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EUROPEAN UNION LAW

The Adherence of the European Union to the Istanbul Convention – towards a Common European Perspective on Violence

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Abstract

In the present paper we aim to analyse the adherence of the Union to the Council of Europe Convention from the perspective of underlining the juridical peculiarities of the conventional normative framework but also the possible convergences between the Convention's provisions and the juridical documents of the European Union. We consider the analysis to be necessary in the context of cultural differences existing at European level augmented by realities such as the challenges of the migration phenomenon. On the other hand, by virtue of the democratic commitments assumed through the quality of member of the Council of Europe, respectively of the European Union, European States are bound to re-evaluate the limits within which will be guaranteed the rights of cultural minorities. To the extent that cultural practices are likely to disseminate acts of violence, is necessary the adjustment of democratic rules that are intended to respond to cultural diversity by means of adopting relevant criminal instruments. Between democratic concepts and cultural norms, the States of the European regional system pursue to achieve a normative convergence in the field of human rights. The European Union adherence to the Istanbul Convention represents a valid solution within this demarche.

Keywords: human rights, violence, harmful cultural practices, the Istanbul Convention, adherence.

1 The correlation between the phenomenon of violence and cultural practices: a regional convergence instrument

The accession of the European Union to the Council of Europe Convention on the Prevention and Combating of Violence Against Women and Domestic Violence [1] describes the convergence of the two European regional legal sub-systems in the spirit of

the thesis of the *universalism of human rights* [2]. Placing in the same context of violence and cultural norms leads to an unprecedented scientific construction in the field of human rights, in which both violence and cultural norms are manifest limitations of human rights, the first limit being the natural consequence of the latter. *The thesis of cultural relativism* [3] exerts pressure on the relation between violence and culture, legitimizing, within its own scientific parameters, the protection of human rights to the point of the effectiveness of cultural norms.

Combining violence with the issue of human rights protection and identifying the cultural factor as a potential source of violence are steps that have been undermined by incompleteness under the legal framework of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women [4].

Although it marks the most articulated debut of international regulations on women's rights, the Convention does not, *de plano*, openly *analyze violence as a discriminatory phenomenon based on gender*.

Following the adoption of the text of the Convention, the Committee of Experts, on an interpretative basis, stated the issue of violence – identifying it as an integral part of the gender dimension of the protection of human rights. By General Recommendation no. 19 [5] of the Committee of Experts, the definition of discrimination contained in Article 1 of the Convention should be interpreted to include *gender-based violence* in its content.

The latter is understood as any act that causes physical, mental or sexual violence, the threat of such acts, the constraint or deprivation of rights and freedoms that are directed *against women for being women or disproportionately affecting women*. The Committee also notes that the persistence of the phenomenon of violence against women also resides in *traditional attitudes wh7ere women are associated with subordinate roles in society*, respectively in *female social stereotypes*.

The demonstration of the negative influence of the cultural factor on women's rights was the object of the analysis of the General Recommendation no. 14 of the Committee of Experts [6] on the basis of *which female mutilation falls within the category of practices harmful to human rights*.

As a result of initiatives taken internationally, the inter-American regional system has shown receptivity. The process of systematization of the culture-violence relationship as well as the inclusion of this approach in the human rights logic has gained normative constraints through the Convention for the Prevention, Punishment and Eradication of Violence Against Women. [7]

Thus, according to Article 6 (b) of the Belem do Para Convention, *the right of women to freedom from violence* includes the right to education in the absence of stereotypical behavioural patterns based on cultural and social promotion practices of a state of *inferiority* or *subordination*.

Another regional normative "replica" on the elimination of violence against women supported by cultural heritage is the Maputo Protocol [8], which defines in Article 1, letter "g", *practices harmful to women as any behaviour, attitude affecting the fundamental rights of women or girls, such as the right to life, health, dignity, education or physical integrity*. Taking as a mark the general remarks of the African Commission on Human Rights [9] over the content of the Maputo Protocol, the harmful cultural practices of

women are identified as a discriminatory tool – having the purpose of disseminating and maintaining the state of gender inequality at society level.

The Istanbul Convention is the *normative model of exemplary aggregation* for the European regional system, as it takes on the relationship between c*ultural limitations* and the *phenomenon of violence against women*, *taking into account the standards created by the United Nations and the Organization of the American States and developing them into a suis generis manner, by regulating the ban on forced marriages or honor killings.* Also, the *normative model of exemplary aggregation* is supported by the fact that *the regulatory object* of the Istanbul Convention refers both to *stopping the phenomenon of violence against women* and to the *etiology of violence – identifying the cultural factor as a catalyst in this respect*.

Accepting the multiple challenges related to the phenomenon of violence, the Istanbul Convention is a regional legal instrument requiring a special status by calling for at least two aspects: (1) opening to a broad audience (having the vocation to be ratified both by the member states of the Council of Europe as well as non-member states or international organizations); (2) merging, in its content, the legal aspects related to the protection of women's rights, criminal law provisions as well as issues related to the cultural diversity generated by the intensification of migration.

2 The signing of the Istanbul Convention by the European Union: legal prerequisites

The normative orientation of the European Union towards the field of human rights, the entry into force of the Treaty of Lisbon [10] and the inclusion of the Charter of Fundamental Rights of the European Union [11] in the category of primary law have led to insinuation of *identity doubt* in relations between the European Union and the Council of Europe. If during the precursor of these moments, the mission of the European Union consisted in fulfilling common economic objectives and the Council of Europe's mission was reiterated by the statutory principle of the *preeminence of law*, we now observe changes in the dynamics of the activity of the two organizations. The main consequence of redefining the European Union's mission by assuming extensive responsibilities in the area of human rights lies in finding a standard to ensure the *convergence between the two European organizations*. Beyond the notable achievements fulfiled by giving binding legal force, equal to that of the Treaties, in favor of the Charter of Fundamental Rights of the European Union (we mainly take into account the obligation of the Member States of the European Union to respect the rights and freedoms enshrined within the Convention on Human Rights and Fundamental Freedoms [12] and the binding force of the jurisprudence of the European Court of Human Rights in relation to the Member States of the European Union), a more comprehensive desideratum was proposed at the regional-European level: the accession of the European Union to the European Convention on Human Rights. The possibility of the European Union joining the European Convention on Human Rights was blocked by the opinion of the Court of Justice of the European Union [13]; in assessing the opportunity of the Union's accession to the European Convention, the Court has highlighted the need to preserve the specific features of the very nature of Union law: *Union law is characterized by the fact that it*

originates from an independent source constituted by the treaties, by the primacy of its law in relation to the law of the Member States and by the direct effect of a whole set of provisions applicable to Member States and their nationals.

The peculiar construction envisaged by the European Union's legal order determines the solution that the *autonomy enjoyed by Union law in relation to Member States' law and international law requires that the interpretation of fundamental rights be ensured within the structure and objectives of the Union.[14]* The Court's advanced considerations in issuing an opinion finding the incompatibility between the accession of the European Union to the European Convention on Human Rights and the provisions of Art. 6 par. (2) TEU, respectively the provisions of Protocol no. 8 on Art. 6 par. (2) TEU aiming at the accession of the Union to the European Convention on Human Rights are mainly based on: (a) the touches brought by the specificity of Union law on common foreign and security policy and on (b) the ambiguity of the way in which would be solved the litigations between EU Member States or between the EU and its Member States on the application of the European Convention in the field of substantive law of the Union.

On these coordinates, it was necessary to build a common legal standard for the two regional organizations – to be highlighted by their compatibility with the specificities of EU law. This legal standard resulted from a laborious process of identifying and *correlating the fundamental values promoted by the Council of Europe and the European Union in the field of human rights*. The Istanbul Convention concretises sustained efforts at European level to promote real, substantial equality between men and women. The signing of the Istanbul Convention by the European Union on 13 June 2017 is the result of a detailed detailed analysis of the Council, which agreed to this by two successive decisions. [15]

Although dealing with different aspects of the Convention (judicial cooperation in criminal matters and asylum), the two Council Decisions provide quasi-identical legal arguments on the basis of which the usefulness of the Union's accession to the Istanbul Convention is validated. Point 4 of both decisions summarizes the reasons that led to the convergence between the two European legal systems in the field of combating violence against women and domestic violence: (1) Effective achievement of equality between men and women in line with expectations comprised in art. 2 and 3 of the Treaty on European Union (EU Treaty) in art. 8 of the Treaty on the Functioning of the European Union (TFEU) and in accordance with art. 23 of the Charter of Fundamental Rights of the European Union; (2) Violence against women must be understood both as a serious form of discrimination and as an extreme hindrance to human rights; (3) In order to combat the phenomenon of violence, the Union is committed to adapting its substantive legal framework to the field of criminal procedural law. Although both decisions recognize the competence of the Union and the Member States in the fields covered by the Istanbul Convention, it is necessary to sign the Istanbul Convention on behalf of the Union for two major reasons: (1) highlight the main lines of action of the Union in relation to the application of the Convention (judicial cooperation in criminal matters and asylum provisions and the principle of non-refoulement); (2) the cross-compliance report between the competences of the Member States and the competences of the European Union stresses the need for the Union's accession so as to ensure a high level of effectiveness in fulfilling the rights and obligations deriving from the Convention.

The European Parliament's analysis of the rationale for ratification of the Istanbul Convention by the European Union is summarized in its Resolution of 12 September 2017 [16]. While acknowledging the importance of cultural limitations in the process of protecting women's rights, paragraph 3 clearly states that women's rights violations are committed under harmful cultural practices: Forced marriage, genital mutilation, forced abortion and forced sterilization, sexual exploitation and trafficking in human beings. In this context, the thesis of the Istanbul Convention reiterates that *culture, customs, religion, tradition or "honor" cannot be a justification for any act of violence against women*. Among the recommendations made by the European Parliament with a view to stepping up the process of guaranteeing women's rights at the level of the European Union, the immediate recommendation is *to ensure a broad accession to the European Union Convention so that any limitation is excluded in the process of accession*. At the same time, in view of the fact that the intensification of the migration phenomenon has led to the "importation" of traditions with harmful potential over the sphere of protection of women's rights, Parliament inserts in the recommendations section the *need to take relevant measures regarding migration and asylum, recalling that gender violence, including genital mutilation, can be recognized as a form of persecution and victims can rely on the protection afforded by the 1951 Refugee Status Convention*.

The European Parliament's argument in favor of the full accession of the Union to the Istanbul Convention is extended to the content of the *Motion for the adoption of a resolution* [17] whereby Parliament applies art. 218 (11) TFEU attesting to *the possibility of requesting an opinion of the Court of Justice of the European Union on the compatibility of an agreement envisaged with the provisions of the Treaties*. Acknowledging the importance of achieving lasting convergence between the two regional legal systems by supporting the accession of the Union to the Istanbul Convention, Parliament highlights in its resolution seeking the opinion of the Court the essential features of the Convention that legitimize the opportunity of accession: (1) The Istanbul Convention is a holistic and comprehensive tool that places the victim's rights at the heart of its concerns by analyzing violence against women from a multidimensional perspective; (2) The Convention advances a coherent set of measures to combat discrimination against women, with emphasis on measures to combat impunity through criminal law and measures to protect and reintegrate victims of violence. The main reason justifying the Parliament's resolution for obtaining the opinion of the Court of Justice of the European Union lies in *the dual legal framework that provides the basis for the signing and subsequently ratification of the Convention by the European Union*. In other words, the legal uncertainty surrounding the accession of the Union to the Istanbul Convention *consists of the two Council Decisions approving the signing of the Convention by the Union*. The two decisions deal with different issues: cooperation measures in criminal matters and measures on migration and asylum, thus forming a segmented legal basis for the EU accession process to the Istanbul Convention. The expectation of a favorable opinion of the Court of Justice of the European Union is determined by the awareness of the need to achieve effective legal convergence in the field of human rights at the level of the European legal system, especially in the context where the previous attempt to achieve such convergence – the accession of the Union to the European Convention on Human Rights – failed as a result of the Court's negative opinion.

3 The rationale of the ratification of the Istanbul Convention by the European Union

The full accession of the European Union to the Istanbul Convention relies on two dimensions: *the specificity of the provisions contained in the Convention* and the *correspondence between the legal framework of the Istanbul Convention and the EU's legislative action*.

Concerning the first dimension, the Istanbul Convention represents the legal framework *suis generis* which addresses synoptically the issues surrounding the protection of women's rights as human rights: (1) *gender* is identified as the main factor of violence against women and the conceptual framework of the Convention stipulates in express that *gender violence* against women *means violence directed against a woman for the mere fact of being a woman or disproportionately affecting women*; (2) the applicable criminal measures against those who commit violence are emphasized; (3) the role of the cultural factor in the preservation and dissemination of acts of violence against women is highlighted.

The Istanbul Convention places its regulations around the concept of *gender*. The absolute innovation of capitalizing on the cultural factor in building the legal framework for the protection of women's rights is feasible through the *gender criterion.* For the understanding of the latter, it is necessary to specify the following: (1) the term is used in an ambivalent sense, defining both masculine and feminine behaviors and attitudes; (2) identifying *gender* as the nucleus of the Convention's regulations, most provisions will be formulated to include the gender dimension (Article 6 – Gender-sensitive policies, Article 14 – Education, Article 18 – General Obligations of Protection and Support, Article 46 – Aggravating circumstances or Article 60 – Gender-based asylum applications); (3) the introduction of *gender* into the provisions of the Convention facilitates the approach of the cultural factor as the main limitation of the effective guarantee of women's rights as human rights.

The integration of a rigorously-articulated criminal legal framework into the Convention's content strengthens the Convention's vocation – to provide effective legal protection for women's rights. Thus, the section contained in Articles 43 to 58 has a very punitive character, laying down a set of rules whose objective is to effectively bring to justice the persons who have committed acts of violence. The prevalence of criminal law provisions contained in the Istanbul Convention determined its classification as *an international penal human rights treaty through which violence against women is criminalized*. [18]

In accordance with the logic of criminal law, the Convention systemizes the acts that constitute crimes by explaining their content and the procedural measures that are ought to prevent and sanction them. In the sphere of crimes, we distinguish harmful acts applied as a consequent of culture or religion: forced marriages (art. 32-37), genital mutilation of women (art. 38), honor killings (art. 42). The rules governing these crimes mark a legal breakthrough by merely criminalizing these facts and by correspondently explaining each offense. By way of example, the regulation of female genital mutilation in Article 38 of the Convention sets out the three ways in which it can be accomplished: *a. Extirpation, infibulation or any other total or partial mutilation of the major labyrinth, minor lobe or clitoris a woman; b Constraining or procuring a woman to undergo any of the actions*

listed under point a. c incitement, coercion, or purchase of a girl to undergo any of the actions listed at point a.

Criminal law measures aimed at preventing and combating these crimes are organized in a coherent and cohesive system: (1) legal recognition of offenses regardless of the relationship between the victim and the aggressor – art. 43; (2) application of the jurisdiction of States Parties to offenses under the Convention in the event of an offense committed against one of the citizens or against a person ordinarily resident in their territory – art. 44, paragraph 2; (3) the application of effective, proportionate and dissuasive penalties according to the seriousness of the offenses committed-art. 45, paragraph 1; (4) the impossibility of extrajudicial settlement of disputes-art. 48; (5) the conduct of investigations and judicial proceedings relating to the violence covered by the scope of the Convention in an effective manner, taking into account the victim's rights throughout all stages of criminal proceedings; – Article 49, paragraph 1; (6) consideration of the gender dimension of violence in the investigation and prosecution of offenses – art. 49 paragraph 2.

It is noteworthy that the section of criminal law provisions pays special attention to the rights of the victim by establishing the means of preventing the phenomenon of violence (emergency ordinances – art. 52), but also by taking measures after the criminal act is committed (the restraining or protection order – art. 53; measures to protect victims' rights and interests – art. 56; Juridical Assistance of Victims – art. 57 and the adoption of measures to ensure that the limitation period for initiating legal proceedings for some of the offenses established by the Convention may be continued for the purpose of initiating proceedings after the victim has reached the age of majority – art. 58).

The approach of the cultural factor within the substantive law section of the Convention has as a counterpart in the section on criminal and procedural-criminal provisions the aspects contained in Chapter VII – Migration and asylum. Taking into account the limitations of the rights of women promoted on cultural heritage, the States Parties to the Istanbul Convention have agreed in art. 60 to take measures to establish complementary protection for women subjected to violence by *expressly recognizing gender-based violence as a form of persecution in the spirit of art. 1, A (2) of the Convention on the Status of Refugees*. [19].

Although equality as a legal value is declared as a central concern of the European Union, illustrated at the level of primary law (art. 19, art. 157 TFEU) and implemented also by means of secondary legislation (Directive 2006/54/EC [20] or Regulation 492/2011[21]), *the context of protecting and promoting equality is different from that built up by Council of Europe rules* by calling on the following issues: (1) equality is promoted in the field of labor and social security; (2) the cultural factor is not valorized in guaranteeing equality; (3) there is no consideration regarding the migration phenomenon and its repercussions in guaranteeing human rights.

Judicial cooperation in criminal matters is common to the two regional systems of law. The Istanbul Convention provides in Chapter VIII – under the marginal title *International Cooperation*, the obligation of States Parties to cooperate for the purposes of: preventing, combating and prosecuting all forms of violence under the Convention; protecting victims; investigations or proceedings relating to offenses established in the Convention; the execution of criminal and civil sentences, including protection orders.

The Union's legal system establishes judicial cooperation in criminal matters by the rules contained in section art. 82-86 of the Treaty on the Functioning of the European Union. Article 82 para. 1 TFEU clarifies the principle that provides the logic of undertaking co-operation in the matter by establishing the *principle of mutual recognition of judgments and judicial decisions*. The following paragraph regulates the possibility for the Parliament and the Council to adopt directives and, in accordance with the ordinary legislative procedure, *minimum rules* which take into account the differences between the legal traditions and the legal systems of the Member States. The object of the minimum rules consist in the following: (1) the mutual admissibility of evidence between Member States, (2) the rights of individuals in criminal proceedings, (3) the rights of victims of crime. Following the same reasoning – to develop the framework for the application of the principle of judicial cooperation – art. 83 par. 1 TFEU establishes the possibility for Parliament and the Council to decide by directives and in accordance with the ordinary legislative procedure on trafficking in human beings and sexual exploitation of women and children.

