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CONTENT

ANALYTICAL ISSUES OF THE RIGHT TO BE FORGOTTEN - BETWEEN THEORETICAL LANDMARKS AND PRACTICAL EXPECTATIONS

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ABSTRACT

Technological developments have produced essential changes in the European regional legal framework, being a real factor in the configuration of law. Standards on the protection of human rights acquire a special dimension in the context of virtual reality, leading to the emergence of innovative prerogatives such as the right to be forgotten. Taking into account the recent crystallization of the right to be forgotten, in this paper we aim to address issues related to clarifying the conceptual framework associated with this prerogative and, subsequently, to capture the general legal and jurisprudential coordinates of the right to be forgotten. The specific difficulties of researching a modern resurgence right, such as the right to be forgotten, reside in the dynamics of the virtual world as well as in the implicit technical aspects of exercising this right in the Internet environment. Although the complexity of the right to be forgotten allows the application of various research frameworks - from IT approaches, to sociological or legal approaches - we opted to analyse this right in the human rights paradigm, highlighting issues related to the conditions and limits of exercise in order to guarantee the following: data confidentiality, personal rights, the right to image, dignity and the protection of privacy and family life.

KEYWORDS: *protection of personal data; the right to be forgotten; the right to protection of private and family life; confidentiality;*

General conceptualization framework

The right to be forgotten is a prerogative that raises the issue of reconciling transparency information with the protection of personal data.

Although there are different legal predecessors to the right to be forgotten, the conceptual origin of this right can probably be found in the

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ideas of self-government and self-determination presented in Niklas Luhmann's work, where he proposes systems that should be self-organized and within which people would interact. These concepts were first implemented in German legislation in the form of the concept of *self-determination of information* which implies the existence of a space in which the individual is protected from interference in personal matters, thus creating a sphere in which he or she can feel safe from any interference. Although this concept does not specifically correspond to privacy, the right to privacy being seen as protecting a type of interests, self-determination of information is an important starting point in building the right to image and the free development of the human personality.[1]

The evolutionary perspective within which the *right to be forgotten* must be understood also implies the association with *the protection of personal data* and *the preservation of their confidentiality*. It is clear that in this perspective the application of the right to private and family life becomes incidental. Related to this dimension is *the freedom of information and expression* of the individual according to which the Internet is a remarkable source of information by its comprehensive and current nature and the individual must have access to all relevant information that he needs whenever is accessing this source of documentation. In this context, *the right to be forgotten* corresponds *to the right to be remembered*, which will serve the general information needs of individuals. On the other hand, in the literature, there have been outlined that argue for the extension of the right to informational self-determination in the sense of including the right to delete unwanted information from online public spaces that may prove to be harmful.[2]

At the conceptual level, the challenges attached to the right to be forgotten are multiple. The development of computer systems has led to the right to be forgotten related to the adoption of legislation requiring the deletion of personal data at certain intervals or the right to request websites to delete personal data.

The doctrinaire studies developed in the field of personal data protection leads to the idea that the right to be forgotten includes the

[1] A. Guadamuz, Freeman Centre, University of Sussex, Brighton, UK. A.guadamuz@sussex.ac.uk, *Developing a Right to be Forgotten*, pp. 3-4.

[2] *Ibidem*.

following prerogatives: (1) the right to erasure; (2) the right to de-list /the right to obscurity. The right to delete allows individuals to delete all personal data related to them when they leave a service or application. This right of deletion is essential to give the user control over personal information. The right to delete from the list allows users to request that search engines remove personal data from the results when performing a search using their name.[3]

If the right to delete personal information is the classic dimension of the right to be forgotten, some further clarifications are needed in relation to the right to withdraw from the list: *the right to withdraw from the list must be limited to the sole purpose of protecting personal data; the criteria for delisting must be clearly defined in comprehensive data protection legislation, in order to avoid interference with the protection of human rights; the competent judicial authorities should interpret the standards to determine what information should be deleted; given its non-absolute nature, the right to withdraw from the list should be limited; search engines must be transparent about when and how to comply with removal requests*.

The fundamental technical difficulties in enforcing the right to be forgotten lie in: (i) allowing a person to identify and locate personal data stored in connection with it; (ii) tracking all copies of an article and all copies of information derived from the data article; (iii) determining whether a person has the right to request the deletion of a date; and, (iv) deleting or disposing of all exact or derivative copies of the article if an authorized person exercises his right.

Within the difficulties identified above, the most important *is the determination of the scope of the right to be forgotten*; given that the virtual space is a completely open and free system, the possibility of an interested person having access to all personal items is restricted and it is difficult to determine with certainty whether a person has the right to request the deletion of certain data; also, identifying the degree of responsibility of a person/entity/authority in order to delete personal data and their copies is an approach whose uncertainty arises from the correlation with all other elements previously exposed. From a technical point of view, the implementation of the right to be forgotten is

[3] Access Now Position Paper, *Understanding the right to be forgotten globally*, September 2016, p. 3.

conditioned by the reference system in which personal data are entered. If we consider "closed" systems that have pre-defined processing, storage and dissemination of all information and that prevent the dissemination of data to locations where a deletion cannot be implemented then the implementation of the right to be forgotten is feasible. If we refer to open systems such as the public dimension of the Internet, public data can be accessed by people whose identities are unlikely to be clearly associated with a natural person. In turn, people who access public information can pass it on to other people with regard to whom there is a low level of trust. In this case, there is no plausible technical approach to the right to be forgotten.[4]

European legislation is not uniform in identifying this prerogative under a certain concept. The law system of the Council of Europe mentions the right to the deletion of personal data while European Union law associates the right to the deletion of personal data with the right to be forgotten. The right to delete personal data evokes technical circumstances while the right to be forgotten evokes human circumstances – the fact of forgetting being, by its nature, a process carried out in the human intra-psychic. At the same time, each of the two formulations has certain advantages: (1) the right to delete personal data is rigorously determined, having an exact character, indicating the technical operation of removing personal data from the records of computer systems; (2) the right to be forgotten has a flexible scope, involving two cumulative actions - the action of deleting personal data from the computer records and the intrapsychic process of forgetting the information exposed about a person. Forgetting is a complex process that has profound psychological implications while erasure is a technical process that refers to material operations. The regulation of the right to be forgotten in European Union law describes the humanistic dimension of the protection of personal data, confining this issue to the more comprehensive field of human rights.

[4] European Network and Information Security Agency, *The right to be forgotten – between expectations and practice,* 2011, p. 13.

Legal and jurisprudential characterization of the right to be forgotten

The traditional article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which governs the right to privacy and family life, has been adapted to the requirements of the technological society through the regulations of *Convention no. 108*[5] adopted by the Council of Europe, ratified by all member states of the European Union.

The Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data[6] aims to modernize the relevant provisions by addressing the rules on the protection of personal data in the light of the challenges posed by the use of new information and communication technologies. The Protocol creates a legal bridge between the provisions of Convention no. 108 and European Union legislation that will be applicable from 25 May 2018 taking into account the change in the requirements regarding the circulation of information in the context of cross-border data flows.[7] Article 11 of the Protocol provides for the following amendments to the provisions of the Convention: (1) article 8 of the Convention is renumbered article 9; (2) article 9 of the Convention shall have as its marginal name *The rights of data subjects*.

The right to be forgotten is governed by article 9, paragraph 1, letter e in the following dimension: *the right to obtain, on request, free of charge and without undue delay, rectification or erasure, as appropriate, of such data if they are processed contrary to the provisions of this Convention*. The explanation of the content of the right to be forgotten can be found in paragraphs 73 and 81 of the Explanatory Report to Convention no. 108. Paragraph 73 sets out the conditions for the exercise of the right to delete personal data by stating that: *these rights may be reconciled with other*

[5] Convention no. 108 is officially known as the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data; The Convention was adopted at Strasbourg on 28 January 1981 and entered into force on 1 October 1985.

[6] Adopted at Strasbourg, on 10 October 2018; the date of entry into force of the Protocol shall be subject to the ratification of the Protocol by all States Parties to the Convention or to the expiry of the deadline of 11 October 2023 provided that at that date the Protocol has been ratified by 38 States Parties.

[7] According to the information accessed at:
https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/223.

rights and legitimate interests and may, in accordance with article 11, be limited only in the case where this is required by law and is a necessary and proportionate measure in a democratic society. For example, the right to the deletion of personal data may be limited to the extent that processing is necessary to comply with a legal obligation that requires processing in accordance with the law -obligation to which the controller is subject or to perform a task performed in the public interest or in the exercise of the official authority assigned to the operator. Paragraph 81 states that, in the event of an incident, the rectification or deletion shall be free of charge and if the rectification or deletion operates in accordance with the content of the right to be forgotten the rectifications and deletions should, where possible, be brought to attention of the recipients of the original information, unless this proves impossible or involves disproportionate effort.[8]

Inspired by the requirements established by the Council of Europe Convention no. 108, the European Union has adopted *Regulation 2016/679*[9] which regulates in detail the right to be forgotten and the coordinates within which it becomes effective.[10]

In this respect, the Preamble of the Regulation sets out and analyses the ideas underlying the regulation of the right to be forgotten: (1) the right to be forgotten is particularly relevant in situations where the data subject has given his or her consent to the processing personal data when he was a child and was not fully aware of the risks involved in processing, and subsequently wishes to delete such personal data, in particular from the Internet. (…) The retention of personal data should be lawful where it is necessary for the exercise of the right to freedom of expression and information, for the observance of a legal obligation, for the performance of a task which serves a public interest or which results

[8] Explanatory Report to the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (*) Strasbourg, 10.10.2018.

[9] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46 / EC (General Regulation on data protection) (Text with EEA relevance).

[10] A. Peasel, *The "right to be forgotten": Asserting control over our digital identity or re-writing history? The case of Google Spain and Google Inc. v. AEPD & Mario Costeja González*, pp. 2-3.

from the exercise of public authority with which the operator is vested, for reasons of public interest in the field of public health, for archiving purposes in the public interest, for scientific or historical research or statistical purposes or for establishing, exercising or defending a right in instance; (2) in order to strengthen it, the "right to be forgotten" in the online environment, the right of deletion should be extended so that an operator who has made personal data public should have the obligation to inform the processors of the respective personal data to delete any links to those data or copies or reproductions thereof. To this end, the controller concerned should take reasonable steps, taking into account the available technology and the means at his disposal, including technical measures, to inform the controllers who process personal data of the data subject's request.

Article 17 of the Regulation establishes the right to be forgotten by reference to the following content elements: The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies: (a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed; (b) the data subject withdraws consent on which the processing is based according to point (a) of article 6 (1), or point (a) of article 9 (2), and where there is no other legal ground for the processing; (c) the data subject objects to the processing pursuant to article 21 (1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to article 21 (2); (d) the personal data have been unlawfully processed; (e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject; (f) the personal data have been collected in relation to the offer of information society services referred to in article 8 (1).

Although the current rules on the right to be forgotten are contained in the Regulation described above, Directive 95/46/EC is of particular significance for the case-law development of the content of that right as reflected within the solution given in Case C-131/12[11]. In this case

[11] Case C-131/12, *Google Spain SL, Google Inc. against the Spanish Data Protection Agency (AEPD), Mario Costeja González*, OJ C-212, 07.07.2014, pp. 4-5.

preliminary questions have been raised regarding the application of the Directive in relation to the Internet search engine that Google operates as a service provider. In fact, the events in the present case can be summarized as follows: personal data relating to an individual were published by a Spanish newspaper in two printed editions since 1998 and both were republished in the electronic version; the person targeted by those publications argues that that information should not be displayed if a search for the first and last name is performed in the search results submitted by the Internet search engine operated by Google.

As noted in the Opinion of Advocate General delivered on 25 June 2013[12], the questions referred for a preliminary ruling can be grouped into 3 categories: (1) the territorial scope of Union rules; (2) the scope *ratione materiae*; (3) the right to be forgotten - in this case, examining whether the persons concerned may request that some or all of the search results relating to them may no longer be accessed through the search engine.

In relation to the latter, two coordinates must be considered: (1) the preliminary question implying the assessment of the right to be forgotten is based on the following question: *It must be interpreted that the rights of erasure and blocking data subject to article 12 (b) and the right of opposition under article 14 (a) of the [Directive] include the possibility for the data subject to go against search engine operators in order to prevent the indexation of information relating to his person published on the web pages of third parties, taking advantage of his desire that such information would not be known to Internet users when he considers that it may harm him or when he wishes to be forgotten, even though it is legally published information by third parties?*; 2. the interpretation of the Court of Justice of the European Union in relation to the right to be forgotten may be summarized as follows: *the rights of erasure and blocking of data, regulated in article 12 (b), and the right of opposition, regulated in article 14 point (a) of Directive 95/46 does not confer on the data subject the right to require a search engine service provider not to index information relating to his person lawfully published on third-party*

[12] Opinion of General Advocate delivered on 25 June 2013 in Case C-131/12 Google Spain SL, Google Inc. against the Spanish Data Protection Agency (EDPS), Mario Costeja González [reference for a preliminary ruling from the Audiencia Nacional (Spain)].

websites, taking advantage of his desire to that information should not be known to Internet users when they consider that it may harm them or when they want that information to be forgotten.

The right to privacy prevails in the cleavage between the right to privacy and the protection of the rights and economic interests of personal data controllers. According to the Court's judgment, Google is the operator of personal data given that it carries out activities of collection, storage, organization and disclosure of personal data. However, it is emphasized that the right to be forgotten is not an absolute right but rather a balance must be struck between the interests of Internet users and the protection of personal data.

The jurisprudential development of the right to be forgotten brings new nuances to the activity of the Court of Justice of the European Union through the analysis carried out in *Case C-136/17*[13] regarding the relation between the right of access to information of public interest and the right to be forgotten. The applicants' requests concern the deletion of articles containing sensitive data from the Google search results pages and, in response, Google refused to delete this information, citing the prevalence of the public's right to information. The National Commission for Informatics and Freedoms - CNIL from France agreed with the reasoning invoked by Google. In order to resolve the dispute in accordance with the principles of the law applicable in the case, the French Council of State drew up a reference for a preliminary ruling based on article 267 of the TFEU, *with the aim of clarifying the manner and the degree to which the right to be forgotten may be applied through the activity of personal data controllers*.

Among the preliminary issues examined by the Court the following issues contribute to the construction of the legal argument regarding the autonomous legal existence of the right to forget: (1) to what extent Google as a data operator and search engine had to comply with the ban on personal character? (2) before displaying a search result that leads to

[13] Judgment of the Court (Grand Chamber) of 24 September 2019. The case concerns the dispute between GC, AF, BH and ED, on the one hand, and the Commission Nationale de l'Informatique et des Libertés (National Commission for Informatics and Freedoms, CNIL) (France), on the other hand, in connection with four decisions of the latter refusing to delay Google Inc., now Google LLC, in order to deindex various links included in the results list, which are displayed following a searches based on their name and leading to web pages published by third parties.

information containing sensitive data, Google must verify the existence of an exceptional situation beforehand? (3) the information regarding the criminal investigation and conviction activities are included under the scope of article 10 of Regulation 2016/679 and the possibility of processing them implies certain particularities? We note that the Court's analysis in the field of personal data protection relates equally to the provisions of Directive 95/46 / EC and to the positive law on the subject represented by Regulation 2016/679.

One of the key aspects of the case is *the qualification of the specific activity of a search engine in the scope of personal data protection*. In that judgment, the Court notes that: (…) *the activity of a search engine is to find information published or posted on the Internet by third parties, to index it automatically, to store it temporarily and, finally, in making them available to Internet users in a certain order of preference should be described as' processing of personal data (...)*. The Court's reasoning becomes more profound, aiming to *including the specific difference between search engines and website publishers - both acting within the meaning of Union law as personal data controllers: (...) the processing of personal data performed in the activity of a search engine is different from and is added to that performed by website publishers, which consists in making this data appear on a web page, and this activity plays a decisive role in the global dissemination of such data by making them accessible to any Internet user performing a search based on the name of the data subject, including Internet users who would not otherwise have found the web page on which the same data is published. In addition, the organization and aggregation of information published on the Internet by search engines in order to facilitate their users' access to that information may lead, if the search is carried out on behalf of an individual, to the fact that, through the list of results, they obtain a structured overview of the information about this person that can be found on the Internet, which allows them to establish an approximate detailed profile of the person concerned.*

Once the regime applicable to search engines has been established, the Court agrees that Google's activity in the field of personal data processing must be carried out on the coordinates established by relevant European Union law by Directive 95/46 and Regulation 2016/679, respectively. Thus, paragraph 44 of the Court's judgment states that the *a priori* and general exclusion of the activity of a search engine from the

scope of the specific requirements laid down in those provisions in relation to the processing of special categories of data on ensuring greater protection against such sensitive data are likely to constitute a serious interference with the fundamental rights to privacy and the protection of personal data.

At the same time, we take into account the Court's view on how a search engine operator can be held liable in the handling of personal data: *the search engine operator is not liable for the fact that the personal data covered by those provisions appear on a web page published by a third party, but for indexing this page and especially for displaying the link to it in the list of results presented to Internet users following a search based on the name of an individual, such a display of the link in question in such the list is likely to significantly affect the fundamental rights of the data subject to respect for his or her privacy and to the protection of personal data concerning him or her*.

The Court's contribution in resolving the questions referred in the present case is edifying as regards *the interpretation and application* of the right to be forgotten; paragraph 57 of the Court's judgment resolves the ambiguities regarding the legal status of the right to be forgotten by deciding on issues related to the scope, limits of application and principles according to which the content of the law : *the fact that article 17 (3) (a) of Regulation 2016/679 now expressly provides that the data subject's right to erasure is excluded where the processing is necessary for the exercise of the right to, inter alia, freedom of information guaranteed by article 11 of the Charter, is an expression of the fact that the right to the protection of personal data is not an absolute right, but must, as states recital 4 in the preamble to that regulation, be taken into account in relation to the function that it fulfils in society and must be balanced with other fundamental rights, in accordance with the principle of proportionality*.

If the person requesting the protection of personal data has been guilty of an offense, the search engine will have to apply concrete criteria for the comprehensive assessment of the case so as to determine whether the data subject has the right to have the information in question no longer linked by its name through a list of results displayed following a search based on that specific name. Criteria identified by the Court as appropriate to be applied in resolving this issue concern: *the nature and gravity of the crime; progress and outcome of procedures; time elapsed; the role*

played by the data subject in public life and his or her past behaviour; the public interest at the time of the request; content and form of publication; consequences of publication for the data subject.

In the case *C-507/17*[14], the subject-matter of the dispute concerns the correct interpretation of the right to be forgotten in the context in which a request to delete personal data from Google search results was accepted, but is discussed the issue of removing all links to all domain name extensions of the global search engine and not just those versions of the website with extensions of the Member States of the European Union. In other words, can the admission of a request for the deletion of personal data at regional level lead to the extension of this consequence globally? In legal terms can we say that the invoked example is a specific application of the principle *accesorium sequitur principalem* in virtual space? In assessing the issue, the Court took into account the diversity of the legal cultures of third countries and the fact that, by virtue of this diversity, third countries benefit from a margin of appreciation in recognizing the right to withdraw from the list or have a different approach to this right; compared to how to achieve a fine balance between the right to information, the protection of personal data and the right to be forgotten. With regard to the consequences of admitting the request to delete personal data from search engine results, the Court has adopted a middle ground, stating that European Union law cannot require third countries to remove such data from the list of results but cannot prohibit such a practice.

In the legal system of the *Council of Europe*, the right to be forgotten is circumscribed to *article 8 of the European Convention on Human Rights* on the protection of privacy and family life, the European Court of Human Rights addressing this prerogative for the first time in the case law analysis *ML and WW vs. Germany*[15]. The case concerned the request made by the applicants - convicted nationally for the murder of W.S. (a popular German actor) - having as its object the deletion of identification

[14] Judgment of the Court (Grand Chamber) of 24 September 2019 'Preliminary reference - Personal data - Protection of individuals with regard to the processing of such data - Directive 95/46/ EC - Regulation (EU) 2016/679 - Internet search engines - Processing of data appearing on web pages - Territorial extent of the right to deindexing".

[15] *Affaire M.L. et W.W. vs. Allemagne*, Requêtes nos 60798/10 et 65599/10, Arrêt, Strasbourg, 28 juin 2018, définitif, 28.09.2018.

data and all information related to the crime committed on the websites. In their favour, the applicants invoked the right to the protection of privacy and family life in the context in which they served their sentence, being released on parole in August 2007 and in January 2008. The applicants initiated legal proceedings against the post Deutschlandradio before the Hamburg Regional Court, requesting the anonymization of personal data appearing on the website. In its judgments of 29 February 2008, the Hamburg Regional Court upheld the applicants' claims, taking into account their private interest - which they should no longer be associated with the actions which they had taken in the past and for which a punishment has been executed. Although the Court of Appeal upheld the rulings, underlining the prevalence of the right of convicts to rehabilitate themselves in the eyes of the public, the Federal Court overturned those rulings, stating that the public interest in being informed of criminal offenses at the national level can be achieved only by granting an increased margin for exercising the freedom of expression provided by article 10 of the Convention.[16]

Overcoming the shortcoming in the European Convention determined by the fact that article 8 does not refer *expressis verbis* to *the right to be forgotten*, the European Court carries out a corroborated analysis of articles 8 and 10, seeking to create the argument for the correct interpretation of this innovative legal prerogative. Starting from the extensive evaluation of the concept of privacy, the European Court recognizes that *the right provided in article article 8 of the Convention includes personal information which a person may legitimately expect not to be published without his or her consent; in the same vein, the idea that the protection of personal data plays a fundamental role in the exercise of the right to respect for private and family life enshrined in article 8 of the Convention has been recognized*. The Court's reasoning goes further *to recognizing a form of informational self-determination by which individuals can invoke the right to privacy in relation to data that, although neutral, is collected, processed and disseminated to the*

[16] Press release issued by the Registrar of the Court ECHR 237(2018)/28.06.2018, *The public's right to access archived material online took precedence over the right of convicted persons to be forgotten*, pp. 1-2.

community, in forms or ways that allow article 8 of the Convention to be invoked.[17]

In the light of those considerations, the European Court emphasizes that the present cases involve an examination of the balance between the applicants' right to respect for their privacy, guaranteed by article 8 of the Convention, and the freedom of expression of radio and publishing, and freedom of the public to be informed as they are guaranteed by article 10 of the Convention. The Court notes that websites are separate information and communication tools from the print media in terms of their ability to store and disseminate information, and online communications and their content are much more likely than the print media to undermine related fundamental rights and freedoms. Although balancing the two rights discussed is an issue set out in the States' margin of appreciation, the Court has identified, within its case law, relevant criteria worthy of application in the present case, such as: *contribution to a debate of general interest, notoriety, subject matter, the previous behaviour of the person concerned, the content, form and repercussions related to the publication, etc.*[18]

The European Court upholds the German Federal Court's argument regarding the public's interest in being informed, stressing that the subject matter of this case is of interest to the community because the crime committed and the criminal proceedings that followed had a profound impact on the human community and the online environment regarding these aspects have a truthful and objective character. At the same time, the European Court and the Federal Court have converging views on the fact that the mission of the media is to participate in shaping democratic opinion by making available to the public the old information kept in their archives so that the public is informed of the current and past situation existing in a democratic society. Bearing in mind the objective nature of the information extracted from the convictions and the fact that the photographs showing the two convicts on the Internet were taken a long time ago - an aspect which makes it unlikely that they will now be physically recognized by the public, the European Court concludes in the sense that the maintenance on the Internet of the information regarding the criminal act committed by the two plaintiffs

[17] Paragraph 87 of the Judgment of the Court.
[18] Paragraph 95 of the Judgment of the Court.

does not represent an interference in the exercise of the right to private and family life thus not being a violation of article 8 of the European Convention.

At European regional level, *the right to be forgotten* is differentiated depending on the legal system to which we refer: in the European Union law system, the express legislative enshrinement of the right to be forgotten has led to the extensive analysis of this prerogative by jurisprudence and to solutions destined to sanction the application of this right; the system of conventional law developed under the auspices of the Council of Europe does not formally recognize the existence of this right (neither in its individual dimension nor in the dimension of a prerogative limited to the right to privacy and family life) - this results in the reluctance of an effective jurisprudential recognition of the right to be forgotten.

Concluding remarks

Being a prerogative that has recently gained recognition within the regional-European and international law, the right to be forgotten raises problems related to the *legal object* and *the scope*. Given its legal enshrinement in specific instruments to the field of personal data protection, the right to be forgotten refers to the possibility of deleting information disseminated in the virtual environment in order to protect the privacy of the individual. Among the elements circumscribed to the right to the protection of private and family life, the protection of the image, honour and reputation of the individual are also aspects discussed by applying the right to be forgotten. The analysis of the right to be forgotten through the lens of the human rights-based approach implies its relativity. Thus, the right to be forgotten is not absolute, being contextualized according to the general interests of society - the right to information being a central element in this regard. Proportionality is also a key requirement in the exercise of the right to be forgotten, under which the elements of the right to privacy and family life will be balanced in the exercise of other fundamental rights and freedoms.

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[12] *https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/223*.
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THE AUTONOMY OF COMMERCIAL LAW WITHIN THE ROMANIAN PRIVATE LAW SYSTEM

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ABSTRACT

Socio-economic realities and, in particular, legal ones, which are still based on the existence of "commercial substance", and on a special category of professionals, respectively the traders, whose activity of production, trade, provision of services, falls into the category of acts (deeds) of trade impose a convincing plea regarding the autonomy of commercial law Trade, as an occupation which, through its long and repeated practice, has acquired the characteristics of a profession, that of a trader, which generates the idea of a special kind of law, which can only be the commercial law. Commercial law, in its modern evolution and the legislation of different states, has known two regulatory systems, namely the dual system of private law and the unitary system. The issue of the autonomy of commercial law becomes relevant in the conditions of the unity of private law.

KEYWORDS: *commercial law; autonomy; traders; status; commercial code, consumer;*

Introduction

From a historical and conceptual point of view, **the dual[1] system of private law** was based on the dichotomy (separation) between civil law and commercial law, which meant a categorical recognition of the autonomy of commercial law[2], concept based on the French Commercial

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[1] For a detailed analysis of the obligations regime in the dualist system of the 1864 Civil Code and the 1887 Code of Commerce, see M. Nicolae, *Unification of Civil and Commercial Obligations and Rights*, Universul Juridic Publishing House, Bucharest, 2015, p. 38 et seq. See, also, M. Nicolae, *The unitary regime of the law of obligations in the system of the new Civil Code*, in *op. cit*., p. 398 et seq.

[2] I.L. Georgescu, *Autonomy of Commercial Law*, in RDC no. 4/1993, p. 5 et seq.; I.L. Georgescu, *Romanian Commercial Law*, vol. I, Restitutio, All Beck Publishing House, p. 64 et seq.; St.D. Cărpenaru, *Introduction to the Research of Commercial Law – the Relevancy and Perspectives of Commercial Law*, in "Dreptul", no. 9/1991, p. 10 et seq.

Code of 1807, the Italian Commercial Code of 1882 but also the Romanian Commercial Code of 1887.

The autonomy of commercial law has been determined by practical requirements, as a result of the economic development of the states, in the modern era, development which imposed a requirement for legal regulations for commercial activity as part of the general economic activity. Thus, commercial law was created as a right of commercial acts (deeds) of trade and as a right of traders, natural persons or legal persons/commercial companies, considering that trade relations cannot have the same rules as civilian ones because they do not have "homogeneity" with regard to the nature and purpose of the activity carried out on the one hand by traders and on the other hand by non-traders.

The arguments behind the recognition of the autonomy of commercial law in the system of duality of private law are substantively the features specific to the commercial activity, respectively speed, continuity, credibility, or regulations on the status of traders, such as: their legal status, especially the obligation to register and authorize the company, the activity carried out and any other mentions concerning the aforementioned in the Trade Register; the obligation to carry out the activity in compliance with the rules of fair competition[3].

At the same time, pertinent arguments regarding the autonomy of commercial law concerned the existence of particularities of commercial obligations and of evidence in the matter of commerce; the existence of contracts that are specific to the trade activity and are mostly conducted by the traders, such as: sale-distribution, commission, mandate, agency, consignment, insurance, workshop, deposit, bank credit etc.

These arguments which underpin the autonomy of commercial law in the system of the duality of private law exist even in the system of unity of **private law,** unity which is defined by the integration of the Commercial Code regulations into the Civil Code and, in the view of some legislators, by the unity of private law referring to "the disappearance" of commercial law.

The system of unity of private law is based on the unitary regulation of civil and commercial relations, a system of regulation that at the time

[3] See S. Angheni, M. Volonciu, C. Stoica, *Commercial Law,* 4th ed., C.H. Beck Publishing House, Bucharest, 2008, pp. 4-6.

(the second half of the 19th century and the beginning of the 20th century) was determined by the corporatist conceptions in Italy.

Thus, according to the Italian Civil Code, adopted in 1942, the trade activity was integrated into the economic activity, and the trader is found in the general concept of entrepreneur, creating a new concept, namely the concept of "enterprise"[4] with the understanding of industrial, agrarian, commercial, credit production activity.

Based on the analysis of the provisions of the Italian Commercial Code of 1882 and the Civil Code of 1942 it was found that to a large extent the activities provided by the Civil Code executed by the entrepreneur are those of the Commercial Code, extending their scope to all entrepreneurs, and the concept of trader has been replaced by the concept of an entrepreneur (person who professionally carries out an economic activity organized for the purpose of producing or exchanging goods or services)[5].

The arguments behind the unitary system of private law regulation have been "embraced" by all the laws of the states that have gone through it, such as Switzerland, the Netherlands, Quebec and, more recently, Romania.

These arguments mainly concern: the application of commercial law to non-traders in the case of unilateral trade acts (mixed), trade acts concluded between a trader and a non-trader, the example being the case of contracts concluded between a professional-trader and a non-trader consumer; commercial law does not have its own regulatory principles, often resorting to the principles of civil law; practice (trader creation) would also apply to non-traders, which would be excessive.

In this framework we also emphasize the conclusion expressed in the French doctrine that the rules of commercial law are sometimes better suited to economic life, which is why it should also apply to non-traders through a "commercialization" of civil law[6].

[4] See P. Demetrescu, *The Enterprise in the New Italian Civil Code*, apud *St.D. Cărpenaru*, Romanian Commercial Law Treatise, 4th ed., updated, Universul Juridic Publishing House, Bucharest, 2014, p. 19.

[5] *Idem*, p. 20.

[6] Y. Guyon, *Droit des affaires, Tome 1*, 12eme, ed., Economica, Paris, 2003, p. 11.

The autonomy of commercial law

The renunciation by the Romanian legislature of the general law applicable to commercial relations, namely the Commercial Code, is not a decisive and convincing argument regarding the "disappearance" of commercial law[7].

As stated in the specialized doctrine "commercial law is an existentialist law (...)"[8]. To paraphrase a well-known French jurist (Y. Guyon), the author explains the feature of commercial law, as an existentialist law, in that, "its essence is preceded by its existence".[9]

The unification of the main regulations of private law, by including them in the Civil Code, does not mean that commercial law would no longer have arguments in support of its autonomous existence, distinct from other legal relations of private law.

The civil law - commercial law dichotomy cannot be supported solely from the perspective of the (Civil and Commercial) Codes, since both the socioeconomic realities and, above all, the legal ones lead us to the conclusion of the continued existence of commercial law, be it as solely a discipline of study, in which the particularities of this field, so present in these times, are highlighted and analyzed.

First of all, the arguments that "plead" for the autonomy of commercial law are generally based on the provisions of the Civil Code and, in particular, on the special legislation. Starting from the idea that the substance of commercial law is represented by the "commercial matter" referring to the persons (subjects) involved in the commercial legal relations and the operations they carry out, we observe that in the Civil Code there is the general framework of definition of the professional (Article 3 of the Civil Code), Leaving out of regulation an important category of them, that of professional-traders.

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[7] For details on the autonomy of commercial law under the Civil Code, see St.D. Cărpenaru, *Commercial Law under the new Civil Code*, in "Curierul Judiciar" no. 10/2010, pp. 543-546; *S. Angheni*, Commercial Law - Between Traditionalism and Modernism, in "Curierul Judiciar" no. 9/2010, pp. 483-485; L. Tuleașcă, *Commercial Law. Commercial Enterprises*, Universul Juridic Publishing House, Bucharest, 2016, p. 20 et seq.

[8] Gh. Piperea, *Romanian commercial law, general theory, business and insolvency,* C.H. Beck Publishing House, 2020, p. 3.

[9] *Ibidem.*

However, **the definition of professional-traders, their legal status as well as the applicable legal regime is a discipline** which is a matter of commercial law, as it also exists for other professionals who form the substance of other components of private law. Thus, the legal status of the employer, their relations with the employees form the content of the labor law relations, which still preserves its autonomy; family relations are still present in the subject matter of family law, even though the 1954 Family Code was abolished by regulating these relations mainly by the Civil Code.[10]

Secondly, the autonomy of the commercial law is also required from the perspective of the professional-trader's activity. Formal renunciation of the expression "acts"/"deeds" of trade and their replacement with "production, trade and service provision activities" does not mean that, de facto, but also de jure, they have disappeared.

In fact, almost all 20 trade deeds listed by the legislator in Article 3 of the Commercial Code is currently in the Civil Code (sales, consignment, mandate, commission, agency, etc.), keeping the same characters underlined by the legal doctrine, either as intermediary activities in operations commodity exchanges or other assets, either as activities carried out by undertakings organized for that purpose, their activity being based on the idea of intermediation specific to trade operations. Although in the current regulation the legislator uses the term "trade", operations that are in the sphere of trade are no longer defined.

However, commercial law, by its nature and essence, is intended to define these operations, which are mainly carried out by professional-traders.

The other categories of professionals, in particular professionals who practice liberal professions (lawyers, notaries, bailiffs, doctors), even if they are engaged in for-profit activities, do not "fall" within the scope of commercial law because, traditionally, these categories people do not commit acts of trade, which is even present in the current legislation – commercial activities (Article 8 (2) of Law no. 71/2011)[11].

[10] S. Angheni, *Commercial Law, Treatise*, C.H. Beck Publishing House, 2019, p. XXI et seq.

[11] See also V. Nemeș, *Commercial Law*, Hamangiu Publishing House, Bucharest, 2018, p. 10.

The legal status of these categories of professionals is established by special laws and, under no circumstances are the obligations of professional traders, such as the obligation to register or authorize the activity in the Trade Registry, provided for under Law no. 26/1990, republished, as subsequently amended and supplemented.

Thirdly, there are institutions that are currently found in the Civil Code or in special laws that belong to the commercial law through its specificity (particularities), namely credit insurance, speculation, etc., even if some of these respective operations can be performed by other categories of professionals and even possibly by nonprofessionals. From this point of view, the present Civil Code did not take over an important category of the unilateral or mixed deeds (acts) provided by Article 56 of the Commercial Code, acts which for a contracting party are commercial in nature because they are professional-traders, and for the other party the act is civil in nature[12].

What is important to emphasize in our approach to arguing the autonomy of commercial law is the existence in the content of the current Romanian Civil Code of the term "commercial" in defining or regulating legal institutions that traditionally belong to commercial law. Thus, in Article 340 of the Civil Code, the legislator, arranging the legal framework of the personal property of the spouses, within the shared ownership, provides at letter c *"goods intended for the exercise of the profession of one of the spouses, if they are not elements of a goodwill that is part of the shared ownership".* Therefore, the legislator appeals to a classic institution of commercial law, respectively, the legal institution of *"goodwill".*

On the one hand, the solution adopted by the Commercial Code solved many practical problems, including the jurisdiction to resolve disputes between the subjects involved in the respective legal relations, and which at present generates non-unitary practices[13], not only by the quality of

[12] Art. 56 *Commercial Code*. "If an act is commercial only to one of the parties, all contractors are subject to this act of commercial law, apart from the provisions relating to the person of the traders themselves and the cases in which the law would provide otherwise".

[13] See H.C.C.J., *Decision no. 24/2015* (The Official Gazette of Romania no. 76 of 2 February 2016); H.C.C.J., *Decision no. 18/2016* (The Official Gazette of Romania no. 237 of 6 April 2017).

professional of one of the subjects involved in the legal relations[14], but also about the nature of the matter, of the legal relations.

Thus, commercial law justifies its autonomy even in the context of the unification of private law.

Moreover, even under the terms of the Commercial Code, many of the regulations existed in special laws: Company Law no. 31/1990, republished, as subsequently amended and supplemented, The Law of the Trade Registry no. 26/1990, republished, as subsequently amended and supplemented, GEO no. 44/2008, on the authorized individual, individual enterprises and family businesses, etc., which justified the existence of commercial law, independent of the Commercial Code.

On the other hand, laws that have "embraced" the unity of private law by repealing the Commercial Code, such as Italy, the Netherlands, Switzerland, the Scandinavian countries, have not renounced the discipline or the branch of commercial law[15], in fact, a "commercialization" of civil law, in particular by unifying the rules on obligations and contracts, regulations that were part of commercial law, due to the fact that they were provided for in the Commercial Code and which, at present, apply to all those who "exploit an enterprise", and therefore to all professionals, evidently, to the extent in which they are compatible with the special regulations on the status of each category of professionals.

In our opinion, what the legislator wanted through the Civil Code was the unification of the main source of regulation of legal relationships under private law, abandoning some concepts (institutions) specific to commercial law.

Therefore, the autonomy of commercial law must also be analyzed from the perspective of the sources of commercial law in the context of the unification of private law.

In a **formal sense,** by a source of commercial law we understand the form of expression of the legal rules governing "commercial matters".

Article 1 of the now repealed Commercial Code provided: "In trade, the present regulation shall apply. Where it does not provide, the Civil Code shall apply". Interpreting this provision, it can be seen that *illo tempore* **the legislator established, on the one hand, the main sources**

[14] See also art. 226 (2) and art. 228 (2) of *Law no. 71/2011*.

[15] See St.D. Cărpenaru, *op. cit*., p. 21; Gh. Piperea, *Commercial Law*, vol. 1, C.H. Beck Publishing House, Bucharest, 2008, p. 10.

of commercial law and, on the other hand, their hierarchy. At the same time, it can be observed that **the positive interpretation of the text** leads to the conclusion that in the activity of trade, at that time, first of all, the commercial laws (Commercial Code and special laws) were applied and where they did not provide, civil law was applied (Civil Code and special legislation). **Commercial practice** proved that the two sources based on written law are not enough, especially in **the case of gaps** (the lack of a provision of commercial law which applies or adapts to the case in question).

Historically, the issue of the existence of other sources of commercial law arose in the expression of the **German Commercial Code** of 1861, which contained the following provision: "In matters of trade, unless otherwise provided in this Code, commercial common practices shall apply and, in their absence, general civil law". This provision has been adopted, with some modifications, by the **Italian legislator**[16], in the Commercial Code of 1882, which provided: "In matters of trade, commercial laws apply. If they do not provide, commercial, local or special common practices apply. Failing that, civil law applies."

There was no similar provision in the **French Commercial Code** of 1808.

In **Romanian law**, the common practice (or custom, habit) – which appears as a source of law in Italian law, was removed by the Romanian legislator in the Commercial Code, and regarding the analogy and general principles of law, the problem can be solved depending on the meaning we give to the notion of source of law.

By source of law we mean the generative form through which the law is realized through positive, mandatory legal norms. From this point of view, the legal norms that act on commercial matter are expressed, firstly, by written laws and, secondly, by common practice (customs of traders), the so-called unwritten law (customary). If the one who applies the law finds some gaps in the law, nothing prevents him from resorting to the analogy of law and, in particular, to its general principles.

[16] In Italian law, commercial usages are established as one of the main sources of commercial law. See C. Vivante, *Commercial Law principles*, Cartea Românească Publishing House, Bucharest, 1928, p. 19.

At the moment, as a result of the unification of private law, the Civil Code also contains, along with the rules of civil law *stricto sensu* rules of commercial law, family law, private international law. Thus, the Civil Code is considered the "civil law"[17].

In accordance with Article 1 (1) of the Civil Code, in the formal sense[18], the sources of civil law are: law, customs and other general principles of law. In the hierarchy of sources of civil law, the legislator provides that the law is the main source of law, while the customs and general principles of law are subsidiary sources. This conclusion follows from paragraphs (2) and (3) of Article 1 of the Civil Code, according to which *„(2) In cases not provided by law, the customs apply, and in their absence, the legal provisions regarding similar situations, and when there are no such provisions, the general principles of law. (3) In matters governed by law, customs shall apply only in so far as the law expressly refers to them*".

At the same time, it is important to emphasize that European Union regulations as well as international human rights treaties are applicable in domestic law, in accordance with Articles 4 and 5 of the Civil Code.[19].

Also important in the justification of the autonomy of commercial law are the regulations adopted at the level of the European Union, whether they are directives that have been implemented in domestic law or directly applicable Regulations.

Thus, a codification of the directives in the field of companies has been carried out at the level of the European Union, being included in the EU Directive 2017/1132 relating to certain aspects of company law and the provisions relating to the disclosure of companies, amended by EU Directive 2019/1151 of the European Parliament and of the Council of 20 June 2019 as regards the use of digital tools and processes in company law[20], a normative act pending implementation in Romanian legislation.

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[17] Uliescu M., *About civil law in the New Civil Code-studies and comments*, vol. I, Academia Română, Universul Juridic Publishing House, Bucharest, 2013, p. 54.

[18] See Y. Eminescu, *Civil Law Treatise*. General Part, Academiei Publishing House, Bucharest, 1987, p. 53; M. Popa, *General theory of law*, All Beck Publishing House, Bucharest, 2005, p. 161 et seq.

[19] Fl.A. Baias, E. Chelaru, R. Contantinovici, I. Macovei (coordinator), *The new Civil Code. Comments on Articles. Art. 1-2664*, C.H. Beck Publishing House, Bucharest, 2012.

[20] Published in the Official Journal of the European Union L 186 of 11.07.2019.

At the same time, there are international bodies, such as UNICITRAL, which draw up model contracts or framework contracts in commercial matters and which apply both in domestic and international trade relations.

Therefore, the law is the main source of law in terms of commercial law, by law meaning not only the normative act adopted by the Romanian Parliament, but any other normative act adopted or elaborated by the public authorities within the limits of their legal capacity and in accordance with their attributions.

The general application of the Civil Code

As previously stated, by abandoning the duality of private law and by the repealing of the Commercial Code in the quasi-totality of its provisions, the Family Code, etc. the present Civil Code is of general application, even with regard to the status of persons participating in legal relationships under commercial law and the civil or commercial nature of obligations.

The legal basis for this statement is Article 3 (1) of the Civil Code, according to which „*The provisions of this Code are also applicable to relations between professionals, as well as to relations between them and any other subjects of civil law".*

At the same time, Article 3 of the Civil Code provides for the definition of professionals as all those who operate an enterprise. And "operating a business" means „the systematic exercise, by one or more persons, of an organized activity consisting in the production, administration or alienation of goods or the provision of services, whether or not for profit".

From the content of the evoked legal texts it can be observed that the legislator does not distinguish between persons who exercise a lucrative activity (I.e: businesses, agricultural cooperatives, autonomous municipal companies, cooperatives, authorized natural persons, individual enterprises, family undertakings etc.) and persons engaged in non-profit activities (for example: associations, foundations).

The definition also applies to persons practicing liberal professions (lawyers, notaries, bailiffs etc.), individually or within a professional society[21].

At the same time, some provisions that existed in the Commercial Code and that applied only to traders, currently exist in the Civil Code, and will apply to all those who operate a business. For example, the presumption of solidarity of co-debtors of a contracted obligation (Article 1446 of the Civil Code), the formal notification of debtors for non-performance of obligations consisting of sums of money [Article 1523 (2) d) of the Civil Code].

Therefore, in relations of private law, including in relations of commercial law, the Civil Code represents the common law, the general law.

In addition to the Civil Code, in commercial law, a rich special legislation on companies applies (Law no. 31/1990), and regarding the Trade Registry (Law no. 26/1990), in the matter of credit securities (Law no. 58/1934 and Law no. 59/1934), regarding the insolvency (Law no. 85/2014) etc.

Constant common practice and custom (legal custom) of the commercial law

Common practice is a **long practice** (attitudes, behaviors), **which has a certain age, a certain degree of repeatability and stability applied to an indefinite number of traders, which may or may not have the quality of a source of law[22].**

Currently, in the Civil Code, the Romanian legislator uses the term "common practices" [Article 1268 (2), Article 1272 (1)], „steady practices between the parties" (custom).

As a name, in some legislations (Italian law), these general or special or local practices appear in the form of "practices"[23]; in Romanian law this term is confused with "custom"[24], and in international trade law the

[21] S. Angheni, *Commercial Law. Professional Traders*, C.H. Beck Publishing House, Bucharest, 2013.

[22] I.L. Georgescu, *Romanian Commercial Law,* vol. I, Restitutio, All Beck Publishing House, Bucharest, 2002, p. 125 et seq.

[23] C. Vivante, *op. cit*., p. 19.

[24] St.D. Cărpenaru, *op. cit.,* pp. 16-17.

term used is "customs"[25], some of them being standardized, either by standard contracts, general conditions developed by traders or by international bodies, such as the International Chamber of Commerce in Paris, which in 1953 developed the so-called INCOTERMS rules. The INCOTERMS rules are a codification of customs in the field of the contract of international sale of goods, especially for Europe.

What is important in commercial law are common practices (customs and professional practices).

In the Romanian Civil Code, adopted in 2009, commercial practices are highlighted under the generic terminology of "common practices".

The inclusion of common practices in the category of sources of civil law, even under the generic name of "common practices", is based on the idea that, in the relations between traders, common practices represent a specific source of law. However, by unifying private law, it is natural for common practices to be mentioned in the category of sources of civil law.

Practice, according to the Universal Dictionary of the Romanian language[26], represents the set of practices and rules that regulate the activity of the institutions, the relations between them, the diplomatic common practices, the parliamentary common practices, etc. At the same time, the common practice represents a custom, tradition, stating that it comes from the French word "usance"[27]. The term "usance" derives from the verb "to use" which designates a rule that is often synonymous with the term "custom"[28]. Moreover, the term also refers to a particular common practices of a profession (professional practice), a region or a locality.

Common practices are defined by the legislator in Article 1 (6) of the Civil Code as being: *„custom and professional practices".*

Custom, like the law, expresses a legal norm, but unlike the law, it does not emanate from a state authority or from a body authorized in the

[25] D.A. Sitaru, *International Trade Law*, vol. I, Actami Publishing House, Bucharest, 1995, pp. 98-99.

[26] *The universal dictionary of the Romanian language*, vol. II, Litera Publishing House, Bucharest, 2011, p. 48.

[27] *Legal vocabulary*, PUF Paris, 2018, p. 720.

[28] See also the *Explanatory Dictionary of the Romanian language*, 2nd ed., Universul Enciclopedic Publishing House, Bucharest, 1996, p. 1443.

elaboration of legal norms. Custom is a spontaneous creation, which has become a rule of conduct through its continuous, repeated use.

The generic value of the custom results from two constituent elements: continuous use *diuturnus usus*, according to good morals *boni mores*. Custom represents a traditional social behavior, a legal belief, a psychological element that is based on the idea of the binding nature of this *opinia juris* and also a certainty as to the binding nature of the common practice pursued.

In trade, common practices is a custom born of international trade relations. They contain either practices or rules created in certain branches of international trade, or contractual common practices or clauses that usually exist between business partners, the latter being implied or implicit clauses, such as: the provisions of the Civil Code regarding the interpretation of the contract [Article 1268 (2) of the Civil Code]; the mandate contract [Article 2010 (2) of the Civil Code]; the shipping contract [Article 2068 (1) of the Civil Code].

Thus, international commercial practices fall into two categories: normative, which may have the functions of a source of law, and optional or interpretative, which have the value of a contractual stipulation.

Professional practices represents another component of the definition of common practices corresponding to the practices used in different fields of activity, such as: notarial, legal, commercial activity, etc. These common practices are not sources of law, unless the law expressly refers to it.

Common practices (customs and professional practices) only apply *secundum legae* only if the law allows (makes reference to them).

In matters not regulated by law, the custom applies directly. Moreover, professional custom is compulsory only insofar as it complies with public order and good moral.[29].

Bringing arguments for the real existence of certain legal institutions specific to commercial law, even in the context of the unification of the law, we believe that, supported by *lege ferenda,* there could be a revival of commercial law and even a recodification of its specific rules, bringing them into a general law called the "Commerce Code" or even

[29] M. Nicolae, *Introductory commentary on the preliminary title to the New Romanian Civil Code, commented translation*, Juriscope Publishing House, Dalloz, 2013, p. 29 et seq.

"Commercial Code", which obviously has a different configuration from that which existed in the Commercial Code of 1887, a modern and practical configuration, specifically by incorporating in the Code all the regulations regarding the professionals-traders, as well as regarding the legal operations (activities) they carry out, materialized in "deeds" or "legal acts" of "trade" , the term "trade" having the *stricto sensu* meaning (sale, distribution, etc.) as well as the *lato sensu* concept, which includes production activity, provision of services, execution of works (enterprise), etc.

Conclusions

Taking into account the present normative framework, where there is no clear delineation of the specificity of the activity of **professionals-traders** and no **definition of them**, we believe that **commercial law**, **justifies its autonomy and necessity**, having the role of establishing, on the one hand, **the legal status** of professionals-traders (rights, obligations, liability), **the legal regime** applicable to them, **the particularities of the obligations** arising from the exercise of the authorized activities and the sources of these obligations, mainly the specific contracts for such activities (such as mandate contract, commission, agent, consignment, leasing, franchise, etc.). At the same time, within the commercial law there must be a part intended for **debt securities**, the general effects of trade.

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PELLIAN HORIZONS ON WOMEN'S AND CHILDREN'S RIGHTS

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ABSTRACT

Human rights protection has been a constant concern for states even since the interwar period. By addressing the issue of minorities, the peace conferences at the end of the First World War raised the issue of human rights for the first time. In the years that followed, under the auspices of the League of Nations states joined forces in order to ban trafficking in women and children and to abolish the slavery. On October 12, 1929, at the Institute of International Law in New York, the Declaration of International Human Rights which required states to recognize human rights was voted. In this context, we shall analyse the activity of Romanian jurist Vespasian V. Pella and his involvement in the movement for the consecration of women's and children's rights. The paper is focused on Pella's works and also on the recording of his activity in the documents of the time.

KEYWORDS: *human rights in the interwar period; Vespasian V. Pella; women's and children's rights consecration;*

Perceived as "one of the noblest missions"[1], the protection of human rights has been a constant concern for states even since the interwar period. By addressing the issue of minorities, the peace conferences at the end of the First World War raised the issue of human rights for the first time. President Wilson's January 1919 projects[2] called on states (as a precondition for the recognition as independent states) to recognize the rights of certain national minorities and religious freedom. Although initially rejected by the Crillon Commission, the proposals are re-discussed by the Commission of the New States and inserted in the Covenant of the League of Nations. Thus, Member States were required

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[1] André N. Mandelstam, *La protection internationale des droits de l'homme*, Académie de Droit international de la Haye, Recueil des cours, 1931-IV, Tome 38, Librairie du Sirey, p. 133*, gallica.bnf.fr/Bibliothèque nationale de France.*

[2] The second draft, from January 10, and the third draft, from January 20, 1919.

to undertake to "ensure fair treatment of indigenous peoples in the territories they administer" (Article 23b). In the years that followed, under the auspices of the organization, states joined forces in order to ban trafficking in women and children[3] and to abolish slavery[4]. On October 12, 1929, at the Institute of International Law in New York, the Declaration of International Human Rights[5] destined not for "the citizen, but for man" and justified by the "legal conscience of the civilized world"[6] which required states to recognize human rights was voted with 45 votes. In this context, we shall analyse the activity of the young Romanian jurist Vespasian V. Pella and his involvement in the movement for the consecration of women's and children's rights.

1. A phrase from the book "Delicte îngăduite" ("Permitted Torts") can be considered a **true *credo* of Vespasian V. Pella**: *"As the criminal law has in its hands the life and honour of men, it must go beyond the cold sphere of objectivity of other legal branches, and to get as close as possible to the souls of those whom it defends or punishes*[7]". In the volume published in 1919 by the (still) unknown jurist of only 22 years old (!), he captures the conflict between criminal and moral law and analyses some shortcomings of the Criminal Code of 1864. It is, in fact, the starting point for drawing up the first proposals that will be taken over in the Unified Criminal Code draft[8]. The volume is prefaced by Professor Iulian Theodorescu, then rector of the University of Iasi, who appreciates that by treating with great *"competence"* the great social problems, Pella makes "*a real service*" to all legal specialists but not

[3] A conference on this subject was organized in 1921, the final act of which shows that any form of exploitation of women under the age of 21 must be criminalized (and even after this age if fraud and intimidation were used). At the same time, the punishment of the crime of pandering is proposed.

[4] The Convention on the Abolition of Slavery was adopted in 1926, and later (in 1929) the States requested the Council of the League of Nations to set up a commission of inquiry in order to monitor the application of the provisions of the Convention.

[5] A.N. Mandelstam, *op. cit*., p. 203.

[6] *Ibidem*.

[7] V.V. Pella, *Delicte îngăduite (Permitted Torts)*, Cartea Românească, Bucharest, 1919, p. 45.

[8] "Mihai Eminescu" Central University Library Iasi, Special Collections Section, Doc. 422, *Lucrările scrise ale domnului profesor Pella (Written works of Professor Pella).*

only, using "*solid arguments and often bold that reveal a fully formed critical spirit*"[9].

Speaking about the mission of criminal law in the complex of juridical life, Pella identifies a series of deeds that are not punished by criminal law, *"which develop and multiply under the permissive protection of other laws the provisions of which may even encourage countless immoral and dishonest actions*"[10].

Regarding the condition of the woman, he criticizes the fact that the deceit is not considered a vice of consent upon marriage. Thus, he says, "*anyone can enter an honest family and by shameful manoeuvres may determine the parents to let him marry their daughter. After the marriage is celebrated, if the parents discover that their daughter's husband was a corrupt man, a downcast, a man morally expelled from society because of his dirty deeds - they will not be able to take any action against the one who abused their good faith and who brought this shame into the family. Such deeds are permissible torts, and Loysel's principle of "En mariage trompe qui peut" still applies to the maintenance of marriage. Getting married by simulating a status you don't own, misleading the family in which you enter is a permissible crime". Frauds used by one of the parties to mislead in regard to the physical or moral qualities are exempt from punishment, and cannot be considered as grounds for dissolution of the marriage*". [11]

Pella also finds that Article 307 of the Civil Code does not allow the investigation of paternity, which, he says, "*encourages seducers who abuse the good faith of a woman, leaving them absolutely free and without any duty in relation to the children born in as a result of their iniquity... Look to a poor woman being deceived by a seducer. She will bear the fruit of her mistake, having almost no means of constraining the wretched who abused her good faith, of forcing him to take care of the unborn child. She will be left with no defence, choosing between abortion, infanticide or abandonment. If she is frightened by the prospect of these crimes, then she will take care of the child, often carrying with her the darkest misery. These bastards, with a few exceptions, will*

[9] V.V. Pella, *Delicte îngăduite (Permitted Torts)*, Cartea Românească, Bucharest, 1919, Foreword signed by Iulian Teodorescu, pp. IX-X.

