiuni (Commercial law. Actual problems concerning the shareholders companies. The shareholders democracy), Cluj Napoca: Sfera Juridică Publishing House, p. 98; Schiau, I., Prescure, T. (1997). *Legea societăţilor comerciale nr. 31/1990. Analize şi comentarii pe articole* (Company law no. 31/1990. Analizes and coments on articles), Bucharest: Hamangiu Publishing House, p. 393; Duțescu, C. (2006). *Drepturile acţionarilor* (The shareholders rights), Bucharest: Lumina Lex Publishing House, p. 253.

[3] Published in Commercial Law Magazine no. 11/2009, p.141.

[4] High Court of Cassation and Justice Judgment no.153 of January 18. (2011). Published on the website www.scj.ro.

created by the GMS decision"[5]. The issue may, however, revolutionize the judicial practice since, at that date, the effect of the 15-day deadline was to block the legality control of the GMS decisions after its expiration, even incidentally. Compensations are designed as a complementary sanction for the annulment; thus, in its absence, no autonomous claims for damages for allegedly unlawful decisions were made[6].

I mention that the compensation is not complementary or subsidiary to the annulment, which determines the fact that, for an unlawful decision, an action for damages can be filed after the expiry of the 15-day deadline stipulated by Article 132 paragraph 2. Entailing the liability determines proving the unlawful deed causing damage, that is, proving the fact that the GMS decision is contrary to the statutory or legal provisions. Finding that a decision violates the law is not one and the same as annulling the decision. The principle of legal certainty prevails with regard to the time limit in which the annulment of a decision can be demanded but, in the present case, the ex iniuria isu non oritur principle precludes it.

If legal certainty is not impaired, there is no reason to prohibit the exercise of the right to seek a declaration of unlawfulness of the decision and to award damages after the expiry of the 15-day deadline, but within the three-year general limitation period.

In administrative law, for example, a similar reasoning would be difficult to conceive, because Law no. 554/2004 of the litigation requires the presence of an application for annulment of the administrative act as a prerequisite for any claims for compensation for damages. Only the administrative litigation court has the right to find the illegality of an administrative act, a sine qua non condition for granting the application for compensation for damages. Regulating the judicial proceedings of pleas of illegality has the same purpose. This reasoning does not exist in the case of unlawful decisions of GMS which, being a matter of common law, can be challenged by any civil court.

With regard to the question of whether an action for annulment could be brought only after the decision has been published in the Official Gazette or it could be filed before that date (between the date of adoption of the decision and the date of its publication), several points of view were expressed in practice and doctrine. Thus, shareholders may have a justified and current legitimate interest in bringing an action for annulment between the above-mentioned moments, but the requirement to publish it in the Official Gazette is a measure of protection for the shareholders and, as such, it cannot be enforced against them[7].

In fact, the case-law practice has undergone a sudden change and recent decisions reveal with no doubt that the shareholders' right to bring an action for annulment before the decision is published in the Official Gazette is accepted. The

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[5] Duțescu, C. (2006). *Drepturile acţionarilor* (The shareholders rights), Bucharest: Lumina Lex Publishing House, p. 253.
[6] Bojin, L. (2012). *Judecarea acţiunii în anularea hotărârii Adunării Generale a Acţionarilor şi a cererii de suspendare* (The Claim of Annulment of the GMA'S of the Shaholders), Bucharest: Universul Juridic Publishing House, p. 207.
[7] Schiau, I., Prescure, T., *supra*, p. 394.

period for bringing an action for annulment is therefore the period elapsing between the adoption of the decision and its publication, plus the 15 days following publication[8]. The limitation period starts to run from the date of publication in the Official Gazette and represents the period during which a right may be exercised[9]. As such, the moment when the limitation period begins to run is the moment when the right to action was born and can be exercised. However, the expiration of this deadline depends on an event that is, in principle, certain to occur, unless the decision is no longer published (publication in the Official Gazette), but it is not known for certain when it will occur.

It is preferable to accept that there is always the obligation to publish the GMS decision in the Official Gazette without derogations from the rule, in order to be able to mark in time when the 15-day deadline begins to run until the expiry of the limitation period.

The High Court of Cassation and Justice, by judgment no. 311 of January 25, 2011[10], stated that an application for interference in its own interest is incompatible with the procedural framework established by an action based on the provisions of Article 132 of the Law on Commercial Companies. The reasoning is not related to the limitation period but is that the action is directed against the company, the interest of the action concerns the social will and it is not possible to conceive and accept other particular interests that could be defended by an intervention in its own interest.

The action for declaration of the absolute invalidity is not subject to a limitation period, and, practically, it can be brought at any time.

A long period elapsed from a decision and until an action for declaration of absolute invalidity is brought has led the court practice to impose a de facto form of limitation. Thus, Constanța Court of Appeal[11] granted protection to the principle of the stability of legal acts by rejecting an action for declaration of absolute invalidity of a GMS decision from 1996 as devoid of purpose, an action brought in 2006. The reasons given by the court were that the decision "has produced effects that can no longer be eliminated", consequently the possible granting of the action could no longer lead to any practical use to the applicant.

2 Conclusion

Regardless of the form of relative or absolute invalidity, the time limit for bringing an action for annulment of the GMS decision is extremely important because the exercise of this type of action leads to an interference in the social life of a company, disturbing it or not. If the decisions taken within the GMS remain valid or not depends on this time limit, provided they are subject to the legality control exercised by the courts.

[8] Duțescu, C., *supra*, p. 254.
[9] Articles 2501 and 2517 of the New Civil Code.
[10] Published on the website www.scj.ro.
[11] Judgment No. 141 of November 9, 2009, published in Jurindex.

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Legal Perspectives on the Internet of Things

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Abstract

The Internet of Things (IoT) is a collection of interconnected physical objects across the Internet that exchange information with each other and collect information from the environment, creating a network where objects interact. For example, there are portable gadgets that monitor vital signs and transmit information through an application to a healthcare provider, there are intelligent security systems that automatically lock the house at a predefined time, or communication systems that can be handled on the machine by mobile phone. The Internet of Things has evolved exponentially due to the huge growth potential and profit-making that has prompted traders to rethink their products and services to integrate technology and communications systems. Starting from the legal challenges posed by the development of the Internet of Things, this article presents the solutions adopted at European level in terms of personal data protection, regulations adapted to new technological developments.

Keywords: Internet of Things (IoT), Internet of Everything (IoE), Industrial Internet, Machine to Machine (M2M), Industry 4.0 (Industry 4.0), Web of Things, General Data Protection Regulation (GDPR).

1 The Notion of the Internet of Things

The term "Internet of Things (IoT)" represents a network of interconnected "smart objects" that incorporate software, electronic components, sensors, actuators and Internet connections through to which data is collected and distributed. These objects can be uniquely identified and interact with other objects and the external environment without the intervention of the human factor. [1]

The first use of this term in 1999 is attributed to Kevin Ashton[1]. The formal introduction of the notion of Internet of Things was made in 2005 by the International Telecommunication Union (ITU), which defined this concept as a global information society infrastructure that enables advanced services by interconnecting objects (physical and virtual) based on existing and future information and communication technologies[2].

At the European level, there is no legal definition of the term Internet of Things. But semantically analyzing this expression composed of the concepts of "Internet" and "Thing", the European Commission assigns it the meaning of a universal network of uniquely interconnected objects, based on standard communication protocols. [2]

Given the novelty and dynamics of the evolution of Internet of Things, there are a number of similar concepts, such as the Internet of Everything (IoE), the Industrial Internet, Machine to Machine (M2M), Industry 4.0 4.0) or the Web of Things (Web of Things). Between these concepts there are different degrees of overlap and technological convergence, with side-to-side correlations being established.

Thus, the Internet of Everything (IoE) is the concept with the largest scope, including all the connections that can be imagined. Industrial Internet has a narrower scope than IOE, but more comprehensive than M2M, because it includes not only machine connections but also human interfaces. Industry 4.0 is a term used to describe the fourth industrial revolution represented by the profound digital transformation of our lives, changes that cover everything from artificial intelligence and robotics to tridimensional printing and new augmented hardware reality. The Web of Things has the narrowest scope than the other concepts, focusing exclusively on software architecture.

Since the lack of clear terminology can be a source of confusion for users, the Industrial Internet Consortium has created a working group to develop a vocabulary[3] containing terms related to IoT.

2 Applications of the Internet of Things

The number of objects connected to each other via the Internet (cars, home appliances, lighting, mobile devices, portable devices, etc.) has increased exponentially, with more Internet-connected objects now than people in the world. Thus, if in 2003 there were estimated 500 million connected objects, by 2015 their number has increased 50 times to almost 25 billion. Estimates of the number of

[1] Kevin Ashton has created a global standard for Radio Frequency Identification (RFID) and is the founder of Auto-ID Center at the Massachusetts Institute of Technology (MIT).
[2] The definition is found in the ITU-T Recommendation Y.2060 which provides an overview of the Internet of Things (IoT). This recommendation clarifies the notion and scope of IoT, identifies the fundamental characteristics and describes the IoT reference model. Available at https://www.itu.int/ITU-T/recommendations/rec.aspx?rec=y.2060.
[3] The Industrial Internet Consortium, The Industrial Internet of Things Vocabulary. Available at http://www.iiconsortium.org/pdf/IIC_Vocab_Technical_Report_2.0.pdf.

interconnected devices by 2020 show that the Internet of Things will double its number to nearly 50 billion smart online items, on average every individual uses more than 6 devices[4].

The Internet of Things can be integrated in almost all areas, like Smart Health, Smart Home and Buildings, Smart cities, the Industrial Sector (IIoT), Smart Energy and the Smart Grid, Smart Agriculture, etc.

In the medical field, for example, there are portable gadgets that monitor vital signs and transmit information through an application to a healthcare provider. This system can replace the process of always having a specialist, who should periodically check the patient's condition. Due to the continuous and automatic flow of information, the quality of medical care increases, while at the same time reducing the costs of classical care. This solution can also be used to safely capture patient status data that can be sent after a wireless connection to healthcare professionals who can make recommendations remotely.

With regard to the practical applications of smart buildings, smart security systems that automatically lock the house at a predetermined time can be mentioned. Smart cars, which are already a reality nowadays, are equipped with communication systems through which the car can be controlled via the mobile phone.

Another example of the Internet of Things in is the smart city, which is an urban ecosystem that uses information and communication technology to develop an easily accessible, interactive and efficient public infrastructure and services. The IoT ecosystem allows entities to connect and control their own IoT devices. Thus, through a device (a smartphone, tablet, etc.), a command or request is sent over a network to an IoT device that will perform the command and /or send the information back to the network for analysis and displayed on the original equipment. The data generated by the IoT device can be stored and analyzed in various locations, for example in the cloud, in a database, on a device or even on the IoT device. [3]

In a smart city, sensory systems make it possible to monitor and manage the infrastructure, air monitoring, smart lighting systems, traffic, smart transport networks, etc. Such a city is Songdo in South Korea, where SparkLabs alongside Google, Cisco and others continue to develop their technology infrastructure and implement their new applications[5].

A very important field of application of the Internet of things in the industrial sector is predictive maintenance which involves the use of data collected from sensors for real-time analysis and monitoring. Thus, predictive maintenance uses

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[4] Dave Evans, *The Internet of Things: How the Next Evolution of the Internet is Changing Everything*, Cisco Internet Business Solutions Group, April 2011, p. 3. Available at http://www.cisco.com/web/about/ac79/docs/innov/IoT_IBSG_0411FINAL.pdf

[5] Elena-Liliana Stan, *Studiu de fundamentare a conceptului "Internet of Things"*, Sesiunea Științifică Studențească a Facultății IMST Universitatea Politehnica din București, 13-14 mai 2016, București. Available at http://www.imst.pub.ro/Upload/Studenti/SSS_2016/lucrarile_sesiunii_stud_2016/STUDIU_DE_FUNDAMENTARE_A_CONCEPTULUI_INTERNET_OF_THINGS.pdf.

sensors to monitor certain components and systems, uses analysis algorithms to identify anomalies and causes that have led to them, and algorithms that determine whether components will need replacement or repair. Also, you can schedule the most suitable moments and/or locations for maintenance. In particular, predictive maintenance can be used to predict the time at which gas pumps must be changed before they fail, thus avoiding potential losses. Or, some sensors can be used to diagnose and predict the need for aircraft repairs. [4]

In the context of the development of IoT and the new opportunities created by it, data threats and confidentiality increase proportionally given the large area of attack. [5] Each connected device may be subject to a potential abuse, and therefore each user is at risk of becoming a potential target for attack due to contextual information generated by the use of IoT devices. [6]

3 Legal Challenges of the IoT

The potential of IoT to increase profits and develop business has prompted traders to invest in integrating technology and communications systems into their products to become able to collect and transmit data. Due to the operation of IoT based on sensors that receive data, there is an intense exchange of information between objects.

Objects included in the Internet of Things contain two electronic parts that provide the two primary functions, namely the data collection, usually done by means of sensors, and the transmission of these data by means of an Internet connection. [2] This architecture of the IoT system generates a series of technical and legal challenges generated by the risks associated with these data exchanges.

One of the major challenges posed by the development of IoT is to ensure **confidentiality and data security**. By using massive amounts of data flowing between databases as well as sensitive information that is transmitted between devices, a profile of the person who is at risk of disclosing this information to unauthorized persons is automatically created. The information obtained by such interconnected systems is disseminated without the express consent of the person at each stage. Therefore, confidentiality of personal data is difficult to achieve because the whole system (the IoT platform) is built to operate in a coordinated manner, a prerequisite for such automation being the connection and exchange of information[6].

Another challenge in developing IoT is **data protection**. Free data flow is exposed to the risk of interception and transfer to other databases, and if security systems are broken, personal information may be passed to unauthorized persons. By adopting the General Regulation on the Protection of Personal Data[7],

[6] Legal Resolved, Internet of Things: legal perspective-risk & challenges. Available at https://medium.com/@legalresolved/internet-of-things-legal-perspective-risk-challenges-cd98b7a05bf7

[7] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on

European legislation has imposed the obligation to obtain informed consent from the user. Also, the new European data protection legislation obliges people who manipulate data to comply with reasonable security conditions.

Intellectual property rights also raise particular issues as the operation of IoT systems is largely based on interconnection, which forces companies to develop products and technologies that work together on an integrated platform. This leads to the diminishing of intellectual property rights limits on developed technologies, and therefore, it rises difficulties in defining the rights of each holder.

A problem that has generated many legal controversies is the question of **data ownership**. In the context of perfect integration of data from different technologies and devices, the question of who is the owner of the information created becomes legitimate. For example: if a watch measures the pulse and body temperature, and on this basis directs the air conditioning power to adjust the room temperature to a comfortable level, or if the navigation system in a car estimates and transmits household appliances when the person arrives at home, the ownership of the data generated about that person (route, time, habits, etc.) belongs to the person who holds the electronic devices (because the data collected is about him/her) or to the electronic devices (because they created the data)?

And as far as **jurisdiction** is concerned, there are many problems because it cannot be attributed to a limited geographical area. Because IoT involves the interconnection of different technologies and services belonging to distinct companies that may be in different jurisdictions, establishing a common jurisdiction for disputes arising from IoT disputes involves developing criteria to determine it.

Last but not least, the issue of **accountability** must be highlighted. If the IoT operation generates a consumer dispute or if any injury is caused to a party, it becomes difficult to determine precisely the cause that produced the damage, which aspect of the interconnected devices has been malfunctioning and the person responsible for the damage created. This is due to the continuous flow of information that sometimes makes it impossible to pinpoint the exact cause of the malfunction.

The challenges generated by the emergence and development of the Internet of Things is a catalyst in the process of developing new regulations that meet the needs created by new technologies, as well as an opportunity to adapt the existing regulations that correspond to the new economic, technical, legal and social realities.

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the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), published in OJ L 119/1 of 04 May 2016.

4 Initiatives on Internet of Things at the European Level

The Internet of Things (IoT) is an important step towards the digitization of the EU and the European Union (EU) economy where objects and people are interconnected through communications networks and transmit information about their status and/or the environment. In this respect, over the last six years, the European Commission has actively cooperated with various organizations, as well as with EU Member States, to capitalize on the potential of IoT technology[8].

In March 2015, the European Commission launched the Alliance for Internet of Things Innovation (AIOTI)[9] to support the creation of a European eco-system of the Internet of Things. Through this initiative, the European Commission wants to work closely with all stakeholders, as well as Internet stakeholders, in order to establish a competitive European market for IoT and to create new business models. At present, AIOTI is the largest European association of IoT.

In May 2015, the Single Digital Market Strategy[10] was adopted, documenting the need to avoid fragmentation and encourage interoperability for the Internet of things so that it reaches its potential.

Subsequently, in April 2016, the European Commission adopted the "European Industry Digitization"[11] stating the EU's three-pillar vision for IoT, namely the development of an IOTT ecosystem, a human-centered approach to the IoT and the creation of a single market for IoT. A potential barrier to a single market for IoT is related to the ability to manage a great diversity and a great deal of connected devices. In this context, it is necessary to promote an interoperable number of IoT numbers in order to identify and authenticate the objects.

The latest European Commission initiative, adopted in January 2017, called the "European Data Economy Initiative"[12], also contributes to the creation of a single European market for IoT. This initiative proposes policy and legal solutions to the free flow of data across national borders across the EU, as well as solutions to liability[13] as a decisive factor in increasing legal certainty in IoT products and services.

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[8] The Internet of Things. Available at https://ec.europa.eu/digital-single-market/en/policies/internet-things.

[9] For more information on the Alliance for Internet of Things Innovation (AIOTI) see https://ec.europa.eu/digital-single-market/en/alliance-internet-things-innovation-aioti

[10] COM(2015) 192 final. Available at https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A52015DC0192

[11] COM(2016) 180 final. Available at https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52016DC0180&from=EN

[12] The European Data Economy Initiative can be consulted at https://ec.europa.eu/digital-single-market/en/building-european-data-economy

[13] For more details on the responsibility for emerging digital technologies, see COM (2018) 237 final. Available at file:///C:/Users/Larisa%20Capisizu/Downloads/EuropeanCommissionStaffWorkingDocumentonliabilityforemergingdigitaltechnologies.pdf

In addition to the above-mentioned initiatives, the EU has set specific targets for Internet research and innovation through the Horizon 2020[14] framework program, representing the largest research and innovation program ever undertaken by the EU.

5 European Union Rules on Personal Data Protection Regarding the Internet of Things

The speed which the Internet of Things transforms our lives and the way we perceive reality is so great that we are often unaware of the effects of this new technology on the relationship between law and society. Being a developing area, a key objective of the European Union is to find the best ways to capitalize the different technologies of the latest generation and, at the same time, to reduce the increasing gap between the new technology and the different European legal systems.

The core of the legal aspects of the Internet of Things is confidentiality and the protection of personal data because most data that devices connected to the Internet of Things generate and use are personal data and some of them are extremely sensitive.

In this context, the European Union has adopted Regulation 2016/679 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter referred to as "the Regulation"), which has entered into force on May 25th, 2018. The first concerns at European level regarding the protection of personal data[15] were highlighted by the adoption of Directive 95/46/EC[16], which was repealed once Regulation has entered into force.

The Article 29 Working Party, which is an independent Data Protection and Privacy Advisory Body set up under Directive 95/46, published in September 2014 an Opinion on recent developments in the Internet of Things ('the Opinion')[17]. The opinion outlines the main risks that data protection encounters in the ecosystem of the Internet of Things and provides guidance on how the EU legal framework should be applied, including the application of the Regulation.

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[14] The Horizon 2020 Framework Program for Research and Innovation. Available at https://ec.europa.eu/programmes/horizon2020/sites/horizon2020/files/H2020_RO_KI0213413RON.pdf

[15] Handbook on European data protection law – Practical Guide to Personal Data Protection Legislation at European Level launched by the Council of Europe and the Fundamental Rights Agency of the European Union. Available at http://fra.europa.eu/sites/default/files/fra-2014-handbook-data-protection-law_en.pdf

[16] The Directive 95/46/EC of the European Parliament and of the Council from 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, published in OJ L 281/31 of 23.11.1995, has been transposed in the Romanian legislation on 12 December 2001, by adopting Law no. 677/2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data.

[17] "Article 29" Working Party on Data Protection, Opinion 8/2014 on recent developments in the Internet of Things (1471/14/EN WP 223), adopted on 16 September 2014. Available at http://www.dataprotection.ro/servlet/ViewDocument?id=1273.

Regarding **the risks** raised by the Internet of Things related to privacy and data protection, the Opinion identifies six specific challenges, namely:

1. **Lack of control and informational asymmetry** related to the generation, storage and communication of personal data by connection devices, over which the user has no control.
2. **Quality of user consent** that requires informed consent of the user with regard to the processing of data by IoT devices, this standard being much higher with the entry into force of the Regulation. If the user is unaware of the processing of data from an IoT device, consent can not be invoked under EU law as a basis for data processing because it is not a duly informed consent.
3. **Deductions based on data and the use of data originally processed for other purposes** that relate to modern data analysis and cross-checking techniques that can cause the data to be used for purposes other than the purpose of the original processing, for which no consent was given.
4. **Intrusive practices to highlight behavior patterns and profiles** by aggregating data from different IoT devices.
5. **Limitations on the possibility of keeping anonymity** in the context of the use of IoT services.
6. **Security risks** such as, for example, finding a balance between battery efficiency and device security. Specifically, it is still unclear how device manufacturers will reconcile the introduction of privacy, integrity and availability measures at all levels of data processing with the need to optimize the use of computing resources – and energy – by sensors and objects.

In light of these identified challenges, the Article 29 Working Party proposes a series of practical recommendations on how the EU legal framework should be applied. First, the basic terms of the Internet connection are defined. Thus, the Opinion provides a broad definition for IoT devices representing all the objects that are used for the collection and processing of personal data in the context of the provision of IoT services. The opinion states that EU data protection legislation will apply to these devices even when the data controller is outside the European Union, provided that the device has been used within the EU.

Personal data is the information by which a person can be identified. The opinion states that even data processed after applying pseudonymization techniques could be considered personal data because there is the possibility of re-identification by using aggregated data generated by multiple devices.

Also, the Opinion identifies and defines the various **stakeholders** in the IoT ecosystems that may be data operators, for example device manufacturers, aggregators or data brokers, application developers, social platforms, organizations, lenders or borrowers.

Data subjects according to the EU law refer to users or subscribers of the Internet of Things, as well as to individuals who are neither subscribers nor users of the Internet of Things, but to whom data are processed. Therefore, the

application of EU data protection rules does not depend on who owns a device or a terminal, but on the processing of personal data, regardless of who the individual is concerned with.

Stakeholders of the Internet of Things that meet the criteria to be considered data operators (whether acting alone or with others) under EU law have to meet different **obligations**. Thus, the processing of personal data must be primarily legitimate. This obligation shall be fulfilled if the processing is based on the consent of the data subject, if the processing is necessary for the performance of a contract to which the data subject is a party or if the processing is necessary to achieve the legitimate interest pursued by the trader provided that such interest is not prejudicial to the interest or the fundamental rights and freedoms of the data subject[18].

Personal data must also comply with data quality principles. Thus, they must be collected and processed fairly and legally, which means informing the data subjects. In addition, under the purpose limitation principle, data may be collected for clearly specified, explicit and legitimate purposes only, defined before the actual data processing. Also, data collected on the data subject should be strictly necessary for the specific purpose previously established by the operator, an obligation that reflects the principle of minimizing data. Last but not least, personal data collected and processed in the context of the Internet of Things should not be retained for a longer period than is necessary to achieve the purpose for which data was collected or further processed.

Stakeholders of the Internet of Things should respect the rights of the data subjects, for example the right of access to the data processed, as well as the possibility of revoking the prior consent for a particular data processing and opposition to processing.

Considering the legal requirements imposed on data operators in the IoT ecosystem, the Article 29 Working Party proposed a series of **recommendations** for all stakeholders.[19] Thus, before launching any new application in the Internet of Things, it is recommended to assess the impact on privacy. After extracting the necessary data by processing the raw data, the latter should be deleted immediately. Principles relating to the protection of personal data should be considered from the time IOT devices are conceived. Individuals should be able to exercise their right of control over personal data and the methods of providing information, granting the right of refusal and requesting the agreement should be as simple as possible.

[18] In its judgment in Case C-131/12, the Court of Justice of the European Union provided important guidelines on the interpretation of this data processing ground.

[19] Richard Kemp, *Legal Aspects of the Internet of Things*. Available at http://www.kempitlaw.com/wp-content/uploads/2017/06/Legal-Aspects-of-the-Internet-of-Things-KITL-20170610.pdf.

6 Conclusion

The Internet of things has brought major changes in our lives. Undoubtedly, IoT has many advantages such as increased efficiency, productivity, low energy consumption, simplification of processes and activities, easy and simultaneous access to multiple resources, increased reliability, etc. [7] At the same time, in this process of developing IoT, the risks of data security and protection resulting from the use of such technology and having a wide impact on privacy must not be neglected.

The amount of data collected and processed by intelligent objects has increased exponentially in recent years. The challenges of using the Internet of things have led to important changes at European level regarding the protection of personal data. In this context, the European Union has adopted new regulations to respond to these challenges.

The Internet of Things can bring tremendous benefits to consumers in all areas, from healthcare to housing, transport and insurance. Surely there will be applications in the future that will bring unpredictable benefits given the current stage of knowledge in this emerging field.

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Guilt. New Civil Code. Commented

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Abstract

In analyzing the guilt, we start to establish that only an attitude reproved by law, is/was classified as negative, it will lead to civil liability in its forms, tort and contract.

It also aims liability occurs on the one hand to repair the damage caused as well as prevention following the act which caused the damage should not be committed in the future.

In analyzing and debating art. 16 of the New Civil Code, consider the culpability of the offender's conduct as a prerequisite, since we can not discuss the presence and applicability of liability where there is guilt.

For civil liability of those who caused the injury to be engaged, is not enough to be an illegal act which is in causal connection with the damage that has been produced, it is necessary that this act can be attributed to its author, moreover, and the author must have had a fault when he committed it, acting with guilt.

It is therefore appropriate analysis of guilt in civil law, according to the New Civil Code, to determine issues of novelty and distinction needed his role in the matter of prevention, civil liability, establishing damages, the burden of proof etc.

Keywords: guilt, civil liability, intent, culpability.

1 Preliminary Issues

1.1 *Based Materials – Art. 16 Guilt*

(1) If not otherwise provided by law, only the person responsible for his acts committed intentionally or negligently.

(2) The act committed intentionally when the author provides the result of its production is intended by the act, or, although not pursued accept the possibility of this outcome.

(3) The act is committed negligently when the author or predict the outcome of his act, but does not accept it, believing without reason that will not happen or does not provide the result, although it should provide. The fault is serious when the author acted in a negligent or reckless that no person lacks the prowess would be manifested to its own interests.

(4) Where the law determines the legal effects of an act of committing to the fault condition is met even if the act was committed intentionally.

1.2 *The Importance of the Analysis on Guilt*

It is that just an attitude reproved by law, is/was classified as negative, leading to its civil liability in tort, contract forms[1] [1].

It also aims liability occurs on the one hand to repair the damage caused as well as prevention following the act which caused the damage should not be committed in the future[2] [2].

In light art. 16 NCC consider the culpability of the offender's conduct as a prerequisite, because we can not discuss the presence and applicability of liability where there is guilt.

For civil liability of those who caused the injury to be engaged, it is not enough to be an illegal act which is in causal connection with the damage being produced. But it is necessary that this act can be imputed to its author, and in addition, the author must have had a fault when he committed it, acting with guilt[3] [3].

2 Definition and Legal Analysis on Guilt

Guilt it is the mental attitude of the offender illegal during its commission, to conduct and its negative consequences. So, guilt implies a conscious attitude of the perpetrator, it has represented its actions or inactions and their outcome. In conclusion, the commission of such acts or omissions will assume the author[4] [4].

In a strictly logical and scientific reasoning, whether see the civil liability in terms of paragraph 1 as a legal sanction, it is based in principle on the idea of guilt.

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[1] Mangu, F.I. (2014). *Răspunderea civilă. Constantele răspunderii civile* (Civil Liability. Constants of Civil Liability), Bucharest: Universul Juridic Publishing House, p. 222.

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[4] Săvescu, A. (2011). *Noul Cod civil comentat* (New Civil Code commented), www.codulcivil.ro.

Paragraph 2 it defines the meaning of Article intent concept of direct and indirect, as a form of knowledge governed by the legislator. It appears that the difference between the two categories for intentional is that the perpetrator can follow or not produce the result through scene.

This, combined with guilt, which makes speech para. 3 substantiates the principle liability, noting that the law may have significant and different (paragraph 1). In conclusion, we can talk about liability and without negligence, tort as objectives responsability (Art. NCC 1375-1376)[5] [5].

The legislator also built alike, and par. (3) art. 16 Civil Code, making dividing fault with provision where the offender provides the result of his action, but does not accept it, believing without reason that there will be, on the one hand and, on the other hand, guilt simple when the author illicit not predict the outcome of his act, although supposed to provide.

There is however one difference that lies in regulating the Civil Code, compared with the Criminal Code, defining fault. This is manifested in the case of ordinary negligence because, in criminal matters, the legislature considered appropriate that the perpetrator, besides not predict the outcome of his act, although you must provide (as taken part definition in civil matters), have however possible to foresee the result.

So, it resumed only in the definitions, (2) and (3) do nothing to take the Criminal Code of Romania descriptions of the two forms that takes the guilt.

In the two paragraphs above analysis, it appears that the four subcategories of guilt are arranged in descending scale, diluting the perpetrator is guilty of attitude towards work.

Both intent and guilt must be proved by the person who is injured, they can not be proven directly for is a mental attitude. Thus, the judge inferred mental attitude of the author after proving the existence of the illegal act and the circumstances in which it was committed.

In addition, civil, para. (3) art. 16 establish novelty existence of serious misconduct – "culpa lata" – a way to fault with a higher degree of guilt than the other two ways of it as negligence or recklessness with acting perpetrator is related to the lack of prowess person in the administration of own interests.

The wording of this paragraph leaves room for multiple interpretations, since the meaning of the notion of "prowess" is very subjective, engaging more semantic meanings, depending on context, the region of the country and even the individual's ability to understand.

Thus, according to Explanatory Dictionary of the Romanian language [10], find the meanings attributed to the word:

Clever, prowess, noun. skill. Wherever it may be gathered cluster on a branch as high as the boy skillfully him down and sober movements. SADOVEANU, PM 50. Has... confectioner prowess to erect a large bowl beat

[5] Perju, P., in Baias, F.A., Chelaru, E., Constantinovici, R., Macovei I. (coord.) (2012). *Noul Cod civil. Comentarii pe articole* (New Civil Code. Comment on articles), Bucharest: C.H. Beck Publishing House, p. 16.

cream with tassel. ARGHEZI, PT 6. [In ancient times] prowess, physical strength fighter decisive victory. Gera ST. CR. II 108. ♦ craftiness, cunning refinement. Man's purpose, hardworking, thrifty, Badea circle was more petite, but with all their prowess had not been able to catch him in the snare none. GALACTION, O. and 124.

Dexterous noun. 1. skill, competence, dexterity, ingenuity, cunning, cunningly, cleverness, knowledge, talent, ease, (pop.) Craft, Craft, (INV. and reg.) smith (reg.) habit, skillful, (INV.) cunning trick, practice (Demonstrated in handling the large ~ ...). 2. art, skill, craftsmanship, craft, knowledge, talent (Subject done very ~). 3. wit, cleverness, intelligence, cleverness, skill and understanding (~ A person in a given instance).

In the virtual environment, in some dictionaries of synonyms, we find this:

Clever, noun female

Synonyms: Skill, Dexterity, diplomacy, ingenuity, intelligence, skill, skill, skill, whims, craftsmanship; cunning, craftiness refinement.

The wording "no person lacks the prowess" admits many interpretations and discussions, as if we replace each of its synonyms prowess we understand always different, sometimes fundamentally different meaning.

In such circumstances the text is ambiguous and its application as lacking an end unit, and even an explanation of the legislator on this issue, we can not claim a uniform practice of judgment about the meaning of serious negligence, according to art. 16 para. 3 NCC.

Moreover, some questions remain which are based on simple logic grammar: Can it to manifest cunning/cunning to their own interests? And how can we determine the unit of interest that anyone would have to show? Suppose that the legislature intended it to interpret in this context "prowess" as "diligence" of a person?

Perhaps the legislature disregarded the standard formulation, the possibilities of grammatical interpretation of it, but only wanted to show authenticity in language.

If par. 4, it is inverted in par. (3) art. 19 Criminal Code, because if for criminal law legislature considered to regulate statements regarding the "act consisting of an action intentionally committed an offense only when the law expressly provides that" (It follows, *a contrario* as a rule in criminal matters regarding punishment as a crime the act committed intentionally is the non-responsibility of the perpetrator, whereas the exception set out in the legal text.), and if "works consisting of inaction are crimes whether committed intentionally or negligently, unless the law penalizes only the intentional acts" (but if facts or omission committed by negligence, either intentionally they are considered crimes, as a rule, always; the exception being represented by legal texts sanctioned if they intentionally committing only, removing them from the scope of facts omitted by negligence). In contrast, civil law does not distinguish between acts committed and facts omitted, as does the Criminal Code, and in addition, the Civil Code expressly regulates acts committed with the lowest form of guilt – guilt – goes through an argument *a fortiori*, to normal *expressis verbis*, that the

conditions for committing the act are met, especially if the deed shape guilty intent removing them from the scope Savas facts omitted by negligence)[6] [6].

However, there is guilty of the offense at that, although antisocial its significance and its aftermath, no one commits his will, being forced into it. He can free external cause such liability by proving onerous volitional factor missing in this case.

3 Burden of Proof

Therefore, the burden of proof in the matter of guilt is placed differently, as we are in the realm of tort or contract.

Thus, the burden of proof incubate tort victim is claiming in court the existence of injury. If crime elements accountability objectives are easier to prove, the main part being the mental attitude of the perpetrator before and after the act and attitude towards the consequences of misconduct. Proof of guilt is in principle a matter of mental and emotional state behind a human behavior[7] [7]. So, the victim is required to prove the existence of conditions for torts, including the testimony admissible and assumptions. The only element that this might raise some problems in proving his guilt remains as part of psychic[8] [8].

Civil liability in contract, operates a presumption of guilt of the debtor, because if of a total or partial, or the faulty execution of the obligations, the borrower must prove a third case, self-esteem, to be exempted from liability, and even so, it will be appreciated debtor's guilt according to the criterion of minimum object of endeavor[9] [9]. Guilt debtor is presumed in this case, and it is impossible to prove no fault of his that prevented the fulfillment of the obligation, it is held to pay damages. There are also views the doctrine to this theory applies only in relation to obligations of result, if the due diligence burden of proof creditor will have to prove that the debtor did not use the most appropriate means for achieving the result. If the obligations of doing, things are clearer in the sense that the one who must prove the existence of the claimed is creditor.

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[6] Săvescu, A., *op. cit.*

[7] Tamba, A. (2009). *Considerații privind cele două forme ale răspunderii civile: răspunderea civilă delictuală și răspunderea civilă contractuală, în lumina dreptului francez și a dreptului român. Există veritabile deosebiri între răspunderea civilă delictuală și cea contractuală? Analiza convențiilor de modificare a răspunderii civile, a punerii în întârziere și a probei culpei* (Considerations on the two forms of liability: torts and contractual civil liability in the light of French law and Romanian law. There are real differences between tort liability and the contract? Analysis amending liability conventions, the enforcement notice and proof of guilt), in Romanian Pandectele no. 3/2009, pp. 106-107.

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4 Conclusions

Finally, art. 16 para. (1) Civil Code [11] establishes usually found in criminal matters, that guilt is the theme of responsibility; However, exceptionally, if the law provides otherwise, liability may also engage in other ways. However, the legislature has considered it necessary to borrow from criminal law (art. 19 of the Criminal Code) dichotomous classification of guilt, sharing the idea that facts – civil delicts in broad sense – be committed or intentionally or recklessly. The difference between acts committed by negligence (para. 3) and intentional (para. 4), the element will, for proper law establishes civil penalties for both the existence and for proper lack of whether the offense is committed or omitted.

However, establishing guilt remained for the courts and doctrine. And if there's guilt poses no big problems when the wrongful act was committed intentionally, when talking about an act committed by negligence, to establish the guilt becomes difficult things and complicated even more when it established gross negligence, leaving the clear interpretation relative "prowess".

So, in terms of law and justice, we can draw two conclusions eloquent way: we are facing on the one hand the lack of understanding of the legislator on the clarity of the rules and with the failure to adopt a unitary judgment practice – the lack of a standard by which we can determine the severity of the fault.

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Particularities of Holding Companies

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Abstract

In terms of concept, a holding is an enterprise that holds a legal investment portfolio in different companies, which it manages and controls within a group. The holding may also be regarded as an intermediary between investors and subsidiaries and, even more, considering its role of providing an overall planning at group level and of giving it certain advantages, we may state that holding companies are a real instrument of fiscal planning promising favourable results.

Keywords: offshore trading companies, cross-border companies, holding, fiscal paradises.

1 Introduction

In time, the existence and development of man supposed the satisfaction of multiple needs, which are fully expanding today due to the social extension and amplification processes. Considering the multitude of wishes and their complexity, as well as the scarceness of natural resources able to satisfy them, the economic activity has become the core that feeds and maintains the society.

On the one hand, the consumer communicates its needs through demand, and, on the other hand, the economic agent uses all the resources that it owns to propose a most satisfying offer. However, the satisfaction degree is determined considering much more parameters than we would be tempted to believe, because it must keep a balance between both topics. In other words, even the economic agent, by carrying out the economic activity, aims at satisfying its own needs – as regards trade companies, those upon which we will focus in this paper, the need coincides with the purpose itself: profit.

For these reasons, the tax duty is a major concern, meaning that the economic agent aims at minimizing taxes and duties by using the national and

even the supranational legislative opportunities. This technique is called "fiscal planning ".

Further, we will focus on one of the practices that is most used – incorporation of holding trade companies – and we are going to present their operating mechanism, the advantages that they create, as well as the risks that they suppose, in order to explain the increased tendency of the companies to use them.

2 Concept and Operating Mechanisms of Holding Companies

Holding companies are, together with base companies and with sham companies, the main types of offshores [1], namely those companies registered in a certain country, carrying out their economic activity of substance outside it. The economic activity of substance represents the economic activity that is actually carried out, be it either trade or manufacturing of goods or provision of services; the fictitious economic activity will be defined, for the purpose of this study, as that activity which is never carried out factually, but only in writing. Analysing the definition of holding, the obvious question arises: "why would enterprises choose to be registered in a different country than the one on the territory of which it carries out the economic activity of substance?" The answer is simple: to minimize or even avoid the tax charge corresponding to the trading activity that has been carried out. We will further see what the instruments that make this practice possible are.