In secondary legislation, safeguards put in place to protect victims of crime are systematized in Directive 2012/29/EU [22]. Paragraph 17 of the Preamble summarizes the problems of violence against women through *gender* and *culture* criteria lenses. The concept of *gender-based violence* is approached from a three-dimensional perspective: conceptual, legal and taxonomic. From a conceptual point of view, gender-based violence is identified by using as a conceptual delimitation tool the gender and its correlative aspects (gender identity, gender expression) without defining *gender* in an express manner. Acts of gender violence are assimilated, with respect to the applicable legal regime, to discriminatory acts, constituting a serious violation of the victim's fundamental rights and freedoms. In the category of gender-based violence, the Directive includes harmful practices manifested in specific cultural contexts such as *forced marriages, female genital mutilation, honor crimes.*

4 Conclusions

Given the legal convergence between the two legal systems, we believe that the full accession of the European Union to the Istanbul Convention is possible and desirable. The confrontation of the European space with the migration phenomenon determines the reconsideration of the cultural factor and the integration (increasingly important!) Of this in the sphere of human rights regulations. Violence against women – observable in its cultural dimension – is a particular form of violation of human rights that requires a balanced approach. The pursued balance has two issues: the safeguarding of the rights of cultural minorities in the context of border flexibility and the prosecution of public order (in this case criminal law) in order to respond to the need to counteract harmful cultural practices.

For Romania, this issue is of full and sensitive timeliness. Violence against women as an endemic phenomenon has not been addressed effectively, which has prompted the European Court of Human Rights to find in its judgment of 23 May 2017 in *Bălsan v. Romania* case (application No 49645/09) with concern that "Despite the adoption by the Government of a national law and strategy for preventing and combating domestic violence, which the Court appreciates, the general lack of responses to the judiciary and

the impunity enjoyed by aggressors indicate that there was no corresponding commitment to take appropriate action on domestic violence. "

The atony of responsible domestic institutions is also aware of the collective mentality, a survey conducted in 2017 by the National Agency for Equal Opportunities for Women and Men stressing that 9 out of 10 Romanians appreciate that family violence is a problem for Romanian society.

That is why a structured policy at the level of the European Union, which develops the substantive provisions of the Istanbul Convention, would be likely to induce progress in those Member States where cultural or educational or institutional synchropos arises undesirable social realities and phenomena.

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[2] The thesis of universalism synthesizes the concept of human rights in terms of absolute and common recognition of individual prerogatives; expressing the Western vision in the field, the thesis of human rights' universalism is identified in the preamble of the Universal Declaration of Human Rights: *Considering that the Member States have committed themselves to promoting, in cooperation with the United Nations, universal and effective respect for human rights and fundamental freedoms, Considering that a common understanding of these rights and freedoms is the most great importance for the full realization of this commitment (...).*

[3] The thesis of cultural relativism engages in the promotion of cultural norms as an imperative benchmark, accepting the protection of human rights as a subsidiary alternative (in the specific hypothesis that culture is not devalued, desacralized by the promotion of individual rights).

[4] Adopted and opened for signature by the General Assembly of the United Nations by Resolution 34/180 of 18 December 1979. It entered into force on 3 September 1981, in accordance with the provisions of Art. 27 (1.). Romania ratified the Convention on 26 November 1981 by Decree no. 342, published in the "Official Bulletin of Romania", Part I, no. 94 of 28 November 1981.

[5] General Recommendation no. 19 of the Committee of Experts on the Elimination of All Forms of Discrimination against Women entitled *Violence Against Women* adopted at the second session of 1992.

[6] General Recommendation no. 14 of the Committee of Experts on the Elimination of All Forms of Discrimination against Women entitled *Female Circumcision* adopted at the ninth session of 1990.

[7] Legal instrument adopted in the Inter-American Human Rights Protection System by the General Assembly of the Organization of American States on 9 June 1994; The Convention entered into force on 5 March 1995 on the 13th day after the deposit of the second instrument of ratification. *Brevitatis causa*, given the place of conclusion of the Convention, we will use the term *Belem do Para* to designate this legal instrument.

[8] This regional instrument amends the African Charter on Human Rights and Women's Rights in March 1995 and signed on 11 July 2003 in Maputo, Mozambique. The Protocol entered into force in 2005.

[9] We refer in particular to the General Commentaries of the African Commission on Human Rights and Peoples adopted at its 52nd Ordinary Session on 22 October 2010 at Yamoussoukro, Côte d'Ivoire, the subject of which is the implementation of sexual rights and reproductive features of women.

[10] Mandatory legal document constituting the fundamental legal order of the European Union. Also referred to as the Reform Treaty as it amends the Treaty on European Union and the Treaty establishing the European Community, the Treaty of Lisbon was signed on 13 December 2007 and entered into force on 1 December 2009.

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[13] Opinion 2/13 of the Court of Justice of the European Union, 18 December 2014, pursuant to Article 218 (11) TFEU, paragraph 167.

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[20] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (reform).

[21] Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on the free movement of workers within the Union.

[22] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 laying down minimum rules on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA, published in the Official Journal of the European Union Of the European Union L 315/57. For further details on the content analysis of the Directive, see Nicolae Voiculescu, *Protecția internațională a drepturilor omului. Note de curs, Ediția a 2-a,* (*International Protection of Human Rights. Course Notes, 2nd Edition)*, Titu Maiorescu Series, Hamangiu Publishing House, Bucharest, 2017, p. 197-198.

Legal regulation of the phenomenon of migration in the European Union

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Abstract

The legal dimension of the policies of the field of migration concerns the legal regulation of the phenomenon, aiming at first the issues regarding the differentiation between the economic migrants and those for other reasons. In this respect, a first step would be the inventory of existing legal rules at EU level.

Keywords: resident, highly qualified migrants, brain drain, economic migrants, directive, non-refoulement principle.

In the specialty literature, nullity was defined as representing the sanction that deprives the legal act of the effects contrary to the legal norms enacted for its valid conclusion [1]. In a different opinion [2], the nullity of contract is seen as a civil law sanction which intervenes, unless otherwise provided by the law, after the moment of non-compliance with the validity requirements necessary by law for the valid conclusion of a contract, the concluded contract thus being devoid of the specific legal effects. The French doctrine refers to the nullity of the contract as a cause of its disappearance, the nullity being either the irregularity of the contract or the absence of its training conditions [3]. In any of the above-mentioned views, nullity is therefore a sanction that deprives the civil legal act of its effects on causes that exist at the time of conclusion of the act.

There is currently a broad legislative framework that needs to be taken into account when analyzing the phenomenon of labor migration at the European Union level. It is comprised of a series of directives, programs, communications from the European Commission covering all aspects of labor mobility. In this respect, it is important to highlight these documents at great length, highlighting those points on labor mobility at EU level. After one can see, some of the documents are about reuniting the family, accessing students and researchers to the labor market, integrating people coming from third countries, etc. All of this is important as it relates to issues that are part of the broader set of labor market management.

In this context it is important to present the documents in question in chronological order. These are Directive 2003/86/EC on the right to family reunification. This right is essential to facilitate a harmonious family life. It also plays an important role in creating socio-cultural stability that will facilitate the integration of new people in that state, as well as the promotion of social and economic cohesion, a fundamental objective for the Union, as has been stated over time by the various treated. Directive 2003/109/EC on long-term resident status for those outside the European Union. The main criterion applied to obtaining this status is given by the duration of residence on the territory of a Member State. Residence must meet both legal norms, but also be continuous to show that the person has developed a deep attachment to the state ("Begins to catch roots"). Of course, a degree of flexibility has to be taken into account in terms of temporary departures of the person in that territory for various reasons. In order to acquire long-term resident status, third-country nationals must have sufficient financial resources to support themselves, as well as health insurance, in order to avoid becoming a burden for the EU Member State. For this purpose, in order to make a comprehensive assessment of the financial situation of the person concerned, taking into account elements such as his contributions to the pension system or taxes. Another important element is that those wishing to obtain long-term resident status do not pose a threat to public safety in any way. Directive 2004/114/EC on admission of students.

This directive is very important as it includes the germs of a future transformation of students into European workers/people who will enjoy the right to free movement and the right of residence. One of the Union's objectives in the field of education is to promote Europe as a center of excellence for vocational education and training. Promoting individuals' mobility for access to education is a key element in this strategy. Therefore, EU Member States need to adapt their national legislation to introduce elements such as entry and residence conditions in this case. As this type of migration is, by definition, temporary, it does not depend on the labor market situation in that state, but can contribute to it later on graduation. Directive 2005/71/EC on the facilitation of the entry of researchers into the European Union. This directive seeks to increase research activity at EU level by facilitating the entry and mobility conditions for this highly skilled workforce. Also, unlike other workforce, researchers have a residency right for more than three months, in order to make the Union more attractive to researchers around the world and to position themselves as an international research center. Implementation of this directive does not imply the phenomenon of "brain drain" in emerging or emerging countries, and should be seen as an element in the development and consolidation of these researchers' long-term activity, followed by their reintegration into the societies of origin. This directive therefore seeks to create a partnership to stimulate and develop research with mutual benefit. Directive 2008/115/EC on the return of citizens of non-EU Member States who are illegally resident in the Union. In this regard, the Union has put in place a fair and transparent procedure to look at each case to see the motivation of illegal stay. Illegal residence is often the result of "black" services, which the Union is trying to eliminate. However, when deciding to apply this directive and returning the persons concerned, such a decision is also accompanied by a ban on returning to the territory of that State. In this respect, it is necessary to establish extradition agreements with those states without affecting the principle of non-refoulement.

Of course, if the situation in the State of origin is malignant and the return of the person concerned can affect his or her integrity or even life, steps must be taken to implement asylum in the host state in order to protect the individual. Directive 2009/50/EC on receiving highly qualified migrants. This Directive establishes a flexible entry system based on objective criteria, such as the provision of a minimum wage threshold comparable to the other EU Member States and compliance with professional criteria. These issues are necessary to respect a minimum level of harmonization of access criteria across all EU Member States. Of course, this minimum wage threshold must also take into account the financial situation in that state and specific professions that are deemed not to have sufficient specialists in that state and need labor outside the state. This may include those professions that are in Group 1 and 2 of the Standard International Occupation Classification.

The occupational and geographical mobility of highly skilled workers should be seen as a primary mechanism for improving labor market efficiency, preventing labor shortages and eliminating regional employment imbalances. In most cases, in order to avoid abuses in the system, the mobility of these workers may be limited to only two hiring in one of the Member States. Directive 2009/52/EC on sanctions applicable to employers. This directive mainly refers to the situation where nationals from non-EU Member States who do not have the right to reside in the Union are employed. The sanctions concern those situations where either employers did not know that the employee was in such a position or knowingly violated the rules. The text of the directive provides for minimum rules to apply, with states adopting and enforcing stricter sanctions at national level.

Directive 2011/95/EC on the qualification standards for third-country nationals or stateless persons as beneficiaries of international protection for the uniform status of refugees who may receive additional protection. Although this directive refers to those migrants who seek asylum and escapes from problems that threaten their integrity and/or life, and if they receive the asylum they require, they will need to be further integrated, including economically, and will become part of the national workforce in the host state. Beyond the generic aspects, each state is free to set its own rules and benefits that it can give to these people so that they enjoy protection from all points of view and are encouraged to stay in the state concerned and integrate easier, if any.

Directive 2013/32/EU on common procedures for granting and withdrawing international protection. This directive is extremely important because one of the situations in which international protection can be withdrawn is that in which the individual in question is in fact an economic migrant but conceals this quality by asking for asylum and protection under the pretext of being a refugee. It also seeks to harmonize procedures at Member State level for granting and withdrawing international protection in order to establish a common asylum procedure in the Union. This will limit population movements between Member States, and the latter will also be able to implement their own regulations if the situation so requires and can effectively contribute to improving the conditions of these people.

In this respect, if possible, these people will be able to benefit from even job-assistance assistance from the authorities, thus providing a "recruitment" basis for future Union workers by individualizing them of them having a high degree of specialization. Directive 2013/33/EU on standards for the reception of applicants for

international protection. This directive concerns the possibility for persons from non-EU or stateless persons to apply for international protection upon entry into the territory of a Member State. This Directive does not apply to cases where diplomatic or territorial asylum is required. Again, this directive provides for control over non-EU persons to clearly distinguish categories of migrants: economic migrants from the rest of migrants. 2014/36/EU Directive on seasonal workers. This directive seeks to ensure an efficient management of this type of migration – temporary migration – and to provide decent working and living conditions for this type of worker, establishing transparent and fair rules for receiving and establishing them in the host state. At the same time, a set of rules and rules must be established to prevent them from being exceeded or to remain unlawfully. Member States shall implement this Directive without discrimination based on sex, race, color, ethnicity, social origin, genetic characteristics, language, religion or religious beliefs, political or any other kind, membership of a national minority, disability, age or sexual orientation, etc. Directive 2014/66/EU on intra-corporate transfers. As a result of the globalization of the business environment, the growth of trade and trade, the mobility of managers, specialists and trainers especially at the level of various sub-branches of multinational corporations has also gained momentum. Such transfers take place over short periods within the same company, but between different subsidiaries located in different states. These transfers play a key role in developing new skills and know-how, innovation and increasing economic opportunities for host countries, while increasing the flow of investment across the Union. Transfers can also take place between subsidiaries located in third countries and the European Union, which facilitates the growth of the Union's image as an area of knowledge and development, as well as the transfer of skills, technology and know-how to third countries. Such a transfer also allows multinationals to maximize their human resources policy. Directive 2014/67/EU on workers posted to post.

The free movement of services includes the right to send persons outside the State of origin to provide services directly from the source in the host State. Of course, the reference to the post (such as the diplomatic or military service) must be seen as being different from the free movement of persons, in which case those persons are free to look for a job on their own. The elements of this directive can also be useful in those cases where it is intended to identify those persons who are falsely declared to be self-employed or self-employed. Such attempts are aimed at circumventing current legislation and allowing people to remain fraudulent on the territory of some countries in the absence of a job and maintenance resources. The purpose of that directive is precisely to prevent and combat such practices.

Directive 2016/801/EU on Students and Researchers. Again, it is a directive that extends to possible future employees. Its purpose is to create a legal, secure and transparent framework for the integration of the different categories of third-country nationals entering the Union. It seeks to standardize the entry and residence rules of citizens coming from third countries at EU level, especially as it is proven that third countries are an important source of highly skilled workforce; therefore, students and researchers coming from these countries are relevant in developing human capital at Union level and ensuring sustainable and inclusive growth as a result of the Europe 2020 objectives.

It also aims to create people-to-people contacts and mobility, especially in the immediate neighborhood, with a view to developing contacts between Member States and third countries to create a single and unified framework for dealing with migration. From the perspective of this directive, migration must promote the acquisition of knowledge and skills., being a form of enrichment both at the personal level and for the host state and the host Member State. At the same time, cultural links and cultural diversity are strengthened. Through this directive, the European Union is represented as an attractive location for research and development globally, but also as a source of jobs designed to contribute to GDP growth. In addition, the Union's opening to third-country nationals for research purposes is part of the Union's Innovation Initiative and the European Research Area.

Documents on labor migration do not end here. The debate was moved to the Directorate-General for Migration and Internal Affairs at the European Commission level. As it is known in 2005, the Commission has relaunched the debate on establishing a set of rules for the reception of economic migrants. The Green Paper on an EU approach to managing economic migration has emerged (COM (2004) 811 final). The document shows that although immigration is not a solution to the problem of Europe's aging population, immigration flows can be useful in meeting the needs of the European labor market and ensuring prosperity at EU level.

At the same time, it should not be forgotten that immigration has a considerable role in the development of entrepreneurship, which is already visible at EU level, where the various regions are competing to attract migrants to various areas of the economy. The document therefore shows that there is a growing need to shape a legal framework for managing people moving between different countries. In the absence of an initiative to ensure a unified and unitary approach, there is a potential for migratory flows to rise and more and more people enter the Union without having a declared job. The circumvention of national legislation can only affect the states concerned and, ultimately, the savings to be saved.

The discussions during the elaboration of this Green Paper were fruitful and resulted in the adoption of a Plan on Legal Migration (COM (2005) 669 final) at the end of 2005. The ongoing consultations highlighted the advantages of a horizontal framework at the level of the Member States Member States to manage similarly the situation of third-country nationals seeking work in the Union. Such a framework must be flexible, precisely in order to meet all the needs expressed by them but which must also be correlated with the needs of the national labor markets. This plan therefore aims to increase objectives such as transparency, the effectiveness of European legislation and the application of the principle of non-discrimination in order to create a general framework for the functioning and application of rules throughout the Union. Such an effort seeks to create non-bureaucratic and flexible instruments that treat individual economic migrants and ensure that all the economic benefits (through qualification) that they can bring to the Union are reaped.

This package of legislation seeks to regulate those entry conditions and procedures for certain categories of migrants and establishes those employment rights that citizens of third countries will enjoy once they have been admitted to the territory of the European Union. The natural continuation came in July 2006, when the European Commission adopted a Communication on priorities in the fight against illegal immigration of

third-country nationals (COM (2006) 402 The purpose of this document is to strike a balance between the need for security and respect for the rights of the individual throughout the procedure of identifying an illegal immigrant Although it may seem that such communication is not very useful in the situation analyzed in this report, on the contrary, it is particularly important for situations where many of these immigrants arrive in the Union for job search or choose to stay illegally across the EU to find another job after the conclusion of the contract legal.

This comprehensive EU approach to tackling illegal immigration is accompanied by a set of fundamental principles that seek to combine solidarity, fundamental rights of the individual, general perception of the EU on third countries as well as relations with third countries. Valorisation of the principle of solidarity is essential both at Union level, but also outside it, especially in the context of the Schengen area. Faced with the pressure of immigrants from outside the EU, states on the external border of the Union must act together in their fight against illegal migration. Even if considerable efforts are made to combat illegal migration, this does not mean that the fundamental rights of the individual can be affected, regardless of the moment when he was detained. There are cases where individuals fall prey, involuntarily, to traffickers networks and are exploited by the employer. The European authorities must therefore show understanding, respect and protect the fundamental rights of the individual. Any limitation must be justified in accordance with the provisions of the European Charter of Fundamental Rights and the European Convention on Human Rights.

This is even more so in the current situation, when the European Union is experiencing massive migratory flows, among those who fraudulently cross the Union's frontier and which seeks international protection, including economic migrants who do not shelter life-threatening events but they are looking for a way to access the labor market in the European Union. Under these circumstances, the application of solidarity and respect for the fundamental rights and freedoms of the individual are extremely important.

In September 2007, the European Commission presented its Third Annual Report on Migration and Integration of Migrants (COM (2007) 512 final). Although it may seem a report that concerns exclusively migration from the Middle East, the document reinforces the dimension of social inclusion and social protection as the broad objectives of the European Union, correlating them with the objectives imposed in the field at Member State level. This document also presents the tools to be used at Union level to better integrate these people in order to reduce disparities between immigrants and citizens: the Inter-service Group on Urban Development, European Cities for Local Integration, coordinated by the European Foundation for the Improvement of Living and Working Conditions. All of these provide examples of good practices aimed at increasing the means by which individuals can be better integrated into the community, to help vulnerable groups and to reduce inequalities in the European Union.

