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CONTENT

THE IMPORTANCE AND THE USEFULNESS OF THE CONCEPT OF *STOCK AND TRADE* WITHIN THE CURRENT LEGISLATIVE FRAMEWORK

Prof.univ.dr. Smaranda ANGHENI[*]

ABSTRACT

*In the heritage of the professional - trader, there is a **"set" of goods** intended to business, goods which, by their nature tangible or intangible, movable and immovable, are regarded as a **fact universality** (de facto) and not a **legal universality** (de jure).*

Thus, from the outset, it should be noted that stock and trade cannot be confused with the heritage, the essential difference consisting in the fact that stock and trade not only contains rights and obligations but goods intended to business that is carried out by the professional person[1], while the assets include all rights and liabilities that can be quantified in money belonging to it (art. 31 C. civil).

*Under these conditions, **the stock-in-trade is not identified with professional dedicated assets**, which, according to the Civil Code (Article 31 paragraph 3 and art. 31 para. 1 and paragraph 2), is represented by the "fiduciary property masses, created under the provisions of Title IV III of the book, those intended to develop a licensed profession and other patrimonies determined by law ".*

KEYWORDS: *stock-and-trade, dedicated assets, business, goodwill, heritage, company*

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[1] For the definition of *heritage*, see also C. Barsan, *Civil Law. Principal real rights*., All Beck Publishing House, Bucharest, 2001, p 6; I. Balanescu Rosetti, Al. Băicoianu, *Treatise of Civil Law*, Vol I, Ed Al Beck, Bucharest, 1996, p 522, V. Stoica, *Principal real rights*, Humanitas Publishing House, 2004, page 46 et seq. In another definition, the definition includes property and assets covered by the rights and obligations, Tr Ionaşcu, G. Brădeanu, *Principal real rights in the Socialist Republic of Romania*, Academy Publishing House, Bucharest, 1978, p 13.

1. GENERAL CONSIDERATIONS

Reconfiguring commercial law adopted under the New Civil Code (NCC), defining **assets**, **dedicated assets**, **individual professional assets** legitimates the question concerning the importance and usefulness of "stock and trade" concept, especially because there are authors who consider that the stock and trade is actually a collection of dedicated assets[2].

Interest, the utility of the stock and trade concept is based on general issues but especially on considerations specific to economic operations, legal operations, in which are involved are present individuals and businesses qualified as legal professional traders. Thus, the stock and trade as an essential element of the heritage of the professionals-traders is a reality that cannot be ignored, even if the legislator has not set up a special regulatory framework to meet business features, features that are mainly **speed and security of transactions**.

On the other hand, the concept of "stock and trade" is necessary in the context of free movement of goods, services, persons and capital within the European Union, freedom imposing economic activity / trade by individuals and legal entities in compliance with the law of fair (honest) competition.

However, in the rules of competition, the protection of stock-and-trade fully occupies an important role, but also its elements (the legal entity, company logo, customers and so on). Moreover, the Romanian legislator in Law 11/1991 on Unfair Competition, as amended, provides unfair competition deeds referring to the firm, trader's reputation, goods (products) of merchant, clientage.

In the same pro-merchant assets there may be more funds of stock-and-trade if he develops more different activities. Thus, under the French law, these funds of stock-and-trade appear as "enterprise activity branches". Specifically, in art. 81. 2 of the Law on 25th January 1985 on the recovery and liquidation of legal assignment it is provided the enterprise cession specifying that the cession operation may be total or partial. About the partial cession, the French law states that "this bears on a set of operational

[2] St. D. Cărpenaru, *Commercial Roman Law Treaty*. Legal Universe Publishing, Bucharest, 2012, p. 95. According to the author, at present, according to legal regulations, stock and trade represents a heritage of equity as distinct fraction of assets trader for carrying out business.

elements which form one or more complete and independent branches of activity"[3] .

Under these circumstances we believe that "stock-and-trade" justifies the interest, the practical utility, both economically and legally.

2. THE LEGAL AND CONCEPTUAL FRAMEWORK OF STOCK-AND-TRADE

The concept of "stock-and-trade" is rarely used by the legislator, both in under the Romanian law and comparative law.[4]

Following the evolution of the Romanian commercial law regulations, we can see that the legislator incidentally used the concept of "stock-and-trade". Thus, in the Commercial Code (now repealed) there was a text, respectively art. 861 applicable to bankruptcy (repealed by Law no. 64/1995), art. 21 and art. 42 of Law no. 26/1990, republished, regarding the trade register, and Title VI of Law no. 99/1999 regarding some measures to accelerate economic reform[5].

The concept of "stock-and-trade" exists, however, in the regulations regarding the accounting activities which provide that it is a part of "goodwill"[6], **goodwill** where the company's reputation, so called "**Good Will**" from the **British common law** or **excess of assessment** from the **French law**, is substantially influenced by the goodwill in its entirety.

Being in accordance with the provisions of the European law, in particular with the 4th European Directive on the annual accounts of 25th July 1978[7], from the economic and accounting point of view, there is no distinction between "stock-and-trade" and "goodwill".

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[3] For details about the stock-and-trade in comparative law, see: S. Angheni, *Les fonds de commerce en droit anglais et en droit français, Revue Economique Droit International*, Brussels, 1996, no 2, p 237-255.

[4] For details about stock-and-trade in comparative law, see: S. Angheni, *Le fonds de commerce en droit anglais et en droit français, Revue Economique Droit International*, Brussels, 1996, no 2, pp. 237 255, S. Angheni, *Quelques aspects, concernant le fonds de commerce en droit anglais et en droit français, Revue roumaine des sciences juridiques*, tome VII, no 1, 1996, p 56-73, J. Derruppe, *Le fonds de commerce*, Dalloz, 1994, p.1- 99.

[5] Official Gazette no. 236 of 27 May 1999 (repealed by Law no. 287/2009 of the Civil Code).

[6] Regulation on the application of Accounting Law no. 82/1991, republished approved by Government Decision no. 704 of 14.12.1993.

[7] The translation of this document was published in the *Journal of Romanian Specific Expertise Accounting* No. 5/1994 p 2-15.

In the Romanian law, in accounting terms, intangible elements of goodwill are recorded in accounting balance assets, items that are related either to customers, such as loyalty, number, merchants customers quality, prospects for its development, elements related to the quality of the suppliers, of the delivered goods or services rendered, elements related to the staff employed and the quality of relationships between employees (employees / workers) and the company's management, elements of business assets: real estate, movable, reputation of trademarks and products, in general, intellectual property rights.

These elements of goodwill are not homogeneous, some are specific to the notion of *enterprise* (such as the human factor), others are specific to the notion of *heritage* (e.g., real estate, movable intended to the trader's activity), so that stock-and-trade appears as a **complex concept, autonomous, which cannot be confused with the business or dedicated assets** or other legal or economic concepts.

Currently, the concept of "stock-and-trade" is used by the legislator in Law no 11/1991, as amended[8], regarding unfair competition. According to art. 1^7 letter c) of this regulation, "*it represents stock-and-trade all movable and immovable tangible and intangible assets (brands, company plates, logos, patents, commercial venue) used by a retailer to carry out his business activity*". Therefore, for the first time in our legislation, the legislature defines stock-and-trade, even if, in our opinion, the definition is not complete.

In the French law, the Law of 17th March 1909 contains provisions relating to stock-and-trade, provisions that are limited to establishment of some rules relating to the sale, secure and monitoring. The legislature uses the term "stock-and-trade", especially in tax matters.

3. COMPARATIVE LAW. STOCK-AND-TRADE IN FRANCE

In terms of history, in **the French law**, the concept of "stock-and-trade" appeared in the nineteenth century springing from practical needs. Old Law acquainted only fund boutiques common to the handicraft trade professions, which gradually identified itself with goods warehoused (stored) in the merchant's exploitation store. At that time, there was a small stock of goods,

[8] Law no. 11/1991 on Unfair Competition, published in Official Gazette no. 24 of 30 January 1991, amended by Law no. 298/2001, published in Official Gazette no. 313 of 12 June 2001.

fewer materials and machines, being a quasitotal absence of industrial property rights. Regarding the intangible elements of stock-and-trade a greater attention was paid to the company and logo.

The term "stock-and-trade", in its modern meaning, was set up in France for the first time in the Law of 28th May 1838, which amended the provisions of the Commercial Code (now repealed), relating to bankruptcy and insolvency. Later, the Tax Law of 28th February 1898 governed the organization, mutations recordings of stock-and-trade, to give prominence to the concept of stock-and-market. The Law of 1st March 1898 launched the institution of the "guarantee of stock-and-trade".

Subsequently, the Law of 17th March 1909 (the 'Act Cordelet' after the senator who proposed it) marked a decisive step in clarifying the concept of "stock-and-market". The Law of 1909 regulated three fundamental operations on stock-and-trade: to ensure the guarantee, sale and contribution to the company fund. Later, the Law of 20th March 1956 regulated the location of the commercial management of the stock-and-trade, business and artisanal operations that involve break-up of the property right of exploiting the stock-and-trade. Legislation only provides an overview of these operations, stock-and-trade remaining a product of practice.

Practical needs that required the stock-and-trade institution materialized in the fact that:

- on the one hand, *the traders wanted to protect their customers against current and potential competitors*. In this purpose, they demanded the protection of intellectual and financial investment they have made during the creation and development of the enterprise. Finally, they obtained the protection of the goods resulted from their work, enjoying a special status, including the possibility of assigning these goods, both by legal acts *inter vivos* and *mortis causa* legal acts. Thus, traders went out of the ordinary category of workers (entrepreneurs), entering the category of "capitalists" because the results did not come exclusively from their work, but also from the capital invested in stock-and-trade.
- on the other hand, *the recognition of stock-and-trade was claimed by traders' creditors* . The goods from trade exercise are elements of heritage asset traders. Only to remove or mitigate the risk of the trader to develop legal operations in fraud of creditors (e.g. prices disguise, occult sales etc.) the assignment of stock-and-trade was subject to specific procedures and formalities. And yet, this procedure was and it is also incomplete because the fund creditors do not enjoy preferential treatment in relation to other creditors whose claims arise from civil legal acts (e.g., all creditors are

entitled to object to the price at which the goods were sold from stock-and-trade).

4. DELIMITING THE TERM "STOCK-AND-TRADE" FROM OTHER CONCEPTS

The concept of "stock-and-trade" is quite difficult to establish, especially that it is often confused with some similar institutions, as follows:

a) stock-and-trade should be delimited from what is called the *store* where the professional-trader operates, even if there are similar elements. Stock-and-trade cannot be reduced to the notion of "store" which traditionally is specific to retail trade.

b) stock-and-trade must be delimited from *customers*. Traditionally, the "customer" is an essential element of stock-and-trade, which is reflected obviously in the turnover of professional-trader. Therefore, without clients the merchant could not carry on his business. And, yet, in the free concurrence framework the trader has no own right on the customers because those customers can belong to several traders. Therefore, the customers, as a concept, is rather considered as a component of another concept, that of "prosperous business", especially of collective stores.

c) stock-and-market must not be confused with *the building in which the trader operates*. Usually, "building" is dissociated from stock-and-market because there are two categories of goods which not always belong to the same person. The owner of the business is often, if he leased the space in which he operates. Delimitation exists when both stock-and-trade and the building where the fund is exploited belong to one person. As noted, under the French law, the buildings are excluded from the regulation of commercial law, stock-and-market having a purely corporal nature. However, the problem is not resolved if the building and stock-and-market have the same destination or the same economic purpose, a small profit. According to opinions expressed in the French doctrine in this case, the traditional delimitation made by Civil Code in movables and immovables seems to be outdated.[9]

d) stock-and-market must be delimited from *the notion of enterprise*. The term "enterprise" is used both by the legislature and by academics and

[9] P. Blaise, *Les rapports entre le fonds de commerce et l'immeuble, dans lequel il est exploité*, Rev. trim. de com., 1966, p. 827.

practitioners to refer to either work developed by natural and legal persons, usually professionals-merchants, or issues of law: one-man businesses (e.g. individual enterprise), corporate enterprises (companies) or even in the sense of stock-and-market. Yet stock-and-market cannot to be confused with the notion of "enterprise". The notion of "enterprise"[10] is much broader than that of stock-and-market:

-The company *is not limited only to commercial activities* (*strictly speaking*), existing also enterprises where the handcraft, relating to agriculture, liberal professions are exercised;

-The enterprise includes also both **material and human** elements, organized and grouped by the merchant, whereas stock-and-trade is devoid of the human factor. Therefore, the concept of enterprise is analyzed, especially, by the Labor Law and purely economic sciences;

-The enterprise may be a matter of law, whereas stock-and-trade is without patrimonial autonomy, even if some goods have a legal regime different from other recognized to other goods from the professional-trader heritage.

e) stock-and-trade may be delimited from the *notion of company*[11]. The distinction is somewhat delicate, because "society" is a legal concept. The commercial society is a legal person, a legal subject, whereas stock-and-trade consists of a set of goods belonging to a company, so, between stock-and-trade and society there is a legal traditional connection, the *relation between person and goods*. Thus, *stock-and-trade is an element of the society's heritage.* The heritage meets other values of assets, liabilities and, in particular, real estate.

f) stock-and-trade can be delimited from the notion of **branch office** without conceptualizing the term of branch, Romanian legislator in Company Law no. 31/1990, republished, with subsequent amendments, provides in art. 43 par. (1) that „*branches are subsidiaries of companies, being qualified as their branch offices, as well as agencies, representative offices or other establishments*."

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[10] A. Jauffret, *Manuel de droit commercial*, Paris, 1973, p 73; O. Capatina, op. cit., p 172, V. Pătulea, C. Turianu *Course summary business law*, Ed Scripta, Bucharest, 1994, p 56; C. Stoica, S. Cristea, *Regulation in the Romanian legislation of the concept of enterprise, stock-and-trade and heritage equity, in* the *Law Courier Magazine* no. 9/2009, p 498-499, St. D. Cărpenaru, *Commercial law treaty*, Legal Universe Publishing, 2012, p 91-92, Gh Piperea, *Commercial Law. New regulation undertaking Civil Code*, Ed GH Beck, 2012, pp. 55 ff, V. Nemes, *Commercial Law under the New Civil Code*, Ed Hamangiu, 2012, p 50-51

[11] Le Floch, *Le fond de commerce*, éd. Librairie Générale de droit et de jurisprudence, Paris, 1986, p. 24

Branch is characterized by two *defining features*: the absence of legal personality and management autonomy.

Lacking legal personality, the branch office differs from *subsidiary*, which is a legal entity, legally distinct, but economically dependent on a "parent-company".

Branch presents more economic benefits than legal advantages, that means that it is entitled to have material devices of production and must be led by a person who has the power (the right granted by the power of representation) to deal with third parties and to represent the company in these relationships.

The consequences of qualification branches as unincorporated bodies, but with management autonomy are reflected in the fact that:

-They have their own clients (through self-management) and have a distinct stock-and-trade of the company besides which they work;

-They need to undertake their registration in the trade register.

The branch office differs from simple branch establishments (offices, warehouses) which are just parts of an enterprise, lacking autonomy.

Stock-and-trade, as an entity in its own right, can be found both within the enterprise, the company, as well as the branches, without being confused with any of them.

Stock-and-trade, as an entity in its own right, can be found in the national point of view both within the enterprise, society and the branch being a common element to them, but without being confused with each other.

g) **stock-and-trade and dedicated assets**. As we stated, stock-and-trade is not the same with dedicated assets even though elements of stock-and-trade (movable, immovable) can be components of dedicated assets.

The essential difference between the two concepts results from current legal definitions (even incomplete, if we refer to stock-and-trade).

The general, common and legal framework for the concept of "dedicated assets" is art. 31 Civil Code (NCC)[12] which enshrines the **principle of the uniqueness of the assets** consisting in rights and obligations estimated in money (economic value, pecuniary, s.n.) (paragraph 1); the possibility of

[12] Article 31. 1 Civil Code "Every natural or legal person holds a heritage that includes all rights and liabilities that can be monetised and belong to it." Article 31. 2 Civil Code "This may be a division or assets only in the cases and conditions provided by law." Article 31. 3 "The dedicated assets are financial masses and fiduciary liabilities, created under the provisions of Title IV of Book III, those dedicated to licensed professions and other assets determined by law".

dividing of the assets in financial assets and liabilities and also the possibility of assets under law regulations (par. 2); the definition of dedicated assets, rights, obligations and goods with economic dedicated to develop accredited profession and fiduciary liabilities.

For the **licensed professions**, the legislature provides in art. 33 par. 1 Civil Code the concept of "individual professional heritage", consisting of financial mass dedicated to the individual development of an accredited profession, representing the document signed by the owner (which may be a statement) in the manner prescribed by law.

Special legal framework for professionals - individuals (traders) is represented by GEO. 44/2008[13] where the legislature defines the dedicated assets for authorized individuals, individual enterprises and family businesses.

Analyzing the content of the quoted legal texts results one conclusion, namely: stock-and-trade do not contain rights and obligations although some contracts are delivered (the transferee of the stock-and-trade) while the dedicated assets are characterized by rights and liabilities valued in money (economic value).

In other train of ideas, the stock-and-trade may contain goods that can be included conceptually in dedicated assets (e.g., a building for offices). The legal basis is Art. 1[14] lit. c) of Law 11/1991 amended by Law no. 298/2001 which defines stock-and-trade, text in which the legislature provides "expressis verbis" that the stock-and-trade consists of all movable, immovable, tangible, intangible, dedicated to trader activity.

Moreover, the existence of the concept of "stock-and-trade" is relevant in terms of the intangible elements mainly of customers, the good custom, dealer reputation, all of which are influenced by the entire stock-and-trade in its complexity.

Under these conditions it cannot be argued that a named customer (own customer) is influenced only by the dedicated assets.

Also, clients, good custom, in terms of notional elements are not parts of dedicated assets.

[13] GEO no. 44/2008, as amended, on economic activities by authorized individuals (PFA), individual enterprises and family businesses, published in Official Gazette no. 328 of 25.04.2008

[14] G. Ripert, R. Roblot, *Traité de droit commercial*, Tome, I, 15e ed., Paris, 1993, p. 467-468; Y. Guyon, *Droit des affaires*, Tome I, 1988, p. 688.

5. LEGAL NATURE OF THE STOCK-AND-TRADE

5.1. Stock-and-trade - actual universality

In the French law, stock-and-trade is considered as a universal fact and as an incorporeal movable[14].

Stock-and-stage is therefore a *universality*[15], which means that *its identity is independent and is not reduced to its components*.

Stating that stock-and-trade is universality, automatically, we can explain the following consequences:

a) stock-and-stage, itself, *may be subject to non-gratuitous contracts* or free of charge, may be subject to moveable security etc. Such contracts are different from those bearing the components of stock-and-trade (e.g., contracts on transfer of industrial property rights).

b) qualifying the stock-and-trade as a universality, its components can be sold, transformed, destroyed etc. Thus, the goods can be replaced, the logo can be modified or filled etc.

The stock-and-trade exists in all the moments of the development of an enterprise as an independent entity. However, stock-and-trade is not considered as an asset, but it remains a *component of heritage* alongside and together with other elements.

c) Stock-and-trade is a *universality of fact* and not a legal universality.

On this issue, there are two theories in the French doctrine.

According to the first theory, *the stock-and-trade is a legal universality, representing a distinct heritage, unique*. Stock-and-trade consists of a mass of goods united by one common assignment. It is not just accounting or tax asset, but dedicated assets. According to this theory, the trader has two patrimonies: civil heritage and another one, commercial, represented by stock-and-trade.

The consequences of this theory are that the asset will be dedicated to the commercial liability payment. In case of transfer, it will be transmitted at the same time to the transferee accepting liability. Stock-and-trade will be

[15] Y. Reinhard, *Droit Commercial*, 3e ed., Ed Litec, 1993, p 278. The unit of the stock-and-trade is purely intellectual, believes the author, the elements that compose it are united by common purpose (dedicated to a trade or business), but without that this unit being legal. Each of its elements, in turn, has its own status.

subject to prosecution by "commercial" creditors which will be satisfied with priority (preference) to "civilian" creditors.

This theory is criticized, primarily on the grounds that yet positive French law establishes the theory of the asset uniqueness. A natural or legal person can have only one asset.

However, in the French law there are arguments in justification of the *universality theory of stock-and-trade*. The right to *bail* (use of the space in which it operates the stock-and-trade), export licenses, employment contracts, all can be transmitted. Also, transmission of tax debt, the existence of financial and fiscal autonomy which is expressed in the accounting balance sheet, the creation of a limited liability company with sole shareholder are examples on which there is established a separation of assets theory.

According to the second theory, *stock-and-trade is only a universality de facto*, of goods actually joined by a link in order to develop their common purpose: the pursuit of a determined trade. Thus, each element retains its own individuality.

This theory is consistent with the requirements of the French and the Romanian law (art. 541 Civil Code). According to this legal text, universality actually means all the goods belonging to the same person and having a common destination determined by his/her will or by law. Goods that can actually compose universality, together or separately, are subject to separate legal acts.

Therefore, stock-and-trade is universality actually. This conclusion is based on the legal argument that stock-and-trade is not an asset and own liability, debts and payables are parts of dealer's assets and not of stock-and-trade.

However, in practice, given the immediate interest of the business operation, the transferee's interest is to take over his predecessor contracts, without being obliged to do so. Thus, the transferee *may take over* contracts which have as their object: the supply of electricity and water, telephone, labor contracts etc. Thus, the transmission of contracts simply not operates *ipso facto* to the assignment of stock-and-trade.

5.2. Stock-and-trade - intangible movable

Stock-and-trade is qualified as an intangible movable, *subject to the movable specific legal regulations.*

Although legal classification made is of "movable", however, some rules of stock-and-trade are based on estate law techniques. For example,

provisions relating to constituted guarantees resemble to the real estate mortgage (in the French law). In the Romanian law the legislature provides movable real collateral securities, including stock-and-trade, considering it from this point of view, a good movable.

Because it is qualified as an incorporeal movable, stock-and-trade is not itself in itself. It does not last only as long as it is operated, its existence is less stable than that of tangible property.

The legislature, by Law no. 11/1991 amended by Law no. 298/2001, solved somehow the existing controversy in the specialized doctrine by including in stock-and-trade immovable, featuring, unquestionably, that *the buildings are part of stock-and-trade*.

Although this definition is not complete on the elements of stock-and-trade, however, the legislature merit is incontestable, on the one hand, to provide, for the first time, a legal argument on the concept of "stock-and-trade" and, on the other hand, to solve the controversies over time, both in specialized doctrine and judicial practice, regarding the inclusion or exclusion of immovable from the stock-and-trade.[16]

Including immovable in stock-and-trade does not solve all problems that arise in practice regarding competence dispute: whether it belongs to the commercial court in all cases, currently specialized courts to resolve

[16] I.N. Finţescu, *Commercial Law Course*, vol I, Bucharest, 1929, p.163, I.L. Georgescu, *Romanian Commercial Law*, Vol II, 1947, p 515; C. Bîrsan, V. Dobrinoiu, Al. Contrive, M. Thomas, *Companies*, Sansa SRL Publishing & Media House, Bucharest, 1993, p 97; S. Angheni, I. Ionaşcu, *Legal and accounting difficulties of defining stock-and-trade and goodwill*, *Journal of expertise in account* no. 4/1994, p 30; R. Petrescu, *Romanian Commercial Law*, Publishing House Oscar Print, Bucharest, 1996, p. 85-87, P.M. Cosmovici, Civil Law. Rights. Obligations. Legislation, ALL Publishing House, Bucharest, 1994, pp. 4-7; Cas. III Code, dec. no. 199 of 12.05.1910, the Code of commerce, commented and annotated, Bucharest, 1994, p 472, Cas. III Civil Code , dec. no. 277/1946, in V. Pătulea, C. Turianu, *Judicial practice in commercial matters*, Lumina Lex Publishing House, Bucharest, 1991, p 228; SCJ s com, dec. no. 10 of 2.02 .1994, commented by R. Petrescu, *Romanian Commercial Law*, Oscar Print Publishing House, Bucharest, 1996, p 89. See also O. Căpăţînă, *General characteristics of companies* in the *Law Journal* no. 9-12 / 1990, p 23; St.D. Cărpenaru, *Romanian Commercial Law*, ALL Beck Publishing House, Bucharest, 2000, p 111; Trib. Bucharest Municipality, village com, dec. no. 292/1996, in *Commercial Legal Practice Reports*, 1990-1998, ALL Beck Publishing House, Bucharest, 1999, p 473.

For a comprehensive analysis of the issue see: G. Papu, *About excluding immovable in Commercial Law*, the *Journal of Commercial Law* no. 2/1998, p 69-85, S. Angheni, *Some aspects of stock-and-trade under French law and comparative to Romanian*, the *Romanian Law Journal Studies* no. 3-4/1996, p 258.

disputes between professional traders, regardless of the subject of the action, or civil courts (which solves other civil litigation panels).

We believe that, whenever immovable are dedicated to business professionals, traders, the settlement power should belong to specialized courts.

Although the immovable is part of stock-and-trade, however, it is qualified "incorporeal movable", subject to the general rules on movable, plus the provision laid down in Art. 21 of Law no. 26/1990, republished, with subsequent amendments, on the making of the claim in the commercial register of the following operations: donation, sale, lease or pledge constitution.

If the holder alienates the stock-and-trade to a person and the building where the stock-and-trade was exploited to another person practically de *lege lata*, there are no regulations by which the acquirer of the business to maintain the immovable and exploit it. However, if the owner sales the immovable on which the holder of the business disposes on a lease contract, the contract is enforceable against the new purchaser until expiration, if the contract has been concluded under private signature or authenticated by a certain date, the date being the date of registration of the contract to the Tax Administration.

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CONSIDERATIONS ON THE LAW APPLICABLE TO FIDUCIA (TRUST) INSTITUTION

Camelia Florentina STOICA[*]
Silvia Lucia CRISTEA [**]

ABSTRACT
In the Civil Code, in the "goods" section was introduced the institution of fiducia (trust). This institution is adapted to the Romanian realities and European citizen are being able to capitalize on the more private nature means its interests. As an institution was governed initially by the British doctrines, then, taken in the European doctrine. Institution provides advantages in terms of organization assets and Trust as a true owner would use the property for the purpose intended.

KEYWORDS : *fiduciei, law, extraneity, element*

Among the texts of the new Civil Code, in section "Assets", one of the most important concepts introduced is that of "fiducia" or "trust" with respect to the organization of assets. This section of the code is adapted to the Romanian reality and, last but not least, to the European reality, and it is intended to ensure for citizens, several means whereby these can exercise their private rights. The fiduciary has the duties of an owner but the ownership right must be exercised by such in compliance with the purpose for which this was granted fiducia (a well-specified purpose).

The main source for the proposals in this chapter (chapter 8) is the Hague Convention of 1992 related to the law applicable to trust and the recognition thereof. The manner in which this is regulated is compatible with the institution of fiducia and, due to this, the concept was subsequently adopted by the continental law. Several other sources of information which constituted the basis for this chapter were the Quebec Civil Code and the

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Belgian private international law, Regulation 864/2007 concerning the law applicable to extra-contractual obligations. (Rome II).

Art. 2659 of chapter 9 sets forth that "fiducia is governed by the law chosen by the creator (the proposed solution is provided by Art. 7 of the Hague Convention and Art. 3107 of the Quebec Civil Code). With respect to the area of application, the proposed solution is provided by Art. 8 of the Hague Convention and, with respect to special situations set forth in Art. 2662 "an element of fiducia, which can be isolated, and especially, the administration thereof, can be governed by a different law." The source for this information is represented by Art. 9 of the Hague Convention and by Art. 3108 of the Quebec Civil Code.

Thus, fiducia is considered to be a polymorphic concept having multiple uses (fiducia for the administration purposes, fiducia for guarantee purposes). By the fiducia for the administration purposes, whereby "instead of investing, one can reward another by granting, free of charge, ownership over certain assets, the person who disposes of the assets prefers to first transfer them to a third party which will have the duty to encumber the assets on account of the person being rewarded and transfer them, subsequently, to such (this appears to be an extremely attractive idea!).

Fiducia, as legal concept, appeared during the Middle Ages, being known as well under the name of "trust." This was intended to reduce the amount of fiscal debts and regulate patrimonial relations (prevent the wasting of the families' fortune, the removing of assets from the civil circuit representing the origin of trust for several generations). Due to the advantages associated with the institution of trust or fiducia for the organization of patrimonies, the institution was widely regulated by the Anglo-Saxon system and was also transposed into the continental legal system, in some countries such as France, Switzerland, Luxembourg, etc. The use of fiducia (trust) for illegal purposes, such as money laundering or tax evasion, was avoided.

The framers of the English doctrine have provided several definitions of "trust" and we must note the definition of trust taken from the Hague Convention of 1985: "a recognized relation based on arms length terms which is created when one or several persons, called *trustleels*, are entrusted certain assets for the purpose of holding them and managing the profit derived by the titleholder of the ownership right" (the assets representing a group of assets which is different from those constituting the patrimony).

Thus, according to the New Romanian Civil Code – fiducia "is the legal operation whereby one or several creators transfer real rights, debt claims, guarantees or other patrimonial rights or a set of rights of this kind,

present of future, to one or several fiduciaries who manage them for a well-established purpose for the use of one or several beneficiaries. These rights form an autonomous patrimonial mass which is different from the other rights and obligations of the trustees' patrimonies." The source of the concept of fiducia can be represented by any special law which instates fiducia operations, supplemented by the provisions of the civil code, with the application of the principle *specialia generalibus derogant*.

& 1. Differences in the Manner in Which Fiducia Is Regulated in Other Legal Systems

1.1. Differences in the French Law

According to the French Civil Code, the only persons who can have the capacity of creators can be those legal persons which, pursuant to the law or at their own option, are subject to the payment of a company tax; creators' rights cannot be transferred free of charge (interdiction which was transposed and is present as well in Art. 775 of the New Romanian Civil Code) and, furthermore, the transfer of these rights in exchange for a consideration is allowed only towards other legal persons which have the obligation to pay the company tax (Art. 2014 of the French Civil Code);[1]

The term for which fiducia can be instated was extended to 99 years (as of 2009), following the modification of Art. 2018 of the French Civil Code (according to the previous version of this article, the maximum duration was of 33 years, duration which was transposed in Art. 779 of the New Romanian Civil Code);

The possibility of the creator to keep the right of use over the *fond de commerce* or the professional headquarters, set forth in Art. 2018 – 1 of the French Civil Code, no longer exists according to the New Romanian Civil Code.

As opposed to the solution proposed by the New Romanian Civil Code, the French Civil Code sets forth in Art. 2025 paragraph 2 the possibility that, if the amount of the liabilities of the person giving the assets in fiducia exceeds the amount of the assets granted in fiducia, the contributor's assets may constitute the general pledge of the trustee creditors, except for the case in which, when fiducia was instated, it was

[1] The regulations of the French Civil Code were taken over from Florence Deboissy and Guillaume Wicker "*Code des societes – Autres groupements de droit commun*", Publishing House, pages 588 – 591.

expressly set forth that, for a part of the liabilities related to the patrimony subject to fiducia, the trustee will guarantee with its own assets.

In other words, the distinction made, in terms of fiducia, between a civil patrimony and a commercial patrimony is cancelled and the lawmakers have readopted the approach according to which either the contributor or the trustee can guarantee with all their assets. From the perspective of the doctrine, we note that the legal framers have reverted from the theory of separation of patrimonies to the theory of existence of a sole patrimony.

1.2. Differences Present in the American Law

Although admitted, as in the New Romanian Civil Code (Art.774 paragraph 1), the possibility to establish an express trust (trust which is voluntarily created by the owner) or an implied trust, (trust which is created pursuant to the law), in case of those which are created pursuant to the legal provisions, two forms can be identified: "resulting trusts", when the creator makes a full transfer of assets and "constructive trusts" created for the purpose of avoiding unjust enrichment.[2]

The trust deed is a document similar to those creating mortgages whereby owners (the creators) of an immovable asset transfer the said immovable asset to a trustee (trustee/settler or trustor), as guarantee for the payment of a debt, to a third party: the beneficiary.[3]

If we analyze together the two cases presented above, we note that, as opposed to the Romanian law, the trustee is the very owner of the assets transferred by fiducia and has unlimited powers with respect to the entrusted patrimony, reasons for which the American regulations especially underline the attributes that the trustee must have (especially the one according to which, pursuant to the American law, any natural or legal person can have this capacity, which is not possible according to the Romanian law) as well as on the obligation thereof to account for the legal operations carried out at the end of the trust relation.[4]

1.3. Differences Present in the Canadian Law

2 In this respect, see Daniel V. Davidron, Brenda E. Knowles, Lyun M. Forsythe, Robert R. Jesperen, *Comprehensive Business Law - Principles and Cases*, Kent Publishing House, Borton - Massachusetts, 1987, page 1216 and 1232 – 1233.
3 *Idem*, pages 1216 – 1217.
4 Idem, pages 1217 – 1232.

It can also be noted that many of the provisions of the Canadian law (Art. 981 a – 981n of the Canadian Civil Code) were transposed into the Romanian law. Still, we must also note the different manner in which the concept is defined by the two legislations. Thus, according to Art. 981a of the Canadian Civil Code,[5] any person may freely dispose of his/her/its assets, may transfer ownership over certain movable of immovable assets to trustees, by donation or will, for the benefit of other persons, for the benefit of whom they may conclude valid donation or inheritance documents.

Thus, based on the model of the Anglo-Saxon law, the Canadian law recognizes the capacity of the trustee to act as owner of the assets representing the patrimony transferred in fiducia.

2. Conclusions

From the challenges that the framers of the New Romanian Civil Code[6] had to face, with respect to fiducia, we chose to analyze here three of them: the definition of the concept, the persons which may have the capacity of parties in a relation of this kind, the extent of the liability for the debts related to the patrimony given in fiducia.

In our opinion, progress has been made with the provision included in Art. 773 of the New Romanian Civil Code, if we compare it to the Canadian law. The new provision of the Romanian law is no longer limited to transfers which can be made free of charge (as donation or inheritance) and it instates a new type of contract, which can have specific aspects.[7] We consider that, in addition to the fact that is serves the theory of separation of patrimonies expressly regulated by G.E.O. 44/2008, fiducia may be deemed as a new form of guarantee; for example: the bank grants a loan and concludes a fiducia agreement whereby this acquires the capacity of fiduciary and beneficiary in the relation with the client bringing the assets as contribution.

5 Taken over from Paul A. Crepeau, Gisele Laprise, *Les codes civils – edition critique* by the care of Centre de recherche en droit prive et compare de Quebec, Montreal, 1986, pages 208 – 212.

6 For a detailed presentation of these challenges, see Paul Perju, *General Considerations concerning the New Civil Code (preliminary title, persons, family, assets*, in Dreptul magazine, issue no. 9, pages 13 – 30, especially section 1, pages 13 – 15.

7 Presented in Section 1 of this paper.

With respect to the persons who are parties to the fiducia agreement, we note that, as opposed to the French law, which limited the category of the persons who can be contributors, according to the Romanian regulations, any natural or legal person may have this capacity (Art. 776 paragraph 1). We consider that this lack of restrictions should have been mirrored by allowing the same degree of freedom as far as trustees are concerned. Why is it possible only for credit institutions, investment and investment management companies, financial services companies and insurance and re-insurance companies or for public notaries and attorneys-at-law to hold this capacity? (Art. 776 paragraphs 2 and 3).

In our opinion, the restriction set forth by the French law was due to the very special capacity of the contributors, which could also trigger the special registration of the fiducia with the fiscal authorities.

We consider that the solution adopted by the Romanian law is praiseworthy due to the fact that it limits liability only to the assets given in fiducia; the French solution consisting in the inclusion of an express stipulation that "liability is extended beyond the amount of these assets (either towards the assets of the contributor, or towards those of the trustee), although not too appealing for the parties, corresponded to the formula adopted by the lawmaker with respect to the affected assets. Both according to the French and to the Romanian law, natural persons will be liable for their obligations with the affected assets (if these assets were designated as such) and, if these are not sufficient, with all their assets.

