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SAFETY AND HEALTH DURING WORKING TIME OF THE TEMPORARY WORKERS ACCORDING TO THE ROMANIAN LAW NO. 319/2006

Andrei M. AIRINEI*

ABSTRACT

The Law no. 319/2006 regarding safety and health at work will soon celebrate a decade of the first regulation and during this time, The Labour Code, Law no. 53/2003 was changed by the Law no.40/2011, which inserted a series of new concepts, such as those of temporary employment agency, temporary employee, and user of the temporary labour. Amendments to the institution of temporary employment agent were generated as a result of national transposition of the Directive 2008/104/EC from 19 November 2008 regarding the temporary employment agency work, when in the Romanian law emerged the GD no. 1256 from December 21, 2011 on the operating conditions and the procedure for the authorization of temporary employment agency.

The regulation regarding safety and health law does not contains any references to the premises arising from temporary employment agency work, in disagreement with the rules of the Labour Code, without any provisions regarding the development of services in Europe.

KEYWORDS: *health and safety at work, temp, temporary employment, temporary user, European regulation*

1. Introduction

The concepts of safety and health at work are based on a general and complex phenomenon, namely, the day by day activity of the workers in various economic fields. Strict and actual regulation of this domain in the field of labour law is needed to reduce accidents and industrial diseases.

During the recent years there has been a remarkable evolution in the level of computerized industrialization in the European Union, trying to reduce human contact with dangerous machines or processes that could generate employment injuries or occupational diseases. Worldwide, the statistics presented at the XIX Congress of the International Labour Organisation in Turkey (11 to 15 September 2011) revealed that in 2008 there were a total worldwide 2.3 million people deaths from accidents at

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work and occupational diseases, of which 321,000 from accidents at work and occupational diseases 2.02 million from various ("29% of occupational cancers, circulatory diseases 21%, 25% diseases caused by pathogens") representing an average overall daily deaths of nearly 6,300 people. In the same year that the statistics of the XIX the Congress made reference to there were about 317 million of workers injured (missing at least 4 days or more from work), with a daily global average of 850,000 people overall involved in such events. The works of these Congresses expressed that in the global economic context, where labour migration is a current phenomenon, it is necessary to have an unification of the standards of protection and safety in work, and in this regard states should work with the employers structures in order to easily implement an efficient management system of this vital area for a solid development of national economies [1].

The activity of temporary employment agent was introduced in national legislation by transposing Directive with 2008/104/EC, and in this way this European legislation was actually an extended application of the concept of the provision of service at the EU community level, as it appears in the Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of services. Inserted in the Romanian legislation by the Government Decision No 1256/2011 and the Law no. 40/2011, which amended the Labour Code, the institution of temporary employment agent had to be considered also by the Law no. 319/2006 on health and safety at work, in particular because of the European dynamic aspects of this type of provision of services (Romania joined the European Union on 01.01.2007, so that the legislation could not forecast the country evolution at the EU Community level), especially because there is a doubling of the specific authority of the employer, which is divided between the temporary employment agent and the labour user.

2. The limited frame of regulation of the Law no. 319/2006 in relation to the international provision of services in the EU Community

The International Labour Organization was founded in 1919 as a specialized agency within the United Nations and aimed primarily at promoting effective mechanisms for establishing internationally uniform standards for safety and health at work. National states had in this way

access to international uniform regulations which should be the inspiration sources for the development of internal rules connected to a global vision in matters of health and safety at work. We recall in this way international regulations such as the Convention no. 155/1981 on health and safety and working environment, Convention. 161/1985 on health services at work, Convention no.174/1993 on the prevention of major industrial accidents, Convention. 187/2006 on the promotion for the safety and health at work (adopted at the 95th Conference of the International Labour Organization, 2006). If national regulations from all around the world have not always managed to fully rally to the trajectories imposed by the international community space, in the EU space, the community rules could easily draw for uniform guidelines in this area.

In this way, the European Member States committed themselves through art. 118 and art. 118A of the EC Treaty to develop a common legislation leading to the establishment of a high level of safety and health in the economic and social environment (see to that effect Framework Directive no. 89/391/EEC of 12 June 1989 on the implementation of measures to encourage improvements in the safety and health of workers at work). In support of this explanatory note we underline the Directive. 91/383/EEC of 25 June 1991 on measures to promote improvements in the safety and health of workers with a fixed duration employment relationship or a relationship of interim work is to provide the same level of protection for this type of workers with that of other workers in the firm receiving the work, published in OJ no. L206 of 29 July 1991.

In the content of this provision it is regulated specifically how to fulfil health and safety at work when the work is done by temporary workers made available to a user of labour. Thus, the "art. 91 the Romanian Labour Code, resumed the duty that this European directive detained on behalf of the employer to provide the temporary employee personal equipment for protection and work, but did not retain the prohibition to use this kind of employees for particularly hazardous work, which is a weakness of Romanian legislation" (current regulation art. 92 Labour Code) [2].

The European regulation states in art. 7 that "information" of the employees covered by the Directive shall be achieved both by the user of labour, in an indirect manner and by temporary employment agency directly. Thus, the enterprise or the user of labour "before it receives the services of an employee in an employment relationship of the type shown in art. 1 para. 2 (must – authors note) to notify the temporary employment

agency and inter alia the professional qualifications required characteristics of the job vacancy". On the other hand, the "temporary employment agent (must - authors note) to bring all these facts to the attention of the workers concerned". The national legislation states can establish who is responsible for the content of the original information: "Member States may provide that the details which will be provided by the user of labour or by the temporary employment agent must be foreseen, in accordance with paragraph (1), in a contract for the provision".

Such a hypothesis is not regulated by the Law no. 319/2006, where there are no distinctions between the notions of temporary workers and common employers, respectively, between the common employer and temporary employment agency. Moreover, as the Romanian legislator did not seek to amend the law regarding safety and health at work after Romania joined the European Union, it was impossible to anticipate the rules of the institution of temporary employment agency, something which bear many problems in the practical application of the rule both by traders and by the Labour Inspection or by the courts.

On the other hand, European legislation established by art. 8 a particular approach in relation to the responsibility for the security and health. Thus, "1. Without prejudice to the liability established by the national law of temporary employment, the company or the user of temporary labour should be responsible during the mission of the conditions of performance of that work; 2. For purposes of paragraph (1), the conditions of execution of the work shall be limited to those specific health, hygiene and safety at work".

The National legislation provides in an abstract manner in art. 7 a legal view which does not express any distinction between the common employer and temporary employment agent, so: "within its responsibilities, the employer shall take the necessary measures to: a) ensure the safety and health protection of workers; b) prevention of occupational risks; c) information and training of workers; d) ensure the framework and means necessary safety and health at work".

The National legislation continues in the same article in the same way, without operating any distinction in relation to the possibility of labour migration at the EU community level through temporary work "(3) The employer is obliged to implement the measures referred to in para. (1) and (2) based on the following general principles of prevention: a) avoiding risks; b) evaluating the risks which cannot be avoided; c) combating the risks at source; d) adapting the work to man, especially in the design of work stations, the choice of work equipment, methods of

work and production to reduce monotony of work, work with predetermined rate and to reduce their effect on health; e) adapting to technical progress; f) replacing what is dangerous with what is not dangerous or with what is less dangerous; g) developing a coherent overall prevention policy covering technology, organization of work, working conditions, social relationships and the influence of the work environment; h) adopting, as a priority, collective protection measures to individual protection measures; i) giving appropriate instructions to workers. (4) Notwithstanding other provisions of this law, taking into account the nature of the undertaking and/or establishment, the employer shall: a) assess risks to health and safety, including the choice of work equipment, substances or chemicals used and the layout of workplaces; b) that after assessment referred to in subparagraph a) and, if necessary, preventive measures and the working and production methods implemented by the employer to ensure the improvement of safety and health protection of workers and be integrated in the overall business and/or establishment and at all levels hierarchical; c) take into account the worker's capabilities as regards health and safety at work, when they entrust tasks; d) ensure that the planning and introduction of new technologies subject to consultation with workers and/or their representatives concerning the safety and health of workers consequences caused by the choice of equipment, working conditions and environment; e) take appropriate measures so that, in specific high-risk areas and access is allowed only workers who have received adequate instructions have learned".

A simple reading of the provisions of art. 92 of the Labour Code leads to a contradiction between the two regulations. Thus, if "(1) Temporary employees have access to all the services and facilities provided by the user, under the same conditions as other employees thereof", then it is understandable that during the posting for the provision of services through temporary employment agency, the company receiving temporary work must provide a security level of this category of workers similar to the one set for its own employees. This measure requires information and training actions in the workplace. On the other hand, confirmation of this hypothesis comes from art. 92 para. 2 of the Labour Code, which states that "(2) The user is obliged to provide temporary employee provision of personal protective equipment and work, unless the contract for the provision equipment is the responsibility of the temporary employment".

It is noted that although the Labour Code explicitly expresses that labour through temporary employment agency the parties of the posting

contract, the temporary employment agency and the user of labour can regulate responsibilities regarding health and safety at work, Law no. 319/2006 does not provide the same situation. Law no.319/2006 treats such temporary employment as a normal employee, without even mentioning the possibility of having other provisions established by convention in the contract of posting. Moreover, according to the interpretation of Labour Inspection in Romania, the temporary employment agency cannot have a different status than a common employer, because art. 94 of the Labour Code states that a 'temporary employment contract is an individual employment contract to be concluded in writing between temporary employment and temporary employee during a mission". Thus, a narrow vision, caused by the incomplete regulation, may conduct to the idea that the temporary employment agent falls into the category of common employers mentioned in an abstract way in the law no. 319/2006, only because they conclude temporary employment contracts, which in fact are individual employment contracts. Romanian vocabulary proved so unable to capture the European vision delegation of responsibilities in matters of health and safety at work. Offenses and other facts are being retained only on behalf of the employer (without making any distinction in the case of temporary employment agencies) without even mentioning the role of the user of temporary labour.

The only recent legislative changes in the field of health and safety at work can be found only in the content methodological norms, represented by Resolution no. 1425 of 11 October 2006 approving the Methodological Norms for the application of Law of safety and health no. 319/2006. Thus, by Resolution no.955/2010 the law brings some changes, introducing a single provision regarding the temporary employment agent, respectively, that general introductory training must be provided to the "worker by a temporary employment agent" (art. 83 l. d).

However, this provision does not solve all the problems arising from the combination of European and national provisions, because the main legal frame, Law no. 319/2006 does not operate with distinctions regarding the administrative sanctions imposed to the "employer" in different situations, without mentioning how any obligations of the user of temporary labour are valued, especially when such responsibility is delegated.

3. The Regulation of the Law. 53/2003 regarding the delegation of responsibility in matters relating to workers health and safety during the mission contracted by the temporary employment agency

A temporary employment agency is a company that operates in accordance with GD. 1256/2011 on the operating conditions and the procedure for the authorization of temporary employment agency, published in the Official Monitor of Romania, Part I, no. 5 of 4 January 2012. In a complementary manner, the Labour Code, Law no. 53/2003, republished, states in the provisions of Article 88-102 special rules applicable to the temporary employment agent.

In accordance with the legal provisions invoked, a temporary employment has permanent employees, with individual employment contract, concluded for an indefinite period and a variable number of temporary employees for which are concluded temporary employment contracts and also contracts for posting the workers, concluded with the users of temporary labour, in accordance with the provisions of the GD. 1256/2011.

Law no. 319/2006 on safety and health at work defines in art. 5 the terminology used therein. Thus, in letter a) of that article it is defined "employee" as "person employed by an employer, according to the law, including students, students for the period of practical training and apprenticeships and other participants in the work, except for persons providing domestic activities". Further we will analyse a series of regulations of Law no. 319/2006 which may conduct to the penalization of the temporary employment agent, without distinguishing between the common employer and temporary employment agency, without mentioning any difference between the user of temporary work and a regular company, a common employer.

As noted above, the 2006 legislature has not foreseen a distinction that emerged in legislation in 2011, between the employee with an individual employment contract and an employee with temporary employment contract, who operates through a temporary employment agency, who is posted at a labour user (according to GD 1256/2011, respectively, according to the Labour Code, art. 88 102).

Art. 8 para. (1) of Law no. 319/2006 states that "without prejudice to the obligations referred to in art. 6 and 7, the employer shall designate one or more workers to carry out activities for protection and occupational risks prevention activities in the company, hereinafter designated

workers". It does not distinguish in any way between the concepts of permanent employee, hired with an individual employment contract, respectively, the temporary employees, with temporary employment contracts. Moreover, there is no mention in any way for a distinction between the terms "enterprise" and the employer as temporary employment agency, whose activity is regulated by a subsequent law, namely, GD. 1256/2011.

In art. 88 para. (1) of the Labour Code it is stated that "work developed through a temporary employment agency is work performed by a temporary employee who has concluded a temporary employment contract with a temporary employment agency and made available to the user to work temporarily under supervision and management of the latter". In its para. (2) it is stated that the "temporary employee is a person who has entered into a temporary employment contract with a temporary work agency and who is then posted to work temporarily under the supervision and direction of the latter".

The notion of "worker" in Law no. 319/2006 was defined at the moment when the legislature adopted the provision the equivalent of the notion of "employee" with an individual employment contract. Work through temporary employment agency was regulated in Europe on November 19, 2008 by the European Parliament and Council Directive. Transposition into national law of European standard was achieved only in 2011 by GD 1256/2011, imposing legislative changes course operation the Code of Labour, with its republication in May of that year.

The correct interpretation of the rules and regulations which compose the legal framework for temporary employment activity in a systematic and corroborated manner will lead to a conclusion that as long as the obligation of compliance regarding the safety and health at work may be delegated to user of labour, according to art. 92 para. 2 of the Labor Code, then any verifications regarding this compliance with the rules of law should be carried out by the Labour Inspection in these establishments and not only at the temporary employment agency. In the posting contracts and in the general conditions of such business relationships the parties may expressly state that the obligation of compliance to safety and health at work requirements will be carried out by the users of temporary labour, according to art. 92 para. 2 of the Labour Code ("the second paragraph of this article regulates the obligation of endowment of the personal with protection and work equipment. The rule is that this obligation is the responsibility of the user of temporary labour, but the contract for the provision may regulate that this obligation will be performed also by the temporary employment agent. In other words, whenever the user

and the temporary employment agent do not regulate in the posting contract that will be responsible to ensure to the personnel the protection and work equipment, this duty will be fulfilled by the user" [3].

Art. 98 of the Labour Code states that: "(1) During the mission the user is responsible for providing the working conditions for temporary employee in accordance with the legislation in force" ("rendering work in the benefit of the users, it is logical and normal that this person has to ensure the temporary employee all the conditions to prevent accidents or occupational diseases. The provisions of Law no. 319/2006 on safety and health at work must be applied directly to his case as well as any other regulations issued pursuant to that law. If any event happens, it will be immediately communicated to the temporary employment agency [as the employer]. Such an obligation results from the art. 26 of Law no. 319/2006 which states that events should be communicated immediately to the employer" [4].

In art. 98 para. 2 it is stated that "the user will immediately notify to the temporary employment agency any accident or occupational disease that has knowledge and whose victim was a temporary employee provided by temporary employment agency" - "responsibility for health and occupational safety incumbent to the user, otherwise in accordance with Law no. 319/2006 on health and safety at work. Work organization returns to the classical concept of the employer, in such equation, the common employer is meant to be the user of temporary labour force. So if the user has the right to organize his work, it is still him the person who must bear all the responsibility for the health and safety of employees who work within the enterprise organized by him. So, it naturally appears that the responsibility for health and safety of employees performing work in the company held by the user to be carried only by him. This article creates an extra obligation but for the user, beside the ones arising from the Law no. 319/2006, which states that in case of accidents at work the employer must inform the Labour Territorial Inspectorate (ITM) [cf. art. 27 par. (1) of Law no. 319/2006], which mentions that in case of accidents at work the employer must inform ITM, in cases of temporary employment agency the user must also inform the agent regarding any accident or occupational disease of which it has knowledge of and whose victim was a temporary posted employee" [5].

Specifically, through the contract concluded with the user for posting the worker, the temporary employment agency may delegate the obligation to accomplish the individual training required at the working place, so that the temporary employee must follow such a procedure

according to the applicable law of the user. In this regard it should be analysed and the rule of art. 11 para. 3 of the GD 1256/2011: "[...] All the basic conditions of work and employment established by law, applicable collective agreement, and any other applicable specific regulations applicable to the user directly are directly applicable to the temporary employees during their assignment". The user therefore applies directly its law and may possibly confirm by signing this procedure to the temporary employment agency, in accordance with the general conditions of collaboration. European national legislations (see in this art. L 1251-21 of the French Labour Code) expressly provide manpower user's responsibility for the temporary employee on health and safety at work issues, something which is overlooked by Romanian law ("throughout the mission, Romanian interims will find themselves only under the supervision and direction of the user, who is solely responsible for working conditions and for the manner of execution thereof by the interim. The user must ensure enhanced safety training if position requires a particular risk to the health or safety of the employee. Moreover, such an interpretation of the laws is natural given the fact that the temporary employee does not provide specific activities for the temporary employment agent, and working conditions and equipment are different from one user to another, according to the needs of such companies at the time when they need temporary workers. In this condition, workplace training that includes, among others, the use of equipment should be supported by the operator " (Decision no. 4365/ 07.18.2014, Bacau Court).

The obligations lay down in Art. 7 of Law no. 319/2006 cannot be extended in abstract over the temporary employment agency, and their achievement must be analysed by corroborating incident rules for this activity, of labour posting to different users in the country or abroad. European regulations and the amendments of the Law no. 40/2011 require courts and public institutions, in this case, the Labour Inspection to treat carefully the ways of compliance to safety and health law no. 319/2006 in respect of a temporary work agency, in line with the specifics of this activity: "The situation requires reconsideration of the relevant specific obligations on the employer SC INTERIM SRL, given that it is not a fixed number of jobs, opened directly by it and individualized labour market in the country, but real opportunities arising from the need developing certain works and activities for companies from outside Romania. Finally this obligation must be interpreted in

conjunction with HG 1256/2011 [...]" (Sentence civ. No. 19318/2012 of Iasi Court).

As long as the Labour Code provides the possibility for the delegation of responsibilities between temporary employment agency and the user of labour in the field of safety and health at work, it is mandatory for the framework law no. 319/2006 to operate the distinction between the obligations of each party involved in such a business relationship, with significant differences in the field of criminal or administrative offenses that may be retained in charge of the eternal "employer".

CONCLUSIONS

In conclusion, the amendment of the Law no. 319/2006 is required to be given priority, not only due to the fact that at the time of the initial settlement some of the notions involved in the EU Directive 91/383/CEE were treated in a superficial manner, but also due to the fact that in the meantime the Labour Code suffered changes brought by the Law no. 40/2011, and once the Government Decision 1256/2011 was issued, the temporary employment agencies are operating also in Romania, performing services in the national and in the international European areas to different labour users. The latter category must be equally responsible for posted workers' safety and health, and in a complementary manner, the temporary employment agency must free from the risk of being sanctioned by the Labour Inspection, which apply the current regulations law no. 319/2006 in a strict manner.

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THE CONSTITUTIONALIZATION OF THE RIGHT TO GOOD ADMINISTRATION AND THE IMPLICATIONS ON LOCAL PUBLIC ADMINISTRATION

Mihai Cristian APOSTOLACHE[*]

ABSTRACT

The permanent search towards finding normative solutions to regulate the relations between administration and private persons has led to the emergence of new concepts, principles and rights such as the right to good administration. The right to good administration represents the result of on-going concerns coming from the doctrine, jurisprudence and public policy makers to find an appropriate response to the need to balance human rights and public administration acts in a public power regime, between the need to satisfy the general interest and the obligation to respect individual rights. The conquests at European level in the matter of sound management of the relationship between the administration and private persons are valuable sources of inspiration for the national legislator, which tends to take over the European standards of good administration and to include them in the fundamental act. Thus we can speak about constitutionalizing the right to good administration and the consequences of such a process, especially for local public administration. The article follows these coordinates and tries to highlight the dimensions of the right to good administration, how it is intended to be regulated by the constitutional text and its implications on local public administration.

KEYWORDS: *the right to good administration, constitution, local public administration, the relation private persons-administration*

1. Preamble

The relations of private persons with the public administration were subject to doctrinal analyses and the jurisprudential solutions that enabled the development of European and national regulations regarding these relationships. The concept has evolved from being a determinant of administration in relation to private persons to the attempt of balancing the status of each party involved in these relations. With the development

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of society, the original or delegated legislator was called to govern the nature and scope of these relations based on the primacy of public interest or the need to respect human rights. Due to the fact that it is vested with public powers, the administration aims to meet the public interest, the general interest, without affecting human rights.

The administration is often seen as a barrier to private sector development, the excessive bureaucracy and lack of transparency and efficiency of public administration leading to conflicts with the private sector. The reconciliation between the public and private sector is needed more than ever so that society enters normalcy. It takes balance in the relations between the administration and the private sector, viewed either individually or collectively, together with a paradigm shift regarding the role of each subsystem within the global social system. It takes responsibility, finding optimal forms of cooperation between public power exercised by the administration and the administered[1], knowing that administration action is legitimate only if it solves individual problems[2]. The responsibility concerns both the administration and the private person (natural or legal person), since you cannot claim responsibility only from officials, civil servants or contractual staff, this feature needs to be found in private persons as well. Responsibility is the key requirement of good administration, involving all the actors[3] of the administrative process.

The permanent search towards finding normative solutions to regulate the relations between the administration and private persons have led to the emergence of new concepts, principles and rights such as the right to good administration. Initially a principle released from the case-law of the European Union Court of Justice and the Court of First Instance, good administration has gained, in time, the nature of a fundamental right, comprised in Article 41 of the Charter of Fundamental Rights of the European Union. A European document with a juridical force similar to treaties, the European Union Charter of Fundamental Rights placed the

[1] Verginia Vedinaş, *Drept administrativ*, 8th ed., revised and updated, Universul Juridic Publishing, Bucharest, 2012, p. 38.
[2] Ioan Alexandru, *Reflecţii privind evoluţiile contemporane ale democraţiei constituţionale*, in the Journal of Public Law issue 3/2006, pp. 5-7.
[3] Mihaela Pantea, *Evoluţia conceptului de responsabilizare şi dimensiunea bunei administrări*, in Emil Bălan et al., Dreptul la o bună administrare. Între dezbaterea doctrinară şi consacrarea normativă, Comunicare.ro Publishing, Bucharest, 2010, p. 330.

European citizen at the centre of the union priorities and marked an important stage in the constitutional evolution of the European Union[4].

2. The right to good administration in the legal order of the European Union and the Council of Europe

The administrative reform at European level aimed, among others, at bringing citizens closer to the administrative institutions through the democratization of the administrative procedure. Rules to guide the administration behaviour in relation to private persons were established at EU level, but were also generated by other bodies outside the Union, such as the Council of Europe. As a defender of human rights, the Council of Europe has sought to develop a series of mechanisms that largely correspond to certain rules of good administration[5]. The regulations in the European Union state "the right to good administration", while the regulations from the Council of Europe mention "the right to good administration". Each of these rights has a corresponding code, the code of good administration[6] and, respectively, the European Code of Good Administrative Behaviour[7]. Of course that both approaches have the same aim, namely to strengthen the position of private persons in their relations with the administration, by establishing rules to determine the administration to behave properly[8], based on the principles and norms of the rule of law.

The doctrine[9] held that *"the requirements of good administration guarantee, in fact, increased citizen involvement in city life, in public*

[4] Andreea Nicoleta Ștefan, *Dreptul la bună administrare: de la consacrarea în Carta drepturilor fundamentale a Uniunii Europene la recunoaşterea în legislaţia românească*, in the paper „Tendinţe actuale în dreptul public. Abordare juridică şi filosofică", University Publishing, Bucharest, 2014, p. 406.

[5] Cosmin Radu Vlaicu, *Birocraţie şi procedură în administraţia publică*, Universul Juridic Publishing, Bucharest, 2012, p. 273.

[6] Recommendation CM/Rec (2007)7 regarding a good administration, adopted by the Committee of Ministers in the Council of Europe on 20 June 2007, at the 999thbis Reunion of the Ministers Delegates from the member states of the Council of Europe.

[7] Adopted by the European Parliament by resolution on 6 September 2001, at the proposal of the European Mediator.

[8] Andreea Nicoleta Ștefan, *Dreptul la bună administrare: de la consacrarea în Carta drepturilor fundamentale a Uniunii Europene la recunoaşterea în legislaţia românească*, in the paper „Tendinţe actuale în dreptul public. Abordare juridică şi filosofică", University Publishing, Bucharest, 2014, p. 411.

[9] Idem, p. 333.

decision-making at the expense of their former status as mere administered, whose opinion was never asked for."

The European concerns towards establishing some standards specific to the private persons' relations with the administration finalized in shaping a right with a complex structure, the right to good administration, which has become a landmark for the legal order within the European Union and for that set by Council of Europe, and, implicitly, for the legal order of each Member State of the European Council.

The right to good administration is enshrined in Article 41 of the Charter of Fundamental Rights of the European Union and is part of citizens' rights[10], although "any person" may benefit from its exercise, not only citizens, as results from the wording of Article. Under this right, any person is entitled to receive fair, impartial treatment within reasonable time from institutions, bodies, offices and agencies of the Union. This right is meant to protect all persons from administration errors[11]. Therefore, the beneficiary of the right is any person, and the correlative obligation belongs to the institutions, bodies, offices and agencies of the European Union. This obligation belongs to the administrations of the Member States only to the extent to which the European law is applied. However, the provisions of Article 41 of the Charter represent a valuable source of inspiration for the national legislator because they manage to bring together, under the same right, various other procedural or material rights. As appreciated in the literature[12], the right to good administration regulated by the Charter of Fundamental Rights of the European Union has a complex content that includes a sum of rights such as: the right of a person to solve impartially and fairly his/her own cases, within reasonable time; the right to defence and the exercise of this right (paragraph 2 b) - the right of every person to have access to his/her file and paragraph 2 a) – the right of every person to be heard before any individual measure which would affect him/her adversely is taken against him/her); right to

[10] Title V from the Charter of Fundamental Rights of the European Union.

[11] Andreea Nicoleta Ştefan, *Dreptul la bună administrare: de la consacrarea în Carta drepturilor fundamentale a Uniunii Europene la recunoaşterea în legislaţia românească*, in the paper „Tendinţe actuale în dreptul public. Abordare juridică şi filosofică", University Publishing, Bucharest, 2014, p. 408.

[12] Cosmin Radu Vlaicu, *Birocraţie şi procedură în administraţia publică*, Universul Juridic Publishing, Bucharest, 2012, p. 248; Verginia Vedinaş, Sandru Capră Ambru, *Bazele constituţionale ale dreptului la o bună administrare*, in Emil Bălan et al., Dreptul la o bună administrare. Între dezbaterea doctrinară şi consacrarea normativă, Comunicare.ro Publishing, Bucharest, 2010, p. 38.

information (paragraph 4 of Article 41); the right to compensate for damages (paragraph 3 of Article 41); the right to address the Union in the Treaty languages (paragraph 4 of Article 41). These rights are strengthened by the establishment of the administration obligation, based on the principle of legality, to motivate its decisions (paragraph 2 c) of Article 41).

The dimensions of the right to good administration practice may be extended by the European Union Court of Justice, integrating new rights in the composition of this right, adding to the existing standards. This is confirmed both by the wording of paragraph 2 of Article 41, which states that the right to good administration requires, in particular, hence not exclusively, the mentioned components, and by the doctrine[13], which considers that the features of good administration are not fully set, but they are identifiable when the administration fails to achieve an acceptable standard, the latter ranging from one period to another and depending on the context. The failure of the administration is also highlighted by the expressions of "maladministration", "inadequate administrative behaviour" or "misconduct". Maladministration occurs, according to the European Ombudsman[14], when a public body fails to act in accordance with a mandatory rule or principle, a concept that was later accepted by the European Commission. Based on this definition, the literature[15] has established that maladministration can occur through: power abuse; neglect; discrimination; slowness; incompetence; denial and lack of information; incorrect, unfair and formal procedures; delays and exceeding the time limits provided by the law etc.

Regarding the right to good administration enshrined in the Recommendation of the Council of Ministers from Council of Europe Rec (2007) 7, it is considered to be the synthesis of all the rights recognized for private persons in relation to public authorities, consistent with the view of the European Union, and good administration is seen as

[13] Jill Wakefield, The Right to Good Administration, Kluwer Law International, 2007, p. 23.

[14] The Report of the European Ombudsman for the year 1997, accessed at http://www.ombudsman.europa.eu/activities/annualreports.faces;jsessionid=9B8254B6EF87EFD4B98AECB4DA083DFF, on 6 February 2014.

[15] Cosmin Radu Vlaicu, *Birocraţie şi procedură în administraţia publică*, Universul Juridic Publishing, Bucharest, 2012, p. 251.

a component of good governance[16]. Until the adoption of the recommendation on good administration, the Council of Europe adopted a variety of acts that took the form of resolutions and recommendations that have brought to the attention of public decision-makers at European level and those within the Member States of the Council, a series of principles of good administration. These include: Resolution R (77) 31 on the protection of the private person in relation to the acts of administrative authorities[17]; Recommendation R (80) 2 on the exercise of discretionary powers by administrative authorities[18]; Recommendation R (81) 19 on the access to information held by public authorities[19]; Recommendation R (84) 15 on public accountability[20]; Recommendation R (2000) 6 on the Status of public officials in Europe[21]; Recommendation R (2002) 2 on the access to official documents[22]; Recommendation (2003) 16 on the execution of administrative and judicial decisions in the field of administrative law[23]; Recommendation (2004) 20 on the judicial control of administrative acts[24].

As the doctrine stated[25], Recommendation CM R(2007) 7 on good administration represented the end point of certain initiatives and continuous efforts made by the Council of Europe bodies in order to establish standards and principles in the relations between public administration and private persons. This act also includes, in its annex, a

[16] Emanuel Albu, *Excepţia de nelegalitate-garanţie a bunei administrări*, in Emil Bălan et al., Dreptul la o bună administrare. Între dezbaterea doctrinară şi consacrarea normativă, Comunicare.ro Publishing, Bucharest, 2010, p. 116.

[17] Adopted by the Committee of Ministers on 28 September 1977 at the 275th Reunion of the Ministers Delegates, available at www.coe.int.

[18] Adopted by the Committee of Ministers on 11 March 1980 at the 316th Reunion of the Ministers Delegates, available at www.coe.int.

[19] Adopted by the Committee of Ministers on 25 November 1981, at the 340th Reunion of the Ministers Delegates within the Council of Europe, available at www.coe.int.

[20] Adopted by the Committee of Ministers on 18 September 1984, at the 375th Reunion of the Ministers Delegates, available at www.coe.int.

[21] Adopted by the Committee of Ministers on 24 February 2000, at the 699th Reunion of the Ministers Delegates, available at www.coe.int.

[22] Adopted by the Committee of Ministers on 21 February 2002, at the 748th Reunion of the Ministers Delegates, available at www.coe.int.

[23] Adopted by the Committee of Ministers on 9 September 2003, at the 851st Reunion of the Ministers Delegates, available at www.coe.int.

[24] Adopted by the Committee of Ministers on 15 December 2004, at the 909th Reunion of the Ministers Delegates, available at www.coe.int.

[25] Cosmin Radu Vlaicu, *Birocraţie şi procedură în administraţia publică*, Universul Juridic Publishing, Bucharest, 2012, p. 291.

Code of good administration, i.e. a set of procedural principles designed to highlight the concept of good administration. Good administration, in the view of the Committee of Ministers of the Council of Europe, is an aspect of good governance ensured by the quality of legislation, by the public administration benefits, which must be consistent with the basic needs of society, by the quality of the organization and of the management, by the effectiveness, efficiency and relevance for the needs of society. Good administration is closely linked to the provision, maintenance, support and protection of public property and public interests, to the following of the budget constraints and the quality and training of human resources from the administration. Finally, good administration is incompatible with any form of corruption and the abusive exercise of public powers.

In contrast with good administration, the Committee of Ministers also defined maladministration, saying that it results either from administration's inaction or from delay in action or administrative action in circumstances inconsistent with its obligations. These cases should be subject to sanctions regulated by appropriate procedures, be they legal or not[26].

3. The constitutionalization of the right to good administration and the consequences on local public administration

Although the Constitution does not expressly include the right to good administration within its provisions, components of this right already find their reflection in the Romanian fundamental act. Furthermore, the Romanian Constitution Review Commission has included, as a proposal, the right to good administration among the fundamental rights. The individual rights that can be comprised in the composition of the synthesis-right called the right to good administration could be: equal rights (Article 16), free access to justice (Article 21), the right to defence (Article 24), the right to information (Article 31), the right to petition (Article 51), the right of a person aggrieved by a public authority (Article 52). The obligation to state reasons for an administrative act is added to these rights, emphasized by Article 115 paragraph 4, the final part, which establishes the obligation of the Government to justify the urgency for the adoption of emergency ordinances and also the duty of local authorities and decentralized public services, correlative to the rights provided

[26] Cosmin Radu Vlaicu, *Birocraţie şi procedură în administraţia publică*, Universul Juridic Publishing, Bucharest, 2012, p. 294.

by Article 120 of the Constitution, that of providing a translation of official documents in the minority language or the obligation to publish acts of autonomous local authorities in the language of those minorities[27].

Among the amendments proposed to the text of the fundamental law there is also specifically included the right to good administration among the fundamental rights guaranteed by the Constitution of Romania, with the following wording: *"Every person, in their relations with the public administration, has the right to benefit from fair, equitable treatment and to obtain, within reasonable time, a response to their requests"*. In connection with this initiative, the Constitutional Court held, in Decision no. 80[28] of 16 February 2014 regarding the legislative proposal for the revision of the Constitution of Romania, that the proposed legislative solution should be consistent with the constitutional provisions governing the obligation of public authorities to provide citizens correct information on public affairs and matters of personal interest, and with those referred to in Article 51 paragraph 4, which establish the obligation of public authorities to respond to petitions within the terms and conditions provided by the law in order not to generate an overregulation. Basically, the solution proposed by the Commission to review the fundamental act is a takeover, with adaptations and adjustments, of the right contained in Article 41 of the Charter of Fundamental Rights of the European Union, an aspect noticed by the constitutional court. It should be emphasized that this is the first time to include such a right in a proposal to revise the Constitution, being a proof that European regulations continue to influence the national legal framework, and also a recognition of the concerns of the contemporary doctrinarians towards raising the interest of policy makers for the normative consecration of this right, which is considered as a new generation right and of the essence of the rule of law and administrative activities[29].

In order to ensure the correct application of the right to good administration, we consider it necessary for the Advocate of the People to be notified by any person in *maladministration* cases, a view envisaged by the Charter of Fundamental Rights of the European Union regarding the

[27] Verginia Vedinaş, Sandru Capră Ambru, *Bazele constituţionale ale dreptului la o bună administrare*, in Emil Bălan et al., Dreptul la o bună administrare. Între dezbaterea doctrinară şi consacrarea normativă, Comunicare.ro Publishing, Bucharest, 2010, p. 46.
[28] Published in the Official Gazette of Romania, Part I, issue 246 of 07 April 2014.
[29] Verginia Vedinaş, Sandru Capră Ambru, *Bazele constituţionale ale dreptului la o bună administrare*, in Emil Bălan et al., Dreptul la o bună administrare. Între dezbaterea doctrinară şi consacrarea normativă, Comunicare.ro Publishing, Bucharest, 2010, p. 46.

institution of the European ombudsman and also a matter of concern for the Council of Europe Committee of Ministers, which recommends Member States to establish appropriate control mechanisms "to promote and ensure the full effectiveness of the right to good administration"[30]. The notification must concern administrative acts and actions of public authorities or their inaction. Also, we believe that in order to be in line with the new vision of the European Court of Human Rights, and also with that of the Court of Justice of the European Union, the phrase "reasonable time" should be replaced with "optimal and predictable time", a vision shared by the Venice Commission[31]. As rightly pointed in the doctrine[32], the right to good administration should have a clear normative consecration, detailed in terms of components that include both individual rights and the obligations arising for public authorities, so that the sanction of those who violate the right to good administration lead to the purpose of the regulation. The Venice Commission[33] (the European Commission for Democracy through Law) complains about the clarity and coherence of the constitutional text, emphasizing the need for clear and explicit constitutional provisions. Venice Commission recommends the clarification of the nature of the response that private persons (natural or legal persons) must receive from the administration according to the right to good administration. The answer of the administration may be formal, as it happens in most cases. It is therefore important for the constitutional text to include the phrase "reasoned response" and not just limit to compel the administration to formulate a simple answer.

The right to good administration reflects both standards concerning relations between the administration and private persons, and requirements relating to the organization and management of public autho-

[30] Emanuel Albu, *Excepţia de nelegalitate- garanţie a bunei administrări*, in Emil Bălan et al., Dreptul la o bună administrare. Între dezbaterea doctrinară şi consacrarea normativă, Comunicare.ro Publishing, Bucharest, 2010, p. 118.

[31] Opinion on the draft law on the review of the Constitution of Romania, adopted by the Venice Commission at the 98th Plenary Session, Venice, 21-22 March 2014, available at www.venice.coe.int.

[32] Genoveva Vrabie, *Dreptul la o bună administrare- in stato nascendi în România*, in Emil Bălan et al., Dreptul la o bună administrare. Între dezbaterea doctrinară şi consacrarea normativă, Comunicare.ro Publishing, Bucharest, 2010, p. 55.

[33] Opinion resulting from Opinion on the draft law on the review of the Constitution of Romania, adopted by the Venice Commission at the 98th Plenary Session, Venice, 21-22 March 2014, available at www.venice.coe.int.

rities. The doctrine[34] judiciously pointed out that the right to good administration has two expressed functions – to govern relations between people and administration and to establish a high standard for public administration, which is obliged to fully respect fundamental rights or devise rules consistent with them. The application of good administration determines the public administration to train and build a new profile denoting: trust and predictability; openness, transparency and inclusiveness; accountability, efficiency and effectiveness.

It remains to be seen when the process of constitutional review is completed, after which the right to good administration will certainly be found regulated in the fundamental act.

3.1. The implications of the constitutionalization of the right to good administration on local public administration

The registration of the right to good administration in the catalogue of fundamental rights provided by the Constitution of Romania will lead to changes in legislation and administrative practice. A major impact of this change will affect the law regarding local public administration and the local administrative practice.

As seen, the right to good administration aims at the relation administration-private person, but also at aspects of the organization of administration and public management. Local public administration represents the component of the Romanian administrative system that is closest to the citizen, with a best highlight of the principle of subsidiarity, provided it has the necessary administrative capacity[35].

The standards required by the new right will influence the behaviour of local officials, and also that of administrative officials (civil servants or contractual staff). The principles reflected by the right to good administration will ensure greater openness and transparency for local public administration, and they will equally ensure that local public administration is characterized by integrity, accountability, efficiency and effecti-

[34] Andreea Nicoleta Ştefan, *Dreptul la bună administrare: de la consacrarea în Carta drepturilor fundamentale a Uniunii Europene la recunoaşterea în legislaţia românească*, in the paper „Tendinţe actuale în dreptul public. Abordare juridică şi filosofică", University Publishing, Bucharest, 2014, p. 411.

[35] The framework-law of decentralization no. 195/2006 defines, in Article 2 a), the administrative capacity as being *"all material, institutional and human resources that an administrative-territorial unit has, as well as the actions it carries out to exercise the powers established by law".*

veness. From the perspective of the right to good administration, local administration should focus on results and must act in good faith, pursuing the public interest in a reasonable manner, by following the procedures, by non-discriminatory actions based on the principle of proportionality, as stated by the European Court of Justice in its case.

The correct application of the right to good administration will democratize the local administrative mechanism by sending a message of trust and predictability to the private person. This allows the administration to return to its fundamental core consisting in serving the interests of citizens and not in exacerbating its dominant character[36].

The right to good administration obliges local authorities to improve their working procedures in their relation with citizens, to involve more the citizens in the process of making decisions and local public policies, and in the actual decision. The lack of reaction or the delayed reaction of the administration represents events incompatible with the requirements of good administration. Therefore, the local public administration must respond promptly to requests from the social environment, find practical solutions in line with the regulations in force, and show more innovation in the management of local affairs. It is not without interest that the Romanian public sector lacks integrity. Good governance can only be achieved with upright officials and administrative servants, motivated by the interest in the general welfare, to satisfy the interests of the community they represent. Integrity must be completed by professionalism, as well as a permanent spirit of action and consistency.

CONCLUSIONS

The right to good administration was born as a result of the mutual influence exerted by the European Union legal order and the legal order of the Council of Europe. Seen as a *"solid foundation for administrative simplification to the benefit of citizens"*[37], the right to good administration is a complex right, whose components are mainly settled in the

[36] Cristi Iftene, *Administrarea bunei administrări. Elemente comparative şi de bună practică*, in Emil Bălan et al., Dreptul la o bună administrare. Între dezbaterea doctrinară şi consacrarea normativă, Comunicare.ro Publishing, Bucharest, 2010, p. 382.

[37] Sorina Şerban Barbu, *Scurte consideraţii privind codificarea administrativă, condiţie a bunei administrări*, in Emil Bălan et al., Dreptul la o bună administrare. Între dezbaterea doctrinară şi consacrarea normativă, Comunicare.ro Publishing, Bucharest, 2010, p. 343.

Charter of Fundamental Rights of the European Union and in documents from the Council of Europe, and its size can be extended in proportion to the evolution of the jurisprudence of the Court of Justice of the European Union. According to The Charter of Fundamental Rights of the European Union, the states are obliged to respect the right to good administration only to the extent that they are implementing the European law. Therefore, it is necessary that this right gain constitutional recognition and private persons be able to employ it in their relations with public administration, thereby generating duties for the Romanian public administration, which must comply with the requirements of this right, and, practically, act under the law[38].

The constitutionalization of the right to good administration will affect the entire Romanian administrative system, and also the infraconstitutional legislation concerning public administration. Basically, the concept contained in Article 6 of the European Convention on Human Rights is taken, adapted and developed by the right to good administration in order to be applied in administrative practice. The impartial and fair treatment, the reasonable time, or in the new conception, the optimal and predictable time, the motivation of administrative decision, the authorities' obligation to compensate for the damage caused by their action or inaction to private persons represent some of the standards contained in the right to good administration and, once it acquires a constitutional form, it will constitute in solid guarantees provided to private persons in their relation with the public administration. Thus, it can be argued that the component-rights of the right to good administration are a counterweight against the discretionary power of the administration[39]. The application of the components of the right to good administration in local administrative practice will result in substantive changes at the level of local public management, of internal organization of administration, of the manner of reporting to the needs and expectations of private persons, thereby increasing the confidence of private persons in local public administration.

[38] Naomi Reniuț Ursoiu, *Principiul bunei administrări ca principiu general de drept public*, in Emil Bălan et al., Dreptul la o bună administrare. Între dezbaterea doctrinară și consacrarea normativă, Comunicare.ro Publishing, Bucharest, 2010, p. 367.
[39] Idem, p. 366.

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13. *The Charter of Fundamental Rights of the European Union*, http://europa.eu/legislation_summaries/justice_freedom_security/combating_discrimination/l33501_ro.htm.

14. Resolution R(77) 31 on the protection of the person in the relation with the acts of the administrative authorities.

15. Recommendation R(80) 2 regarding the exercise of discretionary powers by the administrative authorities.

16. Recommendation R(81) 19 regarding the access to information held by public authorities.

17. Recommendation R(84) 15 regarding public accountability.

18. Recommendation R(2000) 6 regarding the Status of public agents in Europe.

19. Recommendation R(2002) 2 regarding the access to public documents.

20. Recommendation (2003) 16 regarding the execution of administrative and jurisdictional decisions in the field of administrative law.

21. Recommendation (2004) 20 regarding the jurisdictional control over administrative acts.

22. Recommendation CM/Rec (2007)7 regarding good administration, adopted by the Committee of Ministers from the Council of Europe on 20 June 2007, at the 999th bis Reunion of the Ministers Delegates from the Member States of the Council of Europe.

23. The Report of the European Ombudsman for the year 1997, accessed at http://www.ombudsman.europa.eu/activities/annualreports.faces;jsessionid=9B8254B6EF87EFD4B98AECB4DA083DFF.

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26. Law no. 195/2006 of decentralization, published in the Official Gazette of Romania, Part I, issue 453 of 25 May 2006.

EQUALITY AND NON-DISCRIMINATION WITHIN THE LEGAL SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS. A PECULIAR APPROACH OF THE DISCRIMINATORY CRITERION OF GENDER

Maria Beatrice BERNA*

ABSTRACT

The study advance a comprehensive approach of the issues connected to the matters of equality and non-discrimination that are proliferated in the legal system of the European Convention on Human Rights and Fundamental Freedoms. The general guidelines of the paper are analytical and interpretative, aiming to lay on a just qualification of the concepts of equality and non-discrimination by relating to relevant juridical elements like article 14 of the Convention and article 1 of Protocol 12 and also by relating to caselaw aspects. Sex bias fits naturally in the logic of our paper – first in light of the prevalence that it receives in the debate upon discrimination (as sex is the first discriminatory criterion that is enunciated in the legal enumeration) and also from the point of view of a just social balance that will be maintained by eradicating sex-based discrimination. The central aim of our paper is not expository; we have advanced a personal conception upon the relevancy of sex-based discrimination by emphasising the consequences that it brings upon social equity and by critical assessing the qualification of suspect criterion that doctrinal studies attached with regard to the sex discriminatory criterion.

KEYWORDS: *equality, non-discrimination, sex, gender, the legal system of the European Convention on Human Rights and Fundamental Freedoms*

General utterances upon the theory of equality within the legal system of the European Convention on Human Rights and Fundamental Freedoms

Equality and non-discrimination stand, within the legal system articulated under the auspices of the European Convention on Human Rights and Fundamental Freedoms, as institutions that cannot be inter-

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polated within a monolithic doctrine of *stare decisis* given the fact that the theorizing upon the subject are various and cannot be perfectly reconciled. Such a trend is natural especially if we consider the fact that we cannot obtain a well-shaped framework for defining concepts than we will face a challenge concerning the analysis for practically applying equality and non-discrimination.

Specialized studies[1] tried a unification of the opinions expressed upon equality and non-discrimination, emitting exotic theories – *equality as a legend instrument* or *equality as sovereign value* – that may determine, within the legal sciences paradigm, only consequences of programmatic nature. For a rightful performance, we deem that the explanations must be rather directed towards the content than towards the form and style. Consequently, we subscribe to those opinions[2] which assess the relation equality-non-discrimination in terms of a relation between two self-included notions. From this point, we state that, the two element find themselves in an inter-conditioning relation so that, equality and non-discrimination arise as two sides of the same concept – *equality is the positive side* – the State – as the main actor that pursues the accomplishment of liberal aspirations, will be bound to ensure the equal treatment of all individuals; and *non-discrimination is the negative side* – because being animated by the same desire of achieving all the fundamental exigencies of a democratic society, the State will be bound in a negative sense, abstaining from all the acts that might affect the equality balance.

The issues highlighted by the principles of equality and non-discrimination have mainly preoccupied the international legal system, – the Universal Declaration of Human Rights – in article 7 and the International Convenant on Civil and Political Rights – in article 26, have directed, in general terms, these demands. The manner in which equality and non-discrimination were established was essentially different. Article 7 of the Universal Declaration of Human Rights is worded in a specific manner, advancing the distinction between *equality before the law* and *the right to equal protection of the law*. In the spirit of those noted by

[1] Noel Whitty, Therese Murphy and Stephen Livingstone, *Civil Liberties Law: The Human Rights Act Era*, Bath Butterworths Press, 2001, p. 377; Ronald Dworkin, *Sovereign Virtue*, Cambridge: Harvard University Press, 2000.

[2] Iina Sofia Korkiamäki, *Legal Gender Recognition and (Lack of) Equality in the European Court of Human Rights*, The Equal Rights Review, Vol. Thirteen, 2014, p. 20; Bayefsky, A., *The Principle of Equality or Non-Discrimination in International Law*, Human Rights Law Journal, No. 11, p. 1.

doctrinal studies[3], equality before the law is the synonym of *equality within the law* – that is circumscribed, from our point of view, within legal regulations meanwhile, *the right to equal protection of the law* – is the equivalent of *equality through law* in the sense of applying the law in an equal and non-discriminatory manner with the purpose of granting the same protection in favour of all the subjects of law. We notice, likewise, that equality and non-discrimination encompass, in the sense prescribed by article 7 of the Declaration, the hypothesis of protecting individuals from any *incitement to discrimination.* By including the *possibility* of discrimination within the legal framework of protection against all inequalities, article 7 of the Declaration creates a comprehensive framework that is justly lined to real events.

Article 26 of the International Covenant on Civil and Political Rights expresses, in its first thesis, a unique combination according to which, equality is a value that is achieved by virtue of legal provisions (reiterating, to some extent, the explanations given when approaching article 7 of the Declaration) and discrimination is a special dimension of equality that is achieved by applying in practice those legal provisions that are focused upon the value of equality.

There is a high probability that the interpretation of the above mentioned texts would add some more opaqueness in the field rather than to help clarifying them. The differences of subtlety between *equality through law* and e*quality within the law* or the bold association by virtue of which non-discrimination is a real dimension of the concept of equality – that is rather close to idealism than to a real space,- are eloquent but, at the same time, are much too limber with regard to its content and interpretation. Nevertheless, the merit of the above evoked documents consists of furnishing an autonomous benchmark upon the equality theory – a desirable layout for the European Covention on Human Rights and Fundamental Freedoms, but a layout that is unachievable in practice. Article 14 of the Convention – the legal benchmark in issues arising from applying equality and non-discrimination, has received many reproaches concerning its subsidiarity, and concerning the lack of consistency and independence, being assimilated to a *parasitic rule*[4] or accepting the metaphoric name of *Cinderella*[5] of the Con-

[3] Nica Elena Mădălina, *Egalitatea de Şanse*, (*Equal Opportunities)*, Publishing House Universul Juridic, Bucharest, 2012, p. 9.

[4] Small, *Structure and Substance: Developing a Practical and Effective Prohibition on Discrimination under the European Convention on Human Rights*, European Journal of

vention's regulations. Obviously, the above-mentioned qualifications cannot be without consequences. The cvasi-subliminal attention paid to the provisions of article 14 of the European Convention will determine some difficulties in the process of identifying, defining or recognizing by means of case-law some default dimensions of equality and non-discrimination like *direct discrimination* or *indirect discrimination*; likewise, new challenges are proliferated in the realm of equality and non-discrimination as the *need of introducing the legal institution of reasonable accommodation* will meet opposition. On the other hand, the shift from *formal equality* – centred on the strict logic of legal regulations to *substantial equality* – oriented towards legal consequences and towards the results that the law brings upon a certain group that was traditionally disadvantages, will be a toilsome endeavour that will evolve under the auspices of uncertainty.

Those exposed in the previous paragraph will complete the affirmation under which we have opened the sphere of the argument of the present section: *equality and non-discrimination cannot be introduced in a monolithic doctrine of stare decisis.* The unanimous doctrinal qualification of the European Convention on Human Rights and Fundamental Freedoms – that of a living instrument that is designed to guarantee effective rights, – although is verified in practice, must be approached in a different manner by comparison to the equality principle. The perspectives embraced by the European Court of Human Rights concerning in general the equality principle and in particular the gender equality, were not coherent and were not unanimously accepted – the doctrine of margin of appreciation being a viable alternative in this sense. The case-law developments regarding equality and non-discrimination applied to the gender criterion will follow the direction set out by a distinct section of our paper. In the following, we will refer to the analysis of the regulations that give the foundation rules in the field – article 14 of the Convention and article 1 Protocol 12 of the Convention.

Discrimination and the Law, 2003; Baker, *The Enjoyment of Rights and Freedoms: A New Conception of the 'Ambit' under Article 14 ECHR*, Modern Law Review, 2006.

[5] O'Connell, *Cinderella Comes to the Ball: Art 14 and the Right to Non-discrimination in the Convention*, Legal Studies, 2009.

The legal premises of the equality theory in light of the provisions of the European Convention on Human Rights and Fundamental Freedoms

Article 14 of the European Convention on Human Rights and Fundamental Freedoms was traditionally associated with the reproach of lack of autonomy. A first reading of the content of article 14 seems to prescribe its total dependency on the exercise of the rights and freedoms prescribed by the Convention: *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.* The understanding of the sense of the previous cited provisions is a complex action that must relate to the *ambit*[6] of the Convention. Indeed, the accessory character of article 14 is argued by relating to the rights and freedoms guaranteed by the Convention – we take into consideration those rights and freedoms that rejoice a main application; if we apply the reasoning *accesorium sequitur principale,* we will certainly reach the already anticipated result of the possibility of invoking the dispositions of article 14 only when invoking a substantial provision of the Convention. Despite these observations, we must show that, the accessory feature of article 14 is *relative* and not absolute. The application of article 14 does not entail the precursory condition of the violation of a right encompassed within the Convention, being possible to invoke article 14 in a case that involves another right of the Convention- without the latter being transgressed. Consequently, it is just to assert that, the problem of ambit indirectly addresses the aspects connected to equality and non-discrimination, the Court implicitly sustaining, by means of case law, that the equality theory may be connected to violations of article 3 – relating to cruel, inhuman and degrading treatments or of article 8 – that guarantees the right to private life.

Doctrine[7] observes the tendency existent with regard to the rights and freedoms guaranteed by the Convention. Recognizing the pattern established by the Universal Declaration of Human Rights – a document with moral value, oriented towards drawing the relevant guidelines in the field of protecting human rights, the Convention adopted a minimalist approach, – centred on promoting political and civil rights, neglecting the

[6] O'Connelle, *op. cit.*, p. 5.
[7] Ibidem.

sphere of social, economic and cultural rights. Extending, by means of case-law instruments, the ambit of the Convention to economic and social security issues, the European Court of Human Rights created a breach in favour of an extensive interpretation of the application of the equality and non-discrimination principles.

Article 14 evokes an Aristotelian theory of equality according to which the equality value is violated if persons who are in analogous situations are treated different or if those who are in different situations are treated in a similar manner. Both rules are valid with the exception of an *objective and reasonable justification* – the latter may be objectified as *the pursuit of a legitimate aim* and *the establishment of a reasonable relation of proportionality between the aim and the means that were implemented for achieving that particular aim.*

In order to establish if those who are in analogous situations are treated in a different manner, respectively, in order to establish if those who are in different situations are treated alike, we must proceed to a *comparison test.* For the results to be accurate, the comparison test must be applied in an ambivalent manner: (1) the comparison is applied with the purpose to establish the existence of similar/different situations in which are found the subjects of discrimination; (2) the comparison is applied in order to qualify the treatment that is used – different or alike. The first inconvenient of the comparison test consists in finding an optimal *benchmark.* In doctrine[8], it was reached the conclusion according to which, the unanimous benchmark that is accepted is the benchmark of the Caucasian, Christian, heterosexual male. We feel that, in these terms, the comparison test is void because the central instrument that is used for obtaining results is discriminatory. The legitimacy of this kind of benchmark is frail and may be easily contested by means of formulating some observations that are bound to underline the limits of the comparative approach: (1) what is the reasoning for adopting the standard of the Caucasian, Christian, heterosexual male? – or, more clearly, the invoked benchmark may be legitimate as long as it is based on discriminatory criterions? (Caucasian – means the violation of the discriminatory criterion of race; Christian – means the violation of the discriminatory criterion of the right to identity – whether it is understood as gender identity or as the freedom of sexual orientation); (2) the advanced benchmark bears the limit of the impossibility of integrating differences; – for example, how can we use the benchmark of the Caucasian, Christian,

[8] Sandra Fredman, *Introduction to Discrimination Law,* Oxford: OUP, 2002, pp. 8-10.

heterosexual male in order to address discriminatory issues that affect pregnant women, women who had a baby or women who are breast-feeding or issues that are due to a systematic discrimination of black people?

Because applying the comparator is in itself a more difficult endeavour than the process of establishing the existence of discrimination, we feel that, it is more efficient and more just to resort to the verification of exceptions as the just and reasonable justification, the pursuit of a legitimate aim or the establishment of a reasonable relation of proportionality.

If one of the exceptional situations is verified, the discriminatory state is discarded.

Also, the previously invoked *ambit* was stated under the semblance of a severe problem that needs a close exam in the context of a correct identification and application of article 14, may be approached in another manner. The ambit may be perceived in strict relation to the provisions of article 14, without referring to the coverage of the Convention, respectively to the manner in which, by means of case-law, new rights were added to the content of the Convention. For clarity reasons we choose to reiterate the general truth in light of which, article 14 of the European Convention does not establish a new right – it merely draws a new alternative principle. [9]

Once we have reiterated the nature of the provisions that are contained in article 14, an uncertainty appears in relation to the manner of understanding its *ambit.* If article 14 has, within the context of the European Convention, the role of general principle, than, its ambit can be construed as being linked to *the grounds of discrimination that are mentioned in expresis.* The exact wording of article 14 removes any doubt concerning the fact that the enumeration of the grounds of discrimination that is advanced by the text of the Convention is not exhaustive, the final wording – *other status* suggests this thing. In this point, another difficulty becomes relevant- how can we interpret the expression *other status*; more clearly, what are those criterions that can be included in the content of the expression *other status*? Firstly, the criterions that can be comprised within the expression *other status* cannot be exhaustively enumerated (this aspect results from the no exhaustive character of the enumeration comprised in article 14); secondly, the

[9] Lambert, *La Portee de l'Article 14 de la Convention Europeenne des Droits de l'Homme*, Revue Hellenique des Droits de l'Homme, 2003.

potential discriminatory criterions that may be included in the above mentioned category, must be searched amongst *the types of discriminatory situations that may be associated with article 14*.

Traditionally, article 14 of the European Convention refers to those cases of direct discrimination- respectively to those cases according to which the promotion of a differentiated and unjustified treatment results in an obvious manner. Accepting that indirect discrimination is covered by the provisions of article 14, is a fact that occurred gradually and implicitly. As specialized studies observe[10], through the case *Thlimmenos against Greece* was opened the path to jurisprudence recognition of indirect discrimination as an integrative part of the sphere of action prescribed by article 14. In the quoted case, the European Court identified the breach of article 14 in conjunction with article 9, qualifying the situation of non-distinguishing between the persons who violate the law out of reasons of conscience and religion and those persons who breach the law independently of those reasons as a state of indirect discrimination. From our point of view, this idea is valid because the non-differential treatment between individuals who violate the law depending on reasons that determine their antisocial behaviour (especially if these reasons consists of rights synthesized in the Convention – the freedom of conscience and religious freedom) is a state that can determine a differentiated treatment upon persons that belong to minority groups.

Returning to the subject of the ambit of article 14 and accepting the above exposed thesis according to which indirect discrimination is a component element of the coverage of article 14 then, in the category *other status* we can include those situations that can be conceptualized as facts that determine indirect discrimination such as: sexual identity or sexual orientation.

A sort of reform of the equality framework of article 14 of the European Convention took place when adopting Protocol 12 which, in article 1 establishes the foundation of the non-discrimination principle: *1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall*

[10] Nicholas Grief, *Non-discrimination under the European Convention on Human Rights: A Critique of the U.K Government's Refusal to to sign and ratify Protocol 12*, Oxford Brooks University, 2001.

be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

The independence of the equality theory that saw light under the auspices of the European Convention is proven by means of the provisions of article 3 which, under the name *Relationship to the Convention* mentions in expresis verbis the following: *As between the States Parties, the provisions of Articles 1 and 2 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.* Article 1 of Protocol 12 – the new framework of non-discrimination – resembles article 14 of the Convention through the non-discrimination criterions (as those that were advanced by article 14 were consequently kept) but differs from article 14 by means of two essential elements: (1) the scope of application; and (2) the active subject of discrimination. Judging from the point of view of the scope of application, Protocol 12 is more extended than article 14 of the Convention, – the first relates to interdict discrimination regarding any right that is prescribed by law meanwhile, the second one takes into consideration the rights and freedoms that are stated within the Convention. The second point – that is connected to the active subject of discrimination, – is explained in article 1 of the Protocol 12 – being expressly designated an authority that is included within the public system.

The case law on the discrimination on the basis of sex

Both article 14 and article 1 of the Protocol 12 include *prima verba* on the list of discriminatory criterions to the sex criterion. The distinction gender-sex is the object of heated debates in doctrinal studies, as the correct option regarding the subject remains unclear. We feel that the distinction on the basis of sex implies the use of a biological criterion that will portray the differences between the male and the female segment in a deterministic manner. If gender would have been preferred over sex – as a discriminatory criterion –, than it would have been advanced a juridical reality that is more connected to the immediate factual reality. We upheld this affirmation in view of the argument according to which, the differences between men and women – like they are depicted at the social level, are the consequence of some extensive qualifications that are attached to men and women by associating some social roles and some behavioural patterns that are expressly established. For reasons that entail the integration of the gender issue, we deem that, the proneness of the

wording used within the European Convention for the notion of sex does not prove, by default, a biological-deterministic perspective; it merely shows (or is ought to show) the possibility of an extensive interpretation of the term sex – interpretation that resembles more to the sense we advance for the term *gender*.

In the legal system of the European Convention on Human Rights and Fundamental Freedoms, the sex concept represents more than the first criterion that is prescribed on the list of reasons of discrimination; doctrine [11] consecrated with regard to this reason of discrimination, the character of *suspect criterion.* The idiom *suspect criterion* is an innovation of the inter-American system of human rights protection and designates a certain discriminatory criterion that needs to be subjected to a thorough scrutiny because of the various practical problems that it implies. The exceptions from the application of the principle of non-discrimination on the basis of the gender criterion will be assessed in a distinct and thorough manner as the exceptional situations must be the expression of a peculiar state that is also ineluctable. In other words, the meaning that is allotted to discrimination on the basis of sex/gender – *that of a suspect criterion*- sets the premises for stating that exceptional situations (which are translated by violating the non-discrimination principle on the basis of sex/gender) may be possible only at a *theoretical* level rather than at a practical level. Returning to the general framework of analysing the principle of non-discrimination, exposed in the previous section of our paper, – the derogations from applying the principle of non-discrimination and thus the cases that allow discrimination, emerge from the hypothesis of *an objective and reasonable justification*, from the hypothesis of *a legitimate aim* and finally, form the hypothesis of a *reasonable proportionality relation* between the means that are used and the aim that is pursued. None of these justifications of the application of the discriminatory treatment rejoice a direct practical approach. It is obvious that, consequently, the description of *suspect criterion* cannot produce clear repercussions.

By means of case-law, the Court has approached the criterion of discrimination based on sex with great prudence, justifying, to a certain degree, the prerogative of suspect criterion that doctrine attached to it. Nevertheless, a *prima facie* case law analysis states that, in resolving the cases founded upon the violation of the principle of sex discrimination, it

[11] Samantha Besson, *Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet*?, Human Rights Law Review, No.8, 2008, pp. 647-682.

is assessed the factual state in a holistic manner, without verifying if the discovered discrimination may or may not be justified. As we have previously noted, the suspect criterion operates in the sense in which the discriminatory aspect will be unveiled only in the measure in which it is observed the absence of derogatory situations (see objective and reasonable situation, legitimate aim or a proportional relation between aim and means). From the cases that we will analyse results the primordial concern of the Court for verifying the first part of the equality test- that is *observing the application of a distinct treatment to those that are in similar situations* or *observing the application of a similar treatment to those that are in different situations*. The second part of the discrimination test – which consists of verifying the possible exceptions that would legitimate discrimination- is marked as subliminal. Here lies also the idea of placing *the suspect criterion* under the auspices of a form-concept.

In the case *Ünal Tekeli vs. Turkey*[12] the issue of establishing the existence of a discriminatory treatment has followed the logic that was previously presented – the Court proceeded to verifying, by relating to the factual situation, if there has been a differentiation in treatment, leaving to the subliminal level the issue of a reasonable and objective justification. The factual situation of the case is presented as follows: the plaintiff, having the profession of junior lawyer before contracting marriage, requested the permission to exercise her profession under a joint family name (her family name and that of her husband) stating that she is known in her profession under the name that she had before contracting marriage. It is worth mentioning that, at the date of the facts, the Turkish legislation forced women to take the family name of their husbands after marriage, thus being promoted the legitimate aim of maintaining family unity. As a result to the request formulated by the plaintiff, the European Court noted that, the change in the family name affected the plaintiff's life at the professional, social or cultural level, thus being justified the claims regarding to the violation of the prerogatives established in article 8 of the European Convention on Human Rights referring to guaranteeing private life. When evaluating article 14 of the Convention- whose provisions were in connection to violating the principle of gender equality in the case of establishing the mandatory aspect with respect to the married couple to have the same family name with the husband family name, the Court proceeded to verifying a

[12] *Ünal Tekeli vs. Turkey* Case, Judgement of 16 November 2004, Section IV, request no. 29865/96.

difference in legislative treatment of the issue. Consequently, is was established that the legislation of various European States allow both spouses the possibility to decide with regard to the family name that the new family will have, without imposing, in this sense, the family name of the husband (thus, the male standard).

On the side, the Court assessed the hypothesis according to which there is a reason for applying a differentiated treatment between sexes. Relating to the reasoning offered by Turkey as a justification for the discriminatory treatment- by virtue of which, establishing the family name of the husband as the joint family name is mandatory because of the aim of preserving the family unit-, the Court adopted a distinct point of view. Amid the tendency of reforming the Turkish legislation so that it integrates easier the principle of equality between sexes, the Court felt that, such a legal disquisition that allows the family name of the husband to become the joint family name entails negative implications upon the female segment and violates the those family values whose protection is pursued by these dispositions. Finally, the Court found the breach by reference to both article 8 and article 11 of the Convention.

An unprecedented approach of the non-discrimination principle on basis of sex is illustrated in the case *Opuz vs. Turkey* [13], article 14 being invoked in connection to article 2 – the protection of the right to life and article 3 – prohibiting torture. The unprecedented approach of the equality theory within the context of human dignity and the right to life springs from the fragmentation of the equality test, being obvious that, the European Court has undertaken some demarches in order to observe the degree in which can be verified the first part of the test- that is the part related to the difference in treatment based on sex. The analysis of the second part of the test (the assessment of an objective justification that would legitimate the violation of the principle of non-discrimination) is almost ignored by the Court; this occurs not because it would represent an epiphenomenon but because, considering the relevance of social values that are protected through the right to human dignity and the right to life, such a verification is redundant and is deprived of a clear and concrete objective. In fact, the plaintiff separated from her husband H.O invoking the reason of domestic violence; the violent behaviour manifested by H.O towards the plaintiff has occurred including during the period that followed the divorce, respectively, during 1998-2005, with regard to this fact being pronounced a conviction against H.O to 3

[13] *Opuz vs. Turkey*, Judgement of 9 June 2009, Section III, request no. 33401/02.

months imprisonment that was converted into a fine penalty. In the year 2001 violence escalated, H.O inflicting the plaintiff 7 wounds, consequently, the victim's mother requested to the authorities to arrest the abuser considering his previous behaviour, this criminal record and her numerous complaints against H.O that were afterword retracted. Amid the authorities passivity, a year later, the plaintiff's mother was murdered by H.O and the latter, - although convicted for murder and illegal gun possession, - was set free until the trial of the appeal. Once again subjected to physical and psychological aggressions form part of H.O, the plaintiff requested the Turkish authorities to adopt some corresponding protection measures nevertheless, the national authorities gave a negative response; finally, the requested measures were allowed through the intervention of the European Court.

Discussing the subject of violating the non-discrimination principle is a fact that is undertaken implicitly or, even more clearly, is undertaken by studying the *passive behaviour* of the Turkish authorities towards the situation pointed out by the two women. We interpret the non-implication of the Turkish authorities in solving the case as being equivalent to a differential treatment by comparison to the natural standard of active implication of the authorities in solving the requests that are brought to their attention. The Court has identified the sex criterion as a discriminatory criterion because, following the conducted investigation it was established that, the lack of attention of authorities concerning solving the case is due to the disregard shown to female applicants and to treating violence issues as *private matters* that occur between spouses or ex-spouses- affaires in which it is best for authorities not to intervene. It is worth noticing that, the cultural factor is one of the explanatory reasons for the disinterest of the Turkish authorities towards the case; as it was argued by the plaintiff through the evidence that were collected, in the Turkish culture, women are traditionally assimilated to victims of domestic violence, the cases of spousal abuse being common at the national level. On this reality – founded on tradition, was established the conduct of Turkish authorities to advise the plaintiff, in numerous situations, to drop the complaints and to reconcile with her husband, thus contributing to the plaintiff's vulnerable situation.

We have approached the cases exposed above to argue that, in the application of the equality and non-discrimination principle within the European Court of Human Rights case-law, the cultural factor is not to be neglected; on the contrary, it is insidious inserted in the main juridical problem and it can be translated, at a second sight, in the real cause of the

discrimination case that is identified. In another token, by choosing the cases analysed above, we have aimed to present the versatility of the principle of equality and non-discrimination in the sense of the ability of invoking it with regard to some complex juridical problems as the respect for private life (article 8) or the respect of life and human dignity (articles 2 and 3), problems that are attached to factual situations which, apparently, do not have implications upon the equality theory.

CONCLUSIONS

Equality and non-discrimination represent a benchmark on the basis of which is organised a better exercise of human rights, whether we take into consideration their co-dependent form ensured by article 14 of the Convention, whether we take an additional step in acknowledging their autonomous form that is guaranteed by the adoption of Protocol 12. As law principles, equality and non-discrimination design a symbiotic juridical reality whose aim is explained in a dual manner : (1) equality and non-discrimination function on the basis of an inter-dependency relation – that was evoked at the beginning of our paper; (2) equality and non-discrimination is associated with rights and freedoms (encompassed within the Convention and prescribed beyond the Convention's ambit by means of Protocol 12) with the purpose of achieving, at the highest level, the fulfilment of human prerogatives. On the other hand, the fulfilment, at the highest level of human prerogatives is the best depiction of social justice, being achieved, within these parameters, an inner connection between the application of the principles of equality and non-discrimination and social justice. Human dignity is both a consequence and an objective of equality and non-discrimination – features that are emphasised if we narrow our discourse to gender/sex equality. In this context, the reiteration of the qualification that doctrinal studies offered to sex discrimination- that of *suspect criterion*- becomes futile. Counteracting gender discrimination is the first problem of a large series of issues linked to obtaining social justice and reflecting human dignity. The *suspiciousness* that hovers over gender equality is nothing more than a synonym of the judge's prudence in assessing the facts and is also a synonym of the necessity of fairly solving the legal situation that was brought to justice. Surpassing gender discrimination is not a *suspect criterion* but a scientific and pragmatic *necessity* behind which is found the *equity of social relations.*

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THE SUBJECTS OF THE CRIME OF GENOCIDE

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ABSTRACT

The main purpose of this paper is to analyse the subjects as background elements of committing one of the worst offenses punishable both in international law and in national law, namely the crime of genocide.

In the article, are presented the main theories and theses about the appropriateness of detention of a special quality in terms of the active subject of the crime of genocide.

The paper will also address issues mentioned, in terms of literature and international jurisprudence, followed by the formulation of a personal opinion.

Examining the subjects of the crime of genocide is considering legal amendments made by adopting the new Criminal Code, the provisions of international documents bearing on the matter of genocide and international legal practice elements.

KEYWORDS: *group, community, special quality, plurality, topic*

1. Preliminary issues

Genocide is primarily a legal concept. Like many other terms - murder, rape - is also used in other contexts and disciplines, where the meaning may vary. Many historians and sociologists use the term genocide to describe a series of atrocities involving the killing of large numbers of people. But even as it is inaccurate to speak of a single direction widely recognized genocide. There is a widely accepted definition, the first laid down in Article II of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide.

Like most legal definitions, the term genocide is subject to various interpretations, and important controversies remain regarding the scope of the concept, even within the definition of what is a concise and carefully drafted.

The crime of genocide has been incorporated into the national legal systems of many countries, where the domestic legislators have imposed

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their own views on the term, some of them even varying, slightly or considerably, from the international definition set.

As a result, even in law we can speak about several definitions more or less faithful or interpretations of the concept of genocide. The term itself was coined by Raphael (born Rafał) Lemkin, who wished to fill a blank space in international law, specifically the final period of the Second World War.

For more than two decades, Lemkin was involved internationally, in a continuous attempt to criminalize new categories of international crimes involving atrocities against civilians vulnerable. Even before Lemkin, international law has seen a limited number of so-called international crimes.

As a rule, they were so named not because they were committed on a large scale, but for more understandable reasons, that have excess territorial jurisdiction of states. In this sense, piracy is a classic example, a crime committed on the high seas. Lemkin and others held a different view, proposing the recognition of international crimes only if they were serious violations of human rights. [1]

2. Active subject

The active subject of this crime can be any person, because the law does not require a special quality. I do not care if the person is within the group or outside it.

It also does not matter if the person acting on their behalf or at the instigation of or with the consent of another person or by order of the authorities. Participation is possible in all its forms. In the penultimate paragraph of the law provides a constituted plurality form, consisting in understanding more persons to commit the crime of genocide, and in the last paragraph legislature sanctioned form of committed public incitement directly to this crime.

The literature has expressed the view that the authors of this crime must have a special quality. The special condition, the quality of which must meet offenders is to be employed in a state structure - the various hierarchical levels - or to work in the disposal of such employee [2].

From our point of view, the active subject of the crime of genocide involves a separate analysis, as one of the most significant issues to be addressed in crimes against humanity and genocide matter, which is why we undertake a detailed examination of these issues. In this regard, we

consider that the initial appearance to be addressed is the active subject analysis on the legislative framework, the laws established by international law.

Consequently, the first reference with direct reference to the active subject matter must be made to Article 6 of the Charter of the International Military Tribunal in Nuremberg stipulating against persons who, acting in the interests of the Axis countries, have committed acts of genocide, war crimes or crimes against humanity. To support these provisions, the court relied on the fundamental principle of international criminal responsibility of individuals, in accordance with international law. However, the Nuremberg International Military Tribunal held that the specific crimes of international law are committed by individuals, not by abstract entities, and only by punishing them that are implemented provisions of international law.

Likewise, as a reconfirmation of that principle, the Charter of the International Tribunal for the Far East provided in Article 5 individual criminal responsibility. The principle was established and analysed in the "principles of international law recognized in the Charter of the Nuremberg Tribunal" Principle Title I, adopted by the International Law Commission, in the second session (1950) document which states that "any person who commits an act which constitutes a crime under international law is responsible, and therefore punishable."

Another legal provision incident in active subject matter of crimes against humanity and genocide is Article 25 of the draft statute for an international criminal court, adopted in 1951 by the Committee on International Criminal Jurisdiction Committee (Geneva), established by Assembly Resolution general 489 (V) of 12 December 1950 provides: "The Court shall have jurisdiction only natural persons, including persons acting as head of state or government agent."

International Criminal Jurisdiction Committee established pursuant to General Assembly resolution 687 (VII) of 5 December 1952 in the revised draft statute for an international criminal court, adopted the following wording for draft article 25: "The Court shall have jurisdiction over individuals, whether they are constitutional rulers, public officials or private individuals."

Article III of the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by General Assembly resolution 3068 (XXVIII) of 30 November 1973 provides, inter alia, that "international criminal liability applies regardless of the reason involved, to individuals, members or organizations and institutions and repre-

sentatives of the State, whether residing in the territory in which the acts are perpetrated or in another state, whenever: (a) are they ... acts listed in Article II of this Convention".

Another provision with direct bearing on this matter is contained in Article 8 of the Charter of the Nuremberg which stipulates that no defendant cannot plead that he acted under orders from a superior, although this could be considered as a mitigating circumstance. Failure to recognize the possibility of invoking orders from superiors is known as the "principle of Nuremberg".

Accordingly, we find that the theory is unfounded accordance to which the active subject of the crime of genocide must fulfil a special condition, which is to be employed in a state institution, occupying a particular position in a determined hierarchy. Moreover, if we consider recent advances in high technology weaponry and military technical accelerated development capabilities, we can easily see that the acts of mass murder specific to crime of genocide is a viable option for any person with basic knowledge in the sphere of the use of weapons of mass destruction.