[10] *Ibidem*, p. 425.

[11] *Ibidem*, p. 431.

wander the streets, will beg or start committing petty torts, entering society without any faith, disregarding the laws and the whole social organization that left them without a father who took away the support from them (...) Why should the law make such a difference between legitimate children and those born out of wedlock?" [12]. This is a key question raised by Pella long before states have given the right legislative answers on child protection and non-discrimination on the basis of the birth criterion[13]. Also, addressing the issue of vagrancy and begging[14] (as a critique of the law of the same name adopted in 1921), Pella identifies among the causes of these phenomena the absence of protective regulations for war orphans and natural children. The latter, he says, "are affected by the prohibitions of our civil code which generally stops the search for paternity and thus creates a completely unfavourable situation in terms of their rights. [15]"

2. In the same context, we note Pella's **interest and support for the emancipation efforts coordinated by the feminist elite in interwar Romania.**

One of the personalities of the time with whom Pella collaborated was poet Elena Văcărescu known, among others, as an activist for the emancipation of women. As the first woman with the rank of ambassador to the League of Nations, she had the initiative to found the National Council of Romanian Women (1920), as "the first citizen movement of women in Greater Romania", aiming to support "the state, family and feminist cause." The members of the Council were resonant names of the time: Alexandra Cantacuzino, Elena Meissener, Ella Negruzi, Ecaterina Caragea. The emancipation movement included 30 affiliated organizations (e.g. "Regina Maria", the Intellectual Union, and the Romanian Women's Group) and collaborations with the Federation of University Women and the Romanian Writers' Society. In just one year, they

[12] *Ibidem*, p. 437.

[13] The European Court of Human Rights will rule only in 1979 on *Marcks v. Belgium* (6833/74/1979).

[14] V.V. Pella *Vagabondajul și cerșetoria. Observațiuni asupra legii din 4 iulie 1921 (Vagrancy and begging. Observations on the law of July 4, 1921)*, Tipografia Gutenberg, Bucharest, 1921, pp. 13-15.

[15] *Ibidem*, p. 13.

managed to affiliate the society with the International Council of Women (based in London, which had about 60 million members worldwide). [16]

As a member of the Legislative Council, Pella militated together with the National Council of Romanian Women in order to include some women's rights in the Civil Code. It was about preserving the nationality for the married woman, about the woman's right to have legal and commercial capacity. The results of these steps can be seen in the Law of February 24, 1924 (which allows the preservation of the nationality of a woman married to a foreigner) and in the Law of April 1932 (on trade documents allowed to the married woman, without the consent of the husband).

We also find Pella and Elena Văcărescu on the lists of members of the International Commission for Intellectual Cooperation and of the Standing Committee on Letters and Art within the League of Nations, along with important names from the Romanian and European culture: Ion Pillat, George Oprescu, Sextil Puşcariu, Henri Bergson, Paul Valery, Albert Einstein, Thomas Mann, Marie Curie, Le Corbusier, at the international conferences on the future of culture, the significance of the Latin spirit, translation as an expression of cultural, universal and national dialogue in culture[17]. In 1938, the Fifth Conference of the League of Nations on Trafficking in Women (whose vice-president for socio-humanitarian issues was Elena Văcărescu) proposed the creation of a joint committee of lawyers in order to discuss the legal status of women.

In 1939, the work of the Social Commission of the League of Nations (held in Geneva) focused on issues of family placement, the issue of illegitimate children, the rescue of minors and the re-education of adult prostitutes. Speaking about these meetings, Mrs Alexandrina Gr. Cantacuzino noted[18]: "*I had the satisfaction of having achieved a great*

[16] M. Negru, *Din istoria Consiliului Național al femeilor Române (From the History of the National Council of Romanian Women)*, pp. 149-150, *Arhivele Naționale, http://arhivelenationale.ro/*

[17] M.-C. Bârliba, *Elements of philosophy of language in the sciences of communication: cognitive and action-oriented paradigms, http://noesis.crifst.ro/wp-content/uploads/revista/2012/2012_1_04.pdf , p. 59.*

[18] The name of Alexandrina Cantacuzino, representative of the women's emancipation movement in Romania, is linked to the establishment of the association "National Council of Romanian Women" (1921), the organization of the first Congress of Romanian Women's Societies (1925) (as a project of territorial-administrative reorga-

victory for Romania, which for years has been fighting to make the issue: leaving the family, triumph on the agenda, which is the neuralgic point of the home, the recall of the parents to the duty, the sanctioning of the crime of leaving the family through an international legislation, which would punish those who do not understand their first and most sacred duty". [19]

"*Nowadays the situation is changing, as serious sanctions are foreseen by the international legislation that Minister Pella has drafted together with the International Codification Bureau and which will be presented with all the scientific research of the situation of this issue in 40 countries from different continents, at the April 1939 session of the Social Commission. It is an honour for our country to preside over these works and to have had two eminent Romanian lawyers Mr. Ionescu-Dolj, Vice President of the Legislative Council, and Mr. Minister Pella, appointed rapporteur, who through their work bind forever the name of Romania to the most important work for the Protection of the Child and the strengthening of the Family. I am happy that I was the one able, as the only representative this year in the Social Commission, to have succeeded after a fierce struggle, (because each delegate sought that his country be called to direct these world works) that Romania and the Romanian lawyers have this high honour that places us among the first-*

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nization, in order to eliminate excessive centralism), the inauguration of the social care centre "Casa Femeii", the establishment and management of the Women's Auxiliary Section (1926) affiliated to FIDAC (Fédération Interalliés des anciens combatants) in Paris and for the establishment of the National Council of Romanian Women. At European and international level, she participated in the Congress of the International Committee of Women in Washington (1925), in the establishment of the "Little Women's Entente", in the work of the "International Council of Women" (1925-1936), and in the work of the Arts Committee (1936), at the session of the League of Nations in Geneva, collaborates with the National Council of Romanian Women and with the "International Alliance for Women's Suffrage", based in New York, constantly collaborates with the League of Nations. For details, V. Manolache, review, A.M. Negru (editor), *Alexandrina Cantacuzino şi mişcarea feministă din anii interbelici* (*Alexandrina Cantacuzino and the feminist movement of the interwar years*), Vol. I, Cetatea de Scaun Publishing House, Târgovişte, 2014, in Revista Polis, nr. 3(9)/2015, p. 257,

http://revistapolis.ro/documente/revista/2015/Numarul_3(9)2015/Numarul_3(9)2015.pdf

[19] Ş. Mihăilescu, *Din istoria feminismului românesc Studiu şi antologie de texte* (1929-1948) (*From the history of Romanian feminism. Study and anthology of texts*) Polirom Publishing House, 2006, pp. 331-332.

rank factors that have contributed to the settlement of a great social problem"[20].

3. Protection of women detainees and penitentiary reform

V.V. Pella pleaded from the rostrum of the League of Nations for the humanization of the penitentiary regime. Thus, he proposed minimum rules for the treatment of detainees, rules developed by the International Criminal and Penitentiary Commission (based on reports drawn up by him in 1931, 1933 and 1933). [21]

As a delegate of Romania to the 8th Assembly of the League of Nations (in 1927), he proposed the establishment of an International Institute for the Unification of Criminal Law[22]. In the country, he is a member of the committee for the revision of the criminal code draft (throughout 1928) [23] and rapporteur in the Chamber of Deputies. In 1928, as a delegate to the International Conference on the Unification of Criminal Law (in Rome), he proposed the creation of the International Bureau for the Unification of Criminal Law, and was elected its Secretary General.

In 1934 he participated in the Committee of the League of Nations for the Suppression of Trafficking in Women and Children and proposed the adoption of an international convention for the *suppression* of family abandonment[24]. In 1934, at the session of the Penitentiary Commission in Bern, he proposed resolutions on improving the detainee regime (resolutions adopted).

In 1939, as Minister Plenipotentiary of Romania to the Romanian Legation in The Hague and as President of the International Bureau for the Unification of Criminal Law, he was going to organize a conference on the legal status of women. In this respect, in order to ensure a basis for discussion for the participants, he is the one who deals with the drawing up of a questionnaire on the criminal and penitentiary aspects of this

[20] *Ibidem.*

[21] "Mihai Eminescu" Central University Library Iasi, Special Collections Section, Doc. 422, *Lucrările scrise ale domnului profesor Pella (Written Works of Professor Pella),* p. 15.

[22] *Ibidem* p. 16.

[23] *Ibidem.*

[24] *Ibidem*, p. 22.

issue. The questionnaire is sent both to the competent authorities of the Member States of the Bureau and to the most renowned professors and experts. In Romania, the invitation is addressed to his colleague from the Faculty of Law in Iasi, N.T. Buzea[25], holder of the Department of Criminal Law. The questions Pella stops at show special attention to the woman's criminal responsibility. He calls on States to highlight (where available) differences in the approach to crimes committed by men and women, is concerned about the regime of punishments, about security measures applicable to women, about the penitentiary system of women detainees, about criminal prophylaxis, etc. Basically, his intention was to conduct a comprehensive comparative criminal law study (probably the first of its kind). Although the political events of that time prevented the organization of this scientific event, the initiative of the Romanian jurist will mark the concerns for the protection of women in detention (which is still relevant today) and for the achievement of a European penitentiary reform.

Although V.V. Pella will remain in the history of international law thanks to his crusade against impunity and will militate in the most important political forums for almost three decades for the idea of international criminal justice and for the unification of criminal law, by looking through the documents of the time we find him involved, with the same visionary spirit, in the effervescent movement for the consecration of human rights. Nor could it be otherwise for the tireless craftsman of the "right of the future."

[25] A. Ciucă, *Vespasian V. Pella și idealul păcii prin drept (V.V. Pella and the ideal of peace through law)*, Lumen Publishing House, 2019, pp. 60-61 (containing a facsimile copy of the document).

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[2] V.V. Pella, *Delicte îngăduite (Permitted Torts)*, Cartea Românească, Bucharest, 1919.

[3] *Lucrările scrise ale domnului profesor Pella (Written works of Professor Pella)* "Mihai Eminescu" Central University Library Iasi, Special Collections Section, Doc. 422.

[4] V.V. Pella *Vagabondajul şi cerşetoria. Observaţiuni asupra legii din 4 iulie 1921 (Vagrancy and begging. Observations on the law of July 4, 1921)*, Tipografia Gutenberg, Bucharest, 1921.

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THEORETICAL AND PRACTICAL ASPECTS OF THE CONSUMER'S RIGHT OF WITHDRAWAL FROM DISTANCE AND OFF-PREMISES CONTRACTS

Mihaela Georgiana ILIESCU*

ABSTRACT

The present study aims to carry out, first of all, a theoretical analysis of the right of withdrawal enjoyed by the consumer within distance contracts and off-premises contracts, a right regulated in GEO no. 34/2014 on consumer rights in contracts concluded with professionals. The theoretical approach will be completed later with one of the most recent cases in the case law of the Court of Justice of the European Union.

KEYWORDS: *right of withdrawal; consumer; distance contract; off-premises contracts; CJEU.*

The right of withdrawal enjoyed by the consumer with respect to distance contracts and off-premises contracts is regulated in GEO no. 34/2014 on consumer rights in contracts concluded with professionals, a normative act that represents the transposition into national law of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

As a preliminary point, we will make brief assessments regarding the modification of the terminology used by the legislator. The amendment made by the legislator is welcome, respectively the replacement of the phrase "right of unilateral denunciation" with that of "right of withdrawal", because we consider that they do not have the same legal meaning. Thus, the legal right of withdrawal (or the right to withdraw consent, or the right of revocation) is included in the gallery of legal mechanisms of consumer law, being designed as an instrument that has the role of protecting consumer consent, and which gives him the possibility, after concluding the contract, to retract the given consent, in a relatively short period of time, during which he can reflect on the

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decision taken and to verify, at the same time, the way in which the professional fulfills his obligations.

Although, even in the doctrine of consumer law[1] an equivalence is drawn between the phrase "right of unilateral denunciation" and "right of withdrawal", we consider that there are significant legal differences between the two concepts. Thus, while the unilateral denunciation[2] operates on the effects of a legal act (in the cases agreed by the parties or by virtue of the law), being a specific way of termination of synallagmatic contracts concluded for an indefinite period and which produces *ex nunc* effects, the right of withdrawal (withdrawal, cancellation) in the matter of consumer law operates on the formation (conclusion) of the contract, the essence of this right being the retroactive termination of the contract. Given that the legal nature of the right of withdrawal is the subject of a doctrinal dispute[3], we agree with the opinion that we are in the presence of a faculty granted *ad legem* to the consumer to renounce; that is, a possibility to retract the consent given at the conclusion of the contract,[4] being in the presence of an exception from the principle of irrevocability of the legal act.

In the following we will first make a **theoretical approach**, analyzing the legal regime of the right of withdrawal as it follows from GEO no. 34/2014. This analysis will then be supplemented by one of the most

[1] For a comprehensive presentation of the "right of withdrawal" (see right of withdrawal), see J. Goicovici, *Dreptul consumaţiei*, Sfera Publishing House, Cluj-Napoca, 2006, pp. 98-101; A.N. Gheorghe, C. Spasici, D.S. Arjoca, *Dreptul consumaţiei*, Hamangiu Publishing House, Bucharest, 2012, pp. 114-118; D.G. Enache, *Denunţarea unilaterală a contractului încheiat între comercianţi şi consumatori*, in the "Dreptul" no. 4/2009, pp. 162-172.

[2] For the analysis of the unilateral denunciation, see V. Stoica, *Rezoluţiunea şi rezilierea contractelor civile*, All Publishing House, Bucharest, 1997, pp. 154-158.

[3] See: J. Goicovici, *Dreptul consumaţiei*, Sfera Publishing House, Cluj-Napoca, 2006, pp. 99-100; A.N. Gheorghe, C. Spasici, D.S. Arjoca, *Dreptul consumaţiei*, Hamangiu Publishing House, Bucharest, 2012, pp. 117-118; D. Chirică, *Denunţarea unilaterală a promisiunii sinalagmatice de vânzare-cumpărare în temeiul unei clauze de dezicere sau a unei clauze rezolutorii*, in the "Dreptul" no. 3/2001, pp. 27-34; D.G. Enache, *Denunţarea unilaterală a contractului încheiat între comercianţi şi consumatori*, in the "Dreptul" no. 4/2009, pp. 162-172.

[4] L. Stănciulescu, *Curs de drept civil. Contracte*, Hamangiu Publishing House, Bucharest, 2012, p. 77; D.G. Enache, *Denunţarea unilaterală a contractului încheiat între comercianţi şi consumatori*, in the "Dreptul" no. 4/2009, p. 165.

recent cases **in the case law of the Court of Justice of the European Union**.

As currently conceived by the legislator, the right of withdrawal can be characterized as a legal, enabling, free of charge right.[5]

These characteristics result explicitly from the provisions of Article 9 of GEO no. 34/2014 according to which the consumer benefits from this right, "without having to justify the withdrawal decision" and "without incurring other costs than those provided in Article 13 (3) and Article 14". Because the right of withdrawal is an enabling right[6] its exercise cannot be susceptible to abuse of law, it cannot be violated by the discretionary contractor, it can be exercised without the need for its justification and it cannot be censored by the court.

As regards **the scope of the right of withdrawal** in the field of consumer law, it should be noted that this right does not have the status of a general rule in this area, but only applies to distance contracts and off-premises contracts. The special, concrete circumstances in which such contracts are concluded impose the need for increased protection of consumer consent. Thus, in the case of distance contracts, the conclusion of the contract is made on the basis of simple descriptions of the products/services, the consumer not being able to appreciate the opportunity of the contract and the quality of the products or services. In the case of off-premises contracts, unlike the offer in the business premises, where the consumer enters deliberately, expecting to be given offers, the consumer is subject to potential psychological pressure or may be faced with an element of surprise, lacking the time to reflect on the opportunity of contracting and being unable to compare the offer in order to make an informed choice.

The term for exercising the right of withdrawal – its extension is observed compared to the previous regulation, from 7 days to 14 days. In

[5] Unlike the right of withdrawal specific to the right of consumption regarding the waiver clause (withdrawal) in the literature there are different opinions regarding its free or onerous nature.

[6] As a right, the holder of which has the power to modify the legal situation created by the conclusion of the contract by terminating it unilaterally, without the need for the intervention of the co-contractor or justice. (D. Chirică, *Denunţarea unilaterală,* p. 32). For other details, see S. Valory, *La potestativite dans les relations contractuelles, Presses Universitaires, d'Áix-Marseille*, 1999 pp. 175-177; I. Reghini *Consideraţii privind drepturile potestative*, in "Pandectele Române" no. 4/2003, p. 236.

exceptional cases, and as a sanction for the professional who did not transmit to the consumer the information regarding the conditions, terms and procedures for exercising the right of withdrawal as well as the standardized withdrawal form, the term in which the right of withdrawal can be exercised is 12 months.

According to the provisions of Article 9 (2), the term of 14 days starts to elapse differently, depending on the type of contract concluded. Thus, for service contracts, the term starts elapsing from the date of concluding the contract. From the same date, that of concluding the contract, the term begins to elapse in the case of contracts for the supply of water, natural gas, electricity; when they do not provide for the sale in a limited volume or a fixed quantity of thermal energy or digital contents that are not delivered on a material medium. In the case of sales contacts, the rule is that the 14-day period starts to elapse from the day on which the consumer or a third party indicated by him, other than the carrier, enters into physical possession of the products (date of receipt of the products by the consumer). However, if the consumer requests multiple products in a single order which will be delivered separately, then the time begins to elapse from the day on which the consumer or an indicated third party receives the last product. Finally, in the case of the delivery of a product consisting of several lots or parts, the period begins to elapse from the day on which the consumer or a third party indicated by him receives the last product or part.

The last hypothesis considered by the legislator concerns the contracts for the supply of products, in which case the term starts to run from the day when the consumer or a third party that is indicated by him, receives the first product.

Regarding the term of 12 months, from the provisions of Article 10 (1) it results that the time period starts to elapse from the end of the initial withdrawal period of 14 days. If, during the 12 months, the information on the right of withdrawal is transmitted to the consumer, the period of 14 calendar days shall begin to elapse from the date on which the consumer receives that information.

Regarding the *legal nature of these terms* in which the consumer can exercise his right of withdrawal, we consider that they are *limitation periods.*

The ordinance also regulates in Article 16, ***as an exception*****, the situations in which the right of withdrawal cannot be exercised.**

Indeed, given the nature of certain goods or services, the exercise of that right would be inappropriate. An example is the supply of products or services whose price depends on fluctuations in the financial market, which the professional cannot control and which may take place during the withdrawal period[7]; also in the case of the supply of products made to the specifications presented by the consumer or clearly customized[8], or in the case of products that are likely to deteriorate or expire quickly.

The Court of Justice of the European Union had the opportunity to rule recently in the case of *Möbel Kraft GmbH & Co. KG*[9], in connection with one of the exceptional situations, in which the consumer cannot exercise his right of withdrawal under an off-premises contract. The request for a preliminary ruling was made by the Potsdam-German District Court, in a dispute between Möbel Kraft GmbH & Co. KG, a German furniture company, on the one hand, and ML, a consumer, on the other hand. As such, ML – as a consumer – concluded a ***contract of sale having as object an fitted kitchen*** with Möbel Kraft, with the occasion of a ***trade fair.*** ML subsequently invoked the right to withdraw from that contract and, on that basis, refused to accept the delivery of that kitchen. Möbel Kraft brought an action before the referring court for damages against ML, alleging that the person had failed to fulfill the aforementioned contract of sale.

The Potsdam District Court has decided to stay the trial[10] and to refer a question to the Luxembourg Court for a preliminary ruling as to whether Article 16 (c) of Directive 2011/83 must be interpreted as meaning that the exception to the right of withdrawal provided for in that provision is enforceable against the consumer; who has concluded a negotiated off-premises contract for the sale of a good that will have to

[7] According to Article 16 (b).

[8] According to Article 16 (c).

[9] Judgment of 21 October 2020 *Möbel Kraft GmbH & Co. KG*, ECLI:EU:C:2020:846.

[10] The question referred to the CJEU in the context in which the German Federal Court of Justice, in its case-law prior to the entry into force of Directive 2011/83, ruled that the right of withdrawal is not excluded where the property can, without loss of substance and functionality, be restored to the state prior to individualization, with relatively low costs. In contrast, the Stuttgart Regional High Court ruled that the purchaser of an individual good is not authorized to exercise his right of withdrawal, even if the trader has not yet begun to make the good or to adapt it to the personal needs of the consumer.

be made to certain specifications, even if the trader has not started production of that good.

In arguing its judgment, the Court states, by way of introduction, that a contract concluded at a trade fair may be classified as an "off-premises contract", within the meaning of Article 2 (8) of Directive 2011/83, provided that the conclusion of the contract has not taken place at a stand of a trade fair, which may be considered 'business premises' within the meaning of Article 2 (9) of that directive.[11] Subject to the assessment which the referring court must carry out in that regard, the Court will construct its reasoning on the basis of the texts governing the legal regime of the right of withdrawal, namely Articles 9 to 15 of Directive 2011/83. Thus, under Article 9 (1) of Directive 2011/83, the consumer is in principle given a period of 14 days to withdraw from an off-premises contract, but Article 16 provides for exceptions to the right of withdrawal, in particular in the case provided for in point (c), that of off-premises contracts having as their object "the supply of goods made to the consumer's specifications or clearly personalized".

After resolving these preliminary issues, the Court shall demonstrate that the exception to the right of withdrawal provided for in Article 16 (c) is not conditional on the occurrence of any event subsequent to the conclusion of the contract and shall apply regardless of whether the said contract is performed or is about to be performed by the trader.

Thus, first of all, recalls its settled case-law, in so far as, insofar as the provisions of European Union law do not refer to the law of the Member States, to determine the meaning and scope of those provisions, they must be given an autonomous and uniform interpretation throughout the Union, which should be determined by taking into account not only its terms but also the context of those provisions and the objective pursued by that specific regulation.[12] Next, points out that the Member States are required to provide in their national legislation transposing Directive 2011/83 that the consumer cannot exercise his right of withdrawal, in particular in the case of the occurrence of certain events following the conclusion of the off-premises negotiated contract.

[11] See in this regard the Judgment of 7 August 2018, *Verbraucherzentrale Berlin*, C-485/17, EU:C:2018:642, paragraphs 43-46.

[12] See in this regard Judgment of 16 July 2020, *AFMB*, C-610/18, EU:C:2020:565, paragraph 50.

As regards the exception provided for in Article 16 (c) of Directive 2011/83, the Court points out that the wording of that article does not show that the exception to the right of withdrawal depends on the occurrence of an event after the conclusion of the off-premises negotiated contract for "the supply of goods made to the consumer's specifications or clearly personalized". On the contrary, it is clear from that wording that that exception is inherent in the very object of such a contract, namely the performance of a good produced in accordance with the customer's specifications within the meaning of Article 2 (4) of this Directive, so that this exception is enforceable from the outset against the aforementioned consumer.

The Court will further demonstrate that this solution is confirmed on the one hand, precisely in the context of Article 16 (c) of Directive 2011/83, in particular as regards the obligation to inform the consumer of the existence or absence of the right of withdrawal, before he is bound by a distance contract or an off-premises contract,[13]because the situation in which the existence of the consumer's right of withdrawal would depend on a future event, the materialization of which is the decision of the trader, would not be reconcilable with this obligation of pre-contractual information.

In the light of the foregoing considerations, the Court will ultimately rule that ***Article 16(c) of Directive 2011/83/EU must be interpreted as meaning that the exception to the right of withdrawal laid down in that provision may be relied on against a consumer who has concluded an off-premises contract for the sale of goods which are to be made to his or her specifications, irrespective of whether the trader has begun to produce those goods.***

CONCLUSIONS

The complete harmonization achieved by transposing in our legislation Directive no. 83/2011, ***of the right of withdrawal*** in the matter of distance consumer contracts, off-premises contracts answers mainly to the need to promote a real internal market of consumers, maintaining a

[13] Judgment of 10 July 2019, *Amazon EU*, C-649/17, EU:C:2019:576, paragraph 43 and the cited case-law.

balance between a high level of consumer protection and the competitiveness of businesses.

Moreover, in addition to legislative harmonization solutions, the CJEU case law on the right of withdrawal contributes in particular to strengthening the legal certainty of transactions between a trader and a consumer, thus meeting one of the main objectives of the Directive.

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[14] Hotărârea din 21 octombrie 2020 *Möbel Kraft GmbH & Co*. KG, ECLI:EU:C:2020:846.

CONSIDERATIONS ON THE ADMISSIBILITY OF THE APPLICATION TO THE HIGH COURT OF CASSATION AND JUSTICE FOR A PRELIMINARY RULING ON THE SETTLEMENT OF LEGAL ISSUES

Teodor MANEA[*]

ABSTRACT

The admissibility of the request addressed to the High Court of Cassation and Justice in order to pronounce a preliminary decision for resolving certain legal issues is conditioned by the meeting of several conditions, described by art. 475 Romanian Code of Criminal Procedure. Among them is the requirement that the Supreme Court of Cassation and Justice has not ruled on a legal issue whose resolution is requested from the supreme court by preliminary ruling, nor appeal in the interest of the law.
Analyzing this condition, we consider that it is incidental when the previous preliminary ruling belongs to the Panel for resolving legal issues other than criminal matters, provided that the text interpreted by the judges of the supreme court has a similar statement in criminal law. Another interpretation would lead, in our opinion, to unacceptable conclusions, namely that depending on the applicable procedure (civil, criminal or administrative) the person's rights and obligations should be interpreted differently, in the context in which the legal text is similar. Also, to proceed differently collides directly with the text of art. 475 of the Code of Criminal Procedure, which refers to the High Court as a whole, and not to a particular panel of the supreme court.

KEYWORDS: *Preliminary decision; settlement of a legal issue; admissibility;*

1. The institution of pronouncing a preliminary decision is new in the Romanian criminal procedure landscape, being a creation of the new code of criminal procedure.

Regarding this institution, the doctrine states that "in order to achieve the objective of unifying judicial practice, it has been established in the jurisdiction of the High Court of Cassation and Justice to resolve complaints from the courts, in order to issue preliminary rulings to resolve issues related to the correct application of the law. Unlike the appeal in the interest of the law, which pursues the same purpose, the preliminary decisions do not intervene after the final settlement of the

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cases, but before their settlement. This avoids the situation in which the settlement of legal issues given by the supreme court can no longer produce any effect on criminal decisions already handed down, thus, avoiding to inadvertently call into question the very act of justice.[1]"

Also on the same wavelength, the court of constitutional contentious has solved in its jurisprudence states that "the referral to the High Court of Cassation and Justice for a preliminary ruling to resolve issues of law is a legal mechanism that aims to unify judicial practice. Along with the appeal in the interest of the law, it aims to ensure the creation of a predictable jurisprudence in order to shorten the duration of the criminal process. Unlike judgments rendered on appeal in the interest of the law, preliminary rulings are rendered before the final settlement of cases, in order to avoid the impossibility of producing the effects of these judgments on final criminal cases. Therefore, the provisions of art. 475-4771 of the Code of Criminal Procedure prevents the emergence of a non-unitary practice in the interpretation and application of the law by the courts.[2]"

The conditions under which the supreme court may proceed to offer an interpretation of the legal text are found in art. 475. It states that: "if, in the course of the trial, a panel of the High Court of Cassation and Justice, the Court of Appeal or the tribunal, charged to rule on the case as a last instance, finds that there is a question of law, the clarification of which depends on the merits of the case and on which the High Court of Cassation and Justice has not ruled by a preliminary ruling or by an appeal in the interest of the law, nor is it the subject of a pending appeal in the interest of the law, it may request the High Court of Cassation and Justice to rule on the issue of law before it."

In the context in which the institution is heavily used by the lower courts, the specialized panel of the supreme court had ample opportunity to rule. The criteria have also undergone developments, establishing, for

[1] C. Ghigheci in N. Volonciu, A.S. Uzlău (coord.), D. Atasiei, C.M. Chiriță, T.-V. Gheorghe, C. Ghigheci, T. Manea, R. Moroșanu, G. Tudor, V. Văduva, C. Voicu, *Codul de procedură penală comentat,* ed. a 3-a revised and supplemented, Hamangiu Publishing House, Bucharest, 2017, p. 1358.

[2] Curtea Constituțională, *Decizia nr. 440/2017*, para. 22.

example, that a request to resolve a legal issue is not admissible if the text is clear[3].

Regarding the condition that the issue of law put under scrutiny did not represent the object of a preliminary ruling or by an appeal in the interest of the law by 'the High Court of Cassation and Justice did not rule[4]" we have to mention two decisions ruled on by the Panel for resolving legal issues in criminal matters[5].

The first of these concerned a case in which the supreme court was requested to "clarify the interpretation and application of the provisions

[3] For your consideration, for example, *decision no. 15/2020* of the Panel for resolving legal issues in criminal matters, or decision no. 16/2020 of the same panel. In the latter case, the supreme court was requested to establish "If in the application of art. 43 para. (1) of the Criminal Code, in case of multiple convictions, the verification of the fulfillment of the condition regarding the fulfillment of the rehabilitation term is made in relation to the provisions of art. 167 para. (5) of the Criminal Code or in relation to each conviction in order to establish whether the conditions for the existence of post-enforcement recidivism are met." For more details on this condition of admissibility see I. Nedelcu, V.H.D. Constantinescu, *Comentariul realizat la art. 475,* in M. Udroiu (coord.), A. Andone-Bontaș, G. Bodoroncea, S. Bogdan, M.G. Bulancea, D.S. Certeș, I.-P. Chiș, V.H.D. Constantinescu, A.V. Iugan, S. Jderu, I. Kunglay, C.-C. Meceanu, I. Nedelcu, M. Popa, L.A. Postelnicu, S. Rădulețu, A.M. Șinc, R. Slăvoiu, I. Tocan, A.-D. Trandafir, M. Vasiescu, G. Zlati, *Codul de procedură penală, Comentariu pe articole,* ed. a III-a, C.H. Beck Publishing House, Bucharest, 2020, p. 2401.

[4] In the decision no. 18/2020 The Panel for resolving legal issues in criminal matters had the opportunity to rule, including in relation to the situation in which there was a case with the same object pending before the Panel for resolving appeals in the interest of the law. In this case, the supreme court was given the task to settle "Whether the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, in case of overturning a solution ordered by a prosecutor within the prosecutor's office attached to the court, has or does not have the quality expressly stipulated by art. 335 para. (1) of the Code of Criminal Procedure in which reference is made to "the hierarchically superior prosecutor to the one who ordered the solution".

[5] Regarding this condition present in the scientific literature, it was noted that "the fact that there is already a decision on the respective legal issue, which is binding for the courts according to art. 474 para. (4) or art. 477 para. (3) Criminal Procedure Code, constitutes an impediment for the issuance of another preliminary decision regarding the same issue. The given interpretation can be intervened only in case of a legislative change, but even in case of change, the interpretation can be maintained, according to art. 477 Code of Criminal Procedure. In the case of an appeal in the interest of the law being settled, the preference is justified precisely by this fact." – A. Crișu, *Drept procesual penal. Partea specială, conform Noului Cod de procedură penală*, Hamangiu Publishing House, Bucharest, 2019, p. 398.

of art. 44 paragraph (2) of the Criminal Code, in case of committing several concurrent acts, in a state of intermediate plurality, in the sense of ruling on: a) if only the provisions on concurrent infractions are applied (the first term of the intermediate plurality being treated as a term of the concurrent crimes, merging indiscriminately all the punishments applied according to art. 39 of the Criminal Code); b) if efficiency is given first to the sanction of the concurrent infractions and then to the sanction of the intermediate plurality (this implies the merging of the punishments established for the concurrent crimes and then the merging of the resulting punishment with the previous punishment, according to the provisions of the intermediate plurality); c) if efficiency is given first to the sanctioning of the intermediate plurality and then to the sanctioning of the concurrent infractions (this implies the merger of the previous punishment with each one of the punishments applied for the concurrent crimes, and then the partial resulting punishments to be merged between them, according to the provisions)."

By *Decision no. 8/2020* The High Court rejected as inadmissible the request, as a direct consequence of the text of art. 475 of the Code of Criminal Procedure, in the context in which already, by decision no. 7/2020, the Panel for resolving the appeals in the interest of the law had already pronounced a ruling on this aspect, establishing that "In the unitary interpretation and application of the provisions of art. 44 paragraph (2) of the Criminal Code, in the case of the intermediate plurality of offenses, in the event that the first and/or second term of the intermediate plurality consists of a competition of offenses, the merging of all established punishments represents a single operation, in accordance with the provisions relating to the concurrent infractions."

Our scientific and professional interest was picked by yet another decision of the Supreme Court, which proposed the pronouncement of a decision, in the procedure of resolving a legal issue, by the Panel for resolving legal issues in civil matters of the High Court of Cassation and Justice[6].

[6] For a broad treatment of this condition of admissibility see I. Neagu, M. Damaschin, *Tratat de procedură penală. Partea specială, în lumina noului Cod de procedură penală*, Universul Juridic Publishing House, Bucharest, 2015, p. 454 et seq.; I. Nedelcu, V.H.D. Constantinescu, *op. cit.,* pp. 2418-2420.

2. By *Decision no. 12/2020*, the Panel for resolving legal issues in criminal matters of the High Court of Cassation and Justice decided that "in interpreting the provisions of art. 269 and art. 270 of the Code of Criminal Procedure, if the procedural document to be made within a certain period is sent by e-mail or fax, on the last day of the period calculated by days, it is considered to be made within the time limit, even if the document of procedure shall be registered with the judicial body after the expiry of the term."

The considerations of the supreme court begin by specifying the fact that "firstly, it is necessary to specify the fact that in the analysis of the present legal issue it is not possible to start from what was ruled in Decision no. 34 of May 15, 2017 pronounced by the High Court of Cassation and Justice - Panel for resolving legal issues, published in the Official Gazette of Romania, Part I, no. 803 of October 11, 2017, given that the matter in which this solution was pronounced is different, and the legal provisions analysed have no correspondent in the Code of Criminal Procedure. Even if, according to the provisions of art. 2 para. (2) of the Code of Civil Procedure, the provisions of the Code also apply in other matters, insofar as the laws governing them do not contain contrary provisions, it is noted that in the Code of Criminal Procedure there are provisions governing exactly this matter, as a result we are not in the presence of a regulatory vacuum."

It is further shown that "Moreover, it should be noted that the mentioned decision is no longer applicable, given that after its pronouncement the modification of the provisions of art. 183 of the Code of Civil Procedure, by Law no. 310/2018 for the amendment and completion of Law no. 134/2010 on the Code of Civil Procedure, as well as for amending and supplementing other normative acts, published in the Official Gazette of Romania, Part I, no. 1,074 of December 18, 2018, and, as provided by art. 521 para. (4) referred to in art. 518 of the Code of Civil Procedure, the decision ceases to be applicable from the date of the amendment of the normative act. In relation to this legislative change, it is noted that the intention of the legislator is to clarify the conditions for exercising the procedural rights of the parties in order to guarantee the exercise of the right, even if this manifestation of will is achieved by using modern technical means on the last day of the legal term, without being given relevance the moment at which in the records of the court the act is registered."

3. By *Decision no. 34/2017* The panel for resolving legal issues in civil matters of the High Court ruled on a referral made by a court of appeal on the issue of law if "the action brought by e-mail/fax, on the last day of the term that is counted day by day, after the hour when the activity ceases in court, it is considered to be performed in time."

The Supreme Court ruled that "in interpreting and applying the provisions of art. 182 and art. 183 of the Code of Civil Procedure, the procedural document sent by fax or e-mail, on the last day of the term which is counted by days, after the hour when the activity ceases in court, is not considered to be submitted in time."

In the motivation, the Panel shows, among other arguments, that "Requests sent by e-mail or fax may not fall under the provisions of art. 183 paragraph (1) of the Code of Civil Procedure, taking into account the provisions of art. 183 paragraph (3) of the same normative act, which expressly provides that the receipt of the post office, as well as the registration or attestation made by the express courier service or the specialized communication service serves as proof of the date of submission of the document by the interested party, or, in the case of procedural documents sent by fax or e-mail, there is no similar provision."

4. The texts of the Code of Civil Procedure analysed by the supreme court provided, in the content of art. 183 paragraph (1), that "The procedural document submitted within the term provided by law by registered letter to the post office or submitted to a express courier service or to a specialized communication service is considered to be made on time.", As well as, at paragraph (3), that "In the cases provided in paragraph (1) and (2), the receipt of the post office, as well as the registration or attestation made, as the case may be, by the express courier service, the specialized communication service, the military unit or the administration of the place of detention, on the document submitted, serve as proof of the date of submission of the document by the interested party."

5. As shown, "art. 270 of the Code of Criminal Procedure contains a regulation similar to the one analysed by the High Court of Cassation and Justice in the aforementioned decision, in the sense that here too we do not find exceptional provisions in relation to applications sent by e-mail or fax, as the law provides for documents submitted within the time limit

provided by law to the administration of the place of detention or to the military unit or post office by registered letter[7]".

Having fully agreed with this statement, it is difficult to argue that the legal issue raised represents a new issue, as it has already been submitted to the Supreme Court for review and its analysis is well under way.

It is true that the analysis performed by the supreme court was performed regarding the provisions of art. 183 of the Code of Civil Procedure, but this aspect is not likely to affect the previous conclusion.

Thus, on the one hand, in the content of art. 475 of the Code of Criminal Procedure it is stated that the issue of law must be one "on which the High Court of Cassation and Justice has not ruled by a preliminary ruling." It is obvious that the legislator refers to the supreme court, and not to a specific panel of its own.

On the other hand, it is not permissible for similar rules to be interpreted, with a binding, different character, at the level of the High Court of Cassation and Justice, even if they are contained in separate laws.

It would result in an anomaly, namely, that, depending on the panel of the supreme court adjudicating the preliminary issue, similar legislative solutions should be applied separately in practice, depending on the type of procedure followed, civil or criminal, without this being the legislator's option.

6. Subsequently to the decision of the Panel for resolving legal issues in civil matters, the primary legislator intervened on the provisions of the Code of Civil Procedure, at this time art. 183 of the Code of Civil Procedure stipulating in paragraph 3 that "(...) the receipt of the post office, as well as the registration or attestation made, as the case may be, by the express courier service, the specialized communication service, the military unit or the administration of the place of detention, on the filed document, as well as the indication of the date and time of receipt of the fax or e-mail, as attested by the computer or fax received by the court, serve as proof of the date of submission of the document by the party interested."

[7] The conclusions of the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice formulated in file no. 350/1/2020 pending before the Panel for resolving legal issues in criminal matters, *www.mpublic.ro.*

This would normally have been the solution to be followed in terms of art. 270 paragraph (1) of the Code of Criminal Procedure, insofar as it is assessed by the legislator, mayor or delegate, that such a solution is appropriate for the proper conduct of criminal proceedings.

The fact that this change occurred does not justify, in any case, a new analysis of the issue by the High Court, the role of the Panels for resolving legal issues being to interpret the existing law, not to anticipate the will of the legislator.

7. On the merits, we also agree with the decision of the supreme court. The problem of sending documents, especially by e-mail, is an old one. In the current context, in which this is the safest way to interact with the judiciary, from the point of view of its usefulness, the decision is welcomed, especially since it is not known when the legislator would have intervened in order to change the provisions of the criminal law.

In addition, it was unfair for participants in criminal proceedings to have more onerous conditions for the transmission of documents to court than under the Code of Civil Procedure.

However, considering what has been debated, we would be at peace to notice that the decision remains a singular one, and it does not become a constant practice of the Panel for resolving legal issues in criminal matters.

Otherwise, we would arrive at the paradox described above, namely that there should be different interpretations, in different matters, for similar legal texts.

The impossibility for the supreme court to rule again under the same legal aspect was, moreover, highlighted in the doctrine, where, without using a concrete example, it is stated that: "from the moment of publication in the Official Gazette there is only one interpretation mandatory, on which the supreme court can return, only in the event of a legislative change. Therefore, national courts can resolve the issue of law which has been resolved by the supreme court only on the interpretation set out in the decision. Even in the event of a legislative change, the interpretation established by the previous decision may remain binding[8]".

[8] I. Nedelcu, V.H.D. Constantinescu, *op. cit*., p. 2418.

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REGULATIONS AT REGIONAL LEVEL ON PROTECTION OF THE CITIZENS BELONGING TO THE NATIONAL MINORITIES

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ABSTRACT

The protection of citizens belonging to national minorities is reflected in the specific form of discrimination based on ethnic origin in the preoccupations of the international communities as regards the promotion and implementation of the non-discrimination principle. Viewed from this prospect, the protection of citizens belonging to different minority ethnic groups from the European Community states is approached in the international and regional legislation in the field of non-discrimination, which makes all norms and mechanisms for implementation of non-discrimination principle be binding also on the citizens belonging to the national minorities. The trend of harmonising the EU law on discrimination is relevant largely also for the legislative and institutional framework needed for minorities' protection, reason for which we propose in the present study to identify in the already mentioned legislation not only the relevant documents but also the way in which they refer to the ethnic groups.

KEYWORDS: *European convention, the Social Charter of the 21st century, national minority, collective guarantee, individual rights, EU primary legislation, ECHR, ECRI;*

Relevant legal documents of the Council of Europe

The establishment of the Council of Europe is based on the member states wish, signatory of its statute, to avoid in the future the atrocities faced by humankind during the World War II. Therefore, the philosophical pillar which this organisation was built on, envisages **the human being, with its existential needs,** such as the right to life, the right to freedom of speech, of assembly, to decent life, to participate to the public life of society, to human dignity. The history has proved the simple recording or codification of the Human Rights is not enough, thus it was needed a guarantee for their observance by the national authorities.

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In this context, the Committee on Legal and Administrative Questions of the European Council's Consultative Assembly met in 1949, in order to propose the mechanism to ensure the **collective guarantee of Human Rights.** In order to avoid any speculation regarding the meaning of the terminology *collective guarantee*, it is necessary to specify that the meaning of the notion *collective*, which was used during the works of the above mentioned Committee, is the one which expresses the wish of every member state and, consequently, of them all, without exception, therefore of international community and implicitly the European one, to guarantee the Human Rights, whose legal substance falls under the individual rights, as results from the Universal Declaration of Human Rights. Therefore, the above mentioned idea may be reformulated as a collective guarantee of individual Human Rights, from the first, second and more recently the third generation Human Rights.

The instrument which transposed in legal terms the ideas stated in the text of the Universal Declaration of Human Rights was the *Convention for the Protection of Human Rights and Fundamental Freedoms,* known also like *the European Convention on Human Rights,* which was signed by the Council of Europe member states on the 4th of November 1950 and enforced on the 3rd of September 1953. Because the Human Rights matter is extremely wide and meaningful, this study will keep only those elements which are useful for the conclusions which are to be drawn regarding the non-discrimination, as a main principle applied in all the international documents on Human Rights, included the persons belonging to national minorities.

The European Convention does not merely sum up a set of rights, such as *the physical freedom* (right to life, to integrity and dignity, to liberty and security), *the spiritual freedom* (freedom to religion, freedom of speech, right to education)*, right to private life* (right to marry, right to private and family life, right of domicile and of correspondence), *social and political freedoms* (freedom of assembly and association, right to free elections, respect for goods). The Convention also regulates the guarantee of the Human Rights observance **for every person**, through national mechanisms including the legislative, institutional and jurisdictional framework.

Based on this Convention, the natural or legal persons, or groups of private persons, get the right to notify officially **any breach of the individual rights of a person,** which are stipulated in the European

document. We can tell that the *European Convention on Human Rights* established the first coherent and legitimate mechanism for insurance of some effective guarantees for the rights stipulated in the UN Declaration. In this regard, it is useful to mention that two proceedings are regulated by the *Convention,* which makes possible for the states to be found guilty in case they breach the rights provided in the Treaty: individual application, regulated by art. 34, and inter-state, mentioned in art. 33.

The text of the *Convention* was supplemented and enriched with new meanings soon after its conclusion, namely in 1952, by 16 optional successive Protocols which either justified the rights already stipulated by the Convention or aimed at procedural and institutional organisation aspects.

Protocol No. 1 from 1952 approaches the right to property, right to education and right to free elections.

Protocol No. 4 from 1963 refers to prohibition of imprisonment for debt, liberty to leave any country, liberty of movement and freedom to choose his residence, prohibition of expulsion of nationals, the right to enter the territory of the state of which he is a national and prohibition of collective expulsion of aliens.

Protocol No. 6 from 1983 regulated abolition of the death penalty. And Protocol No. 7 pointed out procedural safeguards relating to expulsion of aliens, compensation for wrongful convictions, right of appeal in criminal matters, equality of rights and responsibilities between spouses, right not to be tried or punished twice.

A historical moment for *the European Convention on Human Rights* is the Protocol No. 11, which modified the structure of the institutions authorised to analyse and settle the individual complaints.

The regulations under the Protocol No. 12, relevant for this study were enforced on the 1st of January 2005 and introduced a general clause forbidding the discrimination related to any right guaranteed by the internal law. Hereof, Art. 1 stipulates that the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, **membership to a national minority**, property, birth or other status. These stipulations are subscribed to the preoccupations

regarding the extension of the protection area regulated under Art. 14 of the *Convention*[1].

Starting from the provisions of this *Convention*, the list of the 10 rights extracted from the Universal Declaration of Human Rights and codified in the *Convention* was to be subject to a collective guarantee mechanism, through which the signatory states, members of the Council of Europe, undertook the obligation to respect a conduct at regional (European) level, to observe the fundamental principles of democracy and the establishment of an *European Commission for Human Rights* and of an *European Court of Human Rights*. The latter was assigned competencies regarding the trial of reasons based on human right violation, which **are binding also on the citizens belonging to the national minorities**, and the member states undertook the obligation to observe the Court's decisions.

Thus, *the European Convention* introduced Human Rights in the sphere of the positive law and generated the creation, at European level, of a legal system of those rights, as well as a protection mechanism by appeal to courts. *The European Court of Human Rights (ECHR)* has an essential role in clarifying and enriching the *Convention* signification.

Some partial conclusions can be already drawn so far. First, *the European Convention on Human Rights* **does not specifically regulate the interdiction of discrimination in the matter of Human Rights.** Non-discrimination does not appear like a stand-alone, independent concept, even if there is a number of contradictory interpretations and debates, both at national and European level, on this topic.

The bone of contention relies on the fact that the non-discrimination application area confines to a right or a freedom regulated by The *Convention.*[2] Therefore, discrimination is forbidden at theoretical level for all spheres of human fundamental rights and freedoms, but **it is binding only for those rights or freedoms which are recognised by the**

[1] *Explanatory Report on Protocol No. 12 to European Convention on Human Rights,* available on *http//conventions.coe.int/Treaty/FR/Reports/Html/177.htm.*

[2] European Court of Human Rights' Decision from 28 November 1984 *Rassmunssen v. Denmark*; European Court of Human Rights' Decision from 26 February 2002 Frette v. France.

enforced legal system, while the interdiction manifests itself only insofar the matter where it is applied is legally protected. [3]

Another important conclusion can be drawn up from the above mentioned issues, namely that **the norms defined in *the Convention* are not relevant only by the value of their enunciation, but the jurisprudence** developed in time in the application of the *Convention* by the Council of Europe member states is essential in this equation. The decisions taken by the ECHR can be enlisted in this context, which interpreted the rights and freedoms stipulated in *the European Convention on Human Rights.*

It results obviously that the efficiency and effectiveness of *the Convention* is given to a high extent by the existence of a control system, of a mechanism which allow citizens from the Council of Europe member states, who consider that one of their fundamental right of freedom was broken, to appeal to a superior court, above the national level, to the *European Court of Human Rights*. The Court decisions are compulsory upon the national authorities. Disregard of the ECHR decisions by the Council of Europe member states may lead to severe disciplinary sanctions, even to suspension or exclusion of the respective state from the Committee of Ministers of the Council of Europe.

Another point regarding the European implementation and monitoring mechanism for Human Rights observance is that referring to the **expressly mentioned binding status of the Convention regulations on the persons belonging to the national minorities**. This point brings clarifications also regarding the concept of national minority. First, the fact that **all provisions of the *Convention* are equally applied to both persons belonging to the national minorities** and to other categories of persons without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion.

In this context, **any discrimination of a person belonging to the national minorities is judged in the paradigm of the general mechanism applicable in the matter of fundamental Human Rights and freedoms' observance**, according to the *Convention* provisions. In this regard, any discrimination against a citizen belonging to a national minority is related to the state authority, and thus making the state to

[3] C. Bîrsan, *European Convention on Human Rights,* All Beck Publishing House, Bucharest, 2005, p. 902.

elaborate, implement a legislative and institutional framework regarding its citizens belonging to the national minorities.

According to the letter and the spirit of the Convention, the application of the national norms which regulate the state behaviour towards its citizens who belong to the national minorities must be monitored and, in case of inobservance, sanctioned through either administrative or judicial methods, as appropriate, by the national bodies with competencies in the field.

In case when a citizen who belongs to a national minority, who considers that one of his/her fundamental rights stipulated in the *Convention* was violated, after undergoing all legal forms and levels of the national justice, approachable as remedy for the created situation, and who does not agree with the solution issued by the national courts, may resort as a final remedy to the *European Court of Human Rights*.

Hereof, **the quasi-totality of the civil and political rights of every European citizen is also held by the citizen who belongs to a national minority**, and accordingly the procedure applicable to the majority is equally available for minorities, who can get satisfaction against the national authorities in case of breach of any fundamental human right or freedom. It results unequivocally that it is about **the individual rights**, civil and political, from the first category enjoyed by all citizens from the *Council of Europe* member states.

A second document of the *Council of Europe* relevant for the present study is the *European Social Charter* which regulates the second generation of rights, the economic and social ones, for which, akin to the European Convention of Human Rights, a European protection system is settled.[4] The Charter was open for signature on 18th of October 1961 and enforced on 26th of February 1965, having as signatory more than half from the Council of Europe's member states. The list of the rights codified in the Charter was developed through an additional Protocol on 5th of May 1988 [5].

[4] E. Lundberg, *The Protection of Social Rights in the European Community: Recent Developments*, in Drezwicki, Krysztof, Krause, Catarina, Rosas, Allan (eds), Social rights as human rights: a European challenge Ábo Akademi University, Institute for Human Rights, Ábo, 1994, pp. 120-123.

[5] R. Goebel, *Employee Rights in the European Community: A panorama from the 1974 Social Action Program to the Social Charter of 1989*, speech delivered in March

The Treaty from 1961 was gradually replaced by a revised form of the Charter named the *Social Charter of the 21st Century*, negotiated and signed by the *Council of Europe* member states in 1996, enforced in 1999. The Social Charter of the 21st Century represents one of the fundamental documents of the *Council of Europe* regarding the Human Rights and a milestone legal instrument in the field of social cohesion.

Among the 19 categories of rights and principles regulated in the *Charter*, we can point out the right to work (one of the most important), right to just conditions of work, the right to safe working conditions, freedom of association, the right to bargain collectively.

Besides the rights relating to work, the text also comprises regulations on other issues, such as the right of the family to social, legal, economic protection, the right of migrant workers and their families to protection and assistance, the rights of mothers and children's to social and economic protection.

The *Charter* also comprises the right to vocational training and guidance, to enjoy the highest possible standard of health, the right to social and medical assistance, and the right to benefit from social welfare services, to the right of disabled persons to vocational training and integration.

The *Social Charter of the 21st Century* does not only confine to present the values protected by the signatory states and, correlatively, their incumbent rights, but it also establishes a mechanism for their implementation and monitoring. In this regard, the document comprises an additional Protocol for monitoring of the incumbent rights by the states, through regular reporting.

A first category of reporting refer to the implementation at national level of the rights accepted by the respective state from those presented in Part II, reports which must be drawn up every two years. The second category of reports envisages the remaining rights presented in Part II, which were not accepted by the respective state.

In accordance with the above mentioned, we can state that the two milestone documents of the *Council of Europe*, both the *European Convention of Human Rights* and the *European Social Charter* assure a high level protection against discrimination, even if for a finite number of

1993 at Hasting International & Comparative Law Review's Eleventh Annual Symposium on International Legal Practice.

categories, as limited through the provisions of art. 14 from the *Convention*, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a **national minority**, property, birth **or other status**.

Even though the end of art. 14 indicates an exhaustive interpretation range by introducing the term *other status,* the ECHR has interpreted constantly the limitative framework of the Convention, in order to avoid any inappropriate interpretation against the spirit of the document. [6]

There are also in the text of the Convention some meanings which indicate the extension of the protection area as stipulated in art. 14 of the *Convention*, namely the additional Protocol No. 12, which is part of the European Convention of Human Rights, as it was enforced on the 1st of April 2005 and ratified by Romania on the 1st of November 2006.[7] Concisely, one can say that Protocol No. 12 introduces a clause through which **it is forbidden to discriminate related to a right which is guaranteed by the internal law,** and opening that way the possibility for the national authority to extend the set of rights stipulated in the *Convention* and, correlatively, to implement and observe it.

It is important to be mentioned, as a direct consequence of Protocol No. 12, the fact that the breach of an internal norm, through which it is regulated a right unspecified in the *Convention,* may be claimed at the ECHR, like any other right regulated in the Treaty by the *Convention*, and being that way the object of the monitoring mechanism introduced by the *Convention* in the matter of fundamental Human Rights and freedoms. Therefore, a national regulation in the matter of fundamental Human Rights and freedoms, even if its legal substance cannot be found in the *Convention* text, **it instantly enters under the European monitoring and sanctioning mechanism.**

A last remark on this topic is that the preamble of the Social Charter of the 21st Century comprises a non-discriminatory clause, which **was interpreted as being a general framework, applicable to all rights guaranteed in the document.** Yet, the text of the *Charter* forbids expressly some discrimination categories, such as the right of men and

[6] See European Court of Human Rights' Decision from 12 July 2005 *Moldovan and others v. Romania.*

[7] *Explanatory Report on Protocol No. 12 to European Convention on Human Rights,* available on *http//conventions.coe.int/Treaty/FR/Reports/Html/177.htm*.

women to be equally paid for the same work, the right to social and medical assistance without losing from their civil, political, economic and social rights, the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex.