Therefore, while in case of the affected assets, the framers of the legislation reverted to the theory of the existence of a sole patrimony and of the personal character of the patrimony, in case of fiducia the consequences of the separation of patrimonies depending on the intended scope are incurred in full.[8]

Legal practice will still have to prove the utility of the concept of fiducia and impose the corresponding legislative changes.

[8] According to the provisions of the French law, the disputes related to the possibility to make a clear separation between a civil and a commercial patrimony continued as well after the entry into force of Law 2003 – 721 of August 1, 2003 concerning economic initiative. See in this respect, Lucia Herovanu, op.cit., footnote 24, page 73.

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4. Paul Perju ***"General Considerations concerning the New Civil Code (preliminary title, persons, family, assets",*** in Dreptul magazine, issue no. 9, pages 13 – 30, especially section 1, pages 13 – 15.

ACQUIRING THE PARLIAMENTARY MANDATE AND STARTING THE EXERCISE OF THE PARLIAMENTARY MANDATE

Constantin SIMA[*]

ABSTRACT

Acquiring the capacity as MP implies the competence provided under article 29 of the Code of Criminal Procedure. According to the Romanian Constitution, the Deputies and Senators begin the exercise of their mandate on the date the Chamber they form part of has lawfully met, provided that the elections are validated and the oath is taken. In practice, the question whether the moment the capacity as MP is acquired differs from the moment the MP begins the exercise of their mandate and the question regarding the precise moment the provisions on special competence for senators and deputies start to be enforced have been frequently raised. Upon analyzing the legal provisions and the doctrine, the author considers that the MPs acquire their capacity when the Election Commission issues the certificate of election; also, the provisions on special competence shall be enforced as of such date.

KEYWORDS: *senator, deputy, competence*

1. Preamble

The question regarding the moment the senator or deputy mandate begins has been frequently raised in practice.

Is such moment identical with the moment the deputies or senators begin the exercise of their mandate, according to article 70 of the Romanian Constitution[1], or not?

It is important to settle this issue in order to determine the competence of the criminal prosecution authority or court of law in case of

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[1] Romanian Constitution – article 70: (1) *The deputies and senators begin the exercise of their mandate on the date the Chamber they form part of has lawfully met, provided that the elections are validated and the oath is taken. The oath will be regulated by an organic law.*

(2) *The capacity as a Deputy or Senator shall cease on the same day the newly elected Chambers shall legally meet, or in case of resignation, disenfranchisement, incompatibility, or death.*

persons who acquired a senator or deputy mandate but, due to reasons not attributable to them, did not take the oath and did not begin the exercise of their mandate.

Who has competence to judge the case, the High Court of Cassation and Justice, according to article 29 of the Code of Criminal Procedure, or the county court as first instance court, according to general competence?

2. Notion

Neither the Romanian Constitution nor the election legislation or parliamentary regulations define the MP mandate.

In private law, the mandate is a contract on the grounds of which a person undertakes, free of charge, to do something on behalf of the person who mandated them.

The parliamentary mandate represents the tool by means of which the people exercise the sovereignty rights: according to article 2 of the Romanian Constitution, the sovereignty shall reside within the Romanian people, that shall exercise it by means of their representative bodies, constituted by free, periodic and fair elections, as well as by referendum. Also, according to article 69 of the Fundamental Law, while exercising their mandate, the deputies and senators serve the people.

The term mandate, with respect to deputies or senators, can be found in the Constitution under article 70, paragraphs 1 and 2 and, with respect to parliamentary Chambers, under article 63, paragraphs 1 and 2. The Chamber mandate and the deputy or senator mandate are mutually inclusive. The senator or deputy mandate cannot be exercised without the constitution of the Chamber such senator or deputy forms part of.

The parliamentary mandate is a statement of authority, an agreement between the electorate and the candidate, based on a political platform[2], except the MP is bound by a public law, authority relationship, not by an employment contract[3]. The parliamentary mandate is further defined as a public office granted to the members of the parliamentary chambers by elections, an office governed by the Constitution, based on which each MP representing the nation takes part in the exercise of national sovereignty[4]. This mandate differs from the private law mandate in regard to the content,

[2] Ion Deleanu – *Institutii si proceduri constitutionale* (Institutions and constitutional procedures), C.H. Beck, Bucharest, 2006, page 248

[3] Constitutional Court, Decision no 19/1995, the Jurisprudence of the Constitutional Court, R.A. Official Gazette 1992-1997, page 223.

[4] P. Avril, J. Gicquel – *Droit parlamentaire*, Montchrestien Publishing, Paris, 1988, page 23.

namely the rights and obligations therein are determined by the constitution, operational regulations of the parliamentary chambers or election laws[5].

However, according to the administrative law, the parliamentary mandate is not a public office, neither in terms of content, nor in terms of characteristics or termination methods, but a public dignity, according to article 16 of the Romanian Constitution[6].

3. Acquiring the MP mandate and starting the exercise of the MP mandate

Article 70 of the Constitution, as previously stated, provides that the Deputies and Senators begin the exercise of their mandate on the date the Chamber they form part of has lawfully met, provided that the elections are validated and the oath is taken.

Moreover, the date the Chambers lawfully meet coincides with the date the mandates of previous MPs cease and the new legislature begins.

The term of the legislature coincides with the term of MPs mandates.

Starting the exercise of the mandate is preceded by two essential moments for the capacity as deputy or senator: validation and taking the oath.

Validation represents the assessment of the election process, a mandatory condition for the legitimacy of the works of each Chamber.

In regard to the oath, the citizens filling public offices have the obligation to fulfill the obligations with good faith, according to article 3 of Law no 96/2006 on the statute of deputies and senators. Consequently, the MPs cannot begin the exercise of their mandate without taking the oath, and the refusal to take the oath invalidates the mandate[7].

But what happens if, due to other reasons, the senator or deputy does not take the oath? Do they lose their capacity as MPs?

The answer can be found in article 7, paragraph 1 of Law no 96/2006, which provides that the capacity as senator or deputy shall cease on the date the newly elected Chambers legally meet, or in case of resignation, disenfranchisement, incompatibility, or death.

[5] I. Muraru, E.S. Tanasescu**,** *Constitutia Romaniei – comentariu pe articole*, (Romanian Constitution – review of each article), C.H. Beck, Bucharest, 2008, page 663.
[6] Ibid., *op.cit.*, page 664.
[7] Published in the Romanian Official Gazette, part I, no 763/November 12th, 2008.

Consequently, not taking the oath does not invalidate the capacity as senator or deputy, but merely prevents them from exercising specific attributions.

This is the reason why, in doctrine, the moment the right to a mandate is granted is clearly separated from the actual exercise of the same. Thus, the mandate is granted, after the candidate is elected, based on the certificate of election issued by the Election Commission, while the right to exercise such mandate begins on the date the Chambers legally meet, subject to validation and oath-taking[8].

Thus, the mandate starts upon being elected, while the exercise of the same can only start after such moment, when the new Parliament meets.

Once elected, the MP gains parliamentary immunity and lack of responsibility for expressed opinions, which also implies the obligation of the Romanian President to summon the Chambers[9].

It should be noted that, in terms of immunity and incompatibility, the Regulations of the two Chambers have different provisions: while the Regulation of the Chamber of Deputies provides, under article 191, that the deputies are granted parliamentary immunity on the date the election certificate is issued, subject to validation[10] (without also taking the oath, A/N), the Regulation of the Senate provides, under article 172, that the senators benefit from parliamentary immunity throughout the entire exercise of the mandate[11].

We deem necessary that such discordance between the two provisions be rectified in the future by amending the Regulation of the Senate in order to comply with the other provisions in the legislation and doctrine.

We ground the previous statement on the fact that both Regulations specify the terms "senators" and "deputies" before the legal constitution of the two Chambers, which entitles us to conclude that, once the certificate of

[8] Maria Nastase Georgescu, Simona Th. Livia Mihailescu, *Drept Constitutional si institutii politice*, Universul Juridic, Bucharest, 2011, page 280.

[9] I. Muraru, M. Constantinescu, *Drept parlamentar romanesc*, All Beck Publishing, Bucharest, 2005, page 306.

[10] The Regulation of the Chamber of Deputies, approved by Decision no 8/1994 of the Chamber of Deputies, published in the Romanian Official Gazette, part I, no 762/November 13th, 2012.

[11] Regulation of the Senate, approved by Senate Decision no 28/2005, published in the Romanian Official Gazette, part I, no 948, October 25th, 2005, amended and supplemented by Decision no 22/March 22nd, 2011, published in the Romanian Official Gazette, part I, no 202/March 23rd, 2011.

election is issued, the MPs are granted the afferent rights and obligations, except for the exercise of the mandate in the legally constituted Chambers.

Moreover, even article 70, paragraph 1 of the Romanian Constitution clearly provides that: "The Deputies and Senators shall begin the exercise of their mandate on the date the Chamber they form part of has lawfully met(…)".

Which leads us to conclude that deputies and senators have this capacity before the legal constitution of the Chamber, a very logical fact since the deputies and senators form the Chamber and participate in the legal constitution of the same.

Otherwise, the Constitution should have provided: "the persons who won the parliamentary elections participate in the legal constitution of the Chamber and acquire the capacity as senators or deputies after its legal constitution, subject to election validation and oath-taking".

But such phrase is inconceivable.

The first argument is the fact that senators and deputies form the Chamber and participate in its legal constitution, and only after such moment they will be able to exercise and undertake their specific rights and obligations. In other words, the parts form the whole, not the other way around.

The second argument is the fact that the constitutional principle of the exercise of sovereignty by the people by participating in elections and referendum would be thus violated.

Consequently, one cannot accept the idea that the senators or deputies acquire their capacities when the Chambers are legally constituted and they begin the exercise of their mandate, according to article 70, paragraph 1 of the Romanian Constitution.

The person who has won the elections acquires the capacity as senator or deputy on the date the Election Commission issues the certificate of election and, starting that moment, exercises all rights and undertakes the obligations, except those attributable to the legally constituted Chamber the person forms part of.

Competence *ratione personae*, provided under article 29 of the Code of Criminal Procedure, becomes enforceable on the date the deputies or senators acquire their capacity, not on the date they begin the exercise of the mandate referred to under article 70 of the Romanian Constitution.

4. Conclusion

The moment the mandate starts differs from the moment the exercise of the mandate begins, and the capacity as deputy or senator is acquired the moment the Election Commission announces the person who won the election, this being the moment the legal provisions on the competence to initiate criminal investigations and institute legal proceedings become enforceable.

CONTROVERSIAL ASPECTS REGARDING THE SALARY SYSTEM IN ROMANIA

Radu Razvan POPESCU *

ABSTRACT

Objectives *The salary represents the price of the labour performed, at present, expressed in money. The labour can be performed either for one's self, and it produces income, being called independent work, or for a third party, as dependent work, and it produces salary. The salary is simultaneously* ***object*** *of the contract, representing the consideration for the work and* ***cause*** *thereof, because, in order to earn it, the person is employed in work. In the specialty literature, it was claimed that the wage payment obligation is both an obligation to give and an obligation to make*

KEYWORDS: *wage, private sector, public sector, budget*

1. Introductory considerations

The salary system is an institution specific to labour law and it represents the entirety of regulations through which are established the principles, the objectives, the elements and the forms of salary-giving, at the same time regulating the means, methods and instruments of it execution, by determining the conditions for setting and granting the salaries.

According to art. 162 of the Labour Code, the salary system is established as follows:

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- the minimum wage levels are set through the applicable collective employment contracts;
- the individual salary is set through direct negotiation between the employer and the employee;
- by law, for the personnel within the public authorities and institutions financed fully or mostly from the state budget, the state social security budget, the local budgets and the budgets of the special funds, with the consulting of the representative trade union organizations[1].

The specific principles of the salary system are considered, by the specialty literature, with which we agree, the following:

a. **For equal work or for labour of equal value, equal pay** – consecrated by the Constitution in art. 41 para.4 and by the Labour Code in art.6 para.3.
b. **The wage negotiation principle** – consecrated by art. 162 of the Labour Code.
c. **The principle of pre-establishing the salaries of the personnel paid from public funds** – represents an exception from the negotiation principle; still, Law no. 62/2011 regarding social dialogue expressly regulates, in art.138 para. 3, the fact that: "*the wage rights in the budgetary sector are established by law within precise limits, which cannot make the object of negotiations and cannot be modified through collective employment contracts. In case the salary rights are established through special laws between minimum and maximum limits, **the actual wage rights are set through collective negotiations**, but only between the legal limits*".
d. **The principle of differentiating the salaries in relation to the level of education, the position filled, the labour quantity and quality;**
e. **The confidentiality principle** – is regulated by art. 163 of the Labour Code, in the sense that the employer must take the necessary measures to ensure wage confidentiality.

[1] Radu Popescu, *Labour law ,edition 2e*, Bucharest, Universul Juridic, p.182.

f. The principle of granting an equitable salary which favours a decent level of living;

g. The payment of the salary in money - exceptionally, and only partially, following express contractual provisions, in kind[2].

2. Concrete modalities for setting and paying the wages

Depending on the manner of financing, the salary system is applied differentiated, in relation to the way the employer units are financed, whether from public, or from private funds.

In relation to the organizing form, the elements of the salary system are established according to the Labour Code, taking into account the differences between the private and the public sector[3].

a. In the private sector are considered the following aspects:

- labour is not a homogeneous production factor;
- the level of the labour force training costs differs;
- the functions have a different difficulty degree.

In all cases, in the private sector, there is a rule attesting the existence of a functional market economy – the collective and individual negotiations of the employment contracts.

The wage once settled, in mutual agreement, cannot be unilaterally changed by the employer, except for the cases express stipulated by law.

b. In the public sector, salaries are set by law according to the Labour Code, to Law no. 62/2011 and to Law no.284/2010.

According to art.37 para.1 of Law no. 284/2010, *by means of the collective employment contracts of the collective labour agreements and the individual employment contracts cannot be negotiated salaries or other rights in money or in kind, which exceed the provisions of this law"*.

The hierarchy of salaries has as basis, according to art.5 letter c) of Frame-Law no. 284/2010, the following criteria:

- professional experience and knowledge in the field;
- complexity, creativity and diversity of the activities;
- judgment and impact of decisions;

[2] Ştefănescu Ion Traian (2012) *Treaty of Labour Law, edition 2e*, Bucharest, Universul Juridic, p.570.

[3] R.Popescu, *op.cit.*, p.183.

- influence and coordination;
- contacts and communication;
- work conditions;
- incompatibilities and special regimes.

In order to be able to apply the provisions of Frame-Law no. 284/2010, there are required a series of special, annual, normative acts, for the enforcement of the dispositions in the matter of salaries. Thus, through Law no. 283/2011 regarding the approval of Government Expedite Ordinance no. 80/2010 for the completion of art. 11 of G.E.O. no. 37/2008 regarding the regulation of certain financial measures in the budgetary field, there were established the express norms regarding wages in year 2012 (the previous law, no. 285/2010, which established the actual norms in matters of salaries for year 2011, was not expressly abolished).

According to Law no. 283/2011, starting with January 1st, 2012, the following regulations apply (it is noticed the fact that, although Frame-Law no 284/2010 of the salaries in the budgetary sector is in effect, since year 2010, in reality, it was not fully applied, neither in 2011, nor in 2012):

- the gross amount of the base salaries, of bonuses, indemnities, compensations and of the other elements of the salary system, are maintained at the same level as those paid for the month of December 2011;
- the reference value is 600 lei in year 2012;
- in year 2012 the reference value and the hierarchy coefficients corresponding to the salary classes established in the annexes of Law no. 284/2010 do not apply;
- additional labour is compensated only with corresponding free time;
- prizes and bonuses are not granted in year 2012;
- no meal tickets are granted, except for the institutions fully financed from own funds;
- no gift-tickets and holiday tickets are granted in year 2012;
- in year 2012 the retirement, stepping-down or army discharge indemnities are not granted;

The Labour Code regulates in art. 161, 166-171, the manner of paying the wages, as common law norms, which apply both in the public and in the private sector.

These dispositions will be completed, in the public sector, with the provisions of Frame-Law no. 284/2010 regarding the unitary salaries of the personnel paid from public funds, and with those of Law no. 283/2011 regarding the wages in year 2012.

Art. 161 of the Code stipulates that the *salaries are paid before any other money obligations of the employers.* Still, the legal text is not correlated with the derogatory norm established by art. 123 point 2 of Law no. 85/2006 regarding the insolvency procedure, which establishes that for the employers in insolvency, the liabilities originating from the labour relation are, as priority, only on the second place (it is derived that, in this case, the special insolvency law applies only in case of triggering the insolvency state).

Wages are expressed in money and the payment is done, usually, by bank transfer.

Payment in kind (in products or services) is possible only in exceptional situations, only for a part of the salary, with payment guarantee, in money, of at least the minimum salary in the economy and only if this is established, expressly, through the applicable contract employment collective or through the individual employment contract.

For the payment of salaries, payment lists must be drafted. According to art. 167 para.1 of the Labour Code, the wage is paid directly to the owner or to the person empowered by the owner. In case of death of the employee, the salary rights owed until the date of the death are paid, in order, to the surviving spouse, the children of legal age or the parents of the employee, and if neither of these categories exists, to other heir, in the conditions of the common law[4].

The payment of the salaries will be made according to art.166 para. 1 of the Labour Code, at least once a month, for the previous month. The proof of the salary payment is done, according to art. 168 para. 1 of the Labour Code, by:

- signing the payment lists;
- any other justifying documents.

[4] [4] In the situation when the employee does not come to collect his/her wage, the employer has the possibility to resort to the institution of the real payment offer followed by written recording, established by the Civil Procedure Code/Civil Code" –see Bucharest Appeals Court, section VII civil, decision no. 2261/R/2006.

In the public sector, the payment of the salaries is done monthly, broken-down, on days, in the period 5-15 of each month, for the previous month.

The wage cannot be pursued or withheld except in the cases and conditions established by law. (in jurisprudence was mentioned that "the unilateral change of the salary is not allowed, even when the unit is going through an ample privatization process, being necessary to notify the employee and get his/her consent. Therefore, it is without relevance the fact that at the level of the company was registered by the unit a different collective employment contract, through which were adopted other salary levels than the previous ones" – Decision no. 104/CM of March 27th, 2007 of Constanta Appeals Court). According to art. 169 para. 4 of the Labour Code, the maximum level of the withholdings from the net monthly base salary, cumulated, cannot be higher than half of this salary.

The covering of the material damage caused by the employee to the employer can be performed within the limit of 1/3 of the salary and only on the basis of an irrevocable court order.

Corroborating art. 38 with art. 170 of the Labour Code it is ordered that *the acceptance without reserves of a part of the salary rights or signing the payment documents in such situations cannot have the significance of a waiver of the employee to the salary rights due to him/her, in their entirety.*

In other order of ideas, art. 166 para. 4 of the Labour Code stipulates that the unjustified delay in the payment of the salary or the non-payment thereof may determine the employer's obligation to pay damages-interests to repair the damage caused to the employee. Moreover, the non-payment of the salary set on the bass of the individual employment contract may allow the employee to resign without observing the prior notice period (according to art. 81 para. 8 of the Labour Code).

In all cases, the right to action with respect to the salary rights, as well as to the damages derived from the total or partial on-execution of the obligations regarding the payment of wages has a statute of limitation of 3 years since the date when the respective rights were owed (art.171 para.1 of the Labour Code). This prescription term can be interrupted in case of intervention of an admission of the debt from the employer.

According to art. 261 of the Labour Code, the non-execution of a final court order regarding the payment of salaries within 15 days since the date of the execution petition addressed to the employer by the interested

party constitutes a felony and is punished with imprisonment from 3 to 6 months or with a fine[5].

3. The possibility of reducing the salaries

a. In the private sector

The reduction of salaries is possible **only through the agreement of the parties** to the individual employment contract (art. 41 para.1 of the Labour Code). At the same time, even if the parties reached an agreement, this must be correlated with the dispositions of art. 38 of the Labour Code[6].

Exceptionally, the wage can be reduced **by the employer's unilateral decision** only in the following situations:

- as disciplinary sanction of reducing the base salary for a period of 1-3 months with 5-10% (art. 248 para.1 letter c) of the Labour Code);
- as disciplinary sanction of reducing the base salary and/or, as the case may be, of the management indemnity for a period of 1-3 months with 5-10 % (art. 248 para.1 letter d) of the Labour Code);

b. In the public sector

In year 2010, in the public sector, the gross amount of the salaries was diminished with 25% according to art. 1 of Law no. 118/2010 regarding certain necessary measures in view of re-establishing the budgetary balance. At the same time, a part of the rights targeting social security were diminished, respectively: the amount of the unemployment indemnity was diminished with 15%, the incentives granted to persons who fulfill the conditions for benefitting of the unemployment indemnity, but who start employment diminished with 15%, no more aids or indemnities are granted for retirement, stepping-down or army discharge[7] (D.Țop, 2012).

Through Decisions no. 872 and 874 of the Constitutional Court was decided that the temporary reduction of salaries in the public sector is legal because:

[5] Țiclea Alexandru , *Treaty of Labour Law*, *edition 6e,* Universul Juridic, Bucharest, 2001, p.481.
[6] Voiculescu, Nicolae (2011) *Legislation Law*, Perfect, Bucharest, p.190-192.
[7] Țop Dan (2012) *Labour Law*, Biblitheca, Bucharest, , p.200;

- those engaged in work relations within the budgetary environment (employees and public servants) depend from the financial point of view, on the national public budget, respectively on the collections and expenses from this budget. As a consequence, because the unbalancing of the national budget may have major consequences, in the sense of affecting the general interests, it is possible that the diminishing of expenditure from this budget be imposed. And, the salaries represent such expenses. But, because the right to a wage is adjacent to the constitutional right to work, and its diminishing constituted a true restraint of the exercise of this right, such a measure can be achieved only in the strictly limitative conditions of art. 53 of the Constitution;
- there was a proportionality ratio between the means used and the goal targeted, as well as a balance between the national interest requirements and the protection of the fundamental persons' rights;
- the measure of reduction cannot be considered discriminatory, since it was applied to all categories of budgetary personnel and in the same amount;
- not lastly, the measure was ordered temporarily.

Through another Decision no. 1601/2010, the Constitutional Court rejected the unconstitutionality exception regarding the reduction of the salaries invoked, this time, from the perspective of the retroactive effects of the law, motivating that:

- all legal acts in the matter of salaries have no existence in themselves, but are governed by law, the employer acting on the basis and on the grounds of the law;
- the benefit of bonuses, additions, incentives, cannot be granted depending on the employment date; the employment date refers only to the moment from which the rights in question start to be given, having no relevance in the subsequent establishment of the money rights, when the lawmaker decides to cancel the respective bonuses;

- in the public sphere, the employer does not have the competence to grant salary rights only on the grounds of a discretionary manifestation of will; even if the public employer has a margin regarding the granting of certain specific rights, its manifestation of will is conditioned and limited by law; therefore, when the law diminished or cancels bonuses, the individual employment contract must not be renegotiated in order for the new legal provisions to apply.(also the Constitutional Court appreciated as unconstitutional the temporary reduction of pensions because the Constitution expressly stipulates, in art.47 para. 2 the right to pension as a constitutional right)

Moreover, subsequently, the European Court of Human Rights, which was notified in such cases, through the decision rendered in December 2011, in the case of F. Mihăieş and A.G. Senteş versus Romania (applications no. 44232/2011 and 44605/2011) ended the existing disputes, stating that *it belongs to the state to determine in a discretionary manner the remunerations established from the state budget, which is pays its workers*[8].

4. Conclusions

The headquarters of the matter is found in *Directive 2008/94/CE on the protection of employees in the event of insolvency of their employer* (it represents the codified version of Directive 80/987/CE)[9].

Although the directive refers to the national legislations in defining the terms of „worker", „employer", „rights earned", „remuneration", the Member States, at the moment of transposing, will not be able to exclude part-time workers, the workers on the basis of employment contract with determined time and interim workers[10].

In the Romanian legislation, this problem finds its regulation in art. 172 of the Labour Code, which stipulates the fact that *„the establishment and use of the fund for the guarantee of the salary liabilities will be regulated through special law".*

Subsequently, Law no. 200/2006 regarding the establishment and use of the fund for the guarantee of the salary liabilities was adopted.

[8] Dima Luminiţa (2012), *Labour Relations in EU,* C.H. Beck, Bucharest, p.145.
[9] Dima Luminiţa (2012), *Labour Relations in EU,* C.H. Beck, p.222;
[10] R.Popescu, *op.cit.*,p.188.

According to it, from these funds is ensured the payment of the salary liabilities that result from the individual and collective employment contracts in case the employers are in a state of insolvency.
From the resources of the guarantee fund are supported the following categories of salary liabilities:

a) outstanding salaries;

b) outstanding money compensations, owed by the employers from the rest leave not performed by the employees, but only maximum one year of work;

c) outstanding compensatory payments, in the amount set in the collective and/or individual employment contract, in case of ceasing the work relations;

d) outstanding compensations that the employers have the obligation to pay, according to the collective and/or individual employment contract, in case of labour accidents or of professional illnesses;

e) outstanding indemnities, which the employers have the obligation, according to the law, to pay for the duration of the temporary activity interruption.

According to art. 4 point 3 of Directive 2008/94/CE, the Member States can establish a ceiling for the guaranteeing of the payment of unpaid rights to the employee.

The total amount of the salary liabilities supported from the guarantee fund cannot exceed the amount of 3 gross average salaries on the economy, for each employee, and the liabilities mentioned can be supported for a period of maximum 3 calendar months (*regulation identical to that in the directive*).

The financial resources of the guarantee fund are constituted from:

a) employers' contribution;

b) incomes representing interest, delay increases for not having paid within the payment term of the contribution to the guarantee fund, as well as from other amounts originating from the sources allowed by law;

c) amounts coming from the recovery of the debits created in the conditions of this law, others than those originating from the contributions to the Guarantee Fund.

The employers have the obligation to declare monthly the contribution to the guarantee fund, to the competent fiscal body, the declaring term also constituting payment term. In the favourable situation in which is pronounced the closing of the insolvency procedure, as a result of the employer's recovery, it has the obligation, according to art. 17 of Law

no. 200/2006, to return the amounts supported from the Guarantee Fund, within 6 months from the rendering of the decision to close the procedure.
This normative act must be correlated with Law no. 85/2006 regarding the insolvency procedure.
The management of the guarantee fund is performed by the *National Agency for the Occupation of the Work Force,* through the agencies for the occupation of the work force of the counties and the City of Bucharest.
In case of the transnational employer (by transnational employer is understood the individual or legal person who performs activities on the territory of Romania and of at least one other EU Member States or of a EES country), in insolvency, the establishment of the amount of the salary liabilities due to the employees who regularly perform work on the territory of Romania and the making of their payment are done by the territorial agency in whose area the employees perform their activity.
In establishing the state of insolvency there will be taken into account the decision rendered by the competent authority in any Member State of the European Union or of the European Economic Space, through which the procedure was opened or where it was established that there are no assets in the debtor's estate or that they are insufficient to justify the opening of the insolvency procedure and its erasure from the register in which it is recorded is pronounced.

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INTERPRETATION OF THE INSURANCE CONTRACT

Manuela TĂBĂRAŞ[*]

ABSTRACT

Learning the unsaid[1] *from the wording of the lawmaker, as Haidegger used to say, is a very useful operation when interpreting a random insurance contract, given its particularities, which share both the classical norms regarding contracts and the specifics of particular provisions regarding exclusively the insurance rapport and which shall be based in principle on the specific and general rules of interpretation, as regulated by the Civil Code in art. 977-art. 985.*

The lawmaker has manifested an increased interest in finding the real will of the parties, requiring that the editing of the policy should be made in clear, concise, unequivocal terms, even contractually defined, and together with this legislative requirement, the insurer, a professional editor of the legal text, is positively stimulated to edit clear contracts, under the sanction of an interpretative audit by a court of law in favour of the insured, so that in the recent years, the editors of insurance policies have been more careful in their effort to efficiently edit such policies, to the benefit of all parties and even to the benefit of third parties interested.

KEYWORDS

the insurance contract, the logical-rational interpretation, the restrictive interpretation, the principle of the reasonable expectations, in dubio pro reo - in dubio contra stipulantem, the systematic interpretation, consumer

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[1] *The Unsaid* may consist of the insufficiency of the information, their incompleteness, the equivoque of the clauses, excess information, disagreement of/contradictory clauses, the equivoque given by the succession of the pre-contractual and contractual documents, the discrepancy between the meaning of the literary terms and the technical-economic or legal ones etc.

"Language is the imperfect tool of thinking" Marie Helene Laleville[2] said and that is exactly why the interpretation of a contract, finding the most proper meaning of the parties thought and intentions, when the contract clauses are ambiguous[3], equivocal[4] or incomplete is a very difficult and sensitive operation.

Learning the unsaid[5] from the wording of the lawmaker, as Haidegger used to say, is a very useful operation when interpreting a random insurance contract, given its particularities, which share both the classical norms regarding contracts and the specifics of particular provisions regarding exclusively the insurance rapport and which shall be based in principle on the specific and general rules of interpretation, as regulated by the Civil Code in art. 977-art. 985.

The interpretation of the insurance contract becomes useful and necessary upon the occurrence of a dispute between the insured and the insurer in the performance of the contract. Mention must be made that it is forbidden to interpret clear and precise clauses, and interdiction existing ever since the Roman law "*In claris non fit interpretatio".*

Doctrine appreciated interpretation as "an actual flaw of the badly edited, laconic or ambiguous policies.[6] The coverage exclusion clauses that are incomplete or unclearly described and included in the policy, the big number of contractual clauses, the misinformation, dispersion of clauses, the technical terms used, the privileged position of editor of the insurer are all the more reasons for aggravating the rapports between the insurer and the insured in the performance of the contract and the need for construing the controversial

[2] Marie Helene Laleville – *L ` interprétation des contracts d` assurance terrestre, Ed. L.G.D.J., Paris, 1996, p. 3 și urm.*

[3] Susceptible of having several meanings. French doctrine gives as an example the word *to belong* …= to be owner…= to be at the disposal of…= to be somebody on the basis of a title, order... Ibidem.

[4]The equivoque can result from the equivoque of independent contractual documents, having the same standing, the same legal force, enforceable to the insured, from scheduling in time the contractual documents and from the dispersion of the insurance documents.

[5] *The Unsaid* may consist of the insufficiency of the information, their incompleteness, the equivoque of the clauses, excess information, disagreement of/contradictory clauses, the equivoque given by the succession of the pre-contractual and contractual documents, the discrepancy between the meaning of the literary terms and the technical-economic or legal ones etc.

[6] Marie Helene Laleville – *L` interprétation des contracts d` assurance terrestre, Ed. L.G.D.J., Paris, 1996, p. 4.*

clauses with dangerous consequences to the insurer, as systematically, the policy is interpreted in favour of the insured, and on the other hand the quality of the interpretation work has to do with the subjectivity of the interpreter.

Restrictive Interpretation of the insurance contract represents a priority rule of analysing the contract clauses and conditions as the specific norms in this field are of a strict interpretation and application, and an extensive interpretation could seriously disturb the contractual balance, and also the financial balance of the insurer, which, based on specific mathematical actuarial calculation has assumed the risk, to a certain extent, and implicitly the contractual risk.

Finding, further to an extensive interpretation, a wider scope of the risk, for instance, as probably the insured would like, would trouble the insurer terribly and that is why, the latter, as creator of the of the future legal act, it always understands to introduce in the introductory part of the insurance contract, in respect of the insurance conditions, , all the definitions of the specific terms in the field of insurance (especially, technical terms), but also the meaning of terms that in common language may have other connotations, with special reference to the risks to be insured, the classical example in the doctrine being the meaning of the phrase *heavy rainfalls*, which should not be mistaken for *long lasting rains*, as the two constitute distinctive risks, or *flood*, as scientific hydrologic phenomenon, as different from the common language meaning of *sudden flow of waters*, even from the neighbour up stairs, the two representing distinct risks.[7]

Moreover, the insurers insist on explicitly including in the insurance contract the exclusions from indemnification, both the legal ones and the conventional ones, so that in the end, once the insured has signed the insurance policy, it means that he has acknowledged the definitions proposed by the insurer in respect of the terms with impact on the parties' intentions and the purpose pursued in the conclusion of the contract.[8]

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[7] Given that under the insurance contract concluded, the insured has included the risk regarding the theft of the vehicle, upon the occurrence of the risk, the insurer has the obligation of indemnifying the insured, as per the insurance policy (see High Court of Justice, Civil Section, ruling no. 955/1996 in M. Tăbăraş, M. Constantin – *op. cit.*, p. 170). Also, if the parties agree that the insurer should indemnify the insured in the event of theft of the latter's car, the claims of the insured person against the insurance company having as object the value of the vehicle stolen are outside the scope of the contract clauses, if the crime committed is robbery, not theft – (see Bucharest Court of Appeal, Commercial Section V, ruling no. 587 of 22 November 2006 in M. Tăbăraş, M. Constantin – *op. cit.*, p. 65-66).

[8] In respect of the exclusions from securing he risk, French jurisprudence, interpreting the exclusion clause consisting in theft from an uninhabited dwelling concluded that the parties considered a constant state of not being inhabited, a long term one and not a temporary one – starting from the clause considered unclear of not disclosing the time span during which the

To these preventive measures taken by the insurer for the purpose of ensuring an interpretation as close as possible to the parties' intentions in respect of the form of the contract, there are added the lawmaker's provisions that obligate the insurers to eidt the insurance contract in clear, plain terms that can be understood by the insured and do not lead to ambiguities.[9]

Furthermore, establishing the legal nature of the insurance contract as being one of the classical contracts of adhesion, the economic inequality of the parties, the commercial nature of the activity provided by the insurer focused on profit, but also the law allow the insurer[10] "*to make the law of the contract*", and such a dominant position can lead to abuse.[11]

The existence of the abusive positions in the contractual life has led to the creation of an actual system meant to protect the "*consumer"*[12], considering that the latter, according to the law, can be only a physical entity or an association without profit making purposes[13].

building was not inhabited. În J. Bonnard – *Droit et pratique des assurances. Particuliers et entreprises,* Ed. Delmas, 1990, p. 124-126.

[9] By ambiguities we could understand both excessive information, and insufficient information, which in the economy of the contract creates confusion by allowing multiple, discordant meanings, possibly lacking cohesion, etc.

[10] In order to be in an abusive position punished by Law no. 193/2000, the insurer needs to be a trader, that is any physical entity or authorized legal entity that, under a contract falling under the scope of the law, acts within the scope of its business, industrial or manufacturing activity, or liberal profession, as well as any broker acting for the same purpose in the name or on the behalf of insurer.

[11] The doctrine speaks of even the *presumption of abuse of the insurance contract* as a contract of adhesion. For details, see I. Sferdian - *op. cit.*, p. 112-114. On the other hand, it has also been the doctrine that has sanctioned the law, considering it as having flaws and being unclear in respect of rigorously indicating the scope of application, the relevance of the normative act in the field of insurance resulting from the interpretation of the law and not from the text expresis verbis of the normative act –for further details regarding the analysis of abusive clauses in the insurance contract see Elena Maria Minea – *Încheierea şi interpretarea contractelor de asigurare (The Conclusion and Interpretation of the Insurance Contracts),* Ed. C.H. Beck, Bucureşti, 2006, p. 253-292.

[12] Consumer means any individual or group of individuals grouped in associations, which, under a contract that falls under the scope of the law, acts for purposes outside its commercial, industrial, manufacturing or liber activity. Even the European Court of Justice has promoted a restrictive concept regarding a presumption of professionalism of the legal entity. For details, see I. Sferdian - *op. cit.*, p. 114.