In this respect, it is relatively easy to imagine a scenario in which an individual, based on religious motivations, xenophobic or extremist using weapons of mass destruction, particularly those not involving several perpetrators, specially biological (spread of disease-causing microbes, spray the surface of various objects, viruses, pathogenic fungi) or chemical (chemical contamination of water, soil or air).

Accordingly, we find the possibility of killing or physical harm to members of the human group, as material element of the crime of genocide by an individual, singular or individually viewed as an active subject who does not act under any order or any provision data of a higher hierarchical or governmental power, but under its own criminal judgment or resolution based in various aspects of mental or emotional state, aimed at destroying all or part of the human group concerned.

Also, another factor that may contribute to the crime of genocide by any person without having to fulfil any special conditions is the geographical position of a human group, characterized by isolation, as a community located in a secluded or stray area may be a target that can be easily destroyed, even remotely, by an individual acting on his own.

Of course, it requires a special mention in the analysis of the active subject of the crime of genocide, namely that assessing acts of genocide strictly from the "classic" point of view, widely publicized that occurred throughout history, we find that the authors of these abominations have

operated under a management or under a formal qualities that involves exercise of state authority.

So, we can say that they have a clear picture of the possibility of committing the crime of genocide, making it available to its own means and tools to enforce the criminal resolution, exclusively on executive power with which they were invested in a particular time. Therefore, the management or hierarchical position, held official status or quality was the determining factor, the sine qua non for the crime of genocide in a particular geographic area.

But those precedents cannot be accepted as special condition applicable necessarily to active subject of this crime, whereas now any individual may be able to commit acts of genocide, without the benefit of any resources or even political logistics invoice, which could access under formal qualities.

In support of this view we can also invoke the technological progress of mankind in recent decades, the most popular period after committing acts of genocide (after the Second World War), a process that allows any individual with a minimum of military knowledge in especially in terms of actual use of military equipment, to implement and execute a collective act of violence directed against a group of people determined.

So, making a brief parallel between specific acts of genocide committed in the past and the present, we conclude unequivocally full applicability of the belief that, the active subject of crime analysed can be any person who fulfils the general criminal liability without fulfilling any special qualities.

3. Passive subject

Overall changes made to the criminalization of the crime of genocide, in accordance with the new Criminal Code refers mainly to a better correlation with Article 6 of the Statute of the International Criminal Court, adopted in Rome on 17 July 1998 but was considered, in particular, form the article.

With direct bearing on the issue under review in this paper, the legal text was excluded and replaced by the notion of the community group, since this content was preferred in recent international laws. Passive subject of the crime of genocide is always collectively represented by a national, ethnical, racial or religious subjected to actions aimed at the partial or total extermination of it.

All actions specific to material element of the crime of genocide should refer to a large number of persons forming a national, ethnical, racial or religious group, and the purpose of operating the author must be to destroy the group in question. [3]

We can define the group as a group of people united (stably or temporarily) by a community of interests, views, etc., which have caused social relationships that are subject to the same rules of behaviour.

As a group we mean a social group organized by certain political or economic criteria that lead there and in a certain space, regardless of its size and its recognition by the state structures or other similar structures. By default there is also a secondary passive subject, adjacent, represented by the person subject to direct actions punishable by law. [4]

The key challenge lies in determining the committing of that crime, and genocide should refer to the notion of group as a victim, taking into account, however, identifying the four categories of groups established by the Convention, namely national, ethnic, racial and religious.

In doing so, the International Criminal Tribunal for Rwanda decision (*Akayesu case*) is an undeniable progress as it establishes that protected groups should not be limited to the four categories, but to include "any permanent and stable group". In this case, the court members recognized that it necessary to respect the intention expressed by the authors in developing Convention on the Prevention and Punishment of the Crime of Genocide, namely to protect any group that enjoys permanent and stability.

The doctrine has launched also the theory that the plurality of secondary victims as passive subjects is not a prerequisite for retaining the crime of genocide. [5]

This view shows that this offense is consumed even if, following the commission of any of the ways the material element, the result is a single victim, as long as the active subject acted to destroy all or part of the community or national, ethnic, racial or religious.

However, it should be noted that the establishment of victims belonging to national, ethnic, racial or religious raises other than the consideration of their membership of a community, because in this case, the difficulties start right from the definition, including linguistically, the notion of community.

A parallel is needed between the definition of our criminal law and the one provided by the French penal code, which could be characterized as something broader: "acts committed as a result of the execution of a concerted plan aimed at the destruction of part or overall a national,

ethnical, racial or religious group or any other criterion arbitrarily determined."

This definition makes clear reference to the fact that acts of genocide does not always concern only a certain type of human group, such as racial groups, as in the case of the Jews, but that genocide may also cover social groups.

Russian historian Sergei Melgunov, quoting Latsis, one of the first heads of the Cheka (Soviet political police) who, on 1 November 1918, gives his brute Directive [6]: "We do not go to war against individuals. We exterminate the bourgeoisie in its class quality. Do not look, during the investigation, documentation and evidence of the facts of the accused - acts and speeches - against Soviet authority. The first question you should ask is which class it belongs to, his origins, education, instruction, profession". [7]

CONCLUSIONS

Interest on the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide and legal aspects of genocide have increased dramatically in the last ten years as part of the proliferation of this activity in the field of international criminal law. The past decade has registered most judicial declaration regarding the crime of genocide.

Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide is the starting point of the Rome Statute. The Genocide Convention has the merit of the following items that define the development of international law: an affirmation of the most important principles and reflection of the values and standards specific to the adoption.

At the same time, the meaning of genocide from the legal point of view dropped, probably as a phenomenon directly related to the dramatic expansion of the category related to crimes against humanity. Today, there are few legal consequences in identifying an act as genocide, unlike flexible label describing crimes against humanity, a concept broader and more flexible.

In this context, the analysis of the crime of genocide subjects has a particular importance, both for identifying and punishing those guilty of such wrongdoing, we can categorize, easily, as atrocities, but also to sensitize civil society in the face of such crimes. One can also consider some awareness of the danger caused by people who carry out public

functions that affects an entire group of people, by committing the crime of genocide, causing effects including at interstate relations level.

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MODERNIZATION OF NATIONAL LEGISLATION BY TRANSPOSITION OF EUROPEAN DIRECTIVES IN THE FIELD OF COPYRIGHT AND RELATED RIGHTS

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ABSTRACT

The obligation to transpose European Union (EU) directives is stipulated in art.288 of the Treaty on the Functioning of the EU (TFEU), which specifies that a directive is binding upon the Member States to which it is addressed as to the result to be attained, while form and methods for obtaining it are discretional to the Member States. Regulations issued at EU level should be implemented in a timely, efficient and balanced manner, by appropriate transposing measures adopted by the legislative or the executive of Member States.

KEYWORDS: *European directive, transposition, copyright, related rights, intellectual property*

In the field of copyright and related rights, the acquis communautaire includes 10 directives, whose primary purpose is to eliminate differences between national laws that are likely to create barriers to free trade and to unbalance competition in the Internal Market.

One of the most important directives in the field is the ***Directive 2001/29/EC*** of the European Parliament and of the Council of 22 May 2001 ***on the harmonization of certain aspects of copyright and related rights in the information society***, whose objective is to transpose at Community level the main international obligations under the two treaties on copyright and related rights, adopted in December 1996 within the framework of the World Intellectual Property Organization (WIPO).

Adopted in May 2001, following a legislative process lasting over 3 years, the directive deals, on the one hand, with economic rights and their exceptions, and on the other hand, with technical measures and information on rights regime, resulting in achievement of a mere satisfactory level in the process of harmonization of national legislation in the field.

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Regarding the economic rights, the directive defines the reproduction right, as „the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means or in any form, in whole or in part"; the right of communication („the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless, including making their works available to the public so that everyone can have access to them from the place and time individually chosen"), as well as the distribution right („the exclusive right to authorize or prohibit any form of distribution to the public by sale or otherwise of the original of their works or copies thereof").

The particularities of the directive are the large number of exceptions it establishes and even more, their *non-binding character*. Indeed, the only binding exception refers to technical replicates. This exception aims to remove form reproduction right incidence of certain temporary acts of reproduction which are part of a technical process whose purpose is to allow the lawful use or transmission in a network between third parties by an intermediary of a work or subject-matter and has no independent economic significance.

These provisions, formulated in general terms, are a real obstacle in the process of harmonization of relevant legislation at European level, leaving Member States a margin of appreciation too wide. Failure to impose a mandatory set of limitations in all community area provided an almost complete freedom to choose only those provisions agreed to be taken over into national law. The result is a patchwork of limitations that vary from state to state and oppose serious obstacles to cross-border online services.

In terms of technical measures and information on rights regime, the Directive provides that Member States should ensure adequate legal protection of any effective technological measures designed to prevent or limit, in respect of works or other subject matter, acts un-authorized by the right holder. They should also establish adequate protection against any person who knowingly and without authorization removes or alters any information in electronic form regarding rights regime.

In this case also, the rules of the directive had a modest harmonization effect. Art. 6 para. (1) obliges Member States to provide „adequate legal protection" without indicating the nature of such protection, thus leaving national legislatives with a wide range of solutions, ranging from civil to criminal law. Moreover, the inexplicity of provisions and the absence of legislative guidance led to the national establishment of different solutions and procedures, as well as new bodies responsible in the field.

Another aspect which imposed the elimination of disparities between national regimes was that of enforcing intellectual property rights. In this context, in 2004, it was adopted ***Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights***, which sets the minimum means available to right holders and public authorities to combat intellectual property infringements. The directive also establishes a framework for the exchange of information and administrative cooperation between national authorities and between them and the Commission.

The Directive has had a positive and significant impact on the protection of intellectual property rights under civil law in Europe. However, it becomes increasingly clear that not all issues were taken into account, such as the Internet challenge in relation to the protection of intellectual property rights.

The European Commission's „tradition" to treat uniformly different categories of violations of intellectual property rights and to try to find a „universally applicable" solution has undoubtedly resulted in a failure by adopting the directive on the enforcement of intellectual property rights. This, mainly because the possibility of intellectual property rights infringement offered by the Internet, a key factor for increasing volume and financial value of these rights violations, was not taken into account

In addition, there are a number of other issues that could be further examined. These include the use of provisional and reassuring measures such as injunctions, the procedures to gather and preserve evidence (including the relationship between the right to information and privacy), the meaning of various corrective measures, including the costs of destruction, and calculation of damages.

A distinct category of directives address particular issues relating to: satellite broadcasting and cable retransmission, resale right, rental and lending right, term of protection of copyright and related rights, as well as permitted uses of orphan works.

Council Directive 93/83/EEC of 27 September 1993 ***on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission*** promotes the free cross-border broadcasting of satellite programmes and their cable retransmission from other Member States, and in particular aims to remove obstacles arising from disparities between national provisions on copyright, as well as legal uncertainty existing in the field.

The specificity of the directive resides in the obligation imposed on states to grant the exercise of the cable retransmission rights to collective rights management companies. Thus, the right holders of copyright and related rights may grant or refuse authorization of a cable operator for the purpose of cable retransmission only by a collective rights management company. However, this provision does not apply to rights exercised by a broadcasting organization in respect of its own transmissions.

Directive 2001/84/CE of the European Parliament and of the Council of 27 September 2001 ***on the resale right for the benefit of the author of an original work of art*** completes the provisions of the Berne Convention for the Protection of Literary and Artistic Works by generalizing and harmonizing the community regime of resale rights, so that the internal market for modern and contemporary art functions properly. For this purpose, a compulsory resale right for the benefit of the author has been introduced in Member States' legislation.

Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 ***on rental right and lending right and on certain rights related to copyright in the field of intellectual property*** codifies and repeals Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. The purpose is to harmonize the legal framework regarding rental right, lending right and certain related rights, so as to provide a greater level of protection for literary and artistic property. Member States are asked to provide for the right to authorize or prohibit the rental and lending of originals and copies of copyright works. It determines who holds these rights and lays down certain procedures for exercising them.

Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 ***on the term of protection of copyright and certain related rights*** codifies and repeals Council Directive 93/98/CEE of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, which was substantially amended by Directive 2001/29/ EC on the harmonization of certain aspects of copyright and related rights in the information society.

The term of protection of copyright for a literary or artistic work is set at **70 years** from the death of the author or the death of the last surviving author in the case of a work of joint ownership / the date on which the work was lawfully made available to the public if it is anonymous or was

produced under a pseudonym. The term of protection for a film or audio-visual work is set at 70 years after the death of the last survivor among the following: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audio-visual work.

The term of protection of related rights (performers, producers of phonograms, film producers and broadcasting organizations) is set at **70 years**. This term is to be calculated on a case-by-case basis from the date of the performance, the publication or communication of its fixation.

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 ***on certain permitted uses of orphan works*** provides the necessary legal framework to facilitate the digitization and dissemination of works and other subject-matter which are protected by copyright or related rights and for which no right holder is identified or for which the right holder, even if identified, is not located (the so-called „orphan works").

It was considered that a common approach to determine orphan work status and the permitted uses of orphan works is necessary in order to ensure legal certainty in the internal market with respect to the use of orphan works by publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organizations.

The directive is without prejudice to specific solutions adopted by Member States in order to resolve issues related to the wider mass digitization of works, such as the case of works "outside the commercial circuit".

Adjacent to the framework applicable to copyright and related rights is the sphere of legal rules governing databases, harmonized at Community level by ***Directive 96/9/CE*** of the European Parliament and of the Council of 11 March 1996 ***on the legal protection of databases***.

The Directive applies to databases, irrespective of their form, as *collections of independent works, data or other materials, arranged in a systematic or methodical way and individually accessible by electronic or other means*. The author of the database is "the individual or the group of individuals who created the base or, where legislation of the Member State concerned permits it, the legal person considered by this legislation as the right holder" (Art. 4-1). He owns the copyright on the data basis when the latter, "by choice or by ordering of materials, constitute the author's own intellectual creation."

This protection of databases does not replace the authors' rights over protected elements contained in the base. In addition, the directive creates, in the interests of its maker, a specific right (called sui generis right) which allows it to prohibit retrieval or re-use of all or a qualitatively or quantitatively substantial part of its base. This specific law aims to protect the substantial investment in making a database (material, human, financial investment).

Under Article 7 of the directive, the sui generis right is acquired from the date of completion and protects the maker against non-authorized extracts or re-use for a period of 15 years, with effect from the first of January of the year following the date of completion.

The latest component of European legislation in this field is ***Directive 2014/26/EU*** of the European Parliament and of the Council of 26 February 2014 ***on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market***.

The Directive improves the administration of collective management organizations, introducing new rules on governance, transparency, ability of members to exercise control over the members and distribution of revenue and preventing unreasonable practices.

Another essential element refers to the possibility for right holders to grant licenses for non-commercial use. Unfortunately, the Directive does not adequately state that authors may manage their rights individually, for each work, but allows them to reach a wider audience and acknowledges a certain autonomy which until now has been denied by some collective management organizations.

Regarding licenses for musical works, online music service provision at EU level should be simpler, since providers will be able to obtain licenses covering more than one Member State and even validated across the EU. These provisions ensure new opportunities for online platforms and technology companies, so that they can provide better services to European citizens.

With regard to changing national law in accordance with the acquis communautaire in the field of copyright and related rights, Romania is loyal to harmonization of national specific legislation with the European provisions, Romanian Copyright Office informing the public that all 10 directives European Parliament and Council are transposed into Romanian legislation.

However, during the conference organized on the occasion of World Intellectual Property Day (26 April 2014), the deputy general manager of the above-mentioned office specified a number of directives that needed transposition into national law, namely:

- Directive 2011/77/EU amending Directive 2006/116/EC on the term of protection of copyright and related rights.

- Directive 2012/28/EU on certain permitted uses of orphan works with transposition deadline 29 October 2014. The legislative initiative designed to regulate matters envisaged by the above-mentioned Directive expects since February 2013 the opinion of the Committee on Budget and Finance of the Chamber of Deputies.

- Directive 2014/26/EU on the collective management of copyright and related rights and multi-territory licensing rights on musical works for online use domestically, with transposition deadline 10 April 2016.

Following the expiry of the transposition deadlines imposed by the EU, the Romanian authorities risk financial penalties for failing to comply with national transposition measures.

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ASPECTS REGARDING THE CONSENT OF THE ASSIGNED PARTY WITHIN THE ASSIGNMENT OF CONTRACT

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ABSTRACT

The consent of the assigned contractor constitutes an essential requirement, expressly stipulated within the current Romanian Civil Code, in order to have an operational assignment of contract, but, at the same time, it represents a polemic subject, strongly debated within the specialty doctrine. The present paper aims to present the aspects of the consent of the assigned party, beginning with the obligation to inform the assigned, the valences that are acquired by this obligation, the role of informing the assigned within the context of contract assignment and the effects of the anticipatory consent reported to the demand of the notification and acceptance of the assignment. There will also be argued if there may be a case – or not – in what regards the possibility of a silent acceptance of the assignment from the assigned contractor as regulated by the provisions of the new Romanian Civil Code.

KEYWORDS: *assignment of contract, the assigned party's consent, the obligation to inform, tacit acceptance*

1. Preliminary reflections regarding the consent of the assigned within the conventional contract assignment

Article 1315 of the Civil Code, being the introductory legal provision of contract assignment, stipulates that: "*A party may substitute a third within reports born from a contract* ***only if*** *the benefits have not yet been fully executed,* ***and the other party consents to it***".

The Romanian legislature, expressly admitting the possibility to substitute a contractual party with another, a third besides the initial contract, imposes two main conditions: **a.** the benefits should not have been fully executed (being mostly the case within contracts with successive execution, but without precluding expressly and necessarily contracts that are executed *uno ictu*, but who's benefits have not yet been fully exe-

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cuted) and **b.** the assigned party should express the consent to the assignment.

The French doctrine has devoted a long period of strong debates to the problem of contract assignment; thusly authors still offer different opinions in what regards the role of the consent given by the assigned.

Thereby, a part of the French authors considered that the requirement for the consent of the assigned would lead to the idea that between the assigned and the assignee a new contract will be born[1], but other authors regard this demand as a simple authorization conferred by the assigned in order to have a valid assignment, with no necessity for the assigned to become a party in the assignment contract[2].

Debates were heavy within the French doctrine, but with almost no correspondence within the Romanian one, on the theme of the judicial nature of the consent given by the assigned, part of the authors saying that it would be a condition of validity for the assignment, whereas others promoted the version of an opposability condition of the assignment towards the assigned.

As already stated in a previous paper, we appreciate that in report to the phrasing chosen by the national legislature ("a party may substitute a third … only if … the other party consents to it"), the consent of the obligor would be given the valence of a validity requirement, strictly required by the law to yet spring the very existence of the mechanism of contractual substitution, namely, the object of the assignment of contract.

We appreciate that the debate is a very important one as the effects that are involved are different.

Is the consent of the obligor a condition of validity or a condition of opposability?

The answer to the above question has been given, as stated before, in a different manner by French and Romanian doctrine, thus having two factions, which brought pro and cons to the table, stating in one direction or the other.

With no desire in presenting once again the doctrinal debate, we want to express an opinion, thus taking sides with those that militate for

[1] M. Billiau, *Le point sur la cession conventionnelle du contrat*, LPA 6 mai 1998, p. 46.
[2] L. Aynès, *Note* la decizia Curţii de Casaţie (1re ch. civ) din 14 dec. 1982, in Recueil Dalloz (Chronique) nr. 2/1998, p. 26; L. Retegan, *Cesiunea de creanţă în raport cu alte operaţiuni juridice triunghiulare*, in Studia Universitatis Babeş-Bolyai, Iuresprudentia nr. 3/2009.

considering the consent of the assigned as being a validity condition of the assignment.

With that in mind, the lack of the consent given by the assigned, the assignment of contract will produce no effect, the initial parties being incessantly held to respect the rights and obligations of the assumed contract, and in the case that this would not be possible any longer, the contract would be completed in the ways and with all effects provisioned by the law for the given operation.

In the case in which the consent of the assigned is regarded as only an opposability condition towards the obligor, making thus effective the assignment intervened between the assignor and the assignee, it would result that the assignment of contract would only produce effects between the assignee and the assignor, even in the absence of the consent of the assigned party, but only in a successive phase.

Otherwise, as for the "assigned"[3], the assignment would produce no effect, him having the same contractual partner – the "assignor" – although this operation would exist separately, between the assignor and the assignee, producing certain legal effects, specific to this mechanism.

We cannot understand the efficiency of the above operation as its main effect, the substitution of a co-contractor by bringing in the place of its contractual position a third, would be non-existent.

2. The role of the notification of the assigned in the procedure of contract assignment

The obligation to inform plays a main role inside any type of contract, both in the pre-contractual period as subsequently while it is executed.

To be able to offer a valid consent, the assigned must know aspects with a special importance to the contractual position that it stands.

Thusly, first of all, the parties have to acknowledge the assignable character or otherwise unassignable character of the contracts.

The regulation is the assignable character of the contracts, that results from the interpretation of article 1315, 1st alignment, as the second alignment introduces the exception from the regulation, stating that "are excepted the cases distinctly provisioned by the law", referring thus to special provisions that would forbid the assignment in an express manner.

[3] The terminology of the "assignor", "assignee", "assigned" are unsuitable since the assignment was not perfected without the consent of the assigned party.

We appreciate that, within the legal provisions, the parties may convene, through a contractual clause or later at the time of the contract assignment, that certain contracts, even if of an *intuitu personae* character, may be assigned to a third party, having thus the obligor continue a contractual relation with a new party, namely the assignee.

We consider possible to also have the contrary to the above, namely, based on the freedom of will, so that the parties may convene that a contract, assignable *per se*, would be declared by the parties, within a common consent, to be unassignable.

The pre-contractual phase of the contract assignment conclusion is not regulated by the legislature, or within the national Civil Code, nor within the Italian one, which served as a direct model or drafting of the common provisioning within the civil matters.

We believe that one of the main duties specific to the pre-contractual phase is, even in the case of the contract assignment, the obligation to inform the assigned party.

The assigned would have to be given all the information necessary to have an operational transfer of the contract through the assignment.

According to the new Civil Code, the obligation to inform represents a legal obligation, provisioned expressly in most types of contracts: insurance, intermediation, sale etc.

Necessarily, the assigned party is the most legitimated one to make all required steps in order to learn all information needed to express a valid consent, completely informed.

We believe, all together, that *the obligation to inform the assigned belongs with priority to the assignor*, as a direct contractual partner, being the most interested one in triggering the mechanism of the assignment, it being also the one with the initiative to remodel the original contract, by bringing a third to the existing contractual relation.

We appreciate that an express provision would have been appropriate within the Civil code, of the obligation belonging to the assignor to inform the assigned in a correct and complete manner of the intent to assign the contract and to present the assignee party, especially under the aspect of its solvability (being of even more importance within a perfect assignment, in which case the assignor is completely liberated of all its contractual obligations).

Previously to the legal provisioning of the contract assignment, one of the debates carried within the specialty doctrine – internal and compared – had as a main theme the issue of whether the notification or the acceptance of the assigned would suffice to substitute the assignee contractor,

applying thusly the rules of claim assignment, within which a simple notification or acceptance would suffice.

The debates are no longer topical, from a practical point of view, the requirements being clear: the notification/acceptance of the assigned is not sufficient to have an operational assignment, but it is imperative to have an expressed consent of the latter regarding the replacement of the contractual partner with another party. It is of course the case of the contract assignment within which the consent of the assigned is not expressed previously, but in the very moment in which the party substitution intervenes.

But the obligation to inform acquires a special significance in the case in which a party has consented previously so that the other party would be able to be substituted with a third within reports born from a contract, because in that case, according to article 1317 of the Civil code, the assignment produces effects to that party from the moment in which the substitution is notified to it, or, from the moment it is accepted by the assigned.

Therefore, there are two distinct moments to be pursued in the regard of the consent of the obligor, all within the phase of progressive formation of the assignment contract: the first moment would be the one in which the original contract has a contractual clause, negotiated or only accepted by one of the parties, through which either both parties, or only one, reserves the right to be substituted by a third within the assumed contractual reports, and the second moment, when the party that was given this right through the contract decides to harness it by effectively bringing the assignee within the initial contract, case in which it will notify the contractual change to the assigned.

According to legal provisions, the acceptance of the assigned is sufficient, which means that the contract assignment already intervened will be validated by the latter even if it hasn't been notified, but the assigned got to know about it.

We appreciate that this is a case in which, although the assignor has disregarded the natural requirement to notify the assigned with regard to the contractual modification, the lack of notification would be sanctioned by the inexistence of the assignment contract, contract that is not validly concluded.

Although, the assigned, that may acknowledge from other sources of the conclusion of a contract of substitution with a third, may validate the assignment by acceptance, even in the absence of notification.

Article 1316 of the Civil code that regulates the form of the assignment, speaks of a symmetry of forms, namely between the form that the assigned contract must present, the form of the assignment contract and the form of the acknowledgement.

Of course, as the law sets two validation moments of the consent given by the assigned in advance, namely the notification or the acknowledgement, a question is raised: in the case in which the assigned is first notified and as a follow up it accepts the assignment, which is the moment in which the contract is considered to be assigned, and so the third becomes a contractual party replacing the assignor? Could it be the moment of the notification or the moment of the assignment?

If one should read article 1316, it can be observed that the legislature regulated only the form that the acceptance of the assignment, given by the assigned, has to have, but not the form of the notification. Should that be a clue that the acceptance should take precedence over the notification, as it would be easier to prove?

But more than that, let us assume that an authentic contract is assigned. For that specific situation, the symmetry of forms required by article 1316 of the Civil code forces us to conclude the contract assignment in an authentic manner. But in the case of an anticipated consent, the law forces the perfection of only the acceptance in an authentic manner; as for the notification, it does not have any kind of legal regime stipulated in an express manner in what regards the form it should bear. First question: May it intervene through a simple registered letter or by an underwritten certificate, or through a simple e-mail sent to the assigned through which the completion of the assignment is presented?

The law is mute in this matter. There is no provision of a specific notification procedure, with a separate regime or which should bear a certain form. This means that the notification may occur in any way possible, with the specification that the assignor that formulates the notification would diligently prove, within its own favour, the notification.

We observe thusly that there is a difference of conditions between the modalities of validation of the anticipated consent of the assignee, namely through notification or acceptance that must bear the form of the assigned contract.

Even if the law is more specific with the regulation of the acceptance as a form of validity of the consent, we appreciate that, reported to the phrasing chosen by the national legislature, in the case in which the assigned contract is perfected in an authentic form, and the assigned

expressed an anticipated consent to the assignment, the assignment being thus notified and subsequently accepted through an authentic declaration by the assigned, the moment at which the assignment of contract produces effects towards the assigned is the moment of its notification, with precedence in time to the moment of the acceptance.

This opinion is based on the fact that the law sets two alternative moments, the notification and the acceptance of the assignment, moments that complete the anticipated consent given by the assignee. It is only normal that, giving the same legal value to notification and acceptance of the assignment, the most important would be the one earliest to exist, in this case the notification, and only in the lack of the latter should the beginning of the assignment be the moment of the acceptance.

Besides, the question is that if the notification or acceptance of the assignment has a constitutive value, completing the condition of the consent to the assignment, in what regards the moment at which the assignment is born, or does it represent only a ratification of the assignment.

Article 1317 of the Civil code states that "if a party has consented previously that the other party may substitute itself with a third within reports born from a contract, *the assignment produces effects towards that party* from the moment at which the substitution is notified, or, if the case, from the moment it accepts it".

We observe that the contemporary legislature creates a link between the moment of notification or acceptance by the assigned and the birth of effects of the assignment to the latter.

Again, the phrasing of the provisioning leads to the conclusion that, in reality, the assignment would have been born at a previous moment, most probably at the time of perfection of contractual substitution between the assignee and the assignor, starting from the consent given through the contractual clause stipulated within the initial contract.

Or, if the assignment was born at a previous moment, the notification or acceptance emanating from the assigned has the value of a ratification of the assignment from the latter, moment at which the assignment contract would produce effects towards the assigned party.

The consent to assign comprises thus two moments: the expression of a previous consent to the assignment and the validation of the latter follow a notification or an acceptance of the assignment.

Things are not as simple, as they may seem at first sight, as this might be a starting point for various debates: can there be a silent consent to the

assignment from the part of the assigned, or is there a compulsory demand to accomplish both phases in the expression of consent?

Or, IE, which could be the role of each of the phases of consent of the assigned in the case of a previous acceptance of the latter?

The given answers may have a great practical importance, as they validate the very moment at which the assignment of contract intervenes.

Reported to the expressly stipulated condition within the legal provision regarding the notification or the acceptance of the assignment of contract by the assigned, we appreciate that the completion of both phases is required in the matter of consent expression, namely the phase of the previously given consent and the phase of notification or acceptance of the assignment.

Therefore the consent expressed by the assigned is complete especially through an ulterior acceptance of the assignment, and only its previous expression not being sufficient so that the assignment of contract would produce effects.

We believe though, that the anticipated expression of the consent completes the legal stipulation, the assignment of contract being born at the moment in which the other two consents to the assignments are met: the consent of the assignee and the consent of the assignor, in a such manner that the agreements of will would give birth to a tripartite agreement, validating the demands required by the assignment of contract.

The notification of the assigned with regard to the contractual party substitution plays the part of a notification of the assigned made within the purpose of opposability of the assignment of contract to the latter.

Only from the moment of the notification or acceptance from the part of the assigned, does the completion of the contract continue towards the assignee, in front of which one may invoke exceptions and defences that result from the contract, according to legal provisions.

And then, is the silent acceptance of the assignment of contract possible, considering the previous agreement given the assigned that accepted through the initial contract that its contractual partner may substitute a third in the judicial report?

A possible situation may be presented like this: A and B conclude a contract of service providing in a written form, in which A, the provider reserves the right, through the contract, to assign the contract to C in the case in which it would not be able to provide or would not want to complete the contract. B agrees to the contractual clause, expressing an anticipated consent to the assignment. A completes the assignment of contract with C, but does not notify B about the intervention of the

assignment. B finds out about the new contract, but does not expressly accept in a written form the assignment, but tacitly, by beginning to pay the bills directly towards C. Is the tacit acceptance of the assignment by the assigned valid, as it results from the execution of the obligations and prevalence from contractual rights directly towards C?

We would be tempted to answer affirmatively to the above question, as all parties expressly agreed, or tacitly, to the assignment.

Yes, but article 1316 of the Civil Code that regulates the form which an assignment should bear disagrees. This because it provisions specify that the form of the assignment of contract should be the same form taken by the assigned contract, and the form of the acceptance.

As the above article refers to the form of the acceptance, the interpretation may be just one – that when about expressing an anticipated consent to an assignment, the form of the acceptance would be important in the case in which there is no notification of the assignment to the assigned.

But, in the theoretical situation presented above, we consider that an easier solution would be found through the notification of the assignment to the assigned, that would "save" the tacitly accepted assignment, but not in a legal manner.

Whom would be yet compelled to inform the assigned regarding the birth of the assignment of contract, in the case in which it would have previously given the consent to an assignment?

We appreciate that *this obligation is due mainly to the assignor*, as from the phrasing of the article 1315 of the Civil Code; it results that the party that wills to be substituted by a third within the contractual reports may very well do so if the other party consents to it.

He is the party that is more interested with the effects produced by the assignment, effects that are produced towards the assigned only since the notification (or acceptance), so it should be the most interested party to carry the notification.

Although the law does not regulate in a specific manner which party should be compelled to this obligation, it is deducted. And if the law does not differentiate, we appreciate that the assignee may notify the assignment to the assigned, notification that triggers the effects of the assignment, as the latter may have a direct interest in contractually "meeting" the assigned, their relationship becoming a partnership.

CONCLUSIONS

To conclude, we appreciate that the national legislature should have expressly regulated the obligation of notification of the obligor in what regards the relevant aspects of the assignable character of the contract, but especially of the assignor party.

Such a demand, we appreciate that is more appropriate to the assignor, but it would produce the effect of opposability of the assignment towards the assigned also by having it done by the assignee.

We suggest, although, that as for a *lege ferenda*, there should be a specific regulation to allow the assigned to accept tacitly the intervention of the assignment of contract, as sometimes the requirement for an authentic form would not be the most appropriate to the practical situation.

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JUDICIAL TREATMENT OF PERSONAL BANKRUPTCY IN THE EUROPEAN UNION

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ABSTRACT
The new realities of the twenty-first century require an economic and legal system reform to overcome the economic crisis.
In addition to the negative effects of the financial crisis, it has also led to a collective effort from specialists in economic and juridical specialty to adapt domestic legislation, adaptation to the purpose, on the one hand, at harmonization with European legislation and on the other seems to find concrete and immediate solutions implementation issues arising in the current socio-economic context.

KEYWORDS: *Debtor, individual, creditors table, insolvent, restructuring*

European legislative regulations

This paper aims to make an objective analysis of the legal treatment that benefits an individual in a state of insolvency, through the regulations of the Member States of the European Union.

In order to achieve the purpose, it is necessary, first, a conceptual definition of the notion of personal bankruptcy. Who is this person, who qualifies to be analyzed within the concept?

European Law no. 1346/2000, governing the European insolvency, allows borrowers who declair insolvency in another country, to achieve recognition in home country (except Denmark). Romania is a signatory to the United Nations Commission on International Trade Law – UNCITRAL 1997 – since 2003 – Convention governing cross-border insolvency.

In Swedish law, the insolvable individual is defined as the person who was unable to pay its debts properly and this inability is not temporary.[1]

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[1] http://ec.europa.eu/civiljustice/bankruptcy/bankruptcy_swe_ro.htm.

In Greek law, the insolvable individual is similar situation in which liabilities exceed its assets to a person, and that person can not pay creditors.[2]

To summarize, we can say that the insolvable individual is the individual, called debtor, who was unable to pay its debts certain, liquid and due, either due to the high degree of indebtedness, either due to lack of cash money.

Most European countries have domestic legislation regulated institution individual insolvency.

The first country to introduce such a law was Denmark - in 1984 - after which followed France, Germany, Austria, Belgium, UK, Netherlands, Italy and Spain. Among the new Member States, Estonia and the Czech Republic have a similar legal framework, according to a report by the Council of Europe.

The Council of Europe has developed a European Convention on the international aspects of bankruptcy, signed in Istanbul in 1990, but unfortunately the Convention never entered into force because it was not ratified by a sufficient number of Member States.

United Nations Commission on International Trade Law (UNCITRAL) has developed a standard law adopted in 1997, to promote the adoption of modern legislation applicable in cases where the insolvent debtor has assets in several countries.

This law-type determines the conditions under which a person who handles bankruptcy in a foreign country can have access to the courts of a state to adopt the law-type conditions for recognition of foreign bankruptcy proceedings and indicating measures protection for foreign manager.

It also empowers the courts and law-type receivers from different countries to cooperate more effectively and establishes provisions for coordination of insolvency proceedings conducted simultaneously in different states. It was published a Guide to the adoption of the UNCITRAL law standard to help governments to adopt legislation on the law-type.[3]

The European Union has established a system for coordination of insolvency proceedings.

Thus, on 29 May 2000, the EU adopted a Regulation on insolvency proceedings, Regulation which entered into force on 31 May 2002.

[2] http://ec.europa.eu/civiljustice/bankruptcy/bankruptcy_gre_ro.htm.
[3] http://ec.europa.eu/civiljustice/bankruptcy/bankruptcy_int_ro.htm.

Particularly relevant for our country is that this regulation includes a special edition in Romanian language, namely Chapter 19, Volume 001, pages 143-160.[4]

The main objective of the Regulation is to ensure that the parties (debtor and its creditors) have no reason to transfer assets or judicial proceedings from one Member State to another in order to obtain more favorable treatment.

Regulation is directly applicable in all Member States except Denmark, so litigants are able to support the cause in the national courts. This regulation has a limited range of application, meaning that it doesn`t apply to insurance companies or credit institutions and investment.

To meet the objective, the regulation establishes common rules on jurisdiction of courts, recognition of judgments and the applicable law, and compulsory coordination of open procedures in several Member States.

Courts have jurisdiction to open insolvency proceedings are those of the Member State in which the "debtor's center of main interests". If it is a company, it is usually the company's headquarters.

But it can also open later secondary procedure for liquidating the assets in another Member State. Legislation of the Member State in which such open insolvency proceedings establishes consequences.

Regulation provides that proceedings opened in several Member States are coordinated primarily through active cooperation between different insolvency.

All decisions made by a court of a Member State which is competent on main proceedings are in principle automatically recognized in another Member State without being reviewed later.[5]

Relevant national regulations for proper future insolvency individual institution is that regulation provides in point 9 of the Romanian edition, that "this Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a person legal, a trader or an individual. "[6]

Private ordinary insolvency procedure is a concern of most developed countries in terms of economy. American law allows individual (consumer) to declare "bankruptcy" and put wealth under the control of

[4] http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32000R1346&from=RO.

[5] http://ec.europa.eu/civiljustice/bankruptcy/bankruptcy_ec_ro.htm.

[6] http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32000R1346&from=RO, pct.9.

federal courts to get rid of debt. The procedure is covered by Chapter VII of the U.S. Commercial Code.

And other states have legislation after the American model, which aims to ordinary insolvency proceedings private. They statutory rules Britain, Germany, Spain, France, all European Union member states.

The World Bank has introduced an initiative to establish principles and guidelines for the management of insolvency proceedings.

In general, this initiative promotes the idea that a functional credit system should be supported by mechanisms and procedures that provide for efficient, transparent, and reliable methods for satisfying creditors' rights by means of court proceedings or no judicial dispute resolution procedures. To the extent possible, a country's legal system should provide for executive or abbreviated procedures for debt collection.[7]

In 2005, in New York, the United Nations adopted the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide about an insolvency law.

United Nations Commission on International Trade Law is a subsidiary organ of the General Assembly. This committee develops international legislative texts to support Member States to modernize commercial laws and rules to facilitate negotiations between the parties to a commercial transaction.

Legislative procedures in personal bankruptcy

According to European legislation, so companies and individuals can enter into voluntary agreements with creditors to reduce debt. Such agreements are not specifically regulated by law, but are treated in the same way as other types of agreements.

In Sweden, individuals can apply for debt restructuring (skuld-sanering) under the Act on debt restructuring.

Conditions which may make such a request are: the person must be resident in Sweden, you must have debts so large that it is possible that it should be able to pay its debts in the near future debt restructuring is the solution required.

The debtor (person or entity) that is unable to pay, namely that the debtor is unable to pay its debts properly without that disability is temporary, may be declared bankrupt.

[7] http://siteresources.worldbank.org/EXTGILD/Resources/5807554-1357753926066/ICRPrinciples-Jan2011[FINAL].pdf.

Application for bankruptcy is filed with the court in whose jurisdiction the debtor resides, and if a company, the court in whose jurisdiction the registered borrower. The application may be filed by the debtor or the creditor. The court decides on bankruptcy and appoints a receiver.

Bankruptcy is a legal procedure, so the court is acting initiation or termination of bankruptcy proceedings.

Bankrupt person (directors if a company) has the legal obligation to cooperate with the receiver, the courts and to provide information. Bankrupt person is required to declare in court, under oath, that his statement about his financial situation is correct. After judgment before bankruptcy and bankrupt person to have made the declaration under oath in court, it cannot leave the country without permission from the court.

As an immediate effect of the opening of proceedings, all the debtor's assets are included in the list of creditors and should be used as soon as possible to pay debts. However, a natural person declared bankrupt can retain certain personal property under seizure rules in the debt enforcement proceedings cannot be confiscated.

A person in bankruptcy cannot have a good part of the list of creditors. Consequently, it cannot enter into agreements or, for example, cannot sell goods or pay claims that are part of the list of creditors. As soon as the judgment declaring bankruptcy, real estate that is part of the list of creditors cannot be seized unless the property has been pledged as security for a particular claim.

Employment contracts do not automatically cease if the employer is declared bankrupt, and the receiver has to decide on the termination notice. Employee's claim regarding wages or other remuneration generally receives preferential status for a certain period of time. Basic rule provides that a payment claim submitted within three months before the court has received an application for bankruptcy, and payment application lodged within one month of the judgment declaring bankruptcy have preferential status.

Claims resulting from salary or other remuneration enjoying preferential status are also covered to a point by a "security wage", which means that if the officer did not have sufficient mass goods to pay claims, the employee may obtain payment of compensation from the state. The security wages is limited; such a guarantee can be paid also during the reorganization of society.

Once the decision on the bankruptcy has been issued, the debtor no longer has assets in the list of creditors. If, however, the debtor favours one creditor at the expense of others, it can be sanctioned. Also, the

receiver has several ways to cancel a legal act performed by the debtor before judgment declaring bankruptcy, if this was to the detriment of creditors.

If the debtor favours one creditor at the expense of others, the legal act of the debtor may be cancelled if, after this act, the debtor became insolvent, and the favoured creditor knew or ought to have known of that question. For these provisions to apply, the transaction must have occurred within five years prior to the date the bankruptcy was filed. However, if the payment was made to a person close to the debtor, such as a family member for five years does not apply.

In certain circumstances, the payment of a debt can be recovered if it was done in a period of less than three months after filing bankruptcy. This applies if the payment was made in an unusual way (i.e., without using money) if payment was made before they become due, or if the payment involved an amount of money so large that the debtor's financial situation has worsened dramatically. This does not apply if the payment could be considered a regular payment. This means that payments of debts, as they are due, cannot normally be recovered.

Creditor who filed bankruptcy is cited to appear at a hearing to the court swearing. Other creditors are summoned by publication bankruptcy decision. Borrower has the obligation to notify the receiver, the court and the supervisory authority, the identity of creditors.

If it is considered that sufficient assets to pay the creditors who do not have a preferential claim, it is necessary to apply the procedure by which to prove the debt. The receiver calls for the implementation of the procedure and the court issues a judgment on this. The court shall decide on the procedure, it should last between four and ten weeks. Decision on the implementation of the procedure by which proof of debt must be published in the Official Gazette and in one or more newspapers circulating in the region. Subsequently, creditors may submit their applications to the court for payment of debts.

An individual whose debts are so large that it will not be able to pay its debts in the near future may require debt restructuring. A further requirement is that the approval of debt restructuring is adequate in terms of personal and financial situation of the debtor.

Debt restructuring means that the list of creditor’s debts are reduced or eliminated entirely. Applications for debt restructuring shall be submitted to the executing authority. All creditors affected by the demand for debt restructuring should be given the opportunity to express their views on the proposal. Decision on debt restructuring will provide part of the debt

that the debtor must pay. It will also provide instalment plan payments over a period longer, normally be five years.

In the instalment plan payments, the debtor whose debts were restructured must maintain the minimum subsistence amount. If the debtor does not have an income that exceeds the subsistence minimum, it does not have to pay anything; this occurs in approximately one third of cases.

Rules on liquidation of assets in the list of creditors are set out in bankruptcy law. After the sale of goods, the balance is distributed. If at the time of declaration of bankruptcy, the assets are insufficient to cover the costs arising from the bankruptcy, the court shall order the procedure. Where are the remaining goods, the procedure is closed when the court decides on the distribution of assets to creditors in accordance with the priority required by law on preferential debts.

French legal system is one of the most well-structured systems regarding personal bankruptcy. The procedure has several steps.

In the situation of a personal bankruptcy, starting from the principle of mutual renegotiation of the contract, an amicable mediation between the applicant and creditors is attempted. Only after that procedure, is convened the so-called committee of indebtedness. This committee sets the level of income for a decent life to those who sought bankruptcy and then proceed to the sale of goods to cover the debt. In addition, French citizen who was declared insolvent has no right to ask other bank loans, for over eight years.

The French system is applied almost identical in Canada. A judge decides what goods can be sold to settle personal loans. If the value does not cover the debt, the individual start paying the loan from the beginning. However, as in France, the debtor can not ask for bank loans in the coming years. [8]

Overwhelmed debtors from countries such as Ireland and even Germany or Austria - where procedures are more difficult - come to England to declare personal bankruptcy. A personal bankruptcy lasts in Ireland for 12 years, and in Germany six years, during which the debtor's rights are few and the law gives the creditor all the levers to extract as much money from the debtor. Germans turn to French law, especially in the English for a quickly and easily bankruptcy. [9]

[8] http://www.digi24.ro/Stiri/Digi24/Economie/Stiri/FALIMENT+PERSONAL+EUROPA+CANADA.

[9] http://indrumari-juridice.eu/indrumarijuridice/tag/faliment-personal/.

Regulation of individual bankruptcy in Romania

In our country there is legislation at this time of insolvency regulation of the individual institution.

Adopting a law on individual insolvency is necessary, but mandatory due to the fact that Romania is a member state of the European Union and Regulation. 1376/2000 requires Member States to extend insolvency and individuals. [10]

There have been several legislative proposals which, unfortunately, have not materialized to this day.

All mentioned initiatives aimed at the establishment of a special collective proceedings against debtors, individuals, which in terms reasonable to download the debt certain, liquid and due to them from various creditors.

In this context emerged bill insolvency individuals submitted to the Senate in November 2009 written by lawyer Gheorghe Piperea and 13 Senators have taken the PDL. The bill was passed in the Senate in March 2010 with 76 votes in favor and three against. In order to adopt an individual insolvency law Piperea scored three main arguments for the reality of legal, social and economic.

From a legal perspective, it was argued that it is contrary to the Constitution as a trader, individual, insolvent, to enjoy the right to the protection of the court, while a natural person of a liberal profession, but is in the same state of insolvency / indebtedness, do not have that right. Finally, contrary to the law of human rights protection as a Frenchman, for example, residing in Romania and enter in an over indebted state, the court can require protection, while a Romanian, was in the same situation of indebtedness, not to benefit the same right. [11]

Social argument was that a large number of people remain without a job, and utility bills, current expenses of the family, child in school, all these people have become sources of beeing in debt. Last but not least, the economically appreciated as a non-performing debtor, individuals, banks and many other lenders causes additional costs to actual loss. Insolvent banks are not obliged to provisions; debtor is excluded from nonperforming loan term of at least five years from the incident of payment, when passed automatically blacklists Credit Bureau.

[10] Amalia Postu, Journal of Commercial law no. 6/ 2010, p. 83.
[11] Gh.Piperea, Journal of business law, no. 2/2009, p. 73.

The law is necessary for the debtor insolvent, if not fraudulent banks can regain customer. A debtor who has to pay the bank a rate that it can not allow (low income, unemployment, disease, growth rate) may enter into a plan of reorganization to pay a certain amount monthly for three years or, if there is sufficient income to fail. Call for bankruptcy is a very serious thing for the borrower and should be avoided. In case of bankruptcy, the customer loses his house and other properties dispensable. That happens now if enforcement, except that now, if the collateral / assets made not cover the debt, the debtor will still have to pay the bank the difference, that will remain embarrassed for many years, perhaps decades, no chance of resorting to a loan, credit card etc.

A person can go bankrupt / insolvent when its revenues can no longer satisfy creditors. The debtor may request protection of the bankruptcy court will consider whether or not excusable. Banks worry that will give Romanians rush to declare bankruptcy not to pay rates on credit, it is a method by which they meant to evade obligations. Romanian Bankers have expressed opposition to this law since the advent of the project. Radu Gheţea, president of CEC Bank and the Romanian Banking Association - bankers lobby organization - Steven van Groningen, CEO of Raiffeisen Bank Romania and Andreas Treichl, CEO of BCR at the time, had numerous interventions that and- expressed their opposition to this bill. [12]

Beginning collective procedures were applied to traders in financial difficulty, provided the Commercial Code, and the Law. 64/1995, in original form, as the "cessation of payments" and OG No. 38/2002 has replaced the notion of "cessation of payments" with "insolvency".[13]

CONCLUSIONS

From the material presented, a definite conclusion emerges: there is now sufficient legal regulation in European law that can form the basis for harmonization of Law no. 85/2014 of the European legislation regarding bankruptcy Institutionalize individual.

The context in which imposes a statutory targets mainly the current political priorities of the European Union to promote economic recovery

[12]http://www.economica.net/legea-insolventei-persoanelor-fizice-falimentului-personale-pe-mana-celor-care-l-au-votat-la-senat_26613.html.
[13] Stanciu Carpenaru, Commercial law, Ed. All Beck, Bucharest, 2004, p. 583.

and sustainable growth, safeguarding jobs, according to the strategy developed in Europe - 2020.

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APPLICATION OF THE MORE FAVORABLE LAW UNTIL THE FINAL JUDGMENT OF THE CAUSE IN TERMS OF CRIMES COMMITTED BY UNDER-AGE CHILDREN

Bogdan GIURCĂ*

ABSTRACT
The enforcement of the new Criminal Code involved, as expected, certain problems as regards the application of the criminal law more favourable to under-age children, considering that this code stipulates the punishment of under-age children only by educative measures, while the previous Criminal Code stipulated both educative measures, and punishments.
Thus, according to art.115 of the New Criminal Code, the under-age are applied both freedom-non-privative educative measures, and freedom-privative educative measures.
This article proposes to analyse very precisely certain transitory situations occurring until the final settlement of the criminal clauses involving under-age children.

KEYWORDS: *Criminal Code, supervised freedom, institutionalization in a re-education centre*

Analysis of transitory situations

a) Departing from the requisite that in a certain case type subject to judgment, the court decides to apply to the under-age the educative measure of *scolding*, we believe this solution to be more favourable than any other measures stipulated in the new Criminal Code, even those that are non-privative of freedom, because the latter have a limited execution term, also being joined by the implementation of obligations specified in art.121 NCC, while the educative measure of scolding is executed instantly (*uno ictu)*, lacking a certain duration of execution and without subsequent obligations in the under-age child's charge;

b) As regards the educative measure of *supervised freedom*, we are appraising that, in certain cases, this measure may be applied to the detriment of the educative measures of the new laws, even though the

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latter are ordered for a smaller duration of time. The argument making us express this opinion is that, if the court chooses to apply such a measure, the under-age child will be entrusted to the parents, to the person/persons that had adopted him/her or to his/her guardian, to close family or trustworthy persons. Thus, the under-age child continues to remain close to the persons that he/she presumably trusts and cares for. Indeed, in the new law, as previously specified, the educative measures only have a shorter execution term, but they have the disadvantage that the monitoring and control are exercised by the Probation Service, respectively by a probation counsellor (a person who is a stranger to the under-age child), at the same time as assigning one or several obligations in the charge of the under-age child, circumstances that we are appraising as unfavourable in terms of provisions of the Criminal Code of 1968.

In the event the court believes that the under-age child's supervision while he/she is free should be made by an institution legally habilitated to supervise under-age children or should be carefully performed by setting specific supervision conditions, we are appraising that any of the freedom-non-privative educative measures included in the new law are more favourable, because they have a shorter execution term, any of them being able to be applied.

One may state, considering the shorter execution term, that the freedom-non-privative educative measures are always more favourable and they must be applied regardless of the situation, and they correspond better to the lawmaker's criminal policy on the moment of application. We believe that, first of all, the under-age child's interest is primarily important in establishing the more favourable criminal law by the court of law, starting from the requisite that he/she will however be applied a freedom non-privative educative measure.

c) As regards the educative measure of *institutionalization in a re-education centre* stipulated in the Criminal Code of 1968, it must be taken into account the fact that this measure could be taken against the under/age children who have not turned 18, whatever the nature and social danger of the committed deed, unlike the freedom privative educative measures of the new Criminal Code, which may be applied only if the conditions stipulated in art. 114 para. 2 of NCC are satisfied. In lack of any of the aforementioned conditions stipulated by the law, the accused under-age child may be applied only a freedom non-privative educative measure. For this reason, when the court appraises that, according to the old law, the measure of his/her institutionalization

into a centre of re-education should be taken, the correct solution would be to apply a freedom non-privative educative measure, according to the new law, which is obviously more favourable.

Therefore, after the enforcement of the new Criminal Code, freedom privative educative measures may be ordered against the under-age children having committed crimes before that moment, measures included either in the old law, or in the new one, only if the conditions included in art.114 para. 2 of NCC are met. We must also notice the form of expression used in this article, more specifically "may be taken", which reveals that ordering such freedom-privative educative measures is elective, and not mandatory, even when any of the required conditions is met.

Making a comparison between *the educative measure of institutionalization in a re-education centre* stipulated by the old Criminal Code, which may be taken for an unlimited term, namely until the child turns 18, being possible to extend it by maximum two years, and the *educative measure of institutionalization in an educative centre* stipulated by the new Criminal Code, measure ordered for the interval between 1 and 3 years, with the possibility to replace it with the educative measure of daily assistance or of being released from the educative centre after executing a fraction of at least ½ of the initial term, we are appraising that the freedom-privative measure of the Old Criminal Code is more favourable if the sentenced child is allowed to be released from the re-education centre when he/she becomes of age, when this measure is ordered little before this specific moment. For instance, when he/she is 17 years old, at 17 years and 6 months old, and the extension of this measure is elective.

When setting the criminal law that is more favourable for the under-age child in terms of these two measures, the court must consider not only the criterion of age of the accused child, but also the interval of time for which the measure is ordered.

For instance, if an under-age child aged 15 is subject to trial, the court must first of all establish the term of the educative measure it is to apply. If this measure is ordered for the interval of 2 or 3 years, the older law is the favourable one, because it creates the possibility for the under-age child to be released before turning 18 after executing the fixed term of one year, while the new Criminal Code provides the possibility to replace institutionalization after executing a fraction of at least ½ of the term of the measure. At first sight, in the version of ordering the measure for the interval of 2 years, the under-age child's possibility of being

released/replaced comes after the elapse of the same interval, respectively of 1 year, but taking into account that the *measure of institutionalization in a re-education centre,* stipulated by the old Criminal Code does not specify that obligations should be set to the under-age child after his/her release, unlike the new Criminal Code (art.124 para. 5). Therefore, we will appraise as more favourable the measure stipulated in the old Criminal Code.

On the other hand, if the measure of institutionalization in the educative centre is set for a shorter period than 2 years (for instance, 1 year and 6 months), we will consider as being more favourable the new Criminal Code, because it stipulates the option to replace said measure with the freedom non-privative one of daily assistance after executing the fraction of at least 1/2 of the applied term, therefore in less than 1 year than stipulated in the old law, even though, after the replacement, the under-age will be set certain obligations until the expiry of the term of institutionalization.

In conclusion, we believe that the more favourable criminal law must be always set considering the opportunity given to the under-age child to be released from the educative or re-education centre, according to the precise case type, after the shortest interval of time, calculated from the moment of institutionalization, not considering the possible obligations set in the charge of the under-age (according to the NCC), respectively the other provisions of the successive norms related to the extension, revoking of freedom (old Criminal Code) or reconsideration of release or replacement (NCC), because the more favourable criminal norm must be set, first of all, depending on the criterion of the duration of the freedom-privative measure ordered by the date when it ceases. An exception is made only when the freedom non-privative measure ceases on the same deadline, regardless of the successive criminal norm that it is part of, when the other applicable institutions are also taken into account, the under-age child being applied the more favourable measure, for said case type, in virtue of the aforementioned institutions.

d) As regards the *educative measure of institutionalization in a detention centre* (art.125 NCC), a delimitation must be first made between the two execution means of this measure, to establish the more favourable criminal norm compared to the educative measure of institutionalization in a re-education centre included in the old Criminal Code, with the solution that the previous law is more favourable.

As regards the first modality of the measure specified in art.125 NCC, we are showing that it is ordered if the conditions stipulated in art.114 para. 2 are met for the term between 2 and 5 years, if the accused under-age child has not committed a crime punished by 20 years of imprisonment or more or by life detention (art.125 para. 2 NCC), in which case, regardless of the term of the measure included in the new law to be taken, the old regulation is more favourable.

For instance, in the event when, for the committed criminal deed, the trial court appraises that the measure of institutionalization in a detention centre for the duration of 2 years is in order, regardless of the child's age, said re-education measure (included in the old law) will always be more favourable. If the measure is taken before the under-age child turned 17, we will deem the old law as more favourable, considering that, after the under-age is released, before he/she comes of age, he/she will not be set certain obligations, as stipulated in the new Criminal Code. Nonetheless, if the child has already turned 17 when the measure was set, the old Criminal Code is more favourable, because it offers the child the chance to be released before he/she becomes of age (art.107 OCC).

The doctrine includes certain discussions, on the one hand, as regards the educative measure of hospitalization in a detention centre (stipulated by the new law), ordered for the minimum term of 2 years, when the under-age child is 15 years old, in which case the measure would cease when the under-age turns 17, and, on the other hand, if the under-age child were applied the measure of institutionalization in a re-education centre, as stipulated by the old Criminal Code, and execution that would cease when he/she turns 18. Some authors[1] believe as more favourable the measure stipulated in the old code, even if it has a longer execution term. However, the main consideration is that, when the measure ceases, the under-age child would not be ordered to observe certain obligations. As far as we are concerned, we do not share this opinion, since the child's interest is determined by the possibility to be released as soon as possible from the re-education or detention centre, ignoring the obligations that should be set according to the new law. Indeed, according to the old law, the under-age child may be released after executing the period of one year of the ordered measure (when he/she turns 16) without having to observe certain obligations, but his/her release is not a sure thing, it is not an absolute right, but a benefit

[1] Teodor Dascăl, *Under-age children. Application of the more favorable criminal law*.

regulated by the lawmaker, which, in order to be granted, certain conditions related to the child's person must be satisfied.

In conclusion, we are appraising as more favourable for the under-age child the measure of his/her institutionalization in a detention centre (stipulated by the new Criminal Code), because, also in this case, the under-age child has the possibility to be released after the interval of one year (when he/she is 16 years old), namely after executing at least half of the ordered measure, for the case type specified above.

As regards the second thesis of article 125 para. 2 NCC (when the measure is ordered for the interval between 5 and 15 years), we believe as more favourable the old law, which stipulates that the ordered measure ceases when the child comes of age.

e) As regards the educative measure of *institutionalization in a medical-educative institute,* included in the old Criminal Code in art.105, with correspondence in the new code in the frame of freedom-privative educative measures, the same as the educative measure of institutionalization in a re-education centre, we believe that this measure is more favourable than the freedom-privative ones of the new code. The main argument is that the previous law stipulates that this measure may be cancelled if the reason or cause determining its ordering is noticed to have disappeared, the term executed by that moment having no relevance whatsoever. We believe this opinion to be valid, even if, after the measure is cancelled, the trial court may order the hospitalization of the under-age child in a re-education centre, as such a decision is elective and not mandatory and is left to be appraised by the court according to the specific of the case type.

f) Plurality of crimes. Analysing the joint provisions of Chapter IV of the old Criminal Code, we notice that the under-age child is applied only those provisions concerning the form of the complex of crimes and of the intermediate plurality, except for the relapse state. We are mentioning that art.34 has a partial applicability in determining the main punishment, as the punishment of life detention cannot be set for an under-age child. Also, it is not possible to join several educative measures, as this procedure is allowed only for punishments, when the court orders accordingly, in compliance with art.109 of the Old Criminal Procedure.

The New Criminal Procedure, included in art.129, specifies in the matter of plurality of crimes, a distinct legal regime than the one related to the children of age, considering the psycho-physical features of the

under-age child. Thus, according to NCC, when the under-age child commits several crimes, only one educative measure is established and taken. Following these provisions, the solution provided by the Supreme Court by the Guidance Decision no. 9/1972 is registered, recommending the application of only one educative measure in such cases.

It is obviously noticed that the new Criminal Code is more favourable in matter of plurality of crimes for two reasons. First of all, a different legal regime has been created, distinct from the one applicable to the children of age, showing certain kindness of the lawmaker, appraising that, by such educative measures, the under-age re-integrates more easily. Secondly, as previously specified, the application of one single educative measure shows the advantages that it may be non-privative of freedom, and when an educative measure privative of freedom is ordered, the under-age has the possibility to assimilate certain knowledge by professional training or school preparation within re-education centres. Also, the new Criminal Code represents the more favourable norm also due to the fact that its contents stipulate more measures non-privative of freedom, as well as to the fact that it provides the reversible progressive replacement system from a freedom-privative measure into a non-privative one.

CONCLUSIONS

Analysing the provisions of the successive norms, one may draw the conclusion that the most favourable criminal law is the new one, from two points of view: the impossibility to apply punishments to under-age children, and the provision, to courts, of a wider range in applying and individualizing sanctions. This point of view must not be generalized, because, as we may notice, there are also situations when the older provisions were more favourable to the under-age child who committed a crime when they were in force. However, in all the cases, if, since the crime has been committed until the final conviction sentence has been given, the under-age child has come of age, the more favourable criminal law would be the new Criminal Code, because it stipulates only educative measures that are less tough than the punishments foreseen in the former Criminal Code.

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THEORETICAL ISSUES ON LEGAL TAX RELATIONS

Aurelia HERLING[*]

ABSTRACT
The legislator has offered up to now no legal definition of the legal tax relation and the legal provisions from the Tax Procedure Code in regard to the constitutive elements of the legal tax relation are neither coherent nor clear, managing to cause more confusions than clarifications. We hope that a rewriting of the Tax Procedure Code at which they are working these days would solve these issues, as the legal tax instability also starts from the wrong understanding of the concepts of relations of material tax law and the relation of tax procedural law. When drafting a procedure code, it is obvious that one should focus on the relations of procedural law, whereas in case of the Tax Procedure Code a mix up is produced in the general provisions of terms and notions specific to the relation of material tax law and the procedural tax law relation respectively and we believe this is not desirable.

KEYWORDS: *legal budgetary relation, legal tax relation, material tax law relation, procedural tax law relation*

1. The Notion of a Legal Budgetary Relation[1]

It is common knowledge that in social relations, those social relations falling under the incidence of legal regulation gain a legal capacity and thus become legal relations. Viewed through the prism of legal norms, such relations appear as a realization thereof. However,"legal norms provide only hypothetical cases and comprise certain possibilities. The conduct comprised in the norm as possible becomes real when it is

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[1] The notions of tax receivables and tax obligations are of new in the Romanian legislation and in the specialized doctrine and practice. In the old Romanian legislation and in the older specialized doctrine and practice were used the terms of *budgetary obligation and budgetary receivable*. It is imperiously necessary to precisely establish the content of such terms. We believe that this entire confusion of terms starts from the vagueness in the legislation and practice in regard to the notions of legal budgetary relation and the legal tax relation.

materialized in a social relation between certain subjects that have rights and obligations related to an object"[2].

Indeed legal norms regarding the incomes of the general consolidated budget of the State only hypothetically provide the obligations of individuals and of legal entities to compute and pay the profit tax, the obligations of the economic agents – employers to compute, withhold and pay the tax on salary incomes, etc. The conduct of computing, paying, collecting, etc. on behalf of the general consolidated budget of the State, the amounts regulated as budgetary incomes become real when materialized in the legal relations that are established between taxpayers and the relevant financial and tax bodies authorized to collect such amounts.

Legal budgetary relations are differentiated from other legal financial relations by the nature of their content, the rights and obligations to collect and pay on behalf of the general consolidated budget of the State the amounts that are the object of the budgetary obligation. Due to their finality, namely of setting up a monetary budgetary fund of the State, relations of this type are a separate category of legal relations, namely legal budgetary relations.

Legal budgetary relations[3] are formed of financial relations that arise in the process of distributing a part of the national income and in the redistribution of incomes of legal entities and individuals, in order to set up monetary funds of the State budget.

2. Legal Nature of Budgetary Relations[4]

Due to the general structure and their essential elements, budgetary relations cumulate the characteristics of legal administrative relations and set up a category of legal administrative and financial relations.

Considering that the relations of administrative law are characterized by the fact that at least one of the subjects is a body of the State administration, the other taxpaying subject being always in a subordination position, budgetary relations are classified in the category of relations of

[2] Gliga I., *The Legal Regime of Budgetary State Incomes*, Scientific Publishing House, Bucharest, 1967, quoted work, p. 78. For details, I. Demeter, I. Ceterchi, *Introduction in the Study of Law*, Scientific Publishing House, Bucharest, 1962.

[3] See, D.D. Şaguna, *Financial and Tax Law*, Publishing House All Beck, *quoted work*, p. 390.

[4] Gliga I., *The Legal Regime of Incomes of the State Budget*, Scientific Publishing House, Bucharest, 1967, *quoted work*, pp. 103-104.

administrative law, as they fulfil both essential features that determine the legal administrative nature.

The legal administrative and financial nature of budgetary relations is consistent with the fact that the earning of incomes of the State budget by the administrative -financial or banking bodies is a component part of the financial State activity that in its turn is part of the fundamental State activity carried out by the bodies of the State administration.

3. Categories of Legal Budgetary Relations

From the category of legal budgetary relations are also part, according to the formation source and nature of budgetary incomes: legal levying relations, legal taxation relations, legal relations of paying and collecting the amounts that are not provided in the general consolidated budget of the State, such as fines, vacant legacies, donations to the State, abandoned assets, amounts of money resulting from the capitalization of seized assets, amounts of money originating from the recovery of schooling expenses paid in advance by the State, etc., legal relations of paying and collecting the non-fiscal and para-fiscal duties, legal guarantee relations; relations of contributing to the setting up of the general funds of the company; relations of enforcing the obligations towards the State budget, etc.

Out of this itemization of legal budgetary relations, it results that certain legal budgetary relations have a fiscal content (taxes and duties charged from individual or corporate taxpayers), whereas others have no fiscal content (incomes originating from the properties of the State and other amounts due to the general consolidated budget of the State, in accordance with the provisions of art. 75 from Law no. 500/2002 on public finances).

4. The Legal Tax Relation – A Category of Legal Budgetary Relations

We believe that legal tax relations are only one part of the multitude of legal budgetary relations and comprise the aggregate social relations of economic nature under a monetary form regulated by the legal tax norm, protected by the State and characterized by the existence of the

rights and obligations of the participating subjects (the State by the tax bodies, on one side, and the taxpayers, on the other side*)*.[5]

″Legal tax relations are made up of levying relations that arise during the process of distributing a part of the national income and in the redistribution of certain incomes of legal entities and of individuals, in order to set up monetary funds of the State budget.″[6]

Legal tax relations are regulated by virtue of the legal norms on the activity of the State of collecting tax incomes. This category of legal relations is particularized by the nature of their content, i.e. the rights and obligations of the participating subjects.

In the opinion of the authors, there is no legal regulation that should define the legal tax relation, but from the interpretation of several provisions of the Tax Procedure Code, i.e. art. 1, art. 16 and art. 21 respectively, result both the parties and the content and object of legal tax relations[7]. We agree that the lawmaker has not offered a legal definition of the legal tax relation, but the legal provisions from the Tax Procedure Code in regard to the constitutive elements are neither coherent, nor clear, managing to cause more confusions than clarifications. To make it clearer, Title I General Provisions comprises Chapter IV entitled Legal Tax Relation, including provisions referring to the content of the procedural tax law and the subjects of the legal tax relation, whereas Title II General Provisions on the relation of material tax law comprises in Chapter I General Provisions, the provisions on the tax receivables and tax obligations. Thus, in regard to this technical incoherence of legal wording, we specify the following: the necessity of a clear delimitation between the concept of legal tax relation and its meanings of relation of material tax law and procedural tax relation; the necessity of a clear regulation of the object, the subjects and content of the procedural tax relation appear as imperative.

On the other side, we believe that from the interpretation of art. 1 from the Tax Procedure Code, the lawmaker makes it clear that he regulates the relations of procedural tax law, not such of the legal tax relations, as is erroneously edited the legal tax norm, as the code regulates the rights and obligations of the parties regarding the management of the taxes and

[5] For details, see N. Popa, *General Theory of Law*, Actami Publishing House, 1994.
[6] D.D. Şaguna, D. Şova, *Tax Law*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2009, *quoted work*, p. 4.
[7] D.D. Şaguna, D. Şova, *Tax Law*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2008, *quoted work*, p.4.

duties due to the State budget and the local budgets provided by the Tax code, the management of customs rights, as well as the management of receivables originating from contributions, fines and other amounts that are incomes to the general consolidated budget according to the law.

4.1. The Structure of the Legal Relation

Legal tax relations cumulate all characteristics of the legal financial relations and have joint elements of all legal relations in general, irrespective of the differences of content among the categories of incomes of the State budget. As any legal relation, in the structures of the legal tax relation[8], we encounter the following three elements: object, subjects[9] and content.

4.1.1. The Subjects of the Legal Tax Relation

The subjects of the legal tax relations[10], according to the provisions comprised in art. 17 from the Tax Procedure Code are on one side the State, the administrative and local units, and on the other side, the taxpayer.

The first subject is the State represented by the Ministry of Public Finances through the National Tax Administration Agency and its local units, whereas the administrative and local units are represented by the authorities of the local public administration, as well as by the specialized departments thereof, within the limit of the attributions delegated by the concerned authorities. The National Tax Administration Agency, its local units, as well as the specialized departments of the authorities of the local public administration are called tax bodies in the Tax Procedure Code.

The second subject, the taxpayer[11] is defined in the doctrine as any individual or legal entity holding a taxable or chargeable asset or earning

[8] For details in regard to the correlation between the relations of material tax law – the relations of procedural tax law, see D. Dascălu, C. Alexandru, *Theoretical and Practical Explanations of the Tax Procedure Code*, Rosetti Publishing House 2005, pp. 36-37.

[9] It is true that in most cases, individuals and legal entities fulfil a double capacity of subject both in a relation of material tax law and in a relation of procedural tax law.

[10] For details in regard to the legal tax relations, see D.D. Şaguna, *Financial and Tax Law Treaty*, Eminescu Publishing House, Bucharest 2000, p. 683.

[11] In the specialized literature and in the tax legislation, the taxpayer is also called debtor, payer, taxable subject, chargeable subject.

taxable or chargeable incomes on the territory of a state and that is bound to pay amounts of money as taxes and duties to the State budget or the local budgets.

The lawmaker defines in art. 17, para. 2 Tax Procedure Code, the taxpayer as "any individual or legal entity or any other entity without legal status owing taxes, duties, contributions and other amounts to the general consolidated budget[12], in terms of the law". From both definitions it results that the capacity of a taxpayer can have:

- Romanian individuals[13]: Romanian citizens, stateless persons, citizens with double and foreign citizenship, who in their turn can be resident (are domiciled overseas and are resident in Romania for at least 183 days within one calendar year): diplomatic and commercial representatives, PhD candidates a.o. and non-resident persons (they have both the domicile and residence overseas and are in transit on the territory of our country): foreign artists and tourists, specialists, man of letters, art, culture and others.

- Romanian legal entities having their registered office in Romania, being registered and operating according to the law (trading companies)[14] and foreign ones, having their registered office overseas and representatives offices in Romania.

In the relations with the tax body, the taxpayer may have a direct legal relation or may be represented by a proxy. The proxy may be conventional or legal.[15]

[12] From the interpretation of this text it results that the notion of taxes and duties is susceptible of receiving two meanings: taxes and duties in narrow sense, taxes and duties regulated by the Tax Code; taxes and duties in a wide sense, any type of incomes of the general consolidated budget.

[13] For details, see Gh. Beleiu, *Romanian Civil Law. Introduction in Civil Law. Subjects of the Civil Law*, 7th edition reviewed and supplemented by M. Nicolae and P. Truşcă, Universul Juridic Publishing House, Bucharest, 2001; T. Pop, *Romanian Civil Law. General Theory*, Lumina Lex Publishing House, Bucharest, 2003; I. Dogaru, *Elements of Civil Law. Introduction in Civil Law. Subjects of Civil Law* vol. I, Şansa Publishing House, Bucharest, 1993.

[14] For this purpose: M. Şcheaua, *Company Law no. 31/1990 commented and annotated*, All Beck Publishing House, Bucharest, 2000.

[15] In accordance with art. 18 from the Tax Procedure Code, in the relations with the tax body, the taxpayer may be represented by an attorney-in-fact. The content and limits of his representation are such comprised in the power of attorney or established by law, as the case may be. The appointment of an attorney-in fact shall not prevent the taxpayer to personally fulfil the tax obligations, even if he has not proceeded to revoke the power of attorney. The attorney-in-fact is bound to submit with the tax body the authorization deed in original or in authenticated copy. The revocation of the power of attorney shall

4.1.2. The Object of the Legal Tax Relation

The object of legal tax relations is made up by the amounts of money comprising taxes, duties, contributions, payments, samplings, fines and other amounts owed by the taxpayer to the State budget and local budgets. The collection of tax incomes on the terms and in the amount provided in the regulations have a special significance in the accomplishment of the State budget and of the local budgets respectively, so that such should be able to set up the centralized monetary funds necessary to finance the actions and objectives of general or local interest, for the social and economic development of the entire society or of the local community.

4.1.3. The Content of the Legal Tax Relation

The content of the legal tax relations is made up of the rights and obligations of participating subjects. We shall furthermore perform an itemization - that is not meant to be exhaustive - of the main rights and obligations of the State, as well as of the obligations and correlative rights of the taxpayer. The most important rights of the State are: the right of setting up and regulating taxes and duties[16]; the right to identify

operate towards the tax body as of the date of submitting the revocation deed. In case of representing the taxpayers in the relations with the tax bodies by lawyer, the form and content of the power of attorney are such provided by the legal provisions on the organization and exertion of the lawyer's profession. The taxpayer without a tax domicile in Romania, who is bound to submit returns with the tax bodies, should appoint a proxy with the tax domicile in Romania, who should fulfil on behalf of and from the estate of the taxpayer the obligations of the latter towards the tax body. According to art. 18.1. from the Methodological Norms of applying the Tax Procedure Code «The appointment of the tax representative by the taxable persons settled overseas, performing operations subject to VAT on the territory of Romania is accomplished according to art. 151 from Law no. 571/2003 on the Tax Code, with subsequent amendments, hereinafter called Tax Code.».
The lawmaker regulated in art. 19 from the Tax Procedure Code that in case there is no proxy, the tax body shall request in terms of the law from the relevant court of law the appointment of a tax curator for the absent taxpayer, whose tax domicile is unknown or who due to sickness, an infirmity, old age or a handicap of any type cannot personally exert and fulfil the rights and obligations incumbent on him according to the law. For his activity, the tax curator shall be remunerated according to the court decision and all expenses related to this representation are incurred by the represented person.

[16] The State has this sovereign right of levying taxes and duties according to a principle from the Roman law: "Nullum impositae sine lege=No tax outside the law"'.

the taxable matter[17] and the paying subjects; the right to charge taxes, duties, contributions and other amounts that are incomes of the general consolidated budget; the right to the reimbursement of VAT; the right to the return of taxes, duties, contributions and other amounts that are incomes of the general consolidated budget, hereinafter called by the lawmaker main tax receivables; the right to charge late payment interests and penalties in terms of the law, called accessory tax receivables; the right to collect taxes and duties; the right to pursue the collection of tax incomes; the right to perform tax controls; the right to finalize the amounts challenged by the taxpayers; the right to prove certain tax facilities requested by the taxpayers; the right to apply sanctions specific to the legal tax norms, such as the right of applying late payment interests and fines to the taxpayers; the right to commence and carry out the enforcement against the persons, who do not willingly pay the amounts of money due to the general consolidated budget of the State and others.

The correlative obligations of taxpayers, called by the lawmaker tax obligations, are the following: the obligation to observe the tax legislation; the obligation to declare the taxable assets and incomes or, as the case may be, the taxes, duties, contributions and other amounts due to the general consolidated budget; the obligation to compute and register in the books and tax journals the taxes, duties, contributions and other amounts due to the general consolidated budget; the obligation to pay on the legal terms the taxes, duties contributions and other amounts due to the general consolidated budget; the obligation to pay late payment interests and penalties related to the taxes, duties, contributions and other amounts due to the general consolidated budget; called accessory payment obligations; the obligation to compute, withhold and register in the books and the payment journals, on the legal terms, the taxes and contributions accomplished by withholding; the obligation to produce tax documents and any other data requested at the control exerted by the tax bodies; any other obligations incumbent on the individual or corporate taxpayers in applying the tax laws. In the category of other obligations incumbent on the taxpayers in applying the tax laws are also included the obligations**:** of cooperation; of supplying information; of presenting on the request of the tax body registers, evidences, business documents and any other deeds; of allowing to the authorized clerks of the tax body to perform investigations on site; to record the tax identification code on the own

[17] For details, see D.D. Şaguna, *Financial and Tax Law Treaty*, Publishing House Eminescu, Bucharest 2000, p. 626.

documents; of appearing at the headquarters of the tax body on its request; of fulfilling the measures provided in the deed drafted on the occasion of the tax inspection in the terms provided by the applicable legal provisions. Taxpayers have also rights, such as: the right to claim the determination of the levy and the method of payment in accordance with the provisions of regulations that stipulate each tax income; the right to specialized legal support; the right to benefit of the incentives or legal tax facilities[18]; the right to benefit of reductions of fines; the right to file objections and challenges against the tax control deeds; the right to challenge enforcement, if its commencement or the terms in which it is carried out and others are deemed injustices.