The European Commission recommendations against Racism and Intolerance

From the beginning of the last decade of the 20th century, after the Cold War end, Europe faced a wave of racism, xenophobia, anti-Semitism and intolerance recrudescence, leading the responsible bodies of the *Council of Europe* to highlight the need to prevent and sanction any forms of discrimination, wherever they would be shown. Hereof, the **Action Plan against Racism, Xenophobia, anti-Semitism and Intolerance** was adopted, which included some preventive measures, such as organization and implementation of a large campaign for raising people's awareness, with greater emphasis on younger people from the entire Europe, with a clear message of tolerance.

In Romania, even a non-profit organisation was established with such a profile, named **the Romanian National Foundation of Fight against, Racism, Xenophobia, Anti-Semitism and Intolerance**, which comprised representatives from all important youth organisations, including political parties' organisations. The activities organised by that Foundation had a major impact on the Romanian public, generating constructive debates, between the members of the organisation and the representatives of the civil society, consultations finalised with the establishment of concrete action plans for that purpose[8].

At European level, the *European Commission against Racism and Intolerance (ECRI)* was established in 1993 with a view to consolidating the legal and political guarantees against any forms of discrimination, on the one hand, and to intensifying the inter-governmental cooperation in all activity sectors, on the other hand. Generally speaking, the *ECRI* objective is to coordinate the activities developed in the area of racism

[8] G. Micu, *European Campaign against Racism, Xenophobia, Antisemitism and Intolerance – Human Rights Magazine* published by the Romanian Institute for Human Rights (I.R.D.O.), year VI, No. 3, 1996, pp. 26-29.

and intolerance at European level, based on **instruments without obligatory legal effect**, but with an impact on the public, regarding the increase of sensibility for this topic, such as *general policy recommendations*, as well as *general reports*, which are elaborated, case by case.

So far, *ECRI* has elaborated several *general policy recommendations* which suggest the adoption by the member states governments of the national law against racism and racial discrimination or integration of the key elements against these in their national legislation. Without entering into exhaustive details of the *ECRI General Policy Recommendations*, only the most relevant elements strictly linked to the current study will be outlined.

ECRI General Policy Recommendation N° 1 on combating racism, xenophobia, anti-Semitism and intolerance, resume some elements enshrined in previous documents or resolutions adopted by the *Council of Europe*, such as *Recommendation 1275* of the Parliamentary Assembly of the *Council of Europe* on the fight against racism, xenophobia, anti-Semitism and intolerance, adopted on 28 June 1995. *ECRI General Policy Recommendations* aims at two distinct elements.

The first refers to the national legislation, the law enforcement and judicial remedies, by monitoring the ratification of the main international law instruments in the matter of discrimination, as mentioned in the document. It is pursued to make the national authorities action in order to assure the equal treatment for all citizens, in all social life sectors, as well as combating any actions or manifestations which might promote racism, xenophobia, anti-Semitism and intolerance, inclusively in view of establishing sanctions in this regard.

The second objective of *Recommendation N° 1* refers to the preventive nature of the matter, mentioning the need to adopt some educational policies in domains like promotion of the cultural diversity, of some policies on IT and labour, such as special training measures which **may help the persons belonging to the national minorities to integrate themselves in the labour market.** The second objective is foreseen to be achieved based on research of the nature, causes and expression of racism, xenophobia, anti-Semitism and intolerance at local, regional and national levels, followed by training of the governmental clerks for this purpose.

ECRI General Policy Recommendation N° 2 envisages the establishment of specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level, based on the *UN Resolution 48/134*

adopted by the General Assembly of the United Nations on 20 December 1993, and on the „*Paris Principles*". The fundamental principles laid down at the first *International Meeting of the National Institutions for the Promotion and Protection of Human Rights* held in Paris from 7-9 October 1991.

It is relevant for the present study the fact that the main guidelines were established, which should be followed by the mentioned institutions during their activities, such as their tasks, responsibilities, administration, functioning and operation, as well as the alternative possible organisation forms in order to achieve the previously mentioned objectives.

ECRI General Policy Recommendation N° 3 is relevant for the current study from the standpoint of the envisaged target groups, and it resumes a part of the provisions under Recommendation no.1, namely **the ethnic groups,** in the light of the official name used for different communities.

The core of this recommendation is represented by Roma/Gypsies minority, seen, we might say inappropriately, as a national minority or ethnic group which exists in most of the European countries, and who has neither the political awareness of a nation, nor a territory for self-determination, their main characteristics being that of travelling (from where the name of travellers used by some European states when they refer to Roma/Gypsies).

The experience gained in the process of managing the problems on Roma/Gypsy minority shows the fact that the needs they encounter in their relationship with the society they live in are of cultural and social nature, which makes that Roma/Gypsies be considered as vulnerable by all states members of the *Council of Europe*, as compared with other minorities or majorities recognised by the member states.

It is also important to outline that in this particular case the non-discrimination should take into account the sensitiveness of the topic, which obliges the national authorities to pay an increased attention not only to combating the racism and intolerance against this ethnic group (mostly on labour force employment, housing and education) but also to the intransigence regarding the sanctioning of their criminal offences, which should be the same as for the rest of the population, in order to avoid a discrimination to contrary, while this issue is to be brought for the public awareness in a professional manner, with recommendations in this regard addressed to the media.

ECRI General Policy Recommendation N° 4 establishes guidelines for the organisation of national surveys regarding the experience and perception on discrimination and racism from the point of view of potential victims. Starting from the aim of these surveys, it is very important the selection of the chosen groups as *„categories",* the selection algorithm being decisive in crystallising a correct opinion on the phenomenon. Thus, the selection factors should take into consideration the size of the target population and the information already available, namely the degrees of discrimination faced by each group. For example information about complaints of discrimination filed and on employment statistics.

It also outlines the fact that the results of the survey may be used in a variety of ways. For examples can be mentioned the wish to highlight areas where special action is necessary; to increase public awareness and understanding of the problems of discrimination as seen from the viewpoint of victims; to increase awareness among those working in particular areas of how their institutions and practices are perceived by minority groups (e.g. police, employers, service providers etc.). There are also recommended follow-up surveys in order to explore changing patterns of discrimination and racism over time, or to include different groups, if it is necessary.

Another important document for our study is *ECRI General Policy Recommendation N° 8* which outlines the national legislation on combating racism while fighting terrorism and thus combining two concepts that are, in principle, in two different action plans. Besides the legislative review, the recommendation outlines the need to pay particular attention to guaranteeing in a non-discriminatory way the freedoms of association, expression, religion and movement.

These must not generate any discrimination resulted from legislation and regulations or their implementation, notably governing the following areas: checks carried out by law enforcement officials, criminal procedure, fair trial, protection of personal data, protection of private and family life, expulsion, extradition, deportation and the principle of *non-refoulement,* residence and work permits and family reunification, acquisition and revocation of citizenship.

ECRI General Policy Recommendation N° 10 refers to combating racism and racial discrimination in and through school education. It outlines the need to **ensure compulsory, free and quality education for all,** based on coherent and sustainable policy for promoting of equality in

education. The recommendation also outlines the need to combat racism and racial discrimination at school, by setting up some various instruments to monitor and manage racist incidents at school, as well as anti-racism campaigns. Thus it is important to train the entire teaching staff to work in a multicultural environment with emphasis on non-discrimination and observance of fundamental Human Rights and freedoms.

One of the most encountered preoccupations of a society regarding discrimination refers to insurance of internal order. *ECRI General Policy Recommendation N° 11* outlines the issue of combating racism and racial discrimination in policing, with emphasis on aspects regarding surveillance/investigation activities on grounds such as race, colour, language, religion, nationality or national or **ethnic origin.** The recommendation also refers to all forms of racial discrimination and racially-motivated misconduct by the police, which can be modified by training the police in Human Rights and also by forbidding the direct and indirect discrimination.

On the other hand, it is important the role of the police in combating racist offences and monitoring racist incidents, including to encourage victims and witnesses of racist incidents to report such incidents, and also to establish and operate a system for recording and monitoring discriminatory incidents. In order to make all efforts for combating discrimination more effective, the recommendation outlines the harmonisation of the relationships between the police force and the citizens belonging to minority groups, by also recruiting members of under-represented national minority groups in the police.

Sport is also an important field of combating discrimination and racism, a wide-spread phenomenon where pride and ambitions of some groups of persons are often encountered. In this regard, *ECRI General Policy Recommendation N° 12* focuses on ensuring equal opportunities in access to sport for all, by conceiving appropriate and effective legal and policy measures, achieved by authorities and supported actively by sports federations.

It is also outlined the need to combat racism and racial discrimination in sport, based on specific legislation against racism and racial discrimination in sport is. In particular, the legislator should provide all range of discriminations which may be committed in this context but also legal provisions penalising racist acts. Preventive actions may be the public

awareness campaigns achieved by local public authorities, in partnership with sport federations, supporters and media.

An important place in the matter of discrimination continues to be held by the topic of combating anti-Gypsyism and discrimination against Roma. *ECRI General Policy Recommendation N° 13* outlines and develops the issue into a separate document, by considering such an approach necessary (a special recommendation only on the issues of discrimination of Roma/Gypsies), in the context of the anti-Roma attitudes intensification, (some of them grounded but judged by all communities) as signalled at European level.

The recommendation combats the anti-Roma behaviours and proposes a series of methods which might be used with a view to promoting a non-discriminatory attitude towards this ethnic group, through actions in the fields of education, health, housing and public services. *Recommendation N° 13* also indicates some instruments that may be used by authorities, such as planning, policies or measures to increase trustworthiness.

Regarding the above-mentioned issues, we can say that *ECRI General Policy Recommendations*, even if not binding, are important because they approach the discrimination in a comprehensive manner, regarding both topics but also the used practices and thus succeeding to outline an overview on the way the non-discrimination is mirrored in the legislation and policies, as they define unequivocal criteria and milestone domains.

EUROPEAN NON-DISCRIMINATION LAW

Primary legislation. EU treaties

Concerning the primary EU legislation, several stages of non-discrimination principle can be identified, in light of application area, action modalities or European competencies in this field.

The milestone of non-discrimination principle was laid down in the *Treaty of Rome*, officially the Treaty establishing the European Economic Community (TEC), in 1957, which defined the application criteria of non-discrimination principle, such as *citizenship/nationality* – expressed

in relation to any other domain, ex art. 7 of the TEC and art. 12 of the consolidated version[9] –, and *sex*.

The **application domains** outlined in the Treaty are *commerce,* by prohibition of quantitative restrictions between member states (art. 30 of the TEC and art. 28 of the consolidated version) or of discriminatory taxation (art. 95 of the TEC and art. 90 of the consolidated version), *economic activities* (art. 40 of the TEC and art. 34 of the consolidated version), *work conditions* (based on freedom of movement, it is forbidden any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment, as regulated in art. 48 TEC and art 39 of the consolidated version), and *the right to establishment and freedom to provide services* (based on freedom of services, in accordance with art. 52 and art. 59-60 of the TEC and respectively art. 43 and art. 49-50 of the consolidated version) [10].

It can be highlighted the idea that the non-discrimination principle in the economic field as regulated in the **TEC does not comprise explicit elements which we identify in the non-discrimination principle,** the way this principle was accepted in all international documents, with clearly stipulated criteria of sex, race, colour, religion, political opinion or others, nationality or national or ethnic origin. Even though the Treaty is not elaborated explicitly for all situations involving non-discrimination, the TEC envisages the principle as a whole and **applies it particularly to the economic domain.**

The further step was achieved in the *Treaty on European Union (TEU)*, signed at Maastricht in 1992, which brought significant modifications of the European law in the matter of discrimination. Establishing the *geopolitical concept of European citizenship* opens a new prospect on discrimination starting from citizenship/nationality. At the same time, the competencies granted to the EU regarding education allowed the establishment of legislation on creating the possibility for all students, regardless the country they come from, to choose any education insti-

[9] Consolidated version means including the modifications brought by the Treaties of Maastricht (1992), Amsterdam (1997) and Nice (2001).

[10] Ş. Tudorel, *The principle of non-discrimination in community law: the impact on the national legal order,* in Themis Magazine, no. 4, National Institute of Magistracy, September 2005.

tution from the EU, thus bringing in a larger offer and contributing directly to the consolidation of the competition environment, based on qualitative education.

This modification has an impact for the current study topic, because the European rule **is applicable to every citizen from a member state, thus implicitly to citizens belonging to national minorities** from the EU, whatever the internal enforced provisions are. By exceeding the internal legislation, we can say that this category of regulations represent **a concrete step towards the creation of a European unitary legislation regarding the national minorities.**

*The Treaty of Amsterdam***,** signed in 1997, consolidates the legal aspects linked by the observance of the non-discrimination principle in the European legislation, and regulates explicitly the establishment of an action mechanism against discrimination. In this regard, art. 13 from the *Consolidated Version of the Treaty Establishing the European Community TEC* stipulates that: *"Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."*

The Treaty took over also the American model concerning the introduction of the concept of positive discrimination, first limited to the principle of equality between men and women. Another element with impact in the sphere of discrimination is represented by the provisions regarding police and judicial cooperation, preventing and combating racism and xenophobia. Based on these asseverations, some authors reckon that the Treaty of Amsterdam conferred to the European institutions important competencies on discrimination, allowing them to adopt some measures in the field, legally binding for the member states[11].

Strengthening the European legislation on non-discrimination represents a broader process, comprising also detailed directives concerning the implementation and observance of the non-discrimination

[11] G. Dezideriu, M.-C. Vicol, *Forbidding discrimination in the European Union and the relevance of this principle in exerting the medical profession*, in the Romanian Magazine of Bioethics, vol. 9, no. 2, April-June 2011.

principle, by following the criteria mentioned in the Treaty of Amsterdam.

Thus, although it is designed explicitly for racial discrimination, the *Council Directive 2000/43/EC* of 29 June 2000 is of historical importance by being the first European legal instrument that **forbids discrimination based on race or ethnic origin,** in many sectors of activity, for instance education, social protection, social protection and health care, social advantages, access to goods and services. At the same time, the directive is applicable to all persons, as regards both the public and private sectors, including public bodies.

It is important to emphasize that the directive is a legally binding instrument. It entails the states responsibility for the implementation and initiation of infringement proceedings, fact which fosters to a high degree the development of the mechanisms designated for combating discrimination. They can be reminded the cases which brought about the initiation of infringement proceedings against Austria, Germany, Greece, Finland and Luxembourg, on the 19th July 2004.[12]

The Treaty of Nice signed in 2001 introduces completions of art. 13 from the Treaty of Amsterdam which confers to the European bodies competencies for adopting some harmonisation measures through co-decision and thus clarifying the expression "within the limits of the powers" has used in art. 13. Some other directives on non-discrimination were adopted, based on sex/gender in the working sector, employment and working relations, as well as for goods and services supply.

A significant contribution of the Treaty of Nice is the reaffirmation of **the non-discrimination principle as a prerequisite in defining and applying the European Union's policies,** the Union wishing to combat any discrimination on grounds like *sex, race or* ***ethnic origin****, religion or belief, disability, age or sexual orientation* (art. 9), as well as the social exclusion (art. 10).

One of the core elements introduced by the **Treaty of Lisbon** signed in 2007 concerning the protection of fundamental Human Rights and, implicitly, of the non-discrimination principle, is the Union objective to adhere to the *European Convention of Human Rights*. The achievement

[12] Press releases, European Commission, cases of Austria, Germany, Greece, Finland and Luxembourg who breached *EU* law by *failing* to transpose fully *the Directive 2000/43/EC* and Directive 2000/78/EC, IP/04/1512.

of this goal would make the *Convention* provisions become part of the European Union law and, accordingly, would make possible the European legislation be interpreted by the *European Court of Human Rights*, including direct appeal for the situations which fall under the *Convention*.

A relevant element which supersedes partially to the above mentioned objective is the adoption of the *Charter of Fundamental Rights of the European Union***,** which confers legal status to the rights and freedoms envisaged by it. The authenticity element is not necessarily the Charter purview, but the fact that it validates a legal instrument for observance of Human Rights, as exclusive part of the EU law.

This document was adopted on 7 December 2000 during the Intergovernmental Conference on the Treaty of Nice, but had no legal status. Later, the draft *Treaty establishing a Constitution for Europe* included the Charter in the purview of the Treaty, and conferred it an obligatory legal status. Rejection of the draft of the *Constitutional Treaty* made the Charter to have an existence of its own and it was solemnly proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and the European Commission.

The objective of such endeavour was to correlate the responsibilities of the EU institutions and member states with the fundamental individual rights, so that the EU citizens might benefit of protection of their fundamental rights offered by the belonging state, in the conditions of transfer of some responsibilities at the European Union level.

In this regard, the Charter outlines(…) *with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.*

Because the text of the *Convention* was obsolete, as signed in 1950, and it needed to be updated, it created the possibility to take over in *the Charter of Fundamental Rights of the European Union* only those appropriate paragraphs, almost one third from its provisions, which could be then adapted in compliance with the recent evolutions. As sequel of that legislative approach, after *the Charter of Fundamental Rights of the*

European Union was proclaimed, the Council of Europe decided to revise *the European Convention on Human Rights.*

Concerning non-discrimination, the Charter stipulates in art 21, (1) that *any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion,* ***membership of a national minority,*** *property, birth, disability, age or sexual orientation shall be prohibited.* The respective prohibition became thus obligatory both on legal basis and on the overview of the Treaty of Lisbon, by defining the principles (general guidelines) and criteria (specific guidelines) for implementation of the non-discrimination principle.

A major advantage offered by *the Charter* is the fact that it gathers the rights of the EU citizens which are spread in a large number of legislation, difficult to handle even by specialists. Thus, *the Charter* represents an useful instrument, in compliance with the core of the existing European primary legislation (TEC and TEU) and the jurisprudence of the Court of Justice of the European Union, the relevant European legislation in the field, such as the European Convention on Human Rights, completed by its Protocols, and the jurisprudence of the European Court of Human Rights from Strasbourg, the European Social Charter from 1961 of the Council of Europe, to which the TEU preamble refers to, the Council of Europe's conventions, the statute of the International Criminal Court, Europol Convention, the Schengen Agreement, etc.

Conclusions

1. The Human Rights legal substance falls under the **individual rights**, as results from the *Universal Declaration of Human Rights*, and all the international documents regulating legally binding Human Rights.

2. The regulations regarding the guarantee of the Human Rights observance are enforceable **for every person**, through **national mechanisms**.

3. In the European context, based on the *European Convention*, the natural or legal persons, or groups of private persons, get the right to notify officially **any breach of the individual rights of a person,** which are stipulated in the European document.

4. *European Court of Human Rights* was assigned competencies regarding the trial of reasons based on human right violation, **individually** and **non-discriminatory**. Correlative, the Court decision are legally binding for everyone, including **the citizens belonging to the national minorities**, and the member states undertook the obligation to observe the Court decisions.

5. All provisions of the *European Convention on Human Rights* **are equally applied** to both persons belonging to the national minorities and to other categories of persons.

6. Any discrimination against a citizen belonging to a national minority **is related to the state authority**, and thus making the state to elaborate, implement a legislative and institutional framework regarding its citizens belonging to the national minorities.

7. The **application of the national norms** which regulate the state behaviour towards its citizens who belong to the **national minorities** must be monitored and, in case of inobservance, sanctioned in the same conditions with other categories of citizens, through either administrative or judicial methods, as appropriate, by the national bodies with competencies in the field.

8. The quasi-totality of the civil and political rights of every European citizen is also held by the citizen who belongs to a national minority, and accordingly the procedure applicable to the majority **is equally available for minorities**.

9. In case of breaching any fundamental human right or freedom, the citizens belonging to national minorities can get satisfaction against the national authorities, under an equal treatment with the majority. It results unequivocally that it is about **the individual rights**.

10. The concept of **European citizenship** has had underline the European rule **is applicable to every citizen** from a member state, thus **implicitly to citizens belonging to national minorities** of the EU member states, whatever the internal enforced provisions are.

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EXPERIMENTAL METHODS BASED ON THREE-DIMENSIONAL TECHNOLOGY, A NEW PARADIGM IN JUDICIAL FORENSIC EXPERTISE

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ABSTRACT

Until now, graphics have been used to describe, illustrate, communicate quantitative data and information such as graphs and diagrams. From the fusion of graphics with technology resulted computerized three-dimensional graphics, a field of graphics that deals with the geometric representation of the three-dimensional surfaces of an object, through specialized software. While at international level experimental method based on three-dimensional technology, respectively, three-dimensional computer graphics betide a real paradigm in forensic expertise, at national level, they are almost missing, being used very isolated and mainly in forensics road traffic accident expertise. Currently, guidelines are being developed to facilitate the implementation of three-dimensional technologies in forensic identification activity at international level and we will note that the phenomenon of digitization will not bypass the activity of Romanian forensic expertise, being only a matter of time until theoretical information it will connect with empirical evidence and eliminate the prejudices that have arisen around three-dimensional technologies. Given this circumstance, this article aims to make a brief comparative analysis to outline the particularities of experimental methods based on three-dimensional technology used by other states, in forensic expertise.

KEYWORDS: *forensic expertise, three-dimensional computer graphics, virtual reality, augmented reality;*

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INTRODUCTION

As we pointed out in a precedent article[1] presented on November 6, 2020 at the international conference „*Public safety and the need for high social capital*", organized by the Arad County Council through the Arad County Cultural Center, „technology represents a vital element in society, and the value of science is embodied in technology, which enables society to fully benefit from innovations, aspect that, in general, is considered to be the main driver of global economic growth."

Romanian forensics has kept up with European quality standards and technological innovations, promoting equipment that has effectively supported criminal prosecution[2], until a few years ago, when it failed to mark scientific victories[3], as we were used to in the past and when, the forensic identification activity was blocked by the well-known legislative inaccuracies.

Meanwhile, the application of three-dimensional technologies has expanded in almost all fields and has seen important development in medicine, archeology, and conservation of historical heritage, engineering, architecture.

In forensics, at international level, three-dimensional technology overturns the nineteenth-century archetype of investigating the crime scene and objectifies the process of forensic identification, while ensuring a higher degree of accuracy and efficiency, reduced working time, and increased transmission speed of information.

Three-dimensional technology has also brought into light new methods of discovering, lifting traces and new means of presenting evidence in court.

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[1] G. Popa, A. Teacă, *Private forensic expertise, the guarantee of a fair criminal trial*, to be published in the conference volume, Universul Juridic Publishing House, Bucharest, 2020.

[2] See in this sense: *Documentary Bulletin no. 1/2018 of the Ministry of Internal Affairs* - Institute of Studies for Public Order, Publishing House of the Ministry of Internal Affairs.

[3] When scientists have made an important contribution to the forensic investigation activity through inventions and innovations at an international recognition. See, for example, The method of revealing the traces created on vegetal supports - G. Popa, N. Gament, in *Practical course of forensic tactics Power Point*, Pro Universitaria Publishing House, Bucharest, 2015.

Among these technologies, three-dimensional laser scanners have created a real revolution in the last 10 years, being used by countries such as Canada, United States, Switzerland, France, Italy, Spain, mainly to document the crime scene.

With the help of the scanner, the operation of crime scene „freezing" is carried out in just a few minutes[4] and it represents a very important aspect for forensic identification and finding out the judicial truth, directly influencing the activity of the independent forensic expert in criminal trial, respectively its possibility to ensure the balance in the administration of evidence.

Referring to the independent forensic expert, we note that, internally, one of the ways to successfully integrate three-dimensional technologies could be achieved through forensic expertise in the private sector, which in addition to being „an expression of equality of weapons between accusation and defense, it also has the ability to successfully integrate scientific discoveries and technological innovations through testing equipment that significantly influences the quality of examination, software, etc., financially inaccessible to public institutions"[5], as it results from international jurisprudence[6], especially that of the *common law* system.

We will see further that, unlike Romanian Forensics where the only experimental method based on three-dimensional technology is the virtual simulation, in the jurisprudence of other states, a way to successfully integrate three-dimensional technologies in forensic expertise, was achieved by three-dimensional modeling, reconstructions, and forensic animations, some being used as experimental methods, and others as visual support by experts, in explaining complex scientific issues, or by lawyers in support of their plea, in court.

But, before starting our approach, we need to make a few brief details about the two ways in which the user interacts with the digital environment.

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[4] A scan can take between 20 minutes and 2 hours, depending on the area determined.

[5] G. Popa, A. Teacă, *op. cit.*

[6] In the *common law* jurisprudence, as I showed in the article I referred to in the introduction, witness experts who are part of authorized entities that provide, in addition to forensic expertise, testing of technological equipment that significantly influences the quality of examination and software. For example: *ForensisGroup - The expert of experts*: *https://www.forensisgroup.com/.*

The first mode is virtual reality (VR), a digital environment that completely replaces the real world. When we talk about virtual reality, we refer to a technology capable of transporting us to a reality different from the one we live in.

With virtual reality, we can move and look from different perspectives (up, down, side, back, depth).

If virtual reality can teleport us in real environments, captured by spherical photographs or in environments completely reconstructed by three-dimensional models, augmented reality (AR) is an amplification of the real environment, by superimposing digital content.

When we talk about augmented reality (RA) we refer to an augmented version of reality, obtained by adding information to the real environment. There are three types of augmented reality AR-3D, AR-Browser, and AR-Gaming. AR-3D is the one that allows the placement of three-dimensional virtual models, in life-size over the real environment.

In particular, the application of photorealistic immersive media, based on photogrammetric acquisitions and processed as spherical photographs and/or three-dimensional models, have been recognized for their ability to return the intuitive and immersive perception of spatiality, the materiality of objects, while three-dimensional models from point clouds were recognized for automatic measurements.

I. VIRTUAL SIMULATION

The first experimental method, based on three-dimensional technology is virtual simulation, used internationally, in several areas of forensic expertise, and internally, in forensic expertise of road or air traffic accidents.

Currently, virtual simulations, such as those that „reproduce the pre-impact, impact and post-impact movement of vehicles, to establish the circumstances and causes of accidents, determine the technical condition of means of transport, determine the possibilities of avoiding accidents and non-compliance with the traffic rules"[7], is, according to the local specialized literature, „an integral part of the forensic expertise"[8].

[7] S. Alămoreanu, *The issue of forensic expertise. Course notes for master studies,* Hamangiu Publishing House, Bucharest, 2013, pp. 126-127.

[8] *Ibidem.*

The simulation, as we learn from forensic expert Cristian Dumitrescu, „is a complex operation, which takes place over several days, during which dozens and even hundreds of variants are checked, until the margin of error between the real situation and the simulated is close to the minimum allowed. Mainly, the value of these applications lies in the objectivity they provide, within the limits of the accuracy of the data entered."[9]

Dirk Hartmann defines virtual simulation as „something that imitates one process by another process."[10] In this definition, the term „process" refers exclusively to an object or system whose state changes over time.

Computer simulations are used to predict the data we do not have, to understand the data we already have, and for exploratory or heuristic purposes.

Some authors[11] describe simulation as a tool for detecting real-world phenomena with data produced under experimental control, others[12] as an experimental method of solving problems, and others[13]consider that in an experiment the real object of interest is controlled, and in a simulation is experimented with a model rather than the phenomenon itself.

To perform virtual simulations, the most used software and accepted by the European Network of Forensic Science Institutes (ENFSI) are PC Crash, Virtual Crash, HVE, V-SIM, Analyzer PRO, Carat, Madymo, Photomodeler, Collision Accident Assistant, Pedestrian Accident Assistant, PAM Crash, LS DYNA.[14]

PC Crash, also used in virtual simulations integrated with forensic expertise in Romania, is one of the software used mainly for the reconstruction of sequences in traffic accidents, which can study vehicle movements in two-dimensional coordinates (2D) and can be generated an animated view, in three-dimensional (3D) coordinates. PC Crash contains several different computational models, including a pulse-moment fault

[9] *Forensic course notes*, National Institute of Magistracy, 2008.

[10] J.M. Durán, *What is a simulation model?* in Minds and Machines, march 2020, Vol 30, available: *https://link.springer.com/article/10.1007/s11023-020-09520-z*

[11] P. Humphreys and B.B. Hughes.

[12] C. McMillan and R. González.

[13] N. Gilbert and K. Troitzsch.

[14] European Network of Forensic Science Institutes (ENFSI), *Best Practice Manual for Road Accident Reconstruction*, V 1, 2015, *op. cit.,* p. 6, available: *http://enfsi.eu/wp-content/uploads/2016/09/4._road_accident_reconstruction_0.pdf.*

model, a stiffness-based impact model, a model for realistic trajectory simulations, and a simple kinematic model for distance studies over time.

In combination with other techniques, a dynamic simulation of all or only one of the collision sequences can allow a better understanding and knowledge of the different aspects of the accident. These simulations, as well as other scientific methods, can then be used as a basis for animation, an extremely powerful tool that allows you to view an event from a variety of perspectives.

The phenomenon of digitization, which creates the paradigm in question, draws our attention to other current technologies and software, which through their complex functions can significantly influence the quality of examination.

A large number of software can be used to generate a virtual simulation. For example, 3D Studio Max, one of the most popular three-dimensional (3D) graphics programs that are used in Hollywood for the possibility to render realistically different phenomena[15]. It also has complex animation functions that respect the physical laws of motion for precise and realistic simulations, and through several operations, modifiers can be added to three-dimensional models that reproduce real physical phenomena, special light effects (volumetric light, fog, smoke), reflection and refraction effects.

In general, simulations make creative use of computational techniques that can only be motivated extra-mathematically and extra-theoretically. Unlike simple calculations that can be performed on a computer, simulation results are not automatically reliable. A lot of effort and expertise is put into deciding which results of the simulation are reliable and which are not.

Since virtual simulation basically refers to the use of a computer to solve or roughly solve the mathematical equations of a model that is meant to represent a system, either real or hypothetical, we note that simulations are epistemologically inferior to experiments.

Unlike simulations, the judicial experiment has the function of concretely verifying a hypothesis about the development of an event and of controlling the context, to avoid the danger of some confounding factors.

In other words, we note that virtual simulations are an essential tool for supporting real experiments, inspiring experiments when, for

[15] *https://en.wikipedia.org/wiki/List_of_films_made_with_Autodesk_3ds_Max.*

example, a new hypothesis has been found and an analysis of simulation results is needed for several sets of parameters.

II. THREE-DIMENSIONAL MODELING

The second experimental method in forensic expertise in international jurisprudence is computer modeling or three-dimensional graphics, a branch of graphics that deals with the geometric representation of three-dimensional surfaces of an object, through specialized software.

Three-dimensional (3D) models are created using polygons, consisting of a collection of vertices, edges, and faces that define the shape of an object, with several facets.

Facets are generally composed of triangles, quadrilaterals, or simple, convex polygons to facilitate playback.

Polygons are graphical primitives composed of bands of triangles or quadrilaterals that allow the visualization of shaped shapes and can be constructed using triangular algorithms, such as the Delaunay triangulation algorithm, starting from point clouds.

A point cloud is a set of points characterized by their position in a Cartesian coordinate system and an intensity value, such as color, associated with it.

The dot cloud is used to represent three-dimensional structures such as objects and embossed surfaces and is the result of using 3D scanners and 3D sensors.

The computer, by using software such as 3D Studio Max, can model different o objects, but also to reproduce real technological processes or phenomena.

Generated/modeled three-dimensional models can be viewed from a variety of angles, usually simultaneously, rotated, enlarged, and reduced.

Currently, in forensic expertise, the three-dimensional (3D) model can be an extension of the two-dimensional (2D) information presented in a photograph, but as we will see soon, using photogrammetry or three-dimensional laser scanning to obtain/generate 3D models, we will be able to reproduce the reality perceived by the human eye.

III. RECONSTRUCTION AND FORENSIC ANIMATION

Based on the traces left in the criminal field, we can establish the position of the aggressor and the victim. This aspect can reveal, in most cases, the form of guilt with which the criminal offence was committed or the route taken by the aggressor before and after committing the criminal offence.

Any change of position can generate new hypotheses for investigators, so that by using experimental methods based on three-dimensional technology we can clarify certain circumstances, through a vision comparable to that of an eyewitness.

At present time, our investigative bodies already have the possibility to reproduce the crime scene in three dimensions, but not to explore or enter the *locus commissi delicti* to verify/harness the data obtained in the documentation phase of the crime scene.

In international jurisprudence and especially in the *common law* system[16], reconstructions and three-dimensional forensic animations are used:

- for the analysis of some circumstances in which a crime was committed, applying the deductive and inductive reasoning;
- for the presentation of evidence and the interrelationships between them;
- as a visual aid used by the expert witness, in explaining complex scientific issues, in court;
- as visual support used by the lawyer in his plea, in court.

Three-dimensional reconstruction allows, through a process of logical analysis, a static event to become a dynamic event and is considered a scientific process of collecting facts, defined by the Association for Crime Scene Reconstruction as a process of „using scientific methods, evidence, of deductive and inductive reasoning to understand the series of circumstances that led to the commission of a crime"[17] and generally, involves several steps:

- data collection;

[16] See in this sense: *Campoamor v. Brandon Pest Control, Inc*., Florida (1998), *Tillis Trucking Co. v. Moses*, Alabama (1999), *State v. Robbins*, New York (2008), *State v. Hultenschmidt*, Washington,(2004), *State v. Sipin*, Washington, (2005), *Lewis v. State*, Texas (2013) etc.

[17] *https://www.crimesceneinvestigatoredu.org/crime-scene-reconstructionist/.*

- formulation of the hypothesis;
- hypothesis-testing (controlled or experienced testing);
- formulating the theory based on certain parameters that can be integrated, such as the environment in which an event took place;
- presentation of analytical results (genetic, ballistic, dactyloscopy data); ballistic firing trajectories; Bloodstain Pattern Analysis; images captured by video surveillance systems; expert reports; images and videos on the spot.

Animation is a tool that energizes the criminal process, by presenting a clearer idea of the facts, offering, in the future, the opportunity to represent the event through a virtual film, made based on physical laws and existing evidence, integrated as parameters in software.

The difference between reconstruction and animation is that, in the case of animation, a third dimension is added to the three dimensions, that of time.

To perform these experimental methods in forensic expertise, specialists use the best digital graphics software used in modeling and three-dimensional animation such as 3D Studio Max[18], belonging to Autodesk, Maya[19], belonging to Autodesk, Blender[20], belonging to The Blender Foundation, Cinema 4D[21], belonging to MAXON Computer GmbH, ZBrush[22], belonging to Pixologic Inc, etc.

Both three-dimensional reconstruction and forensic animation are valuable tools being used by both forensic experts and lawyers to help present the facts and details of an event, as well as to argue opinions.

Besides, these two experimental methods, in addition to the mentioned purposes are used in the initial and continuous training of practitioners or the educational process, many universities offering even various programs/courses of three-dimensional reconstruction of the crime scene, considered useful tools in the process of teaching-learning.

The use of these experimental methods in the educational process has the role of increasing the interest of students, but also their ability to understand the information provided, being well-known, in fact, that 90%

[18] *https://en.wikipedia.org/wiki/Autodesk_3ds_Max.*
[19] *https://en.wikipedia.org/wiki/Autodesk_Maya.*
[20] *https://en.wikipedia.org/wiki/Blender_(software).*
[21] *https://en.wikipedia.org/wiki/Cinema_4D.*
[22] *https://en.wikipedia.org/wiki/ZBrush.*

of information processed by the brain is visual and that our brain processes visual information 60,000 times faster than text information.

In light of the above, shortly, we appreciate that three-dimensional modeling, reconstruction, and forensic animation, will generate a paradigm in forensic expertise in Romania, and can be used for:

- Verification of data that are important for the criminal case and that can be reproduced under the conditions of experiments and other investigative activities. For example, it can be verified whether the witness was able to visually perceive, in concrete conditions, the reported event;
- Confirmation or refutation of dubious evidence as well as other data or indications likely to contribute to proving the existence of the crime and the guilt of the perpetrator;
- Confirmation or refutation of the illicit activity performed by the author and of the circumstances in which he acted, but also the existence of possible accomplices;
- Ensuring the direct perception of the judicial body regarding the circumstances in which the witnesses became aware of the actions taken by the perpetrator at the place of the crime;

CONCLUSIONS

The experimental methods based on the three-dimensional technology presented in this approach are directly assigned to the phenomenon of digitization, which in international jurisprudence has begun to be popularized and deciphered.

Of the four methods presented, the only one that applies in the forensic expertise in Romania is the virtual simulation and this, isolated and mainly in the forensic expertise of road traffic accidents, given that three-dimensional imaging technologies have become of particular importance for the new possibilities it offers.

In the current context of digitalization, but also of the approach of harmonization of quality standards at the international level, we consider that the presented methods find a correspondent in the activity of Romanian forensic expertise, being able to be adapted as follows:

- Computerized modeling of three-dimensional graphics for studying the object (original), reproducing the particularities of

structure, behavior, and other properties of the original and its experimental research.

- Three-dimensional reconstruction to verify and clarify certain circumstances that are important for the criminal case and that can be reproduced in the conditions of performing experiments and other investigative activities;
- Animation to illustrate a complex scientific opinion or as visual support in arguing the opinion of the independent forensic expert.

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RESTRICTING THE STAGE OF ORAL PROCEEDINGS IN SOME CASES PENDING IN COURTS – IS SUCH A TRANSITORY SOLUTION NECESSARY IN THE PANDEMIC CONTEXT OR NOT?

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ABSTRACT

In the new reality of these days, professional associations of magistrates have asked, through public calls, for urgent decisions intended to stop the pandemic spread in courts and prosecutors' offices, and for legislative and administrative amendments, either by a reduction of the court examination activity to the settlement of urgent cases or by eliminating the stage of oral proceedings in some of the cases pending in courts and the immediate digitization of courts.

This article seeks to bring into discussion once again the (alternative) proposal regarding the elimination of the stage of oral proceedings, by bringing back the relevant procedure provisions to the forefront, even under the temporary circumstances faced by the society, in order to see whether such restriction is in the letter and spirit of Art. 6 of the Convention, of ECHR's jurisprudence and of the rigors imposed on the practice of the lawyer profession, in order to conclude whether such intervention in the normal, natural judicial activity is necessary and should be adopted. By changing the procedure rules in courts, can we eventually conclude that such requested restriction is able to guarantee an efficient and safe administration of justice?

KEYWORDS: *oral proceedings; principles; civil proceedings; procedure rules; courts; restriction of rights; legislative measures;*

I. Brief considerations

The associations of magistrates (the Forum of Romanian Judges and the "Initiative for Justice" Association) have requested, not only once, the Romanian Parliament, the Romanian Government, the Ministry of Justice and the Superior Council of Magistracy to urgently take legislative and administrative steps, within the limits of their legal competence, intended

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to diminish the spreading of infections caused by the SARS-CoV-2 virus either by reducing the court examination activity to the settlement of urgent cases ***or by eliminating the stage of oral proceedings in some of the cases pending in courts.***

We will address herein the ***proposal to eliminate the stage of oral proceedings*** in some of the cases pending in courts in the civil area lato sensu, for the declared purpose of securing the rendering of justice under safe conditions for all actors involved in judicial proceedings.

There is no doubt, the right to health protection is a fundamental right of any individual, having its legal basis in the provisions of Art. 34[1], being in fact consecrated also in other international documents (the Recitals of the Constitution of the World Health Organization (1946), the Universal Declaration of Human Rights (1948), the European Social Charter, as revised (1996), or the Charter of Fundamental Rights of the European Union).

Recently, in the new social reality, *Law no. 136* of 18.07.2020 on Setting Steps in the Public Health Area in Situations of Epidemiological and Biological Risk, published in Official Gazette no. 634 of 18.07.2020 (in force since 21.07.2020), regulates some temporary steps in the public health area required in situations of epidemiological and biological risk in order to prevent the introduction and to limit the spreading of infectious and catching diseases in the territory of Romania.

The aim of the law is defined by the provisions of Art. 2, according to which the steps provided for by law are ordered and applied in situations listed under Art. 1 exclusively for the protection of public health, by ***observing the citizens' fundamental rights*** and freedoms and the public order. All steps ordered under the law ***will be proportional to the situation that triggered them***, limited in time to such situation, and applied on a non-discriminatory basis.

The right to oral proceedings is part of the fundamental principles of civil proceedings.

Cases are debated orally, except for situations for which the law stipulates otherwise or when the parties expressly ask the court to examine

[1] Art. 34 of the Romanian Constitution - Right to health protection: "(l) The right to health protection is guaranteed. (2) The state has an obligation to take steps intended to secure hygiene and public health."

a case based exclusively on the documents lodged with the case file (Art. 15 of the Civil Procedure Code)

It has been judiciously stated that this principle ensures a direct contact between the judge and the parties, ***imposes a specific order*** that needs to be observed in the presentation of the parties' submissions and defense arguments (established by the provisions of Art. 237 para. 2 point 110 of the Civil Procedure Code – for the investigation stage of the proceedings, for the purpose of preparing debates on the merits, and of Art. 389-394 of the Civil Procedure Code - for debates on the merits), facilitating both a correct ascertaining of the facts and the judge's personal conviction on such facts[2].

If at least one of the parties requests the case adjudication *in absentia*, the case will be settled based on the documents lodged with the case file, without oral debates (this aspect is set forth by the provisions of Art. 223 and Art. 411 para. 1 point 2 of the same Code).

On the other hand, the oral nature of debates is a principle complementary to the right to defense, guaranteed both by the provisions of the Constitution (Art. 24) and by those of the procedure code (Art. 13 para. 3 of the Civil Procedure Code, which stipulates the parties' possibility to participate in all stages of the proceedings, being able to present their arguments both in writing and orally).

Our lawmaker has regulated the conducting of civil proceedings by combining the oral proceedings with the written ones (the court will examine all documents contained in the case file, will hear the arguments of the attending party, for situations in which only one party appears in court, will decide based on the produced evidence, and will examine the objections and defense arguments of the absent party, as provided for by Art. 223 para. 2 and Art. 237 para. 2 point 3 of the Civil Procedure Code).

We ***wonder*** whether the current epidemiological context and the digitization of judicial activities of courts ***can change the procedure rules in courts.***

The Code is the only one establishing the rules for the court examination of civil cases for the rendering of justice in the civil area (Art. 1 para. 1)

Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms establishes an obligation for states to create independent and unbiased courts and ***to promote efficient proceedings***.

[2] *https://legeaz.net/dictionar-juridic/principiul-oralitatii-dezbaterilor.*

We do not deny the fact that such "efficient" proceedings must be redesigned, and readapted to the new reality, all the more that we can see a future in which justice and the alert pace in which technology evolves will lead to benefits/disadvantages for all actors of the justice system.

We believe that civil proceedings have been designed by the lawmaker as a trial conceived for the courtroom[3], in which the human factor and the direct perception of proceedings are, maybe, in our opinion, the most important elements.

The ethics of a profession "describes the specific duties assumed by its members through a social contract"[4], and the objective of legal ethics consists in a study of the personal and professional ethics and the relations between them."[5]

In deciding how significant the involvement of the judge should be, many different opinions have been expressed (impairment of the principle of immediateness regulated by Article 16 of the Code, which requires that all evidence be produced before the judge, who must be able to ascertain directly, through his/her own means, the relevant factual content, or a breach of the fundamental principle of orality of court hearings).

Irrespective of the particularities of each judicial system and of the practices applied by courts of various states, oral proceedings are unquestionably one of the processual safeguards of the activity related to the examination and debate of the merits of cases for their lawful and solid settlement, in order to attain the purpose of adjudication set forth by Art. 1 para. 2 and Art. 211 of the Civil Procedure Code.

Civil proceedings should not take into account only the relevant judicial instruments but also the concepts and realities specific to the context of controversy (determined by the efforts seeking to diminish the spreading of breathing infections caused by the SARS-CoV-2 virus).

It has been stated that[6] ***in the civil law area lato sensu***, "the right to oral proceedings is not an absolute one, the European Court for Human Rights admitting derogations when proceedings concern an extremely technical

[3] A general rule for any law system established by Art. 212 of the Civil Procedure Code: "A case is examined at the premises of the court, unless the law provides otherwise".

[4] Hamilton, 2002, p. 3

[5] D. Fodorean, *Etică Juridică. Note de curs (Legal Ethics. Course Notes),* Law School of "Titu Maiorescu" University, Bucharest, 2012, p. 5.

[6] *http://www.forumuljudecatorilor.ro/index.php/archives/4251.*

aspect, which is proven through written evidence, or when a proceeding concerns legal aspects, unrelated to the setting of a factual situation (*ECHR, Blücher v. the Czech Republic*). States can establish proceedings of no oral nature before courts of appeal or of extraordinary appeals, to the extent that these take into account the factual situation established by the first instance, and provided that oral proceedings have been held before the court of first instance (ECHR, *Rippe v. Germany*). In the case of civil court claims (excess of speed or other traffic misdemeanours), as long as the credibility of witnesses did not need to be assessed, the Court admitted that an oral hearing was not necessary and that proceedings could be conducted only in writing (*ECHR, Suhadolc v. Slovenia*).

"In the ***criminal law area***, proceedings related to the approval of means of appeal or those concerning only matters of law, not factual aspects, can be compliant with the requirements of Art. 6 also when the appellant has not been offered a possibility to be heard in person by the court of appeals or by the Court of Cassation (*ECHR, Monnell and Morris v. the United Kingdom*). Considering the role of the Court of Cassation and examining the proceeding as a whole, the Court decided that the fact that the plaintiffs were not offered a possibility to defeat their arguments orally, either in person or through members of the regular bar, did not breach their right to a fair trial (*ECHR, Meftah et al v. France*). Before courts of appeal having jurisdiction both on de facto and de jure matters, Art. 6 of the Convention does not necessarily guarantee the right to a public hearing or, if such hearing exists, the right to attend the hearing in person is not necessarily guaranteed. Considering that in his/her appeal the plaintiff did not rely upon factual or law matters that could not be settled based on the documents lodged with the case file, and considering the low severity of the offense, and the prohibition of increasing the conviction in appeal, the court of appeals judiciously decided that that a public hearing was obviously unnecessary, and observed this way the plaintiff's right to a fair trial (*ECHR, Fejde v. Sweden*).

Arguments that have led us to reflect on the restriction of the stage of oral proceedings have been raised: neither the letter nor the spirit of Art. 6 of the Convention prevents a person to voluntarily waive the safeguards offered by a fair trial, both expressly and tacitly; in order for someone to be able to consider that a plaintiff waived implicitly, through his/her behaviour, a right provided by Art. 6, one must establish that the plaintiff could reasonably foresee the consequences of his/her behaviour (*ECHR, Sejdovic*

v. Italy); ever since the beginning of the written stage, the court needs to be able to inform the parties on their possibility to waive the stage of oral proceedings (just like the parties can request for adjudication of their case in absentia), and where the nature of a trial allows it (for example, there is no need to produce evidence under oral proceedings), in situations where the parties waive oral proceedings, the trial will be conducted in writing (by observing the adversarial principle); an extended production of evidence through lawyers or legal counsels; the physical presence of a person is necessary in order to collect evidence, in situations where these are witnesses to events of importance for the case (*ECHR, Kovalev v. Russia*).

As an example, the Spanish civil procedure norm has been mentioned, which provides for a possibility that proceedings in the court of first instance be conducted under an oral proceeding but, in fact, only the written proceeding is followed in most of the cases; in appeal (appeals and extraordinary appeals), as a rule, the Spanish civil procedure law regulates the written stage (with no oral debates) in situations where there is no new evidence to produce, or such evidence has been dismissed, or the court of appeal/extraordinary appeal decides that the organization of an oral debate is not necessary, and, this way, the desideratum of speedy settlement of cases is secured[7].

A fact omitted to be mentioned is that the national provisions and the proceeding of adjudication in absentia have been established to the benefit of parties interested in making use of a facility, parties that are sovereign in making such decision.

Or, under the current circumstances, we are dealing with litigants "*forced*" (by a health context) to become aware of the fact that the life of judges, prosecutors, auxiliary staff, or lawyers, interpreters and other participants in the act of justice prevails and, obviously, is most important, and to decide that, as far as they are concerned, the written proceeding (which is widely used in civil trials starting from the moment when the court is notified with a statement of claim and until the setting of the first hearing date of the trial) is sufficient to them, that such trial does not void

[7] http://www.forumuljudecatorilor.ro/index.php/archives/4251.

Art. 464 para. 2, Art. 465 and Art. 475 para. 1 and 2 of the Spanish Civil Procedure Code, accessible at:

file:///C:/Documents%20and%20Settings/user/My%20Documents/COMUNICATE/BOE-333_Codigo_Procesal_Civil.pdf.

their processual rights of content or substance and that the trial proceeding in which they do not appear would not become an illusory one.

For a better understanding of the concept of trial in absentia, the study highlighted the fact that "most courts regard a **trial in absentia** as problematic from the perspective of procedural equity only in situations where a petitioner has not been aware at all of the existence of a (criminal) proceeding conducted against him/her".[8]

This conclusion can be definitely valid also in the case of civil proceedings, in which the mandatory requirement consists of the procedural summoning, while the absence of a party, as an act of unilateral waiver of his/her appearance in person or through a representative, is not in a position to prevent the case adjudication.

Civil courts can decide on an application only after the **summoning** or ***appearance*** of parties before court, unless the law provides otherwise (Art. 14 para. 1 of the Civil Procedure Code). The procedure norm contains a disjunctive structure, because it sets two procedural regularity hypotheses – the ***summoning*** or the ***appearance*** of parties before court, establishing this way an alternative relation.

On the other hand, in all situations in which a party did not (voluntarily) waive his/her right to appear, the European court decided that "there is a violation of Art. 6 resulted from the state's omission to secure his/her presence at its own proceedings".[9]

One cannot question the fact that the proposal to restrict oral proceedings is determined by a situation assimilated to *force majeure*[10] (the coronavirus epidemics, an event that cannot be foreseen).

A second question arises here, namely whether the situation existing in Romania has the elements of force majeure that could determine the creation of a new legal structure (i.e. that the decision of ensuring oral proceedings be left at the discretion of courts, as proposed) designed to provide a new legal framework, in which judicial proceedings would be

[8] Ph.D. lawyer G. Zlati, Case Re-adjudication following a Conviction in Absentia, an Illusory Proceeding. Study on the Compatibility of the Concept Provided for by Art. 522, indent 1 of the Civil Procedure Code with the Standards of the European Court for Human Rights in the Area (Review).

[9] Cases *Sejdovic v. Italy* and *Somogyi v. Italy*, ECtHR, Division l, Decision in case *Stoichkov v. Bulgaria*, 24 March 2005, 9808/02.

[10] Force majeure is an external, unforeseeable, absolutely invincible and unavoidable event (Art. 1351 para. 2 of the Civil Code).

conducted under safer conditions, and would result in an act of justice rendered under new "*procedure"* terms.

The proposal is that the analysis (the decision of courts to ensure oral proceedings) should be done on a case-by-case basis, depending on the type of proceeding, and according to the particularities of each case, in order to clarify sensitive issues of cases, a situation in which the procedural safeguards related to the notification of parties on the venue and time where/when the proceedings are conducted are observed; parties can request for a stage of oral proceedings, but such request does not become an obligation for courts, which will decide on a case-by-case basis.

First of all, one can see that oral proceedings (which are a fundamental principle of the trial) become the exception, and the absence of oral proceedings becomes the rule (obviously, this would be limited in time by the situation having determined it).

Secondly, the whole philosophy of Law no. 134/2010 on the Civil Procedure Code is based on adversarial debates and on the appearance of parties in court, which are elements supporting a fair proceeding.

This conclusion is supported by the provisions of Art. 10 para. 2, Art. 13 para. 2, Art. 14 para. 1 and 4 (parties have a right to ***discuss*** and ***argue*** any factual and law matter invoked during the proceedings), Art. 21 para. 2 (all along the proceedings, the judge will attempt to reconcile the parties, by offering them the necessary ***guidance***), Art. 22 para. 2 (the judge is entitled to ***request*** the parties to offer explanations, ***orally*** or in writing, and to request them to debate any factual or legal circumstances), as well as by Section 3, Chapter II – debates on the merits of the case.

In the spirit of the European Court, the right to oral proceedings is part of the practical and effective, not theoretical and illusory, rights and, at the same time, fully falls under the scope of the right of access to court, understood in the sense of the right of a person to be present at his/her own proceedings.

We should remind again the fact that, according to the jurisprudence of the ECHR, any individual has a right to a fair and *public* examination of his/her case, the Court trying to apply the provisions of Art. 6 for the purpose of protecting such rights, which, in fact, are practical and effective (the principle of effectiveness) rather than theoretical and illusory (*Sakhnovskiy v. Russia* [CG], §§99-107).

As a result of this non-literal and contextual interpretation of Article 6, the observance of the right to a fair trial under the European Convention on

Human Rights requires implicitly the existence of the stage of oral proceedings.

Article 6 sets the presumption of truth established by the domestic courts, except for the situation in which the domestic proceedings have ***diminished the essence*** of the provisions of Article 6.

Article 6 requires an ***examination of the correctness of proceedings applied as a whole***, by considering all stages and opportunities offered to a plaintiff.

At the same time, in recent years, the Court started to pay higher importance to specific significant moments during the domestic proceeding.[11]

States continue to have the freedom to apply the procedure law on any act (to the extent that they do not breach other rights protected under the Convention), but a plaintiff should be offered extended opportunities to present his/her case, because this is the aspect essentially addressed by Article 6 of the Convention.

Under Article 1 of the Convention, Contracting States have an obligation to organize their legal systems in such a way to secure the observance of Article 6.

And the right to have oral proceedings falls within the extended opportunities protected by the Convention.

In the *Council of Europe Human Rights Handbooks*[12], it is stated that "as a rule, references to financial or practical difficulties cannot justify the non-observance of such requirements" (Salesi v. Italy, §24). For the most **rights provided for by Article 6**, **derogations may be done**. However, an (explicit or implicit) derogation will be accepted by the Court only if it is genuine, i.e. unequivocal (there should be no doubt related to its presence and its scope of application), free (the person must not be compelled to waive his/her rights in any way (*Deweer v. Belgium*, §§48-54), the person concerned is informed (the person must understand the consequences of his/her waiver) and the derogation **is not directed against an important**

[11] For instance, in the situation where a suspect is questioned under criminal proceedings (*Imbrioscia v. Switzerland* §§39-44, cases *Salduz v. Turkey* [CG], §§ 56-62, *Panovits v. Cyprus* §§66-77, *Dayanan v. Turkey*, §§31-43; *Pishchalnikov v. Russia*, §§72- 91).

[12] G. Dikov, D. Vitkauskas, *Protecting of the Right to a Fair Trial under the European Convention on Human Rights*, Council of Europe Human Rights Handbooks, Strasbourg, 2012.

public interest (*Sejdovic v. Italy* [CG], §§96- 104; *Talat Tunç v. Turkey*, §§55-64).