Also, this document puts considerable emphasis on education and training to ensure that migrants become active participants in society. Integration must start at the lowest educational level – so it is better to integrate children, taking into account the fact that they can later become responsible citizens, who have a job at the level of society and who are contributors to the national budget for that status. At the time, such initiatives were part of the 2010 Education and Training Program, the European Youth Pact and the EU

Strategy on the Rights of the Child. All of these documents concerned at that time the creation of tools for better social and professional integration of individuals and the stimulation of the intercultural dialogue that naturally flowed here. Another Communication adopted by the European Commission (COM (2008) 611 final) in October 2008 highlighted the importance of strengthening the Global Approach to Migration by increasing coordination, coherence and synergies in the field, being important elements for the Union's development policy. This Communication supports and promotes EU efforts for third countries to better manage legal migration, including by providing facilities and counseling to those entering the territory of an EU Member State. In this context, it is important to note that third countries should be seen as an important dialogue partner to address the needs of the EU labor market. While there is a preference for the use of citizens of the Member States of the Union, a number of tools should also be put in place to provide information to potential third-country stakeholders about working opportunities within the Union.

In this regard, communication provides for the establishment of an online portal to inform those concerned about such opportunities, the rights and obligations arising from access to employment at the level of the European Union, the risks that may arise and the conditions to be met to access such a position. At the same time, the communication aimed at conducting information campaigns. In order to better operationalize these ambitious but extremely useful objectives, two Pilot Mobility Partnerships were signed in June 2007 with the Republic of Moldova and Cape Verde.

From this point it will be much easier to develop a common European migration policy that will facilitate flexible access for migrants to the European Union. This is the moment when the discussion has turned to pressing issues such as recognition of education diplomas and qualifications, portability of pension rights and other social benefits, promotion of labor market integration, social inclusion, intercultural skills development, and better management of the visa system, especially as regards the access of highly qualified third-country nationals, such as researchers. This document also acknowledges that fixed-term business and financial benefits are beneficial to the Union and its economic development.

Thus, the EU and the Member States will have an interest in promoting short-term mobility, especially by simplifying travel arrangements for third-country nationals, such as neighboring countries. Also during this period, the Visa Information System (VIS) was set up, which was to become operational in 2009, and which means that all Member States can abolish the visa system from 2011 onwards.

Elimination of the visa system should not panic about the lack of border control, so the role of the Community Code on Visas, which had to continue to provide information on visa applications, as well as the procedures to be followed, followed in order to obtain the visa, if necessary. In view of the gradual abolition of visas, the document also set out a series of steps to be taken to harmonize legislation in the field and to establish all the situations that could be manifested over time, even if an application visa could be rejected.

In order to better manage the visa system until their total elimination, the Commission proposes such issues as: Implementing a first generation of mobility partnerships and then assessing them as a strategic cooperation mechanism with third countries; of course, the implementation of such measures will take into account the Union's external priorities; Developing national capabilities for managing migration and

setting up migration management centers, taking into account past experiences; Establishing more practical channels for informing migrants about access conditions, rights and obligations, fundamental rights and freedoms, thus so that they are prepared for the conditions in the host states; Develop labor market management tools in each Member State so that there is a correlation between the number of migrants entering the Union and the needs of the labor market over time; Stimulating the exchange of good practices between Member States, migrant and diaspora associations and local and regional actors in third countries; Establishing incentives for circular migration through a series of initiatives aimed at developing relations between third countries and possible host states, then correlating the labor market needs between the Member States of the Union and the desire of individuals to move towards the Union, ensuring that the phenomenon of "brain drain" for third countries is not reached, especially in those areas such as medical, education and research where the need for professionals is stringent both in the Union and in third countries. At the same time, twinning programs can be established between EU Member States and third countries to help migrants reintegrate into their home labor market after a limited stay at EU level. Also, the extension of the provisions on the possibility to acquire the right of permanent residence in the Union for migrants, especially the research of the possibilities of porting the social security rights and the related benefits they enjoyed in the state of origin and the development of some visa facilitation facilities easier to put into practice.

On the framework already set by these documents, the Stockholm Program, a platform for the period 2010-2014, adopted by the Heads of State and Government of the Member States of the Union in December 2009, overlapped. The purpose of the document was to place all the principles and elements that defined the justice and home affairs policy for the given period. Under the justice and home affairs policy, which, after the implementation of the Lisbon Treaty, became the Area of Freedom, Security and Justice, the issue of migration, whether it was economic migration or refugee migration in the face of conditions that threatened the life of the individual, became a matter of utmost importance.

The Stockholm Program 2010-2014 is an extremely important document for everything that moves individuals across the European Union. He himself looks at the area of freedom, security and justice and brings a series of clarifications on everything that mobility of individuals is and the consolidation of the framework in which it will be achieved. Although the Stockholm Program addresses the issue of migration as a whole and regulates major issues such as asylum and integration of non-economic migrants, the document focuses primarily on respecting the fundamental freedoms of the individual and his integrity, whether he is an economic migrant or not. To address these issues, the Stockholm Program focuses on five priority areas such as: Promoting Citizenship and Fundamental Rights, Europe of Justice, A Europe that Protects, Access to Europe, A Europe of Solidarity.

As regards the first strand of the Stockholm Program, the promotion of citizenship and fundamental rights, it should be specified that citizenship is a significant element in defining the individual, seen as a European citizen with rights and obligations distinct from those of the national. European citizenship adds to national citizenship, giving individuals a better identification with the principles of the Union. Also, European citizenship offers it protection not only within the EU but also on the territory of other

states where diplomatic representations of EU countries exist in the absence of a diplomatic representation of its state.

European citizenship also ensures respect for the rights and freedoms of the individual as enshrined in the Charter of Fundamental Rights of the EU.

The second direction concerns the construction of a Europe of justice. Given the existence of the Schengen area, but also the various facilities for implementing the free movement of persons and services, as well as the provisions of the right of residence, it is necessary to harmonize the legal provisions of the states with those of the supranational level, in order to ensure the judicial and police cooperation in such issues. With regard to labor mobility issues, it is of utmost importance to recognize mutual recognition of the decisions of the courts in civil and criminal matters across the Union. Also, by facilitating the access of the individual to justice, it ensures the possibility of exercising its rights unrestricted on the territory of the Union and it is given the necessary tools to hold accountable persons or authorities in the event that the rights are not respected.

The third direction concerns a Europe that protects. The program aims at internal security at Union level in order to protect the life and integrity of the individual and the fight against organized crime and terrorism. Of course, labor mobility is indirectly targeted, as it is tangential to internal security issues such as border management, civil protection, crisis management, such as migration flows. For example, in the context of the wave of immigrants in the MENA area, the issue raised by the European authorities was whether there were no economic migrants among the refugees in the war.

The fourth strand of the Stockholm Program is about accessing Europe. Although this priority direction is more about third-party access to the European Union, the issues concerned also touch on the issue of labor mobility. Integrated border management, the establishment of a uniform visa policy, strict border controls to reduce and combat cross-border crime and organized crime, but also the instrumentalization of a framework to address vulnerable groups be unaccompanied minors.

The last strand of the Stockholm Program refers to the building of a Europe of solidarity, solidarity being one of the basic principles in the functioning of the European Union. Solidarity and responsibility are basic principles in managing the migration issue, even when it comes to economic migrants. In a Europe of solidarity, migration policy must be flexible, taking into account the needs of migrants, exploiting their potential and providing a framework for development and growth for them within the Union, recognizing that such mobility is extremely important for cultural development and diversity in the European conglomerate. This is why the first step towards developing a common migration policy is the European Pact on Immigration and Asylum.

Since the Stockholm Program was a generic one, it was felt that an instrument is needed to translate it into practice, so that in 2010 the European Commission issued an Action Plan implementing the Stockholm Program [Action plan implementing the Stockholm Program – COM(2010) 171 final], which states that at Union level the facilitation of citizens 'mobility is of crucial importance to the European project, with the freedom of movement being a central element for the European Citizens' Initiative. European citizens and their families, which need to be rigorously strengthened, where appropriate, and especially where possible. This can be done by removing the barriers that European citizens face when deciding to move to one Member State, another than the home state to pursue a study program to acquire a job that to start a business,

start a family or enjoy a pension. This document places great emphasis on the need to protect these citizens, whether they have diplomatic or diplomatic representatives in their country. That is why the Action Plan for the Implementation of the Stockholm Program seeks precisely to apply the conditions that allow citizens to enjoy the same rights and freedoms as in the state of origin (of course, if they are citizens who are European citizens and migrate from one EU country to another Member State).

Greater progress was made in May 2013 when the European Commission published the "EU Citizenship Report 2013" [COM(2013) 269 final]. Although the document is a massive issue on citizenship issues, it also brings to light other elements regarding the freedom of movement of European citizens at EU level. The document is significant in that it introduces a series of rights and opportunities related to the concept of citizenship, especially given that freedom of movement at EU level is a right frequently associated with European citizenship. With technology that facilitates greater freedom of movement, this freedom must be used to enable citizens to broaden their knowledge horizons, access study programs across borders or places to work in States other than the State of origin for longer periods or The document shows freedom of movement exponentially increases social and cultural interactions at EU level and creates new connections between EU citizens, generating economic benefits.

In order to facilitate freedom of movement, the obstacles to the access of workers, students and trainees at EU level must be removed. This is even more important in the context of the financial crisis that shook Europe and left many unemployed, forcing them to look for another across national borders. Thus, freedom of movement as a basic principle in the European project is a tool for combating unemployment and, above all, unemployment among young people. At that time, there was pressure to establish a single EU labor market that would unite all labor market opportunities across countries and contribute to the growth of the European economy. At the same time, efforts have been made to facilitate access to training and training stages, which are considered to be essential for access to further jobs. Also, by participating in such training and training, it contributes to the professional development and growth of the Union as a whole.

On May 13, 2015, the European Commission presented the European Agenda on Migration [COM(2015) 240 final], a document outlining the immediate measures that can be taken to respond to the crisis of Mediterranean migrants, and the next steps that can be taken to manage migration. Concerning economic migration, another important document is the European Union's Annual Migration Report of 2016 published in April 2017. This document also covers the legal framework and policies that can be adopted to manage immigration and asylum, but it also contains a number of reference elements on mobility management.

Since the need to acquire highly qualified staff is acknowledged at the Union level, there is a threat to the Brain Drain phenomenon, which may affect those states that provide such staff. As a result, countries such as Belgium, Denmark, France, Hungary, Italy and Luxembourg have put in place a series of initiatives aimed at eliminating the fears of such a phenomenon: the adoption of measures to support circular migration with third countries (Belgium) scholarship programs to support the return of foreign students to their countries of origin (Hungary), or cooperation agreements with third countries to promote vocational education and training (Luxembourg). Many of these actions have been duplicated by consistent financial efforts, which are visible in the economies of some EU

countries, which have allocated special funds to this effect – Austria, Belgium, Denmark, Spain, Hungary, Finland, France, Hungary, Italy, The Netherlands and the United Kingdom.

Conclusions

The Union's labor market is dynamic, strongly influenced, on the one hand, by internal requirements but also by external factors. The legislation under consideration has shown us that there is a high demand for highly qualified workforce on this market, which, in most cases, comes from outside the Union. Also, all legislation has shown that, no matter how much we try to delimit economic and refugee migrants, the limit is a flexible one because there is a possibility in the long run that today's refugees turn into a highly specialized workforce level of the European Union.

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The Legal Nature of the Mechanism for Cooperation and Verification

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Abstract

The presented study brings to attention an extremely debated topic at national level: the existence, scope, application and conditions of the cooperation and verification mechanism. Beyond the political debate, which is not always objective, we will present the conditions of the mechanism's appearance, the benchmarks, the progress of Romania and the Commission's reports, but also the recent developments that have led to the accentuation of new recommendations and to the notification of the Court of Justice of the Union. We will also analyze the position of the decision within the European legislative acts

Keywords: Cooperation and verification mechanism, European law, supremacy of Union law, decision, preliminary rulings, legal order

1 Introduction

The accession of Romania and Bulgaria to the European Union and to the EURATOM Treaty was materialized by the Accession Treaty, even though during the negotiations there were elements that questioned the democratic development and respect for the rule of law in the two countries. The will to expand, to enlarge the European family, was more important than ensuring that all the Copenhagen criteria are fully met. However, the participation of an unprepared state in the internal market, as well as its entry into the area of European freedom and justice, could endanger the entire legal and economic order of the Union. In order to monitor and support the two states in order to reach the optimal parameters, a special mechanism, not used up to that time, was established through individual decisions for the candidate states.

2 The Act regarding the conditions of accession[1]

In order to effectively prepare for the accession of Romania and Bulgaria, this act was concluded which, according to the agreement between the states, has mandatory power of application, in all its elements for all the states. The effective reason for the conclusion of the act was given by the reasonable doubts expressed by some states regarding the capacity to fulfill the commitments assumed during the accession negotiations, especially regarding the assurance of the functioning of the internal market, and of ensuring a legal framework of independence for the judiciary.

If the newly acceded states did not fulfill their obligations for sectoral policies, the Commission was mandated to take the necessary measures, proportional to the degree of disruption of the activities of the Union, including safeguard measures, within 3 years from the date of accession. Even though this deadline seems to be a deadline, the final paragraph of Article 37 states that these measures can be ordered and applied beyond this deadline, as long as the commitments made have not been fulfilled. The act stipulates that the measures can be adapted by the Commission according to the progress and evolution registered, but they cannot be maintained longer than necessary and will be revoked when they are completed. The revocation of the measures must be notified to the Council before it is decided. Interpreting the provisions, we consider that it follows, that the revocation must take an official form of a legislative act derived from the law of the European Union.

Similar provisions are stipulated in Article 38, regarding the existence of significant deficiencies or the risk of their occurrence in the conduct of the Member State in the application of the legal regulations specific to the law of the Union. They are thus listed: the transposition, the stage of application or ensuring compliance with the framework decisions or any other commitments, cooperation instruments and decisions regarding mutual recognition in the field of criminal law, of the directives and regulations regarding the mutual recognition in the field of civil law.

3 Decision 2006/928/EC[2] which introduces the Cooperation and Verification Mechanism for Romania

Noting, in the September 2006 report, that Romania did not fulfill all the commitments assumed in the accession process, the European Commission notified the Member States, but also Romania and Bulgaria, that additional monitoring measures were needed after accession. Starting from the principle of the rule of law, fundamental principle of the legal order of the European Union and from the belief that this principle finds its applicability in the organization and practice of the judicial systems of all the Member States, the Commission reiterated the common values in the field of justice.

[1] The Act of 25-April-2005 concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded, published in the Official Journal of the European Union 157L of 2005.06.21.

[2] Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, published in the Special Edition of the Official Journal of the European Union of 2007.01.01.

Noting that accountability, independence, efficiency and control mechanisms of the judiciary are not yet ensured and that the Commission can at any time take safeguard measures, both for the protection of the internal market, and for the protection of the interests and credibility of the justice, up to the suspension of the obligation to recognize and execute the judgments issued by the Romanian courts, as well as European arrest warrants (recital 7), the need to establish a special mechanism for cooperation and verification of the progress [1] made in the field of judicial reform and the fight against corruption is emphasized. This mechanism is to be established, without limiting the possibility of initiating safeguarding or sanctioning state procedures.

The establishment of the mechanism, carried out with the approval of Romania/Bulgaria respectively, entered into force on January 1, 2007, following the effective accession to the European Union. The decision establishes that it will be in force until the moment it will be repealed, after the reference objectives set out in the Annex to the Decision have been achieved, or after the objectives modified by the Commission, following the evaluation of the measures necessary for a better development of the legal system have been achieved.

According to the decision, Romania has the obligation to present a progress report by March 31, and the Commission can provide technical support or exchange of experience so that the reference objectives can be met. Also, expert assessments of the Commission can be organized, with the support of the national authorities. The Commission is required to submit a report every 6 months to the Parliament and the Council, on the basis of the national progress report, but also on the basis of its own findings.

The annex to the decision sets out the reference objectives that Romania was to achieve:

"1. Ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes.

2. Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken.

3. Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption.

4. Take further measures to prevent and fight against corruption, in particular within the local government."

The decision is in force, even if there is a controversy regarding its application, and an apparent lack of equality between Member States, by maintaining this mechanism.

4 The decision, a legislative instrument specific to the European Union

The legal order of the European Union also includes derivative acts, applying the treaties, and Article 288 (4) TFEU stipulates that „A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them". Among the characteristics of the decision, considered as an individual

administrative act of the Union, is its obligatory character, according to art. 288 TFEU, in all its elements [2]. The decision specifying to whom it is addressed is binding only on the recipient, as is the case with the establishment of the cooperation and verification mechanism [3].

Since the competent national authorities do not need to intervene in order to transpose it into the domestic legal order, the recipient state only has to take the necessary measures to comply with the provisions of the decision. A particular situation arises in this case, since the reference objectives, listed in the annex to the decision, require legislative measures specific to national law. Not being in a situation where the powers of regulation belong exclusively to the Union, by reference to the principle of subsidiarity, the national legislator must approach the regulation so that there is no violation of the Union legislation, on the one hand, but also no violation of sovereignty of the state, on the other hand.

Although decisions are, by their nature, directly applicable, according to the case law of the European Court of Justice, decisions having a direct effect on the legal relationships between Member States and individuals, the latter acquiring rights that can be claimed before national courts [4], in the particular situation of establishing the mechanism, the state must regulate social relations and legal norms in a wide area, with many implications for society. Ensuring the independence of the judiciary, strengthening the role of the Superior Council of Magistracy, standardizing the anti-corruption procedures and controlling the assets require not only adequate legislation, but also personnel who understand the fair and non-partisan application of the law.

The supremacy of European Union law is one of the fundamental characteristics specific to the legal order of the European Union, which distinguishes it from any other entity at the level of the international community. The principle of the supremacy of European Union law presupposes that in the event of a conflict between national law and EU law, European Union law is applied to the detriment of contrary norms of national law [5]. The supremacy of Union law applies whenever a conflict of laws arises before a court or any body with attributions in making legal decisions. In this way, the principle of the supremacy of the Union law significantly strengthens the judiciary, any court having powers to review the law, if the respective national law violates the norms of the Union [6]. The basis of this principle was established in Van Gend en Loos in 1963, when the European Court of Justice presented the Community as a new legal order of international law, in favor of which the states had limited their sovereign rights [7]. In addition, the operationalization of the concept of "direct effect" was carried out in the same case, the European Court of Justice ruling that, based on the direct effect in national law, nationals of the Member States could invoke rights that the national court must protect [8], during which the judgment of the Court in the "Grad" case corresponds, with regard to the direct effect of the decisions, to the conclusions of the Attorney General Roemer (Opinion of Attorney General Roemer in the Grad case, *apud* Ispas, op. cit., p. 102) concluding that „the decisions of the Community institutions addressed to the Member States may contain provisions which have direct effects on the legal relations between the Member States and individuals and which create rights for individuals, which the courts of the Member States must protect". Therefore, the provisions of a decision may have direct effect on the relations between the Member States to which the decision

is addressed and their executors, if their content creates rights for individuals, which can be used by them in court.