The correlative obligations of the State bodies with tax attributions are: the obligation to establish incomes in accordance with the public and moral order; the obligation to collect only legally due tax incomes; the obligation to pursue only legally due incomes; to grant on the justified request of the interested persons, the facilities provided by the regulations; the obligation to grant *ex officio* the tax facilities of which the taxpayers benefit; the obligation to solve the taxpayers' requests within the legal terms established by the imperative norms; the obligation to solve objections or challenges filed with the tax control body; the obligation to compensate or return the illegal taxes and duties due or exceeding the legally due ones and others.

CONCLUSIONS

As we showed, there are two meanings of the notion of a legal tax relation: the relation of material tax law and the relation of procedural tax law. It is difficult to make a distinction based on the legal regulations, as according to the above opinion, the texts do not perform a clear separation between the legal relations, but such can be deduced. From the aggregate activities carried out in view of establishing and collecting at the consolidated budget the taxes and duties, some are specific relations of material tax law and others legal procedural tax relations. In case of the two meanings of the notion of legal tax relation, the subjects are the

[18] The tax legislation acknowledges as tax facilities: exemptions and reductions at the payment of taxes and duties, deferrals and rescheduling at the payment of taxes and duties, see the Tax Code of Romania enacted by Law no. 571/22.12.2003, published in the Official Gazette no. 927/23.12.2003, with subsequent amendments and supplementations.

same, i.e. tax bodies and taxpayers, the object is the same, i.e. the determination and collection at the general consolidated budget of the taxes, duties and other contributions owed by the tax debtors, but the content of the two categories of relations is different. *The relation of material tax law* has in its content the rights and obligations of the parties related to the charging of taxes, the charging[19] of interests and penalties, the right to the return of taxes and duties, the right to the reimbursement of VAT and the correlative obligations of declaring the taxable matter, the chargeable or taxable held assets and earned incomes etc. *The relation of procedural law* comprises those rights and obligations related to the administrative, administrative - jurisdictional and civil - procedural actions related to the activity of managing taxes and duties.

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BRIEF CONSIDERATIONS ON THE "ELECTORATA" (GOVERNMENT EMERGENCY ORDINANCE NO. 46/2014)

Irina IACOB[*]

ABSTRACT

This paper contains a concise analysis of Government Emergency Ordinance no. 46/2014on amending and supplementing Law no. 571/2003 on the Tax Code, adopted by the Romanian Government on26.06.2014.[1]

The purpose hereof is to identify, besides performing a review of the relevant legal regulations applicable in this case, the effects that the legislative measure concerned caused in economic and social terms as of its coming into force until the present, as well as to evaluate the criticisms brought against this measure.

We have also considered providing an explanation for the causes and reasons that have determined the lawmaker to adopt this legislative measure.

KEYWORDS: *electorata, credit, restructuring, banks, pay cuts, Swiss franc, rescheduling, deductions, Tax Code, individual, gross salary*

1. Generalities. Rationale behind its adoption

Government Emergency Ordinance no. 46/2014 for the amendment and supplementation of Law no. 571/2003 on the Tax Code was adopted, as resulting from the very premise of the enactment „for the elimination of the distortions caused, mainly, by the high tax burden borne by individuals with low income" [2]. This bill permit to debtors who opt for the restructuring of loans to benefit from a special deduction when calculating the income tax to be paid monthly after the conclusion of the period set for instalment reduction. Being adopted before presidential elections, Government Emergency Ordinance no. 46/2014 was named "*electo-rata*" (electoral instalment).

The text of the law makes reference, therefore, from its very preamble, to the notions of "high tax burden", "individuals" and „low income". The consequence of the three elements mentioned above is the

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reduction in the level of consumption by the population which, in its turn, adversely affects economic growth.

As motivated in the Substantiation Note at the basis of adopting GEO 46/2014, "the passing of this enactment is determined by:

- the need to take urgent measures for stimulating consumption, in the absence of such measures economic growth being possibly negatively affected in the short and medium term,
- the more difficult access to financing imposed by creditors, as well as a certain greater preference of some part of the population, during the financial crisis, to save money by way of precaution, which generates limited perspectives as regards the resumption of the consumption trend,
- the worrying deterioration in the finances of a portion of the population, which, objectively, could not have been foreseen by the affected people at the time of taking up the financial obligations represented by the respective bank loans,
- the radical reduction in the incomes of these people reflected in the their reduced capacity to pay back their debts to the banking institutions, as well as the alarming rise in the number of people who became incapable to execute such obligations, as the latter turned too onerous,
- the extremely high level of the debt service weight onto the monthly income of the individuals earning incomes lower than the level of the average salary per economy, who were the most affected by the crisis..." [3]

More exactly, according to the same considerations in the Substantiation Note, at a statistical level, the indebtedness of the Romanian population towards banking institutions may be expressed synthetically in the following figures.

a) more than 30% of households in Romania are over-indebted;
b) over-indebtedness exists towards the banking institutions from which the population has contracted various loans, as consumption loans that were either unsecured or secured with mortgages;
c) in 2013, 43% of the active population, representing 4.31 million people, was indebted to banks;
d) the loans contracted by the population were, on an average, for 21 years (the ones secured with mortgages), respectively 6 years (the ones unsecured with mortgages);

e) in the national currency, the total amount of debts towards the banks in June 2013 was 115.3 billion RN, which is very high;
f) the economic crisis substantially affected the persons/debtors towards banking institutions with incomes situated below the average per economy, which automatically determined their impossibility to continue to pay off the contracted loans.

The consequence of not paying debts arising out of loan agreements was the opening, by Banks, of hundreds of thousands of foreclosure cases all over the country, with a view to recovering the amounts given as loans, by selling the assets mortgaged by the debtors. In most cases, the mortgaged asset was precisely the one for which the mortgage loan had been contracted.

Yet, on the other hand, the real estate crisis undervalued also properties set up as security for returning the loans at the time when the loans had been granted and secured, such that, even if the real estate securities have been foreclosed, in most cases, they did not cover the entire receivable, and the debtors continued being subjected to foreclosure until the recovery, by the borrowing institutions, of the respective receivables in their entirety.

In social terms, the situation became more dramatic, considering the fact that the salaries of budgetary employees were cut down in 2010 by 25%, and were only replenished in 2012.

On the other hand, nevertheless, as also noted down in the Ordinance Substantiation Note, quoted in the above, one of the aspects that was impossible to be foreseen right from the time of contracting the two loans was, as regards the loans taken in Swiss francs, the manner of operation of the CHF/RON currency exchange rate, as well as the continuously rising evolution of the CHF, in the sense of its appreciation as compared to the national currency.

Thus, even until January 2015, the RON/CHF currency exchange rate had risen already by approximately 70% as compared to the time when the loans were granted. The maximum level in contracting this kind of loan was reached in the period 2006-2008, when the average RON/CHF currency exchange rate was approximately 2.1 RON/CHF. In December 2014, the average currency exchange rate was of approximately 3.7 RON/CHF.

The unexpected waiver of the minimal threshold of 1.2 CHF/EUR by the Central Bank of Switzerland at the beginning of January 2015, resulting immediately in the substantial increase of the RON/CHF exchange rate to monthly averages of approximately 4.2 RON/CHF has

largely led to a doubling of the value in RON of the monthly instalments related to the respective loans, without also taking into account the possible rises of interest occurring during the unfolding of the loans.

In this context, for an employee whose salary is paid in the national currency, and who bought CHF in order to pay off instalments related to the contracted loans, the modification of the currency exchange rates and the huge appreciation of CHF as to the EUR and RON determined a much higher indebtedness degree as to the moment of taking the respective loans, sometimes reaching values of over 90-95% of the monthly income.

The adoption of GEO 46/2014 took place before December 2014, when the burden onto the banking creditors was already alarming both for the banking institutions, and for the State, which, against the background of the impoverishment of the general population via banking over-indebtedness, was looking for ways of stimulating consumption (that could generate revenues to the state budget).

2. Effects, criticism, similar examples in Europe

As appreciated by the Tax Council, ”debtors who opt for the restructuring of loans shall benefit from a special deduction when calculating the income tax to be paid monthly after the conclusion of the period set for instalment reduction, equalling the new instalment, but not exceeding RON 900 per month. Also, the deduction is granted only within the timeframe January 2016- December 2017. Therefore, a debtor who agreed with the lending institution on reducing the instalment within the period July 2014-June 2016, respectively for the maximum period provided for by the legislative proposal, shall benefit from the application of the deduction to the calculation of the income tax for the period July 2016 – December 2017, respectively 18 months” [5]

The effect of GEO 46/2014 was practically non-existing, no loan restructurings based on the discussed enactment being registered to date, despite the fact that, at the time of adoption, it was stated that this shall be enforceable for a segment of around 800,000 people.

Currently, against the background of a more acute stage of the bank debt crisis at the level of the general population, especially considering the instability of the CHF, the amendment of GEO 46/2014 is contemplated by means of increasing the gross income with which debtors would get included in the restructuring schedule, from RON

2,200 to RON 3,000, the number of beneficiaries increasing to1.05 million people. At the same time, the special deduction for loans will rise from 900 to 1,500 RON per month, the equivalent of maximum RON 240 as monthly reduction of the income tax, and the granting of the special deduction (tax credit) shall be applied as of the month following loan rescheduling, comparatively with a 2-year delay according to the current version. [6]

Ever since was adopted, the ordinance was criticized by employers, and by banks, debtors, as well as by representatives of the economic and political environment. The criticism brought referred to the following issues: the need to implement in the computerized accounting software regarding salaries a new and different software for the employees who chose loan restructuring as contemplated by GEO 46/2014. The banks have raised the same issue when stating that "...they will have to operate major system changes. Currently, the restructuring process is manual. An employee will sit down and make calculations. How would it be to suddenly have a part of your portfolio of clients appear at the door of your branch?" (statement made by the CEO of Kiwi Finance, the largest loan broker in Romania, Anca Bidian). [7]

Other issues are raised due to the fact that, further to the restructuring, the clients shall pay more at the end of the loan. Moreover, there are also problems as regards the perception over the relationship between clients and the bank, being likely that the latter would avoid granting loans to certain people who have already benefitted from the measures contained in GEO 46/2014, even if they are not bad payers.

"The Romanian Banking Association expresses its reserves as to the implications of this restructuring scheme in terms of provisions, the rules and regulations of the National Bank of Romania and of the costs for the implementation and management of the measures regarding loan restructuring, as well as the granting of tax incentives". [8]

The bureaucratic side cannot be disregarded either, the beneficiaries of the restructuring having, in order to benefit from the special deduction, to submit, on a monthly basis, with the employer, a series of documents proving payment of the instalment. Also, individuals whose salaries shall increase and exceed the threshold provided for in the enactment shall not longer benefit from the respective deduction.

"Such measures (our note – taxation measures) whereby governments have intervened directly to support debtors are a relatively frequent practice in Europe as of the start of the crisis. For instance, in the United Kingdom, in 2008, a measure was implemented allowing the deferral of

interest payments, such measure being sustained by state securities, for creditors. In Croatia the state initiated some incentives for the better return of mortgage loans in foreign currency. Iceland implemented measures for subsidizing the efforts of the population by bearing the interest for a period of two years, financed via a tax incentive granted to banks". [9]

Additionally, in Ireland and the United Kingdom the aid offered by the government to the people who contracted banking loans consisted in the deduction, for a period of 1-2 years, of the interest out of the taxes to be paid to the state.

CONCLUSIONS

The inefficiency, to date, of GEO 46/2014 is due to several causes such as: the reduced threshold of incomes benefiting from the special deduction, the limiting of the instalment restructuring level, the time limitation in enforcing the special deduction, the bureaucracy placed in the charge of debtors, the absence of implementing certain programmes within the banking systems for the calculation of amendments caused by a restructuring of loans and due to the final costs of the loan, which, as a result of the rescheduling, might become higher.

Moreover, the largest number of individuals affected by the economic, and even more acutely by the monetary crisis, due to the CHF exchange rate, cannot be included, in terms of their salary incomes, within the interval whose threshold is RON 2,200 asset in the criticized enactment.

From the same point of view, i.e. that of setting a threshold for salary incomes to a certain amount, we should mention, once again, the actual problem created as a result of increasing the level of indebtedness per income, occurring during the unfolding of the loan, both by interest changes and the devaluing of the national currency as compared to the currency of the loan (especially to the CHF, as shown above).

Thus, in terms of affecting the purchasing power per household and decreasing consumption, which are the main reasons for issuing the measure contained in GEO 46/2014, the current and really extremely high indebtedness degree affects both purchasing power and consumption, regardless of the level of the monthly income.

Maybe a separation on degrees of the income thresholds and an appropriate comparison of the special deductions to the actual

indebtedness degree of a person might bring about additional effects of such enactment.

Increasing the salary threshold to RON 3,000, according to the bill for amending GEO 46/2014, might increase the attractiveness of this measure, without turning it into a determining one, on the grounds shown above.

At the same time, the increase from RON 900 to RON 1,500 of the maximum deductible amount by means of the special deduction, related to the loan subjected to restructuring, would determine a more extensive enforceability of the proposed measure.

Another problem that should be taken into consideration would be the enforceability of the special deduction, in the sense of limiting its duration in time. As the aforementioned Tax Council noted down, ever since the passing of GEO 46/2014, it seemed extremely unlikely to benefit in full, time-wise, from the special deduction granted, because of the time limitation in enforcing the deduction (our note – December 2017). In this context, it might be beneficial to only limit, as far as time is concerned, the moment of starting to enforce the deduction, thus giving tax payers the chance to fully benefit from the special deduction throughout the period granted by the bank.

Nevertheless, we believe that the criticisable measure would otherwise bring, from many points of view, highlighted in the above, after the operation of some further amendments, undeniable benefits, among which a rise in consumption by the population due to the increase in available income/household, with positive effects in terms of economic growth, etc.

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[8] *Idem* 3.

[9] *Idem* 3.

THE NOTION OF *PROFESSIONAL* IN CONSUMER LAW

Mihaela ILIESCU[*]

ABSTRACT

The term of professional is not provided express verbis by the legislature in the framework regulation, Consumption Code, rather one can find it in several special laws, thus having an application under the scope thereof. According to the Consumer Code, another notion represents the proximate genus, the notion of economic operator. Although the legal definition of the notion of economic operator is comprehensive, de lege ferenda, the concept of professional should be also taken over in the framework law, in order to avoid confusions that could arise from the terminological ambiguities, and to create a unitary conceptual framework; if we analyze this notion, we can find that the consumer law ignores, inter alia, the traditional distinction between traders and other noncommercial professionals categories and the freelance jobs can, in principle, be included in the scope thereof. Starting from the definition of professional notion set out by the new Civil Code, we will describe all the categories of professionals that will be applied the norms of Consumer Law.

KEYWORDS: *professional, economic operator, trader, consumption right*

A comprehensive approach of the relationship between professionals and consumers involves, in addition to the analysis of the consumer concept, also all the concepts used by the legislature in the normative acts of consumer protection law, such as: producer, economic operator, supplier, distributor, vendor, supplier etc., notions subject to the general concept of *professional*. Although this concept was used in the specialized literature specific to the consumer protection law and before the entry into force of the new Civil Code, we believe that, under the circumstances of this new normative act, the use of the term *professional* has a legal support (basis) gaining new values, as well.

Before answering the question "*which are the categories of professionals in the field of consumer protection law and how are they defined by the legislature*", we shall summarize the conceptual background of the notions of *professional* and *enterprise*, as described by the provisions of

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the new Civil Code and of the Law no. 71/2011 – the Law implementing the new Civil Code[1].

The notion of *professional*, introduced by the provisions of the new Civil Code has also a legal definition in art. 3 paragraph (2), which stipulates that p*rofessionals shall be considered those running a business*.

As can easily be seen by simply reading this legal text, the concept of *professional* is defined by reference to another concept, namely the concept of *enterprise*[2]; in its turn, neither the concept of *enterprise* is defined by the legislature, the latter defining the *operation of an enterprise* and not the concept of *enterprise* in itself. This failure in the law, demonstrated by most of doctrinal opinions[3], leads to a number of difficulties of interpretation and understanding of the concepts involved.

Considering the provisions of art. 3 paragraph (3) of the Civil Code, and also some legal definitions of the notion of *enterprise* found in several normative acts, such as GEO 44/2008[4], Law no. 346/2004[5], the Law no. 381/2010[6], the doctrine[7] summarized the elements defining the enterprise, as follows:

[1] For a broad description of the issue of professionals according to the New Civil Code, see S. Angheni, *Drept comercial. Profesioniştii - comercianţi* (Commercial Law. Professionals - traders), Ed. C.H. Beck, Bucharest, 2013, pp. 1-34.

[2] According to art. 3 of the Civil Code, *the operation of an enterprise is represented by the systematic exercise, by one or more persons, of an organized activity consisting in production, administration or selling of goods or in providing services, whether or not with lucrative purpose*.

[3] In this respect see S. Angheni, *op. cit*., p. 1; St.D. Cărpenaru, *Tratat de drept comercial român* (Treaty of Romanian commercial law), Ed. Universul juridic, Bucharest, 2012, pp. 35-36; Gh. Piperea, *Introducere în Dreptul contractelor profesionale* (Introduction to Professional Contract laws), Ed. C.H. Beck, Bucharest, 2011, pp. 15-22.

[4] GEO no. 44/2008 contains in art. 2 letter f) the definition of *economic enterprise – the economic activity carried out in an organized, ongoing and systematic manner, by combining financial resources, workforce employed, raw materials, logistics means and information, at the entrepreneurs risk, under the cases and conditions provided by the law.*

[5] Law no. 346/2004 regarding the stimulation of founding and the development of small and medium-sized enterprises includes in art. 2, a definition of the *enterprise* as follows: *For the purposes of this law, enterprise means any form of organization of an economic activity authorized under the laws in force, to carry out and deeds of commerce, for profit, under competition conditions, namely: commercial companies, cooperative companies, individuals carrying out economic activities independently and under family associations, authorized under the laws in force.*

[6] Law no. 381/2010 – The law on arrangement with creditors does not contain a definition of enterprise, rather it defines the enterprise in difficulty.

- Systematic exercise of an organized activity;
- The continuous nature of the work to be carried out by way of profession and not isolated;
- The risk assumed by the person / persons acting as authority, i.e. the holder of the company – the *professional*;
- the object of the activity carried out by the professional consists in producing, administration or selling of goods, provision of services and execution of works[8].

It should be noted that although the legislature does not include the activity of *works execution* both in the definition of *enterprise* contained in the art. 3 of the Civil Code, and in art. 8 paragraph (2) of the Law no. 71/2011, when proceeds in replacing the expressions of *commercial acts* respectively *commercial facts*, by the expression *activities of production, trade or services provision*, the doctrine reported this omission of the legislature, showing that the *execution of works*[8] should also be added.

- the purpose of the activity, which can be lucrative, i.e. making profit, or non-profit.

In essence, according to the new provisions of the Civil Code, the professional is, therefore, the operator of an enterprise, i.e. its holder, regardless of the name he/she used to have prior to the adoption thereof, such as trader, entrepreneur, authorized natural person, individual enterprise, family business, etc.

In this respect, the legislature, in art. 8 para. (1) in the Law for the implementing of the new Civil Code, Law no. 71/2011, supplements the legal definition of the term of *professional* as follows: "the notion of *Professional* referred to in art. 3 of the Civil Code includes the categories of trader, entrepreneur, economic operator and any other persons authorized to run business or professional activities, as these terms are provided by the law, on the date of entry into force of the Civil Code."

In the following we shall describe the professional categories as shown in the consumer framework law and then we shall complete this background of professionals with the required explanations specific to special legislation on consumer protection.

Thus, the provisions of the framework law on the consumer protection law, Law no. 296/2004 regarding the Consumer Code, republished, even

[7] S. Angheni, *op. cit.*, pp. 2-3; St.D. Cărpeneanu, *op.cit.*, p. 31; Gh. Piperea, *op. cit.*, pp. 21-22.
[8] See S. Angheni, *op. cit.*, p. 7; St.D. Carpeneanu, *op. cit.*, p. 31.

from the art. 1, establishing the object thereof, the legislature uses the phrase *economic operator* and also establishes which the subjects are participating in the legal relationship of Consumer Law, namely the *economic operator*, on the one hand, and the *consumer*, on the other hand.

In a welcome manner, the Consumer Code includes, in the Annex making part of this normative act, a number of definitions of the terms used in the consumer protection legislation, including the definition of *economic operator*. Therefore, for the purposes of consumer protection legislation, the economic operator is the *natural or legal person authorized*, who, *within his/her professional business, manufactures, imports, stores, transports or sells products or parts thereof or provides services*.

By analysing this legal definition, we can easily ascertain that the economic operator is a *professional*, carrying out a *professional activity*, i.e. operating an enterprise.

Also, we can conclude that the essential element in the definition of the economic operator, as a professional in the consumer protection law, is the fact that it acts within its business, in contrast with the consumer, who always acts for purposes outside his business activity (commercial, industrial, production, craft or freelance). Although not explicitly setting out the notion of professional, the economic operator definition contained in the framework law is comprehensive, thoroughly detailing, as examples, the professional activities that a professional can exercise. However, we consider that, by *law ferenda*, the concept of professional should be taken over in the framework law, all the more so because this notion has been legally defined in special regulations. *Exempli gratia*, the Law no.193 / 2000 on unfair terms in the contracts concluded between the professionals and the consumers, and in the recent GEO no.34 / 2014 on consumer rights in contracting, the legislature abandons the generic terms of *economic operator* or *trader* in favour of the term of *professional*. Thus, the professional is defined, according to this regulation, *as any legal or natural person, public or private, acting within its commercial, industrial or production, craft or freelance activity in relation to the contracts covered by this Emergency Ordinance, and any person acting for the same purpose, in the name or on behalf thereof*. It should be noted that, in this form, the widest sense of the term of professional is set out, thus solving the problem of inclusion in this notion of legal persons of public law and of the professional representation.

It should be noted, however, that a characteristic of consumer protection legislation, under the influence of the European law, is represented by redefining the parts of the legal relationship of consumption in each special regulation. In this context, when analysing the concept of professional in the consumption law, the doctrine held that two guidelines define the concept, conferring it a unitary view: the lack of importance of the capacity of natural or legal person and the organized nature of the profession, of the activity carried out[9].

Categories of professionals in the field of consumer protection

The provisions of the Consumer Code Annex contain also the definitions of the concepts of *manufacturer*, *trader*, *seller*, *distributor* and *provider*. As shown below, in the Consumer Code approach, all these notions are included in the concept of *economic operator*, so the ratio is from **gender** (represented by the notion of *economic operator*) to **species** (represented by the notions of *manufacturer, trader, seller, distributor, supplier*, etc.).

Given the legal provisions in the Consumer Code, the **manufacturer** is that economic operator manufacturing a finished product or a component of a product, raw material, or reconditioning the product, or applying its name, mark or other distinguishing feature on the product; a producer is also considered the economic operator or the distributor, which, by its business, changes the product features, or the registered representative in Romania of an economic operator not being based in Romania or, in the absence thereof, the importer of the product; the economic operator importing products in order to subsequently carry out an operation of sale, rental, leasing or any other form of distribution specific to conduct its business; the distributor of the imported product, if the importer is not known, even if the producer is mentioned; the distributor of the product where the importer cannot be identified, in case does not inform the damaged person, within 30 days of the occurrence thereof, on the identity of the importer.

We note that the legal text in question contains no synthetic, actual definition of the concept of producer, rather lists a number of cases in

[9] D. Fasquelle, *Rapport introductif,* in *Le droit communautaire de la consommation. Bilan et perspectives* (coordinators: D. Fasquelle and P. Meunier), Ed. La Documentation Française, Paris, 2002, p. 13; J. Calais-Auloy, F. Steinmetz, *Droit de la consommation,* Ed. Dalloz, Paris, 2000, p. 4 et seq.

which an economic operator can be considered a producer. Thus, manufacturer is considered not only the manufacturer of a product / component of a product / raw material[10], but also the economic operator applying its name, mark or other distinguishing sign on the product, reconditioning the product, or modifying the features thereof. Moreover, the concept of producer is also extended to the representative registered in Romania of an economic operator not based in our country, to the importer and to the distributor of the imported product, under the law.

This extension of the scope of the persons included in the notion of producer can be fully explained in terms of the possibility of establishing the manufacturer liability for the defective products.

Another category of professionals in consumer protection law is represented by the **distributors**. According to the definition in the Code of Consumption Annex, "the distributor is the economic operator in the supply chain, whose business activity does not affect the product characteristics. Corroborating this definition with the concept of *producer*, specifically the last two cases (paragraphs h) and i), we can conclude that, as a rule, there is no identity between the two concepts, but only exceptionally, under certain conditions[11], can the distributor be considered a manufacturer.

The doctrine deemed it important that the distributor, which normally has no direct contractual relationship with the consumer, is applied special provisions in the field of contracts concluded with consumers in an attempt to provide increased protection for the consumer, in all the cases it could be prejudiced in its relations with any types of economic operators[12].

Another category of professionals operating in the consumer protection matter is represented by the ***traders***. In relation to this notion, one should note that, in this matter, the concept of *trader has a proper*,

[10] In the current sense, *producer* means *the person who, by its work, creates the goods (products) with scientific or artistic value* - (cf. www.dexonline.ro).

[11] The conditions to be met, according to the legal text of the Code of Consumption (the definition of *producer* notion, para. h) and i) are the following: a) such products to be imported; b) the importer should not be known, even if the manufacturer is mentioned; or a) the products to be imported; b) the importer should not be identified; c) the distributor had not informed the person damaged regarding the importer identity, within 30 days as of its request.

[12] A.M. Apetrei, *The notion of consumer in the CE Regulation no. 593/2008 of the European Parliament and Council from June 17th 2008 on the law applicable to contractual obligations (Roma I) and respectively, in the Romanian law (Consumer Code – Law no. 296/2004)*, in the Dreptul magazine nr. 1/2011.

narrow sense, compared to the sense commonly used in civil law. This conclusion can be drawn following the interpretation of art. 6 of Law no. 71/2011 of implementation of the Civil Code. According to this text, in the normative acts applicable as of the entry into force of the Civil Code, the references to traders shall be deemed to be made to individuals or, where appropriate, to the legal persons subject to registration in the Trade Registry [...] and in accordance with para. (2), provisions of par. (1) shall not apply the term "trader" provided in [...] Law no. 296/2004 on the Consumer Code, republished, as amended and supplemented. Thus, in the matter of consumer protection law, the concept of trader has a specific, narrow meaning, i.e. *the natural person or legal person authorized to conduct its activity of sale of the products and of the market services*.

The Code of Consumption Annex includes also the definition of the concept of seller which can be considered, too, a category of professionals in the field of consumer protection. According to this definition, the Seller is the "distributor offering the product to consumers". Also, in this case, the meaning of the notion of *seller* is different from the actual meaning given by the Civil Law[13] meaning that, under this definition, *the term of "seller" is equivalent to the term of "tenderer" in the civil law*, respectively that person sending to a particular person or to the general public an offer for the conclusion of a specific contract.

We believe that this is an inadequate definition lacking, from its contents, the essential element that characterize the term of "seller" namely the transmission of a right of reference – the ownership (or another real right or debt).

However, it should be noted that the seller is included in the category of distributors, considered by law as being the distributor who has direct contact with the consumer, meaning it sells the product to the consumer.

A final category of professionals in the consumer protection law consists of **service providers**. The Code of Consumption defines this category of professionals as the economic operators providing services,

[13] According to the civil law, the seller is the person who, by a contract of sale, transfers to another person (buyer) the ownership (or another real right or claim) on one or more specific assets under civil circuit (or another real right or claim) on one or more specific good found in the civil circuit, while paying some money called a price (M. Costin, M. Mureşan, V. Ursa, *Dicţionar de drept civil*, Ed. Ştiinţifică şi Enciclopedică, Bucureşti, 1980, p. 545.

meaning any natural or legal person, who, by acting within its business, provides services, freelancers being also included in this definition.

In conclusion, despite the fact that the concept of professional is not yet defined explicitly in the Consumer Code framework law, the legislature's intention is to include in the notion of professional all the natural or legal persons participating in the making and providing to consumers the goods and the services in the entire economic chain of production and distribution, not just the economic operator coming into direct relationship with the consumers. This broad conception of the notion of professional confirms that the consumption law ignores, *inter alia*, the traditional distinction between traders and other categories of non-commercial professionals and the freelancers can also be included in principle in the scope thereof. Obviously, the legislature primarily considered the legal consequences in terms of professional liability, regardless of the quality under which it can be identified given the desire to provide consumers with a higher protection in all situations the latter could suffer damages.

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MAXIMIZATION PRINCIPLES OF THE DEGREE OF CAPITALIZATION OF THE ASSETS AND OF RECOVERY OF RECEIVABLES ACCORDING TO LAW NO. 85/2014

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ABSTRACT

For the first time since the issuing of an insolvency law in the scenery of Romanian law after 1989, the Insolvency Code establishes, expressis verbis, a number of 13 principles. The necessity of proclaiming such principles, as fundamental norms, which govern and subordinate the subsequent norms, derives from the logical unity of the legal order, insolvency not being an exception in this subject, being inspired from the World Bank Principles, The European Principles on the subject of insolvency, as well as the UNCITRAL Legislative Guide on the subject of insolvency. The legislator's effort to expressly show the guidelines of the procedure is praiseworthy, especially in the context where, as it results from the content of the rationale, they are aiming at the avoidance of the regulation gaps and of the interpretation divergences which have lead to the development of behaviour of debtors in fraud of the creditors.

The implementation of these principles is found in the entire normative structure of the Insolvency Code, in other words, the concepts, the institutions, the procedural rules, the entire "architecture of insolvency" are subordinated and are interpreted in terms of these principles.

This study undertakes to analyze the maximization principle of the degree of capitalization of the assets and of recovery of receivables by the creditors. In order to obtain the necessary amounts of money for the satisfaction of the creditors' claims, the goods from the debtor's fortune shall be sold globally or individually, by public auction, direct negotiation, or by the combination of the two ways.

KEYWORDS: *the insolvency procedure, the principles of the insolvency procedure, receivables, recovery of the receivables*

1. The maximization principle of the degree of capitalization of the assets and of recovery of receivables

Before this principle had an express regulation, it could be easily deducted from the content of several texts of Law no. 85/2006. According to art. 86, par. (1) of the Law no. 85/2006 "In order to

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increase to the maximum the value of the debtor's fortune, the official receiver / liquidator may denounce any contract, the unexpired leases or other long term contracts, as long as these contracts shall not be executed totally or substantially by all the parties involved."

The maximization principle of recovery of receivables is a principle which must be had in view at the realization of the law's purpose, which consists of covering the liabilities of the debtor in insolvency[1].

This principle could be inferred also from art. 79 of the Law no. 85/2006, text according to which the official receiver or, as the case may be, the liquidator may introduce with the syndic judge actions for the annulment of the fraudulent acts concluded by the debtor in prejudice of the creditors' rights, in the 3 years prior to the initiation of the procedure. Also, according to art. 116, par. (1) of the Law no. 85/2006, during the carrying out of the liquidation, for the maximization of the debtor's fortune, the liquidator shall make all the endeavours for the exposition on the market, in an adequate form, of the goods. And also for the maximization of receivables recovery, in art. 126 of the Law no. 85/2006 it was provided that "in case the goods making up the fortune of an economic interest group, or that of a partnership firm or of a limited partnership, are not enough for the payment of the receivables recorded in the final consolidated receivables table, against the group or the company, the syndic judge shall authorize the forced execution, in the conditions of the law, against the limited liability associates or, as the case may be, the members, pronouncing a final and binding sentence which shall be executed by the liquidator through officer of the court."

Finally, the principle laid down found an expression also in the stipulations of art. 138, article which gave the responsibility to the members of the management in the express and limitative situations provided by the legal text mentioned[2].

[1] I. Adam, C.N.e Savu, *Legea procedurii insolvenţei. Comentarii şi explicaţii,* C.H. Beck Publishing House, Bucharest, 2006, p. 8.

[2] According to art. 138, par. (1) of the Law 85/2006: "In case in the report drawn up in accordance with the stipulations of art. 59, par. (1) they can identify persons to whom the emergence of the debtor's state of insolvency can be imputable, upon request of the official receiver or of the liquidator, the syndic judge may dispose that a part of the liabilities of the debtor, corporate body, which has reached a state of insolvency, be borne by the members of the management and/or supervising bodies of the company, as well as any other person who has caused the debtor's state of insolvency, by one of the following actions: a) they have used the corporate body's goods or credits to their own benefit or that of another person; b) they have carried out production, trading activities or service rendering to their personal benefit, under the coverage of the corporate body;

The Law 85/2014 also took over the rule that the analyzed principle applies both in the legal restructuring procedure and in the bankruptcy one, as a result of its initiation in the general or in the simplified procedure[3], this principle having in the content of art. 4, point 1 an express dedication. At the same time, this principle corresponds to the purpose of the regulation shown by art, 2 of the Law no. 85/2014 – the institution of a collective procedure for the covering of the debtor's liabilities, with the granting, when possible, of the chance to recover its activity.

2. Maximization of the degree of capitalization of the assets and of recovery of the receivables through the possibility of formulating requests of presidential ordinance for the prevention of the debtor's forced execution prior to the initiation of the procedure

According to art. 66, par. (11) of the Law no. 85/2014, after the deposition of the request for the initiation of the procedure, in urgent cases, which would endanger the debtor's assets, the syndic judge may dispose urgently, in the council chamber, and without the summoning of the parties, the temporary suspension of any procedures of forced execution of the debtor's goods until the pronunciation of the decision concerning the respective request. The Insolvency code defines the debtor's fortune as being the totality of its patrimonial goods and rights, including those acquired during the insolvency procedure, which may be the object of forced execution according to the Code of civil procedure. It was considered that "the freezing of the debtor's fortune on the initiation date of the insolvency procedure, conferred by the suspension *ope legis* of forced executions or prosecutions[4] is not sufficient, there being the

c) they have disposed in their personal interest the continuation of the activity leading, obviously, to the ceasing of payments by the corporate body; d) they have held a fictitious accounting, made some accounting documents disappear or did not hold the accounting in accordance with the law; e) they have embezzled or hidden a part of the corporate body's assets, or have fictitiously increased its liabilities; f) they have used ruining means to obtain funds for the corporate body, with the purpose of delaying the ceasing of payments; g) in the month preceding the ceasing of payments, they have paid or disposed the payment with preference to one creditor, to the detriment of the other creditors.

[3] C.B. Nasz, *Declanşarea procedurii insolvenţei*, Hamangiu Publishing House, Bucharest, 2014, p. 85.

[4] According to art. 75, par. (1) of the Law 85/2014 "From the date of initiation of the procedure, all judicial, extrajudicial actions and forced execution measures for the realization of the receivables are suspended on the debtor's fortune. The capitalization

possibility for it to be late and inefficient. In this sense, there was the recommendation of the possibility to formulate a preventative request, of the nature to lead to the protection of the debtor's fortune, by the prevention of its premature dismemberment, even prior to the initiation of the insolvency procedure[5].

3. Maximization of the degree of capitalization of the assets and of recovery of the receivables through the possibility of formulating requests of presidential ordinance for the prevention of the debtor's alienation of goods, until the pronunciation of the procedure initiation

According to art. 70, par. (5) of the Law 85/2014, the creditor who has a request for the initiation of the procedure recorded, in cases of emergency until the judging of the request, may ask the syndic judge to pronounce a presidential ordinance by which to dispose temporary measures, with the purpose of suspending the alienation operations of important patrimonial goods or rights from the debtor's fortune, under the sanction of nullity, as well as conservation measures of these goods. The institution of these preventative requests has been created, symmetrically and uniformly and for the defence by the creditors of the fortune, prior to the pronunciation of the syndic judge concerning the debtor's request of initiation of the insolvency procedure.

of their rights can only be carried out within the insolvency procedure, by the handing in of admission requests of the claims. Their retrial is possible only in case the procedure initiation decision is annulled, the procedure initiation conclusion is revoked, or in case of the closing of the procedure, in the conditions of art. 178. In case the procedure initiation decision is annulled or, as the case may be, revoked, the judicial and extra-judicial actions for the realization of the receivables on the debtor's fortune can be retried, and the forced execution measures can be recommenced. On the date when the procedure opening decision remains final, both the judicial and the extrajudicial action, and the suspended forced executions cease.

[5] S.M. Miloş, A. Deli-Diaconescu, *Principii. Caractere. Scopul şi obiectul procedurii insolvenţei*, în *Tratat practic de insolvenţă,* by Radu Bufan, Andreea Deli-Diaconescu, Florin Moţiu, Hamangiu Publishing House, Bucharest, 2014, p. 64.

4. Maximization of receivables recovery by distributions to creditors, resulting from the success of revocative actions

Through the intermediary of these *bankruptcy revocative actions*, goods or values can be brought to the debtor's fortune, alienated in the suspect period and which can contribute decisively to a superior satisfaction of the creditors. The official receiver/liquidator may introduce to the syndic judge actions for the annulment of fraudulent acts or operations of the debtor, in prejudice of the creditors, in the 2 years preceding the initiation of the procedure. The following of the debtor's acts or operations can be cancelled for the restitution of the transferred goods, or of the value of other performances carried out: a) free acts of transfer, carried out in the 2 years preceding the initiation of the procedure; b) operations where the debtor's performance obviously exceeds the received one, carried out in the 6 months prior to the initiation of the procedure; c) acts concluded in the 2 years preceding the initiation of the procedure, with the intention of all the parties involved in them to remove goods from the pursuance by creditors or to trench upon their rights any other way; d) property transfer deeds to a creditor for the extinction of a prior debt or to its use, carried out in the 6 months prior to the initiation of the procedure, if the amount the creditor could obtain in case of bankruptcy of the debtor is smaller than the value of the transfer deed; e) the constitution of a right of preference for a claim that is unsecured, in the 6 months prior to the initiation of the procedure [Art. 117, par. (1) and (2) of the Law 85/2014].

These actions have the legal nature of special Paulian[6] (revocative)

[6] The doctrine appreciates paulian action as being that action through which the creditor requests the declaration of inopposability towards it of the legal acts concluded by the debtor in fraud of its interests, such as those through which the debtor creates or increases its state of insolvability. It results that paulian action is a legal instrument provided by the law to protect the creditors' interests against de debtors' fraud. The conditions for the exercising of paulian action in civil law are the following: i) the creditor's claim must be uncontested, liquid and enforceable and usually prior to the act attacked; ii) the deed concluded by the debtor with the third party must have caused a prejudice to the claimer creditor; iii) the debtor's fraud; iv) the third party's complicity to the debtor's fraud; See S.I. Vidu, *Garanţiile executării obligaţiilor,* în *Tratat elementar de drept civil. Obligaţiile,* by Liviu Pop, Ionuţ Florin Popa, Ioan Stelian Vidu, Universul Juridic Publishing House, Bucharest, 2012, pp. 767-778.

actions, which represent only in subsidiary specific effects of the actions in the nullity of the legal act[7].

The bankruptcy revocative action acquires full interest to be exercised also in the conditions of a reorganization, in this sense art. 140 par. (2) of the Law 85/2014 showing that "if after the confirmation of the reorganization plan additional amounts shall be recovered from actions introduced based on art. 117, these shall be distributed in the way provided by art. 163".

5. Maximization of receivables recovery by the recovery of the prejudice produced by the special distributions to creditors, resulting from the success of revocative actions

The special trustee has the following responsibilities within the insolvency procedure: i) takes part as the debtor's representative in the judging of the actions provided at art. 117-122 or of those resulting from the failure to observe art. 84; ii) formulates claims within the procedure regulated by this law; iii) proposes a reorganization plan; iv) manages the debtor's activity under the supervision of the official receiver, after the confirmation of the plan, only in the situation where the debtor's right of administration has not been removed; v) after the bankruptcy participates at the inventory, signing the act, receives the final report, and the closing financial standing and takes part in the meeting called for the solving of objections and the approval of the report; vi) receives notification of the closing of the procedure;

Thus, the special trustee is directly responsible for the covering of the prejudice produced by the failure to observe the type of acts and operations it may exercise in the procedure, namely current management acts and acts of disposition. The special trustee designated in an insolvency procedure is responsible for the violation of the stipulations of art. 87, the syndic judge upon request of the official receiver, of the assembly of creditors, formulated by the president of the creditors' committee or by another creditor designated by it, or upon request of the creditor owning 50% of the value of the receivables from the mass of creditors, having the right to dispose that a part of the liabilities produced as such be borne by the special trustee, without exceeding the prejudice in a relationship of causality with the acts or operations thus carried out. [Art. 84, par. (2)]

[7] P. Pricope, *Procedura insolvenţei. Acţiunea în anularea actelor frauduloase,* Hamangiu Publishing House, Buharest, 2014, p. 5.

The finality of the special trustee's responsibility is thus ensured by the completion of the debtor's fortune and the appropriate assignment to the creditors of the amounts obtained by the application of the institution of responsibility.

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INTERNATIONAL RESPONSIBILITY OF STATES FOR DAMAGES CAUSED TO PERSONS THROUGH UNLAWFUL ACTS. THE INSTITUTION OF DIPLOMATIC PROTECTION

Gabriel MICU[*]

ABSTRACT
Constitutional One of the most important international juridical instruments which can be used by state in defending their citizens abroad is the diplomatic protection. In order to use as efficiently as possible this institution it is necessary to be correctly understood its juridical substance, the condition necessary to invoke it and the effects can have in the international relations level. Regarding to their international effects it is necessary also to be removed the confusions can be done related to the consular protection or diplomatic immunity. The current study purpose itself to bring some clarification upon all these aspects.

KEYWORDS: *global diplomatic protection, unlawful act, consular protection, diplomatic immunity, citizen*

Legal core of the institution of diplomatic protection

The legal basis of the diplomatic function regarding the protection of its own citizens derives from **the principle of state sovereignty**, which fully encompasses all its goods, activities and citizens. Granting diplomatic protection represents an inward right of the state, which stems out from its sovereignty, including the regulatory framework regarding citizenship and nationality[1]. In this context, there are encountered obligations of the same legally binding value, arising from mandatory rules of international law, such as the territorial sovereignty of the residence state, the sovereignty of the state whose citizenship is held by the natural person or, respectively, whose nationality is detained by the

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[1] Decision of Permanent Court of International Justice in case Mavrommatis Pelestine Concessions, Greece v. United Kindom, PCIJ, series A, nr.2, p.12.

legal person, the imperative obligation of states to observe human rights and fundamental freedoms.

The globalisation and integration phenomena acting more and more harshly nowadays cause the constant increase of persons circulation flow between states, as well as of the number of residents in other states than those legally binding through their citizenship, situation that makes necessary the use of appropriate means needed for the efficient management of the migratory phenomenon, such as the diplomatic, legal, and in extreme cases, the military means[2]. Exercising the diplomatic protection represents the expression of the state's own competency regarding the relationships with its citizens, the substance of the citizenship legal and political relationship with the citizens or the nationality relationship with the legal persons.[3]

Another source of international law that contributes as well to the legal substantiation of the state's law to protect their conational is **the obligation incumbent upon the states, according to the international law, to ensure the foreigners on their territories a treatment which should not be inferior to a certain minimum standard.**

For the sending state and its citizen present on the receiving state's territory, the diplomatic agent is the official person to whom the citizen can address on the territory of the respective state, when their interests are harmed, regardless of the fact that the source of the obligation infringement is a governmental institution of the sending state or (natural or legal) private persons. The diplomatic agent is able to ask the receiving state to undertake appropriate measures to protect the life and goods of its citizens, being empowered to protest in case of lack of reaction by the receiving state.

It should be mentioned that the diplomatic protection institution should not be interpreted as one of the consular functions, which are exerted by the specialised state's bodies for foreign policy. Furthermore, the diplomatic relations have existed together with the consular ones, hence in the states practice, there is a department for consular activity within the diplomatic missions which deal with granting of visas, passports issue, documents legalisation, etc.

The solution of establishing such a department within the functional structure of the mission is adopted also in the consular office on the

[2] M.U. Saillard, *Les aspects operationnels de l'exercise de la competence personelle a l'egard des nationaux a l'etranger*, în AFDI, 2009, p. 139.
[3] *Idem*, p.137 and next.

territory of the state of residency in the cases when there is or there is not consular relations between the respective states, because **protecting the rights and interests of the sending state represents an obligation of the diplomatic mission, even in the absence of the consular relations.**

The totality of judicial and extrajudicial activities with which a state is empowered to exercise to protect its citizens and their rights in the residency state are grouped under the institution of *diplomatic protection.*

The function of protection of the sending states' interests in the receiving states must be exerted within the limits imposed by the international law provisions. From this point of view, the mentioned function is of subsidiary nature, because, in the case of absence of a specific agreement between the states or of any obligation deriving from an international law provision, exerting the right and protection of the respective persons is done in compliance with the receiving state legal system.

Whatever may the legal reason be based on, exerting the diplomatic protection must not represent a threat or involve the effective use of force or become a form of internal affairs interference. At the same time, it must represent neither a mean for pressure on the receiving state nor a pretext to interfere in its internal affairs.

2. Preconditions which allow using the institution of diplomatic protection

In order to get the institution of diplomatic protection functional, to allow it to be invoked, a series of prerequisites must be fulfilled, otherwise it is inapplicable.

First, the **person whose right was infringed must be the citizen of the sending state,** the prerequisite for the state to have the legitimacy to intervene in favour of the injured person, arguing that there is a legal bond between the citizen and the state which defends the rights in front of the receiving state. The citizenship rule is of general applicability, representing a condition for diplomatic protection regardless of whether it is about a natural or legal person. In case of natural persons, **there is no relevance in the fact that the respective person belongs to any of the citizen groups from the sending state belonging to national minorities**, and in case of legal persons it is important that its nationality appears from the registered office, place of registration, or the main place where the activity is carried out.

Second, **the action through which the citizens' rights were infringed should be of unlawful nature.** *The diplomatic protection* can be accessed only if there is a breach of the respective person's right, an infringement of an obligation incumbent upon the person's residency state, situation that may entail the international responsibility of the receiving state. As a rule, *the diplomatic protection* leads to the states' responsibility, by preceding it. As a rule, the illicit characteristics of the infringement action may reside either in the breach of an international legal rule or of the agreements between the two states into force at the moment of the breach, or by infringement by the receiving state authorities of an international legal rule assumed by the state through some international organisations or multilateral treaties, or by breach of some obligations which arise from mandatory rules of international law.

The third condition requires that, before demand for diplomatic protection, **the person injured in his/her rights by a foreigner should have exhausted all internal jurisdiction means.** This rule offers the possibility to establish whether the diplomatic mission can intervene, considering that the receiving state did not undertake all measures to assure the sending state's citizen the minimum standard applied to foreigners. They are taken into account all remedies open for the right full use, judicial or administrative, ordinary or special, which the state provides in such situations.

But there are exceptions from this rule. One of these is grounded on the fact that, in the state against which the claim of being guilty for committing an unlawful action is formulated, there are not reasonable available domestic appeals for obtaining an efficient remedy or, if it still exists, they do not offer any chance to grant an efficient remedy. Another exception starts from the premise that, in the guilty state, the running of appeals is done with abusive delay generated clearly for such situations by the authorities of the state alleged as being responsible. Likewise, in case when there is no relevant connection between the injured person and the state alleged responsible, at the moment when the unlawful action is produced, the person is released from the obligation to undertake the legal way necessary to establish subsequently the diplomatic protection. Exceptional situations are also the ones when the injured person is evidently restrained to resort to domestic appeals or the one when the responsible state gives up claiming the exhaustion of domestic appeals.

The last prerequisite necessary for the diplomatic protection to be functional is that **the protecting state endorses the claims of its citizen**. The state's diplomatic action occurs in order to declare its own

right, which is to assure the observance of the international law rules for its citizen, *the diplomatic protection* representing a measure to defend the state's sovereign rights. **Granting it is not obligatory though,** being just of discretionary nature beside the citizen of the sending state (natural or legal person). Correspondingly, **grating of diplomatic protection is a benefit for the citizen,** which can be granted or refused, and it does not represent a subjective right of the person.

Once all the mentioned conditions fulfilled, the state is able to grant its diplomatic protection for the citizen found on the territory of the receiving state and whose right was infringed.

It must be made a distinction between *the diplomatic protection* and *the diplomatic immunity*, while the general condition of citizenship has neither relevance nor application in the case of the functional protection. Observing the diplomatic immunities and privileges as integral part of the international function is imposed on legal authorities, even to the international officials who hold the same citizenship with those authorities. Therefore, the international organisations do not replace its agents when it is formulated a compensation for damages but they express their own right to attain the observance of the agreements assumed by the third subjects of international law with the respective international organisations.

3. International regulations regarding the states' responsibility for damaged to persons

The definition accepted in the actual context to identify the core of the notion of international responsibility of the states for damages to persons through unlawful acts highlights that the international responsibility of the states includes also the state's responsibility for damages to citizens or foreign legal persons, by its bodies or persons, whether on its territory or on another territory under its control or jurisdiction. As already mentioned, this responsibility can be invoked by the foreign state whose citizen or legal person was injured, in compliance with his/her right to diplomatic protection, after exhaustion of all legal remedies they may undertake in front of the respective state's courts in order to recover the infringed rights.

One of the latest legal approaches of this topic is the analysis performed by the International Law Commission, which formulated a series of rules recommendable to the states, and comprised in the

resolution of the UN General Assembly no. 62/67 December 6, 2007. The text of the resolution resumes some relevant elements in the matter and codified in the Vienna Convention from 1961 regarding the diplomatic law and from 1963 regarding the consular law. In this regard, it is reiterated the content of art.3 from Convention of 1961, and of art.5 from the Convention of 1963, which stipulate that: *one of the functions of diplomatic and consular missions is to protect in the receiving state the interests of the sending state and of its citizens, to the extent allowed by the international law*. The same legal content is found in the jurisprudence of the International Court of Justice which specified through a decision that „… within the confinements prescribed by the international law, a state can exercise the diplomatic protection by all means and to any proper extent, because the state capitalises its own right"[4].

The Commission's document deepens and extends some of the already mentioned elements. In this regard, it is laid down the right to diplomatic protection which can be used by the invocation by a state of another state's international responsibility, for damages produced by the state's unlawful acts, having the freedom to use any peaceful mean to solve the dispute, including the diplomatic means.

One of the meanings introduced in the spirit of the evolutions of the contemporary international law, which pays an increased attention to reduction of statelessness phenomenon, refers to the extension of the right to exercise the diplomatic protection to stateless persons, as well as to persons granted refugee status by a state, by conditioning with existence of residence of those persons on the territory of the state that breached the assumed obligation, at the moment when the unlawful act was produced and at the moment when it was sanctioned officially by complaint.

The text of the Commission also expands the diplomatic protection applicability to situations of multiple citizenship, and points out that a state has the right to grant diplomatic protection for its citizen, even if the citizen has the citizenship of the defendant state, provided that citizenship should be prevailing over the claimant state. At the same time, in the practice of the states there is also an opinion of the need of citizenship effectiveness that is of the effective relationship with the respective state, as a condition to be able to use the protection mechanism offered by the institution of diplomatic protection[5]. This point of view is detrimental

[4] *ICJ Reports*, 1970, p. 44 – case Barcelona Traction.
[5] *ICJ Report,* 1955, p. 23 – ICJ decision in case Nottebohm.

though to a large number of persons, who, due to globalisation, have their residency on the territory of other states, without obtaining their citizenship, and thus they do not fulfil the condition of citizenship effectiveness towards the state they belong to, situation when the state would have not any legitimacy to grant them diplomatic protection, depriving its own citizens of one of their rights.[6]

It is useful to remind in this context that every state is free to choose the way of granting the citizenship, as conditioned solely by the general rules of non-discrimination and international provisions in the matter of statelessness reduction.

Legitimacy of diplomatic protection intervention in favour of the citizens outside the borders is clarified in the text of the International *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, from 1991, which acknowledges the right of these persons to benefit of consular assistance and diplomatic protection from the origin states or from the states representing their interests, for the category of rights provided in the Convention.

Some clarifications are though necessary also regarding the diplomatic protection granted to legal persons, especially regarding the modality of establishment of a company's nationality. Relevant for establishing the nationality of a legal person is the place where the registration office is and where the financial control is performed. If both are in the same state, then the legal person has its citizenship, having no relevance other elements such as citizenship of the company's managers, or the activity deployed by the company in the state where it was established, a different state from the one where it deploys its activity and fulfil its fiscal duties.

Even for legal persons it is necessary the continuity of nationality, both at the moment when the unlawful act is produced and at the moment the claim is submitted officially. This right it is maintained as well, as long as the legal person does not modify its nationality. If a legal person, after being notified officially as responsible for an unlawful act, gets the nationality of another state, then the claimant state does not have the right to fulfil its diplomatic protection against the state whose nationality the company gets. The claimant state has yet the right to maintain the diplomatic protection for a legal person that stopped its activity just because of the damage produced through the unlawful act carried out in the defendant state.

[6] G.J.Dugard, Special Rapporteur, *First report on diplomatic protection*, doc. A/CN.4/ 506 of 7 March 2000, pp. 34-41.

A state can exercise as well the diplomatic protection in favour of a company's shareholders, who have its citizenship, but only on condition that the unlawful act damaged the shareholders' rights distinct from the company's rights. When a company is dissolved, in compliance with the existing rules from the state where it was established, the state can apply its diplomatic protection in favour of the company's shareholders against whom an unlawful act was produced, if the closure had nothing to do with the damage or if the company had at the moment when the unlawful act was performed the nationality of the guilty state and, cumulatively, it was obliged to establish itself in that state, in compliance with its rules, in order to develop its activities in the future.

The text of the Commission comprises also the classic assertion for such documents, namely that its proposals do not affect the rules and procedures for remedy of damages suffered as result of an unlawful act, by states or persons, established between parties, if they are in compliance with the international law. At the same time, the Commission's proposals become inoperative in the situation when there are already conventional rules that regulate special protection regime, such as those referring to investments protection. The state whose citizens are members of a ship's crew has the right as well to demand the compensation for the injury suffered by them through an unlawful act, without being affected by the national legislation of the state whose nationality the ship belongs to.

In order to understand correctly the nature and content of the institution of diplomatic protection, some specifications should be made, which helps **to differentiate it from the institution of consular protection**, because they are presented often together, due to some similarities of their legal nature, but they have different legal effects, and the only one which can attract the international responsibility of the states being the diplomatic protection.

The consular protection can be defined as an operational mechanism made available to a state's citizens, found outside its borders, in order to facilitate solving of various problems and to assure the protection of their rights and interests. For this purpose, the state interested by the situation of its citizens, opens a consular office in the state where they have residency, with the free and unflawed consent of the receiving state, on basis of bilateral agreement which establishes clear rules of conduct, for both consular employees, who are obliged to observe the national legislation of the residency state, and also for the local and central authorities of the respective state, from the consular district admitted for the

respective office, which commits itself to support the personnel developing this activity. The situations dealt with by the consular activity are various, such as arrested, dead, incapable, disabled persons, minors, successors, members of ship crews, regardless its flag or nationality, crews or passengers who navigate under the flag of the state that opens the consular office, residents or tourists who need travel documents or different documents (notary, civil status or another), its own citizens in case of natural disasters or domestic conflicts in the residency country.

All developed consular activities are amicable or administrative, in compliance with the legislative framework of the residency country, but at the directions of the sending state, and thus they do not have the possibility to perform an unlawful act and, implicitly, to trigger the international responsibility of the residency state. The activity of the consular staff responds to a right or need of a person who is citizen of the sending state, and in most of cases it does not envisage the management of some breaches of an international obligation. The consular procedures do not presuppose the application of some prior appeals or their exhaustion, but moreover they can contribute to avoid the breach of citizens' rights from the sending state and, consequently, to resort to legal or other procedures.

When the consular functions cannot cope with some cases that needs protection of its citizens, situations which exceed their assigned competencies and which determine a limited framework for action of the consular staff, then the diplomatic protection innerves, complementary to the consular one. Sometimes, they can be used successively.[7] No matter how we analyse the convergence views of the two protection mechanisms, it should be highlighted that the international responsibility issues cannot be raised at the level of local bodies, of consular district, by presupposing a dialogue between states, which can be achieved only at diplomatic level.

The best exemplification regarding the core difference between the two analysed institutions is found in the community international legal order. Both the Lisbon Treaty and the Chart of Fundamental Rights adopted in 2007 record the right of the citizens from the European Union to be protected from diplomatic and consular standpoints, in the geographical areas where a member state does not have diplomatic mission or

[7] M.U. Saillard, *op. cit.*, pp. 149-150.

consular office by diplomatic and consular missions of the member states, which are present in those areas.[8]

The content of this protection decided by the EU Council in 1995 and assumed subsequently by all members that accessed to the EU[9], provides only the cases *of demise, arresting or loss of documents,* and the expenditures caused by assistance of the member state with consular office or diplomatic mission remain to be reimbursed finally by the state whose citizenship is held by the respective person. Another important observation is that the text of the EU decision does not make reference to the legal persons, which are analysed together with the citizens in the context of diplomatic protection. Therefore, **the community regulations in the matter represent de facto consular protection and not diplomatic protection[10].**

The continuous regional integration phenomenon to which the states are confined to resort to in order to face the globalisation challenges brings about an unprecedented evolution of the institution of human rights protection and the accrued enlargement of communications and emigration influences substantially the states regarding the diplomatic and consular protection, for the purpose of getting the two institutions closer, both as legal substance but also as application mechanisms.

It results from the above mentioned assertions that the member states which maintained their option to exercise diplomatic protection for situations when the citizens' rights were infringed, thus the diplomatic protection cannot be exercised by other states' missions, as being an institution whose existence and functioning derive from the national sovereignty, as fundamental principle of the international law.

More and more often the states are obliged to assure a qualitative consular protection with extended objectives and in the situations when they do not succeed to do it they appeal without hesitation to approaches that must be advanced at the level of the diplomatic representatives. Resorting to diplomatic protection in more frequent situations oblige to shorten the time for every procedure, reason for which it is often given

[8] A. Popescu, I. Diaconu, *European and Euro-Atlantic Organizations,* Universul Juridic, 2009, p. 277.

[9] Decision 95/553/CE fromDecember 19, 1995 of them emberstates' government representatives reunited in the EU Council regarding protection of the EU citizens by diplomatic and consular representations doc. JOCE L314 from 28.12.1995.

[10] J.P. Cot, E.Cujo, *Remarques sur l'article 20 du Traiteinstituant la Communaute Europeenne: protection consulaire ou protection diplomatique?*, în Melange en hommage a Jean Touscoz, 2006, pp. 830-843.

up to wait for the results of domestic appeals, which are actually uncertain.

The evolutions of the international law in the matter have been recorded more in the sense of intensifying the international cooperation than of achieving a standard regarding the states' right for the purpose to assure the abroad citizens' rights protection. This road highlights that the states are more willing to both multiplication of undertaken obligations and extension of the benefit of consular and diplomatic protection, which presupposes the creation of more performing mechanisms for protection of the international public order so that the mankind may counterpoise the activity of the organised crime[11].

A last comment on this topic highlights that the states' responsibility for damages caused to citizens of other states is subject to the rules of international responsibility. Except the diplomatic protection, which refers to damages caused to citizens, not directly to the states, all the other rules of the international responsibility should be followed thoroughly. In this regard, any countermeasures should obey the regime provided by the international law rules, any dispute should be subject to the agreed regulations on peaceful solutions, without breaching the mandatory rules of international law. It results from here that it is not allowed the use of force or threat with for in solving the international disputes and, therefore, neither its use in action of humanitarian aid which are endeavoured by a state for protection of its citizens or of the population of another state.[12]

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[11] M.U. Saillard, *op. cit.*, p. 141.

[12] I. Diaconu, *Responsibility to protect versus humanitarian intervention*, in the Romanian Journal of Geopolitics and International Relations, vol. IV, nr. 1/2012, pp. 45-54.

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CRIMINALIZATION OF CHILD PORNOGRAPHY THROUGH INFORMATION SYSTEMS AND GROOMING IN COMPLIANCE WITH EUROPEAN REGULATIONS

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ABSTRACT

An analysis about the main legal regulations in the child pornography field at the level of the European Union is carried out in this study. At the same time, it is also carried out an analysis at the European level on other offences related to illegal content, such as the grooming (the offence to solicit children for sexual purposes through the information and communication technology), which is intended to mirror a more and more worrying, that of sexually abused children in meetings with adults they initially met in the cyberspace, such as e.g. within the groups of discussions or online games. The offence of solicitation of children for sexual purposes is more easily committed through online environment than in the offline environment, as the children feel more disinhibited in the online environment than in the offline environment, becoming more vulnerable for the offenders.

KEYWORDS: *child pornography; information and communication technology; grooming; information systems; sexual abuse*

1. Introduction

In recent years, the Internet has become the main instrument in the development of child pornography[1]. This development is determined by several factors:

1. The Internet offers unique possibilities regarding the dissemination of the pornographic materials content. Thus, by making a file available in a system of file sharing system, it can be downloaded by millions of users. As the Internet determines the dissemination of files worldwide, this will determine the

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[1] Krone, Tony (2004). *A Typology of Online Child Pornography Offending*, Australian Institute of Criminology, Trends & Issues in crime and criminal justice, No. 279, July 2004. Retrieved 31 December 2014 from http://aic.gov.au/publications/current%20series/tandi/261-280/tandi279.html

increase in the number of potential consumers, compared with the traditional methods of dissemination.

2. The successful use of the web pages containing pornographic materials is determined by the fact that users consider they are more difficult to observe while accessing online pornographic materials, compared with the accessing of pornographic materials from a shop. This situation represents an advantage for the carrying on of the investigation process, because most users are not aware that they can leave electronic traces while surfing the Internet.
3. Criminals use more and more the encryption technology in order to protect the content of their messages, thus making the investigation process more difficult.
4. The investigation and incrimination of child pornography is hindered by the criminals' ability to hide their real identity.

Child pornography is defined as, "an image that depicts a clearly prepubescent human being in a sexually explicit manner"[2].

2. Convention of the European Council on cybercrime[3]

Article 9 in the Convention of the European Council on cybercrime refers to the only offence related to content, which is the offence of child pornography. The offence consists in the following conduct, which is committed intentionally and without right by producing child pornography, offering or making available child pornography, distributing or transmitting child pornography, procuring pornographic materials having children as subjects, through a computer system.

For the purpose of art.9(2) of the Convention, child pornography is „any pornographic material that visually depicts a minor engaged in a sexually explicit conduct or a person appearing to be a minor engaged in sexually explicit conduct or realistic images representing a minor engaged in sexually explicit conduct".

[2] Mattei Ferraro, Monique; Casey, Eoghan (2005), *Investigating Child Exploitation and Pornography: The Internet, The Law and Forensic Science*, Burlington, Massachusetts: Elsevier Academic Press, p. 9.

[3] Convention of the European Council on cybercrime. Retrieved 31 December 2014 from: http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm.

A minor is defined as any person less than 18 years of age, although the Member States may require a lower age-limit, which shall be not less than16 years.

The activity of *production* child pornography means any process of creating child pornography. The distinction between the activities of *procuring* and *producing* in article 9 of the Council indicates that the drafters of the Convention did not consider the mere download of child pornography as production[4]. Even on the basis of this distinction, I consider that further differentiation is required. In case an offender is taking pictures of a child being sexually abused, this fact certainly produces child pornography. The situation when a person uses child-pornography pictures to put them together in an animation is uncertain to similarly producing child pornography.

The fact that the Council of Europe Convention of cybercrime intends to criminalize the production of fictive child pornography, which does not require the actual abuse of the child, is an argument in favour of a broad interpretation of the term *production*.

It is necessary that the production of child pornography be carried out for the purpose of distribution through a computer system. If the offender produces the material for his own use, or intends to distribute it in non-electronic form, article 9 is not applicable.

The activity of *offering* covers the act of soliciting others to obtain child pornography[5].

Making available child pornography refers to an act that enables other users to gain access to child pornography. This activity is carried out by placing child pornography on websites or connecting to file-sharing systems and enabling other persons to access such materials.

Distribution of child pornography refers to the activity of forwarding child pornography to others.

Transmitting of child pornography covers all communication by means of transmitted signals.

Procuring child pornography for oneself or for other person covers any act of actively obtaining child pornography.

[4] International Telecommunication Union (2012). *Understanding Cybercrime: Phenomena, Challenges and Legal Response*, pp. 194. Retrieved 31 December 2014 from: www.itu.int/ITU D/cyb/cybersecurity/legislation.html.

[5] The Explanatory Report of the Convention of the European Council on cybercrime item no.95. Retrieved 07 December 2014 from: http://conventions.coe.int/treaty/en/reports/html/185.htm.

The act of *possessing* child pornography materials involves the control intentionally exercised towards child pornography. It requires that the offender have control with regard to local storage devices but also remote storage devices. Possession of such material could encourage sexual abuse towards children, so the drafters of the Convention suggest that the effective way to curtail the production of child pornography is to incriminate the illegal possession of such materials[6]. The Convention enables the Member States in paragraph 4 of article 9 to exclude the criminalization of mere possession, by restricting criminal liability to the production, offer, making available, distribution and transmission of child pornography.

Paragraph 2 (a) of the Convention focuses directly on children abuse.

Paragraph 2 (b) and 2 (c) of the Convention covers images that where produced without violating children's rights, e.g. images that have been created through the use of *3D modelling* software. The reason for the criminalization of the fictive child pornography is the fact that these images can, without necessarily creating harm to a *real* child, be used to seduce children into participating in such acts[7].

Article 9 of the Convention requires that the offender is carrying out the offences intentionally. In the Explanatory Report of the Council of Europe Convention on cybercrime, the drafters of the Convention pointed out that interaction with child pornography without any intention is not covered by the Convention. Lack of intention can be relevant especially if the offender accidentally opened a webpage with child pornography and despite the fact that he/she immediately closed the website some images were stored in temp-files[8].

The offence stipulated by art.9 of the Convention, in order to be criminalized, must be committed without right[9]. However, the drafters of the Convention did not further specify in which cases the Internet user is

[6] The Explanatory Report of the Convention of the European Council on cybercrime item no.98, Retrieved 07 December 2014 from: http://conventions.coe.int/treaty/en /reports/html/185.htm.

[7] The Explanatory Report of the Convention of the European Council on cybercrime item no.102. Retrieved 07 December 2014 from: http://conventions.coe.int/treaty/en /reports/html/185.htm.

[8] International Telecommunication Union (2012). *Understanding Cybercrime: Phenomena, Challenges and Legal Response*, pp. 196. Retrieved 25 November 2014 from: www.itu.int/ITU D/cyb/cybersecurity/legislation.html.

[9]The Explanatory Report of the Convention of the European Council on cybercrime item no.38, Retrieved 07 December 2014 from: http://conventions.coe.int/treaty/ en/reports/html/185.htm.

acting with authorisation. In general, the act is not carried out without right only if members of law-enforcement agencies are acting within an investigation.

3. Directive 2011/92/EU[10] of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JAI

Directive 2011/92/UE has as purpose, according to the provisions of art.1, „to establish minimum rules concerning the definition of criminal offences and sanctions in the area of sexual exploitation of children, child pornography and solicitation of children for sexual purposes".

In art.2 several terms are defined. Thus, *a child* means any person below the age of 18 years. *Child pornography* is defined, at art.2(c) as being:

- „any material that visually depicts a child engaged in real or stimulated sexually explicit conduct;
- any depiction of the sexual organs of a child for primarily sexual purposes;
- any material that visually depicts any person appearing to be a child engaged in real or stimulated sexually explicit conduct or any depiction of the sexual organs of any person appearing to be a child, for primarily sexual purposes; or
- realistic images of a child engaged in sexually explicit conduct or realistic imaged of the sexual organs of a child, for primarily sexual purposes".

A new term introduced by the Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography is that of *pornographic performance* which, in compliance with art.2 letter e means „a live exhibition aimed at an audience, including by means of information and communication technology of: a child engaged in real or simulated sexually explicit conduct; or the sexual organs of a child for primarily sexual purpose".

[10] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JAI, Official Journal of the European Union, 17.12.2011, L335/1, Retrieved 31 December 2014 from: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0093&from=RO.

In art.3 and 4 of the Directive are stipulated the offences related to sexual abuse and the offences related to sexual exploitation.

Article 5 of the Directive comprises the offences concerning child pornography, as follows: acquisition or possession of child pornography; knowingly obtaining access, by means of information and communication technology, to child pornography; distribution, dissemination or transmission of child pornography; offering, supplying or making available child pornography; production of child pornography.

In art.6(1) of the Directive is stipulated the offence of solicitation of children for sexual purposes and consists in „the proposal, by means of information and communication technology, by an adult to meet a child who has not reached the age of sexual consent, for the purpose of committing any of the offences referred to in art.3(4) (practicing sexual activities with a child who has not reached the age of sexual consent) and art.5(6) (production of child pornography), where that proposal was followed by material acts leading to such a meeting, shall be punishable by a maximum term of imprisonment of at least 1 year". Also, in art.6 (2) of the Directive is criminalized the attempt, by means of information and communication technology, to commit the offences provided for in article 5(2) (acquisition or possession of child pornography) and article 5(3) (knowingly obtaining access, by means of information and communication technology, to child pornography) by an adult soliciting a child who has not reached the age of sexual consent to provide child pornography depicting that child.

The offence to solicit children for sexual purposes, also known as *grooming*, is a commonly committed offence in the cyberspace. Grooming is a special form of online harassment of minors, being defined as a „strategy used by a sexual offender to manipulate the child, so that the sexual abuse take place subsequently, in circumstances that allow total control of the offender on the child"[11]. Directive 2011/92/EU found out in Ground 19 related to grooming as follows: "Solicitation of children for sexual purpose is a threat with specific characteristics in the context of the Internet, as the latter provides unprecedented anonymity to users because they are able to conceal their real identity and personal characteristics, such as their age. At the same time, Member States acknowledge the importance of also combating the solicitation of a child outside the context of the Internet, in particular where such solicitation is not

[11] Vasiu, Ioana; Vasiu, Lucian (2011). *Criminalitatea în cyberspaţiu*, Bucharest: Universul Juridic Publishing House, pp. 248-249.

carried out by using information and communication technology. Member States are encouraged to criminalise the conduct where the solicitation of a child to meet the offender for sexual purposed takes place in the presence or the proximity of the child, for instance in the form of a particular preparatory offence, attempt to commit the offences referred to in this Directive or a s a particular form of sexual abuse. Whichever legal solution is chosen to criminalise off-line grooming, Member States should ensure that they prosecute the perpetrators of such offences one way or another".

4. Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse[12]

Grooming is also criminalised in other legal instruments, such as in the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, specifically in article 23[13]. The Explanatory Report of the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse in point 156 defines the term grooming, which refers to the preparation of a child for sexual abuse, motivated by the desire to use the child for sexual gratification. It may involve the befriending of a child, often through the adult pretending to be another young person, drawing the child into discussing intimate matters, and gradually exposing the child to sexually explicit materials in order to reduce resistance of inhibitions about sex. The children may also be drawn into producing child pornography by sending compromising personal photos using a digital camera, webcam, which provides the groomer with a means of controlling the child through threats. Where a physical meeting is arranged the child may be sexually abused or otherwise harmed.

In article 20(1) of the Convention are listed the offences related to child pornography: producing child pornography; offering or making

[12] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No.201), Lanzarote, 25 october 2007. Retrieved 31 December 2014 from: http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm.

[13] Article 23 provides: "Each Party shall take the necessary legislative or other measures to criminalise the intentional proposal, through information and communication technologies, of an adult to meet a child who has not reached the age set in application of Article 18, paragraph 2, for the purpose of committing any of the offences established in accordance with Article 18, paragraph 1.a, or Article 20, paragraph 1.a, against him or her, where this proposal has been followed by material acts leading to such a meeting".

available child pornography; distributing or transmitting child pornography; procuring child pornography for oneself or for another person; possessing child pornography; knowingly obtaining access, through information and communication technologies, to child pornography. In art.20(2) of the Convention, the term child pornography shall mean „any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes".

The offence stipulated by article 23 of the Council of Europe Convention of protection of children against sexual exploitation and sexual abuse, *solicitation of children for sexual purposes through information and communication technology* is intended to mirror a more and more worrying phenomenon, of children sexually abused during meetings with adults they initially met in the cyberspace, e.g. in discussion groups or online games.

5. Criminalization of grooming in the Romanian legislation

Grooming is stipulated in the Romanian legislation in art.222, referring to solicitation of minors for sexual purposes.

This offence is stipulated in art.222 of the Criminal Code in one single variant and consists in the act of the major person to propose a minor who has not reached the age of 13 to meet in order to commit one of the offences stipulated by art.220 (sexual intercourse with a minor) or art.221 (sexual corruption of minors), including when the proposal was made through computer system. This criminalization also appeared in the Romanian legislation because of the increase of sexual abuse of minors, following the meetings with adult persons in the offline environment, but known in the cyberspace. Thus, this new criminalization in the Romanian legislation refers to the preparation of the minor to have sexual acts of any nature in order to obtain sexual satisfactions. The offender, in order to reach his purpose, first tries to befriend with the minor, by drawing the minor into intimate discussions and gradual exposure to explicit sexual material to reduce inhibitions of minor about sex[14]. Also, the text of art.222 of the Criminal Code stipulated the fact that the proposal of

[14] V. Dobrinoiu, M.A. Hotca, M. Gorunescu, M. Dobrinoiu, I. Pascu, I. Chiş, C. Păun, N. Neagu, M.C. Sinescu (2014), *Noul Cod penal comentat. Partea specială*, second edition, Universul Juridic Publishing House, Bucharest, p. 185.

offender to solicit children for sexual purposes be carried out through information and communication technology.

The offence of corrupting minors for sexual purposes or soliciting children for sexual purposes (grooming), as it is used in Directive 2011/92/ER on combating the sexual abuse and sexual exploitation of children, and child pornography, and in the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse of 2007, is a commonly committed offence in the cybercrime.

Following the analysis carried out, we noticed the fact that the provisions of art.6 of Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children, and child pornography, as well as the provisions of art.23 the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, regulating the *solicitation of children for sexual purposes through information and communication technology*, have been transposed almost all in the art.222 of the Criminal Code.

CONCLUSIONS

We consider that the two legal instruments regulating grooming, both the Council of Europe Convention of protection of children against sexual exploitation and sexual abuse and the Directive 2011/92/UE exclude from the scope of this provision other forms of grooming through real contacts of non-electronic communications stating as means for committing this offence information and communication technology only. This can be justified by the reasoning that it is more likely to conceal the real identity of the offender in cyberspace than in real life and such conduct might have different elements in real life that can be covered under other offences[15].

In the literature[16] it has been noticed the fact that solicitation of children for sexual purposes is not a new offence, and it existed before

[15] Council of Europe. Data Protection and Cybercrime Division. Global Project on Cybercrime (2012), *Protecting children against sexual violence: The criminal law benchmarks of the Budapest and Lanzarote Conventions*, Strasbourg, pp. 40-41. Retrieved 31 December 2014 from: http://www.coe.int/t/DGHL/cooperation/economiccrime/cybercrime/Documents/Reports-Presentations/2571_Child_benchmark_study_V32_pub_4_Dec12.pdf.