[13] In respect of this topic, also see F. Maxim - *Dreptul la informare şi educare al consumatorilor. Aspecte generale (Consumers' Right to Information and Education. General Aspects),* Curierul Judiciar (Judicial Courier) no. 2/2007, pp 82-92 si Aurelia Giga – *Soluţionarea pe cale extrajudiciară a litigiilor consumatorilor în dreptul comunitar*(*Extra-*

Law no. 193/2000 regarding the abusive clauses in the contracts concluded between traders and consumers[14] defines a contract clause that has not been negotiated directly with the consumer as being abusive "*if by itself or together with other contract provisions it creates, to the detriment of the consumer and contrary to the requirement of good faith, a significant unbalance between the parties' rights and obligations".*[15]

The fact that certain aspects of the contract clauses or only one of the clauses has been negotiated directly with the consumer does not rule out the application of the provisions of the law for the rest of the contract, in case where a global assessment of the contract reveals that it has been unilaterally pre-established by the trader. If a trader claims that a standard clause, pre-formulated, has been negotiated directly with the consumer, it is its responsibility to produce evidence in this respect.

Actually, the notion of abusive clause must be construed as a flexible one, corresponding to a need for equity, loyalty, justice, balance in the contract rapports and as a result there need to be set certain minimal limits from where the unbalance between the parties' rights and obligations to the detriment of the insured becomes significant, the concept being obviously sensitive and it must be appreciated especially considering its quality of perturbing the economy of the parties' rights and obligations rather than quantitatively.

If in the case of mandatory insurances, the insurance is concluded under the law[16] and it would be very difficult if not impossible to claim the existence of abusive clauses, the contract clauses being presumed *iuris tantum* to be in an absolute balance, in case of optional insurances, there can be cases where the insurer imposes certain clauses to the insured, clauses that favours the former to

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judicial Settlement of the Consumers' Litigations in EU Law), Revista Curierul Judiciar nr.3/2007, p.104-110, ISBN 1582-7526;

[14] Law no. 193/2000 regarding the abusive clauses in the contracts concluded between traders and consumers published in the Official Gazette no. 140/10 November 2000, republished in the Official Gazette, Part I, no. 305 of 18/04/2008.

[15] The definition of this notion can be found also in EEC Directive 93/ 13 of 5 April 1993, J. Of. 95 of 21 April 1993.

[16] In respect of the general aspects of restrictive interpretation of the law, see Dan Drosu Şaguna, Şova Dan, Aurelia Gîgă - *Drept Financiar Public*-Curs pentru invăţământul la distanţă (Public Financial Law – Course for Distance Learning) Bucuresti, Editura Universitaţi "Titu Maiorescu", p.255, 2006 , ISBN(10) 973-596-351-5; ISBN(13) 978-973-596-351-4; Dan Drosu Şaguna, Şova Dan, Aurelia Gîgă - *Drept financiar public si Drept Fiscal* - Cursuri pentru invăţământul (format electronic) la distanţă (Public Financial Law and Fiscal Law – Courses for distance learning _electronic format) -Bucuresti, Editura Universitaţii "Titu Maiorescu", 2010-2011, ISBN 978-606-92302-7-5 cat and Aurelia Gîgă the Doctoral Thesis *Obligatia bugetara (Budget Obligation)-prepared in 2010* not published.

the detriment of the latter, to which it is created a source of legal insecurity, the insurance contract being susceptible of abusive provisions subject to the provisions of the law mentioned above, both by virtue of the nature of the services, and by the capacity of the signatory parties.

Exactly in order to avoid such cases, from the point of view of qualifying such clauses as being abusive, the law provided for certain norms that should limit the occurrence of abusive clauses, in order to protect the insured, such as: the insurance contract shall be concluded in written form. It cannot be proven with witnesses; the insurance contract shall include clear, unequivocal, contract clauses, for the understanding of which no expert knowledge is needed.[17]

It is, however, true that the Romanian lawmaker, as different from the French one has failed to include in the text of law the interdiction of using in the insurance contract elliptical, incomprehensive terms, abbreviations or terms copied from the laws of other countries – a text which we deem useful, whose punishment in the French law is the lack of enforceability of that text, article of the contract against the insured, [18] and many others, among which the rules according to which, in case of doubt in construing contract clauses, they shall be construed in favour of the consumer.

The Interpretation of the Insurance Contract According to the Common Intention of the Parties

If, however, in spite of all the protective measures taken by the insurer when editing the insurance policy, ambiguities arise, the unclear clauses of the contract shall be construed according to the common intention of the parties.[19]

[17] The same requirement exists in the French Law: L 133-2 of the new Consumption Code. In this respect, see Marie Helene Laleville – *L `interprétation des contracts d `assurance terrestre, Ed. L.G.D.J., Paris, 1996, p. 7.*

[18] Jean Bigot coord. – *Traite de droit des assurances*, Editura L.G.D.J., Paris, 2002, vol. 3, p. 333.

[19] This principle is present in all modern laws. Thus, Swiss law give prevalence in the order of interpretation to the *common intention* of the parties and only then it is determined the *probable intention* by analysing all the circumstances that have led to the conclusion of the contract. In Switzerland, Italy and Germany, the unclear conditions are interpreted, the same as in our law, against the insurer, which is a professional and editor of the controversial legal act. The same goes for the Canadian and American law. Italian civil law gives prevalence to the special norms, as against the general ones, exactly as in the Romanian law. In UK law, the insurance contract is interpreted in the sense that the equivocal terms, the unclear clauses need to receive the common interpretation of the purpose pursued upon the conclusion of the contract, and the clauses of exclusion from indemnification are interpreted restrictively and against the insurer. Marie

If their inner intentions are different, even divergent, it shall be noted as a common denominator their common intention to conclude the insurance rapport and the scope of the insurance, the risk subscribed, so that the result of the interpretation should not lead to absurd conclusions, conclusions leading a termination [20] or contrary to the parties' interest.

However, this interpretation cannot be obtained by ignoring the legal nature of the insurance contract (civil legal document, objective trading fact or mixed, contract of adhesion or negotiated, forced, mandatory or optional, etc.) which above all the formalist criterion, in the sense of the priority of the declared intention – an objective criterion supported by the insurance policy itself or even by the reciprocal information documents prior to its conclusion, to the detriment of the subjective aspects invoked by the parties.

If, however, both conclusions of interpretation render efficiency to the legal act concluded, but may have different legal effects, there shall be applied to the contract the meaning that fits best the nature of the interpreted contract[21].

The logical-rational interpretation of the insurance contract involves resorting to arguments of logical, rational, inductive or deductive nature, meant to clarify the clauses disputed by the parties.

Thus, ***the exception provided for by the parties in the contract are of strict interpretation*** and cannot be extended to other cases, and exceptions should mean those referring both to the norms of merits, and the terms negotiated by the parties.

Also in this spirit, we should analyse the contractual clauses inserted further to the provisions of the special norms in the field of insurance, that are, moreover, derogatory from the norms of common law.[22]

Helene Laleville – *L` interprétation des contracts d `assurance terrestre, Ed. L.G.D.J., Paris, 1996, p. 10-12.*

[20] *Actus interpretatus est potius ut valeat quam ut pereat.*

[21] In respect of the techniques of interpretation of the legal document, also see in dateil V.Slavu-*"Teoria actului juridic civil. Persoanele"(Theory of Civil Legal Act),* course support for the students of Law School, Public Administration specialization, magnetic support, 2006, V.Slavu-*"Dreptul proprietăţi intelectuale"(Intellectual Property Law)* course for distance learning, Prof. Ph.D. Otilia Calmuschi, third edition, revised by Reader PhD Violeta Slavu, Editura Renaissance, ISBN 978-606-8321-31-8, Bucureşti, 2010, and Anca Lucia Rădulescu, Madalina Voiculescu, Luiza Melania Teodorescu – Drept Civil (Civil Law), Editura Universităţii Titu Maiorescu, Bucureşti, 2005, ISBN 973-7963-44-X, Smaranda Angheni, Madalina Voiculescu – Drept Comercial - Editura Universităţii Titu Maiorescu, Bucureşti, 2005, ISBN 973-7963-91-X.

[22] *Specialia generalibus derogant.*

Also, wherever ***the parties failed to distinguish***, to give further clarifications or examples, the interpreter can neither do that, as they would trouble the contract balance risking an extensive interpretation in contradiction with the correct and real will of the parties.

Using the ***reduction to the absurd***[23] method can prove useful in case of analysing a contract clause in the field of insurance, as it makes clear to the parties that only one solution is admissible, any other interpretation leading to irrational and unsustainable conclusions in the economy of the contract and absurd considering the parties' interests.

It is obvious that, especially in the field of insurances, the contractual clauses cannot derogate either from the imperative norms of the law, be it special, or general, or from the norms that interest public order, morals, etc. .[24]

A fortiori or ***of analogy***[25] logical-rational arguments cannot be used in this field, as this would equate an extensive interpretation of the contract clauses, which is not allowed in the insurance contract for the arguments previously made as to the restrictive interpretation.

The grammatical interpretation of the insurance contract involves the clarification of the meaning of various contract clauses based on the grammatical rules, more precisely, on the morphology and syntax of the sentence, on punctuation marks and, in part, on the technical semantics of the terms used, so that in case of a contradiction between the explicit terms defined in the policy and the implicit ones, those explicit should prevail, and in the case of using terms susceptible of different meanings in literary language and in legal language, the legal language should prevail, given that we analyse a legal act.

As different from the manner described above in countries such as England, United States, the literary meaning of the words prevails, as it is appreciated as known by everybody, as common, intelligible and undoubtedly assumed by the insured.

In dubio pro reo - in dubio contra stipulantem in the insurance contract

As the insurance contract is a contracts fully edited by the insurer, to which, to a large extent, the insured adheres, the rule "*in dubio pro reo"* is replaced by a restrictive interpretation in the sense of interpreting the contract to the detriment of insurer, which is guilty of the faulty editing of the insurance

[23] *Reductio ad absurdum.*
[24] Agumentul *per a contrario.*
[25] *Ubi eadeam est ratio, eadem lex esse debet.*

contract– insurer which thus ends up by being liable for its mistake in favour of the insurance consumer.[26]

The systematic interpretation of the insurance contract involves the clarification of various terms, contract clauses as against the entire contract and its compact cluases, giving each of the apparently unclear clauses the meaning that naturally results from the analysis of the entire contract.

Thus, as part of this interpretation, it resulted in case law that the insured risk consisting "*in terminis"* in the *theft of the item* is the one covered, if the provocative crime of the risk was theft, if, however, the cause of the occurrence of the risk was burglary, the coverage offered by the insurer does not work.

American justice has identified another principle of interpreting the insurance contract, namely ***the principle of the reasonable expectations*** created by the insurance contract, according to which *it is less important the truth of the words than the expectations they give to the parties.*[27]

Also, the doctrine, in its effort of finding new techniques of interpreting as close as possible the insurance contract has inscribed in the process of interpretation also the rule *ejustem generis* or *of the same kind* used when a clause is followed by a generic provision, the latter must be understood as being the same as the initial clause [e.g.: objects of art of national heritage, paintings, sculptures, and others (our note: of the same sort)].

It has been noted that in case of the insurance contracts edited bilingually, the version in the national language of the insured prevails, as it is presumed to be known in the most profound semantics, even if the other version is a language of international circulation.

Also, in case where there is a contradiction between a printed clause and a handwritten one added on both copies of the contract, the handwritten one shall prevail, as being more conformant to the will of the parties as effect of negotiating the contract printed by the insurer.

In case there are differences between the printed content of the insurance policy issued to the insured and the same contract held by the insurer, bearing the signatures of both parties, the copy given to the insured prevails, as it is presumed to have been studied, known and acknowledged by them.

In conclusion, *the lawmaker has manifested an increased interest in finding the real will of the parties, requiring that the editing of the policy should be made in clear, concise, unequivocal terms, even contractually defined, and together with this legislative requirement, the insurer, a professional editor of the legal text, is positively stimulated to edit clear contracts, under the sanction*

[26] *Ambiguitas contra stipulatorem est.*

[27] For more details regarding this principle see I. Sferdian – *op. cit.*, p. 109.

of an interpretative audit by a court of law in favour of the insured, so that in the recent years, the editors of insurance policies have been more careful in their effort to efficiently edit such policies, to the benefit of all parties and even to the benefit of third parties interested.

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REDUCTION OF PENALTIES IN THE NEW CIVIL CODE AND IN OTHER EUROPEAN LEGISLATION. THE LIMIT IMPOSED TO THE JUDGE, THE LIMIT BELOW WHICH NO PENALTY VALUE CAN DROP

Florin LUDUŞAN[*]

ABSTRACT

According to New Civil Code, the penalty clause may be reduced by the judge in case the main obligation was partly fulfilled and the creditor benefited by this fulfillment and in the situation in which the penalty is clearly excessive compared to the damage that could be foreseen by the parties upon the signing of the contract.

KEYWORDS

penalty clause, new Civil Code, contract

1. Legislative acts that provide for the possibility of reducing the amount of the penalty clause

The draft of the Civil Code of 2004 and the draft of the European Code of contracts.

Article 1025 paragraph (2) of the draft of the Civil Code of 2004 provided for the possibility of the court to assess the amount of the penalty clause: "The court may reduce the penalty clause only when it is clearly excessive related to the prejudice that could be provided by the parties upon the signing of the contract. By reduction, the amount of the penalty clause may not reach the level of the prejudice suffered by the creditor, under any circumstances".

The draft of the European Code of contracts, a project developed by the "Academie des Privatistes Europeens" in 2001, which refers to the civil and commercial contracts, provides in article 170 paragraph 4 that the judge may intervene in the contract when the parties' rendering of services are clearly uneven; the condition for the intervention of the court being the existence of a striking imbalance between the parties' rendering of services.

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Benelux Convention – Hague 1975 - and the Resolution of the European Council relating to the penalty clauses in the civil law, adopted in 1976 by the European Council

The Benelux Convention concerning the penalty clause was passed in Hague on 26 November 1975 and it provides for the possibility of reducing the penalty clause by the judge. Under article 4 of the Convention, a penalty clause may be reduced when equity clearly requires it, except for the case when the damages are due according to the law.

The Convention has not only the merit of allowing the repression of abuse, but also that of leaving no doubt about the nature of the circumstances the judge takes into consideration to exercise the power of reduction. The magistrate rules according to equity, taking into account all particularities of the case.[1] However, the Benelux Convention recognizes the sanctioning character of the penalty clause stipulating in article 1 that "any clause providing that the debtor, in the event of failure to fulfill his obligation, will be made liable by way of punishment (penalty) or allowance to pay an amount of money or any other rendering of services, is deemed to be a penalty clause".

Other rules established by the Benelux Convention refer to the interdiction to cumulate the main obligation with the penalty; interdiction to cumulate the penalty with damages owed according to the law; inefficiency of the penalty clause when the failure to fulfill the obligations may not be attributed to the debtor; the creditor's obligation requesting the enforcement of the penalty clause, sending a subpoena, if necessary, to obtain damages due according to the law.

The resolution of the European Council related to the penalty clauses in civil law was passed in 1976. The Committee of Ministers met to discuss the issue of abusive clauses of contract, in order to protect the interests of the customers, particularly in the contracts of adhesion. The resolution of the European Council was inspired by the Benelux Convention, the definition of the penalty clause raising problems for the editors of the project because of the different ideas of the Member States on the character of the penalty clause. The resolution of the European Council allows the legal review of the penalty clauses, while limiting the power of the judge to reduce the penalties, this reduction reaching the real value of the prejudice.

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[1] S. Angheni, *Consideratii teoretice si practice privind reductibilitatea clauzei penale in dreptul roman si in dreptul comparat,* article published in "Revista de Drept Comercial" no. 6/2001, p. 69;

UNIDROIT principles, the principles of the International Institute for the Unification of Private Law in Rome, prepared between 1971-2004, recognize the right of the court to reduce the amount of the penalty clause. The International Institute for the Unification of Private Law (UNIDROIT), an independent intergovernmental organization based in Rome, aimed to examine the ways that can harmonize and coordinate the private law of the states or groups of states and to prepare uniform rules of private law to be adopted by the Member States. In 1994, the first edition of UNIDROIT Principles applicable to the international commercial contracts was published. UNIDROIT Principles had great success soon after the release of the first edition in 1994, which, in 1997, led to the creation of a new working group made of 17 persons, lawyers, coming from completely different cultural and legal backgrounds. At the end of the debates of this working group, the International Institute for the Unification of Private Law approved in April 2004 the second edition of UNIDROIT Principles.

Article 7.4.13 (*agreed payment for failure to perform*)[2] provides that despite any contrary agreement, the amount of penalties specified in the contract may be reduced to a reasonable amount when the amount is excessively high in relation to the prejudice resulting from the failure to perform the obligations and given other circumstances. The comment to the text[3] also adds that the agreed amount may be only reduced, not suppressed as might be the case when the judge, despite the parties' agreement, would decide upon damages corresponding to the prejudice. Moreover, it is necessary that the agreed amount to be "too high", namely to be clearly for any reasonable person that it is as such. We should take into consideration specially the relationship between the agreed amount and the damage actually suffered.

Also, article 9.509 paragraph (2) of the **Principles of the European Contract Law** includes a formulation according to which the amount

[2] Article 7.4.13 of UNIDROIT Principles applicable to the international commercial contracts has the following content: (1) "When the contract provides that the party who fails to perform the obligations has to pay a certain amount for such failure, the prejudiced party is entitled to this amount, regardless of the prejudice actually suffered by him"; (2) "However, despite of any contrary agreements, the specified amount may be reduced to a reasonable amount when it is excessively higher in relation to the prejudice resulting from the failure to fulfill the obligations and given other circumstances."

[3] See: *Principiile UNIDROIT aplicabile contractelor comerciale internationale 2004*, *Dreptul pe viu cu Eugen Vasiliu***,** Minerva Publishing House, Bucharest, 2006, p. 262; Dragos-Alexandru Sitaru, *Dreptul Comertului International***,** handbook, general part, Lumina Lex Publishing House, Bucharest 2004, p. 758; M. Dumitru, *Regimul juridic al dobanzii moratorii***,** Universul Juridic Publishing House, Bucharest, 2010, p. 465;

established in the contract may be reduced to a reasonable amount if it is "clearly excessive in relation to the prejudice resulted and other circumstances."

French Civil Code. According to article 1231 of the French Civil Code, "the judge may modify the penalty when the main obligation has been partly performed."

2. Reducing the penalty clause in the New Civil Code

Doctrine and jurisprudence disagreements regarding reducible penalty clause were somewhat overcome by the introduction of article 1541 in the New Civil Code, an article called *the reduction of the penalty amount*. According to paragraph (1) of article 1541 "the court may reduce the penalty only when: a) the main obligation has been partially performed and this fulfillment of obligation has been in the benefit of the creditor, b) the penalty is clearly excessive compared to the prejudice that could be foreseen by the parties upon the signing the contract." In other words, the New Civil Code expressly acknowledges in article 1541 two cases in which the amount of the penalty may be reduced by the judge. In the Civil Code of 1864, the reduction of the penalty clause was allowed only in the cases when the debtor's obligation was partly fulfilled. In this respect, article 1070 of the Civil Code of 1864 provided that "the penalty may be reduced by a judge when the main obligation has been partly fulfilled." This possibility provided for in the Civil Code of 1864 did not contravene the principle of payment indivisibility mentioned in article 1101 of the old Civil Code, according to which the debtor could not oblige the creditor to receive a part of the debt even if the obligation was divisible.[4] For the other cases, the legal practice adopted, in general, the solution of irreducible penalty clause. Thus, in the absence of express legal provisions concerning the reducibility of the amount of the penalty clause, the courts were authorized by the legislator to order the reduction of penalties only for partial fulfillment of the main obligation.

2.1. The rule provided for by the texts of the New Civil Code related to the reduction of penalties. Exceptions to the rule

[4] S. Angheni, *Clauza penala in dreptul civil si comercial*, 2nd edition, reviewed and added, Oscar Print Publishing House, Bucharest, 2000;

The rule established in article 1541 of the New Civil Code is that the court may not reduce the amount of the penalty clause established by the parties.[5] **Two exceptions** are allowed to this rule.

a) **According to the first exception, the penalty clause may be reduced by the judge in case the main obligation was partly fulfilled and the creditor benefited by this fulfillment. (article 1541, paragraph (1), a).**

As shown, this exception was also provided in article 1070 of the Civil Code of 1864. The legislator requires a double condition to be fulfilled cumulatively, namely a partial fulfillment and the fulfillment should be in the benefit of the creditor.[6] We may notice that, compared to the former regulation, the New Civil Code adds the condition that the partial fulfillment be in the benefit of the creditor. In case of an undertaking contract concluded for the performance of a construction plan for a building, the partial fulfillment of this plan will not give the right to the reduction of the penalty clause because the beneficiary would not benefit from the partial fulfillment of the architect's obligation.[7]

As related to this exception, it was appreciated [8] that the limits for the involvement of the court are to determine the amount of the main obligation was fulfilled and if this was for the benefit of the creditor. If the court is given proof that the main obligation has been partly performed and

[5] See: I. Adam, *Drept civil. Obligatile. Contractul*., CH Beck Publishing House, Bucharest, 2011, p. 715; L. Pop, *Reglementarea clauzei penale in textele Noului Cod civil*, article published in the magazine Dreptul no. 8/2011, p. 24; L. Pop, *"Unele exigente ale solidarismului contractual in cazul nerealizarii de catre o parte contractanta a interesului celeilalte parti*", article published in Revista Romana de Drept privat no. 2/2012, p. 207; G. Boroi, L. Stanciulescu, *Institutii de drept civil in reglementarea noului Cod civil*, CH Beck Publishing House, Bucharest 2012, p. 196; N.A. Daghie, *Sanctiunile civile fundamentate pe neexecutarea culpabila a contractelor sinalagmatice***,** Ph.D. Thesis defended at "Nicolae Titulescu" University Bucharest, p. 267; C.S. Ricu, G.C. Frentiu, D. Zeca, D.M. Cigan, T.V. Radulescu, C.T. Ungureanu, G. Raducan, Gh. Durac, D. Calin, I. Ninu, A. Bleoanca, *Noul Cod civil, Comentarii, doctrina si jurisprudenta, vol. II., art. 953-1649, Mosteniri si liberalitati, Obligatii*, Hamangiu Publishing House, Bucharest 2012, p. 897; L. Pop, I. F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligatiile*, Universul Juridic Publishing House, Bucharest, 2012, p. 318;

[6] B. Oglinda, *Dreptul afacerilor. Teoria generala. Contractul*. Universul juridic Publishing House, Bucharest 2012, p. 491;

[7] e-juridic.manager.ro/…/solutiile retinute in noul cod civil privind reductibilitatea clauzei penale – 8874.html

[8] I. Adam, *Drept civil. Obligatile. Contractul*., CH Beck Publishing House, Bucharest, 2011, p. 715;

it is in the benefit of the creditor, the amount representing the penalty clause will be reduced proportionally with main obligation partly fulfilled.[9]

The literature has argued that in the case of an indivisible obligation, the judge would not have the right to censor the penalty clause, even in the case of partial fulfillment of the obligation.[10] Indivisible obligations [11] are those obligations that may not be divided between debtors, between creditors, nor between their heirs "(article 1425 paragraph 1 NCC). Each of the debtors or their heirs may be forced separately to fulfill the entire obligation, respectively, each of the creditors or their heirs may require full performance of the obligation. In the case of indivisible obligation, the creditor does not benefit of partial fulfillment of the obligation.

b) **Related to the second exception to the rule**, according to which, the court may not reduce the penalty, article 1541 paragraph (1) letter b) of the New Civil Code provides that the court may reduce the penalty when " the penalty is clearly **excessive** compared to the damage that could be foreseen by the parties upon the signing of the contract." However, to emphasize the sanctioning element from the punishment of the civil penalty clause, paragraph (2) provides that "the penalty reduced this way should remain higher than the main obligation". It results that the courts cannot reduce the penalty clause below the value of the main obligation, even if the creditor does not prove the existence of a prejudice. Moreover, this rule is consistent with the principle mentioned in article 1538 paragraph (4) of the New Civil Code according to which "the creditor may ask for the enforcement of the penalty clause without being asked to prove any prejudice."

There are **two conditions** that should be met to apply the mechanism provided for by article 1541 of the New Civil Code:

- the penalty provided in the contract should be "clearly excessive"
- the legal criterion according to which the excessive character of the penalty is reported is represented by the prejudice that could be provided by the parties upon the signing the contract.

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[9] I. Adam, *Drept civil. Obligatile. Contractul*., CH Beck Publishing House, Bucharest, 2011, p. 715;

[10] B. Oglinda, *Dreptul afacerilor. Teoria generala. Contractul*. Universul juridic Publishing House Bucharest, 2012, p. 491;

[11] See the definition proposed in the literature by prof. L. Pop, I.F.Popa, S.I. Vidu, in *Tratat elementar de drept civil. Obligatiile.* Quoted text p. 608 "The indivisibility obligations are those relations of obligation having several subjects whose object is not susceptible of division by its nature or by the agreement of the parties"

The legislator did not define the term "**excessive**", so the courts have to make such an assessment, which leads us believe that the new provisions will create many discussions and non-unitary legal practice. However, we share the view according to which the "clearly excessive" character aims not only an excessive penalty, but such an obvious excessive penalty, that the judge does not need additional verifications to notice this aspect.[12]

For the evaluation of the "clearly excessive" character, the legislator takes into consideration the "**prejudice** that could be foreseen by the parties upon the conclusion of the contract", not the actual prejudice suffered, since the role of the penalty clause is exactly that of exonerating the creditor to prove the prejudice and its amount.[13] This exception also raises the question of abusive penalty clause.[14]

Analyzing article 1541 paragraph (1) letter b) of the New Civil Code, we may say that the legislator considered as a reason for the reduction of the penalties that a condition of the civil contractual liability is not fulfilled, respectively that *the prejudice had been foreseeable upon the conclusion of the contract*. However, if the penalty is clearly excessive in relation to the prejudice that could have been foreseen by the parties upon the signing of the contract, the debtor's liability will be determined by the court that will reduce the amount of the penalties.[15]

3. The limit imposed to the judge, the limit below which no penalty value can drop. Article 1541 paragraph 2 of the New Civil Code provides a limit if the judge orders to reduce the amount of the penalty. The penalty reduced this way should remain higher than the main obligation. Setting the lower limit of the penalty in relation to the main obligation is likely to cause problems in practice, especially in those ***situations where the loss suffered by the creditor is much higher than the main obligation***.

The New Civil Code allows the judge to reduce the penalty at a ***lower level than the prejudice suffered by the creditor***, as long as the penalty amount remains higher than the main obligation. One may rightfully

[12] B. Oglinda, *Dreptul afacerilor. Teoria generala. Contractul*. Universul juridic Publishing House, Bucharest 2012, p. 491;

[13] F.A. Baias, E.Chelaru, R. Constatinovici, I. Macovei, *Noul Cod civil. Comentariu pe articole.* CH Beck Publishing House, Bucharest, 2012, p. 1635;

[14] L. Pop, I. F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligatiile*, Universul Juridic Publishing House, Bucharest, 2012, p. 319;

[15] S. Angheni, *"Cateva aspecte privind interpretarea si aplicarea dispozitiilor Noului Cod civil privind reductibilitatea clauzei penale***",** article published in the magazine "Curierul Judiciar", no. 3/2012, p. 149;

ask the question how much higher the penalty should remain than the main obligation. The doctrine and jurisprudence of the next few years will reveal and establish fair solutions in this regard.

The legal systems that served as inspiration in drafting the New Civil Code decided on another solution, setting that the limits for the reduction of the penalty be determined by the prejudice actually suffered by the creditor. The solution mentioned in the New Civil Code, namely the reduced penalty should be higher than the main obligation, could be explained by the desire of the legislator to emphasize the sanctioning character of the penalty clause.[16]

In terms of the contract, the parties may insert a clause to provide that, if the penalty does not cover the prejudice caused by the debtor, the latter should be obliged to pay additional damages. Thus, if the penalties are lower than the amount of the prejudice, they should be supplemented by compensation, if it is stipulated in the contract.

If the parties have not stipulated a clause to complete the penalties with damages, we may ask if the court may admit this upon the request of the creditor. There are arguments for both the acceptance and the rejection of supplementing the penalties with damages.

In supporting the solution of completing the penalties with damages, in the event that a contract clause is missing in this respect, article 1531 of the New Civil Code may be invoked. The creditor is entitled to the full compensation of the prejudice suffered because of the failure to fulfill the obligation. (article 1531 paragraph 1 of the NCC).[17]

In terms of motivating the solution of dismissing the creditor's application, to complete the penalties with damages, in the absence of a contractual provision, we may argue taking into consideration that the parties introduced a penalty clause in the contract, thus assessing the prejudice and understanding that it should be within the limits of the penalty clause.

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[16] Levana Zigmund, *Solutiile retinute in Noul Cod Civil privind reductibilitatea clauzei penale*, article published on the web site *www.noulcodcivil.ro/solutiile -retinute-in-noul-cod-civil-privind-reductibilitatea-clauzei-penale*; A\ also see N.A Daghie, quoted text, p.267;

[17] S. Angheni, "*Reductibilitatea clauzei penale. Repere legislative, doctrinare si jurisprudentiale*", article published in the volume "Justitie, Stat de drept si Cultura Juridica", by the Institute of Legal Researches "Acad. Andrei Radulescu" of the Romanian Academy, at the annual session of scientific communications 13 May 2011, Universul Juridic Publishing House, Bucharest, 2011, p. 573;

We support the view that, in principle, the court may not decide for damages in addition to penalties in the event that the parties have not stipulated a contract clause to this effect, the only exception being the case when the penalties are ridiculous and the penalty clause might not have any function.

The mutability of the penalty clause in its reducibility version is an obvious example of implementing the obligation of fair quantitative measure that allows the judge to establish a correct and equitable proportionality relationship between the seriousness of illicit failure to fulfill the contract and the amount of the penalty clause.[18]

The right of the courts to reduce penalty clauses does not breach the principle of will autonomy, but it takes into account the fact that the reduction of the penalty clause is undoubtedly in line with the current regulations at the European level, which highlight the significance of the penalty clause. The European solution related to the possibility of reducing the penalties by the judge to the total value of the debit is reasonable and it is based on the *principle of unjust enrichment*, being a guide for the correct enforcement of the civilian law.

According to another point of view expressed in the legal literature, the exception provided by article 1541 paragraph (1) letter b is criticized for the following aspects:[19]

- this regulation opens Pandora's box because in practice there is the problem of identifying the criteria according to which the penalty is deemed to be clearly excessive;
- the criterion established by the legislator, namely that the clearly excessive character of the penalty relates to the prejudice that could be provided by the parties upon the conclusion of the contract, is very general and it will leave room for split and even arbitrary interpretations;
- we may find that the penalty clause is insignificant;
- by regulating this exception, the legislator allowed the interference in the parties' contract;

[18] L. Pop, *"Unele exigente ale solidarismului contractual in cazul nerealizarii de catre o parte contractanta a interesului celeilalte parti*", article published in Revista Romana de Drept privat no. 2/2012, p. 208;

[19] I. Adam, *Drept civil. Obligatile. Contractul*., CH Beck Publishing House, Bucharest, 2011, p. 715;

- the parties' freedom of will is diminished; the provision of article 1541 paragraph (2), according to which the penalty thus reduced should remain higher the main obligation, is irrelevant.
- the regulation of this exception substantially diminishes the efficiency of the penalty clause, especially related to its sanctioning function, the debtors relying on the idea that they will reduce it in court, even if they are in default, and do not fulfill their obligation under the contract, invoking the excessive character of the penalty clause.

It is worthy to note that the New Civil Code does not provide the mutability of the penalty clause in its increased variant, in case there would be an extremely low penalty clause in relation to the prejudice caused to the creditor. Article 1152 paragraph 2 of the French Civil Code gives the judge the right to increase the penalty clause given that this is ridiculous.

The proportionality between the seriousness of the failure to fulfill the obligation and the repairing and sanctioning functions, as well as ensuring a fair measure, could have been achieved by admitting the mutability of the penalty clause in its increased version.[20]

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[20] L. Pop, *Reglementarea clauzei penale in textele noului Cod civil*, quoted text, p. 24;

THEORETICAL ANALYSIS ON THE PATRIMONIAL RIGHTS OF THE FINE ARTS CREATORS

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ABSTRACT: *Copyright law gives to the holder the legal possibility to use and dispose from his intellectual creation according to his own interests, but within the limits imposed by law. Following the creation of intellectual works, moral and patrimonial rights are acknowledged to the authors.*

KEYWORDS: *classical artwork, copyright, moral rights, patrimonial rights, resale right.*

1. Concept and content of the copyright[1]

The analysis of the economic rights of creators of works of art has as its starting point the clarification of copyright and its content[2]. In the literature[3] there are many definitions of this right[4]. A broad overview, far from complete, is that this right can be seen as all the legal rules governing and protecting social relations[5] arising from the creation and use of works of art, regardless of their nature (literary, artistic, arts, etc..) or other works of intellectual creation, and the protection of the authors and their interests[6]. Copyright law gives the holder[7] the legal possibility to use and dispose of

[1] See Rodica Parvu *Copyright in Romania during 1996-2006*, in the Romanian Intellectual Property nr.2/2006.
[2] See Ligia *Danila Copyright Classification from the perspective of the New Civil Code*, the Romanian Journal of Intellectual Property, no. 4/2011.
[3] See for more details, Viorel Ros, D. Bogdan, O. Spineanu Matei, *Copyright and Related Rights*, All Beck Publishing House, Bucharest, 2005, p.33.
[4] See Stanciu D. Cărpenaru, Civil Law. *Rights to intellectual creation. Succession*, E.D.P., Bucharest, 1971, p.7.
[5] See Radu Romiţan, *Moral rights of the author and their protection by means of criminal law* in the Romanian Intellectual Property no.1/2004.
[6] See for details John Macovei *Treaty of intellectual property law*, CHBeck Publishing, Bucharest, 2010, p.419.
[7] See Ligia Danila *Copyright topics from the perspective of the New Civil Code*, the Romanian Journal of Intellectual Property, no. 1/2012.

his intellectual creation according to his own interests, but within the limits imposed by law[8]. Following the creation of intellectual works, moral and patrimonial rights are acknowledged to the authors[9].

Therefore the content of the copyrights[10] is a complex[11] one, and refers both to moral rights and economic/patrimonial rights[12]. If in terms of moral rights, their recognition along the time, has been the subject to numerous debates; the patrimonial rights have enjoyed since the beginning, unanimous recognition, the copyright being considered a form of property[13].

2. Moral rights of the authors[14]

Article 10 of Law no. 8/1996 on copyright and related rights[15], acknowledges the following moral rights[16]:

-The right to decide if, how and when the work will be disclosed to the public;

-The right to claim recognition of authorship;

- The right to decide under what name will be brought opera to the public

- The right to the integrity of the work[17], which gives him the power to oppose any changes, and any interference with the work, if it harms the honor or reputation[18]

[8] See Yolanda Eminescu, *Industrial property Treaty*, vol I, new creations, Romanian Academy Publishing House, Bucharest, 1982, p.15.

[9] See Constantin Tufan, *Subject to copyright*, in the Romanian Intellectual Property No.2/2005.

[10] See Ionel Didea, *The Object of intellectual property rights. Law proposal on the object of intellectual property rights* in intellectual property Romanian Journal, no. 1/2005.

[11] PI Demetrescu, *Copyright, Scientific Annals of the "Al. I. Cuza " University*, new series, Section III, Social Sciences, 1956, p.379.

[12] See also Ligia Danila, *Copyright and industrial property rights*, CH Publishing Beck, Bucharest, 2008, p 5.

[13] Victor Volcinschi, *Defining issues of the copyright*, in the Romanian Journal, no. 2/2007.

[14] Ciprian Romiţan *Moral rights of the author under the rule of law no. 8/1996*, in the Romanian Intellectual Property no.1/2007.

[15] Published in the Official Gazette of Romania, Part I, no. 60 of March 26, 1996, as amended

[16] See Gabriel Olteanu, *Exercise of the moral rights of the author of the heirs*, in Romanian Journal of Intellectual Property, no. 1/2009.