From the legal point of view, there is no special kind of holding company, and such a company may take any form stipulated by the laws on trade companies in the country where they are incorporated. In Romania, unlike other states, holding companies do not benefit from a special legislative regulation, and the general standards related to trade companies apply to them as well, concentrated in the Law no. 31/1990. Therefore, on the territory of Romania, a holding company may take the form of any other type of enterprise, be it capital companies, partnerships or trade limited companies. From the practical points of view, however, for legal reasons, we choose a joint stock or a limited liability company, given the fact that, within such enterprises, the shareholders' liability is limited to the social contribution. Or, should one or several enterprises within the group go bankrupt, and the holding would be a partnership, for instance, it would be jointly and severally liable, which would constitute a major disadvantage both for the holding, and for the group. Although there is no specific definition of holdings, they are characterized by the fact that they have control over the shares or over the voting rights within one or several third companies, usually owning at least half of the shares or voting rights from those enterprises, without carrying out economic activities of manufacturing and/or trading of goods or provisions of services. In other words, holding companies ensure the joint management and control over a group of companies.

It is important to mention that the companies protected by a holding may carried out different economic activities in different states, regardless of their geographic location. However, to be able to generate advantages for the group, the residence of the holding company is a very important factor for the further reasons.

First of all, the chosen location must provide taxation according to the pursued advantage – for instance, if the aim is to reduce the withholding tax, the Netherlands, France and Denmark are three of the recommended states; if the aim is to minimize the taxation of capital gains, the Netherlands and Belgium may be the best choice [2]. Secondly, the incorporation costs must be considered – for instance, if a holding is placed in a fiscal paradise or in an offshore financial hub, the enterprise will be subject to pay mandatory charges, among which the incorporation charge and the renewals charge, under the punishment of striking the company off the records and of passing the goods constituting the company's patrimony into the patrimony of the state on the territory of which it is incorporated.

Therefore, we cannot say that there is a generally favourable location but, in any way, we recommend avoiding a location which is not part of a covenant of avoidance of double taxation between the source country of profits, the transfer country and their country of destination [3].

As regards the incorporation modality of holdings, it may take three forms [4]. One first option consists in bringing as contribution the securities owned by a person in another company, thus constituting the holding. A second option consists in purchasing corporate titles – technically, the newly created holding buys corporate titles from companies that already exist; a third possibility – by dividing the activity object. This last variant supposes the creation of smaller companies, to which activity objects from among those resulting from the division of the main objective will be assigned and the shares of which will be owned by the holding company.

The profits made by group companies will be directed towards the holding company, and this company, on its turn, will be able to direct them back to the companies that it owns under several forms: the holding will be able to finance subsidiaries, will be able to grant loans without interest, will be able to lent them equipment under a leasing system and will be able even to allow them to use invention patents or franchises, in exchange of royalties. Both the rents, and the royalties paid by subsidiaries will be registered in their accounting books as expenses; in the holding's accounting records, however, they will appear as incomes, and they will be taxed at smaller rates, according to the taxation system of the State of residence of the holding [5]. Thus, for instance, we may consider the activity carried out by the KFC chain of fast-food restaurants in France: since it has been implemented in France, in 1991, until present time, this restaurant has not paid any charge or tax to the French state – the actual building of the restaurants was achieved from loans obtained with minimum interest from the mother company, resident of a fiscal paradise, and the recipes of the products, the license for the name and restaurant concept and/or all the elements of goodwill have always been registered as expenses for the subsidiaries incorporated on the territory of France.

It is important to underline that, as previously mentioned, this tax may be minimized thanks to the tax policy of the state where the holding company is

incorporated. As an antithetic example, as regards cross-border payments, the payer's state of residence may order it to pay a withholding tax; if there is no treaty of avoidance of double imposition, this may be quite burdening. This is precisely why we are herein reiterating the idea that the choice of the holding's state of residence must be made with caution, after a thorough analysis of the foregoing criteria.

3 Advantages and Disadvantages of Incorporating a Holding Company

Although some authors believe that holdings are not the prerogative of fiscal paradises or of off-shore financial hubs [6], however, considering their concentration in this kind of jurisdictions, we believe that holdings are a product of fiscal paradises, and in order to support this idea, we take a look at their main role: to grant tax and legal advantages, aspects on which we are going to focus in this subsection.

One of the advantages of this company pattern is revealed by the definition presented at the beginning of this piece of work. We are hereby specifying that the holding company is that company that owns a shareholding interest in third companies, reuniting them in terms of management and control. Consequently, we may deduct that such a structure ensures the unity and cohesion of several distinct entities from the legal point of view and, furthermore, it may bring advantages as regards the management of group companies. For instance, by inserting a captive insurance company within the group, both the mother company and the owned companies have the guarantee that certain risks are covered, other than those that the insurance companies would normally accept**.**

Another great advantage of holding companies obviously consists in the fiscal efficiency that may be obtained by implementing them in states with advantageous taxes or that even exempt the dividends, interests and royalties received by the holding company from taxation and the transfers of shares made by it. Therefore, to be able to benefit from fiscal advantages, the holding's state of residence must have favourable tax laws and also must have a ratified treaty for the avoidance of double taxation signed with the countries where holding companies reside.

At the same time, this type of company provides a flexible structure of the group and allows it to develop on the long run, in conditions of risk that are as low as possible. Such a risk consists in, for instance, the legal restructuring in case of insolvency of one of the group companies – by a careful implementation, this type of risk may be avoided (for instance, by separation in limited liability companies), so that the "collective" patrimony [7] of the group is not affected.

On the other hand, in case of fiscal losses registered by one or several subsidiaries, they may be set off with the profit of other group companies only in certain conditions. If they reside on the territory of the European Union, the consolidation process of the fiscal result demands the compliance with rules stated

by the case law of the European Court of Justice. Thus, according to the decision of C.J.U.E in the case "Marks&Spencer" (C-446/03) [8], the fiscal losses of a group company may be set off with the holding's profits, but only if the subsidiary does not have the possibility to recover them in the country of residence. Also, in the case "X Holding" (C-337/08) [9], an issue has been raised concerning the illegality to condition the tax set-off on the existence of the group on the territory of only one member state; the Court has decided that, should the group own companies on the territory of several member states, the interdiction of a cross-border set-off is not incompatible with the provisions of the European Union Treaty, which may apply on the grounds of the principle of tax sovereignty of the states. Nevertheless, the interdiction must not be disproportional with the pursued goal, because such an extrapolated practice could trigger the violation of the freedom of incorporation principle.

As regards the disadvantages of management of a company group through a holding, we believe that they concern mainly the minority shareholders of the owned companies. Considering their participation share in the share capital of one of the companies owned by holding, they do not have a significant power in the decision-making process dictated by the dominating company. There are certain cases where the minority shareholder may claim the abuse of majority before the court (for instance, if a decision of the general assembly of shareholders is decided to be cancelled), but they must be joined by solid evidence showing without any doubt the intentional harming of the rights or interests of the minority share-holders or at least the obvious disproportionality between the result aimed by the majority and the actual one.

Another hypothesis which, we believe, cannot be qualified as disadvantage, but as risk, consists in the error made by the business partners of group companies related to a third company. They may decide to contract a certain company, but based on a fake representation of its capacity. The most often situation of this kind that is encountered refers to franchise, which may seem affiliated to the group, but which, in reality, is an independent professional who is bound by a simple contract relation to the franchiser.

The same category of risks includes the management of such structures in a manner that would cross the border between fiscal optimization and criminal illegality. Although the fiscal planning supposes the use of leverages that would allow the taxpayer to choose among the various solutions applicable to its case, these leverages must be legal and must be based on real economic operations; otherwise, said activity may constitute the material element of offenses such as tax evasion or money laundering, two of the widest spread economic offenses.

4 Conclusions

As revealed by the previous data, the implementation of a holding company may bring considerable advantages to the entire group, provided that the legal and tax factors are judiciously analysed. Otherwise, not supported by favourable elements, the holding will not be able to reach its maximum potential.

In most European states, holdings benefit from special regulations, conceived as to encourage the extension of the economic activity abroad of the companies incorporated on their territory. In Romania, there is no special law regarding holding companies and, although the current tax system includes several favourable provisions for companies that wish to invest in shareholdings in other enterprises (for instance, exemptions of tax on dividends, in the situations stipulated in art. 229 of the Tax Code, and the reduced taxation rate), they are not enough to outline an attractive environment for investments related to holdings.

We believe that, in order to increase foreign investments and, more particularly, to encourage the concentration of the autochthonous capital on the territory of Romania, it is necessary to draft a special law in terms of holding companies, that would allow, in advantageous conditions, both to own and manage shareholding portfolios, and financing activities within the group.

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[7] We are hereby specifying that the notion of "collective patrimony" must not be interpreted word by word, as it does not exist as an official attribute of the group of companies controlled by a holding, but it must be understood as an overview of the state of fact.

[8] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62003CJ0446.

[9] http://eur-lex.europa.eu/legal-content/RO/ALL/?uri=CELEX%3A62008CJ0337.

Post Mortem Assisted Reproductive Technology and the Will in Romania

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Abstract

The latest and most remarkable technological discoveries/developments, which allow gamete cryopreservation (spermatozoa, embryos, ovarian tissue), raise many legal, social, ethical and moral issues, especially regarding the right to post-mortem reproduction, that includes either a woman's request to conceive a child after her husband's death or a man's to require a surrogate mother's help to carry the dead wife's embryos. Romania is one of the few European countries which does not benefit from a legislative framework with respect to assisted reproductive technology (ART), currently only assisted reproductive technology with third party donor being regulated (articles 441-447 Civil Code of Romania). Starting from real cases which took place in the United States and Europe, this work wishes to go even further and to discuss the will in connection with the assisted reproductive technology (post mortem), under the light of the New Civil Code and under the light of the European Court of Human Rights' case-law, more precisely: mandating the surviving spouse (wife/husband) to start and go through all the necessary procedures for giving birth to a child (with the sperm, embryo etc. left and preserved for this purpose by the deceased spouse who dies after expressing his consent), the recognition of a child not conceived and not born at the date of the inheritance's opening, as well as the right to inheritance of the child resulted from such a situation. This study is not only a scientific presentation, a proposal for a law to expressly regulate post mortem assisted reproductive technology, but it has slowly turned into a plea for the recognition of a foetus as a person, a plea for life in all its forms and stages.

Keywords: assisted human reproduction, post mortem reproduction, assisted reproductive technology (ART), Civil Code, European Court of Human Rights, ECHR, European Convention on Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, filiation, recognition of

a child by means of a will, legal time of conception, case-law, jurisprudence, conception, foetus, right to life, right to abortion, Hecht v. Superior Court (Kane) 1993, Vo v. France 2004.

1 Introduction

The latest and most remarkable technological discoveries/developments, which allow *gamete*[1] cryopreservation (spermatozoa, embryos, ovarian tissue), raise many legal, social, ethical and moral issues, especially regarding the right to *post-mortem reproduction,* that includes either a woman's request to conceive a child after her husband's death or a man's to require a surrogate mother's help to carry the dead wife's embryos[2].

Post-mortem reproduction is an extremely controversial topic and it can generate a conflict between two ethical principles – the respect for the persons' autonomy to decide with regards to human reproduction and the principle of the superior interest of the child expressed through the concern for its wellbeing. Other considerations may include the guardianship's issue which intervenes after the death of the genetic parent. The European Court of Human Rights (ECtHR) gives an interpretation to the cases on ART under the light of the rights guaranteed and protected in the European Convention on Human Rights[3]. However, although the Council of Europe has adopted a *European strategy for the promotion of sexual and reproductive health and rights*[4], a thematic report *"Health-related issues in the case-law of the European Court of Human Rights"*[5] and a research report *"Bioethics and the case-law of the Court"*[6], the absence of a convention visibly reflects the lack of an agreement on this matter. The introduction of the thematic report states that the European Convention on Human Rights does not guarantee the right to health protection or a right to be healthy. Issues such as health, housing, social benefits and other socio-economic rights are more appropriately addressed in the *"European Social Charter"*[7] (revised) or in the *"European Social Security Code of the Council of Europe"*[8], or at a more global level, with reference to the socio-economic rights set out in the *"International*

[1] Human reproductive cells bearing sexual chromosomes.
[2] E. Aziza-Shuster, Ethics and Society, A child at all costs: posthumous reproduction and the meaning of parenthood, Oxford Journals, Human Reproduction, vol. 9 nr. 11, 1994:2182-2185.
[3] Council of Europe: European Court of Human Rights (2011), "Reproductive Rights".
[4] Council of Europe: Parliamentary Assembly, "European strategy for the promotion of sexual and reproductive health and rights". Resolution 1399 (2004); http://assembly.coe.int/nw/xml/XRef /Xref-XML2HTML-EN.asp?fileid=17257&lang=en%20.
[5] Council of Europe/European Court of Human Rights, Thematic Report "Health-related issues in the case-law of the European Court of Human Rights", June 2015.
[6] Council of Europe/European Court of Human Rights, Research Report "Bioethics and the case-law of the Court", October 2016. This report is available for downloading at www.echr.coe.int (Case-law – Case-Law Analysis – ResearchReports).
[7] Article 11 of the European Social Charter guarantees the right to health protection.
[8] Articles 7-12 of the European Social Security Code of the Council of Europe regulate the right to health care.

Covenant on Economic, Social and Cultural Rights"[9]. However, this traditional view of the Convention must be interpreted in the light of the developments in the case-law. It is becoming increasingly difficult to establish precise and clear boundaries between the fundamental rights and freedoms enshrined in the Convention and the socio-economic rights mentioned above. The Court is inevitably called to judge cases that have a socio-economic dimension, including health, where a problem arises from the perspective of one or more of the fundamental civil and political rights guaranteed by the Convention. The recommendations of the Committee of Ministers in the Health Sector *(Biriuk vs. Lithuania)*, the *Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Glass vs. UK)* and the *Social Charter European* healthcare case-law are enriching ECHR decisions and provide an important starting point when it comes to assessing an emerging European trend in a given area, such as allowing people on compassionate grounds to have access to experimental, but unauthorized medical products *(Hristozov vs. Bulgaria, November 13, 2012)*. Romania is one of the few European countries which does not benefit from a legislative framework with respect to assisted reproductive technology (ART) (the most known techniques of assisted reproductive technology being gamete cryopreservation, artificial insemination and in vitro fertilization). Until now/to date several draft laws/law projects in this field have been rejected or abandoned, currently only the medically assisted human reproduction with third donor being regulated (Articles 441-447 of the New Civil Code). A legal framework for ART as a whole is needed and not just a small segment represented by ART with third donor, considering the fact that most of these procedures take place with the reproductive cells of the couple's members. Excluding the persons who wish to use their own gametes will make impossible their access to ART because special norms apply only to the category of people expressly nominated and the application of such norms is not permitted by analogy (Article 10 of the New Civil Code): the special law has priority over/takes precedence over the general one, it is of strict interpretation, *specialia generalibus derogant*[10]. Guţan Sabin, doctor of laws with the thesis *"Medically Assisted Human Reproduction and Filiation"*[11], considers that under these conditions the law allows only two possibilities, opinion to which this paper adheres as well: 1. The prohibition of ART without a donor, since it is not regulated; or 2. Allowing ART without a donor without any restrictions,

[9] Adopted and open for signature by the General Assembly of the United Nations on 16 December 1966 by Resolution 2200 A (XXI). Entry into force on 3 January 1976, according to the provisions of Article 27. Romania ratified the Pact on 31 October 1974 by Decree no. 212, published in the "Official Gazette of Romania", Part I, no. 146 of 20 November 1974.
[10] Baias, Fl.A., Chelaru, E., Constantinovici, R., Macovei, I. (2012). Noul Cod civil. Comentarii pe articole (art. 1-2664), Bucharest: C.H. Beck Publishing House, p. 12.
[11] Guțan, S. (2009). Medical Assisted Human Reproduction and Filiation, Doctoral Thesis (abstract), Facultatea de Drept "Simion Bărnuțiu", Universitatea Lucian Blaga, Sibiu; http://doctorate.ulbsibiu.ro/obj/documents/REZ-ROM-GUTAN.pdf or Guțan, S. (2011). Medical Assisted Reproduction and Filiation, Bucharest: Hamangiu Publishing House.

anywhere, as social service, since common law would apply to it. By the treaties to which Romania is a party and the recommendations available on European level the regulation of the entire field is required.

2 The Structure of the Paper

Starting from real cases which took place in the United States and Europe, this work wishes to go even further and to discuss the will in connection with the assisted reproductive technology (post mortem), more precisely: mandating the surviving spouse (wife/husband) to start and go through all the necessary procedures for giving birth to a child (with the sperm, embryo etc. left by the deceased spouse), the recognition of a child not conceived and not born at the date of the inheritance's opening, as well as the right to inheritance of the child resulted from such a situation. The paper is divided into four sections: the first section presents the practical case-law regarding medically assisted human reproduction post-mortem, the second section briefly discusses the will and its clauses which do not have to refer only to the assets, the third section deals with recognizing the child by means of a will in the Romanian law, but also the possibility or the necessity of recognizing the baby conceived post-mortem by means of ART, and last the fourth section presents the right to inheritance of the child conceived this way. Ultimately, conclusions are briefly presented.

2.1 *Case-Law*[12]

Europe: Parpalaix vs. CECOS – Centre d'Etude et de Conservation du Sperme Humain – 1984[13]

Corinne Parpalaix's husband, Alain, died of testicular cancer two days after they married. However, although her husband died, Corinne wanted to carry Alain's child. *"Corinne's wish to have her deceased husband's child is not just a fantasy; Alain may actually be able to father a child from the grave."*[14] Two years before his death, when Alain was diagnosed with cancer for the first time, and warned that chemotherapy treatments could leave him sterile, he made a sperm deposit at CECOS, a research center and a sperm bank in France, backed by the government. The sperm has been frozen and stored for more than two years. However, Alain did not leave any instructions regarding the future use of his sperm. At that time, he lived with Corinne, but only when his condition began to deteriorate rapidly, the two decided to marry. After his death, Corinne asked for her CECOS husband's sperm deposit to use it to conceive a child through artificial insemination. The sperm bank declined this request. At the trial, the French Court

[12] European Court of Human Rights, Factsheet – Reproductive rights, February 2018.
[13] Benshushan, A., Schenker, J.G. (1998). The right to an heir in the era of assisted reproduction, Oxford Journals, Human Reproduction, vol. 13, nr. 5, 1998:1407-1410; Gilbert, S. (1993). Fatherhood from the Grave: An Analysis of Postmortem Insemination, Hofstra Law Review, vol. 22, nr. 2, art. 4.
[14] Gilbert, S., *op. cit.,* p. 2.

ruled that the wife had the right to be inseminated with the sperm of her deceased husband. However, it is important to underline that she did not win the case on the basis of an argument of the property right, but, with regard to the legal status of the semen, the court described it as *the seed of life (...) tied to the fundamental liberty of a human being to conceive or not to conceive"*[15]. Corinne Parpalaix was inseminated in November 1984, but she did not get pregnant.

Vo vs. France – 8th of July 2004 (Grand Chamber)[16]

In 1991, a French doctor carelessly broke the amniotic sac of the applicant Thi-Nho Vo, a 36-year-old woman who was five months pregnant. Because of a confusion regarding the same family name, the doctor confused her with another patient who wanted to have a contraceptive coil removed. His negligence led to the need for an emergency abortion and the loss of the baby by Vo. Vo claimed that her child's unintentional killing should have been classified as unintentional homicide. The French Court of Cassation has ruled that the doctor cannot be accused of murder by imprudence because the unborn baby is not considered a person entitled to protection under the French Criminal Code. V has brought the case to the European Court of Human Rights, arguing that the right to life is guaranteed to all persons, including foetuses, by the European Convention on Human Rights. The ECHR refused to extend the right to life to unborn children. It argued that *"firstly (...) the issue of such protection has not been resolved within the majority of the Contracting States themselves, in France in particular, where it is the subject of debate (...) and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life"*. The Court further underlined that *"At European level ... there is no consensus on the nature and status of the embryo and/or foetus (...), although they are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation. At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts, and also in the United Kingdom (...) – require protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of Article 2. (...) the life of the foetus was intimately connected with that of the mother and could be protected through her (...)"*. In this case, the Court ruled that there **has been no violation of Article 2 (right to life)** of the Convention. To be noted that it was not appropriate or possible to decide whether an unborn child is a human being under Article 2 of the Convention. And there was no need for criminal compensation; there are already ways to allow the applicant to prove medical negligence and to seek redress.

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[15] Rothschild, G. (partner of the law firm of New York Moses & Singer) (2010). *Issue of Issue*, chapter 15, pp. 15-9.

[16] https://www.echr.coe.int/Documents/FS_Reproductive_ENG.pdf https://hudoc.echr.coe.int/eng#{"itemid": ["002-4246"]}

United States of America: Davis vs. Davis – Supreme Court of Tennessee, Knoxville, SUA – 1992[17]

In Davis vs. Davis (1990), dealing with 7 cryopreserved embryos created by in vitro fertilization and whose custody and control were challenged in a divorce proceeding, the Tennessee Supreme Court, Knoxville, by decision no. 34/1992 solved a dispute over of the cryopreserved *pre-embryos*[18] in favour of Junior Lewis Davis, who sought to destroy these pre-embryos over the objections of his ex-wife, Mary Sue Davis. The Davis decision, though not mandatory in other states, has suggested a framework for resolving similar US disputes. That framework established that courts should follow the wishes of those who contribute with their sperm and egg cells or gametes to create pre-embryos. In the event of a dispute, the courts should implement any prior agreement between the gamete providers and, in the absence of such an agreement, the court should weigh the interests of the parties, usually acting in favour of the party wishing to avoid procreation. In the absence of a judicial precedent or statutory authority, the court took into account various recommendations made by medical and ethical researchers. The court opted not to establish a ***bright-line test***[19] to resolve similar litigation, as many researchers have recommended, but the court has applied its own framework to assess the interests of each party in the absence of an agreement between them, focusing on the burden that would fall on each of the parties if the other party won the case. In the June 1992 decision, the court ruled that Junior's burden of being an unwilling father exceeded Mary Sue's burden of not being able to donate the pre-embryos to another couple. If Junior's child was to be born in another couple, Junior could theoretically lose both his procreation autonomy and the ability to raise his baby. Mary Sue, on the other hand, could still become a genetic mother through future IVF treatments, even if the existing pre-embryos were destroyed.

Hecht vs. Superior Court (Kane) – 1993[20]

This case was published and discussed in detail in the press[21]. Deborah Hecht had been with William Kane for five years when he committed suicide at the age of 48. A few weeks before his death, William had deposited 15 sperm bottles in an account at California Cryobank, a sperm bank, where he signed a specimen storage agreement. Part of the agreement provided that, in the event of his death, the semen would continue to be preserved or released at the request of

[17] Chapman, J.E., Zhang, M. (1992). Davis v. Davis, The Embryo Project Encyclopedia, published at 17.10.2013. – https://embryo.asu.edu/pages/davis-v-davis-1992; Supreme Court of Tennessee, Knoxville, Decision no. 34/1992, First Embryo Disposition Case – Davis v. Davis – https://biotech.law.lsu.edu/cases/cloning/davis_v_davis.htm

[18] A human embryo or fertilized ovum in the first fourteen days after fertilization, before implantation in the uterus has occurred. – https://en.oxforddictionaries.com/definition/us/pre-embryo

[19] https://en.wikipedia.org/wiki/Bright-line_rule.

[20] https://www.ncbi.nlm.nih.gov/pubmed/11648608

[21] https://www.nytimes.com/1994/04/29/us/15-vials-of-sperm-the-unusual-bequest-of-an-even-more-unusual-man.html?pagewanted=all

the executor. A specimen release clearance provided William Kane's authorization for the semen to be released to Debora and/or her doctor. In his will, one month before his death, William named Deborah his testamentary executor. He also left all the sperm preserved in the bank to Debora. Included in the testament was a statement of wishes, which provided for his intentions that the sperm samples be used by Deborah if she opted for this purpose for insemination, and that she would keep his diploma and memories framed for their future child or children. In addition, a few days before the suicide, William wrote a letter to his two children from a previous marriage with explicit reference to other children that might be born to him by Deborah using the specimens of sperm. A few months after William's death, Deborah tried to obtain the sperm from the California Cryobank. Because the other two children of William, Katherine Kane and William Kane Junior have asked the court to destroy the sperm, the sperm bank refused to release her the samples. The Appellate Court decided that sperm, as well as embryos, are gametic material and a unique type of property, so the gamete source should decide on how to use them. A Los Angeles probate judge therefore ruled that Mrs Hecht was entitled to at least three bottles of semen from the 15 left to her as a result of a succession partition signed by the parties after Mr Kane's death.[22]

2.2 *The Will[23] and Its Clauses*

Art. 60 the Civil Code, entitled *Right to dispose of oneself*, provides that the individual has the right to dispose of himself, unless he violates the rights and freedoms of others, public order or good morals. In other words, a person is his own master over his own body, this special property right being different from the others because it *carries on an object attached to a person and is therefore non-transferable to death and is imperfectly available*. The result is that *les choses humaines can be mastered without difficulty and as a consequence they can be seen as goods*. According to a different opinion, the human body is seen as part of the person, and then we talk about the rights of personality, *stricto sensu* and about the rights a person has over his own body as an object. Based on the right to dispose of oneself, the individual may voluntarily engage in dangerous activities or consent, resulting in harm to his or her integrity, such as: medical intervention that may consist of experiments, tests, sampling, treatment or other interventions for therapeutic purposes and scientific research in the cases and conditions (express and exhaustive) provided by law[24]. *"The body is the biological substrate of the person, so that through his defence the subject of law himself is*

[22] Margolick, D. (1994). 15 Vials of Sperm: The Unusual Bequest of an Even More Unusual Man", US: The New York Times.
[23] Article 1040 Forms of the Common Will: Common will may be holograph or authentic. Article 1043 Authentic Will: (1) The will is authentic if it has been authenticated by a public notary (* here, public notary means civil law notary) or by another person invested with public authority by the state, according to the law.
[24] *Op. cit.* 17, p. 65.

defended."[25] The new Romanian Civil Code defines the *will*, in *Art. 1034*, as *"the unilateral, personal and revocable act by which a person, called the testator, dispose, in one of the forms required by law, for the time when he will not be alive." Art. 1035* provides that *"the will contains provisions relating to the succession patrimony or the assets which are part of it and to the direct or indirect designation of the legatee. Along with these provisions, or even in the absence of such provisions, the testament may contain provisions relating to partition, revocation of previous testamentary provisions, de-inheritance, appointment of will-enforcers, tasks imposed on legatees or legal heirs, and other provisions that have effect after the testator's death."* Other provisions that can be found in a will: recognizing a child, naming a guardian for a child, etc. However, the power-of-attorney/mandate within a will only take effect if it is accepted by the administrator/executor designated by the testator. Based on the above-mentioned cases, but also on the legal possibility of including such a provision in the will, even in the absence of a post-mortem medical assisted human reproductive regulation in our country, we believe that a husband can leave his wife or his partner frozen gametic material and hypothetically may mandate the latter to undertake all the procedures necessary to have a child after his death if she wishes and accepts, in particular in conjunction with *Art. 78*, which states that *"The deceased is owed respect with regard to his memory as well as his body," Art. 80*, suggestively entitled *Observance of the Will of the Deceased,* which states in paragraph 1 that *"Any person can determine the way of his own funeral and dispose of his body after death"* and, last but not least, in conjunction with *Art. 81*, which provides that *"Sampling organ, tissue and human cells, for therapeutic or scientific purposes, from deceased persons shall be performed only under the conditions stipulated by law, with the written consent, expressed while alive or, in the absence thereof, with the written, free, prior and express consent, in order, by the surviving spouse, by the parents, by the descendants or, finally, by the relatives in the collateral line up to the fourth degree inclusive."*

2.3 *The Recognition of a Child by Means of a Will in the Romanian Law*

Article 416 of the Civil Code lists as a form of child recognition the will, only that in conjunction with *Article 36* which states that the rights of the child are recognized from conception if he is born alive, it results that one can recognize

[25] Cercel, S. (2009). Law Enforcement Considerations, p. 2: *It has been shown that the theories concerning the alleged property rights over the human body are abusively disputed by the terminology of the patrimony, without taking into account that in this matter it is "About being, and not about having"* – Cornu, G. (2005). Droit civil. Introduction. Les personnes. Les biens, 12th edition, Paris: Montchrestien, p. 216; Malaurie, Ph., Aynès, L. (1999). Droit civil. Les personnes. Les incapacités, 5th edition, Paris: Cujas, pp. 238-240, which shows that *if a person is considered to be a thing, accepting to be considered a thing, if he ceases to believe that he is a human being deemed to be respected, « there will be no hope, and the end of hope marks the end of civilization";* http://drept.ucv.ro/RSJ/images/articole/2009/RSJ3/A01SevastianCercel.pdf.

by will only the child conceived (not necessarily born) at the time of his father's death, that is why *Art.'s 412* provisions regarding the legal time of conception are important. The legal provision contained by Art. 36 comes from the Latin saying *"infans conceptus pro nato habetur, quoties de commodis ejus agitur"* (The unborn is deemed to have been born to the extent that its own benefits are concerned). This rule has different meanings to authors[26]. Some believe that even from conception the baby has a conditional personality confirmed by birth, while others think that his personality is given only after birth, here connected to the retroactivity of the conceived child's capacity of use when there is a need to protect the minor's interests. We refer here to the conceived child's anticipated capacity of use which relies on a fiction and which was elaborated for inheritance purposes in order to allow the child to inherit his pre-deceased father[27]. In support of the opinion on the right of the children born and conceived post-mortem to be recognized by the father, we want to present the cause of ***Kroon and Others vs. the Netherlands – 27th October 1994***[28] from the European Court of Human Rights, in which the court decided that in establishing the parentage, account should also be taken of the criterion of biological reality. **According to the Court, *"respect"* to *"family life"* requires biological and social reality to prevail over a legal presumption that affects both the established facts and the wishes of the persons concerned without bringing real benefits to anyone**. Hence, even in view of the margin of appreciation enjoyed by the Netherlands, it failed to guarantee the petitioners *"respect"* to family life, and there was **a violation of Article 8.**

The post-mortem conceived children are a product of the 20th century's technology in the field of assisted reproduction. Impossible in the past, nowadays one can use the cryopreserved gametes of a deceased partner to conceive a child. Back to the subject of the legal time of the conception in Romania, established by *Art. 412 (1)* as *"The time interval between the three hundredth and the one hundredth and eighty days before the birth of the child is the legal time of the conception*", it is important to note that the same article in *paragraph 2* expressly states that *"By means of scientific evidence it is possible to prove the child's conception within a certain period of time stipulated in par. (1) or even outside that range.*" It follows that the legal presumption established by *Article 412* in the first paragraph is no longer an absolute one and can be overthrown by scientific evidence. *DNA paternity testing is the use of DNA profiling (known as genetic fingerprinting) to determine whether two individuals are biologically parent and child. DNA testing is currently the most advanced and accurate technology to determine parentage. In a DNA parentage test, the result (called the "probability of parentage") is 0% when the alleged parent is not biologically*

[26] To read Starck, B., Roland, H., Boyer, L. (2000). Introduction au droit, Paris: Litec, pp. 389-392.
[27] *Op. cit.* 17, p. 42.
[28] https://jurisprudentacedo.com/KROON-c.-OLANDEI-Imposibilitate-legala-pentru-o-femeie-casatorita-de-a-contesta-paternitatea-sotului-asupra-copilului-ei-si-care-sa-permita-astfel-o-recunoastere-de-catre-tatal-biologic.html

related to the child and the probability of parentage is typically 99.99% when the alleged parent is biologically related to the child[29]. Most commonly used genetic material samples for DNA testing are saliva and blood, but in some situations, other non-standard samples may be used, such as: blood on paper, sperm (frozen), liquid sperm, handkerchief or nasal mucus, bone, ear wax, nails (from the hands or feet), dry blood stains, sperm stains on clothing or material, body tissue (muscle or organs), umbilical cord, teeth, cigarette butts, toothpicks or dental floss, post-mortem body tissue, bands used to test blood glucose, hair, razor blades, cut beard (or shavings left on the razor), toothbrush, chewing gum, envelope and stamp (with saliva), doses (juice, etc.), plastic glasses or milk bottles[30]. Of course, I also asked myself with regard to the life of a genetic material sample, which can be used to establish paternity by DNA testing, assuming that the samples in question are kept under the required conditions, according to all medical, legal, scientific norms. DNA preservation (also known as DNA Banking) is the long-term and safe preservation of the genetic material of a person. Thus, preserved DNA will remain intact for potential future use. I have also learned that there is now a possibility to keep a sample of genetic material permanently. *SecuriGene*[31], an American company specializing in DNA preservation services and DNA testing services, provides *SecuriGene DNA Capsule*[32] for the storage of genetic material indefinitely[33]. Therefore, benefiting from all these scientific possibilities, accessible to everyone today, we consider that there is no longer any impediment to the establishment of the filiation, even post-mortem. It is our opinion that it is law's duty to protect these children, who same as the ones conceived but not born at the opening of the inheritance, are entitled to a name and to be recognized. Same, the father of a potential future child (conceived post-mortem) has the right to recognize him by will and/or leaving genetic material for a medical test in order to establish the parentage if the law or the other heirs ask for it or contest it.

2.4 *The Right to Inheritance of the Post-Mortem Conceived Child*

This last section proposes to discuss the right to inheritance of the child conceived through ART (post-mortem). The *Romanian Constitution* guarantees in *Article 46*[34] the right to inheritance referring to both legal inheritance and testamentary inheritance, although not expressly mentioned. By *Constitutional Court's Decision no. 312/2002*[35], published in the Official Gazette of Romania on

[29] https://en.wikipedia.org/wiki/DNA_paternity_testing
[30] https://paternitytestinglabs.com/non-standard-dna-sample/
https://www.vaterschaftsanalyse.de/en/info/faq/samples-and-traces/
[31] SecuriGene – DNA Preservation Services & Medical DNA Testing Services, info@securigene.com
[32] dnalegacy by SecuriGene © DNA Legacy 2018.
[33] www.securigene.com/dna-banking-preservation/faq/
[34] Constitution of Romania, http://www.cdep.ro/pls/dic/site.page?id=339&par1=2&idl=2
[35] The provisions of art. 1 paragraph (2) of Law no. 9/1998, republished, were declared unconstitutional by the Constitutional Court Decision no. 312/2002, published in the Official

February 7, 2003, it was held that *article 1 paragraph 2* of *Law no. 9/1988 regarding the granting of compensations to the Romanian citizens for goods that have been taken by the Bulgarian state*[36] following the application of the *Treaty between Romania and Bulgaria*, signed at *Craiova on September 7, 1940*, republished, are unconstitutional/contrary to *Article 42* of the *Constitution (now Article 46)*, as far as limiting the scope of persons entitled to compensation only to the former owners and their legal heirs, excluding the testamentary heirs. The European Court of Human Rights links inheritance rights to family life, the right to respect for private and family life enshrined in Article 8 of the European Convention on Human Rights and other provisions such as Article 1 of Protocol no. 1 on ownership, in a case considering succession as an element of family life that cannot be neglected[37]. It is important to observe here that the institution of inheritance is treated indirectly by the Convention, *"as a consequence of other rights such as the right to privacy, the right to property"*[38]. The ECHR Case Zaieţ vs. Romania – March 24, 2015 aimed the annulment of a woman's adoption, at the sister's initiative, 31 years after approval and 18 years after the death of the adoptive mother. The applicant alleged, amongst others, that after canceling her adoption, she lost her right to the five hectares of forest she had inherited from her adoptive mother. This was the first time the Court had to consider the annulment of an adoption order in a context where the adoptive parent was dead and the adopted child reached adulthood. In the case of the applicant, the Court found that the annulment decision was vague and did not justify the adoption of such a radical measure, it concluded that interference in family life was not supported by relevant and sufficient reasons**, contrary to Article 8 (right to respect for private life and family)** of the Convention. In particular, **the Court emphasized that, in any event, the annulment of an adoption should not even be considered a measure against an adopted child and stressed that the child's interests in the legal provisions and decisions on adoption had to remain primordial**. The Court also found that there had **been a violation of**

Gazette of Romania, part I, no. 81 of 07 February 2003, "In so far as it removes the testamentary heirs from the benefit of granting the compensations provided for in paragraph (1) of Article 1 of the same law."

[36] Law no. 9/1998 regarding the granting of compensations to the Romanian citizens for the goods passed into the property of the Bulgarian state following the application of the Treaty between Romania and Bulgaria, signed at Craiova on September 7, 1940, republished. Article 1: (1) The Romanian citizens injured by the application of the Treaty between Romania and Bulgaria, signed in Craiova on September 7, 1940, hereinafter referred to as the Treaty, are entitled to compensations established under this law, insofar they have not received or have received only partial compensation for the real estate – constructions and land – owned in the Durostor and Caliacra counties assigned to Bulgaria for the unharvested crops of maize, cotton and sunflower, as well as for plantations of fruit trees and or nurseries of grafted fruit trees. (2) The provisions of paragraph (1) also benefit the Romanian citizens, legal heirs of the former owners.

[37] Bîrsan, C. (2005). European Convention on Human Rights. Comment on articles, volume I, Rights and Freedoms, Bucharest: All Beck Publishing House, p. 645.

[38] Vădeanu, Fl. (2010). Transmisiunea moștenirii, Bucharest: Wolters Kluwer România Publishing House, p. 20.

Article 1 of Protocol No. 1 (protection of property) to the Convention, because of the disproportionate interference with the applicant's ownership of the land in question.