[16] I. Vasiu, L. Vasiu (2011), *Criminalitatea în cyberspaţiu*, Universul Juridic Publishing House, Bucharest, p. 250.

the occurrence and the development of information and communication technology, and was committed through real and personal interaction with the child, most frequently in a public space or through a trusted person. Thus, we consider that the offence of soliciting children for sexual purposes is easier to commit through online environment than offline, as the children feel more disinhibited in online than offline environment, becoming more vulnerable for offenders.

Referring to the provisions of art.20 of the Council of Europe Convention of protection of children against sexual exploitation and sexual abuse, we have found out that that they have a larger scope than the provisions of art.9 of the Council of Europe Convention on cybercrime, which have the same subject, child pornography. The main difference is the fact that the provisions of the Council of Europe Convention on cybercrime refers to criminalisation of acts related to information and communication services (producing child pornography for the purpose of its distribution through a computer system), while the provisions of the Council of Europe Convention of protection of children against sexual exploitation and sexual abuse mainly takes a broader approach (producing child pornography), and even covers acts which are not related to computer networks. Moreover, we notice the fact that art.20(1)(f) of the Council of Europe Convention of protection of children against sexual exploitation and sexual abuse criminalises the knowingly obtaining access, through information and communication technology, while the Council of Europe Convention on cybercrime does not comprise such provision. Pursuant to art.20(1)(f) of the Council of Europe Convention of protection of children against sexual exploitation and sexual abuse, gain of access refers to any deed of commencing the process of displaying of information made available through information and communication technology. For example, the offender enters the domain name of a known child-pornography website and initiates the process of receiving the information from the first page which involves a necessary automated download process[17]of information. In the specialized literature[18] it is supported the idea that the simple opening of a website automatically initiates a download process of materials with illicit content, often without the knowledge of the user. Thus, the legal

[17] International Telecommunication Union (2012). *Understanding Cybercrime: Phenomena, Challenges and Legal Response*, pp. 197, Retrieved 25 November 2014 from: www.itu.int/ITU D/cyb/cybersecurity/legislation.html.
[18] *Ibidem*.

bodies must evidence in this fact that the offender intentionally opened that website which contains child pornography as well as the fact that he/she downloaded that child pornography material in the computer system.

The Explanatory Report of the Council of Europe Convention of the protection of children against sexual exploitation and sexual abuse in paragraph 140[19] emphasises the fact that the provisions of art.20 (1) (f) should apply also in cases when the offender just views the online child pornography, without downloading. Thus, pursuant to point 140 of the Explanatory Report of the Council of Europe Convention of the protection of children against sexual exploitation and sexual abuse, the persons who open and just view the child pornography materials and without downloading cannot be accused of committing offences of producing or possessing child pornography. Also, in order to engage criminal responsibility, the offender must both intend to enter a site where child pornography is available and know that such images can be found there. Moreover, the same point 140 from The Explanatory Report of the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse stipulates the fact that sanctions must not be applied to persons accessing sites containing child pornography inadvertently. We consider that it is a different situation when a person recurrently opens a website containing child pornography and viewed child pornography via a service in return for payment. Thus, we consider that in these two cases the offender will be criminally liable, as both the offences are intentionally committed.

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SOCIAL DIALOGUE AT EUROPEAN AND INTERNATIONAL LEVEL

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ABSTRACT
The matter of social dialogue at the European and international level has been and continues to be of maximum interest for the doctrine and the European and specialized legal practice, but it reflects in the domestic legal order as well, in terms of creating a coherent system of social dialogue and in terms of the guarantees resulting hereof. The European social dialogue may be a strong instrument of improvement of work conditions and of establishment of minimum standards common for the entire Europe; it has manifested its positive part by creating common practices in this field. The importance of social dialogue is also seen at the international level, particularly as instruments of implementation of the tripartite system of social dialogue.

KEYWORDS: *Trade union, social dialogue, European social dialogue, system, tripartite*

I. Aspects of concept

The matter of social dialogue and of the conceptual crystallization of this phenomenon has been an element of maximum interest for doctrine in the European and specialized legal practice, particularly at the level of the European Union and of the international bodies with duties in the field of labour protection.

Thus, the International Labour Organization (ILO) proposes a work definition for the social dialogue, reflecting processes and practices that are found in various countries, and which sees the social dialogue as an intentional act of information, consulting and negotiation of social agreements between partners, as well as of negotiation of collective bargaining agreements.

More precisely, according to the definition proposed by the International Labour Organization (ILO), the Social Dialogue includes *„all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues*

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of common interest relating to economic and social policy. It can exist as a tripartite process, with the government as an official party to the dialogue or it may consist of bipartite relations only between labour and management (or trade unions and employers' organizations), with or without indirect government involvement. Social dialogue processes can be informal or institutionalised, and often it is a combination of the two. It can take place at the national, regional or at enterprise level. It can be inter-professional, sectorial or a combination of these."[1]

According to the concept adopted at the level of the European Union, the social dialogue instituted by the Treaty of Rome, of 1957, is the process of ongoing information and consulting between the trade union organizations and owners' associations, aiming at reaching certain understandings concerning the control of certain economic and social variables, both at macroeconomic, and at microeconomic levels.

Thus, from the European Union's point of view, the European social dialogue supposes debates, consulting, negotiations and joint actions taken by the representative organizations of the social partners, art. 138 of the EC treaty instituting the consulting of the social partners at the community level as regards all the initiatives in the field of social occupancy and protection[2].

Following a simple analysis of the concepts and perspectives of the International Labour Organization and of the European Union on social dialogue, we may notice the existence of two approaches which, without being totally antagonistic, have a relative character of divergence.

Thus, if ILO promotes the tripartite social dialogue, also involving the state or the public factor, EU promotes the bipartite social dialogue, focusing on the involvement of the employees' and owners' representatives. However, as we have already shown, this divergence is only relative, because in reality, the two forms of social dialogue co-exist, since they reflect complementary economic and social contexts.

A conceptualization of the social dialogue, reuniting and reconciling both visions presented above is the one achieved by the International Labour Office - ILO, in whose vision social dialogue is described as representing: "*all types of negotiation, consulting or exchange of information between representatives of the government and employees as regards issues of common interest, both of economic, and of social politics nature"*.

[1] http://www.ilo.org/ifpdial/areas-of-work/social-dialogue/lang--en/index.htm.
[2] http://europa.eu/legislation_summaries/employment_and_social_policy/social_dialogue.

Thus, in the vision of this institution, the social dialogue may be encountered as a tripartite process, in the frame of which the owners' association, the representatives of the employees and the government intervene, as well as a bipartite one, with the participation of the representatives of the employees and of the management of the enterprise or of the owners' association[3].

The European doctrine also encloses a concise definition, making the distinction and the conceptual delimitation between the notion of "*social dialogue*" and that of "*collective negotiation*", conceptualization according to which the "*social dialogue is not the same thing as the negotiation, but if provides a framework for a more efficient negotiation, helping to differentiate the negotiation concerning the state of the world from the negotiation concerning the distribution of costs and benefits*"[4].

In other words, in this vision, social dialogue is a requisite and a general framework of reference for providing the conditions capable to actually achieve a collective negotiation during which the social partners get involved in the negotiation of their positions, in the settlement of the issues and in the identification of possible solutions.

Either way, as we have already noticed[5], "the concept of social dialogue is associated with the passage from one culture of conflict to a partnership culture, considering the common interests of the social partners involved in a wider process of social consulting".

II. Short historic parenthesis

The occurrence of the concept of social dialogue has been the result of the evolution of reports between the participants in the work relations, a sinuous evolution marked by the passage from antagonism and con-

[3] C. Marinaş, *Principalele abordări în măsurarea dialogului social (Main approaches in the measurement of social dialogue)*, in the Magazine Administraţie şi Management Public (Administration and Public Management) nr. 2/2004, p. 98.

[4] V. Jelle, *Beneath the Surface of Stability: New and Old Modes of Governance in European Industrial Relations*, European Journal of Industrial Relations, 11, no. 3 (2005), pp. 287-306.

[5] S. Mesaroş, R. Iliescu, A. Săbiescu, E. Corjescu, I. Popescu, coord. L.M. Pop, *Dialogul Social European. Ghid de informare legislativă al dialogului european (European Social Dialogue. Guide of legislative information on European dialogue)*, p. 1, at http://www.mmuncii.ro/j33/images/Documente/Dialog_Social/Dialogul%20Social%20European.pdf.

frontation to dialogue, as means of conciliation and settlement of divergences between parties.

We may speak of the birth of the principle of social dialogue and of collective negotiations as manners to solve divergences between the participants in the work relations only after the incorporation of the International Labour Organization (ILO), body of tripartite structure, (including representatives of governments, trade unions and owners' associations), who, by the adopted conventions, created the general framework of development of the social dialogue, and who also conceptualized this institution.

From the legislative point of view, the deed that finally established the social dialogue was the Declaration of Philadelphia adopted in 1944 as annex to the Constitution of the International Labour Organization, which registered, among several other positive aspects, „*the actual recognition of the right to collective negotiation and cooperation between employer and manpower, for the ongoing improvement of the organization, as well as the cooperation between worker and owner to draft and apply the social and economic politics*"[6].

An international document of maximum importance in the implementation and conceptualization of social dialogue as institution was the *Convention no. 98/1949 on the application of the principles of the right of collective organization and negotiation*[7] in whose contents was instituted the functional principle, according to which, „the aim will be to encourage and promote the use on a wide scale of intentional negotiation procedures of the collective convention between social partners, in order to regulate work conditions by conventional bases" (art.4).

In 1976, the general Conference of the International Labour Organization held in the Government adopted, on June 2, 1976, the *Convention no. 144 on tripartite consulting* destined to promote the application of international labour norms, according to which the member States commit themselves to apply procedures providing efficient consulting between representatives of the Government, of employers and of employees, in issues concerning the activities carried out by the International Labour Organization.

[6] V. Dorneanu, *Dialogul social (Social Dialogue)*, Lumina Lex Publishing House, Bucharest, 2006, p. 13.

[7] Adopted by the General Conference of the International Labor Organization, held in Geneva on June 8, 1949, Convention ratified by Romania in 1958.

ILO also adopted the *Convention no. 154/1981 on promoting collective negotiation* (ratified by Romanian in 1992), aiming at democratizing work relations through collective negotiations, „*because we passed from the mere recognition of the subjective right of social partners to organize and participate in an negotiation, to the awareness of the importance that the institution of negotiation has*"[8], and Recommendation no. 163/1981 of ILO, aiming both at facilitating the actual application of the Convention no. 154/1981, and at completing it.

A very important part in the institutionalization and conceptualization of social dialogue was played by the *European Social Charter*, adopted by the Council of Europe in Turin in 1961, a document which guarantees 31 fundamental rights and principles with social character, among which the right to collective negotiation, therefore the social dialogue, implicitly.

III. Social dialogue in the vision of the International Labour Organization

As previously pointed out and as revealed by the definition proposed by the International Labour Organization (ILO), this institution promotes the tripartite social dialogue as form of inter-relation, involving the representatives of the employees, of the employers and the State; the principle of the organisation on tripartite basis is a creation of the International Labour Organization ever since its incorporation in 1919[9].

The International Labour Organization established the principle of association of employees, owners' associations and Government representatives in order to jointly seek the most efficient manners to achieve social justice, a principle also confirmed by the Declaration of Philadelphia of 1944 concerning the purposes and objectives of the International Labour Organization, which sees and establishes tripartite action as a permanent basis of its activity[10]. The Declaration of Philadelphia has been subsequently confirmed and validated in the normative activity of the International Labour Organization for the adoption of international

[8] M. Volonciu, *Negocierea contractului colectiv de muncă* (*Negotiation of the collective bargaining agreement*), Omnia Uni Publishing House – S.A.S.T., Braşov, 1999, p. 63.
[9] A. Popescu, *Dreptul internaţional al muncii* (*International Labor Law*), C.H. Beck Publishing House, Bucharest, 2006, p. 49.
[10] Al. Ţiclea, *Tratat de dreptul muncii* (*Labor Law Treaty*), Rosetti Publishing House, Bucharest, 2006, p. 115.

instruments but also in the specific control activity of their application, since the Organization has established and implemented the need to involve the employees and the owners in the drafting and application of the social and economic politics in each country.

In order to continue all the above, the International Labour Conference adopted in 1971 the Resolution by which it demanded the involved states and entities to analyse all the necessary measures so that the tripartite structures may include a more complete range of activities.

The Consolidation of Social Dialogue is one of the four essential strategic objectives of ILO to promote decent work, together with promoting work standards, fundamental principles and rights related to work, creating wider opportunities to provide decent work both for men, and for women, and an efficient social protection system for all.

From this point of view, the Social Dialogue may have different forms, implying both the collective negotiation, and other forms of negotiation, consulting or communication between the social partners and between them and the public entity; however, all these forms have a multilateral character, excluding those with clearly unilateral character, such as deontological codes, internal regulations or organization and operation regulations, which cannot be assimilated to the forms of Social Dialogue.

In terms of actual implementation means and manners, ILO uses, in promoting social dialogue at the national level, a series of specific instruments, among which the International Labour Standards, the Technical Cooperation and the Technical Assistance or policy recommendations.

The ratification and implementation of international labour standards is one of the important means by which ILO promotes social dialogue, and for this purpose there are several Conventions and Recommendations of ILO providing social dialogue as means to reach the objectives. Convention no. 144, as well as Recommendation No. 152, refers directly to social dialogue and tripartite action. They promote tripartite action and social dialogue, providing the involvement of social partners in activities related to ILO standards.

Moreover, the International Labour Conference adopted conclusions concerning the tripartite cooperation at the national level in terms of economic and social policy in 1996, as well as a Decision on Tripartism and Social Dialogue in 2002.

In addition to the international labour standards, directly promoting social dialogue, there are also other ILO Conventions and Recommendations that are essential for an efficient social dialogue and which

confirm that one of the basic activities of ILO to support Social Dialogue is the establishment of certain standards.

Of these Conventions and Recommendations, the most relevant for the Social Dialogue are Convention 144 on tripartite consulting, respectively Recommendation 152, Convention 87 on trade union freedom and protection of trade union law, and Convention 88 on the application of the right to organization and collective negotiation.

Convention no. 144/1976 on tripartite consulting destined to promote the application of international labour norms stipulated that any member State of the organization ratifying this convention commits to apply the procedures providing efficient consulting between representatives of the Government, of employers and of employees on issues concerning the activities of the International Labour Organization.

ILO implements a number of technical cooperation projects at national and sub-regional level where social dialogue is a major component, involving activities to institute and improve processes and institutions of social dialogue.

ILO also promotes social dialogue by other forms of technical assistance, which may take various forms, among which national and sub-regional conferences, direct recommendations of politics at country level, training workshops, etc.

IV. Social dialogue at European Union level

The issue of social dialogue at the European Union level must be seen in the wider context of social politics of the Union, since the interaction between the participants in the work relations and the settlement of any specific divergences are by definition a social matter.

The social policy is among the competences shared by the member states and the Union, and in some of its components the Union is called only to coordinate national politics, while in others, it may initiate measures whose actual application manners are left in the hands of the member States. The European Social Charter (both in its initial form, signed in Turin in 1961, and in its revised form, in 1996), the White Book „European Social Politics" (1993), as well as the „Community Charter on fundamental social rights" (1989), have established the objectives of social politics, which include, among others, the provision of a social dialogue between employees and employers;

In the context of the social politics of the European Union, the Social Dialogue is part of the European Social Model or, in other words,"*Social Dialogue is a distinctive trait of the European social model, which means that the employees and the employers and the organizations representing them) play an important part in coordinating economic and labour market reform, as well as in the building of social politics*"[11].

The part of social partners is recognized in the Treaty of Amsterdam by Art.137, asking member States to provide a dialogue between employees and employers or in any case the framework required for such a dialogue.

At the Community level, the European Commission is in charge with promoting consulting with the owners' associations and trade unions, and with taking the measures that are deemed to be necessary to facilitate the dialogue, by giving a balanced support to the parties (Art. 138).

The dialogue with the social partners is the corner stone of the European social model. Its part was mentioned in the manpower occupancy strategy and in the European Manpower Occupancy Pact.

The first progresses have been made together with adopting the Directive no. 96/34/CE on parental leave. Directive no. 97/81 refers to the agreement between social partners, by which the representatives of the big industries decided that the workers involved in flexible labour forms should receive a treatment comparable to that of workers employed under full-time employment contracts. In 1999, a new framework agreement was signed, stipulating the principles referring to fixed-term employment contracts (Directive no. 99/70/CE).

In 1970, the Permanent Committee on Manpower Occupancy was incorporated, responsible with providing the continuity of the dialogue between Council, Commission and social partners in order to facilitate the coordination of politics on manpower occupancy. In 1998, reforms of the committee were performed, concerning its composition and operating manner, and sectorial committees of social dialogue have been incorporated, replacing the committees that expressed joint opinions, as well as the informal work groups (Decision no. 98/500/CE).

The consulting of the European social partners contributes to the drafting of the European social politics and to the definition of social standards. Thus, on the grounds of Art. 152 of the Treaty on the opera-

[11] M. Dumitru, *Cooperare şi conflict în relaţiile industriale: Rolul dialogului social, (Cooperation and conflict in industrial relations: Part of social dialogue*), in the Magazine Calitatea Vieţii, issue 1-2/2010, p. 180.

tion of the European Union (TFUE), said Union recognized and promotes the part plaid by the social partners at the European level, and respectively it facilitates the dialogue between social partners, respecting their autonomy.

According to Art. 154 of TFUE, the Commission consults with the social partners before making legislative proposals in the field of social politics, and in accordance with Art. 155 of TFUE, the consulting with the European social partners may generate contract relations, including agreements.

One of the forms of great impact of social dialogue at the European level consists in the European Sectorial Dialogue, which constitutes a level of discussion and negotiation that allows a better understanding of the issues that are specific for each sector, managed by the representatives of owners and of European employees, grouped per economic activity sectors.

In the legislative frame, the European Sectorial Dialogue is regulated by Decision 98/500/CE of the Commission of May 20, 1998 on the constitution of sectorial dialogue committees, meant to promote the dialogue between social partners at the European level, according to which the social partners in a professional sector may submit a common petition to incorporate a sectorial dialogue committee. These committees are consulted in terms of community evolutions with social implications, and they promote the sectorial social dialogue.

Of the forms of sectorial social dialogue with practical relevance, we may remind that of railway sector, of naval transport or of agriculture, forms of social dialogue following which a series of essential elements connected to work relations have been established, such as those related to the maximum number of work hours provided every week, rest periods, duration of breaks or maximum duration of night shifts.

What is not currently found in the primary or secondary laws of the European Union is a series of imperative European norms, which may be directly applicable in the domestic law systems, which may implement tripartite action as a natural legal and factual state and as indispensable pillar around which the national systems of social dialogue may be structured.

Not uniformly adopting the idea and paradigm of tripartite action at the level of the European Union creates breaches in the entire European System of Social Dialogue, which may be speculated by the domestic lawmaker, particularly in periods of crisis or of financial difficulties, meaning that the tripartite form of social dialogue may be eliminated.

CONCLUSIONS AND FINAL APPRECIATIONS

The analysis of all the above information may result in a series of conclusions with a variable degree of generality, but with doubtless relevance and impact.

Thus, we may conclude that the Social Dialogue is a form of communication, information and negotiation between employees and employers, with the State's participation as mediator, to settle collective issues targeting work relations and their problematic.

It has also been proven that the Social Dialogue favours social peace and stability in the society, the economic and social development, and it contributes to overcoming the economic crises and to the replacement of conflict relations with a climate of trust;

The tripartite character represents the most efficient and suitable manner to practice social dialogue, summing up all the factors involved in the social political issues and providing employees with additional guarantee, by involving the state as arbitrator.

At this moment, there are international instruments providing the tripartite character, which are, first of all, those resulting from legislative instruments and practice of the International Labour Organization.

The European Social Dialogue may be a strong instrument of improvement of work conditions and of establishment of minimum standards common for the entire Europe, and it has shown its positive part by creating common practice in this matter.

Nevertheless, like any other system, the European Social Dialogue may also be subject to improvements, as we have shown, particularly as regards the assimilation and provision of mechanisms that guarantee the tripartite character in the development of the social dialogue.

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FIXED-TERM WORK: EUROPEAN STANDARDS AND JURISPRUDENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Vasile Neagu*

ABSTRACT
This paper presents the main provisions of the Council Directive 1999/70/EC, as well as the most important decisions of the Union European Court of Justice on topics as non-discrimination, ebuse prevent, obligation of information.Likewise, is presented an analyse of some problems of harmanisation of the Romanian legislation with European standards.

KEYWORDS: *fixed-term work, non-discrimination, abuse prevent*

Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1] was adopted by the desire to modernize the organization of work, including flexible working arrangements, with the aim of making undertakings productive and competitive and achieving the required balance between flexibility and security.

However signatories Framework-agreement subject to the Directive admit, in its preamble, that the classic form of employment contracts, the contracts of indefinite duration, are and remain the general form of employment relationships between employers and workers.

The Framework Agreement sets out the general principles and minimum requirements relating to fixed-term work, emphasizing that their detailed application needs to take into account the realities of specific national, sectorial and seasonal situations. It illustrates the will of the social partners to establish a general framework to ensure equal treatment for fixed-term workers by protecting them against discrimination and for using fixed-term employment contracts on an acceptable basis for employers and workers.

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[1] JO L 175 of 10 July 1999, pp. 43-48. *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31999L0070&qid=1423831082827.*

The main objective of the Framework Agreement is to improve the quality of fixed-term work, ensuring the non-discrimination principle, and to establish a framework to prevent abuse arising from the use of successive fixed term contracts or employment relationships (clause 1).

For the purpose of this agreement „"fixed-term worker" means a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event. (Clause 3 par.1).

Directive 1999/70/CE must be interpreted as not applying either to the fixed-term employment relationship between a temporary worker and a temporary employment business or to the employment relationship between such a worker and a user undertaking.[2].

Clause nr. 4 (1) of the Framework Agreement establishes the *principle of non-discrimination,* according to which: in respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.

The Court of Justice of the European Union interpreted in the broadest sense this clause, stating that it must be interpreted as meaning that it precludes the introduction of a difference in treatment between fixed-term workers and permanent workers which is justified solely on the basis that it is provided for by a provision of statute or secondary legislation of a Member State or by a collective agreement concluded between the staff union representatives and the relevant employer. [3].

On the same occasion, the term "*objective reasons*" which in the mentioned clause is drafted in general terms has been explained by the Court as requiring that the unequal treatment at issue to be justified by the existence of precise and concrete factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria in order to

[2] Judgment of the Court (Eighth Chamber) 11 April 2013. *Oreste Della Rocca vs Poste Italiane SpA*. Request for a preliminary ruling under Article 267 TFEU from the Tribunale di Napoli (Italy). Case C-290/12.

[3] Judgment of the Court (Second Chamber), 13 September 2007, *Yolanda Del Cerro Alonso vs Osakidetza-Servicio Vasco de Salud*, Case C-307/05.

ensure that that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose[4].

Employment conditions within the meaning of Clause 4 encompass conditions relating to pay and to pensions which depend on the employment relationship, to the exclusion of conditions relating to pensions arising under a statutory social-security scheme[5].

A key objective of European norm is to *prevent abuse* that may result from the use of successive fixed term contracts or employment relationships. To this end, Member States shall, after consultation with social partners when there are no equivalent legal measures aimed at preventing abuse, may enter one or more of the measures laid down in *Clause no. 5* of the Framework Agreement, namely the renewal of such contracts or employment relationships or establishing the maximum duration of successive fixed term contracts or employment relationships, or the number of renewals.

Is inconsistent with the European norm that any national provision is to be applied by Member State authorities in such a way that the renewal of successive fixed-term employment contracts in the public sector is deemed to be justified by 'objective reasons' within the meaning of that clause solely on the ground that those contracts are founded on legal provisions allowing them to be renewed in order to meet certain temporary needs when, in fact, those needs are fixed and permanent. By contrast, clause 5(1) (a) does not apply to the first or single use of a fixed-term employment contract or relationship.[6].

On the other hand, a temporary need for replacement staff, provided for by national legislation such as that at issue in the main proceedings, may, in principle, constitute an objective reason under that clause. The mere fact that an employer may have to employ temporary replacements on a recurring, or even permanent, basis and that those replacements may also be covered by the hiring of employees under employment contracts of indefinite duration does not mean that there is no objective reason under clause 5(1) (a) of the Framework Agreement or that there is abuse within the meaning of that clause.. However, in the assessment of the

[4] *Idem*, pt. 58 and 59.

[5] Judgment of the Court (Grand Chamber) 15 April 2008. *Impact vs Minister for Agriculture and Food and Others.* Reference for a preliminary ruling under Article 234 EC from the Labour Court (Ireland). Case C-268/06.

[6] Judgment of the Court (Third Chamber) 23 April 2009 *Kiriaki Angelidaki and others vs Organismos Nomarchiakis Autodioikisis Rethymnis and Dimos Geropotamou.*

issue whether the renewal of fixed-term employment contracts or relationships is justified by such an objective reason, the authorities of the Member States must, for matters falling within their sphere of competence, take account of all the circumstances of the case, including the number and cumulative duration of the fixed-term employment contracts or relationships concluded in the past with the same employer[7].

Employers *shall inform* fixed-term workers about vacancies which become available in the undertaking or establishment to ensure that they have the same opportunity to secure permanent positions as other workers (Clause nr. 6). However, a Member State, which provides in its national legislation for conversion of fixed-term employment contracts into an employment contract of indefinite duration when the fixed-term employment contracts have reached a certain duration, is not obliged to require that the employment contract of indefinite duration reproduces in identical terms the principal clauses set out in the previous contract. However, in order not to undermine the practical effect of, or the objectives pursued by, Directive 1999/70, that Member State must ensure that the conversion of fixed-term employment contracts into an employment contract of indefinite duration is not accompanied by material amendments to the clauses of the previous contract in a way that is, overall, unfavourable to the person concerned when the subject-matter of that person's tasks and the nature of his functions remain unchanged[8].

The fact that the Directive lays down minimum requirements, allows Member States and/or social partners to maintain or introduce more favourable provisions for the workers taken into account by the Agreement. Also, its provisions shall not prejudice more specific provisions of the European Union, especially those on equal treatment and opportunities for men and women.

Both Directive 1999/70/ EC and Directive 97/81/ EC on part-time work, they aimed to promote *flexible working* conditions and protection of labour rights which operate under atypical conditions. However, for some commentators, the impression left by action of the institutions of the European Union is *at least contradictory* giving the impression that

[7] Judgment of the Court (Second Chamber) 26 January 2012 [Reference for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Germany)] – *Bianca Kücük/Land Nordrhein-Westfalen*, Case C-586/10, OJ, 2012/C73/06.

[8] Judgment of the Court (Sixth Chamber) 8 March 2012. *Martial Huet vs Université de Bretagne occidentale.* Reference for a preliminary ruling under Article 267 TFEU from the tribunal administratif de Rennes (France), Case C‑251/11.

they do not act promptly to unwanted effects of atypical work, but more even they adopt a favourable position in their case. The effects are obviously at the expense of workers, challenging recognized principles of international and European law and are able to compromise the idea of European social model[9].

In this regard, a 2012 judgment of the Court of Justice of the European Union was considered able to reduce the level of protection provided by Directive 1999/70/EC concerning the excessive use of fixed-term employment contracts. Surprisingly, The Court appreciated that the mere fact that an employer may have to employ temporary replacements (in this case an employer has with the same worker 13 fixed-term employment contracts in a period of 11 years) on a recurring, or even permanent, basis and that those replacements may also be covered by the hiring of employees under employment contracts of indefinite duration does not mean that there is no objective reason under clause 5(1)(a) of the Framework Agreement or that there is abuse within the meaning of that clause. However, in the assessment of the issue whether the renewal of fixed-term employment contracts or relationships is justified by such an objective reason, the authorities of the Member States must, for matters falling within their sphere of competence, take account of all the circumstances of the case, including the number and cumulative duration of the fixed-term employment contracts or relationships concluded in the past with the same employer[10].

However, on several occasions, at European level attention was drawn to the *balanced use of fixed-term employment contracts*, to avoid situations of insecurity and instability of workers[11] .

In European societies there is a *risk of labour market segmentation*, in which can be found on the one hand, "integrated workers" (on permanent contracts, steady employment and a career perspective, promotion,

[9] See, Carole Lang, *Travail atypique: quelles évolutions dans une Europe en crise?*, 30 Novembre 2013, http://www.metiseurope.eu/travail-atypique-quelles-evolutions-dans-une-europe-en-crise_fr_70_art_29791.html.

[10] Judgment of the Court (Second Chamber) 26 January 2012 [Reference for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Germany)] – *Bianca Kücük/Land Nordrhein-Westfalen*, Case C-586/10, JO C 73, 10.3.2012, p. 4-5. Also see Emmanuelle Mazuyer, *Que reste-t-il de la protection des travailleurs à durée déterminée* ?, Revue Lamy Droit des Affaires, 2012, pp. 72-74.

[11] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards Common Principles of Flexicurity: More and better jobs through flexibility and security {SEC(2007) 861} {SEC(2007) 862}.

revenue increases and internships training) and, on the other hand, "secondary workers" (temporary contracts, risk of having repeated periods of unemployment, limited career advancement opportunities, reduced incomes and pension rights and limited access to education, training, housing and medical care)[12].

Fixed-term individual employment contract in the Romanian legislation

In Romanian law, in the **Labour Code** the fixed-term individual employment contract is regulated within Articles 82-87[13].

The doctrine stressed a more important aspect. Is that, unlike the European directive, the Romanian Labour Code limits in art. 83 the situations in which a fixed-term individual employment contract may be concluded. This legislative solution chosen by Romanian law is regarded as being "counterproductive, being able to reduce labour mobility in a labour market affected by economic restructuring"[14]. In fact, in practice, fixed-term individual employment contracts are concluded also in other situations than those expressly listed in art.83, and such practices cannot be successfully removed, since, as correctly noted[15], administrative penalties that may be imposed by labour inspectors in these situations are not laid down. Therefore, *in our opinion*, in a future amendment to the Labour Code, the cases of termination of fixed-term employment contracts listed in Article 83 should be abandoned.

Referring to the obligation that the employers have to inform the workers with fixed term employment contract about vacancies or future vacancies in the unit, corresponding to their professional training, and to ensure access to these positions on equal terms with employees with indefinite period individual employment contracts (art.86 Labour Code),

[12] According to, Guide de l'Europe sociale, Vol. I, *Politique de l'emploi*, Office des publications de l'Union européenne, Luxembourg, 2011, p. 25.

[13] Articles amended by Government Emergency Ordinance nr. 65/2005, published in M. Of. nr. 576 din 5 iulie 2005 and Law nr. 40/ 2011, published în M. Of. nr. 225 din 31 martie 2011.

[14] Nicolae Voiculescu, *Dreptul social european,* Ed. Universul Juridic, Bucuresti, 2014, p. 204.

[15] See, *European Commission, Implementation Report for Romania Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP*, 2009, p. 9.
http://ec.europa.eu/social/main.jsp?catId=706&langId=fr&intPageId=199.

it was considered that it is not an obligation of the employer to the employee who goes with fixed-term contract of employment in a job that involves a contract of indefinite duration. The employer keeps a right of choice, after checking the skills and training of those interested[16].

However, Romanian law does not transpose Clause 6.2. of the Framework Agreement that is the subject of Directive 1999/70 / EC, which establishes that, as far as possible, employers should facilitate access of fixed-term workers to appropriate training opportunities, to enhance their skills, career development and professional mobility. Of course, in a broad interpretation, we could understand that these facilities are assumed by the wording of Article 87 of the Labour Code. Even Article 194 of the Labour Code which establishes the obligation of employers to ensure participation in training programs "for all employees" could be understood in this sense, making application of the principle *Ubi lex non distinguit, nec nos distinguere debemus* (where the law does not distinguished, we do not need to distinguish). But, considering the importance of the mentioned clause, and for the sake of clarity and to remove any ambiguity of interpretation, *we consider* it necessary that such a rule transposition to be adopted by amending the Labour Code.

Although, in general, Directive 1999/70 / EC is adequately transposed into Romanian legislation, however, it was found that in general, workers hired with fixed-term individual employment contracts do not submit complaints to the trade unions and the courts. The explanation of this situation is that workers who accept this kind of fixed-term employment under conditions that do not conform to the laws are students, pensioners or workers who have also an indefinite duration job and which are satisfied to have an extra income[17].

[16] According to, Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Codul muncii. Comentarii pe articole*, vol. I, Ed. C.H. Beck, Bucureşti, 2007, p. 467.

[17] *European Commission, Implementation Report for Romania Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP*, 2009. *http://ec.europa.eu/social/main.jsp?catId=706 &langId=fr&intPageId=199.*

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FACTORS OF LAW CONFIGURATION AND THEIR REFLECTION IN THE NATIONAL LEGISLATION AND JURISPRUDENCE

Mihail NIEMESCH*

ABSTRACT

Law is strongly influenced by the social reality. Law is not a spontaneous creation, but a socio-historical product directly influenced by numerous factors.

Jus est ars boni et aequi. Nothing of what is connected to law and its institutions is allowed to go beyond the sphere of good, equity and moral. Law cannot be conceived outside the field of individuals' fundamental laws that guarantee the full equality of all people.

The human factor represents both the law-maker's major interest and the aim of the legal norm. Law is circumscribed to the socio-human field, and all human actions and non-actions are governed by law.

KEYWORDS: *socio-historical, equality, political factor*

The origin of law can be retrieved in the oldest times of the emergence and development of the human communities, when the practice and the rules combined with the tradition and customs, and the latter governed the relationships of understanding or conflict between the tribes. Thus can be explained the well-known Latin saying *Ubi societas, ibi jus*.

Law emerged and developed as an absolute necessity of the human species and is framed by social pragmatism. Defining law is a difficult mission, hard to accomplish because law means both objective and subjective law.[1]

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[1] M. Niemesch, *Izvoarele dreptului internaţional şi ale dreptului Uniunii Europene din perspectiva Teoriei Generale a Dreptului (The Sources of International Law and of the European Union Law from the Perspective of the General Theory of Law)*, Hamangiu Publishing House, Bucharest, 2010, p. 2.

The social order resulted from the system of the human activities led gradually to the normative rule[2]. Yet, the rules of law do not emerge from the void and they are not an artificial creation. Man is a social being and needs to live in a community, where can develop, and refine. However, society involves organization and any organizational system involves rules. A good functioning of the human society requires conduct rules, which are influenced by external factors, characteristic to the structure of the human species, to the environment in which people live, to their creations, to the climate etc.

Law is strongly influenced by the social reality. Law is not a spontaneous creation, but a socio-historical product directly influenced by numerous factors, such as:

- Natural environment;
- Social, politic and ideological framework;
- Human factor;
- Religion, moral and human rights;
- Ethnic composition of a community;
- International factor;
- Internet

Without claiming to exhaust all the factors of law configuration, we will try to analyze them and the way in which we retrieve their influence in the normative acts and national jurisprudence.

1. Natural environment

Natural environment refers to demography, fauna, flora, geographical environment etc. All these factors configure and influence all the components of law. As Montesquieu said "The laws have to be suitable to the physical factors of the country: with the climate – cold, hot or temperate –, with the quality of the soil, with the settlement, with its extension..."[3]

Geographical environment, subcomponent of the natural environment, influences especially the social and economic life of people. Man interacted with the geographical environment since the oldest times. For example the knowledge about the shorter and safer marine or terrestrial

[2] I. Humă, *Teoria generală a dreptului (General Theory of Law)*, Danubius Academic Foundation Publishing House, Galaţi, 2000, p. 12.
[3] Ch. de Montesquieu, *Despre spiritul legilor (On the Spirit of Laws)*, vol. 1, Ştiinţifică Publishing House, Bucharest, 1964, p. 17.

routes favored the development of trade, as people elaborated cartography and some instruments of space orientation, such as the compass or the sextant.

The biological and physiological factors influence law as regards the effects that the natural human features have both on the individual conscience, and on the collective conscience. The biological and physiological factors of law configuration have constantly influenced legislation. For instance, the New Romanian Civil Code establishes in art. 272 the minimum age for marriage conclusion. The same article para.2 stipulates also derogation in the favor of the minor who turned 16 years old, but under certain circumstances, strictly mentioned. The reason of this provision is to be found in the doctrine which shows that as marriage involves the capacity to perform sexual acts, for biological considerations, but also from the psychical point of view in all the legislations there are provisions forbidding marriage between people who did not reach a certain age, called minimum age.[4] Other authors proposed to extent the spectrum of the factors of law configuration, including the psychological or linguistic factor[5].

In Romania the natural environment influenced the emergence of some legal norms such as the law of the environment – Law no. 265 of 29 June 2006 for the approval of the governmental emergency ordinance no. 195/2005 regarding the protection of the environment or the law concerning the legal regime of Danube Delta biosphere reserve– Law no. 82 of 20 November 1993 on the constitution of Danube Delta biosphere reserve with the subsequent amendments and completion.

[4] A. Gheorghe, *Consideraţii privind condiţiile de valabilitate ale actului juridic al căsătoriei (Considerations regarding the conditions of validity of the legal act of marriage)* in M. Uliescu (coord.), *Noul Cod Civil. Studii şi comentarii, vol.I, Cartea I şi Cartea a II-a (The New Civil Code. Studies and Comments, vol.I, Book I and II)*, Universul Juridic Publishing House, Bucharest, 2012, p. 640.

[5] See C.R.Butculescu, *Criteriul lingvistic – componentă esenţială a integrării culturilor juridice în sistemele de drept internaţional (The linguistic criterion – essential component of the integration of the legal cultures in the international law systems)*, in *Dinamica Dreptului românesc după aderarea la Uniunea Europeană (The Dynamics of the Romanian Law after the Adhesion to the European Union)*, Universul Juridic Publishing House, Bucharest, 2011, pp. 609-615.

2. Social, politic and ideological framework

Among the essential elements of this complex factor complex would be the basic economic structures of a certain form of social organization, with the specific objective legislation; the fundamental social groups; the ideological environment characterizing the human life in that society; the system of organization and political, cultural and juridical institutions regulating the relationships and the mind-sets characteristic to that society.[6]

This factor of configuration is extremely dynamic and complex. It involves the political, economic, cultural, historical, social dimensions etc., components of the social life that are continuously changing and which establish an interdependence relationship.

The current literature in Romania emphasized the fact that the economic factor prevails over the other components of the social system, that the economic modern law reveals the instrumental nature of the juridical field, and the ideology leaves its mark on the way the law receives the economic influence. [7]

A subcomponent of this factor of law configuration is represented by the organizational structures of the societies through which:

- the political parties that have means through which the own policy becomes state policy,
- the pressure groups (for example, the syndicates that through specific and legal means such as strikes, manifestations) can influence the elaboration of the legislative act in fields such as: salary policy, social protection etc.,
- the ethnic groups activating for linguistic autonomy, the possibility to use their own language in administration, court etc.

3. Human factor

While in a scientific analysis of the process of law conditioning it is not admissible that the analysis of the factors of law configuration be substituted by an analysis of the factors of configuration of the various

[6] A. Naschitz, *Teorie şi tehnică în procesul de creare a dreptului (Theory and Technique in the Process of Law Creation)*, The Publishing House of the Romanian Academy, Bucharest, 1969, p. 70.

[7] N. Popa, M.C. Eremia, S. Cristea, *Teoria generală a dreptului (General Theory of Law)*, second edition, All Beck Publishing House, Bucharest, 2005, p. 47.

legal institutions, it should be taken into account the fact that eventually a system of law is composed of a complex organized by juridical institutions.[8] Man can live only in the society and any human society needs organization, order and discipline.[9]

The human factor is the strongest active force in constituting and modifying the positive law. Stipulating types of conduct the concrete law-maker cannot ignore the fact that they are addressed to people who would appropriate them for some ideals of living in the society, for some values, desires, hopes, beliefs.[10]

We can say that the human factor represents both the law-maker's major interest and the aim of the legal norm. Law is circumscribed to the socio-human field, and all human actions and non-actions are governed by law.

4. Religion, moral and human rights

Human rights

Jus est ars boni et aequi. Nothing of what is connected to law and its institutions is allowed to go beyond the sphere of good, equity and moral. Law cannot be conceived outside the field of fundamental laws of individual that guarantee the full equality of all people.

In this regard it was shown that the mind-sets of the members of the society about a certain aspect of their life, moral, religious or even legal, tend to coagulate and generate eventually a general principle[11].

As Irina Moroianu Zlătescu and Radu C. Demetrescu show, the Greek thinkers considered the human rights as those fundamental, eternal and immutable rights that any human society has to comply with. In other words these are rights emerging from the nature of things, and law is

[8] A. Naschitz, *op. cit.*, p. 80

[9] E. Ciongaru, *The Law – Concept And Validity*, *Conference Proceedings – Galaţi, 20th-21st of April 2012, Year IV, No. 4, Vol. I – 2012*, Galati University Press, Galati, 2012, p. 83.

[10] Gh. C. Mihai, *Teoria Dreptului (Theory of Law)*, second edition, All Beck Publishing House, Bucharest, 2004, p. 100.

[11] F.A. Măgureanu, *Principiile generale ale dreptului (General Principles of Law)*, Universul Juridic Publishing House, Bucharest, 2011, p. 88.

only the expression of this nature. Thus, the human rights emerge from the natural law, and are natural rights.[12]

While the jurist is interested in the positive law of the human rights, he cannot ignore their philosophical and moral fundaments and the ideological and political "environment" in which is raised the issue of their defense (of the fundamental human rights – our note).[13]

The emergence of the human rights and freedoms, which will be included later in the notion of human rights, was at the beginning associated with a form of fight against the feudal absolutism and of the various forms of state abuses. In this regard the first text known in history is Magna Carta (1215 A.D.) in England, proclaimed by King John, which enumerated the privileges granted to church, London town, merchants and feudal dignitaries. The essential thing is that this document held that "no free man will be arrested, outcast or exiled and will suffer no harm, only on the basis of a legal judgment made by his fellows or on the grounds of the law of his country." Similar provisions are to be found in Bill of Rights or Habeas Corpus Act (17th century A.D.), both establishing the freedoms of the individual under trial or under arrest as well as the necessity of a fair justice regarding the legality of the measure.

Certainly, it is necessary to mention also the ample and consistent contribution of the Greek and Roman thinkers in Antiquity. For example, Sophocles, through Antigone's voice invoked the divine, immutable laws, deriving from gods, while Aristotle supported the rational laws and the moral life. In Ancient Rome, speaking about the self-improvement of people, Seneca took into account the idea of justice and equality between people, and Cicero showed that the role of the state was to protect the rights in the form and content of law.

The merit to raise the human dignity to the position of social value belongs to the School of natural law, characterized by the idea that law is a means of attaining justice and equity. According to the natural law jurists, people are sociable beings by nature, are born free and organize their life on the basis of a social contract through which they limits the powers of the state. The state has as main mission ensuring the complian-

[12] I. Moroianu Zlătescu, R. C. Demetrescu, *Din istoria drepturilor omului (From the History of Human Rights)*, second edition, The Romanian Institute for Human Rights, Regia Autonomă Monitorul Oficial, Bucharest, 2003, p. 9.

[13] C. Bîrsan, *Convenţia europeană a drepturilor omului, Comentariu pe articole (The European Convention of the Human Rights. Comments on Articles)*, vol. I Drepturi şi libertăţi (Rights and Freedoms), All Beck Publishing House, Bucharest, 2005, pp. 7-8.

ce of the laws and the citizens' equality and freedom. The founder of the theory of natural law was Hugo Grotius who emphasized the idea that people have rights and obligations resulting from their human nature. The essence of hid theory of natural law contains Aristotle's ideas according to which man is good by nature and the need of the norm of law, of the rule of conduct results from man's instinctive need to live in the society.

Later, the illuminists elaborated the concepts that launched the values of the French revolution. Montesquieu saw in the separation of the state powers the best guarantee of respecting the human freedoms by state, and Voltaire used for the first time the notion of "human rights", stating that being free equals to knowing the human rights, and their knowledge requires their defense.

On the other hand, the mystic feeling that was at the base of law in immemorial times led to a more or less complete "confusion" between law and religion, which manifested under the form of theocracy, i.e. the direct governing of the society through gods, as in the case of the ancient Egypt, where the pharaoh was considered as a god, or in the case of the Jews in the early times when the society was governed by Jehovah, or in the case of monarchy of divine right when the governing people represented divinity.[14]

The same author shows[15] that Christianity was the first religion that did not interfere with law. Giving Cesar what belongs to Cesar and God what belongs to God, the Christian religion did not interfere in the mundane business. But when the Christian church consolidated, religion restarted to interfere with law, the monarchs justifying their authority through the will of God.

Religion

As regards religion, Irineu Mihălcescu, former Metropolitan of Moldavia in the interwar period, showed that: "It gives power to the laws. Without the idea of God, as the highest law-maker and judge, from which the human authorities derive their powers, laws would not have any power. The myths of some old peoples considered certain divinities (such as Osiris and Isis in Egypt and Ea in Babylonia etc.) as authors of their oldest laws, and some law-makers stated that they received from

[14] D. Țop, *Dimensiunea istorică a dreptului (The Historical Dimension of Law)*, SC REFACOS GA SRL, 2002, p. 86.
[15] D. Țop, *op. cit.*, p. 87.

gods the laws they gave. Thus, at Jews, Moses received the Tablets of Law from Jehovah on Sinai Mountain, at Indians, Manu received the law from Brahma, at Romans King Numa Pompilius claimed to have been inspired by Egeria in the elaboration of his law. What the idea of divinity represented later for the Roman society is included in Cicero's words: "I do not know if, once with the undermining of the fear of God the faithfulness and social order will not disappear from the society too.", "*Quid leges sine moribus*?" is a Latin saying and indeed healthy morals cannot exist without religion. The modern sovereigns, elected or hereditary, entitle themselves sovereigns by the grace of God and the will of people."[16]

God is fair through His nature and applies His justice not because He was harmed by the unfairness or the sins and guilt of the world, but by the fact that our world needs His divine justice. The terms of the Holy Scripture *ṭaddiq* and *ṭoedaqah* (Hebr.) and *dicaioma* (Gr.) mean fair, correct, just, unsullied, innocent, flawless, in compliance with the Decalogue, showing a stat of fair, perfect, ideal relationship between man and God, an absolute harmony of the believer's life with God's will and plan.[17]

The positive law in our country is in agreement with the religious freedom, and in this regard there should be mentioned the punishment of the crimes against religious freedom (see title VIII, chap.III, art. 381 and 382 in the Penal Code) or the provisions in the Constitution in art. 4(2) (Romania is the common and indivisible country of all its citizens, regardless of race, nationality, ethnicity, language, religion, sex, opinion, political affiliation, wealth or social origin) or in art.29(1) (The freedom of thinking and opinions as well as the freedom of the religious beliefs cannot be constrained under any circumstance. Nobody can be forced to adopt an opinion or to adhere to a religious belief, contrary to his beliefs.

Thus, the religious factor plays also an important role in the systemic construction of law, together with the other factors of law configuration[18].

[16] I. Mihălcescu, *Noţiuni de filozofia religiunii (Notions of the Philosophy of Religion)*, 7th éd., Cugetarea-Georgescu Delafras Publishing House, Bucharest, 1941, p. 36.

[17] I.Ghe. Rotaru, *Conceptul de dreptate divină prin prisma celor zece porunci (The concept of divine justice in the Decalogue),* in Dreptatea – abordare juridică, politică, socială si teologică (Justice – Juridical, Political, Social and Teological Approach), Universitară Publishing House, Bucharest, 2012, pp. 152-153.

[18] C.R. Butculescu, *Cuantica dreptului – o nouă perspectivă în percepţia fenomenelor juridice (The Quantic of Law – A New Perspective in the Perception of the Legal*

Moral

In the Romanian legislation the influences of the moral on the norms of law can still be found, as in the case of art. 376 in the Penal Code that incriminates bigamy, i.e. the act of the married person who concludes a new marriage.

The new Civil Code also refers to moral, as in the case of art. 11, which forbids in the contractual matter the harm of the morals, but also in the case of art 14, which requires the subjects of law a conduct in compliance with public order, morals and the good faith. As regards the good faith, we should mention that Cicero defined it as sincerity in words (*veritas*) and fidelity (*constantia*), in other words the balance between acts and words. Cicero also considered that a law deserves consideration if it is just, and the law is just if it can be traced in the moral conscience. In time, within the Roman law, law and moral separated so that bona fides became a component of law, and honesty (*honestum*) fell under moral. *Honeste vivere* means: loyalty, prudence, order.

The predecessors of the Roman natural law jurists were the ancient Greeks, inhabitants of the polis, lovers of philosophy, moral and human virtues. Thus Solon the law-maker (640-558 B.C.) pronounced against tyranny. Heraclitus (580-470 B.C.) considered that government has to belong to the few and good, able to share justice to all the people that deserve it. Aristotle (384-322 B.C.) held that the constitution of the polis was aimed at the virtue, well-being and happiness of the citizens. Taking into account all these noble conceptions, it can be noticed that the beliefs of the wise men of Ancient Greece stated that the elements of moral can and should influence law, and the acts of people have to be carried out with good faith.

On the other hand, according to the recent Romanian doctrine, the legal concept of good faith has certainly a moral base which necessarily involves the existence of a relationship between moral, ethics and law. The social conscience has as components both law and moral and ethics, each of them fulfilling specifically a function of regulation of the human conduct[19].

Phenomena), in *Justiţie, Stat de Drept şi Cultură Juridică (Justice, Lawful State and Juridical Culture),* Universul Juridic Publishing House, Bucharest, 2011, p. 98.

[19] M. Uliescu, *Noul cod civil studii şi comentarii (The New Civil Code. Studies and Comments),* vol. I, Universul Juridic Publishing House, Bucharest, 2012, p. 92.

As regards the nowadays life, we can notice that one of its biggest challenge, but also one of the almost indispensable components of the human species is represented by internet.

Internet is "a network of the informational networks" which reunites thousands of various size networks from tens of countries all over the world. It is a virtual network formed out of a continuously increasing number of public and private Local Area Networks (LAN), Wide Area Network (WAN), interconnected regional and national networks[20].

Internet has more components such as:

- ✓ *World Wide Web* (www) can be characterized as an "electronic market" of goods and services with plenty of applications. Here different users create sites, real "electronic exhibitions" in cyberspace. Trying to define the cyberspace, Gabriela Grosseck showed that some definitions present the cyberspace like a phantasy, a breach in development or something real and present. Others mistake it for the virtual reality, storage and electronic transmission of information or with the computer mediated communication, while others define the cyberspace as a conceptual space or as a product of the social interaction. Thus, the cyberspace is everywhere and being used intensively tends to become everything. As we cannot ignore the popularity of this term, it has become even harder to define[21].
- ✓ *Electronic mail* (*e-mail*) is a "daughter" of the traditional post-office, allowing the internet users to communicate and exchange, extremely rapidly and with low costs, various messages (texts, graphic, static images, video images) to other users, regardless of the time zone or the geographical area.[22]
- ✓ *Facebook* can be defined as a social networking website, a virtual place where an individual can create a profile (more or less in conformity with reality), specifying personal data and contacts, preferences, hobbies etc., aiming at getting to know other people with the same fields of interest and exchanging information with them.[23]

[20] I. Vasiu, *Criminalitatea informatică (Information Criminality)*, Nemira Publishing House, Bucharest, 1998, pp. 121-122.
[21] G. Grosseck, *Revista Informatica Economica*, no. 3(27)/2003, p. 12.
[22] I. Vasiu, *op.cit.*, p. 124.
[23] Internet source: http://www.it4fans.ro/449/.

Currently, national legislation and jurisprudence are strongly influenced by the internet factor, as in the following cases:

– art. 199 in the Code of Civil Procedure allows the valid service of the court summons by e-mail;

– **The electronic signature** represents data in an electronic form, attached or logically associated with other data in electronic form and which serve as an identification method, according to art. 4 pt. 3 in Law 455/2001], thus electronic (digital) signature offers to the addressee a strong reason to confirm the fact that the message or the digital document was created by the person who signed it, and the content of the digital message or document has not been modified since the date it was issued;

– The new Romanian Penal Code incriminates and sanctions in the content of chapter IV in title II (art.249-252), the frauds done through the information systems and the electronic means of payment;

– A recent decision of High Court of Cassation and Justice of 27.XI.2014 (not elaborated yet) stirred online controversies and is perceived differently by the public opinion and the users of Facebook, which counts millions of Romanians. According to the final and irrevocable decision of the magistrates, the personal Facebook is considered a public and not a private space so that a person can be held liable from the penal or civil point of view for his/her statements published there.

CONCLUSIONS

Law is a component of the social reality being influenced by it. Obviously, it is an accurate social receiver, which processes through its own filter the needs of the society on which it leaves its mark by the means of the specific ways of influencing the social order.

Law is not a spontaneous and abstract product, it does not emerge from the void, but it is a historical creation of man, being deeply influenced, directly or indirectly by numerous factors of configuration, which are modeling it formally and substantially.

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19. Internet source: http://www.it4fans.ro/449.

THE PAYER'S MISTAKE AS A CONDITION OF THE UNDUE PAYMENT

Oana Cristina NIEMESCH[*]

ABSTRACT

The new wording of the provisions of art. 1341 para. 1 in the Civil Code, which only states that the person who pays without a debt has the right to the recovery of money, avoiding to mention the phrase "by mistake", does not represent a consecration at the level of the Romanian legislation of the circumstance that for the admissibility of the action for the return of the undue payment the fulfilment of the condition of mistake has gained a relative character belonging to the nature and not to the essence of the undue payment.

On the other hand, even if the legal text does not stipulate anymore the payer's mistake as a condition of the undue payment, this condition cannot be excluded from the juridical construction of the undue payment. In exchange, for reasons of juridical accuracy and efficacy, it is preferable the formulation "the payment should have been made, in principle, by mistake" instead of "the payment should have been made by mistake".

KEYWORDS: *undue payment, condition, mistake, art. 1341 Civil Code*

Introduction

While business management and unjust enrichment – the other two institutions considered to be juridical licit acts – benefit from an article entitled *"Conditions"* which stipulates the conditions that have to be met that such institutions exist, the Romanian law-maker has omitted in the case of the undue payment the inclusion of such an article within the regulation of this juridical institution. From this point of view it can be stated that there is at least an inconsistency as regards the structure of the regulation.

Criticizing the current regulation of the undue payment it was shown[1] that, as it is regulated as a source of obligations, the undue payment should

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[1] S. Neculaescu, *Izvoarele obligaţiilor în Codul civil art. 1164-1395. Analiză critică şi comparativă a noilor texte normative (The Sources of Obligations in the Civil Code art. 1164-1395. Critical and Comparative Analysis of the New Normative Texts)*, C.H. Beck Publishing House, Bucharest, 2013, p. 582. In this regard, it has been shown

have been defined through what it is *in se* and not through the effects it produces.

Yet, the conditions of undue payment can be inferred from the corroboration of the stipulations of art. 1341-1344 in the Civil Code, which represent the legal regime of the institution, with art. 1635-1649 in the Civil Code, which includes the general rules applicable to the obligation of return. Thus, the following can be retained as conditions of the undue payment[2]:

a. the existence of a payment;
b. there should be no debt between the parties' relationships;
c. the payment should have been made, in principle, by mistake.

As it was shown[3], in the new regulation, the conditions (of the undue payment – our note) are approximately the same, but emphasized differently.

Comparing the provisions of art. 993 in the Civil Code of 1864 with those of art. 1341 para. 1 in the Civil Code in force, some specifications are necessary as regards the condition that the payment should have been made by mistake.

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that it is less common that within the law the marginal names of certain institutions regard juridical notions, as it is known that the positive law operates with legal definition while the theory of law is meant to explain the juridical notions. This way of relating to law notions characterizes only certain concepts, many of them being defined only through their conditions (business management, unjust enrichment) and it challenges the unitary way of regulation of the current Civil Code.

[2] See in this regard, L. Pop, I.-F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligaţiile conform noului Cod civil (Elementary Treatise of Civil Law. Obligations according to the New Civil Code)*, Universul Juridic Publishing House, Bucharest, 2012, pp. 359-363; I. Adam, *Drept civil. Obligaţiile. Faptul juridic - în reglementarea NCC (Civil Law. Obligations. The Juridical Act – In the Regulation of the New Civil Code)*, C.H. Beck Publishing House, Bucharest, 2013, pp. 53-70; S. Neculaescu, *op.cit.*, pp. 579-581; L. Pop, *Plata nedatorată în reglementarea Noului Cod civil (The undue payment in the regulation of the New Civil Code)* in Dreptul no. 12/2013, Universul Juridic Publishing House, Bucharest, pp. 17-24. According to an opinion (singular in the doctrine up to now), there are four conditions of the undue payment, i.e.: making a payment, the intention to extinguish a debt, the absence of the debt and the mistake. See in this regard, C. Jugastru, *Faptele juridice licite - surse de obligaţii (The Licit Juridical Acts - Sources of Obligations)* in Studia Universitatis Babeş-Bolyai Iurisprudentia no. 4/2013, Internet, www.studia.law.ubbcluj.ro, last accessed on 23.01.2015; C. Jugastru, *Dreptul persoanelor. Dreptul obligaţiilor - secvenţe în actualitatea Codului civil (The Individuals' Law. The Law of Obligations – Sequences in the Actuality of the Civil Code)*, Hamangiu Publishing House, Bucharest, 2013, p. 264.

[3] L. Pop, I.-F. Popa, S.I. Vidu, *op.cit.*, p. 359.

The payment should have been made, in principle, by mistake

As concerns the condition of the payer's (*solvens*) mistake the corresponding text in the French Civil Code is art. 1377 according to which: "*Lorsqu'une personne qui, par erreur, se croyait débitrice, a acquitté une dette, elle a le droit de répétition contre le créancier*." (When a person, mistakenly considers himself a debtor, has paid a debt, he has the right to have his money returned from the creditor).

Examining this legal provision, it can be noticed that from the formulation of the French Civil Code the payer's mistake represents an express requirement of the undue payment, this normative act being also the source of inspiration of the Romanian Civil Code of 1864 which took over in art. 993 the payer's mistake as a condition of the undue payment.

In order that the specific terms of the undue payment exist, an essential condition is necessary: the person who makes the payment should believe that he has to carry out that obligation in relation with the payee (*accipiens*).[4]

As regards the condition of the mistake in the doctrine elaborated according to the Civil Code of 1864[5], it was shown that it equals to the

[4] A.-G. Uluitu in F.-A. Baias (coord.), *Noul Cod civil: comentariu pe articole (The New Civil Code: Comments on Articles)*, C.H. Beck Publishing House, Bucharest, 2012, p. 1402.

[5] See C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligaţiilor (Civil Law. General Theory of Obligations)*, All Educational Publishing House, Bucharest, 1998, p. 111; T.R. Popescu, P. Anca, *Teoria generală a obligaţiilor (General Theory of Obligations)*, Ştiinţifică Publishing House, Bucharest, 1968, p. 153; R. Sanilevici, *Drept civil. Teoria generală a obligaţiilor (Civil Law. General Theory of Obligations)*, "Al.I. Cuza" University Iaşi, Faculty of Law, 1976, pp.218-219; I. R. Urs, S. Angheni, *Drept civil. volumul II, Drepturile reale. Teoria generală a obligaţiilor (Civil Law. Volume II. Real Rights. General Theory of Obligations)*, Oscar Print Publishing House, Bucharest, 1998, p.256. In a paper dedicated to the study of this juridical legal act it was shown that in principle, the condition of mistake has to exist under the circumstances stipulated in art. 992 of the Civil Code, and in art. 993 of the Civil Code, does not mean that this principle should be granted a general and absolute application. That is why there can be established cases when the mistake represents a condition of the return, as well as cases in which its absence does not exercises any influence on this action. In this regard, D. Gherasim, *Îmbogăţirea fără cauză în dauna altuia (Unjust Enrichment to the Prejudice of Another Person*), The Publishing House of the Romanian Academy, Bucharest, 1993, pp. 83-85. It was also expressed the opposed point of view in the sense that the existence of this condition (of error – our note) is absolutely necessary for the admissibility of the action for the return of the money, as the payer's mistake has as effect the absence of the cause that was at the basis of the payment. In this regard, L. Pop, *Drept civil. Teoria generală a obligaţiilor. Tratat* (ediţie revizuită) (*Civil Law.*

payer's belief that he is a debtor of the payee, with the mistake being also assimilated the dolus which in fact represents a mistake provoked by fraudulent acts. It was admitted that it could be mistake of fact or mistake of law, which could be thus proved by any means of evidence. Yet, from the perspective of the regulation of the Civil Code of 1864 situations were also identified in which for the emergence of the obligation of return it was not required the condition of payer's mistake:

- the situation of the debtor who paid his debt, losses the receipt and the creditor asks him to pay again. To avoid the legal seizure, the debtor pays again, and thus makes an undue payment for an already extinguished obligation, but if the receipt is found the second payment proves to be unfounded and will be subject to return, even if it had not been made by mistake;
- it is not required the condition of the payer's mistake in the case of the return of the payment carried out on the grounds of a null and void obligation (but for the null and void juridical acts that by exception can be confirmed).

Unlike the provisions of art. 993 para. 1 in the Civil Code of 1864 according to which "*The person who, by mistake, considering himself a debtor, paid a debt, has the right to have his money returned from the creditor*" and which stipulated expressly the mistake as a condition of the undue payment, in para. 1 of art. 1341 in the Civil Code in force there is no such mention, this legal text stipulating only that "*The person who pays without having a debt has the right to have the money returned*."

In the analysis of the condition of the mistake in the current regulation of the undue payment it should be started from the circumstance that the payment involves a material element doubled by an intentional one. From the subjective viewpoint it was stated that the payment has to be carried out with the intention of extinguishing a debt. In this regard, from the evidence point of view, para. 3 of art. 1341 in the Civil Code regulated a legal presumption regarding the fact that the payment was made with the intention to extinguish an own debt.

Contrary to the opinion expressed in regard to the Civil Code of 1864[6] according to which if the payer pays being aware that he is not a debtor, the payment can be interpreted or as a liberality made by the true debtor, or as a management of another person's interest, as he acts as a manager

General Theory of Obligations, revised edition), "Chemarea" Foundation Publishing House, Iaşi, 1994, p. 150.

[6] C. Stătescu, C. Bîrsan, *op.cit.*, p. 111.

on the behalf of the real debtor, who appears as the managed, in the recent literature[7] it was stated that the importance of the assumption (established by art. 1341 para. 3 – our note) results from the fact that it cannot be presumed the liberal intention, but only the intention of extinguishing a debt. Thus, any undue payment could be considered a liberality, which was not admissible.

The payer ignores the fact that he does not owe anything and he pays as he is under the impression that he is the debtor of the payee. The mistake regards *animus solvendi* intention, but does not identify with it. The mistake sustains psychologically the will to make the payment (which is undue). The mistake is the consequence of a distorted representation of a juridical reality: the payer wrongly believes that he has an own obligation and that thus he makes a (valid) payment. Therefore, the mistake does not distort the intention to make the payment (*animus solvendi*), but the belief that there is a due obligation which would justify the payment. The source of mistake does not matter, as it is useless to search if it was a mistake of fact or a mistake of law. As a result, it will be the payment of the non-existent debt and if the payer considers himself a debtor on the grounds of an agreement, an illicit act or of a legal provision that he misinterpreted.[8]

From the perspective of the necessity of the payer's mistake, as a condition of the undue payment in the current regulation two important tendencies can be identified.

The first one emphasized[9] that through the lack of the express mentioning of the mistake, the New Civil Code did not want to renounce at this condition, the argument being that the existence of such a requirement is absolutely necessary for the admissibility of the action for the return of the money.

This opinion, taking over an idea expressed in the previous literature[10], reiterated that, in order that the action for the return of the money should be admissible, the mistake has to fulfil three conditions:

[7] L. Pop, I.-F. Popa, S.I. Vidu, *op.cit.*, p. 361.

[8] P. Vasilescu, *Drept civil. Obligaţii (Civil law. Obligations)*, Hamangiu Publishing House, Bucharest, 2012, p. 212.

[9] I. Adam, *op.cit.*, pp. 66-67. In the same regard, Gh. Durac in *Noul Cod Civil. Comentarii, doctrină şi jurisprudenţă, vol. II, art. 953-1649 (The New Civil Code. Comments, Doctrine and Case Law)*, Hamangiu Publishing House, Bucharest, 2012, p. 669; P. Vasilescu, *op.cit.*, p. 212.

[10] L. Pop, *op.cit.*, pp. 150-151.

a) only the payer has to be mistaken; when the payment is made through a representative is sufficient that only this one be mistaken;
b) should have had a determinant character, in the sense that in the absence of the mistake the payer would have not made the payment;
c) the payer should have no guilt, he has to be of good faith.

As regards this last condition, it was added that any mistake in the case of the undue payment involves also the existence of a higher or lower seriousness and the return can be removed only in case of the payer's serious guilt.

We consider that the support of the absolutely necessary character of the condition of mistake has to be nuanced, as we will detail in the following.

According to a second tendency supporting the thesis according to which the existence of this condition is relatively necessary for the admissibility of the action for the return of the money, as the payer's mistake has as effect the absence of the cause that was at the basis of the payment, it was shown[11] that the mistake has to fulfil the following conditions:

[11] L. Pop, I.-F. Popa, S.I. Vidu, *op.cit.*, pp. 361-362. In the same regard I. Turcu, *Noul Cod civil. Legea nr. 287/2009. Cartea a V-a, Despre obligaţii (art. 1164-1649). Comentarii şi explicaţii (The New Civil Code. Law no. 287/2009. Book V, On obligations (art. 1164-1649). Comments and Explanations)*, C.H. Beck Publishing House, Bucharest, 2011, pp. 394-395; C. Jugastru, *Faptele juridice licite - surse de obligaţii (The Licit Juridical Acts - Sources of Obligations)* in Studia Universitatis Babeş-Bolyai Iurisprudentia no. 4/2013, Internet, www.studia.law.ubbcluj.ro last accessed on 23.01.2015; C. Jugastru, *Dreptul persoanelor. Dreptul obligaţiilor-secvenţe în actualitatea Codului civil (The Individuals' Law. The Law of Obligations – Sequences in the Actuality of the Civil Code)*, Ed. Hamangiu, Bucharest, 2013, pp. 265-266; S. Neculaescu, *op. cit.*, pp. 580-581; L. Pop, *Plata nedatorată în reglementarea Noului Cod civil (Undue payment in the regulation of the New Civil Code)* in Dreptul no. 12/2013, Universul Juridic Publishing House, Bucharest, pp. 21-24. It has to be mentioned the fact that there are authors who, even if they formulate the condition in an absolute way (the payment should have been made by mistake), at the moment of the examination of this condition, in an indirect way, through the support of the fact that if a payment is subjectively undue, the payer can obtain the return only if he proves that by mistake he considered to have paid an own debt, although this did not belong to him, or if he was mistaken as regards the beneficiary of the payment, it is admitted the relative character of the condition of the payer's mistake. See I. R. Urs, P. Ispas, *Drept civil. Teoria obligaţiilor civile (Civil Law. The Theory of the Civil Obligations)*, Titu Maiorescu University Publishing House, Bucharest, 2012, pp. 103-104.

a) only the payer has to be mistaken; the existence or the absence of the payee's mistake is not relevant (from the perspective of the existence of the undue payment – our note)[12]. When the undue payment is done through a representative, it is sufficient that only the representative was mistaken. On the other hand, the payer's mistake can be provoked (by the payees or by a third party), the dolus being assimilated to this situation;
b) the mistake should have had a determinant character, in the sense that in its absence the payer would not have made the payment.

In another opinion[13], which adheres to the same theory of the relative character of the necessity of the condition of the mistake for the undue payment, it can be retained also a third condition, i.e. the mistake should be excusable, which involves the lack of the guilt of the payer's or of the representative who made the payment. The excusable character of the mistake does not equal to the payer's good faith.

Arguing the relativity of this condition, it was established[14] that this is attested by numerous exceptions in which it is not necessary the fulfilment of the condition or even more, the payment can be returned if it is proved that the payer knew that he did not owe any payment and despite of this fact he made the payment. These exceptions limit the field of application and empty the condition that the payment should have been made by mistake. The exceptions are circumscribed especially to the situations of absolute or objective inexistence of debt whose extinguishment was aimed at through the payment.[15]

As concerns the situations in which the condition of the payer's mistake is not necessary for the admissibility of the action for the return of the undue payment, the following should be mentioned[16]:

[12] Taking into account the provisions of art. 1641, 1642, 1644, 1645, 1646 in the Civil Code, it results that the payee's good or bad faith could be relevant, in the case of the undue payment, only as regards the aspect of the extension of the obligation of returning the money.
[13] L. Pop, *op.cit.*, p. 22. In the doctrine it was shown that any mistake in the case of the undue payment involves also the existence of a higher or lower seriousness. Thus the mistake in the case of the undue payment is different from the mistake included in the good faith, for which it is required the lack of any guilt, no matter how easy. In this regard, I. Adam, *op.cit.*, p. 67.
[14] L. Pop, I.-F. Popa, S.I. Vidu, *op.cit.*, p. 362.
[15] L. Pop, *op.cit.*, p. 23.
[16] A se vedea, L. Pop, I.-F. Popa, S.I. Vidu, *op.cit.*, pp. 362-363; L. Pop, *op.cit.*, pp. 23-24.

a) the primary absolute inexistence of the obligation whose extinguishment is aimed at through the payment, when the debt has never existed, being imaginary;
b) the later absolute inexistence of an obligation, i.e. the situation in which at the moment of the payment the debt existed only that later it was annulled with retroactive effects as in the case of nullity or resolution of the contract from which the obligation results. In contrast with the provisions of art. 1262 and art. 1263 para. 2 in the Civil Code, it results that, if the payer is aware of the nullity at the moment of payment, the payment of such an obligation emerged from a juridical act affected by relative nullity can have the significance of a tacit confirmation with the consequence that the payment is not subject to the return;
c) the payment of an obligation with suspensory condition, if this condition was not fulfilled (art. 1404 corroborated with art. 1343 second thesis in the Civil Code);
d) the payment of a debt made for the second time by the debtor who, after having paid, losses the receipt and is forcedly executed by the former creditor, and later finds the receipt;
e) the payment under force;
f) the natural obligations (art. 1471 in the Civil Code). It was considered[17] that the execution of the natural obligations represents a particular case, as the only condition is that the payment should be made willingly, which involves only the intention to extinguish the debt, even it is natural, and if the debtor makes the payment on the grounds of the natural obligation, without knowing that he could not be forced to it, it is still considered that he makes a valid payment.

Among the situations that do not require the condition of mistake it was mentioned also the hypothesis of the payment made due of the dolus[18]. Under this circumstance it should be taken into account the fact that the dolus represents in fact an induced mistake, so that it is difficult to state that the condition of the mistake is not required.

This difference relative to the regulation of the condition of the mistake concretized in the absence of mentioning the payer's mistake in the content of art. 1341 para. 1 in the Civil Code could appear as justified from the perspective of the case law of the French Court of Cassation

[17] L. Pop, I.-F. Popa, S.I. Vidu, *op.cit.*, p. 363; L. Pop, *op.cit.*, p. 24.
[18] L. Pop, I.-F. Popa, S.I. Vidu, *op.cit.*, p. 363.

(the legislative solution of the Civil Code of 1864 being identical with that in the French Civil Code) in relation to the absolute or relative character of the existence of the debt with the consequence of establishing the circumstance that the mistake concerns only the nature and not the essence of the undue payment.

In the context of examining the condition that there should be no debt in the relationships between parties, it was made the difference between the relative or subjective inexistence of the debt and the absolute or objective inexistence of the debt, and this can be anterior or posterior. From the absolute or relative character of the debt, respectively of the undue payment, in the French case law new solutions have been found as regards the requirement of the mistake.

Thus, in a case solved by the Civil Division of the French Court of Cassation[19] having as subject-matter a dispute regarding the salary rights, consequence of a long strike that affected the employer's information technology systems, the payment of the salaries by transfer[20] to the employees by the means of the Savings Bank in Paris was affected by a wrong date. Therefore, the employees received also undue interests and it was established that the financial institution can request the return of the interests on the grounds of undue payment, without having to prove the mistake.

On the other hand, in another case[21], the Commercial Division of the French Court of Cassation stated that the payment made by mistake by a person who was not a debtor does not give the right to the return of the undue payment when the payee received only what the debtor owed to him and when the payer can be charged for making the payment without the precautions imposed by prudence.

Practically, in France it was established by case law that, when the debt is inexistent absolutely or objectively, it is not necessary anymore to be met the condition that the debtor be mistaken, while under the hypothesis of the subjective inexistence of the debt, regardless of the fact that the payment was made towards a person who was not the creditor,

[19] Case 83-10550 on 17 July 1984, The Court of Cassation, First Civil Division, Internet, www.juricaf.org/arret/France_COURDECASSATION_ 19840717_8310550

[20] For a detailed analysis of the payment as a particular aspect of the undue payment, in the situation of the mistake of the bank as regards the ordered amount see I. Turcu, *op.cit.*, p. 399.

[21] Case 86-143447 on 12 January 1988, The Court of Cassation, Commercial Division, Internet, www.juricaf.org/arret/France_COURDECASSATION_ 19880112_8614347

for the incidence of the legal regime of the undue payment it is required to be met the condition of the payer's mistake.

The current regulation only reflects the circumstance that the payer's mistake does not represent anymore a binding condition of an undue payment, existing express cases as well as situations in which the debt is absolutely (objectively) inexistent, in which the condition of the payer's mistake is not required for the admissibility of the undue payment.

CONCLUSIONS

If a payment is objectively undue, as well as in the cases expressly stipulated in the Civil Code, the return of the payment can be obtained on the grounds of undue payment and without being necessary that the payer's mistake be proved, while in the case in which the payment is subjectively undue, it will have to be proved that fact that the payer was mistaken as concerns the fact that he pays an own debt, even if he was not the owner of the obligation, respectively he was mistaken as regards the person of the creditor, paying to a third person.

In other words, the new formulation of the provisions of art. 1341 para. 1 in the Civil Code which only states that the person who pays without a debt has the right to have the money returned, and the phrase "by mistake" is not mentioned, represents an establishment at the level of the Romanian legislation of the circumstance that, subsequent to the difference between the objectively undue payment and the subjectively undue payment and simultaneously with the express regulation of the cases in which the condition of the mistake does not have to be fulfilled, for the admissibility of the action in the return of the undue payment, the achievement of the condition of the mistake has gained a relative character, belonging to the nature and not to the essence of the institution of the undue payment.

On the other hand, even if the legal text does not mention the payer's mistake as a condition of the undue payment, this condition cannot be excluded from the juridical construction of the undue payment. In exchange, for reasons of juridical accuracy and efficacy, it is preferable the formulation "the payment should have been made, in principle, by mistake" instead of "the payment should have been made by mistake".

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THE CONSEQUENCES OF CRIMES AGAINST VICTIM'S SEXUAL FREEDOM AND INTEGRITY

Andrada NOUR[*]

ABSTRACT
Once committed the crime, the victim suffer a whole series of consequences of psychological, social, physical and biological or material nature, which is why the passive subject of the offence, most of the time, no longer can return to living as if nothing had happened. Sometimes, of course, and depending on the nature of the offense, but also depending on the nature of the injury, the victims managed to overcome trauma, partially or even totally, but most of the time, the consequences are impossible to repair. In the case of offences against sexual freedom and integrity, the consequences of these facts can be all kinds of issues listed above, however, it may happen that the consequences to be limited only to psychological disorders, the so called "post-traumatic stress", characterized by behavioural changes, nervous and anxious crises, unwarranted agitated feelings or even eating disorders.

KEYWORDS: *sexual abuse, physical trauma, mental trauma, psychological decompensating, underage, rape, sexual assault, discrimination, social values*

1. The dimension and the limits of the effects over the victims of sexual abuse

Studying the problem of the consequences caused by committing such crimes, we must have in mind the human person in terms of its existence's value. Criminal law operates as an instrument of defence of human values, regarded as real goods or legal goods. In a social system in which you want to protect the human value, the legal assets, which may be both material and spiritual nature (freedom, sexual freedom and integrity, physical integrity, life, honour and human dignity) represents some heady conditions required not only to the person, but also to its free development[1].