Under the patterns set by ECHR, a restriction of the stage of oral proceedings in some of the cases pending in courts would be a serious interference in the conducting of judicial proceedings both in terms of impairment of the fundamental principles of the trial (adversariality, the parties' right to defence, immediateness, and their right of disposition), the parties being sovereign to dispose of their rights in any way permitted by law, and also in terms of application of the fundamental provisions of the Convention's system.

One should take into account the plaintiff's vulnerability and the risk that authorities may influence him/her in his/her decision to not appear in court in order to participate in his/her own proceedings.

According to the Court, the conditions under which an interference of the nature of that brought in discussion, i.e. *the reduction of the stage of oral proceedings in particular cases*, is allowed can be generated by a need to protect specific public interests (such as those related to health protection).

States benefit from a margin of discretion in setting the need for such measures in a democratic society but, ultimately, the European courts for human rights will have to decide on the compatibility of this interference with the provisions of the Convention, by assessing on a case-by-case basis whether the interference occurs as a result of an imperative social need and whether it is proportional to the sought-after purpose.

And these interferences must have three characteristics: to be provided by law, to pursue a legitimate purpose and to be necessary in a democratic society, therefore, to be proportional to the sought-after purpose.

Last but not least, **we wonder** whether this restriction can guarantee an efficient and safe rendering of justice.

Oral proceedings mean, first of all, the right of a party to be heard and a correlative obligation of the judge to hear him/her.

In another train of thoughts, in case of conventional representation, the lawyer's obligation to plea is profoundly affected.

Lawyers have an obligation to appear at each hearing date set by courts and to show scrupulousness and probity in fulfilling the mandate entrusted to them, to plea with dignity before judges and the other parties in the proceedings (Art. 229 para. 1 and 3 of the Statute of the Lawyer's Profession); they must assist and represent their clients with professional

competence, by using adequate legal knowledge, specific practical abilities, and by a reasonably necessary preparation for the actual assistance or representation of their clients.

This is all the more so as the court performs activities related to the case examination and the debates on the case merits by observing all the procedural principles and safeguards for its lawful and solid adjudication (Art. 211 of the Civil Procedure Code).

Lawyers play a critical role in the efficient functioning of justice. In practicing their profession, lawyers have an obligation to act for the defence of their clients in accordance with the law and with the professional rules (Art. 10 para. 1 and 2 of the **Code of Ethics of Romanian Lawyers**).

The Code of Ethics addresses this very matter, by stipulating that no rule of ethics set by an authority may limit the lawyers' obligations related to the defence of their clients' interests through all legitimate means.[13]

We mentioned the statutory provisions of the profession so as to draw the conclusion that a defence attorney's obligation to plea (obviously, performed within the process of communication in court and in the proceedings that are debated orally), in cases in which the court may decide not to conduct oral proceedings, will be profoundly affected.

The filing of written submissions or of post hearing briefs, at one's own initiative or at the court's request, ***cannot fully substitute the processual function of oral submissions***.

If we take another look at the Code's philosophy, the stage of oral conclusions has its well-defined place (Art. 15 para. 1 "trials are debated orally", Art. 17 – the public nature of court hearings, being well known that the right in discussion is effectively "heard" in a public hearing, Art. 244 para. 2, under which the obligation to draft written submissions does not affect the right of a party to present oral conclusions, etc.).

In conclusion, the "*submissions on the merits*" are part of the case merits examination and represents an element for the settlement of the merits of a litigation that cannot be "*easily*" eliminated from a trial.

This is all the more so when a decision to conduct oral proceedings or not is left at the court's discretion without setting *requirements* that

[13] Art. 26 para. 2 of Decision no. 268/17.06.2017, whereby the Council of the National Union of Romanian Bars approved the Code of Ethics of Romanian Lawyers.

should be met by a case that does not "*qualify*" and for the conducting of oral proceedings, an aspect that can give rise to arbitrary.

The predictable consequence would be that of causing processual damages to the litigating parties, which could be eliminated only by a sentence cancellation/quashing under the terms of the provisions of Art. 175 and Art. 176 point 6 of the Civil Procedure Code, the protected interest being a public one (health protection).

II. Conclusions

Therefore, the principle of orality of civil proceedings, a direct consecration of the Latin adage *audiatur et altera pars* (let the other side be heard as well), implies the exercise of the right to oral expression, and duties and responsibilities for the parties and their representatives.

The application of the amendment proposals in question also depends on any potential restrictions, on the imposition of conditions for its exercise, and, last but not least, on the way in which such issues are addressed.

Independently from the manner in which they were drafted, but in the meaning of the civil procedure law mentioned above, civil disputes concern private rights and interests of the parties, of which they are free to dispose of in the way deemed fit by them, by establishing the processual strategy for the defence of the claimed rights.

At the same time, another valence of the provisions of Art. 15 of the Civil Procedure Code requires one not to make a confusion between the right of a party to expressly request the court to adjudicate the case solely based on the documents lodged with the case file and the situation in which the absence of a duly summoned party does not prevent the proceedings or the existence of conditions related to oral proceedings, in a situation where the parties do not waive them, and the proceedings will not be conducted only in writing.

We will not conclude before asking ourselves: What could be the effect of the new procedure norms requested to be urgently taken through legislative measures when these are combined with fundamental principles of the trial?

Our own conclusion, an optimistic one, would be that, unquestionably, the professionalism of judges, lawyers and all those involved in the act of

justice is the first safeguard of "properly tried" cases and of high quality court decisions.

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CONSIDERATIONS REGARDING THE ECONOMIC INTEREST IN SOME CREDIT AND INTER-SOCIETY GUARANTEE OPERATIONS

Florin-Bogdan CONSTANTINESCU *

ABSTRACT

This article aims to analyse the premises and the need to document the economic interest, in the context of the intercompany guarantee operations provided by Law no. 31/1990. The celerity presumed by the commercial transactions, the urgent need for competition and streamlining of the contractual documentation, especially within a group of companies, where there is a community of shareholders and management can sometimes lead to the setting-up the of intercompany guarantees without a thorough prior analysis of the economic interest, taking into consideration that any operation of a company must bring a benefit, direct or indirect, present or future. This is all the more so as the lack of such an interest can lead to a breach of the provisions on the unlawful cause as provided by the Civil Code, with important effects on the company. In other words, the economic interest has to be considered prior to the signing of the guarantee act, from a financial-accounting and legal perspective, inclusively through the amendment of the law, so that the guarantee act to be outside of any reservations.

KEYWORDS: *economic interest; intercompany guarantee; unlawful cause; credit; guarantee; profit; administrator; shareholders;*

I. Preamble. Argument

In the current activity, the inter-company guarantees operations are usual, especially in the case of the companies that have a community of shareholders and management bodies, respectively they are part of the same group of companies, for reasons that derive mainly from the need for competition, financing of the various needs/transactions of the company, for the proper preservation of the market share, but also of the customers. This is valid for the credit and guarantee operations performed by companies regulated by the Companies Law no. 31/1990 (*hereinafter referred to as Law no. 31/1990*), a fact also supported in doctrine, respectively the commercial circuit is based on the rapid

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circulation of goods, on the unfolding of the activity of professionals with maximum celerity, in the context of using the credit (in the double meaning of debt rescheduling and good faith)[1]. Although there have been important legal provisions for a long time governing the credit and guarantee operations granted by a company to its administrators, respectively the already known general articles 144^4 and 272 of the Law no. 31/1990, an insufficiently analysed aspect is that of the economic or corporate interest, which must necessarily accompany the guarantee and credit operations. In other words, this economic interest must or should be a corollary of the credit and guarantee operation, so that there should be no risk of interpretation that the operation may be cancelled on the ground of the illicit cause/fraud of the law, according to the Articles 1237 and 1238 of the Civil Code; moreover, if the credit/guarantee operation is carried out in compliance with the cited legal provisions, is the existence of the economic interest beyond any doubt or is there at least a reasonable presumption in this respect?

To the same extent, it must be analysed with the utmost diligence in advance that the credit/guarantee operation **(i)** it is not in fact a liberality or the apparent legal mean which provides another professional with a direct or indirect patrimonial advantage, without any financial, economic, accounting and legal justification, **(ii)** the company's legal capacity of use is respected, according to the Article 206 of the Civil Code; **(iii)** to comply with the legal provisions in the area of conflict of interests (the Article 215 of the Civil Code), of representation (the Article 1303 et seq. of the Civil Code). Or, it is commonly known that, in its professional activity, a trader cannot be generous[2].

In this sense, the provisions of the Article 1 of the Law no. 31/1990 **(i) regarded** the natural and legal persons who may associate and set up companies for the purpose of carrying out **commercial acts (ii) currently** concerns natural and legal persons who may associate and set up companies with **legal capacity** in order to carry out for **lucrative activities**. In accordance with the relevant doctrine, the trade acts were defined as the legal acts, legal facts and economic operations by which

[1] S. Angheni, *Commercial Law. Treaty*, C.H. Beck Publishing House, Bucharest, 2019, p. 7.

[2] Fr. Deak, *Civil Law Treaty. Special contracts,* Universul Juridic Publishing House, Bucharest, 2001, p. 120.

the production of goods, the execution of works or the provision of services or an interposition in the movement of goods, aiming to gain profit[3]. So, the goal was to obtain a benefit, patrimonial advantage, present or future, directly or indirectly; of course, these benefits must not have been doubtful or imperceptible, respectively difficult to identify or measure, but concrete, effective, measurable or identifiable, at least.

By reference to the current wording of the Article 1 of the Law no. 31/1990, it takes into account the lucrative activities, respectively those profitable activities, bringing advantages or benefits. It is interesting that the same legal text refers to the companies with legal capacity, regulated by the Law no. 31/1990. Therefore, are excluded the civil societies, regulated by the Civil Code (the Article 1881 et seq.), the associations in participation (the Article 1949 et seq. of the Civil Code), the associations that may carry out certain economic activities, according to the Government Ordinance no. 26/2000 on associations and foundations. Thus, in general, a professional can make credit/guarantee operations if there is a quantifiable profit, direct or indirect, present or future.

Next, we will analyse the main guarantee and credit interdictions provided by the Articles 144^4 and 272 of the Law no. 31/1990, we will try to outline the content and limits of the economic interest, the definition of the economic interest by referring to the conclusions extracted from the analysis of credit and guarantee interdictions, the need to substantiate and the preliminary analysis of the economic interest.

II. Analysis of credit and guarantee operations

II.1. The content of the credit prohibition provided by the Article 144^4 of the Law no. 31/1990

The cited legal text establishes from the beginning a prohibition, respectively that it is forbidden for the company to credit the administrators. The performance of the crediting activity with professional title is made by the credit institutions, regulated by the Government Emergency Ordinance no. 99/2006 on the credit institutions and capital adequacy and by non-banking financial institutions, regulated by the Law no. 93/2009

[3] St.D. Cărpenaru, *Romanian Commercial Law*, 7th ed., Universul Juridic Publishing House, Bucharest, 2007, p. 34.

on non-banking financial institutions. The granting, unfolding of the loans, management of the risks associated by these entities is carried out under strict conditions, under the prudential supervision of the National Bank of Romania, according to a specific legislation, of which we mention the NBR Regulation no. 17/2012 regarding some conditions of lending, its main purpose being the establishment of the conditions for granting and carrying out credits in Romania for granting and carrying out credits in Romania, individuals and non-financial entities, in order to ensure financial stability, according to art. 1 of this regulation.

It can be observed, therefore, the special attention paid by the legislator and regulator/supervisory authority to the lending activity, respectively its unfolding only by entities specially authorized in this respect, responsibly, transparently (including at the contractual level, but also by prior interrogation of the Credit Bureau databases), avoiding excessive indebtedness and excessive costs (usury); in the same line, it can be stated that, by expressly mentioning the purpose, respectively, ensuring the financial stability, *the lending activity is one of public interest/importance.* A company that is not a credit institution or non-bank financial institution can grant loans (and not credits), accidentally, so not professionally and in the conditions in which there is a benefit/profit for the company. Certainly, it is important to be observed the principle of the speciality related to the legal capacity. Thus, until the entry into force of the new Civil Code, there was the provision of the Article 34 of the Decree no. 31/1954 regarding natural and legal persons, in accordance to which a legal person could have only those purposes corresponding to its purpose, established by law, the act of establishment or statute, any legal act that is not made in order to achieve this purpose, being null.

In other words, there was a risk that any guarantee or credit operation made by a company that did not mention such activities in the articles of association should have been considered absolutely null and void by the competent Court of Law, according to the law. This risk was significantly reduced by Law no. 441/2206 which amended Articles 144^4 and 272 of the Law no. 31/1990, being thus allowed, within certain limits, the guarantee and intra-group credit operations. Through the new Civil Code, the legislator adopted a more flexible approach in this direction, respectively, according to the Article 206, the legal person may have any civil rights and obligations, which, by their nature or according to the

law, cannot belong to the natural person, the sanction being the absolute nullity for an act performed in violation of this provision.

With regard to this legal text, certain clarifications are required:**(i)** the first limitation regards the categories of rights and obligations that may belong to a legal person is the **nature** of those rights and obligations that cannot be held by a natural person. Therefore, the coverage area for the legal entities can be quite wide; by way of example, the right to the protection of the personal data is a right which, by its nature, applies to the individuals; **(ii)** the second limitation is given by a **legal provision**, being able to be mentioned by way of example the right to dignity, the right to one's own image, the right to privacy, which are rights belonging to the natural person, being provided by the Civil Code (the Articles 71-73).

Considering the previously mentioned, it can be stated that a company, regulated by the Law no. 31/1990, may grant loans under the conditions of the common law, respectively the consumption loan, regulated by the Civil Code (the Article 2158 et seq.). To the extent that a credit or guarantee operation takes place in violation of the Article 144^4 of the Law no. 31/1990, although the imperative wording of the text (*the crediting is prohibited*) may lead to the idea of the absolute nullity (as sanction), we are of the opinion that there are sufficient arguments in this respect **in contrast to the supporters of the relative nullity**, by reference to Article 1238, 2nd paragraph of the Civil Code, according to which the illicit or immoral cause attracts the absolute nullity of the contract if it is common or, otherwise, if the other party knew it or, according to the circumstances, should have known it. It should be mentioned that absolute nullity can be invoked at any time by the interested person, according to the Article 1249 of the Civil Code, being able, however, to be confirmed only according to the law (the Article 1247, 4th paragraph of the Civil Code).

II.1.2. The area of application of the credit prohibition provided by the Article 144^4 of the Law no. 31/1990

II.1.2.1. The Article 144^4 stipulates that a company is forbidden to carry out credit operations of its administrators. It is useful to establish from the very beginning whether this prohibition applies only to the joint

stock companies or other categories of companies regulated by the Law no. 31/1990.

Although the idea is supported that the credit and guarantee ban would also apply to the limited liability companies, we highlight the following reservations: **(i)** a first argument is the topography of the text, which is placed *in section III About the administration of the company*, which, in turn, is part of **Chapter IV Joint Stock Companies**; **(ii)** the provisions of the Article 197, par. 4 of the Law no. 31/1990, in accordance to which the provisions regarding the management of the joint stock companies are not applicable to the limited liability companies, regardless of whether or not they are subject to the audit obligation; **(iii)** the provisions of the Article 47, para. 1 and 2 of the Law no. 24/2000 on the norms of legislative technique for the elaboration of normative acts, according to which the article comprises, as a rule, a **single** normative provision applicable to a **given situation** and that the structure of an article must be balanced, addressing **exclusively** the legal aspects necessary for regulation; **(iv)** the style of the normative acts must be c**oncise, sober, clear and precise, which excludes any ambiguity**, according to the Article 36, para. 1 of the Law no. 24/2000 regarding the norms of legislative technique for the elaboration of the normative acts; **(v)** a contrary approach may generate the risk of interpretation that it may be negatively impacted the principle of the contractual freedom enshrined in the Article 1169 of the Civil Code and the right of private property, provided by the Article 555 et seq. of the Civil Code, with the mention that this last right also benefits of constitutional guarantees, respectively private property is inviolable, under the conditions of the organic law (the Article 136 of the Constitution) and the property right is guaranteed (the Article 44, paragraph 1 of the Constitution);**(vi)**if the legislator had expressly intended this prohibition to apply to the limited liability companies, it would have expressly provided for that. One possible argument is that limited the liability companies may be the protagonists of smaller operations compared to the joint stock companies. Certainly, the possibility of extending this ban in the case of limited liability companies is certainly not ruled out in the future. Thus, we consider that, for now, there are more arguments in the sense of applying the prohibition of crediting and guarantee only to the joint stock companies.

II.1.2.2. The main subject of the credit ban is the administrator of the joint stock company. The administrator of a joint stock company has the following main obligations: **(i)** the obligation of loyalty towards company, the obligation of reporting, the obligation of diligence towards the company, according to the Article 72 of the Law no. 31/1990; **(ii)** the obligation to supervise the directors and the other personnel subordinated, when the damage would not have occurred if he/she had exercised the supervision imposed by the duties of their position, according to the Article 144^1 of the Law no. 31/1990. In this case, the liability of the administrator is secondary, the one pursued being the one who, by his action, directly caused the damage in the company's patrimony[4]; **(iii)** the obligation to be jointly and severally liable to the company for the reality of the payments made by the partners; the actual existence of dividends paid; the existence of the registers required by law and their correct keeping; the exact fulfilment of the decisions of the general meetings; the strict fulfilment of the duties that the law, the constitutive act impose; **(iv)** the obligation to notify the board of directors of any irregularity notified, otherwise the guilt of the directors for the same lack of vigilance in the execution of the mandate conferred by the company will be retained[5]; **(v)** the obligation is to be jointly and severally liable with their immediate predecessors if, being aware of the irregularities committed by them, they do not communicate them to the auditors or, as the case may be, to the internal auditors and the financial auditor, according to the Article 144^2, para. 4 of the Law no. 31/1990.

Therefore, it appears justified to establish this credit ban, given the multiple responsibilities of the administrator and his substantial involvement in the company's decisions. At the same time, this ban appears as a guarantee given to the shareholders and also as an argument of best practice, transparency in the area of the corporate governance.

It should be noted that the subject of the interdiction may also be the *de facto* administrator, (the person who currently fulfils the legal duties of the administrator), without an express corporate approval in this regard and the mention of that administrator in the trade register. In other words, it is a tacit mandate from the company, an approach that is not recom-

[4] S. Angheni, *Commercial Law. Treaty*, C.H. Beck Publishing House, Bucharest, 2019, p. 268.

[5] *Ibidem.*

mended, especially if there are administrators expressly appointed by the company and registered in the trade register. Of course, the company can subsequently ratify in various ways the operations performed by a *de facto* administrator, but the existence of such an administrator generates legal uncertainty regarding the assumption and compliance by law of legal obligations, effective liability and possible prejudice to shareholders and business partners.

II.1.2.3. Forms of the crediting prohibition

The credit ban has the following options:

a) granting loans to administrators. As an example, they can be cash loans, but also consumption loans for the use of movable or immovable assets, because the legal norm does not distinguish. With regard to cash loans, such loans have to bear interest, given that a company can carry out profitable activities;

b) granting financial advantages to the administrators on the occasion or after the conclusion by the company with them of operations of delivery of goods, provision of services or execution of works. For example, the financial benefits could be cost reductions, rescheduling or debt restructuring on more favourable terms that do not currently apply to standard customers;

c) the direct or indirect guarantee, in whole or in part, of any loans granted to the administrators, concomitantly or subsequent to the granting of the loan. For example, the guarantee provided by company may be in the form of a movable or immovable mortgage, the issuance of a promissory note, providing a personal guarantee or facilitating the provision of an autonomous guarantee, or the issuance a letter of bank guarantee at the request of the company in favour of the administrator's lender, by granting (by a bank) a non-cash credit to the company that will become cash by executing the letter of bank guarantee;

d) the direct or indirect guarantee, in whole or in part, of the execution by the administrators of any other personal obligations of theirs towards third parties. As examples of guarantee, the same as those mentioned in letter c) may be provided;

e) the acquisition for consideration or the payment, in whole or in part, of a claim having as object a loan granted by a third person to the administrators or another personal benefit thereof.

The rationale for imposing such a ban is as follows: **(i)** to identify and establish situations that give rise to conflicting interests and call into question the impartiality, loyalty of the administrator towards the company, shareholders; **(ii)** the weakening of the positions of the parties regarding the discussion of the details of the operation due to the fact that one of the parties is the administrator, who should have positioned himself differently (conflict of interests); **(iii)** financial losses for the company as a result of the low costs incurred, with the possible risk that such losses will not be recovered by the company, being, in fact, disguised donations; **(iv)** the occurrence of the possible effect of losing customers; **(v)** the compliance risk due to non-compliance with the business ethics and good practices.

II.1.2.4. The analysis of the Article 144^4 paragraph 2 of the Law no. 31/1990

II.1.2.4.1. According to this legal text, the crediting ban is also applicable to the operations in which the administrator's spouse, administrator's relatives up to (and including) the fourth degree or the relatives of administrator's spouse up to (and including) the fourth degree are interested. The extension by the legislator of the credit interdiction to the husband or wife of the administrator is fully justified, given the conflict of interests and the lack of objectivity in the analysis and carrying-out of such an operation. From the wording of the text, it derives the conclusion that the spouse is considered on the basis of a marriage certificate, a situation that leaves uncovered the risk of the spouse or de *facto* wife of the administrator.

De lege ferenda, the legal text must be amended in the sense of including the partner of the administrator, given that they live and manage together, the relationship being notorious, similar to any civil married couple. We consider that it is not relevant to mention a minimum duration of the partnership, because the economic interests such as favouring, creating patrimonial (unfair) advantages can appear regardless of the period elapsed from the beginning of the partnership, a relationship that can be terminated at any time.

The reference to the relatives of the administrator's spouse must be related to the definition of the kinship provided by the Article 407 of the

Civil Code, according to which the kinship is the connection between a spouse and the relatives of the other spouse; also, the relatives of a spouse are, in the same line and the same degree, the relatives of the other spouse. It is justified to be included within the credit interdiction the relatives of the other spouse, because there is a significant degree of certainty that the involvement of other spouse's relatives in the credit/ guarantee operations negatively impact the necessary impartiality of the administrator and may harm the company. We appreciate that the reference to the relatives up to and including the 4th degree of the administrator's spouse is based, mainly, on the existence of the 4 classes of heirs provided by the Civil Code. Obviously, it could have been a reference to the relatives up to the second or third degree of the administrator's spouse, but this could not have been based on a realistic assessment on an economic basis. Therefore, the legislator was *intransigent*, going to the maximum degree of the civil kinship. The same arguments for the administrator's relatives up to and including the 4th degree.

II.1.2.4.2. The 2nd paragraph of the Article 144^2 stipulates, in the second thesis, that the interdiction (credit and guarantee) also concerns a civil society or a company regulated by the Law no. 31/1990 in which one of the aforementioned persons is an administrator or holds, alone or together with one of the above-mentioned persons, a share of at least 20% of the value of the subscribed share capital.

The extension of the credit and guarantee ban, as mentioned above, is mainly justified by the removal of the presumption of partiality of the administrator, his relatives and the relatives of the administrator's spouse, by safeguarding the interests of the company and its shareholders. In the current lending practice, there is the approach according to **which the guarantees** provided by the company B for the credit contracted by the company A, where in the company B are administrators the same natural persons who are administrators in the company A, the administrator's spouse (from the company A), the relatives of the administrator's spouse up to the fourth degree (from the company A) **are not accepted**. It should be noted that in the groups of companies there is a management community for practical reasons, such as simplification and urgency of decision making process, not being desirable for companies the change of its administrators when a guarantee operation occurs.

This approach is supported by significant arguments such as: **(i)** the elimination of the risk of cancellation of the guarantees and, as an effect, of the possibility of their execution and recovery of the credit; **(ii)** the credit institutions must organize their entire activity in accordance with the requirements of a prudent and sound banking practice, in accordance with the law, of EU Regulation no. 575/2013 and of the regulations issued in their application, according to the Article 101, para. 2 of the Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy. Likewise, the prudential approach is also a requirement in the matter of guarantees, respectively the credit institutions must have procedures for evaluating the real guarantees and for verifying that the respective guarantees are and continue to be enforceable and worked-out, according to the Article 91 of the NBR Regulation no. 5/2013 on prudential requirements for credit institutions.

In any case, the following must be taken into account in any guarantee transaction: **(i)** a prior rigorous analysis of the purpose of the guarantee, so that the guarantee corresponds to the articles of incorporation of the two companies and there is a real economic interest, derived from a thorough financial analysis performed by the guarantor. Only such an analysis can demonstrate or justify that the purpose of the guarantee corresponds to a real need, there being a quantifiable benefit, directly or indirectly, present or future for the guarantor; **(ii)** the cause of the guarantee contracts must exist, be lawful (not be contrary to law and public order) and moral (not be contrary to good morals), as required by the Article 1236 of the Civil Code. It should be mentioned that an illicit or immoral cause may lead to the absolute nullity of the contract if it is common or, otherwise, if the other party knew it or, according to the circumstances, should have known it (the Article 1238, paragraph 2 of the Civil Code); **(iii)** the guarantee contracts should not be only the means of avoidance an imperative legal norm (respectively the crediting or guaranteeing of the administrator and of the persons associated with him, according to the law), thus creating fraud at law, according to the Article 1237 of the Civil Code, with the possible sanction of the absolute nullity of the guarantee contract; **(iv)** the careful analysis of the Article 215 of the Civil Code, which implicitly modifies the Article 144^4, para. 2 of the Law no. 31/1990, in the sense that the area of persons who may conclude acts in fraud of the interests of the legal person is nuanced, respectively a member of the administrative bodies, the spouse,

ascendants and descendants, relatives in collateral line or relatives up to the fourth degree inclusive and it is provided that such an act may be annulled if the member of the administrative bodies and the persons mentioned herein had an interest in concluding that act and if the other party knew or should have known about it. The paragraph 2 of the Article 215 of the Civil Code stipulates that, if the person who is part of the administrative bodies and these persons have an interest in a matter subject to the approval of these persons, they must inform the company and not take part in the deliberations on that matter; **(v)** the elimination of the risk of cancellation, according to the Article 1303 of the Civil Code, respectively the designation of two different persons to represent the companies in the guarantee contract; **(vi)** the existence of the approval of the guarantee by the competent statutory bodies (the general assembly or the board of the directors, according to the Article 153^{22} of the Law no. 31/1990). It should be mentioned that the existence of such an approval does not completely defeat the credit and guarantee interdiction provided by art. 144^4 of the Law no. 31/1990. Therefore, the avoidance of this prohibition can be supported by the real economic interest, analysed according to those mentioned with the point (i) above.

II.1.2.4.3. Article 144^4 paragraph 3 of Law no. 31/1990 (analysis)

According to this legal text, the provisions of par. (1) shall not apply: a) in the case of operations whose cumulative due value is lower than the RON equivalent of the amount of 5,000 euros; b) in if the operation is concluded by the company in the conditions of the current exercise of its activity, and the clauses of the operation are not more favourable to the persons provided in par. (1) and (2) than those that the company normally practices towards third parties. These derogations are justified by the small value of the operation or the unequivocal objectivity of the operation, and no corporate approval is required; even if the conditions of the derogations are met, the administrator, spouse, relatives and the relatives of the administrator's spouse up to and including the fourth degree should refrain from deliberations and voting[6].

[6] S. Bodu, *Company Law, commented and annotated*, Rosetti Publishing House, Bucharest, 2017, p. 786.

II.2. The analysis of the credit and guarantee prohibition provided by Article 272, paragraph 3, letter c) of the Law no. 31/1990

The legislator places in the area of the criminal law (the sanction being imprisonment from 6 months to 3 years or a fine) the fact of the founder, administrator, general manager, director, member of the supervisory board or board or legal representative of the borrowing company, in any form, directly or through an intermediary, from the company he manages, from a company controlled by him or from a company that controls the company he manages, the amount borrowed being higher than the limit provided in the Article 144^4, paragraph 3, letter c) of the Law no. 31/1990, respectively 5000 euros **or makes one of these companies grant him any guarantee for his own debts.** The incriminated actions are the acts of lending in any form/through interposition and of determining the provision of guarantees by the administrator and persons from the management level (with evaluation attributions, decision) and of representing the company. Thus, it can be a loan in cash or by transfer to the bank account, any facility granted such as deferral of payment of an existing debt, payment in instalments, debt restructuring. Although the legal text does not distinguish, the fact of having one of the companies provide guarantees (movable, immovable, personal guarantee as surety, etc.) for the debts of the active subject, it is possible that the determination of granting guarantees is made by malicious/illegal means, which can be an offense in itself, in which case the rules of the competition of offenses will apply. Taking into account the attributions and responsibilities of the administrator, as previously highlighted, the incriminated actions concern the company that the active subject manages, the company controlled by this one or the company that controls the company that he manages. Although the legal text does not distinguish, we reasonably consider that the term **control** designates the holding of a shareholding and/or voting rights to an extent that determines the influence of the decisions (for example, at least 50%, including usufruct on the voting rights). The protected social relations are the company's patrimony, the interests of the shareholders, the reputation of the company and its customers.

III. The main features of the economic interest

In relation to those mentioned in this paper, the economic interest can be defined as that aptitude of a guarantee act between professionals characterized by the following: **(i)** is the result of a rigorous financial analysis carried out in advance, which shows that there are certain or determinable economic benefits / advantages, direct or indirect, present or future, for the guarantor; **(ii)** it is correlated with the activities that the guarantor can carry out according to the statutory acts, the law, the business practices, with the observance of the guarantor's legal capacity to use; **(iii)** strengthens the cause of the guarantee act.

IV. Conclusions

De lege ferenda, it is advisable to be introduced in the relevant commercial legislation the obligation for the guarantor company to perform a preliminary financial analysis attesting whether or not there are economic advantages for the guarantor; to the same extent, the guarantee will be constituted, only if there are such economic advantages, under the sanction of the relative nullity of the guarantee act. This is not, in our view, to limit the contractual freedom, but, on the contrary, to strengthen the act of guarantee, from a financial-accounting and legal perspective.

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SOME REMARKS ON THE SPECIALIZED LAWYER PROJECT

Cristina DOBRE *

ABSTRACT

Before bringing to the fore a subject whose urgency, if not opportunity, is at least debatable, we consider that it would be much better and more appropriate for the bodies of the profession to gather all their power to concentrate on these issues which pose a enormous pressure on lawyers and which creates mental and financial blockages due to which many are pursuing their profession with increasing difficulty and topics such as of specialization will be proposed only after the real emergencies facing the profession will receive prompt, real and effective, fair and, last but not least, effective reactions.

KEYWORDS: *specialized lawyer, technique of the profession, pleading lawyer, consulting lawyer;*

1. The lawyer's problems have always aroused the greatest interest, the most searches and hypotheses, the most controversies. And not by chance. Because this is perhaps one of the issues that most clearly focuses on such diverse and complicated aspects of legal life. The great topicality of the issue results especially from the Minutes of the meeting of the Permanent Commission in videoconference system on 12.06.2020 within the U.N.B.R. We specify that, in the "miscellaneous" section, the project of the *specialized lawyer* initiated by some lawyers (Dan Oancea and Turculeanu Ion) was discussed, a project admitted in principle[1].

2. In this context, the question that naturally arises in connection with the cited project is the following: Do we need to bring a new notion to the local advocacy, namely that of *specialized lawyer*[2]? or *what is the explanation of this notion*?

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[1] *http://www.unbr.ro/minuta-sedintei-comisiei-permanente-in-sistem-videoconferinta-din-12-06-2020/.*

[2] We remind you that the project of the specialized lawyer has appeared since 2011, at present, being only a nuance and insistence in supporting this project.

To this question, the authors of the project[3] argued, among others, the *lack of guidance* of lawyers in other areas, such as: urban law, financial and banking law, computer law, communications law, social security law, computer law, etc., in the alternative, in addition to well-known matters of criminal law, civil law, etc.

In addition, the authors, concerned with the *removal of legal shortcomings* (covering some *niches / legal areas*) which they consider to be the consequence of shortcomings in the legal training of lawyers and the desire to provide them with effective assistance for the enrichment of their knowledge, proposed, in this context, the *specialized lawyer* project. Or, in the current legislation *it is not* necessary for the term lawyer to be paired with the specialized adjective, immediately acquiring a *new meaning*, because in the fair solution of the problem we find it, even in Law no. 51/1995 on the organization and exercise of the legal profession[4]. Thus, art. 1 stipulates that the profession of lawyer is free and independent, with autonomous organization and functioning, under the conditions of the present law and of the statute of the profession. The profession of lawyer is exercised only by lawyers registered in the board of the bar they belong to, a component bar of the National Union of Romanian Bars, hereinafter referred to as U.N.B.R.

In this legal context, it seems to us that the *specialized lawyer* project is imperfect and useless.

We base this opinion because a rating (adjective) is usually used only to create a *new notion* or to make a *new difference*. For example, we add to the word *lawyer*, the adjective *specialized,* to *create a notion* distinct from that expressed by the word lawyer alone; on the contrary, we add the specialized adjective to the word lawyer, not to create a new notion other than the one expressed by the term lawyer, but to mark a difference. But a difference to be marked, the *need* for that institution must be felt, so the use of ratings (adjectives) becomes a useless verb. Or in the project, we find the proposal of the specialized lawyer and then we ask

[3] *https://www.juridice.ro/695353/dan-oancea-ion-turculeanu-despre-proiectul-avocatului.*

[4] Republished pursuant to art. II of *Law no. 25/2017 regarding the amendment and completion of Law no. 51/1995 for the organization and exercise of the profession of lawyer,* published in the Official Gazette of Romania, Part I, no. 210 of March 28, 2017, giving the texts a new numbering.

ourselves: what is the use of the adjective specialized with which we could confuse it? So, a construction as artificial as it is not recommended.

Secondly, the project proposal is also useless because no one will be tempted to believe that the specialized lawyer can be anything other than what the law provides regarding the notion of lawyer.

Moreover, the prestige of the legal profession cannot be raised and the task of defence cannot be performed by the appropriate lawyers. It was found, however, that *not all* institutions keep a clear record of the frequency of students in specializations and that many of those present *do not* take part in discussions, limiting themselves *only* to a physical presence. It also does not ensure all the conditions of fairness, integrity and performance for the "specialized" rating, without preventing, by itself, the rating too lightly in times of economic hardship when the money from the assessment fee is more than necessary for bars. Worse, it does not even guarantee that all those who deserve to be awarded the grade will have the liquidity to pay the examination fees. It also does not guarantee equal opportunities between lawyers who work in large university centres, where they have easy access to permanent training and academic development and those who have the chance or, depending on the perspective of each; the misfortune to practice law in the most isolated regions of the country, where it is difficult to sometimes find a hill from the top of which there is a decent signal on the mobile phone.

Then, taking into account the fact that the antithesis of the *specialized lawyer* project is rejected by the legal doctrine which shows that, Law no. 51/1995 for the organization and exercise of the legal profession, refers *globally (complex)*, in a broad sense, without making an explicit distinction between the different categories, specialists, of lawyers, even if such differences exist objectively and visibly, interpreters (authors of the project) should not make such distinctions according to the well-known principle of Roman law "*ubi lex non distinguit, nec nos distinguere debemus*". In that case, suffice it to say that, in so far as the law refuses to make any distinction within the concept of lawyer, it would be, in such a view, that the concept of lawyer should be interpreted *uniformly* as before, whether there would be qualitative differences between them.

We do not know how the initiators of the project view the terminology issues, but for us they have always had a special importance because most of the shortcomings in the application of the laws come from the *letter*, not always correct, choice.

3. However, we also agree that these new legal gaps should be filled by lawyers, because otherwise the controversies they will cause, in practice, will *undoubtedly* end up being resolved to the detriment of the client.

4. As is well known, since law is one of the most important tools for carrying out state policy, lawyers who invoke legal rules in certain cases must be guided by a fair legal point of view, because only knowing well the essence of the law, the content and its purpose, they will be able to ensure the just resolution of cases. On the other hand, in order to avoid such situations, as it is known, at present, a special emphasis is placed on the procedural guarantees, which form as a whole, the guarantee of the *right of defense*, conferred by the Romanian Constitution[5] (art. 24).

In these circumstances, the first concern of every lawyer must be the thorough acquisition of the legislation in force. Even more than that, lawyers must continuously improve their professionalism and that it is in the nature of things that, from a certain degree of professional maturity, each lawyer chooses the *comfort zone* (specialization) that he masters best and towards which to apply the vast majority of their professional activity. Consequently, the *urgency* of this project must be questioned, if not *its opportunity*.

Having a good knowledge of the areas mentioned by the initiators of the project, lawyers will be able to apply in practical work and the defence before the courts will be better. If the authors of the project wanted at all costs to make a proposal, then they had to say that lawyers must always be aware of the new legislation, judicial practice, Romanian and European legal literature and more.

The lawyer must be both a conscientious defender of the rights and legitimate interests of the litigant, as well as an active factor in the realization, in the best conditions of justice. This idea is expressed in the Law on the organization and practice of law. In order to fulfil these tasks, the lawyer, as I have already stated, must have a thorough scientific training, especially in the field of national law and European law, the basis of any discipline. But this is not enough, even in the new legal fields.

[5] T. Toader, M. Safta, *Constituția României*, Hamangiu Publishing House, Bucharest, 2015, p. 117.

5. In addition, the lawyer must master *the technique of his profession*.

The technique of the legal profession involves *all the procedures* that the lawyer must use in the exercise of his professional activity, in order to achieve as effectively as possible his position as defence attorney, that of helping the litigant to obtain from the court the solution according to truth and legality. In the doctrine, it was stated that the lawyer must know the content of the case in all its details[6]. A missing detail may cause the defence the lack of one of its decisive arguments. Simply *reading* the parts of the file is not enough. As it is read, all the facts and arguments resulting from them must be *noted*, indicating in front of each one, the proving piece and, as far as possible, the number of the page on which it is found. The indication of the page number at which a certain act is found, either during the debates, or especially in the written conclusions or in the grounds of appeal, is very useful for the defence and facilitates the work of the court.

The parts of the file must be consulted in a natural order, for example, in a civil process, first the action, then the answer, the interrogations and the other evidence; and in a criminal case, first the indictment or order of the criminal investigator and the conclusion of the trial, then the interrogations and other evidence.

If we are on appeal, we must, moreover, extract all the arguments of the judgment which we are to criticize or defend.

Once the factual elements are well established, the legal issues that are contingent on the case must be studied. Not only those that result directly from the file, but also all that could be involved. It is always good to check the legal texts. Even if we know them, their recitation often reveals new aspects or suggests new arguments.

It is known that, once the documentation is completed, the defence must be elaborated. It will be necessary, on the occasion of fixing the defence system, to eliminate the factual situations initially considered, but which the administration of the evidence did not confirm or even refuted. Then, the facts must be definitively framed in the most appropriate texts and principles of law.

[6] Of course, the file has been studied before this moment. In particular, it must be well known even before the first time limit, when the evidence was requested. After administration of all proofs, the resulting ones should be studied. This is our starting point.

Once we have mentally fixed the essential points of the defense, it is very useful to draw up the defence plan in writing. The plan should include: *Introduction*, which should be *very brief*; to contain the minimum necessary data, in order to inform the court on the framework of the process. No details, no arguments; The content must consist in the successive development of the essential points that we have dealt with above, listed in a natural order and the *Conclusion*, must first include a brief recapitulation of the essential theses of the defense.

Discussion of legal issues must be done in the same good faith as factual circumstances. We must not resort to forced, false interpretations in order to create an advantage in the process. If the legal thesis of the prosecution (or of the adverse party) coincides with the conception of the defender, he cannot develop an opposite one.

As the succinct statement shows, being a lawyer in the current context, known to all of us, are a complex and difficult task. It requires persevering work, as well as a continuous training, through the study of new fields, of the law of the European Union, through the collection of knowledge in *all fields*, literature as well (for the perfection of language and style).

The simple verbal facility, without the completion of the training, leads to templates and speech, so it keeps the lawyer on the periphery of the profession.

Given the importance and difficulty of their role in the justice mechanism, lawyers need to intensify their professional training in order to become as appropriate as possible to their mission. It follows that the lawyer would create all the conditions for him to correspond in the profession and to appear before the courts, as a *worthy, prepared* man, who can exercise the function of defence. In this situation, those who seek legal assistance will be better protected by lawyers who have knowledge in the new legal fields.

From this perspective, we affirm that lawyers must take into account the spirit of the new legal fields created in Romania, the system of organization of our courts, the conception on the function of law, now, as well as the professional ethical rules arising from it, as well as the best results obtained in the practice of the profession of lawyer, in our country, in the European Union and in the other European states.

In this respect, we must specify that, unfortunately, equality is not, first and foremost, a state of mind, so it can often be annulled in fact, by

not at all superficial issues, such as the purchasing power of litigants in these countries, compared to that of the Romanian litigant, the difference in the quality of higher education systems, the dynamics of economic life in each country, the legal tradition of the place, the organization of the judiciary. After all, in the post-pandemic era, equality between European lawyers will not be guaranteed only by adopting detailed, formal projects, and solutions will have to be found for essential, substantive, extremely serious problems before talking about the repetition of various projects in other cultural and geographical areas. Basically, we are of the opinion that the Romanian lawyer will be equal to the confreres, for example, German, only after certain errors of approach faced by the Romanian space will be corrected, equality will be translated, if solutions are found for these problems, not only in terms of degree of specialization or overspecialization, but also the respect they enjoy from society, magistrates, fees charged, standard of living. If we still want to be equal, in the end, which is admirable, we should, ideally, start by being equal in rights and not strictly in obligations.

6. Referring to some *European and non-European legal systems, the Middle East, the Indian Continent and Central Asia*, we note that this "specialized lawyer" is found only in the *German* system.

In England the lawyer is *attorney* (consulting lawyer) or, on your own choice *barrister* (pleading lawyer), but there is a completely different system of law. The ex-officio lawyer is separate, being similar to the civil servant.

In France, this traditional distinction is maintained between *l'avocat pledant* (chamber lawyer) and *l'avocat de conseil* (consulting lawyer).

In Turkey, the organization system is similar to our system (Legal Regulations of the Turkish Bar Union, published in the Official Gazette, edition 24790 of 19.06.2002 for the implementation of the Law of the legal profession no. 1136 of 19.03.1969) which does not mention the specialization of the lawyer, this deriving from the professional attitude of each lawyer.

In India and Pakistan, the legal system is of the Anglo-Saxon type, the lawyer being specialized as a litigation lawyer or as a consulting lawyer, separately being the ex officio lawyer, also considered a civil servant. Although the consulting lawyer can also be a pleading lawyer, in prac-

tice, clients prefer two lawyers at the same time, namely the consulting lawyer and the chamber lawyer.

In the United Arab Emirates we note, *lawyers* and *urgent lawyers*, being the only federation where there is a specialized lawyer, given the British influence under which the country was[7].

7. In *conclusion*, before bringing to the fore a subject whose urgency, if not opportunity, is at least debatable, we consider that it would be much better and more appropriate for the bodies of the profession to gather all their power to focus on these issues, which put enormous pressure on lawyers and create mental and financial blockages due to which many are pursuing their profession with increasing difficulty, and will propose topics such as specialization only after the real emergencies facing the profession will get real, effective and, last but not least, effective prompt reactions.

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[3] *http://www.unbr.ro/legislatia-profesiei-in-statele-uniunii-europene/*

[7] See, in detail, the U.N.B.R. website, page *http://www.unbr.ro/legislatia-profesiei-in-statele-uniunii-europene/*. The organization of the legal system is explicitly shown, both in the EU and in other countries.

PRACTICAL PROBLEMS RELATED TO THE METHOD OF CALCULATING THE INJURY CAUSED BY THE COMMITMENT OF CUTTING OFFENSES, RESPECTING OF THEFT OF TREES

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ABSTRACT

The problem that we intend to address in this study and which has received different solutions in practice is establishing the rules to be used by the judiciary to determine the number of damages in theft cases of trees provided by art. 109 of Romanian Law no. 46/2008 and illegal cutting of trees, deed provided by art. 107 of Law no. 46/2008. This aspect is of great importance as the value of the damage is the legislator's criterion to delimit the criminal offense's scope from that of the crime.

KEYWORDS: *theft of trees; illegal logging; value of damage caused; value of stolen wood; factor k; Christmas trees;*

I. Applicable legislation

Law no. 46/2008 of the Forest Code in Articles 106-109 regulates several offenses including theft forest of trees and illegal cutting of trees.

Article 107 of the Forestry Code establishes that **the breaking, destruction, degradation, or uprooting, without right, of trees, seedlings, or shoots** from the national forest fund, regardless of the form of ownership, constitutes a forestry crime and is punished as follows:

a) with imprisonment from 6 months to 3 years or with a fine, **if the amount of damage caused** is at least five times higher than the average price of one cubic meter of standing timber at the time of the commission of the act;

b) with imprisonment from 6 months to 3 years or with a fine, if the value of the damage caused does not exceed the limit provided inlet. a), but the deed was committed at least twice within one year, and **the**

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cumulative value of the damage caused exceeds the limit provided in letter a);

c) with imprisonment from one year to 5 years if the amount of the damage caused is at least 20 times higher than the average price of one cubic meter of standing timber at the date of the crime;

d) with imprisonment from 2 to 7 years, if the value of the damage caused is at least 50 times higher than the average price of one cubic meter of wood per foot, at the date of committing the deed. (1^1)

Unauthorized trees felling from the national forest fund, regardless of the form of ownership, constitutes a forestry crime and is punished as follows:

a) with imprisonment from 6 months to one year or with a fine, **if the value of the damage** is up to 5 or the average price of one cubic meter of wood per foot at the date of the finding of the deed;

b) with imprisonment from one year to 3 years, **if the value of the damage** caused is between the limit provided in letter a) and at most, 20 times higher than the average price of one cubic meter of wood per foot at the date of finding the deed;

c) with imprisonment from 2 to 7 years if the value of the damage caused is at least 20 times higher than the average price of one cubic meter of wood per foot at the date of finding the deed.

Furthermore, Article 109 of the Forestry Code provides that the **theft** of seedlings or shoots that have been cut or removed from roots, forests, forest protection curtains, degraded land that has been eased by afforestation works is a crime and is punishable as follows:

a) with imprisonment from 6 months to 3 years or with a fine, **if the value of the stolen wood material** is at least five times higher than the average price of one cubic meter of wood per foot;

b) with imprisonment from 6 months to 3 years or with a fine, if the deed was committed by someone at least twice within one year, **and the cumulative value of the wood material exceeds** the amount provided in let. a);

c) with imprisonment from one year to 5 years, if the value of the stolen wood material is at least 20 times higher than the average price of one cubic meter of wood per foot;

d) with imprisonment from 2 to 7 years if **the value of the stolen wood material** exceeds 50 times the average price of one cubic meter of wood per foot.

The art. 109 para. (1 ^ 1) of the Forestry Code, introduced by Law no. 197 of September 7, 2020, the legislator establishes that the **theft** of trees felled or broken by natural phenomena or trees that have been cut or removed from roots, forests, forest protection curtains, degraded land that have been improved by afforestation works and of forest vegetation outside the national forest fund, as well as of any other specific products of the national forest fund, constitutes an offense and punished as follows:

a) with imprisonment from 6 months to one year or with a fine, if the value of the damage caused is up to 5 times the average price of one cubic meter of wood per foot at the date of finding the deed;

b) with imprisonment from one year to 3 years, if **the value of the damage** caused is between the limit provided in let. a) and at most 20 times higher than the average price of one cubic meter of wood per foot at the date of finding the deed;

c) with imprisonment from 2 to 7 years, **if the value of the damage caused** is at least 20 times higher than the average price of one cubic meter of wood per foot at the date of finding the deed.

II. Is the method of calculating the injury caused by the commitment of the crimes of cutting, respectively of theft of trees, identical?

From the legal provisions cited above, a first observation emerges: that these forestry crimes are resultant, the immediate consequence being the production of damage, which must have an absolute value for the deeds to become crimes. Therefore, the amount of damage is a constituent element of these forestry offenses, which in many cases are retained in competition.

Although it depends on this element the classification or not of the deed in the crime, from the analysis of the judicial practice it is observed that the courts rarely lean on this aspect, omitting to show in the considerations of the court decisions how the value of the damage retained to refer to the calculation performed by the forest district.

Although the legislator did indeed provide art. 105 of the Forestry Code that the damage to the national forest fund, regardless of the legal nature of the property, is assessed by forestry staff, following the law, we

consider that this calculation must be analysed by the judge, who must show reasoned why it retains or not this method of accounting, the court is the only entity empowered by law to rule on the elements necessary to outline the typicality of the crime[1].

We note from the content of the two texts of law cited above that in the case of the crime provided in art. 107 para. 1 of the Forestry Code, the legislator uses as a criterion to delimit the criminal offense from the scope of the misdemeanor **the value of the damage caused** by breaking, destroying, degrading, or uprooting, without right, trees, seedlings, or shoots from the national forest fund, regardless of form property. It must be at least five times higher than the average price of one cubic meter of wood per foot at the act's date. In the case of the offense provided by art. 107 para. (1^1) of the Forestry Code, the legislator uses the same criterion, except that this time the damage will be related to the date of finding the deed.

For the offense provided by article 109 para. 1 of the Forestry Code, the legislator refers to **the value of the stolen wood material**, which must be at least five times higher than the average price of one cubic meter of wood per foot, so that in the article (1^1), it also refers to **the amount of damage caused**.

Given the different terms used by the legislator in defining the offenses, in practice, the question arose whether, in the case of all forest offenses, the method of calculating the damage is the same.

On this issue, two opinions have emerged in judicial practice.

In a first opinion, the calculation method must be the same in both situations, following to be done by reference to the Emergency Ordinance provisions no. 85 of November 8, 2006.

In the second opinion, it was appreciated that in the case of the crime provided by art. 107 of Forestry Code, the value of the damage will be

[1] We give as an example some paragraphs from such court decisions: In the criminal sentence no. 27/2012 of the Odorheiu Secuiesc Court noted that the calculation sheet prepared by Ocolul Silvic Private Praid shows that the total value of the damage created is 6,630.40 lei, which exceeds 89.6 times the average price of one cubic meter of mass woody on foot. (F. 21). Likewise, in the criminal sentence no. 86/2015 of the Curtea de Argeș Court noted that the calculation made by the employees of the Forest District shows that the entire damage created by cutting the four trees is 700.69 lei, of which 592.04 lei represents the value of the damage created by the cutting actions carried out by the defendant DA and 108.65 lei through the cutting actions carried out by DMG.

established following the provisions of the particular law, while in the case of the crime provided by art. 108 of the Forestry Code, the damage will represent the equivalent value of the wood material, which will be established under the conditions of the common law and not by reference to the provisions of the O.U.G. no. 85/2006.

As the Forestry Code did not regulate the manner of determining the damage, the texts must be correlated with the Emergency Ordinance provisions no. 85 of November 8, 2006, establishing the modalities for assessing the forest's damages vegetation inside and outside the woods.

According to art. 2^2 of the Emergency Ordinance no. 85 of November 8, 2006, the damage assessment is performed in a unitary way, regardless of a) the property's nature; b) owner; c) how they were produced. (2) The assessment of damages is differentiated according to their occurrence by affecting: a) trees; b) seedlings or shoots; c) Christmas trees. The value of the compensations for the damages provided in this emergency ordinance is established by multiplying the specific factor "k," supplied in annexes no. 1-3, with the average value of one cubic meter of wooden table per foot, was established according to the provisions of art. 25 para. (4) of Government Ordinance no. 96/1998 on the regulation of the forestry regime and the administration of the national forest fund, republished, with the subsequent modifications and completions. In case of damage in the forest vegetation in the forests or the forest vegetation outside the forests, other than those provided in par. (2) lit. a)-c), as the case may be, they are evaluated by extrajudicial or judicial expertise, as the case may be.

Article 3 of the same normative act establishes that the unit value of the damage for the case provided in art. 2 para. (2) lit. a) is determined according to the provisions of art. 2 para. (3), using the value of the factor "k" provided in annex no. 1. The cost of the "k" factor shall be used according to the diameter category in which the diameter determined for the affected/damaged/felled tree and its species or group of species falls.

The notion of damage is defined in art. 1 lit. a) as a change in the appearance, physical integrity and/or physiological characteristics of the tree (s) or tree/plantation / natural regeneration, as appropriate, resulting from pruning, degradation, destruction, rooting of trees, seedlings or shoots, pruning standing tree legs, whether or not followed by their acquisition, in illegal conditions.

According to art. 116 of the Forestry Code, the average price of one cubic meter of timber is approved by law, for five years, at the proposal of the central public authority responsible for forestry.

In our opinion, all the arguments of interpretation lead to the conclusion according to which the calculation method must be similar in the case of both crimes, Emergency Ordinance no. 85 of November 8, 2006, being the only normative act that regulates the modalities of assessment of the damages caused to the forest vegetation in the forests and outside.

The text of the ordinance does not distinguish between the two offenses, and where there are the same reasons, the same solution must be applied. From the analysis of the judicial practice, we notice that most of the times, the two crimes, theft of trees and illegal cutting of trees, are retained in the competition, and as far as we are concerned, we consider that the court could not report, when its legal classification, to different damage for each of the two offenses (insofar as the amount of wood is identical).

The legislator associates the notion of damage with cutting, degradation, destruction, uprooting of trees, seedlings, or shoots or cutting the legs of standing trees, respectively, with the modalities of the material element crime provided by art. 107 of Law no. 46/2008, regardless of the realization of the content element of the crime offered by art. 109 of the same law, does not lead to the conclusion that in the case of the latter offense, the assessment will be made based on other criteria.

The argument used in support of the second opinion was that the legislator, to achieve the objective typicality, uses two types of values, respectively, **the cost of the damage caused**, in the case of the crime provided by art. 107 of Law no. 46/2008, and **the value of the wood material**, in case of the crime offered by art. 109 of Law no. 46/2008 and the notion of damage is semantically equivalent to that of damage[2].

We appreciate that this grammatical interpretation of the text is not infallible as long as, by the modification brought to art. 109 of the Forestry Code in September 2020, the legislator understood to refer to the amount of damage caused in the case of the crime of tree theft.

[2] Furthermore, regarding the method of calculating the damage caused by civic crimes, it should be noted that the courts encounter difficulties and regarding the concrete application of the provisions of the Emergency Ordinance no. 85 of November 8, 2006, *http://inm-lex.ro/wp-content/uploads/2020/04/Minuta-intalnire-procurori-sefi-sectie-Bucuresti-9-10-martie-2020.pdf.*

Exceptions are the damages resulting from the forestry works, as defined by Law no. 46/2008, republished, with subsequent amendments and completions, which do not represent illegal cuts; b) theft or misappropriation of trees cut with or without right, of seedlings, Christmas trees or shoots from the national forest fund or of Christmas trees from specialized crops or theft or appropriation of trees cut with or without right on lands with vegetation outside the national forest fund, if the value of the damage, established by law, is up to 5 times the average price of one cubic meter of wood per foot.