As far as the present Civil Code is concerned and the capacity to inherit, *Art. 957* provides in *paragraph 1* that a person can inherit if he/she exists at the time of the inheritance's opening and that the provisions of *Art. 36* amongst others are applicable. From this stipulation it results that natural persons who are not alive (the child born dead, the predeceased, the unborn child at the opening of the succession who does not benefit from the presumption of *Art. 412* on the legal time of conception) do not have the capacity to inherit[39]. However, *Art. 989* of the Civil Code, entitled *The Designation of the Liberality's Beneficiary*, states in *paragraph 2* that *"a person who does not exist at the time when the liberality is made can benefit from a liberality if it is made in favor of a capable person, with the task for the latter to transmit/hand over to the beneficiary the object of the liberality as soon as possible"*. It is regulated in this way the possibility of gratification of a future not yet conceived physical/natural person, as well as of the future legal person. In other words, there is a liberality with the task for the capable gratified person (at the time of the liberality) of transmitting the object of the liberality as soon as possible, namely, of carrying out the task. According to the comments from the *Civil Code of Romania. Notarial Guidance, Union of Notaries Public in Romania*, vol. I, ed. Official Gazette, Bucharest, 2011, p. 352, the phrase *"as soon as possible"* must be assessed according to the provisions of *Art. 36* of the Civil Code (according to which the rights of the child are recognized from the conception but only if he is born. *Paragraph 2* of the rule under consideration regulates the situation of gratification with a burden/task in favor of a third party (which does not exist at the time of the gratification), which, according to the doctrine, is a stipulation for another, which may take the form of double bond or double donation. Capacity rules are reviewed between the disposer and the capable person, respectively between the dispatcher and the third party. The condition of doing and receiving liberalities should not be fulfilled in the relationship between the capable person and the third party, since they only carry out the task. For example, the disposer makes a liberality to his daughter, with the task stipulated in favor of the child who will be born of the marriage she will conclude. It is our opinion that the child conceived and born through ART (post-mortem) should benefit from the same rights, guarantees and legal protection as the others, especially if he is recognized by his father through will and is his heir. Concerning the existing legislation regarding the gamete or embryos donors – whether or not they are protected, namely the existing laws on donors, the fact that *today embryos can be created by in vitro fertilization sheds a new light on debate on the legal status of the human embryo*[40]. The Romanian legislator has chosen to guarantee respect for the human being from conception,

[39] *Op. cit.* 17, p. 1003.
[40] Ungureanu, O., Jugastru, C. (2007). Civil Law. People, ed. II, reviewed, Bucharest: Hamangiu Publishing House, pp. 36-37.

prohibiting, among other things, in *Art. 63*, the creation of human embryos for research[41]. However, from corroborating the provisions of *Art. 63 paragraph 2*, second thesis, with *paragraph 3 follows that creation of human embryos for medically assisted human reproduction is still allowed*[42]; this permission is implicitly pursued by *Article 142 letter e)*[43] of *Law no. 95/2006 on health reform*[44], which refers to the techniques of in vitro fertilization. From here results that also the post-mortem reproduction in the hypothesis discussed in this article can take place as it is not forbidden and the child resulted in this way should benefit from all related rights, including the one to inheritance.

3 Conclusions

As the research required to write this article and as we progress with writing, I realized that this paper is not just a scientific presentation, a proposal for the express regulation of post-mortem assisted reproduction technology, recognition of the child conceived and born post-mortem through a will, and the right of such a child to inheritance, but it has gradually become a plea for recognizing the fetus as a person, a plea for life in all its forms and stages. I have learned that one of the reasons why the European Court of Human Rights has refused in ***Vo vs. France*** to extend the right to life to unborn fetuses is the lack of consensus in European countries on the legal and scientific definition of the beginning of life, better explained by Laura Katzive, Legal Advisor at the *Center for Reproductive Rights*[45]*: "Had the Court gone the other way, abortion laws in thirty-nine countries across Europe would have been rendered invalid. The facts in this case were extremely sad, but a woman's right to make her own decisions about her life and body were at stake"*. In its ***amicus brief***[46], the Center argued that a decision affirming Vo's claim could lead to the regulation and monitoring of women's activities during pregnancy in order to protect the presumed interests of fetuses. The Center emphasized that the loss of a wanted pregnancy is an injury to the pregnant woman and accordingly, the Court could recognize a violation of her rights, rather than those of the fetus. The European Commission of Human Rights itself, in ***Bruggemann and Scheuten v. The Federal Republic of***

[41] *Op. cit.* 17, p. 68.
[42] For a presentation of the medical assisted human reproductive techniques, see Dagh, N.-A., Iorga, D.-M. (2010). Medical Assisted Procreation – Currents and Perspectives, in Law, no. 3/2010, pp. 83-84.
[43] Article 142: e) ... The regulations contained in this law also cover in vitro fertilization techniques;
[44] Law no. 95 of April 14, 2006 on Health Reform, published in the Official Gazette of Romania, no. 372 of April 28, 2006. http://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=72105.
[45] https://www.reproductiverights.org/about-us; https://www.reproductiverights.org/press-room/court-rejects-use-of-european-human-rights-law-to-establish-fetal-rights.
[46] https://en.wikipedia.org/wiki/Amicus_curiae.

Germany*[47] *(application no. 6959/75), dated **12 July 1977**, states in paragraphs 59-61 concerning abortion and legal protection of prenatal life that: *"There can be no doubt that certain interests relating to pregnancy are legally protected"*. Life is a public interest, and not just a private interest, which explains why it is protected by the Criminal Law[48] and not by Civil Law: violation of the right to life is not only a violation of the victim's private interests but also affects the common good of society, including public order[49]. In this regard, the Court acknowledged that *"pregnancy cannot be said to pertain uniquely to the sphere of private life"*, so it does not refer only to the mother's private life. Other arguments in favour of recognizing fetus as a person are the provisions of ***Recommendation 874 (1979) of the Parliamentary Assembly of the Council of Europe on a European Charter on the Rights of the Child***[50], which stipulates in *point VI Social and medical protection point a): "The rights of every child to life from the moment of conception, to shelter, adequate food and congenial environment should be recognized, and national governments should accept as an obligation the task of providing for full realization of such rights"* and ***Recommendation 1046 (1986) on the use of human embryos and fetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes***[51], which states in *points 5 and 10*: *"Considering that, from the moment of fertilization of the ovule, human life develops in a continuous pattern, and that it is not possible to make a clear-cut distinction during the first phases (embryonic) of its development, and that a definition of the biological status of an embryo is therefore necessary;"* and *"Considering that human embryos and foetuses must be treated in all circumstances with the respect due to human dignity, and that use of materials and tissues therefrom must be strictly limited and regulated (see appendix) to purposes which are clearly therapeutic and for which no other means exist;"*. In conclusion, we believe that the legislator should adopt/amend

[47] http://www.globalhealthrights.org/wp-content/uploads/2013/10/Bruggemann-v.-Germany.pdf Paragraphs 59 and 60.

[48] Article 201 Criminal Code Interruption of pregnancy and Article 202 Criminal Code Fetus injury.

[49] Further reading on this subject, D. Puppinck, G., Abortion and the European Convention on Human Rights, Pro VITA Iași&București, www.provitaiasi.ro www.asociatiaprovita.ro http://www.provitabucuresti.ro/docs/publicatii/Avortul_si_CEDO.pdf.

[50] Recommendation 874 (1979) on a European Charter on the Rights of the Child, https://rm.coe.int/0900001680797f7c.

[51] Recommendation 1046 (1986) on the use of human embryos and fetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes, Parliamentary Assembly of the Council of Europe, 24th of September 1986 (18th Sitting). http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15080&lang=en;
Further reading, Andreea Popescu, "Is the human being still unborn enjoying the fundamental right to life?", ON THE LINE, January 14, 2017, http://inliniedreapta.net/fiinta-umana-inca-nunascuta-beneficiaza-de-dreptul-fundamental-la -life/; Text presented on December 8, 2016 for the Association of Catholic Physicians in Bucharest, within the Symposium "Bioethical Research XXI Century" of the Department of Logic, Methodology and Philosophy of Science of the Romanian Academy; See also Mona-Maria Pivniceru, Florin Dorian Dăscălescu, "The Lower Limit of the Right to Life: Between the protection of the human fetus, the right to abortion and progress."

the criminal laws on aggression on the foetus, the legal status of the foetus in terms of its explicit recognition as a person, as well as the civil laws on filiation/parentage and succession to expressly include the new generation of children born through medical assisted human reproduction: *"... the wills and trusts should be modified to reflect the new technological realities of the present and future eras of reproduction."*[52] So far, the issue has never been raised, but today it is an absolute necessity for regulating this area, as Judge Edward M. Ross of the Los Angeles Superior Court, in Kane, said in December 1992, *"We are making new frontiers, because science has moved ahead of (evolving) to common law*", but in order not to harm the lives and interests of other people involved directly or indirectly (other children, parents, former spouses, creditors, etc.), we propose to introduce a time limit, 1-2 years (similar to the time for expressing the succession option) until the surviving/surviving spouse can accept the pregnancy/pregnancy in his or her favour and conceive the child through post-mortem assisted human reproduction.[53]

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[5] Council of Europe/European Court of Human Rights, Research Report "Bioethics and the case-law of the Court", 2016.
[6] European Social Charter.
[7] European Council Social Security Code.
[8] International Covenant on Economic, Social and Cultural Rights.
[9] European Convention on Human Rights.
[10] Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine.

[52] *Op. cit.* 16, pp. 15-3.
[53] https://www.wikigender.org/wiki/practices-and-controversies-surrounding-assisted-reproductive-technology-art/.

[11] Baias, Fl.A., Chelaru, E., Constantinovici, R., Macovei, I. (2012). *Noul Cod civil. Comentariu pe articole* (The New Civil Code. Comment on Articles), Bucharest: C.H. Beck Publishing House.
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PUBLIC LAW

The Economy of Means in the Normative Elaboration – A Condition of the Accessibility of the Normative Legal Act

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Abstract

The legal normative act is the main source of law in the Romanian-German legal system. It is the result of the constructive activity carried out by specialized bodies (legally entitled) with normative competence.

In their complex approach to elaborating the normative headings, the legislative bodies have to comply with rules and techniques of elaboration and drafting, so that the result of their activity will materialize in normative acts that once enacted to produce the legal effects pursued by the legislator. For this purpose, the law-making bodies must prove the appropriation and application of the most appropriate legal forms, means and instruments necessary for the process of adopting the rule of law.

The elaboration of normative acts is a complex process in which political, economic, moral, social, historical, national and international factors, legal consciousness and trends of society evolution, the specificity of legal normality have to be taken into account.

This process, which must aim at the embodiment of rationality and normality of law, calls for compliance with principles, requirements of lawmaking, including the principles of accessibility and the economy of means in normative development.

Keywords: law, normative legal act, law, principle, lawmaking, rationality.

1 Introduction

The regulation of social situations by law and by other categories of normative acts is carried out in compliance with the general principles of law-making that are inherent in the system of Romanian law, observing the constitutional and legal provisions, as well as the principles of the rule of law.

The principles of lawmaking are as follows: the principle of scientific substantiation of normative acts, the principle of ensuring a natural relationship between the dynamics and the statics of law, the principle of correlation of the normative acts system, the principle of accessibility and the economy of means in normative elaboration.

Legal thinking has been concerned about the accessibility of the normative act even 250 years ago. Contrary to the situations of earlier times – when norms of law could only be understood by initiates in the matter – at the beginning of the nineteenth century, when the law was based more on the rules, the problem of the elaboration of legal norms to the understanding of its recipients was raised. The law can not fulfill its purpose unless it is clear, elegant and precise.

2 The Requirement of Means by the Economy in the Normative Development

The requirement (principle) of means by the economy in normative development can be embedded in the following two main rules to be observed: **avoiding repetitions** and **avoiding contradictions**. [1]

The very reason of the economy of means is, first of all, to **avoid repetitions**, which would make it difficult to read texts and increase the volume of normative acts. From this perspective, **to avoid repetitions means adapting formulations suitable enough to be applicable to a large number of legal provisions.** "*The iron rule of the legislator, according to prof. Zlătescu, is that, after using a certain term, an expression, in a certain sense, he is obliged to use it in the rest of the normative act, each time it returns to the same sense.*" [2]

Avoiding contradictions is a second important rule to be observed in the normative development from the point of view of the economy of means. "*The frequent repetition of some, sometimes long, expressions urges the creation of variants to avoid a monotony of style.*" [3] On the other hand, the creation of variants raises the danger of different interpretations, which find special legal meanings where there must be a unity of view. This is – what the aforementioned author considers to be – **the preventive function of the principle**. [4]

3 Procedures for Legislative Technique

The literature contains a number of **legislative technique procedures**, sometimes called **conceptualization procedures**, which give expression to the economy of means in the normative elaboration, such as: *definitions, concepts,*

classifications, legal constructions, legal categories, references, assimilations, fictions, quantifications, enumerations. We will analyze them in turn.

3.1 *The Definitions*

In the view of several authors, the definition is the aptitude of the theoreticians, and therefore it is stated that in the texts the definitions should be avoided. Here is a conception that confuses the **theoretical definition** with the **legal definition**. It is obvious that the theoretical definition is specific to the juridical doctrinal perimeter. The doctrine, using the laws of formal logic, can make a synthesis of the essential elements that are to become defining. Thus, the theoretical definition appears to have an absolute value and consequently, we appreciate that it is not necessarily obligatory. [5]

However, **defining some legal terms is necessary in a normative text**; it has a conventional character and should be understood *pro causa*. [6] It presents a relative logical value, different from the theoretical definition, and does not pursue an absolute, scientific interest, but **imposes a certain sense on terms**, used in a normative act or in several such acts. Thus, **the definition is mandatory in a legal text** only in its scope, beyond being inoperative, because it is exclusively an instrument of legislative technique. [7]

We must not lose sight of the fact that the meaning of the terms of the institutions can be expressed intelligibly – and, as a rule, this is the way to be followed in the sphere of lawmaking – not through the direct expression of definitions but by the way in which the whole set of regulations is set up, in the way in which the rules – even in the absence of some didactic definitions – depart from this regulation – the characteristic features of the institution in question. The example of the sale-purchase is given – in context – which – undefined by any civil law as such – is perfectly understandable as a legal institution, therefore viewed from the entirety of the legal regulation. [8]

3.2 *Legal Concepts*

To formulate (create) the legal norm, the law technician has at hand the resources of the common language. This language contains words corresponding to concepts that evoke a certain degree of *abstraction*. [9]

In the process of constructing the normative sentence, of the legal norm, the words of ordinary, ordinary language are transformed, they change nature, become *legal terms* or *legal concepts*. Often, this transformation leads to changing the meaning of such terms. For example, the concepts of "fruit", "mobile", "immobile", etc., have a different value in the law, much more intense than the same words have, but used in the usual daily language.

It is legal technique that creates its own legal realities (*e.g.*, the notion of "guarantees"), giving rise to notions and to a *legal terminology of its own*. [10]

In drafting legal concepts, the legislator can formulate either *lato sensu* or *stricto sensu*. According to Jean Dabin [11], a right defined in strict terms – especially by the use of purely formal features – is an incomplete right, because it leaves out certain hypostases, some singular cases, without taking into account the fact that the extremely complex and changing social life is reduced to a sum of hypotheses – type, to which the law offers predetermined, typical or uniform solutions. In consequence, to avoid such situations "*the right must correspond to this complexity of life, it must cover the plasticity of social life, by resorting to broad definitions of principle, malleable in the multitude of concrete, predictable or unpredictable cases, in order to ensure their adequate legal treatment.*" [12]

The process of developing broad legal concepts can not be used in all cases and in all legal regulations, as this could seriously harm the legal security, legality and general interests of society. [13] In order to avoid such situations, the legislator resorts to strictly determined or determinable concepts, which do not allow the judge to extend the meaning of the legal norm beyond the limits set by the legislator. Such concepts are claimed by the specificity of criminal law, the *nullum crimen sine lege* and *nulla poena sine lege* principles, as well as other situations that require precision in assessing the fundamental rights and obligations of citizens, as well as in establishing sanctions that affect the status of the persons concerned. [14]

3.3 *Classifications*

The classifications bring together legal concepts or concepts that share common features. [15]

Quite often used by the legislator, the **classification process –** unlike definition by enumeration, starting from a higher degree of generality, to descend to hypostases closer to the concrete – **starts from the premise of generalization**, tending towards grouping **distinct elements into a common idea**. In the first case the analytical procedure is performed, in the second case it is proceeded synthetically. [16]

For example, classifications of goods – mobile and immovable, individuals – physical and legal, legal acts – normative, individual, etc., of legal facts – events and actions, rights – real and personal, etc. can be given as an example.

The essential requirement – in the case of classifications – is that all their **elements are subsumed to a general idea**, "not to be arbitrarily taken." [17]

3.4 *Legal Constructions*

Legal constructions are *"a true coronation of legislative techniques ... the most elevated on the scale of logical abstractions."* [18] They "*consist of detaching from the study of particular solutions a general idea that links them and explains them.*" [19]

According to Prof. Zlătescu, this technical process (of legal constructions) has a creative effect. In order to synthesize certain general theses – often of

principle value – it has not only cognitive goals. Bringing it to the general sphere – which the construction entails – allows subsequent legislation and jurisprudence to apply the principles or theories outlined in new situations. *"It is a premise of legal creation."* [20]

Systematizations that have explanatory value, clarifying and affirming solutions, legal constructions are thus tools for discovering and perfecting the law, as long as they allow them to solve the unpredictable difficulties. [21]

The specific function of legal constructions is to introduce an element of logical coherence in the complex of legal regulations, allowing to unravel the unity of the regulations, making up an institution, as well as their relations with other institutions. [22]

3.5 *The Legal Categories*

The legal categories are the result of the division of legal reality into categories, each having its distinct physiognomy, conferring on the right systemic unity and rational congruence.

The true rudiments of the science of law that constitutes its elemental matter, the legal categories represent the unity that is characterized by a **meeting of constant and necessary elements**. **[**23]

An integral part of the concepts, the legal categories are identified by the multitude of elements that make them up and by the nature of the relations established between them. The determination of legal categories is the result of intellectual processes, of technical artifices that reveal distinct legal realities. [24]

The definition of legal categories requires an intellectual effort to highlight the criteria that distinguish one legal category from another. [25] Determining the criteria of the legal categories presupposes the isolation of the common features of the elements that make them up and of the traits that make the different categories distinguishable between them. [26] For example, offenses and contraventions are legal categories that differ from each other by the degree of social danger they pose. This distinction is relative and in most cases is controversial, but does not lead to the cancellation of the distinction between them, which is otherwise based on the law.

Often, **dichotomies** are used in defining legal categories. A class of legal elements that form a category is opposed to a similar class through a trait or a series of common antagonistic traits. [27]

3.6 *The References*

The reference is another technique often used under the imperative of the economy of means. According to this procedure, after the term or expression has been used for the first time, it is sufficient that in the following articles only a reference is made to the text in which it was originally used. [28]

References are allowed to avoid repeating a rule in the text. If the norm to which reference is made is included in another act, it is mandatory to indicate

its title, number and other identification. The reference to the norms of another normative act is made in its entire content or only in a subdivision, specified as such. [29]

Also, references can operate not only from one article of a law to another, but from one law to the other as wells. [30] As a rule, no reference to another referral law can be made.

Particular issues arise when the text to which reference is made – from the same law or from the other – is subsequently abrogated or modified. Repeating the referral text does not automatically mean missing the substance of the one making the referral. [31]

If the reference is made only under certain conditions in which the repealed text is applied, it may be considered that the reference text will survive because its meaning was that of those conditions, their virtual takeover and inclusion in the reference text. These conditions remain as such, even if the text containing them has been abrogated. [32]

In p**rivate international law,** the issue of referral is of essence, with private international law being "a law of referrals." [33]

Referring to the law of another state, the rule of private international law takes over the content of the foreign law to which it refers, applying it in the present case through nostrification, and conferring upon it a national law value. It is noteworthy here that, unlike what is happening in other branches, the reference here does not concern a specific text, but entirely the regulation of another country in the matter. For this reason, the reference made by private international law to the entire legal system of the country concerned, including the possible references that its laws make to each other. [34]

It is also worth mentioning the **institution of referral,** when the law of the country to which reference is made encompasses a provision indicating either the law of the forum or the law of a third State. [35]

3.7 *The Assimilations*

Assimilation – as a process of legislative technique – **consists of subjecting a category of subjects or legal situations to the regime created for another category.** It has quite frequent application, almost in all branches of the law.

As a rule, the legislator chooses the assimilation process when the regime he intends to accomplish has already been regulated around another subject or legal situation. By assimilation, he makes it applicable also to the case that interests him.

In other cases, the legislator, through assimilation, wants to recognize a certain legitimacy of a category of subjects or situations by referring to another category whose legitimacy is incontestable (the case of the assimilation of stateless persons and aliens with Romanian citizens). [36]

3.8 *The Fictions*

Fiction in law is an artificial process, often used by the legislator to admit the existence of a fact that is nevertheless denied by reality. [37]

Fiction implies the existence of facts or circumstances that are non-existent or otherwise different from those presented by law. [38]

According to J. Dabin, fiction is part of what he calls *"deformation processes"*, which the legislator uses in the process of conceptualization.

If the term "*deformation*" has a metaphorical nature in the case of presumptions, in fictions it is perfectly appropriate because *"fiction asserts as real things that do not exist, denies existing things, assimilates things or situations that are not identical, considers some things that do not yet exist or, on the contrary, they consider nonexistent things or situations that continue to produce their effects."* [39]

Here are some examples:

- The first example is the expression taken from Roman law *infans conceptus pro nato habetur quoties de commodis ejus agitur*, which in Romanian law finds its expression in the following legal norm: *"The rights of the child are recognized from the conception, but only if he is born alive."* [40]

Thus, under this legal norm – which gives expression to a legal fiction – **the conceived child is considered alive under the condition of his viable birth** to be called as heir to the succession of his ascendants as if he were born on the day of his father's death. [41]

According to A. Naschitz, this fiction anticipates by law the appearance of physical personality and assimilates the child conceived with the one viably born in order to achieve the purpose of the legislative policy to ensure the child only conceived the benefit of rights that the general conception of the moment of the birth of his personality could not provide. [42]

- Also, by regulating **adoption with full effects** (*adoptio plena)*, the legislator assimilates the condition of a foreign person with that of the child born of marriage;
- In Roman law – also in the matter of inheritance, the fiction of "*post liminium*" was known, under which the prisoner returning to the legion in which he belonged was considered to have never been deprived of the city, thus retaining all his rights or, in otherwise, the fiction governed by the **Cornelia Law,** by virtue of which the prisoner who did not return to the city was considered to have died before his fall into captivity, which made his testament – previously made – valid, thus opening up the succession [43];
- The so-called presumption of knowledge of laws – *nemo censetur ignorare legem* – is in fact a fiction. No one can claim that all citizens of a state know – and still to perfection – all of the legislation. *"It's not malicious if we assert that not even all lawyers know it."* [44] Although the legislator is aware that the entire legislation can not be known and

appropriated, he adopts this fiction with a value of principle, due to considerations of legislative policy, otherwise – in the absence of such a fiction, legality could not be assured;

- Another fiction is the situation where a person is declared permanently incapacitated; although there may be cases when she is capable, she has moments of lucidity, however, through a fiction, **the disabled is considered permanently incapable**;
- Other examples: [45]
  - the law considers that certain conditions, which in reality have not been fulfilled, are fulfilled when the impediment to their fulfillment is due to the one who was bound by the condition;
  - the law considers in free acts the condition as nonexistent if impossible, unlawful or contrary to good morals;
  - fiction is based on the extraterritoriality of foreign diplomatic missions, which allows them to be preserved as a foreign territory, although, in reality, this hypothesis is false;
  - In matters of succession, fiction takes the form of continuity of the deceased person into those of his heirs.

Referring to the role of legal fiction, **Mircea Djuvara** remarked: "*The law always works with fictions and is observed in the evolution of law, that fiction was one of the most important levers of the progress of law. Fiction is a lie, and yet the law enshrines it. How, by what wonder?*" [46] To this question, Djuvara himself gives the answer to when he finds that fiction is *"only a helpful means of the solution to the perfecting of the ideal of justice."* [47]

The use of fictions in the law-making process is sometimes challenged. Some authors believe that recourse to fictions reveals the legislator's inability to quickly create new legal solutions to cover emerging social realities. On the other hand, fiction is repudiated due to the discrepancy that they place between law and reality. "*However,* Prof. I. Vida says – *the advantages of the fictions (avoiding the quantitative increase in legal regulations, ensuring the unity of the legal system and limiting the increase in the number of concepts) make them useful in the law-making process."* [48]

In the same sense, "*the procedure of legal fiction* – remarks V.D. Zlătescu – *it is not out of the danger that he – abusively used – can lead to the legal promotion of truths that could violate the equity of the system of values itself. That is why it should be seen only as an exceptional way, which is to be used with great care and only where it is required by political or legislative reasons."* [49]

3.9 *The Quantifications*

In support of the principle of the economy of means we come across as a technical but not a general process – **the quantification** used in situations where the legislator wishes to regulate as precisely and in accordance with the above principle. [50] Quantification involves the existence of at least two distinct

techniques: **numeracy** and **enumeration**. These are means by which various quantitative and qualitative phenomena are reproduced. [51]

The quantitative dimension of legal quality is expressed in legal regulations with the help of figures that accurately determine the **duration**, **size** or **extent** of **phenomena** subject to the will of the legislator, precise modalities of determination. [52] The use of figures proves to be a useful way of:

- the determination of procedural or prescription terms;
- determining the amount of court fees, taxes and other monetary contributions;
- determining the length of time, the legal effects of an act or legal act, the extent of the various rights and obligations;
- the determination of cash incomes, interest, penalties and other legal penalties;
- determining the quorum required for a meeting to function legally, the majority of votes required to obtain a law, decision or another legal act;
- determining the results of local, parliamentary or presidential elections or referendum, etc. [53]

By setting deadlines, ordering sizes, determining quantities, etc., the law uses figures, in most cases expressing ideas is not possible otherwise, or anyway, requiring a number of broad explanations.

There is an area of the Law in which the figure is essential: the special part of criminal law, in which penalties are established. [54]

Quantification can vary in degrees: it can be more **rigid** – when using absolute figures – or more **flexible** when setting limits (minimum or maximum).

The rigid quantification is used to express as accurately as possible the quantity envisaged by the legislator [55], while **supple quantification** highlights the will of the legislator to leave a certain margin of maneuver to the law enforcement. [56]

The second procedure under which quantification is revealed is t**he enumeration.** The enumeration process resides in "*the discovery of an abstract idea – considered to be too vague to allow a unitary and efficient realization – in practical applications.*" [57]

The use of the enumeration process makes it possible to fully understand a legal statement with a high degree of abstraction. In such situations, the legal statement includes a reference to the concept, and then, by way of example, it shows some characteristic notes of the concept used in the statement. [58] In the case of enumeration – shows J. Dabin – the distant genus substitutes closer species, the abstract idea being replaced, by decomposing the substance of the regulation, with more concrete elements. [59]

Currently, the legislator uses the enumeration to:

- establishing public authorities' attributions;
- determining cases requiring adaptation of an organic law;
- establishing disciplinary sanctions;
- determining cases of loss of parental rights, etc.

The enumerations in the legislative texts may be **exemplifying enumerations** or **limitative enumerations. [**60]

Exemplifying enumeration is characterized by the fact that the legislator leaves it to the discretion of law enforcement to extend its application to other similar cases. [61]

As opposed to exemplifying enumeration, **limitative enumeration** obliges the lawyer applying the law to confine himself to them. This type of enumeration is especially used when it comes to establishing derogations from the common law, which has the effect of restricting the application of the law only to those cases mentioned in the enumeration text.

4 Conclusions

Contemporary law increasingly discusses a crisis of the law, a crisis caused by several factors, one of which is major: lawmaking is no longer grounded on its two essential conditions, namely the k**nowledge of reality** and the proper **application** of legislative **technique**, a technique designed to ensure consistency, compatibility between social reality and reality reflected in the rule of law.

The contemporary legislator, ignoring the ultimate goal of the law – defending and promoting social values by strengthening the fundamental rights of the individual – instead of regulating the given social reality by seeking the most appropriate rules to follow (the *"normative ideal"* that Mircea Djuvara spoke of), creates a parallel reality; he, the *"producer of realities",* through the given norms, transforms reality, legislating without taking into account his requirements, in turn *"being compelled to assimilate more rules than it is able to absorb".*

From this perspective it is necessary to observe in the process of legislation its requirements, principles of legal editing that lead to legal, efficient, clear and sustainable norms. One of these principles, as discussed above, is *the principle of the economy of means in the act of normative elaboration.*

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[27] Thus, legal acts have an international dimension insofar as they involve a foreign element. Without this element, they are internal legal acts. Children are also from within or without of wedlock. In the same sense, the goods are movable or immovable (Vida, I., *op. cit.*, p. 55).
[28] Zlătescu, V.D., *op. cit.*, p. 54.
[29] Popescu, S., Ţăndăreanu, V. (2003). *Probleme actuale ale tehnicii legislative* (Current Issues of Legislative Technique), Bucharest: Lumina Lex Publishing House, p. 54.
[30] Zlătescu, V.D., *op. cit.*, p. 130.
[31] *Ibidem*.
[32] *Ibidem*.
[33] *Ibidem*.
[34] *Ibidem*.
[35] See, Mayer, P. (1977). Droit international privé, Paris: Montchrestien, pp. 176 et seq.

[36] The Constitution of Romania, in art. 18 par. (1) assimilates the condition of foreigners and stateless persons domiciled in Romania with that of Romanian citizens: "Foreign citizens and stateless persons living in Romania enjoy the general protection of persons and property guaranteed by the Constitution and other laws."
[37] Cornu, G., *op. cit.*, p. 81.
[38] Zlătescu, V.D., *op. cit.*, p. 138.
[39] *Ibidem*.
[40] Cf. art. 7 par. 2 of Decree no. 31/1954.
[41] Cornu, G., *op. cit.*, p. 81 (cit. de Vida, I., *op. cit.*, p. 58).
[42] Naschitz, A., *op. cit.*, p. 285.
[43] Zlătescu, V.D., *op. cit.*, p. 148.
[44] *Ibidem*, p. 138.
[45] *Ibidem*, p. 139.
[46] Djuvara, M. (1930). *Teoria generală a dreptului (Enciclopedia juridică)* [General Theory of Law (Legal Encyclopedia)], vol. II, Bucharest: Librăriei Socec Publishing House, p. 458.
[47] Craiovan, I. (2011). *Tratat elementar de teoria generală a dreptului*, (General Theory of Law Elementary Treaty), Bucharest: All Beck Publishing House, p. 269.
[48] Vida, I., *op. cit.*, p. 60.
[49] Zlătescu, V.D., *op. cit.*, p. 139.
[50] Bădescu, M. (2013). *Teoria generală a dreptului* (General Theory of Law), Craiova: Sitech Publishing House, p. 236.
[51] Dabin, J., *op. cit.*, p. 289.
[52] Naschitz, A., *op. cit.*, p. 261.
[53] Vida, I., *op. cit.*, p. 55.
[54] Zlătescu, V.D., *op. cit.*, p. 141.
[55] For example, when setting wages, pensions, taxes, etc.
[56] For example, when setting vehicle speeds, maximum and minimum limits of punishments or other legal penalties (disciplinary, contraventional, etc.).
[57] Naschitz, A., *op. cit.*, p. 263.
[58] Vida, I., *op. cit.*, p. 56.
[59] Dabin, J., *op. cit.*, p. 289.
[60] Vida, I., *op. cit.*, p. 56.
[61] For example: art. 7 par. (2) of the Law no. 24/2000 stipulates: "The provisions contained in the normative act may be, as the case may be, mandatory, suppletive, permissive, alternative, derogatory, optional, transitional, temporary, recommendation or the like".

International Civil Liability for Damaging Consequences of Acts Not Restricted by International Law

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Abstract

A series of major industrial accidents with litigious legal consequences have served as a basis for both doctrine and RDI to explain the legal aspects of civil liability of states for acts not prohibited by international law.

Keywords: Legal liability, international civil liability, damages, harmful consequences, acts not prohibited by international law.

1 Introduction

The fast evolution of globalization phenomenon and intensification of technological transfers, as well as the legal difficulties appeared during the last decades, in settlement of damage remedy actions caused mainly by industrial accidents with cross-border effect [1] have intensified the doctrinaire preoccupations in the field. Among severe industrial accidents with serious consequences on population and environment, we mention: oil pollution (barge tank shipwreck Amoco-Cadiz/Spain), pollution with toxic chemical gases (case Bhopal/India), radioactive contamination (accident from Three Mile Island/SUA, Goianya/Brazil, Chernobyl/URSS, Fukushima/Japan).

Al least theoretically, regardless the classification assigned – "international" or "transnational", industrial accidents with effects overcoming the territorial limits of a state are managed identically in legal terms, when a private law rule is

applied (*conflicts of law*) or public law rule (*international conventional ruling*) [2].

The specific international conventions in the field of civil liability of states appeared in the majority of cases pursuant to catastrophic accidents.

In the absence of special international rules, the compensatory actions have been examined based on the norms of civil law. Currently, there are certain activities deemed dangerous, for which the associated risk and mechanism of compensation in case of accident have no specific international ruling.

Handl said that "once private individuals and companies have become actors in a multitude of transnational activities, the international community has reacted promptly and recognized their right to exercise but also the ability to respond to their actions" [3].

In practice, in case of transnational accident from *Seveso*, the means used in settlement of disputes have been subject to a political decision, having as result the admission of compensation actions and enforcement in this respect of Italian civil law norms. The sole international element of dispute was represented in this case by the source of funds necessary to repair the damages and compensate the victims.

In the case of the accident from India at *Bhopal factory,* no similar political solution has been reached, which could allow the enforcement of Indian civil legislation, the case being changed of venue by decision of Indian government at the American court.

In case of the accident from Switzerland from *Sandoz a Bale* factory causing the pollution of Rhine downstream, in the French sector, the French government required the Swiss government the remedy of damages. The Swiss party answered *per actia concludentia,* submitting directly to the company Sandoz the demand of remedy received from French party [4].

In the case *Trail Smelter,* the interests of the citizens of Washington state who suffered damages to the emission of smoke of a Canadian factory were directly protected and defended by American government [5]. The demarches of American authorities were included in the category of civil actions of remedy of damages with cross border effect.

The conventional international ruling of civil liability and distribution of risks was entered for the first time in the air transport law, in 1929 – Convention from Warsaw. Subsequently, international rules appeared in the field of nuclear power, use of extra-atmospheric space, pollution with hydrocarbons and transport of dangerous toxic substances.

The issue of codification of civil liability of states for activities not restricted by international law was for the first time included in CDI agenda on 1978, special rapporteur being appointed Robert Q. Quentin-Baxter. Given the conceptual complexity of the issues subject to debate, theoretical difficulties, and determination of a connexion with the institution of **state responsibility**, the Commission decided to approach the *international liability* under two separate issues: **(1) prevention** *(prevention of cross-border damages generated by dangerous activities)* and **(2) international civil liability** [6].

During the reunion organised on 3 august 2001, the Commission decided in conformity to art. 23 of by-law, to recommend to ONU General Meeting the approval of convention draft related to prevention of cross-border damages caused by dangerous activities, based on the articles agreed during the work sessions.

2 Prevention of Cross-Border Damages: Concepts and Principles

The concept of prevention/precaution was formulated in the context of ruling and authorisation by states of activities with increased degree of risk, which may cause damages with cross-border effect.

In this respect, the measures of prevention as procedures or obligations must be ruled in the internal legislation with a view to prevent the accidents since the states are liable and have the obligation to provide for reparations and/or compensations.

The concept of prevention and related policies are extremely important for environment protection [7], field where promoted mainly the risk-based liability. It is obvious that reparatory and compensatory measures and the capacity of states acting in this respect cannot assure completely the restoration of environment or property, calamity caused by accidents determined by dangerous industrial installations.

The adoption of effective measures of prevention/precaution, entails a good knowledge of dangerous activities, materials and system of management of technological trials in the field.

From the juridical perspective, the development of capacities able to follow a causality assembly, respectively the physical relation between cause (*activity*) and effect (*damage*), as well as other intermediary elements of this process, becomes a necessity for those carrying out a dangerous activity.

The principle of prevention of cross-border damages determined by dangerous activities is also reflected in the Declaration from Rio and other international documents in the field [8]. In the international jurisprudence this principle is recommended by the International Court of Justice in its consultative note dated 8 July 1996 on "Legality of using nuclear weapons by states in armed conflicts" [9].

In the international judicial practice, the prevention principle has been emphasized for the first time in the arbitrage decision in the case *Trail Smelter*.

Subsequently, the principle of prevention was reiterated in the Declaration from Stockholm [10] (Principle 21) and in the resolution of ONU General Meeting from 1972 related to cooperation of states in the field of environment.

The project of conduct principles in the environment field stipulates *inter alia* the obligation of states to "avoid as much as possible and reduce on minimum the damaging effects on environment outside their jurisdiction, in case of using shared natural resources and to protect environment when the use of resources: (a) may cause damages to environment and may have consequences on the use of

resources by another state; (b) impairs the conservation of renewable resources; (c) endangers the health of the population of another state" [11].

The prevention of cross-border damages caused to environment, individuals and property was accepted as important principle in the majority of international treaties in the field of environment protection, nuclear accidents, launch of space objects, international streams, management of dangerous waste and prevention of marine pollution [12].

3 Sphere of Enforcement

Article 1 of convention draft of CDI restricts the sphere of enforcement of this project of activities not restricted by international law, but which involve risks of causing significant cross-border damages by their physical consequences.

Sub-paragraph (d) of article 2 restricts as well the sphere of enforcement to activities carried out on the territory under the control or jurisdiction of a state.

In the current version, such articles cover the activities deemed "dangerous" and "ultra-dangerous". The latter include activities in which the probability of materialisation of related risks is rather low, but which, by their effects, may have catastrophic consequences.

During the negotiations, proposals have been presented related to drafting generic lists with such activities, with a view to take them over from national legislations in the field of interested states. Such a list couldn't have been agreed, given the fast evolution of technologies with high degree of risk and preoccupation of fast adjustment and improvement of standards related to functioning under safety conditions of such technologies.

It is unanimously accepted however the possibility of being included by states in the national legislation and bilateral agreements in the field, of express references to activities with high degree of risk.

A range of activities is deemed as generating risks for environment, such as: refining crude oil, production of energy in power stations, enriching nuclear fuel, marina and terrestrial storage of wastes of liquid and solid gas etc.

The definition of the area of enforcement by restriction of activity allowed or substances ruled by international law followed mainly the separation of the issue of *international liability*) from *state responsibility* [13].

The use of such criteria allows a state which may carry out a dangerous activity to ask the risk generating state to adopt proper measures of prevention for dangerous activities, licit *per se*. In this context, it is necessary to mention that the absence of measures of prevention or reduction of related risk does not change in any way the licit character of dangerous activities [14]. The absence of such measures may entail the liability of the state, but only when the state does not issue rules related to exploitation under safety conditions of a risk generating installation and does not determine specific measures of protection in the charge of operator [15]. The obligation to have a legislative and institutional frame to provide operation of installations under safety conditions, including by adoption

and elaboration of norms of prevention and safe management of materials used is properly ruled by nuclear law [16].

4 The Risk Generating State

Articles 3 and 4 of codification project of CDI equally refers to the management of risks and outlines the obligation of consultation and international cooperation between the interested states. The states having near their territories dangerous industrial installations from the perspective of related risks, have the possibility to hire consultations and collaborate with risk generating states in the implementation of joint management projects related to the safe functioning of such installations and environment protection. This does not offer the states the right to exercise a veto of such activities and projects [17].