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[1] M. Dirk Dubber, *Theories of Crime and Punishment in German Criminal Law*,Buffalo Criminal Law Center, p. 683.

For real perception of legal goods, they must be materialized, incorporated in substantial objects, governed by the criminal law. Between legal and material object there is a relation of interdependence, so that the injury of one causes legal harm to the other. When the damage is in direct connection with the material object infringed by illegal action incriminated as a crime, it becomes possible to quantify it[2].

In the case of the crime of rape, the victim can get to be impossible to participate in a normal social life (moral damages), can get to suffer a permanent physical disability (the aggravated form of the rape, which had as a result a body damage - physical and biological damages), can suffer behavioural disorder (social damages) or conceptual disorder (psychological damages) or even can get to lose a part of its regular income (material damages due to temporary incapacity for work during the healing process or due to the medical expenses - hospitalization, purchase of medicines for healing treatment). Also, there is the possibility that, as a result of rape or sexual aggression, the victim loses his life, and as a result, in such cases it may happen that a close relative of his (child, parent, husband, brother) to suffer psychological disorders (temporarily or permanently), putting his health in danger and becoming, indirectly, the victim of the same offense. If the active subject manages to survive, the worst consequences of the crime of rape, but also in the case of other offences relating to sexual freedom and integrity, are the consequences of physical and biological nature, since they may produce from mild bodily injuries (bruising, burns) to organic dysfunction, serious psychological disorders, affecting the temporary discernment, vaginismus, frigid, impotence, abortion, physical disability, loss of an organ, etc.

Statistically speaking, the most numerous are moral damages, caused either by the physical trauma (causing severe pain), or by the causing psychic trauma (causing mental suffering), which have much more serious consequences for the victim and their relatives than the material damages. Although the Court granted, usually, compensation funds for repairing some of the moral damages, traumas suffered by victims of crimes related to sexual freedom and integrity are, most of the time, irreversible and can be never forgotten. There are not very few cases where, as a result of such actions, the victim has lost certain physiological functions (such as the ability of procreation) or she was forced to resort to an abortion or even committed suicide, in which situation, no

[2] A. Eser, *The Principle of „Harm" in the concept of crime: a comparative analysis of the criminally protected legal interests*, Duquesne U.L. Rev. 137, 97, 225, p. 411.

matter how great it would be the fund compensation, they can never reward the loss suffered by the victim or by those closest to them.

In the circumstance where the victim is a minor, the consequences of committing such acts are more serious in the sense that they will affect the physical and mental growth and development of minor, his normal and natural evolution, and also the relationships with those with whom they interact. The risks for the minor are like him to lose his inside equilibrium permanently, the psychical normality or, even though transient, definitely he will remain permanently under the frustration, fear and concern, or other strong traumatic feelings. Let's not forget the fact that practical experience has shown that, in many cases, active subject of crimes relating to the sexual crimes committed against a minor has been found to be a close relative in the direct line, brother or sister, or a person in which care, protection, education, security or treatment the minor is.

Another category of consequences are the moral damages, not having any connection with the physical suffering, but including in their content the harmed of the prestige and dignity of a person, and also the consequences for the suffering due to the loss of a close person, whose absence cannot be covered ever, regardless the size of fund compensation.

The right to fund compensation for the moral damages is practiced in jurisprudence from Romania, being also a right recognized by European normative, in the sense that, in the event of the death of the victim, the repairing of moral damages must be done exclusively in favour of parents, husband, fiancé and the victim's children[3].

If regarding the granting of moral damages in case of death of the victim, things are clear, the same thing is not happen when the victim gets into a state of total unconsciousness and hopelessly, as in jurisprudence pronounced decisions were different. On the one hand it was considered that this right should be only of the victim, although its state excludes the idea of suffering physical and of the moral pains representation and, consequently, it would not be able to put the issue of fund compensation because the victim nor might enjoy. In the doctrine it was also expressed the opinion according to which "the victim's unconscious necessarily excludes the reality of moral injury"[4]. On the other hand, it was considered that this right should be also for the relatives of the

[3] Rezolutia 75-7 a Comitetului Ministrilor Consiliului Europei.

[4] I. Urs, *Repararea daunelor morale*, Ed. Lumina Lex, Bucureşti, 2001, p. 133. Pentru o prezentare a punctelor de vedere exprimate în jurisprudenţă şi doctrină, a se vedea acelaşi autor, *op. cit.*, pp. 108-133.

victim, because the suffering cannot be ignored, they themselves becoming, in our opinion, the indirect victims for the committing of the same offenses.

Another important aspect that should not be ignored is the consequences in psychological plan of the crimes committed against freedom and sexual integrity, consequences which can be manifested in the form of impaired memory, perception, thinking, affection and willpower[5].

Also, the committing of such offences determine including social consequences, since the victim can get to lose the social position, can reach the inability to even be able to exercise the previously profession or occupation, aspects which may result in the isolation of the victim and the destruction of her psychical equilibrium[6], resulting, therefore, in addition to the material damages also a powerful and deep moral sufferance, which will extend to other people, the family members, who are in a dependency relationship with the victim.

2. Categories of victims

Children are the most vulnerable category of victims of the crimes against sexual freedom and integrity, because of their immaturity on both mental and physical. Lack of experience, inability to defend properly, naivety, lack of discernment or a diminished discernment, coupled with a physical force almost void, if minors are at very early ages, immaturity of decision-making or of the action in the case of the adolescents minors, sincerity and curiosity specific for their age, material addiction, psychological fragility constitute the essential elements that make juveniles the most easy "prey" for criminals who commit such antisocial acts. If the minor is at a very early age, that makes easier for the offender to action, turning the victim into a tool of satisfying sexual instincts. The minor can become a victim of any of the criminal offences concerning sexual life, both in extra familial environment and in the family, when the parents have "easy morals", are deprived of affection, aggressive and marked by very strong inner frustrations. Sexual abuses exerted against minors determine hopelessly negative consequences relating the growth and physical and mental development of the child. Child molesting or

[5] T. Butoi, D. Voinea, V. Iftene, Al. Butoi, C. Zărnescu, M.C. Prodan, I.T. Butoi, L.G. Nicolae, *Victimologie,* Curs universitar, Ed. Pinguin Book, Bucureşti, 2004, pp. 101-107.
[6] *Idem*, pp. 99-100.

otherwise exploited sexually, become adult, in turn he will himself have the same behaviour that transformed him into a victim at the age of childhood and, in addition, will be marked by complex mental disorders, incapacity of procreation, anorgasmia or any other type of sexual problems, venereal contaminations, etc.

Women are another group highly vulnerable to danger resulting from offenses of rape and/or sexual assault, both in the family environment, and in the extra familial, with serious consequences in the psychological, physical, biological, social, resulting with injuries or disabilities, unwanted pregnancy or abortion or, ultimately, death or suicide victim. In many cases, the effects of such antisocial actions end up influencing all other persons close to the victim, especially children, affecting their education, leading to their moral degradation or even abandonment, as a result of family disorganization.

As a consequence, both in the case of minors and for women, it is particularly important to be taken measures in order to prevent and to combat such abuses of sexual nature and in order to protect victims also.

Other vulnerable to sexual abuse are those addicted to alcohol and drugs, which in order to obtain such substances, in the lack of financial resources, are willing to endure such abuse, elderly, who lives alone and who, because of age, have mobility and reduced physical strength, mentally ill or disabled people.

3. Psychological decompensating

We cannot stop wondering which of the two categories of consequences - mental or physical suffering - affects more the victims of any of the offenses concerning sexual freedom and integrity. Suffering is a state of stress exerted on the human body. According to the theories of H. Selye body subjected to a stress reactions traverses three phases[7]:

- threat phase, in which the individual lives psychologically stress; is an alarm reaction, which will lead to onset of anxiety. From the physiological point of view, the pituitary gland is activated by the hypothalamus and, by secretion of ACTH, it activates the adrenal glands. In this way, the entire circulatory system is subject to the phenomenon of vasoconstriction. Body reaction stops here, provided that the individual can be able to control the situation. Otherwise, it follows the second phase;

[7] H. Selye, *Ştiinţa şi viaţa*, Bucureşti, Ed. Politică, 1984, pp. 340-350.

- the second phase is the phase of impact, when the victim interact directly with danger; now it manifests itself defensive reaction characterized physiologically by increasing adreno-sympathetic activity, catecholamine release, and then vasodilation. The human body reacts by an automatic and disorganized behaviour (syncope, fainting events). Very few are those who manage to control their reactions in this phase;

- last phase, the decompensating phase, installs when the individual's body can't fight against disorders caused by stress. When this is possible, then it will restore the equilibrium by offsetting - posttraumatic phase.

Basically, Selye demonstrated that in the case of physical stress and in the case of mental anguish, the human body is suffering the same physiological changes, in terms of organic and hormonal changes. Therefore, in our opinion, both physical consequences, as well as the psychological consequences affect as much the victims of any kind of form of sexual abuse and can reach up to a real "psychological decompensating."

All the offenses against sexual freedom and integrity creates situations that seriously affect the human psyche, destroying the mental equilibrium of the individual, especially when there is a vulnerable psychological field, insufficiently resistant to such experiences. Perhaps the term "psychological decompensating" seems too hard in the case of the psychological behaviour of the victims of sexual abuse crimes, but, in our opinion, it is good to know that such psychiatric consequences can still occur, and the victims of various forms of sexual abuse may go through different phases of this psychological phenomenon.

In psychiatry, the term "decompensating" is used to describe a deterioration of the mental health of a patient with psychiatric disorders, decreasing the ability to think and to conduct daily activities.

Grand Larousse Dictionary of Psychology defines neurotic decompensating in a psychodynamic perspective, presenting it as a crisis characterized by the usual neurotic defences collapse in a patient whose neurosis was somewhat offset by the time of occurrence of the crisis, if suddenly confronted patient with a dangerous situation in terms of emotional, fails to handle it in emotionally.

As a consequence, in our opinion, even only the attempt of rape offense in the case of such passive subject having neurotic predisposition hidden, it could provoke to him from very strong negative emotions, accompanied by panic to highly strong and long lasting depression. In very rare cases, but possible, this form of decompensating may be the chronic psychosis onset for particularly vulnerable patients. Even if for diagnosing and improving behaviour of the sexual crime's victims is not

necessary to use psychoanalysis methods, we should know that in psychoanalysis, the decompensating concerns particularly the failure defence mechanisms and subsequent worsening of symptoms. Therefore, we can define decompensating as a state of functional impairment of a prior systemic structure, due to a very traumatic experience, namely, the clinical manifestation of mental exhaustion of the individual.

CONCLUSIONS

We have to keep in mind that the nature of criminal damage cannot and must not remain limited to physical injuries, being necessarily extended to intangible values also, because sometimes even in cases of rape, physical injuries can be little or inexistent, instead psychological injuries which are extremely powerful. In such cases, the damage is equivalent to the loss of values, and when the offender commits sexual abuse, forcing the woman to have sexual intercourse with him, the legislature agreed not to protect the sexual organs as a part of the human body, but rather, on first, women's interests to be mistress of her sexual freedom[8], and on the other hand, the general interest, which consists in protecting and preserving morality.

The crimes included in the sphere of offenses against sexual freedom and integrity is characterized as criminal law protects social values that relate directly the human being in her complexity, depicting us both the offender and the victim in two ways: as human beings and as social elements. Criminal elements have the value of etiological factors in committing sexual abuses, factors fall into two categories: endogenous (educational level, developing intellect, temperament, moral, genetic or acquired psychic disorders) and exogenous (socio-economic living standards, environment in which they live, civilization's degree, vices). Each of these factors, taken individually, may constitute a source in triggering committing sexual abuse, but usually it is a noxious combination and blend.

[8] A. Eser, *The Principle of „Harm" in the concept of crime: a comparative analysis of the criminally protected legal interests*, Duquesne U.L. Rev. 137, 97, 225, p. 379.

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INTERACTION OF LAW WITH POSITIVE SCIENCES

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ABSTRACT
This article presents the significant aspects of the interaction between law and positive science with highlights on the specific characteristics of the two fields.

KEYWORDS: *cybernetics, informatics, Jurimetrics, law, system, complexity, artificial intelligence, biometry*

The application of cybernetics and informatics offer models that can explain the society or its subsystems: social, medical, legal, transportation, information, education, culture, economy, administration, etc.

Mario G. Lozano sustains that the Jurimetrics of Lee Loevinger turned into the legal cybernetics in Europe, statement that is only half true:

- It is true in that Jurimetrics is a component of legal cybernetics
- It is untrue in that legal cybernetics comprises: Jurimetrics, juridical informatics and legal-cybernetics modelling.

A double adaptation process takes place between informatics and law, *heteromorphic* and *automorphic*.

From the perspective of informatics, it adapts to law (automorphic adaptation), and also, it adapts law to its own needs (heteromorphic adaptation).

From the perspective of law, this one increases its area with the law of informatics, while traditional law adapts to informatics, and also it changes informatics, in accordance to the needs of law (specific application, friendly, interactive and sensitive interfaces).

Application of informatics in law lead, on one hand, to the appearance of legal informatics (totality of applications of informatics in the field of law: city-net, informatization of public administration, e-government, GSLDB, distance legal consultancy, electronic tribunal, electronic legal assistance, electronic notary, etc.) and on the other hand to application of law in the field of informatics, that lead to creation of law of informatics (e-commerce, criminal law of informatics, copyright protection in informatics, personal data protection, electronic signature law and electronic commerce).

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Beginning with the works of Norbert Wienner (1948) "Cybernetics: Or the Control and Communication in the Animal and the Machine" the conclusion is that the same rules, principles and laws operate both in technics (machines) and in biology (psychology, biology), and thereafter, with his work "Social Cybernetics" this conclusion was extended to the whole society.

Cybernetics of first order is the regulation cybernetics (homeostasis), first order feed-back, retroactive, needed regulation and self-regulation. The succession of the feed-back loops achieves the processes of instruction, learning, memory.

Law, from the cybernetics perspective, represents the regulation and control normative system of the society.

Claude Shannon and *Denis Weaver*, in 1948, with the report"*The Mathematical Theory of Communication*" laid the basis of the mathematical theory of the information theory.

In 1952 *W.R. Ashby* published "Design for a Brain" that opens the way to the sciences of complexity structured in 1982.

Ludwig von Bertalanffy established the General Theory of Systems (GTS) in 1972.

Heinz von Foerster developed the metha-cybernetics and Gordon Pasks the cybernetic knowledge, while Stafford Beer developed the managerial cybernetics.

Humberto Maturana, Francesco Varela and *Heinz von Foerster* are pioneers of the second order cybernetics

David Easton is famous for his studies regarding the theory of systems in the field of political sciences, for his definition of the political behaviour as a society vector (political behaviourism); he is a pioneer of the study of the behaviour in the political field. Based on GTS, Easton tried to develop a general theory of the political sciences that consists of a deductive thinking system, based on a limited number or postulates, hypothesis and axioms that offer causal prediction explanations for the political behaviours.

The analytical approach to systems represented a fundamental mean for understanding the mode of operation of the political systems that are submitted to structural constraints.

Karl Wolfgaug Deutsch (1912-1992), a Czech, German speaker scientist, studied social phenomena such as: war, peace, nationalism, cooperation and communication.

He is also well known for introducing the quantitative methods and forma analysis of systems and of the thinking models in the field of political and social sciences.

Amitai Etzione has studied the social problems of the modern democracies, activating for the reinvention of the American society and for the economic thinking. He was interested in social movements that can lead to a liberal democracy, creating a theory of the society and of the political processes and being preoccupied with:

- Social liability;
- Civil rights;
- Private life;
- Public order;
- Biometric ID;
- Identity theft.

He invented the term *McJob* – poorly paid and perspectiveless job and militated for promoting values in schools, having as an effect the cure of society.

Anthony Stafford Beer (1926-2002) is well-known for the results he obtained in the field of operational research and management cybernetics. He was the first to apply cybernetics to management and to define cybernetics as the science of efficient organization. He developed the model of the viable system of diagnosing defects in any existing organizational system, in parallel with jay Forrester, who introduced the concept of dynamic system and its characteristics:

- Any system is formed of interdependent elements (parts), acting together, by virtue of one purpose;
- The totality of the connections between the elements of the system, as well as the connections with the whole, represents the structure of system S;
- Systems complexity depends more on the structure of the system than on the nature of its parts;
- Two systems with partially identical structures are called homeomorphic (the simpler system will be the model of the more complex homeomorphic system);
- Two homeomorphic systems will have a similar behaviour, from which the possibility to study the properties of real systems by simulation;
- A system (static) structure antecedes its behaviour (system dynamics);

- The movement within a system is achieved by supposedly concrete and continuous flows;
- In a social organism, all movement categories can be grouped according to the following typology of interconnected flows: material flows, command flows, money flows, human flows, technology flows and information flows;
- Informational flows play a central role in systems operation;
- Decision making processes are considered to play a central role in the systems mechanism; they are presupposed to be discontinue;
- Regulation is a characteristic of systems operation;
- The processes that take place in social systems are, usually, nonlinear.

Management cybernetics applies cybernetics laws to humanly created organizations and institutions, to the interactions within and between them. It is a theory based on the natural laws.

Talcott Parsons (1902-1979), American sociologist, professor at Harvard University, developed a general theory for the study of the action society, based on the methodological principle of voluntarism, while epistemologically it is based on the principle of the analytical realism. He introduced the concept of structural functionalism as fundamental to the theory of social evolution.

Niklas Luhmann (1927-1998) is known for his theory of the social systems, where *complexity* is a fundamental concept. He highlights three categories of systems: living systems (cells, brains and organisms), psychic systems (human mind, consciousness) and social systems (society, organizations, and interactions), differentiated function to the functioning modality and the modality of reducing their complexity. The Luhmann systems are self-referential and self-creating, for generating their own structures and components. He applies the concept of function used by Parsons to the concept of system. The structure of Parson's system explains human action, while Luhmann's systems explain survival as the main vector of their dynamics.

Mario Giuseppe Losano unifies all scientific findings within a new science called legal cybernetics.

In "Cybernetics and Society", *Norbert Wienner* presents law as a complex communication process.

Layman E. Allen is one of the pioneers of using mathematical logics as an analysis instrument in law, and using computers for juridical research. He developed a formal and symbolic logic system of the juridical relationships. Elaboration and interpretation of normative acts is

done on basis of the logical analysis of the relationships and of the legal language. His studies regarding the artificial intelligence lead to the creation of legal specialized systems that facilitate the analysis of the legal text with multiple interpretations, as well as elimination of logical ambiguity from normative texts. His interests comprise mathematical logics, computers and law, game theory (instructive games) and artificial intelligence.

Introduction of scientific methods of quantitative measurement in law and the configuration of a new field of the juridical cybernetics, jurimetrics, are due to *Lee Loevinger*[1].

Colin Tapper – has got remarkable results in the following fields:

- Politics of juridical informatics services;
- IT&C and the general justice system;
- Lawyer – machine relationship.

Cross&Tapper report on Evidence (Collin Tapper) is most comprising with regards to the law of accessible evidence.

John Horty has got results in the philosophical logics, the artificial intelligence, cognitive science, practical reasoning, legal language philosophy, ethics, law philosophy, computerized management of legal information.

Victor Knapp, one of the founders of legal cybernetics has run researches with regards to the application of the juridical methods, through cooperation between lawyers, technicians, mathematicians, logicians, and cyberneticists. He is also interested in computational linguistics[2], logics, informatics and law.

Vitorio Benito Frosini – is the father of legal informatics in Italy. He is a theoretician of technological humanism, paying attention to civil rights. He is of opinion that this competition between law and technology is evolution producing. The paper that launched him as a law philosopher and specialist in legal informatics is: "La struttura del diritto" (1962). He introduces the concept of juritechnics (1975). He gives a new definition

[1] He is accused that he pushes jurimetrics too close to the behavior of lawyers and judges, while science determines a move towards rationality and theory of communication.

[2] Computational linguistic is an interdisciplinary field of research that is interested in statistical modelling or modelling based on the rules of natural language, from the computers point of view. This modelling can have as an object any linguistic field. Traditionally, those interested in computational linguistics are the scientists interested in IT&C specialized in applying computers to the automatic processing of natural language.

of law starting from the uses of technology in law and elaborates a methodology of applying technology to law. He studies the changes in the lawyers' mentality under the impact of the new technology.

Lucien Mehl sustains automatization of legal activity by introducing informatics systems in the law, and he points to two predilection fields:

- Research legal informatics for research;
- Support legal informatics.

Paul S. Hoffman published his work"The Software legal book Internet and Web Related Forms Collection". He has been involved in the study of informatics application in law since 1957. He is a member of the Council of CLA (Computer Legal Association).

Abraham Moles socio-cybernetician, author of "Sociodynamics of Culture" and "Art and ordinator", where he suggests a new sociocultural model based on the principles of cybernetics.

Frank Honywill George, psychologist, cybernetician and manager of the cybernetics institute at Brunel University. F. H. George's areas of interest in cybernetics and connected fields are: artificial intelligence; industrial cybernetics and cybernetic management with a stress point on heuristically modelling and programming, research methods in organizational behaviour.

JURIDICAL INFORMATICS

Juridical informatics is a new field of the science of informatics. Its definition, by Erdelez and O'Hare (1997):

Informatics is the science that studies the informational structures and properties, as well as the application of technology in the organization, storing, management and dissemination of information. Juridical informatics studies the application of informatics in law and its implications in organizations (law houses, tribunals, prosecution, law schools) and users of information and informational technology in such organizations.

The IT&C involvement in the legal field results in new methods of providing legal service, according to the classical business model:

- Service order;
- Service response.

Traditionally, legal service is provided by a professional (lawyer, legal counsellor, notary, etc.), individually, for each client. Under the new conditions, the legal service has specific features:

- The service order and response are systematically and even standardized;
- The legal service is controlled just as a commodity;
- It has no material personality once the cloud computing is largely available, but it becomes a service, a utility, such as water, electricity, heating, etc.

Cloud computing and legal service

”Software as a service” or on-request software is a software delivery method in which associated software and data are hosted, concentrated on a cloud. This is accessed by a web browser.

The use of “Software as a service” in the legal field allows taxation per-user of the clients of by subscription. The system is much more scalable than the classical one.

The use of software as a service allows suppliers to develop legal services on the Cloud or to create new software products. Such a service allows the legal expert to concentrate on his work customization.

It allows the access to the sleeping market due to the low rates and the infrastructure access.

On-line legal services

Computerization of legal documents or documents assembling in work flows that help creating electronic documents by:

- Using logic systems that employ pre-existing text segments;
- Using text correctors, syntax or logic correctors;
- Macros creation and use

allow users to create their own data and rules without software programming.

Both “software as a service” and “on-line” legal service, change the lawyer-client relationship.

On-line services in the legal field

In USA FindLaw (1995), Lega Match (1999), Legal Zoom (2001), Lexis

In Romania www.avocat.ro (2005)

Promoting access to justice by the way of technology generates new issues:

- Law and politics issues in the legal informatics;
- Implication of legal informatics in the judiciary practice;
- Artificial intelligence and legal problems.

Artificial intelligence and legal problems

Artificial intelligence is more and more employed, allowing machines to become autonomous, capable to deliver services and to take actions and tasks in an environment managed by behaviour. This generates new legal problems:

- Free will, empathy, emotion, feelings, are specific to human being, not to a machine;
- Action liability of a machine, which is responsible for the actions of a machine?
- Implications in the field of law, particularly in the criminal law and of its objectives in respect of the criminality prevention, punishment application, discouraging of criminal activities;
- AI is employed in on-line solving of all kinds of litigations.

Interaction between informatics and law can be placed, symbolically, in 1949, when Lee Loevinger published his article:

”Jurimetrics. The Next Step Forward”, article that initiates the scientific investigation in the field of law and introduces in the scientific vocabulary the concept of jurimetrics, representing the science that studies the implications of the relationship between law and the results of positive science, particularly of statistics.

In 1963 Hans Wolfgang Baade used for the first time the concept of jurimetrics to describe employment of informatics in the law, configuring a new domain – legal informatics that for him meant jurimetrics.

He gave a systematic order to the domain, characterized by three applications of the inquiry:

- Legal information management;
- Behavioural analysis of law;
- Use of symbolic logics in law.

In USA, legal informatics is named legal information technology. There are two distinct issues:

- legal informatics – informatics applications in law, such as:

1. automatic management of legal information, involving storing, updating, searching;
2. computerization of law offices, notary offices, consultancy offices, legal counselling; administration computerization: public office, constitutional court, parliament, legislative council;
3. computer use in law (LDB, educational trainings in law, expert legal systems, computer assisted legal text creation);

- Computer law – studies the legal perspective on the social implications of using informatics.

Domains of Legal Informatics:

1. Legal Research Informatics - interested in creating and using GSLDB, formed of:

- Management systems – informatics management software;
- Legal data bases, LDB.

GSLDB introduces legal information in LDB and abstracts required information by designing and developing technology such as:

- Text indexation;
- Text classification;
- Summarizing criteria;
- Information abstracting;
- Legal thesaurus creation;
- Text recovery models;
- Procedures of generating Key words thesaurus.

2. Legal informatics supporting law:

- Legal expert system capable to issue decision models;
- Computer assisted judiciary analysis;
- Electronic tribunal;

Managerial informatics instruments in law, used for the management of the legal and administrative procedure, computerization of legal procedures, computer assisted legal text generation, computerized judges designation, etc.

3. Legal informatics in scientific research and legal education:

- Law computer assisted teaching;
- Use of training and education software;
- Simulation software production in the legal field;

- Specific software use in scientific research, particularly in quantitative measurement activities in law
- Judge decision simulation for similar cases study and statistical analysis.

From the informatics perspective, there are the following directions of computer use in law:

- computerization of legal documents;
- GSLDB and intelligent systems;
- Intelligent documentation research systems;
- Computer-assisted legal text draw out;
- LDB Management;
- Expert systems in law;
- Knowledge bases in law.

From the legal perspective, informatics represents a new field of social activity that has to be normed by legal rules that have to establish the framework of its activities.

Juridical ontology

Artificial intelligence (AI) is used in modelling ontological juridical modelling. Ontology creates an explicit, formal and general specification of conceptualizing the properties and relations between objects in a certain domain.

Roland Dworkin created a legal ontological theory based on three stages:

- Identification of norms, standards and previous decisions;
- Identification of fundamental principles and values;
- Restatement of a set of rules that will accomplish the formulated principles.

Quantitative legal predictions

There are quantitative models of legal prediction. Such a model was applied by SCJ in USA. This prediction model tried to predict the results of all cases in 2002. The model predicted accurately 75% of the cases, compared to the expert lawyers who predicted only 59.1% of the cases. The phrase from which most of the scholars in the social field take distance, according to which a computer is a rational thinker and cannot model social reality due to its complexity, is contradicted by the

presented results. We can state that the future computer will not represent the universal reason, but it will be instructed to make only those errors that most famous researchers in the field make.

Asked how technology changed the fundamental nature and practice in the law in USA, Peter W. Martin answered that there is a strong connection between the way societies think law and the technology they use in providing and using it.

Martin created the legal information institute at Cornell, known as LEXIS, maybe the most performing GSLBD in USA.

Realizing a statistical DB in the criminal law, data base that benefits of a decision classification by solution software, brings lawyers not only a list of similar cases but also an organized representation of such cases based on multiple classification criteria.

CONCLUSIONS

1. There is a determination relationship between positive science and law, both in respect of investigation instruments (new methods of positive sciences applied in law) and in the investment area – extension of law in new fields that it norms.

2. Limitation of the speculative spirit of law (that pushes it towards philosophy) and the extension of analysis methods based on qualitative and especially quantitative indicators.

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MAIN REGULATIONS APPLICABLE TO THE ARBITRATION AGREEMENT. ELEMENTS OF NOVELTY STIPULATED IN THE PROVISIONS OF THE CODE OF CIVIL PROCEDURE

Carmen PĂLĂCEAN *

ABSTRACT

Arbitration has represented a modality of solving the civil law disputes since Antiquity. Beginning with the 20th century, arbitration has become the preferred form for solving the disputes deriving from the international trade activities. The disputes are submitted to be solved, according to the parties' agreement, to some arbitrators designated for certain cases or to some permanent institutions of arbitration, which have the duty to judge the dispute and to render an award, which the parties commit to enforce. Due to its generalization and importance, the institution of arbitration is regulated by national laws and international agreements, both bilateral and multilateral.

KEYWORDS: *domestic arbitration, international arbitration, Romanian Code of Civil Procedure, arbitration agreement, compromissory clause, compromise*

The arbitration agreement represents the main condition of arbitration, being considered to be the "cornerstone" of arbitration[1]. Its conclusion represents the preliminary condition of the organization of arbitration, of the valid entrustment of the arbitral tribunal with the resolution of the dispute.

By concluding the arbitration agreement, the parties give up the guarantees offered by the state justice, these representing the grounds of exclusion - as regards a dispute - of the jurisdiction of the courts of common law.

The arbitration agreement represents the document that configure the framework and the conditions of judgment, establishes the applicable rules, which, allowing the parties' freedom of will to manifest, confers the institution a strong contractual character[2].

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[1] Giorgiana Dănăilă, *Procedura arbitrală în litigiile comerciale interne (Arbitration Procedure in the Domestic Trade Disputes)*, Universul Juridic Publishing House, Bucharest, 2006, p. 47.

[2] Monica Ionaş Sălăgean, *Arbitrajul comercial (Commercial Arbitration)*, All Beck Publishing House, 2001, p. 43.

The Romanian law-maker does not define the arbitration agreement, but only stipulates its forms, its content and effects.

On the basis of these elements, in the doctrine multiple definitions were elaborated.

Thus, the arbitration agreement was defined as *"the agreement of the parties of the international trade contract to submit to arbitration the dispute between them*"[3], "*the parties' agreement of will as regards the dispute resolution by the means of arbitration*"[4] or "*the agreement of will of the parties of a patrimonial legal relationship (civil, commercial, international trade), through which they decide to solve by arbitration the current or future disputes generated by that legal relationship*"[5]. Through the arbitration agreement "*the parties establish in writing that the current or future disputes emerged from their legal relationships be solved by the means of arbitration*"[6].

The Romanian Code of Civil Procedure dedicates to the arbitration agreement articles 548-554, found in Title II entitled *Arbitration agreement* in Book IV *About arbitration* which refers to the domestic arbitration and article 1.112 in Title IV *International arbitration and the effects of the foreign arbitral awards*, in Book VII *International Civil Trial*, referring to the international arbitration.

The Romanian law regulates expressly the two forms of the arbitration agreement, which is also defined expressly. Thus, according to art. 549 para. (1), the arbitration agreement can be concluded under the form of a compromissory clause, written in the main contract or established in a separate agreement, to which the main contract refers, or under the form of agreement. In compliance with the provisions of para. (2), which did not exist in the old code, the existence of the arbitration agreement can also result from the written agreement of the parties made in front of the arbitral tribunal.

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[3] Mircea N. Costin, Sergiu Deleanu, *Dreptul comerţului international (International Trade Law)*, vol. I, general part, Lumina Lex Publishing House, Bucharest, 1994, p. 177.

[4] Ioan Leş, *Tratat de drept procesual civil (Treaties of Civil Procedural Law)*, 5th edition, C.H. Beck Publishing House, Bucharest, 2010, p. 878.

[5] Monica Ionaş Sălăgean, *op. cit.*, p. 44.

[6] Gabriel Boroi, Octavia Spineanu-Matei, Gabriela Răducan, Andreia Constanda, Carmen Negrilă, Delia Narcisa Theohari, Marius Eftimie, Marcel Dumitru Gavriş, Veronica Dănăilă, Flavius George Păncescu, *Noul Cod de procedură civilă. Comentariu pe articole (The New Code of Civil Procedure. Comments on Articles)*, vol. II, Art. 527-1133, Hamangiu Publishing House, 2013, p. 548.

Consequently, the two forms regulated in art. 549 are compromissory clause and compromise.

By the means of the compromissory clause, the parties agree as art. 550 para. (1) stipulates, that the disputes that will rise from the contract in which it is stipulated or in connection to it should be solved by arbitration, showing under the sanction of nullity the modality to designate the arbitrators. In the same paragraph it is stipulated, as a novelty[7], the fact that in the case of the institutional arbitration it is suffice the reference to the institution or the procedural rules of the institution organizing the arbitration.

Compromise is defined in art. 551 para. (1) as the act through which the parties agree that a dispute occurred between them be solved by arbitration, showing under the sanction of nullity the object of the dispute and the name of the arbitrators or the modality of choosing them in the case of ad-hoc arbitration. In the same paragraph it is stipulated, as a novelty[8], that in the case of the institutional arbitration if the parties did not choose the arbitrators and the modality of appointing them, this will be done according to the procedural rules of that institution. In compliance with para. (2), compromise can be concluded even if the dispute is pending in another court[9].

We can notice that both the compromissory clause, and the compromise have to point out, under the sanction of nullity, in the case of ad-hoc arbitration, the names of the arbitrators and the modality of appointing them. The law does not require indicating the subject matter of the dispute also in the case of the compromissory clause because by definition this is understood, as the dispute refers to the disagreement of the parties regarding the contract in which that clause is inserted. In the case of the institutional arbitration, as regards the compromissory clause, it is sufficient the reference to the institution or the procedural rules of the institution organizing the arbitration. In the case of compromise, the appointment of the arbitrators and the modality of appointing them, in the absence of the parties' provisions, will be done in compliance with the procedural rules of that institution of arbitration.

The difference between the compromissory clause and compromise aims at the timeliness of the dispute. Thus the compromissory clause, also called arbitration clause, is an agreement previous to any dispute

[7] Article 343^1 (1) in the old Code of Civil Procedure did not include this provision.
[8] Article 343^2 in the old Code of Civil Procedure did not include this provision.
[9] Article 343^2 in the old Code of Civil Procedure did not include this provision.

between parties, unlike the compromise that has as object already existing disputes[10].

The compromissory clause represents a provision written in the main contract or in a distinct document, always previous to a dispute regarding the contract "*in which it is stipulated*" or "*in connection to it*" and through which arbitration is granted the jurisdiction to solve it.

The second form, the compromise, will have the same subject matter like the compromissory clause, the difference between them deriving from the different moments when they are agreed upon: the former anticipates the emergence of the dispute and is done at a moment when this is only a possibility, the latter coincides with the emergence of the dispute, which is a certitude, a real fact[11].

The rules of arbitration procedure of The Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania stipulate in art. 8 the two forms of the arbitration agreement: the compromissory clause and the compromise.

According to para. (2), through the compromissory clause the parties agree that the disputes that will emerge from the contract in which it is inserted or in connection with it should be solved by arbitration and, according to para. (4), through the compromise the parties agree that a possible dispute rising between them be solved by arbitration, indicating the subject matter of the dispute.

Besides them, para. (6) in art. 8 also stipulates another type of arbitration agreement – the implicit arbitration agreement – consisting of the claimant's referral application and of the respondent's acceptance that this application should be solved by the Court of Arbitration. We consider that the respondent's acceptance can also be tacit, resulting from procedural documents such as: nomination of arbitrators, filing the first statement of defence in which is not invoked the lack of competence of the arbitral tribunal or other similar documents.

As regards the form of the elaboration of the arbitration agreement, both the old[12] and the current Code of Civil Procedure and the Rules of arbitration procedure of The Court of International Commercial Arbitra-

[10] T.R. Popescu, *Dreptul comerţului internaţional (International Trade Law)*, second edition, E.D.P., Bucharest, 1983, p. 372.
[11] Monica Ionaş Sălăgean, *op. cit*., p. 44.
[12] Adopted through Law no. 59 on 23 July 1993, published in the Official Journal no. 177 on 26 July 1993.

tion stipulate the obligatoriness of its existence in writing, under the sanction of nullity.

Para. (2) of art. 549 establishes that, the existence of the arbitration agreement can also result from the written agreement of the parties in front of the arbitral tribunal and para. (6) of the Rules of arbitral procedure of The Court of International Commercial Arbitration state the following: the arbitration agreement can result also from the claimant's referral application and from the respondent's acceptance of this referral to be solved by the Court of Arbitration. The written form requirement is fulfilled through the referral application, which represents a written offer to solve the dispute by arbitration, followed by its acceptance through the first statement of defence or given in default, by recording it in the memorandum[13].

A novel stipulation that was received under certain conditions is included in art. 548 para. (2) in the Code of Civil Procedure. Thus, the mandatory requirement that an arbitration agreement be done in writing in front of a public notary is stipulated in the above mentioned article: in the case in which the arbitration agreement refers to a dispute connected to the transfer of the property right and/or constitution of another real right over immovable property, the agreement has to be concluded in an authenticated form at the public notary, otherwise it becomes null and void. If the requirement is not fulfilled, the arbitration agreement is null and void, and for the law it has never existed.

Although on the whole the regulation regarding the organization and development of arbitration is mainly procedural, it can be noticed that some norms belong to substantive law[14]. It is the case of the special provisions regarding the formation, the conditions of validity and the effects of the arbitration agreement. Thus, as through the arbitration agreement it is expressed an agreement of will of the parties as regards the resolution of an existing or future dispute by arbitration, the jurisdiction of the common law courts is denied, having the legal nature of a convention, this is concluded and enforced in compliance with the common law regulations, included in the Civil Law regarding the contracts[15], and

[13] Vlad Peligrad, Yolanda Ghiţă-Blujdescu, *Ghid practic privind redactarea clauzelor compromisorii (Practical guide regarding the elaboration of compromissory clauses)*, in Revista Română de Arbitraj no. 3/2014, p. 48.

[14] Viorel Roş, *Arbitrajul comercial international (International Trade Arbitration)*, R.A. Monitorul Ofixcial, Bucharest, 2000, p. 83.

[15] Thomas E. Carbonneau, *The Law and Practice of Arbitration*, Juris Publishing, 2004, p. 27.

the Code of Civil Procedure stipulates special provisions that are to be applied mainly in the case in which are made derogations from the common law.

Being a contract, the arbitration agreement must fulfill all the validity conditions required to any international trade contract: consent, capacity, subject matter and clause. If the consent and the case do not present particularities, capacity is established by the national law of the parties. Therefore, the provisions of the Code of Civil Procedure establish in art. 542 the disputes that cannot be solved by arbitration. These regard the civil status, the capacity of the persons, the inheritance debate, the family relationships and the rights the parties cannot exercise. In conclusion, except for the above mentioned disputes, can be solved by arbitration the disputes between the persons with full capacity of exercise and who made an agreement in this regard. So that a dispute represents the subject matter of the arbitration agreement, it should be susceptible to be solved by arbitration. Otherwise the arbitration agreement will be null and void having an illicit subject matter[16].

The arbitration agreement was characterized in the doctrine as a mixt[17] or hybrid institution[18], involving procedural and contractual elements.

The Romanian law-maker chose as regards arbitration agreement that the main provisions be those of the Code of Civil Procedure, not of the Civil Code. Certainly, the special provisions in the Code of Civil Procedure are completed with the general ones in the Civil Code[19].

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[16] Adrian Severin, *Elemente fundamentale de drept al comerţului internaţional (Fundamental Elements of International Trade Law)*, Lumina Lex Publishing House, Bucharest, 2004, p. 386.

[17] Radu Bogdan Bobei, *Arbitrajul intern şi internaţional. Texte. Comentarii. Mentalităţi (International and Internal Arbitration. Texts. Mentalities)*, C.H. Beck Publishing House, Bucharest, 2013, p. 257. According to this author, in the Romanian system of law, the arbitration agreement is not susceptible to be characterized exclussively as a procedural act or exclussively as an act of substantial law.

[18] Klaus Peter Berger, *Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?* in *International Arbitration 2006: Back to Basics*? I.C.C. Congress Series 2006, Albert van den Berg (ed), Kluwer Law International 2007, p. 1.

[19] Cosmin Vasile, Violeta Saranciuc, *Nulitatea absolută a convenţiei arbitrale încheiate fără autentificarea notarului – o extravaganţă a NCPC (The absolute novelty of the arbitration agreement without the notary authentication – an extravagance of the New Code of Civil Procedure)*, available on internet at http://www.juridice.ro/290727/nulitatea-absoluta-a-conventiei-arbitrale-incheiate-fara-autentificarea-notarului-o-extravaganta-a-ncpc.html.

As concerns the provisions of art. 548 para. (2), we consider that, even they are included in a regulation as regards a jurisdictional procedure, through their content they are norms of substantive law.

We consider that through this text of law the law-maker desired to emphasize the importance or the seriousness of the text, and if we take into account the provisions of art. 1242 para. (1) Civil Code [20], according to which "*Null and void will become the contract concluded in the absence of the form, which undoubtedly the law requires for its valid conclusion*", we infer that the law-maker wanted to establish an *ad validitatem* form.

Consequently, the case of nullity stipulated art. 548 para. (2) has the legal regime of any other nullity of substantive law, which involves that the nullity of the arbitration agreement could be invoked by any interested person. This condition, of an *ad validitatem* form authenticated by notary, can prevent the resolution of a dispute upon which the parties agreed to be solved by arbitration[21].

We consider that, in this case, the authenticated form is excessive, taking into account the fact that by the arbitration agreement the real rights are not changed or constituted, which is to be written in the real estate register, according to art. 1244 in the Civil Code: „*Except for the cases stipulated by law, there have to be concluded as an authenticated document, under the sanction of becoming null and void, the agreements that change or constitute real rights, which are going to be written in the real estate register*".

Consequently, it would be useful as a *de lege ferenda* proposal, the abrogation of the provisions of art. 548 para. (2), as there is no reason to preserve them. We should not forget that the UNCITRAL Rules of arbitration, which were reviewed and entered in force in 2010, eliminated, from the provisions of art. I(1), the obligatoriness of the conclusion of the arbitration agreement in written form.

The idea to give up the written arbitration agreement becomes more and more known at the international level, the oral form of the agreement gaining field. In this regard, the provisions of art. 548 para. (2) are excessive and unjustified and in contradiction with the international provisions in the field.

[20] Civil Code – Law no. 287/2009 regarding the Civil Code, republished in the Official Journal no. 505 on 15.07.2011.
[21] Cosmin Vasile, Violeta Saranciuc, *op. cit*.

The mandatory requirement that an arbitration agreement should be done "*in written form*" is expressly included in art. 1.112 in Chapter I *International arbitral trial*, in Title IV *International arbitration and the effects of the foreign arbitral awards*.

According to para. (1) of art. 1.112, the arbitration agreement is concluded validly in a written form, through facsimile, telegram, telex, telecopy, electronic mail or any other means of communication that allows establishing its evidence in a text.

The Rules of arbitration procedure of the International Court of Arbitration, stipulates in art. 8 para. (1) the obligatoriness of concluding the arbitration agreement in a written form.

The principles regarding the binding force and the effects of the arbitration agreement are expressly mentioned in art. 552-553 in the Code of Civil Procedure.

An element of novelty is introduced by the provisions of art. 552 entitled "*The efficacy of the compromissory clause*". Art. 552 establishes that "*the survival of the arbitration agreement*", as a compromissory clause, when the arbitration proceedings ended with or without a decision of the substance of the case[22]. Thus, according to the above mentioned provisions, the conclusion of the arbitration proceedings with or without a decision of the substance of the case does not harm the efficacy of the arbitration agreement under the form of compromissory clause. This will remain valid and will serve as a ground for any new arbitration proceedings that would be started on its grounds for solving any dispute between the parties, deriving from the main contract.

The arbitration agreement has as effect empowering an arbitration tribunal with the resolution of the dispute between the parties. The arbitration agreement produces effects also as regards the formation of the arbitration tribunal and the procedure that should be followed. All these effects derive from the content of the arbitration agreement to the extent to which such an arbitration agreement is not contrary to the public policy or to the morals[23].

If the parties consented to the submission to arbitration, the common law court does not have anymore the jurisdiction to judge that dispute. According to art. 553 in the Code of Civil Procedure, the conclusion of

[22] Gabriel Boroi, Octavia Spineanu-Matei, Gabriela Răducan, Andreia Constanda, Carmen Negrilă, Delia Narcisa Theohari, Marius Eftimie, Marcel Dumitru Gavriş, Veronica Dănăilă, Flavius George Păncescu, *op. cit.*, p. 35.
[23] Ioan Leş, *op. cit.*, p. 881.

the arbitration agreement excludes, for the dispute that makes its object, the jurisdiction of the courts. The same provisions are stipulated also in art. 10 in the Rules of arbitration procedure of the International Court of Commercial Arbitration.

Like any other court, the arbitral tribunal is also required to check its own jurisdiction. Thus, in compliance with art. 597 in the Code of Civil Procedure, at the first hearing, with the procedure legally fulfilled, the arbitral tribunal verifies its own jurisdiction to solve the dispute. If the tribunal decides that it is its competence, it records it in a decision that can be annulled only by setting aside claim, according to art. 608. If the arbitral tribunal decides that it is not its jurisdiction to solve the dispute, it records it in a decision against which cannot be made the setting aside claim stipulated in art. 608. Art. 45 in the Rules of arbitration procedure, entitled "*Verification of the jurisdiction of the arbitral tribunal*", established that: "*The arbitral tribunal verifies its own competence to solve the dispute and decides in this regard in an award that can be challenged only by the setting aside action against the arbitral award*".

In compliance with art. 554 para. (2), in the common law court will retain the case to be solved if:

a) the defendant formulated the substantive defence without reservations based on the arbitration agreement;

b) arbitration agreement is null and void or inoperative;

c) the arbitral tribunal cannot be formed from causes imputable to the defendant.

The above mentioned situations are strictly stipulated by law and therefore are of limited interpretation. In all the other situations, the court, at the application of one of the parties will declare its lack of jurisdiction if there is an arbitration agreement.

The Code of Civil Procedure establishes, in para. (3) of art. 554, the competent institution able to solve a possible conflict of jurisdiction. In this case the text mentions that a conflict, between a court and an arbitral tribunal, will be solved by the superior hierarchical court.

The principle of the autonomy of the compromissory clause is stated in art. 550 para. (2) and in art. 1.112 para. (3) of the Code of civil procedure.

This principle is reiterated within the rules of procedure of many institution of arbitration, being considered by some tribunals a *lex mercatoria*.

The independence of the compromissory clause from the contract that included it is a functional one, in the sense that its efficacy is not influenced by the timeliness of the contract of international commerce.

Yet, the compromissory clause is relatively autonomous from the contract in which it was inserted, because it cannot be conceived in the absence of the reference to the contract.

As regards the law applicable to the arbitration agreement, as in the case of other contracts the parties are free, on the grounds of *lex voluntatis* to choose the law governing the arbitration agreement.

According to art. 1.119 para. (1) in the Code of Civil Procedure, the arbitral tribunal will be solve the dispute between the parties, and if the parties did not specify the applicable law, it will choose the law that it considers appropriate, in all the situations taking into account the customs and the professional rules. Para. (2) establishes the possibility of the arbitral tribunal to decide in equity, but only with the express authorization of the parties.

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ROMANIAN HEALTH SYSTEM REFORM – CERTAINTIES AND EXPECTATIONS

Diana Loreta PĂUN *

ABSTRACT
A real reform of the health system must first harmonize Romanian legislation in the field of healthcare with the European law frame, so that the health system in Romania will always provide quality health services and the patient is receiving health care needs and various forms at all levels of care. Incoherence and legislative instability do nothing but threatening the system which must ensure improved health status of the population of Romania.

KEYWORDS: *Health system, legislation, reform*

INTRODUCTION

Health system includes all independent elements that affect health on both the individual and population level (community) and includes health determinants and health care system.

Health involves individual welfare function, the body's ability to adapt to varying conditions of life and work and the human condition that makes one creative[1]. Achieve the highest standard of health is one of the fundamental rights of every human being, regardless of race, religion, political belief, economic and social status.

Human health appears to be threatened by many factors, which induce problems for each individual and for human society as a whole. Even if the progress of medicine and the natural development of the civilization of mankind led to the increase in life expectancy at birth in the world, we are facing a sharp decline in the birth rate for civilized countries and a decrease in fertility, with obvious consequences for society.

As a result, each State has to promote a health system in order to ensure the health of the population as an essential component of increasing longevity and quality of life. Thus, decision makers at all

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[1] Minca D., Marcu M., *Sănătate Publică şi Management Sanitar,* Ed. II, Bucureşti, Ed. Universitară Carol Davila, 2005.

levels must be aware of the importance of health as generating labour and health insurance to become not only a subject of social policies but a long-term investment objective. This requires a solid and stable legislative framework and objective measurement of health system performance.

There is a wide variation in terms of health results for countries with similar level of civilization, with some differences due to the performance of the health system. The differences are of a legislative nature, form, or content management and translate the differences in social outcomes such as morbidity assessed, responsiveness to people's expectations, equity.

An important problem on highest level of national health care strategies for Romania is to reduce the gap between its system and similar European countries.

The Romanian health system, similar to other European systems, will have to increase its transparency, to provide enough information to the patients in order to take informed decisions when they are choosing a health care provider, hospital or alternative treatment. This should include information on system performance regarding medical safety, evidence-based practice and patient satisfaction.

For a proper allocation of the diagnosis and treatment methods, all medical decisions taken by the health system will be based on the best scientific knowledge available at the time. Thus, a better fit of health care needing for population is achieved, in the same time with direct accountability of the decision makers.

Evolution of the health services system in Romania

The health care system includes all the human, material, financial, and symbolic information used in various combinations to produce the care and services that aim to improve or maintain health.

Health care system in Romania has undergone in the last two decades a transition from the integrated model, in which health care providers were public property under the Ministry of Health to the model of contractual healthcare providers, private or public, binding the health insurance funds with the basic legislative framework contract which regulates medical assistance[2].

[2] Şcoala Naţională de Sănătate Publică şi Management Sanitar – *Managementul Spitalului*, Ed. Public H Press, Bucureşti, 2006.

This process of replacing the integrated health system with a contractual one was made possible by legislative changes. The most important legislative changes have been Law 74/1005 regarding the organization of the Romanian Medical College, Law 145/1997 on health insurance, Law 100/1997 on Public Health, Law 146/1999 regarding the organization of hospitals. The health reform process was widely resumed by reviewing all legislation on health care matter and by adopting of the Law 95/2006.

Analysis of the Romanian population health

Romania's population has declined substantially in the last decade, from 21.6 million people (2002) to 20,100,000 people (2011), due to negative balance of births and deaths and due to external migration[3].We can say that population decline may be the result of several mechanisms: a declining birth rate and maintaining it at a level below that of mortality, increased mortality and external migration and negative natural growth greater than all these mechanisms acting after 1989.

Life expectancy at birth was a positive development in the past 20 years, reaching 70.1 years for men and 78.2 years for women – however, it is much smaller than that of Western European countries[4].

The general trend of population is to get old by reducing the share of young population and increasing share of the population over 60 years to 20.8% in 2012.

The patterns of morbidity and mortality in Romania have also undergone important changes in recent decades to increase the prevalence of chronic disease and mortality in these cases, because the growth of the elderly population, coupled with the action of multiple risk factors, biological, environmental, behavioural, and socio-economic impact and healthcare. However, in terms of health, the Romanian population presents some of the most unfavourable indicators across Europe.

The morbidity and mortality data show a mixture of specific indicators for developed countries, such as increased mortality from cardiovascular disease and cancer with specific indicators in developing countries such as infectious diseases, from tuberculosis to sexually transmitted

[3] Gheţău V., *Declinul demografic şi viitorul populaţiei României*, Ed. Alpha MDN, 2007.
[4] Eurostat, 2011.

diseases. Although infant mortality - one of the most suggestive indicators of health - has declined, reaching a value of 9.4 deaths per 1,000 live births, this health indicator remains the highest across the European Union[5].

The health of our population is influenced by both social-economic and behavioural factors in the physical environment and working life and individual characteristics. Behavioural factors known to impact on health (smoking, alcohol, diet, obesity and physical inactivity) greatly influence the health of the Romanians, with different impacts by gender.

A great influence on health indicators has but health care system performance, which can be appreciated through improved health, increased capacity to respond to the expectations of the people and ensuring equity in terms of financial contribution[6].

The indicator used to assess the comparative ability to meet the needs of the beneficiary is the percentage of self-reported unmet medical needs which Romania is 11.1% in 2011, compared to 0.4% in Norway and Austria and 7% in Bulgaria[7].

Romania is among the last places in Europe from a consumer of health services related to the financial allocation to health per capita. Expenditure in the health sector in Romania was traditionally lower than the European average. However, in recent years health budgets have increased in absolute terms from about 90 Euro/capita at over 200 Euro/capita. Despite this growth, Romania remains one of the last places in the European Union on health resources.

Romanian health system problems

Current problems of the health system in Romania are multiple and related legislative sphere, organizational, financial, and not least of human resources.

Law governing current healthcare system is the Law 95/2006 on healthcare reform, which at the time of publication, it has undergone many amendments, changes and additions, which argues instability in the system and prevents shaping a coherent long-term health care. In 2006

[5] Europeristat, EUROPEAN PERINATAL HEALTH REPORT, Health and Care of Pregnant Women and Babies in Europe 2010.
[6] Murray, Christipher JL, Frenk J., *A framework for assessing the performance of health systems*, Bulletin of the World Health Organization, 2000, 78 (6).
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Act 95 brought the breath of real reforms in the system, each chapter addressing a whole new perspective of medical services.

Numerous attempts to amend the legislation, some of them contradictory, decreased over time not only the confidence of both patients and stakeholders in system but the ability of decision makers to initiate and implement real reform oriented and patient's needs.

At that moment, instability of the legislative and multiple direction changes in the structure and role of the health system is the issue of principle that we can identify in the Romanian health sector. To this is added: institutional centralization and lack of real autonomy of hospitals which lowers their ability to respond to social conditions and changing market, the lack of national and regional plans related to health services and lack of a financing of hospital activity to stimulate efficient use of allocated funds and increase quality of care.

Health reform in Romania cannot be achieved as long as there is no continuity. The 25 ministers who have led the health system over the past 20 years have never continued a program started by his predecessor, each warrant making changes sometimes contradictory and incomprehensible.

In fact the crisis of health care reform consist of little restructuring, excessive bureaucratization, overloaded, lack of a coherent strategy and consistency of the real needs of people and resources.

We can add legislative issues, organizational, financial and staffing problems: significant deficits in terms of total number of health professionals imbalances on territorial distribution of health personnel required and in terms of the division between different professions and specializations lack of an adequate health staff motivation which leads both to decreased attractiveness for entry into the system and increase the number of those who leave.

Lack of adequate health staff motivation leads to informal payments, currently known as pervasive in the health sector. They limited and difficult access to certain services, particularly hospital medical services.

International experience in the problem of informal payments in the health system shows that an increase in staff salaries is a necessary but not sufficient. To eradicate or reduce the phenomenon are necessary legislative measures to impose sanctions against those who clear the medical condition of an informal payments, the introduction of mechanisms to formalize some informal payments, stimulating the development of the private health sector, both private health insurance, the provision of health services and changing service payment systems to encourage efficient and professional performance.

Health system issues inevitably lead to deterioration of health of the nation and as such we appreciate that failure to correct these problems has direct consequences for national security.

As a result, Romania's health system needs structural reform to ensure all citizens, especially vulnerable groups equitable access to quality services and cost effective.

Expectations on healthcare reform in Romania

The strategic goal of a real health reform should be increasing the quality of life of citizens by improving the health of the population. Romanian legislation should support economic and organizational efficiency of the medical system. The legislative framework should provide encouraging professionalism and dignity of the medical profession by rewarding performance, allow diversification of financing methods depending on the performance and quality of care but also to enforce transparency in the use of public funds.

The Ministry of Health, as a specialized structure of the central public administration is the central authority in the field of public health care. Ministry of Health develops policies, strategies and action programs in the field of health, in accordance with the Government Programme, coordinates and controls implementation of policy, strategies and health programs at the national, regional and local level. The principle underlying the strategy to achieve the objectives in health care refers to placing the patient at the centre of health system decision-makers with responsibility before it.

According to the National Health Strategy 2014-2020, Ministry of Health mission is to establish strategic directions and work in cooperation with relevant actors in the system to ensure equitable access to quality health services, cost-effective, as close as possible individual and community needs.

Basic principles of the Health Strategy, strategy that both patients and professionals have a legitimate expectation system are: equitable access to essential services, cost-effectiveness, reliance on evidence, optimizing health services, focusing on services and preventive interventions, decentralization, partnership with all institutions that can contribute to improving health, said the aim is to improve the health status of the Romanian population[8].

[8] National HealthStrategy 2014-2020 "Health Prosperity".

Core values on which the Ministry of Health supports its vision for the future are[5]:

- communication and transparency
- commitment to national strategic directions
- value for money invested
- equity
- continuous improvement
- health decentralization and community empowerment and involvement
- empowering staff health
- professional ethics
- raising awareness and empowering the individual.

Supporting these values involves the principles in: decision on national health priorities and develop health services must be made openly, in consultation with key stakeholders in the system and communication to medical staff and community motivation; is necessary to involve plurisectoral and interdisciplinary firm of Government, Ministry of Health, health staff and local communities in the implementation of strategies in the system; have provided an optimum between health expenditure and the benefit obtained while increasing access to health services for all, especially for the vulnerable; value, rewarding, and adequate training of medical personnel must be followed by an attitude and professional and ethical conduct of medical staff to the patient.

A valid Strategy has to proposes a series of ambitious targets, such as the development of new services such as the health community, strengthening the role of primary care and outpatient care for older people in response to demographic changes expected, but and improving quality and efficiency in healthcare through solutions related to investments in human resources, high-performance technologies and infrastructure. A robust infrastructure, including both medical and communications network and related information storage is a necessity for the collection, dissemination and effective use of health information. Promoting an efficient information system should be seen as a central factor in the decision making process and planning of health services, which must be based on quality information, received in a timely manner.

CONCLUSION

On certain priority areas necessary strategies to the needs existing in Romania, beyond assumptions or our obligations in the European context, assumptions that come to potentiate the overall strategy in the health sector.

Adapting to European legislation requires health care services but that quality assurance becomes fundamental, safety will become a basic feature of the health system. Thus, reducing risk and ensuring patient safety should be supported by information systems and procedures and quality monitoring system, which will help to recognize, prevent and reduce errors.

The efforts of the whole society must always be directed towards health promotion aimed at increasing people to be healthy, fit to participate in society and is achieved by developing sanogenetic measures the contribution of all sectors of the community and social groups.

Such health system reform will improve health indicators nationally and close the gap in health status compared with the EU average.

Thus, a national long-term care services on a system of financing medical sector to stimulate efficient use of allocated funds, the presence of clear criteria for assessing the performance of health professionals especially setting a clear direction on the structure and role Romanian health system will make it an effective and sustainable health system, seamlessly integrated into Europe.

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PROCEDURAL ISSUES IN THE PREVENTIVE DETENTION FIELD

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ABSTRACT
The preventive measures are institutions of penal law procedures with a nature of constraint. The purpose of the preventive measures is to ensure that the penal trial is well carried out, or to prevent the suspect's or defendant's avoidance of legal prosecution, trial or sentence, or to prevent new crimes.

KEYWORDS: *preventive measures, defendant, judge of rights and liberties, court, appeal*

I. Concept

The purpose of the new Code of penal procedure is essentially to create a modern legislative framework in the procedural penal field which will be fully suited to meet the imperative requirements of a functioning modern justice, adapted to the social expectations as well as to the necessity of a better quality of this public service

The preventive measures regulated by the new Code of penal procedure are:

- custody;
- legal supervision;
- legal supervision on bail;
- house arrest;
- preventive detention.

The preventive detention measure is a freedom deprivation measure which consists of depriving *the* defendant of freedom for a limited period of time to ensure that the penal trial is well carried out, or to prevent the suspect's or defendant's avoidance of legal prosecution, trial or sentence, or to prevent new crimes.

Unlike the old procedural penal legislation which allowed the ruling of preventive detention for the accused (a similar notion for suspect), the

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current procedural penal legislation allows the ruling of this measure ***only for the defendant***.

II. Conditions

The measure of preventive detention can be ruled if the following conditions are met cumulatively: there must be evidence from which the reasonable suspicion that a person committed a crime results;

Evidence is any de facto element which helps to discover the existence or non-existence of a crime, to identify the person who committed it and to know the necessary circumstances for the just solving of the case, and which contributes to finding out the truth in the penal trial [art.97 paragraph (1)].

Unlike the preventive measure of custody or legal supervision which can also be taken on the basis of thorough clues regarding the commission of a crime, the preventive measure of preventive detention ***can only be ruled on evidence***.

It must be proportional to the severity of the accusation brought to the person for whom it is taken;

According to art. 23 paragraph (1) from the Constitution of Romania, ”one’s freedom and safety are intangible”.

The right to freedom is also guaranteed by the European Court of Human Rights in art.5.

When the designated judicial body rules a preventive measure, they must analyze which of the measures stated in the Code of penal procedure in art. 202 is fit, assessing in each solid case the severity of the deed, its modus operandi and circumstances, the entourage and the environment of the defendant, the defendant’s criminal record and other facts related to the defendant.

After the analysis of such circumstances, the judicial body must rule the preventive measure which will ensure that the trial will run its course, that the suspect or the defendant will not avoid legal prosecution or will not commit another crime.

- There must not be an obstacle for the initiation or the exercise of the penal action;

The cause which prevents the initiation or the exercise of the penal action is stated in the Code of penal procedure art. 16.

The penal action is initiated by the prosecutor, by decree, during the prosecution, when the prosecutor discovers that there is evidence from which results that a person committed a crime and there is none of the cases of obstruction stated at art. 16 paragraph (1).

The person against whom the penal action is initiated becomes part in the penal trial and is called defendant (art.82 Code of penal procedure).

The measure of preventive detention cannot be ruled *before initiating the penal* prosecution, or against *a suspect*.

- The preventive measure of preventive detention ***is a measure which can be ruled exceptionally*** when after the analysis carried out by the judicial body it is discovered that the other preventive measures stated by the law are not sufficient and necessary to ensure that the trial will run its course, that the defendant will not avoid legal prosecution or will not commit another crime.

The nature of exception regarding the preventive measure of preventive detention also results from the way legal texts which define the conditions which allow for the ruling of preventive measures are written. Thus, art. 211 para. (1) States "… the measure of legal supervision… ***if it is necessary for achieving the purpose*** stated in art. 202 para. (1)", art. 216 para (1) states "….the measure of legal supervision on bail….***if it is sufficient for achieving the purpose*** stated in art. 202 para. (1)...", art. 218 para. (1) states "the measure of house arrest ...***taking this measure is necessary and sufficient for achieving one of the purposes*** stated in la art. 202 para. (1)", and art. 223 para. (1) and (2) which regulate the conditions for ruling the measure of preventive detention no longer requires the analysis of the necessity and sufficiency by the fact that it is a measure which can only be ruled exceptionally, when the other preventive measures are not necessary and sufficient for the achieving or the purpose stated in art. 202 para. (1).

According to the dictionary definition, ***necessary*** means "**-** 1. absolutely needed, so important that you must have it or do it. The necessary = whatever is needed for some purpose. 2. Logically unavoidable and ***sufficient*** means enough to meet the needs of a situation or a proposed end".

According to basil rules of logic, the following relations exist:

1. a necessary thing is not always sufficient as well;
2. a sufficient thing can also be necessary;
3. a necessary and sufficient thing always corresponds to the needs.

If from the analysis carried out by the judicial body results that no other measure stated in art. 202 para. (4***) is necessary and sufficient*** for the trial to run its course, for the defendant not to avoid legal prosecution or not to commit another crime and taking the preventive measure of preventive detention ***is necessary***, the judge of rights and liberties, during penal prosecution, rules the measure by court decision, in the advising chamber procedure, the preliminary board judge rules by court decision, ex officio or on prosecutor's proposal, the preventive measure, and in the course of the trial, ex officio or on prosecutor's request, the court which judges the matter on trial rules by court decision the preventive measure.

- one of the following situations must occur:

1. The defendant fled or hid in order to avoid penal prosecution or made preparations of any nature for such acts;

The danger that the defendant can flee or hide cannot be assessed only in relation to the severity of the punishment which the accused can receive, but also to the character of the respective person, their morality, domicile, profession, financial resources, family relationships, connections of any nature with the country where the penal prosecution is carried out, can confirm or not the existence of such danger; this danger decreases along with the time spent in preventive detention, thus a motive which initially justified taking the measure, in time can no longer be sufficient for keeping the person in detention [2].

2. The defendant tries to influence another participant into committing the crime, be it a witness or an expert, or to destroy, alter, hide or steal material evidence or determine another person to have such behaviour;

3. The defendant puts pressure on the aggrieved person or tries to make a fraudulent deal with them;

I acknowledge that this case is not applicable when settlement intervenes between the defendant and the aggrieved person, or the latter withdraws their early complaint, even if there were a patrimonial agreement at the basis, because the new legislation states a special case of non-punishment, thus an agreement of such sort being allowed by the penal legislation. According to art. 272 penal Code, "The patrimonial agreement between the defendant and the aggrieved person is not a crime if it occurs in the case of crimes for which the penal action is initiated after the early complaint or for which settlement intervenes."

4. There is the reasonable suspicion that, after initiating the penal action against him, the defendant intentionally committed a new crime or makes preparations to commit a new crime.

The second thesis of the above situation should be used cautiously by the judges and only when a high probability regarding the risk of committing a new crime results from the evidence administered in the case. The case at point 4 could be incidental when the judicial bodies discover preparatory acts, or the suspicion of preparing to commit a new crime results reasonably from phone tapping, statements of witnesses, undercover investigators or parties.

The measure of preventive detention for the defendant can also be taken if the evidence leads to the reasonable suspicion that he committed an intentional life-threatening crime, a crime which lead to bodily injury or death of a person, a crime against the national security stated by the penal Code and other special laws, drugs dealing, guns trafficking, human trafficking, acts of terrorism, money laundering, falsification of money or other values, blackmail, rape, freedom deprivation, fiscal evasion, assault, judicial assault, a crime of corruption, a crime committed through means of electronic communication or other crimes for which the law states imprisonment for 5 years or more and, after assessing the severity of the deed, the mode and the circumstances, the entourage and the background, criminal status and other circumstances regarding the defendant, it is discovered that his deprivation of freedom is necessary in order to eliminate a state of danger for the public order.

III. Procedural aspects

Regarding the first controversial procedural aspect, in the judicial practice more solutions have been adopted, the first one being to manage any kind of evidence at the moment the proposal of preventive detention is solved, the second being to manage by way of exception some pieces of evidence which would obviously show that the proposal of preventive detention is not well-founded, and the third which claims that no evidence can be managed when solving the proposal of preventive detention filed during prosecution.

Therefore, regarding the first solution adopted by a part of the judicial practice, I must mention that it is supported by the fact that the judge, being invested with judging a case, can manage any evidence in order to

establish the truth of the state of fact, even when it refers to whether the proposal of preventive detention is well-founded or not.

Another argument for this solution would be that the judge, as a guarantor of respecting the right of defence and equality of arms, must give the defendant the right to propose evidence and manage it at any given time during the prosecution or trial.

We shall also mention as an argument art. 10 paragraph (5) Code of penal procedure which refers to the fact that the judicial bodies, in this case the judge of rights and freedoms, have the obligation to ensure the full and effective exercise of the right to defence, so they will have to grant the probatory requests addressed by the defendant or his lawyer, which serve to prove a certain state of fact.

As to the second solution, the one to manage during the solving of the preventive detention proposal, only by way of exception, some pieces of evidence which could establish that the preventive detention measure is not necessary, there are more arguments which, once the new Code of penal procedure has been in effect and with the new view regarding separation of the judicial functions, have become difficult to dispose of.

A first argument and the most difficult to challenge in favour of this solution is that, according to the provisions of art. 3 Code of penal procedure, the judicial functions are separate, therefore the judge of rights and freedoms has attributions of ruling exclusively on acts and measures within the prosecution, which limit the fundamental rights and freedoms of the person and not on establishing the necessity of managing evidence.

Furthermore, we have discovered that the law does not forbid expressly the management of evidence within the procedure by which the preventive detention proposal is solved.

Indeed, it has been accepted that if a certain piece of evidence, for example the declaration of a witness or a certain document proves to be important to establishing the necessity of taking the preventive detention measure and could lead to the turnover of the reasonable suspicion that the defendant is the person who committed the crime, it could be managed by the judge of rights and freedoms. This piece of evidence must be connected to the solving of the preventive detention proposal and not only with the delivery of a judgement of first instance in the case; however, nothing excludes that piece of evidence to be used for the delivery of a judgement of first instance in the case.

Another argument of the same importance arises from art. 225 Code of penal procedure, which states expressly that the judge of rights and

freedoms has the obligation to solve the preventive detention proposal and not to manage evidence which would help the delivery of a judgement of first instance in the case.

We equally consider that art. 224 and art. 225 Code of penal procedure which in their contents refer to the fact that the case file are to be made available to both the defendant and his lawyer for study is an argument in favour of this solution because from these legal dispositions results that the judge of rights and freedoms, in general, will solve the proposal only based on evidence from the file until that moment, without considering other evidence which could be managed in the case.

Concurrently, in favour of this solution adopted by the judicial practice is the jurisprudence of the European Court of Human Rights, case Creangă vs. Romania, which holds that one should not always apply rigorously the principle affirmanti incumbit probatio (the evidence goes to that who claims); thus, if a defendant claims that a certain piece of evidence which is at the basis of the preventive detention proposal is not legally managed, the judge has the obligation to manage other pieces of evidence in order to establish the truth of those claimed by the defendant.

Moreover, if the possibility to manage evidence at the time of solving the preventive detention proposal were unacceptable, that some arbitrary deprivations of freedom would be possible, this is contrary to the provisions of the Code of criminal procedure and to the European Convention of Human Rights.

Regarding the third solution proposed by the judicial practice, namely that no evidence can be managed during the solving of the preventive detention proposal filed during prosecution, there are some of the arguments expressed in favour of the second solution and the text arguments from art. 3 and 225 Code of penal procedure which clearly delimitate the attributions of the judge of rights and freedoms at the moment of solving the preventive detention proposal.

Another argument is that art. 287 paragraph 2 Code of penal procedure which shows that the prosecutor will send copies numbered and certified by certificate of registry on the documents of the file or only on those connected to the filed proposal, could be interpreted that the judge of rights and liberties can solve the preventive detention proposal only on the basis of the already managed evidence, no longer being able to manage other evidence.

To sustain this opinion one brings the argument that there is no procedural framework which stipulates the possibility of managing

evidence in a procedure with which the preventive detention measure will be solved, since it is not the prosecution stage, nor the stage of the delivery of a judgement of first instance in the case so as managing evidence should be possible.

Concurrently, this opinion holds that by managing other pieces of evidence in the preventive detention procedure one can assess the merits of the allegation brought to the defendant and implicitly an early judgement of the case.

Taking into consideration the arguments expressed for the second opinion as well as the basic principles in the new Code of penal procedure referring to taking the preventive detention measure, namely that no one should arbitrarily be deprived of liberty, I acquiesce to the second solution, respectively that the judge of rights and freedoms can manage evidence only by way of exception during the solving of the preventive detention proposal, these pieces of evidence having to establish if the preventive detention measure is necessary and well-founded or not.

Another controversial aspect of procedural order is represented by the fact that, if at the moment of judging the preventive detention proposal the judge of rights and freedoms can exclude evidence unlawfully managed, it shows that in the judicial practice there were two solutions, the first by which it was admitted that the judge, in the case on view, can exclude the evidence unlawfully managed, and the second, which holds that excluding unlawfully managed evidence is a sole attribution of the first instance judge and not of the judge of rights and freedoms.

When considering the first advanced solution of judicial practice one takes into account the arguments which enable the judge, in any situation, to assess the lawfulness of the managed evidence and its exclusion, such as it is stipulated in the provisions of art. 102 paragraph 2 Code of penal procedure.

Another argument was that the firmness of taking the preventive detention measure cannot rely on unlawfully managed evidence, therefore the judge is obligated to exclude it from the file so as it cannot influence taking the measure.

Regarding the second solution from the judicial practice, namely that at the time of solving the preventive detention proposal the judge of rights and freedoms cannot exclude unlawfully managed evidence, I will show that the main text argument which favours it is art. 3 paragraph 5 and paragraph 6 Code of penal procedure which describes in detail the separation of judicial functions, respectively the attributes of the judge of rights and freedoms compared to those of the first instance judge.

Comparing those two legal texts mentioned before, the judicial practice which favours this solution concluded that the exclusion of unlawfully managed evidence is the exclusive attribute of the first instance judge, at the moment of solving the preventive detention proposal the judge of rights and freedoms not having the possibility to exclude unlawfully managed evidence, him being obligated, such as the provisions of art. 225 Code of penal procedure state, to rule only with regard to the preventive detention proposal.

Another argument is represented by art. 225 Code of penal procedure which, as shown before, does not offer the possibility for the judge of rights and liberties to rule with regard to the lawfulness of the evidence, but only to solve the preventive detention proposal.

This solution has been adopted by the most part of the judicial practice which also gave us an answer to the question what will a judge of rights and freedoms do if at the preventive detention proposal he finds in the file unlawfully managed evidence during prosecution.

The answer is that the judge of rights and freedoms will not refer to those unlawfully managed pieces of evidence at any time during the justifying concluding the preventive detention, will not exclude them but will solve the preventive detention proposal ignoring those pieces of evidence, since the obligation to exclude them goes to the first instance judge.

Taking into account that the new Code of penal procedure indubitably clarifies, in art. 3, the issue referring to the separation of the judicial functions and, as a consequence, the competence of the judge who can exclude the unlawfully managed evidence at the time of solving the preventive detention proposal, we hold that the second opinion expressed in the judicial practice is the correct one, therefore we acquiesce to it.

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THE HARMONIZATION OF THE ROMANIAN LEGAL SYSTEM TO THE EUROPEAN LAWS

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ABSTRACT
Creating the European internal market, having similar properties for all the professional traders, based on the freedom of movement and equivalent customs duties and regulations, represents the background of all economic activities within the European Union.
The European institutions have regulated the company law within the European Union indirectly, by issuing directives (leaving to the member states the task to achieve the objectives, as a teleological obligation) and directly, by regulations, on the one hand, and by European Court of Justice decisions, on the other hand.

KEYWORDS: *company law, the harmonization of national law, law uniformity*

1. The harmonization of national law and its compliance to the European legal system, as well as the European Union accession, represents a **complex, long-term and unavoidable process.**

For Romania, legal compliance and uniformity are a necessity arising first of all from its **fundamental option to reform and create a market economy**, and, at the same time an **obligation Romania took on by the European Agreement**, which created an association between Romania, on the one hand, and the European Union and the member states on the other hand, and which has been ratified by Law no 20/1993. Chapter III of the Agreement is solely dedicated to the legal uniformity.

According to art.70 of the Agreement, ***the legal uniformity and harmonization was closely related to***: the tax law, the **company law**, the banking law, company accounts and taxes, intellectual property, labour and social protection, human health and life protection, animal and plant protection, consumer protection, direct taxing, technical standards and

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norms, laws and regulations regarding the nuclear activities, transport and environment.

Each negotiation step (e.g. opening, temporarily or permanently closing a chapter) took shape within the Adherence Conference.

a) opening a negotiation chapter was conditioned by adopting the Community acquis and by the plans to implement the remaining acquis during the following period of time

b) closing a negotiation chapter implied significant progress in acquis adoption, the existence of an „management capacity", meaning institutions which had human and financial resources to implement and supervise law appliance and, on the other hand, a strong and complete commitment to adapt and implement the remaining acquis.

A fundamental criterion, which was also mandatory for Romania's accession to the European Union was expressed by the European Council in Copenhagen in June 1993. This criterion refers to Romania's **ability to assume and take on the obligations implied by becoming a member of the European Union**, namely the obligation to fully take and adapt the community acquis in the national law by the moment of the official accession.

This is why, in Law no 24/2000 regarding technical legal provisions is issuing laws, we can find the statement of reasons and the founding notes which have to clearly mention the compatibility between the national law and the European provisions and, if necessary, the following measures to achieve uniformity

The law uniformity and harmonization is a **continuous, ongoing process** closely linked to the European Union accession, and it implies good knowledge of the European legal system, adapting it to national realities and ensuring a coherent new legal system[1].