We consider that the legal significance of the circumstance cannot be given to the fact that the legislator uses these two different phrases, being, in fact, an inconsistency of it and a non-correlation of the terms used. We also appreciate that the practice of the courts to report in establishing the value of stolen wood to the orders issued annually by the Ministry of Environment, Waters, and Forests for approval of the list of reference prices, by species and assortments is erroneous; these values will be used exclusively for calculation the equivalent amount of the wood materials provided in art. 22 para. (6) of Law no. 171/2010 on the establishment and sanctioning of forestry contraventions (respectively for wood materials that are not found or cannot be identified).

Furthermore, regarding the method of calculating the damage caused by civic crimes, it should be noted that the courts encounter difficulties and regarding the concrete application of the provisions of the Emergency Ordinance no. 85 of November 8, 2006.

Thus, in a case solved by the Galati Court of Appeal, the question arose regarding the crime of illegal cutting of trees provided by art. 107 para. (1) of Law no. 46/2008 - The forestry code, having as object Christmas trees, when calculating the damage, the actual volume of the cut / stolen wood material is taken into account.

According to art. 5 para. (1) of the Government Emergency Ordinance no. 85/2006 the unit value of the damage for the case provided in art. 2 para. (2) lit. c) (Christmas trees, n.n.) is determined according to art. 2 para. (3), using the value of the factor "k" provided in annex no. 3.

Article 2, para. (3) of the same normative act stipulates that the value of the compensations for the damages provided in the present emergency ordinance is established by **multiplying the specific "k" factor, provided in annexes no. 1-3, with the average value of one cubic meter of wooden table per foot**, was established following the art provisions 25

para. (4) of Government Ordinance no. 96/1998 on the regulation of the forestry regime and the administration of the national forest fund, republished, with the subsequent modifications and completions.

The court of the first instance had appropriated the calculation made by the civil party, which had been made according to the following formula: by multiplying the specific "k" factor (6,125) by the average price of one cubic meter of wood per foot (115 lei), as well as by the number of cut/subtracted Christmas trees (255), to the result thus obtained by adding VAT.

The appellate court considered this calculation erroneous and notified the High Court of Cassation and Justice to issue a preliminary ruling to resolve in principle the following issue of law: "Regarding the crime of illegal logging provided by Article 107 para. (1) of Law No. 46/2008 - Forestry Code, having as object Christmas trees, when calculating the damage, according to Article 5 para. (1) reported to Article 2 para. (3) of the Government Emergency Ordinance No. 85/2006 on establishing the modalities for assessing the damages caused to the forest vegetation in the forests and outside them, the adequate volume of the cut/stolen wood material is taken into account.", notification that was rejected as inadmissible by Decision no. 5/2020 pronounced by the Panel for resolving legal issues of the High Court of Cassation and Justice.

However, in the notification content, it was noted that the judicial practice is non-unitary, art. 5 para. (1) of GEO no. 85/2006 being interpreted in two different ways by the courts.

In a first opinion, it was shown that the value of the damage caused by the illegal cutting of Christmas trees is calculated by multiplying the specific "k" factor provided in annex no. 3 for Christmas trees with the average price of one cubic meter of wood per foot.

In a second opinion, it was considered that the amount of damage caused by illegal logging of Christmas trees is calculated by reference to the actual volume of timber cut or stolen, the "k" factor being introduced by the legislator to compensate for the low volume of Christmas trees[3].

[3] High Court of Cassation and Justice, Panel for resolving legal issues, Decision no. 5/2020,
http://www.scj.ro/1093/Detaliijurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=156645.

Finally, the Galati Court of Appeal upheld the second opinion stating that the damage must be calculated by multiplying the number of trees by the value of one cubic meter of wood per foot at the time of the crime, with the specific k factor provided in Annex 1, as well as the factor k specific set out in Annex 3.

We believe that the first opinion is the correct one, as there is no textual argument to conclude that the calculation method will include twice the factor k taken from different annexes. Annex no. 3 expressly provides that it refers to the value of the k factor for damage to Christmas trees, and indeed higher amount, the aim being the full recovery of material damage, which also includes the time required for the cultivation of Christmas trees, and the court cannot censor this aspect.

CONCLUSIONS

In conclusion, about those presented, it is necessary to emphasize the following ideas:

- We appreciate that the method of calculating the damage caused by committing the offenses of cutting, respectively stealing trees is the same, to be done by reference to the provisions of Emergency Ordinance no. 85 of November 8, 2006.
- Legislative intervention is needed to correlate the terms used to eliminate any subjective and discretionary assessment that could violate the principle of legality. However, it would be desirable that in the case of the crime of theft of trees, the legislator to completely give up the value criterion, as long as the simple theft is provided by art. 228 of the Criminal Code does not offer such a constitutive element.

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[8] Constitutional Court, Decision no. 1.346 of October 19, 2010 regarding the exception of unconstitutionality of the provisions of art. 2 para. (3) and (4), art. 3 and art. 4 of the Government Emergency Ordinance no. 85/2006 on establishing the modalities for assessing the damages caused to the forest vegetation in and outside the forests.
[9] Minutes of the meeting of the chief prosecutors of the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anticorruption Directorate, the Directorate for the Investigation of Organized Crime and Terrorism and the prosecutor's offices attached to the courts of appeal, which can be found at *http://inm-lex.ro/wp-content/uploads/2020/04/Minuta-intalnire-procurori-sefi-sectie-Bucuresti-9-10-martie-2020.pdf.*

ALTERNATIVE DISPUTE RESOLUTION METHODS AND E-JUSTICE: SOLUTIONS FOR COURT SUPPORT

Iulian HAGIU *

ABSTRACT

For the relief of the courts, for the speed of a court process, but also for saving the material and time resources of the parties involved, the alternative resolution of disputes through mediation and not only, is the efficient and correct solution that is required in this state of emergency in which we are.
Alternative dispute resolution (ADR) procedures, such as mediation and arbitration, provide alternatives to the trial. The European Union has encouraged the use of ADRs by adopting relevant legislation, such as Directive 2008/52/EC on certain aspects of mediation and a number of consumer protection initiatives.
Technology can increase the efficiency and transparency of the judicial process and can facilitate the access of individuals to justice. The Court of Justice of the European Union (CJEU) has stated that "electronic means" cannot be the only means of access to proceedings, as this could make it impossible for certain categories of persons to exercise their rights.

KEYWORDS: *mediation; justice access; alternative methods; e-justice;*

1. The current state of justice

In recent years, the number of cases pending before the courts has increased dramatically, the judiciary being overwhelmed by the unprecedented increase in the number of disputes between individuals or legal entities, and the efficiency of justice being at a turning point[1]. Better access to justice and better justice are an integral part of European Union policy. The efficiency of the justice system implies and must

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[1] *http://www.netlawman.co.uk/info/alternative-dispute-resolution.php,* accessed on 22.07.2019.

include the promotion and encouragement of the use of alternative dispute resolution methods.

Many judicial systems face increasing workloads and access to courts can be costly. Quasi-judicial proceedings before extrajudicial bodies - most common in the form of mediation - can provide faster, less formal and less costly alternatives for claimants. However, most out-of-court bodies do not have the power to issue binding judgments (exceptions to this rule include, for example, data protection authorities and some equality bodies), and their power to award damages is generally limited.[2]

It is well known in contemporary society that the congestion of courts affects the entire judicial system that seemingly trivial disputes are delayed due to slowness and cumbersome procedures that court decisions come after repeated deadlines and appearances, in which the litigant loses money, time and nerves, and the result is not always satisfactory.[3] The justice system in Romania faces financial and human resources problems, the decentralization of administrative-financial decisions and the rationalization of expenditures being a necessity.

After many confrontations with the courts in different situations, I found that the workload is immense. There are judges who pronounce and motivate over a thousand decisions a year, which is inhuman. The large number of cases on magistrates directly affects the quality of justice.

According to the Report of the Superior Council of Magistracy (SCM) for 2019[4] on the role of courts, in 2019, at national level there was a total volume of activity of 2,919,548 cases (2,946,106 cases in 2018), which corresponds a decrease of 0.9% compared to the previous period.

Thus, the loading at the level of the High Court of Cassation and Justice on the scheme for 2019 was determined in 877 cases (942 cases in

[2] *Handbook of European Law on Access to Justice*, Luxemburg, Publications Office of the European Union, 2016, p. 53, on *https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2016-handbook-on-access-to-justice_ro.pdf.*

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[4] Report of the Superior Council of Magistracy (SCM) for 2019, *https://www.csm1909.ro/267/3570/Rapoarte-privind-starea-justi%C5%A3iei accessed on 22.10.2020*.

2018, 753 cases in 2017), and that per judge in 1,153 cases (1,152 cases in 2018, 1,001 cases in 2017).

It should be noted that for the calculation of this statistical indicator was taken into account the number of cases that returned to the Supreme Court in relation to its functional competence, in the sense of trial in the merits but also on appeal by the panel of 3 judges or by the panel of 5 judges, with the consequence of multiplying the number of cases in relation to the number of members of the panel of judges.

For the loading at the level of the courts of appeal, we also mention the fact that, for the calculation of the statistical indicator regarding the loading of cases / judge and in the case of the courts of appeal, the fact that these courts judge both on the recourse and in appeal.

Thus, in 2019, there was an average load per judge of 544 cases (586 cases in 2018, 667 cases in 2017) and an average load per scheme of 491 cases (525 cases in 2018, 558 cases in 2017).

Regarding the loading at the level of the courts, as in the case of the courts of appeal, it should be noted that for calculating this statistical indicator were taken into account not only the number of cases that returned to the courts of this degree, but also the specific be both courts of first instance and courts of judicial control - judging both on appeal and recourse.

Thus, in order to analyse the volume of activity of a judge, the circumstance was taken into account that in the appeal the cases are judged by a panel composed of two judges and on appeal by a panel composed of three judges.

We notice that the workload in 2017-2019 in the courts was high and 2020 year it was completed with a pandemic situation and in this way, it ended up suffocating the justice system. Until clear e-justice mechanisms are developed, mediation must remain a viable, secure and legitimate solution.

2. The need to resort to alternative methods to resolve conflicts

Alternative methods of conflict resolution are detached from traditional methods, proposing not the elimination of conflicts or their sources and causes, but better management of conflicts, starting from the

idea that anyone must try to reach an agreement before reaching judicial constraint but also from the idea that by using constraint, the best results are not reached. Through this approach to conflict resolution, coercion is replaced by the initiative and consent of the parties, so that the positive stimulation of the parties involved is reached. Changing the way conflicts are resolved is obviously social progress: in a civilized society we prefer understanding and communication instead of coercion. This way of resolving also induces a preventive effect, minimizing the current conflict and eliminating possible new conflicts. The choice of the alternative method is exclusively the attribute of the parties involved in the dispute, stating that in the case of mediation including the solution belongs to the parties while in arbitration the solution is imposed on the parties by an arbitral tribunal under arbitration rules and civil procedure code.

In the context of restricting access to justice, in order to avoid the already excessive loading on the courts but also to reduce the resource consumption of litigants, it is necessary to resort to one of the alternative methods of resolving conflicts: *mediation, negotiation, conciliation, arbitration, amicable expertise and dispute commissions*. The most used in practice and having the most advantages by saving material resources and time, is mediation.

A definition of *mediation*, similar to those existing in the legislation in which this institution has already been established, would be that mediation is a way of resolving disputes amicably, with the help of specialized third parties, with the free consent of the parties. Through a development of this definition, we can conclude that mediation is primarily an alternative to justice through which a dispute between the parties to the dispute is settled amicably by a third party, neutral, impartial and without power of decision: the mediator is the one who helps the parties find together a solution to resolve the differences between them.[5] Thus, the fundamental principles that govern this institution are as I mentioned: neutrality, impartiality and confidentiality.

We find that over time hundreds of theories have been developed about mediation, more or less scientific, more or less legal, but all united

[5] *Mediation, technique and art*, nr. 26, November 2012, Third Year, nr. 2, p. 15.

by an essential common goal: extinguishing disputes, conflicts, disputes, misunderstandings and so on.[6]

The law[7] defines mediation as a "procedure for the amicable settlement of disputes, with the intervention of the mediator, a third and specialized person, the procedure taking place in conditions of confidentiality, neutrality and impartiality and, of course, in which the free consent of the parties is sovereign from a formal point of view, as well as on the merits ". In short, the mediation procedure is a negotiation procedure that is facilitated by the mediator - a neutral, impartial and decision-making specialist.

Among the advantages of mediation, we mention:

- The solution of the conflict is not imposed, but it is negotiated between the two parties. Each party to the dispute has procedural control over the final agreement;
- Resolving in a confidential manner some issues that could affect the parties (the confidentiality of the mediator, but also of the other parties that appear for mediation is imposed by art. 32 of Law no. 192/2006);
- Conflicts of any kind can be resolved in a short time and with much lower costs compared to a lawsuit;
- If the mediation procedure is accessed after the start of a trial and an agreement is reached through mediation, the judicial stamp duty paid for the start of the trial is refunded (art. 63 paragraph (2) of Law no. 192/2006);
- Avoiding long and expensive processes;
- Mediation may prevent other conflicts.[8]

The mediation agreement is not in itself an enforceable title, art. 59 of Law no. 192/2006 providing the possibility for the parties to present it to the public notary for the authentication of the agreement or to the court in order to pronounce a decision that will consecrate the agreement of the

[6] A. Gorghiu et al., *Mediation – oxygen for a modern society*, Universul Juridic Publishing, Bucharest 2013, p. 16.

[7] Article 1, para. (1) of Law no. 192/2006 on mediation and organization of the mediator profession, with subsequent amendments and completions.

[8] *Mediation, technique and art*, nr. 24, September 2012, Second Year, nr. 12, p. 7.

parties. However, if the mediation agreement is concluded in cases/conflicts concerning the exercise of parental rights, the parents' contribution to the maintenance of children and the establishment of the children's domicile, in order to become enforceable, it must be presented only to the court to rule.

We note that regarding the family conflicts, the legal provisions are special, the parties no longer having a right of choice between requesting the non-authentication of the notary agreement and the notification addressed to the court[9].

Most states consider it beneficial to resolve family law disputes through mediation, rather than in court. In Croatia, parents involved in divorce and custody proceedings are required to use the mediation procedure first. Psychologists from the Centers for Social Protection use mediation.

Mediation is sometimes combined with other activities. For example, in Estonia, a childcare specialist assists parents in the mediation procedure in the early stages of a trial. In Germany, the child's legal counsel provides assistance to parents through mediation[10].

3. The concept of e-Justice

Application of the concept/technology offered by e-Justice

In order to facilitate the access of litigants to the trial, the European e-Justice Portal has been set up. Technology can increase the efficiency and transparency of the judicial process and can facilitate the access of individuals to justice. The term "e-Justice" covers a wide range of initiatives, including the use of e-mail, online application submission,

[9] "According to art. 632 para. (1) CPC, the forced execution can be performed only on the basis of an executory title, and according to par. (2) of the same article, enforceable judgments, enforceable judgments, final judgments, as well as any other judgments or documents that, according to the law, may be enforced. According to the provisions of art. 665 para. (5) point 2, the court may reject the request for approval of the forced execution if the decision or, as the case may be, the document does not constitute, according to the law, an enforceable title" *Piteşti Court, Conclusion of April 15, 2014.*

[10] European Union Agency for Fundamental Rights (FRA), 2015, Child-friendly justice - Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States, p. 47.

online information (including case law), the use of video hearings and video conferencing, online tracking of recordings and the course of a case, as well as the possibility for judges or other decision-makers to have access to information electronically. The visualization of the sentences can be done through online tools, and thus the access to justice, as a fundamental right, is respected, becoming much faster and easier for as many people directly involved in the act of justice.[11]

In accordance with *Regulation (EC) no. 861/2007*, applications can be submitted through the European Portal within the European procedure for low value applications. It aims to improve and simplify procedures in civil and commercial matters involving applications not exceeding 2.000 EUR.[12] The procedure for low-value applications applies between all EU Member States except Denmark. The procedure is written - unless the court deems a hearing necessary. It sets deadlines for the parties and the court to expedite litigation and applies to claims for pecuniary as well as non-pecuniary damages. A judgment obtained following this procedure must generally be automatically recognized and enforced in another Member State.

Moreover, the development of the method of using video conferences and video hearings can facilitate access to justice. For example, the EU Instrument on the European Surveillance Order allows EU Member States to issue surveillance orders for the release of suspects or defendants from pre-trial detention and their supervision in their countries of residence. Article 19 (4) provides for the possibility of conducting conferences by telephone and video conferencing, where

[11] An example of this is the UK Ministry of Justice, which received an award at the International Visual Communications Awards for an interactive guide aimed at supporting people in understanding the sentencing process - "You are the judge". This program facilitates access to justice by familiarizing citizens with court proceedings outside the actual courtroom. For more details see the 2011 Annual Report of the European Agency for Fundamental Rights, in FRA (2012), Fundamental rights: challenges and achievements in 2011 – FRA Annual report, p. 207, in *https://fra.europa.eu/sites/default/files/fra_uploads/2227-FRA-2012_annual-report-2011-chapter8_EN.pdf* accessed on 20.10.2020.

[12] *Regulation (EC) no. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure*, OJ 2007 L 199.

national law requires the issuing Member State to hear the defendant, before amending judicial supervision measures or issuing an arrest warrant. The use of video conferencing for hearings is also promoted by other EU instruments.

Currently, the European e-Justice Portal, as the EU's "electronic one-stop shop in the field of justice", allows people to submit low-value applications or cross-border payment orders online, in accordance with relevant EU secondary legislation. Regulation no. Regulation (EC) No 1896/2006 established a European order for payment procedure (EPO). This procedure simplifies cross-border cases concerning uncontested pecuniary claims in civil and commercial matters. The European order for payment is recognized and enforced in all EU Member States, except Denmark, without the need for consent to enforcement. This allows creditors to lodge claims without appearing in court, using standardized forms that can be submitted and sent to the competent court[13].

Measures regarding the settlement of litigants' claims

If the settlement of disputes could not be achieved through mediation or other alternative means, and recourse to justice is imperative, the persons in dispute may apply to the court. The Romanian Constitution[14] establishes through Article 21[15], that the right to justice is free and cannot be restricted. In this regard, taking into account the exceptional situation we have been in since the beginning of 2020, generated by the COVID-19 pandemic, which affects both individuals and legal entities in terms of exercising constitutional and legal rights and freedoms, the Section for Judges of The Superior Council of Magistracy (SCM) adopted Decision 724/2020, aiming at establishing some rules for carrying out the administrative-judicial activity of the courts.

[13] *Handbook of European law on access to justice*, p. 191.

[14] Republished in the Official Gazette no. 767 din 31.10.2003.

[15] *Free access to justice:* "(1) Any person may apply to the judiciary for the defense of his rights, freedoms and legitimate interests. (2) No law may restrict the exercise of this right. (3) The parties have the right to a fair trial and to the settlement of cases within a reasonable time. (4) Special administrative jurisdictions are optional and free of charge."

Conclusions

We consider that it is absolutely necessary to resort to the mediation procedure in order to resolve conflicts, of course, without violating the competences of the bodies expressly empowered for labour disputes, in civil, commercial or criminal matters, imposed by the legislator.

Taking into account the limited material and human resources of the justice system, the net advantages of resorting to mediation - simple steps to follow, the waiting time for extremely low settlement, the limitation of expenses, there is a need for a growing promotion among litigants from the magistrates themselves or from lawyers for the benefit of all parties involved.

Access to justice is the unrestricted access to any procedural means by which justice can be done, as shown above, and negotiation and mediation seem to fit the profile, it remains the attitude of litigants to sit at the mediation table and prevent the initiation of legal proceedings, releasing the role burdened by the courts, making it more efficient to spend public money and ultimately facilitating access to justice.

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[3] A. Gorghiu et al., *Mediation – oxygen for a modern society*, Universul Juridic Publishing House, Bucharest, 2013.

[4] Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Labour Code, Commentary on Articles, Vol. II, Articles 108-298*, C.H. Beck Publishing House, Bucharest, 2011.

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[10] *Handbook of European Law on Access to Justice*, Luxemburg, Publications Office of the European Union, 2016, on *https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2016-handbook-on-access-to-justice_ro.pdf.*

THE BASIS OF PARENTAL RESPONSIBILITY FOR THE DEEDS OF MINORS

Delia-Mihaela MARINESCU*

ABSTRACT

The conduct of the person in the society must be limited to the observance of the legal provisions and not to prejudice the rights and interests of the other members of the society. The responsibility of the parents for the deed of the minor was regulated in the New Civil Code for reasons related to equity, for the protection of the injured person, so that he can benefit from the recovery of the damage created by committing the wrongful act. This type of liability has multiple applicability in the sphere of practical activity, not only in civil cases, but also in the civil side of criminal actions.

KEYWORDS: *tortious civil liability; liability for the act of another; parents; minors; wrongdoing;*

The multitude and complexity of the situations in which the provisions of the parents' liability for the deeds of minors have an impact on the practical activity have determined ample doctrinal debates in the matter, both under the old Civil Code and in the current regulation.

The incidence of this institution is even higher as its applicability is not limited to civil cases, but can also be identified in solving the civil side of criminal cases, tort liability being a means of defending subjective civil, property or non-property rights[1].

The need to regulate parental responsibility for the acts of minors arose from reasons related to the protection of the victim so that she could recover the damage suffered as a result of the wrongdoing.

The literature defines the victim as the person who suffered the damage and who is entitled to repair it, as a creditor of the obligation to

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[1] I. Ciochină-Barbu, *Răspunderea comitenților pentru prepuși în reglementarea Noului Cod Civil*, article published in Acta Universitatis George Bacovia. Juridica, Volume no. 4, no. 2/2015, available online at http://www.ugb.ro/Juridica/Issue8RO/11._ *Raspunderea_comitentilor_pentru_prepusi.Ioan_Ciochina-Barbu.RO.pdf.*

repair[2], which consists most frequently in the allocation of damages, it rarely taking, for practical reasons, the form of a repair in kind[3].

In these circumstances, given that the minors are not solvent and cannot pay the sums of money directly to the injured person, it was necessary to establish parental responsibility in the situation of committing illegal acts by minors, for reasons of equity, for the benefit of the injured person.

The importance of ensuring adequate legal protection of minors is an internationally recognized principle of unanimous law, considering that, for reasons related to lack of physical and intellectual maturity, children need special protection[4].

The responsibility of the parents for the deeds of the minors is currently regulated by the provisions of art. 1372 Civil Code establishing the general framework in the matter.

In order to attract the parents' liability under the conditions of tortious civil liability for the act of another person, in addition to fulfilling the general conditions of liability deriving from the interpretation of art. 1372, paragraph (1) of the Civil Code, regarding the existence of the illicit deed, of the prejudice, of the causal link between the deed and the prejudice, it is necessary to prove that at the date of committing the illicit deed its author was a minor.

Thus, the parents will be liable for the illicit deeds committed by their children until they reach the age of 18, moment of acquiring the full exercise capacity, unless the provisions of art. 272 para. (2) Civil Code regarding the early marriage of a minor who has reached the age of 16, in compliance with the conditions imposed by the text of the law.

In this case, by concluding the marriage, the minor will be released from parental authority[5], which entails the cessation of parental authority,

[2] I. Adam, *Tratat de drept civil*. *Obligațiile. Vol. I. Contractul,* C.H. Beck Publishing House, Bucharest, 2017, p. 1000.

[3] O.A. Motica, *Fundamentul răspunderii civile pentru fapta minorului și a celui pus sub interdicție judecătorească*, Universul Juridic Publishing House, Bucharest, 2012, p. 5.

[4] See *Convention on the Rights of the Child*, adopted by the General Assembly of the United Nations on 20 November 1989, text available online at *http://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=28213*.

[5] I. Adam, *Drept civil. Obligațiile. Faptul juridic civil în reglementarea Noului Cod Civil*, C.H. Beck Publishing House, Bucharest, 2013, p. 358.

the perpetrator being himself responsible for committing the illicit act, including on the patrimonial side.

The guilt of the perpetrator of the illicit deed does not represent, according to art. 1372 para. (2) Civil Code, a necessary condition[6] for attracting parental responsibility for the acts of minors, this being important for the analysis of the criminal capacity of the perpetrator, in the sense that minors under 14 years of age are liable for damages only if it is proved that they acted with discernment, in a moment of lucidity, while minors over 14 years of age are responsible for the illicit acts caused, unless it is proven that at the time of the act they did not have discernment.

In order to establish the guilt of the minor at the moment of committing the illicit deed, it is necessary to analyse the existence or not of the moral guilt, for which it is essential to be aware of the consequences of one's own deeds[7], but these aspects do not remove the attraction of parental responsibility.

The problem of the foundation of bringing the parents' responsibility for the illicit deeds caused by their minor children was intensely debated in the doctrine of specialties, starting from the analysis of the idea of guilt.

This type of liability has a subsidiary nature to the liability for one's own deed, the latter being able to be retained in situations clearly established by the legislator given the lack of capacity or limited capacity of the perpetrator and based on the authority exercised by parents on minors.

At the same time, this responsibility has a direct character, in the sense that the victim is not obliged to go first against the perpetrator and, after establishing his guilt, to have recourse action against the parents of the perpetrator, but can go directly against the parents to oblige them to compensation.

Therefore, the victim has the possibility to bring an action against the minor and, after establishing his guilt, through a separate action to go against his parents to bring the responsibility for the deed of another or

[6] L. Pop, I.-Fl. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligațiile,* Universul Juridic Publishing House, Bucharest, 2012, p. 470.

[7] L.R. Boilă, *Răspunderea civilă delictuală obiectivă*, ed. 2, C.H. Beck Publishing House, Bucharest, 2014, p. 603.

has the possibility to introduce an action in which the defendants are the parents and minor.

Although it is irrelevant for the liability of the parents that the minor is deprived of capacity to exercise or that he has a limited capacity to exercise, these aspects are relevant for establishing the possibility of regression of parents in order to recover all or part of the damage paid to the injured party or to direct the victim of the wrongful act against its perpetrator for the payment of the damage caused.

If in the case of liability for the own deed of persons with discernment the sanctioning of the perpetrator of the illicit deed prevails, in the situation of those without discernment it is important to restore the previous situation by repairing the damage[8], without taking into account the perpetrator's mental attitude and the fact that he is not aware of the consequences of his deeds.

Analysing comparatively the provisions of the Old Civil Code and those of the New Civil Code, we find a difference of vision in establishing the basis of civil liability.

The old Civil Code claimed the existence of a subjective responsibility in the case of parents for the illicit deeds of their minor children, grafted on proving guilt for the way in which they fulfilled their duties of raising and educating their children.

The idea of increasing parental responsibility existed since the regulations of the previous Civil Code, given that parents were initially considered to have a simple obligation to supervise minor children, and later substantiated the thesis that they have, in fact, a double obligation, to supervision and education, or supervision and upbringing[9], which led to a difficulty in administering the evidence in favour of the parents, leading to their exoneration from liability.

The new Civil Code enshrines an objective responsibility of parents for the illicit deeds of their children, based on the prerogatives of parental authority that they exercise over minors[10].

[8] L.R. Boilă, *op. cit*., p. 620.

[9] C. Stătescu, C. Bîrsan, *Tratat de drept civil. Teoria generală a obligațiilor,* Academiei Republicii Socialiste România Publishing House, Bucharest, 1981, p. 224.

[10] L.R. Boilă, *Răspunderea civilă delictuală subiectivă*, C.H. Beck Publishing House, Bucharest, 2009, p. 224.

The attraction of the parents' responsibility for the deeds of the minors has as starting point the provisions regarding art. 487 of the Civil Code regarding parental authority, which states that parents have both the right and the duty to raise the child, to take care of his physical, mental and intellectual development, education, teaching and professional training.

Thus, the text of the law establishes in the task of parents a general obligation to raise and educate children in the spirit of respecting the law and social and moral values, giving them the main responsibility in guiding minors.

Although the educational process consists of a set of factors, including teachers, nannies, people who have the quality of professionals and who deal with various extracurricular activities, they have legal or conventional obligations to supervise minors for a specific activity, limited in time, so that their liability can be brought only if the damage was caused by the minor during the activities that required supervision[11].

In this context, the liability of these categories of persons is of a subjective nature, which implies the need to prove guilt in non-compliance with professional obligations related to the supervision of minors and the existence of a causal relationship between their improper performance of supervisory duties and acts of minors.

When determining professional misconduct, the concrete conditions of the supervision will be analysed, taking into account a number of factors, such as the number of minors to whom there is an obligation to supervise, the time and place of the act or the place where the supervisor must be etc.[12]

From the perspective of parental obligations, they must deal with the upbringing, education and supervision of their minor children, obligations which are not limited in time and which are complex; there is a wide range of parental actions that can be limited to the general obligation to guide minors.

Thus, the family is considered to have a special importance in the process of forming behavioural skills starting with childhood and

[11] I. Adam, *op. cit*., p. 360.
[12] *Ibidem*, p. 262.

continuing with adolescence, periods in which the child's attitude towards the norms of social coexistence is formed, as well as respect for them[13].

Proof of the parents' observance of their obligations is difficult to fully do, as they cannot administer proof of their lack of guilt[14].

The collateral aspects related to inexperience, early age, external psychological influences, inappropriate entourage or the fact that the illicit act committed by the minor is an isolated episode in his life cannot be viable arguments for removing parental responsibility.

Thus, the parents are required to prove to the court that the unlawful act of their minor is not the result of a deficiency in his education and that they have constantly dealt with the upbringing and education of the child, evidence which they are very difficult to achieve given that the most important role in education belongs to the family.

It should also be noted that in accordance with the provisions of art. 483 of the Civil Code, parental authority belongs equally to both parents, both of whom are responsible for raising their minor children.

If the applicability of the text of the law seems clear in the case of children born out of wedlock, whose parents continue to have the same marital status until adulthood and even later, practical difficulties may arise in the case of children from out of wedlock or whose parents are divorced or in the case of adopted children.

In this context, the analysis of attracting the equal responsibility of the parents for the illicit deeds committed by their minor children must be based on the provisions of art. 260 of the Civil Code which establishes that minors in marriage are equal before the law with minors out of wedlock, a principle of law that is corroborated with the provisions of art. 6 let. b and art. 7 regarding the guarantee of equal opportunities and non-discrimination from Law no. 272/2004 on the protection and promotion of children's rights.

Thus, in order to avoid discrimination by different approach to the legal situation of the minor in marriage and the minor out of wedlock, the Romanian legislator has ruled, as a rule, the joint exercise of parental

[13] C.I. Murzea, *Delincvența juvenilă - abordări teoretice*, article published in Acta Universitatis George Bacovia. Juridica, Vol. 4, no. 2/2015, available online at *http:// www.ugb.ro/Juridica/Issue8RO/1._Delincventa_juvenila-Abordari_teoretice.Murzea_ Cristinel.RO.pdf.*

[14] I. Adam, *op. cit*., p. 370.

authority, in order to ensure respect for the best interests of the minor exercising rights and fulfilling parental duties[15].

If the Old Civil Code provided in art. 1000 para. (2) that the liability of the parents was conditioned by the existence of the same dwelling of the minor with his parents, the New Civil Code no longer imposes this condition.

In these conditions, for the illicit deeds committed by minors, the parent with whom he / she does not live permanently will also be liable, if the parental authority is exercised jointly by both parents and the court establishes that there were deficiencies behind the wrongdoing in the education of the child.

In the case of adopted children, the responsibility for the prejudicial act committed by the adoptee rests with the adopters, and not with the natural parents[16], taking into account the provisions of art. 451 of the Civil Code, which stipulate that by adoption, filiation links are established between the adoptee and the adopter, but also the provisions of art. 470 para. (2) Civil Code which stipulates that the kinship relations cease between the adoptee and his natural parents.

Conclusions

The practical situations identified in the practice of the courts determined the need for regulation by the legislator and some forms of indirect liability, in order to ensure the fulfilment of the reparative function, materialized by restitution of damage to the victim of the wrongful act.

Thus, the parents' responsibility for the deeds of minors has an objective nature, based on the idea of not fully complying with the obligations of raising and educating children, which determines the existence of educational deficiencies that favour the commission of illicit acts.

Most minors who commit acts against legal rigors are victims of lack of education, of a hostile family environment, often violent, who, due to the failure of the family socialization process end up committing illegal

[15] O. Ungureanu, C. Munteanu, *Drept civil. Persoanele în reglementarea Noului Cod civil,* ed. a 2-a, revised and added, Hamangiu Publishing House, Bucharest, 2013, p. 263.

[16] G. Boroi, L. Stănciulescu, *Instituții de drept civil în reglementarea Noului Cod civil*, Hamangiu Publishing House, Bucharest, 2012, p. 257.

acts. The practical situations identified in the practice of the courts determined the need for regulation by the legislator and some forms of indirect liability, in order to ensure the fulfilment of the reparative function, materialized by restitution of damage to the victim of the wrongful act[17].

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APPLICABLE LAW

[1] *The new Civil Code* adopted by Law no. 287/2009, with subsequent amendments and completions.
[2] *The old Civil Code* of 1864.
[3] *Law no. 272/2004 on the protection and promotion of children's rights.*
[4] *Convention on the Rights of the Child*, adopted by the General Assembly of the United Nations on 20 November 1989.

LITIGATION REGARDING THE DURATION OF THE CRIMINAL TRIAL. EFFICIENCY AND PRACTICAL IMPLICATIONS

Ovidiu Viorel MAZILU *

ABSTRACT

The issue of violating the reasonable time of the criminal trial has been a constant in terms of the Romanian State. That this is the case is proven precisely by the case Vlad and others v. Romania, where it was held that, until the judgment was pronounced in that case, the European Court of Human Rights found that the Romanian State had violated the reasonable time in approximately 200 other cases, noting that another 500 similar cases were pending at the time. From this perspective, it was held that in order to preclude and/or prevent the recurrence of such new situations, it is necessary to identify procedural remedies at national level and implement them with expedience.
Currently, the duration of the criminal trial phase, in terms of its length, becoming incompatible with the requirement of a peremptory reasonable time according to art. 6 paragraph 1 of the European Convention on Human Rights, art. 47 par. 2 of the Charter of Fundamental Rights of the European Union, entitles the person concerned to file an challenge regarding the duration of the criminal trial, in accordance with the provisions of art. 488[1] of the Criminal Procedure Code.

KEYWORDS: *reasonable time; challenge; stalling; violation;*

1. Introductory Considerations

The proper management of justice entails, but especially imposes, a prompt and adequate response of the State, on all its areas of activity, including in terms of the settlement term of a dispute, be it one of criminal nature.

Pursuant to art. 6 par. (1) of Convention for the Protection of Human Rights and Fundamental Freedoms, "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a (...) hearing within a reasonable time by a (...) tribunal (...)."

Summarizing the purpose of law-making of the considerations covered by art. 6 of the ECHR, we can agree that the obligation of the

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State is to use its best endeavours in order to form a flexible, accessible and efficient judicial system, capable of solving any case within the spectrum of judicial analysis, within a *reasonable* time.

In addition, for the comprehensive understanding of the concept of *reasonable time* or the *reasonable* character of the investigations carried out within the criminal trial, the provisions of art. 6 of the ECHR should not be analyzed in a singular manner because we would make an inefficient examination regarding the purpose of establishing and regulating the challenge regarding the duration of the criminal trial. Thus, the afore-mentioned provisions must be corroborated and analyzed by direct reference to the provisions of art. 13 of the ECHR, whereby the State is required to regulate in the domestic law an *actual remedy* that allows any person, based on free access to justice, to exercise the rights and freedoms enshrined in the Convention.

A fortiori, in relation to the *actual* nature of that remedy, it can be argued that it must be appreciated, mainly, based on the ability to provide the person concerned with adequate satisfaction by reference to the infringement suffered.[1]

2. Considerations Regarding the Legal Institution Treated

Observance of the reasonable time, especially in criminal matters, becomes an ideal as far away as possible, given the legal instruments that judicial bodies benefit, or better yet, don't benefit from in their fight against crime.

The causes generating delays in judicial proceedings may be *objective*, as are the resources allocated to the judicial system (number of judges/prosecutors in relation to the number of cases recorded or insufficient material resources, such as the reduced number of court rooms, which doesn't allow for granting shorter hearing terms), the workload of judicial bodies, the specific elements of the criminal procedure, preventing the expediency of the criminal trial, or *subjective* causes, such as the behaviour of parties or an inefficient management of cases by the magistrates.

[1] *Abramiuc v. Romania*, judgement of 24 February 2009, no. 34711/02, par. 119.

However, we appreciate that one of the main causes why the concept of reasonable time is not observed in criminal matters is directly generated by the deficiencies of the Romanian judicial system.

The *legal framework* of the institution treated is the scope of a separate chapter in the Criminal Procedure Code, entitled *"Challenge Regarding the Duration of the Criminal Trial"* (Chapter I^1 – art. 488^1-488^6).

Drawing a parallel with the civil law procedure entitled "Challenge Regarding the Protraction of the Trial", regulated within the Contentious Procedure of the Civil Procedure Code (Title IV – art. 522-526), we can argue that the *purpose* of the two institutions is similar, if not even identical, in the sense that both proceedings are deemed to be *special*, incidental proceedings, intended to guarantee the right to having the trial resolved within an optimum and predictable time, in compliance with all procedural guarantees, the purpose of introducing this legal institution being that of hindering any tendency of tergiversating the trials, by violating the principle of settling the civil trial or at the same time, the criminal trial, within an optimal, reasonable and predictable term.[2]

Analysing the concept of *reasonable time* found within art. 5 par. 3 of the Convention, we can consider that there has been a transposition thereof into the Criminal Procedure Code, by enshrining the right regarding the duration of provisional detention, which cannot exceed a reasonable time [art. 239 par. (1) of the Criminal Procedure Code]. The same right is also guaranteed by the legal institution of the challenge regarding the duration of the criminal trial [art. 488^1 par. 3 let. b) of the Criminal Procedure Code].

As it is well known, the judicial bodies have the obligation to conduct the criminal investigation and the judgement in compliance with the procedural guarantees and the rights of the parties and procedural subjects, so that the facts constituting crimes are ascertained in a timely and complete manner, no innocent person are held criminally liable, and any person who has committed a crime is punished pursuant to the law, within a *reasonable time*. (art. 8 – Criminal Procedure Code)

The afore-mentioned article establishes, by way of principle, the *fair nature* and the *reasonable time* of the *criminal trial*.

[2] I. Leş, *Noul Cod de procedură civilă. Comentariu pe articole. Art. 1-1133*, C.H. Beck, Publishing House, Bucharest, 2013, p. 778.

The idea that any person who has committed a crime should be punished according to the law, within a reasonable time is part of the right to a fair trial, the beneficiaries of this rule being not only the suspect of a crime, but also the injured party, or even the civil party, to the same extent, and these procedural subjects being entitled to a trial of a reasonable duration or to the settlement of the civil action within a reasonable time.

Thus, the right to a fair trial is one of the foundations of a democratic society. The excessive duration of judicial proceedings is one of the main causes of violation of this right, with the constant case-law of the European Court of Human Rights repeatedly highlighting this aspect. The phenomenon of "delayed justice" is, thus, a concrete reality in an important number of States within the Council of Europe, with the case of Romania falling within this general context.[3]

In our case, specifically, in the situation where the activity of criminal prosecution or judgement is not fulfilled within a reasonable period of time, the right of the person concerned to file an challenge regarding the duration of the criminal trial arises, requesting the acceleration of the procedure and that measures be taken in order to guarantee and observe all the principles of criminal procedural law.

Locus standi is granted to both the suspect/defendant and the injured party/civil party/civilly liable party. In order to exhaust this topic, it is necessary to mention that, during the judgement, the challenge regarding the duration of the criminal trial can be introduced including by the prosecutor.

An *important* aspect from the perspective of the protection due to the participants in the criminal trial cannot be overlooked. In this regard, although it can be noted that art. 6 of the ECHR does not protect the interests of the injured party, but exclusively those of the person accused of committing a crime, in the challenge regarding the duration of the criminal trial, the Romanian legislator offered adequate protection to the injured person, but also to the civil party, as well as to the civilly liable

[3] ECHR*, case Abramiuc v. Romania*, judgement of 24 February 2009, par. 119, apud C. Jderu, *Note la conferinţele naţionale organizate de Institutul Naţional al Magistraturii în domeniul noului Cod de procedură penală*.

party, the standard of protection conferred by the national law being, to this end, superior to that enshrined in the Community law.

Right of the person concerned to file a challenge regarding the duration of the criminal trial arises as follows:

(i) after the lapse of at least one year from the commencement of the criminal investigation, for cases in the phase of criminal investigation;
(ii) after the lapse of at least one year from the arraignment, for cases in the phase of judgement at first instance;
(iii) after the lapse of at least 6 months from the notification of the court with a remedy, for cases under ordinary or extraordinary remedies.

However, we are drawing the attention to the fact that this period does not include the duration when (i) the trial was suspended due to the medical impossibility of the defendant to participate in the trial, (ii) the period between the moment when the judgment remains file, and the moment when the extraordinary remedy ruling the restitution of the case to the prosecutor for redoing the criminal investigation is admitted, (iii) the periods between the moment when the solution not to proceed to judgment is ruled, and the moment when this solution is infirmed and the criminal investigation is resumed (see *Soianova and Nedelcu v. Romania, par. 20*; *Aliuță v. Romania, par. 15; Bragadireanu v. Romania, par. 113*).

In terms of the special procedure subject to analysis, the verification of the duration of the procedures is made based on the works and the material found in the case file and the points of view presented by the participants in the criminal trial, and covers the elements that represent a transposition of the criteria considered by the ECHR case-law on the matter of reasonable time, i.e., the complexity of the case, the nature of the dispute, the behaviour of the parties, the behaviour of the authorities etc.

Of course, when ruling on the challenge filed, magistrates are bound, beyond the control of legality they perform on the verification of the substantive and formal conditions of the challenge regarding the duration of criminal trial, and the recommendations of the European Court of Human Rights, which, in countless occasions, stated that: "*art. 6 par. 1 imposes on the signatory States of the Convention the duty to organize*

their judicial systems in such a way as to observe the guarantees imposed by the afore-mentioned regulation, including the obligation to solve the case within a reasonable time. If the judicial system is deficient from this point of view, a remedy designed to accelerate the procedure in order to prevent it from being conducted with the reasonable time being exceeded is the best solution. Such remedy offers obvious advantages in relation to the compensatory one, since it does not only repair a violation of the Convention a posteriori."

A fortiori, at the time of pronouncement in relation to the challenge regarding the duration of the criminal trial, magistrates - judges are required not to derogate from the main purpose of the criminal trial, namely that of finding out the truth in the case. Finding the truth, in any area of activity, requires extensive research, investigations and studies performed in order to be proven in all its aspects, because only after these actions have been taken, we can assess whether the judicial truth has been discovered.

Aristotle, in his work *Metaphysics*, appreciated that "the truth belongs to the one who considers as separate what is separate in reality, and as united what is united, as errs the one who thinks contrary to how things are in reality". In another stage of history, Descartes appreciated, in his work *Discourse on the Method*, that "one should never accept anything for true which is clearly know to be such, while carefully avoiding precipitancy and prejudice and all ground of doubt".

Closer to the present day, it is appreciated that finding out the truth in the criminal case means achieving a full consistency between the issue in fact, as it happened in its materiality, and the conclusions reached by the judicial body regarding such circumstances[4].

Therefore, the magistrate - judge has the duty to harmonize the incidence, application and observance of all principles of criminal procedural law when ruling on the challenge regarding the duration of the criminal trial that was referred thereto for competent and comprehensive analysis.

[4] M. Udroiu et al., *Codul de procedură penală – comentarii pe articole*, C.H. Beck Publishing House, Bucharest, 2015, p. 39.

3. Conclusions

We conclude by pointing out that in criminal matters, the challenge regarding the duration of the criminal trial will not be recognized as an *effective remedy*. However, until the creation of a telling case-law in terms of the recognition or non-recognition of internal procedures as *effective remedies*, we are in the situation, sometimes inconvenient, to mandatorily go through all these procedures, with the precise purpose of *exhausting all remedies*.

Finally, in order to comply with the procedural guarantees on the *reasonable* nature of the term during which the criminal trial is performed, the European Court of Human Rights recommends and reminds the Member States:

(i) to ensure, through constant review, in light of the case-law of the Court, that there are domestic second challenges for any person claiming, in a credible manner, a violation of the Convention, and that such second challenges are effective to the extent that such may lead to a decision on the merits of the complaint and to an appropriate remedy for each violation found;

(ii) to review, following judgments of the Court revealing structural or general deficiencies in the State's law or practice, the effectiveness of existing domestic remedies and, to the extent necessary, to create effective remedies to avoid the presentation before the Court of repetitive cases;

(iii) to pay particular attention, in relation to points (i) and (ii) above, to the existence of effective remedies in the event of a credible complaint regarding the excessive duration of jurisdictional proceedings".

In other words, the observance of the *reasonable time* is a direct consequence of observing the right to a fair trial, which, as we well know, represents one of the foundations of a democratic society. The excessive duration of judicial proceedings is one of the main causes of violation of this right, with the constant case-law of the European Court of Human Rights repeatedly highlighting this aspect. The phenomenon of

"delayed justice" is, thus, a concrete reality in an important number of States within the Council of Europe, with the case of Romania falling within this general context.[5]

All these considerations, while also considering the practice recognised within the European Court of Human Rights in cases such as *Pelissier and Sassi v. France (MC), no. 25.444/94, pt. 67, ECHR 1999-II, and Frydlender v. France (MC), no. 30.979/96, pt. 3, ECHR 2000-VII., A*s well as *Valdhuter v. Romania* lead to the *conclusion* that, currently, there is not exactly an observance of the requirements regarding the reasonable duration of the criminal trial. All that remains, in the future, is for the Romanian legislator to harmonise the internal legislation with Community provisions and to align it exactly therewith. However, the effort of the Romanian legislator will be in vain if it will not consider, at the same time, the implementation of practical and sustainable measures aiming to increase the level of operation of the judiciary bodies and their internal operation, by introducing the notion of *fast and efficient justice*.

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[5] *Abramiuc v. Romania*, Judgement of 24.02.2009, par. 119.

THE IMPACT OF CORRUPTION IN EUROPE

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ABSTRACT

The corruption phenomenon has a negative impact both regarding the accession of a state to European Union and the sustainability of full integration in its structures, especially in case of states which do not manage to implement efficient anti-corruption strategies and which do not align their domestic legislation with the community legislation. The corruption remains a major problem, not only in the developing countries, but it is a problem which prevents economic growth, weakens the state of law and undermines the legitimacy of institutions.

KEYWORDS: *corruption; anti-corruption norms; abuse of power; European legislation; civil servant; fight against corruption;*

1. Introduction

The corruption problem is placed in the centre of attention of public opinion from the European community every day. Either we speak of press, radio or television and from other sources, various corruption acts are publicized in which representatives of state power authorities, political parties, civil servants of various ranks who belong to national, international and supranational organizations are involved.

Corruption represents a threat to democracy, the prominence of law and human rights, undermines the principles of good administration, fairness and social justice, misrepresents the competition, prevents the economic development and jeopardizes the stability of democratic institutions and the moral bases of society[1].

The corruption problems have preoccupied the society for a long time. There were made attempts to define corruption at international level. Thus, solicitors, sociologists, criminologists, practitioners – from various countries of the world unanimously identity as corruption acts the deeds

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[1] *Criminal Convention on Corruption* of 27 January 1999, adopted by Law No. 72/2002 (M. Of. No. 65 of 30 January 2002).

which are committed in connection with the exercise of certain functions, job duties and consist of violations of assignments, seeking a profit[2] in all cases.

The Criminal Convention of Council of Europe regarding corruption, signed by Romania on 27th January 1999, defines corruption in two manners of committing it: active and passive.

The active corruption represents the promise, offering or giving with intention, by persons, directly or indirectly of a undue benefit, to a civil servant, for oneself or for another, in view of fulfilment or refraining from fulfilment of an act in the exercise of his/her functions.

Passive corruption represents the request or reception with intention, by a civil servant, directly or indirectly, of an undue benefit, for oneself or for another, or the acceptance of an offer or promise of such benefit, in view of fulfilment or refraining from the fulfilment of an act in the exercise of his/her functions.

2. Appearance of anti-corruption norms

Before 1990, corruption was considered inevitable and even beneficial in the developing countries to the extent that it facilitated and accelerated commercial transactions. However, between 1980 and 1990, corruption ceased to be regarded as an "engine" of economy and started to be considered an obstacle[3]. During the same period, in the European countries a series of scandals related to bribery have appeared. The anticorruption norms started slowly to appear in a utilitarian approach in order to protect the businesses related to value-based commitments of governments and NGOs. Transparency International[4] was founded in 1993, and the first international anti-corruption conventions appeared in 1990. At the end of Cold War, the fight against corruption took a new turn, because it became a requirement for the former Soviet countries to enter the European Communities.

[2] See A. Boroi, N. Neagu, *Harmonization of Romanian legislation with Community corruption legislation,* in Law No. 4/2003, pp. 117-125.

[3] Anagostou et al. (2014), *Basic Report on International and European Law against Corruption,* p. 67.

[4] Transparency International is a non-governmental organization who aims to prevent and combat corruption at international level through research, documentation, information, education and public awareness.

However, the appearance of anti-corruption norms was not sufficient to limit corruption. Some authors claim that the international norms are inefficient because of their lack of application, their mainly repressive approach and their inadequacy with the local social cultures. In addition, corruption today is facilitated by the new technologies, such as the crypto-currencies, which make more difficult the detection of illicit financial flows in case of pecuniary bribery, for instance. Therefore, there is a long way to go to end corruption.

The Treaty of Maastricht in 1992[5] created the pillar "Justice and internal affairs" in order to consolidate the European cooperation in criminal matters. However, the competence of European Union in this field was limited and the process of adopting the anti-corruption legislation was difficult.

In 1997, The Treaty of Amsterdam[6] established the objective of creation of a "space of movement, freedom and justice" which stimulated the action of EU in criminal matters. Finally, at the coming into force of the Treaty of Lisbon, the structure of the three pillars has disappeared. The ordinary legislative procedure which makes equality between the European Parliament and the European Council was applied in criminal matters, and the Court of Justice gained competence in this field in 2014.

Most importantly, since the coming into force of the Treaty of Lisbon[7], corruption has become a "Euro-crime" for which the European Union has the capacity to adopt directives to define the crimes and establish sanctions. Article 83 of the Treaty for the functioning of European Union defines Euro-crimes as "very serious offences with a

[5] The Treaty on European Union (also known as the Maastricht Treaty) was signed by the European Council on 7 February 1992 in the Dutch town of Maastricht, representing the most profound change in the Treaties since the establishment of the European Community. This treaty laid the foundations for the European Union.

[6] The Treaty of Amsterdam was adopted by the Heads of State and Government of the European Union (EU) on 16-17 July 1997 and signed on 2 October 1997. It entered into force on 1 May 1999. The Treaty of Amsterdam amended the Maastricht Treaty, but did not replace it. Its original aim was to ensure the EU's capacity for action after enlargement to the east. The deep reform of the EU has failed, however, by making further

[7] *The Treaty of Lisbon or the Treaty of Lisbon* (originally known as the Reform Treaty) is an international treaty amending two treaties that form the constitutional basis of the European Union (EU).

cross border dimension which results from the nature or impact of such offences or from a special need to fight against them jointly".

3. Instruments necessary against corruption

Both at international and European level there are already several legal anti-corruption instruments. Among them there is the EU *Convention for fight against corruption* which involves civil servants of European Union or civil servants of European Union member states, which came into force on 28th September 2005[8]. However, except for this convention, the existing instruments have not been ratified and transposed in the legislation of all the member states yet. In order to efficiently fight against corruption, the member states should act as a minimal measure in order to complete the process of ratification and transposal.

European Union has been taking specific measures against corruption for about two decades, allowing conclusions to be drawn regarding its achievements in this field. At global level, many aspects show a lack of ambition for European Union to reach the state-of-the-art legislation against corruption. Indeed, since the coming into force of the Treaty of Lisbon, corruption is a so-called "Eurocrime" for which EU has the competence to adopt directives which approximate the definition of offences and sanctions[9]. However, European Union has not used this competence to update the legal framework prior to the Treaty of Lisbon, except for the Directive (UE) 2017/1371[10] for fight against fraud in the financial interests of the Union by criminal law ("PIF" Directive). The fact that many stakeholders have already taken measures against it can partially explain the disengagement of EU. This could be perceived by the public as a lack of interest and can be harmful for EU from political point of view.

In fact, within the instruments aiming at corruption at EU level, a series of deficiencies were identified which could jeopardize the social relations regarding the normal activity of member states.

[8] JO C-195, 25.06.1997, pp. 2-11.

[9] Article 83 (1) TFEU.

[10] *Directive (EU)2017/1371 of the European Parliament and of the Council of 5 July 2017 on combating fraud against the Union's financial interests by means of criminal law.*

First of all, we speak of lack of harmonization, this instrument does not provide for common standards for all member states. For instance, the EU Convention of 1997 and the Framework Decision 2003/568/JAI[11] allow the member states to move unilaterally further from the norms established regarding the incrimination of corruption in the private sector, jurisdiction or *ne bis in idem* of defence. For a long period of time, these instruments did not succeed in imposing a notion truly uniform of civil servant, reminding the failed attempts of European Union to approximate the definitions of organized crime by virtue of legislations of member states. Indeed, according to them, the civil servants must be defined by reference to the legislation of the state member of the civil servant[12]. Therefore, discrepancies remained in the definition of a civil servant in the national legislations.

Secondly, the transposal of European Union anti-corruption instruments seems to be incomplete. For example, the Commission noticed that several member states had not enforced the provisions of the Framework Decision 2003/568/JAI for full incrimination of corruption in the private sector and liability of legal persons[13]. Of course, since 2014, the European Commission has had the right to initiate procedures for acknowledgement of failure of fulfil the obligations against the member states who have not enforced the European Union legislation in the field of judicial cooperation in criminal matters. But European Union is deprived of a monitoring mechanism which aims at assurance of full observance of anticorruption standards by mutual evaluation and mutual pressure, even if the article 70 of TFEU offered an adequate legal virtue. Such soft law mechanisms were instated in OECD[14] (Working Group for bribery) and

[11] *Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector*.

[12] Article 1 (c) of the EU Convention.

[13] European Commission (2011) *Report to the European Parliament and the Council pursuant to Article 9 of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector*. COM(2011)/309 final.