The second criterion included in the definition of *State of origin* shows that the activities to which the prevention measures are enforced "are planned and carried out" in the territory under the control or jurisdiction of this state. Such formula is also encountered in other international legal tools (*Convention on sea right; Convention on biological diversity*) and outlines the importance of territorial, jurisdictional and ruling and control convention if any, between the activities carried out and state.

The territorial jurisdiction is a dominant criterion therefore the activities subject to such conventions create in the charge of states the obligation to assure measures of precaution and prevention.

The expression "jurisdiction of a state" covers, beyond the activities carried in its own territory, those activities for which a state is authorised to exercise competence and authority according to international law.

In some situations, due to the place of development of an activity, as for instance, the extra-atmospheric space, free sea or area of submarine territories, there is no direct territorial relation between a state and an activity carried out under its direct control. Also, for concurrent jurisdictions over the activities mentioned at art. 1 of the project, the state must enforce, to the extent possible, internal, individual or joint rules.

The third criterion refers to the risk of significant cross-border damages. The expression "cross-border damage" refers to the damages caused beyond the territory of the state of origin. The notion of related risk must be examined objectively in this context, as appreciation of potential damage, determined by a dangerous activity, known or which could be known by the individual suffering damages and may exercise the right to ask for reparations or compensations.

The last criterion included in this article refers to the physical consequences of dangerous activities in causing significant cross-border damage. During the debates, the members of Commission agreed due to practical reasons to exclude from the sphere of enforcement of convention the cross-border damage caused by states in tax, monetary and socio-economic field.

The causality must connect the dangerous activity with cross-border effects and this entails that the actions mentioned in the article have physical characteristics *per se*, and the damaging consequences to represent the result of such characteristics.

5 Definition of Risk in the Context of Significant Cross-Border Damages

Article 2, sub-paragraph (a) defines the concept of "risk causing significant crossborder damages" as being the "rather reduced probability of occurrence of a catastrophe with cross border effect or probability of a significant crossborder damage".

The definition refers to the combined effect of probability of occurrence of an accident and the magnitude of its impact, causing damages. This interpretation is also included in the Code of Conduct related to accidental pollution of internal waters, adopted by ONU Economic Commission for Europe in 1990 [18].

According to article 1 of Conduct Code, by "risk" one understands "the combined effect of probability to produce an unwanted event and the magnitude of it". In the codification project of CDI (article 2, paragraph a) the definition relies on combined effect of "risk" and "damage", the magnitude of the latter being deemed significant. In this context, the obligation of prevention in the charge of states is reasonably restricted to actual and not virtual activities.

The term of "significant" is really ambiguous and thus, the legal determination must be made from case to case based on factual elements. Semantically, the term of "significant" must be construed more than "detectable", but, in the opinion of CDI, it is necessary to reach the level of "serious" or "substantial". The damage may have consequences on the health of population, property, agriculture, industry or environment in a state, therefore the "risk-damage" binomial must be assessed by objective and fact procedures and standards.

The idea of restriction of the term of "significant" is reflected in the case *Trail Smelter*, by expression "serious consequence" [19], and in *Lake Lanoux*, in the form of "serious" damage [20].

The restriction of damage is also encountered in a range of international conventions which use the term of "serious", "substantial" or "significant" [21].

6 Measures of Prevention and Reduction of Risk

Article 3 of convention project is based on the principle *sic utere tuo ut alienum non laedas*, reflected as well in the principle 21 of the declaration from Stockholm, according to which "the states have the suzerain right to exploit their own natural resources according to their environment policies and have the obligation to make sure that the activities exercised within the limits of their jurisdiction and control do not cause damages to the environment of other states

or regions which do not depend on any national jurisdiction according to ONU Charta and the principles of international law".

The restrictions included by the principle 21 are presented in detail in the articles 3 and 4 of the Project of convention, which includes the duty and obligations of risk generating states to take all measures necessary to prevent the significant cross-border damages and reduce on minimum the related risks. The two articles impose in addition obligations in charge of the states, respectively taking over, adjustment and enforcement on internal level of international standards in the field, which represent points of reference (models to follow) in the elaboration and adoption of internal measures of prevention.

As general principle, the obligation of prevention is enforced only to those activities with high degree of risk in the production of significant cross-border damages, defined by article 2 of the Project of convention. This obligation may be extended on the identification of all activities deemed as having a significant risk potential, the prevention in such cases being possible to be materialised by legislative, technical, administrative, financial or other measures or other actions of enforcement of legal norms, administrative decisions and politics in the field adopted by risk generating state.

The conduct of the risk generating state is in this context relevant for the evaluation of the manner of accomplishment of the obligations related to assuring the measures of prevention and implicitly reduction on minimum of related risks.

The obligation of adopting measures of prevention (*due diligence*) may be taken from international conventions in the field of environment protection, as well as from the texts of resolutions and reports in the field adopted at international conferences and organisations [22]. This obligation was also subject of discussion in the dispute between Germany and Switzerland, in the context of pollution of Rhine, pursuant to the accidents from Sandoz, the Swiss party undertaking responsibility for the absence of proper measures of prevention on the level of its pharmaceutical level [23].

In the case *Alabama*, the Arbitrage Court examined two different definitions of the measures of prevention (*due diligence*) presented by parties: (USA) – "measures of prevention proportional with the power of exercising by subject of the authority invested; measures which discourage a person appointed to commit acts of war on the territory of a neuter state, against his will" [24] and (Great Britain) – "due diligence which the Government applies in internal activities" [25]. In the examination of the case, the court preferred the definition of USA, considering the explanation given by Great Britain restricted to "national standards".

In the context of the project of convention of CDI, the measures of prevention may be construed as being those reasonable efforts of state to get informed about fact and legal components of a future, presumable event, and take in due time proper decisions in this respect: elaboration and enforcement of strategies and national mechanisms of prevention and minimisation of risks; assignment of proper human and financial resources; adjustment of risk

generating technologies; use of best techniques available; adoption of best environment practices.

The national measures adopted in this respect must consider the international standards – internally being also applied standards higher than the international ones, but not lower – the degree of economic development not being claimed as exemption in the enforcement of prevention obligations, stipulated by article 3 of the project of convention of CDI.

This interpretation is included in a rather similar formulation in the principle 11 of Declaration from Rio on environment and development and in the principle 23 of Declaration from Stockholm.

If, due to objective economic reasons the prevention or reduction of risks is no longer possible, the risk generating states must collaborate in good faith and ask the specialised court of international competent organisations, in conformity to the disposals of article 4 of convention project of CDI.

In the nuclear field, in the International Agency for Atomic Energy (AIEA) from Vienna, juridical instruments were elaborated allowing such assistance: Convention related to offering assistance in case of nuclear accident or radiological emergency (1986). Granting assistance in AIEA context is based on a special petition of the states part of Convention who have also the obligation of notifying the cases of nuclear accident or radiological emergency.

The principle of cooperation is essential in the elaboration and implementation of some effective national politics, meant to prevent the production of significant cross border damages.

7 Authorisation of Dangerous Activities

According to article 6 of CDI project, the states have the obligation to authorise all risk generating activities carried out under their control or jurisdiction. By "authorisation" one understands the issue by competent governmental authorities of licenses for activities, which, by their nature, may cause significant cross-border damages, in conformity to internal law and international conventions in the field. The requirement of authorisation, stipulated by article 6 of CDI project, compels the states to determine the dangerous activities carried out under their direct jurisdiction or control and adopt specific mechanisms of authorisation, ruling and control [26].

By arbitrage judgement *Trail Smelter*, the Court stated that Canadian authorities were "responsible to check the conformity of conduct to the obligations undertaken by Great Britain, also applicable to Canada, according to international law" [27].

In the case *Corfu Channel*, CIJ determined that *Albania* had the obligation "of not allowing knowingly the use of its territory in acts which affect the rights of another state" [28].

8 Evaluation of Risk

According to article 7 of convention project of CDI, any decision related to the authorisation of an activity referred to in the convention, must be particularly grounded on the evaluation of potential cross-border damages which may be caused by such activity, including the evaluation of impact on environment. This evaluation allows the state to determine the degree and nature of the risk generated by a certain activity and to consequently adopt proper measures of prevention.

Although the evaluation of risk in *Trail Smelter* cannot be directly related to civil liability of operator, this case outlines the importance of evaluation of potential consequences of risk generating activities. The court showed in this case that the scientific evaluation of risk performed by the specialists in the field is probably one of the most substantiated evaluations in the field of industrial pollution [29].

The obligations of states stipulated by article 7 of the project of convention of CDI are fully conform to the principle 17 of Declaration from Rio on environment and development, related to the evaluation of the risk generated by activities which may have a negative impact on environment: "the evaluation of environment impact as national instrument must be performed for those activities which may have negative impact on environment and represent the object of the decisions of competent national authorities" [30].

The requisite of evaluation of environment impact in the context of authorisation of dangerous activities was included in different international agreements [31], the most relevant in this perspective being the Convention related to the evaluation of impact on environment in cross border context [32].

According to ONU studies, EIA has a highly important role in the context of enforcement of durable development strategies. Combining the principle of precaution to that of prevention of damages to environment, EIA constitutes a strong instrument for the activities with significant risk on environment in conformity to the requisites of environment protection.

The operator (holder of license) is liable for correctitude of information related to individual evaluations of impact, whereas the state, by its specialised institutions, for the elaboration of EIA directories and licensing and control of dangerous activities.

Except for the Convention on evaluation of impact on environment in cross border context, which provides accurate details for EIA documentation, the other international legal instruments are restricted only to the stipulation of the obligation of evaluation in the context of authorisation of dangerous activities. According to article 4 of Convention on evaluation of impact on environment, EAI must include at least the information referred to in annex II to the Convention, respectively: description of its activity and scope; description, if any, of location alternatives and technological ones; description of environment elements which may be significantly affected by such activity and related alternatives; description of potential impact on environment and of alternatives, respectively of related estimates; description of the measures of reduction of related risk; express

specification of measures of predictability used and undertaking it, as well as of data used in drafting EIA; identification of the lacuna of knowledge and approach of uncertain events, encountered in the process of compilation of information; mention of supervision and management plans of programs and post-project analysis plans; elaboration of synthetic materials of view of study (graphics, maps).

9 Conclusions

The extent of the damages caused by the accidents mentioned and the obligation of compensation of victims and reparation of damages generated complex legal debates related to the nature and degree of civil liability of states on the territory of which appeared the accidents or operators of installations, if any, compensation of damages, competence of jurisdiction and fair distribution of compensation.

The examination of such issues, by reference to norms of international public law and international private law, emphasized that the accidents pursuant to some industrial activities with high degree of risk, not restricted by international law, produces cross border effects and the settlement of compensatory actions overcomes the competence of jurisdiction of a single state.

Such elements have been considered in the codification of civil liability of states both during CDI debates, and during the process of negotiation of some specific international conventions, in nuclear field, pollution with hydrocarbons, air transport, use of extra-atmospheric state etc.

The finding may be explained on the one hand by the fact that human activities generating damages like errors of technological conception, manufacturing or exploitation/operation, are carried out on the territory of a state which most of the time is different from the one where they appear or the effects of such activities occur. We refer to the natural effects of an internationalised economy in which the export of capital and technology means implicitly the transfer of a related risk in terms of civil law.

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The Overthrow of the General Principle of Law *Iura Novit Curia* or the Judge's Desire *Not* to Apply the Law. The Restriction of the Right of Access to Court in the Contentious Administrative Subject to a Time Limit

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Abstract

The present study starts from a certain case-law orientation regarding the re-qualification by the court of the legal grounds invoked by the plaintiff after the judicial action is filed and the case is pending, developed in the field of the judicial review of administrative acts (contentious administrative) subject to a time limit. The two formalistic approaches of the courts in the sense of restricting the right of access to court will be analyzed in the light of the general principles of law, of which the most important is *iura novit curia,* as well as of the relevant case-law of the European Court of Human Rights.

Keywords: *iura novit curia*, the right of access to court, contentious administrative, *lex specialis-lex generalis*.

1 The Case-Law Orientation on the Court Reclassification of Plaintiff' Grounds of Law Invoked Subsequently to the Filing of the Action, in the Judicial Review of Administrative Acts Subject to a Time Limit

In a series of cases pending in the Bucharest Court of Appeal, there are prerequisites for a case-law orientation which raise several problems of interpretation and application of the law, with consequences for the right of access to court, a component of the right to a fair trial.

The legal issue that emerged is the following:

The actions discussed below emerged belong to the area of incompatibilities or conflicts of interest, based on Law no. 176/2010[1], in which the public authority (National Integrity Agency – ANI) issues an administrative act (evaluation report) which ascertains the existence of an incompatibility/conflict of interest, which may be contested by the person subject to the assessment within 15 days of its communication.

The evaluation work carried out by the integrity inspectors within the Agency is conducted with regard to conflicts of interest and incompatibilities of persons performing public functions and offices.

If, following the assessment of the declaration of interests as well as other data and information, the integrity inspector identifies elements confirming the existence of a conflict of interest or incompatibility, he informs the person concerned and is required to invite him/her to submit a point of view (Article 20 of Law no. 176/2010). The person is invited to provide the integrity inspector with data or information that he/she considers necessary either personally or by submitting a written point of view.

If, after expressing the point of view of the person invited, verbally or in writing or, failing that, after the expiry of a period of 15 days after the acknowledgement of receipt of the notice by the person subject to the evaluation, the integrity inspector still considers that there are elements in the sense of a conflict of interest or incompatibility, he/she will issue an evaluation report.

The evaluation report shall be communicated to the person concerned within 5 days of completion after completion, where appropriate, to the criminal investigation and disciplinary bodies.

According to Article 22, paragraph (1) of Law no. 176/2010, the person subject to the assessment may contest the report on the assessment of the conflict of interest or incompatibility within 15 days of its receipt at the administrative court of law. The contestations brought before the administrative courts comply with the rules of competence laid down in the Law on Contentious Administrative

[1] Law no. 176/2010 on the integrity in the exercise of public functions and offices, amending and supplementing Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency, as well as amending and supplementing other normative documents, published in the Official Gazette, Part I, no. 621 of September 2, 2010.

no. 554/2004, which shall apply accordingly. The court procedure is as provided in Law no. 554/2004, as subsequently amended and supplemented, and it shall be applied accordingly, insofar as there are no derogations from this Law (Article 24 of Law no. 176/2010).

We are, therefore, in a special judicial review of the administrative acts subject to a time limit, without the any prior intra-administrative procedure.

The debated question of law arose when the applicant, by way of exceptions on the merits [1], claimed the application in the matter of certain institutions of law such as:

– the statute of limitations of the disciplinary liability in matters of incompatibilities/conflicts of interest, in accordance with the common law in the matter, Article 2517 Civil Code, as well as with the recitals of the Constitutional Court Decision no. 449/2015[2], or
– the cause for the exclusion from the disciplinary liability of incompatibility provided by Article 26, paragraph (3) of Law no. 176/2010, according to which, if the cause of incompatibility ceases before the notification of the Agency, the disciplinary sanction will be applied within 3 years after the cessation of the incompatibility cause, unless the law provides otherwise, or
– the incidental provisions of the European Union law to be applied with priority to the provisions of the applicable Romanian law.

The solutions of the courts when dealing with the cases in which this question of law has arisen can be divided into two categories:

a. In a *first approach*, the court reclassified the exceptions as new grounds for illegality of the evaluation report and, after reclassification, it considered them belated, stating that the reasons for the contestation against the ANI Report must be formulated within the 15-day period stipulated by the law for formulating the contestation, according to Article 22, paragraph (1) of Law no. 176/2010, cited above[3].

In support of this solution, the court made an analogy with "*a solution from a similar matter*", as it calls it, namely Decision no. 44/2016 of the High Court of Cassation and Justice – Panel for the Resolution of Points of Law[4] (hereinafter referred to as "HCCJ – PRPL"), by which the Supreme Court ruled that:

"*In the interpretation and enforcement of the provisions of Article 31 paragraph (1) of the Government Ordinance no. 2/2001 on the legal regime of*

[2] Constitutional Court, Decision no. 449 of November 6, 2013 regarding the objection of unconstitutionality of the provisions of art. 2, 3 and 18 of the Law on the cooperation between the Parliament and the Government in the field of European affairs, published in the Official Gazette no. 784 of December 14, 2013.
[3] E.g., Bucharest Court of Appeal – Section VIII Fiscal and Contentious Administrative Division, File 14225/3/2015.
[4] The High Court of Cassation and Justice, Panel for the Resolution of Points of Law, Decision no. 44/2016 on the examination of the petition filed by Sibiu Tribunal – Civil Division II, fiscal and contentious administrative in File no. 11.338/306/2014, published in the Official Gazette, Part I, no. 1055 of December 28, 2016.

contraventions, approved with amendments and supplements by Law no. 180/2002, as subsequently amended and supplemented, the complaint against the offense report must also be motivated within 15 days from the date of handing over or communicating the offense report, being subject to the adjustment procedure of the writ of summons provided by Article 200 of the Code of Civil Procedure. "

b. In a *second approach*, the court reclassified the exceptions as a supplement to the original action, according to Article 204, paragraph (1) of the Code of Civil Procedure, concerning the modification of the writ of summons, according to which "*the applicant may amend his application and propose new evidence, subject to the penalty of forfeiture of the right, only until the first term on which he is legally summoned* (...)" and according to paragraph (3) of the same article, "*the amendment of the writ of summons beyond the deadline provided in paragraph (1) may only take place with the express agreement of all parties*."

After reclassification, the court applied the appropriate legal treatment, depending on the procedural moment when the exceptions were invoked, at the first trial term to which the applicant was legally summoned or subsequently, the last case in which, in the absence of defendant's consent, it found the amendment of the application as being belated.

We will continue to analyze the legal issues raised by these case-law approaches.

2 The Impossibility of Application by Analogy of a Matter of Law From the Contravention Area to the Field of Contentious Administrative

Firstly, it needs to be observed that the decision of the HCCJ – PRPL no. 44/2016 refers to a matter of law other than that occurring in the case, as reclassified by the court. Thus, the aforementioned decision does not refer to the *supplementary grounds* of the complaint in contravention area – a matter completely foreign to this decision, not being even mentioned in the recitals – but to the *initial motivation* of the complaint, to the presentation of the factual grounds on which the complaint is based at the time the application was formulated by the court.

Consequently, the abovementioned decision does not state that the complaint of violation cannot be amended with other legal grounds, possibly under Article 204 Civil Procedural Code (the question of law occurring in the main case). Moreover, by a second question addressed by the referring court within the procedure which resulted in the abovementioned decision, it sought to determine:

"– *whether the sanction that occurs in case of failing to motivate the complaint of violation within this period is represented by the termination of offender's right to invoke any further aspects of illegality and groundlessness of the contravention report or the*

termination of the right to invoke other aspects of illegality of the report, in addition to those provided by Article 17 of the Government Ordinance no. 2/2001, under sanction of nullity, which the court may also find ex officio ",

the question being rejected as inadmissible, fact that strengthens the conclusion that the question of law applied "by analogy" has not been the subject of the solution given by the Supreme Court through this decision.

The extrapolation of this solution of a point of law in the matter of the complaint on contravention to the amendment of the action against the ANI evaluation report violates at least two insurmountable boundaries of interpretation:

– first of all, it is not possible to extend by analogy a solution relating to the *initial motivation* of the complaint against a contravention in order to be applied to the *subsequent supplement* of the action for judicial review of administrative acts, this being the case of two different procedural institutions;
– secondly, both the complaint of violation and the contestation against the ANI evaluation report are *special procedures.* Or if we do not find a particular issue regulated in a special procedure, we must resort to the common law (which may possibly be Article 204 paragraph (1) Civil Procedural Code, as we shall see below), and not to apply by analogy another special procedure. According to a general principle of interpretation, the special rule is supplemented by the general rule and not by similarity with another special rule (principle which was also reaffirmed by the Decision no. 45/2016[5], point 91).

3 In Matters Involving Restrictions on Fundamental Rights and Freedoms, an Extensive Interpretation May Not be Performed to the Detriment of the Rights and Freedoms of the Person Concerned

The first interpretation of the court described in section no. 1 of this article is an extensive interpretation (by addition to the law), in the sense that ANI gives this text a meaning that does not expressly derive from its content, namely that all the grounds of unlawfulness of the appeal must be formulated within the 15-day deadline stipulated by law exclusively for formulating the appeal, under penalty of lateness.

The question is: could the court interpret this text, extensively, by analogy, by applying the provision it contained to other situations that are not included in its hypothesis?

[5] The High Court of Cassation and Justice, Panel for the Resolution of Points of Law, Decision no. 45/2016, File no. 1886 1/2016, published in the Official Gazette, Part I, no. 386 of May 23, 2017.

The issue of incompatibilities/conflicts of interest is one that brings restrictions to the fundamental rights and freedoms, by the prohibitions it imposes – not occupying positions or holding offices simultaneously, not performing a certain act while in public office – and imposing civil sanctions in case of their non-observance – the termination of the public office and an interdiction to occupy designated public offices, respectively, forfeiture of the right to hold elected public offices, both for a predetermined, fixed period of 3 years (see Article 25 of Law no. 176/2010).

Moreover, even the rule in question, contained in Article 22, paragraph (1) of Law no. 176/2010 introduces a restriction of the assessed person's right to address the court, and thus of the general right of access to justice and of the special constitutional guarantee, to address the administrative court.

Law no. 176/2010, a special law, contains no rules of interpretation. Consequently, we must resort to the general law – the Civil Code.

Article 10 Civil Code, even entitled "Prohibition of analogy", requires that the laws restricting the exercise of certain civil rights or providing for civil sanctions be interpreted restrictively and to be applied only in the express and limitative cases provided for by law. Therefore, if Article 22 paragraph (1) expressly lays down only the period within which the evaluation report may be challenged, we cannot extend that time-limit also for the formulation of all the grounds of the appeal, and in particular of its legal grounds, which, as we will demonstrate further in a subsequent section, have also a non-formalistic legal regime, without sanctions, precisely because of the incidence of the general principle of law *iura novit curia*.

Thus, considering that Law no. 176/2010 (the special law) does not contain provisions regarding the motivation of the appeal, it will be supplemented by the provisions of Article 204 Civil Procedural Code, if we accept that the supplement of the legal grounds is a modification of the action, as, for example, Prof. Ioan Leş [2] considers. This Article provides that the plaintiff may amend his application until the first hearing in which he is lawfully summoned or, even after that time, with the express agreement of the defendant.

4 Restrictions on the Right of Access to a Court by Imposing Certain Formal Procedural Conditions, According to the ECHR Case-Law

The way of interpreting and enforcing the law mentioned above affects the right of access to court, a component of the right to a fair trial, as enshrined in the case law of the European Court of Human Rights (hereafter referred to as the "ECHR" or "Court").

A limitation of the right of access to the court complies with Article 6 of the Convention if it pursues a legitimate purpose and if there is a reasonable proportionality from the means used to the purpose pursued.

ECHR, recognizing the rights of the contracting States to impose certain formal conditions in the judicial proceedings in order to ensure the achievement of the legal certainty and the proper administration of justice, has constantly sanctioned the formalistic approaches of the national courts considering that they are disproportionate with regard to the above-mentioned objectives.

First of all, the rule restricting the right of access to a court must be clear, accessible and foreseeable within the meaning of the case law of the Court (Application no. 7632/04, Brechos v. Greece, Decision on Admissibility of April 11, 2006, point 1).

If we apply this standard to our own premise, we note that there is no text of law expressly providing for the obligation imposed by the court in the first approach, namely the formulation of all the pleas in law of the application within the deadline for formulating the appeal against the administrative act. Consequently, such an obligation is not clear, predictable and accessible to the person concerned.

The Court has sanctioned by its case-law such violations resulting from the judicial practice of the supreme courts from Luxembourg, Greece and the Czech Republic[6].

In the *Dattel Decision no. 2*, the ECHR ruled that the refusal of the Court of Cassation in Luxembourg to consider a ground for cassation on the reasoning that appellants' pleadings failed to inform the court on the merits of the case, under the conditions in which they claimed that the court of appeal refused to analyze their application with regard to an account of a company's financial statement and thus breached, on the one hand, the right to a fair trial within the meaning of Article 6 of the Convention, and on the other hand, their right to property protection guaranteed by Article 1 of Protocol no. 1.

The Court found that the precision imposed on the plaintiff by the Court of Cassation in the formulation of the ground for cassation *was not indispensable* (subl.ns., T.C.) in order for the supreme court to exercise its jurisdictional control, being therefore a disproportionate measure. As a result, a violation of Article 6, paragraph 1 of the Convention was found, in the component of the right of access to court. The Court considered the proportionality of the limitation imposed in relation to the requirements of legal certainty and the sound administration of justice, finding that in the present case the national court's requirement was disproportionate.

The doctrine emphasized, in relation to the ECHR approach, that the imposition of certain formal requirements must not result in excessive formalism and that "*a certain inquisitorial approach* (in the sense of an active role, n.ns., TC) *is required from the national courts, so that they have decide* proprio matu *on the merits of plaintiff's arguments, even if they were not formulated in an absolutely clear or precise manner.*" [3]

[6] Běleš et. al. v. Czech Republic, application no. 47273/99; Zvolský and Zvolská v. Czech Republic, Application no. 46129/99.

In the Decision *Efstathiou and others v. Greece*[7], the Court found a violation of the right of access to a court by the fact that the national Supreme Court declared the plaintiffs' appeals as inadmissible on the ground that they "*did not set out in the contents of the appeal in cassation what the court of appeal has essentially retained* ". The European Court retained that this approach is very formalistic, since it is clear from the contents of the appeal that the plaintiffs had retired at the age of 58 and after 35 years of work, and the appealed decision was attached to the appeal in cassation, therefore the national court was in a position to easily consult the text of the contested decision and to verify the accuracy of a simple fact mentioned in the appeal in cassation.

Therefore, the standard imposed by the ECHR in assessing the restrictions brought to the right of access to court by imposing certain procedural formalistic conditions is high, namely whether these restrictions are indispensable for the court to settle the case. If they are not indispensable, then the approach whereby the non-fulfillment of the formalistic conditions leads to a sanction based on it which prevents the examination of the substance of the case (inadmissibility, nullity etc.) will be considered disproportionate and it will lead to a violation of the right of access to court.

5 The General Rules of Common Law – Civil Procedure Code – Regarding the Amendment of the Initial Action Also Apply in the Procedure of the Contentious Administrative Subject to a Time Limit

If we accept the premise that the petition concerning the application of a legal provision in the matter is a supplement to the writ of summons, this will entail the application of the provisions of common law, Article 204 Civil Procedural Code.[8]

We remind that, according to Article 22, paragraph (1) of Law no. 176/2010, "*the person subject to the evaluation may challenge the evaluation report for incompatibility/conflict of interests within 15 days of its receipt to the administrative court*".

As it can be seen, this text of law does not contain an express provision on the grounds of the contestation, grounds which should be formulated within a 15-day time limit or on the impossibility of further completing the original grounds of the contestation. Law no. 554/2004 does not contain any derogating rule in this regard either.

Consequently, the common law applies, Article 204 Civil Procedural Code.

When the legislator wished to introduce such a limitation of the right of access to court and of the right to defense, it did so expressly, as is the case with

[7] Application no. 36998/02, Decision of the Court dated July 27, 2006.
[8] In this respect, see Bucharest Court of Appeal – Section VIII Administrative and Fiscal Contentious, case no. 10401/3/2017, resolution of January 10, 2018 (unpublished).

Article 21, paragraph (3) of Law no. 101/2016 on remedies in relation to the award of public procurement contracts[9], which expressly provides that:

"*Article 21, paragraph (3): It is inadmissible to submit new grounds of contestation and/or to formulate new pleas by way of written or oral conclusions or statements to the contestation after its statutory period for lodging."*

The argument that Article 204 Civil Procedural Code, which provides for the possibility of amending the application, could not be applied in the case of actions for which the special rules provide for a certain period of revocation is also groundless. If the legislator intends to exclude certain actions, provided by special laws, from the scope of Article 204 of the Civil Procedural Code, he must do so by an express exemption provision, by way of a derogation rule[10], as I have exemplified above. As in the present case such a provision does not exist, the court is required to apply the common law.

6 The Judge's Duty to Apply the Law – The General Principle of Law *Iura Novit Curia*

Finally, the error of both case-law approaches presented above arises from disregarding the principle contained in Article 22 Civil Procedural Code, according to which the court has the duty to apply the law known to it, the applicable legal rules, including those relating to cases of exoneration from liability or priority provisions of EU law, especially since they had been brought to its attention through the raising of certain exceptions by the party.

This general principle of law – *iura novit curia* – was reaffirmed in the matter of administrative law by Decision no. 45/2016 of the HCCJ – PRPL, published in Official Gazette no. 386 May 23, 2017, and which, from the date of publication, is binding. By that decision, the HCCJ reaffirmed the obligation of the administrative judge to enforce the right known to him, including EU law (section 83 of the decision).

In this context, the invocation of certain incidental rules does not represent a relevant new fact referred to judgment and they can therefore be invoked at any time, including in the review, while complying with the specificity of the appeal (see, *mutatis mutandis*, section 75 et seq. of the same decision mentioned above).

Two limitations may interfere with the invocation of incidental rules.

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[9] Law no. 101/2016 on remedies in connection with the award of public procurement contracts, sectorial contracts and works and concession contracts for works and services, as well as for the organization and functioning of the National Council for Solving Complaints, published in the Official Gazette Part I, no. 393 of May 23, 2016.

[10] Article 63 "Derogation rule" of Law no. 24/2000: "For the purpose of establishing a derogating rule, the wording "by way of derogation from ..." shall be used, followed by the reference to the derogating regulation. The derogation may be made only by a normative document having a level at least equal to that of the basic regulation."

The first limit is the one established by law, when by an express provision the legislator imposed the interdiction of the *ex officio* invocation of an institution (which meant that it understood to presume it as having a private, not public, nature, and to give priority to the principle of availability) or has established a specific deadline for it to be raised (for example, Article 2.513 Civil Code, with regard to the moment until when the prescription may be invoked).

The second limit arises from the need to comply with the adversarial principle and with the right of defense of the adverse party so that the latter have the necessary time to prepare the defense on the issues raised, as well as a reasonable opportunity to counteract them. Therefore, if the points of law were raised directly in the context of the conclusions with regard to the merits of the case, the court may, at the request of the adverse party, give it the opportunity to properly rebut them by postponing debates or by giving the opportunity of a reply through written conclusions subsequent to the debates on the substance of the case.

7 Conclusions

Both case-law approaches identified in this article are subject to critique in the following respects:

i. The judge has the duty to apply the law known to him, even if it has not been raised by the party, but the more he cannot ignore it when the party expressly requests its application.

The request concerning the application of the law may be classified in the legal grounds of the application, the absence of which cannot lead to the nullity of the action, in accordance with Article 196 Civil Procedural Code, which represents a particular application of the principle of *iura novit curia*, or to the application of a subsequent sanction, such as the revocation of the right to invoke new legal grounds or the lateness of their lodging.

The invocation of certain incidental rules of law in this matter does not represent new facts submitted to judgment and they can therefore be invoked at any time, including in the ways of appeal, while complying with the specificity of the remedy.

Two limitations may arise in the invocation of the relevant rules, the first resulting from a legal limitation (the express imposition of a deadline or the prohibition of the issue being raised *ex officio*), the second imposed by the compliance with the adversarial principle and with the right of defense of the adverse party.

In support of this approach comes also the ECHR's relevant case-law on the matter of procedural, formal restrictions as well as on restrictions of the right of access to court, the European court stating that these restrictions must be proportionate to the aim pursued, namely to be indispensable for the court in order to settle the case. If they are not indispensable, the approach whereby the non-

fulfillment of the formal conditions leads to a sanction preventing the examination of the merits of the case will be disproportionate and it will lead to a violation of the right of access to court.

ii. The point of law settled by the Decision no. 44/2016 of the High Court of Cassation and Justice – Panel for the Resolution of Points of Law, on the obligation to formulate the grounds of the complaint of violation within 15 days from the date of handing over or communicating the report of the offense, cannot be applied by analogy in the matter of the special contentious administrative of the contestations against the ANI evaluation reports, because we cannot resort to an argument from another special case, by analogy. If the special law does not regulate a particular situation, the corresponding provision of the general law, in this case the provisions of the Code of Civil Procedure, shall apply.

The aforementioned decision has not stated, under any circumstance, that the complaint could not be supplemented by other legal grounds, under Article 204 Civil Procedural Code or on other legal ground.

iii. There is no legal argument based on which to come to the conclusion that the institution of the amendment of the writ of summons, regulated by Article 204 Civil Procedural Code, does not apply also in the procedure of judicial review of administrative acts affected by a time limit.

The Law on Judicial Review of Administrative Acts, no. 554/2004, does not provide for derogatory provisions from the common law, the Civil Procedural Code, in this matter. At the same time, the special law on incompatibility and conflict of interests, Law no. 176/2010, does not provide for derogatory provisions from the Law no. 554/2004 in this matter. Consequently, when there is no provision in the special law, the general law, the Civil Procedure Code, shall apply.

iv. In matters that restrict fundamental rights and freedoms, as in the case of rules concerning incompatibilities/conflicts of interest, an extensive interpretation cannot be made by analogy to the detriment of the rights and freedoms of the person concerned.

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Various Types of Public Contracts in the Field of Oil and Mining Regulated in Other Countries of the World

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Abstract

Although the differences between the types of oil and mining contracts in the world are notable, as we can see, the negotiated contract terms are often more important than the type of contract, the extent of the rights and obligations of the contracting parties being less dependent on the type of contract, and more influenced by contractual provisions.

In our study, we try to highlight the fact that in various states of the world, oil and mining are legally expressed through a variety of terminology, which may lead to confusion in identifying the applicable contractual type. Therefore, a presentation of some of the categories of public contracts dealing with the exploitation of natural resources may be a point of reference in identifying public contracts with similar features in the oil and mining sectors, but also in initiating an analysis of their specifics.

Keywords: concession, rental, exploitation, risk, license.

1 Introduction

The oil concession and the mining concession are contracts that we find in national or foreign law in various forms with the same content. The concession is identified by features and intrinsic elements, by the essence of this contract, and not by the given title. Whether it is a license, an oil deal or a license, the concession contract retains its identity in relation to other contracts in the field.

Article 1 (3) of Directive 94/22/ EC defines the ***authorization*** as any legal provision, regulation, administrative or contractual provision under which the

competent authorities of the Member State attribute to an entity the exercise, in its own name and at its own risk, the exclusive prospecting, exploration or exploitation right of hydrocarbons in a geographic perimeter. An authorization may be granted separately for one activity or for more than one activity at a time.

In the Romanian legislation, according to Article 2, paragraph 2 of the Law no. 238/2004, ***the oil agreement*** is "the legal act concluded, according to the law, between the competent authority and one or more Romanian or foreign legal persons for the purpose of oil operations and the concession of assets necessary for their realization. Article 2 (7) of the same law defines the oil concession as" the legal operation by which the Romanian State, represented by the competent authority, as the conceder, transmits, for a determined period, to a legal person Romanian or foreign, as a concessionaire, the right and the obligation to carry out, at own risk and expense, petroleum operations subject to the present law and the right to use the assets in public ownership necessary for the oil operations in return for a fee".

In general, the oil contract, whether it be a concession or another type of contract, involves two phases: the exploration phase and the exploitation phase (production). The second stage begins with the discovery of exploitable resources. The first stage takes less time, even if it is possible to grant extensions to the contractor who has fulfilled his contractual obligations until that time.

The legal nature of the contract is determined by the answer to the question whether extractive works executed can be considered as public if the works can be considered to be executed not only in the interest of the concessionaire but also in the interest of the public.

Under Brazilian law, the legal nature of the mining concession is controversial, with two trends emerging, starting from **the supremacy of public interest**. In certain respects, the private law regime applies to the concession contract, since this type of contract does not have as its object the delegation of public services but rather the economic activity monopolized by the State (in the European Union, the economic activity described is subject to competition). In a second opinion, simply regulating the concessionaire's obligations denotes the public character of the contract. In a third opinion, the concession contract is considered to have an atypical nature, called a concession contract for the use of public property (concession of public property) [1].

The arguments of the perpetual presence of the public interest in the concluded concession contracts are also stated in the international jurisprudence or doctrine, as well as in case studies that can be constituted in "patterns" to be followed – generated by social and economic crises – we refer to states in Europe, South American countries, or other remote states (for example, Papua New Guinea).

The difficulties of classifying the special concession of the extraction of natural resources make it questionable forcing this classification into one of the types of concession regulated by law. None of these types – the public property concession, the public works concession and the public service concession – is

only partially identified with the distinctive features of the mining concession and the oil concession, and mining can be considered a sui generis concession.

The differences between the different contractual categories also reside in the level of control given to the international oil company, in the level of involvement of the national oil company, but also in the predetermined compensation arrangements [2]. Differences are not rigid, as contracts can be combined using different clauses specific to several types of contract.

The contractual clauses found in most exploration, exploitation and production contracts are: risk assessment, setting the cost of exploration, hiring the company to invest a certain amount of money in exploration/exploitation, giving the company a extensions of the term stipulated for exploration/exploitation, hiring locals if they have certain qualifications, keeping track of the operations of the company for tax purposes, transferring facilities to the state in the event of termination of the contract, dispute settlement arrangements, contract renegotiation situations, currency exchange etc.

2 Lease

Nigeria recognizes the Oil Mining Lease which grants exclusive exploration, acquisition, production and transport rights for a maximum of 1,295 km^2 and a 20-year license under a license for exploration. However, in the case of Production Sharing Agreements (PSA), the license is not required, being included in the contract.

In the United States, the charter lease is made through a competitive bidding procedure, and the state can negotiate the sale at the correct economic value of the extraction coal that is needed. Not less than 50% of the total awarded in one year will be lent to a bonus payment system. The Minister of the Interior may assign an exploration license to any person. No person will conduct the exploration of coal without such a license, for a reasonable fee and for a maximum of 2 years. The exploration license is not granted in the lease system. It establishes the exploration methods and the explored area, being issued at the level of each federal state [3].

On the other hand, the period for granting the right to exploit the coal ore is at most 40 years, the duration being extended if the economical profitability of the coal deposit is thereby ensured.

3 Risk Service Contract

The service contract ensures the host government is exercising greater control, and private companies only fulfill well-defined goals in this respect. The service contract is delimited by other types of contract, since the private company's remuneration is a fixed fee and the private company does not participate in the profit obtained. According to this type of contract, the risks and costs are borne by the State, which has the necessary technological know-how and

access to capital [4], or the private contractor provides services and know-how to the State for a negotiated fee or another forms of compensation. The Contractor shall bear all costs of operation, development and production operations, in accordance with the contract between the State and the oil company.