[17] Rodica Bucur, *The rights to the integrity of the work*, in the Romanian intellectual property, no. 2/2005

[18] See Gabriel Olteanu *Moral right to the integrity of the work*, in the Romanian intellectual property, no. 3/2009

- The right to retract the work of publication, bearing the damages caused by this act of withdrawal

These rights come to show the indissoluble link between the author and his creation, about what your bike is based on the author's intellectual creation. Being vests in the author of these rights are inalienable, imprescriptibly and personal[19].

3. Patrimonial rights of the author

3.1. The concept and importance of patrimonial rights

The patrimonial rights of copyright are the rights to use and exploit the work and includes also the resale right[20].

For a better understanding of the rights resulting from the implementation of plastic work, it is required a summary of patrimonial rights, so that to further highlight the uniqueness of resale right, a right specific to the creators of plastic works.

Patrimonial rights are those subjective rights that rise from the author's exercise of the moral right to disclose the work, and their content can be expressed and valued in money[21].

In the literature it was considered that copyright rights are divided into absolute and relative rights, depending on their degree of enforceability[22]. True nature of these rights comes from the fact that the right holder is recognized all the attributes encountered in the real rights: utendi jus, jus fruendi, jus jus abutendi and possidendi. So these rights are binding, without fulfilling any format, but by law, to all participants in the legal life (erga omnes).
When these rights of authors of works of plastic, arise from unilateral or bilateral legal acts of the third party's wrongful act causing damage, they take the nature of debt instruments.

3.2. The characteristics of patrimonial rights in the copyright

Patrimonial rights have the following legal characteristics:

- they are personal
- they are exclusive

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[19] See CR Romanita, *Moral rights of the author*, Legal Universe Publishing, Bucharest, 2007, p.119.
[20] See art. 12 and 21 of Law no.8/1996 on copyright and related rights, amended several times.
[21] See also Ligia Danila, *Copyright and industrial property rights*, CH Publishing Beck, Bucharest, 2008, p 86.
[22] *Ibidem 10.*

- they are temporary

The personal character of the author's rights is clear from the wording of Article 1 of Law no. 8/1996 which provides that copyright vests in the author. Since the text of the law does not distinguish between the two categories of rights that make up copyright under the "Ubi lex non distinquit, nec nos distinquere debemus" there is no basis leading to the idea that the laws do not consider also the relationship between copyrights and the author.

The personal nature of copyrights is resulting also from other reasons. Given the transmission institution of these rights, and in case of moral rights transfer is possible only by way of exception, the economic/patrimonial rights of copyright can be transferred by virtue of their personal character, both by inter-vivos acts and by acts mortis causa and in some cases ope legis.

This character shows once again the link between the author and his work one indestructible, which notes that the legislature can not differentiate between moral attributes and heritage in terms of their protection[23].

Regarding the exclusive nature of property rights, it has two aspects: on the one hand the author sovereign right to decide if, how and when his work can be exploited, and on the other hand the right to decide whether he will exploit the work himself, or will grant his consent to another person to exploit it. In the latter situation is irrelevant in terms of the author's consent if the work is first published or has other previous publishing. Also, this character does not exclude the author's possibility to decide that his work to be exploited with other persons.

This characteristic reveals that the author has a monopoly in the exploitation of his intellectual creation throughout the legal protection enjoyed by the work and its author. So, only exceptionally, and with the author's agreement the work can be exploited by third parties[24].

Article 25 of Law no. 8/1996 establishes that the patrimonial rights of the copyright extend along with the life of the author, rights can be transferred after his death by civil law heritage; the protection being different based on the type of the work, the way to make it public, the way to produce the work.

[23] See for details John Macovei *Treaty of intellectual property law*, CHBeck Publishing, Bucharest, 2010, p.453.

[24] See for more details, Viorel Ros, D. Bogdan, O. Spineanu Matthew, *Copyright and Related Rights*, All Beck Publishing House, Bucharest, 2005, p.260.

The text of this law is limiting such rights in time. therefore these rights of the author are temporary[25].

If we consider that the asset side of copyright can be exploited by author personally and by a third party which has granted this right by the author of creation, we recognize that these rights are transferable. These rights may be subject to agreements between living or completed acts upon death[26]. Practice has proved that these rights can be transferred in some cases and by law[27].

3.3. Classification and analysis of patrimonial rights

Regarding the classification of patrimonial copyrights, according to several articles of Law No. 8/1996, authors have the following patrimonial rights:

- the right to use and exploit personally the work;
- The right to consent the use of the work to others
- The right to resale.

The right to use and exploit personally the work is a complex and patrimonial right recognized to its owner, according to which the author can legally use its work according to its needs and expectations and exploit it in order to obtain a material advantage.

This is an exclusive right of the author, who decides whether and how to exploit the work personally or through third parties.

Article 13 of Law no. 8/1996 provides for the use of the work and its exploitations in order to gain material advantages by copyright holder.

The use and exploitation of plastic works in order to gain a material advantage, may be done in different ways: reproduction of the work, work distribution, importation for domestic marketing of children made with the consent of the author, after work, public communication, directly or indirectly work by any means, including through the work to the public, so that it can be accessed at any location at any time individually by the public (exposure within galas, openings, or exhibitions), rental as teaching material for highlighting certain qualities; exhibit in order to highlight the qualities of the author, in order to attract clients, to produce new works, for decoration of public spaces for added value; marking social events, and the

[25] See Yolanda Eminescu, *Industrial property Treaty, vol I, new creations*, Romanian Academy Publishing House, Bucharest, 1982, p.167.
[26] See art. Article 39. (1) of Law no. 8/1996.
[27] Ioan Macovei, *op.cit.*, p. 453

development of derivative works etc.[28]. All these forms of usage have as "center" the plastic work itself, and they bring an economic benefit to its author without that work to lose value.

The right to consent the use of the work to others is the way of obtaining economical gain, material benefits from the intellectual creation without any deterioration or obsolescence to the intellectual work, by persons other than the author or owner of the work. He who uses the work in different ways this time is not the author or owner of the work, but a third party, who, for such use, creates, at his turn, an advantage to the first. Use by third parties is possible under a rental agreement, limited in time, and which creates rights and obligations for both parties. If the author or owner of the work is obliged to provide to third party the work, for a period of time, and to guarantee a peaceful use of the work, the third party is obliged to pay for this, to use it for its intended, not to destroy or to alter its shape / structure without the author's special consent, and to return it to its owner at the date agreed in the contract.

3.3.1. Reproduction concept[29]

Reproduction[30], according to art. 14 of Law no.8/1996, is the process of making all or part of one or more copies of a work, directly or indirectly, temporarily or permanently, by any means and in any form, including realization of a video and temporary storage of these electronic materials[31].

If, there are no problems with copying a work for resale and a profit, it could be a problem with the video reproduction means. Here, I believe that these copies can be used, mainly as teaching material, in the learning processes techniques or methods to fine art when the original copy is not available.

Reproduction is considering the material form of the work, and is difficult to accept that a plastic work may be reproduced by means of the

[28] Article 13 of Law no. 8/1996 also provides two ways to use the work but are not works of art possible. These forms relate to broadcasting and relaying works cable operator which is impossible in the case of works of art.

[29] Article 13 of Law no. 8/1996 also provides two ways to use the work but are not works of art possible. These forms relate to broadcasting and relaying works cable operator which is impossible in the case of works of art.

[30] Rodica Bucur, *Reproduction rights* in Romanian Journal of Intellectual Property No.2/2005

[31] See Yolanda Eminescu, op.cit., P 167.

video, while the audio ones are really excluded. The most common methods for plastic reproductions are casting, engraving, drawing.

Reproduction, regardless of how it is done, must be based on consent, the consent of the author[32], as this process is to the author's original work to be reproduced. Reproduction or copying work is always preceded by fixing the original creation by the author on a support (statue, painting, layout, and so on).

Another form recognized by the legislator in the use and exploitation of the work is the distribution.

3.3.2. Distribution concept

Distribution[33] comprises the sale or transfer by any means, whether by onerous title or grace of the original or copies, and offering them to the public, with the consent of the author of a work of art or holder of their ownership. Distribution involves first reproduction of the work and then holding control of the commercial exploitation of the work.

Regarding imports, as a way to use the work[34], is the process of introducing domestic order marketing of the original or legally made copies of a work of art (attached to any kind of support). Import shall be deemed lawful if this operation is accepted by the author[35].

3.3.3. Rental concept

Renting[36], as a form of use of the work is seen by the Romanian legislature as legal operation and material for making available for use, for a limited time and for trade and economic advantage, directly or indirectly, of a work[37].

Borrowing[38] is legal operation of making available for use, for a limited time and without seeking commercial or economic advantages, directly or indirectly, of a work through an institution that allows public access to that purpose[39].

3.3.4. The communication

[32] Ioan Macovei, *op.cit.*, p. 454
[33] Art 14'alin .1 of Law no.8/1996
[34] See Ligia Danila, op.cit., P 87.
[35] See Yolanda Eminescu, op.cit., P 167.
[36] See for more details, Viorel Ros, D. Bogdan, O. Spineanu Matthew, op.cit., P 257.
[37] Article 14 paragraph 1 of Law no.8/1996.
[38] See Ligia Danila, op.cit., P 87.
[39] Ioan Macovei, *op.cit.*, p. 454.

Public communication is considered a way to exploit the economic rights of authors of works of art, if the operation is carried out directly or through technical means, in a public place, where the number of people exceeds the normal circle of a family and acquaintances that can be informed about the plastic work its characteristics (qualities).

3.3.5. Resale right[40]

The resale right require special consideration since it is a right that arises only for authors of plastic works.

Thus, the resale right has its logical reasoning in the need to protect the author's economic interests at the beginning of his creative life, since he does not enjoy fame and public recognition, and his work is not known, most often not assessed and exploited in a way that allows authors to cover their needs[41]. Also regulating the resale right is intended to provide the authors of works the economic benefit brought by the success of their creations.

The need for material fairness gave therefore arise to the resale right under which an author of a work is entitled to receive a percentage of the resale price of the work and know the layout place of his work; so we notice the basis of this as is the idea of fairness: the author who gave his work for a low price can take advantage of some of the added value that it subsequently acquires.

In this respect, resale right means, the right plastic author works, graphic, photographic, to receive a share of the sale price obtained for any resale of the work subsequent to the first transfer by the author, and the right to be informed of the location of his work.

It is a relatively new patrimonial right, which was not foreseen in the Decree nr.321/1956 that, as mention before, is meant to reward the authors of works of art, works that grow in value over time.

According to Law no. 8/1996, resale right consists of two elements: a patrimonial right - the right of the author of a work of graphic or plastic art or a photographic work, which was resold after its first transfer by the author, to receive a percentage (maximum 5%), without exceed 12.500 Euros, from the sale price obtained for any resale act, and a personal right consisting of author's right to be informed about the location of his work.

[40] Mirela romiţan, *Resale right*, in Romanian Journal of Intellectual Property, no. 3/2005.
[41] See Yolanda Eminescu, *op.cit.*, p. 169.

The complex nature[42] of the resale right creates a double obligation to the owner of the work, namely: its duty to allow the author of the work to exercise the copyright without thereby altering the work itself or the interests of its owner or keeper, and the second obligation is the impossibility to destroy the work without previously refunding the author the counter value of the supporting materials on which it is attached and fixed.

Third parties involved in the sale of the work further on, are required to transfer the amounts calculated under the law to the author and inform the author within two months from the date of sale. According to art. 125, para. (3) of Law no. 8/1996, these obligations can be met also by the collective management bodies[43].

Resale right applies to all acts of resale of an original work of art, graphic or photographic regardless of the quality of the seller, buyer or broker. Limited number of copies made by the author, are not considered original works so it recognizes the existence of such a right.

The resale right corresponds to the following reciprocal obligations of the owners or possessors of works[44]

- To allow the author the access to his work in order to exercise the copyrights according to the law
- To provide to the author of the work the cost of material or to permit the author to make a copy before the work is destroyed

From the interpretation of these laws and considering the reason for which the resale right was regulated by the legislature, the following legal characteristics appear to define the resale right:

• The resale right is the projected link between the author and his work, the character of the resale right is that the created work bears the mark of its author's personality, way of thinking, emotions, concepts, their occupations that distinguish the people; so that they cannot be found in the

[42] See T. Bodoaşcă, *Intellectual property law*, Ed CH Beck, Bucharest, 2006, p.45.

[43] Amount due poster may not exceed 12,500 euros or the equivalent in lei and a percentage of revenue from resale as follows:
- From 300 - to 3000 Euro-5%;
- From 3000.01 - to 50,000 euros, 4%;
- From 50,000.01 - to 200,000 - Euro-3%;
- From 200. 000.01 - to 350,000 euro -1%;
- From 350,000, 01 - from 500,000 to 0.5%;
- Over 500,000 euros - 0.25%.

[44] Ioan Macovei, *op.cit.*, p. 454.

same form and structure in another person[45]. These arguments show that the relationship between the author and his work is not only during life but also after his death, fact that must be guaranteed and ensured through recognition of the resale right.

• Has a patrimonial character - apparent from the material benefit that the author gets from a work of art when it is resold at a later date, after first transfer by the author[46].

This character is also based on conduct prescribed for the owner of a work that wants to destroy it, which, as noted above, is required to make available to its author at a cost equivalent the material that makes up the support of the work, and only if the author does not want the work at this price, the owner is free to destroy the work.

The doctrine considers that the obligation of the owner who wants to destroy the work should belong both the author of the work and to the societies of authors, when the author either does not want or cannot afford to purchase the work at cost of the materials, because it is considered that it would maintain the national cultural fund, consisting of works of art, richer, more valuable and harder to damage than before.

• The resale right is inalienable - Law. 8/1996 in Article 21, paragraph 7 prohibits the alienation or waiving of this right, regardless of whether it is realized against money or with free title[47].

The purpose of this prohibition is to protect the author from any speculation and even from himself. Given that this feature is specific only to moral rights, not to the patrimonial ones, inalienability of the resale right is an exception to the rule.

• The resale right has a fruity character

The author of a work of art, both while it is in life and after his death, the holders of these rights during a period of time fixed by law, are entitled to reap the fruits (benefits), without to influence or degrade the substance of the work (for example, works of art that are exhibited in various exhibitions sale, where they obtain material benefits from exhibiting the work and from the eventual sale of the work).

• Also, the resale right and temporary

Copyright of literary, artistic or scientific work arises from the moment of creation, whatever the mode or form of expression. If the work is

[45] See Yolanda Eminescu, *op.cit.*, p. 169.
[46] See for more details Viorel Roș, D. Bogdan, O. Spineanu Matei, *op.cit.*,p. 483
[47] See Ligia Dănilă, *op.cit.*, p. 117.

created in a time, in part, series, books and any other forms of creative development, the patent will be calculated for each of these components[48].

The person who, after the termination of copyright, notifies the public, legally, for the first time, a work not published before, receives a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the date when it was first brought to public attention, legally.

The duration of economic rights of works made public legally under a pseudonym or without mentioning the author, is 70 years from the date of disclosure to the public. If the author's identity is made public before the expiry of 70 years or pseudonym adopted by the author leaves no doubt about the identity of the author, the provisions of Article 25 of the law, namely the resale right applies and lasts throughout the life of the author.

As a related right in terms of copyright, also the Romanian legislation, namely Article 25 of Law no. 8/1996, as amended by Law no. 285/2004, O.U.G.nr. 123/2005 and Law no. 329/2006 such a right last for the author's lifetime and for a period after the author's death, 70 years for his successors in title. If there are no heirs, the exercise of this right is mandated to the collective administration organization during the life of the author, or without, without a special mandate, to the collective body with the largest number of members.

Time limiting the exercise of this right[49] is justified by ensuring optimal civil circuit to the works of art and the recognition of property rights in all its powers, to those who legally purchase such works of art to a certain period from the first alienation of the work or from the author's death.

For the realization and exercise of this right, the seller is obliged to communicate the author's plastic resale information on the work, the price obtained and the location of the work within two months from the date of sale. Failure to appeal within seller's responsibility for damage caused by crime author and the payment of damages. The seller is obliged to withhold quotas percentage of the sale price or without adding other charges and payment of amounts due by the author.

The persons entitled to resale right may require amounts due from vendors within 3 years from the date of sale. The right to claim payment of

[48] See Violeta Slavu, *Objectives, content and duration of copyright* in the Romanian intellectual property, no. 4/2011

[49] Paul Buta, *Limitations in the exercise of copyright. Conditions involved in intellectual property* Romanian Journal, no. 2/2007.

money from the seller starts after two months from the sale and expires in 3 years since the birth of this right.

The three year term is part of the general limitation period and is within the rights of proprietor who, due to abstinence in the exercise of this right is deprived of legal and lawful to carry it out anymore.

Author of works of art, based on the resale right, is recognized also other special privileges. Thus, the owner or possessor of the artwork is obliged to allow access to the author of the work and to provide its intellectual creation, whether this is required for the exercise of copyright. But, the author of the work is held to exercise this legal right without prejudice to the legitimate interests of the owner or possessor of his intellectual work. To defend their interests, the possessor or owner may request certain guarantees sufficient for security work, perpetrator, insurance to equate the market value of the original work.

Another obligation which belongs to the owner of the work is that it does not destroy the work before making an offer to its creator, the cost price of the materials from which this work is done. However, if the return of the work would not be possible due to the nature of the works or other objective factors, the owner is obliged to allow the author to make a copy.

From the analysis of this specific right of works of art, but also from the purpose for which it was governed, one can notice that this right is inalienable, that this right cannot be renounced or alienated. In this sense the author is protected from any form of speculative acts against his work.

The nature of this right allowed the legislature to recognize its holder to exercise the privileges of that right not only throughout his life, but, also to transfer it.

In the final part of my approach I wish to highlight some aspects of international regulation of resale right.

Thus, for the further internationalization process of the Community market for modern and contemporary art, caused by the effects of the new economy and given that few countries outside the European Union recognize the right of resale, the European Parliament and the EU Council point out that it is necessary the harmonization of the laws on the resale right.

The resale right is currently provided for in national legislation of most EU Member States. Such laws, regulations, while providing resale right, shows some differences, particularly in respect of works covered, their

beneficiaries, the rate applied, the transactions subject to payment of the resale right.

Whether or not such right has a significant impact on the competitive environment within the internal market, as far as whether or not the payment obligation arising from the resale right is an element which must be taken into account by each person wants to sell a work of art. Therefore, this law is a contributor to distortion of competition.

4. Conclusions

After analyzing the rights that arise for creators of works of art[50] several conclusions can be drawn.

A first conclusion is that after an author's own intellectual creation acquires a series of specific rights that enshrines the indissoluble connection of personality and work performed.

Legal nature of the rights[51] resulting from creation of works of intellectual property is a specific complex containing interpenetration of the purely personal rights with the financial ones.

These rights can be exploited either directly or through third parties, but the use and exploitation of these rights is the manifestation of the will of the creator of the work.

Another conclusion is that a number of rights, whether personal or patrimonial that they are inalienable and cannot be subject to assignment or waived by the author. This protection finds its purpose in the scope for which the legislature has regulated the intellectual property, namely: protection of the work, its author and the interests of society.

The link between heritage and moral side of copyright content is another conclusion that emerged from this study. Moral rights cannot be analyzed separately from economic rights and vice versa.

The economic side of the exploitation of the works of art has more features. For starters must be noted that these works cannot be exploited by any means recognized by law and that due to the nature of the work. They cannot be exploited by broadcasting and cable retransmission.

Also these works give rise to a right regulated by the Romanian legislature just for this class of work: the resale right.

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[50] Igor Chirosca, *Works of art- movable or immovable assets*, Romanian Journal of Intellectual Property, no. 4/2011.

[51] Gheorghe Gheorghiu, Cosmin Cernat, *Intellectual property law, university course*, Legal Universe Publishing, Bucharest, 2009.

This right, which in turn has a complex content, where are found both sides: personal and patrimonial, is a protectionist right that comes to protect the interests of creators of works and to guard against various speculations until they have acquired notoriety.

In conclusion, we can say that the legislation achieves, by the resale right, the balance between the actual value of the work and the benefit that its author deserves, the resale right therefore appears as a legal situation of unpredictability.

Undoubtedly, the theoretical analysis of art authors' rights wanted to highlight the specific characteristics of this form of intellectual property, the specific rights of the creators of these works as well as how they can be exercised.

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THE RULE ON EUROPEAN LAW, COMPONENT INTEGRATED WITHIN NATIONAL LEGAL ORDER

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ABSTRACT

The rule of EU law must be examined in relation to the new legal system in Romania, due to the accession of our country to European Union on January 1, 2007. The accession prompted the reassessment of all national legislation in the light of EU requirements, requirements expressed in EU-developed numerous legal acts for the achievements of its fundamental objectives.

KEYWORDS: *norm, community legal order, culture of law.*

As a member of this international community, Romania, in addition to the obligation to acquire these objectives, should also harmonize its legislation with EU legislative assembly, continually perfecting its legal instruments of achieving work programs it engaged to.[1]

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[1] George Antoniu, „*Criminal Legislative Activity of the European Union*", Revista de drept penal, No. 1, Bucharest, 2007, p. 9.

The doctrine[2] assumes by *the concept of legal order* a complex of legal institutions and situations created by implementing rule of law provisions in social relations.

Community legal order means "an organized and structured set of legal rules, having its own sources, featured with organs and procedures apt to deliver, interpret so that it can find and sanction, if necessary, violations to such rules".[3]

Romanian positive law must take into account the existence of complementarities between state legal order, Community legal order and international legal order, a functional triad with preeminence from the Community and international legal order, towards the state legal order.[4]

The first legal rules of Community law arose as a result of the sovereign will of the Member States, which, through classical international treaties, agreed to give up some of their sovereignty and submit to the decisions of supranational bodies. Subsequently, these supranational bodies created in turn rules of Community law applicable to the whole community space. New states which joined the first six have signed accession classical international treaties to an international organization, from that moment entering the action area of secondary Community law, the "Community acquis".[5]

The three Institutive Treaties and Modifying Treaties form the *original Community law*, while the term "*secondary Community law*" means Community legislation (regulations, decisions and directives), adopted under the Community Treaties. More broadly, *unwritten rules* applicable to community relations, the *case law* of European Court of Justice, and the *principles of law* common to the Member States may also fall in the EU law.

Characteristics of European legal rules are:

- are rules of positive law, are part of the internal order of the Member States and are of immediate applicability;
- have the ability to create, by themselves, rights and obligations for individuals and businesses;

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[2] Romul Petru Vonica, *General Introduction to Law*, Lumina Lex Publishing House, Bucharest, 2000, p. 201. Legal order can be characterized by different criteria, eg *by field* - criminal legal order or civil legal order, *by territory* - national or international legal order.

[3] See Guy Isaac, Droit communitaire général, Paris, Masson, 1983, p. 111; Jean-Victor Louis, L'ordre juridique communitaire (6-ème edition), Bruxelles, 1993, p.13.

[4] Emil Gheorghe Moroianu, *The Concept of Legal Order*, Romanian Law Studies, nr. 1-2, 2008, Bucharest, pp. 33-42.

[5] D. C. Dragos, *European Union. Institutions. Mechanisms*, 2nd edition, All Beck Publishing House, Bucharest, 2005, p. 98.

- take precedence over national rules.[6]

Legal order of the European Union as a whole consists in two categories of legal rules:

- legal rules of fundamental law value, constitutional (institutive and modifying treaties);
- legal rules of ordinary laws value, developed by institutions in their activity.

We can distinguish between *institutional Community legal rules* applicable to the organization and functioning of the Community institutions and *rules of substantive law* applicable to certain areas such as free movement of persons, commercial competition, etc..

EU law is "a private legal order, integrated into the legal system of the Member States"[7], as the Court stated in its judgment given on July 15, 1964 in Costa v. ENEL case. Therefore, *the concept of Community legal order is double positioned in relation to that of national legal order*:

- *direct integration* [8] into national legal order of the Member States of the European Communities; Community rules are "directly applicable", no confirmation being required or any constitutional, administrative or procedural action being taken by the national authorities[9]; some rules require further action on their implementation to produce legal effects (directive).[10]
- *priority applicability* of Community law in the national legal order of the Member States in relation to their national law.[11]

[6] G. Mihai, G. Motica, *Op. cit*., p.44; Radu Stancu, *Legal Rule*, PhD Thesis, Legal Research Institute, Romanian Academy, Bucharest, p. 184 (published paper – Tempus Publishing House, Bucharest, 2002).

[7] C-6/64, Court of Justice Decision of July 15, 1964, in Recueil de jurisprudence, 1964, I-114.

[8] C-224/97, Decision of European Communities Court of Justice of April 29, 1999, in Case *Ciola*, in Recueil de jurisprudence, 1999, p. I-2517.

[9] W. Cairns, *Introduction to European Union Law*, Universal Dalsi Publishing House, 2001, pp. 114-115.

[10] Emil Moroianu, Adrian Cornescu, *Monism and Dualism (II), in „Law and Society"*, no. 2/2003 („Constantin Brâncuşi" University, Faculty of Legal Science and Administration, Târgu-Jiu).

[11] Sofia Popescu, *General Theory of Law*, Lumina Lex Publishing House, Bucharest, 2000, p. 179; Augustin Fuerea, *European Community Law*. *General Part*, ALL Beck Publishing House, Bucharest, 2003, p. 44-45.

Action of rules is primary and uniform, meaning that, a rule of national law can not be, under any circumstances or justification invoked before national courts against or over the content of Community law when they are in conflict.

Priority of Community rule is necessary, both in competition with the rules of national law in force at the date of issue of Community law and with those that will be adopted in the future, provided that it regulates concurrent legal relations. [12] Accordingly:

- by posterior national laws or regulatory acts the Community legal provisions can not be amended or repealed, any such laws are void and unenforceable;
- posterior Community rules may change or make the national legal rules inapplicable, administration and national judges will provide necessary correlation and will let national rules contrary to Community law as inapplicable, if appropriate, without waiting for the intervention of the national legislature to repeal them.

The Community regulatory acts take precedence in their entirety over the Member States legal acts, regardless of hierarchical position and nature thereof. Practice of the Court of Justice finds that not even the national constitutional provisions can stop the application of Community law, such a position being "contrary to Community public order."[13].

It was held that the act of a state not to remove from its legislation a provision contrary to Community law constitutes an infringement of Community obligations. Action for failure to fulfil the obligations does not lead though to invalidation of inconsistent national legal rules, but only to impelling the state to take measures that are necessary to end that situation.

Elements of conflict between EU rule of law and legal rules of the Member States shall not be removed except through "*harmonization of legislation*".

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[12] C-94/77, Decision of European Communities Court of Justice of January 31, 1978, in Case Zerbona, in Recueil de jurisprudence 1978, p. 00099; I. P. Filipescu, A. Fuerea, *European Community Institutional Law*, Edition V, Actami Publishing House, Bucharest, 2000, p. 52.

[13] Octavian Manolache, *Community Law*, Edition IV, All Beck Publishing House, Bucharest, 2003, p. 67; I.P. Filipescu, A. Fuerea, *cited works*, pp. 55-58; Felician Cotea, *European Community Law*, Wolters Kluwer Publishing House, Bucharest, 2009, pp. 424-425; Decision of European Communities Court of Justice of July 15, 1964, in *Flaminio Costa v. Enel* case, in Recueil de jurisprudence 1964, p. 1141.

The major concern of Member States is "to promote Community legal order", by harmonization of the legal systems rules of the member countries with the EU legal system.[14].

Aiming at highlighting some aspects on harmonization of national legislation with EU law of particular interest to the general theory of law and legal sociology [15], significant examples have been given. Of these, we start with the specifications made by the author Romul Petru Vonica when characterizing how to integrate Community law in the law of Member States, namely that harmonization requires *measures of organization of national provisions* that make national rules compatible to Community rules and objectives, that the legislative power belongs to national authorities, but in relation to Community objectives, it must adopt rules with a certain level of homogeneity within the Member States.[16].

In considering the subject of this paper, we also note that in one of the first dictionaries of Community terms published in the country,[17] ***legislative harmonization*** is characterized as *a process by which the laws of Member States and those who wish to join the European Union align the rules of Community law.*

We also join the opinion of the French author, André Jean Arnaud[18] that a number of challenges of European integration in the field of law are determined by weaknesses of the **"legal transplantation" theory**. The theory argues that the rule of law can be transplanted in certain circumstances and without much inconvenience, from one legal system to another, in the advantage of the loan beneficiary, the only condition being that of the autonomy of legal orders between which the transplantation is operated. In fact, as the author stresses, for a successful graft other conditions are necessary which the successful action of unification or harmonization depends upon. For the graft to be successful, legal systems

[14] Dumitru Mazilu, *Harmonization of Legislation,* in *Treatise of General Theory of Law*, Lumina Lex Publishing House, Bucharest, 2009, pp. 480-481.

[15] See in detail, Sofia Popescu, *Some reflections on the harmonization of national legislation with EU law*, communication at the International Symposium on "Contributions of justice and public administration to reduce the effects of the economic crisis on sustainable development, 26 to 28 June 2009, Brasov.

[16] Romul Petru Vonica, *cited works*, pp. 330 - 331.

[17] Ion Jinga and Andrei Popescu, *European Integration. Dictionary of Community Terms*, Lumina Lex Publishing House, 2000, p. 50. Apud Sofia Popescu, *cited works* note 97.

[18] André-Jean Arnaud, *Pour une pensé juridique européenne*, Paris, Presses Universitairés de France, Ed. I, 1991, pp. 240 – 241. Apud Sofia Popescu, *cited works*, note 97.

between which this operation takes place they also must comply with the characteristics of postmodern law of the XXI century.

To describe the process that led to the formation of the European Community and, later, with the adoption and implementation of the Maastricht agreement of the European Union, the term ***European integration*** is usually used, as I said.

Andrei Marga[19] uses a somewhat more radical term, that of ***European unification***. The author makes the following arguments in favor of adopting the term European unification.

The term "*European integration*" covers better what has happened so far in Western Europe: a coupling of economies and institutions, from judicial ones, passing through educational ones, to the cultural, so that European Community operate under as many issues as possible, as a whole.

The term integration has significance close to that of common language, meaning the settlement of a *growing interdependence between EU countries* that, gradually, they become *parts of a whole*.

Integration has this connotation that comes from experience of obtaining wholes by functionally linking various parts into a more comprehensive whole. These parts are connected by functional criteria.

But, the same author explicitly says, European integration was conceived and promoted by actors on Western European stage, after signing the Treaty of Rome, in its meaning of "*the creation and maintenance of intense and diversified patterns of interaction among previously autonomous units. These patterns may be partly economic in character; partly social, partly political: definitions of political integration all imply accompanying high levels of economic and social integration*".

Integration theories recently make the distinction between *formal integration* and *informal integration*, in the European process undertaken with the Treaty of Rome. By ***formal integration*** they understand changes in legal and other regulations in the mutual compatibilization and ensuring effective functioning of the community. ***Informal integration*** covers in turn products and system communication production and market exchange dynamics.

The term *European integration* has been legitimately applied so far to designate the community process. In fact, more than an addition of West European countries has been achieved, into a more comprehensive whole, but less than an European unification. So far integration was preponderant

[19] http://idd.euro.ubbcluj.ro/cursuri/Andrei Marga

economic. In many economic, social, political and cultural ways, these countries remain differentiated.

The author preferred, however, the term European unification for multiple reasons.

1) The first is related to the fact that *the purpose stated in the Treaty of Rome*, transcends economic integration and integration in general, being the political purpose "*to establish the foundations of an ever closer union among the European peoples, as to substitute for age-old rivalries the merging of their essential interests; community, the basis for a broader and deeper community among peoples long divided by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforward shared"*. The conceptual framework of the European process should be approached from the perspective of its final goal.

2) The second argument refers to the fact that European integration term was sufficient to address the European Community articulation process, but it no longer complies with the process started with Maastricht agreement of European Union articulation.

We are, says the author, not only through announced projects, but also through what has been achieved so far, towards *European unification*.

Evolution is in order to *strengthen and enhance uniform standards* in *all areas*, without underestimating rules that are maintained at national level and sometimes even local level.[20]. Maastricht Treaty leads European integration firmly towards respect for national peculiarities.[21]

Fundamental characteristics of the EU legal order are:

a) is an *autonomous legal order*, nature affirmed both by Court of Justice and the national jurisdictions. This autonomy has many aspects:

- autonomy of Community law sources;
- autonomy of judicial settlement of disputes, with the assistance of Court of Justice and the Court of First Instance;
- autonomy of Community rules.

b) is an *integrated legal order* within national law of the Member States, nature affirmed by the Court of Justice and recognized by all national jurisdictions through constitutional provisions.

Its specificity is reflected in the following rules:

[20] D. Mazilu, *works cited*, p. 95.
[21] Sofia Popescu, *works cited*, p. 79.

- national authorities, including national courts are bound to apply the rules of Community law whenever legal relations deducted to judgment are subject to them, even though the subjects belong to the same state; the application must be identical in space and time;[22];
- Community law topics are Member States but also individuals.

Member States are put in a position of not being able to change the Community provisions which they are addressed to, they are binding.

Individuals are entitled to invoke anytime in the national legal order, the Community law, as per conditions stipulated by Community rules. Currently, same issue of law is subject to pluralism of legal orders.

We recognize a *vertical* direct applicability (invocation of Community provisions unto state and its bodies) and *horizontal* applicability (between individuals).

The conclusion is that the *Community legal order involves super-ordination relations in regard to the institutional system of the Member States*. The specificity element compared with international law, may be drawn from the objective pursued, which is to integrate in a set of rules that come and "govern" over national ones. That involves ceding some segments of the attributes of sovereignty a State has to the benefit of interests that go beyond the boundaries we were fit in with, becoming those of a community of nations and supranational institutions.[23]

The fundamental objective pursued is to build a Europe of nations, achieving common objectives and goals: protecting traditional values of European culture and civilization, contributing to the enrichment of universal culture and civilization, economic development of member countries and ensuring a rising standard of living for all EU nationals.[24]

International legal order, similar with the community one, arises also from the conclusion of treaties between states, but the relations it generates with national legal order are cooperation and collaboration, and not subordination, without prejudice to the sovereignty of states.

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[22] Felician Cotea, *European Community Law,* Wolters Kluwer Publishing House, Bucharest, 2009, pp. 411-413.

[23] C-28/67, Decision of European Communities Court of Justice of April 3, 1968, in *Molkerei Zentrale Westfalen Lippe v. Hauptzollamt Paderborn* case, in Recueil de jurisprudence 1968, p. 211, C-48/71, Decision of European Communities Court of Justice of July 13, 1972, in *Commission v. Italy* case, Recueil de jurisprudence, 1972, p. 529; F. Cotea, *cited works*, p. 412.

[24] Dumitru Mazilu, *Relationship between Community law and national law l*, Romanian Law Studies, no. 1-2, Bucharest, 2004, pp. 89-90.

International legal order does not create supranational institutions, treaty being its main source of law.

European integration process is not proceeding smoothly. German sociologist of law, Volkmar Gessner[25] points out that there is significant evidence demonstrating confrontation between different European legal cultures, for example, in terms of state activity level of legality, frequency of illegal behavior of civil servants, the extent of knowledge of the law by population , preference for judicial or non-judicial disputes settlement, judges' ideological position etc.

Legal normative work carried out within the EU is a typical example of unification and restructuring *ex auctoritas,* of tension between globalism and localism.[26]

Legal acculturation process in the context of European integration is analyzed by French jurist, Jean Carbonnier [27], on the harmonization of national legislation with EU law, the graft that occurs between national law and Community law system. The main effect is acceptance or rejection by the local legal system of "*graft*" which is the foreign legal system.

A possible drawback that can occur is a degeneration of transplanted element, as it loses original features.

If the introduction of new foreign legal regulations is limited to a change in the text, without being accompanied by implementation effectiveness, success is theoretical and has no value to society. In case of acculturation failure, transplanted legal rules and institutions will be ignored and will remain unable to influence the everyday actions of individuals.

Beyond any shortcomings or difficulties, any eventual super-regulations, EU membership is, under the side slip of state of law, for recipients of legal norms, a guarantee of compliance with the law.