Through the **TAIEX Office** (Technical Assistance Information Exchange Office), the European Commission initiated *an instrument of monitoring the legal harmonization and levelling process* within associated countries.

Information found in the "**Armonograma**" database is updated every month by the Romanian institutions and is sent to the TAIEX Office every two months.

For each Community regulation we can find the following information: the corresponding Romanian regulation, the stage (is it just an

[1] Andrei Popescu, *Bringing the national law close to the European provisions*. http://mdrl.ro/_documente/info_integrare/romania_si_viit_europei/armonizarea.htm

initiative, a bill or a law), the date when it was adopted, the authorized institution and the degree of uniformity (complete uniformity or partial).

At the present TAIEX (*Technical Assistance Information Exchange Office*) is the tool or instrument used for technical assistance and information exchange, within the Directorate-General for Enlargement, which offers support to the European Union partners (states) to adapt, apply and respect E.U legislation.

The purpose of this instrument is to assist beneficiaries, meaning the European states, to bring the national law close to the acquis, to the European policies and procedures and it is first of all designed to help the acceding countries and its neighbours through ENP (the European Neighbourhood Policy), but also the new member states during the first years.

National contact points for TAIEX are placed in the states which benefit TAIEX assistance, but also in the states which provide assistance (such has been the case of Romania since 2010), and they constitute the national contact points network. They monitor TAIEX activities and also communicate with the national experts participating at TAIEX events and the European Commission members responsible for organising events and clarify any management problems. Romania participates within TAIEX by national experts as lecturers and specialists and they convey to the beneficiary countries their experience and examples of good practice. Moreover, national authorities may accept and organize working visits for foreign experts.

„Armonograma" is structured on the European acquis chapters, as well as on the chapters of the White Paper. This monitoring instrument shows that, up to the present, the percentage of implementing the internal market acquis is around 80%. There are areas where the progress is even more significant, **reaching even 100%,** and we could mention the laws on competition, on companies, on copyright and on labour.

Within the European Union, the **White Paper** is defined as a document issued by an European institution which draws the main lines within a certain domain of activity and also establishes the measures and actions that have to be taken in order to achieve an important goal for the European Union[2].

The Department for Law Harmonization (DAL) is **the National Contact Point for TAIEX Office under the European Commission** and as such it attends the annual meeting of contact points organised by

[2] http://www.europa.eu.int/scadplus/glossary/index_en.htm.

the European Commission which intends to inform on TAIEX evolution and priorities. The main DAL objective is to ensure the compatibility of the Romanian legislation to the European one, and thus contributing to the establishment of a modern and coherent legal frame and to the fulfilling of the obligations Romanian has as an European Union member state.

1.1. European Commission publicised in October 2013 *the 30th Annual Report on monitoring the application of Union law*[3]. It[4] highlights/emphasizes the results member states have obtained as far as the application of Union law is concerned, during 2012.

According to the report, starting with January the 1st 2007 and up to the mentioned date, European Commission initiated 425 infringement proceedings caused by obligations neglect (non-fulfilment); 382 were dismissed, and in one case the European Union Court of Justice ruled in favour of Romania by declaring the Commission case-case C-522/09, European Commission versus Romania as inadmissible, case which pursued Romania for obligations neglect-possible breaking of art.4 par. (1) and (2) of Directive 79/409/CEE on preserving wild birds.

At the moment, there are 42 proceedings (cases). 40 of them are in a pre-pending stage and two of them are pending-case C-405/13 European Commission versus Romania and case C-406/13 European Commission versus Romania. Most cases regard the environment and taxes.

We could mention some of the cases where the Romanian authorities had talks with the Commission: the project regarding the Sulina beach improvement, interdictions on natural gas export, the access to gas pipelines, implementing the Directive on data saving, taxing legal offices of foreign companies registered in Romania, etc.

According to the report, **up to present no verdict was issued against Romania for breaking the treaties it has joined.**

1.2. *The 31st Annual Report on monitoring the application of Union law*[5] publicised on October 10th 2014 analyses the results obtained regarding essential aspects on E.U. law application during 2013 and it highlights a series of strategic elements.

[3] http://www.mae.ro/node/22696.

[4] http://ec.europa.eu/eu_law/docs/docs_infringements/annual_report_30/com_2013_726_fr.pdf.

[5] http://ec.europa.eu/transparency/regdoc/rep/1/2014/RO/1-2014-612-RO-F1-1.Pdf.

The Commission finds that slow or late application of the Directive continues to represent a problem which prevents citizens from having practical (tangible) benefits.

The number of pending infringement proceedings due to obligation non-fulfilment by Romania was 20, on December 31st 2013.

Based on art. 260 par. (3) in TFUE (Lisbon Treaty on E.U.), if the Court of Justice is referred to according to art. 258 in TFUE on infringement proceedings for late application of European law, the Commission may propose financial penalties without having to wait for a Court decision. The purpose of this new element found in the Lisbon Treaty is to motivate member states to apply the European directives within the terms established by the legislator. The Commission decides on the penalty amount.

In 2013 the Commission continued to refer to the Court of Justice regarding cases of obligation non-fulfilment due to late application, and claimed daily payments /penalties based on art. 260 par. (3) in Lisbon Treaty. In 2013, 14 such decisions were imposed on 9 member states: Belgium, Bulgaria, Estonia, Romania, The United Kingdom (two cases each) and Austria, Cyprus, Poland and Portugal (one case each).

The amount of daily penalties proposed varied from 4,224 to 148,177.92 euros.

Most sanctions were proposed for late application of European Directives on *energy*. The Commission has not proposed yet to the Court the payment of any lump sums.

During the year 2013, member states have increased their efforts in order to achieve a complete application of European provisions before the European Court of Justice expressing its verdict. Nevertheless, taking into consideration all the cases based on art 258 and 260 paragraph (3) in TFUE (the Lisbon Treaty) initiated within previous years, only *twelve cases are still standing*, cases regarding obligations non-fulfilment due to late application of European laws, as we can also find a proposal made to the European Court of Justice concerning daily payments (penalties): two cases against Estonia, *Romania* and Slovenia and one case against Austria, Cyprus, Germany, Poland and Portugal.

The Commission initiated and applied in 2013 the *Regulatory Fitness and Performance Programme* – REFIT. REFIT is a programme which assumes and achieves an inventory and a close assessment of the acquis, in order to ensure the situation where the legislation is „adequate to the objective" by eliminating the bureaucracy and useless tasks, while maintaining the European legislation benefits.

2. The starting point in company law regulations or provisions was to accept and apply the principle of free movement and residence, namely the eliminations of restrictions concerning the freedom of settling one's residence as an important part of free movement for people and services.

According to art 3 paragraph (3) in the Treaty on the European Union, creating the internal European market represents one of the European Union major goals. Creating the internal market may ensure a long-lasting and durable development of Europe, as well a scientific and technical progress.

Based on art.26 paragraph (2) in T.F.U.E. (The Treaty on the European Union/former E.C Treaty on the European Community), we can consider the *internal market* a space/ place with no internal boarders or frontiers, where free movement of goods, people, services and capital is ensured according to the Treaties provisions.

The expression *firms and companies* has a legal base and it is also legally defined, in art.48 of the Treaty on European Community, and it refers to persons subject to the civil or commercial law (including corporate associations), public or private persons, except non-profit companies and associations.

From the European point of view, *the term company* is a very generous one, covering the unfolding of any economic activity which aims to obtain a profit. *The distinctions the doctrine makes between the commercial nature and the civil nature are without any base*. And so is the distinction between public and private when it comes to the economic activity. The key element for any commercial/ trading activity is the profit, the financial purpose[6].

The legal base for the European company law institutions is given by the provisions we can find within the Treaty on the European Community (which became TFUE); these provisions regard companies and their legal nature, and they also insure the right each company has to register itself and reside anywhere on European territory, as long as the listing of the legal office and the registration obey the national law (art.43)

This means that trading companies are acknowledged in all member states and on the other hand a company changing its location (its legal office or administrative centre) to another member state shall only follow the rules issued for trading companies which reside or were established within that state.

[6] Cristian Gheorghe, European, *Trade Law*, C.H.Beck, Publ. Bucharest, 2009, p. 63.

The basic principles of the corporate domain (sector) are stipulated within art 44 paragraph 2 letter (g) and art 48 in the E.C Treaty, meaning these articles ensure the necessary degree of coordination regarding the *guarantees* member states require in order to protect the stock-holders interests and the third-parties interests and also the acknowledgement of these guarantees all over the European Community..

These provisions allow the *second –level law-making*, by issuing directives, through a qualified majority vote within the European Union Council. E.C Treaty also comprises some provisions – art 94, 95, 293, 308 – which allow E.U intervention as far as the European trading companies are concerned.

The manner of regulating implies three paradigms[7]:

- **harmonization**;
- **uniformity** and
- **mutual acknowledgement**.

The European institutions regulated the economic field and the company law within the European Union indirectly, through directives (leaving to the states to find the precise way to achieve the objectives, as a teleological obligation) and directly, through Regulations and decisions issued by the European Union Court of Justice..

2.1. A sole internal market implies, among others, the possibility to create trading companies which can act and function on the Union level as well as in their own country, and to ensure a healthy business environment with no obstacles against competition.

This goal may be achieved only by eliminating the differences between national legal systems regarding trading companies' law and by establishing a minimal series of requirements on the trading companies which fall under the jurisdiction of other member states. Moreover, it is necessary to ensure that all member states have a certain degree of protection regarding people who unfold business relations with trading companies and the increase of the confidence people have in international business relations.

In order to reach this goal, the European Union has set for itself a series of objectives which refer to: the company law stricto sensu (rules concerning the formation, organising and functioning of companies), the companies financial situation, increasing, maintaining or diminishing the

[7] Daniel Mihail Şandru, European Community Law. European Acccesion. *The impact on European and worldwide trading,* Ed. Universitară, Bucharest, 2007, p. 146.

subscribed capital for joint-stock companies, provisions regarding accounting, protection of intellectual and industrial property, acknowledging the legal competence and the enforcement of foreign court decisions in civil and commercial matters, contract obligations.

The European legislator, while taking notice of different solutions of each national legal system, started with a **stage of levelling (standardizing) national legal provisions regarding trading companies**. The body of company law directives, the „12 directives" **comprise the first step, the adjustment of national solutions in order to create equivalence within the European Union**.

As James Hanlon[8] shows, all directives aim a „uniformity", „adjustment" or „cooperation", without asking member states to issue a standard law on trading companies, or just on certain forms of companies, such as the joint-stock companies. The standardization of European company law should be dismissed since there are different institutions and traditions, even within the same legal system – romano-germanic – but also between two legal areas – romano germanic and anglo-saxon.

Chronologically speaking, there are two processes which took place almost simultaneously. ***Regarding trading companies we can safely say we are in the presence of a limited uniformity***.

The First Directive, no. 68/151/CEE, „on guarantees required from the companies in order to protect the interests of the members", „in order to reach the equivalence of these guarantees within the entire Community" is also called the **directive on publicising or transparency**.

The text was modified by **Directive no. 2003/58/CEE** and by the accession documents of member states: Denmark, Ireland, United Kingdom (1973), Greece (1979), Spain and Portugal (1985), Austria, Sweden and Finland (1994), the states which were accepted in 2004, Romania and Bulgaria.

The First Directive *clearly states its purpose*, that is to regulate the standardization/ uniformity of rules on trading company publicity and stipulates three basic rules: the registration when formatting a company and its listing in a registry of commerce covering the given territory; the uniformity of national provisions regarding the obligations assumed in the name of the company, including companies which are in the process

[8] James Hanlon, *European Community Law*, Second edition, Sweet&Maxwell, London, 2000, p. 279. Apud Daniel Mihail Şandru, Romanian Trading companies within the European Union, Sfera Politicii, Nr. 125, http://www.sferapoliticii.ro/sfera/125/art05-sandru.html

of formation and the company liability for these obligations; the establishment of nullity reasons concerning company formation.

For Romania, the types of companies to which the provisions are applied are: the joint-stock company, the private limited company and companies limited by shares.

The Second Directive no. 77/91/CEE, referred to „coordination of measures taken to protect the interests of members and third parties by member states and imposed on companies, regarding the establishment of public joint-stock companies, maintaining and changing their capital, and the uniformity of such measures". It was modified by the Directive no 92/101/CEE and by the Directive no. 2006/68/CE of the European Parliament and the Council in September the 6th 2006 and **repealed** (abolished) by **Directive no 2009/101/CE** (art. 48)

The third Directive no 78/855/CEE, regulated limited-liability trading companies merger and was amended by the accession documents of Greece (1979), Spain and Portugal (1985), Austria, Sweden and Finland (1994), the ten states accepted in 2004, Romania and Bulgaria; Directive no. 2006/68/CE of the European Parliament and Council in September the 6th 2006; Directive no. 2007/63/CE.

The Fourth Directive of the Council no 78/660/ CEE, concerns the standardisation of national accounting systems for some types of companies in other words the *taxing uniformity/standardization.*

Directive no 2013/34/UE of the European Parliament and Council issued on June 26th 2013 regulates annual financial reports (statements) and the consolidated financial statements and additional reports/statements of certain types of companies, it amends the **Directive no 2006/43/CE** of the European Parliament and Council and repeals **Directive no 78/660/CEE and 83/349/CEE** of the Council. ***Coming into force: by 20/07/2015***.

The Fifth Directive regarding the structure of joint-stock companies, their rights and obligations was not adopted and was withdrawn by the Commission in 2001 due to a political blockage.

The Sixth Directive no. 82/891/CEE regulates the joint-stock companies division while stressing the importance of a standard level of protection for stock-holders and third parties within the European Union

The Seventh Directive no. 83/349/CEE concerns the consolidated accounts and was *repealed* by Directive **no 2013/34/UE**.

The Ninth Directive no. 89/666/CEE stipulates the publicity requirements imposed on the subsidiaries established in one member state by companies governed by the laws of another member state.

The Tenth Directive was withdrawn by the Commission, since it did not meet the required number of votes. It regarded the company law and the initiative shall be resumed and take shape through **Directive 2005/56/CE**.

The Twelfth Directive no. 89/ 885/CEE regulates limited-liability companies which have only one share-holder.

Directive no 2005/56/CE of the European Parliament and the Council on international mergers of capital companies applies to joint-stock companies which were formed, established and function legally within the national territory of a member state, having the nationality of such a state, provided at least two of the participating/ merging companies are regulated by two different national legal systems.

Directive 2009/109/CE amends Directives no 77/91/CE, 78/855/CE and 82/891/CE and continues on the same line in stipulating the obligations to draw and publicise the necessary documentation when merging and dividing joint stock companies. It was publicised in the Official Journal L59 in October the 2nd 2009. It was transposed in the Romanian law by the G.E.O (the Government Emergency Ordinance) OUG no 2/2012 (M. Of. nr. 143/2nd of March 2012).

Directive 2012/30/UE of the European Parliament and Council regards the standard guarantees imposed to trading companies within the member states in order to protect the stock-holders interest and also the interests of third parties, while forming joint-stock companies, maintaining or changing their capital.

Adopting as quickly as possible the Directives within the Romanian legal system becomes an obvious necessity, due to their significant practical value for the Romanian economic environment, but also in order to avoid further infringement proceedings and financial penalties imposed by the European Court of Justice for not fulfilling the obligations Romania has as a member state.

In Romania, the Trading Company Law suffered consecutive amendments which reflect the acquis adoption. *The law-making procedure was incorporated in the texts*.

Implementing the directives resulted in the establishment/ formation of equivalent trading (commercial) entities within a unified economic environment, which allows their survival and development based on free and fair competition and on the other hand, through predictable guarantees, the degree of protection for third parties.

The homogenisation of the company law has a tremendous impact on the business environment, since its effects reach not only *the company*

internal regulations (formation, organisation, activity, legally registered office, publicity, structure) but *taxing regulations* as well. Thus, national regulations on consolidated accounts should be coordinated in order to reach the objective of having equivalent and compatible information (information publicised by the companies). Annual accounts should offer a clear and truthful image on the patrimony, on the financial situation, on the company results (profit) and comprise mandatory elements.

The process of company law standardization was also *urged* by the fear that companies may settle mostly in the states where the legal system is favourable, e.g. the Danish system, or the fear that existing companies may migrate to other jurisdiction.

2.2. The second class of regulations refer to an **unified European legal frame**, and to new and original types of companies: the European limited-liability company (SE), the European corporate company (SCE), The European Economic Groups of Interests. We can also find non-profit companies, e.g. the European Mutual Company (ME) or the European Association (EA).

CONCLUSIONS

The relevance of analysing the legal frame or defining the main concepts, namely the European directives but the national laws as well, is visible in the way the information is updated when it comes to the European Union acquis on companies, it is visible in the continuous tendency to simplify the norms/provisions (the regulations are codified and consolidated) and also the obligations and administration tasks imposed by the member states on the economic agents.

Within the present European legal frame, one can safely say that the entire legislation is a new one, drawn based on the Constitution and in respect to the European spirit

A significant part of the adopted legislation is **adapted** to the European Union legal provisions or to the most up-to-date regulations of member states.

This conclusion is based on the fact that Romania has also ratified and accepted a series of instruments crated within **regional organizations**, such as the Council of Europe, or within **international organizations** – United Nations Organization or the International Labour Organization. Though these instruments are, obviously, not Community regulations,

they help the **alignment of the Romanian law to the European acquis**, as most of them (especially those connected to the European Council) are part of what we can call the community acquis. Such is the case of the Law which ratifies the revised European Social Charter, or the Law on Romania's accession to the European Convention on an European Pharmacopoeia, or the Ordinance regarding Romanian's accession on the 1990 Convention on preparing, reacting and cooperation in case of hydrocarbons pollution.

A coherent, fully unified legislation should on the other hand be implemented by institutions which are able to apply it.

In conclusion, the efforts concerning law-making made by the main institutions (Parliament, Government, especially the former Ministry for European Accession, the Legislative Council, the European Institute of Romania) should be accompanied, from the administrative point of view, by an adequate institutional entity. All through this complex process, the civil society and social partners in particular should have a specific and essential contribution to any democratic society.

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CIVIL LEGAL LIABILITY OF THE ADMINISTRATOR GOVERNED BY THE COMPANIES LAW NO. 31/1990, IN THE CONTEXT OF THE LEGAL FRAMEWORK SET UP BY THE CIVIL CODE

Carmen TODICĂ *

ABSTRACT

Based on the provisions of art.72 of the Companies Law no. 31/1990 „duties and liabilities of administrators shall be governed by the provisions relating to the mandate and those of the present law", the vast majority of the doctrine considers that, depending on the source of the obligation breached, administrators' liability can be contractual and criminal.

Although we are placed on a dualistic position of responsibility, the hereinafter study attempts at broadening its scope of employment, in addition to obligations adding the breaching of responsibilities, given that the responsibilities (powers) of the administrator have their source in the mandate given as well as in the law (eg. exclusive powers provided by law for the collective management bodies, sometimes referred to by the legislator as basic competencies), all of them researched in a comparative perspective with the legal provisions applicable in the field, namely the current civil Code.

KEYWORDS: *administrator, administration contract, mandate, legal obligations, statutory obligations, contractual liability, criminal liability*

1. The civil liability of the company's administrator governed by Law no. 31/1990. Delineation from the liability of legal entities

In the literature, the issue of civil liability was approached from two different perspectives: on the one hand, it was analyzed the liability of the company governed by Law no. 31/1990 as a legal entity and on the other hand, the responsibility of the company's bodies for their illicit activities.

As a legal entity, the company, as a commercial entity is a separate legal subject which takes part in legal relations, and achieves rights and is bound by its bodies. In this regard, we consider that provisions of art. 209

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para. 1 and 2 of **the New Civil Code - Law no. 287/2009** are fully applicable[1] „*the legal entity exercises the rights and fulfills its obligations through its administration bodies, from the date of their setting up. The following have the quality of administration bodies in the sense meant by paragraph 1, natural persons or legal entities who, by law, articles of association or statute, are appointed to act in relationships with third parties, individually or collectively, in the name and on behalf of the legal entity.*"

The text of the law is much more complete than art.35 para.1 of Decree no. 31/1954 regarding the natural and legal bodies[2] according to which "*the legal entity exercises its rights and fulfills its obligations through its bodies*." In this context, the provisions of new Civil Code invoked **clarifies a number of issues related to the company manager as a legal entity.** Under the new provisions the company governed by Law no. 31/1990, as a legal entity, it takes part into relationships with third parties through its governing bodies. **The legislative amendment is welcome since the term "bodies" used by Decree no. 31/1954 is too broad.** However, it is directly recognized the administrator of the company the quality of company's body authorized to act for and on behalf it. Regarding the company liability the rules of common law liability for legal entities shall apply. Currently, the foundation of patrimonial liability (contractual and criminal) governed by the Companies Law no. 31/1990 is the art. 218 para. 1 and art. 219 para. 1 of the New Civil Code. Thus, according to art. 218 para.1 "*the legal deeds concluded by governing bodies of the legal entity, within the powers conferred to them are deeds of the legal entity itself*." And under art. 219 para.1 "*The licit or illicit deeds committed by a legal entity bodies commit the legal entity itself, but only if they relate to the powers or the scope of the functions*

[1] *Law no. 287/2009 on the Civil Code*, republished in the Official Gazette no. 505/15 July 2011 pursuant to art. 218 of Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code (Of. G., no. 409/10 June 2011).
(Law no. 287/2009 on the Civil Code was published in the Official Gazette no. 511/24 July 2009, as amended and completed by Law no. 71/2011, and rectified by Official Gazette no. 427/17 June 2011 and in the Official Gazette no. 489/8 July 2011. According to art.220 para.1 of the modifying law, Law no. 287/2009 on the Civil Code came into force on 1 October 2011).

[2] Published in the O.B. no. 8/30 January 1954, amended by Law no. 4/1956 (OB no. 11/4 April 1956), hereinafter named brevitatis causa, Decree. The decree was repealed with the coming into force on 1 October of the new Civil Code, according to art. 230 lit. n) of Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code.

entrusted." Regarding the power of representation of the company and its engagement by concluding legal deeds, the new Civil Code expressly assigns it to the managing body, thet means not to any body of the company (as it was through Decree no. 31/1954).

Provisions similar to those of the New Civil Code are to be found as well in **art. 35 para. 2 and 3 of Decree no. 31/1954**, according to which "*legal deeds concluded by the bodies of the legal entity within the powers that have been delegated, are deeds of the legal entity itself" (para. 2) and "licit and illicit deeds committed by its bodies commit the legal entity itself, if they have been fulfilled while exerting their duties.*" (para.3).

From the texts presented, we conclude that the company has direct responsibility under the law for the deeds of its bodies. The legal documents signed by the management body within the limits of the powers conferred attract the contractual liability of the company in relationships with third parties. Likewise, civil criminal liability for the company's own deed will engage whenever its bodies, while exerting their duties, commit an unlawful act causing damage. In these cases, the liability of the company as a legal entity is not subject to proof of personal liability of the administrative body whose act caused the damage .

To the extent that the company has compensated the entity damaged by an unlawful deed of civil nature, it can turn an action for recovery against natural entities directly responsible. Recourse is based on statutory provisions on liability for the deeds of its own (art. 1357 par. 1 New Civil Code which provides that "*Who causes harm to another by an unlawful deed through an illigal deed, caused with guilt, is obliged to repair it.*"[3]) and it is justified by the fact that the legal entity must not be confused with individuals who have caused the damage and, ultimately, must bear the damage caused.

However, the establishment through the law of the company liability for illegal deeds of its bodies does not exclude the liability of the natural entities who make up these bodies. Thus, according to art. 219 para.2 of the **Civil Code** "*Illegal deeds entail liability of those who have committed them, both to the legal entity and to third parties*."

Similarly, art. 35 para. 4 of Decree no. 31/1954 provided that "*the illicit deeds committed by a person who is an entity of the company,*

[3] Similar to art. 1357 par.1 of the New Civil Code was art. 998 Civil Code of 1864 (repealed to give effect to the Civil Code, according to Art. 270 para. a) of Law no. 71/2011): *"Every deed of the person that causes damage to another obliges the one through whose fault was caused to repair it."*.

attract personal liability of those who commit them both towards the company as well as towards third parties."

Establishing legal liability of the company bodies for their illegal activities led to a series of consequences. If the illegal deeds are of civil nature, compensation is provided by engaging civil liability. In this case, the legal person has three possibilities of choice to be compensated: it can initiate a civil action against the company or against the responsible person (body of the company) or against the company jointly with its body. In the latter case, the liability of the company joins the one of its managing bodies. In all cases where the company is liable for its body, compensating the damaged party, it always has recourse action against him, from whom it shall recover the amount paid as compensation.

Nevertheless, according to the common law of civil liability, there are enough possibilities to repair damage caused by the administrative body for its guilty deed both to the company and to others, **the Company Law no. 31/1990[4] established a specific personal liability specific to administrators for damages caused. This solution of the law was considered as a result of the trend of extending the autonomous liability in the company law.[5]**

As a general rule, whether the liability is towards the company or third parties, art. 72 of Law no. 31/1990[6] establishes the general rule outlining the civil liability of the administrator „*The obligations and liability of administrators shall be governed by the provisions relating to the mandate and the special ones provided in this law.*" The legal provision finds its applicability whether administrators have the right to represent the company in legal relationships with third parties, or if their powers only refer to operations of management, property management without concluding legal deeds, are therefore limited to material deeds.

2. Legal nature of the civil liability of the company administrator

Depending on the penalty criterion applicable, the civil liability of the company administrator governed by the Law no. 31/1990 has a dual nature, being both patrimonial and non-patrimonial liability.

[4] *Company Law* republished in the Official Gazette. no. 1066/17.11.2004, as subsequently amended.
[5] E. Munteanu, *Legal Regime of administrators of public limited companies*, All Beck Publishing House, 2000, p. 264.
[6] Republished in the Official Gazette no. 49/04.02.1998, with subsequent amendments.

Patrimonial liability of the administrator has a *repairing character* and shall result in the obligation to repair the damage. Depending on the source of the obligation for compensation, the patrimonial civil liability can be criminal or contractual.

In doctrine[7], when the obligation is the consequence of causing damage to another person without any direct legal connection between the author and the damaged party pre-existing contractual liability, the civil liability was identified as a criminal one. Alternatively, when the obligation for compensation is the result of non-compliance or breaching of obligations assumed through a contract, such liability will be triggered contractually.

Applying these principles with regard to the company administrator, and based on the provisions of art. 72 according to which „*duties and liabilities of administrators shall be governed by the provisions relating to the mandate and specifically provided in this law"*, the financial liability of the administrator may be contractual or criminal. Thus, the administrator has a contractual liability for the damage caused by failure in fulfilling obligations in the articles of association, resolutions of the general meeting or stipulated in the contract of mandate or administration concluded with the company, and criminal liability for damage resulting from non-compliance with the law.

We believe, however, that the administrator liability was not limited to paying damages to the company or third parties harmed by the breaching of contractual or legal obligations. Most of the times, **Law no. 31/1990 expressly or implicitly provides** such an obligation for compensation. But, at the same time, it imposes as **civil penalties, comminatory damages and civil fines** in case of non-compliance with legal obligations borne by the company administrator.

Thus, in case of irregularities observed after registration, the company is required through its governing bodies, to remove those 8 days from the date of becoming aware of the irregularities, the administrator being responsible for the damage caused this way.

To the extent that the company does not comply, according to art. 48 para.2 "*any interested person may oblige the bodies of the company* (including the administrator who has such an obligation by law), *under the sanction of paying* ***comminatory damages****, to regulate them*." At the

[7] I. Albu, V. Ursa, *Civil liability for moral damage*, Dacia Publishing House, Cluj Napoca, 1979, pp. 26-27.

same time, Law no. 26/1990 regarding the register of companies[8] provides in art 44, para. 2 for breaching legal provisions or the terms within which the company has to be registered, inscribing mentions or registering sample signatures, ***judicial fine*** in the trust of the legal entity from 500 lei to 2,000 lei. Under art. 44 paragraph 4 "*the fine provided for in paragraph 2 shall apply to representatives of the companies fined*." Judicial fines are subject to the legal regime of common law of the judicial fines provided in the Code of Civil Procedure.

In this context it can be said that the liability of the administrator is not totally foreign to the idea of punishment.

Non-patrimonial liability has an *afflictive, sanctioning character*, and involves a number of strict sanctions provided by the Companies Law no. 31/1990. Civil penalties applicable to the administrator being strictly regulated by law, his non-patrimonial liability is lawful. Thus, the governing law expressly regulates the discretionary revoking, in principle, of the administrator as well as a punishment for his incompetence or mistakes in management, for disregarding legal obligations (eg. non-competing the obligation provided for in art. 197 para. 2 and art. 153^{15} of the law). Also, the revocation can occur as a result of promotion the action against administrators. According to art.155 par. 4 "if the general assembly decides to start action for damages against the administrators, respectively against members of the directorate, his mandate shall end as of the date of adopting the decision." If the action for damages against the directors is started, as a punishment they are suspended by law (art.155 par.5). As an exception, as a punishment as well, an associate administrator can be excluded from the company partnerships, limited partnerships and limited liability, for fraud to the detriment of the company or the one who uses the signature or social capital for his or another's benefit [art.222 d) of the law].

It should be noted that, in most cases, the two forms of liability may overlap. The administrator who violates legal obligations undertaken by contract shall respond criminally or contractually towards the company for the damage caused in such a way (patrimonial liability), and he may be penalized at the same time with the dismissal. Furthermore, the law establishes sometimes the need for the two responsibilities. Thus, limited company, according to art. 197 para. 2 „*the administrators cannot receive without authorization of the shareholders' meeting, the mandate*

[8] The **Law no. 26/1990** was published in the "Monitorul Oficial" (Official Gazette of Romania), Part I, no. 121/November 7, 1990.

of administrator in other companies competing on the same subject or activity, nor to do the same trade or another competing trade on its own account or on behalf of another natural or legal entity, ***under the sanction of revocation and liability for damages.*** " Similar provisions requiring both damages and revocation are found regarding the Executive Board in joint stock company (Art. 153^{15}). Also as a penalty, this time required by law, we mention the forfeiture pursuant to art. 73^{1} for administrators, managers, supervisory board members and the directorate in case of conviction for offenses expressly provided that make them incompatible with the owned position.

3. Forms of the civil patrimonial liability of the company administrator

Starting from the dual nature - contractual and legal - of the legal relationship existing between the administrator and the company governed by Law no. 31/1990[9], the vast majority of the authors[10] give (it was stated „rebound") the same double legal and contractual liability for directors how they fulfil their obligations. In other words, the vast majority's opinion, the nature of the liability shall be determined by the source of the obligation breached. Thus, the administrators shall be liable contractually for infringement of obligations arising from the mandate

[9] Republished in the Official Gazette no. 49/04.02.1998, with subsequent amendments.

[10] The doctrine qualifies the relations between the administrator and the company as mandate relations (considered as commercial), whose content is primarily contractual and legal in subsidiary, which customizes the double nature of the legal liability of its administrators. The same, the jurisprudence states "the mandate given to an administrator is a commercial mandate, but its content is not exclusively a contractual one, the regulation of such content is completed with the legal provisions regarding the mandatory obligations imposed on the manager as well as the mandate limits provided by art. 72 of Law no. 31/1990." (Dec. no. 1898/11 December 2003, CA Bucharest, sect. V of com., In Collection Court of Appeal, Commented Court Practice, 2003 Brilliance Publishing House, 2005, p. 248). Moreover, even the provisions of Law no. 31/1990, refer expressly to the warrant, as the foundation of the legal relationship between the administrator and the company (by way of example, art. 144^{1} imposes on administrators, as well as directors or members of the Executive Board and Supervisory Board, their obligation to exercise their mandate with the prudence and diligence of a good manager (para.1), the obligation to exercise their mandate with loyalty (paragraph 4), and not to disclose confidential information and trade secrets, even after the administrator's mandate ceased (para. 5).

contract and criminally for failing in fulfilling obligations under the Companies Law.

In this regard, of particular importance are the provisions of art. 72 of Law no.31/1990 („*duties and liabilities of administrators shall be governed by the provisions relating to the mandate and those of this law"*) and art. 73 para.1 letter d) and e) according to which "*the administrators are jointly liable to the company for ... d) exact fulfilment of the decisions of the General Assembly; e) strict fulfilment of the duties under the law or the articles of association*." The term" duties "should be interpreted broadly both as obligations and responsibilities. Also, under the principle in art. 144^2 para.1 „*administrators are responsible for fulfilling all obligations, according to art. 72 and 73*." Thus, it was generally established the liability of the administrator for failure in fulfilling contractual obligations (the mandate, according to art. 72 sentence I) or legal (listed in art. 73 or under other legal provisions.)

Thus, **the invoked legal texts distinguish between the liability of administrators for failing in fulfilling duties prescribed by law (legal obligations and duties) and those provided by the articles of association or decision of the general meeting (contractual obligations and responsibilities).**

Nevertheless, **we cannot agree with the statement** "*the administrators' liability is contractual in relation to the company and associates and criminal relationships with third parties*."[11] **The double legal liability of the administrator occurs, both towards the company and to the third parties, depending on the source of the obligation breached.**

[11] S. Angheni, *Some legal issues concerning the management of companies. Aspects of Comparative Law in Ad honorem* Stanciu D. Cărpenaru, *Chosen Legal Studies*, C.H. Beck Publishing House, Bucharest, 2006, p. 106; S.D. Cărpenaru, *Romanian Commercial Law*, Eighth Edition, Legal universe Publishing House, Bucharest, 2008, p. 227; C. Popovici, *Liability of company directors*, in the DRC no. 7-8/2002, p. 183; St.D. Cărpenaru C. Predoiu, S. David, Gh. Piperea, *Company Law. Commented on articles*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2006, p. 177; S. Popa, *Companies*, Legal universe Publishing House, Bucharest, 2007, p. 85; M. Foodor, S. Popa, *The main amendments to Law no. By GEO 31/1990 no. 82/2007 the Law no. 1/2008*, pp. 12-13. In the sense that in all cases the liability is contractual M. Şcheaua, *Company Law no. 31/1990, commented and annotated*, Rosetti Publishing House, Bucharest, 2002, p. 257 *("even when certain requirements are prescribed by law and not by the articles of association or shareholders' meeting decision, the administrator is held for the performance of those obligations as a result of the contractual relationship established between him and the company.")*.

Indeed, the legal relationship between the administrator and the company are legal mandate relations, but at the same time, the administrator has obligations incumbent namely legal powers. **Empowerment (function) given to the administrator has a dual basis: *first contractual***, namely the content of the document appointing the mandate: articles of association or decision of the associates/shareholders (for administrators, directors and supervisory board members) and the decision of the surveillance council (for Board members) and ended when the administrator explicitly expressed consent to accept the position According to art. 153^{12} par. 3 of the Law "*for the appointment of a trustee, member of the board or supervisory board to be legally valid, the person appointed must expressly accept it*." The legal text imposes the special condition after appointing, that the person must expressly accept the position. By accepting the appointment, the administrator expresses his consent to the acceptance of such a mandate including (rights, obligations and responsibilities). Such an acceptation of the position results from the person's express declaration materialized in a document contained in the contract with the company (in practice, there is concluded a contract of mandate or of administration), and if such a contract does not end, by the express statement in the general meeting respectively the board where he was appointed, recorded in the minutes of the meeting.

Secondly, the mandate given to the administrator and it is based on law. Thus, the law establishes a number of obligations and responsibilities which complete the contract (conventional) of the mandate. This is the sense in which we interpret art. 72 of the law, the obligations and liabilities of the administrators shall be governed by the provisions of the mandate and by those provided by law. We are considering the legal provisions that require to submit the sample of signature (art. 45), duty of care and caution (art. 144^1 par.1), the obligation of loyalty (art. 144^1 par.4), the obligation of confidentiality (art. 144^1 par. 5), provisions of art. 73 governing joint liability for a number of legal obligations as well as provisions that give exclusive (basic) competences to the board respectively the supervisory council in the joint stock company (art. 142 para.2 in conjunction with art. 153^9 of the Law).

For **obligations and duties provided by the mandate** (whether arising from the appointment - articles of association or the decision to the competent body, subsequently accepted by the administrator or even drawing in practice of such a contract), **therefore agreed on by the parties, the administrator shall be liable contractually and for**

obligations and duties provided by law in his task, it he has criminal liability.

However, **we question what kind nature shall have the civil liability of the administrator, to the extent to which the legal obligation is inserted into the contract concluded with the company** (mandate, administration or management contract)? In this context, is it possible that the same obligation breached, the liability to be different? Doctrine answered that "*we face a cumulating between contractual liability arising from the mandate and civil liability. The company and the associates may choose between contract and criminal liability for damages caused to the company by the administrator*."[12]

We believe that, breaching legal statutory duties inserted in the contract, by its ending (as a result of the agreement of the parties) should not attract criminal liability. In this case, it is not the basis for the liability is not the law, but the contract itself, therefore, the liability must have a contractual nature. In addition, such an interpretation makes it easier the proof of conditions that engage the administrator's liability. In contractual matters these are limited to proof of not executing the contractual obligation and of the damage, whereas the criminal liability conditions are more demanding (illicit deed, damage, causal link between the act and the damage and fault of the administrator).

Whenever we are in the presence of a contract, the liability can be only a contractual one.[13]

And, to the extent it violates an obligation stipulated in a contract, although initially its foundation was a legal one, the liability is contractual, this more so as, in all contracts named, the rights and obligations of the parties covered by the framework of the law, are detailed in the document by the parties. In the practice the companies governed by Law

[12] V. Paşca, *Some theoretical considerations and practical aspects of responsibility of the management members of the company subject to the procedures regulated by Law no. 64/1995*, in R.D.C. no. 2/2004, p. 26.

[13] Regarding the inadmissibility option between the two forms of liability in case of a contract, see C. Stătescu, C. Bîrsan, *Civil Law. The general theory of liability*, All Educational Publishing House, 1998, p 133. "Common law criminal liability is the liabilit, whereas contractual liability is a liability with special derogatory character. Reported to the legal basis of the two liabilities, "... in case of criminal liability, obligation breached is a legal obligation, (...) for contractual liability, the obligation breached is a specific requirement established by existing contract concluded between the two subjects of liability - the damaged and the one who has breached its contractual obligations.".

no. 31/1990 it is common for a number of obligations incumbent to the administrator according to the law to be repeated, expressly mentioned in the contract effectively concluded with the company. Once inserted in the contract, by agreement of the parties, obligations become contractual, providing a more detailed content or may limit the one originally foreseen by law. In this circumstance, we cannot argue that the source of the obligations is not contractual. Consequently, their breaching shall engage the contractual liability of the administrator in question.

A particular problem arises regarding the **obligation of confidentiality and of professional secrecy**, which is a legal obligation. According to art. 144^1 par. 5 of the law "*Board members shall not disclose confidential information and trade secrets of the company, to which they have access in their position as administrators. This obligation rests even after the mandate ends.*" Thus, the obligation subsists even after leaving the position, which is why para. 6 of the same art. 144^1 ("*the content and duration of the obligations referred to in para.5 shall be stipulated in the contract of administration*") requires concluding a contract to that effect. Therefore, even the law compels the conclusion of an agreement (the called "Management contract") detailing the obligation of confidentiality and professional secrecy, will take effects only after the mandate ends. In this context, we wonder which will be the legal basis and the nature of the administrator's liability for breaching the duty and disclosure of confidential information and trade secrets of the company? The problem must be treated differentially: on the length of the mandate, the administrator is responsible under the legal obligation of confidentiality of all information and secrets which are available as such. After ending the mandate, he shall be held responsible contractually only for fulfilling the contractual obligations expressly stipulated and only regarding secrets provided limitatively by the contract.

In general, the main distinction between criminal and contractual obligation is the source of the obligation not executed. In the case of criminal liability, the obligation breached is expressly provided by law, and in the case of contractual liability, the breached obligation is a specific one set up through the existing contract. In this regard, the Civil Code has provisions comparative regarding the legal criminal liability and legal contractual liability. According to art. 1349 entitled "Criminal liability" *"(1) Everyone has the obligation to respect the rules of conduct imposed by the law ... and not to affect through his actions and inactions the rights or legitimate interests of others*", *(2) the one who has acumen, violates this duty is responsible for all damage, and is required to fully*

repair it " Contractual liability is defined by art. 1350 (1) "*everyone must perform his obligations which he has contracted. (2) Where, without justification, fails to fulfil this duty, he is responsible for the damage caused to the other party and is obliged to repair this damage, according to the law*."

Legislative intervention is worthwhile clarifying issues discussed above. Thus, the legislator outlines two forms of civil liability in relation to the source of the obligation breached, while dedicating expressly the criminal liability for failure to comply with the law. At the same time, in a principle regulation, the legislator clarifies the relation between the two forms of liability expressly prohibiting the right of choice between them or removing the application of the rules of contractual liability in favour of more favourable ones. According to art. 1350 par.3 "*unless the law provides otherwise, neither party may refrain from applying the rules of contractual liability to opt for other rules that would be more favourable*."

Reported to the liability of the administrator, this is a joint responsibility: contractual for breaching the mandate assigned by the articles of association or the general meeting or the effectively concluded contract (whatever its name is - management or mandate contract) as well as criminal, arising from violation of legal obligations. It also should not be overlooked that the administrator is held liable, both to others and to the company, for illicit deeds causing damage (under art. 219 para.4 and according to the principles of liability for own deeds provided by art. 1357 par.1 the Civil Code[14]). We consider the fraud committed at the expense of the company or the deed of the administrator who uses the social capital or the social signature for private use or for another person's use.

Specifically, the contractual liability to the company arising from failure of fulfilling performance standards (inefficiency), mistakes in management or losses incurred by the company in the exercise powers conferred by administration mandate.[15] **Criminal liability** occurs in case of default of fulfilling duties imposed by law: (misappropriation of the social interest, unfair competition towards the company, breaching the duty of care and caution, damage to society through loss of credibility reputation of the administrator) but also for causing unlawful deeds committed "in connection with the position entrusted" (liability in

[14] Equivalent of provisions art. 35 para. 4 of Decree and art. 998-999 the 1864 Civil Code.
[15] Gh. Piperea, *cited work.*, pp. 167-168.

regression) as well as detachable from his position (liability for his own deeds).

Towards the third parties, contractual liability is engaged for deeds concluded by exceeding legal limits of the mandate (tasks) of the administrator. These deeds are not binding for the company so obligations and responsibilities are incumbent directly to the administrator. An exception, however, are the deeds concluded by exceeding the line of business with third parties in bad faith (they knew or ought to know this excess) or by breaching the social interest, which are sanctioned by nullity, attract the criminal liability of the administrator. Furthermore, for the illicit deeds, detachable from his position, which do not bind the company the administrator's liability is criminal based on the principles for acting on its own (art. 219 para.4 and art. 1357 par. 1 of the New Civil Code, similar texts are art. 998-999 previous civil Code and art. 35 para. 4 of the Decree).

CONCLUSIONS

Related to the abovementioned issues, we cannot agree with the opinions outlined in the doctrine - "*the administrators' liability is contractual in relation to the company and associates and criminal in relationships with third parties*" or that "*the administrator's liability is contractual in all cases, even when breaching the obligations set out in his task by the law*."

We consider that the double civil legal liability of the administrator occurs, both to the company and to the third parties, depending on the source of the obligation breached.

In addition, ***de lege ferenda*** there is an obligation of concluding a contract between the administrator and the company, similar to the one under the previous regulation, between the administrator as a legal entity and his representative as natural entity. The contract should contain aspects negotiated by the parties (conventional obligations and duties), provided that, in respect to the obligations and duties provided by the law, the liability shall be criminal because at present there are authors who believe that the administrator's liability is a contractual one even when legal obligations are breached.

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SAFEGUARDING OF EMPLOYEES' RIGHTS IN THE EVENT OF TRANSFERS OF UNDERTAKINGS, BUSINESSES OR PARTS OF UNDERTAKINGS OR BUSINESSES

Olguţa-Dana TOTOLICI[*]

ABSTRACT

The Directive 2001/23/EC was transposed into national law by Law no. 67/2006. Although the Romanian law broadly follows the basic principles of the Directive, the transposition was not very clear, leaving room for interpretation and raising practical difficulties upon the implementation. In the absence of a relevant case law of the Romanian courts, the practical clues can be obtained from the case law of the European Court of Justice.

Some of the most relevant aspects concerning the practical implementation refer to the transfer to the transferee of the transferor's rights and obligations arising from the individual employment contracts of the transferred employees, and/or from a collective bargaining agreement applicable at the transferee level at the transfer date, and the prohibition from dismissing the employees on the ground of the transfer itself.

The second matter is, in its turn, controversial and difficult, and although there are some considerations of the European Court of Justice that might offer guidance, the matter will be always susceptible of interpretations in the favour of reintegration and transfer of the dismissed employee, without certain evidence referring to the economic arguments having underpinned the dismissal.

KEYWORDS: *transfer of undertakings, undertaking, business of part thereof, protection of employees' rights, transfer of rights and obligations; prohibition from dismissal*

I. Introduction

Europe-wide the transfer of undertaking is regulated by Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses[1] ("**Directive 2001/23/EC**" or the "**Directive**"). The purpose of passing it is set out in paragraph (3) of recitals, being to provide for "*the*

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[1] Published in "Journal official des Communautés européennes" L 82 of 22.03.2001.

protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded".

Previously, Council Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses[2] (the "**Directive 77/187/EEC**") was applicable Europe-wide, that was substantially amended by the Directive 98/50/EC amending the Directive 77/187/EEC[3].

In Romania, the Directive 2001/23/EC was transposed by Law no. 67/2006 concerning the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses[4] ("**Law no. 67/2006**"), which became effective on the date of Romania's accession to the European Union.

Prior to the passing of the Law no. 67/2006, regulations concerning the safeguarding of the employees' rights in the event of transfers of undertaking could be found in the Labour Code[5] and in Government Ordinance no. 48/1997 concerning the establishment of certain measures of social protection of employees in the event of transfers of title to shareholding interests in trading companies[6], specifically repealed by Law no. 67/2006.

Art. 173 and 174[7] of the Labour Code, Title IV *"Remuneration"*, Chapter VI *"Safeguarding the employees' rights in the events of transfers of undertakings, businesses or parts thereof"* had in view the European directives, however did not provide an appropriate transposition of the Directive 2001/23/EC. The Labour Code provided for, and still provides for, only general rules, such as the transfer of the transferor's rights and obligations arising from an employment relationship or contract existing at the date of the transfer to the transferee, the prohibition from dismissing the employees pursuant to such transfer, the obligation of information and consultation with the trade union or the employees' representatives.

[2] Published in "Journal official des Communautés européennes" L 61 of 05.03.1977.
[3] Published in "Journal official des Communautés européennes" L 201 of 17.07.1998.
[4] Published in the OJ no. 276 of 28 March 2006.
[5] Labor Code – Law no. 53/2003 as republished, published in the OJ no. 345 of 18 May 2011.
[6] Published in the OJ no. 224 of 30.08.1997.
[7] Prior to the republication of the Law no. 53/2003, art. 169 and art. 170 thereof.

II. Transposition of measures of Directive 2001/23/ec into law no. 67/2006 and the practical implementation thereof

"Law no. 67/2006 generally ensures an efficient transposition of Directive 2001/23/EC. However, certain compliance problems have been observed in the transposition law" ("Implementation Report for Romania"[8], p. 2).

The most relevant aspects for the practical implementation of the measures of protection of employees in the events of undertaking transfers refer to the safeguarding of employees' rights and the prohibition of dismissal on the ground of the undertaking transfer itself.

II.1. Safeguarding the transferred employees' rights in the case of a transfer of undertaking, business or parts thereof

One of the most important consequences of qualifying a transaction as a transfer of undertaking, ensuing both from Directive 2001/23/EC and from Law no. 67/2006, is the requirement to maintain the status of the transferred employees to the utmost extent possible. Art. 5 para (1) of Law 67/2006 imposes the takeover in full by the transferee of the transferor's rights and obligations effective at the transfer date under the applicable individual employment contracts and collective bargaining agreement. Furthermore, having regard to art. 9 para (1) thereof, where a collective bargaining agreement was applicable at the transferor's level at the transfer date, the transferee has the obligation to comply with the provisions thereof until the expiry or termination for cause of such agreement.

Since the Romanian law does not specifically regulates termination for cause of a collective bargaining agreement, the provisions of art. 9 para. (1) should be interpreted in conjunction with those of Law no. 62/2011 on the social dialogue[9] (the "**Law no. 62/2011**") concerning the termination of the collective bargaining agreement, being the provisions of art. 151 which provide for the following cases: (i) expiry of time limit or the completion of the work for which it has been concluded, (ii) dissolution or judicial liquidation of the undertaking at the level of

[8] *"Implementation Report for Romania, Directive 2001/23/EC of 12 March 2001 on the approximation of laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses".*
[9] Published in the OJ no. 322 of 10.05.2011.

which the respective collective bargaining agreement has been concluded, and (iii) the parties' consent. Since the cases of termination of a collective bargaining agreement are strictly provided for, our understanding is that by termination for cause of a collective bargaining agreement the lawmaker had in view its termination with future effects, having in view that it is a contract with successive performance, with the parties' consent.[10]

In its turn, Directive 2001/23/EC regulates, in the first thesis of art. (3) para (1) thereof, the transfer of transferor's rights and obligations under an employment agreement or labour relationship effective at the transfer date to the transferee. In pursuance of para (3) first thesis of the same article, pursuant to the transfer the transferee has to maintain the labour conditions agreed under a collective agreement, in the same terms as those provided for by the transferor in the same agreement, until the termination for cause or expiry of the collective agreement, or the coming into effect or implementation of another collective agreement.

The provision of Law no. 67/2007 no longer retains the option of termination of the obligation to comply with the provisions of the collective bargaining agreement applicable at the transfer date, until the coming into effect or implementation of a new collective bargaining agreement, but only until the date of expiry or termination for cause of the agreement applicable at the transferor's level at the transfer date. Nevertheless, para (2) of art. 9 of Law no. 67/2006 provides for the possibility of renegotiation of the clauses of the collective bargaining agreement at the date of the transfer by the transferee and the trade union representatives or elected representatives of the employees, as the case may be, however not sooner than one year from the transfer date. Where the collective bargaining agreement applicable at the transfer date is concluded or a period of more than one year from the transfer date, and between the expiry of one year from such date and the expiry of the agreement its clauses are renegotiated at the transferee's level and included in a new collective bargaining agreement, we could say that in this case the Romanian law is not strict having in view the provisions of art. 3, first thesis of Directive 2001/23/EC.

Another difference between the Directive and the transposition law is given by the fact that the Directive specifically provides for the automatic takeover of the rights and obligations by the transferee pursuant to the

[10] Gabriel Uluitu, *Employees' rights in the event of transfers of undertaking, businesses or parts thereof*, in the Romanian Labor Law Magazine no. 1/2006.

very occurrence of the undertaking transfer. As a consequence, the individual employment agreements of the employees allocated to the operations making the subject matter of the transfer are taken over by the transferee, which becomes their employer, without the need to conclude new employment contracts with the transferee, as mistakenly maintained in a judgment of the Bucharest Court of Appeal, according to which it is irrelevant that the *"employees… were requested to submit their resignation… and conclude a new agreement with the new employer*.[11] On the contrary, as long as the legislative act itself underpinning the takeover of the employees[12] stipulated that the personnel who is to carry out their activity in relation to the outsourced services should be compulsorily taken over by the future supplier of medical and non-medical services, and shall be maintained throughout the period of performance of the agreement, with the observance of the provisions of the Labour Code and industry-wide collective bargaining agreement, it is obvious that the protection intended to be ensured in that case to the employees is that established in the case of a transfer of undertaking, including the takeover of the individual employment agreements by the transferee at the transfer date.

The question is raised how would the provisions of art. 9 paras (1) and (2) be applied where the collective bargaining agreement applicable at the transferor's level at the transfer date expires within the one year time limit after which the transferee may negotiate the clauses of such agreement together with the trade union representatives or the elected representatives of the employees, in the conditions of art. 221 *et sequens* of the Labour Code. The regulation of para (1) of art. (9) is clear, in the sense of limiting the implementation by the transferee of the provisions of the collective bargaining agreement taken over pursuant to the transfer only until its expiry date, this provision being intended to ensure the safeguarding of the employees' rights for a period equal to the one they would have enjoyed had the labour relationship with the transferor continued. The effect of this interpretation would be that in respect of the period after the expiry of the collective bargaining agreement applicable at the transferor's level the transferred employees would only enjoy the rights corresponding to their capacity of employees of the transferee,

[11] Judgment no. 5050/R of 7 July 2009 of the Bucharest Court of Appeal, afore quoted.
[12] Order no. 886/2006 of the Minister of Public Health concerning the outsourcing of medical and non medical services of health care facilities, published in the OJ no. 647 of 26 July 2006.

being those provided for by a possible collective bargaining agreement applicable at the transferee's level. As a matter of fact, art. 3 second thesis of the Directive allows the Member States to limit the period whilst the rights are maintained. We believe the where the collective bargaining agreement applicable at the transferor's level at the transfer date expires within the time limit of one year after which the transferee may negotiate the clauses of such agreement together with the trade union representatives or the elected representatives of the employees, the provisions of the collective bargaining agreement applicable at the transfer date will no longer be applied by the transferee until the expiry of one year from the transfer date.

The transferee's obligation to observe the transferor's rights and obligations under the individual employment agreements effective at the transfer date and under the collective bargaining agreement applicable at the transferor's level at the transfer date should also be interpreted in the sense that the observance will be entirely consistent with their content as regulated at the transfer date. In that connection, for example, the transferee will grant all the rights relating to wages according to the regulation, in the same conditions as these were granted by the transferor until the transfer date, in particular those relating to the date of payment and the composition of wages, the granting of the wage being not enough, even if the latter would be at the same financial level as the sum of all the wage related rights[13].

It is important to emphasize that the transferee is transferred the transferor's rights and obligations stemming from a collective bargaining agreement, and not the collective bargaining agreement itself as a legal instrument. This interpretation is supported, on the one hand, by the provisions of art. 3 of the Directive according to which the transferee has to maintain the labour conditions agreed upon under a collective agreement, and not the agreement itself, as para (1) of art. 9 of the Law no. 67/2006 seems to stipulate. On the other hand, we should have in view the provisions of art. 133 para (2) of the Law no. 62/2011 according to which a single collective bargaining agreement is concluded and registered at the level of an employer.

Another distinction that needs to be made refers to the fact that the transfer to the transferee of the transferor's rights and obligations under a

[13] Judgment of 12 November 1992 in the case 209/91, Anne Watson Rask and Kirsten Christensen v. Iss Kantineservice A/S, ECJ 1992 case law compendium, page I-05755, paragraph 31.

collective bargaining agreement does not entail the taking over as well by the transferee of the receivables rights of the transferred employees against the transferor to set off the obligations stemming from the labour relationship with the latter prior to the transfer and not performed by the transfer date, as mistakenly held in the case law.[14]

In addition to the safeguarding of the employees' rights imposed by the measures provided for by the particular laws, the compliance with all the provisions of the collective bargaining agreement by the transferee after the transfer date entails the extension of this protection to other classes of persons as well, who can be or not employees of the transferees, such as the trade union representatives, where these maintain their position in accordance with the provisions of art. 10 para (1) of Law no. 67/2006, or family members of the transferred employees, who can benefit from certain rights.[15] However, this would entail an extension of the safeguarding of the rights ensuing from the capacity of employees to the safeguarding of other rights as well not necessarily deriving from the capacity of employee but, for example, from that of member holding an eligible position in a trade union, which would run contrary to the basic principle of the Directive and to the rationale of its passing, especially since the latter only protects the status of the trade union positions inasmuch as pursuant to the transfer the representation conditions are still met.

A particular case of the employees' rights safeguarding, regulated only by Law no. 67/2006 under para (3) of art. 9, stipulates that the transferred employees are to enjoy the provisions of the collective bargaining agreement at the transferee's level, immediately after the transfer date, provided that this agreement is more favourable to them, and that the undertaking, business or parts thereof do not maintain their standalone nature pursuant to the transfer. However, establishing which collective agreement is more favourable is a difficult task. Whilst where both the transferor and the transferee are active in the same industry[16] there is a chance that the collective bargaining agreements might regulate the same rights specific for activities corresponding to such industry, and the

[14] Judgment no. 8933 of 15 October 2008 of Craiova Court of Appeal, labor conflicts and social security section, last paragraph.

[15] Magda Volonciu, *Certain aspects pertaining to the protection of the management personnel of trade unions,* in the Romanian Labor Law Magazine no. 4/2004, pp. 19-25 and Gabriel Uluitu, afore quoted.

[16] As established by the Government Decision no. 1.260/2011 concerning the activities established in accordance with the Law no. 62/2011, published in the OJ no. 933 of 29 December 2011.

identification of the more favourable agreement can be done by comparing the levels of the same rights, where the transferor and transferee are active in different industries is it least probable that the collective bargaining agreements might comprise the same rights. In that case, without the existence of certain provisions regulating the mode of establishing the more favourable agreement, the specialized literature has developed two solutions. *"One of these consists in comparing the collective bargaining agreements applicable at the level of the transferor, and respectively the transferee, the transferred employees following to be applied on the whole the collective bargaining agreement which provides for more rights, or more consistent rights, for the employees. A second solution refers to the application to the transferred employees of the more favourable provisions from the two collective bargaining agreements, irrespective of which one of these provides for the respective provisions."*[17] We concur with the first opinion, interpreting the provisions of art. 9 para (3) in the sense of maintaining the rights of the transferred employees at the level granted by the transferor prior to the transfer, except for the cases where the collective bargaining agreement applicable at the transferee's level would stipulate more favourable rights.

Inasmuch as the legal obligation to maintain the labour conditions, in the broad sense regulated by the Directive, which includes the observance of the rights provided for by the effective individual employment agreements and the collective bargaining agreement applicable at the transfer date, is not complied with by the transferee employer bestowed with this obligation, the employer is responsible for the termination of the individual employer agreement. *"Irrespective of the actual ground of the termination of the individual employment agreement, it is automatically considered that the respective termination has occurred for reasons not related to the employee, and consequently the latter will be applied the legal treatment specific for an employee laid off in the absence of a defaulting conduct by him/her. It is obvious an atypical case and legal solution, explainable by the will of the (Community and national) lawmaker to protect the person whom labours conditions would change in a substantially adverse manner pursuant to the transfer."*[18]

[17] Anca Grigorescu, Cristina Randjak, *Aspects concerning the collective bargaining agreement at business level in the event of the transfers of undertaking, businesses or parts thereof*, in the Romanian Labor Law Magazine no. 1/2010.

[18] Ion Traian Ștefănescu, *Theoretical and practical labor law treaty*, Universul Juridic Publishing House, Bucharest, 2010, p. 460.

II.2. Prohibition of individual and collective dismissal

The transfer of undertaking, business or parts thereof is not by itself a reason for the individual or collective dismissal of the employees allocated to the activity the transfer refers to, by the transferor or the transferee (art. 7 of Law no. 67/2006 and art. 4 para (1), first thesis of Directive 2001/23/EC). In addition to the first thesis which has been transposed into the Romanian law, art. 4 para (1) of the Directive also provides for the prohibition of dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce. Thus, we understand that, in the context of the Romanian law, a reorganization followed by individual or collective dismissal[19] of an activity which makes or is to make the subject matter of a transfer of undertaking is possible inasmuch as it is caused by the elimination of the job position occupied by the employee for reasons not related to the latter, having a real and serious cause, in the conditions of art. 65 of the Labour Code.

Notwithstanding that, the mere existence of a transfer of undertaking will always entail casting a special attention on a dismissal occurring in that context, the transferee having reasons to ask, for example, the transferor to perform such dismissal prior to the transfer, in order to reduce the workforce costs.

As a matter of fact, the Court has held that the employees of the undertaking whom employment agreements were terminated at a date prior to the transfer date should be deemed, contrary to art. 4 para (1) of the Directive, as having a labour relationship with the undertaking at the transfer date, with the result that the employer's obligations to them are automatically transferred from the transferor to the transferee, in accordance with art. 3 para (1) of the Directive. In order to establish whether the employees were dismissed only pursuant to the transfer, the objective circumstances of the dismissal should be had in view and in particular the fact that the dismissal occurred at a date close to the transfer date, and that the respective employees were again hired by the transferee.[20]

Where the employees allocated to the activities making the subject matter of the transfer are unlawfully dismissed, notwithstanding the spe-

[19] Judgment no. 720/R of 6 February 2009 of Bucharest Court of Appeal, VIIth civil section and for labor conflicts and social security cases.

[20] Judgment of 15 June 1988 in the case 101/87, P. Bork International v. Foreningen af Arbejdsledere I Danmark, ECJ 1988 case law compendium, page 03057, paragraph 18

cific prohibition in that connection, they may refer to the court to challenge the dismissal decision, and ask the court to ascertain the nullity thereof, and his/her reinstatement in his/her previous position.

CONCLUSIONS

Although we have focused on only two major issues related to the transposition of the Directive in the Romanian law, there are other ones just as sensitive and susceptible of immediate sanctions, such as, for example, the obligations to inform and take advice with the employees about the impact of the transfer, devolving upon both the transferor and the transferee. As regards the resolution thereof and finding the correct solutions from the practical viewpoint, we have seen that both the specialized literature and the case law in Romanian are first of all limited, and not always correct. The ECJ case law could sometimes offer a solution, however not a clear one, leaving on many occasion the actual qualification to be decided by the national courts. Furthermore, although there is a case law from the recent years, that however confines itself to taking over the considerations comprised by the older judgments, without generating new interpretations, more adapted to the current economic needs.

In these conditions, the answers consist in applying the spirit of the principles underpinning the Directive or, for the purposes of a best limitation of the risks of disputes, in an application likely to ensure the broadest possible safeguarding of the employees' rights, which might become very burdensome for a business.

However, from the legal viewpoint, certain possible reasonable solutions would be, on the one hand, to resort to the new procedure of the preliminary rulings, or the substantiation of certain *lege ferenda* proposals likely to clarify the core aspects of Law no. 67/2006, thus ensuring a more adequate transposition of Directive 2001/23/EC.

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ISSUES REGARDING THE ACCEPTANCE UPON THE COMPLETION OF THE BUILDING CONTRACTOR WORKS

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ABSTRACT
The acceptance of building works is one of the essential components of the building quality assurance system. The acceptance upon the completion of building works is the first stage of the acceptance of building works. The acceptance of the works is done by the investor in strict accordance with the recommendations of the acceptance committee. The provisions of art. 1862 paragraph (2) of the Civil Code relating to tacit acceptance are not applicable to building contractor works.

KEYWORDS: *acceptance, definition, recommendation, tacit acceptance, acceptance committee*

1. Introduction

This paper is part of a wider survey on the acceptance of building works. Further on we shall try to define the concept of acceptance and analyze the process of acceptance upon the completion of building works in terms of the regulations in force. I will also try to find solutions to certain problems that may arise in practice. Along with the building permit, the acceptance protocol upon the completion of the building works is the document most frequently encountered in practice and requested by most public authorities.

2. Concept

2.1. Relevant statutes

The statutes governing the acceptance of general contractor works are the ones contained in article 1862 of the civil code [1] that apply to all contractor agreements and those contained in article 1878 of the civil code applicable only to building contractor works.

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[1] Law no. 279/2009 on the Civil Code.

In addition to the general framework provided by the civil code concerning the acceptance of building works, there is a set of special applicable regulations such as those provided by law 50/1991 on the authorization of building works, by law no. 10/1995 on the quality of building works and by **Regulation** [2] of 14.06.1994 on the acceptance of building works and related installations.

2.2. Definition

In order to define the concept of acceptance of building works we have to analyze the legal provisions concerning building works as well as certain definitions contained therein.

The first general rule is found in the civil code book v, chapter vi - contractor agreement. Pursuant to art. 1862 paragraph (1) of the civil code, as soon as the notification on the completion of the work is received from the contractor, the beneficiary must check and the work, and if it meets the contractual terms, the beneficiary must accept it or take it over, as applicable. These provisions reflect 3 main obligations of the beneficiary: *(1) to check the works; (2) to accept the works only if they are compliant; and (3) to take over the works if so required*. Based on a systematic interpretation of the provisions of art. 1862 paragraphs (2) and (3) of the civil code, pursuant to the rule *specialia generalibus derogant*, as well as based on the arguments[3] below, we conclude that they are not applicable to building contractor works because there are special rules[4] for application.

The civil code[5] stipulates that after the completion of the works, pursuant to the law, there shall be a provisional acceptance of the building works and related installations, followed by the final acceptance. Moreover, pursuant to the same provisions, the building risks are transferred to the beneficiary from the date of the provisional acceptance upon the completion of the works. The civil code is limited to these provisions and does not stipulate the meaning of the terms "*provisional acceptance upon the completion of the works*" and "*final acceptance*". It

[2]The Regulation of 14 June 1994 on the acceptance of building works and related installations
was approved by Decision no. 273/1994 of 28-July-1994 which was amended on 03-June-2014 by Decision no. 444/2014.
[3]See section 4 of this survey.
[4]See the provisions of art. 12, 8, 6, 21 and 30 of the Regulation of 14.06.1994 on the acceptance of building works and related installations.
[5] See the provisions of article 1878 of the Civil Code

is interesting to observe that although the civil code is a law which came into force after the vast majority of the special laws in the field of building works, the legislature did not use the same terms as the ones provided in the special laws for the acceptance upon the completion of the works. We consider that the term *provisional* used by the legislature only refers to the provisional acceptance and to the fact that the contractor failed to meet its obligations. Such an interpretation would contradict the provisions according to which on the date of the provisional acceptance the risks are transferred to the beneficiary of the works. It was demonstrated that *"the importance of the provisional acceptance lies with the transfer of the risks pertaining to the building to the beneficiary*[6]*"* moreover, in my opinion, the legislature wished to establish the general rule that, in the case of contracted building works, the acceptance is to be performed in two stages: (1) the provisional acceptance upon the completion of the works and (2) the final acceptance. Furthermore, i consider that the reference to the term *provisional* emphasizes that, although the works were executed, the contractor is still legally and possibly contractually bound to answer both for the apparent defects of the building throughout the warranty period and for the latent defects of the works.

The special regulation stipulated in article 17 of law no. 10/1995 on the quality of building works provides that the acceptance of the building works is performed by the investor "*based on direct examination*", certifying that the works were executed "*in compliance with the execution documentation and with the documents included in the building log book*". Thus, we may conclude that the acceptance is the deed issued by the investor certifying the execution of the works in compliance with the execution documentation further to the direct examination of the works. We note that both the general regulation, stipulated in the civil code, and the special regulation stipulated in law no. 10/1995 are binding for the investor, and in my opinion[7] for the members of the acceptance committee as well, to directly and immediately inspect the quality of the building works.

Concurrently, art. 1 of the regulation of 14.06.1994 ("**The Regulation**") on the acceptance of building works and related installations provides that the acceptance is the deed based on which "*the*

[6] See Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, ed. *Noul Cod Civil: comentariu pe articole.* Bucharest: C.H. Beck, 2012, p. 1903.
[7] Please see the arguments presented in subsection 3.4.3. of this survey.

investor accepts and takes over the works with or without reserve and that the works may be commissioned ... [and] certifies the fact that the contractor met its obligations under the agreement and under the execution documentation."

Furthermore, appendix 5 to the **Regulation** provides a series of definitions for the terms used therein, including the definition of the concept of *acceptance of building works and related installations as being the deed based on which the investor certifies (attests) the execution of the building works and related installations in compliance with contractual provisions (technical execution documentations, tender books, technical specifications etc.) And with the requirements of the official documents (the building permit, permits of the authorized bodies, applicable technical regulations, the building log book etc.) And states that it accepts to take over the executed works and that they may be commissioned"*.

The same appendix 5 of the **Regulation** provides two other definitions, one concerning *the acceptance upon the completion of the works*, which is pursuant to the **Regulation** *on the acceptance performed on the final completion of the works for an object or independent part of the building which may be used separately* and the other one for *the final acceptance* which is *the acceptance performed after the expiry of the warranty period.*

Pursuant to art. 75 paragraph (1) letter c) of the methodological regulations of 12 october 2009 for the enforcement of law no. 50/1991 on the authorization of the execution of building works "*the acceptance is the deed by means of which the investor declares that it accepts and takes over the works (with or without reserves) and that the works may be commissioned*". It is further provided that "*based on the acceptance deed it is certified that the contractor met its obligations pursuant to the provisions of the agreement and of the execution documentation*". This legal regulation also expressly provides that "the acceptance of building works is performed in two stages*:(1) the acceptance upon the completion of the works; and (2) the final acceptance upon the expiry of the warranty period*".

We may note that the provisions of the special regulations are not inconsistent with the provisions of the civil code, but rather use other terms, complement the said provisions and highlight the following:

(i) The acceptance is the deed issued by the investor;

(ii) Prior to the acceptance, the works must be directly inspected;

(iii) The works must be executed in strict compliance with the agreement and with the execution documentation;

(iv) The acceptance of building works is generally performed[8] in two stages: (a) the (*provisional*) acceptance upon the completion of the works and (b) the final acceptance is performed after the expiry of the warranty period;

(v) Taking over the possession and the risk[9] over the building by the beneficiary[10];

(vi) The building works may be commissioned.

Concerning the provisions of the **Regulation** pursuant to which the acceptance deed issued by the investor represents the commissioning deed, i would like to mention the fact that the said provisions were abrogated by default on 24 july 2006. This is the effective date of law no. 307 of july 21th, 2006 on fire protection. Pursuant to the provisions[11] of this law, the commissioning of newly executed building works and of the interventions to the existing buildings is exclusively performed[12] based on the fire safety permit. Moreover, law no. 307/2006 provides that fire safety permit "*grants natural or legal persons owning the buildings, installations and other facilities, the right to build, to commission and to operate the latter in terms of fulfilling the essential requirement - fire safety*[13]*"*.

As, on the one hand, law no. 307/2006 is subsequent to the regulation and, on the other hand, the law has superior authority compared to a

[8] Concerning the rule that the acceptance of building works is performed in two stages, there is a single exception provided by Law no. 267 of 7 November 2008 on certain special measures for the regulation of the outstanding advance payment, as well as for the single phase acceptance of building works and related installations at the investment objective of the Palace of the Parliament. This law was used to approve the Regulation on the single phase acceptance of building works and related installations at the investment objective of the Palace of the Parliament, which was published in the Official Gazette number 779 on 20 November 2008

[9] Concerning the transfer of the risk related to building works, please see (Mangu 2012).

[10] The Civil Code stipulates the concept of beneficiary, while the special laws stipulate the concept of investor. After the acceptance upon the completion of the works, the investor is generically referred to as the owner according to the definition of the term Owner provided in Appendix no. 5 to the **Regulation**.

[11] See art. 30 paragraph (2) of Law no. 307 of July 12th, 2006 on fire protection.

[12] The fire safety permit is not required for the building and landscaping works provided for in art. 1 of Decision no. 1739 of December 6th, 2006 on the approval of the categories of buildings and landscaping that are subject to approval and/or authorization on fire safety

[13] See art. 1 paragraph (2) letter a) of Law no. 307 of July 12th, 2006 on fire protection.

regulation issued by the government, pursuant to art. 56 paragraph (2) of law no. 307/2006 the provisions of the **Regulation** stipulating that the buildings are to be commissioned based on the acceptance deed issued by the beneficiary are abrogated.

Considering the above-mentioned issues i may define *acceptance as being the deed based on which, further to the direct inspections and according to the recommendations made by the acceptance committee, the beneficiary confirms the fact that the building works were fully executed pursuant to the provisions of the agreement, of the technical execution documentation and of the building log book, as well as the fact that it takes over the works and the related risks.*

3. The acceptance committee

Pursuant to art. 37 of law no. 50/1991, republished, authorized building works are deemed to be completed if all the elements provided for in the authorization have been executed and based on the acceptance upon the completion of the works. The acceptance upon the completion of the building works is mandatory for all types of authorized buildings, including in the execution of the said building works by oneself. The acceptance upon the completion of the works is performed in the presence of the representative of the public administration assigned by the issuer of the building permit. Upon the completion of the works, the beneficiary of the building permit must regulate the tax for the building permit, pursuant to the law.

3.1. The assembly of the acceptance committee and the membership thereof

The stage of acceptance of the building works starts with the formal statement of the contractor that the works are completed and may be taken over by the beneficiary. For this purpose, the contractor shall notify the beneficiary, "*by a written document confirmed by the investor"*[14], and the latter, within a reasonable term according to the nature of the works and to the customs in this field, shall have to inspect the executed works and to accept the latter, provided that it corresponds to the terms of the agreement.

The acceptance of the building works is generally performed by a committee convoked by the beneficiary. For this purpose the beneficiary must notify the state inspectorate for constructions – (**ISC)** for the

[14] See art. 6 of the **Regulation**.

designation of a representative thereof in the acceptance committee. Concurrently, the beneficiary must inform the local authority having issued the building permit for the execution of the building works that the latter have been completed and are ready to be accepted. This obligation of the beneficiary, as well as the correlative right of **ISC** to take part in the acceptance procedure were recently introduced in the legislation by government decision no. 444/2014 amending the **Regulation**. We consider this to be beneficial and suitable as presently **isc**, mainly dealing with the inspection of the quality of building works, may directly take part in the inspection of the quality of the completed works. According to the old regulation[15] **ISC** did not have the express right to take part in the acceptance of the building works after the completion thereof. **ISC** only takes part in the acceptance of the determined phases of the works as provided in the execution documentation. As the acceptance is part of the building quality insurance system, the right to take part in the acceptance of building works and in certain cases even the obligation to take part in the acceptance procedure, is beneficent and it is meant to subsequently provide a greater quality of building works.

Pursuant to the provisions of art. 7 paragraph (1) of the **Regulation**, the acceptance committees for building works and related installations shell generally be appointed by the investor and shall comprise at least 5 members. Among the members there must be a representative of the investor and a representative of the local public administration where the building is located, and the others shall be specialists[16] in this field, and according to a recent provision[17] one of the specialists may be the

[15] We make reference to the old provision of the **Regulation** which indeed didn't provide the right of ISC to take part in the acceptance procedure although if this authority wished to participate, there wouldn't be any impediment, as pursuant to article 30 of Law no. 10 of 18 January 1995 it undertakes the responsibility for the unitary enforcement of the legal provisions in the field of building quality throughout all the stages and components of the building quality system, the acceptance of the buildings being a component of the building quality system pursuant to the provisions of article 9 letter h) of Law no. 10/1995 on the quality of building works.

[16] I consider that the term of specialists referred to by the legislature concerns the persons attested as specialists involved in building activities pursuant to the Technical Regulation of 26 May 2003 "Guideline for the technical and professional certification of specialists involved in building activities" and to theRegulation of 20 November 1995 on the verification and technical expertise of the quality of designs, of the execution of the works and buildings.

[17] Please see the new text of article 7 paragraph (1) of the Regulation after being amended by Government decision no. 444/2014.

representative of **ISC**. Pursuant to this legal provision, which is also supported by the article 6 paragraph (3) of the **Regulation**, **ISC** may choose whether or not to take part in the acceptance of building works by communicating to the beneficiary, only in the event of participation, the **ISC** representative assigned in the acceptance committee within 3 days of receiving the notification from the beneficiary. I consider that the term of 3 days available for **ISC** to state their option is a recommendation term. The legislature provided this term in order to prevent the delay of the building acceptance process. After the expiry of this term, the investor shall be free to decide on the competence of the acceptance committee, without including a representative of **ISC.** Considering a free replacement period, upon the expiry of the 3 day term, **ISC** shall no longer be able to claim the participation as a member of the acceptance committee. We have to state that **ISC** is the institution by means of which the state exercises *the control of all the components of the building quality system*[18], and the acceptance is *a component of the building quality system*[19]. If the 3 day term were considered a free replacement period, **ISC** wouldn't be able to meet their obligations concerning the control during the acceptance phase and the provisions regarding these competences would be inefficient. Per a contrario, the 3 day term is a recommended term, not a free replacement term, following for the investor to accept the **ISC** representative as a member of the acceptance committee even if this designation was made after the expiry of the 3 day term.