The Contractor shall be required to carry out such operations from the date on which the contract begins to produce legal effects, whereby it results that a petroleum company has no right or claim on the discovery of the oil. In Brazil, Argentina and Colombia, the service contract is used, considered as a form of PSA, according to which the contractor supplies the entire venture capital for exploration and production, and where no resources are found, the contract ceases to exist. Where, however, there is a discovery that will lead to extraction and oil production, the contractor is entitled to recover his investment and additional compensation in cash *rather than in production [5].*

In Saudi Arabia, Kuwait, Qatar, Bahrain and Abu Dhabi, the so-called ***"pure service agreements"*** are used, which is identical to the risk service contract, although the risk is also borne by to the state, the private company has a preferential right to acquire the extracted resources [6].

This type of contract has developed in Brazil and Venezuela.

In Europe, this type of contract is called a service contract and is a public procurement contract.

In Iran, pursuant to the Oil and RAC contracts (1974), exploration and production contracts with foreign oil companies could be concluded only on the basis of "risk services contracts" where the contractor does not have the right to own the reserves discovered or on production in the contracted area. An eloquent clause (Section 1 of Article 3) states that "Iran's oil resources and oil industry belong to the nation. The exercise of the Iranian nation's sovereignty right over Iran's oil resources on the exploration, development, the operation and distribution of oil throughout the country and its continental shelf is entrusted solely to the Iranian National Petroleum Company, which acts directly or through its agents and contractors. "Thus, according to Iranian law, at the commencement of commercial production, the operations will be fully taken over by the Iranian Petroleum Company and the service contract will be terminated. Exploration operations will be carried out at the sole risk of the contractor and will be repaid without interest for a period of 10 years only if after exploration, there are deposits that can be commercial use.

However, as remuneration for the services rendered, the Iranian National Company may agree that at the commencement of commercial production in the area covered by the service contract, enter into a sales contract for a period of 15 years, at which no more than 50 % of the oil produced will be sold for export to the contractor.

As a result, Iran has chosen this form of contract in order not to lose control of the ownership of oil reserves and the way of capitalizing.

4 Licence

Pursuant to point 14 of the preamble to Directive 2014/23/EC, authorizations or licenses whereby a Member State or a public authority thereof establishes the conditions for the exercise of an economic activity, including a condition for carrying out a particular operation normally at the request of the economic operator and not on the initiative of the contracting authority or the contracting entity, and where the economic operator retains the right to denounce the provision of works or services, should not be considered as concessions.

On the other hand, the license regime is considered to be similar to that of the concession contract [7]. The provisions of the Law no. 85/2003 confuse the identity between the license and the mining concession, starting from the definition of the first notion in Article 3, point 17: "the license is the legal act granting the concession of mining exploration or exploitation activities".

Licensing regimes are typical, so the international oil company cannot negotiate. This regime is met in developed countries: The United Kingdom, Norway, the Netherlands and Australia. The international oil company is given full control over the contracted area and the full ownership of the oil it produces successfully. Unlike PSA, where natural resources remain the property of the state under licensing, the ownership of exploitable resources is transmitted.

Licensing is subject in the UK to award criteria governed by *the Hydrocarbons Licensing Directive Regulations (EC) no. 1434 of 25 May 1995* [8]. The bidder may be one or a group of companies registered in the UK, be it a company or a group of foreign companies. All companies must demonstrate concrete financial capacity, the existence of which cannot be conditioned by certain future events.

Licenses are awarded in the framework of organized auctions [9] and the invitation to tender complies with European advertising rules [10].

There are two general types of licenses that can be obtained for exploration and production of oil or gas in the UK: Maritime License and Terrestrial License. In addition, in 2003, a new license called "promo licences" was created after the government noted that there was demand from companies that were not able to compete for the licensing rounds in its form traditional, typical. Promote the license grants a 2-year grace period in which the licensee company must meet the financial, technical and environmental requirements. The company does not have the right to extract the crude oil until the fulfilment of these criteria.

The licensee pays more taxes, classified by category, similar to other operating contracts [11].

5 Conclusions

About any type of contract, we discuss, their evolution is incontestable. If in the past the traditional concession suffered from a clear disproportion in benefits, petroleum and mining agreements now focus on targeting part of the benefits to local communities, developing local capacity [12], and investing profits.

For example, according to Section 154 of the Papua New Guinea Mine Law, there are eight categories of damage that landowners are entitled to receive as compensation from the mining license holder. Section 155 of the same law calls for a compensation agreement between the two parties registered with the State Mining Department prior to the commencement of mining works. These compensations include compensation for inconveniences, livelihood disorder, social breaks, loss of traditional habits; a land compensation – paid annually for each hectare of land as a result of mining operations; special compensation – paid for damage to specific resources (water, fish, trees) and can be paid annually or globally, depending on the specifics (including sacred sites or ceremonial motives). After a period of 20 years (1969-1989), the total amount of compensation paid to landowners and the cost of relocating villages for operations at the Pangua mine reached 77 kin/year/each of the 13,000 ha of land involved in various concessions mining. 1 Kina worth at that time nearly 1 dollar.

The government plays an active and meaningful role through companies wholly or partially owned by the state. To these modern trends are added the imperative commitments of environmental protection and of human rights. What is important is that these tendencies, which have grown from the needs of collectivises and the negative impact these contracts have had on them, are not just declaratory but concretely applied.

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Legal Interpretation – Connection Between the Letter and Spirit of the Law

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Abstract

In order to survive and live together peacefully in a society, it was necessary to have rules that community to respect.

As general level of society developed and the rules of conduct had registered remarcable evolution progresses outstanding legal rules as to distinguish it from the other especially in that in order to respect and bring them out began to be involved coercion of public power.

If initially these rules were made respecting strictly the law letter, subsequently focused and spirit of the law, being made call including the interpretation of the legal rules existing by the courts when the law was incomplete or when there were no statutory concerned.

Keywords: law, legal rule, reglementation, rule of law, the spirit of the law, letter of law, law, justice, legal interpretation.

1 Law – The Foundation of the Rule of Law

All the rules of right are assured and guaranteed by the state, aimed at organizing and disciplining human behavior in major relationships in society in a specific climate marked by the coexistence of freedoms, human rights prevention of abuses and protection essential spirit of justice [1].

"Right – shown in a paper US – is one of the deepest concerns of the civilization of man, because it provides protection against tyranny and anarchy, is one of the main instruments of society to preserve freedom and order, against arbitrary interference in individual interests" [2].

Laws should be understood as a legal phenomenon, not as a volume full of written pages, and what matters is the idea that emerges from their text. Subject matter is a logical phenomenon, a truth expressed in the legal text and even if

sometimes the human mind is incapable of deciphering meaning and understanding, that does not mean it does not exist.

The right consists of the legal norms system regulating social relations and ensuring social control and no legal rule would have taken birth without having been based on certain fundamental principles. E. Speranţia said that "the right appears as a total binding rules and the unity of this totality occurs due to consistency with all the rules to a minimum number of basic principles, presenting themselves maximum logical affinity between them" [3].

Laws as an element of the right, arise and act solely on the basis of guidelines which they are structurally subordinate to some principles that are the foundation of the entire legal system. Unlike principles that have explanatory value, following the evolutionary path of existence and transformation of the law, legal rules are intended only to preserve and protect values.

Those responsible for the administration of justice have the obligation, at least in theory, because in practice met exceptions, to know the "letter" of the law, but to decipher and "spirit", and principles is precisely the "spirit" of the law. On the other hand, when in a case it does not find an applicable law, the court will use the principles of law to be pronounced as "to act over the law and to help the right to act, it is the nature of general principles of law." [4]

As a rational human being, but finite, subject to ignorance, error, passion, the individual tends – and even and often do it – violate both divine laws, and those settled by himself. Therefore, he must be corrected and returned on a positive direction in relation to the duties they have with civil and political laws.

Crisip said that "the law is the queen of all divine and human things, just and the unjust criteria, and those who are called by nature to civilian life teaches them what to do and forbids them what not to do." [5]

We believe that the law is supreme normative act as it expresses the will of society and represents the expression of human reason, a revolutionary safety measure and continuously. A law insecure or uncertain can not be a righteous law. For a law to be applicable, meaning not to be contrary to social realities, it must limited intervene to the needs and legal awareness of that society, to be able to adapt to the facts, and if it exceeds the existing legal framework or if conflicts arise, then the law should to be changed, supplemented or reinterpreted. So, although the letter of a law remains the same, however the law is modified in order to achieve justice. Of course, we should not understand by this that we approve continually fluctuating on legislation because justice must be based on the principle of continuity in order not to appear chaos and in order that individual rights may be unaffected.

We define law as a social rule of permanent conduct, general and mandatory emanating from a public authority of the state empowered to issue it under certain specific procedures, which has higher legal force comparing other laws, being accomplished when is required, under the coercive force of competent state bodies.

We believe that the law should be mandatory in order to be able to ensure social order. "Never – Sophocles wrote – laws will be respected in a state where

there is no fear of punishment." The pressure of the force law protects social body against the individual excesses, against the centrifugal manifestations which are able to put in question the human coexistence. [6]

Since the law aims to ensure law and justice, it can not be argued that the legislature had ever sought injustice, but he can sometimes be fallible. But even when this happens, the idea of justice must prevail, because the power and the authority of the law does not derive from the temporary power of those who approve the legal norm. Law shall remain in effect even after the creators they lost their power. Any law can be born with gaps, but broaden the interpretation of the law can and should have it resolves any case, since in such circumstances, it will seek in the right as a whole, which is impossible to be so incomplete. On the other hand, we need to think about that as right as a law could be, it can be translated incorrectly in a specific case and, consequently, applied in a different manner intended the legislator. So even judge may be human fallible, reason what for he can not absolutely guarantee the strictly application of legal rules. Given the foregoing facts, we express our opinion that the law constitutes the essential instrument for the achievement of law.

We consider that in order to have a functional and efficient legal system it is very important to avoid the legislative "mania" and Parliament to become "factory laws".

A law should be useful and appropriate, and if these attributes are violated, that legal norm can not be considered to be fully legal. A rule is subject to the principle of legality only when strictly comply with the basic law and is in line with all legislation in force at that time.

We subscribe to the view expressed in the doctrine that "the idea of Justice found in all laws but it is not perfect in any. [7]

In order to maintain and strengthen the rule of law, we consider that the legislator must respect the procedure of drafting the law, not to exceed its skills and to consider that any legal rule must integrate harmoniously into the existing context.

In our opinion, for a law to achieve its objectives, meaning thereby the law to be recognized and respected by all citizens which it is addressed, it must both known and respected by them, that means it must have a concise and systematic content, it must use accessible language and stereotypical terminology precise and clear, without broken and ambiguous expressions or words with double meaning, so that the rule of law to be equal for everyone. Where appropriate, the legislator must explain in the law the meaning of certain words or phrases. These are essential conditions to be met for a new rule of law to represent progress and to ensure an effective social control.

In the view of Jean Jacques Rousseau, in order the principles of justice and equity to be accomplished: "no one should be so rich that he can buy another" and "no one so poor as to be forced to sell."

Under the principle of righteousness and justice, equality and opportunity, laws should give to the society those guarantees to prevent, to deter and to punish

if it is necessary all acts contrary to the law, corruption and other acts against the rules in force. [8]

2 The Reason of the Legal Interpretation

Without interpretation both in the lawmaking phase and in that of its application in practice, the right will get into conflict with society as a whole, but also with the social events of the individuals themselves, because no law will ever be comprehensive. This can not or should not be possible because human needs are endless.

Often, the courts have tried by the solutions passed to promote within the limits of the legality principle, and the ethics and fairness principles by protecting both the individual interest and the general interest of society. Practice has revealed a multitude of situations in which the law has proved to be imperfect by expression or by incomplete content or even obsolete, outdated by social realities. In such situations where basically it was a need of the intervention of the legislator, the courts pronounced decisions by applying a legal standard solutions by linking them with other or with the principles of law or by interpreting that provision in the spirit and purpose of the law.

The legislator thinks about certain facts of real life and sets its formulations by generalization from those situations, but nothing ever repeats itself exactly nor in psychic life and even less in social life. Therefore, each application of the text set in a specific case, necessarily implies an addition and therefore a creation. [9]

The legislator is the creator and the judge is the one that decodes and executes true. The court found the sense, verify the meaning of the legislator's words, analyzes thoughts and/or expression reported to the concrete or abstract. In this regard, M. Djuvara said that "as soon as the law exists it will detach from the legislator's will in order to pursue its own destiny".

Therefore, an interpretation made without ignoring the text of the law, it shown to be beneficial because any law finds its effectiveness by adapting itself to existing social reality. To achieve the ideal of justice and progress law, the legal interpretation of the text is to be made towards clarifying the meaning of the original letter of the law and then towards update the content of that rule under current temporal space.

We believe that no progress could be made in legal matter if it is not look for the law's substance beyond its letter, so the court to reflect the ideals of justice in the solutions that she pronounces.

The form in which is the right presented is not expressing alone the idea of justice. Therefore, the interpretation is the juridical moment when it completes it, exploiting its unexplored areas. [10]

Law must be drafted in such a way as to create the prerequisites for deciphering by the interpreter of the originally meanings targeted by the legislator. His wisdom will always be found inside the wise decision of the judge. [11] Aristotle defines judge as "... the permanent action of idea of fair as being the live fire of justice".

Without interpretation, the law would become a dead letter, but always the interpretation must be in line with the law.

To be the interpreting of the law a crime and a violation of the principle of separation of powers? We do not believe this, given that the intervention of the legislator in legislative matters is not always justified, and the court is the one who knows best the evolution of society in practice, by the cases subject to daily judgment.

Unlike physics, chemistry, mathematics, where the researcher may search for years until to formulate answers and to find solutions, in right the solutions must be given daily.

Unfortunately, however, both in the law-making process and in the courts, right may not use accuracies, but only approximations.

These observations indicate that the right as a science is based on an idea that it owns entirely, which it infuses its entire life, that idea of justice. Without justice, meaning without justice and equity, the right can not be understood, it is only a way of torture for people, not a way of peaceful coexistence between them. [12]

3 Ideal and Finality in Law

The ideal, as the representation of the perfection in a given field, a model always coveted but never fully achieved, it has transformers meanings because "the existence purely ideal of justice is creating social reality of increasingly conform to the requirements of spirit. Thanks to it, the human communities are doomed to continually evolve by adapting quotas to reason, by the progressive abolition of prejudice and by brotherhood all fully sociality" [13].

We express our opinion that the right is an intentional concept, a rational product and justified only if it is under the control of a fair goal: a legislation in harmony with the needs and aspirations of society, free from personal interests and a society full of virtues, whose citizens respect the Kantian formulation of the moral law "each man to be for us an purpose in itself, not a way for our subjective interests". Administration of justice means to suppress private purposes that contradict those generally accepted.

To search for the right's purpose is to search for its value, for its meaning, for its justice. [14] Although the right can not intervene within the human being, he protects, maintains and develops individuals in bio-psychosocial plan, creates the necessary coexistence limits of individual liberties.

We believe that we can not define right without understanding and without going thoroughly its purpose.

The law finalities designates a desirable evolution model of legal realities in order to satisfy the needs and aspirations of the individual, the requirements of social progress accordingly to the values of a historical time, a model that helps to promote the law specificity and to avoid its distortion as a modality of social reglementation, a model that helps to maximize its performance in relation to the

individual and society, a model that helps to its concentration with other systems of social norms. [15]

In the material of law finalities can operate various classifications:

- ✓ The first classification includes theories that claim that the right is to service individuals, having great merit of being placed in legal matters the human person first of all, highlighting the inherent rights thereof, the fact that the state and the society must be in the interest of the individual. This theory believes that this right purpose sets it as a way to determine the binding relationship of coexistence and cooperation of the people, ensuring minimum order that allows harmony freedoms. These theories may be vulnerable regarding the indifference for general interest, regarding neglecting social relations which unite people and regarding the special status of individual as social human being stressed since Aristotle.
- ✓ It follows the doctrines that claim that the society itself is the supreme finality for the law. They put in the first place the community life and the development of human groups considering that the law is intended to help "groups of people to protect themselves against the mixture which could distort the vital development conditions". In this conception, right must be based on authority, while social power distributes benefits among the society members. There are hidden here, as it was noted in the juridical doctrine, dangers of statism, danger of abuse by public authorities, danger of the excessive tendency control of individual's life.
- ✓ The last classification outlines the transpersonal law doctrines trying an intermediate position of preservation both of the independence of persons benefits and of a group cohesion to avoid individual selfishness, but also the spirit of domination. In this perspective, the purpose of law is to contribute to the development of civilization. [16]

French jurist F. Geny shows that the rule of law is guided by the fair idea and it just beyond including basic precepts as do no harm, as not harm another person and to give everyone what he ought, it implies deeper thought of a balance between conflicting interests in order to ensure the essentials order. [17]

In our opinion, the purpose of a rule of law is the common good and in the case of society as a state, it is the public common good, both for present and for future times.

Belgian author Fr. Rigaux says: "Law is meant to insert future in the present, ensuring that the social system will work. Law is a social project which aims at equality and justice [18].

E. Speranţia states that "the right is the guarantee of our progressive spirituality", legal life being required by the deepest human requirement, the special requirement to live as a spiritual human being [19].

We consider that a legal norm contrary to the ideal of justice can not be complied with, and much less respected.

Given the foregoing, and that in this matter man occupies the central plane, we opine that ideals and purposes of law involves a primary objective, namely social protection by preventing abuse and tyranny of the state, avoiding anarchy, the correlation and/or violation of rights and freedoms of individuals or of groups, through the prevention and repression of acts of antisocial character.

Ideal and finality in law also requires defending human dignity by recognizing and guaranteeing of the fundamental rights and freedoms, by configuration, supervision and coordination of human relationships, by achieving social progress and the resolution of the conflict in micro and macro social plan, making justice.

4 Conclusions

We believe that any scientific legal research should aim at finding the ideal of law as a true legal consciousness can not be formed without the ideal of justice.

In our opinion, based on the idea that neither the individual nor society have rights, but social tasks to fulfill, it is more important that a legal norm to have social impact than even its mission to respect and protect individual rights. Only such a legal norm may be imposed on all.

We believe that in a society without penalty, its rules can not exist, and the right is the one that aims to preserve rules allowed. Sanctions, by their pressure, are limiting through official channels, absolute freedom of expression of the human being.

The doctrine has supported the idea of respecting and applying just the letter of the law, even when between letter and spirit there were inconsistencies, but in our opinion, if by the text of the law is not achieved its purpose, that ideal of justice, in so doing, we would accept to commit injustice under the law. We believe that in such situations we have to turn to interpretation, but of course without changing the contents of the will expressed by the legislator as it is not intended by this interpretation inconsistent with the rule of law. We also appreciate that a legal norm should not be construed by an exaggerated limiting to the letter of the law or to the specific social condition that caused that law, especially since today's society requires a legal flexible system for the right in order to not get outdated by the human progress.

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Theoretical and Practical Considerations Regarding the Power Abuse

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Abstract

The revolution in our country both politically and socio-economically, caused significant changes in the legal system, and in the domain of the legal research were completely reconsidered certain fundamental concepts. In this paper, we proposed the definition and analysis of the abuse of power as a legal phenomenon with many implications in legal and social, given the tendency to generalize this form of abuse, practiced virtuous or primitive by the rightholder subjective. The purpose of this study is to provide a clear analysis of the procedures for the exercise of power abuse in the context of existing legislative instability in Romania.

Keywords: power abuse, rights abuse, subjective rights, legislative instability, legal advice, public authorities.

1 Power – Forms and Exercising Modalities

Power and organizational policies are intrinsic components of each organization whose goals can be accomplished through the investment of some person with decision power. The power of decision requires both the possibility of reward and application of coercion measures in accordance with the results. Holder of power in order to determine or influence the conduct of their subordinates must be able to understand their own leadership behavior, to determine exactly what are the limits of this power and to exercise it properly.

"Any organization is based on some system of authority and responsibility. Authority means the right of a ruler to make decisions and to ask their subordinates to submit to realise organizational interests." [1]. Since the holders of power are beneficiaries legitimate of warrant exercise of power in the service of the ruled, it was noted that: "People are free and equal by nature in the sense that there is no higher authority invested with the power to command or with the

responsibility to protect their interests. However, this "natural" state creates uncertainty – in the absence of a government, social norms can not be enforced, and violators are not punished properly. People will fall so to agree to establish a government which to cede some powers while the latter undertakes to ensure the security" [2].

When we speak about power, we must take into account both power position (derived from the position that a person holds it in the organization), and personal power (due to personal influence on subordinates and varies depending on the degree of appreciation and the level of respect, of their trust and security that inspires leader, charisma and leader behavior). The ideal case is that when the holder of power has the ability to hold both, because they have an interactive influence, one affecting it directly to another, but in many cases, it is impossible to have both.

Power position means that the leader can reward or punish subordinates work. [3] We must not forget that the power position is not permanent. Today we can hold it, but tomorrow we can lose it. The same happens with personal power, if we consider that the most difficult task for a leader is to discipline someone who is emotional involved about. In the plan of management efficiency, it seems sometimes indicated as holder of power to sacrifice a short-term friendship for gaining the respect of subordinates and colleagues for long term. The power of influence over subordinates can occur even against their will, especially if we consider the case when the power becomes for its owner a source of motivation, personal aggrandizement and prestige. Such problems show up especially when it exists power abuse.

In literature, it was considered that the sources of power or authority are [4]:

1. Legitimate power (is given by appointment act; it is the juridical legal form by which an organization operates; legitimate power can influence more employees with an average level of preparation as those who have a higher level of education are less impressed by titles and position);
2. The specialist power (expert power) – it is the result of the speciality knowledges of the holder of power, which gives him expert qualifications;
3. Power esteem (respect) – it results from the ability of the holder of power to impose to the subordinates and from his human qualities;
4. Charismatic power (reference) – is the power holder's ability to induce admiration over subordinates determining loyalty, enthusiasm;
5. Coercive power (coercion) – is a right of the holder of power that motivates subordinates to not deviate from normality;
6. Reward power – it means that the power holder is able to reward subordinates differently, depending on each one's contribution to the performance of the organization;
7. The power of information – it results from power holder's possibility of having access to information regarding the members and the

organization as a whole, information through which he can control organization.

2 Power Abuse Versus Law Abuse

The subjective right is defined as a privilege, advantage, a privilege granted by law to a specific subject of law in order to have a conduct or in order to pretend a conduct of others subjects of law for recovery or for defense of an interest protected by objective law in force in case of entering into a legal relationship. [5]

The holder of a subjective right also enjoy many rights whose limitation is the extension of the law in force and which gives its lucrative benefits that can be capitalized in the context of a specific legal relationship.

We subscribe to the opinion expressed in the doctrine that subjective rights are characterized by inequality and legal relationships between two people under such a legal right, empowers one of the parties to demand compliance with other obligations arising from that right legally recognized. [6]

We believe that just the power to require the other party by virtue of a subjective right, it makes the latter to become responsible for disrupting the legal relationship.

In our opinion, that legal relationship can rebalance only if the owner of the corelative obligation ignores the limits of subjective right about which we speak, otherwise being insufficiently that the holder to exercise the right undisturbed.

The subjective right can mean power and not only power in pure form [7] or in other words, not every person holding a subjective right can exercise it, but only one that has legal exercise capacity. Therefore, it is possible for a person to have rights, but do not use them.

In turn, the power law is more than a subjective right, this notion covering also the jurisdiction element [8]. We note that both are juridically powers legal guaranteed. When these powers are guaranteed to provide a value, we are in the presence of a subjective right, and when they relate to the exercise of functions and powers, now we are in the presence of a competency, as it is written in the legal literature. [9] Competence means all, all rights and obligations of a public administration authority or of a public officer in order to achieve them, reason what for he has the empowerment to adopt legal administrative acts. [10]

If we consider power as a cumulative competence and the subjective right, as defined data, we would conclude that abuse of power would find expression only in public administration, which is totally untrue, because in matters of private law there are also situations of power abuse.

Moreover, we must say that we are in the presence of power abuse and if there is a subjective right, but also when it is not legally guaranteed, existing countless examples of personal power exercised abusively.

So, as we have seen from the foregoing, between power abuse and law abuse there are a lot of similarities, mainly driven by the arbitrary conduct of the holder of power, but also a number of differences resulting from the definition of

terms. We believe that in the public administration area, power abuse takes the qualified form, because of the quality of the active subject.

Power abuse can be committed both by individuals and juridical persons, by state bodies, by the State in relation to individuals and juridical persons, internally and with other states and international organizations abroad.

Abuse of law, defined as a deviation of the subjective right from its economic and social legally recognized purpose, exceeding internal limits thereof, it is expressed in particular by actions or inactions of the owner, who aimed maliciously purposes adverse legal rules underlying right.

3 Considerations About Power Abuse in the Sphere of Constitutional Law

In matters of constitutional law, the subjects of a legal relationship are, on the one hand, the holder of state power – the state or a representative (legislators), and on the other hand, citizens taking them individual or in a group collective, specifying that they must to disregard the limits of their legal rights in a legal relationship binding appeared of instauration, maintenance and exercise of power.

We emphasize that, unlike the state and its organs, which in all cases are subject to the legal constitutional relationship, executive and judicial authorities are such subjects only when the report is born in the establishment, maintenance and exercise of power. [11]

In the legal constitutional relationship, citizens that can occur separately, as individuals (in pursuit of their fundamental rights) or as person invested with certain features (deputy, senator) or dignities, or organized in parties and political forms or electoral constituencies, in these latter cases they acting in a specific report of representation. [12]

We believe that the worst forms of abuse of power found in this category of legal relationships are those from the President activity and those from the legislative activity.

4 Aspects of Abuse of Power in Legislative Work

Legislative power is a constitutional prerogative and, therefore, it is only exercised within the limits and conditions established by the Constitution. But although the jurisdiction rules are provided expressly by the law and strict interpretation, Parliament may create privileges or, conversely, inequities for certain social categories, as lawmakers have great discretion to the limits of power with which they are invested.

Since Parliament can legislate unlimited in any field, not being restricted in any way by legislation to establish certain boundaries of the sphere of reglementation, there are only provided to comply with the supreme values of the rule of law state, as they are defined in the constitutional text, we basically speak about

a discretion power of parliamentarians whenever they act freely without a conduct established by a legal norm.

Not even the Law no. 24/2000 regarding legislative technique for drafting new legislation (as amended and supplemented, republished in the Official Gazette of Romania, Part I no. 260 of April 21, 2010) does not specify to what level might go in legislating in a specific area (and it would be impossible how to do it), the legislature can initiate, develop and adopt any legislation it considers to be necessary, but of course, in accordance with the Constitution, with the present law and with the principles of the rule of law state, respecting the rules of legislative technique.

The law-making activity is the primary means of implementing public policies, providing the necessary tools to implement solutions of economic and social development, and to exercise public authority. [13] The draft law should establish necessary, sufficient and possible potential rules to lead to greater stability and efficiency as legislative. The solutions contained therein must be duly substantiated, taking into account the social interest, the legislative policy of the Romanian state and the requirements correlate with all internal reglementations and the harmonization of national legislation with Community law and international treaties to which Romania is a party. [14] In order to create the new rules, legislator will start from the present and future social ambitions, and the inadequacies of existing legislation. [15]

Given the foregoing, we express our opinion that any statutory provision passed by Parliament unconstitutional is a form of abuse of power.

An example of power abuse is trying lawmakers to introduce a law by which they make exceptions from taxation daytime meeting. By decision no. 19/1995 Constitutional Court decided that it would create discrimination, a category of favored in terms of taxation, and such a situation can not be justified by parliamentary status. [16]

Consider to be another example of abuse of power and the adoption of Law no. 97/1998 amending Law no. 32/1968 for establishing and sanctioning contraventions, which contains a single article that provides for the Government the authorization for updating annually by decision the limits of the contraventional fines stipulated in normative acts containing provisions on the establishment and punishment of acts constituting contraventions in the inflation rate. [17] Of course, the Government may change in line with inflation, the amount of contraventional fines set by other government decisions, but we consider unacceptable, in a state of law, Parliament should devote Government the right to change a law by decree. We're talking basically about an increase in government powers by enshrining illegal government practices, which are so excessively used and, consequently, about a serious violation of the rule of law and of the national interest.

5 Aspects Regarding Power Abuse in the President's Activity

President of Romania has, among others, according to the constitutional law, the universal and exclusive right to grant individual pardons. Individual pardon is an act of clemency of the President by which a person convicted shall be exempt, wholly or partly, of a penalty determined by a final judgment of conviction.

We consider it necessary to mention here Decree 1164/December 2004, issued by President Ion Iliescu, decree revoked by the same president after only one day, as a representative case of abuse of power in violation of the limits of this right. Presidential Administration and the General Secretariat of the Government (as the document was countersigned by the Prime Minister) were filed under Law no. 544/2004 on administrative litigation, on January 14, 2005 a common action, which asked the Court of Appeal – Section VIII of administrative and fiscal contencious, the nullity of the decree 1164 of December 2004, regarding the pardon of persons on the grounds of unconstitutionality, on the ground exceed power, power abuse and misuse of powers, with reference to the constitutional role of the President of Romania. The action states: "It is the essence of individual pardon institution that it is exclusively an act of clemency, humanitarian. Individual pardon may not be granted on other grounds, such as political reasons. Also, individual pardon must not lead to the prevention of justice. Granting individual pardon otherwise, that is not purely humanitarian, as an act of clemency is, where appropriate, abuse of power or misuse of power, with the consequent legal invalidity of the decree of pardon."

We should mention that with the annulment of the decree was void and subsequently issued Decree 1173. As the President must, under the Constitution, to be the guarantor of order, stability and democracy, and among those who were pardon's beneficiaries some had been convicted of crimes of subversion of state power, corruption, violent repression of the Revolution of December 1989, serious offenses of violence and economic crime, we subscribe to the opinion expressed in the doctrine that granting a pardon individual which jeopardize the constitutional order, public order, democracy, rule of law, human rights or independence and authority of justice constitutes an abuse of power or misuse power, so an unconstitutional measure. [18]

We believe that these individual pardons were granted for political reasons, in violation of victims' rights and freedoms, endangering public order, economical and constitutional stability, the prestige of the public authorities and, not least, undermining the authority and justice.

6 Considerations of Power Abuse in the Government Activity

In any legal relationship of administrative law, at least one subject is a carrier of public authority, which may be the state through its organs, territorial administrative units, a public administration body or public establishments and

public interest [19], and, in general, conduct of the parties takes place in a public power, administrative law relations being power relations.

We should mention that except power relations, we can talk about common law relationships, situations where government behaves like any legal subject.

We emphasize also that the subjects of administrative law can abuse of the power invested with or of their subjective legal rights.

The government aims to achieve the internal and external policy of the Romanian state and the general management of public administration, under a government program approved by Parliament.

Under the Constitution, the Government may issue decisions to organize the execution of laws and adopt ordinances in exceptional cases, when it is required an immediate action to prevent injury to the public interest, but whereas such cases are impossible to determine concrete, practical, Government acquires broad discretion, abuse of the law by becoming common in post-revolutionary Romania. In support of this view, we mention that in Romania were in force on March 3, 2017 9,250 acts, including Government Emergency Ordinance 1974 and 957 Government ordinances adopted during 1990-2017 [20]. Parliament, which is the supreme representative body of the Romanian people and the sole legislative authority of the country (art. 61 para 1 of the Constitution), practically has reduced its work almost exclusively approving Government Emergency ordinances [21]. Regarded as a clear example of abuse of power and the famous GEO 13/2017 amending the Criminal Code and Criminal Procedure Code adopted in the night of January 31/February 1, 2017, published in the Official Gazette no. 92 of 1 February 2017. In support of this view, we must underline that in the introduction of the ordinance it is not clear why the two codes should have changed urgently, with only a reference to the emergence of non-unitary interpretation therefore the publication of decisions of the Constitutional Court of Romania [22] and the statement that "it is necessary in the context of strengthening procedural safeguards and procedural and implementation according to the criminal procedure Code with the provisions of Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on enhancing certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings". Moreover, the ordinance regards to an area which, although having only consultative value, was still required approval from the Supreme Magistracy. However, the Government adopted the ordinance without this approval. Since the ordinance changes the codes in relation to decisions of the Court even older than one year and the term of 10 days for its implementation, we consider that this ordinance could not constitute an emergency.

We believe that by issuing judgments and ordinances exceeding government limits of this right recognized by constitutional laws means to actually devoted excessive legislative delegation, which constitutes an abuse of power by government.

We share the view expressed in the doctrine that a special situation may arise if Parliament would reject the emergency ordinance, because when issuing them, there was not an exceptional case justifying the use of this procedure, which

equals with ascertaining by parliament of a power usurpation committed by the Government to be so penalized by the lack act flawed. [23]

7 Conclusions and Suggestions

Following the scientific approach taken, we expressed the view that abuse of power and abuse of rights are found in the most diverse and complex forms as a result of exercise, respectively recognition subjective rights and the study of these phenomena knows great importance both theoretical and practical. In our opinion, the abuse of rights and abuse of power can be also a form of protest of the owners of these rights to the way they were recognized not only the result in a bad faith exercise of subjective rights.

There are few situations where the only way to defend the injured party was invoking abuse of law or abuse of power. We believe that abuse of rights and abuse of power must be expressly prohibited by law for reasons of fairness in any legal relationship.

Sanctioning law abuse or power abuse must be carried out mainly by abolishing the abusive act, by an order to pay damages, by the judicial disciplinary measures and fines, by refusing recognition or protecting the subjective right exercised abusively. We propose and even applying severe penal punishment, consisting in custody, prohibition to hold certain positions, professions or public dignities, of certain rights, criminal fine, considering the fact that if someone is recognizing certain rights, this is for that person to carry out a task just and lawful, in accordance with the interests of society and not to facilitate the commission of immoral acts, illegal, which threaten social order, justice, democracy and the rule of law state.

The purpose of law is the good of society and justice and human will acquires legal meanings only when it has a moral determination, ethics, good faith, harmonized with the general interest of society.

We must point out that, unfortunately, court decisions are based less on principles of law and likely, we think, in addition to reglementation gaps abuse of law and abuse of power in our legislation, it would be the reason what for Romanian jurisprudence ignores the two institutions mentioned.

We believe that such abuse of rights and abuse of power should be defined legally to remove any interpretations and uncertainties. Also, we believe that abuse of power should be expressly prohibited in the Constitution and the Civil Code and the Criminal Code.

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establishment to evoke moral persons of public law, other than the state and local authorities and it is identified by three elements: it is a moral person; He is a person of public law; It covers the management of a public service.

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Obtaining Romanian Nationality by the Underage, as per the New Regulations of the Emergency Ordinance no. 65/2017

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Abstract

Since 2015, without any new change in terms of specific legislation, the Directorate for Persons Record and Databases Management and the General Directorate for Passports have changed the enforcement method of art. 9 of the Law on Romanian nationality no. 21/1991. The new interpretation given by the two institutions, in total disagreement with the *legal certainty principle*, was that, in order to acknowledge their citizen statute, the underage were requested, *post-factum*, to follow compulsorily the procedure for obtaining Romanian nationality, at the same time with their parents, at the National Authority for Citizenship. The interpretation, consisting in the denial of the competent authorities to register in the Romanian marital status or to issue the Romanian identification document or passport, or, as the case, to renew these documents for all underage, that did not follow this formality, had extremely severe consequences and an important social impact.

The Emergency Ordinance no. 65/2017 for modifying and updating Law no. 21/1991 introduced essential improvements for the litigious art. 9 of the Law, by clarifying the lenient procedure for obtaining Romanian nationality by the underage. The main benefit consisted in clarifying the legal status of those underage, who, *extra culpam*, did not follow previously the formalities at the Authority and whom have been denied abusively the renewal of the identification documents, these persons basically losing Romanian nationality via this *sine lege* way.

Keywords: nationality, statelessness, underage, registration, marital status documents, identity.

1 Certain Elements Related to Protecting the Underage Rights in Nationality Matters

Child protection is situated in our times by various instruments, both social and economic, as well as especially by a well-defined legal framework, based on a series of documents meant to regulate the main aspects oriented towards the individual, generally, and, as regards the studied subject, the child, particularly. From an extensive point of view, the child protection rights come up for the first time in the Convention on the Rights of the Child, a document of major relevance, adopted by the General Assembly of the United Nations. [1] In its contents, the Convention defines the *child* notion, referring to every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. As regards the catalogue of rights stipulated by the Convention, it is granted to all children under the jurisdiction of signatory countries, with no distinction of race, sex, colour, language, religion, political opinion, **nationality**, national origin, material situation etc. thus, the document stands as an instrument with compulsory legal force for all signatory states, grounded on four essential principles: *non-discrimination, the best interests of the child, the survival and development of the child*, namely *the involvement of the child in decisions that regard him/her*. [2] Not only did those principles create an appropriate legal framework for developing the idea of child protection, but also, they contributed to the acknowledgment by the international community of the position held by the child in the social area, namely of having rights and obligations, independently from the ones obtained in the light of and under the aegis of the parent, as we were used to.

Convention on the Rights of the Child exposes a series of fundamental rights, among which one can find: the inherent right to life (art. 6), the right to a name, **the right to acquire a nationality (art. 7)**, the right to have an identity (art. 8), the right not be separated from his or her parents (art. 9), the right of forming his or her own views (art. 12), the right to freedom of expression (art. 13), the right of the child to freedom of thought, conscience and religion (art. 14), the rights of the child to freedom of association and to freedom of peaceful assembly (art. 15), the right of the child to the enjoyment of the highest attainable standard of health (art. 24), the right to benefit from social security, including social insurance (art. 26), the right to education (art. 28) etc. [3] Consequently, the relevance of assuring and protecting via laws the child rights represented a turn of the entire legislation towards a complex legislative framework, child-oriented, context where at any moment the stress fell on **the best interests of the child**, as main principle of assuring, respecting and promoting child rights. The latter issue governs the subject of the study, the obtaining of Romanian nationality by the underage.

According to the literature, the best interests of the child come up from the Declaration of Geneva from 1924, where it was stated that: "mankind owes to the Child the best that it has to give". This idea is taken over later on in the Declaration of the Rights of the Child, 1959. This document states the support provided to the

underage, by means of legal facilities and of the framework meant to assure normality to the child socially, spiritually, mentally, being based on the best interests of the child. [4] As regards the content of the UN Convention on the Rights of the Child, it is ground on *the best interests of the child principle*, as reflected by the very art. 3 paragraph (1) of the document, namely "in all actions concerning children […] the best interests of the child shall be a primary consideration". [3] These provisions, along with the general ones, reflected by the contents of the Universal Declaration of Human Rights, denote the fact that the best interests of the child represent the expression of all the fundamental rights included in the catalogue of the stated documents, as well as that they must meet the needs of the child, of the social realities he or she is involved in, but also to the challenges our times generate altogether with evolution.