5 Measures adopted by Romania to implement the CVM. Annual Commission Reports. Developments

Immediately after joining the European Union, Romania began a comprehensive process of modernizing the justice system and making the institutions with competencies more efficient in verifying the integrity of the persons holding public positions, as well as the specialized structures of the General Prosecutor's Office, charged with combating corruption and organized crime.

Through successive legislative acts, the Government has taken measures to monitor, implement and coordinate the policies necessary to fulfill the conditions of the cooperation and verification mechanism, but also to adopt national anti-corruption strategies, both at the general and sectoral level. Currently, by Government Decision 216/2012[3], the Commission is set up with the aim to monitor the progress made by Romania in the field of judicial system reform and the fight against corruption, consisting of the Minister of Justice, who chairs the work, the representative of the Ministry of Interior, the Ministry of Public Finance, the Ministry of Foreign Affairs (all at least at the level of Secretary of State), the Superior Council of Magistracy, the High Court of Cassation and Justice, the General Prosecutor's Office, the National Anticorruption Directorate, and the National Integrity Agency. The annex of the Government Decision takes over the reference objectives established by the Commission Decision, so that they are stipulated in an internal normative act as well. We consider that the decision to take, in a national normative act, the provisions of a decision that has as an addressee precisely the Romanian state is erroneous and makes the legal norm less supple. Moreover, the national norm has not been updated with the recommendations of 2017, respectively 2018, presented below.

Regardless of who provided the majority of parliamentary or governmental politics, in the period 2007-2017 there was a consensus to strive for the Mechanism to be lifted, as a result of meeting the established indicators.

In 2017, the Commission carried out a detailed analysis of the progress made by Romania, showing that there are elements that lead to the conviction that the justice reforms and the mechanisms established seem irreversible. The Commission highlighted in particular the role of the Superior Council of Magistracy, as well as the fight against corruption and the activity of the National Anticorruption Directorate[4], all the elements being detailed in the technical report, which accompanies the Commission report[5]. Consequently, the Commission considers that, by implementing a number of 12 recommendations, Romania will be prepared to repeal the CVM Decision.

[3] Judgment no. 216/2012 on accelerating the implementation of the reference objectives provided for under the Cooperation and Verification Mechanism, published in The Official Gazette of Romania no. 209 din 2012.03.29.

[4] https://ec.europa.eu/info/files/progress-report-romania-2017-com-2017-44_en.

[5] https://ec.europa.eu/info/sites/info/files/swd-2017-25_en.pdf.

The 12 measures concern: appointing high-level prosecutors through clear and transparent procedures, establishing a code of conduct for parliamentarians, expressly mentioning provisions regarding the respect between state powers and the independence of justice, conclusion of the reform of criminal law, consulting with the relevant actors, and transparency in the regulation of penal and integrity legislation, enforcement of court decisions and jurisprudence generated by the courts, monitoring the existence of sufficient qualified personnel ensured in the judicial system, carrying out a program of transparency of the judicial system by the SCM, ensuring the entry into operation of the PREVENT system. It is recommended that Parliament should abide by the judgments concerning the incompatibility of its members, and that the immunity be clearly regulated, in order to avoid the interpretation that it is actually used as a cause of non-punishment. It is recommended to limit the immunity for ministers, to further apply the National Anticorruption Strategy and to operationalize the National Agency for the Management of Seized Assets.

Subsequently, in November 2017 the progress was reviewed and it was found that Romania has regressed in this field, especially by trying to change the law certain offenses related to corruption offenses, but also by trying to amend criminal law in Parliament. The Commission concluded that "While progress in meeting some recommendations was advancing well, the reform momentum in course of 2017 was lost overall, slowing down the fulfillment of the remaining recommendations, and with the risk of re-opening issues which the January 2017 report had considered as fulfilled. Challenges to and questioning judicial independence have also been a persistent source of concern."[6].

In November 2018, the Commission considers that the regression has continued, especially with regard to the reference objectives 1 and 3 and proposes a new set of 8 recommendations so that Romania can be excluded from the mechanism. The legislative changes made by the Parliament, even with the negative opinion of the Venice Commission, the establishment of the Criminal Justice Investigation Section, but also the attempt to modify the criminal legislation were considered inappropriate by the Commission. The following recommendations were formulated: immediate suspension of the implementation of justice laws and subsequent emergency ordinances; Review of the justice laws, fully taking into account the recommendations made in the CVM, as well as the recommendations of the Venice Commission and of GRECO; Immediate suspension of all pending proceedings of appointment and dismissal of high-ranking prosecutors; Re-launching a process of appointing a NAD chief prosecutor with proven experience in criminal prosecution of corruption offenses and with a clear mandate for NAD to continue conducting professional, independent and impartial investigations into matters of corruption; Immediate appointment, by the Superior Council of Magistracy, of the interim management team of the Judicial Inspection and the appointment, within three months, by competition, of a new management of the Judicial Inspection; The observance of the negative opinions of the Superior Council of Magistracy regarding the appointment of the prosecutors in positions of management, or regarding the revocation of the prosecutors who occupy leadership positions, until the establishment of a new legislative framework according to recommendation no. 1, formulated in January 2017; Suspension of the entry into force of the amendments to the Criminal Code and the Criminal

[6] https://ec.europa.eu/info/sites/info/files/comm-2017-751_en.pdf , p. 13.

Procedure Code; The reopening of the review of the Criminal Code and the Criminal Procedure Code, taking full account of the need to ensure compatibility with EU law and international anticorruption instruments, as well as the recommendations made within the CVM, and the opinion of the Venice Commission[7].

If, in previous reports, the formulation of the recommendations was a general one, establishing the field in which legislative or administrative interventions were needed, the eight recommendations of November 2018 surprised by the accuracy of the interventions and their imperative formulation. In this context, there have been institutional controversies at national level regarding the legal nature of these recommendations and the way in which the national judge will refer to their application in cases brought to trial.

From a certain point of view, they should be ignored, as they are issued in violation of national sovereignty, and the Union as a whole and the Commission in particular have no ability to intervene directly within the national legal framework, there also being a violation of the principle of conferral. In another sense, as they are measures related to a Commission decision, they must be applied in national law directly, without other measures of the national legislative authorities. But even in such a situation, some recommendations are practically impossible to implement in a rule of law. Phrases such as “suspension of the entry into force of the amendments to the Criminal Code” cannot be received, the norms of legislative technique being violated, as well as the constitutional provisions regarding the certainty of the application of the law. The referral, in criminal proceedings, to the Commission's recommendations led to doubts expressed by the judicial panels and, consequently, to the formulation of preliminary questions addressed to the Court of Justice of the European Union.

6 Conflicts of a constitutional nature

In a Decision that had as object the modifications made to law no. 304/2004[8], The Court finds within the recitals that, “by Decision 2006/928/EC of the European Commission of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, published in the Official Journal of the European Union L 354 of December 14, 2006, it was held that the Commission identified "remaining issues in the accountability and efficiency of the judicial system" of Romania, In the Report of the Commission to the European Parliament and the Council on the progress made by Romania in the framework of the cooperation and verification mechanism, of July 20, 2011, it is noted in this chapter that "Romania has not yet engaged in a process of in-depth reform of the disciplinary system". However, being a member of the European Union imposes on the Romanian state the obligation to apply this mechanism and to follow the recommendations established in this framework, in accordance with the provisions of Article 148 (4) of the Constitution, according to which

[7] https://ec.europa.eu/info/sites/info/files/progress-report-romania-2018-com-2018-com-2018-851_en.pdf , p. 19.

[8] Decision no. 2/2012 [R] on the objection of unconstitutionality of the provisions of the Law for amending and supplementing Law no. 303/2004 regarding the statute of judges and prosecutors and of Law no. 317/2004 on the Superior Council of Magistracy, published in The Official Gazette of Romania no. 131 of 23.02.2012.

"(4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented". According to the statement of reasons, the criticized law gives expression to this obligation, by regulating the deviations for which judges and prosecutors are disciplinarily liable and the inclusion in this category of the acts by which the specific duties of the position are violated or the prestige of the held position is violated. Moreover, the normative act follows the recommendations to strengthen the capacity and the organization of the Judicial Inspection, as well as to continue the process of its reform". Subsequently, in other decisions, the Court resumes the assertions presented above, which we consider to be judicious and well-founded. Attempts to amend the criminal law during 2018 have resulted in new notifications of the Constitutional Court, either before their promulgation, or in lawsuits pending before the courts.

A special situation is represented by Decision no. 104/2018, in which the considerations held by the Constitutional Court refer to the Decision no. 2006/928/EC and to the application of Union law in national law[9]. In a surprising sequence of ideas, the Court develops new meanings of the status of a member state of the Union and non-interference with the exclusive jurisdiction of the Union. In fact, by the entry into force of the Lisbon Treaty, the exclusive powers of the states have been replaced by powers of support, coordination and complementation [9] so that the assertions in point 90 are devoid of legal substance. Moreover, to question the application of the Decision, motivated by the fact that until then the Court of Justice has not ruled for the purpose of understanding its meaning, contravenes the general principles of application of European law rules. The European rule applies and, only when there are uncertainties or difficulties of understanding, preliminary actions are brought before the Court. Regarding the demarcation of the notion of Constitution, as an expression of the will of the people and the other laws, in the matter of applying with priority the regulations of the Union, we show our reservation, pointing out that it is about the essence of integrating the partial renunciation of sovereignty and the legal regulations, of any kind in the Member States.

Rather, the Court's motivation seems to be an argument in favor of those who have decided to ignore Romania's European commitments, rather than a deep, balanced, non-partisan constitutional analysis. The decisions of the Constitutional Court cannot exceed, in a rule of law, the letter and spirit of the Constitution itself.

7 Notification of the Court of Justice of the European Union[10]

The amendments to the criminal law and the 8 recommendations formulated in the Commission Report of November 2018 have generated a series of divergent interpretations regarding the way in which the recommendations will be applied by the national judge. In several litigations, which are pending before different courts, ex officio or at the request of the litigating parties, it was considered necessary to clarify the

[9] Decision 104/2018 [A] regarding the objection of unconstitutionality of the provisions of the Law for amending Law no. 161/2003 on measures to ensure transparency in the exercise of public dignities, public functions and in the business environment, the prevention and sanctioning of corruption, published in *The Official Gazette of Romania no. 446 of 29.05.2018, (81)-(91)*.

application and meaning of the recommendations for Romania, which is why actions were brought before the Court of Justice. Even though the judgments have not yet been delivered, the President of the CJEU ordered the application of the priority procedure for these actions. The most important questions are: whether the cooperation and verification mechanism should be considered an act adopted by a Union institution, within the meaning of art. 267 TFEU, which can be interpreted by the CJEU[10], are the requirements of this mechanism binding?[11], Does the principle of the supremacy of European law oppose a politico-judicial regulation, such as the Constitutional Court, to defeat by way of decisions which are not subject to any appeal?[12] The priority application of the law of the Union must be interpreted as allowing the national court to override the application of a decision of the constitutional litigation court, pronounced in a constitutional conflict, compulsory in national law[13].

8 Conclusions

The status of a member state of the European Union implies assuming not only the benefits of the internal market, but also the obligation to respect the fundamental operating principles set out in European law. The imposition of the Cooperation and Verification Mechanism has proved to be useful, as the fears of the other Member States regarding the functioning of the rule of law and the independence of justice are legitimate. The expertise of the Commission has been useful to governments, regardless of political orientation, as long as personal or group interests have not been put before national interests. Taking advantage of the existence of a strong parliamentary majority and a government with a weak democratic conscience, a group of politicians tried to fundamentally change the internal legal order beyond the status of a member state of the Union. The reaction of the Commission, unprecedented and at certain points with imperative tendencies, generated a chain reaction in the nationalist political areas, which called for the termination by law of the Mechanism.

Our conclusion is that this instrument is in force, directly and fully applicable in the courts, and the repeal can only be done expressly, with the prior notification of the Council and of the European Parliament.

No one prevented the national authorities from bringing an action before the Court of Justice of the European Union, just as the Constitutional Court was not prevented from addressing the same Court of Justice, before interpreting, in a questionable manner, direct application and direct effect of union regulations.

The approach of the courts is natural, within the limits of the rules of judicial cooperation, and the judgments of the Court will probably create an interpretation that will be at the basis for a new approach to the application of the European norms in national law.

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Legislative and jurisprudential issues concerning the application of EU Law into National Pharmaceutical Law

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Abstract

In the context of people's health and life rank foremost among the values and interests protected by the TFEU, this article examines the evolution of the legislative process regulating the internal market for medicinal products in order to ensure a high level of protection of public health against falsified medicines.

However, this article aims to address patient right to have access to safe, effective, quality and innovative medicinal products.

The legislative initiatives that have been taken at EU level taking account of new risk profiles, measures meant to ensure, at the same time, the functioning of the internal market of medicinal products.

This paper also aims to present the complex mechanisms of the pharmaceutical sector which is subject to a careful and consistent analysis both the European Commission and the Competition Council.

To ensure the effectiveness of the strategies to combat counterfeiting, especially in relation to the sale of medicinal products on the Internet, requires increased and effective international coordination and cooperation.

Keywords: European Union law, public health, legislative initiatives, patients' rights, the pharmaceutical sector, internal market, counterfeit medicinal products, high quality drugs, competition at the level of the European Union

1 Introduction

Considering its importance for health services, the pharmaceutical sector is subject to strict regulations. Although the main objective of rules governing the production, distribution and use of medicinal products must be to safeguard public health, however,

the means by which this goal is achieved, should not prevent the development of the pharmaceutical industry or of the trade in medicinal products in the European Union. In this context, the existing regulatory framework in this sector should not include unnecessary regulatory constraints that restrict and limit competition.

The operation of the pharmaceutical sector at Community level is based on four dimensions: regulation, integration, competition and innovation.

2 Theory

Before establishing a Community code concerning to medicinal products for human use [1], trade in medicinal products within the European Union was hindered by disparities between certain national provisions which directly affect the functioning of the internal market.

In this regard, Directive 2001/83/EC represented an important step in achieving the objective of free movement of medicines, establishing rules for monitoring medicines and specifying the obligations of the competent authorities of the Member States to ensure compliance with legal provisions.

The concerns at European level regarding competition on the pharmaceutical market pay particular attention to the rules on marketing authorization, on the pricing and reimbursement of medicinal products, as well as rules on patents.

Generic drugs are therapeutically equivalent to the original pharmaceutical products whose patents have expired. Generic drugs offer the same quality, safety and efficacy as the original products. A generic medicine is marketed under international patent law. Generic drugs are widely used in many EU countries in cost-effective treatment programs, being increasingly prescribed by physicians as effective alternatives to more expensive innovative pharmaceutical products.

Usually, a generic drug is 20%-90% less expensive than the original [2]. In addition, the availability of generic medicines at lower prices lowers the price of original medicines due to competition on the market, giving patients access to low-cost pharmaceutical treatment [3].

Patients do not have access to generic medicines, on average, earlier than seven months from the date on which innovative medicines have lost exclusivity (which is partly due to pharmaceutical companies that use various techniques to extend the commercial life cycle of their products). When the original medicines compete with generic products, prices drop, in some cases considerably, making the products accessible to a greater number of consumers.

Given the experience, especially by the Committee for Proprietary Medicinal Products, since the adoption of the Community code relating to medicinal products for human use additional measures have been necessary in order to cancel any remaining barriers to the free movement of patented drugs. Law no. 95/2006 on the health reform, published in the Official Gazette of Romania, Part I, no. 372 of 28 April 2006 in Title XVII – The medicinal product, has transposed into national law Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, published in the Official Journal Official Journal of the European Union no. L 311 of 28 November 2001, consolidated directive

from art. 86 to 100 by Directive 2004/27/EC published in the Official Journal of the European Union no. L 136 of 30 April 2004.

In 2005 came into force significant changes in the pharmaceutical regulatory framework, which had the objective of facilitating the market entry of generic medicines, for example, the introduction of so-called Bolar provisions [4].

Competition law enforcement and regulatory measures can improve market performance for the benefit of consumers and should be considered in this regard.

To facilitate the movement of medicinal products and to prevent the duplication of controls from one Member State to another, the minimum requirements for the manufacture and imports from third countries were established, as well as the conditions for granting their authorization.

3 Results and discussions

Because the new protection periods were applied for the innovative product for which authorization was applied for and approved after these rules became effective in 2005, some new rules – namely the new harmonized rules on data and market exclusivity, basically entered into force only in 2013.

Before the introduction of the Bolar provision within the EU regulatory framework, the development of the patent before its expiry was not regulated at EU level. Therefore, generic drug manufacturers have developed products conducted the related testing in countries where the basic patent had already expired or where there was no such protection, outside the EU, in European countries where there was a Bolar type provision or in other EU member states where experimental work was permitted in certain cases.

However, the scope and interpretation of Bolar exemptions vary across Europe. Generally speaking, countries can be divided into two categories: those countries where the exemption is limited to activities relating to marketing approval of generic medicines, bioequivalents and biosimilars, such as Belgium, Cyprus, Ireland, Netherlands and Sweden; and those countries that more broadly exempt any act required for marketing approval, as well as acts relating to innovative medicines, such as Austria, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, the UK, and Spain, as well as non-EU states Norway and Switzerland [5].

Intellectual property rights promote dynamic cooperation by encouraging companies to invest in developing new or improved processes or products. Competition has a similar role, encouraging enterprises to innovate. Therefore, both intellectual property rights and competition are necessary to promote innovation and to ensure that it is used in competition conditions [6]. If the existence and exercise of an industrial property right is not in itself incompatible with the right of the competition, they are not excluded from the application of competition law [7], and certain practices may constitute a violation, only in exceptional circumstances [8].

In the past, the Commission and national authorities have already taken action in several cases for specific infringements of competition law in the pharmaceutical sector. Among the decisions taken are: provisional measures taken by the French competition authority for a generic company whose products were constantly criticized by sales staff of an innovative company, even after obtaining the marketing authorization (the Arrow

Génériques case) [9]; the decision of the Italian competition authority, which determined that the denial of an innovative company to grant license for the production of an active substance, which the manufacturers of generic drugs needed to penetrate the national markets where the innovator had no exclusive rights, constituted a violation of Article 82 of the Treaty (Case GSK) [10].

Competitive pressure from generics may be significantly different and stronger than pressure from other originator medicines.

To mitigate the impact of generic entry, originator companies often devise and implement a variety of strategies to extend the commercial life of their innovative medicines (e.g. patent filing strategies, patent disputes and oppositions, settlement agreements, interventions before competent authorities and life cycle strategies for follow-on products). While these practices are not as such illegitimate, in specific cases they attract the scrutiny of competition authorities.

Since pay-for-delay agreements involve coordination between competing companies they fall under Article 101 TFEU (and equivalent provisions in national competition laws). The anti-competitive nature of pay-for-delay agreements does not depend on the form in which they are concluded.