Community legal order, guaranteed by the existence of *judicial review* ensures compliance with the rules by all participants in the community legal relations.[28] *European culture* contains a *culture of effective*

[25] Volkmar Gessner, *L'interazione juridice globale a la culture giuridice,* in „Sociologia del diritto", 1993, nr. 1. Apud Sofia Popescu, *Comparative socio-legal research. European integration and legal reform in Romania*, Romanian Law Studies, no. 1-2, January-June, Bucharest, 2004, pp. 67-82.

[26] Sofia Popescu, *cited works*, p. 77.

[27] Jean Carbonnier, *Sociologie juridique*, Presses Universitaires de France, Paris, 1978, pp. 235-244.

[28] Dumitru Mazilu, *Relationship between Community law and national law*, Romanian Law Studies, no. 1-2, Bucharest, 2004, pp. 89-90.

management, supported by a *culture of law* characterized by personalism, legalism and formalism.

Decision on social relations are subject to the rules of law whose drafting and promoting come to the state; cases are discussed, based on general and, in a sense, abstract rules that jointly make up the formal organization of law.[29]

You belong to European culture, believes Andrei Marga [30], when culture of law promotes the individual as subject and purpose of law, sovereignty and generality of law.

The laws themselves are the fruit of human labor in the public sphere of their lives. Inside it the state and various institutions which are self-sustaining in a greater or lower level, are established.

Integration or unification, let us hope that the European process is unlikely to remain the expression of a wish that contradicts reality step by step.

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[29] See Franz Wieacker, „*Europäische Rechtskultur*", in Franz König und Karl Rahner (Hrsg.), p. 145.

[30] http://idd.euro.ubbcluj.ro/cursuri/Andrei Marga

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PRINCIPLE OF NON-RETROACTIVITY OF CRIMINAL LAW ACCORDING TO ARTICLE 7 OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

BOGDAN VÎRJAN*

ABSTRACT

The Convention for the protection of human rights and fundamental freedoms lays down a number of civil and political rights and freedoms and sets up a system of guarantee and compliance by the signatory states of the undertaken commitments. Being adopted under the aegis of the European Council, the Convention proved to be an effective method to protect the rights regulated by it, as well as by its supplementary protocols.

The effectiveness of the Convention provisions results both from the number and the quality of the human rights it protects and mainly from the judicial mechanism whereby the control of the observance of such rights by the national authorities of the contracting states is ensured. This paper analyses the principle of non-retroactivity of criminal law, regulated by article 7 paragraph 1 second sentence of the European convention, under which "nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed", as well as the supporting clause of the second paragraph of the same article, under which "this article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations". Furthermore, this paper covers the manner in which these Convention texts are transposed into the laws of the European states, but particularly the meaning given to the principle of non-retroactivity of criminal law and to the exception to this principle in the case-law of the European Court of Human Rights.

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KEYWORDS: *non-retroactivity of criminal law ,European convention, European court, European case-law*

I. Preliminary information

I.1. Brief considerations on article 7 of the Convention for the protection of human rights and fundamental freedoms

Article 7 of the Convention for the protection of human rights and fundamental freedoms lays down two fundamental principles: the principle of *nullum crimen, nulla poena sine lege*, and the principle of non-retroactivity of criminal law. The Convention provides for a single exception to these two principles, specifically when the trial and punishment of any acts which, at the time when they were committed, independently of national laws applicable then, were ”criminal” according to the general principles of law recognized by civilized nations.

The provisions of article 7 have an ”absolute nature”, being part of what the doctrine qualifies to be ”tough content” (noyaux dur) of the regulations of the international treaties in the area of human rights, in the sense that the signatory states cannot derogate from the provisions thereof.[1]

This paper also demonstrates that the provisions of article 7 of the Convention are unanimously accepted as being part of the cornerstone of the European legal civilization, having long been included in the legislation of all European states, as well as in international criminal treaties, which account for the much reduced number of Court judgments in this respect. The fact that the principle of nullum crimen, nulla poena sine lege, and the corollary thereof, the principle of non-retroactivity of criminal law, is part of the tough core of the fundamental rights, being a sine qua non condition of the existence of a democratic society, is confirmed by the fact that article 7 is one of the Convention texts from which no derogation is allowed. Not even the supporting clause laid down in article 15 of the Convention covers the potential infringements of these two principles.

We shall hereinafter refer only to article 7 paragraph 1 second sentence of the Convention. According to the said article, if one or more criminal laws were in force between the moment when a criminal offence

[1] Corneliu Bârsan, *European convention of human rights: comments on articles, vol. I,* C.H. Beck Publishing House, Bucharest, 2007, page 573

was committed and the time a final judgment was adopted, the more favourable law would apply.[2]

Article 7 paragraph 2 of the Convention refers to those facts which, although at the time when they were committed they were not criminal under the domestic law in force, are still contrary to the general principles of law recognized by civilized nations or violate the human rights, practically regulating an exception to the principle of non-retroactivity of criminal law.

I.2. Legal nature of the Convention for the protection of human rights and fundamental freedoms in the legal order of the contracting states

The Convention for the protection of human rights and fundamental freedoms in the legal systems of the contracting states are perceived in a different manner, although the provisions thereof have direct applicability.

Thus, there are contracting states such as Austria where the provisions of the Convention are ranked as constitutional norms. In other states, such as France, Spain or Portugal, the Convention norms have a legal nature superior to the domestic laws, but inferior to constitutional norms.[3] For a federal state such as Germany, the fundamental law confers upon the Convention the status of federal law, inferior to the Constitution, but superior to the norms of the federation's member states. Moreover, there are states such as Italy or Lichtenstein where the Convention has the status of a common law.

As for the domestic legal order in our country, the general principle which must be taken into account is that the provisions of the Convention have constitutional force and transcend the legislation. Furthermore, the constitutional provisions on citizen rights and freedoms must be construed in accordance with the international conventions Romania is part of. In case of inconsistency, the international regulations shall prevail, save for the case when the Constitution or the domestic laws contain more favourable provisions. Therefore, the European Convention is integrated into the domestic legal system, being part of the constitutional norms. In case of conflict between the provisions of the Convention and the provisions of any

[2] Ovidiu Predescu, *European Convention of Human Rights and Romanian Criminal Law*, Lumina Lex Publishing House, Bucharest, 2006, page 134

[3] Corneliu-Liviu Popescu, *International protection of human rights – sources, institutions, procedures*, All Beck Publishing House, Bucharest, 2000, page 264

domestic laws on human rights regulated by the Convention, the provisions of the Convention shall prevail. If the domestic norms contain provisions protected by the Convention which are more favourable than the Convention provisions or the manner in which they are interpreted by the European Court, the domestic norms shall apply.

II. Principle of non-retroactivity of criminal law

II.1. Scope

This principle is laid down in article 7 paragraph 1 second sentence, which states that: "**Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed**."

Under this law, a person cannot be punished in virtue of a law which, by hypothesis, he or she could not be aware of. The retroactivity of the law knows two forms which must be taken into account by the European Court: on the one hand, the retroactivity of the law in a broad manner, namely of the legal norm, which is also called direct retroactivity, and, on the other hand, the retroactivity of the interpretation of the legal norm by the court, which is also called indirect retroactivity[4].

The case-law of the European Court quite sparsely faced the retroactivity of the criminal law issue.

An interesting case in which the Court applied the provisions of article 7 paragraph 1 second sentence was **the case of Veeber v. Estonia**.[5] In this case, the applicant invoked the fact that he had been convicted pursuant to a law which came into force on 13 January 1995 for having committed tax offences between 1993-1994. The Court had to examine if, pursuant to article 1 paragraph 1 of the Convention, at the moment when they were committed, the deeds imputed to the applicant constituted offences defined with sufficient accessibility and predictability by the domestic laws.

Thus, the European court held that, under the Estonian criminal law, the tax offence had been considered a criminal offence before 13 January 1995 as well, when a new law on tax evasion came into force. The new law

[4] S. Van Drooghenbroek, *Interpretation jurisprudentielle*, page 470

[5] European Court of Human Rights, Judgment of 21 January 2003 adopted in the case of Veeber v. Estonia, Recueil 2003-I,33

maintained the requirement for a previous administrative penalty, but added a condition concerning intent. The two conditions were alternative, not cumulative, thus making a person criminally liable if one of the conditions was satisfied.

In what regards the applicant, the domestic courts ruled his conviction for the deeds committed before the entry into force of the new law, considering that, although he had not been administratively convicted for prior similar deeds, he intentionally committed the offence for which he had been charged for. The domestic laws considered that the deeds committed under the provisions of the old law, but convicted according to the provisions of the new law, are to be seen together with the ones committed under the new law, in a continuing offence for an activity which extended until 1996.

The Court observed that, by definition a "continuing offence" is a type of crime committed over a period of time.[6] The applicant was charged with and convicted of the intentional, continuous and large-scale concealment of taxable amounts and of submitting false information to the tax authorities on the companies' expenditure over a period of time. While the starting-point of the applicant's activity pre-dated the entry into effect of the provision under which he was convicted, the domestic courts considered the activity resulting in a "persisting criminal state", which continued after the critical date. The European Court observed that, according to the old law, a person could be held criminally liable for tax evasion "only if an administrative penalty had been imposed on him or her for a similar offence". This single condition until the introduction of the second – intent – by the new law, constituted an element of the tax evasion offence, without which the deed did not constitute a criminal offence. Or, the Court held that a number of criminal deeds for which the applicant had been convicted had been committed under the old law, and others under the new one, all being taken into consideration when fixing the sentence for the applicant. Under these circumstances, the Court found that the domestic courts had retrospectively applied the new law for deeds which, before its entry into effect, had not been considered offences, violating thus article 7 paragraph 1 of the Convention.[7]

[6] CEDH, 27 February 2001, Ecer and Zeyrek v Turkey, Recueil 2001-II, 33

[7] Please see in this respect Judgment of 10 February 2004 adopted in the case of Puhk v Estonia, summarized in E.C.H.R. – Collection of judgments 2004, Radu Chiriţă, C.H. Beck Publishing House, Bucharest, 2007

We note that the judgments of the European court in what regards the non-retroactivity of criminal law can also be found in the criminal legislation and doctrine of Romania. Thus, the principle of non-retroactivity of criminal law is laid down in article 15 paragraph 2 of the Romanian Constitution, which sets forth that the law rules only for the future, save for a more favourable criminal law.

If we were to compare the provisions of the Convention and the ones of the Romanian Constitution, we will find that the exception regarding the enforcement of the more favourable criminal law is more clearly laid down in the Romanian Constitution unlike the Convention, where there is no express provision in this respect.

Nevertheless, although not expressly laid down in the Convention, the interdiction to retrospectively apply the criminal law concerns not the more favourable law, since it favours the defendant.[8] Consequently, although the law does not institute the right to retroactively apply the more favourable new law in what concerns the sentence provided for the deed at trial, the European court admits the exception to the non-retroactivity *in mitius*. In this respect, we refer to the case of *G v France*,[9] in which the convicted G notified the European Commission, claiming that he had been erroneously convicted for indecent assault as well, despite the fact that, under a subsequent law, he was exculpated for the deed committed. The Court noted that the deeds which the applicant was accused of were also incriminated by the new criminal law. Under the law in effect at the time when the deed was committed, the applicant might have received a more severe sentence. Instead of a more severe solution for the applicant, taking into consideration the principle of application of the more favourable criminal law both in what regards the incrimination, and the suppression of criminal deeds, the domestic jurisdictions applied the provisions of the new law, favourable to the person facing criminal charges. The retroactive application thereof was made in favour of the applicant, which means that the provisions of article 7 paragraph 1 of the Convention had not been infringed.

Likewise, in another case, the court found that, at the time the deeds were committed, the applicant might have received a four month sentence of

[8] S. Van Drooghenbroek, work cited, page 468

[9] European Court of Human Rights, Judgment of 27 September 1995 adopted in the case of G v France, published in Series A, volume no. 325-B, 26

”coercion” for the deed imputed to him and applied a two year sentence, laid down by the new criminal law. Under these circumstances, the Court found that the provisions of article 7 paragraph 1 of the Convention had been violated, even though the reason was the need to roughen the measures that must be taken within the fight against drug trafficking.

On the other hand, the European court admitted, however, the waiver of the principle of non-retroactivity of criminal law when it accepted the retroactive application of an English case-law with regard to the punishment for rape against the applicant's wife, on the ground that the waiver of the unacceptable idea according to which a husband cannot be charged with the rape against his wife is in compliance not only with a civilized notion of marriage, but especially with the fundamental objectives of the Convention, the core of which is rendered by the respect for human dignity and freedom. Thus, in the case of S.W. v England, the applicant complained to the European Commission that the English courts had applied more severe criminal provisions with retroactive effect when he had been convicted of rape against his wife.[10] The Strasbourg Court ruled that the existence of a new interpretation of the English courts, less favourable to the defendant, unlike the interpretation existing when the deed was committed, does not constitute a violation of article 7 of the Convention. The same solution was given by the European Court in the case of C.R. v United Kingdom, by Judgment of 12 November 1995.[11]

An interesting case in which the European court faced the issue of criminal law's retroactivity was **the case of Achour v France** in which the applicant was sentenced to prison, noting the state of recidivism. The court took into consideration a previous conviction executed in 1986. According to the Criminal code in force before 1994, the state of recidivism was conditioned by the commission of the second offence within 5 years as from the execution of the conviction for the first offence. The 1994 Criminal code extended this term to 10 years. The court considered that, by its first conviction, the applicant also suffered the consequence of the fact that the liability for a subsequent offence committed within 5 years from the execution of the punishment will be aggravated. The subsequent increase of this term to 10 years represents an aggravation of the liability for the first deed, on the basis of a retroactive law. Moreover, if the applicant had committed the second offence in 1992, he would not have been recidivist, being illogical that an institution punishing the persistence in crime is

[10] Ovidiu Predescu, Op.cit., p. 143.
[11] Vincent Berger, *Case-law of European Court of Human Rights*, IRDO, 2001, p. 328-330.

applicable, should the deed have been committed three years later. For the aforesaid considerations, the Court considered that article 7 of the Convention had been infringed.[12]

The Great Chamber of the Court reversed the judgment adopted in 2004, showing that the states are free to establish their criminal policy and to bring amendments to the applicable legislation. In this context, the Court showed that as from the 19th century the Court of Cassation of France has been having a constant case-law, in the sense that when a new law modifies the conditions of existence of recidivism, it is immediately applicable, if the new offence is committed after the entry into effect of the law which sets forth new conditions of existence of recidivism. Consequently, the applicant could predict that the commission of a new offence until the expiry of ten years as from the execution of the prior sentence might result in the noting of the state of recidivism. Therefore, the Great Chamber considered that the new law was predictable to the applicant and we are not in the presence of a retroactive application of the criminal law, actually being a mere immediate application of the new law.[13]

As for the first judgment adopted by the Court, we consider that this is arguable from another point of view as well. Thus, it should not be forgotten that the institution of recidivism becomes applicable only from the moment the second offence is committed. Consequently, the application therefore was predictable for the defendant upon the commission of the second offence, under the conditions in which the interdiction of retroactivity is motivated by the lack of predictability of the effects of the new law.

II.2. Supporting clause in article 7 paragraph 2

Article 7 paragraph 2 of the European Convention provides for that "**This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by**

[12] Radu Chiriţă, *European Court of Human Rights – Collection of judgments 2004*, C.H. Beck Publishing House, Bucharest, 2007, page 155.
[13] Radu Chiriţă, *European Court of Human Rights – Collection of judgments 2006*, C.H. Beck Publishing House, Bucharest, 2007, page 294.

civilised nations." This text represents derogation from the principle of non-retroactivity of criminal law.

It was asserted that by introducing this text the individuals who drafted the Convention wished that the Nuremberg trial cannot be called into question and, thereby, the legality of its judgments, taking into account that this court ignored the principle of legality, punishing deeds not incriminated by the German laws in force at the time such deeds were committed.

The Court also applied the provisions of article 7 paragraph 2 to the disputes before the Criminal Tribunal for the former Yugoslavia, which can only confirm the conjunctural nature of the clause contained therein.

Likewise, this legal text has been recently applied by the European Court in terms of deeds committed by communist leaders from the former Russian Soviet Federative Socialist Republis (SFSR). Thus, in **the case Kolk and Kislyiy v Estonia**, the applicants were convicted of crimes against humanity. The Tribunal considered that the applicants had, in 1949, participated in the deportation of the civil population from the Republic of Estonia to concentration camps within the Soviet Union. The applicants lodged appeals alleging that, under the Criminal Code of the SFSR in force at the time of the commission of the offence, there was no punishment of crimes against humanity. The Court upheld the judgment, on the ground that crimes against humanity were punishable, irrespective of the time of the commission of the offence. The deportation of the civil population was expressly recognised as a crime against humanity in the Charter of the Nuremberg Tribunal in 1945. Although the Nuremberg Tribunal was established for trying the crimes committed during the Second World War by the European Axis countries, the universal validity of the principles concerning crimes against humanity was subsequently confirmed by resolution 95 of the United Nations General Assembly in 1946. Article 7 paragraph 2 of the Convention is also applicable for crimes against humanity, in respect of which the rule that they cannot be time-barred was laid down by the 1945 Charter of the Nuremberg International Tribunal. The Court noted that even if the acts committed by the applicants could have been regarded as lawful under the Soviet law at the material time, they were nevertheless found to constitute crimes against humanity under international law.

Fortunately, save for cases similar to the abovementioned ones, the case-law of the European Court in this area is insignificant and erratic. In this respect, I make reference to the case of Touvier v France in which the applicant, convicted by the French courts for abetting in commission of

crimes against humanity, invoked the violation of the provisions of article 7 of the Convention, since he had been convicted on the basis of a law which stated retrospectively that crimes against humanity cannot be time-barred, and, on the other hand, the applicant considered that he had been convicted for deeds constituting common law crimes, not crimes against humanity.

The former Commission found in the said case that the imprescriptibility of crimes against humanity was laid down by the Charter of the Nuremberg International Tribunal, annex to the agreement between the allied dated 8 August 1945, which the French law expressly refers to. The former Commission also showed that the purpose of the provisions of article 7 paragraph 2 is to demonstrate that article 7 does not affect the laws adopted to suppress war crimes and deeds of betrayal and collaboration with the enemy. In the case, the applicant was convicted for commission of crimes against humanity, not for commission of common law crimes. ‘

III. Conclusions

At present, the principle of non-retroactivity of criminal law is laid down not only in the European convention for the protection of human rights and fundamental liberties, but also in other international acts: the Universal declaration of human rights (article 11 paragraph 2) and the International covenant on civil and political rights (article 15 pt. 1). Moreover, article 15 pt. 2 of the International covenant on civil and political rights takes over the provision laid down in article 7 paragraph 2 with regard to the possibility to punish the deeds which, at the time when they were committed, were “criminal according to the general principles of law recognised by the community of nations”.

Likewise, the Romanian criminal law lays down the principle of non-retroactivity of criminal law in article 11 of the Criminal code, which provides for that “criminal law does not apply to deeds which, at the time they were committed, were not criminal offences”. In addition, the Romanian criminal law expressly lays down the principle of application of more favourable criminal law, both in terms of the moment the offence was committed (article 13 paragraph 1 of the Criminal code), and in terms of execution of punishment (article 14 and 15 of the Criminal code).

In practice, the protection mechanism instituted by the European convention made an individual directly a subject of public international law,

being a party to legal proceedings equal with the defendant state.[14] The regulation of the principle of non-retroactivity of criminal law within the European convention for human rights intended and mostly achieved a uniform application and, especially, the control of the application of this principle at the level of the European states.

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[14] Corneliu Bârsan, *Op. cit.*, p. 72-73.

THE PRINCIPLE OF AUTONOMY OF WILL AND THE FREEDOM OF CONTRACT

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ABSTRACT

Basis and nature of the role will are still debated.

Free trade has suffered along with the development of economic activities. Commercial activity is characterized by dynamism and complexity. Practice often led to the creation of new legal structures that satisfy its requirements.

In commercial autonomy will have the full manifestation land unnamed contracts which may subsequently become due to coding called.

Although the theory of personal autonomy could impose an absolute contractual liberality this has not happened and that he brought limitations at all times.

KEYWORDS: *autonomy of the will, the principle of free competition*

Introduction

Principles of the EC Treaty provides that Member States of the European Community will adopt an economic policy based on "close coordination of Member States' economic policies domestically and on the definition of common objectives, and conducted in accordance with the principle of an open market economy in which competition is free "[1].

Consequently, the policy of free economic competition protection, as guarantor formation, maintenance and development of an open market economy is one of the foundations of the European community.

The first part of the paper emphasizes the paradox of freedom anywhere standardized under the name and doctrine of the Carnatic bestowed and therefore no evidence, but is regarded as self-evident, because

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[1] ART 4 of the European Community Treaty – Consolidated version

indirectly devoted to civil codes with a stretch material which supports the entire contract .

A freedom assuming, as implied by the provisions codificatiilor, multiple powers: the ability to contract or not a contractor to do with their choice, to negotiate and establish the free content of the contract, and to execute exactly as established.

Powers whose classic philosophical foundation of individual freedom of action as a matter of sovereign creator of law, as was imagined political liberalism theory, the individual participant free economic exchanges contractual nature, as was imagined by economic liberalism, and whose right to be bound by the legal relations of this type is given by the power état, but its quality remains inherent in human beings, the state is forced to recognize and guarantee it.

Public policy of freedom of contract and the relative contractual.

Freedom of contract is a relative freedom which, according to legal regulations, sees limited exercise mainly for reasons related to the protection of public order and morality.

We can speak as a public policy that imposes contractual limitations regarding the possibility of termination of certain contracts and by some people, with the aim of ensuring protection of social values (public order protection).

To themselves as "public order and contract lead a parallel existence, both find their reason to be in the autonomy of the will, a limiting one, the other pulling and source of it. But even when the contract will be detached from autonomy, continue to control public order contract"[2].

Public policy defense seeks essential institutions of society against violations that may be brought by contractors, translating to the prohibitions imposed by the mandatory rules[3].

Thus we have to do as what was called public order protection consists of all the imperative rules adopted by the legislature to protect a significant part in a situation of weakness in a contractual relationship[4].

It is about ensuring the protection of contractors "are in a position of inferiority exercise their will so can not guarantee contractual justice"[5]", in

[2] Ph. Malaurie, L'ordre public et le contrat, Ed. Matot-Braine, Paris, 1953, p.19 în Pascal Lokiec, op.cit, p.58

[3] J. Flour, J-L Aubert, Les obligations, Ed. Armand Colin, 6e éd, Paris, 1994, p.203.

[4] J. Mestre, L'ordre public dans les relations économiques, în L'ordre public á la fin du XX éme siécle, dir. T. Revet, 1996, p.34

this sense," to correct this imbalance, the law requires or prohibits certain provisions on that the strongest might contractor without authorization law, to deny or to impose, where appropriate "[6].

Basically, public order protection objective aims to restore balance "strong-weak", this, in relation to contractual freedom, translating to the imperative for the legislature to regulate the content of certain contracts such as insurance contract that meets a constant worry protection of the insured or beneficiary insurance because of lower state of this part in relation to the insurer, the lease contract scenarios of the "weakness" of the tenant vis-a-vis the economic power of the lessor, the contract of employment, which imperative to protect one of the parties, employee-employer, relative to other-he is almost inherent, contract consumption, to prevent and limit the consequences of abuse of power by professionals towards mere consumer.

Morals, public order and freedom of contract

In terms of the legal consequences of this concept that limits contractual freedom, the notion of "morals" seems to encompass two types of rules: the social mores regarding proper (natural skills resulting from constant practice by persons and collectivities, relative to what is good or bad), and the social aspects of public morality (all moral precepts accepted by a certain type society as essential rules of coexistence and social behavior). Need finding a single generic concepts to designate both types of rules that come to life the concept of "morals" determined to use the legal doctrine called "rules of social coexistence" or "social rules[7] of conduct concerning public order"[8].

This should be specified position jurisprudence decided that "if, contrary to the rules of social life, a contractor took advantage of the ignorance or the state constraint was another, to obtain performance benefits disproportionate to that received a, convention, will not be considered valid because it was based on an immoral cause. [9]"

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[5] S. Legac-Pech, La proportionnalité en droit privé des contracts, Ed. L.G.D.J, Paris, 2000, p.30.

[6] J. Flour, J-L Aubert, Les obligations, Ed. Armand Colin, 9e éd, Paris, 2000, p.119

[7] A. Ionaşcu, Drept civil.Partea generală, Ed. Didactică şi Pedagogică, Bucureşti, 1963, p.208-210; C. Stătescu, C. Bârsan, Tratat de drept civil.Teoria generală a obligaţiilor, Ed. Academiei, Bucureşti, 1981, p.34.

[8] Ioan Albu, op.cit., p.35

[9] Tribunalul Suprem, secţia civilă, dec. nr.73/1969

Principle of free competition

A specific application of the principle of autonomy of will in commercial matters is the principle of free competition. Free competition principle as enshrined in Art. 135 of the Constitution, lies in the ability of each company to choose and use the funds as it deems best for maintaining and enhancing customer.

We can say that this principle is freedom conferred economic agents to use freely the means and methods of winning and keeping customers[10], such as promotional, advertising, quality, reputation, and price.

Some authors define this attitude to economic agents have used the notion of competitive behavior[11].

Competition is the underlying mechanism of the market economy, involving supply (producers, traders) and demand (intermediate customers, consumers). Manufacturers offer goods or services on the market, in an effort to meet the requirements, to meet a buyer's demands as much as possible, both in terms of quality, diversity, adaptability, and price products that they require. to

become effective competition on the premise (and protect assumption) that the market consists of more independent bidders.

All participants in the market is subject to each of them a competitive pressure. To make the bidders able to exert such pressure on the market, competition regulations require prohibiting any agreements or practices that could effectively reduce this pressure, finally quantified by ensuring consumer interests at both national and European level.

The principles discussed are related to the existence of one without the other is indissoluble, both are based on 'liberty'. They should not be seen clearly, is often limited in scope, or even eliminated. Some limitations to the principle of free competition are[12]:

1. regulating access to certain economic activities

2. maintain the economic equilibrium conditions of enterprises, there are regulations that directly affect economic and external trade balance, credit, etc..

[10] R. Houin, M. Pedamon, Droit commercial. Acte de commerce et commerciants. Activite commerciale et concurrence, Dalloz, Paris, 1980, p. 379

[11] C. Barsan, A. Ticlea, V. Dobrinoiu, M. Toma, Societatile comerciale, Casa de Editura si Presa ,,Sansa" SRL, Bucuresti, 1993, p. 198

[12] M. de Juglart, B. Ippolito, Traite de droit commercial, Ed. Montchrestien, Paris, 1988, p. 668

3. legislature by introducing discriminatory conditions in favor of certain undertakings such as tax benefits, rescheduling the payment of taxes etc.

4. dirigisme and economic protectionism, disguised in accordance with the principle of free competition, such as standardization and commercial urbanism[13];

5. conventions of restriction of competition.

In recent years emphasis was placed increasingly greater competition policy because the normal functioning of markets depends largely on the competition and fighting crime in this area has become a common concern and has experienced an upward regulation [14]".

Firms daily sign agreements: these agreements are illegal?

There are certain types[15] of agreements particularly harmful to competition and as a result, they are almost always prohibited.

As cartels and some secret understanding whereby competitors agree to set prices, limit production or to divide markets or customers between them. Agreements[16] (manifestations of will) between a manufacturer and its distributors can also be prohibited, especially if they are established by the sale price.

Not all agreements that restrict competition are illegal. Allowed those agreements which have more positive effects than negative. It is true that agreements may restrict competition between rival companies, but they can be, on the other hand needed to improve products or services, to create new products or find new ways, better to make these products available to consumers .

Other types of agreements that may restrict competition are those between suppliers and retailers. For example, distribution agreements for luxury perfumes retail stores impose certain restrictions on decorations or staff training.

Labor market

At the moment the competition is allowed only about the distribution of labor.

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[13] I. Dogaru, Drept civil roman. Idei producatoare de efecte juridice, Ed. All Beck, Bucuresti, 2002, p. 836

[14] O. Pop, Infractiunea de concurenta neoiala, Ed. Mirton, Timisoara , 2002 p. 14

[15] Moşteanu, Tatiana- „Concurenţa. Abordări teoretice şi practice'', Editura Economică, Bucureşti, 2000, pag,293;

[16] A. Fuerea, Drept comunitar al afacerilor, Editia a II a, Ed. Universul Juridic, Bucuresti 2006

As we have seen, the competition comes and steals from areas such as labor protection, social security, minimum wage, etc. The duration of leave.

Merchant-servant relationship

Servant is person, employer or for Trade or the place where they exercise, or in another place. "Commercial servant is forbidden any act of competition with the employer or. Is prohibited both direct competition committed by himself and by the indirect participation in such acts by third parties.

Persons employed under a labor contract can not commit acts of competition against the employer, as stated in Article 4, paragraph 1 of Law no. 11/1991 which prohibits, offering exclusive services of an employee to a competitor or merchant acceptance of such an offer. "

Commercial areas Convention stolen Competition

There are some situations in which the parties themselves limit the autonomy of the will, by convention consenting to refrain from doing acts competition partner. This is materialized by inserting clauses to force the partner to quit the competition, at least for a while. These clauses are allowed only to the extent not contrary to the principle of freedom of trade.

In practice meet clause prohibiting competition[17] in the following situations:

- In the field of labor relations,
- Rent a commercial space
- Exclusive concession for the distribution of goods.

Is accepted as consistent with the principle of free competition clause whereby the lessor undertakes not to rent a space then near the same destination. Freedom of the will of the lessor is so limited even with his consent.

If exclusive concession for distribution of goods, both the supplier and distributor (if desired) undertake the first in the area to not deliver the product to other firms, and the second to not only supply the provider. And this is an example of the autonomy of the will of the parties is limited by treaty.

A non-competition clause to be valid must meet the following conditions:

- The existence of a legitimate interest of her beneficiary
- Clause should not seriously damage the freedom of the will of the party who assumes.

[17] O. Capatana, Dreptul concurentei comerciale, Ed. Lumina Lex, Bucuresti, 1992

Non-competition clauses goal is to maintain a fair competition without abuses. The beneficiary this clause has the right to survive in the market. If there is no clause clientele disappears. We believe that there is a legitimate interest of the beneficiary them: winning and keeping customers, survival.

Criteria by which to make the gravity with which the party will be restricted undertakes are temporal and territorial order. The clause requires that the application have limited time, the perpetual being illegal.

In France, the validity of such clauses was limited to 10 years. Also consider that duty should concern a limited territory.

Interpretation competition clauses is given real intention of the parties. Through extensive reading, it was decided that the contract of sale clause be implied existence of competition.

In conclusion, the parties have the opportunity to narrow a field of commercial activity. Failure to attract assumed contractual responsibility, unlike the facts of unfair competition[18] sanctioned by law, drawing or tort liability or on the criminal.

Conclusions

We tried in this study, to increase the need of maintaining the principle of autonomy of will and the freedom of contract in discussion as constantly research topics for lawyers, hoping all personal and fanciful, a more consistent reception of contractual freedom in the legal culture of the Romanian law system, but also in the French legal system, the distances between those current systems in the field of contractual freedom, proved impossible to remove its convergence in the same area as were imposed in a traditional area of legal freedom which have shape and strengthened civil codes and modern constitutions.

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[18] Y. Eminescu, Concurenta neleala, Ed. Lumina Lex, Bucuresti, 1995

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ASPECTS OF THE LEGAL IMPLICATIONS OF BIOTECHNOLOGY IN THE CONTEXT OF ENVIRONMENTAL LIABILITY

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ABSTRACT
A clear and effective legal protection in biotechnology is essential, both for economic development in Europe and for scientific and technical research. Social and legal reality requires to take into account the development potential of biotechnology on the environment and, especially, the usefulness of this technology for the development of cultivation methods cleaner and more economical in terms of how to exploit the land. The development of biotechnology is important for developing countries, both in health and combating major epidemics and endemic diseases and in that of combating hunger in the world, and the implementation of biotechnological inventions have not only imposed limitations of inventions, but also specific legal protection.

KEYWORDS
biotechnology, environment, legal protection, liability, public health

1. GENERAL ISSUES REGARDING BIOTECHNOLOGY

Biotechnology is a field of research, which, through the fact that it has created innovative techniques in different and most diverse other fields of research, it also raises and has risen various social, economic and legal issues.

With the amazing development of science and technology, in the matter of biotechnology, issues regarding the question of "how biotechnology is affecting fundamental human rights?" have risen.

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Fundamental human rights require, as expected, limitations regarding biotechnology research and innovations that can transform them into reality.

F.Fukuyama[1] stated that "the most significant threat posed by contemporary biotechnology is the potentiality to change human nature".

The uncertainty of the laws engages with public anxieties about social danger posed in legal, ethical and anthropological terms by Biotechnology. More or less obvious is the fear of a possible biotech apocalypse. The law is called upon to decide between maximum permeability and rigorous limitation of scientific research and biotechnology applications. Biotechnology should be subject to regulation where the key to success should be a scientifically organized and rationally managed system, which should ensure a fair assessment of risks and institute rigorous security and control procedures[2].

2. LEGAL IMPLICATIONS REGARDING BIOTECHNOLOGY

Currently, regarding the regulation of legal implications, limitations and influences of biotechnology in the context of protection of fundamental human rights there is a legal framework instated by the European Convention for Human Rights and Dignity towards the applications of biotechnology and medicine and the Convention regarding human rights and biomedicine, ratified by the Romanian Parliament by Law no. 7 of 22.02.2001.

This Convention assumes that scientific research and biotechnology should be used properly for the benefit of present and future generations, tending towards an international cooperation with the purpose to ensure the benefits of biotechnology and medicine for the entire population of the world, but emphasizing the need to respect human beings and their right to dignity.

The main ideas arising from the above mentioned legal text are:

- Human interest and care must prevail over sole interest of society or science (2nd art.)
- Any intervention in the health field, including research, must be in compliance with professional standards and obligations. (4th art.)

[1] Francis Fukuyama , *Viitorul nostru postuman*, Humanitas Publishing House, Bucharest, 2004, p. 19

[2] Costica Voicu, Dreptul şi Biotehnologia, http://fs.legaladviser.ro/643bc446935353d14e236c7e017f13ff.pdf

- An attempt designed to modify the human genome may only be pursued out of preventive, diagnostic or therapeutic purposes, and only if its' main purpose is not that of introducing a change in the genome of progeny. (13th art.)
- Medically assisted procreation technology use is not permitted for choosing a future child's sex but only to avoid a serious hereditary sex-related disease. (14th art.)
- Research upon human beings are not to be carried out unless the following conditions are met:
  - There is no alternative method to human being research with comparable efficacy.
  - The risks taken by the person are not disproportionate to the potential benefits of the research
  - The research project was approved by the court after having been subject to independent examination of its scientific relevance, including and assessment of the importance of the research and also and multidisciplinary examination of the level of its ethical acceptability.
  - The person upon whom is being carried the research has been informed of his rights and the guarantees provided by law for their protection.
  - The consent referred to in the 5th art. was given expressly, specifically and has been recorded in writing. Such consent may be withdrawn at any time, freely.

- When research on embryos IN VITRO is allowed by law, it shall ensure adequate protection of the embryo.
- It is not allowed to create human embryos for research purposes[3].

Starting from the principle that the above mentioned Convention according to which the human body and its parts shall not be sources of pecuniary gains, springs one of the forms of civil liability which occurs in this area, translated by the rule which supposes that the person who has suffered undue harm from a medical intervention, is entitled to fair compensation according to the conditions and procedures prescribed by law.

[3] *http://fs.legaladviser.ro/643bc446935353d14e236c7e017f13ff.pdf*

Legal regulations of various aspects of biotechnology are not uniform throughout European legal systems, even if the mentioned European Convention establishes some general principles and rules to be followed by the European countries.