As regards the Romanian legislative framework, *the best interests of the child principle* are not consecrated in an unspoken manner. On the contrary, it leaves its mark on child rights and on the regulations related to his or her protection as per the Romanian Constitution. Art. 48 of the Fundamental Law stress the right and the duty of the parents to assure the raising, education and instruction of children and art. 49 enumerates a series of child guaranteed rights. [5] In accordance to constitutional provisions, Law no. 272/2004 on protecting and promoting child rights reflects the importance of the underage rights, so that, in the given context, the best interests, as an abstract *in extenso* vision, might refer to a mix of duties that the parent has as related to raising, educating and providing moral support to a child. [4]

Finally, as regards acquiring nationality by an underage, we may conclude that there is an issue, namely, if the special regulations have always noted what is best for a child, i.e. a commonly well-being, on the needs of an underage, as well as on the legal framework supporting this complex system. Consequently, there is a need for a rigorous approach on the way a child obtains the nationality of a state, as well as on the way he or she uses this benefit.

2 The Procedure for Obtaining Underage Nationality Prior to EO 65/2017

Based on the general constitutional rule that "Romanian nationality is obtained, kept and lost in the conditions stated by organic law" [5], the Law no. 21/1991 elaborates on the ways and procedures for obtaining and losing Romanian nationality. According to art. 4 of this special law, Romanian nationality is granted at birth, adoption and on request. Thus, the child born on Romanian territory, of at least one Romanian parent, is Romanian national, irrespective of the place of birth, as well as the child found on the territory of the Romanian state, until contrary proof, if none of the parents is known. [6] As regards adoption, Romanian nationality is obtained, mainly, by the underage if at least one of the adopters is Romanian national.

The matter analysed in the current study aims obtaining, on request, Romanian nationality by an underage, at the same time with the applicant parent(s). Prior to the last changes, done via EO 65/2017, the text of the Law no. 21/1991 stated that "in case the underage acquired Romanian nationality as per the condition of paragraph 1 or 2 [*at the same time with the parent(s) n.n.]* and he or she was not included in the nationality certificate of the parent or the nationality certificate has not been issued (...), the parents, or, if the case, the parents, Romanian citizens, **can request the transcription or the registration of the certificates or the marital status excerpts issued by foreign authorities in the Romanian marital status registers**". We have to mention the fact that this text was introduced by the Government Emergency Ordinance no. 147/2008, in order to "clarify certain transcription situations of marital status documents for the underage" and "considering the importance of assuring efficient legal protection to the underage." [9] In the grounding note of GEO no. 147/2008 it is shown that there are proposed "changes imposed following some court decisions, caused by legal void, so that the Romanian state is no longer facing the situation to notice the Romanian national quality of the descendants of former Romanian nationals by means of court decision" [9].

In practice, it was noticed that the applicants for Romanian nationality, out of various reasons (difficulties in obtaining documents, saving the money requested for notary authentication of certain documents or the supposed solving within the shortest time) were not mentioning the underage child in their application (for obtaining or re-obtaining nationality). Consequently, since the child was not mentioned in the file, he or she ware not either in the order of the president of the National Authority for Citizenship for granting or re-granting nationality or in the nationality certificate. This practice was generated by the fact that, legally, there was no hindrance that, later on, in front of the public bodies with attribution in the area of marital status documents, parents can obtain the transcription or registration of the certificates or the marital status excerpts issued by foreign authorities in the Romanian marital status registers, the only condition being that of having the consent of the other parent (for the case when only one of the parents obtained Romanian nationality). Consequently, even if the underage was not mentioned in the parent's file and, by extension, in the documents issued by the National Authority for Citizenship, he or she was considered of having obtained the Romanian nationality altogether with the parents, upon issuing the birth certificate with social security number. Based on this procedure, for more than seven years, tens of thousands of birth certificates, IDs and even passports have been issued.

Since 2015, at the level of public authorities with attributions in the area of marital status documents, of IDs and travel documents, we noticed a change in the approach regarding the way of interpreting and applying art. 9 of Law no. 21/1991, the National Authority for Citizenship being requested to confirm the circumstance that for the applicants (the underage in the parents' files) the procedure for obtaining Romanian nationality was carried out at the same time with the parents – starting from the idea that art. 9 falls under the matter of

obtaining Romanian nationality and that the nationality granted on request is incompatible with obtaining it by law effect by the underage children as subjects of the matter. [13-10]

Consequently, there appeared a disparity in the legal opinion and vision and, furthermore, in the *de facto* law interpretation and enforcement, leading to a strong social effect. In the light of the new interpretations of art. 9 of Law no. 21/1991, as being different, but by the same institutions, there was a disruption between the letter of law and practice, context which generated an uncertain legal environment. The deeply-rooted practices along the years, regarding the possibility of transcribing the martial status documents after obtaining the nationality by the parent, have been replaced suddenly by a new way of law enforcement, breaching *the legal certainty principle*. This principle, perceived by law orthodoxists as a creation of jurisprudence, with a complex structure, expresses, basically, the idea that citizens must be protected "against a danger coming from the law itself, against an uncertainty which law created or it runs the risk of creating". [10]

In a more elaborated theoretical development, legal certainty is considered as the main quality of a new law order, which guarantees the individual legibility and trust regarding the law, in other words, an entire citizen protection mechanism. That is why, law, once executed too late, with difficulty or even not at all, depreciates and loses is credibility. In its writings, Andrei Rădulescu stated that the main cause of uncertainty of the law resides in the faulty social organisation, reflected in "unclear or inaccurate laws, doubtful or not enough elaborated common laws, frequent legislation changes". [11] The principle for legal certainty was outlined also by the European Court of Human Rights (ECHR), which stated that "throughout the time, constant jurisprudence and administrative practice have created legal certainty, both in the patrimonial area, but also as regards the matter of legal representation of different Catholic parishes, practice and jurisprudence where the plaintiff church could believe in lawfully." [12] The ECHR jurisprudence considers that, according to Convention for the Protection of Human Rights and Fundamental Freedoms, a "law" is only that rule "stated with enough precision in order to entitle the citizen to adjust its conduct" and equally admits that it is practically impossible to reach "absolute certitude" in drafting laws, as well as the risk that the concern to ensure certitude might lead to excessive rigidity. [7]

As per the above-mentioned, we can draw the conclusion that the triggering factors of the problem of the underage without nationality have been: an unclear rule – art. 9 of the Nationality Law –, doubled by the previous constant and continuous institutional practice, which was considered by the beneficiaries – parents of the children – as the letter of the law. The solution, identified also in the literature, was that legal certainty can be controlled by following some essential steps on the path of interpreting and enforcing the legislation, among which there is an important rule for the studied subject, i.e. outlining clear, intelligible laws and rules, whose text to be less likely to generate debates and controversy. [11] That is who GEO 65/2017 came to light.

3 Losing the Nationality of the Underage, in the ECHR Vision

Regarding the issues on obtaining nationality, the jurisdictional courts of the European Union stated in many cases that have presented that the right to obtain or to keep the nationality of a certain state is not guaranteed by the Convention or its protocols. Apart from that, the Court leaves room for interpretation, admitting that the arbitrary denial of the nationality might create controversies and oppose the provision of art. 8 of the Convention, under certain circumstances, given the major implications, which are detrimental, finally, for the social environment of the individual and its relation with the society he or she lives in. This assertion is supported by court decisions, such as *Petropavlovskis v. Latvia,* decision 13.01.2015, par. 73, *Ramadan v. Malta*, decision 21.06.2016; *K2 v. The United Kingdom*, decision 07.02.2017, on which ECHR decided positively, namely agreeing on a certain type of juridical symmetry regarding the situation for the withdrawal of the already granted nationality and the case of denial of nationality. The Court estimates that both situations are governed by the same principle, i.e. the same reason, since they can lead to a similar interference, if not even more severe, in the area of respecting the individual's private and family life. Yet, we have to make a mention regarding the source of these measures, i.e. in the above-mentioned cases, the measure of depriving the plaintiffs of their nationality was the consequence of their guilty behaviour, being the result of their actions. [9]

Practically, the withdrawal of nationality representing the finality of breaching the procedures established by the nationality laws in the Member States, so that for reaching to a compromise solution and for establishing if this juridical operation breaches art. 8 of the Convention, ECHR acted in two directions: the arbitrary character of the measure, on the one hand, and, the way it reflected on the person it aimed, on the other hand. Art. 8 of the European Convention on Human Rights states at paragraph (2) that "There shall be no interference by a public authority with the exercise of this right *(n.n., the right to respect for his private and family life)* except such as is in accordance with the law and is necessary […] in the interests of national security, public safety […] for the protection of the rights and freedoms of others." [13]

To this extent, in its intervention to establishing the arbitrary component, the Court analysed if the measure was stipulated by the law, it if was accompanied by the requested proceeding guarantees, if the respective person could use its right to justice, by addressing a court able to provide the necessary guarantees, as well as if the nationality authorities acted diligently, according to *the celerity principle*. As regards the way the measure of nationality deprivation got reflected on the individual, ECHR showed that depriving a person of its citizen statute, including a series of benefits in the area of social and political rights, has conspicuous consequences, such as losing the opportunity to have a job, losing social insurance, **the impossibility to renew his or her identity documents etc.** On these grounds, ECHR admits that the generated impact might lead, in certain

cases, to breaching art. 8 of the Convention (*Kuric and others v. Slovenia*, decision 26.06.2012, par. 356-359).

Precisely on these grounds, in the Explanatory Report to the European Convention on Nationality, there is a mention that art. 7 of the Convention includes a list of explicit and limitative cases foreseen by the law when nationality can by lost automatically (*ope legis*) or on the initiative of a member state.

4 Legal Changes Brought by GEO 65/2017

As shown previously, due to the way of stating art. 9 of Law no. 21/1991, there were divergent interpretations at the level of the public authorities with attributions in the area of marital status and travel documents. The remedy came via the normative subject to this study, which foresees, mainly, changes in the procedure for obtaining Romanian nationality, changes that aimed at clarifying the issues regarding the situation of the underage.

Thus, the new normative states *ab initio* that the underage whose parents are foreign national (or stateless persons) obtains Romanian nationality on his or her parents request, altogether with them, if this is requested via an application submitted at the same time with them. The child having turned 14 years old must agree. In case the underage is born after the application was submitted by his or her parents, the application can be submitted until the date when the parents obtain Romanian nationality. Basically, this regulation set, with legal power, that the parents must express *expressis verbis* the will that the underage should obtain Romanian nationality. In this way, the idea was to eliminate the possibility of an ex-post procedure for transcribing the birth certificate, without having included the underage in the nationality file of the parents, especially to avoid the situation generated by different interpretations in the first instance.

In case the child did not obtain Romanian nationality at the same with his or her parents, they can submit a separate application, which follows an almost similar procedure as an ordinary request for obtaining nationality. Consequently, the Commission for nationality, constituted according to the provision of art. 14 paragraph (4) of Law no. 21/1991, examines the application submitted by the parent of the underage and, in case it fulfils the conditions stated at art. 10 paragraph (5) of the law, i.e. the parent's application for nationality was approved by order of the president of the National Authority for Citizenship, then the president endorses the application and proposes the approval of (re)granting Romanian nationality to the underage. As per art. 9 paragraph (2) of GEO 5/2010, the president of the Authority approves, by order, the application of the underage for (re)granting Romanian nationality. The child obtains Romanian nationality on the date when the order is issued, and in case it becomes of age during the analysis of the application he or she must take the oath. Another novelty element consists in the fact that the nationality certificate is issued distinctly for the underage.

Art. II. paragraph (1) of GEO 65/2017 states that since the date when parents obtained Romanian nationality, their underage children, who obtained or submitted an application regarding the registration or transcription of the marital

status documents until the date of enforcement of the ordinance, are Romanian nationals. This regulation applies also to the persons, who by final court decision have had their marital status documents cancelled. By the cases described under art. II, there was a try to cover all hypothesis that could have been identified regarding the underage who lost nationality abusively and not legally, as per the limitative stipulations of Law no. 21/1991: by withdrawal or by approval of the abjuration.

5 Conclusions

The adoption of GEO 65/2017 aimed at eliminating the existing incertitude, derived from changing the administrative practices of the institutions of the Romanian state in interpreting and enforcing the legal provisions. This situation led to a very large number of persons, in terms of tens of thousands, to be prejudiced, by being deprived of their citizen statute, which previously granted them social and political correlative rights, even from the perspective of respecting the right to private and family life, fundamental right consecrated by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

GEO 65/2017 covers and solves *ex nunc,* by a clear and predictable procedure, the way to obtain Romanian nationality for the underage, thus eliminating the existing divergent interpretations. Yet, the main merit of GEO 65/2017 is that it clarifies the juridical situation of the underage, who practically lost Romanian nationality, since they were not mentioned in the file of the parent who obtained Romanian nationality previously and, consequently, did not have their passports, IDs renewed and even had their birth certificate cancelled.

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Considerations on the Actuality of the Separation of Powers Principle in the Romanian Society

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Abstract

The sustainable development of a society cannot be achieved without taking into consideration the social, economic, political and regional contexts in which it is located. From this point of view, the Romanian society after 1989 is in a continuous search of identity, which although *de jure*, has been integrated into the European Union, *de facto* we note that it is in a permanent search of «integration», being under constant observation of the international organizations of which it is part. The question is whether a sustainable development of a society can actually be achieved in the absence of a sustainable system of law? Can we analyze the evolution of the Romanian society without scanning the system of law that governs it? Is it possible that a society whose legal system no longer complies with the principle of stability and predictability of legislative acts can in fact have a sustainable development? In the following we aim to analyze the applicability of the principle of separation of powers in the current context, whereas we consider that this represents an illustrative example regarding the fulfillment of the necessary conditions for maintaining the rule of law. The choice of the separation of powers is not purely random, but is determined by the legal topicality and its obsolete becoming. One of the factors which continuously contribute to its depreciation is the way in which the original purpose of the emergency ordinances institution has been distorted, excessively, by the representative of the executive power.

Keywords: context, law, the separation of powers principle, emergency ordinances, society, stability, predictability, legislative acts.

1 Introduction

The social, economic, political and regional contexts under which the development of a society takes place are closly linked to the system of law that

governs the relations between the members of the society in question. Therefore, we consider that the law represents an important criterion in terms of sustainable development of a society analysis. In accordance with the legal rules of legislative technique, for a system of law to be functional it must comply with the principle of stability and predictability of legislative acts of the active fund of law, through complying certain necessary, adequate and possible rules that exist in the period of time in which the social relations are regulated by the law. By failure to comply to these principles and rules not only the system of law that governs the social relations in a society is affected, but it also reflects directly on the sustainable development of the society in question, mainly because the subjects of law lose their trust in the ability of the legislature to issue normative acts adapted to the real needs of the society.

The 1991 Constitution of Romania did not expressly stated the separation of powers principle, but the way that entire act was founded was in accordance with it. For this particular reason we note that in the case law of the Constitutional Court of Romania, when the Court had on its role a case that would have alleged the violation of this principle, it didn't shy off to invoke it in its decisions and to assert that this principle is not clearly stated in the Constitution. The consistency with which the separation of powers principle has been invoked by the Constitutional Court has resulted in its mentioning among the amendments that have been made to the Constitution during its revision in 2003. Therefore, now the Constitution states expressly in article 1 (4) that the state is organized according to the equilibrium and separation of powers principle – the legislative, the executive and judicial – within the constitutional democracy. Thus, we note the importance of the case law of the Constitutional Court, which when adopts certain continuity in the interpretations used for the argumentation of its decisions, they will be reflected at the earliest opportunity in the legislative changes, including the constitutional provisions.

Among the ideas developed by Hegel in his work, we also find the separation of powers principle, which, from his point of view, "while these powers are distinguished they must also be built into an organic whole such that each contains in itself the other moments so that the political constitution is a concrete unity in difference" [1], this is the reason why between these powers there must be a relationship of cooperation and a complementarity of them must be achieved, because otherwise "it is clear that two independent powers cannot compile a unity, and therefore must rise to a fight, – and, in this way, either the whole is wrecked or the unity is established by violence" [1], which will result in the impossibility of achieving a sustainable development of the society in question.

Nevertheless, the implementation of the provisions of the Romanian Constitution with the jurisprudence of the Constitutional Court was not synchronized with the content of the other constitutional provisions and it did not take into account the contextual reality of the present time. In addition to the lack of synchronization with the other articles and the changes that have been made, there are opinions in the doctrine which claim that the changes were made "without shedding some light on whether the Constitutional Court is in fact «a

power» or not, and if it is, how can we put together this factor with the trinity of the powers stated by the article 1 (4) of the Constitution" [2]. We note that an idea that has its origins in the social realities of the 17th century, the separations of powers principle, persists in the present time, but it was transposed into legislation, without being adapted to the present contextual evolution.

2 The Context of the Separation of Powers Principle Affirmation

In a first phase we will initiate a brief incursion during the 17th and 18th centuries in order to better understand the way in which the separation of powers principle evolved, a fundamental principle of the constitutionalism, as well as in order to be able to notice the difference between the way in which it was perceived at that moment and how it is perceived in the present. This period is known for the contribution to the development of the theory of the social contract and the shaping of the separation of power principle in the modern era, brought by Thomas Hobbes, John Locke, Charles Louis de Secondat – Montesquieu and Jean-Jacques Rousseau. In this regard we propose, on the one hand, to highlight the changes that have occurred over a period of a few centuries and, on the other hand, to justify the questioning of the principle of separation of powers affirmation in the current context, in an almost identical way as in the period mentioned.

In the specialized doctrine we note the influence that the different social contexts have had, which have made their mark including on the Romanian legal system, and that is the reason why "starting the imitation is deeply rooted in our nature and comes from far away. Its cause is the lack of an independent historical life and of their own ethnic personality" [3]. Therefore, it is noted a specific problem of the Romanian legal system which was based, for the most part, on «loans» of legal rules from other legal systems and which is reflected on the society in the form of failed experiments.

According to Locke's perspective, at that time, there were three powers: the legislative, the executive and the federative. The judicial power was not found among those dealt with in *Second Treatise of Government*, because in the system from which it comes, *common law*, the judicial power was part of the legislative power. Thus "it shall be guided primarily from the English Constitution and because there The House of Lords had the ability to judge, he inferred that the power to judge belongs to the legislative power" [4]. The idea of the separation of powers in the state is generated by the implications of the concentration of the power of legislation and government in the hands of the same people, given the man's inability to control himself when he has the power, so the people "whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making, and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government" [5].

Subsequently, Montesquieu identifies the three powers as being: the legislative, the executive and the judicial, form in which it is to be found in the Romanian law, pointing out, the same way as Locke did, that reserving them to a single person will generate abuses, whereas "there is no freedom if the power to judge is not separated from the executive and the legislative power" [6]. Thus, we find the principle of the separation of powers stated, in the same form, in two different systems of law, the Anglo-Saxon and Roman-Germanic, the latter being the basis of the source of inspiration for the Romanian legal system.

In the interwar period, professor Negulescu identifies "the three essential attributes that we note in a state: the right to legislate, the right to investigate and to apply the law anytime and the right to judge the conflicts that may possibly occur when and during the application of the laws" [4]. We notice that the three powers mentioned are also outlined in the Romanian Constitution, as revised in 2003. At the same time, regarding the motivation of the separation of powers, professor Negulescu considers that "the freedom and the possibility for the development of a society, of a nation, can only be ensured when these essential powers of the state would be assigned to more than one person, to extraordinary holders, that should not depend on one another, that should be separated, independent, and should control each other" [7].

We note that unlike the 17th century, when the emphasis was only put on the separation of powers in the state, we have in sight two other conditions: the powers must be independent, on the one hand, but to be able to control each other, on the other hand. The simple separation of them, without fulfilling these two additional conditions, it would be meaningless to the content of the principle of the separation of powers. We notice that the principle of separation of powers becomes a *sine qua non* condition for the achievement of the development of the societies, in general, and of the Romanian society, in particular. This period is followed by the communist period which outlines the unique party, the owner of the powers of the state, and the principle of the uniqueness of the power of the people will replace the principle of the separation of powers, whereas it had become incompatible with the new national ideology.

This brief presentation of the principle of separation of powers in the state has the role to allow us an understanding of the contextual differences between the reality of the 17th and 18th centuries and the present one, whereas we find that the analysis of this principle is obsolete "due to the overlapping of the legislative and executive functions at the level of the political parties, but also due to the emergence of some authorities which cannot be truly realized, such as the Constitutional Court" [8]. The reality of the contemporary context is different from the one from Locke's time, and the "torque which becomes operational today is the opposition/majority and not legislative/executive, a torque which is made efficient not by means resulting from the doctrine of the separation of powers, usually ineffective, but especially by giving a sense of judiciary and constitutionality to the majority/opposition relations, by the right granted to the last to refer to the Constitutional Court" [8].

3 The Influence of the Case-Law of the Constitutional Court of Romania in the Express Mentioning of the Principle of the Separation of Powers in the Revision of the Constitution of 2003

The repeated invocation of the principle of the separation of powers in the case law of the Constitutional Court has resulted in the express provision of it in the first review of the Romanian Constitution, in 2003. Thus, we note the importance and the influence of the jurisprudence of the Constitutional Court, which, by the repeated references that it made to this principle, we could say that it re-imposed it in the collective consciousness, after a pause marked by the communist period, and the principle has become respected by the members of the society.

However, no matter how much the principle has been repeated, in the view of the fact that in Romania we can mention a «constitutional cutuma» only from the second half of the 19th century, we cannot claim that the case-law of the Constitutional Court is able to influence the "collective unconscious" [9], whereas we do not have a long period of time, the *sine qua non* condition in Jung's research. The influence of repeatability on the «collective unconscious» has been the subject of in-depth analysis of the psychologists, that's why we do not strive to achieve an overlap identical to the one made by Jung which claims that "while the personal unconscious consists essentially of contents that were once conscious but which have disappeared from the consciousness, being either forgotten or bent, the contents of the collective unconscious have never been aware, and are therefore not acquired individually, and only due to the existence of heredity" [10]. At the same time, in Jung's opinion, «collective unconscious» "consists of pre-existing forms – universals – which may become aware only through others and give the contents of consciousness a well determined form" [11].

From the moment of the adoption of the Constitution of 1991 until its review date, the Romanian Constitutional Court has invoked the implicit provision of the principle of the separation of powers in the Constitution. Therefore, the consistency with which has been invoked has contributed to its reiteration after the communist period and explicit provision in the content of the current Constitution. By way of example, we can see, in this respect, the situation in which, although it was not explicitly provided for in the content of the Constitution of 1991, Romania's Constitutional Court invokes the default presence of the principle of the separation of powers in the fundamental law, in the control exercised on the constitutionality of the Regulation of the Chamber of Deputies. Under this aspect, the Constitutional Court of Romania considers that the provision which granted the inquiry commission the ability to subpoena any person is a violation of the constitutional provisions whereas "any regulatory provision which would involve the possibility of subpoena a judge in front of an investigative parliamentary committee obviously violates the constitutional provisions which states, even if by default, the separation of powers in the state,

and of course the independence of the judges and their obedience only to the law" [12].

However, we believe that the mentioning of the principle in the revised Constitution of 2003 should have been made in a form which corresponds to the current social reality, which emphasizes the role of the Constitutional Court of Romania, as to ensure the supremacy of the Constitution as the fundamental law of the state of law. Therefore, we note the relevance of the argumentation within a recent constitutionality review, when making a comparison with the American system of law, in regard of the competent authority to exercise the supervision of constitutionality, the Court said that "the European Constitutional Courts particularity consists in that they are public authorities separated from any of the powers in the state traditionally known within the constitutional democracy: the legislative, the executive, the judicial, the Constitutional justice representing, therefore, a specialized activity, different from the judicial authority and exercised independently of all other powers" [13]. Having regard to the differentiation invoked by the Court, as compared to the other powers, including the judicial, we take our opinion expressed in the doctrine of the French which analyzed the increase of the role, the influence and the intensity of the powers of each Constitutional Court and concluded that they "appear in the new and genuine separation of powers as «counter-powers»" [14].

Another aspect which is in contradiction with this constitutional principle is represented by the Constitutional wording on these "powers", which, in fact, in the provisions of the Constitution are called "authorities". We believe that an adaptation of the constitutional provisions would have been useful in order to achieve a syncronization with this principle, so many times invoked by the Constitutional Court, but which carries out a transposition of this theory "in a legal fiction of a contemporary reality" [8].

4 Legislative Delegation vs. the Separation of Powers Principle

From the submitted aspects regarding the principle of the separation of powers we can perceive that its repeated invocation in the case law of the Constitutional Court of Romania has eventually been transformed in its expressly retrieval among the provisions of the Constitution. The question is whether this retrieval is in line with the current contextual reality's philosophy? Under this aspect we note the relevance of Hegel's opinion, who claims that "a constitution is not just something created: it thrives from centuries of work, is the Idea and the rational's consciousness, to the extent that it has developed within a society. Therefore, there is no Constitution made only of certain subjects" [15]. Therefore, the transposition of an idea and its imposition into a Constitution, which is not the result of the internal context specific to a state, will be doomed to failure whereas "the people must find into a constitution the feeling of their own right and their

own status, otherwise it may exist, it's true, in the outer face, but it doesn't mean anything and it has no value" [15].

What we want to point out is that although it has been managed to expressly specify the principle of the separation of powers in the Constitution of Romania, this does not mean that it is fully applicable, but *de facto*, there are situations in which its application is in contradiction with the law-making procedures of Romania. Unfortunately, the constitutional provisions have not been implemented in agreement with the latter, an illustrative example being the constitutional legislative delegation, or more exactly, the permissiveness with which the emergency ordinances are adopted. As recent, regarding the aspect of the permissiveness which the Government shows when adopting an emergency ordinance, we submit the exception of unconstitutionality regarding the provisions of Article 2 and Article 3 (5) of the Government Emergency Ordinance no. 114/2013 concerning the modification of the holders in right to administer the immovable property of public and private sectors of the state. In this case, after the owner of the land has been recognized the right of property located in the management of the Autonomous Administration of the Special Assets of the State, by a final and irrevocable judicial decision, the Government adopted the emergency ordinance above mentioned, by changing the holder of the right of management with another state institution, though at the time of the adoption of the emergency ordinance, the land in question was no longer in the domain of public and private sectors of the state. Therefore, through the emergency ordinance mentioned was not only violated the right of property legally recognized to the complainant, but also the principle of legal certainty, by preventing the enforcement of a final and irrevocable decision, the principle of the separation of powers, as well as the rule of law itself, whereas the compliance and the enforcement of judicial decisions are among the criteria which confirms the existence or inexistence of the rule-of-law state [16].

In the Romanian law doctrine the legislative delegation is understood as being "a way of intervention of the executive power in the regulation of social relations, determined by the emergence of circumstances in which the legislative power is unable to regulate, within a reasonable term, a problem subjected to legislation" [17], but the manner in which the institution of constitutional legislative delegation is understood and used by the executive power directly affects the principle of stability and predictability, by the inflowing of emergency ordinances entered into the active legal fund and, it indirectly affects the principle of the separation of powers, whereas, although the Constitution states that the Parliament is the sole legislative authority in Romania, *de facto*, we note that the contribution made by the executive power to the Romanian legal fund exceeds that of the Parliament.

One of the reasons for the revision of the Constitution of 2003 had as purpose the tempering of the pressure which the law is subjected to by the

executive power, by the inflation of emergency ordinances[1], being operated changes regarding the constitutional legislative delegation by replacing the syntagma "in exceptional cases" with "extraordinary circumstances" and under the condition that their ruling may not be delayed. In addition, it was provided the obligation on the part of the Government to motivate the emergency throughout the Preamble. The practice of the executive in the adoption of emergency ordinances, subsequent to the revision, proves that the spirit in which these amendments were made has not been understood, as the effect was unforeseen, thus emptying of substance the constitutional text regarding the legal regulations of this institution[2]. We find that, although the constitutional provisions have been changed in order to increase the limit of these exceptional cases, in fact, from the perspective of the executive, only a restructuring operation to the legislative provisions has been carried out, the content and the possibility of the Government to use this legal institution has remained the same.

Thus, we note the continue deflection of the judicial system by the tendency of legislation by means of emergency ordinances. This trend has the effect of lowering the degree of predictability of the law and increases the degree of instability, when the predictability and the stability of the law are essential for the proper functioning of the socio-economic life of a society. When analyzing the year of 2017, we note other aspects which are only to strengthen the facts regarding the lack of predictability and stability of the direction on which the Romanian law continues to divert. By way of example we note the rejection of the emergency ordinance no. 73/2010 by the Law no. 163/2017. Thus, if in the case of delaying the approval of an emergency ordinance, the subjects of law are not affected, whereas this is approved by the Parliament, in case of its rejection the situation is different, whereas, in the example above mentioned, for the duration of seven years, this decree, issued by the Government, but with legislative value, produced real legal effects. Is this one of the reasons for which the "legislative delegation is one of the most powerful denials of the separation of powers principle" [17]?

Having regard to those presented, the conditions imposed by the Constitution must be strictly complied with, because the "emergency ordinances represent acts of exceptional circumstances, exceptions to the rules of the

[1] Although the reason for which this change has been made in the constitutional legislative delegation was based on the large number of emergency ordinances issued between 1993 and 2002, 1107 emergency ordinances, in fact there has not been carried out a moderation of the executive power whereas, referring to a similar time interval, namely the 2004 – 2013, we note that their number was even greater, 1465 emergency ordinances. A similar rate has also been maintained by the executive power in the following period, in 2017 being adopted 117 emergency ordinances [18].

[2] In the course of the year 2017 the Parliament has adopted 278 laws, and the Government has adopted 117 emergency ordinances. With all that, at first sight, the numbers show that the main type of normative documents entered in the Romanian legislation are the laws, *stricto sensu*, in fact we notice that this reality is relative, and the main type of normative act which creates the law at the moment is, *de facto*, the emergency ordinance. Between the 278 laws, 113 laws concern the approval/rejection of emergency ordinances [18].

common law in the matter of primary ruling of social relations, to the monopoly of the Parliament to legislate and to the separation of powers principle" [19]. We should notice that the doctrine analyzes "the government's inability to invoke its own guilt, i.e. the existence of the hypothesis that the extraordinary situation has been created by the Government itself, through action or inaction" [19].

Therefore, we must have a correlation between law and social life, whereas it should be taken into account the topicality of a problem identified by Dumitru Drăghicescu at the beginning of the 20th century (1907), on the effects of the " reforming the institutions too many times, replacing them too quickly with other foreign bodies, which are too submitted and too complicated, thus dissolving the patterns of activity, dissolves the characters and excites the anarchy" [20]. We agree to the opinion which claims that "this separation of the functions of the state is made precisely to ensure people the legitimate confidence in the continuity of the state's actions and the predictability of the normative changes" [21], without which we consider that there may not be a sustainable development of the society we live in.

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Parliamentary Oversight of Foreign Policy and the Means by Which It Is Achieved

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Abstract

To promote the interests of Romania to the European Union and in the framework of international organizations, the intensification of the actions of the government policy in the field, support through parliamentary action in bilateral for achieving the strategic objective of Romania's accession to the Schengen space, development and optimization of parliamentary collaboration relations multilateral, regional and global, constitute the Pillars on which must be included in the foreign policy, coordination or consultation with the Government of Romania (Ministry of Foreign Affairs).

The adoption of all European Union legislation will be subject to parliamentary scrutiny at an unprecedented level in any other supra-national and international structures.

The adoption of the whole body of laws of the European Union will be the subject of a parliamentary control located on an unprecedented level in any other structures over national and international sources.

On the other hand, pre-control carried out by the national parliaments on the whole Union legislation will be extended, whereas they will receive all the legislative proposals in good time to discuss with their ministers before the adoption by the Council, and the right to make objections to a proposal if they are of the opinion that it does not comply with the principle of subsidiarity.

We need a strategy for proactive foreign policy, to keep us out of the defence, the situation that was uncomfortable in which only react to events created by others.

Striding toward such a way of development, Romanian diplomacy is stated with force as the new, promoting equality between nations and peoples, of the abolition of the international relations of everything has become obsolete. In the new international conditions, disjunction of diplomacy and the national interests

will have to disappear forever, diplomacy is inseparable from the People's aspirations toward freedom and dignity.

Keywords: executive, parliamentary control, notice, the Commission for Foreign Policy, diplomacy.

1 The Role, Importance and Attributions of the Commission for Foreign Policy in the Fulfillment of the Parliamentary Control Function

The organization and functioning of the Foreign Policy Commissions are established by the Regulations adopted by them.

The Foreign Policy Committees are working bodies set up to prepare the Chambers' work in the field of foreign policy and international relations.

In accordance with the provisions of the Regulations of the Chambers of Deputies and the Senate Regulation, the foreign policy committees have mainly the following tasks:

1. examine drafts and legislative proposals for the preparation of reports or opinions in the following areas of competence:

- the overall foreign policy strategy of Romania and the governance program in the field of foreign policy and international relations.
- Romania's sovereignty and independence, the borders of the country and national security, stability and constitutional status, in the aspects related to the foreign policy of the Romanian state;
- the protection of Romanian citizens abroad, their expatriation, the Romanian diaspora and the Romanian communities abroad;
- diplomatic and consular service;
- the international treaties to which Romania becomes a party and the application of their provisions;
- Romania's participation in international organizations, external, economic, military, technical and humanitarian assistance, interventions abroad and war declarations;
- Romania's relations with other states in the fields of political, economic and social life; promoting trade and protecting the rights and interests of Romania abroad; external loans and their guarantee; cultural, technical and scientific relations in the field of education and environmental protection; international colloquia; the image of Romania in the world, etc.

2. Requests from public authorities the reports, information and documents necessary for the drafting of reports and opinions;

3. (a) exercise parliamentary control over the Government's foreign policy;

(b) monitor and control how the MFA, the other public administration bodies and institutions with competence in the field ensure the implementation of Romania's foreign policy objectives and the use of resources and resources to achieve these objectives;

(c) the exercise of this prerogative is achieved by a variety of means, such as: debating and approving the draft budget, proposing and drafting declarations and decisions on foreign policy, initiating motions, general or specific debates on major external issues, questions and interpellations, hearing the Foreign Minister as well as other external relations officials, attending the meetings of the Consultative Council within the MAE, etc.

4. Corrects and examines the application and execution of the international treaties to which Romania is a party and of the provisions of the laws falling within the competence of the Committees;

5. Hears and endorses the appointment of the Minister of Foreign Affairs and the Romanian Ambassadors abroad;

6. Advise motions on foreign policy issues, in consultation with the Ministry of Foreign Affairs;

7. Endorses the draft Annual External Action Program of Parliament as well as any external relations action before being submitted to the Permanent Bureaus of the Chambers for approval.

In accordance with the Constitution of Romania and with the Senate Regulation and the Foreign Policy Committee, it has as its attributions the main issues and programs of foreign policy of Romania, the bilateral dialogue with similar committees of parliaments of other states and international parliamentary bodies, the approval of treaties, conventions and the other international instruments to which Romania joins, the hearing and the approval, with a consultative vote, of the proposed persons so appointed as Romania's ambassador abroad.

Also, alone or in conjunction with the similar committee of the Chamber of Deputies, it controls the foreign policy of the Government, takes positions on specific issues, conducts inquiries in the field, formulates responses to memoirs and letters from institutions and citizens.

According to the provisions of art. 156 paragraph 3 of the Romanian Senate Regulation of October 24, 2005 [Published in the Official Gazette of Romania, no. 387 of 20 May 2016], simple motions on foreign policy matters are subject to debate only with the Foreign Policy Committee's opinion and consultation with the Ministry of Foreign Affairs. *This condition must be fulfilled within 3 days of the* submission of the simple motion. Most of the Commission's work is devoted to the priorities of the Romanian foreign policy – Euro-Atlantic integration, the nomination of relations with the neighbors and the enrichment of the dialogue with the Romanians from abroad. The Committee on Foreign Affairs, during the period 1996-2000, endorsed the notes on the participation and mandates of the delegations of the Romanian Parliament to the international parliamentary bodies (PIU, Parliamentary Assembly of the Council of Europe, European Parliament, North Atlantic Assembly, OSCE Assembly, APCMN, etc.).

2 Parliamentary Control Over the Foreign Policy of the Executive and Ways to Achieve It

2.1 *General Considerations*

Romania's foreign policy until 1989 was structured on an extreme interpretation of Westphalian principles, synthetically expressed by the phrase "**NON-INTERFERENCE IN INTERNAL ISSUES OF OTHER STATE"**. The real world after the collapse of communism was one of increased interdependencies and "shared sovereignty."

In principle, the concept of limiting sovereignty should address both specific issues related to the functioning of some supra-state institutions, such as the **UNO** or especially the EU, as well as the need to facilitate solutions if rights and the fundamental freedoms of citizens are massively and systematically violated by a totalitarian political regime. [1]

Since December 1989, it has been clear that the **EUROPEAN DIMENSION OF ROMANIAN EXTERNAL POLITICS** would become a priority, there was an internal consensus, both politically and at the level of society, on the need to break away from the Soviet Union's sphere of influence by exiting of the Warsaw Treaty, and, in one way or another, to return to the traditions of the Romanian inter-war foreign policy, which aimed to anchor Romania to the European continental block. **Francois Mitterrand**'s words, spoken on December 31, 1989, sounded like a prophecy, but also as an encouragement: L'Europe, comme on rentre chez soi, rentrer dans son histoire et sa géographie. [2]

Therefore, in most states, the Government ensures the general management of relations with foreign states; declarations, and its acts commit the State which it represents.

The Government controls the other bodies in charge of external relations, and the Foreign Minister puts the Government in charge of the main issues in the international field and receives tasks from it; the government appoints some diplomatic representatives (heads and members of delegations empowered to negotiate treaties), negotiates and concludes agreements on empowering the head of state to conclude treaties on behalf of the state, to take part in international conferences without special mandates.

With the increasing complexity of the relations between states, with the expansion of cooperation areas, the number of governmental institutions in each state with specific attributions at the international level increased.

In addition to the Ministries of Trade (with responsibilities in the organization of external economic relations) and the Ministries of Defense (direct links and the institution of military attachés), a growing number of governmental structures have acquired external attributions in their specific field of activity.

This trend has been particularly strong in the Member States of the European Union, including in the process of enlargement. Moreover, specific government

structures (departments, ministries, etc.), usually separated from the Foreign Ministries but closely linked to them, are in all EU Member States or candidates for EU integration. [3]

This evolution tends to reduce the role of foreign ministries, especially in the case of the Member States of the European Union, becoming to a great extent institution with a pronounced technical character, to the detriment of the political side and which usually place their international infrastructure (the diplomatic service external) to other ministries which independently carry out diplomatic activities.

This tendency seems irreversible in the European context, due to the blurring of the border between internal and external policy (in particular, relations between Member States).