There are three exceptions to the rule concerning the membership of the acceptance committee. The first rule concerns buildings of major importance, considering the risk in terms of safety, destination, operation, complexity and volume of the works subject to acceptance. In this first instance, the acceptance committees shall comprise at least 7 members, including at least 5 specialists, out of which one specialist must be the representative of **ISC**. The obligation of the **ISC** representative to take part in the acceptance is reiterated in article 8 paragraph (2^1) of the regulation providing this clause for investment objectives consisting in buildings included in the importance category a - "exceptional" and b - "particular", regardless of the financing thereof.

[18] Please see art. 20 paragraph (2) and art. 30 paragraph (1) of Law no. 10/1995 on the quality of building works art. 2 of the Regulation of 14 June1994 on the state control of the quality of building works
[19] See art. 1 of the **Regulation**

The second exception refers to the same type of works as the first exception but the investment objectives are financed either in total or in part based on the sources of the state budget, including based on external credits, for which the government must approve the technical and economic documents. In this case, the acceptance committees for buildings and related installations must include a representative designated by the main budgetary credit release authority, which does not act as or on behalf of an investor.

The third exception concerns the acceptance committees for residential buildings consisting in ground floor, ground floor plus one floor, with a maximum perch height of 8 meters, with no more than 4 apartments, with a spread area of maximum 150 m^2, for the relevant outbuildings, as well as for provisional buildings, in which case the committees shall be comprised of 2 members: the investor or the owner and the representative of the local public administration.

We hereby note that the number of members of the acceptance committee raises in direct proportion to the importance of the building works. Moreover, the involvement of the state authorities in the acceptance of building works increases based on the importance of the works.

3.2. Other persons taking part in the acceptance

The representatives of the contractor and of the designer cannot by any means be part of the acceptance committees for building works and the related installations, and they shall take part in the acceptance process only acting as guests. Given the fact that they act as guests, the representatives of the contractor and of the designer cannot be calculated for the quorum, cannot cast their vote and cannot take part in the deliberations. This provision is reasonable as, on the one hand, if the representatives of the contractor and of the designer were members of the committee, it wouldn't be possible for them to accept the works executed by themselves (it would mostly be a subjective decision). On the other hand, their capacity of guest insures: (i) their right to answer to the questions of the committee, (ii) the possibility to explain any ambiguities, (iii) the opposable status of the decision or recommendations of the acceptance committee.

In certain situations, namely upon the acceptance of buildings with a height exceeding 28 m or with crowded rooms, able to host more than 150 persons or in the case of hotels, hospitals or in the case of homes for children or elderly or buildings for persons who cannot evacuate

themselves, the investors are bound to include among the specialists in the acceptance committees a person appointed by the **Inspectorate For Emergency Situations** (**ISU**). The investor must request **ISU** to take part and to appoint a representative of **ISU**. The name of the person appointed by **isu** shall be communicated in writing to the investor within the time interval ranging between the receipt of the request until the assembly of the acceptance committee.

Pursuant to article 11 of the **Regulation,** investors are obliged to include in the acceptance committees at least one person appointed by the regional committees for monuments, historical buildings and sites for the acceptance of buildings included in the lists of historical monuments.

In case the investment objectives are included in governmental programs financed either in total or in part based on the sources of the state budget, including external credits, but which are not according to the provisions of art.7 paragraph (2^1) of the regulation, the presence of the representatives of the main budgetary credit release authority as guests is mandatory.

Thus, for the acceptance of the most complex building work such as a hospital which is included in the list of historical monuments, built partially based on funds from the state budget, the following persons shall attend as members of the acceptance committee: (1) the investor, (2) the representative of the local authority, (3) the representative of **isc**, (4) the representative of the regional committee for monuments, historical buildings and sites, (5) the representative of **isu**, (6) a representative appointed by the main budgetary credit release authority and (7) other specialists, as well as (8) the contractor and (9) the designer acting as guests.

3.3. Convocation of the acceptance committee

After the receipt by the beneficiary of the contractor's notification stating that the building works are completed and may be accepted, the beneficiary shall notify the local authority having issued the building permit, as well as **isc,** within 3 days. Pursuant to the provisions of art. 267 paragraph (14) letter b) of law no. 571/2003 on the fiscal code, within maximum 15 days from the date of completion of the building works the beneficiary must file a statement on the final amount of the building works with the issuer of the building permit. Concurrently, pursuant to art. 76 paragraph (2) letter a) of the methodological regulations of 12 october 2009 for the enforcement of law no. 50/1991 on the authorization of the execution of building works "*at the acceptance*

upon the completion of the works, the applicant (the investor/the beneficiary) must regulate the legal taxes and duties". In practice, the regulation of the authorization charges is performed prior to the acceptance as the issuer does not want to undertake a possible loss of the amounts resulting from the regulation.

Pursuant to the provisions of article 8 paragraph (1) of the regulation, the beneficiary must organize the acceptance within maximum 15 days from the date of the notification received from the contractor and shall communicate the said date to all the members of the acceptance committee and to all the guests.

The stages to be followed by the contractor in case further to the communication received by the investor, the latter doe not set a date for the acceptance of the works within the term provided in art. 8 of the regulation, or if it fails to be present at the acceptance place either in person or by representative, are also included in the provisions of the regulation.

For this purpose the contractor shall renew the request to the beneficiary of the works for setting a new date of acceptance within maximum 15 days from the date of the new request. Article 12 paragraph (2) of the regulation provides that, if upon the expiry of the second term, the investor fails to organize the acceptance or if the acceptance committee is not present at the set date, the contractor shall set a third term for acceptance within 12 calendar months from the expiry of the second term. The fourth and the last term for the commencement of the acceptance shall be also set by the contractor in case the investor, by the acceptance committee, fails to attend the meeting set for the third term or in case the beneficiary, by the acceptance committee, fails to attend the meeting set for the third term mutually agreed between the beneficiary and the contractor before the third term set by the contractor. In all cases where the term for the commencement of the acceptance is set by the contractor, the latter must timely communicate to the beneficiary the new term set for the acceptance.

In the notification, the contractor shall also state that the investor shall be held liable for all damages incurred as a result of the failure to convoke the acceptance committee.

In case the investor does not take the necessary steps to organize the acceptance, the contractor is entitled to request the competent court of law to force the investor to organize the acceptance under the penalty to

pay the conservation expenses and damages. We consider[20] that the contractor may not request the court to ascertain that the acceptance was performed and that the risks were transferred to the investor.

3.4. Attributions of the acceptance committee

Based on the analysis of the legal provisions in force, the members of the acceptance committee must take part in the acceptance of the works, they must directly inspect the building works and their location and they must make a decision concerning the acceptance of the works.

Membership of the acceptance committee

Any person included by the investor on the membership list of the acceptance committee must be present upon the works thereof. Article 13 of the regulation provides that the members of the acceptance committee shall meet on the date, time and place set by the investor[21]. It is presumed that the investor, prior to drafting the membership list, discussed with the potential members of the committee and attained their approval concerning the participation as a member of the committee. It would be inefficient for the beneficiary to appoint in the acceptance committee one or more persons not having the competence or the availability to take part in the acceptance procedure. Given such a situation in practice, the only remedy would be for the investor to replace the unavailable members and to convoke the acceptance committee for another date.

As we stated before[22], the contractor and the designer also attend the acceptance of the building works as guests.

Place of acceptance

Neither art. 8 of the **Regulation** nor art. 12 of the same regulation stipulate the person deciding the location for the assembly of the acceptance committee in view of the acceptance. On the other hand art. 13 paragraph (1) of the regulation expressly refers to "*the set location*". In my opinion, the place of acceptance is set by the legislature. One argument is provided by art. 1862 of the civil code stipulating that the works must be inspected. As building works are generally intangible assets, the inspection thereof may only be performed at the location where they were executed. For this purpose, but much more eloquently, article 17 of law no. 10/1995 provides that the acceptance of the works is performed "*based on the direct inspection thereof*". We hereby note that

[20] See section 5 of this survey.
[21] See art. 8 and art. 12 paragraph (1) of the Regulation.
[22] Please see the comments in subsection 3.2. of this survey.

the special regulation provided by law no. 10/1995, stipulates that the inspection of the works shall be performed "directly". In this context, the word "direct" means immediately, on the spot, on the land where the building is erected. For this purpose, the place of acceptance is the place of the investment. Moreover, based on the formulation of the special regulation and on the fact that special regulations are strictly interpreted, we hereby consider that none of the persons attending the acceptance may change the place of acceptance.

Obligation to inspect building works

The main objective of the committee is to inspect the execution of the building works by the contractors. This obligation is provided both by the civil code[23] and by the special regulation[24]. The major issues in terms of theory and practice concerning this obligation are the performance of the inspection, the object of the inspection and the purpose of the inspection.

As we stated before[25] the inspection of the works is performed at the place of execution thereof. The inspection must be performed directly by all the members of the committee. In case one or more members are unable to attend the meeting on the date set for the acceptance of the works, the law[26] provides that for those categories of works which were not inspected, the president of the committee shall set a new term for acceptance. Per a contrario, any acceptance made by accommodation without direct inspection on the spot by one or more members of the committee cannot be deemed as validly executed. We reach the same conclusion upon analyzing the purpose, the components of the quality system and the legislative means concerning the quality of building works. Thus, the stated purpose of the law is to protect[27] human lives in the first place. For this purpose, the legislature established certain requirements[28] based on which building works must meet a minimum quality standard on the one hand, and on the other hand it established the components[29] of the building quality system and the stages[30] of the building to comply with quality requirements. Based on this analysis, the acceptance of the works is an essential component of the building quality

[23] See art. 1862 of the Civil Code.
[24] See art. 17 of Law no. 10/1995 on the quality of building works.
[25] See subsection 3.4.2. of this survey.
[26] See art. 13 paragraph (3) of the **Regulation.**
[27] See art. 3 of Law no. 10/1995 on the quality of building works.
[28] See art. 5 of Law no. 10/1995 on the quality of building works.
[29] Ibidem art. 9.
[30] Ibidem art. 8.

system completing the execution stage of building works. As the main objective of acceptance is the inspection of the works, this inspection must be performed directly. Otherwise, the legal provisions stating that the acceptance is an essential components of the building quality system would be ineffective.

The inspection of building works is based on the direct comparison between the executed building works and the execution documents, including the building permit, as well as the approvals and execution terms required by the competent authorities and the quality regulations in force for each works category. For this purpose the investor must[31] provide the acceptance committee with the execution documentation as well as with the building log book drafted by the investor. Pursuant to the provisions of art. 14 paragraph (1) letter d) of the **Regulation,** in case the acceptance committee has any doubts concerning the documents comprised in the building log book, the committee may request expertise, other documents, additional trials, evidence and other tests.

Building works are the objective of the inspections performed by the acceptance committee. Based on the interpretation of art. 13 paragraph (3) of the **Regulation,** building works are inspected by the members of the committee according to the works categories. The works categories may be identified further to the analysis of the legal provisions in force. For this purpose we have two major sources for the identification of these works categories. The first and most important source is the one resulting from the requirements to be met by building works in terms of quality. These requirements are stipulated in art. 5 of law no. 10/1995 on the quality of building works, as follows: (i) mechanical resistance and stability; (ii) fire safety; (iii) hygiene, health and environment; (iv) operational safety; (v) noise protection; (vi) energy saving and thermal insulation. The second source provides the specialties and the requirements for certifying building specialists. For this purpose art. 4 ofthe technical regulation of 26 may2003 “guideline for the technical and professional certification of building specialists" based on the essential requirements provided by the law, the legislature divided building works into categories and subcategories according to building domains and installation specialties.

Concurrently, further to the provisions of art. 13 paragraph (3) of the **Regulation,** all categories of works must be inspected, with no

[31] See the provisions of art. 13 paragraph (3) and of art. 14 paragraph (2) of the **Regulation**.

exception. Thus, the provisions of the **Regulation** based on which the committee adopts decisions based on the simple majority vote cannot be interpreted in the sense that the said committee may adopt decisions given the quorum and the presence of the investor, however leading to the failure to inspect certain works due to the absence of one or more specialists.

Moreover, the acceptance committee shall check the report[32] drafted by the designer concerning the performance of the building works, the investor being liable to include the latter in the activity design agreement. Pursuant to art. 14 paragraph (1) letters e) and f) of the regulation, the acceptance committee must inspect the accuracy of the declared amount of the investment as well as the documents attesting that the investor paid all the taxes due to **isc**. We have to mention that[33] the acceptance was recently postponed[34] until the investor provides evidence that it has paid to **isc** all the taxes due by the investor based on art. 30 paragraph (1) and on art. 40 paragraph (1) of law no. 50/1991 on the authorization of the execution of building works.

The inspections of the building works performed by the acceptance committee aim to merely grant and certify the fact that the minimum quality level of the works was met in terms of all the essential requirements of the regulations in force. We have to mention the fact that depending on the importance of building categories, the building quality system is applied in different manners[35]. Thus, building works are classified in different importance categories based on several factors such as: the complexity, the purpose, the use, the safety risk, as well as based on economic terms.

Another purpose provided by the legislature is to inspect whether the building works were executed pursuant to the agreement concluded between the investor and the contractor and to the documentation appended to the agreement.

The obligation to adopt a decision

After the assembly of the committee and after inspecting the building works, the committee must make a decision and must mention its

[32] Ibidem art. 14 paragraph (1) letter c).

[33] On 03-June-2014 Art. 17 of the **Regulation** was supplemented by Art. 1, section 5. of Decision no. 444/2014 for the amendment and completion of the Regulation on the acceptance of building works and related installations approved by Government Decision no. 273/1994.

[34] Ibidem art. 7 paragraph (1).

[35] See art. 4 of Law no. 10/1995 on the quality of building works.

remarks and conclusions in the acceptance protocol drafted upon the completion of the works. This obligation is based on the provisions of art. 15 of the **Regulation** providing that "*the committee shall stipulate the remarks and conclusions in the acceptance protocol*" as well as on the provisions of art. 21 of the same **Regulation** pursuant to which "*based on the acceptance protocol, the investor decides the approval, the postponement or the rejection of the acceptance*".

3.5. Organization and operation of the acceptance committee

Pursuant to the provisions of art. 13 of the regulation, the acceptance committee may operate with a quorum of 2/3 of the members of the committee. We have to mention the fact that art. 12 of the regulation provides that "*if on the date fixed [for acceptance] [the investor] is not present either in person or by means of a representative at the place of acceptance, the contractor shall renew the request for a new date of acceptance under the terms of art. 8 [of the **Regulation**]*". Consequently, the presence of the investor upon the acceptance of the works is essential, and the quorum required by art. 13 of the **Regulation** amounting to 2/3 of the members must absolutely include the investor. As we showed before[36] the legislature provided such a situation and stipulated that whenever this happens, the contractor must summon the investor to meet its obligations under the penalty of paying for the damages caused to the contractor. Based on the content of these provisions we reach the conclusion that the acceptance is an obligation for action with a profound *intuituu personae* character represented by the investor.

Article 13 paragraph (2) provides that "*the decision of the committee are adopted based on a simple majority*". We hereby note that, according to the regulations of any collective management body, in the case of the acceptance committee the legislature mentioned the quorum as well as the necessary majority for the adoption of a decision. For this reason i consider that the acceptance committee is a collective management body, which may imply different opinions concerning acceptance, but having three particular features. The first one is the fact that no decision may be made in the absence of the investor[37]. The second one concerns the fact that the acceptance shall be rejected if the legal requirements concerning

[36] See subsection 3.3. of this survey in case the investor is not present or does not convoke the acceptance committee, the contractor has no other choice but to notify once again the investor to meet its obligations.
[37] Please see the comments provided in the previous paragraph.

fire safety are not entirely complied with[38]. In other words, the specialist having the competence to check whether the works meet the requirements concerning fire safety has the right of veto. The third particular feature is the fact that other persons may attend the acceptance as guests, such as the designer and the contractor. The latter are however prohibited[39] to take part in the acceptance committee, which is why they will never take part in the deliberations of the committee.

In case there is a quorum but not all the members of the committee are present, the president of the committee shall convoke the meeting again within maximum four[40] days in order to examine the works categories which were not inspected due to the absence of the specialists. A situation that may be encountered in practice is the fact that one or more certified specialists are temporarily or permanently unable to take part in the works of the acceptance committee. The question arising is whether the investor has the right to replace the latter in this case. Based on the provisions of art. 13 paragraph (3) of the **Regulation** we may conclude that the acceptance is performed for each works category according to the specialty of each certified specialist attending the committee and that the committee shall be convoked again for those works categories for which the certified specialist is not present. Per a contrario, the works inspected on the first convocation shall be valid even if there is a possibility for a specialist who was previously present not to attend the reconvocation. Under these circumstances we consider that the acceptance made by the committee is valid provided that the verifications were performed separately by its members if all works categories were checked in the presence of the investor.

I consider that due to the fact that the acceptance upon the completion of the works has a great economic and social importance, the legislature provided short and precise terms concerning the acceptance process. By setting these terms, the legislature made sure that the acceptance process is performed with expedience, with no unjustified delays. I consider that the term of four days for reconvocation is this short in order to allow the president of the acceptance committee to request the replacement of the members who are temporarily or permanently unable to inspect the works.

[38] See the provisions of art. 10 paragraph (3) of the **Regulation.**
[39] Ibidem art. 8 paragraph (2) and the comments in subsection 3.2. of this survey.
[40] This term is provided by the provisions of art. 13 paragraph (3) of the **Regulation.**

Thus, one or more members of the committee may be replaced by the investor if they are not present on the first and on the second convocation to inspect the works. This way, the acceptance may be carried out with expedience, and the inspections performed by the other members of the committee shall be valid.

3.6. Decision of the acceptance committee

After the completion of the inspections required by the law, the acceptance committee shall deliberate and shall make a decision concerning the rejection, the postponement or the approval with or without objections of the acceptance of the building works upon the completion thereof.

Thus, pursuant to art. 16 of the **Regulation** the acceptance committee shall decide the approval of the acceptance only if there are no objections or if the objections are not likely to affect the use of the works according to their purpose. There are no problems provided that all the legal requirements are met. The problems mostly arise in practice when the building works do not meet all the legal requirements to be accepted and used. In such cases, the law provides that in the event the committee recommends the approval of the acceptance with objections, all the works missing or to be remedied must be expressly stipulated in the acceptance protocol upon the completion of the works.

What are the criteria to be considered by the acceptance committee in making the decision to approve or to postpone the acceptance with objections? We identified four criteria based on which the acceptance committee may decide to approve the acceptance with objections upon the completion of the works. The first criterion is the compliance with the essential requirements concerning the quality of building works provided in art. 5 of law no. 10/1995. The second criterion concerns the susceptibility of the building to be used according to its purpose. The third criterion is provided by art. 22 of the **Regulation** stating that the term provided for the remedy of defects shall not exceed 90 days. The fourth criterion is that the works that are missing or to be remedied are not the ones expressly provided by the legislature as a reason for the postponement or rejection of the acceptance.

This way, pursuant to art. 17 of the **Regulation**, the acceptance committee shall recommend the postponement of the acceptance when: (i) there are missing works or unfinished works affecting the safe operation of the building in terms of the essential requirements; (ii) the

building works have vices requiring long-lasting remedy, whose absence would considerably affect the utility of the works;(iii) there is a justified doubt concerning the quality of the works and trials of any type are required for the clarification thereof; (iv) no documents were provided attesting the payment of taxes to **isc** pursuant to art. 30 paragraph (1) and to art. 40 paragraph (1) of law no. 50/1991 and (v) the original energy efficiency certificate of the building was not provided[41].

Pursuant to art. 18 of the **Regulation,** the acceptance committee shall recommend the rejection of the acceptance if there are any vices which cannot be removed and which are likely to affect the accomplishment of one or more essential exigencies, requiring expertise, redesign, restoration of the works etc.

In case the investor claims to take over a part of the work prior to the completion of the entire work provided in the agreement, a delivery-receipt protocol shall be concluded between the contractor and the investor, stipulating the state of the respective part of the work, the measures for conservation, as well as the measures for reciprocal protection of the activity carried out by the two parties. All the risks and dangers pertaining to the part taken over are temporarily transferred to the investor, except for the latent defects and for the defects generated by inadequate use. For the part of the work taken over by the investor, the warranty period for the vices not related to the security of the building commences on the date of completion of the remedies.

The acceptance committee shall communicate to the investor the acceptance protocol upon the completion of the works within 3 business days. The protocol shall comprise the observations and conclusions of the committee concerning the recommendation to approve the acceptance with or without objections, to postpone or to reject the latter. The date of acceptance upon the completion of the works is the date of conclusion of the acceptance protocol by the acceptance committee, with or without objections.

After the approval of the acceptance by the investor with or without objections, the latter may no longer claim work remedies, penalties, the lowering of amounts or any similar issues, unless they are stipulated in the acceptance protocol. The latent defects observed within the term required by the law are an exception.

[41] See art. 20 of Law no. 372 of 13 December 2005 on the energy performance of buildings, republished.

4. The acceptance deed

The acceptance deed is issued by the investor based on the recommendations made by the acceptance committee. The acceptance deed is practically the acceptance protocol upon the completion of the works. There are few practical situations in which, pursuant to art. 21 of the regulation and based on the acceptance protocol, the investor issues a distinct deed expressing in writing its decision to accept the building works upon the completion thereof.

The legislature provides that the investor shall accept the works based on the *recommendations* made by the acceptance committee. I shall try to find the meaning of the word recommendation in the context of the regulations related to acceptance. May this recommendation be construed as being consultative, thus enabling the investor to make a decision other than the one proposed by the acceptance committee? Such an interpretation may not be considered and the investor should comply with this decision.

If we accept the fact that the decision of the committee is not mandatory for the investor, we may find ourselves in the situation where, although the committee recommends the rejection of the acceptance, the investor approves the acceptance of the building works even if they do not meet the essential requirements of the building quality system. Such a possibility would be absurd as the entire legislation concerning the quality of building works would be ineffective and may endanger human lives, property, the society or the environment.

Secondly, art. 21 of the second thesis of the regulation stipulates that "the investor makes a decision based on the acceptance protocol". By applying the principle based on which special regulations are strictly interpreted, we reach the conclusion that the decision of the committee prevails the will of the investor, who must comply with this decision.

5. Tacit acceptance

The tacit acceptance is provided by the provisions of art. 1862 paragraph (2) of the civil code providing that "*if the beneficiary fails to timely communicate to the contractor the result of the inspection for unjustified reasons, the works are deemed to be accepted with no reserves.*" The problem arising is whether or not this provision may also be applied in the case of building contractor works.

What happens if the investor is not present or if it fails to communicate the result of the inspections to the contractor? May these situations be subject to the provisions of the civil code concerning general contractor agreements, namely the provisions of art. 1862 paragraph (2)? We showed[42] that the tacit acceptance provided in art. 1862 paragraph (2) of the civil code also applies to building contractor agreements.

The civil code, in the section concerning building contractor agreements, has several provisions concerning the acceptance, but they only refer to the effects of the acceptance on the parties and to the obligations thereof. We may be first tempted to apply the provisions concerning contractor agreements in general, namely the provisions of article 1862 of the civil code concerning tacit acceptance. However, this interpretation[43] may not be considered for various reasons.

Firstly, article 1878 of the civil code, which is included in the special section concerning building contractor works, stipulates that *"after the completion of the building,* ***pursuant to the law****, there shall be a provisional acceptance upon the completion of the works".* We note that the legislature expressly refers to the application of other legal provisions concerning the acceptance, and in my opinion this reference is made to the provisions of the special laws and of the laws on building works.

I may say that the special laws on building works provide details on the procedure to be followed for the acceptance of building works. As the special law has enforcement priority compared to the general regulation, the provisions of art. 1862 paragraph (2) of the civil code cannot be applied. It is obvious that there would be a different solution if the laws concerning building works provided no answer to the above questions.

Furthermore, the obligation of the beneficiary to accept the works is an obligation to take action, where the beneficiary of the works is the debtor of the obligation and the contractor is the creditor of this obligation. We demonstrated[44] that in the old regulation of the civil code[45] under 1864, the obligations to take action may be enforced in kind, except for those "*obligations to act as intuitu personae, implying a*

[42] See Mangu, Codruţa E. «Riscul lucrului şi riscul contractului în contractul de antrepriză în construcţii.» *Pandectele Române*, nº 1 (01 2012).
[43] *Ibidem*.
[44] See Constantin Stătescu, Corneliu Bîrsan. *Drept civil: Teoria generală a obligaţiilor.* Ed. a 9-a, rev. Bucharest: Hamangiu Publishing House, 2008 p. 322.
[45] See the provisions of art. 1075 of the Civil Code of 26 November 1864 - updated until 1997.

special personal activity of the debtor"[46]. We also demonstrated that[47] pursuant to the regulation of the new civil code[48] in order to analyze the possibility of the enforcement in kind of the obligation to take action there must be a distinction between the *intuitu personae* obligations to take action and the obligations implying a special personal activity of the debtor. Thus, it was ascertained that "*the obligations to take action implying the personal act of the debtor may not be performed by enforcement in kind by direct means, but only by indirect constraint means, by taking measures over the goods owned by the debtor, thus indirectly determining the action of the debtor*[49]"

As we stated before[50] the acceptance is an obligation to take action with a profound *intuitu pesonae* nature. This nature is also highlighted by the special importance granted by the investor during the design and execution of the building works. For this purpose, the regulations in force provide a series of obligations which are binding only for the investor, out of which we would like to mention the obligation to draft and to keep the execution documentation and the building log book. In the lack of the execution documentation or of the building log book, the acceptance committee shall be unable to inspect and to further accept the works. Moreover, we should remember that the beneficiary has the obligation to appoint the members of the acceptance committee.

Due to the fact that the obligation of the beneficiary is an *intuitu personae* obligation to take action and such obligations may not be enforced in kind, i hereby conclude that the provisions of art. 1862 paragraph (2) of the civil code concerning tacit acceptance are not applicable to building contractor works.

Moreover, if we accept the fact that tacit acceptance is applicable to building works, we may find ourselves in the situation in which a building was accepted without reserves even if the quality of the building works could not be checked pursuant to the legislation in this respect. In this case, the entire legislation concerning the quality of building works may be ineffective and may endanger human lives, property, the society

[46] Ibidem.
[47] See Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, ed. *Noul Cod Civil: comentariu pe articole.* Bucharest: C.H. Beck, 2012, p. 1619.
[48] See the provisions of art. 1528 of the New Civil Code.
[49] See Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, ed. *Noul Cod Civil: comentariu pe articole.* Bucharest: C.H. Beck, 2012, p. 1619.
[50] See subsection 3.5. the first paragraph of this survey.

or the environment. Consequently, tacit acceptance may not be approved if the contracted works involve building works.

6. Conclusions

The acceptance upon the completion of the works marks the end of the execution of building works and represents the moment in which the works are thoroughly examined mainly by the investor, as well as by the other members of the acceptance committee.

The rules concerning the performance of the acceptance process are strict and very detailed. The membership of the acceptance committee is determined by the investor in strict compliance with legal provisions. Depending on the importance category of the works and on the financing thereof, it may include a series of representatives of state institutions. The number of members of the acceptance committee increases depending on the importance of the building works.

The acceptance committee is a collective management body adopting decisions based on the majority vote of its members under the express quorum requirements of the regulations. The acceptance deed is a document issued by the investor, with *intuitu personae* nature. For this reason, the tacit acceptance provided by art. 1862 paragraph (2) of the civil code may not be applied to building contractor works.

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ROMANIA AND THE ORGANIZATION OF THE BLACK SEA ECONOMIC COOPERATION (BSEC)

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ABSTRACT
After the dismantling of the Soviet Union, in the Black Sea region emerged a number of international cooperation initiatives, some of which contain the entire region (especially the Organization of the Black Sea Economic Cooperation), others involving only some countries, either intergovernmental non-governmental actors. This shows that there is a growing recognition of the fact that a mutually beneficial cooperation can be developed. This recognition and the cooperative response to it create a regional identity. The consciousness of this identity has not existed in the past, due to geopolitical factors that still tend to emphasize the aspects of differentiation and not the identity aspects.

KEYWORDS: *international cooperation, regional identity, geopolitical factors, identity*

1. History of BSEC

Organization of the Black Sea Economic Cooperation (BSEC) was created in June 1992 by the governments of 11 countries: Albania, Armenia, Azerbaijan, Bulgaria, Georgia, Greece, Moldova, Romania, Russia, Turkey and Ukraine. In 2004, at the first extension, the organization included two more states: Serbia and Montenegro. Today, BSEC is the most advanced form of regional cooperation in the Black Sea area.

The original plan which included the BSEC Economic Agenda the creation of an area of free trade proved to be unrealistic and obtained a limited political support. The diversity of the international commitments and the joining of several BSEC Member States to the legislation and to the EU rules have made the establishment of a unified regional economic regime to become an almost impossible task. The second original purpose, to create a cooperative process based on business interests could not

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be achieved primarily because the private sector has remained largely outside the organization's decision process.

BSEC, with its wide range of activities, as well as its composition, remains a useful framework to stimulate dialogue and mutual trust between Member States, thereby paving the way for a possible viable employment to more ambitious projects.[1]

2. Objectives of the BSEC

The Black Sea region has a strategic importance that is given by the rich natural resources, particularly oil and gas, and a potential market of over 350 million consumers. The cumulated trade of the region is over 5% of the world trade.

The strategic component of the region has increased in recent times due to the outbreak of anti-terrorist campaign; US is interested in the developments in the region and EU assist the countries in the region with the New Neighbourhood Policy.[2]

As the BSEC Charta say, the major objective of the organization is the development and diversification of economic relations between Member States by harnessing the benefits arising from their geographical proximity, relations tradition, the complementary nature of national economies and the potential of the market. Such a development will transform the Black Sea region into a zone of peace, stability and prosperity.

To achieve its objectives, BSEC was structured on various platforms: governmental, parliamentary, business, finance and banking, academic and scientific affairs and justice, and the areas of cooperation are focused on trade, transport, communications, energy, agriculture, tourism, environment, education, health care, science and technology, institutional renewal and good governance, combating terrorism and organized crime, etc.

Of particular importance in the expanding of the economic cooperation between the BSEC states has been the Trade and Development Bank of the Black Sea (1999) and Project Development Fund (2004), which meant to support financially the projects and the cooperation programs which will be initiated in this geographic area.[3]

[1] http://www.mae.ro/ocemn
[2] http://www.mae.ro/ocemn
[3] http://www.cdep.ro/proiecte/2005/500/30/1/em531.pdf

3. BSEC relationship with Romania

The relations with the European Union are of particular importance for the BSEC. As stated in the "Economic Agenda for the Future", adopted in 2000, BSEC expect the European Union to develop a coherent strategy for cooperation with the Organization and its Member States, in order to achieve a gradual economic space Euro-BSEC.

Romania has consistently called for strengthening links between the BSEC and the EU. The approach was determined by Romania's priorities in the Black Sea region and by favourable current created by the "European Neighbourhood Policy".

Romania thinks that it is very important to participate in BSEC activities, being convinced that any contribution to development programs and projects in the Black Sea region is an investment in the future of stability, security and prosperity of the entire European continent. As a testimony to its interest in BSEC, Romania organized the Summit of the organization (June 1995), a series of meetings of the Plenary Session of Foreign Ministers and the Parliamentary Assembly of the Black Sea Economic Cooperation, and in January - June 2011, Romania has held for the fourth time the Presidency-in-Office (CiO) of the BSEC. Romania will take over the presidency for the fifth time in the second semester of 2015.[4]

The Black Sea region as a whole was and will be a topic of interest on long-term priority for our foreign policy. Our strategic objectives consist of: strengthening democratic stability, access to prosperity through regional cooperation projects and partners in the European Union, inclusive approach to all partners for dialogue and cooperation in the Eastern area, connecting to the EU regional projects.

Romania supports the ongoing reform of the BSEC and ensures the increase of the efficiency of the organization. Romania has initiated a series of consultations with Bulgaria and Greece, the other two EU countries of the BSEC member states, in order to continue the reform and reach certain results in the implementation of the BSEC projects.[5]

[4] I. Diaconu, A. Popescu, *Organizaţii europene şi euroatlantice*, Ed. Univers Juridic, Bucureşti, 2009.

[5] I. Stribis, D. Karabelas, *The BSEC at fifteen: key documents*, International Centre for Black Sea Studies, Atena, 2007.

CONCLUSIONS

Today, the Black Sea region, due to its location and the extraordinary development potential, has the opportunity to play a new role in the European system. No single organization (EU, NATO, OSCE) or a single political actor can hold all the solutions to the specific problems in this area with its own dynamics, or on any place on Earth. Policy cooperation is the key to strengthening the security and the stability, so that each state has a word to say and yet not feel threatened.

BSEC, through its the wide range of activities, as well as its composition remains a useful framework to stimulate dialogue and mutual trust between Member States, thereby paving the way for a possible viable employment to more ambitious projects.[6]

For the Black Sea regionalism is vital that the BSEC develop a structured and constructive relationship with other regional and international actors, notably the EU, which both have the resources and the expertise to engage in regional projects. Turning BSEC into a reliable partner with a clear strategy will give new meaning to the concept of regionalism of the Black Sea in a united and democratic Europe. In fact, the relations with the EU and other European organizations have become a central element of the BSEC agenda, along with a separate consolidated financial instrument, which was included in the 2007-2013 financial project. In this context, it is expected to form a new "Platform for Cooperation between the EU and BSEC" and to define its role as a regional partner.[7]

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4. http://www.balcanii.ro/2013/12/vocatia-colaborarii-regionale-e-s-omur-solendil/

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[6] http://www.balcanii.ro/2013/12/vocatia-colaborarii-regionale-e-s-omur-solendil/
[7] http://www.mae.ro/ocemn

DEFENCE DIPLOMACY AND ITS IMPORTANCE IN MANAGING CONFLICTS OF THE 21ST CENTURY

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ABSTRACT

Given the changes taking place in the international security environment, permanent, accelerated and unpredictable, defence diplomacy, from a vector of study, becomes an active foreign policy of a state. National interests and values of a state obtain global meanings by changing institutional working tools, by moving from state level to regional or global. In this context, the promotion of a state, in all respects, can be accomplished by appealing to concepts that have become working instruments, defence being one of them. In a secondary role, defence diplomacy becomes a leading actor in the world of international actors.

KEYWORDS: *defence diplomacy, national and international interest, national and international security, military diplomacy, defence attaches*

1. Introduction

The international security environment is the subject of intense and sometimes violent worries which have formed the basis for a number of reasons more or less justified by public international law. On international level, serious conflicts may be charged in respect of the future security architecture because some states, depending on their national interests, are trying to impose by force at times, other times through their vision of environmental diplomacy of contemporary security.

The concept of „defence diplomacy", was mentioned for the first time by the United Kingdom in the Strategic Defence Review of 1998, in this document is also examined the role of military attaché, thus being one of the first promoters of this concept. After the attacks of 11 September 2001, the United Kingdom has reviewed this document and has developed "the new chapter". Here are put in evidence the importance of defence diplomacy to address the causes of conflict and terrorism, as well as the benefits

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of open treatment of issues, on which it is based. Defence diplomacy has led to a review of the tasks that the soldier and diplomat have in the field of foreign policy. In addition, new conceptual changes of "security", both national and international, as well as the relations increasingly closer between the field of politics, an area mostly "civil" and military affairs (working with international military organizations) led to the consecration of military diplomacy as part of defence diplomacy. Therefore, military diplomacy becomes part of diplomacy, distinctive in his goals and tasks of foreign policy, for the protection of the rights and interests of the state in its relations with other subjects of international law. The defence has been and will remain a fundamental domain for a State as it includes all the decisions, measures and violations of state institutions that enact and enforce them, both nationally and internationally, in order to guarantee constitutional rights, protecting national interests and promote the values, in accordance with domestic and international law, with all international documents to which a state is a signatory party. That's why the national character of defence will also include obligations of a state towards the international organizations, obligations which may be material, human and financial[1].

Diplomacy existed regardless of the form of organization and the historical evolution of humanity, representing the most important tool to promote the foreign policy of states. The entire world's states and their political leaders have used diplomatic instruments in order to meet the official political or secret objectives of their enemies and allies, which allow them to adopt the appropriate decisions in order to defend the interests of national security.

Regarding the etymology of the word „diplomacy", it is believed that it comes from the Greek „diploo" (to fold), word that refer to the action of the sovereigns of producing copies of official documents, the meaning is that the documents in question were drawn up in two copies, one of which was given as a power of attorney or letter of recommendation to the delegates, and the other to be stored in the archive. Most authors who have dealt with the study of this area are willing to ascribe the philologist and French philosopher Emile Littre (1801-1881) the fact that the notion of „diplomacy", even if it takes an older origin, began to extend only in the 17th century, being used at first in a restrictive way to define a set of documents and treaties in international relations. British diplomat Ernest Satow locates this word for the first time in England in 1645. The

[1] http://www.rft.forter.ro/2010_2_t/05-inv/03.htm

German philosopher Gottfried Leibruiz 1646-1712) and French scholar Dumont used the word „diplomatic" in their works *Codex Juris Gemium Diplomaticus* (1693) and Corps Universel *Diplomatique du Droit des Gens* (1726). It is obvious that the titles of these works, the meaning of the word, „diplomaticus",respectively, and „diplomatique" is related to the idea of agreements or international contracts. The term „diplomacy" is used in several ways. It means the art of diplomacy in particular, but also a career diplomat or anyone who embraces this career, as well as the foreign policy of a State. In English, as a basis of international law and foreign policy, we meet towards the end of the 19th century, borrowed from the French language. In an old form the sense of a document (diploma =royal document) we meet in *Hronicul româno- moldovlahilor* of Dimitrie Cantemir, at the beginning of the 18th century.

The terms used today are adopted in the period preceding the Revolution of 1848, being found, for example, in the French-Romanian Vocabulary, published in Bucharest, in the years 1840-1841 by Aaron Blair, G. Hill and Petrache Poenaru. In this dictionary, the French term „diplomacy" is defined by writers of that period „the science that learns to meet the interests and relations between rulers and States themselves, those interests and relations, the Ministers, Ambassadors etc. who administrate them". The Romanian word „diplomacy" had not yet entered the language. The word, „ambassade"is explained by „deputy sent to a sovereign state". According to statements, the best solution discovered by civilisation in order to prevent relations between states to be governed only by force, is diplomacy. In other words, political negotiations, diplomatic negotiations are the only alternative to the politics of force at international level. In the reference work of Sir Ernest Satow, „Guide to diplomatic practice", diplomacy is defined as the application of intelligence and the tact used in official relations between the governments of independent states, extending sometimes to their relations with vassal states or, more briefly, conducting the affairs between states through peaceful means.

Of the definitions closest to the original meaning of the word „diplomacy" we may quote that of De Flassan, at the beginning of the nineteenth century: „„Diplomacy is the term by which is designated, for many years now, the science of external relations, which is based on diplomas or acts emanated by sovereigns. Ferdinand de Cussy, in his work, „*Dictionnaire ou manuel- lexique du diplomate et du consul",* says that diplomacy is the „totality of knowledge and principles that are necessary to drive good public affairs between states". Another definition

of diplomacy, which was made at a more recent date (1866), belongs to a renowned author of international law, Charles Martin, who said that „diplomacy is the science of foreign relations or foreign affairs of states and in a more precisely sense, the science or art of negotiation".

According to the dictionary of the Romanian language in 1998, the term ' diplomacy ' means the activity of a state by its diplomatic representatives in order to achieve the planned foreign policy; „subtle, clever, sly behaviour, 2. career, profession of diplomat 3. diplomatic representatives constituted as a whole body, from the French „diplomacy"[2]. In Anglo-Saxon dictionaries, the concept „diplomacy" is extensive explained, it includes some new elements, such as „diplomatic skills", or „diplomatic art"[3]. Although the terms are not synonymous, diplomacy is most often confused with foreign policy or foreign relations. Diplomacy is the main but not the only instrument of foreign policy. Foreign policy establishes objectives, prescribes strategies and requires measures that must be followed to ensure their fulfilment. In the attainment of foreign policy, political leaders may be using secret agents, subversive actions, may declare war on or impose their views through other violent actions, but at the same time can use diplomacy, the only non-violent tool which can lead to the achievement of these objectives. Diplomacy is therefore the main substitute for the use of violence, force or subversive tactics and how peaceful and pacifying whereby two or more states negotiate a common foreign policy. The main levers of diplomacy are international dialogue and negotiation, in particular, led by the accredited ambassadors and other political leaders with skills of negotiators. Use of diplomats is one of the keys to a successful foreign policy. They, but not only, are charged with the task of practicing diplomacy. They go and convey messages and negotiate changes in relations with other states, in settling conflicts between belligerent states and peoples. Their weapons are words, strengthened by the power of the state or the organization you represent. Diplomats help leaders understand the attitudes and actions of opponents and allies, also contributing to the elaboration of strategies and tactics through which their actions to be altered or undone, depending on the interests of the state they represent.

[2] *Explanatory Dictionary of the Romanian language, 1998, http://dexonline.ro/search.php?cuv=diplomaţie.*

[3] *Oxford English Dictionary*, online edition, http:// www.askoxford.com/concise_oed/diplomacy?view=uk.

The concept of „defence diplomacy" has gained international consecration with the involvement of more and more turn to military factors in monitoring and settlement of conflicts emerging after the Cold War. In diplomacy, „defence diplomacy" occupy a special place, representing „the totality of the actions performed, as a Government and it staff, designed to reduce the climate of tension or hostility, to implement new measures to increase confidence between states, to contribute to the development of collaboration and cooperation between the armed forces and ensure the conditions of creation or operation of allies and coalitions"[4]. The concept of „defence diplomacy" was picked up by almost all the states of the world, its interpretation is always chasing the same goals, but in ways tailored to the strategy of national security of each state. Institutionally speaking „defence diplomacy" is exercised by defence attaches, military and naval, aero, but some of its components can be run through the army's representatives in different organizations, coalitions, alliances, joint exercises and other activities that foreign soldiers participate in. Evaluation of the effectiveness of „defence diplomacy" is almost impossible to achieve, but, in general, it is believed that as long as it manages the preservation of a climate of peace and mutual trust, the defence diplomacy has fulfilled the mission.

2. Military diplomacy

Military diplomacy represents a part of defence diplomacy which refers only to the military and, partially, the politico-military[5]. In the framework of military diplomacy, a special role is for specialized institutions which, in their official activities, carried out through peaceful negotiations and treaties, follow to achieve foreign policy goals for the protection of the rights and interests of the state in its relations with other subjects of international law. Thus, the deduction becomes intrinsic regarding that policy promoted through military diplomacy does not differ from that of the Government of that state „it becomes nuanced by the specificity of the competent authorities to carry out such work, and the means used, the particular official action, the nature of negotiated treaties and agreements, the specific political objectives followed to be fulfilled and the direct collaboration with the military structures of the

[4] Sergiu Medar, *The diplomacy of defense*, ECTA Publishing, Bucharest, 2006, p. 4.
[5] *Ibidem*, p. 1.

states or international organizations[6]". Like many modern concepts, „military diplomacy" focuses on an area of the border and that is the interference of military aspects in diplomacy. The international security environment is found in an ever-changing, generated mainly by the changes that have taken place in the sphere of risks and threats. Thus, emergence and development of asymmetric risks[7] and threats that are beyond the area of action, state level, have spotlighted the need to change the way of thinking-from the one who has to pay attention to safety and national defence at the mission to public ensure the security in several states[8]. A dynamic and pro-active approach to trends that threaten national and international security refers to the use of national instruments in a new way, adapted to the current situation. One of these tools, indispensable in establishing appropriate strategic decisions, military or peaceful, and in promoting the state's interests in the international scene represents defence diplomacy. Its representatives, military attaches must continually adapt to the changes in the spectrum of threats to this political component, especially by advising the chief of the mission, appropriate proposals in the implementation of future policies held in bi-or multilateral relations.

The threats and risks of the 21st century is shaped around the concept of „asymmetry". Characterized by high destructive potential and the idea indiscriminate attacks, asymmetric threats lead indirectly „to the injury of the fundamental rights of states and the security of their systems[9]." Military diplomats have a very important role in the management of such threats, claiming the political decisions through the information they present to the beneficiaries. Also defence attaches have as mission, through the activities undertaken in accrediting states, to ensure a climate of stability between the state they represent and the resident state. Following to alleviate conflict situations by peaceful means, with arguments,

[6] Gheorghe Tinca, *The Magazine of The National Defence College*, nr. 1/1995, pp. 9-12.
[7] Transnational and international political terrorism, including its biological and informational forms; actions that may threaten the safety of transport systems, domestic and international; individual or collective actions of illegal access to information systems, disinformation and manipulation of information; actions designed to damage Romania's image; financial and economic aggression; deliberate provocation of environmental disasters; potential global effects of natural processes.
[8] Cristian Cişmigiu, *Prospects of Romanian military diplomacy developments as an important factor in reducing the effects of asymmetric threats*, presented in the National Defence University Bulletin, Carol I, nr. 1/2010, p. 252.
[9] *Ibidem* p. 253.

and not using force, they ensure the chief mission support for making the best decision. In the case of asymmetrical threats, military diplomats take into account all the factors that have caused the appearance of certain situations (ethnic, religious, economic and political) and propose to solve a series of interrelations of their nationwide or international structures between different skill in this area. To do this, you need to order the defence attaches skills regarding analysis of situations and build some potentials scenarios of evolution of events.

Information that support the activities of defence attaches must come from all sources referred to, and in the era of globalization an important role has the information provided from open sources. Today, we cannot longer talk about the lack of information, but rather about an over-information that puts at risk services everywhere. The current international environment is based mainly on the idea of public relations of the states at the level of international organizations to ensure a common high security level. From this point of view, through the activities undertaken, defence attaches of the Ministry of National Defence aims at increasing confidence among states through cooperation in various fields, prevention or strain relief of conflict situations which could affect the national interests, promoting the Euro-Atlantic space of Romanian democratic values, as well as supporting the efforts of Romania's diplomatic missions abroad to promote foreign policy goals[10].

In this sense, it can be said that the primary objective of taking on a solid profile as a member of the EU means to increase the involvement of military diplomacy in foreign policy objectives with special emphasis on the fields of defence, security, regional development of natural resources, an influential and active role of Romania, its army, thus strengthening a national profile through consistent participation in the PESA.

In order to complete its strategically profile, Romanian military diplomacy will need to increase efforts to promote within the EU and NATO major themes of the Romania's foreign policy[11]. Membership of the EU and NATO offers our country the possibility of bilateral relationships with added value, pragmatic and diversified cooperation in different areas, one of which is the defence. From this perspective, the essential

[10] *Idem.*

[11] Major themes of Romania's foreign policy on short and medium term are: the Wider Black Sea issues and the Black Sea Synergy, further EU enlargement, the progress in negotiations with Croatia and Turkey, supporting the European prospects of Balkan, of Moldova and Ukraine, the European neighborhood stabilization and getting closer to the EU, including on the Eastern Partnership.

role of military diplomacy remains in developing relations with European States as well as the French Republic, the Federal Republic of Germany, the Kingdom of Spain, the United Kingdom of Great Britain and Northern Ireland, the Italian Republic, the Republic of Austria, the Republic of Hungary. Regarding Romanian regional foreign policy, it is necessary that military diplomacy accommodates its major objectives on problematic activity (bilateral relations, security, environment protection, energy security), geopolitical spaces or areas of interest, including the states of the Black Sea region, Russia, Ukraine, Republic of Moldova, the Republic of Azerbaijan, Central Asia.

Adapting continuously to the connectors of the external policy objectives of Romania, it can be considered that military diplomacy has to focus attention on diversifying and strengthening the partnership with the USA, as well as a reorientation of efforts towards deepen and diversify the special relations with the Republic of India and Republic of China, but also with the Republic of Brazil and the Republic of South Korea as global actors in the ascent. At the same time, NATO's transformation and making progress in ensuring an effective framework for cooperation between NATO and the EU in order to achieve a stable European security architectures are two objectives of utmost importance that should play a very important role in the future in terms of the activity of the Romanian military diplomacy. In this framework, it can be concluded that the role of the military diplomat will have to be reshaped and resized regarding the nature of his training, he must have a solid experience in the field of post-conflict reconstruction, and a contribution to increasing the capabilities and performance of Romania's foreign policy, of its army in international conflict management.

It is necessary a more pronounced military involvement of the negotiations on the cooperation in the field of non-proliferation, to affirm the role of Romania regarding geographic area and in the world, as a state able towards implementing and generation of stability. The new challenges to international security, especially terrorism, require a special attention to this matter. In this context, military diplomacy will need to continue to pursue the diplomatic role of the Romanian State to fulfil its global commitments on the fight against terrorism and organised crime. A less used approach so far, and that military diplomacy should be focused in the future is that of multilateralism as a strategy of action. This concept, based on a solid system of international law, aims at strengthening the capacity and influence of regional and international organizations such as UN, OSCE to solve major problems related to

systemic stability and international security with an emphasis on maximum impact: climate change, post-conflict reconstruction. The promotion of an active military diplomacy, results-oriented, has become one of the required criteria in order to achieve effective defence policy. The major crises of recent times in the social, financial, economic and military field have accelerated the need for their armies and states to step up in order to cooperate and to identify common solutions in combating their effects, on this background "... in allied countries, military diplomacy continued to be mainly oriented towards promoting and developing collaborative relationships with those countries, to identify and support the optimal solutions for the materialization of our country's efforts to adapt to NATO standards and structures of gradual integration in the Alliance[12]". Starting from these premises, the Romanian military diplomacy has to make further efforts to increase the speed of identification and evaluation of far-sighted indices relating to risks and threats of the country, affirming the role of Romania regionally, but also globally, as a state able to implant or in the direction towards stability.

CONCLUSIONS

At present, the national security and defence of Romania can no longer be detached from the security of Europe as a whole, and in this context it can be concluded that the efficiency and modernization of military diplomacy should constitute the major priorities of the Romanian military organism, considering the potential and the role more wider in promoting and maintaining stability in the region. Military diplomacy is and will be the main instrument of Ministry of National Defence, the focal centre for foreign military relations, as well as an active factor of implementation in practice of the Romanian foreign policy objectives. Mutations occurring in the international security environment, as well as the many current challenges regarding politics, economics and security that are caused by these factors in the politico-military, require decision makers more flexibility built in reconsidering diplomatic-military activity. In this context, reconfiguring and positioning of the main vectors of military diplomacy in international policies of this field becomes an obvious priority. As a result, the decision-makers factors have the responsibility to improve the management of permanent

[12] Gl.(r) dr.ing Sergiu Medar, *Military intelligence in the context of current security*, Editorial Technical Center of the Army Publishing, Bucharest, 2006, p. 158.

defence, respectively to reconsider, individualize and differentiate more sharply driving job descriptions and tools (mandates, mission orders, business plans) from country to country. In the contemporary security environment, defence diplomacy begins to become an important tool in the preservation of international security due to stimulation of international actors to dialogue and to negotiate at the expense of the initiation of violence. Although currently are implemented a series of procedures and the use of modern methods of diplomacy in various crisis situations, we can still refer the fact that countries do not hesitate to reveal armed forces. This idea outline the need for a pragmatic attitude on the part of states which have understood, for the most part, that the ownership of the armed forces with a high power of struggle may become an argument that partners of discussion have in mind in helping the state in diplomatic negotiations, that owns them, to count in the equation of international relations.

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THE STATUS OF HIGHLY QUALIFIED THIRD COUNTRY NATIONALS WITHIN THE EUROPEAN UNION

Amelia TUTILESCU[*]

ABSTRACT

The phenomenon of migration is a priority on the EU agenda. The Lisbon European Council held in March 2000 set ambitious targets for the EU economy to become the most competitive and dynamic in the world. One of actions to meet this goal was to create a unified system of rules on the conditions of entry and residence of third country nationals for employment of highly qualified jobs.

Through the EU Blue Card the aim was to encourage the development, strengthening and integration of legal economic migration within the provisions system of mmigration policy. This article seeks to identify whether the Directive 2009/50/ EC of 25 May 2009 on the conditions of entry and residence of third - country nationals for employment of highly skilled jobs has fulfilled the objectives set.

KEYWORDS: *migration, highly skilled jobs, the Directive 2009/50/EC*

1. General framework and patronage

″Highly qualified people from around the world are welcome in the European Union. [...] The Blue Card is not a blank check. The Blue Card is not a "blank cheque". It is not a right to admission, but a demand-driven approach and a common European procedure″[1] said the President of the Commission during the day of the adoption of the Directive[2]. As it is stated in the Preamble, the Directive ″seeks only to establish the conditions of entry and residence of third-country nationals for highly qualified employment within the EU Blue Card system, including the eligibility criteria related to the salary threshold″[3].

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[1] http://europa.eu/rapid/press-release_SPEECH-07-650_en.htm?locale=en.

[2] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

[3] *Idem*, Preamble, (11).

The aim of the Directive[4] is to contribute to the goals of the Lisbon[5] strategy ″to address the scarcity of labor [...] so as to make the Community more attractive to such workers from around the world and sustain the competitiveness and economic growth of the Community″[6]. The Proposal for a Council Directive[7] stated that it ″aims specifically [...] to compensate current and future skills shortages″[8]. According to the same Proposal of Directive[9], the EU is not perceived as attractive by highly qualified workers and that ″the EU is the main destination for unskilled workers with average skills from Maghreb (87% of such immigrants)″. Globally main competitors are the US and Canada[10]. The right to free momvement has been relatively less used until 2004, although it is the oldest labor right in the European Union[11].

2. Set objective and provisions

2.1. Objective

The objective of the Directive is to establish the ″conditions of entry and residence for more than three months in the Member States of third-country nationals, as owners of a Blue Card EU and their family members″ and ″in Member States other than the first Member State″[12].

It is established a requirement that third country nationals apply to be admitted in the teritorrial space of a Member State of the European Union in order to take up highly qualified employment. This determines commissioning of the entire mechanism for issuing a Blue Card. The categories of third country nationals who are not eligible for the Blue

[4] *Idem*.
[5] *Idem*, Preamble.
[6] *Idem*, Preamble, (6) and (7).
[7] Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (presented by the Commssion){SEC(2007) 1382} {SEC(2007) 1403} Brussels 23.10.2007 2007/0228 (CNS), explanatory Memorandum, 1) context of the Proposal, Grounds for and objectives of the Proposal.
[8] *Idem*.
[9] *Idem*.
[10] *Ibidem*.
[11] Catherine Barnard, *EU Employment Law*, Oxford University Press, 9 aug. 2012, p. 188.
[12] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

Card are: beneficiaries of temporary protection, national or international, or those who ″have applied for protection in conformiate national law international obligations or practice of the Member State and whose application has not yet made a final decision″; beneficiaries of international protection under Directive 2004/83/EC[13]; family members of EU citizens as beneficiaries of the right of free movement; long-term residents who undertake economic activities as employed or self-employed in another Member State; third country nationals who enter the territory of a Member State under an international agreement entry and temporary residence for individuals pursuing an activity in trade and investment; seasonal workers; third country nationals whose expulsion has been suspended for reasons of fact or law; third country nationals covered by Directive 96/71/CE[14]; third-country nationals who enjoy rights of free movement as the EU citizens.

An important element that the Directive[15] approaches is to establish a minimum frame of rules of entry and residence in the EU, applicable to third-country nationals to take up highly qualified employment. Member States may provide more favorable provisions in national legislation on admission criteria, procedural safeguard measures, the minimum period that have limited access to employment, temporary unemployment, equal treatment, family members and the period of absence from the territory EU long-term resident permit and family[16]. Member state's power to generate an individual frame - starting from the minimum level laid down by the Directive - of provisions suitable to the needs of the labor market that the Member State manages, is a matter on which we will discuss in detail in the following discussion.

2.2. Conditions and limitations

Admission criteria for access to highly qualified employment are:

[13] Directive 2004/83/CE of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
[14] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.
[15] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.
[16] *Idem*, Art 4.

- existence of a valid contract or a contract according tor the provisions of national law, or a firm job offer for highly qualified employment in a Member State for a minimum period of one year;

- thegross annual salary to be ″at least 1,5 times the gross average annual salary in the State in question″. It requires a waiver for categories 1 and 2 - Managers and Specialists - according to ISCO (International Standard Classification of Ocupations)[17], which will be higher salary threshold of 1.2 times, keeping the other conditions apply. The Proposal for the Directive[18] provides a more favorable frame because it provided derogations for young professionals under the age of 30 years on wage levels and professional experience. But according to the same Proposal,it would have been introduced an additional clause on the obbligation of performing the studies in an educational institution located in the EU[19]. The exemption in question is not present in the final version of the Directive, which determines the existence of a significantly lower percentage of highly skilled labor and early career, which may be formed according to the principles and standards of the labor market of the Member States;

- in regulated professions: demonstrate compatibility with highly qualified work through a document proving that the credentials of such employment;

- in unregulated professions: submission of documents under national law, proving ownership of professional qualifications suitable for the job in question and which were obtained in higher education[20];

- valid travel document, in accordance with national law. If national law requires a visa or a visa application and evidence of a valid residence permit or a national long-stay visa;

- an application or sickness insurance;

- not to be perceived as a threat to public ordering (order, safety, health);

[17] http://www.ilo.org/public/english/bureau/stat/isco/

[18] Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (presented by the Commssion){SEC(2007) 1382} {SEC(2007) 1403} Brussels 23.10.2007 2007/0228 (CNS), explanatory Memorandum, 1) context of the Proposal, Grounds for and objectives of the Proposal.

[19] *Idem*, Art 6.

[20] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

- to demonstrate a valid address of residence if this is required by the Member State in whose territory they are located;

One aspect that may have a significant impact on the effectiveness of the Directive in question, is that Member States may establish a quota for admission into its territory. According to the Commission Communication to the European Parliament and the Council on the implementation of Directive 2009/50/EC COM (2014) most states have introduced quota intake.

Fulfilling the prerequisites for admission and obtaining a positive decision from the competent authorities leads to a gaining a EU Blue Card, valid for a standard period of one to four years. It will be issued in compliance with the general model prescribed by Regulation (EC) no. 1030/2002[21]. Where the employment contract is less than the stipulated period, the Blue Card is issued or renewed for the duration specified in the contract, plus a period of 3 months.

2.3. Rights

The rights conferred by the Blue Card are ″entry, re-entry and stay in the Member State which issued the EU Blue Card″ and ″rights recognized in this Directive″[22].

Issuance of an EU Blue Card may be refused when:

- thethird country national does not meet the admission criteria or if the documents he presented ″was obtained by fraud or were forged or altered″[23];

- the volume of admission has been exceeded;

- the ethical recruitment needs to be fulfilled. This means ensuring ethical recruitment in countries of origin, in areas affected by the lack of skilled workers. Ethical recruitment decision is optional for Member States. Literature consequences associated with a possible brain drain phenomenon[24]. The Report on the implementation of the Directive, considers that the small number of Blue Card issued generates a reduced risk of brain drain on countries of origin of migrants.

[21] Regulation no. 1030/2002 on the creation of a standard model of residence permit for third coutnry nationals.
[22] *Ibidem*, Art 7, (4) (a) and (b).
[23] *Ibidem* Art 8, (8).
[24] Peter Kotira, Peter Mészáros, *Migration Programmes – A New Way to Solve Problems with Brain Drain From Poorer Cuntries?*, International Journal of legal research, vol. 4, nr. 3/2014, ISSN: 1805-840X, p. 232.

- the employer has been sanctioned sanctioned under national law for work/employment which was undeclared/illegal;

- the principle of Community preference, that gives preference to national labor and employment within the EU. This principle is equitable for the workforce already present in the EU, but it reduces employment opportunities for highly qualified third-country nationals.

The cases for withdrawal or refusal to renew an EU Blue Card are expressly provided: not fulfilling the conditions required by the Directive or discovering that the Blue Card was obtaind by fraud, forgery or alteration, or when restrictions of access to the labor market or temporary unemployment were not respected.

The deadline for adopting a decision is 90 days, being significantly larger than the 30 days included in the Proposal[25]. The triple length of the deadline for adoption of a decision constitutes a negative impact on the third country due to more extended time involved in obtaining favorable decision or refusal of admission as an EU Blue Card or renewal thereof.

The same Proposal for a Directive[26] recommends that after the period of limited access to labor market, the third-country nationals do not need to ″prove they meet labor and professional requirements″[27]. Lack of guidance from the body of the final form of the Directive[28] outlines a less attractive framework for third-country nationals.

Temporary unemployment is not reason to withdraw if it takes longer than 3 consecutive months and if there is a time during the validity period of the Blue Card. Highly skilled workers who hold an EU Blue Card benefits of equal treatment with nationals of the Member State on various rights. This phenomenon can be managed through implementing flexible admission quotas[29].

[25] *Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment* (presented by the Commssion){SEC(2007) 1382} {SEC(2007) 1403} Brussels 23.10.2007 2007/0228 (CNS).
[26] *Ibidem*.
[27] *Ibidem*.
[28] *Idem.*
[29] Ewald Nowotny, Peter Mooslechner, Doris Ritzberger-Grünwald, Edward Elgar Publishing, *The integration The Integration of European Labour Markets*, 2009, p. 20.

3. National provisions

Romania has issued 46 Blue Cards[30] in 2012 and 119 in 2013, and during the same years none has been issued and renewed[31]. Still, Romania is one of the 20 countries against which have been launched infringement procedures[32]. Romanian authorities have decided to manage the highly qualified third country workers flows through admission quotas and these quotas can be renewed once a year or once in two years[33]..

One important aspect is that our country has decided to raise the salary threshold for a highly qualified worker from 1,5 to 4 times higher than the annual medium gross salary[34]. A favorable decision for highly qualified third country nationals is that of the validity period of the Blue Card of two years[35]. When a Blue Card holder requests social assistance[36], his Blue Card will be withdrawn.

We consider that the number of highly qualified third country nationals that have entered the Romanian territory is reduced, and therefore at a national level they can not influence significantly from an economic perspective.

4. Fulfilled objective?

In our opinion one of the highlights for highly skilled workers is the framework provided by family members. In 2012, 1107 family members have been admitted and 3664 Blue Cards have been issued[37]. From these numbers it is obvious the importance of the general provisions relative to

[30] Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment (″EU Blue Card″), Brussels, 22.5.2014COM(2014) 287 final, p. 2.
[31] *Ibidem.*
[32] Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment (″EU Blue Card″), Brussels, 22.5.2014COM(2014) 287 final, p. 2.
[33] *Idem*, pag 3, p. 5.
[34] *Ibidem*.
[35] *Idem*, p. 7.
[36] *Idem*, p. 8.
[37] Commission Communication to the European parliamenty and the Council on the implementation of Directive 2009/50/EC COM(2014), p. 3.

family members. They will be issued residence permits within 6 months from the date of application. This period may be extended and I could reach almost half of the total validity length of the Blue Card.

As shown in the explanatory memorandum of the Proposal for a Directive[38], the main point of attraction for highly skilled workers is the access to a system containing the labor market of each of the Member States. The Directive[39] creates a system containing a standard framework of rights and obligations for minimum applicants. Due to the Member States prerogative to unilaterally extend these rights on their own teritorry, they can destabilize this framework that is intended to be homogeneous.Therefore they can be in competition with each other and with the Blue Card system. However, for the Blue Card applicant, the different conditions imposed by each Member State,can create the perception of a segmented system that can be changed at any time according to the specific needs of the market of any Member State. These are reasons of important value when one takes chooses the workplace. If Member States position themselves differently than part of the system, they could be disadvantaged in competition with major players in attracting ″the best and the brightest″[40]. A significant number of countries have national policies and procedures to attract workers with high level of qualification in addition to Blue Card system[41]. However, Member States who have such national policies, have a higher percentage of highly skilled migrants within the migrant population, than countries without such policies[42]. As is clearly shownby the Report the national systems can impact the Blue Card system: in 2012 the Netherlands issued

[38] Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (presented by the Commssion){SEC(2007) 1382} {SEC(2007) 1403} Brussels 23.10.2007 2007/0228 (CNS).

[39] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

[40] Peter Kotira, Peter Mészáros, *Migration Programmes – A New Way to Solve Problems with Brain Drain From Poorer Cuntries?*, International Journal of legal research, vol. 4, nr. 3/2014, ISSN 1805-840X, p. 235.

[41] Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC COM (2014) 287: ″BE, EE, FI, EL, IT, LT, LU, SK, SI and SE have specific provisions in wider migration policies; AT, CZ, DE, ES, FR, NL and PT have separate policies targeted at highly qualified migrants″ and European Migration Network and reports from 2007 and 2013.

[42] *Ibidem.*

5514 national permits and 1 Blue Card; France 3030 versus 77 Blue Card etc.[43].

The date by which Member States were required to transpose the Directive was 11 June 2011. 20 Member States have not met this obligation on time, so the Commission launched infringement procedures against them[44]. According to the same Commission Communication in 2012 have been released 3664 Blues Card despite delays in transposition[45] and 2013 have issued 15,261,Germany has issued 14,197, Luxembourg 306 and France 304[46]. We consider that the small number of Blue Card is still low due to reduced time from the date of transposition.

We consider that the facilities offered by the Directive, support obtaining long-term resident status. The possibility of aggregation of periods of residence in different Member States, the derogation on the periods of absence and extension of the period of absence to 24 months, build an importnat foundation for the highly skilled worker. However,the family members do not benefit of similar provisions. These provisions destabilize once again the unitary system created for these workers. For a person with a high level of academic and professional training, we can suppose that their family situation is important. Failing to meet their expectations, can impact in a negative manner the effects of the Directive[47].

The geographical and occupational mobility in the EUof highly skilled workers is one of the main ambitions of this Directive[48]. As stated in the Preamble is to ″be recognized as a primary mechanism for labor market efficiency, preventing shortages of highly skilled workers.″ Taking into account that the first Member State considered that the highly qualified worker fulfills all the conditions for admission, we believe that with the application in a second Member State, it would be appropriate to the existence of incentives to encourage the worker to opt for geographical mobility or occupational in comparison tothe decision to leave the EU

[43] *Ibidem.*
[44] The Commission Communication to the European Parliament and the Council on the implementation of Directive 2009/50/EC COM (2014) 287 final of.
[45] *Idem*, p. 3: ″4 Member States have transposed the Directive in time, 5 until the end of 2011, 8 in the first half of 2012, 2 only in 2013″.
[46] *Ibidem*.
[47] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.
[48] *Idem.*

territory. We consider that a minimal improvement would be to reduce the term of providing the answer to the admission request.

According to the Report on the implementation of the Directive[49], the Commission is ″concerned about irregularities in implementation of the provisions, low coherence, the limited number of rights and barriers to mobility in the EU″[50].

CONCLUSIONS

The area of action of the Directive[51] is an important category for the EU economy andthe objectives EU has assumed .The level of skills that third country nationals bring in the EU is very important for the economic, social and demographic future of EU. These rationale together with the reasons outlined in the present article, have generated the creation of a legal framework for the recognition of their status in the EU.

The Directive[52] sets a minimum framework of conditions and rights provided for this category of workers. The right that states have to build national provisions more attractive for these category of workers, the right to determine volumes of admission, the right of preference for national or EU workforce, reduced rights offered to family members and restrictive regulations of occupational mobility within the EU build an insecure frame. Future reports on the implementation of the Directive[53] will show whether these provisions are suitable or if their status needs to be imprived.

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[53] *Idem.*

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THE LAWYER'S ROLE IN THE NEW CODES

Costin-Ion UDREA*

ABSTRACT

This paper aims to examine the lawyer's role given by the legislature following the entry into force of the new Romanian Civil and Criminal codes, the impact they bring to rights and obligations, and to what extent its attributes are taken into account by the new legislation. The adoption of general laws is a unique moment in the legislative framework and a challenge for practitioners. Therefore, this paper aims to firstly analyse the concept of a lawyer, then the rights and role in criminal and civil law cases, and the extent of liability regarding the lawyer, concluding with lex ferenda proposals.

KEYWORDS: *lawyer, rights, liability, criminal, civil*

1. Definitions

The entry into force of the new Romanian Civil and Criminal codes is probably the most important moment in the evolution of the domestic legal system, the reason for being of the new legislation representing the creation of a generally valid and stable regulatory framework regarding human interactions, which shall remain in force for a long period of time. The new codes desire to respond to situations often encountered in practice, in cases where the previous legislation could no longer be applied or could not have answer current requirements.

The lawyers are, in light of new regulations, key players in the judicial process, with new rights and obligations correlated with a European legal system, in the ongoing quest regarding the modernization of national legislation as a result of accession to the European Union.

The lawyers are "*those legal professionals who, without being part of the judiciary, contribute to the administration of justice with activities (...) sometimes indispensable to the process of making justice*"[1].

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[1] Traian Cornel Briciu, *Principles of Justice organisation. The magistrature. The lawyers*, C.H. Beck Publishing, Bucharest, 2012, p. 325.

The rules governing the profession are found primarily in Law No. 51/1995[2], regarding the exercise and the organisation of the legal profession, law that is completed with the provisions of the Statute regarding the legal profession[3] that defines the attributes of both lawyer and the acts they can do, or are required to do. Lawyers in Romania are organized in Bars, legal persons of public interest, consisting of all lawyers registered as such. Under the current provisions, there are several bars, depending on the number of administrative-territorial units, each bar consisting of all lawyers in a county or in Bucharest.

The lawyer's role in the new legislation emphasizes the main attributes of this profession, **having an increased importance by extending existing prior rights, and with the adoption of new codes and also by implementing new institutions and introduction of previously non-existent rights by amending the legislation.** Thus, a role that current doctrine hat stated as a fundamental attribute of the profession: „the *lawyer promotes and defends the rights, freedoms and legitimate interests of people"* [4] is solidified

Advocate activity can take place through *"consultations and requests (...), assistance and representation, (...) drawing up legal documents, (...), presence (...), defence (...) mediation (...) fiduciary activities (...), establishing temporary headquarters of the company, (...) any other means and ways of exercising their rights of defence in accordance with the law"* [5].

This activity could be summed up as the support that lawyers' „ *give (...) via the means of explanations, advice and interventions as specialists in their field of law*" [6], while being independent and obeying only the law, the statute and the code of conduct.

In other words, the lawyer cannot perform an illegal activity, operating in support of his client within the possibilities allowed by the

[2] Republished under article VI of the 270/201 law regarding the modification of the *Law 51/1995 regarding the exersice and organisation of the legal profession* (Off. Mon no. 872 of 28.2010).

[3] Decision no. 63/2001, regarding the approval of the Statute regarding the legal profession (Off. Mon no. 898 of 19 december 2011).

[4] Nicoleta Bedrosian, Teodora Blidariu, Lucian Drăgoi, Alexandra Mura, Carmen Tufariu, coord. Ligia Catună, *The organisation and exercise of the legal profession*, Juridical Universe Publishing, Bucharest, 2012, p. 64.

[5] Law 51/1995, art. 3.

[6] Ion Neagu, *Criminal procedural law*, Treaty, Global Lex Publishing, Bucharest, 2007, p. 210.

existing rules in force. The new legislation establishes a set of rights and obligations, some non-existent until the adoption of codes, which will be analysed in detail, showing attributes lawyers have both in civil and criminal matters.

2. Atributes

2.1. The civil-case lawyer

The first provision regarding the lawyers' activity is found in article 13 of the Code of Civil Procedure, where it is stated that „ *(1) The right to defence is guaranteed. (2) The parties are entitled, throughout the trial, to be represented or where appropriate, assisted, in accordance with the law (...)"*[7].

This legal framework represents the codification of provisions regarding the ensuring of the rights of defence; any person can thus have a lawyer of his choice, a provision that was not expressly found in a separate article in the previous legislation.

The new legislation also establishes the civil provisions of paragraph (2): „*In case of an appeal, the applications and conclusions can be made and supported only by a lawyer or, where appropriate, legal adviser, unless the party or its authorized representative, if they are the spouse or relative to the second degree, possesses degree in Law"*[8].

However, this provision was declared by the Constitutional Court as being inconsistent with the Constitution, by accepting the objection of unconstitutionality of articles that establishes the required support or drafting an appeal with the condition of a lawyer being the one who supports it, and declaring said article unconstitutional in less than 2 years after the entry into force of the new Code of Civil Procedure, the Court noting that "*the measure of representation and assistance by a lawyer at the stage of appeal proceedings is not proportionate to the aim pursued by the legislature, public benefit is insignificant in relation to the degree of impairment of fundamental rights and freedoms of the individual* "[9]

Thus, we can observe which was the perception of the legislator body towards the lawyer – the lawyer is a professional, a main part in the civil

[7] *Law 134/2010 regarding the Civil Procedure Code* (Off, Mon. No 5454 of 3 august 2012), article 13.
[8] *Ibidem.*
[9] *Constitutional Court Decision, no 462/2014* (Of. Mon. no 775 of 24 november 2014).

proceedings, whose role is among others, one of streamlining the course of justice with respect for existing rules.

Correctly the legislative body, when adopting the Code of Civil Procedure considered that only legally qualified person (whether we refer to a lawyer, jurist or spouse/close relative with degree in law) can support/write actions in the court of appeal. Historical interpretation of this legal provision leads to the conclusion that the aim was to introduce a procedural rigor to avoid abuse and unnecessary loading of the courts vested with judicial review of those cases where the appeal was made. Also, we can interpret that legislative body has considered the attorney directly as the most qualified person, since a jurist is employed in a company and situations where the parties have a law degree family members are insignificant in number compared to the amount of existing civil cases in courts.

Despite this, as we have previously mentioned, the Constitutional Court held that "*the aim of the legislator was a legitimate interest*"[10] but "*there is a reasonable relationship of proportionality between the demands of the general interest of good administration of justice and protection of fundamental individual rights*"[11], provisions regarding the obligation to support the appeal by a lawyer not having effects after the Court's decision.

We believe that, in accordance with the adoption of modern legislation there is required a return by the legislature on these provisions, by entering the following phrases:

"***On appeal, if the court considers that the appeal request does not comply with the law or the party in cause cannot defend themselves, the court will name a special legal guardian appointed from among lawyers namely the Bar in said case",*** considering that this formulation can satisfy both the legitimate interest in mind that came with the adoption of the Code, and the streamlining of processes to ensure civil and valid public interest litigants to present their case without being obliged to enter into a contract with a lawyer.

Another novelty of the Code is reflected in the wording of the article governing special guardianship - *"naming these curators will be (...) from the body if specially appointed lawyers (...) by the bar*." [12], a framework coming to settle the primary role of and advocate – that of a better administration of justice. This provision appropriate, given that the

[10] *Ibidem.*
[11] *Ibidem.*
[12] Law 134/2010, article 58.

lawyer may, as a professional in civil cases, ensure the rights of persons deprived of legal capacity or legal person without representative. We believe that the legislative body considered that no other profession can guarantee the just implementation of rights, apart from a lawyer.

The lawyer "*writes claims and sends them to court, arguments the evidence offered or exposes the entire legal scaffolding in their final conclusions*"[13], in order to prove his client's claim, while being independent and obeying the law, statute and code of conduct.

2.2. The Criminal-case lawyer

Regarding the criminal procedure law, in Article 29 the parties involved are listed, and the lawyer is included. This solidifies the lawyer, as a fundamental part of the criminal process, and although "*unlike the previous regulation, after defining the main subjects and the parties of the proceedings, we find enumerated a number of rights that they have*"[14], regarding the lawyer, the code of Criminal Procedure only briefly describes their work in Article 31, but broadly defining their rights in Articles 88-95.

The first express provision relating to the lawyer is found in Article 10 of the Criminal Procedure Code recently entered into force, entitled **The right to defence**, which states that "*the parties and the main subjects in the proceedings have the right to defend themselves or to be assisted a lawyer*"[15] different legal framework from the previous regulation provided for in paragraph (4) of Article 6 of the past Criminal Procedure Code, entitled **Ensuring the rights of defence**, which provided that "*any party has the right to be assisted by a defender throughout the criminal trial* "[16] the new provision setting, on the one hand, a person's right to defend himself, and replacing the outdated formulation of **defender** with the one of **lawyer**.