[14] The Organisation for Economic Co-operation and Development (OECD) is an international organisation of those developed nations that accepts the principles of representative democracy and the free market economy. The organisation has its origins in 1948, under the name Organisation for European Economic Co-operation (OEEC)

Council of Europe (GRECO[15]) and turned out to be a discouragement factor. They are based on thematic assessment cycles performed by the states Parties by inter pares assessments. They include on-the-spot visits, press releases and publication of reports. The attempts of Commission at creating a monitoring mechanism of European Union reached the publication of EU Report for fight against corruption in 2014[16]. The purpose of this report was to assess the threats which come from corruption in Europe and to emphasize the best practices in the member states. However, the idea of its publication every two years was abandoned, and the report was replaced by a discussion in the European semester[17].

Thirdly, the European Union instruments which aim directly at corruption seem to be outdated, because they do not take into account the latest anti-corruption trends, which are focused on detection and prevention rather than repression. On the other hand, the other international anticorruption frameworks involve relevant provisions. The OECD Convention of 1997[18] and the Convention of 1999 regarding the criminal law of the Council of Europe oblige the member states to incriminate the intended forgery of accounts, registers and financial statements for the purpose of committing or hiding the bribery. UNCAC[19] emphasized the prevention of corruption in the public and private sector, the publication of codes of conduct, the public reporting and participation of civil society. Some EU member states also dispose of ambitious national prevention frameworks such as the United Kingdom or France.

A last necessary instrument would be a better international cooperation. The various deficiencies of European Union anticorruption framework can lead to obstacles in the European judicial cooperation. Of

[15] The Group of States against Corruption, a body of the Council of Europe, was established in 1999 to improve the capacity of Member States to fight corruption. GRECO, which is also open to non-European states, currently has 49 members.

[16] European Commission (2011) *Communication to the European Parliament, the Council and the European Economic and Social Committee. Combating corruption in the EU*. COM(2011/308 final.

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[18] Article 8 of the 1997 OECD Convention.

[19] The United Nations Convention against Corruption is the only legally binding multilateral anti-corruption international treaty.

course, by Decision 2008/852/JAI[20] of the European Council a specific network of anticorruption contact points was created in order to facilitate the exchange of information between the authorities in charge with prevention and fight against corruption. But the cross border corruption cases cannot be treated adequately if the condition of double incrimination is not fulfilled and the national criminal procedures differ too much regarding rigour. In spite of the mutual trust principle, the mutual recognition instruments of European Union would be the European investigation order or the European arrest warrant, they are prevented without a minimal level of approach of national legislations. The relatively low monitoring rates and the foundation by Eurojust[21] of joint investigation teams in corruption cases may suggest that there is no judicial cooperation in these matters.

4. Conclusions

Unfortunately, as certain is the age of corruption, as certain is the impossibility of its total elimination form the contemporary human societies[22]. This is the reason for which lately there has not been talk of total elimination of corruption phenomenon but there has been rather talk about the reduction of corruption to acceptable and bearable limits by the human society. Since there are still civil servants who request and receive bribe under various forms, and citizens who offer or are asked for bribe for the services they need from the authorities/public institutions, the eradication of corruption remains a goal impossible to achieve[23].

Corruption represents a reason of concern in European Union, as it happens at global level. Even if the nature and breadth of corruption varies, it is present in all the member states, and brings serious economic, social and democratic prejudices.

[20] *Council Decision 2008/852/JAI of 24 October 2008 on a network of anti-corruption contact points.*

[21] Eurojust is a European Union agency dealing with judicial cooperation in criminal matters between the agencies of the Member States. Located in The Hague, South Netherlands.

[22] *http://htcp.eu/coruptia-cauze-efecte-si-remedii/*

[23] N. Niţă, *The current dimensions of corruption in Romania and its impacts on the sustainability of integration into the structures of the European Union*, Legal Universe No. 10/2019, p. 2.

The international instruments and the European Union legislation for fight against corruption have already existed, but their enforcement is insufficient. For this reason, the member states should make sure that all the relevant legal instruments are fully transposed in their own legislation, and as a crucial issue, they are effectively monitored and enforced by detection and prosecution of corruption crimes, based on the provisions of criminal law and by a systematic record of sanctions with dissuasive nature and recovery of assets.

For the fulfilment of this goal, a firmer political commitment is necessary from all the decision-makers. Therefore, at European Union level, actions should be carried out which stimulate the political will in all the member states, in order to firmly approach corruption. The fight against corruption requires actions on several fronts, from the enforcement of preventive measures until strong sanctions for the corruption crimes.

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INCRIMINATION AND PENALTY OF ATTEMPT

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ABSTRACT

The execution of the intention to commit a socially dangerous act that is criminally sanctioned takes place gradually and successively until the final production of a result. During this period, circumstances may arise and result in the interruption of the execution or the lack of the expected effect of the actions that constitute the material element of a committed crime. Based on the Criminal Code, the attempt means to try out to implement the direct or indirect intention to commit a certain crime by committing enforcement acts that are not completed or which (although performed) do not produce the characteristic result of a committed crime. The attempt thus appears as an atypical form of the crime to which it relates and contains all the elements required by law for the existence of the crime in its typical form, but with an incomplete objective side. The acts of execution are interrupted, prevented from being carried out to the end (interrupted or unfinished attempt) or committed in full, but the result pursued by the perpetrator does not occur for reasons beyond his/her control (completed or perfect attempt). The Criminal Code adopted the concept of limited criminalization of the attempt, and in terms of sanctioning, the system of diversification of punishment was chosen.

KEYWORDS: *crime; attempt; intention; incrimination; punishment;*

I. General notions

The attempt does not contain the characteristics of the usual type of crime and consists in the execution of the intention to commit an act provided by the criminal law, but whose realization is interrupted or does not end because it does not produce its result.

The provisions of art. 32 paragraph (1) of the Criminal Code specifies that the attempt consists in the execution of the intention to commit the

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crime, execution which, however, was interrupted or did not produce its effect."

It has been shown in the legal literature that "the attempt is the triggering of the causal process and the beginning of the transformation of the possibility into reality."[1]

Under this respect, the new Criminal Code expressly references the execution of "the intention to commit the crime," which is to highlight the fact that the attempt is possible in the case of both direct and indirect intent. The old Criminal Code (1969) referred to the attempt as a form of crime which consists in the execution of "the decision to commit the crime," manifested by the beginning of its execution, but where the execution is interrupted or, without being interrupted, does not produces the result.

In such circumstances, the execution of the "decision to commit the crime" required only direct intent in the case of the attempt.

From examining the provisions of art. 32 of the Criminal Code, it results that the elements of the attempt are: the intention to commit the crime, its execution and the interruption of the execution or the absence of the accomplishment of the result determined for reasons independent or related to the will of the perpetrator.[2]

As a result, the attempt is a criminal activity in the imperfect form of the crime that the perpetrator intends to commit, but which is characterized by a mismatch or disagreement between the subjective side (intention) and the objective side (stopping execution or lack of effect).

The legal object, the subject, the subjective side and the objective side of the attempt are similar to those of the crime committed, and under this aspect, art. 174 of the Criminal Code states that "By perpetrating or by committing a crime is committed the commission of any of the acts punishable by law as a consummated or attempted crime, and the participation in their commission as co-perpetrator, instigator or accomplice." However, there are some peculiarities regarding the enforcement act and the immediate consequence. In this sense, for the attempt, the act of execution is performed only by an action, while for the

[1] I. Oancea, *Drept penal. Partea generală*, Didactică și Pedagocică Publishing House, Bucharest, 1965, p. 188.

[2] C-tin Mitrache, C. Mitrache, *Drept penal român. Partea generală (conform noului Cod penal),* Universul Juridic Publishing House, Bucharest, 2014, p. 285.

committed crime, it may also consist in an inaction. The immediate consequence is individualized in a material injury or wounding in the case of the committed crime, while the commission of the deed in the form of an attempt creates only a state of threat and danger.[3]

The provisions of art. 32 paragraph (2) of the Criminal Code it is stated that "There is no attempt when the impossibility of consummating the crime is the consequence of the way the execution was conceived."

According to the provisions of the law, we distinguish in the case of the attempt the degree of accomplishment of the action that constitutes the material element of the objective side of the crime and the causes that determine the lack of the result, depending on the used means or the material object of the crime.

The attempt is presented as follows: interrupted (unfinished), perfect (without effect), suitable (dangerous, punishable) and unsuitable (non-dangerous).[4]

The suitable (dangerous) attempt, as it results from the provisions of art. 32 paragraph (1) of the Criminal Code, is characterized by the (direct or indirect) intention of the perpetrator to commit the crime, its execution being followed by the interruption of the enforcement acts or the absence of any consequence thereof in case of their execution / exhaustion. As for the attempt, the reasons why the crime was not committed were not significant, as they were due to the interruption of the criminal activity (the interrupted attempt) or the lack of effect and the dangerous result (the perfect attempt).

The unsuitable attempt (regulated by art. 32 para. (2) of the Criminal Code) exists in cases where the way of elaborating the execution makes it impossible to commit the crime. In this respect there is the possibility that the production of the effect is not possible (improper attempt) or that this impossibility is the consequence of the absurd way in which the execution was elaborated (absolutely improper attempt).

[3] Al. Boroi, *Drept penal. Partea generală,* ed. 4, C.H. Beck Publishing House, Bucharest, 2020, pp. 211-212.

[4] Al. Boroi, *op. cit*., pp. 214-216; C-tin Mitrache et al., *op. cit.,* pp. 286-288.

II. Way of incrimination

The Romanian Criminal Code has adopted the general incrimination modality. The general part of the Code (art. 32-34) defines the attempt and shows the fundamental framework of punishment, and the provisions of the special part mention the crimes in respect of which the attempt is incriminated and sanctioned.

Regarding the extent, the Criminal Code adopted the concept of limited incrimination, a fact consecrated by the provisions of art. 33 paragraph (1) which states "The attempt is punished only when the law expressly provides for it." The provision naturally refers to cases where the punishment of the attempt is expressly provided for in other normative acts of the criminal law. It should be noted that for the crimes that do not create a serious threat to the rules of social coexistence, the application of a criminal sanction for attempt does not appear necessary, the defense of the rule of law being ensured by sanctioning the committed crime.

From the point of view of the legislative technique in the Criminal Code, the Special Part opted for two procedures. The first consists in incriminating and punishing the attempt in a paragraph of the text of the law governing the crime, and the second contains the corresponding reference in a common article at the end of a title or chapter of the Special Part corresponding to a particular group of crimes.[5]

The system of limited incrimination has as justification the perpetration of serious crimes against which the attempt also presents a high social danger.

However, there are also crimes for which the attempt is not possible due to the (material) objective element or the subjective element.

The impossibility of the attempt due to the material element exists in case of omissive crimes (committed by inaction) because they are consumed at the time of the non-fulfilment of the obligation imposed by law (e.g. omission of notification, provided by art. 267 of the Penal Code; 352 ^ 1 of the Penal Code introduced by GEO No. 28/2020; (1) and (2) of the Penal Code, which is, however, conditioned by a period of 10 days).

[5] Al. Boroi, *op. cit*., p. 218.

In the same category of the impossibility of the attempt due to an objective factor are the crimes of immediate consumption (with instant execution) because they do not allow a timely conduct of the criminal action (e.g. false testimony, provided by Article 273 of the Penal Code; violation of the solemnity of the hearing of court, provided by art. 278 of the Penal Code), as well as "crimes that are consumed in advance" (e.g. taking bribes, provided by art. 289 of the Penal Code that is consumed when claiming the benefit, being simple enough acceptance of use).[6]

The impossibility of the attempt deriving from the specifics of the material element is present in the usual offenses which presuppose a repeatability of the criminal activity (e.g. harassment, provided by art. 208 of the Penal Code; exercise without right of a profession or activity, provided by art. 348 of the Penal Code). For these criminal activities, a single act has no criminal relevance.[7]

The attempt is not possible by referring to the subjective element for the crimes committed at fault (lack of intention) and pre-intentional ones (intention and recklessness) because the provisions of art. 32 paragraph (1) of the Criminal Code refer exactly to "the execution of the intention to commit the crime."

III. Sanctioning the attempt

The Criminal Code contains provisions regulating the manner of punishing the attempt, as well as the situations for which it is not punished.

Art. 33 paragraphs (1) and (2) of the Criminal Code regulates the punishment of the attempt: paragraph (1) "The attempt is sanctioned only when the law expressly provides for it."; paragraph (2) "The attempt shall be sanctioned with the punishment provided by law for the committed crime, the limits of which shall be reduced by half. When for the committed crime the law provides a life sentence punishment, the attempt is sanctioned with imprisonment from 10 to 20 years ".

This provision of the criminal law is in line with the elements that characterize the attempt and takes into account the fact that the psychological process that accompanies and guides the activity of the material

[6] C-tin Mitrache et. al., *op. cit*., p. 290.
[7] Al. Boroi, *op. cit*., p. 214.

acts contains the same components that characterize the intention (volitional and intellect) to commit the crime.[8]

By this provision it was chosen the system of punishment diversification which is presented by sanctioning the attempt with a lesser punishment than for the committed crime, appreciating the lower social danger of the attempt by not achieving the result.

The rule cannot be applied when the law provides a life sentence for the committed crime, and in this situation, if the court turns to this hypothesis the attempt is punishable with imprisonment from 10 to 20 years.

The individualization of the punishment for the attempt is made in relation to the punishment provided by the law for the committed crime, and further on there are applied the provisions regarding the sanction for the attempt. Since the reduction of the punishment refers only to the punishment for the committed crime, the attempt does not produce effects and the limits of the complementary punishments that are likely to restrict some rights are not reduced.

If for the same crime several provisions are incidental and they refer to the reduction of the punishment, according to the provisions of art. 79 paragraph (1) of the Criminal Code, "the special limits of the punishment, as provided by law for the committed crime, are reduced by the successive application of the provisions regarding the attempt, mitigating circumstances and special cases of punishment reduction, in this order."[9]

The situation is similar if the law provides alternative punishments in the sense of first establishing the sanction based on the general criteria of individualization of punishments which is further followed by the application of the rules specific to the attempt.

In case of applying a fine (regardless of whether it is provided by law as a single or alternative punishment to imprisonment) the special limits per day/fine for the committed crime are reduced by half (and not the amount corresponding to one day/fine).

[8] G. Antoniu, *Tentativa (doctrină, jurisprudență, drept comparat),* Tempus Publishing House, Bucharest, 1996, p. 103.

[9] L.V. Lefterache, *Drept penal. Partea generală. Curs pentru studenții anului II,* ed. a 2-a, Hamangiu Publishing House, Bucharest, 2018, p. 324.

The criteria established by art. 33 paragraph (1) of the Criminal Code considers the offender, adult natural person, because for the crimes committed during the minority there are incidental the provisions of art. 128 Criminal Code according to which the causes of mitigation and aggravation are taken into account in establishing the educational measure and they produce effects within the limits provided by the law for each educational measure.

Through the provisions of art. 36 paragraph (3) of the Criminal Code, an exception is established regarding the punishment of some material acts remaining in the form of an attempt, but which have as a result, due to exceeding the intention, a more serious result. It is the situation of the complex crime committed with outdated intention (premeditated) which resulted in the production of only the more serious result, in which case the sanction consists in the punishment provided by law for the complex committed crime.[10]

The attempt, for a legal person, is subjected to the rules established by art. 147 paragraph (1) of the Criminal Code, the regime of the fine provided by law for the natural person being applicable.

Article 34 paragraphs (1) and (2) of the Criminal Code includes references to causes of impunity as a result of withdrawal and prevention of the result: paragraph (1) "The perpetrator who, before the discovery of the deed, gave up or inform the authorities of its commission so that consumption may be prevented, or he himself has prevented the commission of the offense;" paragraph (2) "If the deeds committed up to the date of finding or obstructing the production of the result represent another infraction, it is applied the sanction for this crime."

The action of the active subject must take place before the discovery of the deed, the attempt continuing to exist, but the perpetrator being no longer punished.

The effects of giving up and/or preventing the production of the result consist in the fact that the committed actions until that moment are no longer punished if they refer to a single crime. In case of withdrawal or impediment of the production of the result if the perpetrator has committed acts that meet the constituent elements of another crime

[10] Art. 36 para. (3) Criminal Code: "The complex crime committed with extended intention, if it produced only the more severe result of the secondary action, is sanctioned with the punishment provided for the finished complex crime."

committed (with an autonomous character), the punishment for that crime will be applied.

The provision contained by art. 34 paragraph (1) of the Criminal Code constitutes a cause of impunity which has a personal character in relation to the perpetrator. The accomplice and the instigator being participants benefit from this cause of impunity exclusively under the conditions shown by art. 51 of the Criminal Code "if, before the discovery of the deed, he denounces the commission of the crime, so that its consummation can be prevented, or if he himself prevents the consummation of the crime."

IV. Attempt and prescription of criminal liability

Strictly speaking by exact reference to the provisions of art. 154 and 187 of the Criminal Code, the terms for the prescription of the criminal liability refer to the punishment provided by law "for the committed crime," and "the punishment provided by law means the punishment provided by the text of law that criminalizes the act committed in the finished form, without considering the causes for reducing or increasing the punishment." As a result, in the case of the attempt, it is understood that the limitation period of criminal liability is considered according to the punishment provided by law for the committed crime.

In legal doctrine, the attempt is considered "in its essence, an autonomous crime" that contains the object, subject, objective side (own action, socially dangerous consequences), and the subjective side.[11] The claim that the attempt is in itself a criminal act is based on the provisions of art. 15 paragraph (2) and art. 174 of the Criminal Code, according to which "the crime is the sole basis of criminal liability", and "by perpetrating a crime or committing a crime is meant the commission of any of the acts punishable by law as a consummated or attempted crime." Also, in the legal literature it has been shown that the Romanian criminal

[11] T. Vasiliu, G. Antoniu, Ș. Daneș, G. Dărângă, D. Lucinescu, V. Papadopol, D. Pavel, D. Popescu, V. Lămureanu, *Codul penal.Comentat și adnotat. Partea generală*, Științifică Publishing House, Bucharest, 1972, p. 109; Al. Boroi, *op. cit*., pp. 211-213; M. Udroiu, *Sinteze de drept penal. Partea generală*, C.H. Beck Publishing House, Bucharest, 2020, p. 268; L.V. Lefterache, *op. cit*., p. 310.

law knows the existence of the crime – attempted deed and the crime – executed deed.[12]

Considering these, there are taken into account the punishment limits for the attempt in terms of "punishment provided by law" with strict reference to the committed crime and in relation to the statute of limitations of criminal liability.

In an opinion regarding the provisions of art. 122 paragraph (1) of the old Criminal Code 1969 (similar to art. 154 paragraph (1) of the current Criminal Code) it was shown that "in case of attempt, the limitation period depends on the punishment provided by law for this imperfect, atypical form of the crime," so that by reference to the "committed crime" the prescription term is established based on the legal punishment of the attempt.[13]

This theory was not resumed after the enforcement of the new Criminal Code, but the High Court of Cassation and Justice, the Panel for solving legal issues in criminal matters issued Decision no. 6/2014 (published in the Official Gazette, Part I, no. 471 of 26.06.2014; mandatory according to art. 477 para. (3) Code of Criminal Procedure) according to which "in case of attempt, the maximum limit of the punishment to be taken into account is the maximum provided by law for the attempted form (the special maximum of the punishment provided by law for the committed crime, reduced or replaced according to the provisions on the sanctioning treatment of the attempt)." In grounding this decision (it has as object the legal punishment of the attempt) reference was made to the provisions of art. 174 of the Criminal Code and it was held that the attempt is an imperfect autonomous crime.

By referring to the maximum provided by law for the attempted form [art. 32 para. (2) Criminal Code], which is considered an imperfect autonomous crime, it leaves place to be understood that for establishing the terms of prescription for the criminal liability in case of attempt these are reported to the punishment limits reduced by half. As a result, for art. 154 of the Criminal Code, the reference to the "committed crime" means the attempt to accept a distinct imperfect autonomous crime, as it results from the content of art. 174 Penal Code.

[12] G. Antoniu, *op. cit*., pp. 41-42 with reference to V. Dongoroz, *Drept penal. Tratat*, Bucharest, 1939, pp. 260-261.

[13] T. Vasilu et. al., *op. cit*., p. 637.

The arguments and interpretation are contradictory with the provisions of art. 154 and 187 of the Criminal Code, but so far the judicial practice has not solved such a case, and the legal doctrine has not issued an opinion leading to a conclusion.

In supporting the admission of such a solution, the provisions of art. 172, the final thesis of the Criminal Code regarding the meaning of some terms or expressions from the criminal law in case it is considered that "the criminal law provides otherwise" through the legal meaning and value of art. 15 and art. 174 Penal Code.

V. Conclusions

The attempt is characterized by the unfinished execution or by the absence of the criminal result.

The starting moment of the attempt is signalled by the beginning of an act of execution that has the aptitude or the capacity to prove the certain and objective intention of a criminal resolution. The intention of committing the crime has as finality the production of the material consequence of the deed provided by the criminal law and of the socially dangerous consequences, so that the committed actions must be circumscribed to some objective elements. Intention presupposes the will and anticipation of committing a crime.

The need to incriminate and sanction the attempt is imposed in order to prevent the commission of crimes even if there are acts of interruption by the perpetrator or if (due to various circumstances) the execution has not produced its effect. In relation to this situation, however, the sanctioning of the attempt is still subjected to a state of attenuation from the point of view of the punishment.

The regulations regarding criminal liability and criminal law sanctions are fully applicable if the law expressly provides that the attempt is punishable.

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[9] *Decision no. 6/2014 of the High Court of Cassation and Justice, Panel for solving legal matters in the criminal field*, published by the Official Gazette, Part I, no. 471 on 26.06.2014.
[10] *Decision no. 785/2017 of the Constitutional Court*, published in the Official Gazette, Part I, no. 193, on 02.03.2018.

THE EUROPEAN ARREST WARRANT. SURRENDER OF THE REQUESTED PERSON. TIME LIMITS FOR SURRENDER

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ABSTRACT

The requested person is surrendered by the International Police Cooperation Centre within the General Inspectorate of the Romanian Police within 10 days after the surrender decision becomes final and binding. If, for reasons beyond the control of the Romanian authorities or of the issuing State, the surrender cannot be carried out within the time limits thus established, the competent authorities may successively set new surrender time limits, without the duration of the preventive measure exceeding 180 days.

KEYWORDS: *surrender of the requested person; provisional detention; de jure termination of the provisional detention measure; the principles of mutual recognition and mutual trust;*

I. Preliminary considerations. General legal framework

The establishment of the European Arrest Warrant has been a constant concern of European authorities to fight cross-border/transnational crime in an efficient and rapid manner, which has led to the creation of a judicial procedure to the detriment of political and administrative proceedings.[1]

In this context, Romania's integration into the European Union, along with the other Member States, has forced our country to adopt new rules that will place us on a level at least equal in terms of the development and reforms in the field of judicial cooperation in criminal matters.

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[1] J.F. Renucci, *Tratat de drept european al drepturilor omului*, Translation from French, Hamangiu Publishing House, Bucharest, 2009, p. 738.

Thus, starting with the date of Romania's accession to the European Union[2], the Romanian legislator adopted *Law No. 302/2004 on international judicial cooperation in criminal matters*, as a framework law that regulates in a unitary way various forms of international judicial cooperation and assistance in criminal matters[3].

On the date this law becomes effective[4], a series of other regulatory acts were repealed, including: Law No 296/2001 on extradition[5]; Law No 704/2001 on international legal assistance in criminal matters[6]; Law No 756/2001 on the transfer of convicted persons abroad[7]; Government Ordinance No. 69/1999 to facilitate the enforcement of international conventions regarding the transfer of convicted persons, to which Romania is a party, as regards the surrender-take-over of convicted persons[8]; art. 519-521 from the Code of Criminal Procedure; as well as any other provisions to the contrary.

The new regulatory act transposes into national legislation the provisions of several framework decisions of the European Union in the field of judicial cooperation in criminal matters[9], but, in this paper, we will take into account the content of *Framework Decision 584/2002 on the European arrest warrant and the surrender procedures between*

[2] Based on the Treaty of Accession of 25 April 2005, on January 1, 2007, Romania became a member state of the European Union; it can be found on the website *https://eur-lex.europa.eu*.

[3] Statement of reasons, available at *www.senat.ro.*

[4] Art. 354 para. 1 of Law No. 302/2004 on international judicial cooperation in criminal matters, republished in the Official Gazette, Part I, No. 411 of 27 May 2019, reads: *"This law*[*)] *becomes effective 60 days from the date it is published in the Official Gazette of Romania, Part I, except for the provisions of chapter IV under title II, the provisions of title III, of chapter III under title IV and of chapter II under title VIII, which will become effective on the date of Romania's accession to the European Union."* The law was published in the Official Gazette of Romania, Part I, No 594 of July 1, 2004.

[5] Published in the Official Gazette of Romania, Part I, No 326 of June 18, 2001.

[6] Published in the Official Gazette of Romania, Part I, No 807 of December 17, 2001.

[7] Published in the Official Gazette of Romania, Part I, No 2 of January 4, 2002.

[8] Published in the Official Gazette of Romania, Part I, No 415 of August 30, 1999, approved by Law No 113/2000.

[9] See art. 355 of Law No. 302/2004 on international judicial cooperation in criminal matters, published in the Official Gazette, Part I, No. 411 of 27 May 2019.

Member States[10] in terms of regulating the time limit for surrendering the requested person[11], following the provision on the execution of a European arrest warrant.

II. The European Arrest Warrant. Concept

From a first viewpoint, we deem it necessary to point out that, at the moment, it is well known that the establishment of the European arrest warrant, as a form of international judicial cooperation in criminal matters, is by far the most important tool for achieving such cooperation, given the high level of trust between Member States[12], and for the

[10] Published in the Official Journal of the European Union no. 190 of July 18, 2002. This Framework Decision became effective on the twentieth day following its publication in the Official Journal and was amended by Framework Decision 2009/299/JHA of 26 February 2009, published in the Official Journal of the European Union No. L 81/24 of 27 March 2009, available on the website *https://eur-lex.europa.eu* or in the legislative program Lege5.ro.

[11] Art. 23 of the Framework Decision 584/2002 on the European arrest warrant and the surrender procedures between Member States entitles "*Time limits for surrender of the person*", reads as follows:

"(1) The person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned.

(2) He or she shall be surrendered no later than ten days after the final decision on the execution of the European arrest warrant.

(3) If the surrender of the requested person within the period laid down in paragraph 2 is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within ten days of the new date thus agreed.

(4) The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within ten days of the new date thus agreed.

(5) Upon expiry of the time limits referred to in paragraphs 2 to 4, if the person is still being held in custody he shall be released."

[12] The statement of reasons that were the basis for the adoption of the Framework Decision 584/2002 on the European arrest warrant and the surrender procedures between Member States, para. 5.

implementation of the principle of mutual recognition of judicial decisions[13] in an area as complex as criminal law.

As we know, the European arrest warrant is defined by the Romanian legislator, in accordance with the European provisions in this area[14], as "*a judicial decision by which a competent judicial authority of a Member State of the European Union requests the arrest and surrender to another Member State of a person, for the purpose of prosecution, trial or execution of a custodial sentence or measures involving deprivation of liberty*[15]".

Thus, in agreement with the legal provisions in force previously mentioned, it is doctrinally recognized that this establishment of the European arrest warrant applies in relations of international judicial cooperation in criminal matters only between the Member States of the European Union or with "*other states that have adopted and applied its provisions*"[16], with the Romanian legislator devoting an entire title to this legal institution[17].

III. The obligation to execute the European arrest warrant. The principle of mutual recognition and trust

The concept of international judicial cooperation in criminal matters is not a novelty within the European Union, as this institution has been of interest since 1970[18], but the classic international cooperation relations materialized in complex and considerably lengthy systems in terms of

[13] *Ibidem*, para. 10.

[14] See art. 1 para. 1 of Framework Decision 584/2002 on the European arrest warrant and the surrender procedures between Member States.

[15] See art. 84 para. 1 of Law No. 302/2004 on international judicial cooperation in criminal matters, republished in the Official Gazette, Part I, No. 411 of 27 May 2019.

[16] Al. Boroi, I. Rusu, M.I. Rusu, *Tratat de Cooperare judiciară internațională în materie penală*, C.H. Beck Publishing House, Bucharest, 2016, p. 16.

[17] Title III called "*Provisions on the cooperation with the Member States of the European Union in the implementation of the European Union Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States)"* of Law No. 302/2004 on international judicial cooperation in criminal matters, published in the Official Gazette, Part I, No. 411 of 27 May 2019 .

[18] F.R. Radu, *Drept european și internațional penal,* C.H. Beck Publishing House, Bucharest, 2013, p. 213.

surrender of persons convicted or criminally investigated in other Member States.

Thus, the establishment of the European Arrest Warrant[19] is the first form of international judicial cooperation in criminal matters that implements the principle of mutual recognition of judgments and judicial decisions[20] by the Member States of the European Union, representing a major change in approach to this issue in itself and being based on effective cooperation against transnational crime[21].

However, the enforcement of the principle of mutual recognition, which is the basis for the adoption of the framework decision mentioned above, imposes a *de jure* obligation on the Member States to execute a European arrest warrant[22], as a general rule.

In this context, we emphasize that the role of a court in the procedure of executing an European arrest warrant is limited and confined to verifying the formal conditions of the warrant, to resolving any objections to the identity of the requested person, to verifying the existence of double criminality of the criminal deeds he/she is charged with, as well as the situations that constitute reasons for refusal to have him/her surrendered[23]. In other words, the requested State does not analyse or rule in any way on the allegations against the requested person, which is the sole duty of the requesting State in accordance with its own internal procedures.

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[19] As per para. 6 of the preamble to the Framework Decision 584/2002 on the European arrest warrant and the surrender procedures between Member States, "*the European arrest warrant (...) is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the «cornerstone» of judicial cooperation".*

[20] See art. 82 para. 1 (ex-Article 31 TEU) of the Treaty on the Functioning of the European Union, consolidated version, published in the Official Journal of the European Union on 07.06.2016, C202/1; TFEU can be consulted at: *https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html#new-2-52.*

[21] L. Klimek, *European Arrest Warrant,* Springer International Publishing Switzerland, 2015, p. 19.

[22] CJEU, Judgment of the Court (Grand Chamber) of 6 October 2009, Dominic Wolzenburg, case C-123/08, paragraph 57, which can be consulted on the website *www.curia.eu,* in the Journal "*Pandectele Săptămânale*" – Rosetti Publishing House, no. 31/2011 in the legal library legalis.ro (accessed on 27.10.2020) or on the website *www.pandectelesaptamanale.ro, quotation code 1442.*

[23] Art. 85 et seq. of Law No. 302/2004 on international judicial cooperation in criminal matters, republished in the Official Gazette, Part I, No. 411 of 27 May 2019.

However, we emphasize that, in order to apply and comply with the principle of mutual recognition and trust[24], which underlies the execution of the European arrest warrant issued by the competent foreign judicial authority, as we have shown above, if none of the reasons for refusing to execute the European arrest warrant stipulated in the provisions of the framework law applies[25], the national judge appointed to execute a European arrest warrant shall also decide on the arrest and surrender of the requested person, in order to ensure the speed and efficiency of this special procedure.

Only as a matter of principle, we recall that, according to the relevant legal provisions, the jurisdiction to settle the case in the first instance rests with the court of appeal in the jurisdiction of which the requested person was apprehended[26], and the decision by which the case is settled by the first instance court[27] is called a *sentence*[28], then the procedure for surrendering the requested person within the time limits for surrender shall be analysed.

IV. Surrender of the requested person, an effect of the execution of the European arrest warrant[29]

As a general rule, the requested person is surrendered by the International Police Cooperation Centre within the General Inspectorate of the Romanian Police, with the support of the police station in the area where the place of detention is located, within 10 days after the surrender decision becomes final and binding.

[24] A. Vlăsceanu, *Law No. 302/2004 on international cooperation in criminal matters: case-law, decisions of the Constitutional Court, ECHR judgments, CJEU judgments, European documents,* Hamangiu Publishing House, Bucharest, 2010, p. 53.

[25] See art. 99 of Law No. 302/2004 on international cooperation in criminal matters, published in the Official Gazette, Part I, No. 411 of 27 May 2019.

[26] A. Vlăsceanu, *op. cit*., p. 55.

[27] See art. 109 para. 1 of Law No. 302/2004 on international cooperation in criminal matters, published in the Official Gazette, Part I, No. 411 of 27 May 2019.

[28] G. Tudor, M. Constantinescu, *Mandatul european de arestare. Aspecte teoretice și practică judiciară*, Hamangiu Publishing House, Bucharest, 2009, p. 234.

[29] See art. 113 et seq. of Law No. 302/2004 on international cooperation in criminal matters, published in the Official Gazette, Part I, No. 411 of 27 May 2019.

Of course, the national legislator, in agreement with European legislation, also regulated exceptions to this rule, so that if the surrender cannot be made within the time limits set by the International Police Cooperation Centre within the General Inspectorate of the Romanian Police and the competent authority of the issuing State for reasons beyond the control of the Romanian authorities or the issuing State, this shall take place within 10 days of the newly agreed date[30], without exceeding the time limits for the surrender, in which case the prosecuted person shall be released[31].

Moreover, we deem it necessary to highlight the fact that the Romanian legislator also transposed in the domestic legislation the exceptional situation provided by the framework decision regarding the temporary suspension of surrender for serious humanitarian reasons[32], aspects that are to be analysed in detail in a future endeavour.

Going back, by researching the domestic and European legislation and case-law, from the perspective of regulating a time limit for the surrender of the requested person, we note, from a first viewpoint, the fact that, although the legislator refers to it, it has not been provided *tale-quale* in the contents of the special law.

However, we consider that the measure of provisional detention of the requested person should not be understood as a *sine die* arrest, since, on the one hand, it would violate the fundamental rights[33] of that person and, on the other hand, it would clearly exceed the purpose for which the European arrest warrant procedure was established: to remove the complexity and risks of delay inherent in previous extradition proceedings[34].

[30] See also Judgment of the Court (Third Chamber) of 25 January 2017, *Case C-640/15 Tomas Vilkas,* available at *http://curia.europa.eu/juris/liste.jsf?num=C-640/15&language=RO.*

[31] See art. 113 para. 3 of Law No. 302/2004 on international cooperation in criminal matters.

[32] Art. 23 para. 4 of the Framework Decision 584/2002 on the European arrest warrant and the surrender procedures between Member States.

[33] D. Shelton, *The Oxford Handbook of International Human Rights Law*, Bell&Bain Ltd, Glasgow, Great Britain, 2013, p. 558 – it essentially shows, that the main purpose of international law and human rights is to protect individuals against possible abuses of power by the authorities.

[34] See para. 5 in the preamble to the Framework Decision 584/2002 on the European arrest warrant and the surrender procedures between Member States.

Moreover, we deem it necessary to point out that European law also provides *in concreto* that the application of the provisions on the execution of a European arrest warrant may not have the effect of changing the duty to respect fundamental rights and fundamental legal principles, such as those enshrined in Article 6 of the Treaty on European Union[35].

Therefore, to continue our research approach regarding the maximum time limits for surrender, regulated in a generic way by the legislator in art. 113 para. 3 of the special law[36], we have found that the case-law has ruled that the duration of the provisional detention of a requested person cannot exceed 180 days, which results from the corroborated interpretation of the previously-mentioned provisions with those provided by art. 104 para. 10 of the same regulatory act[37], then, in the event that the person concerned fails to be received by the requesting State within the time limit thus set, the person requested shall be released (*in other words, the measure of provisional detention shall cease by law*), without this being a reason for refusing to execute a future European arrest warrant, based on the same facts.

We also emphasize the fact that, as per art. 113 para. (4) of Law no. 302/2004, "*In all cases, at the time of surrender, the Romanian authorities shall communicate to the authorities of the issuing State which ensures the taking over of the surrendered person the duration of his/her arrest in execution of the European arrest warrant, in order to be deducted from the sentence or custodial measure to be applied".*

[35] Art. 1 para. 3 of the Framework Decision 584/2002 on the European arrest warrant and the surrender procedures between Member States.

[36] As per art. 113 para. 3 of Law No. 302/2004 on international cooperation in criminal matters, published in the Official Gazette, Part I, No. 411 of 27 May 2019, "*If the maximum time limits for surrender are exceeded, without the person concerned being received by the issuing State, the pursued person shall be released, without this being a ground for refusing to execute a future European arrest warrant, based on the same facts*."

[37] In terms of the duration of the preventive measure, the provisions of art. 113 of Law No. 302/2004 on international judicial cooperation in criminal matters, published in the Official Gazette, Part I, No. 411 of 27 May 2019 shall be completed with the provisions of art. 104 para. 10, the final sentence of the same law which provides the following: *"In all cases, the custodial measure for surrender may be approached only after hearing the requested person in the presence of the defense counsel. The initial duration of the detention may not exceed 30 days and the total duration, until actual surrender to the issuing Member State, may in no case exceed 180 days."*

V. Conclusions

In relation to the actual and factual arguments mentioned above and in accordance with the provisions of the relevant doctrine and case-law in the field[38], we note that, although it is obvious that the special law does not expressly (*expressis verbis*) regulate the maximum time limit in which a requested person can be surrendered to the foreign authority, it results *iuris* et *de iure* from the corroborated interpretation of several provisions of the special law, that the measure of provisional arrest of the person requested during the entire procedure of execution of a European *arrest warrant may be enforced not exceeding 180 days under any circumstances*.

Also, considering that the provisions of the special law are supplemented with the provisions of the Romanian Code of Criminal Procedure and in terms of preventive measures that may be ordered in the procedure of executing a European arrest warrant[39], for identity of reason, we consider that *a brief reference should be made to similar domestic criminal procedural provisions*[40], in that the national legislator provided in the Romanian Code of Criminal Procedure[41] that the total duration of the provisional detention of the defendant during the criminal investigation may not exceed a reasonable time limit and may not be

[38] See, for instance, *Decision No. 201/20 March 2020,* pronounced by the High Court of Cassation and Justice, Criminal Section, final, available on the website *www.scj.ro.*

[39] Art. 104 para. 9-11 of Law No. 302/2004 republished, on international judicial cooperation in criminal matters, published in the Official Gazette, Part I, No. 411 of 27 May 2019, shall read as follows: "*(9) The court checks periodically, but not later than 30 days, whether it is necessary to maintain the arrest for surrender. In this respect, the court shall rule by reasoned decision, taking into account the time limits provided in art. 112.*

(10) In all cases, the custodial measure for surrender may be approached only after hearing the requested person in the presence of the defense counsel. The initial duration of the detention may not exceed 30 days and the total duration, until actual surrender to the issuing Member State, may in no case exceed 180 days.

(11) If the requested person is released, the court orders the judicial control, the judicial control on bail or the house arrest, with the provisions of art. 211-222 of the Code of Criminal Procedure applying accordingly. In this case, if the court subsequently orders the execution of the European arrest warrant, by the surrender decision, the arrest of the person requested for surrender to the issuing judicial authority shall also be ordered."

[40] M. Udroiu (coord.), *Codul de procedură penală. Comentariu pe articole*, ed. 3, C.H. Beck Publishing House, Bucharest, 2020, p. 1460 et seq.

[41] See art. 236 para. (4) from the Romanian Code of Criminal Procedure.

more than 180 days[42], a duration calculated by adding all the periods in which it was ordered[43].

In conclusion, we consider that the intervention of the legislator in such a circumstance would be useful, in order to have an *ad litteram* interpretation of the legal text on the time limits for the surrender of a requested person, a context in which any arbitrary interpretation in certain cases in this regard would be avoided.

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THE DRAFTING OF JUDGMENT GROUNDS OF APPEAL AFTER CEASING TO BE A MAGISTRATE

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ABSTRACT

The issuance of the court decision also implies the presentation of the grounds that were the basis of the solution adopted by the judge who participated to the trial of the case. However, in the event that the court decision was not drafted by the judge of first instance prior to the termination of its capacity of magistrate, the drafting of grounds by another person is equivalent to a lack of motivation, a circumstance that constitutes a violation of the right to a fair trial.

KEYWORDS: *Criminal Procedure Code; drafting of judgment; procedural remedy; right to a fair trial; law issues; referral for retrial;*

Introduction. Legal provisions subject to analysis. Aspects regarding the motivation of the court decision

The European Court of Human Rights has ruled that, in some cases, there might be administrative or procedural factors that make it impossible for judges to participate in the trial, but the ruling rises the obligation for the trial judge to present the reasons that led to the adoption of that solution.

Article 406 of the Criminal Procedure Code, entitled "Drafting and signing of the judgment", provides in paragraph 2 that *"the judgment shall be drafted by one of the judges who participated in trial, within 30 days of its render and shall be signed by all members of the panel and the clerk."*

As it concerns the drafting of the court decision, the Constitutional Court of Romania, by decision no. 33 of January 23, 2018[1], held that *"The decision by which the court trials the case in first instance must*

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[1] Published in the Official Gazette of Romania no. 146 of 15.02.2018.

contain an introductory part, the recitals and the operative part. The recitals of the decision represent its motivation. According to Article 403 paragraph (1) of the Criminal Procedure Code, the recitals must include, inter alia, the motivation of the solution regarding the criminal side, by analyzing the evidence that served as a basis for resolving the criminal side of the case and those who have been removed, and the motivation of the solution regarding the civil side of the case, as well as the analysis of any elements of fact on which the given solution in question is based and the indication of the legal bases that justify the given solutions in question. In case of conviction, pursuant to art. 403 paragraph (2) of the code, the recitals must also include the deed, respectively each deed retained by the court in charge of the defendant, the form and guilt degree, aggravating or mitigating circumstances, recidivism, the time deducted from the rendered sentence and the documents that state the period to be deducted.

The judgment motivation must be clear and precise, related and consistent to the evidence adduced in trial, must respond in fact and in law to all aspects of the incident in question, to logically and convincingly lead to the solution set through the operative part of the judgment. The court's decision must include, as a guarantee of the fairness of the judicial procedure and the observance of the parties 'rights of defense, the factual and legal reasons that formed the court's conviction, as well as those for which the parties' claims / defenses were removed. The recitals of the judgment, representing the explanation of the solution in the operative part, it is necessary support, form a common body with the operative part and enter both the res judicata authority, related to the parts of the file and the object of the case."

The reasoning of court decisions is, along with equality of arms, the principle of adversariality and the right of the accused to remain silent and not incriminate himself, one of the implicit guarantees of conducting a fair trial, finding its regulation in art. 6 par. 1 of the Convention[2].

In this context, the obligation of the courts to motivate their decisions has been the subject of analysis in numerous judgments handed down by the European Court of Human Rights in its case law, as the

[2] *Convention for the Protection of Human Rights and Fundamental Freedoms*, concluded in Rome on November 4, 1950, ratified by Romania by Law no. 30 of May 18, 1994, published in M. Of. no. 135/31 May 1994.

litigant must be convinced that justice has been done, that the judge has examined the requests invested and analyzed the evidence administered. A motivated decision allows the parties to show that their case has actually been heard, and the statement of factual and legal issues on which the judge based his considerations must be such as to enable the litigant to assess whether he has a chance of success in the event that he would like to promote an appeal[3].

The obligation to motivate the judgments arises from the right of the parties to present to the judge the arguments and observations which they consider appropriate[4], right that must be regarded in conjunction with another right recognized by the Court, namely that an effective examination of such[5] is required. The obligation to motivate the judgments is the only means by which a compliance verification with the aforementioned rights can be carried out, which constitute basic pillars of the right to a fair trial[6].

Similarly, the Constitutional Court notes in the above-mentioned decision: *"The obligation to motivate court decisions is a condition of fair trial, requirement of Article 21 paragraph (3) of the Romanian Constitution and Article 6 paragraph (1) of the Convention for protection of human rights and fundamental freedoms. As noted in the case law of the European Court of Human Rights, in the Judgment of 28 April 2005 in Albina v. Romania, paragraph 30, the right to a fair trial, guaranteed by Article 6, paragraph 1, of the European Convention for the Protection of Human Rights, and of fundamental freedoms, "includes, inter alia, the right of the parties to submit observations which they consider relevant to their case. Since the Convention is not intended to guarantee theoretical or illusory rights, but concrete and effective rights (Artico v. Italy, judgment of 13 May 1980, Series A, no. 37, p. 16, paragraph 33), that right cannot be regarded as effective only if these observations are actually 'heard', ie correctly examined by the court seised. In other words, Article 6 implies in particular the task of the "court" the*

[3] Case *Hadjianastassiou v. Greece*, judgment of 16 December 1993, Series A no. 252, para. 33.

[4] Case *Werner v. Austria*, judgment of 24 November 1997; *Bulut v. Austria*, Judgment of 22 February 1996.

[5] Case *Van den Hurk v. The Netherlands*, Judgment of 19 April 1994.

[6] R. Chiriță, *The right to a fair trial*, Universul Juridic Publishing House, Bucharest, 2008, p. 225.

obligation to proceed to an effective examination of the means, arguments and evidence of the parties, at least to assess their relevance [Perez v. France (GC), Application no. 47.287 / 99, paragraph 80, ECHR 2004-I, and Van der Hurk v. The Netherlands, of 19 April 1994, Series A, no. 288, p. 19, paragraph 59] ". It is also noted in the practice of the European Court of Human Rights that the obligation of the court to respond by reasoning to the arguments presented by the parties is justified, as "only by a reasoned judgment can a fair administration of justice be achieved" (Judgment of September 27, 2001, in Hirvisaari v. Finland, paragraph 30).

In view of these arguments, the Constitutional Court held that the drafting of the judgment, the final act and order of the court resolving the dispute between the parties with *res judicata*, is the result of deliberative activity, carried out in secret, in which only judges who are members of the panel before which the debate took place participate. Only they can rule on matters of fact and law before the court, resolving them. Therefore, the law expressly provides that the judgment is drafted by one of the judges who participated in the trial of the case. Moreover, the drafting of a court decision is inherently related to its motivation, the latter aspect being, as shown above, an obligation of the judge of the case arising from the provisions of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedom. All these aspects constitute guarantees of the right of the parties to a fair trial, judged by an independent and impartial court, which is subject only to the law.

However, if the judge who participated in the debates and deliberations is not the one who drafts / motivates the court decision, the guarantees that the Constitution and the law enshrine for the protection of the right to a fair trial, for ensuring an impartial justice, performed in the name law, remain declarative instruments, ineffective, useless. In other words, the entire regulation on the independence of the judiciary, the rules of criminal or civil procedure on the settlement of cases, the need for a reasoned act of justice is devoid of legal effect if the judgment by which "the law is said" is drawn up by a person who does not fulfill the quality of judge of the case, that is foreign to the judicial procedure, to the deliberative act that led to the adopted solution and, implicitly, to the act of justice itself.

For these reasons, the Constitutional Court has ruled that the motivation of the judgment is an act inherent in the function of the judge of the case, is the expression of his independence and can not be transferred to a third person. The motivation is not only the premise of a good understanding of the decision, but also the guarantee of its acceptance by the litigant, who will submit to the act of justice with the confidence that it is not an arbitrary act. It is an essential element of the judgment, a strong guarantee of the impartiality of the judge and the quality of the act of justice, as well as a premise for the proper exercise by the higher court of the powers of judicial review of legality and soundness. However, in the conditions in which the court decision would be drafted / motivated by other person than the judge of the case, the litigant is deprived of precisely these guarantees.

The distinction between the procedural moments of drafting and signing the judgment is underlined by the Constitutional Court, by decision no. 633/2018[7], which in paragraphs 893 - 894, argues the essential legal distinction, namely that if the motivation / wording of the judgment is the act inherent to the judge of the case function, being an intrinsic manifestation of it, the signing of the decision is the extrinsic, formal act, which certifies the fulfillment of the judicial function by the judge of the case. In the case of the panel with a single judge, the decision is drafted and signed by the judge of the case, and in the case of the panel with several judges, the decision is drafted by one or more of the judges of the panel that resolved the case and is signed by all judges.

Thus, the signing of the court decision is done by the members of the panel who participated in the debates and deliberations and by the clerk. In case of impediment of any of the members of the panel to sign, according to art. 406 para. (4) of the Criminal Procedure Code, the decision is signed in its place by the president of the panel, and if the president of the panel is also prevented from signing, the decision is signed by the president of the court. When the impediment concerns the clerk, the decision shall be signed by the chief clerk. In all cases, the cause of the impediment shall be mentioned in the decision.

[7] Published in the Official Gazette, Part I no. 1020 of November 29, 2018.

2. The principle of non-mediation and the jurisprudence developed in consideration of the ECHR practice. Particular situations regarding the drafting of court decisions

The principle of non-mediation is specific to the trial phase, and according to it the court must perceive directly the means of evidence that are administered in the case, as well as the claims of the prosecutor and the parties to the trial.

In order to ensure the principle of non-mediation, the principle of continuity of the trial panel was regulated, according to which the trial of a case is performed during the entire criminal process, depending on the procedural stage, by the same trial panel to which the case was randomly assigned (art. 354 of the Criminal Procedure Code). Exceptionally, if it is not possible to maintain the composition of the panel, its change can be made without the need to redo the acts already performed, during the judicial investigation, but at the latest until the beginning of the debates.

The jurisprudence of the European Court of Human Rights has brought certain nuances to the principle of non-mediation, so that according to the conventional standard, guaranteeing the right to a fair trial requires, in principle, that the judge pronouncing the judgment be also the one before whom the defendant and the relevant witnesses were heard directly.

In *Beraru's case against Romania*[8], the Court considered that an important aspect of a fair criminal trial is the possibility for the defendant to be confronted with witnesses in the presence of the judge who, in the end, rules on the case. The principle ofnon-mediation is an important guarantee in criminal proceedings in which the observations made by the court regarding the behavior and credibility of a witness can have important consequences for the defendant. Therefore, a change in the composition of the court following the hearing of an important witness should normally lead to a new hearing of that witness [see *P.K. v. Finland* (dec.), no. 37.442/97, July 9, 2002]. The Court has acknowledged that there is a possibility for a higher court to remedy, in certain circumstances, the shortcomings of the proceedings at first instance (paragraph 67).

[8] Published in the Official Gazette, Part I no. 944 of December 23, 2014.

In the ECHR judgment in the case *Cutean against Romania*[9], the Court recalls that, according to the principle of non- mediation, in a criminal trial the judgment must be taken by judges who were present at the trial and the process of administering evidence [see *Mellors v. The United Kingdom* (dec. .), no. 57.836 / 00, 30 January 2003], however, it cannot be considered as a prohibition on changing the composition of the panel during a trial (*RK v. Finland*, cited above). Very obvious administrative or procedural factors may arise that make it impossible for a judge to continue to participate in a trial. Steps may also be taken to ensure that judges who continue to try the case have properly understood the evidence and arguments, for example, by ensuring that written statements are available in writing, if the credibility of the witnesses in question is not compromised or through new hearings of relevant arguments or important witnesses before the newly formed panel (see Mellors, cited above, and PK v. Finland, cited above).

The Court therefore examines whether, in the light of the change of court, the right to a fair trial has been generally respected, and it is essential that the main evidence in the indictment and the witnesses whose credibility is challenged be heard by the defendants.

The legal issue under analysis was also discussed by the Court in *Cerovšek and Božičnik v. Slovenia* (applications 68939/12 and 68949/12), in which the defendants were accused in 2005 and 2006 of committing the theft by cutting down and taking trees from a forest belonging to another person and by appropriating wood. They were tried by a professional judge, AK, as the sole judge, who convicted both defendants, but although, after hearing the verdict, both of them notified their intention to appeal, which gave rise to an obligation on behalf of Judge AK to give good reasons for rendering his judgments, he retired later, at an unspecified date, and the files in both cases were lost. Therefore, as it is acknowledged, the application of the principle of non-mediation in criminal proceedings [see: Cutean v. Romania (cited above), §§ 60 and 61; PK v. Finland (dec.), no. 37442/97, Decision of July 9, 2002; the decision of the Constitutional Court of Slovenia of 11 October 2006] led to the observation by judge A.K. of the conduct of witnesses and applicants and the assessment of their credibility, which should have been an important, if not decisive, factor in assessing the facts on which

[9] Published in the Official Gazette, Part I no. 261 of April 20, 2015.

the defendants' convictions were based. In the ECHR's view, these observations should have been included in the written reasons justifying the convictions. The European Court emphasizes that, in accordance with national law, these observations should be one of the essential components of written judgments.

The content of the two ECHR judgments analyzed shows the importance given to one of the components of the right to a fair trial, namely the judgment in question to be given by the judge before whom the essential evidence was administered. In this sense there are also the provisions of art. 354 par. (2) of the Criminal Procedure Code, according to which if the change of the panel occurs after the beginning of the debates, respectively after the end of the judicial investigation, therefore of the activity of administering evidence and starting the debates on the case, it is necessary to resume, at this procedural stage the principle of non-mediation is total, respectively the judge pronouncing the decision must be the same before whom the debates taook place.

Even though the ECHR has acknowledged that, in some cases, there may be administrative or procedural factors that make it impossible for judges to participate in the trial, the decision must be given by the judge who administered all the evidence in question, in order to respect the principle of continuity of the trial panel, and the drafting of the decision must be done by the magistrate who rendered the decision, thus ensuring the right to a fair trial.

Relevant for this analysis is also the notion of composing the court panel, which takes into account the composition of the panel according to the law, until the moment of pronouncing the decision, when the disinvestment of the court takes place. The interpretation according to which the legal notion of composing the panel extends even after the moment of disinvestment of the court has in view an interpretation by extension, unsupported by any legal basis and would minimize the role of drafting the judgment, procedural stage subsequent to pronouncing the judgment by the judge at the date of pronouncing the decision, without intervening on the mode of deliberation.

However, the dismissal of the judge of the case after the date of rendering the decision does not exonerate him from the duty to draft the rendered decision, as the legal work of the wording belongs exclusively to the judge of the case, according to art. 406 of the Criminal Procedure

Code. No other person may draft the judgment as it expresses the logical-legal considerations taken into account at the date of the judgment, so that the loss of the position of judge due to retirement, occurred after the date of the judgment does not exonerate the judge from the obligation to draft, there being no other possibility of delegating this attribution inherent to the position of judge.

In this respect, in a decision[10], it was considered that the drafting of the judgment by the judge who delivered the judgment, after he ceased to be a magistrate, does not constitute a ground for annulment of the judgment, since the dismissal of the judge, by retirement, after the date of rendering the decision and until the date of full drafting of the decision, is an administrative event that does not produce legal effects against the decision previously rendered by judge, during the period he was in office, as long as there is no illegality defect reported at the date of rendering the decision, respectively of the way of resolving the legal conflict relationship with which it was invested.