Reducing the role of Foreign Ministries should not be confused with a certain **EROSION** of the role of the state in interstate relations, although there is a certain link.

Essentially, part of the role of the Foreign Ministries has been taken over by other institutions, including the state, on the one hand, the widening of the spheres of international cooperation and, on the other hand, the significant increase of the specialization in fields, which makes it impossible for a career diplomat to be well prepared at the same time for political, security, environmental, trade, communications or human rights issues, for to list only part of the current themes of international relations.

The Foreign Ministries remain, however, the main internal structures for the day-to-day management of relations between states and maintain a coordinating role in each country in this area.

The other domestic institutions operating externally have created their own structures, a kind of foreign ministry.

In many countries there is the practice of posting career diplomats to ministries with external attributions, which contributes to the harmonization and homogenization of international relations approaches and provides foreign ministries with a role to monitor these relations.

At the level of execution, specialized structures for multilateral relations have been created, both within the ministries of foreign affairs, as well as of some ministries and institutions with external attributions (departments, general directorates, services, special advisers, etc.).

2.2 *The Role of the Government in External Representation*

The fundamental law of Romania stipulates in paragraph 1 of Article 102 that the Government, according to its governing program accepted by Parliament, ensures the realization of the country's internal and external policy and exercises the general management of the public administration.

The government, under the names of the cabinet, the government, the council of ministers, according to the constitutional system, has two components:

the head of the government (where it exists) and the ministers and state secretaries.

Law no. 90 of March 26, 2001 on the organization and functioning of the Romanian Government and of the ministries regulates in Article 1 the role and functions of the Government:

"(1) The Government is the public authority of the executive power, functioning on the basis of a vote of confidence granted by Parliament, which ensures the realization of the country's internal and external policy and exercises the general management of the public administration.

(2) The Government has the role of ensuring the balanced functioning and the development of the national economic and social system, as well as its connection to the world economic system in the conditions of promoting the national interests.

(3) The Government shall be organized and function in accordance with the constitutional provisions, based on the Governing Program accepted by the Parliament.

(4) The appointment of the Government shall be made by the President of Romania on the basis of the vote of confidence given to the Government by the Parliament.

(5) For the implementation of the Government Program, the Government exercises the following functions:

a) the function of strategy, which ensures the elaboration of the implementation strategy of the Government Program;

b) the regulatory function, which ensures the elaboration of the necessary normative and institutional framework for the achievement of the strategic objectives;

c) the state property management function, which ensures the management of public and private property of the state, as well as the management of the services for which the state is responsible;

d) the representation function, which ensures, on behalf of the Romanian state, the internal and external representation;

e) the function of state authority, which ensures the monitoring and control of the application and observance of the regulations in the sphere of defense, public order and national security, as well as in the economic and social fields and the functioning of institutions and bodies operating under or under Government Authority " [Law no. 90/2001, published in the Official Gazette no. 164 of 2 April 2001].

The attributions of the Government in the field of foreign policy, according to the Romanian Constitution, are the following:

- Ensures the realization of foreign policy, in line with its governance program, accepted by Parliament (Article 102, paragraph 1);
- negotiate the conclusion of international treaties (art. 91 paragraph 1);
- proposes to the President of the Republic the accreditation and the recall of diplomatic representatives of Romania (art. 91 paragraph 2);

- proposes to the President of the Republic the establishment, abolition or change of rank of diplomatic missions (Article 91 paragraph 2).

In most states, the Government provides general management of relations with foreign states; the declarations and its acts commit the State which it represents.

The government controls the other bodies in charge of external relations, and the Foreign Minister puts the government in charge of the main issues in the international field and receives tasks from it; The government appoints some diplomatic representatives (heads and members of delegations empowered to negotiate treaties), concludes or approves agreements, etc. The Chief of Government has an important role to play as a representative (invites and receives representatives of foreign states), conducts negotiations, concludes agreements, empowers the head of state to conclude treaties on behalf of the state, takes part in international conferences without special mandates.

Therefore, the prime minister is naturally the foreign government spokesman, fulfilling the same role as the Minister of Foreign Affairs, which is part of this body, with special attributions in foreign policy; the latter was given a special place in international law because the orderly management of foreign affairs requires that any communication between governments pass through the Foreign Affairs Ministry.

2.3 *Ministry of Foreign Affairs and External Representation*

The Ministry of Foreign Affairs, as a specialized body of the central public administration, subordinated to the Government, ensures the realization of the foreign policy of the Romanian state, including the participation in the European and Euro-Atlantic integration process of Romania.

In order to achieve these objectives, the Ministry of Foreign Affairs performs the function of representation, by which it seeks to ensure, on behalf of the state or the Government of Romania, the internal and external representation in its field of activity; defends and promotes externally the national interests of Romania, initiates international activities aimed at developing relations with all states, promotes the interests of Romania in international organizations, defends abroad the rights and interests of the Romanian state, citizens and Romanian legal persons, initiates, negotiates or participates in the negotiation of treaties and other international agreements for Romania, either alone or together with other ministries, proposes to the Government the signing, ratification, approval or acceptance of international treaties, adherence to them or their denunciation, exchange of instruments of ratification, etc.

At the same time, the Ministry of Foreign Affairs, represented by the Minister of Foreign Affairs and the Deputy Minister for European Affairs, has a special role to play in the activities related to Romania's participation in the European Union.

In this context, Government Decision no. 1040 of 19.10.2011 provides for a series of main tasks of the Ministry of Foreign Affairs, of which we exemplify the following:

1. defends and promotes externally the national interests of Romania;

2. initiate and support international activities aimed at developing peaceful and cooperative relations with all States, based on the fundamental principles and rules of international law; promotes internationally the values of democracy, the rule of law, respect for human rights and fundamental freedoms, peaceful cooperation and human solidarity;

3. contributes to the promotion of Romania's national interests in organizations and other international structures;

4. participate in the coordination of the national system for managing European affairs;

5. Coordinates, within the limits of specific competences, with the Ministry of European Affairs, the process of formulating national positions that are promoted within the structures of the European Union;

6. Examine and endorse, the positions that will be expressed by Romania within the formations of the Council of the European Union;

7. Coordinate the elaboration of the necessary documents for participation in the meetings of the European Council;

8. Monitor and endorse the participation of the institutions in the process of elaborating and formulating the positions of Romania, depending on the specific field, as well as the participation of their representatives in the negotiations held within the Council of the European Union and the European Commission;

9. ensure, on the basis of a mandate approved under the law, the representation of Romania at the General Affairs Council. If the agenda of the General Affairs Council is made up of topics within the competence of the Ministry of European Affairs, it ensures representation;

10. Co-ordinates, according to the law, the meetings of the European Affairs Coordination Committee, in which external relations issues are discussed;

11. seeks to ensure the compatibility of the actions of the Romanian authorities with the objectives of Romania's foreign policy, respectively with the objectives and decisions adopted within the framework of the external action of the European Union and with the attributions derived from the Treaty of Accession of Romania to the European Union;

12. monitors developments in the European Parliament in the European files with implications for the common foreign and security policy and European Parliament decision-making process in general, with implications for the foreign policy agenda;

13. informs the Romanian members of the European Parliament on the positions taken by Romania in the field of the common foreign and security policy, as well as in other areas with implications in the foreign policy agenda;

14. Participates in the observance of the obligations of Romania as a member state of the European Union, including the provisions of the Act of Accession of Romania to the European Union with implications in the external relations plan,

as well as in ensuring compliance with the European acquis in all the international agreements concluded of Romania;

15. is consulted on all matters with implications for Romania's foreign policy and on the external action of the European Union;

16. participate in the implementation and implementation of the common foreign and security policy of the European Union and ensure the representation of Romania in the Foreign Affairs Council;

17. coordinates at national level the participation of Romania in the common security and defense policy, as well as in the civil and military missions under the aegis of the European Union;

18. in accordance with Act no. 590/2003 on Treaties, initiates and/or participates in the negotiation of treaties and other international cooperation documents, including treaties concluded at the level of the European Union and those amending the fundamental treaties of the European Union.

The Minister of Foreign Affairs, together with the Deputy Minister for European Affairs, assures the leadership of foreign affairs either under the control of the head of state or of Parliament, depending on the degree of involvement of the President in foreign policy; the foreign minister runs the state's foreign affairs and is an intermediary between states as well as between heads of state.

There is the rule of international law, according to which the Minister of Foreign Affairs has full powers in all areas within his sphere of attributions; he represents the state as well as the Government in international relations, without the need for special powers.

The Minister of Foreign Affairs has a wide range of tasks, including: he maintains contacts, discusses the issues of mutual interest of Romania with other states and their diplomatic agents (he or she listens to their proposals or requests and answers them); initiates and conducts negotiations; ensures that the Treaties are honestly executed; appoints some diplomatic agents and consular officers sent abroad, guides them and gives them the necessary instructions to carry out the missions; notifies foreign states of the appointment or recall of diplomatic agents and consular officers; receives and submits to the Head of State foreign diplomatic agents; is responsible for ensuring respect for the immunities and privileges of diplomatic agents and foreign consular officers; ensures the drafting of documents issued by the Head of State in the field of foreign affairs (treaties of peace, alliance, trade and navigation, declarations of foreign policy, responses to foreign documents received); ensures the preservation of archives, diplomatic correspondence, originals of treaties and conventions, etc.

In order to cooperate between the Parliament and the Government in the field of European affairs, Law no. 373 of December 18, 2013 [4], which exemplifies that the Government, through the Ministry of Foreign Affairs or the competent ministry, for the areas under their competence, according to the law, periodically informs the two Chambers of Parliament on the essential issues for Romania and for the Union on the European agenda (Article 7, paragraph 2).

The Government also regularly sends the following documents to the two Chambers of Parliament (Article 8):

a) information on the results of its participation in the European Council;

b) periodic reports on the activity and results of Romania's participation in the decision-making process of the European Union at Council level;

c) half-yearly reports on the fulfillment of obligations to transpose European Union law into national law.

In order to exercise the parliamentary control function on the representation of Romania in the European Council, art. 18 of Law no. 373/2013 on the cooperation between the Parliament and the Government in the field of European affairs stipulates that the Government shall transmit to the two Chambers of Parliament, at least 10 calendar days before the meeting of the European Council, the proposal of the mandate that the Romanian delegation intends to present. Before the European Council meeting, Parliament may adopt proposals on the mandate, and the proposals adopted are included in the draft mandate formulated by the Government. Parliament's specialized committees will not hear the person nominated by the Government as a member of the European Commission.

Also, art. 36 of Law no. 96/2006 on the Statute for Deputies and Senators (published in the Official Gazette, no. 49 of 22 January 2016) regulates the fact that MEPs and senators examine drafts of legislative and consultative documents of the European Union under constitutional rights regarding parliamentary control on the work of the Government and the constituent treaties of the European Union.

At the same time, deputies and senators participate in the implementation of the principle of representative democracy, stipulated in art. 10 of the Treaty on European Union (TEU) by exercising parliamentary control over the Government's work in the field of European affairs.

Deputies and senators actively contribute to the smooth functioning of the European Union, under Art. 12 of the TEU, of Protocol 1 to the Treaty of Lisbon on the role of national parliaments in the European Union and of Protocol 2 to the Treaty of Lisbon on the application of the principles of subsidiarity and proportionality through participation in the political dialogue with the institutions of the European Union – the Council.

The activity of Deputies and Senators in the field of European affairs is carried out in accordance with the legislation on the cooperation between the Parliament and the Government in the field of European affairs, the Regulation of the joint activities of the Chamber of Deputies and the Senate and the regulations of the two Chambers.

The Government's obligation to inform the Parliament through reports, reports, reports, etc. which the Government presents to Parliament at its request or by virtue of constitutional or legal provisions, is a particularly important activity in connection with the control of the Government's activity.

The rationale for this information lies in the need to ensure the functioning of the legislative authority.

An uninformed Parliament is always at the disposal of the Executive, turning it into a simple ratification body for governmental decisions.

In order to avoid such situations, which affect the principle of national sovereignty and diminish the exercise of power by the people by transferring the

political decision from the elected representatives of the nation to the members of the Government, it is necessary for the members of Parliament to be fully aware of the competences which they can exercise as well as on the content of the activity performed by the Government.

On the other hand, informing parliamentarians is also useful for the use of dialogue with the electorate, a sine qua non condition for the exercise of the parliamentary mandate.

Thus, all the Ministry of Foreign Affairs holders who succeeded in the leadership of this ministry were heard on the occasion of their appointment in joint sessions of the two parliamentary foreign policy committees and received a favorable opinion.

Lunar meetings were held with senior officials from the Ministry of Foreign Affairs, for current consultations on topical issues and for informing committee members.

Relevant is also the activity of debating appeals, statements, statements that have presented the position of the commissions or some of their members.

Rarely, there have been situations in which the Commission or some of its members have expressed stronger positions or, on the contrary, more nuanced than those of the Presidency, the Government or the Ministry of Foreign Affairs towards some international events, and because parliamentarians have a higher freedom of expression stemming from their very position as representatives of the nation, but also from representatives of the ruling and opposition political formations.

An important chapter in the work on the parliamentary control is the hearing at the joint meetings of the two committees of persons designated to carry out missions abroad as ambassadors. In fact, a hearing procedure has been developed within the Foreign Policy Committees of people proposed to be appointed ambassadors. This document stipulates, among other things, that during the hearing, the interviewed candidate will have to present some considerations regarding Romania's foreign policy in general and in the geopolitical space of the country in which it is to be accredited, in particular; the degree of knowledge of the country in which the person is to be accredited and the history of Romania's relations with the country concerned will be discussed: the main aspects of the political, economic, social, legal and cultural life of that state in the context of its relations with the other states of the world; the candidate will specify how he understands to promote and develop Romania's relations with this country: if necessary, will present aspects of his personal life that can contribute to the fulfillment of the mission: will make an appreciation of the current situation in Romania and will present its option of perspective regarding the ways in which the Romanian state will fulfill its assumed obligations.

Considered in a general context, Parliament's informing of the Government is a condition for exercising parliamentary control over it. As it emerges from a study conducted by the Inter-Parliamentary Union, in most of the states under consideration, the constitutional rules on the Executive's obligation to report to

Parliament, the work they carry out are generally binding, and on that basis a permanent control over the Executive. [5]

In some countries parliamentary procedures for informing Parliament have specific extensions and effects.

World parliaments are increasingly connected to international bodies, including the Interparliamentary Union, the Parliamentary Assembly of the Council of Europe, the European Parliament, the NATO Parliamentary Assembly, and so on. These forms of parliamentary diplomacy have the role of harmonizing the work of national parliaments with those of international bodies, which are accredited or have cooperative relations.

For the countries of Central and Eastern Europe, the presence of external parliamentary delegations at the meetings of these international organizations is related to the prospect of integration into the European and Euro-Atlantic structures, a desideratum not only of political significance, but also of its realization without parliamentary support to become a mere utopia.

The activity of external delegations is subject to interrogations either in the plenary of Parliament, in one of the Chambers or in a parliamentary committee, usually the Foreign Policy Committee, in all cases under the supervision of the Permanent Bureau which liaises the delegations with the Parliament.

The information received from external parliamentary delegations is, in turn, the source of new legislative, control or parliamentary diplomacy decisions.

Regarding the means of achieving parliamentary control, we can remember that each year, the Department of Foreign Relations of both Chambers draws up a joint program, approved first of all by the foreign policy committees of the chambers, then by the standing bureaux.

This is a means of control because both foreign policy committees and permanent offices have the possibility to modify the joint program.

This control concerns both the political composition of the program and its financial composition as it is part of Parliament's budget.

These actions, which are predominantly set out in an annual external relations program, are detailed for each activity.

Then a note is submitted to the Permanent Bureau which may decide the composition or mandate of the delegation, may restrict the delegation, support or reject the opportunity of the action to present the mandate and fulfill it respectively.

After each action, a report is drawn up on the work done and its performance.

After each action, a report shall be drawn up on the work done and its performance, which shall be forwarded to the Permanent Bureau.

If the members of some delegations participating in some meetings of parliamentary committees do not draw up a report on the work carried out, then the Permanent Bureau draws their attention to them, and if this circumstance is repeated, it may go as far as imposing sanctioning measures on the MPs concerned.

These notifications are necessary because the growing and elements that may require the presence at some future actions, and the standing bureau must decide whether to accept them or not.

The Questions and interpellations addressed to officials of MAE -ministers, secretaries of state, directors, etc. are of importance because through these means of parliamentary control to obtain a more extensive information regarding the actions of the foreign policy of the executive, in order to clarify certain accusations launched in some environments with regard to the work of the MFA.

Another means of achieving the policy of parliamentary control, constitutes the hearing of the persons proposed to be appointed Romania's ambassadors abroad, as a result of which the Commissions for foreign affairs of the two chambers of the Parliament give consultative opinions.

The main purpose of this hearing is to carry out a dialogue that allows both the knowledge of the person proposed and his/her ability to carry out the mission entrusted to him/her, and, on the other hand, the reception of suggestions for his/her future activity.

To this end, the hearing procedure shall include:

1. the MAE's proposal and an extensive Curriculum Vitae of the person to be heard shall be circulated to the members of the Commission at least three days before the hearing;

2. the chairperson of the hearing draws the attention of the person interviewed that the concealment of some data and information or misrepresentation in order to mislead the committees will lead to the withdrawal of the opinion, and the MAE will take appropriate action;

3. the interviewed candidate gives succinct considerations regarding:

a. the foreign policy of Romania, in general, and in the geopolitical space of the country in which it is to be accredited, in particular;

b. the degree of knowledge of the country in which they are to be accredited and the history of Romania's relations with this country.

The Joint Foreign Policy Committee also oversees how the Ministry of Foreign Affairs, the other ministries and institutions with competence in the field ensure the implementation of Romania's foreign policy objectives and the use of resources and resources to achieve these objectives.

At the same time, the Commission is also responsible for the aspects related to Romania's overall foreign policy strategy and the Foreign Policy Governance Program, national sovereignty and independence, the protection of Romanian citizens abroad, Romania's participation in international governmental organizations, Romania's relations with other states in political, economic and social life.

Until now, the two foreign policy committees have done remarkable work in terms of lawmaking, Euro-Atlantic integration, external relations, but also in terms of controlling the work of the Government.

2.4 *Parliamentary Oversight of European Affairs*

The Treaty of Lisbon strengthens the institutional balance of the Union through the right of initiative of the Commission and the adoption of joint decisions by the Council and the European Parliament. The place of national parliaments in the institutional architecture of the European Union addresses a question of a method that creates responsibilities for national parliaments through the monitoring and control of executives on decisions of European relevance and the transposition of Community legislation.

Given that accession to the European Union has restricted the traditional legislative, budgetary and controlling powers of national parliaments in favor of joint European institutions with similar decision-making powers, national parliaments have to be reimposing themselves in the European and national legislative process as legitimate representatives of the people. [6]

In this respect, the Treaty of Lisbon has instituted more effective national control over the European activities of their governments, as well as closer ties with the European Parliament as a representative of democratic principles.

The Protocol on the role of national parliaments annexed to the Treaty of Amsterdam encouraged the involvement of national parliaments in the activities of the European Union and required that the Commission's consultation documents and legislative proposals be promptly forwarded so that national parliaments could examine them before taking decision in the Council.

Article 12 of the Treaty on European Union (TEU) sets out three forms of intervention by national parliaments in the functioning of the European Union.

Therefore, the work of national parliaments within the European Union takes account of subsidiarity control, the simple revision procedure and the area of freedom, security and justice.

The parliamentary control procedure referred to in the foreign legal literature as the "scrutiny" mechanism is exercised by the Parliament on the way in which the executive power of a Member State manifests itself in the intra-Community relations, from the positions expressed in the decision-making bodies of the European Union to the position and the measures taken in relation to specific European issues within the Union's legislative framework (Union's public policies in a national context or European public policy pursued within a Union framework). All member states of the European Union exercise parliamentary control over the executive power. The parliamentary control function is also a direct consequence of the principle of representation, of the necessity to exercise national sovereignty through the representatives of the nation, which have not only the right, but also the obligation to control the conduct of public activities.

In the literature has shaped a circumstance that the institutions of the European Communities create a supra-national power in order to cope with the problems which can resolve separately.

As such, parliamentary oversight is based on the idea of democracy and is exercised through interpellations, simple motions or censure motions.

The control exercised by parliaments on governments, by reference to the European Union's decision-making process, concerns both the control of compliance with the principles of subsidiarity and proportionality through the draft European Union legislative acts (role recognized in the Treaty of Lisbon) and the control on the draft national depositions to be expressed by the representatives of that state in the Council of the European Union, drafted by its own government, followed by mandate. So, in this latter category (participation in the decision-making process), parliaments can exercise a dual function.

In other words, the national parliamentary control in European affairs, which has as central objective the way of policy formulation and decision making at European level, specifies two ways that can be exercised by the national parliament: internally – by controlling the action Government in the Council, respectively at the European level – within the mechanisms prescribed by the Treaty of Lisbon and through the political dialogue with the European Commission.

In accordance with the forms and procedures of the parliamentary control of foreign policy has involved more firmly the idea that the inspection of subsidiarity by national parliaments should not involve a radical review of parliamentary procedures and structures.

In Romania, has been lodged a common commission for European Affairs at the Chamber of Deputies and the Senate.

By the decision of the Romanian Parliament no. 52/2006 [7] was the common commission for European Affairs under the Chamber of Deputies and the Senate, by transforming the commission for European integration, with effect from 1 January 2007, with the mandate for the duration of the validity of the Treaty of Accession of Romania and the Republic of Bulgaria in the European Union.

By the decision of the Romanian Parliament no. 11/2011 [8], it was decided to reform the existing system at that time, like murderous establishment, within the framework of the Parliament of two separate committees for European affairs, one of the Chamber of Deputies – on 13 April 2011 and the other to the Senate – on 3 March 2011. The commissions are supported by the structures of the technical journals within each parliamentary room:

- ✓ Parliamentary and Community Law Department of the Chamber of Deputies;
- ✓ European Affairs Division of the Senate;

3 By the Decision of the Chamber of Deputies no. 11/2011 [9] Established the Working Procedure and the Decision-Making Mechanism for the Exercise of Parliamentary Scrutiny of the Draft Legislative Acts of the European Union, Under the Provisions of the Treaty of Lisbon on the Role of National Parliaments

The parliamentary examination implies both the evaluation of the background of the legislative proposals and the consultation documents, including the positions of the Romanian Government towards them, as well as the verification of compliance with the principles of subsidiarity and proportionality of the legislative proposals eligible for the subsidiarity test, 2 of the Treaty of Lisbon.

The Committee on European Affairs of the Chamber of Deputies asks the Ministry of Foreign Affairs and – or the Ministry of the Ministry for the initial position of the Government on the draft legislative act or consultation document. Information provided by the Ministry of Foreign Affairs and – or by the relevant ministry, are immediately sent to the standing committees which have been consulted, drafting a draft opinion on the background of the document examined, and forward it to the Committee on European Affairs of the Chamber of Deputies.

Monitoring the harmonization of national legislation with European Union law requires the Government to submit annually to Parliament its legislative program, including draft laws transposing legal acts of the European Union. The Government also shows the parliament half-yearly progress transposition into national law of the legislation adopted at European Union level.

Note that in the framework of the cooperation relations between Parliament and the Government we are in the context of a traditional parliamentary control, by identifying information, the interpellation and monitoring the activity of the governmental institution.

4 Conclusions

Parliamentary oversight of the foreign policy of the executive is particularly noticeable when the current events of international life require either the adoption of laws or a common position of the Parliament or of the two specialized committees as well as the appeals, statements, interpellations and press releases presenting positions of the foreign policy committees or some of their members.

It is not rare that the members of the foreign policy committees have expressed stronger positions or, on the contrary, more nuanced than those of the Presidency, the Government or the Ministry of Foreign Affairs towards some international events, starting from the concrete reality determined by the greater freedom of expression and of the action that parliamentarians possess in accordance with their status as representatives of national sovereignty.

At the same time, the assumption of the responsibility for achieving an efficient external policy must be determined by finding the specific modalities to implement it through participation in major international parliamentary events, working meetings, information and observation missions, development of regional impact documents or worldwide.

The Government's obligation to inform the Parliament through processes, inform them of the reports, records, etc. The Government shall submit to the European Parliament, at the request of either in accordance with the constitutional rules in force, shall constitute a particularly important activity in connection with the control of the activity of the foreign policy of the government, all the more so as the monthly meetings were held with the factors of management within the Ministry of Foreign Affairs, for the current consultations on matters of topical interest relating to foreign policy and international relation.

Therefore, the questions and interpellations addressed to dignitaries within the Ministry of Foreign Affairs – ministers, state secretaries, directors, etc. is of particular significance because through these means of parliamentary control more information is obtained regarding the executive's foreign policy actions, or to elucidate certain allegations launched in various media or communication areas in connection with the foreign policy activity of the MA.

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Courts of Judgement of the Romanian Orthodox Church. A Living Testimony of Joining the Tradition With Novelty

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Resume

The institutions of Orthodox church law were less analyzed in the juridical state literature [1], for which reason this study suggests the analysis of the judgement court of the Romanian Orthodox Church, according to the state and church law. The subject it is not aimlessly, because the VIth Edition of *THE INTERNATIONAL CONFERENCE OF RIGHTS, EUROPEAN STUDIES AND INTERNATIONAL RELATIONS* offers the opportunity to evoke *European tradition, future and European vocation* as factors influencing state law and, at the same time, to see to what level the Church has managed to maintain the perfect balance between the stated concepts. In ecclesiastical [2] space, the canonical [3] tradition and church law perfectly blends with the evolution of profane law, because Orthodox church law and canons have a unique and own element, namely, *the Person of the Son of God made human* [4], who by the power of the Holy Spirit penetrates the legal text with grace. Thus, the text of church law, either it is canonical, statutory or regulation, produces not only legal effects, but also spiritual or charismatic effects. In this sense, a living expression of the joining work of tradition with novelty in the field of criminal procedural church law is the very theme of the present study, namely *The Courts of Judgement of the Romanian Orthodox Church*. In the following, we will analyze the state and church provisions regarding the existence, definition, composition and competence of these judicial courts, and at the end we will outline the natural course of the church process, in parallel with the state one.

Keywords: Canonical Regulations, Consistory, Church Judgment, Legal Definition, Componence, Competence.

1 General Aspects of the Courts of the Romanian Orthodox Church

The Romanian Constitution [5] stipulates at art. 29 para. (3): *Religious cults are free and organized according to their own statutes, according to the law*. Regarding the expression *according to their own statutes*, used by the fundamental law, it should be noted that *the Statute for the Organization and Functioning of the Romanian Orthodox Church* appears in the legal plane as a true *"Constitution"* of the Church from the perspective of its inner content. And, although it is not the highest normative act of the Romanian Orthodox Church at the top of the internal legislative pyramid, *the Status is the act of linking the canonical tradition with the assistance of the Holy Spirit on one hand and of the state and church authority on the other. Through the collaboration of the canonical tradition, through the assistance of the Holy Spirit and through the recognition given by the state authority, the Statute of the Romanian Orthodox Church enters the historical time and ecclesiastical space, producing legal effects*. One concretization of this collaboration is that the Statute of the Romanian Orthodox Church was recognized through H.G. no. 53/16 January 2008 [according to art. 17 par. (1) and (2) of the Cults Law].

Law no. 489/2006 [6], referring to the internal judicial organization of cults, states at art. 26 par. (1): *Cults can have their own organs of religious judgment for internal discipline issues, according to their own statutes and regulations*. From the above paragraph we conclude that, in addition to the possibility for cults to have their own courts of law, the state also recognizes the internal normative framework, which is the foundation of these organs. Moreover, paragraph 2 of the same article states that: *For internal discipline issues, statutory and canonical provisions are exclusively applicable*. Therefore, under the legal text law mentioned above, we observe, *as a rule*, the prevalence of statutory and canonical law to any other law, even state ones being.

However, in order to establish the limits of the application of the internal normative framework of the Romanian Orthodox Church, *as an exception*, par. (3) of the same art. 26 stipulates that: *The existence of its own juridical court does not remove the application of the law on contraventions and crimes in the juridical (state, s.n.) system*. As a consequence, to a person to whom the provisions of the Canonical Regulation apply, he will respond twice for an act that is qualified both as a deviation (in church criminal law) and as a crime (in state criminal law). For example, *Murder* is stated both in art. 16 of The Regulation of Canonical Authorities and in art. 188 of the state Penal Code.

The Statute of Romanian Orthodox Church [7] (the mentioned normative framework) specifies at art. 148 par. (1) that: *According to the Holy Canons and the tradition of the Romanian Orthodox Church, through the empowerment of the authority body (bishop or synod of bishops) the exercise of the judgement power is made through the consistorium, which instrument's and proposes decisions for approval to the respective authority body*. We observe two central ideas from the

statutory rule. *Primo*, the Romanian Orthodox Church Courts are called *consistories*. The consistory [8] can be defined as: *the court exercising the power of judgment, from the entrustment of the bishop or the synod of bishops, and proposes to them decisions for approval*. *Secundo*, the decisions of the consistories do not have power by themselves, as the decisions must be approved by the bishop or the synod of bishops.

The Regulation of Canonical Authorities [9] states at art. 46 par. (1), the following types of consistories:

1. For *Judgment in first instance* of the case: The Protopresbiterial Consistory, The Eparchial Consistory, The Monachal Eparchial Consistory;
2. For *Judgment in appeal* of the case: The Metropolitan Consistory, The Monachal Metropolitan Consistory;
3. For *Judgment in recourse* of the case: The Eparchial Consistory, The Metropolitan Consistory, The Monachal Metropolitan Consistory, The Higher Church Consistory, The Higher Monachal Consistory.

2 Specific Theoretical Aspects Regarding the Judgement Courts of the Romanian Orthodox Church

The Regulation of Canonical Authorities *defines* the ecclesiastical courts, establishes *the componence* and *competence* of each and at the same time points out certain *relevant features*.

2.1 *The Protopresbiterial Consistory*

The legal definition of this type of court can be found in art. 49 para. (1) of The Regulations of Canonical Authorities and states as follows: *The Protopresbiterial Consistory is the disciplinary and judgement court for non-clerical staff (the lay employees of cult units in a protopresbitery) and the reconciliation body for conflicts among clergy in a protopresbitery, as well as among parishes, clergy, and non-clerical staff*. From the legal text we point out two essential features, for this type of institution:

1. It is a trial court (or contestation);
2. It is a reconciliation court (or mediation). For this reason, The Protopresbiterial Court is also called *court of peace*, and its president is a *peace judge* [10]. We can say that in this hypothesis it is, not a proper trial, but an authentic mediation, carried out by the peace mediator. There is a particularly interesting aspect here. In the state mediation process, as a result of committing a crime, art. 5 par. (3) of the Mediation Law [11] provides that: *Mediation can be done by one or more mediators*. Also, according to art. 6 of the same law we find that: *the judicial and arbitral authorities, as well as other authorities with jurisdictional powers, inform the parties about the possibility and the*

advantages of using the mediation procedure and advise them to resort to this way to resolve the conflicts between them.

As a consequence, the state juridical body only ratifies the mediation agreement concluded between the parties. In the diametrically opposed plane, in the process of church mediation, the members of the consistory, they themselves are directly involved in ending the conflict by reconciling the parties.

In concreto, the main activity of the consistory members is that of *mediating*, as is apparent from the normative text [according to art. 50 lit. a) of The Regulation of Canonical Authorities *the Protopresbiterial consistory mediates conflicts among the church staff*]. We can even point out a canonical and theological substantiation of church mediation, given even by the Savior Christ in His preaching on Mount Sinai: *Blessed are the peace-makers, for those sons of God will be called* [12].

The componence of The Protopresbiterial Consistory is, according to art. 49 para. (2) of the Regulations of the Canonical Authorities, the following: *a clerical president, two clergy members, a lay member (church singer)*. All members are appointed by the chiriarch (bishop) for a four-year term and they belong to the territory of the protopresbitery. The clergy members and president must have at least a second degree in priesthood, PhD, masters or a degree in theology and canonical-juridical knowledge. The church singer member participates in a trial case concerning another church singer. According to par. (2) of the same article: *The Protopresbiterial consistory also has a registrar proposed by the president and appointed by the chiriarch (bishop)* [13].

The competence of The Protopresbiterial Consistory is multiple. According to art. 49 para. (1) of the Regulation, this court has a *personal competence*, given by the quality of the persons for whom mediation is being applied or which are being tried. Thus, they may be: *non-clerical staff* (the lay employees of the cult units), *clergy staff* (priests or deacons), *parishioners* (the faithful of a parish). From the provisions of par. (1) of the above-mentioned article we also deduce a *territorial competence*, given by the fact that cults units, clerical or non-clerical staff and parish members are assigned to a *zonal protopresbitery*. Also, the territorial competence is pointed out by the provisions of art. 49 para. (2) of the Regulation, because the members of The Protopresbiterial Consistory themselves (president, clergy, singer, registrar) belong to the protopresbitery of that territory.

The provisions of art. 50 of the Regulation of Canonical Authorities also reveals a *functional competence*, oriented on two types of procedures:

- *The mediation procedure (or reconciliation)*. According to art. 50 let. a), *The Protopresbiterial consistory mediates the misunderstandings among church staff (clerical and neclerical)*. Let. b) state's: *settling misunderstandings between parishes members and church staff (clerical and neclerical) personnel*. Furthermore, let c) stipulates: *the settlement of misunderstandings between parishes members and clergy in connection with the payment of contributions for religious services, or the refusal of giving the religious services, as well as the*

settlement of personal conflicts. Let. d) stipulates: *settling misunderstandings in the clerical staff families*.

- *The trial procedure (or litigation)*, which takes over the provisions of art. 50 let. a) to d) of the Regulation (referred to above), applying them in trial terms. It should be noticed that trial is applied when mediation is no longer possible. Last but not least, according to art. 50 let. e) *The Protopresbiterial Consistory judges in first instance the non-clerical staff for disciplinary deviation*. This is, of course, a first instance trial on the case.

2.2 *The Eparchial Consistory*

The legal definition of this court can be found in art. 52 par. (1) of the Regulation, which stipulates the following: *The eparchial conscription is a disciplinary and judgment court for the misconduct of the myrtle clergy, teachers of pre-university and university education, students from the orthodox theology faculties and churchmen, which makes decisions about sanctioning them*. As an essential feature, we note that this court is *a litigation or trial one*, and it does not have the object of mediation, as in the case with of The Protopresbiterial Consistory.

The componence of the eparchial consistory is, according to art. 49 of the Regulation, the following: *3 full members* (priests, with the second degree, PhD, master or graduates or theology who have canonical-juridical knowledge and who improve at the courses organized by the Romanian Patriarchy), *2 supplementary members*, *one president* [according to art. 49 para. (4) of the Regulation] and *a clerical registrar* [preferably licensed in canon law, cf. 49 (5)]. When judging cases of non-clerical personnel, in which the sanction of the deposition was applied by The Protopresbiterial Consistory, *a church singer* can also attend, but he is approved by the chiriarch (according to art. 49 para. (6) of the Regulation].

The competence of the eparchial consistory is projected on several planes. Thus, according to art. 52 par. (1), this court has a *personal competence*, given by the quality of the persons being tried. Thus, they may be: *pre-university and university teachers, students from orthodox theology faculties and lay from church administration*. The provisions of para. (2) of the same article, according to which *the eparchial consistory functions at each eparchy*, reveals a *territorial competence*, because the educational establishments where the teachers or students are operating are circumscribed to the territorial eparchy. Moreover, as in the case of the protopresbiterial consistory, the territorial competence is also given by the bounding of the members of the eparchial consistory themselves to the eparchy of the area.

The Eparchial Consistory also possesses a *functional competence*, strictly specialized in litigation or trial proceedings, but oriented in parallel plan, as following:

- According to art. 46 par. (1) point 1 lit. b) of the Regulation, The Eparchial Consistory *is the court of law on firs instance*, for the causes of the myrtle clergy, teachers, theology students;
- According to art. 46 par. (1) point 3 lit. a) The Eparchial Consistory is a *court of recourse*, for cases of dismissal of church singers. It should be noted that in the criminal procedural church law, *recourse is an ordinary way of attack* for singers punished with dismissal.

The Eparchial court also has a section for judging the monks and nuns in the monasteries, namely **The Monachal Eparchial Consistory**. Because in this instance the issues related to: legal definition, composition and competence are almost identical to those of the eparchial consistory, *we will summarize on specific elements*.

Concerning **the componence** of The Monachal Eparchial Consistory, we specify that *the members are appointed by the chiriarch (bishop) of the archimandrites* [14] *and the protosingheles* [15] *in the diocese* [according to art. 53 par. (3) of the Regulation], of course being clergy monks. *A registrar* from the monastic clergy is present in the trial [according to art. 53 par. (5)], and when a nun is judged, *two abbesses* can also attend the meeting [according to art. 53 par. (6)], which are proposed by the eparchial exarch [16]. *The conditions of education and training* are almost identical to those imposed to the members of the eparchial consistory, but *as a specific condition*, in the case of the of the monk members, *the spiritual life is required* [according to art. 53 par. (3) of the Regulation]. This is a concrete example of combining tradition with novelty in church criminal procedural law, because the spiritual life is a condition of admissibility as a member of the monachal judgement court. Moreover, *the spiritual and moral condition produces legal effects in the sphere of the criminal procedural law and even the state criminal law*.

Regarding **the competence** of the Monachal Eparchial Consistory, we specify that it possesses a *functional competence*, judging *of first trial* the cases of the monks, but also has a *personal competence*, since only monks are judged in this court [according to art. 46 par. (1) point 1 lit. c) of the Regulation]. The consistory also has also a *territorial competence*, as it operates at every eparchy (diocese or archdiocese) and each monastery is territorially assigned to it. Also, regarding the territorial competence, please note that, according to art. 54 of the Regulation: *The dioceses who do not have enough archimandrite and protosingheles for the establishment of the monachal eparchial consistory, may, with the consent of the metropolitan of the place, call to a monachal eparchial consistory of a neighboring diocese*.

2.3 *The Metropolitan Consistory*

The legal definition, contained in art. 55 par. (1) of The Regulations of Canonical Authorities, stipulates that it is: *disciplinary and judgment court for the recourse of the clergy of the Metropolitan dioceses, who are sanctioned with clerical deposition, for the appeals against the defroking decisions, for the causes of withdrawal of the blessing of the teachers of pre-university and university education and for the causes of excommunication*.