Thus, for example, there is still no coherent, unified stand on the status of the embryo. In some countries (Hungary, Poland, Norway, Ireland, Switzerland, Italy) embryo research is prohibited. In Germany and Austria it is forbidden to use the embryo for purposes other than its implantation in a MAP (Medical Procedure Assisted fertilization). Other countries, such as Spain, Sweden and Finland allow research on supernumerary embryos. England authorizes the use of supernumerary embryos for precise purposes of research and diagnosis of genetic diseases. France has criminal sanctions for reproductive cloning.

Scientists consider the embryos to be an exceptional research material, embryo cells allowing the healing of neurological or genetic diseases[4].

However, in most democratic countries, legal regulations exist on abortion, in vitro fertilizations, diagnosis before implantation, sex selection, research on STEM cells, cloning for reproductive and research purposes, and germline engineering.

Both agricultural biotechnology (genetically modified organisms) and human biotechnology are areas where the power of the legislature should materialize in strict regulations. "If Biotechnology proves to be beyond the control power of any individual country, then it should be internationally controlled. We must begin even now to think concretely how to build institutions that can distinguish between good and bad uses of biotechnology, which can efficiently implement these rules, both nationally and internationally"[5].

A perfect unification of European law, not to mention international one, presents serious difficulties as the problems that arise in biotechnology research techniques cause controversy of ethical, legal, social – according to political systems – cultural and religions of different countries, manner.

For example, the Romanian legal system, although in a previous version of the draft Criminal Code, established a special chapter of special crimes and felonies against the human genotype, inspired by modern European codes which contained regulations in this area, as the Spanish Code, but subsequently such legislation has been abandoned.

[4] *idem*
[5] Francis Fukuyama , *op. cit.*, p. 22.

C.E. Recommendation No. 934/1982 states that freedom of scientific research (fundamental value of human society and a condition of adaptability to changes occurring in the world) determines duties and responsibilities, especially with regard to public health, safety and freedom of the lifestyle; Paragraph 7 recommends to the Committee of Ministers to express recognition in the European Convention of Human Rights, the right to a genetic heritage, which has not undergone any handling, except resulting from the application of certain principles recognized as fully compatible with human rights, for example in the application of biotechnology for therapy, stating that the rights to life and dignity guaranteed by the ECHR includes the right to inherit features that have not undergone any genetic modification and the importance of maintaining genetic diversity of human beings[6].

The development of biotechnology is important for developing countries, both in health and combating major epidemics and endemic diseases and in that of combating hunger in the world, and the implementation of biotechnological inventions have not only imposed limitations of inventions, but also specific legal protection.

For these reasons and many others involving the need to encourage, but at the same time protect and limit the effects of different techniques involved in biotechnology, the European Parliament and Council has adopted on 6 July 1998 the Directive 98/44/EC on the legal protection of biotechnological inventions, which defines the patent in terms of biotechnology inventions, the scope of the patent concept and the need that the Member States adopt coherent legislation in line with the European Act.

EC Treaty contains no specific provision applicable to biotechnology. Article 157, however, provides a legal basis in the EU industrial policy. EU may take a number of actions in the various sectorial and horizontal policies at the international level of the EU and Member States and at a local level, such as competition rules (Articles 81-89) and the mandate of 30 May 1980 authorizing the Commission to submit proposals in industrial policy (Article 308), trade policy and the completion of the internal market (Article 95).

Biotechnology industry sector is increasingly important for the EU because of its economic, social and environmental potential. For this

[6] Alexandra Huidu, *Reproducerea umană medical asistată-etica incriminării versus etica biologică*, Lumen, Iaşi, 2010, p. 336-337.

purpose, it is crucial that EU countries cooperate, because the challenges and needs of the sector remains significant.

Scientific and technological developments in life sciences and biotechnology continues at a steady pace.

The Commission proposed a strategy for Europe and an action plan in the statement "Life Sciences and Biotechnology" [COM (2002) 27 final], which focuses on three main issues:

- Life sciences and biotechnology offer opportunities to meet the significant global needs regarding health, aging, nutrition, environment and sustainable development;

- Broad public support is essential, and societal consequences and ethical concerns must be taken into account;

- Scientific and technological revolution is a global reality, which creates new opportunities and challenges for all countries.

The main premise that constitutes the basis of the Commission Communication to the Council, the European Parliament, the European Economic and Social Committee also the Committee of Regions on the interim evaluation of the Strategy on Life Sciences and Biotechnology {SEC (2007) 441} is that "biotechnology is a means important to promote growth, employment and competitiveness in the EU ".

In terms of liability for environmental and life protection regarding agricultural and animal biotechnology, the basic principle, reflected in the international legislation is the Precautionary Principle.

As said[7], this is a principle of anticipation: damage did not occurred, and the event's occurrence is not undeniably demonstrated or demonstrable. The risk is uncertain, its realization is only possible or plausible. This is an early preventive action in the context of uncertainty about risk, difficult to define, but still has a positive effect in law.

The only serious regulation invoking the precautionary principle refers to human and environmental risk assessment of hazardous substances[8] and especially those related to biotechnology, as privileged field of application of this principle.

Thus, the use of genetically modified micro-organisms requires that those who are concerned to assess health and environmental risks of their work, even if they are not known[9].

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[7] Constantin Teleaga, *Principiul precauţiei şi viitorul răspunderii civile*, in Revista de Dreptul Mediului 1(3)-2004, p.33.

[8] Directive 93/67 CEE from 20. 07. 93.

[9] Constantin Teleaga, *op. cit.*, p. 33.

Since genetically modified organisms may give rise to new types of damage that can be currently unknown, but where there is a high probability of occurring, states have looked different into the eco-economic issues and legal impact of biotechnology involved.

The main concern is in regard to public health, as consumption of products derived from genetically modified plants or animals can have consequences undiscovered by science and which may have an unknown impact and long-term health effects.

Precautionary Principle was found by some of the countries as a solution to encourage in some limits the agricultural and animal biotechnology, in response to a legal reality in which science and technology have gained very strong momentum, being ultimately an expression of liability based on uncertainty.

The basic idea is that because no one can predict the future and the new risks arising from unrestrained development of science and technology "there should be a remedy of law to punish those who do not adopt appropriate behavior of this new existential situation."[10]

For full compatibility of national legislation with the EU, Romania has adopted Emergency Ordinance no. 43 of 23 May 2007 on the deliberate release into the environment and placing on the market of genetically modified organisms, prohibiting through art. 3, 4 ff., according to the Precautionary Principle, to avoid adverse effects on human health and the environment, the deliberate release into the environment of a genetically-modified organism, for research and development purposes or for any other purposes than placing on the market without authorization, issued by the competent authority in the strict conditions imposed by law, in case of failure applying the sanctions specified in the Law.

In Europe, New Zealand, and the United States, producers and users of agricultural biotechnology are subject to the usual rules of civil (legal) liability that apply to all persons and products. More specifically, if a producer or user of transgenic crops or animals causes damage to the property, person, or markets (economic interests) of another person, the producer or user may be liable for those damages[11].

[10] Denis Mazeaud: „*Responsabilité civile et précaution*“ in Responsabilité Civile et Assurances Nr. 6 bis/2001, p. 72

[11] Stuart Smyth et al., *Liabilities and Economics of Transgenic Crops*, 20 NAT. BIOTECH. 537 (2002).

We can identify different categories of damages: damage to property, person, markets, etc.

Property damage may occur most likely in two contexts – seed production and organic production. In both contexts, the source of the alleged damage will originate with pollen flow from the transgenic crop to non-transgenic crops. Organic producers may claim that transgenic pollen flow has damaged their organic production, rendering it no longer "organic." Seed producers may claim that transgenic pollen flow has damaged the purity of their seeds, rendering them no longer certifiable for specified purity as required by law. Even so, seed producers and organic producers may face significant difficulties in proving that the farmer growing transgenic crops caused damage.[12].

Persons who believe that their land or crops has been damaged by a neighbor's transgenic crops may bring a tort claim in strict liability – i.e. liability without fault and despite the exercise of utmost care – if the activity of growing transgenic crops is abnormally dangerous[13].

In the United States, The Restatement of the Law (Second) Torts sets forth the common law principles for strict liability in §§ 519-524 established that in determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes[14].

As regard to the damage of the person, persons claiming personal damage arising from transgenic crops might assert harm based on toxicity of the transgenic crop or its food product, an allergic response to these crops or their food products, or a claim that long-term exposure to transgenic crops or their foods caused ill-effects to

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[12] Drew L. Kershen, *Legal Liability Issues in Agricultural Biotechnology*, The National Agricultural Law Center , University of Arkansas School of Law, nov.2002, p.5

[13] Idem. Also see A. Bryan Enders, *"GMO:" Genetically Modified Organism or Gigantic Monetary Obligation? The Liability Schemes for GMO Damage in the United States and the European Union*, 22 LOY. L.A. INT'L & COM P. L. REV. 453, 488-91 (2000)

[14] Drew L. Kershen, *op. cit*., p. 8

health. In the United States, concerns about the health effects of transgenic crops and their food products explain why the Food and Drug Administration (FDA) and the Environmental Protection Agency (EPA) exercise regulatory control over transgenic crops[15].

The damage to economic interests refers to the damage filed against agricultural biotechnology companies by farmers who did not grow transgenic crops, saying that while their particular crops have suffered property damage through cross-pollination, their more significant damage claim is that the presence alone of the transgenic crops in the agricultural sector has affected market access and the market prices for their non-transgenic crops generally[16].

3. Conclusions

The research made in the field of biotechnology, even though is very important for various aspects of life, has to be protected by law, so that the possible damages could be prevented or the factual damages could be repaired.

That is why many states have found solutions regarding legal liability for the damages caused by GMO. Also, in many states was created a great jurisprudence on this matters, but Romania isn't really one of them. There are few cases that raised the question of civil liability regarding genetically modified organisms.

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[15] *Idem*
[16] *Idem*

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CONSTITUTIONAL REGIME FOR THE ENGAGEMENT OF GOVERNMENT'S LIABILITY ABUSE OF POWER IN THE PRACTICE OF ENACTMENT

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ABSTRACT

The procedure for engaging Government's liability is a topical issue, with profound legal and political implications that should be viewed with great interest in case the Constitution would be subjected to review.

This procedure shows, as it is now governed by Art. 114 of the Constitution, many legal loopholes which allow multiple interpretations and grants the Government an excess of power that can result in diminishing the role of the sole legislative authority Parliament of the country.

The procedure for engaging Government's liability for a bill without limiting the object of liability engagement and the period in which the Government may assume its responsibility, creates for the executive the possibility to substitute for Parliament in legislative activity.

We believe that, if Constitution would be subjected to review in relation to the institution regulated by art. 114 of the Fundamental Law, at least three objectives should be considered: regulatory directions which may be the subject of the engagement of Government's liability for a bill, the period in which it may assume its responsibility and possibility that Government accept the amendments as drawn by deputies and senators, especially amendments concerning the content of the bill and not necessarily drafting conditions.

KEYWORDS

procedure, Government, program, bill, Constitution, abuse of power, legislative authority.

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I. Constitutional regime for the engagement of Government's liability

In the constituent legislator's view, the engagement of Government's liability relates to a "a program, a general policy statement or a bill"-art 114, para. (1) of the Constitution.

The engagement of Government's liability is a complex parliamentary procedure that involves mixed relationships, as, given its content, it is an act of the Government that can cause the onset of parliamentary control over it and by its effect whether produces a legislative act or leads to Government's dismissal.[1]

The engagement of Government's liability before the Parliament is a consequence of the fact that Government's investiture is made by Parliament and the withdrawal of confidence granted may take place only through a symmetrical procedure.

Thus, by engaging its liability, the Government assumes the risk of being dismissed if, according to art. 114, para. (2) of the Constitution, a motion of censure, presented within three days after submission of the program, of the general policy statement or bill has been passed in accordance with art. 113 of the Constitution.

Unlike the motion provided by art. 113 of the Constitution, which is a motion emanated from the will of Parliament, the motion provided by art. 114 of the Constitution is a motion triggered by the Government in order to overcome an emergency situation, whether political or legislative.

The engagement of Government's liability may relate to a program, a general policy statement or a bill that will be presented to the two Houses of Parliament, convened in joint session.

In case a motion of censure will be presented, it must be submitted to the expiration of the three days period, provided by art. 114, para. (2), which is a limitation period by whose setting up the settlement of urgent problems subject to the engagement of Government's liability is aimed at.

Through the engagement of its liability, the Government places the Parliament before an alternative: either to keep it in office, forcing it to grant what it requested or not to grant it the requested in order to act, by assuming the accountability of its dismissal.[2]

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[1] A. Varga –*Engagement of Government's liability, a special parliamentary procedure for regulation and control in On Constitution and Constitutionalism*, Liber Amicorum John Muraru, Hamangiu Publishing House, Bucharest, 2006, pp. 221-234

[2] Dana Apostol Tofan in *Romanian Constitution, Comment on Articles*, coordinators Ioan Muraru, E. S. Tanasescu, C. H. Beck Publishing House, Bucharest, 2008, pp.1067-1080

The engagement of Government's liability is an attempt to withdraw the confidence granted by legislative power to an executive that has not met the political coordinates represented by the government program.

As Pierre Avril and Jean Gicquel evaluate, unlike states where public authorities independence is subject to strict separation regime, such as the U.S., in other countries modern parliamentary regime is characterized by mutual solidarity of the Government and the parliamentary majority.[3]

According to the same authors, putting under responsibility the relationship between the parliamentary majority and Government is inappropriate because it is based on the idea of guilt and punishment, borrowed from the civil law, without taking into account that in this circumstances we are in the presence of a political agreement by virtue of which loss of parliamentary confidence will lead to cabinet resignation.

By analyzing art. 114 of the Constitution, revised, we notice that the Government is not obliged to engage its responsibility, the initiative and initiative object is left to its discretion.

By using this procedure, the Government aims to verify in concrete the support it can count on in Parliament, because if no motion of censure is filed, its position is consolidating, increasing the legitimacy granted.

Government's dismissal appears to us as a sanction of public law, which materializes the political and legal responsibility that integrates into a particular form of liability in constitutional law.[4]

The engagement of responsibility is done by the Government as a collective and joint body, which requires the enactment of a Decision in this regard.

The engagement of liability does not imply the appanage of the Prime Minister but the chance or risk of the entire Government.[5]

The initiative of liability engagement comes to the entire governmental team, a situation that differs from that of French constitutional system where the Prime Minister, after deliberation by the Council of Ministers, engages Government's responsibility.

According to art. 49 of the Constitution of France, after deliberation by the Council of Ministers, the Prime Minister can engage its responsibility before the National Assembly for a program or a general policy statement.

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[3] Pierre Avril, Jean Gicquel – Droit constitutionnel et institutions politiques, Montchrestien, Paris 1996,p.221

[4] Elena Simina Tanasescu, in Romanian Constitution, Comment on Articles, coordinators Ioan Muraru, E.S. Tanasescu, C. H. Beck Publishing House, Bucharest, 2008, p. 1062

[5] Ioan Deleanu Institutions and Constitutional Procedures in Roman Law and Comparative Law, C. H. Beck Publishing House, Bucharest, 2006, p. 180

Also, the Prime Minister may engage the Government's liability before the National Assembly for passage of a bill on public finance or social security system financing. In this case the draft is considered adopted unless a motion of censure, filed within the next 24 hours, is passed by a majority of the National Assembly. In France the use of this procedure by the Government was considered to be exaggerated: Prime Minister can not engage the Government's liability for any bill. Consequently on July 28, 2008 a constitutional reform was approved to limit the prerogatives of Government's liability engagement only on bills relating to the state budget and social security budget and only once per parliamentary session. The report of the National Assembly Deputy, Jean-Luc-Warsmanse of May 15, 2008 on the constitutional bill, stated, among others: "such a procedure is not outrageous if it occurs after a wide debate, in which all opinions could be expressed freely. Abuse occurs only when parliamentary debate is suppressed."

According to M. Duverger there are two situations "to put into question" the problem of reliability held by the Government:

- those made by the Prime Minister after reading the program or general policy statement, in which case the National Assembly vote intervenes in the usual conditions of parliamentary procedure;
- those put on a text (draft, bill proposal), in this case the voting mechanism is complex. Once the reliability is questioned, the text is considered adopted if a censure motion is not filed within 24 hours, or if the motion filed is not adopted.

We find that, according to art. 49 of the French Constitution, the Government is politically responsible before the National Assembly. This parliamentarism is different from the classic – the means of interaction of Parliament and Government are not exactly balanced, the executive still gaining significant position in the legislature.

According to art. 50 of the Constitution of France, if the National Assembly adopts a motion of censure or rejects the program or general policy statement of the Government, the Prime Minister must submit his resignation to President of the Republic.

The engagement of Government's liability in the form established by the Romanian Constitution is found only in France. In other constitutional systems the Government's political liability can take various forms.

Assumptions of engaging Government's liability were grouped in the doctrine into two categories: engagement of Government's liability on a program or general policy statement and engagement of Government's liability on a bill.[6]

Program or general policy statement are included in the category of purely political acts and by engaging the accountability on these coordinates, the Government aims to strengthen confidence enjoyed in Parliament and to increase its legitimacy.

The engagement of Government's liability on a bill has been referred to in the doctrine as induced motion of censure,[7] as it is a simplified, indirect way to adopt a new law which aims to avoid the normal legislative procedure.

The procedure of engaging Government's liability for a bill is a simplified one, a legislative way to apply to in extremis, when the adoption of the bill by the usual procedure or emergency procedure is no longer possible. It is believed that the Government would turn to such a procedure in cases where it would be sure of parliamentary majority and would like to quickly promote a law which it considers essential for its program of government.[8]

If the Government wants to engage is liability for a bill, according to art. 114 of the Constitution, Standing Bureaus of the two Chambers will be notified, and they will set the agenda and schedule of future joint session in which the Government will undertake the responsibility. Presidents of both Chambers will convene deputies and senators in joint session, date and place of each joint session will be communicated to the Government by the President of the Chamber of Deputies, 24 hours before it takes place. In joint session, Prime Minister declares expressly he assumes responsibility on a bill, motivating why he chose this way for promoting the bill. The Prime Minister must also present the content of the new regulations, this presentation being no longer followed by debate. It is considered that starting with this period, the three days term to submit motion of censure starts to run.

If the motion of censure was not initiated or, although initiated, it is rejected, said bill is considered adopted.

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[6] Verginia Vedinas, *Administrative Law*, revised and updated edition VII, Universul Juridic Publishing House, Bucharest, 2012

[7] M. Constantinescu, Antonie Iorgovan in M. Constantinescu, I. Deleanu, A. Iorgovan, I. Muraru, F. Vasilescu, I. Vida, *Romanian Constitution, commented and annotated*, R. A. Publishing House "Official Gazette'', Bucharest, 1992, p. 253

[8] Dana Apostol Tofan- *Engagement of Government's Liability*, in R.D.P. no. 1/2003,p. 8

If the motion of censure has been accepted, the Government shall be dismissed and, consequently, the bill for which it engaged its responsibility, rejected.

By engaging its responsibility, the executive assumes full risk of governmental instability, it gets the role of dealing with a potential dismissal.

As a consequence, the procedure of engaging Government's liability on a bill is the one in which this particular form of liability in public law has direct legal consequences also, because it can be completed with the adoption of a legislative act or with executive dismissal.[9]

In terms of the engagement of Government's liability for a bill, this procedure is an accelerated system for passing laws, granting the Government discretionary power. Therefore, Government, whenever it is assured of a parliamentary majority, could use this procedure, dispossessing of content the constitutional provisions relating to regulation.

II. Abuse of power in the practice of enactment

The enactment of a bill by engaging Government's liability is not just a way of bypassing the legislative process rules, but an ultrafast way generated by exceptional circumstances, to adopt a law.

The motion provided by art. 114 of the Constitution, is a motion triggered by the Government because it wants to change its government program or adopting a bill without ordinary legislative procedure steps.

Such a bill can not propose to amend, repeal or supplement a number of acts, because, in this case the legislative emergency is determined by the absence of legal regulations in a given area of social life.

In the absence of a legislative framework in the field, in practice, the Government has violated not only the rules of the art. 114 of the Constitution regarding the adoption of the bill, but also those provided on the subject of regulation, namely its circumscribing to the analysis of a single matter, defined and imposed by extraordinary circumstances, assuming responsibility, repeatedly, on two bills or a package of such bills.

Therefore, the Government invested in April 1998 assumed responsibility on a bill regarding some measures to accelerate economic reform, later becoming Law no. 99/1999 regarding some measures to accelerate economic reform, which contained no less than six regulatory

[9] Elena Simina Tanasescu in *Romanian Constitution, comment on articles*, coordinators Ion Muraru, E.S. Tanasescu, C. H. Beck Publishing House, Bucharest, 2008, p. 1065

objects, and which amended and supplemented GEO no. 88/1997 regarding the privatization of companies. On February 4, 1998, the Constitutional Court was notified about the unconstitutionality of Law for approval of GEO no. 88/1997 regarding the privatization of companies, adopted within the engagement of the Government's liability on a bill. One of the authors' criticisms referred to "the inadmissibility of approving an Emergency Ordinance by engaging Government's liability". It was stated, in support of the objection, that the emergency ordinance is subject to the occurrence of the exceptional case and which can not consist in normal and customary regulations, but in the state of things which impugn the maximum emergency of adopting a measure and its execution and the conditioning of entry into force of such an ordinance for its prior submission to Parliament demonstrates the incumbency of Parliament's control over such exceptional measures taken by the Government. It was also noted that the Government has already taken responsibility with the adoption of the emergency ordinance, so there is no need for another assumption of responsibility, but rather the debate of the ordinance by the Parliament is required, in the normal legislative procedure. Rejecting the criticism, the Constitutional Court has, by its decision[10], thus retained that the bill on which the Government assumes responsibility may imply the approval of an emergency ordinance.

In March 2003 the Government of that time engaged its liability for a bill containing not less than 15 regulation items, becoming after promulgation and publication Law no. 161/2003 on measures to ensure transparency in exercising public dignities, public positions and in business environment, preventing and sanctioning corruption. The opposition initiated a motion of censure, which however fell to pass. On April 3, 2003 the opposition apprised the Constitutional Court, criticizing especially the procedure of engaging Government's liability on not less than fifteen laws, some of which had no connection with anti-corruption measures. The Constitutional Court rejected the objection made, keeping in mind that "the legislature may by law regulate a complex group of social relationships, in order to obtain a desirable result in the entire society."[11]

[10] Decision of the Constitutional Court no. 34/1998, Official Gazette of Romania, Part I, no. 88 of February 25, 1998

[11] Decision of the Constitutional Court no. 147/2003, Official Gazette of Romania, Part I no. 279 of April 29, 2003

Government invested in 2004 engaged its responsibility for the package of laws on reform in property and justice, becoming Law no. 247/2005 on reform in property and justice, and other related measures.

On September 15, 2009 the Government invested in the elections of 2008, assumed responsibility for bills with respect to national education, unitary remuneration and reorganization of public authorities and institutions. Motion of censure filed by opposition was rejected, and the laws were adopted. However their unitary application was not possible due to unconstitutionality verdict on Law of national education and lack of implementing rules for unitary remuneration law. The doctrine specifies that the solution that all these bills be adopted by the engagement of Government's liability is logically and legally unacceptable. For example, the law on the unitary wage system is a "long range" complex law and therefore should benefit from a parliamentary procedure that allows it to be analyzed in specialized commissions of the Chambers of Parliament, "transparency, real public debate and also realizing the rights of Parliament to make amendments."[12]

Taking into discussion the "complex laws" issue, could the Government assume responsibility for complex drafts that target multiple and distinct domains of social life? Could the Government, as executive authority, propose on this opportunity to amend or supplement the existing laws?

Interpreting the provisions of art. Article 114. para. (1) of the Constitution, the Government may assume responsibility on a bill wherefrom we might conclude that its accountability might not cover complex bills or supplementation of existing laws.

In doctrine it was assessed that by the word "bill", formulated in the singular, we should understand that there is no question of a package of laws, even if wearing a unique name.[13]

But in the absence of explicit regulations and as constituent legislator did not make a distinction, it is up to the Government to outline the size and content of the bill. [14]

[12] Verginia Vedinas, *Procedural Orgies*, Universul Juridic Publishing House, Bucharest, 2011, p. 85

[13] Dana Apostol Tofan in *Romanian Constitution, Comment on articles*, coordinators Ioan Muraru, E.S. Tanasescu, C. H. Beck Publishing House, Bucharest, 2008, p. 1075

[14] A. Iorgovan in M. Constantinescu, A. Iorgovan, Ioan Muraru, E. S. Tanasescu- *Constitution of Romania revised, comments and explanations*, pp. 218-219

Constitutional Court by Decision no. 298/2006 stated that the provisions of art. 114 of the Constitution do not establish conditions that a bill must meet regarding the structure and scope of the regulatory domain. Thus the Court, invoking its own case law states that a bill can be of a "complex" nature.

Although at first sight the possibility of engaging Government's liability is not subject to any conditions, the opportunity and content of the initiative remaining theoretical at the exclusive discretion of the Government, it can not be absolute, because the Government's exclusivity is opposable to Parliament, in its capacity of sole legislative authority.

By Decision no. 1431 of November 3, 2010, published in Official Gazette of Romania, Part I, no. 758 of November 12, 2010, the Constitutional Court established that the Government may not assume responsibility on a bill in its sole discretion, anytime and anywhere, because it would mean turning it into legislative public authority, in competition with Parliament regarding lawmaking powers.

Judges of the Constitutional Court determined that this procedure may be used when adopting the bill in the usual procedure or emergency procedure is no longer possible or when the political structure of Parliament does not allow the adoption of the bill.

In practice though, Government, often ignoring both the Constitutional Court decision and doctrine accounts, has continued to engage its responsibility for various situations, either for a bill that contained several regulatory items or for bill approving an emergency ordinance that already produces its legal effects or for a bill that was already in parliamentary debate, being adopted with amendments by the Chamber of Deputies and being in the Senate.

In November 1999 the Government has undertaken responsibility for the bill on the Status of Civil Servants, which became Law no. 188/1999, a project which is being debated in Parliament. Government withdrew the draft from parliamentary debates, engaging its responsibility to the initial version, which is the form in which it was promulgated and published in the Official Gazette.

In this case 51 deputies have apprised the Constitutional Court but by Decision no. 233/1999 the Constitutional Court dismissed the complaint because, discussing the term in which the law adopted under emergency procedure, related to engagement act of Government's liability could be challenged in the Constitutional Court, it found that the term had passed.

For the first time in December 2002, the procedure of engaging Government's liability was turned to for the adoption of a code, namely the

Labour Code, which became Law no. 53/2003. This time also the Constitutional Court, by Decision no. 24/2003 established the constitutionality of provisions with which it was invested.

In March 2003, the Government in service assumed responsibility for a bill containing more than 15 regulation items, which became after promulgation of the Law no. 161/2003 on measures to ensure transparency in exercising public dignities, public positions and in business environment, preventing and sanctioning corruption.

Opposition initiated a motion of censure which however fell to pass. The Constitutional Court was appraised, the procedure of engaging Government's liability on not less than 15 laws, some of which having no connection with anti-corruption measures, being criticized. It was also argued that the procedure for adopting the law violates the provisions of Art. 3 and 12 of Law no. 24/2000 on rules of legislative technique for drafting laws, because the law which is subject to appeal "draws together a total of 15 separate laws, gathered in an eclectic project".

But by Decision no. 147/2003, the Constitutional Court determines that such objection can not be accepted because "the legislature may by law regulate a complex group of social relationships, in order to obtain a desirable result in the entire society."

Subsequently, the procedure of engaging Government's liability was used for the Law no. 247/2005 on the reform in property and justice, and in 2006 for the Law no. 95/2006 on healthcare reform.

On September 15, 2009 the Government has undertaken responsibility for Bills with regard to national education, minimum wage and reorganization of public authorities and institutions.

About the engagement of Government's liability on National Education Law which at that moment was in debate in the Senate, the Constitutional Court was appraised. By Decision no. 1431 of November 3, 2010, published in Official Gazette, Part I, no. 758 of November 12, 2010, the Constitutional Court declared unconstitutionality because, as said in the motivation, that bill was being debated in the Senate, in its capacity of deciding Chamber.

In this case the urgency condition does not subsist, whereas measures provided in the draft take effect in 2011-2012.

But the Government filed an appeal to the Constitutional Court on November 15, 2010 to postpone censure motion debate on the accountability regarding the Education Law.

In the session of November 23, 2010, the Constitutional Court found, contradicting its earlier decision, that the procedure of engaging the responsibility and related motion of censure should be continued even if the engagement of Government's liability, under art. 114 of the Constitution, is unconstitutional because it gave rise to a conflict of a constitutional nature between Parliament and Government. The opposition refused to debate the motion, considering that the first decision of the Court obviated the procedure. Under these circumstances, on December 14, 2010, as part of signatories of motion of censure retreated their support signature, President of the Chamber of Deputies informed the parliamentarians that Education Law was passed tacitly, against inexistence of censure of motion. Although the opposition has filed a new complaint with the Constitutional Court, Court decision of January 4, 2011 ruled that the law was passed legally, which became Law no. 1/2011 on national education.

In late 2011, the Government uses the procedure for engaging its liability for two bills adopted in the meeting of December 15, 2011, respectively the Bill amending and supplementing Law no. 303/2004 on the Statute of Judges and Prosecutors, and amending and supplementing Art. 29 para. 1 letter. b) of Law 304/2004 on judicial organization and the Bill on the organization and conduct of elections for local public administration authorities and elections for the Chamber of Deputies and the Senate in 2012, and amending and supplementing Law no. 67/2004 for the election of local public administration authorities, the Local Public Administration Law no. 215/2011 and Law no. 393/2004 on the Statute of local elected officials. As against the first draft no complaint of unconstitutionality has been filed, it was adopted and became Law no. 300/2011. On the second draft the objection of unconstitutionality advanced by a total of 144 deputies was banished, complaint allowed by the Constitutional Court by Decision no. 51/2012.[15]

By excessively using the procedure of engaging Government's liability, Parliament turns "from forum of enactment to forum of ratification or forum of acknowledgement of government fulfilled."

Constitution of Romania adopted in 1991 has inserted therein two institutions that gave the executive the opportunity to acquire exorbitant powers in legislating sphere, namely legislative delegation (Article 115) and engagement of Government's liability (art. 114).

Amid the absence of explicit regulations on the nature of the bill for which the Government may assume responsibility, we consider necessary

[15] Decision no. 51/2012, Official Gazette of Romania, Part I, no. 90 of February 3, 2012

the revision of Art. 114 of the Basic Law and the amendment of existing legislation, namely Law no. 90/2001 on the organization and functioning of the Romanian Government and ministries to establish unequivocally the possibility of engaging Government's responsibility for a bill that contains a single object of regulation, not to be in debate in Parliament, not to refer to the amendment of a code and not to regard the approval of an ordinance.

Regarding the possibility provided for by art. Article 114 para. (3), to intervene with amendments in the actual content of the bill, although initially claimed that the Government may accept any modifications thereof, in state practice, the law text remained always that promoted by the Government.[16]

Thus, taking as an example the Law no. 247/2005 on the reform of property and justice, 370 amendments have been proposed, of which 70 were accepted.

In terms of Law no. 95/2006 on healthcare reform, 434 amendments have been proposed of which 86 were accepted by the Government. And the examples may continue.

Given the constitutional status of Parliament as sole legislative authority of the country and representative body of the people and relationships that are established between Parliament and Government, regulated by art. 111 and 112 of the Constitution, articles establishing parliamentary control over Government activities, we believe that amendments made should be accepted by the executive.

It was sustained though that acceptance of amendments remains at the discretion of the Government, as a privilege derived from the risk assumed by engaging political liability.[17]

The fact that, as long as the amendments are rejected, the bill will be adopted in its original form, desired by the Government, becomes unequivocally, so in that context changes introduced by the reviewing law are devoid of content, they can be seen as "ingenious artifice" which partially reconsiders the ordinary, common or "traditional" items of the mechanism of engaging Government's political accountability. [18] We are in the presence "of the only case in the current constitutional regime, where a

[16] Dana Apostol Tofan in Romanian Constitution, Comment on articles, Coordinators Ioan Muraru, E.S Tanasescu, C. H. Beck Publishing House, Bucharest, 2008, p. 1074
[17] Ioan Deleanu Institutions and Constitutional Procedures in Roman Law and Comparative Law, C. H. Beck Publishing House, Bucharest, 2006, p. 657
[18] Dana Apostol Tofan, works cites, p.1079

bill is adopted without being effectively debated. In other words (...) the Government obtains a law without being enacted by the Parliament, theoretically strictly speaking."[19]

Thus we notice that the procedure of engaging Government's liability became increasingly a tool by which it avoids parliamentary debate. In more than 20 years since the adoption of the Constitution, the Government undertook responsibility for a total of 26 bills, and the interval between two engagements has decreased.

From the perspective of Constitution review, we believe that the whole issue of limits of engaging Government's liability may concern:

A. Scope of bill regulation for which the Government may assume responsibility which currently is very varied and atypical, in the sense of limiting it to bills that include **unitary regulations and be consistent with the name they contain, with the regulatory purposes mentioned**.

a) The Government has committed responsibility for **complex bills**, whose object of regulation is very different, targeting areas of social and economic life that are not intertwined, and that served to completion and amendment of a large number of laws.

b) Also the engagement of Government's liability functioned also for amending and supplementing **three codes**, **namely the Labour Code, Civil Code and Criminal Code**, of which the labor code was amended by the procedure of engaging responsibility, becoming Law. 53/2003.

c) Assumption of responsibility by the Government on an **Emergency Ordinance**, which has triggered vehement criticism among legal professionals. It's Law no. 44/1998 for the approval of Emergency Ordinance on companies' privatization, which the Constitutional Court by Decision no. 298/1998[20], declared as constitutional.

[19] Dana Apostol Tofan, works cites, p. 1074

[20] Constitutional Court Decision no. 298/1998 published in the Official Gazette no. 372 of April 28, 1998

d) The Government has undertaken responsibility for **bills being debated in the Parliament - National Education Law, the Civil Code and Criminal Code**. The Constitutional Court ruled, using its jurisprudence, that "the assumption of liability by the Government on a bill being debated in the deciding Chamber is not itself unconstitutional" if the emergency in adopting measures contained in the bill on which Government has committed liability, subsists.

B. The period in which the Government may assume responsibility. The engagement of Government's liability should be limited to no more than once per parliamentary session and for a single bill, thus preventing the Government's tendency to substitute itself to the legislative authority by the large number of bills resulting from the engagement of liability.

C. Regarding **the amendment of the bill** on which the Government assumes responsibility, we believe that special attention that should be paid by review, might concern two issues. The first would target the acceptance by the Government of amendments made by deputies and senators. Given the constitutional status of the Parliament, as sole legislative authority of the country and representative body of the people and relationships that are established between Parliament and Government, regulated by art. 111 and 112 of the Constitution, articles establishing parliamentary control over Government activities, we believe that the amendments made should be accepted by the Executive. The second issue concerns the term for introducing the motion of censure. If the time limit for filing motion of censure is three days, being very short, which is the time available to parliamentarians to make amendments? The period in which parliamentarians could submit amendments to the bill for which the Government assumes responsibility should be determined whether by the provisions of the Basic Law or by express statutory provisions. In practice, in the absence of explicit

regulations, the period between the submission by the Government to the Parliament of the intention to engage liability on a bill and the date of submission in joint session by the Prime Minister of that bill was considered to be the time in which parliamentarians can submit amendments.

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CCD no. 51/2012, Official Gazette no. 90 of February 3, 2012

PUBLIC INTEREST, MANDATORY CONDITION FOR ACCESS TO COURTS, ACCORDING TO ART. 8 OF LAW NO. 554/2004 OF THE CONTENTIOUS ADMINISTRATIVE. ANALYSIS FROM THE PERSPECTIVE OF ART. 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND OF ART. 52 OF THE ROMANIAN CONSTITUTION.