Thus, the court held that there are no legal provisions that would allow the invalidation of judgments handed down by a judge, retroactively, following the dismissal from office after the date of the judgment and until it is drafted. At the time of the judgment, the judge of the case was in office and there is no legal possibility to remove a judge in question during the trial, following the submission of a request for dismissal by retirement, as the organization of courts and the conduct of legal proceedings are carried out according to the principle of legality. Therefore, there is no legal basis for the removal of a judge from an ongoing criminal trial only for the fact that he filed a request for dismissal by retirement, the principles of random distribution of criminal cases and the continuity of the trial panel being fundamental to the conduct of justice so that one cannot intervene in a criminal trial and replace the judge of the case with another judge, except in cases expressly regulated, limited and imperative by law.

This legal issue was also the subject of a referral to the High Court of Cassation and Justice for a preliminary ruling on the issue in principle of the following: "whether the motivation of the criminal sentence by a person who was a judge at the time pronouncing, but which he no longer

[10] Craiova Court of Appeal, Criminal Section and for cases with minors, Decision no. 496 of April 2, 2019.

has at the time of drafting the reasons, as a result of his dismissal by retirement, is a reason for the absolute nullity of that decision, pursuant to Article 281 paragraph (1) letter a) of the Criminal Procedure Code referred to in Article 406 paragraph (2) of the Criminal Procedure Code".

Even if by Decision no. 16 of October 11, 2018 pronounced by the High Court of Cassation and Justice, the Panel for resolving legal issues in criminal matters has rejected the complaint as inadmissible, it was held the majority opinion of the courts consulted in the sense that the reasoning of the sentence by a person who had the quality of judge at the time of rendering, but who no longer has it at the time of drafting the reasons, as a result of dismissal by retirement, does not constitute a reason for absolute nullity provided by art. 281 para. (1) lit. a) of the Code of Criminal Procedure.

In support of this view, the following arguments put forward by the courts were set out:

- the notion of composing the panel refers to the legal composition of the panel from the moment of rendering the decision, regardless of whether at the moment of drafting the reasons the judge is unable to sign the decision, and art. 406 para. (2) of the Criminal Procedure Code does not regard the composition of the trial panel;

- the invoked circumstance is not found among the cases of absolute nullity provided by law, since the retirement of the judge subsequent to the pronouncement of the sentence does not affect the composition of the panel, so that the provisions of art. 281 para. (1) lit. a) of the Criminal Procedure Code;

- the signing of the decision by a person other than the one who pronounced the decision is not a reason for absolute nullity of the decision, as long as the judge participated in the debate, deliberated and established the guiding principles of the recitals, and the motivation of the criminal sentence was made by the person who had the capacity of judge at the time of rendering the decision;

- the motivation of the criminal sentence by a person who had the quality of judge at the time of rendering it, but which he no longer has at the time of drafting the reasons, as a result of dismissal, is not a reason for absolute nullity of the decision, pursuant to art. 281 para. (1) lit. a) of the Criminal Procedure Code reported to art. 406 para. (2) of the Criminal Procedure Code. The situation presented is not related to the provisions regarding the composition of the panel. This composition

concerns the trial phase and the render of the decision, and cannot be extended after this moment, as the panel has disinvested. The wording of the reasons underlying the solution rests with the judge who pronounced the decision, even if an objective situation occurred, namely his retirement;

- the motivation of the criminal sentence by a person who had the quality of judge at the time of rendering, but which no longer has at the time of drafting the reasons, as a result of dismissal, is not a reason for absolute nullity of the decision, pursuant to art. 281 para. (1) lit. a) of the Criminal Procedure Code reported to art. 406 para. (2) of the Criminal Procedure Code. The legal reasoning is similar to the hypothesis in which a judge is promoted to the hierarchically superior court or is transferred to another court, but he writes the sentences during the period in which he no longer has the quality of judge at the court where he worked.

Consequently, as it is shown, in order to respect the right to a fair trial, it is imperative that the reasoning of the judgment be made by the judge who took part in the trial and who delivered the judgment because the legislature, although it regulated the situation in which the judge is prevented from signing the judgment, he did not regulate the situation in which there is a case of impeding the judge to draft the judgment, precisely because this attribution cannot be delegated to another person, so it is implicitly admitted that even after losing office by the judge, the drafting of the judgments rendered by the judge in office is also done by the judge, without this administrative circumstance producing retroactively legal effects, in the absence of express and imperative legal provisions.

Particular situations are represented by the collegiate panels in which the minute of the judgment is signed by all members of the panel, but, according to art. 406 para. (2) of the Criminal Procedure Code, the decision shall be drafted by one of the judges who participated in the settlement of the case, within 30 days from the pronouncement, and shall be signed by all members of the panel and the clerk.

Thus, the presentation of the logical-legal considerations taken into account at the date of pronouncing the judgment is made by one of the members of the collegiate panel, subsequently, the other members appropriating these arguments by signing the court decision.

The signing of the decision is a procedural stage that is not to be confused with its drafting since the drafting of the decision is the

exclusive attribution of the judge of the case, but the signing of the decision can be done by another person under art. 406 para. (4) of the Criminal Procedure Code, the legislator also regulating the situation of impossibility of the judge of the case to sign the decision: in case of preventing one of the members of the panel to sign, the decision is signed by the president of the court.

Another particular situation regarding the drafting of court decisions is encountered in the supreme court where the judgment may also be drafted by assistant magistrates. According to art. 71 of Law no. 303/2004 on the status of judges and prosecutors, assistant magistrates who participate in court hearings of the High Court of Cassation and Justice draft judgments, participate in an advisory vote in deliberations and draft decisions, according to the distribution made by the president for all members of the panel.

Thus, in this case, the presentation of the arguments in view of the pronouncement of the judgment is to be made by the assistant magistrate, under the guidance of the panel chairman, subsequently, the members of the panel of judges appropriating these arguments by signing the court decision.

In a decision[11], the High Court found that there was no violation of the procedural rules in the situation where, after the decision on appeal, until the finalization of the judgment by the assistant magistrate, two of the members of the panel were retired, and the reasoned decision was signed, for retired magistrates (including the President of the Panel of 5 Judges), by the President of the High Court of Cassation and Justice. The court also referred to a point of view of the Legislation, Documentation and Litigation Directorate of the Superior Council of Magistracy regarding the activity of which the fear was expressed that the disappearance of the sole judge who pronounced the court decision, before its completion (due to death or a very serious illness that no longer allows the exercise of duties) can cause real difficulties in the work of the courts, in the absence of specific legal rules, noting that the analysis in this legal opinion refers strictly to the situation of non-collegiate panels, so in the case of the sole judge.

[11] High Court of Cassation and Justice, Panel of 5 judges, Decision no. 81 of April 24, 2017.

In view of the above principles, taking into account the practice developed following the jurisprudence of the ECHR, the supreme court in another case decision[12] ruled that in the event that the court decision was not drafted by the judge of the first instance prior to the cease of magistrate quality, such equates to lack of motivation. Since the obligation to state reasons for a judgment plays a complex role, on the one hand, it constitutes a measure of protection against arbitrariness, since the judge is aware that he must justify his decision on objective grounds and, on the other hand, contributes to obtaining public and parties' confidence in the decision reached and allows a possible bias on the part of the judge to be identified and remedied, for example, by a re-examination before another judge or judges, that purpose is circumvented in the event that the judge who led the trial did not draft in writing the reasoning on which he based his conviction and determined him to rule, and the only way to compensate the judge's inability to present the reasons justifying the decision would be to retrial the case.

Consequently, although this violation of the obligation imposed on the judge does not constitute a cause of absolute nullity, so it is not included as such among the reasons that may lead to the annulment of the sentence and sending the case for retrial in accordance with art. 421 point 2 lit. b) of the Criminal Procedure Code, the High Court considered that the solution is necessary to guarantee the observance of the right to a fair trial and to two degrees of jurisdiction in criminal matters. The impossibility to establish concretely what were the considerations taken into account when pronouncing the solution is equivalent to the lack of trial in the first instance, and its performance for the first time in the appeal deprives the party of appeal, the appellate court having the obligation to ensure that the rights guaranteed by the Convention *"to be concrete and effective, not theoretical and illusory"*.

3. Conclusions

The render of the court decision also implies the presentation of the reasons that were the basis of the solution adopted by the judge who participated in the trial of the case.

[12] High Court of Cassation and Justice, Criminal Section, *Decision no. 145/A* of June 12, 2020.

Although the European Court has held that in some cases there may be administrative or procedural factors which make it impossible for judges to participate in the proceedings, a judgment rises the obligation for the judge to set out the reasons for the decision, and the loss of the capacity of magistrate after the date of pronouncing the judgment does not exonerate him from the duty to draft the pronounced judgment, as the legal work of the wording belongs exclusively to the judge of the case and no other person can draft the court judgment as the wording of the judgment logical-legal order taken into account at the date of pronouncing the decision.

In the event that the court decision was not drafted by the judge of the first instance prior to the termination of the quality of magistrate, the drafting of the reasons by another person is equivalent to a lack of motivation.

Even if the non-drafting of the reasons by the judge of the first instance, who pronounced the decision, does not represent a reason for absolute nullity according to art. 281 para. (1) lit. a) of the Criminal Procedure Code, this lack of motivation constitutes a violation of the right to a fair trial that cannot be remedied otherwise than by sending the case for retrial considering the double degree of jurisdiction in criminal matters, guaranteed by art. 2 of Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

In conclusion, the defendants' right to a fair trial is violated due to the fact that the judge of the case did not draft a written motivation of the solution, and the compensation of this deficiency by the appellate court would be equivalent to a ruling in the first and last instance, the appellate court ruling fully substituting the first instance in this regard, which leads, in concrete terms, to the artificial elimination of a degree of jurisdiction, to the detriment of the procedural interests of the parties.

This solution is also in line with the case law of the ECHR (*Cerovšek and Božičnik v. Slovenia*) which ruled on the fairness of the proceedings as a whole and found that the defendants had not received a fair trial, in the context in which the reasons for the judgments were not performed by the judge who had ruled, but by other judges who had not participated in the trial.

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CONSIDERATIONS REGARDING THE IMPLICATIONS OF USING EMPLOYEE'S OWN IT DEVICES IN PERFORMING PROFESSIONAL ACTIVITY ON PRIVATE LIFE AND ON THE RIGHT TO PERSONAL DATA PROTECTION

Adina Daniela RUS *

ABSTRACT

The way in which the great part of the employees performs their activity in pandemic period, namely on teleworking regime, imposes an analysis on how devices monitoring may violate some fundamental rights of the employee. The aim of this article is to highlight the framework and the limits of using the employee's own devices in professional activity in such a way as to ensure a fair balance between the private life and the right to personal data protection of the employee, on one side, and the employers' interests, on the other side.

KEYWORDS: *"bring your own device" principle (BYOD); the right to private life; the right to personal data protection; legitimate interest; proportionality and transparency;*

1. Context and premises

The new existing context both at national and international level generated by the spread of COVID-19 pandemic, determined several employers to rethink the way of performing activity, imposing through the mechanism provided by the law, the teleworking regime[1]. Therefore,

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[1] Teleworking has a special regulation on the Romanian *Law no. 81/2018 regarding teleworking,* published on Official Gazette no. 296 from April 2, 2018. According to the law, teleworking is possible only based on mutual agreement of the employment relation parties included directly in the individual labour contract with teleworking clause or in an addendum to this. Despite this, considering the situation, during state of emergency imposed in the COVID-19 context and established by the Presidential Decree no. 195 from 16th of March 2020 and prolonged by the Presidential Decree no. 240 from 14th of April 2020, the employers had the possibility to impose teleworking by unilateral will, namely based on a decision (its content being the one

it is observed that the use of this concept resulted from the need to protect the employee and not from an internal need for more flexibility, determining the employers to concentrate immediately efforts in establishing teleworking policies appropriate for the current situations, but also able to follow the objectives that are in the employers advantage. Unfortunately, the context in which teleworking was implemented at the level of some employers led to a sharp and sudden action, without allowing both the employer, but moreover the employee to acquire the proper level of maturity necessary for adopting the imposed conduct and for understanding the implications of teleworking.

Such a flexible work organization typically provides employees with high levels of work autonomy and entails the potential to improve job quality, increase and facilitate the reconciliation of work and family life[2]. On the other hand, a fair balance between private and professional life imposes an adequate degree of common and clear understanding by both parties regarding the way in which teleworking should be implemented which inevitably involves frequent use of the electronic communication means. Irrespective of the level or position in the organization, the

provided by law for the clause in the individual labour contract which states teleworking). After the state of emergency ended, this possibility was eliminated, the employers being obliged to conclude addendums with those employees who are planned to work on teleworking regime. The legislator waving to the possibility of imposing teleworking by unilateral decision is somehow in contradiction with the additional preventive measures for COVID-19 spreading by which it is stated the recommendation and, currently even the obligation to organize the activity in teleworking regime, where possible (obligation imposed by Government Ordinance no. 19/2020 for changing the Law no. 55/2020 regarding some measures for preventing and combating the effects of COVID-19 and for changing the Law no. 81/2018 regarding teleworking; Government Decision nr. 935/2020 for changing and completion annexes 2 and 3 of the Government Decision no. 856/2020 regarding the prolongation of state of alert on Romanian territory starting 15th of October 2020, as well as for establishing measures to be applied during this period for preventing and combating COVID-19 pandemic. There are opinions saying that the imposing of teleworking is possible on a unilateral basis under the provisions of the Government Ordinance no. 19/2020, but such an appreciation is interpretive as the wording of this normative act is not very clear).

[2] Opinion no. 2016/C-013/24 of the European Economic and Social Committee on "The effects of digitalization on the services sector and employment in relation to industrial change". See also, Laura Georgescu, *Soluții privind desfășurarea raprturilor de muncă în contextul digitalizării și flexibilității lor*, Romanian Review of Labour Law no. 3/2020, Wolters Kluwer Publishing House, Bucharest, 2020.

employees are, or they are felling obliged to be available any time, even if the request of the employer intervenes outside the working program. Or, *such situations of "work without boundaries" may cause stress and overworking*[3], affecting the private life of the employee. It is true that the employee is the one responsible to ensure a fair balance between private and professional life, but the employers has an equal responsibility to support the employee in this sense. An instrument which is in the hand of the employer is the teleworking procedure applicable at unit level, which should provide both clear rules for activity performing and obligations for employees in order to restrict a general availability of them or the possibility to be approached any time.

As a rule, established by the law, the employer has the obligation to make available to the teleworker the necessary IT means and/or work equipment used for performing activity, being recently reiterated by the national legislator[4] the possibility to use employee own IT devices and work equipment. Based on its organisational prerogative and for the purpose to ensure productivity[5] and a proper operation of the unit, it appears the need of the employer to monitor electronic communication, which from our perspective is possible but with certain limits. *Traditionally, the monitoring of electronic communications in the workplace (e.g. phone, internet browsing, email, instant messaging etc.) was considered the main threat to employees' privacy Modern technologies enable employees to be tracked overtime, across workplace and their homes, through many different devices. If there are no limits to the processing, and if it is not transparent, there is a high risk that the legitimate interest of employers in the improvement of efficiency and the*

[3] *Opinion no. 2016/C-013/24* of the European Economic and Social Committee, *cited above*.

[4] Art. II of Government Ordinance no. 192/2020, *cited above*.

[5] *If the employee performs activity in the employers' subordination and authority, it is normal that the employer to be entitled to control the work performed by the employee. The employers' control extends within the face of the individual labour contract but not only related to the fulfilment of the performance itself in the work performed by the employee, but also with regard to respecting the discipline at work by the employee* (Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Codul muncii. Comentariu pe articole, Vol. I. Art. 1-107*, All Beck Publishing House, Bucharest, 2007, p. 206). See also Al. Țiclea, *Codul muncii, Legislație conexă. Comentarii. Jurisprudență*, Universul Juridic Publishing House, Bucharest, 2020, pp. 208-209.

protection of company assets turn into unjustifiable and intrusive monitoring[6].

Fortunately, the Regulation 2016/679/EU[7] anticipated the accelerate evolution of digitalization and technology, succeeding that in addition to the general principles enshrined in the Directive 95/46/CE[8], to introduce also specific obligations for the employer meant to prevent a behaviour which might lead to excessive use of personal data, to ensure ego protection and to establish standards related to confidentiality and proportionality.

The intention of this article is to tackle the implications, limits and the framework for using own employee IT devices and/or work equipment in such a way as to prevent breaches of the fundamental rights of the employee, such as the right to private life and the right to personal data protection.

2. "Bring your own device principle" (BYOD)

BYOD principle represents the employee's possibility to use laptops, tablets, phones or other own devices in performing work tasks. Such a policy is already implemented within some states, the expectation being in the sense of a further use increasing[9].

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[6] Opinion 2/2017 on the processing at work, issued by the Working Party set up under Article 29 of the Directive 95/46/EC (hereinafter "*Working Party 29*"). This is a European working group with independent statute and with consultative role, which dealt with aspects related to protection of private life and of personal data up to 25th of May 2018 when the General Data Protection Regulation entered into force.

[7] *Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC* (hereinafter "*General Data Protection Regulation*").

[8] Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on free movement of such data, repealed by the General Data Protection Regulation.

[9] According to a Forbes article published at the beginning of 2019, the BYOD market was in 2014 at around 30.000.000 dolars, being estimated that until 2022 will reach the level of 367.000.00 dolars.

https://www.forbes.com/sites/lilachbullock/2019/01/21/the-future-of-byod-statistics-predictions-and-best-practices-to-prep-for-the-future/?sh=344f39081f30, visited on 8th of November 2020.

2.1. BYOD is an opportunity or a disadvantage for the employer?

Even if at a first glance BYOD policy may be tempting for employers, any decision for implementation should be based on a good *understanding of business requirements, constraints, regulatory compliance needs and user's needs and goals*[10], namely of the employees. The analyses demonstrated that *this planning phase is often completely overlooked, and gaps are found when the next phase, designing the solution is underway. The best way to mitigate risk is to be aware how the company operates*[11]. In addition, in the planning phase, the employer should answer to some essential questions, such as: *the security strategy addresses the security challenges that BYOD introduces to the environment? the infrastructure is prepared in this respect?; the existing management platforms allow the users to bring their own devices?* Moreover, *the industry that the company works in also plays an important role in how BYOD should be adopted*[12].

From the employer perspective such an approach has both advantages and disadvantages, depending on the business needs and interests. Therefore, this possibility provided also by the national specific legislation may be considered by some employers as not serving their interests. Among the main disadvantages are the need to use more complex IT monitoring systems and the risks that may occur from the employer data security perspective, but also possible breaches of the personal data protection right considering the IT challenges in managing personal and professional data in a separate manner. The disadvantages may also arise from the perspective of possible costs to be paid for wear compensating due to the using of such devices for the employer's interest or other additional costs. Moreover, such an approach is possible to create a different treatment between employees since part of them does not have own devices, generating complaints with direct effect on the employer's image, determining in different situations possible personnel losses.

On the other hand, there are some advantages that cannot be ignored following implementation of a policy regarding the use of employee's

[10] Y. Diogenes, J. Gilbert, *Enterprise Mobility Suite Managing BYOD and Company-Owned Devices,* Microsoft Press, Washington, 2015.
[11] *Ibidem*.
[12] *Ibidem*.

own devices in the sense that this can bring economies regarding acquisition and replacement of IT equipment, reducing in the same time the costs with additional IT services for employees. Also, the use of employee's own devices is a familiar one being avoided the discomfort caused by managing two devices, private and received from employer.

2.2. BYOD regulation at national level

Very recently the Romanian legislator[13] established that the employer has the *obligation to provide the means of information technology and/or safe work equipment necessary for the performance of the work, the parties having the possibility to establish based on a written agreement including the using of the employee own devices, by stipulating the using conditions*. Even if the by its action the legislator refers to the changing of the initial form of the legal text, this is not a fundamental one, but more an attempt to clarify the possibility to use own employee work equipment and IT means in teleworking context. Such a conclusion results from a simple analyses of the initial wording of the legal provisions which established in the first part the obligation to provide the employee IT means and equipment, the exception being highlighted in the second part of the provision which refers to the *cases when the parties agreed otherwise*[14]. Therefore, the parties of the employment relation had also before the Government Ordinance no. 192/2020, the possibility to conclude an agreement regarding the use of the employee own devices.

On the same time, it is observed that the legal document refers to two terms. One is "IT means" which may include both hardware elements (laptop, tablets, printer etc.) and software elements (programs, application etc.) and licenses, internet connection etc. The second term is "work equipment necessary for work". Considering the place of this phrase in the context of the entire article which refers to the obligation to ensure health and safety at work, we appreciate that the notion "work

[13] Art. II of Government Ordinance no. 192/2020, *cited above*.

[14] Art. 7 letter a) of the Law 81/2018 provides that "*The employer obligation to provide the means of information technology and/or safe work equipment necessary for the performance of the work, exception being the case when the parties agree otherwise*".

equipment" includes not only IT facilities but also other goods[15] used by the employee while performing teleworking (writing materials, chair, desks etc.).

The agreement regarding the use conditions of the employee's own IT means and work equipment can be part of the individual labour contract where teleworking is included or an addendum to the contract. The legislator offers the parties the freedom to define depending on the concrete needs, the content of the use conditions. With reference to the implication created by the policy providing the use of employee's own devices on the employees' rights, but also on the employer through the risks regarding the data security, in detailing the use conditions the parties should observe among others the monitoring rules, the technical conditions and standards for using the devices and their obligations.

In the context of such regulation at national level, there is the possibility that certain sectors of activity the employees to show interest and to ask for concluding an agreement regarding the use of their own IT means/ work equipment. In case of such initiative from the employee side arises the question if the employer is obliged to comply with the request. From our perspective, as long as there is no express exception stipulated by the law, the employee has no leverage of coercion for the employer in concluding an agreement with the employee, such a conclusion being equally applicable in cases when the request belongs to the employer.

3. Monitoring in the context of BYOD practice and the impact on the private life and on the right to personal data protection

"Private life" notion *is vast, does not lend itself to an exhaustive definition*, referring in certain situations to "*commercial and professional activities*", "*existing an interaction area between individual and others member of the society, which, even in a public context, may belong to*

[15] From the perspective of health and safety at work area, the work equipment is defined as "*any machine, device, tool or installation used at the workplace*" (see art. 2 letter a) of the Decision no. 1146/2006 regarding the health and safety minimum requirements for using the work equipment by the employees).

private life"[16]. A clear delimitation between private life and professional activity is difficult because at the workplace most of the people "*have and keep contact with external world*"[17], having a reasonable expectation that a certain degree of privacy will be respected also at the workplace[18]. In certain circumstances, the right to private life must give way to common interests. In respect to the work relations, these interests are represented by the right of the employer to order and to exercise control, the obligation of employee loyalty, as well as the right to property of the employer[19].

Considering the evolution of the personal data protection right, the link with the private life is clear, existing situations in which a clear demarcation between the limits of the two concepts is not possible[20].

From specific regulation perspective, at European level, the distinction between the private life and the right to personal data protection was materialized in the art. 8 of the Charter of Fundamental Rights of the European Union.[21] Therefore, this European normative act offers the personal data protection right the character of a fundamental right.

Throughout the entire work relationship, the employer processes several personal data of the employee, based on the contract concluded

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[16] C. Bîrsan, *Convenția europeană a drepturilor omului. Comentarii pe articole, Vol. I. Drepturi și libertăți*, All Beck Publishing House, Bucharest, 2005.

[17] Relevant are the decisions of the European Court of Human Rights, namely the decision from 23rd of November 1992 in the case *Niemtz vs Germany*, the decision from 25th of June 1997 in the case *Halford vs Great Britain* and the decision from 3rd of April 2007 in the case *Copland vs Great Britain*.

[18] Idea underlined in the Working document on the surveillance of electronic communications in the workplace, issued by the Working Party 29, on 29th of May 2002.

[19] Charles Morgan, *Employer Monitoring of Employee Electronic Mail and Internet Use*, McGill L.J., vol. 44, p. 888.

[20] For a detailed analysis regarding the comparison between the right of private life and the right of personal data protection, see S. Șandru, *Protecția datelor personale și viața privată*, Hamangiu Publishing House, Bucharest, 2016, pp. 147-148 (and seq.)

[21] Article 8 is dedicated to the personal data protection rights, providing that: "*(1) Everyone has the right to the protection of personal data concerning him or her. (2) Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. (3) Compliance with these rules shall be subject to control by an independent authority*".

between the parties, with the condition a legitimate interest and a precise scope can be substantiated.

Possible measures taken by the employer in the context of BYOD implementation, such us monitoring, can have an impact on the right to private life and on the right to personal data protection, if these measures exceed the limits of the scope and the framework established by the policy.

BYOD principle is subject to a detailed analyses of the Working Party 29 in the Opinion 2/2017 on data processing at work, where it is stated that "*monitoring the location and traffic of such devices may be considered to serve a legitimate interest to protect the personal data that the employer is responsible for as the data controller; however this may be unlawful where an employee's personal device is concerned, if such monitoring also captures data relating to the employee's private life and family life"*. According to the Working Party 29, there two main conditions to be met by the employer in order to ensure a monitoring in compliance with the personal data protection right, namely to take *appropriate measures to distinguish between private and business use of the device* and *to implement methods by which employers own data on the device is securely transferred between that device and their network. Configuring the device for routing the traffic through VPN back into the employer network, in order to offer a certain level of security or using application which offer an additional protection such as "sandboxing"*[22], can be solutions for implementing the recommendations included in the Opinion of the Working Party 29.

[22] Sandboxing is the act of sectioning off a program on the hard drive so that its exposure to the rest of the apps and critical systems is minimized or eliminated, according to *https://www.comparitech.com/blog/information-security/what-is-sandboxing/*, visited on 7th of November 2020. See also C. Ogriseg, *GDPR and Personal Data Protection in the Employment Context*, Labour&Law Issues, vol. 3, no. 2/2017, p. 16.

4. Considerations regarding the minimum content of BYOD policy which allows the balance between the employers' interests and the respect for employee's right to private life and personal data protection

Currently, there are no legal provisions issued by the European institutions or by the Romanian legislator to regulate the minimum content of BYOD procedure. More precisely, considering the implications which may occur by using the employee own devices in professional activity, the content of such a procedure should be defined not only from a technical perspective, but also from the perspective of the measures to be taken in order to ensure the respect of private life and personal data protection right. This policy should stipulate the scope of it, which are the obligations of the work relationship parties and to which activities this procedure applies. We appreciate that the applicability of such procedure to only some activities is justified as long as the employer is able to substantiate and to argue the criticality of the date belonging to the respective activities and the security risks that may occur in case of using the own devices.

In addition to those exposed above, within the policy making process, the employer has some elements which might help in defining the procedure, such as: *what tasks will employees be permitted or encouraged to do, from their own devices?; how much control will the employees be willing to grant to the employer over their devices?; monitoring limits; what minimum standards for hardware and software versions will the employer enforce?*[23]*;* which are the consequences for non-compliance with the procedure in relation with the employees. Moreover, a BYOD procedure should respond to certain questions such as: what happens in case the employee loses his/her devices or destroy it? where e-mail will be stored?; what happens with data when the employee terminates the contract with the employer?; who is responsible for possible repairing and which are the conditions for this?

On the same time, the conditions and the monitoring method have a great importance in the sense that this should observe the limits imposed

[23] For details regarding guiding questions in policy making process, see *https://www.ncsc.gov.uk/collection/mobile-device-guidance/bring-your-own-device*, visited on 8th of November 2020.

by the European legislation, namely legitimacy, proportionality and transparency in relation with the targeted employee, in order to avoid an intrusive and illegal action. Concretely, the implemented measure should ensure "*a balance between (...) the right to private life* (of employees) *and the employer possibility to ensure protection of its property and good operation of the company*"[24].

4.1. Legitimacy

During monitoring, any action proposed or implemented in this respect should be strictly analysed in relation to the targeted scope and, especially, to the legitimate interest of the employer, observing in the same time the rights of the targeted person. The legitimate interest in the context of monitoring the employee's own device is represented, primarily, by the need of the employer to protect the data security and the confidentiality of some sensitive data, which once disclosed may lead to damages for employer, both pecuniary and non-pecuniary such as the right to image as employer or as a supplier. In the Opinion 06/2014 of the Working Party 29, it is showed[25] that monitoring constitutes "*processing that is likely to go beyond what is necessary for the performance of an employment contract"*, being still "*legitimate under another ground, for instance, consent or the legitimate interest"*. Regarding the use of the consent in work relationship, the Working Parties 29 through the Opinion 2/2017 reiterates[26] that in case "*an employer has to process personal data of his/her employees it is misleading to start with the supposition that the processing can be legitimised through the employees' consent. (...) Thus, for most of the cases of employees' data processing cannot and should not be the consent of the employees, so as a different legal basis is required"*. For example, we consider that a provision in BYOD procedure according to which the employee is asked based on his/her general consent to give access to the employer in any moment to the desktop of his/her own device, with the purpose of checking on sample basis, if the

[24] European Court of Human Rights, the decision from 17th of October 2019 in the case *Lopez Ribalda and other vs Spain*.

[25] Opinion 06/2014 on the notion of legitimate interests of the controller under Article 7 of the Directive 95/46/EC, p. 17

[26] Opinion 2/2017 of the Working Party 29, *cited above*, p. 7.

BYOD procedure is observed, without any prior notification consisting in a message for access, is an abusive one. In this sense, the employer should have other means less intrusive to ensure possible breaches of data security by implementing some monitoring programs capable to facilitate a clear separation between personal and professional data.

4.2. Proportionality of monitoring measures

Working Party 29, in the Opinion no. 8/2017 on the processing of personal data in the employment context, recommends the following: "*Any monitoring must be a proportionate response by an employer to the risks it faces considering the legitimate privacy and other interests of workers. Any personal data held or used in the course of monitoring must be adequate, relevant and not excessive for the purpose for which the monitoring is justified. Any monitoring must be carried out in the least intrusive way possible.*"

In defining proportionality of the monitoring measures, the employer should consider, at least the elements defined by the European Court of Human Rights in the case *Bărbulescu vs Romania*[27], namely a) information of the employee with respect to the existence of such monitoring procedure; b) "*the extend of the monitoring*"; c) the existence of "*legitimate reasons*"; d) the possibility to "*establish a monitoring system based on less intrusive methods and measures than directly accessing the content of the employee's communications*"; e) "*the consequences of the monitoring for the employees*" and f) "*providing adequate safeguards*".

Clarification of the above-mentioned aspects is more important as "*it is for the one who process personal data to prove the cumulative fulfilment of the adequate, pertinent and non-excessive character, because he/she has the obligation to respect proportionality of the used method"*[28].

At national level, the minimum requirements imposed by the employer in case of using monitoring systems through electronic communication means are expressly provided by the *Law no. 190/2018*

[27] European Court of Human Rights, decision from 5th of September 2016 in the case *Bărbulescu vs Romania.*

[28] Bucharest Court of Appeal, decision no. 36 from 13th of March 2017, in Ș.D. Mihail, *Protecția datelor personale în relațiile de muncă. Considerații privind temeiul prelucrării*, Pandectele Române no. 5/2019, Bucharest.

on measures for the application of the Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)[29].

4.3. Transparent information of the employees regarding the content of BYOD policy

Any BYOD policy for being effective should have a clear and well-structured content, be able to cover all areas of interests for employees, and not the least, to ensure a transparent[30] dissemination in relation with the employees. Such an approach from the employer side represents an obligation as stated at art. 12 of the General Data Protection Regulation, according to which "*the controller shall take appropriate measures to provide any information (...) relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language (...)*". As stated in the Regulation, the information should have a written form, the communication being possible also by electronic means.

[29] Art. 5: Processing personal data in the context of employment relationships "*In cases where workplace monitoring systems through electronic communications and/or video surveillance measures are used, the processing of the personal data of employees, for the purpose of pursuing the legitimate interests of the employer, is permitted only if: a) The legitimate interests pursued by the employer are thoroughly justified and prevail over the interests or rights and freedoms of the data subject; b) The employer has provided mandatory prior, complete and explicit information to the employees; c) The employer performed consultations with the trade union or, as the case may be, with the employees' representatives before introducing monitoring systems; d) Other less intrusive forms and means for reaching the aim pursued by the employer did not prove to be efficient; e) The storage periods for the personal data is proportional to the processing aim, but not longer than 30 days, save for situations which are expressly provided by law or in thoroughly justified cases*".

[30] In case of a monitoring situation, the employees' information should be defined based on the elements provided by the Working document on supervising and monitoring of the electronic communication at the work, adopted by the Working Party at 29th of May 2002, such as: reasons and scope for monitoring or other details regarding how the monitoring is performed.

4.4. Trade Union/employees representative's involvement in the BYOD policy making process

The primary task the trade union or employees' representatives is to supervise the application of law and collective agreements affecting the employees, inevitably entails a knowledge of such data[31], including the way in which the data are processed and the how activity is monitored.

The Opinion 2/2017 issued by the Working Party 29 in the section 5.4.2. dedicated to the principle "bring your own device" makes no express references in this respect. Nevertheless, in the Working document on supervising and monitoring electronic communications at work, adopted by the Working Party 29, it is recommended to prior inform and consult employees regarding the elaboration of a policy on using the internet at work. Given the implication of a BYOD policy, we appreciate that the Working Party 29 recommendation should, by way of analogy, be applied also in such a situation. Moreover, the need to involve employees is highlighted also by the national legislation, namely by the art. 5 para. (1) letter c) of the Law no. 467/2006 establishing a general framework for informing and consulting employees, according to which "*the employers have the obligation to inform and consult employees representatives, according to the legislation in force, with regard to (...) decisions likely to lead to substantial changes in work organisation, in contractual relations or in work relations (...)*".

On the same time, the Law no. 190/2018 cited above[32], established at art. 5 the express obligation to "*consult trade union or, by the case, employees' representatives before any implementation of the monitoring system*".

Usually, the information and consultation process is performed through the involvement of the social partner which can be depending on how the employees are organized, a trade union (representative or not) or employees representatives. Also, when the trade union is affiliated to a federation, the employee has fully liberty to initiate this process with that

[31] S. Simitis, *Reconsidering the Premises of Labour Law: Prolegomena to an EU Regulation of the Protection of Employees' Personal Data*, European Law Journal, vol. 5, no. 1/1999, p. 48.

[32] Published in the Official Gazette no. 651 from 26th of July 2020.

respective federation, if already there is a negotiation and involvement practice in different business areas.

5. Conclusions

Irrespective of the possible disadvantages and of the employers' efforts to establish technical standards for implementation and specific monitoring rules, BYOD policy represents an important option for employer, as long as the next generations will be characterized by an advanced and "natural" knowledge of the technology, expressing their openness to the possibility of using own IT means and work equipment, by assuming all the implication.

Regarding the recent changes of the national specific legislation, analysing how the employees from the public sector performed their activity during state of emergency, when through the presidential decrees it was highlighted the need and even the obligation to organize the activity based on a teleworking regime, it can be observed that the great majority of them worked at the office even if the specific of the activity allows such a form of work organization, the lack being the an IT functional infrastructure suitable for teleworking. It is more than clear that the public institutions are not prepared for implementing teleworking, because they do not have the necessary infrastructure. Continuing with such an approach in the context of new regulations which reiterates and highlights the obligation to organize the activity in teleworking regime, where possible, it would be contrary with the measures imposed by the state's institutions. Considering all these premises, it seems that the law text is mainly an instrument for the public institutions to create even express possibility for asking to their own employees to use IT means and equipment. It remains to be seen how the state institutions will be able to ensure a BYOD policy in compliance with the requirements developed by the jurisprudence and by the specific legislation.

Indeed, the implementation of a BYOD procedure entails a shift in mentality both from employers and employee perspective who probably at this stage do not fully acknowledge the possible advantages, being somehow anchored in the traditional set up of using working devices by the employer. Even though, using employee's own devices has clearly an

impact on private life and personal data protection, a proper strategy of the employer can eliminate this barrier and can eventually lead to a win-win situation for both parties of the employment relation.

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TYPOLOGY OF THE LEGAL ASSISTANCE CONTRACT

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ABSTRACT

In the arena of legal relations, there is a contract that has been used for several decades, but which has been less analyzed in the specialized doctrine and practice, the legal assistance contract. The low interest in researching the typology of this contract was probably due to the particular legal relations in which the legal assistance contract is incidental - in the lawyer-client relationship - but also to its confidential nature, but as the professional responsibility is developing and the legal assistance contract is the source, we consider particularly useful the analysis of the typology of this contract, a contract that due to the complex generated effects it goes behind the scene of the lawyer-client relationship in the light of the ramp, on the stage of juridical dissection.

KEYWORDS: *lawyer; legal assistance contract; legal characteristics;*

I. Introduction

The complexity of the *legal assistance contract* requires in-depth knowledge of the rules of specific legislation, but also a thorough understanding of the institution of the contract, as the main source of obligations and, at the same time, a perfect correlation with the rules of special contracts with the most accurate similarities. Analysed in terms of regulation and legal characteristics, the legal assistance contract is a complex contract, having both an autonomous legal physiognomy outlined by the legislation specific to the legal profession, and a construction based on the legal architecture of three institutions regulated by the Civil Code: *the representation*, which through the prism of art. 1167 of the Civil Code, applies primarily, the *mandate contract* and, finally, the *enterprise contract* in the form of providing services, whose rules become incidents in terms of similarity with the specific rules of lawyer‘s profession.

From the point of view of legal disputes, *the legal assistance contract* generates niche disputes which, in most cases, are resolved by the bodies

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of the legal profession, without being brought to justice, so that the substantial law governing this contract is less known at the level of other legal professions than that of lawyer. From this point of view, when the legal dispute is generated by the interpretation, development and/or execution of a *legal assistance contract*, the legal issue revolves less around the probation of the legal assistance relation, but in identifying incidental rules to cover gaps in specific legislation. The operation of identifying the *jus commune* norms is facilitated by knowing the typology of *the legal assistance contract,* typology that can be deduced from the legal reasoning that can be extracted from the analysis of the legal characteristics of such a complex contract.

II. Analysis of the typology of the legal assistance contract in terms of special regulation

The legal assistance contract is provided in the provisions of *Law 51/1995 for the organization and practice of the lawyer's profession*[1] and in those of *By-law of the lawyer's profession*[2] and represents the source of relations between the lawyer and his client, respectively the agreement by which the lawyer, through the his form of exercising the profession assumes the obligation to perform a characteristic professional activity[3] in favour of a client, in exchange for a fee and the expenses incurred in the client's interest.

[1] *Law no 51/1995,* republished, was published in the Official Journal no. 440 of May 24, 2018.

[2] By-law of the lawyer 's profession was adopted by the *Decision of the Council of the National Union of Romanian Bars no. 64/2011,* published in the Official Journal no. 898 of December 19, 2011.

[3] A lawyer's activity shall be achieved through: legal advice and petitions of legal nature, legal assistance and representation before the courts of law, criminal prosecution bodies, jurisdictional authorities, public notaries and bailiffs, public administration bodies and institutions and other legal entities, drawing up legal documents and certifying the parties' identity, the content and dates of the documents submitted for authentication, mediation activities, fiduciary activities, temporary establishment of companies' headquarters at the lawyer's professional office, any means and ways specific to the exercise of the right to defense (art. 3 of *Law 51/1995*).

Ab initio, knowing that the general legal regime of contracts is different as they are *named* or *unnamed*[4] contracts, and the doctrine[5] has outlined the opinion that, in this classification is essential the criterion of regulation, and not the existence of a normative naming, in the process of researching the typology of this legal act we must establish whether *the legal assistance contract* belongs to the category of *named* or *unnamed* contracts.

Without reservations, we consider that this contract, named in the legislation regarding the lawyer‘s profession, *the legal assistance contract* is a regulated contract, many particular normative provisions establishing its own, complex, special legal regime.

Thus, the provisions of art. 28 and art. 30 para. 5 of Law 51/1995 and Subsection 2. *The legal assistance contract* (art. 121-149 of *By-law* provides particular rules regarding the form, content and effects of this contract.

The provisions of the special law stipulate that, as a rule, *the legal assistance contract* will be concluded in a written form, *ad probationem*, in the form of a document under private signature, which acquires a certified date after being recorded in the lawyer ‘s official register of evidence[6].

Annex 1 of By-law contains the model of the *legal assistance contract* that lawyers will use in relation with the clients, which will be customized according to the activity to be performed by the lawyer, the agreed fee, the related expenses and other agreed clauses. *The legal assistance contract* will be considered concluded using either *the model contract in Annex* 1, or a *model contract drafted by the lawyer himself* in compliance with the essential clauses, or *the form of a letter of commitment* from the lawyer indicating the legal relationship between

[4] "*The provisions of this chapter apply to the contracts regulated by law, and if they are not sufficient, the special rules regarding the contract with which they most resemble*" (art. 1168 Civil Code *Rules applicable to unnamed contracts).*

[5] A.-A. Moise in the *New Civil Code. Comment on articles*, coord. Fl.A Baias, E. Chelaru, R. Constantinovici, I. Macovei, C.H. Beck Publishing House, Bucharest, 2012, p. 1221.

[6] *"A lawyer appearing on the bar’s table shall be entitled to assist and represent any natural or legal entity, based on a contract concluded in a written form, which acquires a certified date after being recorded in the official register of evidence."* (Art. 28 para. 1 of *Law 51/1995).*

him and the client, including the legal services and the fee, signed by the lawyer and the client, with the express mention of acceptance of the content of the letter[7], either *tacitly*, if the client has paid the fee mentioned in the contract[8], or, exceptionally, in *verbal form*[9]. At the same time, the provisions of *By-law* regarding the form of the contract detail the aspects related to the internal organization in the profession, stipulating that it will be printed in standardized and serialized forms, including the logos and names of the U.N.B.R. (The National Association of the Romanian Bars) and of the issuing Bar, forms issued by each Bar separately or by the very forms of exercising the profession in its own and personalized system[10].

With regard to its content, *the legal assistance contrac*t shall include the following elements: identification data of the form of exercise of the profession, name, professional headquarters and its representative, identification data of the client, indicating the person of the legal representative, and of the client's representative, if applicable, the object of the contract, which may be limited to one or more of the activities provided by art. 3 of the Law or may have a general character, giving the lawyer the right to administration and conservation of the client's assets, the fee, attestation of the client's or his representative, the way of resolving disputes between the lawyer and the client, the signatures of the parties. With the exception of the dispute settlement clause, the lack of other elements will invalidate the contract, if an injury has occurred that cannot be remedied otherwise[11]. The expenses incurred by the lawyer in the client's procedural interest are estimated in advance at the time of concluding the contract and are discounted according to the client's documented information on their amount and destination, the parties being able to supplement these expenses during the contract by additional documents[12].

The legal assistance contract expressly provides for the extension of the powers that the client confers on the lawyer, but in the absence of contrary provisions, the lawyer is empowered to perform any act specific

[7] Art. 121 para. 3 of By-law.
[8] Art. 121 para. 4 of By-law.
[9] Art. 121 para. 5 of By-law.
[10] Art. 122, 123 of By-law.
[11] Art. 122 para. 1 and 2 of By-law.
[12] Art. 125 of By-law.

to the profession he deems necessary to achieve the client's interests. For the activities expressly provided in the object of *the legal assistance contract*, it represents a special mandate, in the power of which the lawyer may conclude, under private signature or in authentic form, acts of conservation, administration or disposition in the name and on behalf of the client[13]. Based on the contract, the lawyer identifies himself to third parties by the power of attorney drawn up according to a model included in *Annex II of By-law*[14].

Regarding the effects of the *legal assistance contract*, the special legislation dedicates an entire section[15] to them, including also the rules of conduct that the lawyer will adopt in his professional activity.

Having a normative name and our own regulation established by law, we conclude on the *named character* of the *legal assistance contract*. Therefore, the express provisions of the lawyer 's profession laying down special rules applicable to *the legal assistance contract* will be applied as a matter of priority and will be supplemented by the general rules applicable to all contracts provided for in *Chapter I. The contract, Title II. The sources of the obligations of Book V. About the obligations* from the Civil Code, respectively the articles 1166-1323 C. civ.[16], especially with those of the institution of *representation*[17] (art. 1295-1314 Civil Code).

In cases not provided by law, the customs (usages/custom and professional usages) will be applicable when the law expressly refers to them, and in their absence, the legal provisions regarding similar situations - the provisions of the *mandate contract with representation*[18] or

[13] Art. 126 para. 3 of By-law.

[14] Art. 126 para. 1 of By-law.

[15] Subsection 2. Second part. Effects of the legal assistance contract, art. 133-140 of By-law.

[16] Art. 1167 Civil code. Rules applicable to contracts. (1) All contracts are subject to the general rules of this chapter.

(2) The particular rules regarding certain contracts are provided in this code or in special laws.

[17] Regulated in Section 7, Chapter I - The contract, Title II - Sources of obligations, Book V - About obligations of Civil code.

[18] Regulated in Chapter VI of Title IX Various special contracts of Book V On obligations of the Civil Code, Art. 2009-2038.

enterprise contract[19], as the case may be, and in their absence the general principles of law[20].

Therefore, the qualification given in the traditional conception prior to the new Civil Code according to which *the legal assistance contract* is a mandate or enterprise contract should be nuanced because, not only we are in the presence of a regulated contract *sui generis*, but it should apply in addition to the specific rules, first the general rules of the contracts provided by art. 1166-1323 of the Civil Code, and second those of the most similar contract, respectively of the mandate or enterprise contract, as the case may be.

Another natural conclusion resulting from this character is that the parties are not required to provide the entire content, all the terms and effects of the contract, but, insofar as they have not deviated from the supplementary legal rules, they will be applicable to the relations between parts automatically, whether provided for in the contract or not. On the other hand, the parties may not derogate from those legal provisions which are mandatory, under penalty of their replacement by the applicable legal provisions[21], so far as the contract can be maintained. For example, the lawyer's obligation to ensure the confidentiality of the case entrusted will remain irrespective whether or not this is expressly provided for in the legal assistance contract concluded[22]. On the other hand, the contractual clause allowing the trainee lawyer to represent the client in a case before the High Court of Cassation and Justice may lead to the annulment of the contract, as the parties cannot derogate from the mandatory provision restricting the trainee lawyer's activity only to district court[23].

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[19] Regulated in Chapter IX of Title IX Various special contracts of Book V On obligations of the Civil Code, Art. 1851-1880.

[20] "*In cases not provided for by law, the customs apply, and in their absence, the legal provisions regarding similar situations, and when there are no such provisions, the general principles of law."* (Art. 1 para 2 Sources of civil law. Civil code).

[21] Art. 1255 para. 2 Civil code.

[22] *" The lawyer shall have the obligation to keep the professional secrecy regarding any aspect of the cause entrusted to him/her, unless the law expressly stipulates otherwise*." (Art. 11 of Law 51/1995).

[23] "*A trainee lawyer may make submissions only with district courts and may assist or represent parties before the bodies and institutions stipulated under Article 3"* (Art. 22 para. 1 of Law 51/1995).

III. Analysis of the typicality of the *legal assistance contract* in terms of its legal characteristics

The legal assistance contract is a synallagmatic contract as the obligations arising at the time of its conclusion are reciprocal and interdependent[24]. For his professional activity, the lawyer has the right to a fee and to cover all the expenses made in the procedural interest of his client[25]. Thus, the main obligations arising from the contract are the obligation of the lawyer to perform the characteristic professional activity in favour of the client, respectively the obligation of the client to pay the fee and expenses incurred by the lawyer for the activity performed in his favor. The lawyer's obligation to provide the professional service is the cause of the client's obligation to pay the fee/expenses incurred and reciprocal.

The parties may be creditors and debtors to each other, but most of the time not simultaneously, which does not affect the synallagmatic character, as the reciprocity of benefits shall not be confused with reciprocity of the performances. Therefore, the fact that the lawyer's performance follows the payment of the fee does not lack *the legal assistance contract* of a synallagmatic nature, as the obligation to perform the professional activity arises from the moment of concluding the contract, depending on the fee paid by the client. At the same time, the fact that the client's obligation to pay the success fee is executed during or after the performance of the lawyer's characteristic service does not lack the synallagmatic contract as the obligation to pay a success fee conditioned by obtaining a certain result is a conditional obligation[26], being affected only by the fulfilment of the suspensive condition of providing a certain result in order to become effective.

The importance of this classification lies in the incidence of the specific effects of synallagmatic contracts resulting from reciprocity and the interdependence of mutual obligations: the exception of non-performance of the contract, the resolution and termination of the contract, the risk of

[24] "*The contract is synallagmatic when the obligations arising from it are reciprocal and interdependent. Otherwise, the contract is unilateral even if its execution entails obligations on both parties".* (Art. 1171 Civil code The synallagmatic contract and the unilateral contract)

[25] Art. 30 para. 1 of Law 51/1995.

[26] "*The obligation whose effectiveness or abolition depends on a future and uncertain event is affected by the condition"(Art. 1399 Civil code. Conditional obligation).*

the contract. The lawyer will be able to successfully invoke the exception of non-performance of the contract and will be able to refuse the execution of his obligation if the client does not pay the negotiated fee due and/or the expenses made in his professional interest. With regard to resolution, the model contract in Annex I also contains a resolutive pact[27], regarding the operation of resolution in case of non-payment by the client of the fee and/or expenses advanced by the lawyer, but the parties have the possibility to insert any clause regarding the manner in which the declaration of unilateral resolution will be made or in which the negotiated commission pact will operate, under the conditions of art. 1516, 1552-1553 of the Civil Code.

The distinction between synallagmatic and unilateral contracts is also of interest to some evidentiary aspects, regarding the obligation of the plurality of copies (art. 274 of the Procedure Civil Code - Plurality of copies) - in the case of the synallagmatic one, or of the "good and approved" formality for the unilaterally containing the obligation to pay a sum of money. However, the particular provisions of art. 121 paragraph 7 of the By-law which stipulate that it *"shall be concluded in as many copies as parties there are. Any copy bearing the original signatures of the parties shall be considered the original copy".* This special provision is an exception to the general rule of art. 274 of the Procedure Civil Code, which stipulates the obligation of the plurality of copies for each of the parties with contrary interests, for those having the same interest, one original copy being sufficient. Or the particular provisions impose the obligation of the plurality of copies for each of the parties of the contract, therefore also for the clients who, having the same interest, all conclude with the same lawyer a *contract of legal assistance.* The same exceptional rule is kept in the relations between professionals, respectively for *the legal assistance contracts* concluded by the lawyer, professional within the meaning of art. 3 of the Civil Code, with another professional,

[27] "*One's failure to pay the fee in the amount and within the delays set under article 2 of the contract, as well as one's failure to pay the value of the expenses incurred according to article 3 of the contract shall entitle the lawyer to proceed to the rightful termination of the present contract without any other formality or other judicial or extrajudicial procedure. The present fourth-degree resolutive pact shall start its effects on the date the unmet obligation became overdue*"(art. 4.6. of the legal assistance model contract, Annex 1 of By-law).

given that, as a general rule, in the relations between professionals, the evoked formalities provided by art. 274 does not apply[28].

According to the purpose pursued by the parties, *the legal assistance contract* is a contract, by its nature, *for consideration*: in return for the obligations assumed, each party seeks to obtain an advantage: the fee for the lawyer and the solution of a legal proceeding through a qualified professional for the client. However, *the legal assistance contract* can also be free of charge when the lawyer undertakes a *pro bono* characteristic professional service, thus seeking to provide the client with a benefit without obtaining any advantage in return.

In principle, *the legal assistance contract* is a commutative contract because at the time of its conclusion the existence of the rights and obligations of the parties is certain, their extent being determined or determinable.

The legal assistance contract is *a consensual contract* that is concluded by the simple agreement of the parties, without the legislator providing for the observance of any formality for its validity as *negotium iuris*[29]. The written form is required *ad probationem*, only for proof of the conclusion and content of the contract, and not *ad validitatem*. In principle, the mere agreement of the parties to enter into a contract can be proved by any means of proof. However, although it is a consensual contract, *the legal assistance contract* can be proved only by documents, art. 121 of *By-law*, expressly stipulating that the written form, required *ad probationem*[30], *"constitutes the only means of proof of the relations between the client and the lawyer"*.

In the doctrine[31] it is considered that we are in the presence of a contract essentially *intuituu personae* since the choice of the lawyer is made by the client considering the training, prestige, reputation of the chosen lawyer. The personal, unique, essential characteristics of the lawyer determine the client to conclude a contract with him considering

[28] Art. 277 of Civil Procedure Code. The documents prepared by the professionals
(1) The provisions of art. 274 and 275 do not apply in relations between professionals.

[29] "*The contract is consensual when it is formed by the simple agreement of the parties*" (Art. 1174 para. 2 of Civil Code. The consensual, solemn or real contract)

[30] Art. 28 para. 1 of Law 51/1995.

[31] L.B. Luntraru, *Civil responsibility for professional malpractice,* Universul Juridic Publishing House, Bucharest, 2018, p. 218.

that in the execution of the contract these qualities will count. Choosing a lawyer requires a sense of loyalty, trust and fairness. However, the legal assistance contract may also be concluded in consideration of the client and/or his situation, as is the case with *pro bono legal assistance contracts*. Without denying the *intuituu personae* on character of the contract, we appreciate that it is not one related to its essence, but only to its nature because, with the client's consent, the lawyer signing the legal assistance contract can be replaced.

The legal assistance contract is a contract with successive execution in the case of those professional activities that involve a certain duration in time, such as continuous legal aid services, assistance, representation in a proceeding, but can also be executed *uno ictu*, for example for a legal consultation or for the drafting of a notification, so that, on a case-by-case basis, the contract is to be qualified. This classification is of interest to the institution of resolution/termination, unilateral denunciation or nullity as their effects will only occur for the future in the case of contracts with successive execution. In the case of *the legal assistance contract*, the particular provisions stipulate that the lawyer as well as the client have the right to give up (denounce) *the legal assistance contract*, but the unilateral denunciation of the client does not constitute a reason for exemption for lawyer‘s fee or for covering the costs incurred by the lawyer in the client's procedural interest.[32] These particular provisions represent an application of the general provisions enacted by art. 1276 C.civ. on unilateral denunciation which provide, in addition, that in the case of contracts with successive or continuous performance, the right of unilateral denunciation of the contract may be exercised within a reasonable period of notice. In the case of the legal assistance contract, the lawyer will be obliged to take in a timely and reasonable manner appropriate measures to protect the client's interests, such as: notifying him, giving the client sufficient time to hire another lawyer, handing over the documents and the goods to which the client is entitled and the notification of the judicial bodies[33].

The legal assistance contract is *an enforceable title* regarding the arrears of fees and other expenses incurred by the lawyer in the interest

[32] Art. 28 para. 2 of Law 51/1995 and art. 147 of By-law.
[33] Art. 149 of By-law.

of the client[34]. It is to be invested with executory formula at the court in whose territorial area the professional headquarters of the lawyer is located and, being a document under private signature, for its execution it is necessary to register it in the National Register of Mobile Advertising in accordance with art. I point 4 of Law no. 196/2020[35].