With regards to the terminology adoption - that of a lawyer, we consider it timely amended, whereas this term solidifies the lawyers' role - not one of a person whose role is limited to defend a party to the proceedings, but as the legal professional who operates not on the procedural

[13] Adrian Toni Neacşu, *Convince the judge. The tehnique and art of persuading the court.* Wolters Kluwer Publishing, Bucharest, 2014, p. 38.
[14] Corina Voicu, Andreea Simona Uzlău, Georgiana Tudor, Victor Văduva, *The New criminal procedure case*. *Application guide for practitioners*, Hamangiu Publishing, Bucharest, 2014, p. 26.
[15] Law 135/2010, art. 10.
[16] Law 29/1968, art. 6.

position of a certain party, but the role to carry out their work – ensuring the implementation and respect of his client's fundamental rights, by all means permitted by the law.

The existing doctrine stipulated that "*although they are not part of the criminal case. the lawyer is situated on the same scaffolding as the party whose interests it supports and defends*"[17], but the adoption of the new criminal Procedure Code amended the criminal case lawyer's fundamental role, which is thus that of a real „*participant in the criminal process not being situated on the procedural position of the party that they defend, but with a distinct position, with rights and correlative duties, a concept that settles their role, namely to ensure not only the defence of their client, ut singuli but to ensure the implementation of the entire criminal trial itself in terms of legality*".[18]

With regard to a person's right to defend himself in a criminal trial, it should be noted that although this is guaranteed, there are some situations in which legal assistance is mandatory and the exercise of their right of self-defence person is not restricted, but completed with the assistance of the court-appointed lawyer. The judicial body is bound to have legal assistance required under the following conditions:

1. When the defendant is arrested or detained, interned in a detention centre or educational one, or in the case of a underage defendant;[19]

2. in those cases where the penalty for the offense is more than 5 years of prison or life imprisonment;[20]

3. Although provided in Article 90, that includes mandatory legal situations, we consider necessary to separate the case when "*the judicial body considers that the suspect or defendant could not defend themselves alone*" because, unlike the other two cases, the provision leaves room for interpretation in practice, as the judicial body in those situations can, guided by his own conscience, believe that the suspect or the accused can defend themselves, and will not appoint a lawyer.

In the other two cases, mentioned above, we find objective conditions that stem from situations above such things as a person's culture level, personality, legal knowledge, or other elements that might configure a defence in the legal sense. Considering the fact that in accordance with

[17] Ion Neagu, *cited work,* p. 210.
[18] Costin-Ion Udrea, *The lawyer in the new Criminal Procedure Code. The Rule of Europe in a polarised society*, The International conference of law, european studies and international relationships, Hamangiu Publishing, Bucharest, 2014, p. 547.
[19] Law 135/2010, art 90 lit a).
[20] Law 135/2010, art 90 lit c).

the new legislation, the punitive system regarding a suspended sentence is harsher than the previous one, in that it can only be given for crimes punished with at least 3 years of prison, we consider that the right of defence may be affected by an eventual faulty appreciation of a judicial organ.

Also, considering the fact that an increase number of crimes have a maximum sentence of 5 years - for instance the theft, in the commonly found modalities of breaking-and-entering, or during the night -, and a real possibility of a non-suspended sentence for defendants that are found to be guilty, we consider that the modification of previous legislation regarding a court-appointed lawyer for crimes punished with **prison over 5 years** is faulty, and we litigate for the return of the previous framework - a court-appointed lawyer in cases **where the punishment is 5 years or greater**.

The lawyer in criminal proceedings has a fundamental role, but Article 88 of the regulation does not define the lawyer, but refers to their actions, stating that them "*assists or represents, in criminal proceedings, the parties or main subjects, under the provisions of the law*"[21].

These provisions must be read in conjunction with those found in the Law on the organization of the profession in order to describe the work of the lawyer, which includes "*all acts, means and operations permitted by law, necessary care and protection of clients' interests before all public authorities*"[22].

3. The lawyer's liability

3.1. Criminal liability

The lawyer may be liable for acts committed during the exercise of their profession, in terms of criminal law the new legislation has stipulated the taking on earlier of provisions, but also adding new ones in place. Thus, the new Criminal Code introduces the offense called is **Unfair Assistance and Representation.** "*The regulation is new, and according to the concept of the code, advocates are under the protection*

[21] Law 135/2010, art 88

[22] Ştefan Naubauer, *The organisation and exercise of the legal profession. Theoretical and practical explination (articles 1 to 28)*, Juridical Universe Pulishing, Bucharest, 2013, p. 26.

of criminal law, but the correlation is the sanction of this breach of the rules of ethics"[23]

This can be committed by two alternatives: the assisted or represented client's interests are injured following a fraudulent agreement with a person with conflicting interests in the same case.

The second alternative represents the act of having a fraudulent deal between the lawyer and a person who is not involved in that case, a third party to legal proceedings, but the latter is interested in the solution in the case, and the fraudulent deal is made in order to harm the interests of the lawyer's client. It should be noted that this variant of the offense is one of danger, harm no need for it to be effective, the mere existence of the fraudulent deal being sufficient for criminal liability of said lawyer who commits the deed, with a direct intention qualified by purpose.

We believe that this alternative should have the condition of injury regarding interests, like the first normative form, and in case it is still maintained by the legislature, for equal treatment – there is no explanation why the agreement with a foreign person concerned should be considered to have the same social risk, and should be punished in the same way, as the actual harm brought to the client, so we consider it would be appropriate to amend paragraph (2) of Article 284 of the Criminal Code in accordance with paragraph (1)

3.2. Civil liability

From the civil law point of view the lawyer is responsible for his actions, and since the law "*does not give the lawyer a privileged status in relation to other professionals. The lawyer responsible for simple negligence*"[24], as a lawyer's liability arises from the contract between it and the client.

The legal assistance contract is "*the express agreement and will form between the profession of lawyer through which the lawyer accepts the mandate given by his client undertaking to carry everything necessary to*

[23] Corina Voicu, Andreea Simona Uzlău, Raluca Moroşanu, Cristinel Ghigheci, *The new Criminal Code. Guive of application for practitioners.* Hamangiu Publishing, Bucharest, 2014, p. 459.
[24] Traian Cornel Briciu, *cited work,* p. 394.

ensure the legal rights, freedoms and legitimate interests of the contracting partner's "[25]

Since the commitment by the lawyer is one of diligence, therefore mere failure to achieve the goal envisaged by the co-contracting parties shall not constitute, ut singuli a cause of occurrence of contractual civil liability, but negligence must be proven regarding the lawyer.

3.3. Disciplinary liability

The lawyer is responsible for his actions from a disciplinary point of view, taking into account the legal provisions concerning the profession. The lawyer will respond to two distinct categories of offenses:

First, for "*violation of the law of organizing the profession, the professional statute or the decisions of the governing bodies of the Bar Association or the National Union of Bars in Romania*"[26]

Secondly, the lawyer will respond to "*acts committed in connection with the profession or beyond, likely to harm the honour and prestige of the profession or institution*"[27]

It can be seen that the legislation establishes a disciplinary rule bipartite system - on the one hand, it indicates directly those acts considered to be mandatory in the exercise of its activity, and on the other hand refers to any other conduct likely to prejudice the required ethics of a lawyer, not being exhaustive, unlike direct provisions that could be breached.

Also, "*constitutes serious misconduct the violation of the provisions of the Law and Statute that expressly provide as being a serious misconduct*"[28]. For example, the act of noncompliance of the lawyer regarding the advertising forms of practice of the profession shall constitute serious misconduct.

The existing legislation does not distinguish between serious misconduct and disciplinary misconduct of another form, but we can infer, *a contrario*, that any form of misconduct, except as expressly identified as constituting serious misconduct, will be considered simply disciplinary misconducts, without being qualified as serious.

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[25] Ligia Dănilă, *The organisation and exercise of the legal profession*, C.H. Beck Publishing, Bucharest, 2007, p. 150.
[26] Lawyer profession statute, art. 86.
[27] *Ibidem*.
[28] Eduard Dragomir, Roxana Paliţă, *The organisation end exercise of the legal profession*, Nomina Lex Publishing, Bucharest, 2010, p. 256.

CONCLUSIONS AND *LEX FERENDA* PROPOSALS

The lawyer's role in the context of modernization of national legislation seems to be well defined in the sense of recognition by the legislature of the importance one has in cases. The extent of existing cases before the courts in many times can lead to situations where a better administration of justice is directly related to these legal professionals, which, by having the expertise and training, are recognized as paramount contribution to the implementation of the law.

Unlike previous legislation, the lawyer is identified in the first passages of the new codes - the Civil Procedure and Criminal Procedure, establishing its importance in law enforcement. The lawyer's role becomes one distinct in the national legal framework, one well defined, with distinct personal responsibilities from other stakeholders, and with an obligation to respect the existing legal rules.

However, in the context of adapting domestic legislation to the European one, we consider important the following suggestions appropriate of lex ferenda:

The introduction of a new paragraph (2) of Article 13, the new Code of Civil Procedure: ***On appeal, if the court considers that the appeal request does not comply with the law or the party in cause cannot defend themselves, the court will name a special legal guardian appointed from among lawyers namely the Bar in said case",***

Replacement of paragraph (2) of Article 284 of the Criminal Code, with the words "***The same punishment is sanctioned the deed lawyer or representative of a person who, in agreement with a third party, interested in the result of the case, fraudulently harms the interests of the client or represented person***"

Amending of Article 90, point c) of the Code of Criminal Procedure, by providing free legal assistance not in cases where the punishment is "**imprisonment of more than 5 years**", but in cases where the punishment is "**imprisonment of 5 years or more**"

Amending the Criminal Procedure Code by replacing the term **defender** with the term **lawyer** in articles: 91 of (4), 194 (3) 344 of (2) and (3) 352 of (11) and (12), 353 of (2) and 466 of (2), for a fair regulation, terminology-wise, in accordance with the rest of the Criminal Procedure Code, the term defender being an anachronistic one.

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THE EXECUTOR'S ROLE IN PASSING THE ASSETS OF THE SUCCESSION

Ana Maria VASILE[*]

ABSTRACT

This paper aims to analyse the institution of the executor, given that this analysis would seem necessary in the context where, after the death of an individual, a representative must exist to distribute his assets and carry into effect his wishes post mortem for the purpose of avoiding misunderstandings between inheritors.

In the same time, in practice, these instructions are often carried through by the deceased's inheritors, but the legislator thought necessary to institute an executor by law and invest him with the necessary power of attorney to ensure the execution of the testamentary devises for the case in which the deceased, wishing to create equality between the inheritors, did not appoint any of them to bring his instructions into effect.

KEYWORDS: *Executors, assets of the succession, will, inheritance*

1. Brief history

During the Roman period, there weren't available for the bequeather any means as of right to ensure the bringing into effect of his final wishes. [1]

This method, the execution of the will, was elaborated under the influence of the church, being the most favourable to the will during the old IVth century French common law. Reconfigured over time by jurisprudence, the execution of the will was introduced also in the Napoleonic Code and was assumed afterwards by our Civil Code as well.

In other law systems, where the institution of the seizing doesn't exist, as for example in the Swiss law, unless otherwise provided by the bequeather, the executors have the same rights and duties as the official estate administrator. The executor's function is to administer the inheritance, distributing its assets of succession, settle debts, distribute legacies and divide the probate estate in accordance with the bequeather's instructions or as required by law (Art. 518 of the Swiss Civil Code). In this law system, as well as in common law systems, the

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executor is not just a representative of the bequeather with the mission to oversee and control the distribution of the legacies and take measures of preserving the assets, but also a liquidator of the estate, with numerous duties, acting as intermediate for the debtors and creditors of the inheritance, namely to represent the bequeather for the assets of the succession and inherited debts, and also to distribute the assets after settling the liabilities. [2]

2. The concept of will execution

The inheritors are co-owners of the assets of the succession and, accordingly, no one can benefit from the inherited property without their consent. Exceptions to this rule are set up by the law, respectively the vacant succession and the executor. Therefore, a possible *post mortem* mandate does not produce effects unless approved by all the inheritors. [3]

The executor is the person appointed within a will to represent the bequeather after his passing away and ensure the bringing into effect of his last wishes testified during his life by observing the substantive and formal requirements concerning the will. These wishes may be pecuniary claims (as for example executing legacies), but also non-material (for example arranging the bequeather's funerals and the memorial service).

In almost all cases these provisions are fulfilled by the inheritors of the deceased or by the universal legatees.

Article 1077 of the Civil Code defines the will execution as a testamentary provision by means of which the bequeather appoints one or more persons, granting them the necessary power to ensure the execution of the devises. The executor may be also appointed by a third party designated in the will. If more than one executor has been appointed, any of them can act without the assistance of the others, unless otherwise provided by the bequeather or if the responsibilities were divided among them in a different way.

"In a broad sense, the execution of a testament is the work of giving effect to the will of the bequeather. In a limited sense, the will execution is that testamentary disposition by which the bequeather appoints one or more persons, granting them the necessary power to ensure the execution of the devises; the will execution is the executor's mission. This way, the bequeather relieves the inheritors of this duty or ensures the fulfilment of

his dispositions when he estimates that those in charge of it would not want or be able to fulfil their duties". [4]

The reason for which the bequeather appoints an executor of the will may reside in that he desires to relieve the inheritors of such duties, so disputes would not be generated between them, if the inheritors are under-aged or placed under interdiction, or the bequeather simply doesn't trust any of the inheritors to fulfil objectively his last wishes.

The Civil Code in force brings a new element concerning the execution of a will with the fact that the appointment of an executor may also be done by a third party, also appointed by the bequeather in the will. The person appointed as the executor must have full legal competence on the date the succession is opened.

If an executor hasn't been assigned and the execution of the will shall devolve upon the universal legatee in case legal inheritors are absent, the later shall have to observe the bequeather's wish and distribute all the personal assets left by the deceased. In practice it may arrive that after the legacies are distributed, the entire estate be wasted. The case requires for an investigation whether the bequeather really wanted to gratify the universal legatee or if his legacy requires in fact a testamentary execution.

3. The legal aspect of a testamentary execution

According to certain opinions, the execution of a will has the same legal nature as a special mandate. The resemblances between the two legal institutions are: acceptance of the execution of the will is optional, the execution of the will is made on a free basis (the executor may however demand remuneration if the bequeather provided such remuneration or if the executor is an expert), the executor has the same duties as a legal assignee; if the executor dies, his inheritors are not bound to continue to take measures in the bequeather's interest and until his successor are informed. [5]

There are also important distinctions between the two institutions: the execution of a will may be instituted by means of a will, in other words by a solemn act, whereas the mandate is a consensual legal document; the mandate ceases when the assignee passes away and, when its continuation post mortem is provided, the successors of the assignee can revoke it at any time; in the case of the common law mandate, the execution of the will begins when the bequeather passes away, the

boundaries of the power of attorney are established by the parties, whilst the limits of the executor's duties and the maximum period of some of his duties are established by law by means of imperative dispositions. [6]

4. Appointing an executor

As shown, the executor is appointed by will, directly by the bequeather, or by a third party acting in the bequeather's behalf. Generally, by third party one legally understands an individual external to a legal act concluded, not bearing its consequences. In the case of an executor, by a third party one shall not understand a person not connected to the inheritance, as he might be an inheritor as well with the mission to identify a suitable person to fulfil the responsibilities of an executor.

If there are more than one executor, this does not mean that their duties are divided, but that each executor has full powers and may fulfil alone any of the duties related to the execution of the will.

This rule provided in Article 1077 paragraph (2) of the Civil Code has enacting character and can be modified by the bequeather either in order to enforce a joint execution on the executors, or to establish clear responsibilities for each executor separately.

The bequeather can therefore appoint an executor for the civil affairs, another for the commercial affairs, case in which their responsibilities are divided, but it may arrive that executors have joint responsibilities, case in which they will work together to fulfil the last wishes of the bequeather.

Persons unable to receive legacies may be appointed as executors of the will, but the quality doesn't invest an executor with the capacity of a successor meaning that he will not be able to receive legacies from the bequeather whose estate he administers. Notaries Public may also have the quality of executors but they cannot be invested with that particular estate settlement. Minor persons and persons placed under interdiction cannot have the quality of executors.

Municipalities cannot fulfil the responsibilities of an executor because, according to law, they cannot administer a foreign estate free of charge.

The Notary Public with the competence to settle the estate in compliance with Article 83 of Act no. 36/1995 shall deliver to the person appointed by the bequeather a certificate of incumbency for the quality of executor, that, according to Article 85 in the regulation of enforcement of

this law, shall state as well the extent of his rights and obligations. The powers of the executor shall be put into effect as of the date of acceptance of the mission by means of a statutory declaration. Waiving the quality of executor shall be made by observing the same legal formalities according to the principle of symmetry of the legal documents. [7]

No special formula is necessary for appointing an executor; it may result from simply designating a capacity of a person, for example indicating the name, or by naming a quality for that person (for example the family's lawyer, the priest of the church the bequeather attended etc.), but it may also result from the implied designation which might result from interpreting the devises.

In conclusion, one might say that the bequeather has all the freedom to appoint the executor, unspecialized natural persons, but also legal persons within the limits of their capacity of use. The bequeather might as well appoint as executors natural persons practicing in the legal field (lawyers, experts, notaries).

5. The executor's administrative right on the assets of the succession

According to Article 1077 of the Civil Code, the executor has the right to administer the probate estate for a period of at most two years as of the date the succession is opened, even if the bequeather didn't invest him expressly with this right. The will can reduce the administrative right to only a part of the estate or for a shorter period. The period of two years can be extended by the court of competent jurisdiction for grounded reasons, by successive terms of one year.

The quality of assets of the succession's administrator allows the executor to carry out actions of preservation and administration of the estate, regardless of the fact that the estate includes tangible and intangible assets.

If the bequeather doesn't grant this right to the executor, he must mention it expressly in the will, as he has the option to limit the administrative right over a number of tangible or intangible assets in the country or abroad. The capacity of administrator of the assets of the succession is limited to two years, but it can be reduced at the request of the deceased, mentioned in the will, and also extended by the court for grounded reasons. The legislator does not define in this case what might

constitute grounded reasons, but the legal practice determines the force majeure, the act of God or promoting in justice an action on succession, upon the resolution of which the constitution of the assets of the succession depends, the quality of the inheritors and their number.

The term provided by the law concerning the quality of administrator of the assets can be extended for one year only and the legislator does not determine a maximum number of extensions that might be allowed. We consider that even if the executor fulfils his duties during the two years or during the one year term granted by extension, at the end of each year he must relieve from administration.

6. Executor's responsibilities concerning the assets of the succession

According to Article 1080 of the Civil Code, the executor shall request the affixing of seals if the inheritors are also minors, legally incapacitated persons or missing persons, and shall insist upon making the inventory of the assets of the succession in the presence of the inheritors or upon their summoning. The Notary Public, which has been notified for the respective settlement of the estate, is the one normally making the inventory of the assets of the succession. Making the inventory is of importance in terms of protecting the assets of the succession, given that the inheritors are liable for the debts of the succession within the limits of the available assets, but also because the executor is personally responsible for the assets on the estate received from the bequeather.

According to the law, the executor shall demand the court of justice to rule the selling of goods if he considers that there are not sufficient resources in the patrimony in order to execute the legacies. The court will decide by taking into account if the selling of immovable property is requested, if the inheritors also include persons who are entitled to a portion of the inheritance, in this case the requirement of granting the forced heirship in kind being observed. Mention should be made that the court shall rule the granting of the assets only if there are no forced inheritors.

In the same time, the executor shall use his best efforts to execute the will and, if contested, to protect its validity and make due diligence to cash the outstanding debts.

According to Article 1080 paragraph (2) of the Civil Code, the executor shall instruct the partition of the inheritance if the bequeather provided so in his will. The partition produces effects only if the project submitted by the executor is approved by the inheritors.

The executor can practically submit for approval to the inheritors a project for the partition of the inheritance, which may be drafted either according to the instructions of the deceased, or according to his own ideas and experience, but, regardless of the situation, he must submit it for the approval of the inheritors as it is well known that no particular method of carrying out the partition can be enforced on them. A novelty in the Civil Code in force is thus identified, with the purpose of simplifying the procedure of the partition of inheritance. Consequently, the executor himself may instruct the successional partition of the assets between the inheritors, if the following two conditions are met at the same time:the deceased mandates the executor to this effect, as this responsibility is not characteristic for every testamentary execution, being expressly instructed by the deceased and the deceased inheritors approve the partition project submitted by the executor. [8]

The executor is not a representative of the succession, but an administrator with a clear mandate stipulating the preservation and administration of the assets of the succession.

For the purpose of exercising the powers granted by the law, the executor must be summoned to the notary successional procedure of settlement of the estate, together with the legal or testamentary successors.

According to the provisions of Article 1079 of the Civil Code, the executor is granted the power to administer the assets of the succession. In compliance with the law, in order to exercise such a right, the executor must come into the possession of the estate. As provided by the law, administering an estate stipulates that all advantages of the assets must be used and the rights afferent to their administration be exercised (Art. 796 paragraph (1) of the Civil Code), the sums of money in the executor's administration are to be invested (Art. 798 paragraph (1) of the Civil Code), a particular determined asset is to be alienated or encumber with a mortgage whenever necessary for the proper administration of generality (Art. 799 paragraph (3) of the Civil Code). No paragraph in Article 1080 of the Civil Code grants the executor the responsibilities of a simple administrator of the assets of succession.

Moreover, we acquiesce in the opinion communicated by the specialized literature according to which the so-called “duty of the

executor" to proceed in *partitioning the inheritance*, provided in Article 1080 paragraph (2) of the Civil Code is merely a useless legal artifice, as long as in reality it represents just a right to make a partition proposition with no legal value and no effects unless the inheritors unanimously approve it, which might have as well been done in the absence of an expressly formulated legal provision. [9]

7. Executor's liability to account for the assets of the succession

At the end of his mandate, the executor must account to the inheritors of the deceased for the manner in which he administered the assets of the succession, even if there weren't any forced inheritors; mainly, this provision stipulates that the executor has the responsibility to justify the use given to the assets of the succession and, ultimately, to restore the remaining assets.

Liability for this approach is expressed towards the general inheritors, legal or by will, as well as towards the curator of the vacant inheritance.

According to Article 1082 paragraph (1) of the Civil Code, if the executor passed away before giving account, his liability passes on to his inheritors as part of the probate estate.

8. Termination of the executor's mandate

According to Article 1085 of the Civil Code, the executor's mandate ceases as soon as his responsibilities provided under the law are fulfilled, if a reason making impossible the accomplishment of the execution, regardless if the cause is a personal reason of the executor or relates to the succession or outer motifs. As well, the mandate is terminated also if the executor passes away, is placed under interdiction, the court of justice revokes the mandate, or the term of the initial execution and the initial extension terms expire.

CONCLUSIONS

To conclude, we can point out that the institution of the executor has the legal nature of an ordinary mandate, as he has the same duties as an assignee. All the approaches carried out by the executor particularly regard the preservation of the assets of the succession.

With regard to the provisions of the law by means of which the executor may submit to the inheritors for approval a project for the partition of the inheritance, we consider that this partition is not required if the deceased himself instructed in the will the division of the assets between the inheritors, and the executor must carry on *ad literam* these instructions. The issue of the partition is raised only if the deceased left it up to the executor's decision and experience to divide his assets to the inheritors in equal shares.

In practice, the testamentary succession represents the exception to the legal inheritance one usually opts for (in the Roman law, the will was the rule and the legal inheritance, the exception). Consequently, in the rare cases one opts for the testamentary succession, usually the deceased gives the instructions that all his assets be divided between the inheritors according to his will, by the notary public settling the estate in the successional procedure, or he appoints as executor the very notary public in the jurisdiction of which the estate is to be settled, in the person of a legal expert.

It is why, according to the intended law, we recommend that the legislator considers including in the executor's functions those provided for exercising the rights specific in simple administration, such as alienating an asset or charging it with a mortgage, only for the purpose of extending and preserving the value of the assets of the succession.

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[3] For example, a bank provides in the deposit agreement that, in case the holder of the deposit dies, an inheritor or a third party may withdraw money from his account. This post mortem instruction may violate the imperative rules on the legal inheritance insofar as the power of the legatee is established with the respective clause (legatee which may not be legal heir) over the account of the deceased, without the successors' consent.

[4] See Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *Noul Cod civil. Comentariu pe articole (The New*

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[9] See *Dan Chirică, op. cit.*, p. 358.

ASPECTS REGARDING THE OFFENSE OF FORGERY PERFORMED BY MEANS OF CYBERNETIC SYSTEMS

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ABSTRACT
The recent and explosive development of computer technology has determined the emergence of new methods of committing offenses besides the so-called traditional pattern of criminality. In the legal articles of the new Romanian Criminal Code (2014), the legislator pays special attention to the field of computer crime and that is why the present paper aims at treating thoroughly several practical matters related to the offense of computer forgery, whose threat has become more and more substantial in the current economic and social reality.

KEYWORDS: *Crime, computer forgery, computer, new Criminal Code*

1. Introduction

With their double status, both as a consequence of and a source for progress, computers have become indispensable in the initiation, amelioration and development of various activities at all the levels of human society given the fact that, since the beginning of this millennium, no other invention has had such a massive impact on daily life.

Cyberspace has paved the way for the global social and political networking and politics, by crossing over the barriers among countries, citizens and ethnic groups, enabling multiple inter-relational structures and dynamic exchange of information and ideas on the planetary level [1]; all this is being made possible through forums dedicated to freedom of expression and to the exercise of fundamental human rights. [2]

Yet, the excitement that welcomed this splendid achievement of human mind is also accompanied by its reverse. Certain studies show that the intensity of the fear of cybernetic attacks even exceeds the intensity of the same negative feeling against the ordinary theft or fraud. Criminological research on crime performed by computer systems are

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still in the exploratory stage and those that have been achieved so far tend to change the classical manner in which crimes in the current criminal justice system are viewed. [3]

Only a small proportion of criminal offenses related to the use of cybernetic systems come to the knowledge of criminal investigation bodies, therefore it is very difficult to achieve an overview on the extent and the evolution of the phenomenon. Although it is possible to achieve an adequate description of the types of offenses encountered, it is very difficult to present a consistent synthesis based on the extent of losses caused by them, as well as on the real number of crimes committed.

In the vast range of crimes performed by means of cybernetic systems, the "updated" offence of forgery is definitely included. Formed initially as an intelligent means of committing legal offense, this crime has subsequently undergone significant development in line with the technological evolution. Nowadays, making a false document with simple image processing applications and a printer seems to be of minor significance compared to the possibility of faking (or simulating) a person's identity, bank accounts, financial transactions or electronic communications. [4]

2. Legal Content

The previous Romanian Criminal Code (functional before 2014) did not contain specific regulation on the offense of forgery performed by means of cybernetic systems, but this fact did not mean that this offense was not sanctioned by the Romanian law. Before the entry into force of the new Romanian Criminal Code, the offense of forgery performed by means of cybernetic systems was regulated in a special law, namely the article 48 of Law no. 161/2003 on certain measures for ensuring transparency in exercising public dignities, public functions and in the business environment, as well as for preventing and sanctioning corruption, which read:

"The deed of inputting, modifying or deleting without right, any computer data, or of restricting, without right, access to these data, resulting in misreporting the truth in order to be used in order to produce legal consequences, constitutes an offense and shall be punished with imprisonment from 2 to 7 years". [5]

The entry into force of the new Romanian Criminal Code highlighted the increased attention of the law provider on cybercrime, the content of the new legal act specifically regulating the offense of cybernetic forgery.

In article 325 of the new Romanian Criminal Code, its definition is in most part identical to the previous legal text, namely:

"The deed of inputting, modifying or deleting, without right, any computer data, or of restricting, without right, access to these data, resulting in misreporting the truth in order to be used in order to produce legal consequences, constitutes an offense and shall be punished with imprisonment from 1 to 7 years". [6]

It can be easily noticed that the only change in the new text of the law is the one regarding the penalty, which was reduced in order to correlate the offense of cybernetic forgery with the rest of the punishments for the group of offenses known under the title "Forgery of Documents" in which it is included.

The major importance, which is currently given at the global level to protection by legal means against counterfeiting in the electronic environment through awareness of the hazards of these crimes, is also revealed by the fact of suggesting the including the offense of forgery by electronic means (as enshrined in the European Convention on Cybercrime and taken over by the Romanian criminal law) in the proposal of the United Nations Global Treaty on security and cybercrime in 2010. [7]

3. The structure of the offense

3.1. The Offense Object

The legal object refers to those social relations that protect public confidence in the content of electronic data.[8] In particular, this is represented by the same values that are protected in the law traditional framework on forgery, such as security and reliability of documents or other instruments, the validity and authenticity of the electronic information and of the entire modern process of processing, storage and automated transaction of data of both official or private interest, which may generate legal consequences.

The material object of the offense of forgery by electronic means is represented by the material resources, the medium in which the electronic data are introduced or stored, subject to the perpetrator's interference or by the parts of the computer system on which the parties act in order to restrict access to electronic data. [7]

The same perspective of material object of the offense is applied to the electronic data on which the perpetrator is focused. The electronic data appearing on the computer monitor or on the printer as alphanumeric characters that are meaningful for the users are represented on the "physical level" (on the computerised machine) or on the storage medium as a logical sequence of states "0" and "1" corresponding to the voltage variations. Acting on such data (or introducing new ones) is equivalent to the action (via CPU) on the lining of "0" and "1", therefore on the storage media implicitly (hard disk, floppy disk, flash memory, CD, DVD, etc.). [4]

It should also be noted that there are authors who consider that the offense of forgery by electronic means is devoid of material object [8], on grounds that the social value under protection is the public confidence in the information content of the data, a value that is not represented by a material entity in the objective reality.

3.2. The Offense Subjects

3.2.1. The active subject

In the text of law that defines the offense of forgery by electronic means, there is no conditioning for meeting a special quality on the part of its author. Therefore, the active subject of this crime can be represented, according to the new Romanian Criminal Code, by any person or legal entity of criminal liability. It should be made clear that, most often, the manipulations, such as false information, are performed by individuals who possess expertise in this area or who have access to computer systems. [7]

As far as the criminal participation in the offense of false information is concerned, it is worth mentioning that it is possible in all forms that have been known so far, more precisely, the offense may involve other persons as instigators, accomplices and co-authors.

3.2.2. The passive subject

The passive subject of the offense may be any natural or legal person holding the social value protected by the criminal law, injured in their interests and against which legal consequences (in the economic, social or moral fields) are produced, due to computer data counterfeiting.

4. The Content of Incorporation

4.1. The objective aspect

4.1.1. The material element

The material element of the offense of forgery by electronic means is revealed in the text of article 325 of the new Romanian Criminal Code. This element is the result of one of the following actions: introduction, modification, deletion of electronic data or restriction of access to electronic data.

The actions by which the material element of this offense is achieved involve negative effects on the state of the data, namely on their ability to perform and certify facts or situations in the manner provided by the person in whose possession they are, leading to a situation that corresponds to the manufacture of false documents or to the falsification of authentic documents. [4]

Introducing electronic data involves typing information or inserting information by other means (e.g. by using a modem, scanner or various types of disks) in a computer system. [7]

Modifying electronic data envisages any alteration, change or variation in their content.

Deleting electronic data involves criminal activity consisting in the act of eliminating electronic data from a tangible medium.

Restricting the access to electronic refers to the activity of preventing the access to data and of storing them in locations which are difficult to find or access, as well as to the activity of significantly delaying the access to such data, aiming at the result of blocking the access to the data when they are needed for a computer operation that must be carried out correctly and completely. [7]

The material element of the offense of forgery by electronic means entails certain requirements, as entry, modification, deletion or access restriction to electronic data must be committed without right, namely in one of the following situations:

a) lack of authorisation by law or contract;

b) exceeding the limits of authorisation;

c) inexistence of permission from the person or entity legally responsible to grant it in order to use, manage or control an informatics system, to conduct scientific research or to perform any other operation in a computer system. [8]

Furthermore, as a result of conducting such activities (data input, modification, deletion or restriction), misreporting truth should result.

4.1.2. The immediate result

The immediate result consists of the emergence of a state of danger for the protected social values, for the public confidence in electronic data. The status of hazard is definitely generated by data that reflect inappropriate truth, resulting from the activity of falsification of data. [8]

4.1.3. Causation

In terms of causation, we believe that this results precisely from the materiality of the offense "*ex re*". The offense of forgery by electronic means is formally a danger, a reason for which it is not necessary that causation should be proved. In the cases of socially dangerous offenses, the focus is not on effective results, but mainly on the creation of a state of danger that can produce results that are socially dangerous. Within this category of crime, social danger – namely harmful immediate consequence - results from the materiality of the act, i.e. from the forbidden act of behaviour.

In formal offenses or in socially dangerous offenses, the result of social danger, therefore the harmful immediate consequence is presumed. In terms of probation such an aspect should not be proved. [9]

4.2. The subjective aspect

The offense of forgery by electronic means can be committed only by direct intention. This follows from the text of law that determines that the input, alteration, erasure of electronic data and access restriction to electronic data are committed "*in order to be used for producing legal consequences*". Thus, this offense is committed with direct intention because of the very existence of a qualified purpose, existent at the time of committing the offense under the criminal law.

The offense of forgery by electronic means will also be under consideration even if the purpose of the person who has altered the truth of the data content was "legitimate" (i.e., to create a sample of a real legal situation). Moreover, not only the effective use of such data is a necessary element, but also the process of obtaining the data in order to achieve the intended purpose.

The intended purpose is the improper use of the data obtained in order to produce legal consequences. The data are likely to produce legal consequences if they are able to generate, to alter or extinguish legal relationships, creating rights and obligations. [10]

5. The Forms of Offense. Sanctions and procedural aspects

5.1. The forms of crime

The preparatory acts, although possible and sometimes necessary, are not covered by the legal text of the Criminal Code. However, they may be subject to autonomous offense if all the elements of the offense are in question. [11]

It should also be noted that, whereas in the previous criminal regulation the attempt to commit the offense of forgery by electronic means was sanctioned, in the new Romanian Criminal Code, there is no incrimination of this attempt; in other words, the attempt is possible but not punishable. [12]

This offense is under consideration once the socially dangerous consequence occurs, particularly when data inappropriate to the truth are obtained, thus creating a state of danger to the social values protected by law.

The exhaustion of the offense of forgery by electronic means occurs at the moment of committing the last act criminalised by law.

This offense can also be committed through repeated acts.

5.2. Sanctions and procedural aspects

In previous criminal regulation, the punishment for the offense of forgery by electronic means was imprisonment of 2 to 7 years. The new Romanian Criminal Code has decided a reduction of the sentence limits for this crime, so that, at present, the offense of forgery by electronic means is punished with imprisonment of one to five years. [6]

Criminal proceedings shall be initiated *ex officio*.

CONCLUSIONS

The values, principles and rules that are promoted and supported by the European community need to be applied to the online environment as

well, because it is vital that cyberspace – this phenomenon of our times, so much and so frequently reflected in the media - should remain free and open. Consequently, the offenses in the field of electronic systems must benefit from a careful legal treatment.

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INCRIMINATION OF TAX EVASION IN THE ITALIAN CRIMINAL LAW

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ABSTRACT

We intend in this paper to carry out a summary analysis of how evasion is incriminated in a European Union Member State. This study focuses primarily on Italy's tax evasion legislation by comparison to the Romanian legislation in the same field.

The purpose of this approach is to describe the experience of a country with tradition in the fight against tax evasion the legislation of which proved efficient in limiting as much as possible this phenomenon. We think such an analysis can contribute significantly to the finding of more efficient ways to harmonize the Romanian legislation on the prevention and combating of tax evasion with the EU legislation, as well as with the similar laws of other EU Member States. The utility of such an effort is evident in the current European context where the uniformization of European law is a much sought after process.

KEYWORDS: *tax evasion, tax, taxpayer, income, offences*

1. Introductory comments on tax evasion

Tax evasion is a phenomenon with extremely serious societal consequences which explains the significant place its combating has within the economic and social policies of modern states. However, the actions aimed at preventing and combating tax evasion raise numerous problems given the ingenious solutions employed by taxpayers in their attempt to evade the taxation of taxable income or assets.

Romania's Law no. 241/2005 on the prevention and combating of tax evasion solved a great deal of issues emerged in practice. Unfortunately though tax evasion remains a quite extended phenomenon and the Romanian State has to contend with a lot of issues related to the identification and sanctioning of fraudulent acts by which the payment of taxes, duties and other contributions owed to the consolidated general public budget is circumvented.

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This is why the design of more ingenious legislative solutions aimed at preventing and combating tax evasion should be an ongoing priority. In this line of thought any proposals meant to improve the legislation in this field must take into account a detailed analysis of the mechanisms for the prevention and combating of tax evasion in the context of European legislation. In this regard, the study of the legislation of EU Member States that proved successful in these states' fight against tax evasion can be highly fruitful for the complex process of modernization of the Romanian legislation. And among the states that can provide solutions in our area of interest special attention should be paid to Italy.

2. Tax evasion acts incriminated by the Italian criminal laws

The Italian legislation incriminates in two separate laws the acts by which the payment of taxes, duties and contributions owed to the State budget is circumvented. On the one hand there is the *Italian Criminal Code*, while on the other hand there is *Legislative Decree no. 74 of March 10th 2000* on the new legislative treatment of offences related to the income tax and the value added tax. It is certainly obvious that the relation between the two legal texts is that the Italian Criminal Code represents the general law while Legislative Decree no. 74/2000 represents the special law.

Article 640 bis of the Italian Criminal Code provides for an aggravated variant of fraud regulated by the same code's Article 640 for the circumstance where an act is perpetrated so as a public benefit is obtained, such as a contribution, a funding or other public benefits. Therefore such an offence can be encountered when public benefits are appropriated by simulating circumstantial elements that actually do not exist, when existing circumstances are dissimulated or hidden or when essential elements are not declared, all of these acts being done in bad faith[1].

Such an incrimination by the Italian Criminal Code is matched in the Romanian legislation by Article 8 paragraph 1) of Law no. 241/2005 on the prevention and combating of tax evasion which incriminates "the assessing in bad faith by a taxpayer of taxes, duties or contributions resulting in the illegal obtaining of sums of money as repayment or

[1] Ioana Maria Costea, *Combaterea evaziunii fiscale şi frauda comunitară*, Ed. C.H. Beck, Bucharest, 2010, p. 17.

reimbursement from the consolidated general budget or compensation owed to the consolidated general budget".

Much like in the case of the Italian legislation a special criminal provision was dedicated to this offence in our legislation which it treats as a species of fraud, i.e. the general criminal norm. It can be noticed however that the scope of incrimination in the Italian Criminal Code is much broader than the scope of incrimination stipulated by Article 8 paragraph 1) of Law no. 241/2005 on the prevention and combating of tax evasion. This is so because the Romanian incrimination from Article 8 paragraph 1) concerns *only sums of money consisting in taxes, duties or contributions* unlawfully obtained by taxpayers *as repayments, reimbursements or compensation* whereas Article 640 bis of the Italian Criminal Code applies if the actions or inactions making up the material element of the offence's objective side are aimed at taxpayer's obtaining of a public benefit of any kind that the same would have not achieved in the absence of such fraudulent acts.

But the Italian legislation also includes other incrimination clauses for acts dealing with the circumvention of tax obligations. Thus, there shall be imprisoned and fined any person that in order to circumvent the payment of the tax on income, value added tax or pursuing to obtain an unlawful reimbursement of already paid taxes:

i) helps in declaring the annual income or issues and uses counterfeit documents;

This incrimination is partially matched by the Romanian legislation through Article 9 paragraph (1) points a) and c) of Law no. 241/2005 which incriminates the hiding of taxable assets or sources, as well as the recording in accounting books or other legal documents of expenditures not supported by real operations, or the recording of fictitious operations, if such acts are perpetrated for the purpose of circumventing the fulfilment of tax obligations.

ii) destroys and hides entirely or partially the accounting books or the documents the keeping of which is mandatory in order to make impossible the retracing of business or income volumes;

This act is matched by Article 9 paragraph (1) point d) of Law no. 241/2005 which incriminates the alteration, destruction or hiding of accounting documents or memories of electronic cash registers or other means of storing data for the purpose of circumventing the fulfilment of tax obligations.

iii) indicates imaginary names or anyway different from the real ones in submitted tax returns thus hindering the identification of the subjects it refers to;

It can be seen that such acts are not expressly criminalized by the Romanian laws dealing with the prevention and combating of tax evasion. For this reason I recommend that Law no. 241/2005 also incriminate the acts performed in order to circumvent the fulfilment of tax obligations by acts consisting in the provision of incomplete or inaccurate names, data or information, different from the real ones or imaginary, thus hindering the identification of taxpayers or other data needed for the calculation of taxes, duties or contributions owed to the consolidated general budget.

iv) issues or uses invoices or other documents for totally or partially non-existing operations or provide data related to value added tax higher than in reality;

Although not expressly incriminated by the Romanian criminal legislation dealing with the prevention and combating of tax evasion, such acts are indirectly covered by the provisions of Article 9 paragraph (1) points a) and c) and/or Article 8 paragraph 1) of Law no. 241/2005 on the prevention and combating of tax evasion. Maybe Romanian legislators should also incriminate in an express manner these acts so as to avoid any interpretation risks in view of the principle of legal incrimination stipulated by Article 1 paragraph 1) of the Romanian Criminal Code.

v) provides through tax returns, balance sheets or reports documents that certify inaccurate facts[2].

The Romanian correspondent of this incrimination is Article 9 paragraph (1) point c) of Law no. 241/2005 on the prevention and combating of tax evasion.

Also, the act perpetrated by a person that while lacking legal authorizations prints or procures printing installations so as to issue accompanying documents for goods in transit or tax receipts, as well as of any other person that holds or uses such printing equipment or of unauthorized resellers is incriminated[3]. The perpetration of such an offence is punished by imprisonment of at least 6 months up to 3 years

[2] Constantin Ioan Gliga, *Evaziunea fiscală. Reglementare. Doctrină. Jurisprudenţă*, Ed. C.H. Beck, Bucharest, 2007, p. 184.

[3] Constantin Ioan Gliga, *op. cit.* pg. 184; Bogdan Vîrjan, *Infracţiunile de evaziune fiscală*, Ed. C.H. Beck, Bucharest, 2011, p. 313.

and the active subject is not qualified. A similar incrimination is stipulated by Article 7 of Law no. 241/2005.

We will further review the tax evasion crimes regulated by Decreto Legislativo no. 74 of March 10 2000 concerning *Nuova disciplina dei reati in materia di imposte sui redditi e sul valore aggiunto, a norma dell'articolo 9 della legge 25 giugno 1999, n. 205*[4]. In Legislative Decree no. 74/2000 tax evasion crimes are grouped in two major categories: Part I regulates offences related to tax returns[5] while Part II deals with crimes related to documents and the payment of taxes[6].

The *crimes related to tax returns* are the following:

a) Fraudulent tax returns by using invoices or other documents for non-existent operations;

The incrimination is stipulated by Article 2 paragraph 1 of the law and consists in the act performed by any person that, in order to avoid the payment of the income tax or the value added tax by using invoices or other documents for non-existent operations, declares fictitious liability items in its tax returns concerning such taxes. This crime is punished by imprisonment of at least one and a half years up to six years. The law also provides for a mitigated variant of this crime. It is deemed that invoices or other documents for non-existent operations were used, if such invoices or documents were recorded in the taxpayer's mandatory accounting books and are kept as evidence for tax administration. Thus, if the total value of fictitious liability items is less than Euro 155,000[7], an imprisonment of at least six months up to two years shall be applied.

[4] Legislative Decree no. 74 of March 10th 2000 regarding „The new regulation of income tax and value added tax crimes, in accordance with Article 9 of Law no. 205 of June 25th 1999" was published in the Official Gazette - General series no. 76 of March 31st 2000. This legislative act deals with crimes involving the income and value added tax according to the criteria established through Article 9 of Law no. 205 of June 25th 1999.

[5] *Delitti in materia di dichiarazione.*

[6] *Delitti in materia di documenti per operazioni e pagamento inesistenti*.

[7] The incriminating provision mentions the sum of ITL 300 million but due to the fact that as of January 1st 1999 the Italian Lira was officially replaced by the Euro, the conversion was performed at the ITL 1,936.27 = EUR 1 exchange rate; the Italian legislation continues to provide the sums in Italian Lira so the conversion was needed to express the fines.

b) Article 3 paragraph 1 stipulates *fraudulent tax returns through the use of other means*;

The offence consists in an act performed by any person that, apart from the cases provided for by Article 2, in order to circumvent the payment of income tax or value added tax, based on false mandatory accounting records and by using fraudulent means to obstruct the evaluation of the income tax, declares in a tax return concerning the same taxes asset items of a sum lower than the actual one, or fictitious liability items when considered jointly:

a) the evaded tax exceeds, for each separate tax, the amount of Euro 77,470;

b) the total sum of the evaded asset elements, even by declaring some fictitious liability elements, exceeds five percent of the overall sum of the asset elements declared in the tax return or, in any case, exceeds Eur 1,550. The punishment for this crime consists in imprisonment of at least one and a half years up to six years.

c) Untrue tax returns;

Provided for by Article 4 of the law it consists in an act carried out by any person that in order to circumvent the payment of the income tax or the value added tax declares in its annual tax returns concerning the aforementioned taxes asset elements of a sum lower than the actual sum or fictitious liability elements if considered jointly:

a) the evaded tax in the case of each separate tax exceeds Euro 103,290;

b) the overall amount of the asset elements evading taxation, even by declaring some fictitious liability elements, exceeds ten percent of the total amount of the declared asset elements or, in any case, Euro 2,065. The punishment consists in imprisonment of one up to three years.

This incrimination deals with tax evasion acts and is supplemented by the provisions dealing with accounting crimes from the Italian Criminal Code. A special trait of tax evasion in this wording is the fact that it refers only to the final phase in the performance of such a crime, more precisely the declaration of diminished asset or liability elements. This purpose is also regarded by the incrimination from Article 9 paragraph (1) point b) of Law no. 241/2005 on the prevention and combating of tax evasion.[8]

[8] Ioana Maria Costea, *op. cit.*, p. 84.

d) Failure to submit tax returns;

This act is incriminated by Article 5 paragraph 1) of the law and its correspondent in the Romanian legislation is Article 9 paragraph (1) point a) of Law no. 241/2005 on the prevention and combating of tax evasion (the hiding of taxable assets or sources). This crime consists in an act performed by any person that in order to circumvent the payment of the income tax or the value added tax fails to submit the mandatory annual tax returns for the same taxes, and the eluded tax exceeds, in each case, Euro 77,468. This crime is punished by imprisonment of one up to three years. In the case of this offence which basically consists in a damaging act the sums not paid to the consolidated general budget are relevant for this act's criminal character[9]. Its incrimination is a novelty for the Italian penal law as, by imposing a minimum limit to the damages, it practically transforms a tax evasion crime from an offence of danger into a material offence.[10]

The attempt to perpetrate such a crime is also punished.

Paragraph 2) of Article 5 introduces a non-punishment clause in that the failure to submit a tax return within 90 days as of its deadline removes criminal liability, and for tax returns that are not filed or signed using the prescribed form there is no criminal liability at all.

The acts incriminated by Articles 3 and 4 of Legislative Decree no. 72/2000 are not punished if:

- accounting records and balance sheet data that violate the criteria of jurisdiction are calculated based on constant accounting methods;
- records or estimates were made based on criteria mentioned in the balance sheet;
- each of the estimates, considered individually, differs by less than ten percent than the correct ones.

Part II of the law, named *Crimes related to documents and the payment of taxes* deals with the following crimes:

e) the issue of invoices or other documents for non-existing operations;

Pursuant to Article 8 paragraph 1 of the law, the crime consists in an act perpetrated by any person that in order to allow third parties to

[9] Ioana Maria Costea, *op. cit.*, p. 46.

[10] E. Di Nicola, *La cultura dell'evasione fiscale quale cultura della illegalita,* in L'Amministrazione Italiana, no. 3/2006, p. 345, cited by Ioana Maria Costea, *op. cit.*, p. 46.

circumvent the payment of the income tax or the value added tax, issues or releases invoices or other documents for non-existing operations. If more invoices or documents are issued for non-existing operations throughout the same tax period a single crime shall be considered.

Article 8 paragraph 3) provides for a milder version of that crime where throughout a tax period the sum that does not match reality but is recorded in invoices or other documents is less than Euro 155,000.

The crime in its full version is punished by imprisonment of one up to six years, while the milder version by imprisonment of six months up to two years.

f) the hiding or destruction of accounting documents;

This crime is stipulated by Article 10 of the law and consists in an act of any person perpetrated in order to evade the payment of the income tax or the value added tax or to allow third parties to circumvent the payment of such taxes by hiding or destroying, entirely or partially, the accounting records or documents the keeping of which is mandatory. Such an act makes it impossible to calculate the income or turnover. The punishment for this crime is imprisonment for six months up to five years.

g) the fraudulent failure to pay a tax;

Article 11 of the law incriminates the offence consisting in an act perpetrated by any person by simultaneously alienating or committing fraudulent acts with regard to its own assets or the assets of third parties in order to render inefficient, either partially or entirely, the mandatory tax collection procedure, aiming at eluding the payment of the income tax or the value added tax, of fines or administrative sanctions in relation to the same taxes for a sum exceeding Euro 51,645. The law punishes this crime by imprisonment of six months up to four years. The Romanian legislation does not include a similar incriminating provision. Article 9 paragraph (1) of Law no. 241/2005 only incriminates the degradation or alienation of legally seized property in accordance with the provisions of the Tax Procedure Code or Criminal Procedure Code, should such an act be perpetrated with an aim to evade the performance of fiscal obligations. Therefore we deem necessary the inclusion in our legislation of an incriminating provision similar to that stipulated by Article 11 of Legislative Decree no. 74/2000.

The persons convicted for committing one of the crimes stipulated by Legislative Decree no. 74/2000 are applied one of the following ancillary punishments:

- suspension of their rights to hold a management position with a legal person or company for a period of at least six months up to three years;
- incapacity to conclude contracts with public administrations for a period of at least one year up to three years;
- suspension of their right to hold representation or assisting position in the field of taxation for a period between at least one year up to five years;
- permanent exclusion from the position of Tax Board member;
- publication of the conviction ruling.

Also, the conviction for one of the crimes provide for by Article 2 paragraph 1), Article 3, and Article 8 paragraph 1) implies the suspension of the right to hold a public office for a period between one year and three years.

If we look at our legislation, we notice that according to Article 12 of Law no. 241/2005 the persons convicted for tax evasion crimes or crimes related to tax evasion crimes cannot be founders, directors, managers or legal representatives of companies, or if they were elected they are deprived of their rights. Such injunctions or deprivations can be of course supplemented by ancillary and complementary punishments stipulated by the Romanian Criminal Code.

The punishments provided for by Legislative Decree no. 74/2000 get halved and Article 12's ancillary punishments do not apply should, before the opening of court proceedings in first instance, the tax liabilities regarding the acts making up the respective crimes be settled through payment, including through special conciliation proceedings or proceedings of adherence to tax assessing, as per the provisions of the Italian tax laws.

The Romanian legislation dealing with the prevention and combating of tax evasion includes a similar provision of reducing by half the punishment limits. Thus, according to Article 10 paragraph 1) of the said legislative act in case of perpetration of a tax evasion crime provided for by the law's Articles 8 and 9, if prior to the first court hearing the defendant covers in full the claims of the civil party, the law-provided limits for the punishment of the perpetrated act are halved. These provisions do not apply if the offender has committed another crime stipulated by Law no. 241/2005 within 5 years after committing the act for which it benefited from the provisions of Article 10 paragraph 1).

CONCLUSIONS

In light of the above, we can draw the conclusion that the analysis of the Italian legislation dealing with the prevention and combating of tax evasion may help us find some solutions to improve the Romanian laws treating the same field.

As we have seen, the incrimination provisions are placed in the Italian legislation either in the Italian Criminal Code, which provides general criminal provisions, or in Legislative Decree no. 74/2000, which is a special law that deals with crimes related to the income tax and the value added tax and where the majority of tax evasion crimes are present. The tax evasion crimes mentioned by Legislative Decree no. 74/2000 are grouped into two categories: crimes related to tax returns and crimes related to documents and the payment of taxes.

The Italian legislation in the field of prevention and combating of tax evasion is in many ways similar to its Romanian counterpart. The Italian legislation includes a special law dealing with the prevention and combating of this sort of crimes as well as provides for mitigating circumstances, whereas our legislation includes provisions that allow for the reduction of punishments, but the conditions for their application are the same, i.e. the full coverage of damages until first court hearing, and also their effect is the same, i.e. the halving of punishment limits. The differences between the two legislations with regard to the way different acts of circumvention of tax obligations' fulfilment are incriminated can support us in improving the incriminating provisions already present in the Romanian laws as well as in incriminating new acts of tax evasion.

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[3] Bogdan Vîrjan, *Infracţiunile de evaziune fiscală*, Ed. C.H. Beck, Bucharest, 2011.

[4] E. Di Nicola, *La cultura dell'evasione fiscale quale cultura della illegalita*, în L'Amministrazione Italiana, no. 3/2006.

[5] Decreto Legislativo 10 marzo 2000, n. 74 - Nuova disciplina dei reati in materia di imposte sui redditi e sul valore aggiunto, a norma dell'articolo 9 della legge 25 giugno 1999, n. 205.

[6] Codice penale italiano.

[7] Law no. 241/2005 on the prevention and combating of tax evasion;

[8] Romanian criminal Code.

THE USE OF A VIRTUAL GOODWILL BETWEEN FREEDOM AND LEGAL PROVISIONS

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ABSTRACT

The present article wishes asses the differences and the similarities between the commercial name, trademarks and the domain name, the confusions which may appear while using and defining these terms, and also the difficulties one may encounter is solving conflicts facing persons who own copyrights on domain names, commercial names or trademarks. Nowadays, the trademark copyright owners and the domain name owners have issues due to the differences between the system which registers trademark copyrights and the system which registers domain names, on the one hand, and the system which offers internet website copyright, on the other hand, and this happens because these systems are totally separate and with no connection between them. As far as the defense base in this type of cases is concerned, the Romanian and European court decisions have evolved from solving these cases by applying the civil delictual liability to applying special laws on trademark infringement, unfair competition or special administrative procedure (UDRP). Towards the end of the article there are some proposals on how to improve the law and to solve the conflicts between trademark and commercial name copyright one had previously obtained and the domain name.

KEYWORDS: *internet, virtual goodwill, domain name, web site, commercial name, trademark, reputation, competition, cybersquating*

Motto:
"*Within the civil right we can find an evolution, whereas within the trade law we can find a revolution*".
(I.L. Georgescu)

INTRODUCTION

The Internet, an unlimited virtual space, often named "a network of networks" has become at the present a new trading channel and more. Among other professional who unfold non-profit activities (on-line education system, on-line counselling), the professional traders use this instrument more and more, as it allows non-substantial transactions, saving money and time, through websites, and so we can find more and

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more professional traders unfolding on-line trading. And within this age of fast information access the professional traders have adapted *goodwill* to the virtual market. Nevertheless, the advantages the internet brings should also be accompanied by the necessary legal protection, on the same terms as the traditional, substantial, operations.

The economic reality and the literature on the topic[1] constantly proved that *goodwill remains the core of business activities,* the most important part of any professional trader's patrimony, despite the fact that Romanian law has no special regulation for it, but merely a few isolated provisions. Nowadays, within the Romanian legal system we can find many regulations in reference to goodwill. For example art. No. 21 paragraph 8 in Law no. 26 /1990 regarding the Registry of Commerce, modified and republished, states that "the Registry of Commerce shall list notifications on donation, sale, lease or forfeit on the trade fund (goodwill) as well as any documents which modify information or dissolves the company or a goodwill". The Law no. 298 / 2001 [9] which modifies and completes Law no. 11/ /1991, regarding unfair competition defines for the first time goodwill: "the trade fund (goodwill) represents the assembly or total of movable and immovable goods, corporeal and incorporeal goods (trade-marks, company names, symbols, patents, commercial venue) used by a trade company". It is worth mentioning the fact that in the Romanian legal system there is a series of regulations concerning some goodwill elements in particular, and we can list: Law no. 26/1990 on Registry of Commerce, reviewed and republished (art.no 27-40), on company symbols (previously regulated by the Law issued on April 10th 1931), Law no.84/1998, regarding trademarks and geographical elements, Law no. 64/1991 on patents, Law no.129/1992 on industrial designs and Law no. 8/1996 regarding copyright, still these regulations are far from having a general view on the matter, they are unstructured and with no inner relation to goodwill as an independent and abstract entity.

One should remark on the fact that provisions sometimes applied have not always met the goodwill traits and characteristics within real life, and are far from able to solve the new problems which appear within the virtual space. Moreover, presently no special law, in the countries which created the term „goodwill" or in the countries which have no regulations on it, has reached the electronic/ on-line professionals goodwill.as a consequence, the specialists and the courts have to fill this legal void and

[1] J. Derruppe, *L'avenir du fonds de commerce et de la propriete commerciale*, Melanges Terre, 1999, p. 579.

make an effort in interpreting the already existing provisions. All these considered, the trade fund (goodwill) proved and continues to prove its usefulness by being a very flexible institution, which can be easily adapted by any professional trader according to his immediate needs and interests, on a certain market segment.

VIRTUAL GOODWILL

On the internet, any physical location becomes senseless, and geographical distances are impossible to overcome. As a consequence, any professional trader who wants to make come to the fore within the cyberspace needs, first of all, a website which can be accessed by a *domain name*.

Using common terms, a *domain name* represents the address of a web site. In technical terms, the domain name represents an unique string of characters assigned to an IP address (Internet Protocol) corresponding to a computer (server) permanently connected to the internet. The listing of the domain names is the responsibility of ICANN (Internet Corporation for Assigned Names and Numbers), the successor of an American private company named NSI – (Network Solutions Inc.), a non-benefit international institution, created in 1998, during an agreement between Europe and America. A domain name consists of three levels which are decrypted right to left, as follows: the first level (the extension) represents the domain and usually consists of three letters (e.g. com, net, org, biz) or two letters indicating the national networks (e.g. ro, us, uk, fr), or more letters (e.g. info, name, mobi); the second level, also known as the subdomain, indicates the entity and most of the times represents the name of the professional; the third level refers to the servers, which have a logical name (e.g. www – World Wide Web, the most common). The domain name cannot have more than 67 characters, without taking into consideration the extensions. All the extensions are managed by a TLD (Top Level Domain), for Romania ROTLD (Romania Top Level Domain). The domain name is unique, and so the visitors can connect to a particular website and have access to the information and files the website provides[2].

A legal definition of a domain name was proposed by the French professor G. Loiseau: "The domain name represents the mark under which a company (business) develops and unfolds, on the internet, a

[2] M.I. Bocsa, *Closing international trading agreements by electronic means*, Universul Juridic Publ., 2010, pp. 115-116.

virtual activity, and to which the clients can address in order to obtain goods, services or information on the activity the company unfolds"[3].

This definition clearly shows the fact that the domain name represents a *new distinctive mark*. Nevertheless, there is still some uncertainty regarding its legal nature, the main difficulty consisting in determining its effects. Unlike the trademark, which takes effect only on the territory it is listed for, the domain name actually has a worldwide effect, much more so because it has some specific and clear protection criteria. All these being said, some authors say that: "the domain name becomes an international trademark which affects the trademarks"[4]. The doctrine unanimously acknowledges the fact that, being a personalized electronic address, the domain name is a part of the trade fund (goodwill) as an element which attracts clients. Different opinions appear while trying to define it; the French authors define it as „the name of a business (company) functioning on the internet, the virtual location (web store) to which the clientele addresses in order to obtain goods or services from the trader or to get information on its activity"[5]. In our opinion, this definition is far from being precise and clear and may create confusion.

Regarding the *domain name*, it is registered or listed by special institutions, based on the principle „first come, first served", by an electronic and automatic processing which verifies whether the domain name is available or not. Once the payment is done, the domain becomes active and it offers to the owner the exclusive right to use it. The Romanian domain registry .ro is managed by RNC – The National Computer Network for Research and Technological Development within ICI – The National Institute for Information Research and Development[6]. The legal nature of the domain name is still uncertain and its legal status is not regulated by special laws, but by the terms of the agreement between the person which applies for a domain name and the institution authorised to offer it. Some institutions specialized in listing domain names act based on a mandate (warrant) from their clients, others prefer to register the domain names themselves and then give the clients the right to use it. In this case the institution/society remains the owner of the virtual address, and as such it may decide to deny the access to the

[3] G. Loiseau, *Nom de domaine et Internet: turbulences d'un nouveau signe distinctif*, D. Chronique, nr. 5,1999, p. 245.
[4] B. Schaming, *Internet ou l'emergence de la marque mondiale de fait*, PA 9 mars 2001. nr. 49, p.14.
[5] *Op. cit.*, p. 246.
[6] www.rnc.ro.

client. In return, the client may give it away to some other trader, and get a better price. The institutions authorized to register the domain names renew, on demand, the registration agreement, before the term expires. Otherwise, the right to use the domain name may be lost, and this situation may have really serious consequences. Professional traders which do not preserve their right to use the domain name may suffer as far as their activity is concerned, they may lose clients and the business they unfold on the internet.

We can therefore conclude that the stability and the development of goodwill are determined by the renewal of the registration agreement/contract, as it grants the trader access to the website, an important element that turns casual clients into loyal clients. This is the very reason why the French doctrine proposed the up taking of the domain name into a *virtual location*, which could allow the professional trader to have the certainty of the agreement renewal, regarding the registration of the domain name, just as a tenancy contract. This would offer the trader a certain legal security and protection. We are of a different opinion[7], as we consider the domain name, a unique and distinctive sign, to be the address of the virtual location, and the location itself to be the website or the web store.

The website concept (the word site in English is a synonym for location, spot, place) is used to describe a number of multimedia web pages containing texts, static images, animation, etc., on a certain topic, which can be accessed by anyone and which are connected by hyperlinks. The website is maintained usually by a webmaster and consists in some webpages. The initial page (the homepage) is the page used to access the other secondary pages. Technically speaking, a website can contain any type of static information, chat rooms (forums), products, goods, services, ads, online forms, videos, digital sounds, static and animated images, special effects, dynamic menus and much more.

The theme of a website can consist in: a blog, a catalogue, a portal, a web store, a bank, a virtual university, a library, a magazine, an encyclopaedia and so on. Nowadays, one pays more and more attention to the content of a website and to the design, and their creators or owners have the same right as any other type of author (copyright). As far as the domain name is concerned, on the other hand, things are not so clear. The domain name represents the indispensable element, and without it the professional trader cannot be identified within the cyber-space, nor

[7] M. Levis, *Site internet: de l'incorporel au virtuel*, AJDJ, 2001, p. 1073.

attract clients, and one the other hand, due to the fact there is no special regulation, the specialists have not yet agreed on its legal nature, so it was often enough mistaken for the commercial name.

Because of his situation, while using the elements of goodwill within the cyber-space, in real life we can find numerous situations, namely conflicts between owners of the domain name and the owner's trademarks or commercial names. The issues and situations we can find in real life are different and vary a lot: most of the times, trading companies/ businesses wish to use, as a domain name, their own trademark or commercial name; other times, the domain name has nothing to do with the commercial name or the trademark.

The differences and the separation (lack of communication) between the system which registers commercial trademarks and names to a government authority controlling a certain territory and the system which registers the domain names (in this case we have a non-governmental organization which is not limited by a territory), a new phenomenon (activity) appeared: the cybersquatting. This term (concept refers to the action of registering, intentionally and willingly, a name on the domain names list, a name which another professional trader uses as a commercial name or a trademark, in order to prevent the latter to register or continue using the name as a website address; those who practice cybersquatting then ask from the trademark owners or the commercial name owners considerable amounts of money in order to allow them to use the website on the internet.

The European Court of Justice, even the Romanian courts, more recently, have sanctioned such abusive activities, either by applying the regulations on civil delictual liability, or special provisions, namely the proceedings on unfair competition or actions for counterfeit; lately, the professional traders have started to use the special arbitrage proceedings – a standard proceeding for solving disputes or conflicts – which was adopted by ICANN (Internet Corporation for Assigned Names and Numbers) and RNC, in 1999.

LEGAL PROVISIONS APPLIABLE TO CONFLICTS RELATED TO THE VIRTUAL GOODWILL

Nowadays we can discuss on an *internet law*, as a distinct and separate branch, on *digital rights*, on *Lex Electronica* which comprises "an assembly of rules on the activity unfolded within the virtual space by

using computers and the internet protocols."[8] There are other specialists who consider the concepts and the relations we can find within the cyber-space as a mere extent of intellectual property law. As far as other authors are concerned, it is difficult to define the legal nature of this new context, since the traditional regulations refer to a substantial, material context: "in reference to the internet – as a new trading channel, the classical legal solutions can be fully adapted, since the law always has to adapt to new realities, sooner or later"[9].

The legal practice has showed that, even though registering a domain name "does not represent the type of products or goods or services for which the sign (name) was registered for, but can only make the name unavailable for future registration ", still it represents "a distinctive sign, used for identifying a website on the internet, and therefore also helps identify the gods and services provided through that website".[10] The distinctive character of the domain name can easily be demonstrated by its specific traits: it may have nothing to do with selling goods or rendering services and, more often than not, it is chosen so as to describe the context of the website, so, even when it is used and registered for economic activities, "is sphere of uniqueness and specificity are not limited to certain types of goods or services"[11]. The domain name was created and is used as "an address within the virtual space, which brings it closer to the commercial name, but it also indicates the source of goods and services offered by that address, and this brings is close to the trademark"[12]. The essence of the domain name and its specific traits were analysed and interpreted by courting connection to the characters of trademarks and commercial name, and the courts found that: "each domain name helps find the locations on the internet, but also allows and enables professional traders to promote names which identify them and distinguish them from other companies, and to attract or maintain clients for the goods they provide", and " the purpose for which the domain

[8] P. Trudel, *Lex electronica. Le droit saisi par la mondialisation*. Collection Droit international. Ed. Bruylant. Bruxelles, 2001, pp. 221-268.
[9] L. Leveneur, *Situation de fait et droit prive*, L.G.D.J., 1990, p. 212.
[10] The High Court of Justice, Civil and Intelectual Property Section, Verdict nr.2279 in March 13th 2007, cit by O. Spineanu-Matei, *Intelectual Property. Legal practice*, Hamangiu Publ., Bucharest. 2009, p. 133.
[11] S. Florea, *Legal aspects on solving conflicts between rights on trademarks, commercial names and domain names*, RRDP nr.1/2010, p. 118.
[12] *Ibidem.*

name is registered may be achieved only by reference to the website object, implicitly to the goods or services it provides"[13].

In real life we can find several situations which lead to a conflict between copyright, the right on a commercial name and the right to a domain name. Most often, previous rights on a label or sign registered as a trademark or a previous right on a commercial name interfere with a right obtained later-on, on an identical or similar sign/ name registered as a domain name. These conflicts arise due to the fact that the trademark and its previous existence do not constitute an obstacle against registering an identical domain name afterwards; moreover, the person registering the domain name has no legal obligation in proving the ownership of a copyright or a commercial name. At the same time, having a right on a trademark or on a commercial name does not automatically establish the right to register the name as a domain name. Any sign registered as a trademark on a certain national territory is protected within the limits of special trademarks principle, and meanwhile the right to use a certain domain name is not limited, the only case where the principle of trademark uniqueness stands is copyright infringement action As far as the domain name is concerned, " the slightest difference between registered signs or names, although ignored in the beginning, may create a new and distinct right of use, so the risk to create confusion for internet users can be mistaken for the sign availability "[14].

The Romanian legal practice reveals the diversity of legal defence means and instruments, used by the rightful owners of trademarks, commercial names and domain names while in court. Taking into consideration the first case, the court[15] solved a conflict regarding the registration of a domain name by applying the regulations on delictual civil liability (art. 998-999 of the Civil Code effectual at the time); the claimant was the well-known company Air France who has seen fit to defend its right on its own commercial name. The court considered that the illegal act consisted in "the purchase of airfrance.ro as a domain name for speculative purposes", and the real situation was that the defendant SC Amalteea Impex SRL "took dishonest advantage on the reputation and recognition

[13] Bucharest Appeal Court, 9th Section specialized on intelectual property, Civil Verdict no.142/A in May 31st, 2007, cit by O. Spineanu-Matei, *Intelectual property. Legal practice*, Hamangiu Publ., Buc., 2009, p. 130.

[14] S. Florea, *Legal aspects on solving conflicts between rights on trademarks, commercial names and domain names*, RRDP nr.1/2010, p. 119.

[15] Bucharest Court of Justice, Civil Verdict no. 1682 in November 6th 2001, publicised in *Roman Pandects* no.6/2003, p.132 noted by R. Papadima.

the commercial name of Air France has, whereas the claimant was deprived of its right to register for itself a domain name corresponding to its commercial name" and rejected as irrelevant the argument that the claimant had the possibility to use any other subdomain, for example .com, .org, with the exception of .ro; the speculative and malicious intent became obvious in the manner in which the defendant tried to block and the domain name airfrance.ro for and force the claimant into buying from the defendant the respective domain name

Within the following cases the courts adopted the same line of reasoning, but, in analysing the terms of the illegal act, the damage, the relation between the intent and the act, they also considered the high risk of confusion between signs, stating that "by maliciously registering a domain name which is identical for similar to the trade mark an illegal civil act occurs and this act affects the real absolute right to the trade mark"[16], and this line of reasoning leads to a trade mark infringement action.

For the first time within such cases, provisions stipulated in art. 35 in Law no. 84/1998 on trademarks and geographic elements were sustained in the case *www.cosco.ro*[17], where the court considered applying special regulations, rejected the action during the first trial on the reason that the copyright was not violated since "the use of the registered name was done by third party for non-commercial activities, since *www.cosco.ro* which was functioning as a chat room and for entertainment activities, which eliminates the risk of confusion or to associate the website to the claimant's goods". The trade mark infringement action was used in order to defend the European Community trade mark, the international trade mark and the commercial name "Pharma Nord" against the right to register the domain www.pharma-nord.ro, which was purchased later on by the defendant, which claimed the fact it had purchased the right to register the commercial name under the national law; the court considered that the claimant's exclusive rights on trademarks and the commercial name were violated by the fact that the defendant used an identical domain name for similar goods and services; in this case the

[16] Bucharest Appeal Court, 9th Section specialized on intelectual property, Civil Verdict no.92/A in May 25 th 2006, maintained by the Verdict no. 2279 in March 13th 2007 of the High Court of Justice, cit. by O. Spineanu-Matei, *Intelectual Property. Legal practice*, Hamangiu Publ, Bucharest. 2009, p. 133; www.legi-internet.ro

[17] Bucharest Appeal Court, 9th Section specialized on intelectual property, Civil Verdict no 142/A in May 31st 2007, cit by O. Spineanu-Matei, *Intelectual Property. Legal practice*, Hamangiu Publ, Bucharest. 2009, p. 124

court presumed the risk of confusion. Within the last few years, we can observe the increase of conflicts having the same object, and here are some examples of domain names: *asirom.ro, billa.ro, banat-crisana.ro, tophid.ro.*

The Romanian courts of justice were reluctant to solve the conflicts between trade mark or commercial name on the one hand, and the domain name on the other hand by taking into consideration unfair competition and found the best legal base to be art 35 paragraph 2 in Law no 84/1998, corroborated with art 998-999 in the Old Civil Code. Within the case regarding the domain name www.asirom.ro, the claimant Asirom SA also invoked and based its case on Law no 298/2001[18] on modifying and amending Law no.11/1991regarding preventing unfair competition, and also art 8 in Law no. 148/2000 regarding publicity, presently repealed. The court[19] analysed the registration of the domain name as "a type of publicity which can create confusion among the clients, a confusion between the person publicising and a competitor or between trademarks, commercial names or other distinctive signs, thus taking advantage of the reputation the trademark and the commercial name has obtained, therefore creating prejudice/damage to the claimant".

Starting with August 26th 1999, there is a procedure which regulates these conflicts, namely the UDRP – the Standard Procedure on solving conflicts regarding domain names – adopted by ICANN[20] – Internet Corporation for Assigned Names and Numbers – which is applied by a series of institutions approved by ICANN, for OMPI – The International Organization for Intellectual Property – as the most frequently addressed to. According to this procedure on solving conflicts, we are facing an administrative procedure, and not an arbitrage[21]. The verdict can be challenged/appealed within 10 days since it was adopted, and during this time is effects are suspended, according to art 4 letter k) in the UDRP regulations. This type of procedure has the advantage to be much faster than a regular legal trial (70 days maximum), but it also implies high financial charges (at least 1500 euros) and meeting simultaneously some conditions which are similar to the terms the court has to analyse, and we can mention the following: the domain name is identical or similar to a

[18] Published in M.O. nr.313/2001.
[19] Bucharest Court of Justice, 3rd Civil section, Civil Verdict no. 597 in June 16th, publicised on www.legi-internet.ro.
[20] www.icann.org.
[21] P. Buta, *Protecting the internet domain names*, The Romanian Journal on Intelectual Property no.2/2006, p. 97.

trademark owned by the claimant, and this leads to a risk of confusion; the domain name was registered and is maliciously used by the defendant; the defendant has a right or a legitimate interest. Some of the cases which have been solved through this legal procedure are: *philips.ro; swissair.ro; att.ro; pizzahut.ro; kfc.ro; praktiker.ro*. A good example in illustrating this procedure was the case no DRO 2009-0002, in which the court had to decide on the right concerning the sign *Borsec* registered as a trademark in Romania in March 2000, in the US in March 2004, as an European Community trademark in January 2005, as a geographical element in April 2001, as a part of the domain name www.borsec.romaqua-group.ro, versus the domain name www.borsec.ro, registered in January 1996. After analysing all three conditions mentioned above, although the defendant had registered its domain name before the defendant registered its trademark, the court dismissed the case, considering that: there is a risk of confusion, but there is no evidence the defendant had a legitimate interest regarding www.borsec.ro, since the defendant had also registered in 1996 several domain names which represented geographical names in Romania (www.sighisoara.ro, www.danube.ro, www.blacksea.ro, www.bacau.ro) but those websites had not been active for more than 10 years, therefor no malicious intent can be proven, since the defendant did not know the claimant existed ; the court could not say beyond any doubt the purpose of the registration was to take advantage of the possible confusion.

We should also mention the fact that– the Standard Procedure on solving conflicts regarding domain names does not protect geographical names in the absence of a trademark. This case sends a red flag when it comes to the possibility to register geographical names as .ro domain names by trading companies which renders services to tourists in Romania or by local authorities who are authorised to inform the tourist on towns, resorts or geographical areas.[22]

PROPOSALS ON LEGAL REGULATIONS

All these being said, in order to avoid any confusions and hesitations of legal specialists or courts, we consider the following amendments as necessary:

- Law no. 84/1998 regarding trademarks and geographical names should be amended by clear regulations which would enable and allow a trademark owner to protect himself against a malicious registration of a

[22] S. Florea, *op. cit.,* p. 125.

domain name, against the confusion such a registration could create regarding the distinctive nature of the trademark, by opening a trademark infringement action;

- The procedure used to register domain names should also receive some amendments; a person who owns an industrial property right or an intellectual property right, previously registered, should be able to find and challenge the registration of a domain name which could affect him, within a reasonable period of time starting the moment of the acknowledgement. The procedure should enable and demand ICI to search for a similar or identical sign previously registered within the Registry of Commerce and/or the National Trademark Registry; if such a sign is found, the solicitor should prove the consent of the trademark or company owner regarding the registration of the domain name. After the registration takes place, the domain name owner should clearly state on the website the information that there is no connection between the domain name and the identical sign, previously registered.

One should notice the fact that in the United States, in order to avoid conflicts which are more and more frequent (conflicts regarding the registration of domain names), a special legal act was issued – Trademark Cyberpiracy Prevention Act, which comprises Section 43(d) of the US Trademark Act. Having this regulation as a reference, the European Union could also issue a special law regarding the domain name.

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