Mihaela CONSTANTINESCU[*]

ABSTRACT

Having in view the distinct provision of access to justice for people invoking a public interest, towards people invoking a private interest, the present paper proposes to answer the following questions: To what extent the conditions imposed for disproof of the administrative document, as a result of breach of public interest do not represent a limitation brought to the right to apply to the courts? If provisions of art. 8 in Law no. 554/2004 of the contentious administrative circumscribe provisions of art. 6 of the European Convention on Human Rights? Are the means of protecting public interest, stipulated by art. 8 paragraph 1^1 of Law no. 554/2004 really efficient and do they reach their goal or is it necessary a re-thinking of them in such a way not only an appearance of possibility of disproof of documents that breach the public interest? The answers to all these questions come from analysis both of the internal and communitary normative acts and of courts and Constitutional Court jurisprudence. We mainly follow the correspondence of the provisions of art. 8 in Law no. 554/2004 with those in art. 6 of the European Convention on Human Rights and those of art. 52 in the Romanian Constitution.

KEYWORDS

administrative, public interest, private interest, Law no. 554/2004

Apparently, the Law no. 554/2004 of the Contentious Administrative gives the opportunity of any harmed party in its right of legitimate interest, either private or public, to approach the court. This is the interpretation resulting from provisions of art. 1 paragraph 1 of the

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abovementioned normative act.[1] Furthermore, paragraph 2 specifies that "the person harmed in a right or legitimate interest through an administrative act with personal character, addressed another subject of law, can address the contentious administrative court."

Corroborating these provisions we notice that a person can apprise the court even though that person was harmed by an administrative act with individual character addressed to another subject of law, in case a right or a legitimate interest was endangered, whether it is public or private, lacking an express specification of its category, issued by the legislator.

Law no. 554/2004 of the contentious administrative establishes that subject harmed and the object of litigation which can be formulated, respectively the harm brought to the private or public interest of the person both by an individual administrative document or a normative act addressed directly (art. 1 paragraph 1), and by an individual administrative document addressed to another person (art. 1, paragraph 2).

In order to understand legal provisions we should also have in view the meaning given to the **private legitimate interest**, representing the possibility of asking for a certain behaviour, in achieving a subjective, future, prefigurated and predictable right. More complex is the area of **public legitimate interest**. Apparently, it is easy to define, representing, according to Law no. 554/2004 of contentious administrative, the interest which regards the rule of law and constitutional democracy, guarantee the citizens' rights, freedoms and fundamental obligations, satisfying the community needs, achievement of public authorities competences. We notice that the notion includes the values at the basis of the lawful state and this very peculiarity gives importance to the public interest and makes necessary the establishment of additional means of protection, including legislation to allow the public interest defence. The public interest implies the preoccupation, the importance to society of obeying the values provided by Constitution, domestic normative acts or acts of the E.U. [2]

1 "Any person who onsiders harmed in a right or a legitimate interest by a public authority, through an administrative act or by not having solved in due time a request, can address the competent contentious administrative court, for annulment of the act, recognition of the alleged right or the legitimate interest and to have the damage repaired. Legitimate interest can be either private or public."

[2] A first principle found in the notion of public interest is "the rule of law". The word "rule" makes us think of organization, stability. It represents the order imposed by the law, including the public order as well and it refers to both citizens and state institutions, to their

By analyzing, hereinafter, the provisions of Law no. 554/2004 of the Contentious Administrative, we notice that art. 8 limits the object of judicial action, as compared to the previously mentioned art. 1 and imposes implicitly active subjective restrictions to the action[3]. Thus, article 8 of Law 554/2004 contains several theses regarding the subjects of the requests formulated according to the contentious administrative law:

- A first thesis is to be found in paragraph 1 of art. 8, according to which the party can notice the contentious administrative court if he/she was harmed

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organization according to the law. It refers to respecting the regulations which organize society, both by citizens and public institutions.

"Constitutional democracy", principle to be found in art. 3, paragraph 3 of the Constitution, Romania as a democratic state, supposes the exercise of power by the people within the limits and conditions provided by the Constitution. It is considered that democracy implies: freedom restriction, society imposing the law of the majority, participation of the subjects to judicial order settlement, equality of participation and pluralism, by expressing the will of different categories of citizens. (Dan Claudiu Danisor, Romania's Constitution commented, Publishing House Universul Juridic, 2009 p.44,45)

"The citizens' rights, freedoms and fundamental duties" are provided in Chapters I and III of the Constitution. "Satisfying the community needs" refers to the rights and obligations assumed by the Romanian state as a member of the European community. "Achievement of public authorities competences" refers to fulfilling the obligations established by Constitution and by the laws that grant administrative authorities rights and obligations in carrying out public power. Competences of the public authorities represent "the assembly of activities carried out by administrative authorities, those locally autonomous, intercommunity development associations and bodies performing public services and public utility, in a material way, practically or by issuing normative acts with judicial power inferior to the law or which perform public services." (Verginia Vedinas, Administrative Law, Publishing House Universul Juridic 2009, p. 30)

3 . "(1) The damaged person in a right recognized by the law or in a legitimate interest through an unilateral administrative act, unsatisfied by the answer received to the previous complaint or who did not receive any answer within the term provided by art. 2, paragraph 1, letter h, can seise the competent contentious administrative court, in order to request the annulment of the act, the repairment of the damage and, eventually, moral damages. Also, can address the contentious administrative court the person who considers harmed in a legitimate right or interest by not solving in due time or by unjustified refuse of solving a request, as well as by refuse of performing a certain administrative operation necessary for exercise and protection of his/her legitimate right or interest..

(1^1) Natural and legal persons of private law can formulate requests through which they invoke the defence of a public legitimate interest **only in subsidiary, as long as damage of the public interest logically results from infringement of a subjective right or a private legitimate interest."**

in a right recognized by law or in a legitimate interest, harm that was produced as a result of an individual administrative act, by not solving in due time, by unjustified refuse of solving a request, by refuse of solving an administrative operation. This first thesis actually refers to the person harmed in his/her private legitimate right.

- The second thesis, provided by art. 8, paragraph 1^1, according to which natural and legal persons can formulate requests, by which they invoke de defence of a public legitimate interest. The condition for these requests is that the damage brought to the public legitimate interest to result from breaching the subjective right or the private legitimate interest.

The difference between the categories of persons provided by art. 8 and art. 1 appears as regards those who can invoke the public interest. We notice that a person can initiate legal action in the contentious administrative for an infringement of a public interest, only if this results from infringement of a subjective right or a private legitimate interest. Thus, art. 8 completes art. 1 by limiting the category of persons who have the quality of active subjects.

The actions in which a person can be considered harmed by infringement of a public legitimate interest should fulfill the following conditions:

- to be breached an individual right or a private legitimate interest, and this infringement to be the object of the legal action;

-infringement of the individual right or the private legitimate interest to have as consequence the damage of the public legitimate interest.

The consequence of these conditions is the fact that no person can invoke directly the defence of a public legitimate interest unless he/she also had at the same time infringed an individual right or interest. Thus, we reach the situation in which severe infringements of the rule of law are not sanctioned**.** Situations of infringement of the public legitimate interest, frequently invoked by persons who could not prove a private right or interest and which are rejected by courts due to the lack of interest of the active subjects were: requests having as object issuing authorizations for building which violated the legal provisions, formulated by persons who were not the owners of the building authorizations but ordinary inhabitants in the areas for which the authorization was issued; the legal action having as object the annulment of the decision through which a public institution is reorganized, formulated by one of its employees, legal actions having as object the annulment of the regional urbanistic plans, realized illegally by ignoring the legal provisions regarding the protection of historical monuments; legal actions having as object the annulment of the

local council decision regarding the change of good from the private domain to the public one, rejected as being formulated by a person without a legal interest, etc. We could not state that these are cases that suit the society and that there are no citizens feeling the need to eliminate them, in such a way that law be respected. When the Public Ministery or the People's Advocate do not understand to seise the contentious administrative courts, there occur situations in which the public interest is not defended and persons have no means to interfere.

Having in view the values included in the notion of public legitimate interest, essential for the functioning of the lawful state, the possibility of catching the attention on its infringement and of asking for repair of its damage should be given to each of the harmed persons.

Yet, the law limits this right only to the category of persons who sufer mainly a damage by infringement of an individual right or an individual interest, if this has as effect the damage brought to the public legitimate interest.

A first aspect on which we should focus is that of finding in the contentious administrative courts' practice situations in which "harm brought to the public legitimate interest logically comes by infringement of a subjective right or a private legitimate interest", as such cases do not exist. Otherwise, it is difficult to imagine a possible situation to fulfill the abovementioned condition, most of the cases we could think of being opposite situations to that provided by law, in which by infringing a public legitimate interest results at the same time from infringement of a private legitimate interest.

Such an analysis is important to see to what extent the provisions of art. 8, paragraph 1^1 of Law no. 554/2004 are really efficient and reach their aim**.** In practice, most of the favourably solved cases have as object the infringement of the private interest and even if there are situations in which in subsidiary there could be an infringement of the public interest, the request of the harmed person can sum up to realizing his/her own right or interest, without invoking the public interest.

The lack of social situations which should be the object of art. 8, paragraph 11 provisions leads to the conclusion of the inefficacy and uselessness of these provisions, as long as there in no applicability in the courts' practice, having just a formal character. The need of such provision does not arise, as it is supported by the actual relationships between the administration and those administered as in the relationships between the

two parties there are no situations occurring in subsidiary by damage brought to the private interest leading to a damage of the public interest.

Taking into consideration the jurisprudence of the courts, more conspicuous appears the need for granting the right of invoking the public legitimate interest, as main request, to those who consider they suffered a direct prejudice by its infringement, and not only in subsidiary as long as an individual right or a private interest was damaged. This regulation supposes changes brought to art. 8 of Law no. 554/2004 in such a way that it should agree with social reality.

The consequence of the lack of efficacy of art. 8 of Law no. 554/2004 of the contentious administrative and limitation of legal actions having as object the defence towards the damage brought to the public interest only to those actions respecting the provisions of paragraph 1^1, leads to the conclusion that the legislative created only the appearance of observance of art. 52 of the Constitution, in fact, not existing the means for defending the public interest in the relationship with the administration.

Art. 1, paragraph 1 of Law no. 554/2004 of the contentious administrative should be the expression of the Constitution regulations, entitling a damaged person in a right or legitimate interest, no matter if it is private or public, to obtain a recognition of the alleged right or the legitimate interest, the annulment of the act and repair of the damage (art. 52 paragraph1). It is true that paragraph 2 of art. 52 stipulates the possibility of establishing by organic law the conditions and limitations to exerting this right, but, because the cases of persons who can invoke the public interest are limited, there occurs the question up to what extent the present form of Law no. 554/2004 of the contentious administrative really respects the provisions of the Constitution**.**

What should have precedence in answering this question is the possibility of achieving the scope of the provisions in the fundamental law, respectively by providing by organic law (Law no. 554/2004) the satisfactory means of achieving the right or the interest of the harmed person through the administrative act. Regarding the possibility of invoking the damage brought to the public legitimate interest, we can notice only a regulation distinct from that one which allows invoking the private legitimate interest leading to a limitation of the category of persons having the right of formulating legal actions in the contentious administrative. We should analyse to what extent this limitation is excessive, making almost impossible the invocation of public legitimate interest damage in contentious administrative courts, because reaching such a situation leads to the conclusion of lack of means of achieving the right or the public

legitimate interest and, implicitly, the infringement of the harmed person's rights on behalf of the public authority according to art. 52 of the Constitution.

Another issue occurred in applying art. 8 of Law no. 554/2004 of the contentious administrative refers to its correspondence to the provisions of art. 6 of the European Convention on Human Rights. It is important to appreciate to what extent the conditions imposed for defending the public legitimate interest are not a restriction of the free access to justice right itself.

According to provisions of art. 6 of the European Convention on Human Rights "Any person has the right of having his/her case judged in an accurate, public way within a reasonable term, by an independent and impartial court, instituted by law, that shall decide either on infringement of the rights and obligations with civil character, or on solidity of any penal charge against him/her". Even if, apparently, this provision regulates the right to a fair trial, the doctrine in the field and the jurisprudence of the Europen Court of Human Rights have stated that art. 6 provides, first of all, the right of any person to free access to a court, the right of requesting the recognition of his/her rights and interests by addressing a court, because only subsequent to this fundamental right exertion it xcan be analysed to what extent the trial was carried out in a fair way. The exercition of the access to justice supposes the insurance of any person's access to a court instituted by law, that is the guarantee of a judiciary procedure in front of which he/she can effectively exert the right.

Furthermore, the access to a court is guaranteed by art. 21 of Romania's Constitution, and the right consists of "the free access to justice"[4], therefore a right recognized to all citizens, without restriction, in such a way that it should be regulated the right to invoke in court a public legitimate interest, as the provisions of the Constitution do not make any difference between the categories of rights whose recognition could be requested to the judicial power. Even if art. 52 of the Constitution gives the possibility of regulating by organic law the conditions and limitations of exerting by the damaged person of his/her rights, rights harmed by a public authority, it does not give the possibility of limiting the damaged person by

4 Any person can address justice to have his/her rights, freedoms and legitimate interests protected

infringement of a public legitimate interest to come into the court, as this right is guaranteed only by art. 21 which does not specify any exception. As a result, establishing the conditions and limitations of exerting the rights of the damaged person within the relationship with the public authority does not mean a hindering of recognizing the person's rights, only the establishing the conditions and limitations under which the persons can benefit from their rights and could obtain achievement of their interests. Establishing the conditions and limitations of exerting the rights and interests, represents the phase after seising the court, the latter, after investment, checking if the public authority respected the limits and conditions within which the citizen exerted his/her rights.

Provisions of art. 6, paragraph 1 of the European Convention on Human Rights, as it was interpreted in the European jurisprudence, request for cumulating certain conditions for limiting the free access to justie right. These conditions should have been observed by art. 8 of Law no. 554/2004 of the contentious administrative, in order to lawfully restrict the right to invoke the public legitimate interest in court.

- Thus, a first condition is that limitation of the free access to justice to pursue a legitimate scope. The scope of art. 8, paragraph 1, ind. 1 is to prevent the excessive crowding of courts, but, if we have in view that the role of the judicial power is to solve litigations and re-establish the rule of law within society, it seems natural to find solutions to relieve the burden of courts, mainly referring to their organization and personnel, and not by limiting the citizens' free access. Thus, the scope of limitation is not the protection of the judicial activity, but its restriction, by limiting the judicial power competences, art. 8, paragraph 1 derogating from the principles of judicial system organization.
- The second condition is that the limitation not to affect the very substance of the right, and by restricting the possibility of sesing the courts regarding the infringement of a public legitimate interest the very substance of the right is affected, the natural person having no option to obtain the recognition of the public interest, the annulment of the administrative act and repairment of the damage. Granting the Public Ministery, People's Advocate and social bodies the right of formulating actions based on infringement of the public interest (art. 1, paragraph 2 and art. 2, paragraph 1, letter a) does not represent a possibility for the natural person to obtain a recognition of the public interest and annulment of the administrative act, as these bodies are not means that the natural person can control directly and as there is no sanction applicable to them in case they fail to exert their competences in the field of the contentious administrative**.** The court

established that the efficacy of the free access to court imposes that its exercise should not be affected by obstacles of lawful or de facto impediments which could question its very substance.

- The third condition is to insure a reasonable ratio of proportionality between the purpose aimed by the law and chosen means. If we consider that the purpose pursued by the law was to eliminate the so called "popular action", actio popularis, formulated by different persons of private law, the means chosen, respectively limitation of cases in which natural persons can invoke the infringement of the public interest, are unequal to this purpose, by the effect of total restriction of the free access to justice as a result of impossibility of proving the cases in which the private public interest is the result of the infringement of an individual public interest and the impossibility of seising the courts of contentious administrative by natural persons invoking an infringement of the public legitimate interest not resulting from the infringement of an individual legitimate interest.

Inobservance of art. 6 of the European Convention on Human Rights (CEDO), by restricting the free access to justice right, has as a consequence the restriction of the right to an effective recourse, granted by art. 13 of CEDO. According to it, any person whose rights and freedoms recognized by the Convention were infringed, has the right to seise a national court, even when the infringement could be due to persons acting in their official duties exercise. Thus, the right of the person to challenge the illegal nature of the administrative act in court is breached. Art. 13 guarantees the existence, within the domestic law, of a remedy to allow the person to prevail-and to prove their inobservance- of the rights and freedoms within the Convention, as the Convention states them.[5]

Regarding all the aforementioned aspects, the Constitutional Court has repeatedly been seised, to pronounce itself on the unconstitutionality of art. 8 of Law no. 554/2004 of the contentious administrative. The Court's solutions, yet, were to reject the requests, although from the formulated motivations there did not result a thorough analysis of the invoked arguments. Therefore, remind the Decision of the Constitutional Court no. 66/2009, according to which "The Court ascertains that the critised law provisions do not contain regulations in order to restrict the free access to justice or the right to a fair trial, as the author of the

[5] http://jurisprudentacedo.com/Boyle-si-Rice-contra-Marea-Britanie-Conditii-de-aplicare-ale-dreptului-la-remediu-intern.html

exception alleges. On the contrary, the text gives the possibility to natural and legal persons of private law, under certain conditions, to invoke in court of contentious administrative the defence of a public legitimate interest, attribute that usually belongs to the competent public authorities and not to natural or legal persons of private law. Thus, as it results from the provisions of art. 1 of Law no. 554/2004 of the contentious administrative regarding "Subjects to seise the court", the People's Advocate, the Public Ministery, the National Agency of Clerks and the prefect are public institutions which, according to their own laws of organization and functioning, as well as to Law no. 554/2004 have specific competences regarding the direct seise of the contentious administrative court if they consider that an administrative act (normative or individual, as the case arises) is illegal or affects the legitimate rights, freedoms and interests of citizens or the public interest. As a result, the general interest of society is protected by public institutions with special competences in this field, and the provisions of the critised law offer the same possibility to natural persons and legal persons of private law, on the justified condition that the public legitimate interest alleged to be infringed to be the result of the infringement of their subjective right or the private legitimate interest."

In the Constitutional Court decisions we notice that it generally limits to analyzing the provisions of the Constitution, without answering the arguments regarding the infringement of art. 6 and 13 in the European Convention on Human Rights, even if these are invoked by authors of these exceptions and, according to art. 11, paragraph 1 of the Constitution "The Romanian state compels itself to fulfill exactly and with good will the obligations occurring from the treaties to which it s part."

CONCLUSIONS

Natural persons can take legal action in the subjective contentious administrative only under the condition of proving that they are the owners of certain subjective rights or private legitimate interests (art. 2, paragraph 1, letter a. of the Law of contentious administrative) and, as a result, they can take legal action in contentious administrative, respectively to ask for annulment of an administrative act starting from the premise of damage of a public legitimate interest only if they prove that the damage of the public legitimate interest results logically (as a consequence, existing a causality connection) from infringement of the subjective right or of the private

legitimate interest (art. 8, paragraph 1^1 of the Law of contentious administrative no. 554/2004).[6]

The conditions imposed to natural persons in order to invoke the public interest seem excessive and lead to rejection of most legal actions formulated with this object, from the judicial practice resulting the fact that there are few cases in which the infringement of a private legitimate interest leads to infringement of a public legitimate interest. Therefore, there occurs the need of regulating the latter situation, offering the possibility to directly invoke the public legitimate interest and not in subsidiary as the present legislation provides.

The only explanation for restricting the exercise of legal action in contentious administrative by which the public interest can be invoked, imposed by legislator, is to avoid the crowding of courts. It is understandable the fact that these restrictions have the ground in elimination of the so called "popular actions", action popularis, taken by different persons of private law, natural or legal persons, but the risk of taking ungrounded legal actions, some take with malice, has to be balanced with the risk of not insuring efficient means for public interest protection. Having this situation in mind, there should be a re-thinking of art. 8 of Law no. 554/2004 of the contentious administrative, in such a way that the person's right of invoking harm of public interest should be guaranteed efficiently. Fear that extending the granting this right to request annulment of administrative acts breaching the public interest could lead to a larger number of ungrounded actions is a false issue if we draw a parallel with the right of asking for annulment (observing absolute nullity) of civil acts, regulated by the Civil Code, and whose exercise, although granted unlimitedly for reasons of absolute nullity, did not have as consequence the unjustified infringement of the courts' role.

A first choice would be to grant this right to persons who manage to prove the damage brought to a public individual right or interest logically resulting from a public interest damage. The main object of action shall be represented by infringement of the public interest, on the condition that it has as effect the infringement of an individual right or interest. This is the

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http://www.studiijuridice.ro/feed/resurse_juridice/jurisprudenta/jurisprudenta_romania/16443-acte-de-autorizarea-edificarii-unei-constructii-de-uz-si-interes-public.txt The Appeal Court CLUJ, Decision no. 1854 on 9th September 2010

thesis opposed to the current regulations, but it meets the society needs, such cases being commonly met and having an easy probative effort. Another choice is to directly grant the persons the right to invoke the infringement of a public legitimate interest, but only if they manage to prove the moral or the material prejudice. Paying a bail for exerting the right to invoke infringement of the public legitimate interest by natural persons can also be a solution less restrictive as compared to the present provisions. Furthermore, granting the right to invoke the public interest could be done to persons depending on the severity of the infringed public interest.

The present means of protection of the public interest, provided by art. 5, paragraph 1 giving competences to the Public Ministery to request annulment of the normative administrative acts by which a legitimate public interest is damaged, prove to be inefficient on the one hand because this protection is granted only as normative acts are concerned, not for individual ones, and on the other hand, as a result of the large number of competences that this institution has to carry out, and which, most of the time, have as consequence its non-apprehension and its passivity in the administrative field. Similar competences have been granted by art. 2, paragraph 1 to social groups and to the People's Advocate, which also can seise the infringement of a legitimate public interest, but without efficacy in practice as a result of non-apprehension in fact of these competences by the abovementioned authorities. Having in view that as a result of seising the courts through the Public Ministery or the People's Advocate, the petitioner, respectively the harmed person, "has the quality of complainer" and not the public authority, the right of prevailing of the infringement brought to a legitimate public interest is yet recognized by legislative as belonging only to the citizen and not to other authorities. Because the European Court of Human Rights states that achievement of the right to be effective and not theoretical or illusory, in order to entirely have recognized the person's possibility of invoking the infringement of the legitimate public interest incourt, there imposes granting the right of directly formulating introductory actions and not through intermediary parties.

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THE LEGAL NATURE OF THE ADMINISTRATION OF THE PROPERTY OF OTHERS

Alexandru Mihnea-ANGHENI [*]

ABSTRACT

The delimitation of the legal institution of administration of the property of others by comparing it against other institutions to which it presents similarities, leads us to the conclusion that the administration of the property of others has a complex legal nature which implies the presence of elements of the analyzed legal institutions (mandate, fiducia, business management, agency etc.) without reducing or confusing it to each of them.

KEYWORDS

administration, property, power of attorney, legal nature, convention, legacy.

1. Assess of legal nature of the administration of the property of others

The delimitation of the legal institution of administration of the property of others by comparing it against other institutions to which it presents similarities, leads us to the conclusion that the administration of the property of others has a ***complex legal nature***[1] which implies the presence of elements of the analyzed legal institutions (mandate, *fiducia*, business management, agency etc.) without reducing or confusing it to each of them. In other words, the administration of the property of others, depending on the form of administration (simple or full administration), comprises

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[1] Concerning the legal nature of the administration of the property of others, please see, collective, the new Civil Code, comments, literature and case law, volume I, art. 1-952, About the civil law. Persons. Family. Goods. Ed. Hamangiu, 2012, p. 1115

elements of the contract of mandate when legal acts are concluded on behalf and on the account of the person whose property is being administered, elements of the business management each time the administrator undertakes material facts necessary and useful for the administered property. At the same time, the administration of the property of others, especially in the form of full administration, is close to the contract of ***agent of affairs*** (from the French law), the administrator having to *preserve and to make use, in a profitable manner, of the goods, to develop the property or to carry out the appropriation of the property providing this is for the interest of the beneficiary* (art. 800 Civil code).

Even if there are interferences with several legal institutions, the strongest connection of the administration of the property of others is with the mandate. This conclusion is based on the very expression of the legislator who often uses the term "power of attorney" (art. 792 Civil code). Therefore, the administrator is empowered by another person to manage one or several goods or a mass of the property or the entire property belonging to this person. The difference between the two institutions is that, in the case of the mandate, the attorney in fact is empowered to conclude legal acts referring to the person of the grantor of power, as well as to his property[2], while the administrator is empowered to conclude legal acts or to undertake material facts, only with respect to the patrimonial elements or to the entire property of the beneficiary of the administration.

It is not less true that, also in the case of the agency contract, the legislator uses the word "power of attorney" or "empowers" (art. 2072 Civil code), only the agent is empowered by the principal to negotiate or to negotiate and conclude contracts on behalf and on the account of the principal, compared to the attorney in fact who receives the power of attorney from the grantor of power for the conclusion of legal acts. Basically, the attorney in fact, is his quality of representative of the grantor of power, usually, does not negotiate the contract.

Unlike the agent, the administrator of the property of others is acting, according to the case, as an attorney in fact, if legal acts are concluded, as well as an agent, if, for the purpose of the administration, he has to negotiate and conclude contracts. Hence, the agent, according to the law (art. 2072 paragraph (2)), is an ***independent intermediary*** who acts on a basis of a professional title which means that he makes a profession for himself from this authority, condition which is not required for the administrator of the

[2] The Civil code of Romania, Notary Handbook, volume I, Official Journal Publication, 2011, p. 265

property of others. The latter may be, according to the case, a representative or an intermediary who acts for the purpose of the administration of the property of others, as well as a professional in the sense of article 3 of the Civil code[3] or a non-professional (*any other subjects of civil law*).

In addition, the administrator of the property of others, just like the agent, undertakes a series of material facts (acts) which make them different from the attorney in fact and similar to the manager (business manager) or to an entrepreneur.

The ***complex legal nature*** of the administration of the property of others is specific to the ***complex contracts***, like the consignation contract which comprises in its structure three legal operations: sale, deposit and commission[4].

As the specialized legal literature[5] states, one must not forget the fact that the source of inspiration for the Romanian legislator was the Quebec Civil code which, on its turn, combines ***particularities*** of the French law (continental law) with elements belonging to the legal system of ***common law.***

Thus, as far as the legal institution of ***agency*** is concerned, the liability of the agent towards the principal is, on one side, a contractual liability, just like of the attorney's in fact, but, on the other side, it is a tort liability for torts and technical offences (torts).

The presence of the institution of administration of the property of others in the Romanian legal system having as source the Canadian law of the province of Quebec, makes us treat this institution taking into account the reasons which determined the Canadian legislator to create the legal institution of administration of the property of others. Therefore, according to the specialized literature[6], the Canadian law preferred the qualification as attorney in fact of the administrator of the property of others in the detriment of that of ***trustee*** (according to *commom law* system) which

[3] Article 3 paragraph (2) "All those who exploit an enterprise are considered professionals". Constitutes exploitation of an enterprise – the systematic exercise, by one or by several persons of an organized activity which consists in the production, administration or alienation of goods or in the delivery of services, irrespective if it is lucrative or not.

[4] For details concerning the consignation contract, please see St. D. Carpenaru, *Treaty of Commercial Law*, Ed. Universul Juridic 2012, P. 538-543, S. Angheni, M. Volonciu, C. Stoica, Commercial Law, Ed. C.H. Beck, 2008, p. 365-368

[5] The new Civil code, Ed. Hamangiu, 2012, already quoted, p. 1115

[6] M. Cartin, *L'Administration des biens d'autrui dans le Code civil de Québec*, The Catalan Journal of Private law, volume III, 2004, p.17-19

means ***sui generis*** owner or holder of the administered property. If, as far as the activity of the administrator is concerned, sometimes, there are perfect similarities between his obligations and those incurring to the attorney in fact, on the other side, the regulation of mandate, of the reports between the grantor of power and the attorney in fact, is far more restrictive which, ***in our opinion,*** is determined by the "*intuitu personae*" character of the mandate. Taking into account this character, it results that the mandate may be revoked at any time by the grantor of power, the powers of the attorney in fact being, in most of the cases, limited (special mandate), characters which do not exist in the case of the administration of the property of others[7].

Going back to the Canadian law, the reason of the legislator to regulate a new legal institution - the administration of the property of others, resided in the fact that the conventional representation was not sufficient and efficient even in the conditions of the existence of the irrevocable mandate, of the commercial mandate, of the mandate in common interest, of the mandate without representation, of the *post mortem* mandate. The legal provisions concerning the mandate did not respond to all the particularities of the administration of the property of others, especially of a company, and the concerted application of several legal institutions (agency, *fiducia*, business management etc) would have meant a division of the legal provisions applicable to the same legal situation, respectively to the administration of the property of others.

Practical reasons determined the Canadian legislator to create a general legal framework, a common law applicable to the administration of the property of others.

The same reasons determined the Romanian legislator to ***create a general legal framework applicable to the administration of the property of others***, legal framework which will apply each time there are not provided any special regulations in the matter of the administration of the property of others or even if such regulations exist, they have to be supplemented with general provisions, common to the administration of the property of others.

Following the analysis of the general legal framework, the common law in the matter, respectively articles 792 – 857 of the Civil code, one may

[7] For details on the legal characters of the mandate contract, please see Fr. Deak, Civil Law, Special Contracta, Ed. Actami 1996, p. 268; L. Stanciulescu, Civil law lectures. Contracts according to the new Civil code, Ed. Hamangiu 2012, p. 359 and the following; D. Florescu, Civil law, Civil contracts in the new Civil code, the second edition as revised and supplemented, Ed. Universul Juridic 2012, p. 223 and the following

conclude that the administration of the property of others has a ***complex legal nature*** which combines elements of mandate, business management, *fiducia*, agency, etc. but which is not reduced to each of them, thus justifying its autonomy in the framework of the Romanian law.

At the same time, from the very beginning, one must observe that the provisions of the Civil Code, Book III "About property", Title V – Administration of the property of others – representing the common law for the administration of the property of others, are perfectly compatible to the provisions comprised by the civil Code or by special laws and which represent *applications of the institution of the administration of the property of others, like the guardianship, curatorship , administration of the legal person, administration of enterprises.*

2. The legal basis of the administration of the property of others according to the Civil code may be, according to the case, the legacy or the convention. Therefore, the legislator first had in mind a legal act "*mortis causa"* (the legacy) and only then thought about the convention[8].

From a terminology and conceptual point of view, the legislator uses the word ***convention*** in Title II – Book V, even if, comparing the provisions of the old Civil code (the 1864 Civil code) with those existing in the present Civil code (the new Civil code), we observe the fact that the previous Title III was named "*About contracts and conventions*". The conclusion is that the legislator kept in some texts the word convention which existed in the previous legislation, term used at least for the case of the legal basis of the administration of the property of others.

Irrespective of the word used by the legislator, convention or contract, we consider that, from a conceptual point of view, there aren't any differences between the convention and contract, no matter of the name, contract of administration of joint property, association convention etc.

[8] Please see C. Statescu, C Birsan, Treaty of Civil law, The General Theory of Obligations, Ed. Academica RSR Bucharest, 1981, p. 32; T.R. Popescu, P. Anca, The General Theory of Obligations, Ed. Stiintifica, Bucharest, 1968, p. 21. The explanation of the existence of two words: convention and contract in the content the Civil code of 1864 consists in the fact that, article 1101 of the French Civil code, reproduced in the Romanian legislation, defines the contract as being "a convention through which one or several persons are obliged to do or not to do something", considering that the word convention has a larger meaning then that of the contract. The convention would mean the creation, transmission or the extinction of rights and obligations, while the contract would have the effect the creation and the transmission of rights and obligations.

Anyways, when we analyze the legal basis of the administration of the property of others according to the new Civil code, it is important the fact that it may be a "*mortis causa*" ***unilateral act*** (the legacy) or a ***bilateral legal act*** (the convention or the contract).

Analyzing the content of article 792 of the Civil code, especially the provision comprised by paragraph (3), we have to remember the fact that the dispositions are applicable to any administration, except for the case when the law, the constitutive act or the actual circumstances require the application of another legal regime of administration.

In these obviously exceptional cases, the legal basis is, according to the case, ***the law*** (the case of guardianship, the curatorship, the judicial administration), ***the constitutive act*** (the case of commercial companies, the cooperative companies, the simple companies etc.) or ***actual circumstances.***

It is important to highlight the fact that the unilateral legal act – ***the legacy*** - produces effects ***only if the power of attorney given by the legacy is accepted by the designated administrator*** (article 792 (paragraph (2) of the Civil code), acceptance which is produced after the death of the author, because the will (the legacy) produces effects from the date of the death of the testator; the administrator, by notary declaration of acceptance, becomes executor of the will. According to article 1079 of the Civil code, the executor of the will is entitled to administer the estate of the succession for a period of 2 years at the most from the date of the opening of the succession even if the testator did not expressly conferred this right to him. The 2 years deadline may be extended by the court for justified reasons, by granting successive deadlines of one year.

The legal act of administration

In the specialized literature, the legal act of administration was defined as „*that civil legal act by which it is aimed to carry out a normal enhancement of a good or of a property*"[9]

Adapting this definition to the content of the provision comprised by article 792 paragraph (1), the object of administration of the property of others may be detailed, including "*one or more patrimonial masses*", which do not belong to the owner and which are entrusted to a person empowered as administrator.

The administration act implies the enhancement of a single good "*ut singuli*", situation in which the administrator, by the activity that he deploys,

[9] G. Boroi, Civil law, General part, the persons, Ed. All Beck, 2008, p. 144

by the legal acts that he concludes, aims only at enhancing that good, without concluding disposition acts; the administration of a property or of a patrimonial mass might also need legal acts of alienation of the goods belonging to the patrimonial mass or in the respective property[10].

2.1. The legacy-legal basis for the administration of the property of others

Even if the institution of administration of the property of others represents a transposition in the Romanian legislation of the provisions of the Civil code of Quebec, still there are certain differences, among them being the legacy, as source or basis of the administration of the property of others. Thus, in the Civil code – Quebec, the legacy is not provided as basis of the legal relations between the administrator and the beneficiary. Only the convention is[11].

2.2. Convention – basis (source) of the administration of the property of others

The source of the administration of the property of others is a convention (contract of administration) which comprises the agreement of the parties.

The legal provisions applicable to the ***convention*** by which a person is empowered by the owner with the administration of his property are the general ones, as provided in article 1166 and the following from the Civil code, rules which take into account the ***principle of contractual freedom*** (article 1169 of the Civil code) and of ***autonomy of will in establishing its content***, ***the principle of good faith***[12] at the negotiation and the conclusion of the contract, as well as all along its execution, the ***principle of mandatory force*** (*pacta sunt servanta*) etc., principles which imply ***limits or exceptions***. As far as the contractual freedom is concerned, the limits are established by article 1169 of the Civil code which provides that is has to be exercised in ***the limits imposed by the law, by the public order and by the good character.***

Just like any convention (contract), the convention of administration of the property of others is required to comply with the conditions of validity,

[10] Idem, p. 145

[11] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinator), the new Civil code, Comment on articles, p. 837

[12] For details on the good faith, please see D. Gherasim, the Good Faith in the civil legal reports, Ed. Academiei RSR, Bucharest, 1981, p. 63-64

common to all contracts: the legal capacity of the parties, the consent expressed in a valid manner, the existence of a determined object, of a licit object etc.; the existence of a moral and licit cause, according to the public order. Each validity condition is particularized in the contract of administration of the property of others taking into account the object of administration, the type etc.

As far as the ***form*** of the contract is concerned, the legislator does not provide for a certain form as a condition "*ad validitatem",* but the agreement of the parties has to take up the written form *ad probationes,* taking into consideration the provisions of article 303 paragraph (2) according to which "*no legal act cannot be proved with witnesses if the value of its object is superior to 250 lei".*

Having in mind the principle of symmetry of form of legal acts, if the acts which are to be concluded by the administrator have to be concluded in an authentic form – *ad validitatem* – normally, also the convention by which the administrator is empowered has to be concluded in authentic form[13].

As it was established by the specialized literature, it is possible that the power of attorney of the administrator exist in a clause inserted in another type of contract, clause which has to be valid from a legal point of view so that it produces the effects specific to the administration of the property of others.