An example for this is the Fentanyl case where Johnson & Johnson and Novartis (through their Dutch subsidiaries) agreed on delaying – against payment – market entry of the generic pain-killer fentanyl by entering into a co-promotion agreement [11].

In the Lundbeck decision of 2013 the Commission imposed a fine of EUR 93.8 million on Danish pharmaceutical company Lundbeck, as well as fines totalling EUR 52.2 million on four producers of generic medicines, for entering into agreements that delayed the market entry of generic citalopram.

In the judgment upholding the Commission's decision, the General Court confirmed that pay-for-delay agreements are akin to market sharing, which constitutes a serious infringement of Article 101 (restriction by object) [12].

The seminal judgments of the General Court (in 2010) and the Court of Justice (in 2012) in AstraZeneca [13] established that misleading public authorities and misusing the regulatory procedures as a part of a commercial strategy to launch a follow-on product, can in certain circumstances constitute an abuse of a dominant position.

Another type of practice affecting generic competition is the strategy used by some dominant companies to disparage (denigrate) the generic entrant to hinder the uptake of cheaper generics.

The Court of Justice recently provided guidance on which type of dissemination of information to the authorities, healthcare professionals and the general public raises concerns under the EU competition rules. The Court clarified that companies must not disseminate, in a context of scientific uncertainty, misleading information relating to adverse reactions resulting from the off-label use of one product with a view to reducing the competitive pressure it exerts on another product [14].

The parallel trade in products is a legal form of trade on the internal market of the European Union that creates healthy competition and price decreases for consumers and is a direct consequence of the development of the internal market. The legal basis of parallel import lies in the European principle of exhaustion [15]. Exhaustion is one of the basic principles of intellectual property law worldwide. According to the principle of exhaustion of rights under trademark law, and more generally under industrial property

law, the proprietor of a trademark may not prohibit its use for goods which have been placed on the market in the Community or the European Economic Area under that trademark by itself or with its consent.

In the European Union, parallel trade in medicines is based on the free movement of goods, in accordance with Articles 28 and 30 TFEU and on the case-law of the European Court of Justice.

The European Commission would emphasise that parallel imports are a lawful form of trade within the Internal Market based on the principle of the free movement of goods. In the pharmaceutical sector, parallel trade benefits from the divergence in prices set by national governments to control their health care expenditure. Whilst they are legal, parallel imports of medicinal products may be restricted if they constitute a risk to the protection of human health and life, and to the protection of industrial and commercial property.

Two provisions of the Treaty on the Functioning of the EU (TFEU) [16] are relevant for the competitive assessment of restrictions on parallel trade of pharmaceutical products, namely: Article 101(1), which prohibits agreements and concerted practices that are restrictive of competition, unless their efficiencies outweigh their anti-competitive effects pursuant to Article 101(3); and Article 102, which prohibits abuses of dominant position, unless objectively justified.

In applying these provisions to cases regarding restrictions on parallel trade, the Commission and the EU Courts have been guided by the so-called 'single market imperative', which provides that a clause designed to prevent a buyer from reselling or exporting goods he has bought is liable to partition the markets within the EU and consequently to violate EU competition law [17].

The principle of the legality of restrictions on parallel trade in medicinal products has been established as a result of decisions of the Court under the provisions of the Treaty on the free movement of goods [18].

Certain features of the pharmaceutical sector set it apart from all other industries engaged in the production of readily traded goods, including in particular the pervasive and diverse regulation to which pharmaceutical products are subject both at national and EU levels, including price and distribution regulations, as well as the importance of innovation and very costly R&D in this sector. As a result, competition in the pharmaceutical sector is not simply the interplay of supply and demand, as is the case in other industries.

The Court has also stated that the pharmaceutical markets are characterized by specific features that ought to be taken into account when applying EU competition law to restrictions on parallel trade of pharmaceutical products.

However, parallel trade cases are concerned with competition in relation to the same pharmaceutical product (so-called intra-brand competition) that is being bought in one Member State and sold into another. They are not concerned with competition between different substitutable pharmaceutical products (so-called inter-brand competition). Therefore, the General Court found that it is not manifestly incorrect to accept that all the medicines which are capable of being subject to parallel trade in a given Member State constitute a relevant product market.

In 2011, the Romanian National Competition Authority (NCA) adopted three decisions against a number of companies found to be restricting parallel trade in medicines,

thus making it more difficult for the distributors from one country (Romania) to compete on the markets in other countries [19]. The aggregate fines imposed by the Romanian NCA in the three cases amounted to RON 59.4 million (approximately EUR 12.75 million). Several other NCAs (e.g. the Spanish and the Greek) have also tackled various issues related to restrictions of parallel trade.

Parallel trade is a result of differences in prices between pharmaceutical products [20], for example, when Member States establish or otherwise control the price of products sold on their markets.

However, we must distinguish between parallel trade and reimport. For example, in the case of pharmaceutical products, re-importation designates transactions through which are imported medicinal products from a Member State in which they are authorized, after having been previously obtained by a pharmacy in another Member State from a wholesaler in the Member State of import. In this regard, the Court held that a product manufactured in a Member State which is exported and then reimported into the concerned Member State is an imported product in the same way as a product manufactured in another Member State [21]. The Court noted, however, that these findings do not apply if it is found that such products were exported solely for the purpose of re-importation in order to avoid legislation such as that at issue [22].

As a result of the developments in information and communication technologies, goods are now increasingly marketed domestically often through these channels. Therefore, it is not surprising that the role of Article 34 TFEU in Internet transactions involving the transfer of goods from one Member State to another has led to calls for action before the Court of Justice.

When examining the compatibility with Union law of the conditions for the retail supply of medicinal products, the Court of Justice of the European Union has recognised the very particular nature of medicinal products, whose therapeutic effects distinguish them substantially from other goods. The Court of Justice has also held that health and life of humans rank foremost among the assets and interests protected by the TFEU and that it is for Member States to determine the level of protection which they wish to afford to public health and the way in which that level has to be achieved. Since that level may vary from one Member State to another, Member States must be allowed discretion [23] as regards the conditions for the supply on their territory of medicinal products to the public.

Considering, in particular, the risks to public health and given the power granted to Member States to determine the level of public health protection, the Court of Justice has recognized that Member States may, in principle, restrict the retail sale of medicinal products to pharmacies [24].

The illegal sale of medicinal products to the public via the Internet constitutes a serious threat to public health because in this way counterfeit drugs may reach the public. Taking into account that specific conditions for the supply of medicines to the population were not harmonized at Union level, and that is an alarming increase of medicinal products detected in the Union which are falsified in relation to their identity, history or source, it was necessary to amend Directive 2001/83/EC as regards the prevention of the entry into the legal supply chain of falsified medicinal products [25].

Without prejudice to national legislation prohibiting the remote offer for sale to the public of medicinal products subject to medical prescription via the Internet [26], the

Member States must ensure that products are offered for sale remotely to the public by means of information society services.

So that the functioning of the internal market not be unduly restricted, but also for public health protection, for the retail supply of medicinal products sold online, the Directive 2011/62/EU provided the creation of a common logo that can be recognized throughout the Union and allowing the identification oft he Member State of establishment of the person offering the medicinal products for remote sale to the public. The logo shall be clearly displayed on the Internet site offering the medicinal products for remote sale to the public.

To harmonize the functioning of the common logo, the Commission adopts implementing acts concerning the technical, electronic and cryptographic requirements for the verification of the authenticity of the common logo and the Community logo design. If necessary, these acts shall be adjusted to take account of technical and scientific progress.

By applying the provisions of Directive 2011/62/EU, each Member State has set up an Internet site providing information on applicable national legislation on the distance selling of medicines to the population, including information that there may be differences between Member States as regards the classification of medicinal products and the conditions for their supply.

Also, Internet sites of the Member States should provide information on the purpose of the common logo, the list of persons offering medicinal products for sale at a distance to the public by means of information society services and their website address. This site should also provide general information on the risks related to medicinal products supplied illegally to the public via information society services, and a hyperlink to the internet site of the competent authority in that Member State.

The European Medicines Agency (EMA) has created a website that provides information on the purpose of the common logo, general information on the risks related to medicinal products supplied illegally to the public via information society services, information on the European Union legislation applicable to falsified medicinal products, as well as hyperlinks to the Internet sites of the Member States. EMA website explicitly states that websites contain information on persons authorized or entitled to remotely supply medicinal products by means of information society services in the Member States.

The population should be assisted to identify sites which are legally offering medicinal products for sale to the public remotely. To provide comprehensive information to the public, all these sites are interconnected.

In addition, in cooperation with the European Medicines Agency and the Member States, the Commission is organizing awareness campaigns to warn consumers about the risks of purchasing medicinal products from illegal sources via the Internet.

Without prejudice to Directive 2000/31/EC and the requirements of Title VII of Directive 2011/62/EU, Member States must ensure that unauthorized persons offering medicinal products for sale to the public remotely, by means of information society services, and operating on their territory, are subject to effective, proportionate and dissuasive sanctions.

To prevent drugs that are suspected to present a danger to health from reaching the patient, Member States use a system that includes the receipt and handling of notifications

of suspected falsified medicinal products, as well as quality defects of medicinal products that are suspected. If it is suspected that falsified medicinal products have reached patients, urgent public announcements are made within 24 hours to recover these products from the patients. Such notices shall contain sufficient information on the suspected quality defect or falsification and the risks involved.

4 Conclusions

The pharmaceutical industry is one of the most R&D-intensive industries in the EU and worldwide. In 2017, the spend on new R&D equalled 13.7 % of sales in pharmaceuticals and 24 % in biotechnology [27]. Innovation is driven by the demand for new, more effective and/or safer treatments for patients, the life-cycles of medicines, and the threat of competition, especially generic competition after loss of exclusivity.

The pharmaceutical sector requires close competition law scrutiny and the reported antitrust and merger cases provide a range of examples of how enforcing competition law specifically helps to safeguard EU patients' access to affordable and innovative medicines.

In 2009-2017, European competition authorities investigated more than 100 cases [28], while over 20 cases of possible antitrust infringements are currently being examined. To ensure that pharmaceutical markets do not get too concentrated due to mergers, the Commission reviewed more than 80 transactions. Competition concerns were detected in 19 merger cases, and the Commission cleared these mergers only after the companies offered to address concerns and modify the transaction.

The EU needs a competitive pharmaceutical industry. With this background, Member States and the Commission should reflect further on how to reconcile the policy objectives of ensuring accessible healthcare for all EU citizens with the need for cost containment. Consideration should be given to improved cooperation on building mechanisms for increased transparency and better coordination to minimise any unintended effects that current national pricing systems may have in terms of accessibility throughout the EU.

The lack of appropriate and continued supplies of human medicinal products to pharmacies is a serious and growing problem that has occurred in recent years in a number of Member States and can gravely impact the treatment of patients. The Commission acknowledges that parallel trade in medicines may be one of the reasons for the occurrence of shortages of a number of medicinal products for human use.

The issue of shortages of human medicines in the EU was discussed during the informal meeting of ministers for health matters held in Bratislava on 3 and 4 October 2016.

The European Parliament adopted its resolution on EU options for improving access to medicines on 2 March 2017. In this resolution, the Parliament called on the Commission and the Council of the EU to analyse the causes of shortages of medicines to monitor compliance with EU rules on the obligation to ensure continuous supply (Article 81 of Directive 2001/83/EC). We believe this is inextricably linked to the affordability of human medicines to patients and related pricing policies in different Member States for which they have exclusive competence.

The European Commission decided on 17 May 2018 to close its infringement procedures and the treatment of complaints in the area of parallel trade of medicines for human use against Poland, Romania and Slovakia.

After careful assessment, the Commission has concluded on the need to look for other ways than infringements to adequately solve this complex situation in order to swiftly and efficiently deal with an issue that might have negative impact on the health of European citizens.

In our opinion, reconciling the respect to the free movement of goods with the right of access to healthcare to patients is a fine balancing act.

For the pharmaceutical sector, the European Commission uses its full powers conferred to it under antitrust rules (Articles 81, 82 and 86 of the EC Treaty), the control of economic concentrations state aid control (Articles 87 and 88 of the EC Treaty). Whenever the interest of the European Union will impose it, the European Commission, in close cooperation with national authorities for competition, will investigate any breach of regulations in the pharmaceutical sector.

Counterfeit drugs are illegal in terms of EU pharmaceutical legislation as they do not comply with EU rules on medicinal products. They pose a major threat to European patients and European industry and the public and stakeholders are deeply concerned about the steady increase of these products detected in the European Union in recent years. The number of falsifications of innovative and life-saving medicines is increasing. Even if you the exact number of existing or future cases is unknown, there is a noticeable trend clearly threatening the high level of public health protection in the European Union. *We believe that this trend can have disastrous consequences for consumer patient confidence in the pharmaceutical industry and the policy makers.*

Any action of public authorities in the pharmaceutical sector should aim at creating a competitive environment to ensure the access of EU citizens to innovative, safe and affordable medicinal products, without unnecessary delay.

In our opinion, in the pharmaceutical sector, European Union law is enforced in national law, even if this is done late or, at the last moment, by the Government Emergency Ordinance, although, in principle, according to the Decision of the Constitutional Court of Romania no. 1599/2010 (published in the Official Gazette no 67 of January 26, 2011), the national measures for the transposition of the directives have to be adopted by Parliament.

Thus, Directive 2011/62/EU on the prevention of the entry of falsified medicinal products into the legal supply chain, which was due for transposition into national legislation on 31 December 2012, was transposed by Government Emergency Ordinance 191 of 12 December 2012 (GEO No. 91/2012 for amending and completing some normative acts in the field of health, published in the Official Gazette No. 886 of 27 December 2012).

By the Government Emergency Ordinance No. 2 of 29 January 2014 (GEO No. 2/2014 for amending and completing the Law No. 95/2006 on health reform, amending and completing some normative acts, published in the Official Gazette No 104 of 11.02.2014), has been transposed Directive 2012/26/EU of the European Parliament and of the Council of 25 October 2012 amending Directive 2001/83/EC as regards pharmacovigilance, which had the deadline for transposition 28 October 2013, and the

transposition omissions of the Article 118a of the Directive 2011/62/EU have been corrected.

Given the fact that, following the notification of the European Commission, Romania assumed its responsibility to promote, by the end of April 2014, a normative act to address the transparency of the measures on the compensation of medicines so that it does not evolve to the state of infringement, in May 2014, the Government has adopted another emergency ordinance, Government Emergency Ordinance no. 23 of 13 May 2014 (GEO No. 23/2014 for amending and completing the Law No. 95/2006 on the health reform, as well as for amending and completing some normative acts, published in the Official Gazette no 359 of 15 May 2014) which provided the primary transposition framework for Directive no. 89/105/EEC of 21 December 1988 relating to the transparency of measures regulating the pricing of medicinal products for human use and their inclusion in the scope of national health insurance systems.

The reasons invoked in the preamble to the emergency ordinances by which the Government transposed, in full or in part, European Union directives with an incidence in the pharmaceutical sector under the Romanian law, were: Romania's obligation to meet the deadlines set for the transposition of the Directives, diminishing the risk of triggering an action in finding the non-fulfillment of the obligations of a member state, according to the provisions of art. Article 258 of the Treaty on the Functioning of the European Union, avoiding the risk that Romania will be compelled by the Court of Justice of the European Union to pay financial penalties, and the Commission Communication 2011/C12/01 on the implementation of art. 260 paragraph (3) TFEU, in particular as regards the Member States' obligation to transpose directives within the time limits set by the legislator and thus ensure effective EU legislation.

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Premises of Turkey's Accession to the European Union

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Abstract

This paper presents the assumptions of the accession of the Republic of Turkey as a Member State of the European Union. To begin with, the paper presents the characteristic features of the Turkish state (geographical position, language, currency, religion, political regime, international relations), followed by the pre-accession and accession process, which began in December 1999 at the European Council meeting in Helsinki, following which the accession negotiations were opened, the European Commission's 2018 Report on Turkey, political and economic implications as well as the advantages and disadvantages of Turkey's accession to the European Union.

Keywords: Turkey, European Union, European Commission Report, Enlargement of the European Union

1 Turkey

The Republic was founded in the remains of the old Ottoman Empire on October 29, 1923. In the same year, following the Treaty of Lausanne on January 30, which represented a population exchange between Greece and Turkey [1], and covered about two million Greek Orthodox Christians Anatolia and Muslims from Rumelia [2] was recognized as the sovereignty of the new Republic, and Mustafa Kemal Atatürk became the first president of the country. It is worth noting that the personality cult of this character, called the "Father of Turkey", still persists in Turkey because of reforms in education, social environment, religion, administration to demystify the idea that Islam is incompatible with democracy.

In 2017, Turkey's gross domestic product was 851.1 billion dollars [3], compared to other European countries such as Romania, which recorded 211.8 billion dollars in 2017, France with 2.853 trillion dollars, or Hungary, where the value was 139.1 billion dollars.

1.1 *Geographical Position – Component of Accession*

Located on two continents, Turkey offers the opportunity to position two historical, cultural, social, economic contrasts – Europe and Asia. The two continents are home to 3% of Europe and 97% of Asia. This is where the question arises about Turkey's rights to join the European Union or another possible Union of Asian states. The answer can be found only after analysing the issues that address the advantages and disadvantages of joining the European Union for both sides.

Thus, by fulfilling the quail-non-political, economic and legal criteria and by assuming the Member State's obligations as well as the conditions for accession, as formulated at the 1993 Copenhagen meeting, a country may apply to become a Member. In accordance with Article 2 of the Treaty on European Union, "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." These values are common to the Member States in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men "and its purpose is determined by the first sentence of Article 49 of the same act "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union." With this enlargement of the European Union of six members to 28, a more united and prosperous union is built by removing trade barriers [4].

Being in the 37th place in the world, as a surface, following its accession to the European Union, the Turkish state can favour the emergence of political, and less economic, complications. Due to its strategic position as well as the numerically large Muslim population, the Republic of Turkey can provide an advantage for the European Union; the balance is destabilized when looking at the security of the Turkish state's borders, the country's economic situation, culture, state history, which do not provide enough, guarantees a safe integration in the European Union.

1.2 *Population, Religion and the Currency of Turkey*

The population has 72,561,312 inhabitants, being the second country in the ranking of the population in the member countries, ranking after Germany.

There is no official religion in the country. The Constitution of Turkey states in Chapter VI entitled Freedom of Religion and Conscience, Article 24 Freedom of Conscience, Religious Belief and Belief. Approximately 99% of the population is Muslim, Sunni, and 1% Christian, declared atheists or followers of other religious beliefs. Difficulties in adapting Muslims to the European environment have increased with the wave created by refugees and migrants in Syria and other military conflict zones between 2015-2016, when more than a million people arrived in the European Union [5].