The componence of the metropolitan consistory is, according to art. 55 par. (4) of the Regulation, the following: *3-5 members and two supplementary members, approved by the Metropolitan Synod*, *among the priests appointed for a period of 4 years by the Eparchial meetings of Metropolitan Dioceses, other than those appointed in the eparchial consistory*. We note that in this instance the members are no longer directly elected by the Eparchial meeting, as in the case of the forming the eparchial consistory. Also, this componence raises for the first time, as is normal, the problem of church criminal procedural law incompatibility. Thus: *No priest, deacon or lay, member of any church discipline body, can take part in the settlement of the cases whose decision has once taken part in a lower court* [according to art. 202 lit. d) of The Statute of Romanian Orthodox Church] [17]. The incompatibility of the church criminal procedural law is symmetrically similar to the state criminal procedural law, because art. 64 par. (3) from Penal Code stipulates that: *The judge who participated in the trial of a case can no longer participate in the same case in a retrial or in the attack way of the case*. Furthermore, the metropolitan consistory also has *a president and a registrar*, appointed by the metropolitan's decision [according to art. 55 par. (5) of the Regulation]. The conditions of education and training apply exactly as to the eparchial consistory.

The competence of the metropolitan consistory is *a personal one*, because the priests and deacons and educators in pre-university and university education are judged here [according to art. 55 par. (1)]. The consistory also possesses *territorial competence*, because several parishes and monasteries are subordinated to a protopresbitery, several protopresbiteries are subordinated to a diocese, and several dioceses to a metropolis. Thus art. 55 par. (1) of the Regulation uses the syntagma of the *subordinated diocese*, this designates territorial jurisdiction in the field of church criminal procedural law. There is also a *functional competence*, as *the metropolitan consistory judges in the appeals the causes of the clergy of the myrrh, sanctioned with the defroking* [according to art. 46 par. (1) point 2 lit. a) of the Regulation], and *it also judges in recourse the causes of the myrtle clergy sanctioned with the deposition, of the teachers and of the lay of the church administration* [according to art. 46 par. (1) point 3 lit. b) of the Regulation].

The metropolitan consistory possesses, as well, a judging section of the clergy monks, namely **The Monachal Metropolitan Consistory**. **The legal definition** of the court is given by art. 56 par. (1) of the Regulation, which states that *it is a disciplinary and judgement court for monastic clergy*. **The compo-**

nence of The Metropolitan Monachal Consistory is the same as The Metropolitan Consistory, and the conditions of education and training also apply accordingly. Also, members of The Metropolitan Monachal Consistory, archimandrites and protosingheli, fall under the provisions of *the incompatibility of the church criminal procedural law* [according to article 56 par. (4), second thesis, of the Regulation]. The appointment of the president and of the registrar is made by the metropolitan through decision [according to art. 56 par. (5)].

The competence of The Monachal Metropolitan Consistory is *a personal one*, judging the causes of the *clergy monks*. The competence is also *a territorial one*, because *the consistory functions at every metropoly* [according to art. 56 par. (4) of the Regulation], and the metropoly has in it's configuration subordinate dioceses [according to art. 56 par. (1)]. Lastly, we notice a *functional competence*, because *the court judges in appeal the causes of the clergy monks sanctioned by the defroking*, but it *also judges in recourse the causes of the clergy monks sanctioned by the deposition* [according to art. 46 paragraph (1) point 3 lit. c) of the Regulation].

2.4 *The Higher Church Consistory*

The legal definition of The Higher Church Consistory and of The Higher Monachal Church Consistory stipulates that both: *are the highest disciplinary and judgment courts for the clergy of the myrtle or the monk* [according to art. 57 par. (1) of the Regulation]. **The componence** of both courts is symmetrically similar, namely: *6 full members and 6 supplementary members*, and *one president and one registrar* for each court [according to art. 57 par. (2) and (3) of the Regulation]. Presidents and registrars are appointed by decision of the Patriarch of Romania [according to art 57 par. (5)] [18].

The competence of the Higher Church Consistory and of the Higher Monachal Church Consistory is divided, for each court. Thus, both consistories have *personal competence*, as the Higher Church Consistory judges *the myrtle clergy* [priests or deacons, according to art. 57 par. (1) of the Regulation], while *the monastic clergy* (priests or deacons of the monks) are judged at the Higher Monachal Church Consistory. The two consistories have also a *territorial competence* because they operate *throughout all of Romania* [according to art. 57 par. (2) and (3), thesis I of the Regulation). Also, in the matter of territorial competence, it should be noted that in case of judging causes of defroking, pronounced by an Eparchial Consistory and maintained by a Metropolitan Consistory outside the country, a clergy member of these consistories assists as a member, him being appointed by the hierarch of the diocese or of the Metropolitan Synodof that territory [according to art. 57 par. (4)]. The aforementioned courts also have a *functional competence*, because the courts *judge in recourse* the decisions taken by an Eparchial Consistory or a Monachal Eparchial Consistory and maintained by a Metropolitan Consistory or Monachal Metropolitan Consistory [according to art. 57 par. (1) of the Regulation].

3 Comparative Practical Aspects of Church and State Criminal Judgment

HYPOTHESIS: The situation in which a church singer carries out a negative act (offense/offense), incidental to both criminal and procedural criminal laws. The natural course of the two types of judgments is as follows:

THE CRIMINAL CHURCH JUDGEMENT	**THE CRIMINAL STATE JUDGEMENT**
JUDGMENT IN FIRST INSTANCE **THE CASE OF THE CHURCH SINGER** **[Cf. art. 46 par. (1) point 1 lit. a) of the Regulation]**	**JUDGMENT IN FIRST INSTANCE** **THE CASE OF THE ROMANIAN CITIZEN** **(church singer of Romanian Orthodox Church)** **[according to art. 38 para. (2) Crim. proc. Code]**
THE DEED COMMITTED: DEVIATION [according to art. 8 par. (1) of the Regulation]	**THE DEED COMMITTED: CRIMINAL OFFENCE [according to art. 15 par. (1) of the Penal Code]**
AUTHOR: CHURCH SINGER, judged on first trial for the MORAL DEVIATION of THIEVERY [according to art. 22 of the Regulation]	**AUTHOR: ROMANIAN CITIZEN (religious singer of the Romanian Orthodox Church), judged on first trial for the CRIMINAL OFFENCE of THIEVERY [according to art. 228 Penal Code]**
Court of judgement: PROTOPRESBITERIAL CONSISTORY. THE COMPETENCE of the protopresbiterial consistory is: • **A PERSONAL ONE:** the author has the quality of non-clerical employee's staff of the cult unit [according to art. 49 para. (1) of the Regulation]. The author is therefore **QUALIFIED;** • **A MATERIAL ONE (**determined by personal competence): the consistory judges non-clerical staff for disciplinary deviation [according to art. 50 lit. e) of the	**Court of judgement: COURT. THE COMPETENCE** of the court is: • **PERSONAL** competence is not involved • **MATERIAL:** The Court judges all criminal offenses, except those provided by law in the jurisdiction of other courts [according to art. 35 par. (1) Criminal procedure Code]. **FULL COMPETENCE;** • **TERRITORIAL:** given by the criteria for determining the incidence of territoriality [according to art. 41 and 42 Criminal procedure Code];

Regulation]. **FULL COMPETENCE** [19]**;** • **A TERRITORIAL ONE:** Determined by the allocation of the church to a zonal protopresbitery (*e.g.*, each church in Sector 6 of Bucharest is territorially assigned to the Sector 6 Protopresbitery). The author's address is not relevant; • **A FUNCTIONAL ONE:** the consistory judges on first trial the cause of the church singer [according to art. 46 par. (1) point 1 let. a) of the Regulation].	• **FUNCTIONAL:** The Court judges in first instance [according to art. 35 par. (1) Criminal procedure Code]. **Note:** The church singer when committing an offense, which is classified as a criminal offense in state criminal law, is seen by state procedural criminal law as an unqualified subject of the thievery criminal offense.
THE CRIMINAL CHURCH JUDGEMENT	**THE CRIMINAL STATE JUDGEMENT**
JUDGING IN RECOURSE **THE CAUSE OF THE CHURCH SINGER** **[according to art. 46 par. (1) point 3 lit. a) of the Regulation]**	**JUDGING IN APPEAL** **THE CASE OF THE ROMANIAN CITIZEN (church singer of Romanian Orthodox Church)** **[according to art. 38 para. (2) Criminal procedure Code]**
Court of Judgement: EPARHIAL CONSISTORY **THE COMPETENCE of the Eparchial Consistory is:** • **A PERSONAL ONE:** the eparchial consistory judges the cases of the deposition of the church singers [according to art 46 par. (1) point 3 let. a) of the Regulation]; • **A TERRITORIAL ONE:** Several protopresbitery are assigned to the territorial eparchy (e.g. if a singer is sanctioned by Babadag Protopresbitery, he may request the case to be tried in the appeal to the Eparchial Consistory of Tulcea); **Note 1:** The ecclesiastical administration copies the state administration with regard to territorial assignment (according to	**Court of Judgement: THE COURT OF APPEAL** **THE COMPETENCE of the Court of Appeal is:** • **A FUNCTIONAL ONE:** The Court of Appeal judges appeals against criminal judgments pronounced at first instance by courts and tribunals [according to art. 38 para. (2) Criminal procedure Code]. **Note 1:** The territorial jurisdiction of the Buftea Court determines the functional and territorial jurisdiction of the Bucharest Court of Appeal. **Note 2:** The Court of Appeal does not have territorial jurisdiction, such as the Eparchial Consistory, although it resolves competence conflict's [according to art. 38 para. (3) Criminal procedure Code].

the canonical principle of territorial proximity and according to can. 17 of the Fourth Ecumenical Council]. **Note 2:** Because of the canonical principle of territorial proximity, church consistories do not have conflicts of competence! • **A FUNCTIONAL ONE**: the consistory judges in recourse the cause of deposition [according to art. 46 par. (1) point 3 lit. a) of the Regulation]. **Note 3:** Is the last attacking way against the decision of deposition! It's an ordinary way of attack.	**Note 3:** It is not the last attacking way against the sentence! It's an ordinary way of attack.
SANCTION: Deposition [according to art. 22 lit. b) of the Regulation]	**SANCTION: imprisonment or fine [according to art. 228 par. (1) Criminal procedure Code]**

CRIMINAL STATE JUDGEMENT
EXTRAORDINARY WAY'S OF ATTACKS **FOR THE CASE OF ROMANIAN CITIZEN (church singer of Romanian Orthodox Church)** **CONVICTED IN FIRST INSTANCE AND APPEAL**
Extraordinary ways of attack (the appeal in annulment, the appeal in cassation and the review of the judgment) shall be exercised only for the reasons expressly provided by the legislator for each of them.

4 Conclusions

From the presented exposition we observe that ecclesiastical judgement organisms are very similar to those of the state. Also, since the issues dealt, regarding the legal definition, composition and competence of Romanian Orthodox courts, have not been dealt with in the literature of canon law and even less in profane legal literature, this year's conference volume may once again be proud of a field of new legal analysis. Moreover, it is worth noting that the Romanian Orthodox judgement courts want to be organized according to the state model, in formal and institutional terms. The desire to approach and to find a common language in the field of church and state criminal judgement can be a new way of juridical analysis in the sense of applying the 17th Canon of the Fourth Ecumenical Council [20], which states that: *if a city would renew the royal power, then to the political and communal arrangements should follow the church parishes* [21]. By the mode of practical organization and by the theoretical analysis of the Romanian Orthodox courts, the tradition of orthodox church law

comes into symbiosis with the modern state law system. However, we can not forget that in the past, in the VIth century, there were patriarchal courts, as organisms that were both church and non-church judgement courts. These were *the highest central courts of the Byzantine State* [22]. Therefore, we can observe the power and importance of church judgement courts in the past, although today these courts are passed into a shadow of cone [23]. We can say even more, namely that the ecclesiastical law itself contributes to the European vocation of the Romanian state, by the special consideration it gives to the individual [24] as a subject of ecclesiastical rights and obligations. Orthodox church law shows that *the individual (human) has a vocation to eternity*, *to the divine kingdom*.

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[2] The term *ecclesiastical* derives from the Greek εκκλησία (fr. Église) and means the church.

[3] The term *canon* comes from the Greek κανον and defines a rule or norm of church conduct.

[4] According to John I, 14: And the Word became flesh and dwelt among us, and we saw His glory, glorious as the One-Born of the Father, full of grace and truth.

[5] Revised by Law no. 429/2003 and republished in the Official Gazette of Romania, Part I, no. 758/29 October 2003.

[6] Law no. 489/2006 on religious freedom and the general regime of denominations, published in the Official Gazette of Romania, Part I, no. 11/8 January 2007.

[7] The Statute for the Organization and Functioning of the Romanian Orthodox Church was approved by the Holy Synod through the decision no. 4768/28 November 2007 and, under Law no. 489/2006 on religious freedom and the general regime of denominations, was recognized by the Government of Romania through H.G. no. 53/16 January 2008, being published in the Official Gazette of Romania no. 50/22 January 2008.

[8] The term consistory comes from the Latin consistorium, derived from the verb consistere (to stand together) and indicated, within

the Roman Empire, the council of the emperor. Over time, the term has experienced a long semantic evolution, and can be translated by: meeting, gadering, council, meeting place or room, etc.

[9] With the full name of: The Rules of the Canonical Disciplinary Authorities and of the Courts of Justice of the Romanian Orthodox Church. This act was approved in the working session of the Holy Synod on February 5-6, 2015 and is in force since February 6, 2015. We will name it in the present study The Regulation of Canonical Authorities.

[10] The function is somewhat similar to that of the peace judges recalled by art. 151 par. (1) of the Constitution of the Kingdom of Belgium. See in this respect: Prof. univ. dr. Muraru, I. *Constituția Regatului Belgiei. Prezentare generală* (Constitution of the Kingdom of Belgium. Overview), in *Codex constituțional. Vol. Constituțiile statelor membre ale Uniunii Europene* (Constitutional Codex Vol. Constitutions of the Member States of the European Union), p. 90, source: http://codex.just.ro/Tari/Download/BE.

[11] Law no. 196/2006 regarding the mediation and organization of the mediator profession, published in the Official Gazette of Romania, Part I, no. May 441/22, 2006, updated.

[12] According to Matthew 5, 9. See for edification: The Bible or Holy Scripture, Bucharest: EIBMBOR, 2005, p. 1100.

[13] According to the canons: 39 apostolic, 9 Synod IV Eum., 14 Sardica, decisions of The Holy Synod: 2455/8 June 1949, 4238/8 July 1953, 3505/15 July 1998, 4768/28 November 2007, 381/17 February 2011.

[14] The term archimandrite comes from the Greek άρχιμανδρίτης and it translates literally the leader of the flock. So, the archimandrite is the ruler of the speaking flock or of the monastery.

[15] The word protosingheles comes from the Greek πρῶτοσύγελλος and means the first of the singles.

[16] The eparchial exarch is the inspector of the monasteries in the territory of diocese and, at the trial, acts as an accuser or prosecutor.

[17] Being in the spirit of the concepts of tradition, novelty and European vocation, evoked by the VI edition of *The International Conference Of Rights, European Studies And International Relations*, we wish to express the following point: art. a) of the Statute of the Romanian Orthodox Church states that: In the entire Romanian Orthodox Church no one can at the same time be a member of The Eparchial Consistory and of the Monachal Eparchial Consistory, of the Metropolitan Consistory or of the Superior Church Consistory. At let. c) it is stipulated that: no one may at the same time be the eparchial Vicar, eparchial counsellor, eparchial inspector, eparchial secretary, archpriest and the member of the church Consistories. Let. d) stipulates that: members of the Protopresbiterial Consistory,

of the Eparchial Consistory, of the Monachal Eparchial Consistory, of the Metropolitan Consistory, of the Monachal Metropolitan Consistory and of the Superior Church Consistory can't be elected members of the respective bodies those who are related, to the fourth degree of blood and second of alliance to the chiriarch. Also, art. 202 let. a) to e) stipulates that: No priest, deacon or ley, member of any deliberative, executive, administrative, control, or discipline body, can take part in solving the following causes: their own cause or those that can bring personal damage or gain; the causes of the relatives, to the fourth degree of blood or the second to the alliance; the causes of parents or adoptive children, and the causes of those under their tutoring or caretaking; the causes of witnesses, prosecutors, experts or investigators; the cases to whose decision they once took part in a lower court. Since the articles stated above concern the church criminal procedural aspect, it would have been advisable to regulate the issue of the incompatibility of church criminal procedural law, as it was normal in the Rules of Canonical Disciplinary Authorities and Courts of the Romanian Orthodox Church, and not in the Statute of the Romanian Orthodox Church. Why this observation? Because the Romanian Orthodox Church Statute has a constitutional nature (it is a "Constitution" of the Church in its relationship with the state), and the Regulation is nothing more than a criminal code and a code of church criminal procedure.

[18] According to the decisions of the Holy Synod: no. 208/2 July 1926, 2455/8 June 1949, 381/17 February 2011, 6270/21 July 2011, 8561/24-25 October 2011.

[19] See prof. univ. dr. Paraschiv, C.-S. (2017). *Drept procesual penal* (Criminal Procedure), 2nd edition, Bucharest: Hamangiu Publishing House, p. 45, and prof. univ. dr. Zarafiu, A. (2013). *Drept procesual penal* (Criminal Procedure), Bucharest: C.H. Beck Publishing House, p. 204.

[20] The term ecumenical is from the from the Greek οἰκουμένη. The synod was held in Chalcedon in 451. See, prof. univ. dr. Răмureanu, I. (2005). Universal Church History, 2nd edition, Bucharest: EIBMBOR Publishing House, p. 112.

[21] Archdeacon prof. univ. dr. Floca, I.N. (2005). *Canoanele Bisericii Ortodoxe. Note și comentarii* (Canons of the Orthodox Church. Notes and Comments), Sibiu: Andreiană Publishing House, p. 96.

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[23] Anti-canonical attitude is present among many lawyers about the existence and importance of church law in relation to the state. See

in this sense: Harosa, L.-M. (2013). *Drept canonic* (Canonical Law), Bucharest: Universul Juridic Publishing House, pp. 19-20.

[24] In Orthodox Theology the human is an icon of the Most Holy Trinity on earth. See Rev. Acad. Stăniloae, D. (1995). *Chipul nemuritor al lui Dumnezeu* (The Immortal Face of God), Bucharest: Cristal Publishing House, p. 214. Man, as a living icon of the Holy Trinity on earth, has a mind, a word and a spirit. The mind is the image of the Father, the word is the image of Christ, and the living spirit is the image of the Holy Spirit. See in this sense: Ilie, A.C. (2004). *Ghiduri spirituale pentru temporalitate și eternitate* (Spiritual Guidelines for Temporality and Eternity), Cluj-Napoca: Teognost Publishing House, p. 176.

Aspects Related to the Right to Freedom of Religion Within the CEDO Jurisprudence. Legality, Neutrality and National Characteristics

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Abstract

Analysing the jurisprudence of the European Court of Human Rights (hereinafter called *CEDO*), we can observe that the right to freedom of religion is manifested in two main directions: on the one hand, CEDO doesn't force the Member States to adopt a unitary model of the legal framework for the manifestation of religious freedom; on the other hand, CEDO carefully oversees the way in which the states interfere and act in the field of religious freedom, where there have been breaches of art. 9 in the European Convention of Human Rights (hereinafter called *the Convention*).

This dual perspective mentioned above indicates the important role that freedom of expression of religion has in the contemporary democratic society and in the current sphere of justice.

Keywords: human rights, religious freedom, CEDO jurisprudence, international law.

1 Introduction

Starting with the revolution and illuminist-humanist reforms, the subject of human rights and liberties have been a continuous preoccupation, especially in the field of social sciences. In particular in the legal space, affirming and guaranteeing the human rights and liberties have known, in the last centuries, a

significant ascension, both nationally and internationally. This can be currently proven and is reflected both through the varied and complex legislation in the field, and through a rich jurisprudence of the courts of law.

In the context of affirmed social values and guaranteed by the applicable international legislation, a significant role had and has the right to freedom of religion.

In the following lines, we intend to approach and analyse the position that CEDO took, in its jurisprudence, to the human right to religious freedom, respectively how this institution with international specificities understood to speak in case of disputes with regard to breaching and guaranteeing this right.

2 Art. 9 of the Convention

In the text of the Convention [1], the term "religion" appears multiple times. Thus, in art. 14, the legislator mentions the interdiction of discriminating for religious grounds, an aspect which affirms the important social role of religious manifestations [2]. The problem of religious discrimination is mentioned again in the text of art. 1 par. (1) of the Protocol no. 12 to the Convention.

In art. 2 of the additional Protocol, the right of the parents to ensure the children's training and/or education is mentioned, taking into account their religious and philosophical convictions [3]. It is noted that the text of the above-mentioned article does not impose a certain religion or philosophical orientation at national level, but states and guarantees the right of the parents to have the freedom to raise their children in agreement with the religion that they (the parents) share.

This liberty recognized to parents is particularized depending on the national characteristics and especially in tight correlation with the level of the child's psychic capacity development. The influence of parents is a decreasing one in relation to the child's development with regard to rationality, the capacity to choose and the moral autonomy. At the same time, the article mentioned does not offer any perspective with regard to the way in which the internal legislation should regulate the manner of exercising the religious freedom.

A clarification with regard to religious freedom is given by art. 9 of the Convention, which regulates the freedom of thought, of consciousness and of religion [4]. In the two paragraphs, the article mentions the three human freedoms: the freedom to think, of consciousness and of religion [5].

According to the respective law text, based on the right to religious freedom, the citizen can express its religious freedom "individually, collectively, in public or in private, by cult, education and different practices or rituals". The forms listed are not presented for limitation purposes, but have a general character, confirmed by the fact that religious freedom cannot be submitted to restrictions. Moreover, based on the same right, a person also has the liberty to change one's religious belief, without being restricted by anything in this sense. Thus, through par. (1) of art. 9, the right to religious liberty receives a legal, universal and mandatory character, for the nationals and for the states they are part of. Moreover, based on

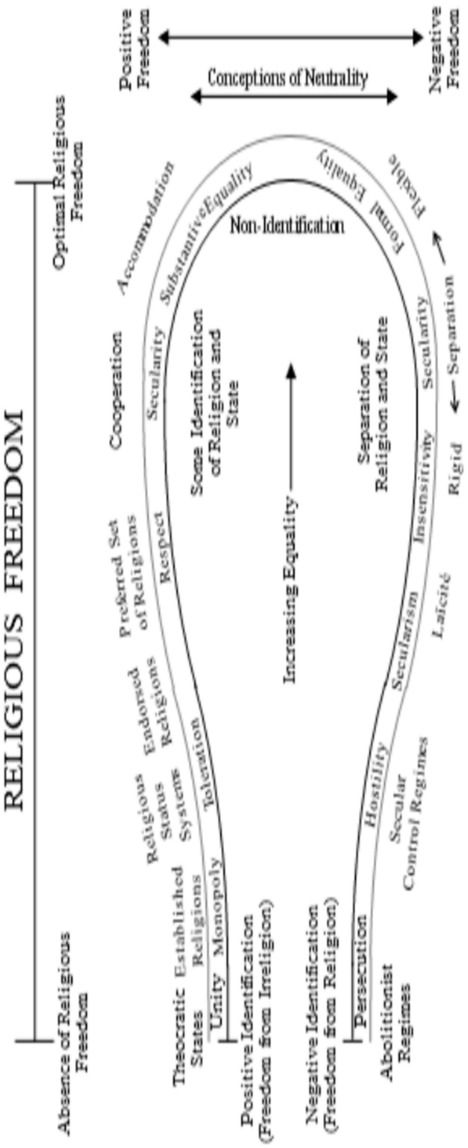
this Article of the Convention, CEDO is legally invested to solve mentioned disputes, which have the object of breaching the right to religious freedom.

It must be mentioned that, in par. (2) of art. 9, an exception is made from the ones regulated in the first paragraph, in the sense that the legislator understood that the only hypothesis in which the religious freedom might be limited or restrained is that in which the manifestation of this freedom would "touch the public safety, the protection of the order, of health, of public morale, of their rights and liberties". In the context of social values and the principles promoted by democracy, we consider this mention (made by the legislator, in par. 2) to be important and necessary, because it has the role to establish a significant balance between the rights and obligations that the manifestation of religious freedom can give birth to, at a national level. Of course, reported to the national legislation, art. 9 gives the states both negative obligations, and positive obligations. If in the first case, it is about the obligation of the national legislator to not breach the manifestation of the right to religious freedom, in the second situation it is about the responsibility of the State with regard to ensuring the social and legal climate necessary and favourable, which ensures citizens the right to express and exteriorize their belief and religious convictions.

3 CEDO Jurisprudence and Its Position Towards the National Specificities of the Regulation for Freedom of Religion

We have noticed, from the ones presented above, that, through its articles, the Convention does not "obligate" any state to adhere to a certain "model" with regard to regulating the manifestation of freedom of religion of its citizens. The negative and positive obligations which we mentioned above have a general character; they do not interfere under any circumstances in the national legislation about the regulation of religious freedom. A pragmatic proof in this sense is the national legal diversity that currently exists in Europe, with regard to the relation state-church [6].

The following diagram [7] describes the current trends with regard to the relation state-church:



However, although it does not impose a manner of internal regulation of religious freedom, CEDO has monitored and continues to monitor how the state legally regulate and actively involve in affirming the human right to freedom of religion. This is proven firstly by the rich jurisprudence in the field. [8]. Based on this jurisprudence, it is necessary to make some specifications.

CEDO established that the autonomy of a religious community is indispensable to pluralism and is a mark of the protection system that the state must provide with regard to religious freedom [9]. In this sense, the arbitrary interferences of the state are excluded in the religious communities' activity, including with regard to the exercise of the power to register the religious communities.

Moreover, it was claimed that religious freedom is an essential element in believers' identity and in their conception about life. In this sense, although religious freedom is in tight connection with the human inner world, it however implies openness towards religious manifestation. Consequently, manifesting a religion implies trying to convince other people, otherwise the freedom to change religion or conviction would be worthless [10].

Starting with the year 2000, CEDO introduced the concept of neutrality, represented as a guarantee of community religious freedom, compared to the state activity. This neutrality also has the role to guarantee religious autonomy [11].

Although it affirms the freedom of states in regulating the freedom to manifest religion depending on the traditional and historical specificities, however, it interfered in situations in which the autonomy of a religious community was not recognized [12].

At the same time, CEDO also got involved in defining the expression "religious convictions" and in particularizing it compared to other conviction and ideas. Thus, it was stated that the characteristics of "religious convictions" are strength, reliability, coherence and importance of points of view [13]. Moreover, there was a difference between "religious convictions" and "personal motivations". We bring forth the conclusion reached in a cause, in which the claimant funded its refusal to move the burial spot of a relative for religious reasons: "taking into account the fact that the behaviour of the claimant has a strong personal motivation, the judges did not consider it is a manifestation of a religion in the sense in which it can be construed as the essential and coherent expression of the personal religious convictions" [14].

In another dispute, CEDO defined the term "church", used to name a religion or a religious group: "a church is an organized religious community, based on identical convictions or mostly similar" [15]. From the given definition, the result is that the particularity of a religious cult is its organization and that its followers share the same convictions.

CEDO also pronounced itself with regard to the legal regulation of the relation between state authorities and religious communities with fundamentalist specificities. In this sense, in the context of values and principles promoted and defended by democracy, it concluded that it is not possible that a religious law becomes a civil law, because pluralism and democracy stop the situations in which officially recognized religions are opposed to the entire country [16].

Least, but not last, in another cause, the constraints were identified that the national legislations must impose to state churches and smaller religious communities. In this sense, the conclusion is that the obligations and constraints are directly proportional to the received privileges and rights [17].

4 Neutrality, Autonomy and Discrimination

These are three very important terms that resume (we might say) the entire CEDO perspective with regard to religious freedom, as well as the way in which member states regulate the legal cult regimen. As mentioned, although it affirms its neutrality, by jurisprudence in the field, CEDO has proven a special interest towards monitoring the way in which member states report to the cult autonomy and to preventing religious discrimination cases. A recent example in this sense is represented by the point of view that the Great Chamber has given in the case Vera Egenberger against Evangelisches Werk für Diakonie und Entwicklung eV, Germany.

The decision of April 17th, 2018, is of interest because it brings into discussion two very important aspects: the problem of cult autonomy and the way in which it relates to religious discrimination cases.

The mentioned cause has the object of soling a dispute found at the Federal Court for Work Disputes in Germany. The subjects of the dispute are Vera Egenberger, a lady of German nationality, and the Protestant Church in Germany.

In fact, in November 2012, the Evangelical Activity for Mission and Development within the Protestant Church of Germany published a job offer, for a limited period, within a project that had the object of drawing up the alternative report regarding the International UNO Convention about eliminating all forms of racial discrimination. The job offer was published together with the task to be fulfilled and, at the same time, with the conditions that the future employee would have to meet. Among the conditions, there was also the "adherence to a protestant church or to a member church of the Professional Association of Christian Churches in Germany and the identification of oneself with the diaconal mission" [18].

Vera Egenberger did not belong to any confession. However, she submitted her application for the mentioned position. Although, after a first selection, her application was selected, the petitioner was not called for an interview. She considered that the statement regarding the religious adherence (as a condition), mentioned by the employer in the recruitment procedure, represented a clear means of discrimination. Consequently, she brought an action to court (at the Court for Work Disputes, Berlin), in which she requested claims of 9,788.65 Euro.

At the time of the hearings in court, the Protestant Church justified its position motivating that "the right to impose adherence to a Christian Church is linked to the right to ecclesial self-determination (religious autonomy)" [19], as this right is affirmed in the German legislation. Moreover, it stated that "due to the nature of the job offer, religious adherence represents a justified professional requirement".

Given the complex conflict created between the subject of cult autonomy and that of religious discrimination, it was decided to suspend the respective case and to request clarifications from the Court. The main problem for which clarifications were asked was the following: can an employer (namely the Church)

establish itself, as a mandatory condition, if the religion of a certain candidate represents an essential, legal and justified professional requirement?

From the conclusions communicated by the Great Chamber, it results that, in accordance with art. 4 par. (2) of the *Directive of the Council 2000/78 regarding the creation of a general framework in favour of treatment equality for hiring and occupying the workforce,* a church can stipulate a requirement related to religion or religious convictions, if it takes into account the nature of the respective activity or the context in which it is provided. The two criteria (religion or religious conviction) represent essential, legal and justified professional requirements with regard to organization ethics. Through such a regulation, it is intended to guarantee the right to autonomy of churches and other public or private organizations whose ethics is based on religion and religious convictions.

On the other hand, in case of a dispute whose object represents an act of discrimination (differentiated treatment due to religion within the access to a workplace), such as the case presented to the Court, CEDO concluded that an assessment is necessary by a national court of law. In other words, in the Court's opinion, if a church (or another organization whose work ethics is based on religion) states that religion is an essential, legal and justified professional requirement and uses this criterion to reject (as in this case) the participation of a person to the procedure for occupying a job position (inside the cult), the situation must make the object of an actual jurisdictional control, which guarantees that the criteria related to the field have been met.

In conclusion, although it affirmed its neutrality [20] with regard to religious freedom and its regulation at a national plan, by the member states, through its conclusions, CEDO underlines the fact that it keeps its status of "actual jurisdictional control" in finding certain discrimination acts, including in the religious field. For this reason, it drew an alarm signal with regard to the responsibility of national courts about establishing the reasons for which the right of a certain individual was limited (an individual who requested employment on a position, within a cult), as well as if they were thoroughly argumented, in the context of applicable national and international regulations.

In other words, recognizing the neutrality and affirming its right for actual jurisdictional control, CEDO underlined, through the decision given in the above-mentioned case, the responsibility of national courts of law to keep a balance between the cult autonomy and the cases of religious discrimination.

5 Conclusions

From the ones presented above, some general conclusions can be drawn with regard to the way in which the freedom to manifest religion is reflected in the CEDO jurisprudence.

First of all, we retain the fact that, in its jurisprudence, CEDO recognizes the freedom of states to regulate the legal regimen of religious freedom. Actually, this perspective of state independence in regulating religious freedom was noted including in official documents [21]. In the given context, one can speak of a "lack

of competence" in defining the regimen of religious and philosophical structures presented on the territory of member states. Thus, there was no imposed unique model for organizing religious/philosophical structures and there is no intention to create one, but it observes tradition in each state, depending on the particularities and own history and undertakes to not prejudice at all the existing regulations.

Secondly, although there is no own model for regulating religious freedom, CEDO carefully follows the way in which each state protects and regulates this right. Through the decision made, it managed to create a set of important prescriptions for national policies, which although it does not impose a uniformity of solutions, it however requests to observe the freedom to manifest religious beliefs [22].

Thus, although some decisions made had a stronger impact than others, through the created jurisprudence, it was firmly intervened in some of the significant aspects, such as: recognizing the legal personality of certain groups/religious communities; involving the state in the activity of religious communities and breaking the latter's autonomy; defining certain specific terms; preventing religious discrimination; establishing the rights and obligations of the religious communities; stating the neutrality principle at a national legal level etc.

In conclusion, the entire CEDO jurisdiction, indicates a constant preoccupation in affirming and guaranteeing the right to religious freedom, as well as high attention in keeping a balance in the relations between the states and the religious communities. All this context is relevant with regard to the role and utility that religion has in the current society.

REFERENCES

[1] For the current study, the Romanian version of the text belonging to the Convention for defending Human Rights and Fundamental Liberties was used, text amended by Protocols no. 11 and 14 and accompanied by the additional Protocol and Protocol no. 4, 6, 7, 12 and 13. The text is available at: http://www.echr.coe.int/Documents/Convention_RON.pdf (website consulted on December 20th, 2017, 11.40 a.m.).

[2] The text of art. 14 is the following: "Exercising the rights and liberties recognized by this Convention must be ensured without any difference based especially on gender, race, colour, language, religion, political opinions or any other opinions, national or social origins, adherence to a national minority, fortune, birth or any other situation."

[3] The text of art. 2 is the following: "Nobody can be refused the right to education. The state, while exercising the functions it would assume in the field of education and training, shall observe the right

of the parents to ensure this education and training according to their religious and philosophical convictions".

[4] The text of art. 9 is the following: (1) "Any individual has the right to freedom of thought, consciousness and religion; this right includes the freedom to change religion or convictions, as well as the freedom to manifest religion or conviction individually or collectively, in public or in private, by cult, education, practices and ritual performance"; (2) "The freedom to manifest religion or convictions cannot be the object of other restrictions than the ones stipulated by the law which, in a democratic society, represent the measures necessary or public safety, protection of the order, health, public morale, their rights and liberties".

[5] About mentioning the three liberties within art. 9, it was reminded that they refer to the "inner world of the individual, and their delimitation is sometimes difficult to achieve, that is why CEDO avoided to define these notions, especially the one of religion". The Association for Defending Human Rights in Romania – the Helsinki Committee (APADOR-CH), Manual of human rights, Bucharest, 2008, pp. 19-20.

[6] However, in its jurisprudence, referring to the difference between "religious convictions" and "religious opinions or ideas", CEDO mentioned "the level of strength, reliability and coherence of the former". See the case of Campbell and Cosans against the Great Britain (February 25th, 1982). The Association for Defending Human Rights in Romania – the Helsinki Committee (APADOR-CH), Manual of human rights, Bucharest, p. 20, note 40.

[7] In the doctrine there have been multiple types of religious life classifications at the level of a nation. Thus, one speaks of: a. jurisdictialism, which states the needs of state intervention in religious problems; b) ultra-liberalism, which means the state's renunciation to any right of regulation in the field of religious life; c) secularism, expressed through the state's hostility or neutrality with regard to any form of religious manifestation. See: POULAT, E., Liberté, laïcité: la guerre des deux France et le principe de modernité, Paris, Edition du Cerf, 1987, pp. 151-152.

[8] Another classification is the following: a. system of close collaboration between the state and the Church (e.g.: Denmark, Finland, Greece, England, Sweden etc.), which stipulates the existence of a state religious structure; b. neutrality system (e.g.: Austria, Belgium, Germany, Luxemburg, Italy, Portugal, Spain, etc.), in which the state is neuter, but concludes agreements with religious structures; c. system of total division (e.g.: France, the Netherlands, Ireland, the Czech Republic, etc.), in which the state declares itself separated from any religious structure. Grigoriță, G. (2007). *Legea nr. 489/2006 și Biserica Ortodoxă Română* (Law

no. 489/2006 and the Romanian Orthodox Church), in Theological Studies (2), pp. 167-168.
[9] Durham, C. jr. (2011). Religious Freedom in a Worldwide setting: Comparative reflections, Pontifical Academy of Social Sciences, p. 36.
[10] Among the case in which CEDO gave an opinion, we hereby mention: the case of Muslim Community against Bulgaria (the problem of state intervention in religious activity); the case of Leyla Sahin against Turkey (religious manifestation); the case of Religionsgemeinschaft der Zeugen Jehovas against Austria (granting legal personality to a religious group) etc.
[11] See the decision of the Great Chamber of CEDO in the case of Hassan and Tchaouch against Bulgaria (30985/96, October 26th, 2000).
[12] The CEDO decision in the case of Kokkinakis against Greece (14307/8825, May 1993).
[13] The CEDO decision in the case of Hasan and Ceauș against Bulgaria (30985/96, October 2000).
[14] We hereby mention the CEDO decision in the cases of Hasan and Eylem Hasan and Eylem Zengin against Turkey (1448/04, October 2007, in which case the decision was about the right of the Alevites to not participate to the Muslim religion class, respectively Cumhuriyetçi Eğitim Ve Kültür Merkezi Vakfi against Turkey (32093/10, December 2014, in which case the fiscal rights of certain Alevite cult places were recognized). Moreover, we hereby mention the decision in the case of Basarabia Mitropoly and Countries Exarchate and others against Moldova (45701/99, December 13th, 2001).
[15] The CEDO decision in the case of Campbell and Cosans against the United Kingdom (7511/76, February 1982).
[16] The CEDO decision in the case of Daratsakis against Greece (12902/87, October 1987).
[17] The CEDO decision in the case of X against Denmark (7374/76, March 1976). To mention the fact that, in the case of religious manifestations, the organized community character was stated in other cases, as well.
[18] The decision of the Great Chamber of CEDO in the case of Vera Egenberger against Evangelisches Werk für Diakonie und Entwicklung eV (April 17th, 2018), point 25.
[19] The decision of the Great Chamber of CEDO in the case of Vera Egenberger against Evangelisches Werk für Diakonie und Entwicklung eV (April 17th, 2018), point 28.
[20] "It must be concluded that article 17 TFUE expresses the Union's neutrality with regard to the organization by the member states of their relations with the churches and associations or with religious

communities. In exchange, this article does not mean that the observance of criteria mentioned in article 4 paragraph (2) of the Directive 2000/78 should elude an actual jurisdictional control".

[21] The CEDO decision in the case of Refah Partisi against Turkey (41340/98, 41342/98, 41343/98 and 41344/98, July 2014).

[22] The CEDO decision in the case of Knudsen against Norway (11045/84, March 1985).