As regards membership in the category of *adhesion contracts*[36], we consider that, although *the legal assistance contract* is drafted and proposed by the client's lawyer, this contract cannot be considered as an adhesion contract as the essential clauses - the professional activity to be carried out in client favour or the established fee - have a deep negotiated character, incompatible with the one characteristic of the adhesion contract. In addition, the clauses of the legal assistance contract transpose the rules provided by art. 121-132 of By-law, not being imposed or drafted by the lawyer, for this or as a result of his instructions, but to serve a good information and protection of the client's interests. As one author[37] pointed out, in the case of a *legal assistance contract*, it can be seen that the essential elements are usually the fee and the work performed by the lawyer. Other aspects that may constitute essential clauses may include, as appropriate, the identity of the lawyer/lawyers who will provide the services, the method of payment, deadlines for the lawyer to hand over certain works etc., but none of these elements is required in its substance, but only the obligation to mention the object of legal services, fees, etc. is provided. Moreover, through the existence of art. 5 entitled "Other clauses", the parties have practically the possibility to introduce all clauses adapted to the circumstances. For these reasons we consider, the same as the author of the cited study, that this contract does not fall into the category of adhesion contracts and are not applicable to special

[34] Art. 30 para. 5 of Law 51/1995 and art. 124 para. 1 of By-law.

[35] *Law 196/2020 for amending and supplementing Law no. 297/2018 on the National register of movable advertising and for the abrogation of Government Ordinance no. 89/2000 regarding some measures for the authorization of the operators and the registration in the Electronic Archive of Real Movable Guarantees* published in the Official Journal no. 822 of September 8, 2020.

[36] "*The contract its essential clauses are imposed or drafted by one of the parties, for this or as a result of its instructions, the other party having only to accept them as such*" (art. 1175 Civil code).

[37] G. Florea, *The impact of the New Civil Code on the legal assistance contract*, study published on juridice.ro on February, 29, 2012.

rules of the accession contracts, such as the rule of interpretation provided by art. 1269 para. 2 C.civ. according to which the stipulations are interpreted against the one who proposed them or the exception rule provided in art. 2515 para. 5 of the Civil Code regarding the impossibility of changing the duration of the prescription term or of the prescription course.

With regard to *standard*[38] and *unusual clauses*[39], it is possible for each form of pursuit of the profession to customize its practice in concluding legal assistance contracts and to make use of such clauses. Given that the model of the *legal assistance contract* is provided for in an act with normative power within the legal profession, it follows that any unusual clauses provided in that model, such as the case of dispute resolution, does not require separate approval, but any unusual clause introduced in the contract by the form of practicing the profession of lawyer will require express written approval from the client.

The lawyer is a professional according to art. 3 of the Civil Code, so that, in all situations, the *legal assistance contract* will be a *contract concluded with a professional*. This character could be of interest in terms of probation as privately signed documents drawn up by professionals have a special regime compared to other privately signed documents, but as mentioned above, the special rules require the conclusion of the *legal assistance contract* in as many copies as there are parties. At the same time, being a professional, the lawyer has certain legal obligations enacted in order to protect clients, who usually do not benefit from specific training in the field and regardless of whether they are consumers or not. For example, the lawyer has an obligation to inform

[38] "*Stipulations previously established by one of the parties for general and repeated use and which are included in the contract without having been negotiated with the other party* " (art. 1202 para. 2 Civil code).

[39] *"Standard clauses which provide for the benefit of the proposer to limit liability, the right to unilaterally terminate the contract, to suspend performance or which provide to the detriment of the other party forfeiture of rights or benefit of the term, limitation of the right to object, restriction of liberty to contract with other persons, the tacit renewal of the contract, the applicable law, compromise clauses or or by which they derogate from the norms regarding the jurisdiction of the courts do not produce effects unless they are expressly accepted, in writing, by the other party*" (Art 1203 Civil Code *Unusual clauses*).

the client about the current situation of assistance and representation and to respond promptly to any requests for information from the client[40].

Since the lawyer is a professional, in the case of *the legal assistance contract* concluded with natural persons acting as *consumers*[41] - the question would arise whether the *legal assistance contract* is a contract *concluded with consumers*, he would be subject to special laws on consumer protection, and then the common ones of the Civil Code[42]. The relevance in terms of this classification also consists in the consequences of the lack of negotiation of the contract. As instance, the provisions of *art. 4 para. (1) of Law no. 193/2000*, *republished*, which provide that "*an abusive clause is that clause which has not been negotiated directly with the consumer and which, by itself or together with other provisions of the contract, creates to the detriment of the consumer and contrary to the requirements of good faith, a significant imbalance between the rights and obligations of the parties*". The clauses found to be abusive will not produce effects on the consumer, and the contract will continue to run with his consent, if after their elimination the contract can continue.

We consider that the consumer protection legislation is not incidental to the *legal assistance contract* as the structure and content of the contractual clauses are provided by law, being a contract exempted from the incidence of abusive clauses. On the other hand, the essential obligations of the client to pay the fee and to cover the expenses incurred are pre-negotiated clauses, not imposed by the professional lawyer, who also has the obligation to inform the client on any aspect regarding the activity performed in his favour.

IV. Conclusions

The thoroughgoing study of the *legal assistance contract* inevitably involves identifying its typology through legal features, which reveals the

[40] Art. 140 para. 1 of By-law.

[41] According to point 13 of the Annex to Law no. 296/2004 on the Consumer Code, republished (Official Journal no. 224 of March 24, 2008), the consumer is defined as "*any natural person or group of natural persons constituted in associations acting for purposes outside its commercial, industrial activity or production, artisanal or liberal*".

[42] "The contract concluded with consumers is subject to special laws and, in addition, the provisions of this code." (art. 1177 Civil code. *Contract concluded with consumers*).

mechanism of the contract and its various components, components that initiate the general rules of the contract, as a source of obligations and which also borrows various parts from some special contracts, with similarities in terms of characteristic services, which is why we qualified this contract as a complex one, of a diverse nature.

The conceptualization of the *legal assistance contract* as a complex contract, by its similarity with other special contracts, does not oppose *the named character*, the special rules enshrined in the lawyer 's legislation emphasizing and strengthening the need to apply the principles of *jus commune*, which, *a fortiori*, confirms the dynamics of obligations.

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CIVIL REPRESENTATION IN OLD ROMAN LAW, IN FRENCH LAW AND IN CIVIL LAW TODAY

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ABSTRACT

Representation is one of the institutions that has its roots in Roman law under the domination of the idea of 'city law', but somewhat less obvious than in the situation of other fundamental legal institutions. The 'heritage' of Roman law was recovered quite late in European history. Only in the 16th century was the institution of representation highlighted by mandate and centuries later, the institution of representation was separated from the mandate contract. The institution of representation is regulated as a separate institution in French legislation only by the code of 2002.
In the current Romanian civil and commercial legislation there is no section from the general part of the Civil Code, respectively commercial, which deals with the principles of the institution of representation. The definition and characteristics of representation are currently determined by the legal literature based on the provisions of the general or special part of the Code regarding mandate and commission contracts.
In the following study, we will make an analysis of the evolution of representation from the institution of non-representation known in the old Roman law, to the institution of representation today.

KEYWORDS: *civil representation in Roman law; representation in French law; representation in current Romanian civil law; institution of non-representation; institution of representation;*

Introductory aspects

Representation in Roman law

In Roman law, the principle was that a person could not hire another person to represent his interests; the exception to this rule was that the slave's mistake allowed the victim to ask the master to pay compensation or hand over the guilty one[1].

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[1] Ph. Didier, *De la representation en droit privé*, L.G.D.J., Paris 2000, p. 36-37.

The Roman law did not know the principle of representation but that of non-representation. In Roman law, legal acts were concluded by solemn proceedings, and the obligations resulting from them were seen as a strictly material and exclusive connection (*obligatio*) between the contracting parties participating in the special conclusion ritual, generating legal effects only on them. This aspect, for that time of course, had an advantage, in the sense that the parties knowing each other directly and personally could avoid the surprises of an insolvency of any intermediary.

The principle of non-representation becomes an obstacle in terms of concluding contracts, basically in the development of commercial activity, towards the end of the republic when slave production knows a remarkable uncontrollable progress, and trade develops in wider areas, which requires its gradual attenuation and then removal. Therefore, in order to remedy this, the Roman law progressively developed solutions in the direction of the *alieni juris*, then of the sui juris ones.

Thus, since the hierarchical era, the head of the family (*pater familias*) could become a creditor through the persons under his power, sons of the family, as well as through his slaves, the Roman law gradually recognizing their possibility to acquire rights or obligations for the *pater familias*, which did not mean a derogation from the principle of non-representation.

Economic development and diversification of commercial activity, the need to facilitate the conclusion of contracts, required the contracting parties to become simultaneously debtor and creditor. Hence the need for a reconsideration of the state resulting from the idea of non-representation, requiring the removal of the rigor of this principle[2].

The first step in this regard is also made within the family. Thus *pater familias*, could be represented by the son under his power in the following situations:

- when empowered (*iussum*) to carry out a determined commercial business;
- when he had been given the task of conducting a land trade as administrator (*institor*) or a maritime one as shipowner (*exerciser*);

[2] VI. Hanga, *Drept privat roman, Tratat*, Didactică şi Pedagogică Publishing House, Bucharest, 1978, p. 420.

- when the son, when receiving certain goods (peculium) from the head of the family, he speculated them in the commercial activities[3].

Also, the head of the family could be represented by the slaves under his power.

The third parties with whom the sons of the family or the slaves were negotiating, had at hand two actions, on the one hand, one against the sons or slaves and on the other hand, one against the head of the family. In the first phase, these actions of the third party were recognized only exceptionally in certain situations, most of them of a commercial nature. Thus, against the master of the ship directed by one of his slaves, the exercitoria action was used, while against the master who had hired his slave for land trade, the action of the institoria was used. These actions were called 'actions with added quality' (*adiecticiae qualitatis*[4]), with the help of which third parties who had contracted with sons or slaves could sue the head of the family. Thus, in the intention of the formula *(intentia*) the name of the son was written, because he had contracted with the third party, and in the condemnation (*condamnatio*) of the same formula, the name of the family's head (*pater familia*) because the effects of the concluded transaction were reflected on him.

Another step in the direction of admitting representation was made when the priest extended the actions (*adiecticiae qualitatis*) to cases where the head of the family was represented by a third person *(externae persona*) , other than sons or slaves. When the commercial deeds of the head of the family were concluded by the persons under his power, they were called *actio institutoria, actio exercitoria, and actio de peculia et de in rem verso*[5],, a technical procedure by which it can be seen that the head of the family could become Debtor, by the effect of his representation in legal acts, by sons of family or slaves. In the case of the representation of the head of the family by a third person *(externae persona*) we can speak of representation, but in a distant way, the third contractor having at hand an additional action, in which case, the son or slave remains employed. Therefore, in these situations it can be at most

[3] M. Banciu, *Reprezentarea in actele juridice civile*, Dacia Publishing House, Cluj-Napoca, 1995, p. 10.

[4] VI. Hanga, *Drept privat roman, Tratat*, Didactică şi Pedagogică Publishing House, Bucharest, 1978, p. 421

[5] *Ibidem*, p. 423.

an imperfect representation, because both in the case of representation by a third person or by persons under power, they, in their capacity as representative remain obliged together with the represented.

At the beginning of the third century, under the influence of the Papinian jurisconsult[6], it was admitted that all those who have a contract with the administrator *(procurator)* of an owner *(dominus),* within the limits of the administration to which he was empowered by the owner, can sue him. Thus, the representation in the case of the civil mandate was ensured. The action by which this kind of representation is ensured was called the quasi-institutional action *(actio quasi institoria)*, following the example of those that derived from the administration of a land commercial fund. According to some, the existence of this action is due to the compilers[7].

In some cases, however, the Romans knew a perfect representation. This kind of representation was admitted in the case of guardianship and cleanliness, as well as in the case of the transfer of some properties or possessions. In the case of persons placed under guardianship or curatorship, they became the sole creditors and debtors after the cessation of guardianship or curatorship, and in case of transfer of property or possessions acquired the property or possession, the represented persons who received this on the ground of rightful title[8], and not the persons that served as intermediaries.

Although in both cases mentioned above, the representation from a practical point of view had complete effects, this being achieved through all kinds of procedural subterfuges, still it was not constituted in an independent legal institution.

Conditioned by the use of certain technical procedures, the representation had in Roman law, an existence somewhat subordinated to them. The technical ingenuity that made it possible to make the representation highlighted its great insufficiency and importance of this institution.

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[6] Cf.D.5, 31 pr.; D14, 3, 19, pr.; Ulpian D. 14, 17, 1, 10, 5; 19, 1, 13, 25; Albertario, Studii IV 189 et seq.; L'actio quasi institoria (1912) and Carelli, St. Scorza (1940) 144 et seq., care considera *actio quasi institoria* o creatie a lui Iustinian.

[7] *Ibidem*.

[8] VI. Hanga, *Drept privat roman, Note de curs*, "D. Cantemir" University, Law Faculty, Cluj, 1992, pp. 106-107.

Representation in French law

French law has hardly accepted the possibility of hiring another party for representation. However, the representation found in the mandate an instrument through which it could thus develop. We must keep in mind that this development was based on three systems of law, namely: Roman law, canon law and old law.

As presented above, Roman law has had great difficulty in admitting the voluntary representation of a private person through another person, due to the fact that representation was prohibited by legal formalism on the one hand, and on the other hand, the obligation in Roman law had a strictly personal character, the debtor and the creditor confronting each other directly.

The expansion of trade, as well as the needs of practice have led to the development of the mandate. In this sense, several indirect procedures were used, among which:

- *nuntius* (faithfully represents the will of the representative);
- *the foreman of the master* (he had a greater independence than that of his nuncio, being an alien juris);
- *jussum.*

Finally, an imperfect representation was reached, through which the trustee had an obligation towards third parties, and the principal is committed to the trustee[9].

Unfortunately, Roman law has not come to know the perfect representation in which the person who is represented is responsible for the acts concluded by the representative. Therefore, the representation never took place in Rome in the true sense that this institution has today.

Canon law, in the twelfth century, allows the extension of the mandate, given the development of consensualism to the detriment of the formalism of contracts, thus removing the obstacles that the latter constituted for representation. However, the voluntary representation took place very slowly, the technique of the nuncio in Roman law resumed without making a clear distinction between it and the mandate.

At the end of the 16th century, during the time of consensualism, the representation experienced a real progress, so the principal could leave

[9] Ph. Malaurie, L. Aynes, *Droit civil. Contrats speciaux*, 12 ed., 1998/1999, Editions Cujas, Paris, p. 289.

the trustee a power of initiative, thus the trustee not being responsible for his actions, only if he acted within the limits of the mandate.

The principle of representation in the mandate, starting with the 16th century, is gained. Pothier defines the mandate as the contract "by which one of the contractors entrusts the management of one or more businesses, in order to carry it out in his place and at his own risk, to another contractor who is empowered free of charge and undertakes to be accountable.[10]" However, Pothier did not distinguish between the institution of business management and that of the mandate by the fact that one is a contract and the other is not. Pothier also saw in the representation 'a fiction' by which the representative 'puts on the clothes' of the represented one, substitutes him, with the desire to represent him, and the act drawn up by him is considered to have been perfected by the substituted one.

The theory of representation as implying a legal fiction, or more precisely, as based on a legal fiction, starts from the claim that the represented person manifests his will through the person of the representative who has only the role of expressing his will, but in light of this thesis, a disregard is made concerning the existence of the representation convention, which implies the existence of the will of the representative, both in terms of the acceptance to represent, and in relation to the act that follows the conclusion.

Later, in the French legal literature, authors such as Capitant, Demague, Pilon emphasized the autonomy and the own character of the representation. At the same time, the opinion was crystallized according to which the judicial representation has two main characteristic features: the representative replaces the representative, manifesting his own will in concluding the legal act, which once concluded, thus produces its effects directly on the representative.

The nineteenth century brought the most important aspect within the institution of representation, representation becoming an essential element of the mandate, but seen as a distinct feature, it was not immediately adopted. Also, the new theory of representation was divided by some French authors into two, those who supported the old school

[10] Pothier, *Traite du mandat*, 1781, article prelimimaire.

based on facts (object of the mandate) and those who supported the modern school based on representation[11].

In contemporary times, art. 119 of the French Civil Code, recognizes the existence of representation but only in the texts referring to the mandate (art. 1994-2010). At the same time, the French Commercial Code in art. 94-95, provides very few provisions regarding the commission contract.

The institution of representation has known several directions of evolution. The first of these concerns the connection between mandate and representation and the last one considers the contemporary "professionalization" of the mandate contract[12]. Thus, if at the beginning, there was the intention of the French authors to explain the representation, with the passing of time, considering the importance of the institution of representation, as well as the representation needs of the expanding society, they came to consider unnecessary the justification of representation.

Starting with the 19th century, the relations between the principal and the trustee as well as the relations between the trustee and the third parties began to be progressively distinguished, considering that these relations constituted an ensemble. At the end of the 19th century, the representation was separated from the mandate contract, thus dismantling the representation without a mandate (legal, judicial representation, business management and apparent mandate.

In the interwar period, the mandate becomes the activity of the professionals, which means that at the beginning, the employed trustee should develop, following in this sense, the need to regulate the means of protection of the trustee against the principal (the contract termination indemnity) and last but not least, to be invoked the consumer's protection against the trustee (information obligation, informative formalism).

Representation in current Romanian civil law

Currently, representation plays an important role and has a special utility in legal relations.

[11] Ph. Didier, *op. cit*.
[12] Ph. Malaurie, L. Aynes, *op. cit*., pp. 289-290.

Although numerous references are made in the literature towards representation, our Civil Code does not contain general provisions regarding it, limiting itself to the application of the principles of representation in some matters, especially to the mandate. However, the representation and the mandate cannot be seen as identical because there is representation without a mandate, as well as a mandate without representation. The mandate is one of the sources of conventional representation, while legal and judicial representation are cases of representation without a mandate.

Representation is defined as 'the technical-legal procedure by which a person (trustee) concludes a legal act in the name and on behalf of another person (principal), the effects of the legal act thus concluded occurring directly in the person of the represented one[13].' At the same time, the representation suggests the idea of an 'absent still considered present'. Representation in civil legal relations, in general, 'consists in the fact that a person seeks to value the interests of another person, natural or moral, acting in his name, place and on his behalf, and may even oblige him, based on a power conferred by convention - conventional representation -by a court decision - juridical representation - or by law - legal representation ". When we refer to the representation in legal acts 'this consists in the fact that a person called trustee, makes an act whose effects are directly reflected on another person, called principal[14]'.

Conventional representation is most often used in the field of patrimonial legal relations. In the field of obligations, the possibility to use the services of a trustee extends in principle to all documents. There are very few inter-patrimonial acts of a patrimonial nature whose character is so personal as to exclude any representation of the parties. Instead, strictly personal documents cannot be concluded by a trustee. Such documents are found in the matter of family law such as: marriage, adoption, recognition by parents of a child out of the institution of matrimony, as well as in the matter of inheritance law, will.

Representation is useful for persons lacking the capacity to exercise, who cannot personally conclude a valid legal act. Without the institution

[13] G. Boroi, *Drept civil. Partea generală. Persoanele*, All Beck Publishing House, Bucharest, 2002, p. 216.

[14] I. Deleanu, *Fictiunile juridice*, All Beck Publishing House, Bucharest, 2005, p. 443.

of representation, they would not be able to enjoy any advantage of legal life. By representation, the law protects the incapable, giving them a legal representative who with his mature will is able to replace the unconscious will of the one without the capacity to exercise and to conclude legal acts in the name and on behalf of the latter.

The usefulness of representation is also seen in the case of persons with full exercise capacity who are given the opportunity to conclude legal acts without taking part in person in their formation, through a conventional representative, thus considerably facilitating economic exchanges between persons at great distances from each other.

Also through the representation procedure, legal entities can conclude documents through their proxies (bodies). For legal entities, representation is their natural way of appearing as parties in civil legal relations. The representative bodies of the legal person are component parts of it, through which they exercise their rights and assume their obligations, so that they should not be considered as entities distinct from the legal person. Thus, the representation is present in any way of expressing the will of the legal person.

A special case in which representation can work is business management. As it is known, it consists in the commission by a person of a legal act or of a fact in the interest of another person, without the latter having given the business manager any power of attorney. Thus, if the act committed on behalf of another person was useful, it immediately produces effects towards this person, who becomes a direct creditor or debtor. It is a case of representation without power of attorney, the act still producing its effects directly in the person and patrimony of the representative, by the will, usefully manifested, of the business manager and in the power of law, which validates such acts.

Another way in which the institution of representation is highlighted is the succession representation. This is defined as a benefit of the law by virtue of which a legal heir (or several) of a more distant rank, called a representative, ascends to the rank, place and rights of his ascendant, called a representative, who is deceased at the opening of the inheritance, in order to gather the portion, part that would have been given to him from the inheritance, if he had been alive[15]..

[15] Fr. Deak, *Tratat de drept succesoral*, Universul Juridic Publishing House, Bucharest, 2002, p. 78.

Representation can occur in civil law relations in commercial law relations, but also in the field of civil procedural law. Judicial representation 'is a particular form of civil representation, which is why this institution is sometimes not considered to have a purely procedural character. [16].'

Currently, the representation can also be said to be an apparent derogation from the rule that conventions have effect only between the contracting parties, a legal derogation valid as long as it is not stopped by a legal provision or is incompatible with the nature of the right to which it refers to.

Conclusions

In conclusion, history indicates that, along with the mandate, there are other cases that can be assimilated to representation.

The analysis on parts of the history of representation leads us to the conclusion that it cannot be reduced to a variation around an ideal model that would be that of the mandate. In other words, the institution of representation has a much broader vocation. To establish a theory of representation on the model of the mandate appears as unfounded from a historical point of view. However, it remains to be seen whether, despite its partial character, the Theory of Representation, as it is usually studied, offers a sufficient construction[17].

Regarding the representation in the current civil law, we can conclude that the mandate refers to the internal aspect of the relations between the representative and the represented and the representation concerns the external aspect of these relations, respectively on the one hand, the relations between the represented and the representative and on the other hand, the third party contractor.

The basis of representation lies in the possibility of substituting a person by another person, substitution that the law requires (in the case of legal representation) or allows it (in the case of conventional and judicial representation) and due to which the act committed by a person produces its effects directly in the person and the patrimony of another.

[16] I. Leş, *Tratat de drept procesual civil*, All Beck Publishing House, Bucharest, 2001, p. 114.

[17] Ph. Didier, *op. cit*., p. 50.

The institution of representation, from our point of view is in continuous development, needing a continuous updating in accordance with the needs of society generated by the main transformation of communication technologies between the parties.

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OBLIGATION TO WEAR A MASK IN OPEN SPACES. A VIOLATION OF A PERSON'S RIGHTS AND FREEDOMS?

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ABSTRACT

Since ancient times, humanity has faced various threats and risks on the population, respectively on health, economy, but also on the manifestation and social change of citizens in a community, the latter being forced to obey certain rules and restrictions they had to abide by. The coronavirus pandemic has hit the 21st century hard, with the medical and state systems also unprepared for the humanitarian crisis.
With the outbreak of this deadly virus, the wearing of a mask in both closed and open spaces was imposed as an obligation, which is why certain rights and freedoms of citizens were violated. These restrictions were imposed both in Romania and in the states of Europe, depending on the scenario in which they were, respectively the severity of the evolution of the virus. Wearing an outdoor protective mask has become an obligation imposed by several European countries, including Romania. The question arises as to whether its conduct restricts in any way the rights and freedoms of the citizen and how it is demonstrated or what this fact is based on from a legal point of view.

KEYWORDS: *freedom; human rights; mask; coronavirus pandemic;*

Argument

Certainly, the reason for choosing this theme is due to the current reality that is present both in Europe and in the world. The world was represented in a situation of relative peace and tranquility, but with the advent of the COVID-19 virus, things have changed, and the new world order has had and is suffering in all areas: political, economic, social, religious, etc. Any legal professional must be trained and study the ways and means by which state officials undertake and take abusive measures against citizens and implicitly on their rights and obligations. In this context, do scientific researchers in the field of law need to be prepared to answer some crucial questions about how citizens can express

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themselves and be free, such as? Will they have to wear a protective mask forever in closed or open spaces? What could it do to defend the authorities' abuse of the fine?

In our research approach, after more documentation, evaluation of the information provided from the public environment, but also of our own conviction, we arrived at the following two possible hypotheses, such as:

1. Wearing a face mask in enclosed or open spaces will be mandatory for a long period of time, even several years, as citizens have to adapt and submit to the requirements of the authorities;

2. The revolt of the citizens in order not to be obliged to wear the mask of protection and the knowledge of their rights and freedoms, of the legal framework, respectively of the Constitution and of the normative acts in force.

The legal framework for wearing a mask at national level

By Government Decision no. 856 of 14.10.2020, the alert status on the Romanian territory was extended starting with October 15, 2020, and some applicable measures were established regarding stopping or limiting the spread with the SARS-Cov2[1]virus, a document that was necessary for the continuity of normative acts, but also the safety of citizens.

Also, the Decision with no. 26 of 02.11.2020 which maintained the measures applied to citizens, commercial workers, the education system by maintaining online courses, but also the obligation to wear a protective mask for all persons who have reached the age of 5, in all spaces open public[2]. This fact is due to the red scenario in which the city of Bucharest is, but also to other cities in the country that face the same problem, given that the number of 3/1000 inhabitants of the number of diseases with the new virus has not decreased.

[1] Government Decision no. 856 of 14.10.2020 regarding the extension of the alert status on the Romanian territory starting with October 15, 2020, as well as the establishment of the measures applied during it to prevent and combat the effects of the COVID-19 pandemic, p. Accessed on 02.11.2020 and available at *http://legislatie.just.ro/Public/DetaliiDocument/231208*.

[2] Government Decision no. 26 of 02.11.2010 approved by the Bucharest Municipality Committee for Emergency Situations - Permanent Technical Secretariat;

What draws our attention is the fact that Law no. 55 of 15.05.2020 on some measures to prevent and combat the effects of the COVID-19[3] pandemic does not provide in any way the obligation to wear a mask in open spaces, and the establishment of this by another normative act or a government decision, as it is and In our case, it is practically lower forbidden if we are to refer to the principle of the hierarchy of normative acts.

Moreover, the Law No. 136 of 2020 does not provide for the obligation to wear a mask, Article 1, for example, referring to the fact that "*This law regulates some necessary measures in the field of public health on a temporary basis, in situations of epidemiological and biological risk, to prevent the introduction and limit the spread of infectious diseases in Romania."*[4] Thus, among the measures that we consider absolutely necessary to reduce the risk of infection with the new coronavirus, it is not specified in any form to wear the mask, whether it is in the closed or open space.

The legal framework also extends to the Romanian Constitution, the fundamental law of the state, which through art. 53 of the text refers to the fact that the freedoms or rights of a person can be restricted only by law and only if the situation requires it.[5] We understand in this case that restrictions that could actually modify or restrict a person's rights and freedoms can only be made by law, as part of a legal act of Parliament.

As it resulted from all the elements / legal framework outlined above, given the severity and spread of the virus in our country, but especially in Europe, some measures are absolutely necessary to protect citizens, but

[3] Law no. 55 of 15.05.2020 on some measures to prevent and combat the effects of the COVID-19 pandemic, p. Accessed on 02.11.2020 and available at *http://legislatie.just.ro/Public/DetaliiDocument/225620.*

[4] Law no. 136 of July 18, 2020 on the establishment of measures in the field of public health in situations of epidemiological and biological risk, art. 1, p. Accessed on 03.11.2020 and available at *http://legislatie.just.ro/Public/DetaliiDocument/227953*.

[5] Art. 53 of the Romanian Constitution "Restriction on the exercise of certain rights or freedoms (1) The exercise of certain rights or freedoms may be restricted only by law and only if required, as appropriate, for: defense of national security, order, public health or morals, citizens' rights and freedoms; conducting criminal investigation; prevention of the consequences of a natural disaster, disaster or particularly serious disaster. (2) Restriction may be ordered only if it is necessary in a democratic society. The measure must be proportionate to the situation which gave rise to it, be applied in a non-discriminatory manner and without prejudice to the existence of a right or freedom.

the obligation to wear a mask in public spaces can have negative effects on a person's behaviour and freedom of expression. A person's freedom of expression can include the freedom to seek, receive and transmit ideas and information of any kind, and the forms of expression can be speech, writing, art, but also other media, as is the way you dress. Requiring someone to wear a mask may limit a person's freedom of expression.

According to some legal experts, "*The texts of Law 55 which established contraventions for not wearing a mask are declared unconstitutional by the RCC. At this moment, they are virtually repealed, because the 45 days of suspension of their applicability have already passed and they have not yet been modified in order to be agreed with the CCR decision*"[6].

In our opinion, at the national level, the obligation to wear a mask, in addition to the fact that it is not expressly provided for in any legal act, also limits the person's right to liberty and should come more as a recommendation from the authorities to wear it in open spaces, not as an obligation. If we were to look at other European countries, for example, they have taken similar or even different measures to our country, all with the aim of trying to limit the spread of the SARS VOC-2 virus. In other words, the methods applied by European countries cannot be overlooked.

Europe

The situation in Europe become in autumn 2020 dramatic, and European Union states and officials have come together to strengthen collective efforts to prevent and combat the COVID-19 pandemic.

Some of the important issues discussed and implemented by the European Union are objectives for strengthening the health system in order to effectively alleviate the social and economic impact of the pandemic with the support of small and medium-sized enterprises,

[6] The obligation to wear a mask outdoors is unconstitutional. Any fines are illegal, p. Accessed on 03.11.2020 and available at *https://www.smartradio.ro/obligatia-de-a-purta-masca-in-aer-liber-nu-este-constitutiunea-eventualele -amenzi-is-illegal/.*

ensuring the provision of medical equipment (masks, gloves, coveralls, oxygen devices, etc.), promoting research for treatments and vaccines. [7]

Starting from art. 1 of the Decision with no. 1082/2013 / EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision no. 2119/98 / EC provides that "*art. Article 168 of the Treaty on the Functioning of the European Union (TFEU) states, inter alia, that a high level of human health must be ensured in the definition and implementation of all Union policies and activities".*[8] Also, the Decision refers in art. 5 and the establishment of Regulation (EC) no. Regulation (EC) No 851/2004 of the European Parliament and of the Council of 21 April 2004 establishing a European Center for Disease Prevention and Control (1) (ECDC) assigns to the ECDC a mandate covering the surveillance, detection and assessment of the risks of threats to human health of communicable diseases and outbreaks of unknown origin. We note that ensuring the right to health, as well as the possibility of detecting and assessing epidemiological situations are found in the above legal texts, and this shows that European states are prepared for such a situation and the citizen is at the forefront. Hence the need to take measures to ensure that the right to life of the citizen is not endangered, as is the recommendation and/or obligation to wear a mask in response to the global coronavirus pandemic.

Thus, most states across Europe have adopted measures to distance themselves, close restaurants, schools, malls, etc., including the measure of wearing a mask in closed or open spaces. According to some reports, which have a legal basis, at the state level it was established:

• In the Czech Republic, the measure of wearing the mask in open spaces has been taken since the country had less than 500 coronavirus infections per day, being the first country in the European Union to adopt this restriction / obligation on citizens;

[7] Council of the European Union – COVID-19 pandemic caused by coronavirus, p. Accessed on 05.11.2020 and available at

https://www.consilium.europa.eu/ro/policies/coronavirus /

[8] Art. 1 of the Decision with no. 1082/2013 / EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision no. 2119/98/CE, p. Accessed on 05.11.2020 and available at *https://www.cnscbt.ro/index.php/legistatie/1-decizia-1082-amenintari-transfrontaliere-grave-pt-sanatate/ file.*

• In Bosnia and Herzegovina, several measures have been imposed since March 29, such as closing the borders, going out of the house within a certain time slot, but also carrying the mask in open spaces;

• In Austria, the obligation to wear a mask has been imposed in public places since April, with the authorities noticing a slight decrease in the number of people infected with the new virus;

• In Italy and France, it was mandatory to wear a mask indoors, public transport, shops starting in May of this year, but this measure did not limit the number of diseases, the number of cases increasing from day t

• On 20 May, the Spanish authorities ruled that wearing a mask should be worn indoors and outdoors when social distancing is not possible.[9]

Jurisprudence of the European Court of Human Rights

The measures taken by all the authorities of the European states were certainly necessary, as they were applied gradually, depending on the number of infections with the new virus. During the state of emergency, many countries have resorted to ECHR case law in order to prevent the spread of COVID-19.

According to a study on the issue of ECHR jurisprudence, was demonstrated that the measures adopted in the context of the pandemic may risk losing the text of proportionality when they reach the national judge. In Romania, the national judge has the obligation to apply with priority the jurisprudence of the ECHR, fact provided in art. 20 of the Romanian Constitution.[10] As expected, many countries have entered a state of emergency, which is why some of the affected states have resorted to the derogation of art. 15 of the European Convention on Human Rights, a derogation that can be made without exception and perhaps in the conditions that the respective measures do not contravene

[9] Mediafax, "Europe suffocated by a mask. What measures have European states taken", page accessed on 05.11.2020 and available at *https://www.mediafax.ro/externe/europa-sufocata-de-masca-ce-masuri-au-luat-statele- European-19177364.*

[10] M. Maziliu-Babel, *ECHR jurisprudence incident in the State of Emergency to prevent the spread of COVID-19*, page accessed on 06.11.2020 and available at *https://wolterskluwer.ro/jurisprudenta-cedo-incidenta-in-starea-de-urgenta-pentru-prevention-spreading-covid-19 /*

the obligations related to the international law, but also if the situation necessarily imposes it.

It argues that limiting a fundamental right is in fact a violation of it, and the rights arising from the state of emergency / alert to which countries have appealed have violated several citizens' rights, including: the right to life, the right to liberty and security, freedom of expression, the right to respect for private and family life, etc.

In the opinion cited, the obligations of art. 5 arising from the Convention and which were taken even by the Romanian state limited the right to liberty and security. [11] The measures of deprivation of liberty within the meaning of art. 5 of the Convention are the isolation of a person, traffic restrictions, quarantine, the obligation to wear a mask in closed and open spaces, etc. The Court also seeks to ensure that those conditions are imposed in accordance with national law and the prevention of abusive measures. If there will be irregularities regarding the proposed purpose, then there will be a violation of art. 18 of the Convention, but also when there is an element of bad faith and which are contrary to art. 5 of the Convention.

In our opinion, what was not specified in the above study was the obligation to wear a mask in all closed and open spaces, the obligation that we can say is part of the violation of the right to freedom of the citizen, respectively a deprivation of liberty. We support this fact by which it is at the level of our country, the People's Advocate appealed to the Constitutional Court the fines for non-compliance with military ordinances, and the CCR judges were put in the situation of being defined in an Ordinance no. 34 // 2020, by the fact that only by law approved by the Parliament and not through the GEO or other administrative acts can even be restricted constitutional rights. Sanctions during the state of emergency concerning the restriction of the right to free movement were challenged and declared unconstitutional by the authorities.

Thus, we consider that there is a possibility that this fact will be repeated and the authorities will apply very large fines again, but this time for not respecting the wearing of the mask in public and closed spaces, which happened. The conclusion is that these fines will be challenged by citizens and will be declared unconstitutional. We note that

[11] *Ibidem*.

the citizen will have the obligation not to be fined and not to protect those around them, to be guided by their civic spirit and with the hope that if they will comply with this recommended measure even by the World Health Organization, then their right and desire to feel free will be shortened.

World Health Organization

At the beginning of the pandemic, the World Health Organization did not impose and did not consider it necessary to wear a mask in all enclosed and public spaces, this referred more to vulnerable people who could be exposed to the SARS COV-2 virus, such as the elderly, those with chronic heart disease, pneumonia or incurable diseases.

We note that the Organization came before the public with a recommendation to wear a mask in open spaces and not as an obligation, because previously there was not enough evidence to say that healthy people should wear a mask. However, WHO Director said that "*in light of evolving evidence, WHO recommends that governments encourage the general public to wear masks where there is widespread transmission and physical distancing is difficult, such as public transport, shops or other restricted or crowded environments."* [12]

Universal Declaration of Human Rights

In order to answer the question in the title of the scientific paper, we believe that it is absolutely necessary to refer to the Universal Declaration of Human Rights, the most important act with reference to man / citizen, regardless of race, colour, sex, language, culture, political opinion, wealth, place of birth and origin.

Thus, according to art. 1 of this Declaration states that *"all beings are born free and equal in dignity and rights. They are endowed with reason and conscience and must behave towards each other in the spirit of*

[12] BBC News, *Coronavirus: WHO advises to wear masks in public areas*, page accessed on 05.11.2020 and available at *https://www.bbc.com/news/health-52945210.*

brotherhood", and in addition to this, art. 3 refers to the fact that "every human being has the right to life, liberty and security of person."[13]

In our opinion, the fact that a person is endowed with a conscience and thinks what he does and says, being responsible for his own deeds, he is obliged to adapt to situations and events in the civic and fraternal spirit he has or should have. be they negative or positive in society. The most eloquent example is without a doubt the recommendation and then the obligation to wear the mask by all people both indoors and outdoors, a measure adopted by most European states and beyond. Even if this fact may seem at first sight a violation of man's ability to express himself, to be free from a physical point of view (here we refer to facial expressions, gestures, facial expressions, etc.), he is actually responsible for his own freedom both for himself and those around him by the fact that wearing a protective mask can protect vulnerable people, but also the possibility of inducing a state of security, not insecurity of other citizens by following the example of respecting measures imposed by the authorities.

Conclusions

It is clear that the coronavirus pandemic has put the whole of humanity in a situation that it has not faced for a long time, the current society not knowing how to react in a fair and independent way, and as a result, the authorities have had to take action and restrictions that directly affect the citizen and even the state. The measures, which have been gradually adopted by some states and less so by others, have succeeded in limiting the rights and obligations of individuals.

In our opinion, on the one hand, we must be constantly alarmed and worried about the ways in which human rights and freedoms are being restricted, but also the time needed for them to be constrained by force majeure, as they might fall and the coronavirus pandemic. The fact that many countries have resorted to the derogation of art. 15 of the European Convention on Human Rights, does not mean that this derogation must extend or persist for a long period of time, this fact not being mentioned anywhere in the Convention, but only specifying how much the situation

[13] *Universal Declaration of Human Rights* – Art. 1 and art. 3, page accessed on 05.11.2020 and available at
https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/rum.pdf.

necessarily requires. This situation can be interpreted in many ways by the legislator or citizen himself, who does not dispute that his right to life or health is not above his own freedom, but he wants to be specific and clear in time, because the restriction of his rights for an indefinite period of time can have serious effects on his freedom of expression, of future freedom, of non-integration into society. The citizen will no longer know how to behave in society because by the obligation to wear a protective mask, although he understood that it is a necessity and can protect his life and the lives of others, he will not feel comfortable and free to be his own.

On the other hand, in our opinion, we consider that at present, most European countries have established total or partial quarantine, and the obligation to wear a mask has become mandatory in both closed and open spaces, a measure which, according to the WHO, would limit the number of infection with the new coronavirus, which we would agree on in this context. We cannot deny that we all like and appreciate the desire for freedom, for expression, and the rights of each of us are individual, but this very opposite part of rights is what we call responsibility for one's actions and the well-being of those around us. We have no right to endanger the health of anyone other than ourselves, especially if we are referring to close friends, sick and vulnerable relatives to this virus. We will never know their reaction to this virus until their condition worsens and can be fatal. We do not want to live or be conscious of the death of a loved one or just the thought that we could infect someone who had serious health problems, even though we were not aware it could have caused his death.

Thus, towards the end of the scientific paper, we remain at the second hypothesis, in which the obligation to wear a mask in public spaces is absolutely necessary to protect our lives and health, as well as others, even if this, as we have shown limits our fundamental rights and freedoms.

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[14] European Commission Decision 5538 -8 Aug 2012 case definitions, p. Accessed on 05.11.2020 and available at https:// *www.cnscbt.ro/index.php/legistatie/2-decizia-comisiei-europene-5538-8 -aug-2012-case-definitions/tabs.*

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CONSIDERATIONS REGARDING THE LOSS OF CHANCE IN CRIMINAL CIVIL LIABILITY

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ABSTRACT

This study deals with reviewing the legal provisions of the current Romanian Civil Code regarding the regulation of the concept of loss of chance in tort civil liability. As we well know, the victim has been waiting for the full and immediate remedy of the damage suffered, regardless of its patrimonial or non-patrimonial character.

KEYWORDS: *loss of chance; non-pecuniary damage; civil liability; medical liability;*

1. Preliminary remarks

Human rights and fundamental freedoms are recognized as the common legal heritage of mankind, which are considered universal values in international relations, benefiting from legal protection. The recognition, enforcement and protection of fundamental human rights and freedoms are essential for the support of a democratic society.

The priority character of the fundamental human rights and freedoms is found in the beginnings, sources of law such as: treaties, customs, general principles of law, laws, regulations, etc. Thus in international human rights law we find The Universal Declaration of Human Rights, the most important source of human rights but we can also distinguish sources of protection at European level such as the European Convention on Human Rights, additional protocols to it, the Charter of Fundamental Rights of the European Union etc. At national level, the prime regulation is in the Romanian Constitution, which guarantees in article 22 the right to life, as well as the right to physical and mental integrity. The guarantee by fundamental law of fundamental human rights and freedoms means to equally ensure to every human being, the right to life construed as an essential right, to respect and defend their physical and mental integrity,

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dignity and personality, fundamental rights and freedoms, as well as their legitimate interests.

2. Loss of chance in the Romanian Civil Code

The current Civil Code takes over the legal content of art. 22 paragraph 1 of the Romanian Constitution and provides in art. 61 that "The life, health and physical and mental integrity of any person are equally guaranteed and protected by law." Moreover, we find in paragraph 2 of art. 61 the following essential values that must be taken into account, namely: "The interest and wellness of the human being must take precedence over the unique interest of society or science." Also, the ordinary law for the protection and defense of fundamental human rights and freedoms capitalized on the doctrine and jurisprudence in matters of tort civil liability, which led to the regulation in Charter V "About obligations" Title II "Sources of obligations", Chapter IV "Civil liability" of Section 6 "Remedy of damage in case of tort liability" through the provisions of art. 1385 par. 4 of the concept of loss of chance: "If the tort also caused the loss of chance to obtain an advantage or to avoid damage, the remedy will be proportional to the probability of obtaining the advantage or, as applicable, avoiding the damage, taking into account the victim's circumstances and their concrete situation."

Also, the concept of loss of chance is regulated in the Civil Code and in Charter V. "About obligations" Title V "Execution of obligations" Chapter II "Forced execution of obligations" Section 4 "Execution by equivalent" of the provisions of art. 1532 paragraph 2, "loss of chance to obtain an advantage", loss that shall be repaired "proportionally to the probability of obtaining the advantage, taking into account the circumstances and the concrete situation of the creditor." In accordance with article 1532 paragraph 3 of the Civil Code "The damage whose amount cannot be established with certainty is determined by the court". Even if we did not intend to analyse the full remedy of the damage within the contractual civil liability we wanted to mention that the legislator considered the application of the principle of full remedy of damage in the whole matter of civil liability regardless of its legal regime, being considered a fundamental principle of civil liability.

The main purpose of civil liability is to repair the damage and, in the alternative, to sanction the perpetrator as well as to apply the principle of preventing the commission of similar acts. The complete remedy of the damage implies the effectively restore the victim to the condition prior to the moment of committing the tort, it is mandatory to cover all the damages, both the patrimonial and the non-patrimonial ones. The remedy established based on tort liability must be complete, although the provisions of art. 1385 paragraph 1 of the Civil Code set forth: "The damage shall be fully covered, unless otherwise provided by law".

We believe that the remark in art. 1385 paragraph 1 of the Civil Code on the existence of the possibility of limiting the victim's right to request the coverage of the entire damage by adopting special legal provisions would lead to violation of art. 6 paragraph 1 of the European Convention on Human Rights. A category of rights and obligations highlighted by the jurisprudence of the bodies of the Convention is that of civil rights and obligations which fall within the scope of Article 6 paragraph 1 of the Convention, namely "dealing with non-patrimonial and patrimonial personal civil rights."[1]

In this context, the loss of chance "becomes legally relevant only when it is the result of a guilty conduct of another, which intervenes in an evolution or procedure and thus wastes the possibility of a favorable event expected by the victim, materialized, either in a gain, or in avoiding a loss by acts such as: failure to file an appeal by the lawyer in time or failure to file documents significant for the case, thus it resulted in losing the trial for which they were hired by the victim, the doctor's failure to fulfil their obligations to provide the patient with healthcare, causing or favouring - death or infirmity, the tort of a third party preventing the victim from participating in a competition in which the victim could have been ranked among the winners, etc. "Liability may also be incurred if there are negative consequences directly caused by committing a tort consisting in the loss of the real and serious possibility of the occurrence of a favourable event in the victim's life that could have brought

[1] C. Bîrsan, *European Convention on Human Rights. Commentary on articles*, 2nd ed., C.H. Beck Publishing House, Bucharest, p. 366.

fulfilment in their personal life or economic life, by performing some projects.[2]

Over time, the judicial practice has recognized such damages precisely in order to ensure the full remedy of the damage caused to the victim, such damage being compensated. The damage caused by the "loss of chance" must meet the following conditions in order to be repairable by tort liability: it must be a real and certain damage which shows that there must be a causal link between the tort and the favourable event that would have occurred and the chance of gaining an advantage is effective and serious. The damage caused by the "loss of chance" must not be confused with the final damage, namely the one represented by the advantage which the victim was deprived of.

Categories of damages suffered through loss of chance were distinguished as follows: "loss of chance attached to a right which the victim was deprived of due to malpractice by a lawyer or other legal assistant(…)"[3], „ "loss of the chance to improve the social situation" (professional, school, university)[4], „ loss of chance in the medical field[5]. In the past few years, loss of chance in the medical field has a relevant jurisprudence. The jurisprudence has dealt with the loss of the chance of survival or healing when, at the origin of death or disability, a medical error caused the patient to lose a chance to avoid the damage that has occurred in the end. (…) If it cannot be established that the medical healthcare provided on time would have cured the patient, the error-generating delay can only be compensated only with as a loss of chance."[6] „ A loss of a chance of survival or cure when the patient has a chance of being cured of a condition that the doctor has wrongly failed to diagnose or, although diagnosed, has prescribed inadequate treatment.

[2] Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *New Civil Code. Comment on articles,* 2nd ed., C.H. Beck Publishing House, Bucharest, p. 1550.

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[4] *Ibidem*.

[5] *Ibidem*.

[6] G.A. Năsui, *Medical malpractice. Particularities of medical civil liability; relevant domestic jurisprudence, malpractice of liberal professions*, 2nd ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, p. 183.

Losing a chance is only harmful when the chances lost were real and serious."[7]

The French judicial practice regarding compensation states the following: "In case of loss of chance, the reparation of the damage can only be partial and cannot include all the damages suffered by the patient, which were not established to have been caused by the doctor's mistake"[8] "The compensation will be made exclusively on the loss of the chances that the patient had to get rid of this evil. The lost chances must be concretely assessed according to the severity of the patient's condition and the consequences arising from this condition."[9] "The loss of the chance to be provided with healthcare effectively does not represent only a moral damage but a material damage resulting directly from the defective medical act."[10]

The loss of chance suffered by the victim may be caused by the victim's prior lack of information or by a technical error of the practitioner or the health institution.[11] Since 1990, the Court of Cassation of France has held that "by failing to clarify to the patient the possible consequences of accepting the proposed surgery, a surgeon deprives their

[7] *Ibidem*.

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[9] Cass 1re civ., 29 iunie 1999, nr. 97-14254; Cass 1re civ., 18.01.2005, nr. 03-17906, apud G.A. Năsui, *Medical malpractice. Particularities of medical civil liability; relevant domestic jurisprudence, malpractice of liberal professions*, 2nd ed., revised and supplemented, Universul Juridic Publishing House, p. 183.

[10] Cass 1re civ., 10th of January no. 1990, no. 87-17901, Bull civ., I, nr. 10; G. Memeteau, *Les évolutions redoutées de le responsabilité medicale: loi ou jurisprudence?*, Gazette du Palais, 25 October 1997, p. 1353 *apud* G.A. Năsui, *Medical malpractice. Particularities of medical civil liability; relevant domestic jurisprudence, malpractice of liberal professions,* 2nd ed., revised and supplemented, Universul Juridic Publishing House, p. 183.

[11] P. Sargos, *La responsabilité civile en matière d'exercice mèdical pluridisciplinaire,* Médecine et Droit 1996, n. 17, p. 17 *apud* G.A. Năsui, *Medical malpractice. Particularities of medical civil liability; relevant domestic jurisprudence, malpractice of liberal professions,* 2nd ed., revised and supplemented Universul Juridic Publishing House, Bucharest, p. 184.

patient of a chance to avoid, through a, perhaps more judicious, decision, the risk, which eventually occurred, and that this loss constitutes a damage which is different from the bodily damages resulting from the medical intervention.[12]

Checking the provisions of the French Civil Code on the regulation of loss of chance, we note that in Livre III "Des différentes manières dont on acquiert la propriète", Titre III , "Des sources d'obligations", „Sous-titre II La responsabilité extracontractuelle„ Chapitre I contains the general provisions on non-contractual liability in general, (art. 1242 Civil Code) but in addition we identify texts on medical liability in Code de la santé publique which in „Chapitre II.Risque sanitaires résultant du fonctionnement du systemè de santé" art. L.1142-1 states the general principles of the medical civil liability of medical professionals (doctors, medical units, etc.). French doctrine and jurisprudence has noted that the loss of opportunity may be due to the lack of medical intervention, or the existence of a late medical intervention, loss of chance of survival, loss of chance reducing the negative effects (sequelae)[13], losing the chance of reducing the victim's suffering;[14] etc.

Likewise, the Italian Civil Code regulates in art. 2043[15] the granting of reparations for damages arising from torts committed by a person. It is construed that the above-mentioned legal provisions[16] states that when the possibility of obtaining a favourable result fails due to the negligent,

[12] Cass, 1re, 07.02.1990, Bull 1990, I, n. 39, p. 30, n. 88-14797; M.A. Hermitte, C. Noiville, *L'obligation d'information en matière de santé publique*, Gazette du Palais, 24 octobre 1998, p. 1423 apud G.A. Năsui, *Medical malpractice. Particularities of medical civil liability; relevant domestic jurisprudence, malpractice of liberal professions,* 2nd ed., revised and supplemented, Universul Juridic Publishing House, Bucharest p. 184.

[13] Loss of chance of reducing sequelae was found when doctors persisted in an erroneous diagnosis, blaming themselves for losing the chance of the patient suffering less sequelae – Civ. 1re, 8 juill. 1997, no. 95-18.113. P:R, p. 274; JCP 1997.II.22921, rapp. Sargos (1re esp.); RTD civ. 1998.126, obs. Jourdain, *Code civil annoté,* edition limitée, Dalloz, 2020, p. 1721.

[14] Repairing the loss of chances to postpone the fatal time frame of the victim's illness and the possibility of the victim having a better and less painful end of life *Code civil annoté,* edition limitée, Dalloz, 2020 , pp. 1720-1722.

[15] Art. 2043 Codice civile: "Art. 2043. (Risarcimento per fatto illecito). Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno."

[16] Art. 2043 - Codice della responsabilità civile commentato e aggionato, Editore Dott. A. Giuffré, S.p.A. Milano, 2017, Causalità e perdita di chance" p. 26.

guilty conduct of a person then occurs the case in which they are harmed due to loss of chance, specifying that this damage may be different respectively patrimonial or non-patrimonial (taking into account non-pecuniary damages from the medical field).

Moreover, the Italian Civil Code provides in art. 2059 that the moral damages consist in harming the relevant interests from a legal point of view caused in accordance with the regulations of article 2043, and the following of the Italian Civil Code.[17]

As we have seen, the legal provisions as well as the European jurisprudence states that the loss of chance also comes from the medical field, registering a rich casuistry in this respect. Moreover, the European vision is aimed at compensating for the damage suffered by losing the chance, being considered a pecuniary reparable damage taking into account the fact that restoring the victim to the previous state usually cannot be achieved, therefore the courts order compensation for the damage suffered by ordering the payment of an amount of money.

Returning to the national legislation, we find provisions on medical civil liability in *Law no. 240/2004* (on manufacturers' liability for damages caused by defective products) as well as in *Law no. 95/2006* Title XVI on health reform which regulates the civil liability of medical professionals and healthcare, sanitary and pharmaceutical product and service providers.

We note that the legal provisions specified above provide for two situations in which medical staff are not held liable for damage caused in the exercise of the profession, namely: when medical staff act in good faith in emergency situations and when the damage occurs due to working conditions, insufficient diagnostic and treatment equipment, nosocomial infections, adverse effects, complications and generally accepted risks of methods of investigation and treatment, hidden defects of sanitary materials, medical and sanitary substances used. Regarding the liability of public or private health units for damages caused by the act of another, it should be mentioned that the regulations of common law of civil liability are applicable to them. As far as liability for defects in medical equipment and devices, medicinal substances and sanitary materials is concerned, it is provided that public and private sanitary

[17] Art. 2059 – Danni non patrimoniale "Il danno non patrimoniale deve essere risarcito solo nei casi determinati dalla legge".

units, medical services providers, and manufacturers of medical equipment and devices, medicinal substances and sanitary materials are liable under civil law for the prejudices caused to the patients in the activity of prevention, diagnosis and treatment, by the hidden vices or their defects.

The legal text therefore refers to the regulations of civil law that are applicable in such a situation. Consequently, the suffered damage is repaired in accordance with the civil norms, the medical civil liability being in principle a subjective liability based on the guilt (fault) of the liable person.

Turning to the text of art. 1385 paragraph 4 of the Civil Code, we notice that the types of damages for which reparation will be granted as a result of losing a chance are limiting and we find: damage from losing the chance to obtain an advantage or avoid damage, the Romanian legislator did not expressly regulate the cases from the medical field. As we have noticed, the damage consisting in losing the chance is emphasized especially in the medical field due to the importance of the protected values.

In view of European doctrine and jurisprudence, *de lege ferenda* proposals have been made (e.g. supplementing the legal text with a new paragraph according to which the damage resulting from the "loss of the chance to heal, survive or not be born with a disability"), proposals which we agree with, but the development of society has led to the identification of new categories of chances whose loss can be compensated.

3. Conclusions

In view of the above in relation to European jurisprudence as well as the principle of the ubiquity of legislative protection with regard to the human species, we propose to supplement the legal provisions taking into account the damage from the medical field and taking into account the victim’s loss of chance to reduce their suffering, loss of the chance to reduce their sequelae, loss of the chance to improve their health or to get rid of an infirmity.

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