It is also important to recognize that the presence of Muslims is an unfinished and unequal process. It is an ongoing process and looks at all social realities. The internal articulation of European Islam is unfinished, the leaders are infrequent, the ruling class is about to be constituted, the population is still in the possession of their rights in the European public space, many of them being fragile due to the difficulty and the

precariousness their entry into the labour market [6]. Testimony of the complete non-adjustment and the upholding of Muslim principles and values against European conception is the case of Osmanoğlu and Kocabas against Switzerland, in which the European Court of Human Rights ruled that Article 9 of the European Convention on Human Rights has not been violated. Another issue of the development of Islam in European territory is represented by the likeness of the practitioners of this religion with the terrorist struggle; which made the citizens feel afraid, the rights to protest for Islamists is limited. The European Parliament offers the following possible initiatives for the future:

1. To strike a balance between the principle of equality and innovation in the political administration of the reality of European Islam (equality of Muslim believers versus believers of other religions); the desire for integration in general must involve the integration of Muslims into the European space, as well as the training of non-Muslim European citizens about the Muslim reality. For all EU citizens, emphasis should be placed on education on citizenship and democratic foundations (which are often considered self-evident) and on a multidisciplinary investigation into the place of religious dimension in the public space.

2. Avoid reducing questions about European Islam as a way of forming standard models of meeting and dialogue between religions.

3. Promote, with great care and caution, the development of an open and tolerant Islam through the development and circulation of ideas (translation and communication).

4. Promote profound debates that will not hesitate to present themes that could hurt people. They must be guided in a spirit of openness and freedom of expression, without limits, within a framework of mutual respect, reciprocity and "mutual inclusion". It is about going beyond a relatively passive cohabitation to reinvent the promotion of interculturalism in the city to make it operationally active, which is currently limited to expressive, cultural or even folkloric forms [7].

Turkey uses the local currency, the Turkish lira, whose value has considerably depreciated over the past year as opposed to the US dollar as a result of the rupture of relations with the United States of America. Although it better meets the criteria for joining the euro area than other candidate countries, Turkey has shown its option to create a "pound zone".

1.3 *Turkey's International Relations*

Among the founding members of the United Nations is Turkey, which for several mandates has been non-permanent member of the Security Council.

Together with Belgium, Denmark, France, Greece, Ireland, Italy, Luxembourg, Great Britain, Norway, the Netherlands and Sweden, Turkey participated in the founding of the Council of Europe in 1949. It was Turkey's first step towards Europe, followed by the association European Economic Community in 1963. Only the candidate country status was recognized in October 2005 when the European Union opened accession negotiations with Turkey.

Turkey joined NATO in 1952 through international relations, for defending against the threats of the Soviet Union.

The Republic of Turkey becomes a founding member of the Organization for Economic Cooperation and Development in 1961. It is also a member of the Group of Twenty Ministers of Finance and Governors of Central Banks (G20) since 1999. In 1973, it became a member of the Organization for Security and Cooperation in Europe.

2 The Accession Process of the Republic of Turkey to the European Union

Turkey's steps to join the European Economic Community began in 1963. After 56 years, Turkey and the European Union failed to reach a common agreement that would result in Turkey joining the European Union. In the last 14 years, only 16 chapters of the 35 have been debated and only one has been provisionally closed.

"The main factor that makes Turkey's possible accession notably more problematic than those of other Eastern European states is the sheer size of the country, an estimated 64 million people as of 1998. For the European Union, the main economic obstacle to incorporating the ten Eastern European states is the enormous burden they might place on its agricultural and structural funds. The same considerations apply in the Turkish case." [8] It is suggested that to cope with these, as well as prospective radical change in burdens, the European Union will have to adopt a more radical change in which the same rules would not be applied uniformly to all member states.

The relationship with the European Union is not merely the product of structural determinism highlighted by numerous macro-analyses. It is also being constructed dynamically through the appropriation, re-appropriation, investment in or withdrawal of involvement from the enlargement process by a large number of actors. The contributions to this issue stress the paths followed by actors and the socialization processes leading "to the things of Europe". [9]

2.1 *The Republic of Turkey Receives the Candidate Country Status upon Accession to the European Union*

Although it did not meet the Copenhagen political criteria to start the negotiations, Turkey received the status of candidate country in December 1999 because of the European Council meeting in Helsinki. The European Council meeting in Brussels on 16-17 December 2004 took the historic decision to start accession negotiations with Turkey, stating that Turkey is a candidate country destined to join the Union based on the same criteria as those applied to other candidate countries [10].

2.2 *Debate of the Accession Negotiations*

Following the start of the accession negotiations on 03 October 2005, the Council adopted the Accession Partnership with Turkey on 18 February 2008, setting out short-term priorities in areas such as public administration, judiciary, anti-corruption, human rights and protection of minorities, economy. It sets out the medium-term priorities, the conditions for granting financial assistance for the implementation of the

stabilization measures and the monitoring mechanism for the implementation of the Association Agreement through the Commission's progress reports [11].

2.3 *Meetings of the Association Council*

The 54th Meeting took place in Brussels on 15 March 2019 and was the first meeting after Turkey's emergency. It highlighted the European Union's concern about the regressions made in the field of fundamental rights, the civil society's interest in the accusation of activists, the negative impact of the measures on the judiciary. He congratulated the state for the decision to provide accommodation for about four million refugees and reiterated its support for terrorism and EU membership.

2.4 *Debate of the European Council on Turkey*

The 19 October 2017 meeting was an opportunity for European leaders to debate the situation between Turkey and the European Union, underlining the commitment to support migration. Although they have been declared open to Turkey's accession, they have called for caution on the possible reduction of pre-accession funds, considering the situation in that country.

2.5 *The Leaders' Meeting in Varna*

On March 26, 2018, European Union leaders hosted Turkish President Recep Tayyip Erdoğan at the Euxinograd Palace in Varna, Bulgaria. The Union was represented by Donald Tusk, President of the European Council, by the President of the European Commission, Jean-Claude Juncker, and by Bulgaria's Prime Minister Boyko Borisov. The talks focused on migratory flows, the rule of law in Turkey, and Turkey's involvement in Syria. Concerning the first issue, the commitment of both sides to the support of migration was highlighted. Turkey is committed to securing the highest standards of democracy, but its actions do not cause the promise to be respected, moreover, a violation of the promise. Turkey's involvement in Syria can be insecure for civilians, which is why the Union has called for the safety of civilians in those areas and for facilitating access to humanitarian aid.

3 European Commission Report of 2018 on Turkey

In 2018, the European Commission drew up a report on Turkey in the priority areas, which required measures to be in line with European legislative rules.

Because of the coup d'état of 15 July 2016, the European Union condemned the event and expressed support for Turkey in taking the necessary steps to stabilize the country and democratic institutions. The 31 decrees taken in a very short time without the possibility of detailed analysis of the effects they will produce, redundancies in administration, education and justice, arrests raised strong questions about how to lift the state of emergency in the country.

The referendum of April 2017, which changes the political regime into a presidential one, may pose a threat to the separation of powers in the state through the powers conferred on the president; he appoints six of the 13 members of the Judges and Prosecutors' Council, the post of Prime Minister will be suppressed, and the legislative power is composed mostly of parliamentarians from the party led by Erdoğan.

In public administration, Turkey is moderately prepared. Turkey's judicial system is in an early stage of preparation. No efforts have been made to address concerns about the lack of objective, merit-based, pre-determined criteria for the recruitment and promotion of judges and prosecutors. The fight against corruption – the country has a certain level of preparedness in the fight against corruption, where no progress has been made. Fight against organized crime – Turkey needs to improve its legislation on cybercrime, confiscation of goods and witness protection. Human Rights – continued the suppression of freedom of expression, Turkey being in an early stage of training. Criminal cases against journalists – more than 150 of them remain detained – human rights defenders, writers or social media users, media outlets, the closure of numerous media outlets or the government's appointment of directors are worrying and rely on the most much of their selective and arbitrary application. Gender violence, discrimination, hate speech, minorities, hate crimes and human rights violations of lesbian, homosexual, bisexual, transsexual and intersexual persons are still a matter of serious concern. The economic sector – the Turkish economy is well advanced and can be considered as a functioning market economy. The tendency to increase state control in the economic sphere and actions aimed at companies, businessmen and political opponents and their businesses have affected the business environment [12].

4 The Advantages and Disadvantages of Turkey's Accession to the European Union

The geographical position of the country can give the Union the main role in the relations between Europe and Asia, facilitating land, air and maritime transport. From an economic point of view, the Union can benefit from a widespread common market, due to the large area and large population of Turkey, as well as the young labour force.

Turkey has made good progress by abolishing the death penalty, allowing access to education in minority languages. Changing the citizens' mentality and opening to a world whose values are ineligible rules render Turkey's current profile.

The main disadvantage for the Union is the lack of safe boundaries of delimitation of war zones (Syria, Iraq, Iran) and safe areas, where people's protection is guaranteed. Turkey's accession strengthens the borders of the Union, making it a part of ensuring that citizens are protected in areas where security cannot be guaranteed.

The issue of Turkey's borders is also being discussed regarding the dispute with Cyprus, but also the problem with Armenia.

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The European Security and Defence – between "strategic autonomy" and independence

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Abstract

Even before being legally regulated and becoming a self-standing policy, the idea of security and defence in the European Union has sparked a lot of debates and anxiety, as well as some sense of disillusion, which, along with the lack of initiative, or better said the lack of desire to follow through these initiatives, have prevented the coagulation of a common and independent European defence. The growing pressure that the European Union is experiencing, as a result of the increasing threat level within the region as well as on the periphery of Europe, has led to the re-establishment of the European ambition of strategic independence in the field of security and common defence. Thus, since the publication of its Global Strategy in 2016, a series of steps have been taken in this direction, including: the creation of the European Defence Fund, the Permanent Structured Cooperation and the Coordinated Annual Defence Analysis. Building on these premises, our study follows the recent political and legal developments in the EU's security and defence structures, identifying the Union's effective capabilities to move towards a real independence in this area.

Keywords: European Union, common security and defence, independence, strategic autonomy.

1 introduction

The creation of a "common security and defence conscience" in Europe has been, and still is, a slow process, marked by many hesitations and contradictions from the European leaders. At a normative level, the notion of "common defence" officially found expression in the European legal language with the drafting of the Treaty on European Union in the winter of 1991 – whereas up to that point it had been excluded from the scope of the European Communities treaties[1]. Thus, the provisions of article J.4.1. laid down for the newly established European Union, the objective of "implementing a

common foreign and security policy, including the possible definition of a common defence policy, which could in time lead to a common defence"[2]. However, what the European leaders failed to affirm at the Maastricht moment, and since then as well, is how "autonomous" this common defence would be. When the European Parliament drew up its Annual Report on the implementation of the European Security Strategy and the Common Security and Defence Policy, in 2010, the issue of "strategic autonomy" became a topic of discussion for the first time in an official EU document. According to the 3rd paragraph of the Report, "the Union must enhance its **strategic autonomy** (subl.n.) through a strong and effective foreign, security and defence policy, so as to preserve peace, prevent conflicts, strengthen international security, protect the security of its own citizens and the citizens concerned by CSDP missions, defend its interests in the world and uphold its founding values, while contributing to effective multilateralism in support of international law and advancing respect for human rights and democratic values worldwide (...)"[3].

The adoption of the European Global Security and Foreign Policy Strategy (EUGS) on June 28th 2016 gave another impulse in defining a coherent security and defence strategy that would complement the existing measures and policies. As the President of the European Commission, Jean-Claude Juncker stated in 2017 – "the wind is back in Europe's sails. But we will go nowhere unless we catch that wind. (...) We need to work for the creation of a European Defence Fund and a permanent cooperation in this area. By 2025, we need a fully-fledged European Union of Defence"[4]. 2016 was also the year when the European Union and NATO signed a joint declaration aimed at giving "a new impetus and a new substance to the NATO-EU strategic partnership (...) in the spirit of mutual openness and in accordance with decision-making autonomy (...) and without prejudice to the specific nature of the security and defence policy of any of its members"[5], and the year when the European Commission presented its European Defence Action Plan which included the European Defence Fund – a key element in the efficient management of security and defence expenditure, which "had to contribute to the EU's strategic autonomy in terms of common security and defence"[6]. The process of building an independent European defence framework has become even more profound with the launch of PESCO, in line with Article 42 Paragraph (6) of the Treaty on European Union (TEU), which explicitly stated that "those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework"[7].

These recent initiatives of the European Union are direct consequences of the remodelling of the international security environment on the one hand and, on the other, the result of the United States increasingly oscillating and unpredictable foreign policy, that has repeatedly emphasised the obligation of the European States to take more responsibility in securing their own defence, and in reducing their dependence on NATO's structures. Therefore, the creation of a European collective defence force, independent of other international structures, is not only a challenge, but rather a reality and a practical necessity.

The objective of this article is to understand how the EU defines the concepts of "autonomy of action" and "strategic autonomy" in light of the European *acquis*, while trying to answer the question "How independent is the European security and

defence?". To this end, we will briefly analyse the legislative provisions that regulate the issue of common security and defence, as well as the defence initiatives developed by the European Union in terms of its strategic autonomy, from 2016 to the present.

2 "Strategic Autonomy" – a new, but old concept

"Strategic autonomy", along with "defence independence" or "European security integration" – is one of the expressions ever more present in today's political discourse of the leaders in Brussels, being repeated over the years almost obsessively in official documents that refer to Europe's security and defence. However, aside from the political domain, the concept of "strategic autonomy" has been used with increasing frequency in the legal sphere as well, being mentioned in a series of normative acts. An example in this sense is the Regulation developed for the European Defence Industrial Development Program (EDIDP), where is listed as one of the program objectives. Despite the current abundance in its use, the notion of "strategic autonomy" is by no means a new concept, but rather an idea deeply rooted in the evolution of the European Security and Defence Policy (ESDP)/Common Security and Defence Policy (CSDP); because the main scope of their very creation was the endowment of the Union with military and civilian capabilities that would allow it to manage external crises. Therefore, in order to understand the emergence and development of the European concept of "strategic autonomy", first we must refer to the European Union's concept of common defence.

Most often viewed from a military perspective, the common defence was defined by scholars as a set of defensive actions, used by a group of actors, in order to repel a real, presumed or anticipated attack[8]. As for the European Union, the legal basis for the creation of an integrated and autonomous European defence is laid down in the provisions of Article 42 paragraph (2) of the TEU, which clearly states that "the common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides"[9]. Furthermore, paragraph 3 of the same article stipulates the possibility of the Member States to "make civilian and military capabilities available to the Union for the implementation of the common security and defence policy (…) Member States which together establish multinational forces may also make them available to the common security and defence policy"[9]. Without giving a real definition for the concept, the provisions of Article 21, paragraph (2) of the TEU are limited to identifying the Union's objectives in the field of common defence – namely, protecting "values, fundamental interests, security, independence and integrity"[9], while Article 42, paragraph (7) of the same treaty regulates the "collective defence obligation" as follows: "if a Member State is the victim of armed aggression (…), the other Member States shall have towards it an obligation of aid and assistance by all the means in their power"[9].

In the same manner, there is no definition given by the European *acquis* to the notion of "strategic autonomy" either, being described from a scholar point of view, as "the indispensable military capabilities necessary to allow a strategic actor to engage in autonomous actions"[10]. In a different, more synthetic perspective, the concept of "strategic autonomy" can be described as consisting of three distinct elements – namely political autonomy, industrial autonomy and operational autonomy, each one being indispensable for achieving strategic autonomy[11].

The paradigm shift in the evolution of the concept of European security and defence in the last three years have brought the notion of "strategic autonomy" into the forefront once more, turning it into the focus of the 2016 EU Global Strategy. However, the European defence autonomy is a commitment that the EU has assumed ever since twenty years ago, through the Declaration adopted following the Franco-British Summit in Saint-Malo – who paved the way for the establishment of a common security and defence policy[12]. Paragraph 2 of the Joint Declaration explicitly stated that "the Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them, and a readiness to do so,"[13]. This objective was later stressed by the EU Member States at the Cologne European Council. According to the Declaration on strengthening the Common European Policy on Security and Defence "(...) the CFSP must be supported by credible operational capacities aimed at strengthening the CFSP (...), requiring an autonomous capacity for action, backed by credible military capabilities and appropriate decision-making bodies"[14]. From a purely semantic interpretation it could be stated that the notion of "autonomous action" does not have an equally wide operational range as "strategic autonomy", the ability to act independently from other external structures makes them almost perfect synonyms. In line with the provisions of the Declaration adopted at the Helsinki Council, the concept of "autonomous action" implied the creation of a EU rapid reaction force, thus focusing on the operational aspects of the Union's autonomy in the field of security and defence – more specifically, establishing an army contingent of 50,000 to 60,000 troops capable of carrying out operations over a period of 60 days to 12 months[13]. Thus, the European Council underlined "the determination to develop an autonomous decision-making capacity, (...) to launch and conduct EU-led military operations (...) to avoid unnecessary duplication, without involving the creation of a European army"[15].

However, the concept of strategic autonomy was forgotten with the adoption of the 2003 European Security Strategy, whose provisions limited the EU's overall action to promoting a political and legal system of multilateral security agreements[16]. However, the omissions of the 2003 Strategy were remedied by the adoption, at the General Affairs and External Relations Council in 2004, of the Headline Goal, which effectively established a structured plan for the development of the EU's military and civilian capabilities to "address the full spectrum of crisis management operations covered by the TEU"[17] (as set out in Article 21, paragraph 2 of the Treaty). Analysing the provisions of this document we note that, despite some progress, the notion of "strategic autonomy" is strictly limited to its operational dimension, becoming nothing more than a list of military capabilities. As the pattern for addressing European security and defence issues has changed, the model laid down by the 2003 European Security Strategy lost its relevance. Since then, strategic autonomy has been presented from a more industrial and technological perspective. The 2009 economic recession has inevitably produced effects on defence industries as well, which is why the European Commission considered it was time to reiterate its objective of achieving strategic autonomy, and on December 14th 2011, the European Parliament adopted a Resolution on the impact of the financial crisis on the defence sector in the EU Member States[18].

The cleavage between the three elements that define the concept of strategic autonomy was emphasized even more by the European Commission's 2013 Communication on the Defence and Security Sector, according to which the defence

market and industrial interests were taking precedence. In this normative and political background, took place the European Council of December 2013, during which, for the first time since the entry into force of the Treaty of Lisbon, was set up a thematic debate on defence[19]. Acknowledging the fact that by structuring a strategic autonomy based on the industrial component alone would, in the long term, lead to the erosion of the CSDP, Member States excluded the idea of allowing the Commission to play a leading role in defence procurement.[19]. This line of evolution concerning strategic autonomy was maintained until June 2015, when the High Representative was entrusted by the European Council with the revision of the European Security and Defence Strategy. The adoption of the EUGS in 2016 however, has not expressly provided a legal definition for the concept of "strategic autonomy". Nevertheless, the importance of the defence industry for achieving a strategic and political autonomy of the Union has been stressed once more – "a sustainable, innovative and competitive European defence industry is essential for Europe's strategic autonomy and for a credible CSDP"[20]. Among the other objectives listed in the document were: developing a specific defence strategy that would determine the level of ambition of the EU in the field, the tasks and requirements for effective capabilities, and the strategic priorities of the Member States[20].