2.2.1. Legal characters of the convention of administration of the property of others

Analyzing the content of all provisions which form the legal framework of the institution, it results that this convention/contract is, usually ***a contract for valuable consideration***, because the administrator is paid for the deployed activity, the remuneration being established by the constitutive act (the convention), by subsequent agreement of the parties, by law or, in absence, by court decision.

Concerning the modality of establishing the remuneration by court decision, the Civil code provides in article 793 paragraph (2) the last part that, in this case, usages and, in absence of such criterion, the value of the services provided by the administrator, will be taken into consideration.

According to article 793 paragraph (2) "*the person who acts without this right or without being authorized for this is not entitled to remuneration,*

[13] Constantinovici/Mitu in the new Civil code, coordinator Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, already quoted, p. 838

staying applicable, the case may be, the rules governing the business management". Therefore, if a person administers the property of others without a power of attorney, acts as a ***de facto administrator*** without being entitled to remuneration.

Exceptionally, according to the law, the constitutive act or the subsequent agreement of the parties or the actual circumstances, the administration is carried out ***without consideration*** (article 793 paragraph (1) of the Civil code) for example the case of guardianship of the interdicted person of the executor of the will.

Therefore, usually, the contract/convention of administration is a ***contract with valuable consideration.***

According to the existence or not of a reciprocity of actions, we consider that the legal institution of the administration of the property of others which is based on the convention of the parties is an ***unilateral contract***, applying the definition comprised in article 1171 of the Civil code, according to which the "*contract is synallagmatic when the obligations resulting from it are mutual and interdependent. Contrary, the contract is unilateral even if its execution implies obligations for both parties"*

In these conditions, it is obvious that the administration of the property of others originating from the convention/contract does not entail mutual and interdependent obligations, even if the owner of the goods or the holder of the property entrusted for administration, shall have the obligation to pay to the administrator the remuneration established and determined by the law or even by the court[14].

The convention (administration contract) is a ***commutative contract*** because, at the moment of its conclusion, the existence and the scope of the obligation are certain, and their scope is determined or determinable.

As far as the form is concerned, as we highlighted before, the convention has a ***consensual character,*** the mere agreement of the parties being enough (article 792 corroborated with article 1174 of the Civil code), the written form being required *ad probationem,* in the cases where the value of the obligations exceeds 250 lei, which normally happens in the case of the administration even of a single good which belongs to another person.

[14] C. Statescu, C Birsan, Civil law, The General Theory of Obligations, the Obligations, the Xth edition, Ed. Hamangiu, Bucharest, 2008, p. 26; L. Pop, Treaty of Civil law. The contract, volume II, Ed. Universul Juridic, Bucharest, p. 98-102

2.2.2. The content of the convention/contract if administration of the property of others

According to the principle of autonomy of will, the contracting parties establish the content of the contract, according to the forms of administration, respectively the ***simple administration*** or the ***full administration***. The obligations of the parties depend on the form of administration, the essential differences being defined by the legislator. Thus, in case of the simple administration, the person empowered with administration has to undertake all necessary acts for the preservation of the goods, as well as the useful acts so that these goods may be used according to their normal destination, which means that the administrator will conclude, mainly, acts of administration and preservation of the goods, of the property mass or of the entire property (article 7095 of the Civil code); on the other side, if the administration is full, besides the preservation obligation, the administrator also has the obligation to use the goods in a profitable way, to enhance the property or to carry out the appropriation of the property mass provided this is for the best interest of the beneficiary, meaning that, besides the administration and preservation acts, the administrator will have to conclude ***disposition acts,*** if they are in the interest of the beneficiary (article 800 of the Civil code). Speaking about the interest of the beneficiary, the administrator will not be able to draft legal acts without consideration with regard to the goods subject to administration and, in respect of the acts of alienation and of pledging with consideration, these ones shall be concluded only if they are in the best interest of the beneficiary[15].

Even if the clauses of the convention will be established by the parties, still, they have to be in accordance with the provisions regarding the legal regime of the administration provided in Chapter III, Section I of Title V of the Civil code.

In the specialized literature, for the interpretation of the provision of article 792 paragraph (1) of the Civil code, it was expressed the opinion according to which "the power of attorney through a convention comprises any *inter vivos* legal act by which a person is entrusted with the administration of the property of others, irrespective if it is a ***mandate contract, a constitutive act of a legal person, a convention of association, a contract of administration of the joint property***[16]."

[15] UNPR, the Civil code of Romania, Notary Handbook, volume I, already quoted, p. 268
[16] UNPR, the Civil code of Romania, already quoted, p. 263

This approach of the problem is not less interesting, only, as we already highlighted, the administration of the property of others is not confused with the mandate or with the constitutive act of a legal person even if there aren't impediments that the attorney in fact empowered through the mandate contract is empowered to manage one or several goods of the beneficiary or of the entire property of the beneficiary. In these conditions, the mandate contract would be subject to different regulations, on one side, to those regarding the mandate and, on the other side, to the provisions applicable to the administration of the property of others.

We have the same reserves with respect to the opinion according to which the constitutive act of the administration is represented by the convention of administration concluded between the parties.

The different interpretations of the legal texts (article 792, article 793 of the Civil code) are generated by the wording of the legislator. Thus, in article 792 of the Civil code, the legislator provides that the power of attorney is given to the administrator through ***legacy or through convention,*** while in article 792 paragraph (3) and article 793 paragraph (1) of the Civil code, the legislator refers to the constitutive act, the law or the actual circumstances which require the application of another legal regime or that the administrator is entitled to a remuneration established by constitutive act or by the subsequent agreement of the parties, by law or, in absence, by court decision.

Analyzing these texts and interpreting them in a systematic manner, we could conclude that the legislator had in mind the constitutive act of administration (legacy or convention), the law or, in the circumstances enumerated which require the application of another legal regime.

As far as we are concerned, we consider that, *de lege ferenda*, it would be necessary that the legislator expressly provide that this convention through which a person (administrator) is ***empowered*** to administer the property of others is a ***named contract***, respectively a ***convention of administration or an administration contract.*** The argument for this proposal consists in the special legal regime of the administrator of the property of others and to remove any possible confusions with other legal institutions, institutions which represent applications of the administration of the property of others like the guardianship, the mandate etc.

If the legislator would name the constitutive act of administration, namely the convention of administration or the administration contract

which would add to the other constitutive act, respectively the legacy, different interpretations would be removed.

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CRITICAL REMARKS ON PROTECTING THE FAMILY MEMBER IN THE NEW CRIMINAL CODE

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Abstract: *The article proposes a new solution to protect the family member in the new Criminal Code, by grouping all offenses directed against family in a single chapter.*

Keywords: *family member, family, protection, new Criminal Code*

The special part of the new Criminal Code is opened by title I dedicated to the group of criminal offences committed against an individual.

But the content of this title is different from what we currently know, as the legislator chose to make several changes, as follows:

1. special part structuring on sections was given up, the content of the said part being ordered now only by title and chapter. As a matter of fact, the entirety of the Criminal Code is only divided into titles and chapters;

2. the order of criminal offences positioning was changed for example, s*uicide determination or facilitation* is situated before culpable homicide (second degree murder), whereas this order is reversed in the Criminal Code currently in force;

3. criminal offences from other titles and chapters were inserted in title I (for example, the deed of **bad treatments applied to minors** comes from title IX called *criminal offences bringing prejudice to certain relations regarding social cohabitation*, chapter I – *criminal offences against family*; **scuffle** comes from the same title IX, chapter IV, called *other criminal offences bringing prejudice to certain relations regarding social cohabitation)*;

4. new deeds were incriminated (for example, **homicide at the request of the victim** in art. 200; **foetus harming** in art. 202; **help obstruction** in art. **204**; **professional headquarters violation** in art. 225; **private life violation** in art. 226; **harassment** in art. 208;

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5. new chapters were added, increasing their number from 4 to 9 chapters in title I. The newly inserted chapters are: chapter III – *criminal offences committed against a family member*, chapter IV – *unprovoked assault on the foetus*; chapter V – *criminal offences regarding the obligation of assistance for those in danger*, chapter VII – *traffic and exploitation of vulnerable individuals*;

6. the name of the chapter regarding sexual life was changed, this chapter being now entitled *criminal offences against freedom and physical integrity*;

7. some criminal offences or versions of a criminal offence were merged (severe physical injury is being absorbed into physical injury; aggravated first degree murder is to be found in first degree murder);

8. new social values were brought under the criminal law protection, such as: **the foetus –** art. 202; **the professional headquarters –** art. **225; the private life –** art. 226;

9. some criminal offences were re-defined, also changing their names, for example concealment of birth has a different content and another name.[264]

We will make the remarks below on one of these changes, namely the chapter with the title *criminal offences committed against a family member*.

In chapter III, having the title *criminal offences committed against a family member,* the following are incriminated: on one hand, under the name of *family violence,* deeds against life, physical integrity or health of the family member, and – on the other hand – deeds committed against

[264] **Art.** 200. **Homicide or injury on the newly born child committed by the mother –** (1) Homicide of the newly born child immediately after birth, but not later than 24 hours, committed by the mother under psychical distress, is being punished by imprisonment between one and 5 years.

(2) In case the deeds provided in art. 193-195 are committed on the newly born child immediately after birth, but not later than 24 hours, by the mother under psychical distress, the special limits of the punishment are one month and 3 years, respectively.

the child newly born by his mother are incriminated, under the name of *homicide or injury on the newly born child committed by the mother*.

We were used to see that the legislator indicated the value protected by the criminal norm by means of the names given to the titles, chapters and sections. This shows that there is always a liaison between the name of the titles, chapters, sections and the criminal offences regulated by the same, expressing the relationship between the value that we legally protect and the deeds against which we protect it, as follows: life is protected from homicide, patrimony is protected against theft.

The correspondence between the name of the title, chapter, section and the content of the same, checked in the case we analyze, leads us toward the conclusion that in chapter III we protect the family member against the criminal offences committed against life, physical integrity or health of the said family member.

By protecting the family member, the legislator integrated the family social value into the individual attributes group, but only partially, because, on one hand, family has a reserved distinct place in title VIII *criminal offences bringing prejudice to certain relations regarding social cohabitation,* chapter II – *criminal offences against family,* art. 376-380, and – on the other hand – family was brought in title I, not in its broad legal meaning, but reduced to the family member.

Acting this way, the legislator clearly shows that he only wanted to protect the family member as an individual, and not as an element composing the family, making the family member a value in himself, distinct from the family, but originating from it.

In this way, a new group of criminal offences was introduced into the Criminal Code, in order to prevent, control and protect the victims prone to family violence, justified by the fact that most frequent sufferings the family institution has to cope with are caused by violence committed against its members.

If protection was desired for the family member, then it would be more advisable that he be protected against all forms of violence directed upon him (of physical, verbal, spiritual, economic, social, psychical, sexual, emotional nature), by grouping all deeds in a single chapter, which would have meant also bringing the *criminal offence of rape* (art. 218 paragraph 3 letter b) NCP) or the *criminal offence of obstructing access to the mandatory general education* (art. 380 NCP) into the group of criminal offences committed against the family member.

We remark that in case of the aggravated version of the criminal offence of rape, the legislator no longer uses the phrase „family member“

like in the current Criminal Code, but resorts to the criteria of degree („the victim is a direct line relative, brother or sister"), which can be found in the notion of „family member",[265] along with other persons.

As in paragraph 3 of art. 218 NCP a part of the family members are protected against sexual violence, the place of the criminal offence of rape should be in chapter III, along with the other criminal offences committed against a family member.

Choosing to protect the family member separately from his family, inside the title regarding the individual, I believe that the legislator should have grouped in a single chapter all criminal offences committed against the family members, and that the place of this chapter should be after the criminal offences committed against life, physical integrity, sexual freedom, in order to enable a previous knowledge of the same.

The way chapter III is currently positioned, it is difficult to accept insertion of the rape committed against the family member, as long as the criminal offence of rape is placed after chapter III, namely in chapter VIII.

[265] Art. 177. **Family member** – (1) By *family member* one understands:

a) ascending relatives and descending relatives, brothers and sisters, their children, as well as the persons who became such relatives by adoption, according to the law;

b) husband;

c) the persons who established relations similar to those between spouses or between parents and children, in case they cohabit.

(2) The provisions in the criminal law regarding the family member, within the limits provided in paragraph (1) letter a) will also apply, in case of adoption, to the person being adopted or to the descendants of the said person as against the natural relatives.

As a matter of fact, one should also remark, regarding the criminal offence of rape, the fact that the legislator did not provide equal protection for all family members, as the content of art. 218 paragraph 3 letter b) NCP shows that only the brothers, sisters and relatives in direct line with the author of the criminal offence were taken into consideration, being mentioned as family members in art. 177 paragraph 1 letter a) and paragraph 2 NCP, but not the other family members, such as the husband (art. 177 paragraph 1 letter b) NCP) or „the persons who established relations similar to those between spouses or between parents and children, in case they cohabit" (art. 177 paragraph 1 letter c) NCP).

This situation may be corrected by resuming the wording currently used, namely: rape committed against a family member, within the meaning of this phrase in art. 177 NCP.

As I believe that protecting the family member separately from the family institution is not a justified solution, I propose as follows: creation, after title I, of title II called criminal offences against family, which should be divided into several chapters, as follows: chapter I – criminal offences committed against a family member; chapter II – criminal offences regarding the alimentation obligations; chapter III – criminal offences regarding marriage.

This solution gathers together all provisions meant to protect the family institution, providing a unitary legislative framework in this respect, of which we would have been deprived in the case of a fragmentary protection.

I believe chapter III to be a creation that is artificial, for exhibition purposes and ungrounded. Protection of the family member cannot be actually achieved against a particular criminal offence, called *family violence*, but still against the traditional criminal offences of homicide rape, grouped under the name of a phenomenon, that of violence within the family, whose victim is the family member.

As a matter of fact, the deeds in art. 199 NCP, called *violence within the family*, make reference to art. 188 (criminal offence of homicide), art. 189 (first degree murder), art. 193-195 (criminal offences against physical integrity or health).

Therefore, chapter III does not justify its presence in title I, as protection of family member life, physical integrity or health could be achieved within the background of these criminal offences, by an aggravated version, the way it is provided in the case of the criminal offence of rape – art. 218 paragraph 3 letter b) NCP and the way it was

currently done in art. 180 paragraph 1^1 and 2^1, art. 181 paragraph 1^1 in the Criminal Code or art. 197 paragraph 2 letter b^1 in the Criminal Code.

CONSIDERATIONS ON THE EVOLUTION OF THE LEGAL PERSONALITY OF THE EUROPEAN UNION

Dan VĂTĂMAN[*]

ABSTRACT

After nearly sixty years of development, the European Union has become an important actor in international relations and is a benchmark for stability, democracy and human rights. In order to promote these values, the European Union needed effective and coherent tools, adapted not only to the functioning of an enlarged Union of 27 Member States, but also for the rapid changes that the world of today is facing. By adopting the Treaty of Lisbon, the European Union has acquired legal personality, which allows it to work more effectively and consistently worldwide, thus acquired a strengthened position in relations with partner countries and organizations around the world. Considering that until the acquire legal personality the European Union was based on the European Communities that each had separate legal personality and so there were a series of controversies about the legitimacy of the Union's relations with other subjects of national law and international law. Therefore, this article tries to clarify unclear aspects regarding the legal personality of the European Communities / European Union and also to analyze the provisions of the Treaty of Lisbon according that the European Union may exercise its legal personality in the legal order of the Member States and in the international legal order.

KEYWORDS: *international agreements, international organizations, legal capacity, legal personality of the European Union, Treaty of Lisbon.*

1. General aspects of the legal personality of international organizations

If we want to refer to a definition of an international organization it would be difficult because in doctrine there is no universally accepted definition. Over time were issued several definitions, one of which was proposed in 1956 by the UN International Law Commission, which held

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that the international organization is "collectivity of States established by the Treaty, endowed with a constitution and common organs, having a legal personality distinct from that of its Member States"[1]. While these basic elements of international organizations were accepted by the doctrine, the definition was not accepted as such by the Vienna Convention on the Law of Treaties of 1969, which provides that the term "international organization" means an "intergovernmental organization", emphasizing thus that members of an international organization are States, as sovereign and independent entities.[2]

Unlike states which are the *original*, *primary* and universal *subjects of international law*, the international organizations are considered derived subjects of international law as they arise by agreement of the states. When creating an international organization, Member States invest the new entity with certain functions and powers to promote common interests. Thus, the international organization acquires legal personality, distinct from the states that have created it and which is opposable *erga omnes*[3]. Regarding opposability of the legal personality of international organization with non-members or of the third states, according to the Vienna Convention on the Law of Treaties "a treaty does not create either obligations or rights for a third State without its consent". [4]

Once it acquired the legal personality, the international organization can manifest both in the legal order of the Member States and the international legal order.

Regarding the legal personality in national order of the Member States, to achieve the purposes for which it was created, an international organization has the capacity to have rights and obligations in the legal relations of the national territory of any Member State[5].

Under international legal personality, an international organization has the capacity to have rights and obligations in relations with other subjects of

[1] Document A/CN.4/101: Report by G. G. Fitzmaurice – Yearbook of the International Law Commission, Volume II, 1956, p. 108.

[2] Article 2 paragraph 1 lit. i) of the Vienna Convention on the Law of Treaties (1969)

[3] For details see Dan Vataman, *European and Euro-Atlantic Organizations*, Bucharest, "C.H. Beck" Publishing House, 2009, pp. 14-18.

[4] Article 34 of the Vienna Convention on the Law of Treaties (1969)

[5] A case in point is the Article 104 of the UN Charter, which provides that "The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes". Moreover, the provisions of the UN Charter (entered into force on 24 October 1945) are found in most of the acts constituting international organizations and contains similar provisions.

international law in a given area of international relations, in connection with the purposes and objectives for which it was constituted[6].

2. The emergence of the European Communities and evolution of their legal personality

Given the clarifications made above about how an international organization acquires and is exercising legal personality, in continuation of this research an analysis is required on emergence and evolution of the European Communities, focusing in particular on consecration and regulation of their legal personality in founding treaties.

European Communities were created as other international organizations on the basis of multilateral treaties negotiated at international conferences, signed by the plenipotentiaries of the participating states and ratified in accordance with constitutional rules of each Contracting State in part, following to entry into force once all instruments of ratification have been provided.

The first European community was the European Coal and Steel Community (ECSC), established by the Treaty of Paris (signed on 18 April 1951 and entered into force on 25 July 1952), for a period of 50 years.

If you look at the European Coal and Steel Community (ECSC) in terms of the constituent elements proposed by the UN International Law Commission we will find that it meets all four of them, namely: it is an association of states, it is established by a multilateral treaty, it is endowed with its own institutional structure and has a separate legal personality from that of countries that have created it. This fact is stated expressly in ECSC Treaty, which shows that in its international relationship, the Community shall enjoy the juridical capacity necessary to the exercise of its functions and the attainment of its ends. However, in each of the member States, the Community shall enjoy the most extensive juridical capacity which is recognized for legal persons of the nationality of the country in question.

[6] Manifestation of the legal personality of international organizations in their quality as subjects of international law involves expressing these quality by distinct acts such as: international agreements, representing among other subjects of international law or their recognition, assuming obligations and international liability - For details see Raluca Miga-Besteliu, *International Intergovernmental Organizations*, Bucharest, "CH Beck" Publishing House, 2006, p 40.

Specifically, it may acquire and transfer real and personal property, and may sue and be sued in its own name[7].

The other two European communities namely the European Economic Community (EEC) and European Atomic Energy Community (EAEC) were created by the Treaties of Rome, signed on 25 March 1957 and entered into force on 1 January 1958, for an unlimited period.

Separate legal personality of the two new European communities was established in their constituent documents, these by referring to both international legal personality and the legal personality in national order of the Member States[8].

Articles governing the legal personality of the two communities have similar content; they established that in international relations the communities have the legal capacity necessary to perform its functions and achieve their goals and also in each of the Member States the two communities have the most extensive legal capacity accorded to legal persons under their respective municipal law.

European Communities have retained separate legal personality although, over time there were adopted a series of treaties modifying the founding treaties.

The first is the Treaty establishing a Single Council and a Single Commission of the European Communities in 1965 (known as the Merger Treaty), which aimed to unify the institutions of the three European Communities structure. Although there has been an institutional merger, the newly created institutions performed their duties under each of the three constitutive treaties, the European Communities remaining distinct, each possessing its own legal personality.

Also, the Single European Act (signed in February 1986) focused into a single document the provisions relating to the functioning of the unique institutional structure, however the institutions of the European Communities continued to operate in accordance with the provisions of the treaties establishing the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community.

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[7] Article 6 of the Treaty establishing the European Coal and Steel Community (ECSC)

[8] Regarding the European Economic Community (EEC), its international legal personality was established expressly in the Article 210 of EEC Treaty and the legal personality in national order of the Member States in the Article 210 of EEC Treaty. In the case of the European Atomic Energy Community (EAEC), its international legal personality was established expressly in the Article 184 EAEC Treaty and the legal personality in national order of the Member States in the Article 185 of EAEC Treaty.

Another milestone in the evolution of the European Communities was the signing of Maastricht Treaty on 7 February 1992 (entered into force on 1 November 1993), which established the European Union as a structure based on three pillars: European Communities, Common foreign and security policy (CFSP) and Cooperation in the fields of justice and home affairs (JHA).

Although the Treaty on European Union (TEU) stated that among the objectives of the Union it was "to assert its identity on the international scene" or "introduction of a citizenship of the Union", it was not expressly provided the legal personality of the European Union, stating that it "is founded on the European Communities supplemented by the policies and forms of cooperation introduced by this Treaty"[9].

The problem of assigning legal personality to the European Union concerned Member States during the Intergovernmental Conference which negotiated the Treaty of Amsterdam. Although it made some important amendments to the Treaty on European Union (TEU) and the founding treaties of the European Communities, the Treaty of Amsterdam failed to solve all problems (including related legal personality of the European Union), which is why just one month after entry into force (1 May 1999), it was raised the question of convening an intergovernmental conference to negotiate a new treaty.

Treaty of Nice, signed on 26 February 2001, made some reforms in the composition and functioning of the Community institutions; reforms needed for future enlargements of the European Union, but it did not bring any change in the legal personality of the European Union. However, the "Declaration on the future of the European Union", annexed to the Treaty, established a series of reflection topics including simplification of the Treaties.

Laeken Declaration, adopted at the European Council meeting in December 2001, was referring to some challenges and reforms in a "renewed Europe", including simplification and reorganization of existing treaties and the adoption of a constitutional text in the Union. In this sense, it provided to convene an Intergovernmental Conference, which finally completed the draft of Treaty establishing a Constitution for Europe which was signed on 29 October 2004. According to Article IV-447, the Treaty shall be ratified by the High Contracting Parties in accordance with their

[9] Article A of the Treaty on European Union (TEU) - Official Journal C 191, 29 July 1992.

respective constitutional requirements and will enter into force after its ratification, but no later than 1 November 2006. This has not happened since the Constitutional Treaty was rejected in referendums in France and the Netherlands in 2005.[10]

Given the failure of the Constitutional Treaty, the European Council held in Brussels, on 16-17 June 2005, decided to launch a "period of reflection" in which the Member States to organize debates involving citizens, civil society, social partners, national parliaments and political parties, to find a solution for the future of the European Union. After a period of political consultations, the European Council agreed to convene an Intergovernmental Conference (IGC) in July 2007, while taking its mandate to provide the particulars of the expected reform.[11]

After a series of discussions and negotiations, the Intergovernmental Conference completed its work on 18 October 2007. European Council, held from 18 to 19 October 2007, has reached an agreement on the text of the Reform Treaty which will be signed during the summit in December 2007 in Lisbon. Consequently, on 13 December 2007 at the summit in Lisbon (Portugal) was signed the Treaty of Lisbon, officially called "Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community"[12]. After ratification in all 27 Member States, the Treaty of Lisbon entered into force on 1 December 2009.

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[10] Step of ratification of the Constitutional Treaty was a challenge as important as the Intergovernmental Conference which finalized it. Thus, at the referendums in France (29 May 2005) and the Netherlands (1 June 2005), the Treaty was rejected many voices saying that "European Constitution Treaty died in France and was buried in the Netherlands", not a few are those who believed that the political project of a united Europe died before it was born. Nevertheless, even if it took no effect and thus did not alter in any way the existing treaties, the Treaty establishing a Constitution for Europe has provided a number of innovations including the granting of legal personality of the European Union - For details see Dan Vataman, *History of European Union*, Bucharest, "Pro Universitaria" Publishing House, 2011, p 74.

[11] In the mandate conferred to the Intergovernmental Conference it is shown that constitutional concept is abandoned (which consisted in repealing all existing Treaties and replacing them by a single text called "Constitution") and wanted the new treaty to introduce into the existing Treaties, which remain in force, the innovations resulting from the Intergovernmental Conference which finalized the draft Treaty establishing a Constitution for Europe - Presidency Conclusions of the Brussels European Council (21/22 June 2007)

[12] Official Journal of the European Union C 306/1, 17.12.2007

3. Regulation of the legal personality of the European Union following the reform made by the Treaty of Lisbon

Treaty of Lisbon replaced none of the treaties establishing the European Communities and the European Union, but it has changed them. Thus, Article 1 of Treaty of Lisbon modified Treaty on European Union (TEU) and Article 2 of Treaty of Lisbon amended the Treaty which established the European Community (TEC), which was renamed the Treaty on the Functioning of the European Union (TFEU)[13].

Regarding the legal personality of the European Union, the two treaties contain a number of provisions from which derive both the international legal personality and legal personality in the national legal order of the Member States.

According to Article 1 of TEU, the European Union replaces and succeeds the European Community. However, Article 47 of the TEU provides expressly that the European Union shall have legal personality.

If we refer to national legal personality under Article 335 TFEU[14], in each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws. As a result, it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings, to that end being represented by the European Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation.

International legal personality of the European Union is clear from the provisions of Article 216 TFEU, which states that the Union may conclude agreements with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their

[13] The Lisbon Treaty has only seven Articles. There are also 11 new Protocols to be annexed to the Treaties; plus a Protocol (to the Lisbon Treaty itself) amending the pre-existing Treaty Protocols. The texts of the Treaties and Protocols have the same legal value. Finally, the Inter-Governmental Conference (IGC) which agreed the Lisbon Treaty also provided for a number of Declarations; these are political acts, but may be relevant to the Treaty's interpretation – For details see Dan Vataman, *History of European Union*, Bucharest, "Pro Universitaria" Publishing House, 2011, pp. 126-130.

[14] ex Article 282 TEC

scope. According to the same article, the agreements concluded by the Union are binding upon the institutions of the Union and on its Member States. Also, Article 217 TFEU[15] provides that the European Union may conclude agreements with one or more third countries or international organizations to create an association involving reciprocal rights and obligations, common action and special procedures.

Pursuant to Article 218 TFEU[16], the Council shall authorize the opening of negotiations, adopt negotiating directives, authorize the signing of agreements and conclude them.

4. Limits on the exercise of legal personality by the European Union

Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon was accompanied by a statement according to which "the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties"[17].

In this regard, the Treaty on European Union (TEU) provides that the delimitations of Union competences are governed by the principle of conferral and exercise of these powers is governed by the principles of subsidiary and proportionality. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein and, therefore, competences not conferred upon the Union in the Treaties remain with the Member States[18].

Categories and areas of Union competences are laid down in the Treaty on the Functioning of the European Union (TFEU), that specify the case where the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States able to do so only if so empowered by the Union or for the implementation of Union acts[19].

When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. Member States shall

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[15] ex Article 310 TEC

[16] ex Article 300 TEC

[17] Declaration no. 24 concerning the legal personality of the European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon - Official Journal of the European Union C 83/347, 30.3.2010.

[18] Article 5 of the Treaty on European Union (TEU)

[19] Article 2 (1) of the Treaty on the Functioning of the European Union (TFEU)

exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence[20].

In certain areas and under conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas[21].

Scope and arrangements for exercising the Union's competences are established by the provisions of the Treaties relating to each area.

According to them, the Union shall have exclusive competence in the following areas: a) customs union; b) the establishing competition rules necessary for the functioning of the internal market; c) monetary policy for the Member States whose currency is the euro; d) the conservation of marine biological resources under the common fisheries policy; e) common commercial policy. Also, the Union shall have exclusive competence in terms of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope[22].

Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas where it has exclusive competence or carrying out actions to support, coordinate or supplement the actions of the Member States. Shared competence between the Union and the Member States applies in the following principal areas: a) internal market; b) social policy, for the aspects defined in the TFEU; c) economic, social and territorial cohesion; d) agriculture and fisheries, excluding the conservation of marine biological resources; e) the environment; f) consumer protection; g) transport; h) trans-European networks (TEN); i) energy; j) area of freedom, security and justice; k) common safety concerns in public health matters, for the aspects defined in the TFEU[23].

Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. At European level, these actions are the following: a) protection and improvement of human health;

[20] Article 2 (2) of the Treaty on the Functioning of the European Union (TFEU)
[21] Article 2 (5) of the Treaty on the Functioning of the European Union (TFEU)
[22] Article 3 of the Treaty on the Functioning of the European Union (TFEU)
[23] Article 4 of the Treaty on the Functioning of the European Union (TFEU)

b) industry; c) culture; d) tourism; e) education, vocational training, youth and sport; f) civil protection; g) administrative cooperation[24].

Thus, among the reform introduced by the Lisbon Treaty are included the comprehensive and detailed delimitation of competences between the European Union and its Member States, through changes introduced the treaty managed to overcome the shortcoming of previous regulations, which showed no clearly areas of Community competence, establishing only the general characteristics of Community action in relation to the action of Member States in some areas.

5. Conclusions

Today, after almost sixty years of history and unprecedented achievements, the European Union has become an important actor in international relations and is a benchmark for stability, democracy and respect for human rights.

In order to promote these values, the European Union needed effective and coherent tools, adapted not only to the functioning of an enlarged Union of 27 Member States, but also for the rapid changes that the world of today is facing.

By adopting the Treaty of Lisbon, the European Union has acquired legal personality, which allows you to work more effectively and consistently worldwide. Thus, this innovation introduced by the Treaty of Lisbon has significant effects on the Union's external action, creating a single legal entity ensuring better international representation of the Union and also strengthen the role of European Union as a main actor in international relations.

Concluding the above, we can say that by the reform carried out by the Treaty of Lisbon, the European Union has entered in a new phase of its existence as a political, economic and social entity, coupled with effective and consistent tools tailored not only to functioning of a Union with 27 members and with the prospect of continuing its expansion, but also for the new challenges of the 21st century.

[24] Article 6 of the Treaty on the Functioning of the European Union (TFEU)

REVIEW

"THE LAW OF RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS",

lecturer PH.D. Felicia Maxim,

Renaissance Publishing House, Bucharest, 2011,p.266

The work deals with an important and topical theme – in theoretical-scientific realm and, especially, in practical realm, to the international society overall, as well as to international law, responsibility being an institution inherent to each branch of law, none the less to public international law, in order to assert the legal authority of its norms.

Responsibility is a principle of law, according to which any breach of an obligation deriving from a legal norm triggers the responsibility of the author of the breach and their obligation to make reparations for any possible prejudice. Responsibility is also a consequence of manifesting the legal personality of the state, based on the principle of sovereignty. As a result, the work proves with pertinent arguments that the principle of responsibility derives from the principle of sovereign equality and represents a guarantee of observing and applying it, of maintaining international legal order. Under these circumstances, the publication of a monograph that deals with the vast and complex issues of the responsibility of the states for internationally wrongful actions is salutary and welcome.

In its first part, the work deals with **Attempts of Codifying the Responsibility of the States for Internationally Wrongful Actions** examining general aspects regarding responsibility, presenting the objectives of the doctrine and practice of international law during several decades in the field of responsibility. The research of the theme starts from the responsibility of the states for the damage caused on their territory to the person or property of foreigners, a problem subsequently abandoned, and gets to the responsibility of states for internationally wrongful actions.

Focusing on the presentation of the draft codes prepared with a view to the responsibility of states for internationally wrongful actions, the author aims at underscoring the results obtained in the field so far, in almost 60 years that have elapsed since 1953, when the topic was included in the agenda of I.L.C., to date, when the draft articles still have not managed to obtain the expected position of legal instrument.

Also, in the introductory part, there are well placed **General Considerations regarding international responsibility** which introduce to problems such as: the lace and role of responsibility in organized society; responsibility and public international law, particularities of responsibility for wrongful actions; subjects of responsibility; general principles of responsibility and conditions for the existence of the internationally wrongful action.

Also, interesting and worth noting are the chargeability of the wrongful action and the breaching of an international obligation, these clarify also the substance of the work, in particular aspects, specific to the institution of responsibility.

In case of the **chargeability of the wrongful action**, after establishing the necessary conditions for attributing a wrongful action to a state, the work mentions that the wrongful action is attributed to the bodies that committed the action, irrespective of the position of the state body in the internal organizational structure or of its hierarchy, placing thus under scrutiny, under all aspects of responsibility: the lawmaking, executive, judgment bodies as well as persons or entities that action on the behalf of the state, the conduct engaged in the absence of the official authorities, as well as the movements of national liberation, the conduct of the bodies of such movements as against wrongful actions engaged by other states and, as the case may be, the cases where it is raised the problem of the responsibility of the states for the actions of persons that do not action on the behalf of states.

In respect of **breaching an international obligation** there are subjected to a thorough analysis problems such as: origin, existence and content of the obligation assumed; the relation wrongful action- serious violations and other violations, with special focus on serious violations of the *jus cogens* norms and their consequences for the international community overall, as well as on the case regarding the complex action, continuous wrongful action and compound wrongful action.

Circumstances that exclude wrongful character of an action point out to the conditions, limits and way of action of each of the six causes that exclude the wrongful character of the action, drawing attention especially to

the resemblances and differences between them, starting with consent, followed by: self-defence, countermeasures, force majeure, state of distress and state of necessity and a welcome special heed is paid to countermeasures, considering also the frequency of using them in the practice of the states, as well as the variety of measures which can be resorted to in such cases.

Drawing the reader's attention there are especially the aspects regarding the **Content and ways of implementing responsibility, which** have been given a wider space also illustrating the qualities and the depth of the analysis and synthesis, which characterize the entire work, and also the contribution of research in finding a solution specific to the problems regarding the legal consequences for breaching international law norms and ways of applying responsibility.

Analysing the institution of international responsibility as being "the reason of being" of international law, as a normative system, an institution that has been under the attention of international law doctrine, under its various aspects, for a long time –Grotius, considered to be the parent of this law, paid a special heed to it, the same as other authors, which is also shown by the many and various drafts of codification in the field, and, on the other hand, perceived and showed in a personal manner, both its complexity and scope, and also the topicality and necessity of placing this central institution of international law on the strong and firm pillars of this law.

The preparation of a work on international law responsibility of states is a true and continuous challenge. Thus, this topic has a character that is not only complex, encompassing and wide, but also difficult to investigate and treat – requiring a wide area of research – many aspects being controversial, allowing for different opinions between the experts in the field and especially between those belonging to civil law and those belonging to common law, which is also shown by the fact that the monographs are almost completely missing not only from Romanian specialized doctrine, but also from foreign doctrine and that so far it has not been possible to reach an agreement on a regulation that should establish the general legal framework in the field.

In the preparation of the work, a multitude of sources have been used, there have been investigate and used correctly and at their fair value various draft codifications and mainly the works and final draft of the International Law Commission designed to assist the codification of the responsibility of the state for internationally wrongful actions, as well as the draft still

underway of the I.L.C. regarding the responsibility of international organizations. A special merit of the work is the fact that its preparation is based on a wide and diversified international arbitral case law as against multiple practical aspects of international responsibility, including the case law of European Court of Human Rights and North-American Court of Human Rights, as well as the relevant international conventions and documents.

The work is comprehensive, coherent, clear, thorough and solid in formulating its legal reasoning and in grounding its solutions, which recommends the work as a valuable one, which should not miss from the shelves of the library of any legal practitioner, member of the law teaching staff or researcher, it being, in fact, useful to a much wider circle or readers.

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