3 Political Autonomy in the field of Security and Defence

From an etymological point of view, the word "autonomy" is composed of the Greek terms "autos" – meaning *self* and "nomos" – whose significance is *law*. Therefore, if we were to make an *ad literam* translation, political autonomy could be defined as the right of a person/entity to govern itself according to its own laws. The Romanian Dictionary offers several definitions for the concept – (1) "the right (of a state, region, nationality or national minority, etc.) to make its own laws or rules and to govern itself in a state run by a central power"; (2) "the right of a country, organization or group to govern or to administer through its own institutions"[21]. In the field of security and defence, political autonomy can be defined as the ability of a state/organization/entity to establish independently: (1) a strategic line of action – "respect for human dignity, freedom, democracy, equality, rule of law"[7] "cooperation and systematic integration"[22], "assuming a global role"[20]; (2) a scope for action – "defence of values, fundamental interests, security, independence", "supporting democracy, the rule of law", "maintaining peace, conflict prevention and strengthening international security"[7]; (3) political, judicial and economic resources; (4) institutional and organizational structure; (5) the behaviour on the international scene – from diplomatic actions and missions, to one's alliance system, and even the use of force.

Throughout its history, the European Union has frequently expressed its intention to define a common security and defence policy, however, its existence is very recent, more specifically since the signing of the Maastricht Treaty in 1992, being further developed and consolidated by the Treaty of Lisbon in 2009. From a legal point of view, as it appears from the provisions of Title V of the TEU, this so called "common policy" remained within the competence of the Member States, and making it the subject of an intergovernmental collaboration at European level[7]. In line with Article 31 of the TEU, in the field of "peace and war (…) decisions are taken by the European Council and by the Council, acting unanimously"[7], and thus making it easy for other international actors

to tilt the balance of interests between Member States. The European *aquis* in the field of security and defence, however comprises a number of limitations in regards to the autonomy of the decision-making process. On the one hand, we have the legal limitations, if we refer to the lack of efficiency of the decision-making mechanisms, the political limitations, which are largely based on the divergent views of national governments on the management of CSDP instruments and, of course, the economic and budgetary limitations. Another limitation that we identify is that the European autonomy of the decision-making process, and, the strategic autonomy as a whole are intrinsically linked to the North Atlantic Alliance. This is because the United States has for a long time played the role of "Europe's protector", which is why any military action that the Europeans might undertake must have at least a tacit consent from their American allies. Even though NATO exists to defend its members from external attacks, Europeans need to be better equipped, trained and organized to make a decisive contribution to such collective efforts, and to act autonomously if and when necessary. One of the Union's focuses in terms of its strategic autonomy is to better define the EU-NATO relations, instead of building ever more micro-coordinating measures between the two institutions, and stop increasing Europe's dependence on the Euro-Atlantic structures[23]. This was the case at the 2016 Warsaw Summit, where a new set of structures and measures aimed at strengthening European defence were set in place[24]. Remedying the existing deficiencies in the decision-making process in the field of security and defence is another vital objective for the European Union in achieving its strategic autonomy, because, in order to consider the possibility to define an independent military force, it is first necessary that the EU acquire a real political autonomy, which would also entail the creation of a "common defence budget and a joint action doctrine"[25]. Such an initiative should not be perceived as the hypothetical tipping point of the European common and defence idea, but rather the starting point in shaping its military structures.

4 Industrial Autonomy and the European Defence Industry

The industrial component is of particular interest to the European Union's strategic autonomy, in particular in relation to the Defence Industry Development Program (EDIDP), the Rules of Procedure of which were adopted on July 18th 2018. Industrial autonomy in the field of security and defence should be seen as a component of the European Defence Industry, the legal basis of which is Article 173 of the Treaty on the Functioning of the European Union (TFEU). However, the provisions of Article 346 paragraph (1) of the TFEU limited the progress made on the defence equipment market by applying the rules of the EU's internal market, expressly stipulating that "any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material"[26]. The competitiveness and efficiency of the European defence industry are fundamental for the CSDP and its strategic autonomy, however the divergent interests of the Member States have led to the fragmentation of the European defence market. Since the development of a competitive and innovative defence industry is impossible without a consensus at European level, a number of initiative have been launched in order to harmonize the legislation in various sectors of the defence industry, such as exports and military equipment market, acquisition and transfer of materials

defence or security research program. In regards to the defence exports, it is worth mentioning the 2008 Council Common Position 2008/944/CFSP (CP), which defines the common rules governing the exports of military technology and equipment and which came to replace the 1998 EU Code of Conduct on Arms Exports. In spite of the legislative innovations brought by the PC, arms exports remained a matter of national competence[27]. At this time, Regulation no. 428/2009 is the document governing the control of arms exports. In regards to the defence market, two directives, one on defence procurement – Directive 2009/81/EC and the other on intra-Community transfers of defence products – Directive 2009/43/EC were adopted in 2009.

The European leaders, through the 2016 Global Strategy intended to create an "innovative and competitive defence industry to guarantee strategic autonomy"[20]. In November of the same year, the European Defence Action Plan (EDAP) was adopted, that contained a list of measures aimed at strengthening Europe's defence capabilities on the one hand and its security and defence policies on the other. The document was structured into three pillars, aimed at securing defence development and research needs, as well as supporting Member States' spending on joint security and defence capabilities. The three pillars were – the European Defence Fund (EDF); the stimulation of the defence supply chains investments; the consolidation of the single defence market and the promotion of civilian and military cohesion[28]. The creation of an EDF came as a result of an earlier initiative of the EU officials, reiterated by Jean-Claude Juncker in his speech of September 2016 stating that "a strong European force would need an innovative defence industry"[29].

Although there is an entire legal framework governing the defence industry, there is still a remarkable reluctance from the Member States to support the interests of the common security and defence, further promoting their national industries and often circumventing the provisions of European rules in the field. Thus, in what concerns its industrial dimension, strategic autonomy does not yet have a very clear projection, being rather tangential in relation to the overall strategy.

5 Operational Autonomy

None of the other two elements that define strategic autonomy – political and industrial autonomy – have raised so many divergent and controversial opinions as the issue of the European Union's operational autonomy. Although the idea of creating common security structures exists since the signing of the Treaty of Paris, the political debate on the establishment of a European army with a common institutional framework and common funding has not reached yet a consensus. In theory, operational autonomy entails the ability of international actors to conduct military operations independently [30]. In particular to the European defence, in analysing its operational autonomy, we must also take into consideration the level of interoperability of its military forces in order to assess the effectiveness of the European military structures.

The legal framework for the EU's CSDP missions is established by the provisions of Article 42 of the TEU, according to which "CSDP provides the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The

performance of these tasks shall be undertaken using capabilities provided by the Member States"[7]. Furthermore, Article 43 of the TEU contains the catalogue of missions that can be carried out under the CSDP, and which take over the Petersburg Plus[31] missions – called this because the list of missions established in 1992 was amended with the entry into force of the Treaty of Lisbon. Articles 42 paragraph (5) and 44 of the TEU stipulate the possibility for Member States to achieve "enhanced cooperation and the deployment of a CSDP mission by a group of Member States who want and have the necessary capabilities to do so"[7]. And military competence lies with the European Defence Agency (EDA) under Article 42 paragraph (3) and Article 45 of the TEU.

A provision that has been of particular interest in recent years is the one contained in Article 42 paragraph (6) of the TEU, which entails the possibility of a Structured Cooperation, and which lead to the creation of PESCO in December 2017. The Declaration of December 11th, represented the commitment of the participating states "to act autonomously when and where necessary, and with partners whenever possible"[32], and among the 17 projects assumed originally there were included – capacity building and operational training in the field of security and defence[32].

In regards to the effective participation of the European troops in operation theatres, the EU has deployed an increasing number of military and civilian operations and actions both in Europe and beyond its borders – in the Middle East, Asia and Africa – and is currently engaged in 16 CSDP missions and operations. However, of these sixteen missions, ten are of civilian nature, and only six of military nature[33]. In July 2017, for the first time, a regional coordination cell was set up, consisting of both civilian and military personnel, that was going to be deployed in the G5 Sahel countries[33]. Despite this seemingly impressive list, in fact, to date, most of the Member States have only a symbolic representation in the EU's military operations. The European Battlegroups are another example to add to this negative record. Although fully operational since 2007, due to political reasons, lack of initiative and financial solidarity are kept inactive[33].

In reaching its goal of achieving strategic military autonomy, the EU is limited by the provisions of its founding treaties – such as Lisbon, but also by the objectives set by the so-called Main Objectives – as is the one from 2010, at the organization's ability to intervene in managing external crises. Therefore, the discussion on autonomy, and even more so, on Europe's military independence is rather an optimistic projection for the future than a concrete reality at the moment.

6 Conclusions

Strategic autonomy has become an extremely popular topic in Brussels in recent years, however very few European leaders give a real meaning to this concept. Its three dimensions – political, industrial and operational – presented in this article embody the various facets of strategic autonomy and determine the different degrees of autonomy and dependence of the EU. In this respect, European decision-makers have clearly identified the Union's medium-term objectives: advancing EU-NATO cooperation, improving military mobility, creating a common funding mechanism and further developing the defence industry. The provisions of the 2016 EUGS also support initiatives such as the EDF and PESCO, which aim at strengthening the European industrial and operational autonomy. On the other hand, the transition from autonomy to independence in the field

of security and defence is an extremely difficult objective to achieve, especially as the European Union does not even desire a complete strategic independence, nor does it possess the required defence capabilities or the necessary strategic culture.

As for Romania, the European project to establish an autonomous common defence is not only an objective in the development and integration of its own security, but also a responsibility in the context of the Council of the European Union Presidency that started at the beginning of 2019. It is therefore part of the Romanian leaders' mission to support the strengthening of the European security and defence – by enhancing the interoperability of the EU security system – to support cooperative initiatives in the field, to promote the development of EU defence and security capabilities, while ensuring the synergy of new specific instruments, such as the Coordinated Annual Defence Review, the European Defence Fund and the Permanent Structured Cooperation.

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The prohibition of discrimination in employment relationships. The principle of equal treatment between women and men in the Romanian legislation and in the European Union legislation

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Abstract

The prohibition of discrimination in employment relationships, in terms of the domestic and international and EU regulations is currently a fundamental structural element of the Romanian legal system. Both Romanian and the international legislature were constantly concerned about this notion, establishing without a doubt that the term "discrimination" is in fact different treatment of employees who are in comparable situations.

In employment relationships discriminatory phenomenon may come not only from the employer or from its governing bodies but also from other employees, being difficult to prove on a realm of evidence. The burden of proof is the responsibility of both the person which is considered discriminated, as well as the person accused of discrimination, proof shall be in accordance with the provisions of the common law, more precisely by any means of proof. The courts have the responsibility of settle the operations in the non-contractual liability, being the competent authorities to assess to what extent is present or not, the phenomenon of discrimination

The European Court of Justice has held unanimously that in any event there is an appearance of discrimination; the employer is the one who has the duty to prove that the case action is based on objective factors, independent and free of any form of discrimination. Of course this concept is one that can be understood in a easy way but, now, the courts are facing a number of difficulties in tracing a boundary between discrimination

and non-discrimination, this study aiming to analyze the inadequacies of legislation and also to raise other questions on this effervescent topic.

Keywords: non-discrimination, discriminatory phenomenon, the principle of equal treatment, the equality between man and woman, jurisprudence of the European Court of Justice.

1 Defining elements of the concept of discrimination

The concept of discrimination is based on the activity of "discriminating" and to make a difference/distinction between two people or between two situations on comparable positions, applying in this way an uneven treatment in a completely unjustified way.

Any criterion for differentiation that underlies treating different can be considered to be discriminatory, but in this analysis we will focus on the different treatment of men and women who are engaged in the workplace, seeking to see comparative practice at a national level as well as in the community.

Both inside the national jurisprudence and international scrutiny emerged unequivocally the idea that different treatment would be a discriminatory act in the event that would induce differentiation between comparable and similar situations, not based on any terms.[1]

In the European Court of Justice has established under the principle of "equal treatment includes that comparable situations must be treated differently and different situations must be treated the same".[2]

The problem in cataloging an act as being discriminatory or not, arises when it is necessary to identify "comparable situation" to which we must relate. It is therefore particularly important to identify a person whose case can easily be compared with the situation of who claims to have been discriminated against, and only if such action is taken and the two situations are identified, the comparison can be made.

It was held unanimously the doctrine in labor law that acts or acts of discrimination can be generated by employees and their governing bodies and by other employees, and appreciated while ensuring that no discrimination at work would a true "rule binding, which produces concrete consequences for litigants".[3]

2 Concept and distinctive features

According to Art. 3 p. (1) of the Ordinance no. 137/2000, discrimination is "any distinction/exclusion/restriction or preference based on race/nationality/ethnicity/language/religion/socialgroup/belief/gender/sexualorientation/age/disabled/contagiousdisease/infectionHIV/ belonging to a disadvantaged group and any other criterion that aims/restriction, eliminate the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms or the rights recognized law, in the political/economic/social, cultural or any other fields of public life".[4]

The term of discrimination between men and women can relate to the assumption that men are disadvantaged because of females, but this type of discrimination is rarely as opposed to discrimination against women.

Although equality between women and men became slowly but surely, a principle of law in many countries, however, there are currently misconceptions that consider that certain positions would be most suitable to men, ideas that show a lack of courage to promote women. These implemented ideas lead to a lower presence of women on the labor market, and currently there are countries that do not allow women to work.

The European Committee of Social Law, discrimination is seen as' different treatment of persons who are in comparable situations, differentiation that does not pursue a legitimate aim and/or not based on objective and reasonable reasons".[5]

The concept of discrimination reunites in its content the following characteristic elements:

- Differential treatment applied to two or more persons in identical situations/ comparable or alike, the omission to treat two different conditions that are identical;
- The absence of a objectives and reasonable justification for the application of differentiated treatment.

Jurisprudence held in the content of many decisions, both the concept and characteristics of discrimination. So, Bucharest Courthouse, Section VIII for labor disputes and social insurance detained motivation Civil Sentence nr. 7972 of September 23, 2011 that "it is irrelevant that the applicant in the application for summons alleging discrimination between salaried staff of public sector and the private sector (...) since there are only discrimination between similar situations and comparable without being based on reasonable and objective justification", this concluded in the same sentence that such a comparison "beyond this hypothesis in terms of performing in different areas."

However, the case-law of the C.E.D.O. has held that "a difference in treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is a reasonable target of proportionality between the means employed and the intended result."[6]

The Romanian state has transposed EU directives prohibiting infringement of the principle of equal treatment and non-discrimination in the case of employment or during employment, victims of discriminatory acts and currently a number of legal ways concrete countermeasures, restore the previous situation and not least monetary damages.

We conclude by making the statement that such discriminatory behavior may attract civil liability or involvement or the contravention or both, criminal proceedings.

3 The principle of equal treatment between women and men in the Romanian legislation and European Union law

With reference to the legal provisions of the content of national legislation, we note that under the provisions of Law no. 202/2002 republished regulates the principle of equal treatment and opportunities for women and men, being forbidden any way able to lead to discrimination based on sex in all spheres of public life on Romanian territory.

This Law shall be supplemented with the provisions of article 5 of the Labor Code governing principle of equal treatment in labor relations and prohibits any form of discrimination, direct or indirect, gender criterion and also with Article 41. (4) of the Constitution which provides that "equal work, women have equal pay with men."

We see therefore that the Romanian legislature has regulated the prohibition of discrimination in employment relationships actually using terminology and recognized at European and international level. Thus, similar to the European model and Romania there are prohibited direct and indirect discrimination against an employee, discrimination which would be based "on grounds of sex, sexual orientation, genetic characteristics, age, nationality, race, color, religion, political opinion, social origin, disability, family situation any responsibility, trade union affiliation or activity" [art. 5 (2) labor Code].

Identified by reading the provisions of the Labor Code that they are consistent with the provisions of the International Covenant on Economic, Social and Cultural Rights, the Universal Declaration of Human Rights and the European Social Charter.[7]

On April 15, 2010 was published in the Official Gazette no. 242, GD. 237/2010 regarding the National Strategy for equality between women and men 2010-2012, and the Action Plan implementing the National Strategy for equality between women and men for the same period, seeking to ensure in this way non-discrimination based on grounds of gender.

Romanian legislator states in the introduction to National Strategy for equality between women and men that "gender equality and non-discrimination are key concepts that govern society in the context of the current" which detach easily the idea that gender equality is a fundamental right and thus a prerequisite for employment.

But noticed at the case-law that discrimination on grounds of sex still remains in the challenges facing society, marked differences existing in terms of access, participation and therefore involvement of women and men in certain segments of the political, economic, cultural life, and so on.

Seeing rule prohibiting discrimination, it is imperative to be considered exceptions. Thus, indirect sex discrimination is permissible insofar as there is provision, criterion or practice is objectively justified by a legitimate aim, and the means by which this goal to be achieved at the same time are appropriate and necessary.

The legislator did not individualize that would be jobs for which the employee's sex could be a determining requirements, leaving to the discretion of judges to examine each particular case whether or not the exception envisioned operating in the preceding paragraph.

All courts in assessing the problem is allowed to grant compensations in case identify discriminatory practices.

By Decision no. 146/2010, the Constitutional Court stated that "the courts may grant any repair/compensation as it deems appropriate only if the compensation does not cover the remuneration prescribed by law". Thus, courts may award damages when there is this discrimination, but without applying any particular legislative act in salary. [8]

In the European Union, the Treaty on the Functioning of the European Union stated in its Article 10 that the Union wants to combat discrimination based on grounds of sex.

Gender perspective focused mainly on sexual discrimination stemming from criteria related to access to a job, but with social evolution we are witnessing today, this criterion was consolidated and thus expanded into other areas of life.

Gender equality is a principle of tradition in EU legislation since its origins in the provisions stated in the Treaty of 1957, art. 141 for the first time establishing gender equality. This article has performed a number of changes here including the scope of its application and equal treatment between women and men at work.

Currently, Directive 2006/54/EC regulates, among others, issues related to equal pay, equal treatment, etc. Including the European Court of Justice case-law has consistently stated that the general principle of equal treatment between women and men is a fundamental principle within the legal order of the community; this actually represents a mission of Community, the Court holding that the principle can not be reduced only to discrimination on the criterion of affiliation to a sex or other.

We will also see by reading the provisions of Article 14 of Directive 2006/54/EC that expressly prohibits any discrimination, whether direct or indirect, on grounds of sex in the public and private sectors as showing that in terms of access to work, allowed differences of treatment based on an important feature given the nature of the particular occupational activities concerned, provided that the objective pursued at the time of employment to be a legitimate requirement demanded by employers are required to be proportionate.

At Community level, by Regulation (EC) No. 1922/2006 dated December 20, 2006 was set up the European Institute for Gender Equality between Women and Men, the main objective – promoting equality between women and men both in Community policies and in the national seeking – the this way increasing the awareness of the European Union in terms of equality between women and men.

Legislative developments that take part – materialized and inserted provisions in the Law no. 52/2003 is illustrated in incorporating the content of Article 5 of the Labor Code to prohibit discrimination of any kind.[8]

Before the entry into force of the Labor Code, the issue of discrimination found its regulation in the Government Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination, the Labor Code currently coming to regulate this issue Framework Ordinance is a special regulation.

So, we see that:

- The main criterion at the time of employment must be shown the capacity and professional skills;
- Employers must introduce a number of objective and reasonable for the area where hiring (e.g.: knowledge of a specific language for a job involving frequent use of it or a certain religion when desired employment of personnel on a particular position within the unit of each denomination etc.). These objectives must be some reasonable default real and seeking to ensure transparency, advertising, known in advance the specific requirements of the employer, etc.

I conclude this section by mentioning that equal treatment of employees and employers does not mean uniformity and consequently, failure to take account of exceptional circumstances that require differentiated treatment, for which courts are obliged closely, analyzed the particularities that require differentiated treatment.

4 Conclusions

Equality between women and men is a fundamental right and therefore a shared value, both nationally and at EU level.

The discriminatory act is based on different treatment applied to similar situations, but also similar treatment of persons in different situations can be, as well an act of discrimination.

Although now we are facing with inequalities between women and men, we see that in past centuries were registered as significant progress for women and men to share conditions and equal opportunities in all sectors of activity. These advances were achieved mainly through legislation that regulated continuously equal treatment, seeking in this way to include and promote women in all sectors of life. [9]

Noticing that for thousands of years, women were considered inferior to men, and by the change in the content of the twentieth century, their situation has improved with the feminist movement, discrimination is unfortunately a phenomenon perpetually continues to be a reality worldwide.

Thus, the modern world has brought with it the full equality between women and men, today there are still many geographical areas where women are regarded as inferior to man, however, the policies of the European Union tend to think that although the issue was not healed yet, there is a significant improvement.

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The Romanian public authorities have the power to participate in the elaboration of the international treaties

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Abstract

The participation of the Romanian state in international relations requires an adequate internal and international legal framework, which clearly determines the competence sphere of public authorities that contribute to the elaboration of international treaties. Given the consequences of the act of concluding a treaty, its importance, but especially the seriousness of committing international commitments through a sometimes high treaty, at other times enslaving, states have always given special attention to the way in which they are negotiated and conducted; Consequently, rules have been laid down covering the whole existence of the treaty from its conclusion, during its application until it ceases.

It is important to note that international treaties must conform to other generally accepted principles and standards of international law, i.e. sell-offs. Their public or secret nature is not important; States parties to the Treaty shall respect through the contents or principles of international law and shall not propose to do so in a infringing manner. In the present study we shall stop on the competent public authorities, by which the Romanian state becomes a party to international treaties, making a special analysis of the relevant provisions, as they are regulated by the fundamental law of the Romanian State, as well as by the organic law on treaties. It must be emphasized that an essential element of these is their intention to have legal effects, to legally link the parties to treaty Since the International Treaty is a mixed act, both of national law and of international law, in the doctrine there are two theories according to which determination of the competent bodies is made of national law and of international law, respectively; but in the absence of international standards, the internal law of each state determines the discretionary competence of the matter.

From this point of view, we distinguish between: 1. the competent public authorities through a legal act emanating from them, to legally regulate the state, and: 2. other public

authorities having the competence to participate in the process of drafting international treaties.

As for public authorities that do not hold a Treatiy Making power (in our opinion a law giving them such power would be unconstitutional), we believe these are. Courts, Court of Audit, Public Ministry, Legislative Council, Economic and Social Council, Advocate of the People.

The 2003 Constitution of Romania refers to the "treaties" (in Articles 11, 18, 20, 44, 75, 91, 146, 147, 148, 149), the "conventions" (Articles 18, 19, 75, 146, 147) and "pacts" (in Article 20), Law No 590/2003 on "Treaties, agreements, agreements" and the Vienna Convention on any law "law" ('r2) to be called "treaty, paragraph ('regardless of paragraph ('art. From the point of view of our study, the varied nature of terminology under positive is irrelevant so that we will continue to use the expression "international treaty" in general.

Keywords: Public authorities, international treaties, ratification, competence, referendum.

In order to analyze the public authorities hold the *power* in Romania, the respective constitutional requirements must be taken into account.

According to the Constitution of Romania of 2003, "Treaties ratified by the Parliament are part of the national law" (paragraph 2 of Article 11), and "The President ends international treaties on behalf of Romania, negotiated by the Government, and submits them to Parliament for ratification, within a reasonable time. The other international treaties and agreements are concluded, approved or ratified according to the procedure established by law" [Article 91(1) of the Basic Law].

The Constitution therefore calls express two public authorities: The Parliament and the President of Romania; On the other hand, it is necessary to monitor the activity of a state president in order to see whether public money are spent correctly or not by an "honest and poor man", such as the lodger of Cotroceni Treaties prove that the Prime Minister is a public authority as competent in matters of competence. The first question is to find out whether these three public authorities are the only competent to decide that the Romanian state should become part of the international treaties. "It must be observed that art. 11 paragraph 2 of the Constitution does not establish the exclusive competence of Parliament to ratify the international treaties (as the wording of the text is not "treaties ratified by the Parliament, according to the law, and…", it only considers a category of treaties (those ratified by the Parliament by the law) about which a statement is made (that they are part of national law). Paragraph 1 of the Constitution also refers to all treaties on behalf of Romania, negotiated by the Government, ending by the President of Romania (together with the Prime Minister) and ratified by Parliament within a reasonable time. Other international treaties and agreements are concluded, approved or ratified according to the procedure established by law.

Consequently, the interpretation of the provisions of Article 91 (1) of the Constitution shows that there are two main categories of international treaties: 1. treaties on behalf of Romania and 2. other international treaties.

In order to be valid treaties on behalf of Romania, they are necessary in this constitutional text – four events of will and in the same sense: 1. One of the President of Romania, 2. Another Government under the Ministry of Foreign Affairs is negotiating the international treaties to be signed by the Prime Minister and 4. Another of the Prime Minister, since the President is exercising his power to conclude international treaties that must be countersigned by the Prime Minister and by some other European Parliament.

In respect of the other treaties, the constituent does not show the public authority(s) invested with *Treaty Making power.*

We are to consider which public authorities may be competent to rule on a valid legal binding through an international treaty.

1 The Constituent Assembly. The Constitution

The first component that has *the Treaty Making power* is the creator; The Constitution – that its work – is the top of the pyramid the sources of the positive right in a state (the formal law sources), so it is obvious that by the Constitution (more precisely by constitutional laws, that is, by the laws on revising the Constitution, which are common body with it), international treaties can be ratified. As a Constitution power set up, the Romanian Constitution is made up of Parliament and people, as during the process of adopting the Constitution of Romania from 1991 the Parliament elected in 1990 (and then turned into a Constituent Assembly) and the people (who by the referendum organized on December 8, 1991 approved the new Constitution of Romania) and according to the provisions of Article 150 (1) of the Constitution may be of at least 500,000 and the citizens.

Under constitutional law, both the treaties signed on behalf of Romania can be ratified (it would be a derogation from Article 91(1), the derogation allowed, being accomplished by an act with the same legal force as the rule), as well as any other international treaties.

In this respect, the article 11, paragraph 3 of the Constitution stipulates that, in case a treaty to be ratified by Romania is to be a party to include provisions contrary to the Constitution, ratification of the Constitution may take place only after revision of the Constitution".

In the procedure of elaboration of the international treaties where *the Treaty mains* power belongs to the constipule and other bodies, namely:

- The government (which has the right to propose to the president to initiate the revision of the Constitution),
- The President of Romania;
- At least 1/4 of the number of Deputies or Senators;
- At least 500,000 citizens having the right to vote (have the right to initiate the revision of the Constitution),
- The legislative Council (shall approve the draft or proposal for a revision [1]);

[1] The Constitution has it that this body endorses the "draft normative acts" concept including "draft laws" and "legislative proposals" (hence, including "projects to revise the Constitution" and "proposals to revise the Constitution").

- The Constitutional Court (which is ex officio on the constitutionality of Constitution[2] revision initiatives, and referred to the constitutionality of the respective constitutional law prior to promulgation, and the prerogatives regarding the constitutionality of international treaties or other international agreements;
- The constitutional and possibly, the checking of the popular initiative for revision[3]);
- Subjects to refer to the control of the constitutionality prior to promulgation of the constitutional law,
- The president of Romania (who promulgated the constitutional law on ratification of the international treaty).

2 The people

The second topic of international law, which holds *the Treaty Making power*, is the people who can exercise sovereignty directly through referendum, which can be: 1. constitutional; 2 legislation; 3. Terms of reference, 4. For termination of the mandate of the representative bodies.

The 2003 Constitution stipulates three types of referendum: For the revision of the Constitution [Article 151(3)], the consultative referendum (Article 90) and the referendum for the removal of the President of Romania (Articles 95 and 99 of the fundamental law).

The question is whether or not the legislative referendum has been allowed in our constitutional system, since the answer to this question derives its possibility or not to have the international treaties ratified by the people, by referendum. The negative response would start from two premises, namely: In public law, the competence of public authorities is given strictly by law, The types of referendum shall be expressly and in limiting as provided by the Constitution. From these two conditions the conclusion reached is not possible.

In our opinion, this reasoning is rigid and suffers from the understanding of the essence of a rule of the rule-of-law state according to which the holder of political power (of sovereignty) is the people. Therefore, the legislative referendum in Romania is allowed by the Constitution, by imposing the characters of the Romanian state as a rule of law and democratic rule and by directly exercising the power by the people through referendum. In order for the people not to exercise directly certain aspects of political power, it is exercised by representative bodies As well as through referendum, but not all areas (for example, limits on constitutional revision under article 152), and also the possibility to oppose a fundamental rule of law (such as the exercise of justice by independent courts and not by people directly).

The legislative referendum is an essential aspect of the direct exercise of political power by the people, so that, as the Constitution knows the juridical institution of the referendum, the fact that it expressly covers only certain types of referendum, than the legislative one, cannot lead to the conclusion of the referendum (especially because the

[2] Article 146, final sentence of the Constitution.
[3] In this respect, we can see Corneliu-Liviu Popescu, La re-vision from the Constitution of Roumanie, in "Retell roumaine des Sciences Jidiques", t. VI(xxxix), nr. 1/1995, p. 53-67.

legislative referendum – including the constitutional one – is the most important type of referendum), for which express ban would have been necessary. Moreover, if in the opinion we referred to it, we consider the legislative referendum to be just allowed by the Constitution, but its existence is to depend on the future organic law on the organization and carrying out of the referendum [Article 73(d) of the Constitution], we believe that the of the legislative referendum is a requirement, the organic law with no other way than to regulate its organization and organization.

Therefore, the Parliament has no power to appreciate whether or not to impose the legislative referendum, but the institution of the legislative referendum is a constitutional institution, and by the law referred to it, the international treaties can be ratified.

In the process of adopting laws referring to international treaties including ratification of international treaties, the Constitutional Court is intervening with the Constitutional Court, which guards the procedure for the organization and carrying out of the referendum and confirms its results (Article 146 from the Constitution), without having *a Treaty mains power.*

Moreover, in article 146, paragraph B of the Constitution, the Constitutional Court must take action on the constitutionality of the treaties or other international agreements, upon notification by one of the Presidents of the two Chambers, as well as at least 50 deputies or at least 25 Senators.

If the constitutionality of the Treaty or of the International Agreement has been established by Article 146 (b), the latter shall not be subject to an exception of unconstitutionality. The Treaty or the international agreement found to be non-constitutional cannot be ratified [Article 147(3) of the Constitution].

3 Parliament

The parliament is another public authority investing with the power to link the Romanian state with international treaties.

Under the terms of paragraph 1 of Article 91 of Romania's Constitution, the Parliament is the one who ratifies the treaties signed by the President on behalf of Romania, but negotiated by the Government, and sends them to Parliament for ratification within a reasonable time. It is hence that, as far as treaties on Romania are concerned, the Parliament does not own *a Treaty mains power,* but shares this power with the head of state (who concludes the treaty by decree) and with the head of the Government (who negotiate and countersign the treaties).[4]

As a consequence, if such treaty is not concluded by the President, it cannot be ratified by the Parliament; He said that if the parliament ratified a treaty on Romania's behalf, but it was not previously concluded by the head of state, ratification is not constitutional.

Moreover, if the President concludes in the name of Romania a multilateral, reserve treaty, the Parliament may ratify that treaty only with the same reservations; Likewise, if the President terminates the Treaty without reservation, the Parliament has no right to make reservations by the ratification law. The same goes for the point when, according

[4] The consequences of Romania's ratification of the European Convention on the disciplinary sanction with the military arrest in the "Romanian human rights magazine", no. 8 (1995), p. 44-46.

to the multilateral international treaty, Romania has to choose the applicable provisions. If the Parliament does not agree to the reservations, to the statements or to the choice made by the president of Romania when he has signed the treaty or if he thinks that some (or other) reservations (or other statements or choice) must be obeyed, as the legal will of the head of the state (along with that of the chief of the Government) and the Parliament must converse to express Romania's consent to be bound by treaty It should be noted that art. 91 paragraph 1 from the Constitution does not limit the intervention of Parliament to ratify only the treaties on behalf of Romania, but according to art. 11 paragraph 2 of the Constitution, it can ratify other international treaties established by law, in which case, either it own *Treaty Making power* or it shares this power with another public authority, as provided by the law.

As a matter of fact, Law no. 590/2003 on treaties makes it a must. Under Article 19 of the Law, the following categories of treaties are submitted to Parliament for ratification: State-level treaties irrespective of the scope of regulating them; Government treaties that are being used Concerns political cooperation or which involves commitments of a political nature; level treaties government referring to military cooperation; State-of-the-art Government Treaties Which relate to the State territory, including the legal regime of the State border as well as the areas treaties referring to the status of persons, fundamental rights and freedoms of man; Governmental treaties relating to membership of international intergovernmental organizations; Any government treaties including any financial commitment whatsoever which would require additional tasks to the State budget; The Government Treaties with which provisions make it necessary, for their application, to adopt new regulatory provisions having legal force, or new laws, or to amend the laws in force, and those specifically requiring their ratification.

Therefore, two main types of treaties are subject to Parliament ratification: 1. those on behalf of Romania and other treaties (according to the above rules). For this second category of treaties, the Parliament owns the *treaty mains power alone.*

Under the revised Constitution, Romanian citizens cannot be subjected to this initiative, as well as the ratification of the international treaties [Articles 74 (2) of the Constitution]. It shows that the laws on the ratification of the international treaties cannot have the citizens as an initiator.

4 The President of Romania

On the basis of article 91 (1) in the Constitution, the President of Romania holds a treaty making power, but not alone, but only together with the Government and the Parliament.

According to the Constitution, the president of the republic is the state authority that decides, and not a simple body that participates in the elaboration of the international treaties on behalf of Romania, because if he does not manifest – by the decree to conclude a Treaty, Parliament can not ratify that treaty. For the conclusion of the treaties on behalf of Romania, the will of the president alone is not sufficient, and the will of the head of the Government, which countersigns the president's decree, is needed.

According to the Constitution, however, and taking into account the fact that the political regime in Romania is a semi-presidential one), the president can not hold real

power in the state, but in terms of executive power, it belongs in reality to the government (negotiating the conclusion of international treaties) and its head.

As the public law doctrine constantly emphasizes, in a parliamentary regime the head of state is not legally answerable, which immediately leads to the consequence of the lack of any power for it. By signing the decrees of the president, the Prime Minister becomes accountable, so in fact the decision, as well as his initiative, must belong to the head of the Government[5].

Therefore, even in the case of the conclusion of treaties on behalf of Romania, the will to conclude the treaty in fact belongs to the body negotiating and countersigning and at the same time becoming responsible (ie the prime minister) and not by the signatory (the president), the signature being a simple act formal, which does not entail any legal liability and therefore can not in any case be denied.

Clearly, the question is whether, for other categories of treaties, a special law would confer on the President the power to decide to bind the Romanian State through an international treaty, through a manifestation of a single will without the need for will in this sense of Prime Minister and Parliament (or sharing Treaty making power, whether with only one of the two public authorities or other public authorities).

In order to argue a negative opinion, it may be argued that in the field of foreign policy, the powers of the head of state are express and limited in Art. 91 of the Constitution so that a law that would give the president and other duties in this matter would defeat the will of the constituent.

This solution would only be correct if we look only at the strict rules of internal law, especially constitutional law. It should not be forgotten, however, that the subject matter of international treaties is also governed by the provisions of public international law, which increasingly tend to take precedence over domestic law. Or, in public international law, the head of state is generally recognized as being able to bind the state alone by an international treaty. The fundamental law in force, stipulates in paragraph 3 of Article 11 that "If a treaty to which Romania is to become a party contains provisions contrary to the Constitution, its ratification may take place only after the revision of the Constitution".

5 Prime Minister

The prime minister also has a treaty making power, based on art. 100 par. 2, in conjunction with art. 91 paragraph 1 of the Constitution, he countersigning the decrees of the President by which he concludes the international treaties on behalf of Romania, negotiated by the Government, and submits them for ratification to Parliament within a reasonable time.

The signing of these decrees of the President by the Prime Minister is necessary, without the counter-signature, and they do not produce any legal effects; the counter-sign is not a legal obligation, but a genuine manifestation of will by the Prime Minister, a legal act of the latter. We have previously shown that the President's duty to conclude international treaties on behalf of Romania is a treaty making power with which he is

[5] In the parliamentary regimes there is a separation between the position of chief of state (without real power in the state) and the head of the Government, the latter (or the Government in its entirety) being the true and only head of the Executive.

invested; as the president can not issue the decrees by which he concludes these treaties alone, but also the need for the will of the head of the Government to show the same that the latter is also invested with a treaty making power.

Moreover, as I pointed out above, in reality the initiative of the decision to conclude the treaties on behalf of Romania and the actual decision belong exclusively to the Prime Minister and not to the President of the Romanian State. At the same time, taking into account the fact that in a semi-presidential regime, the head of the government and his team rely on a parliamentary majority, so the decision center moved from Legislative to Executive, the first being nothing more than a "voting machine", which makes the Executive decisions the legislative dress, it results that the decision that Romania to become a party to an international treaty belongs almost exclusively to the Prime Minister. Its power is therefore very high, as the treaties ratified by Parliament are part of domestic law, and the ones in the field of human rights have supremacy over national legislation, unless the Constitution or the domestic laws contain more favorable provisions (Article 20 paragraph 2 of the fundamental law).

We note that the Prime Minister is a constitutional public authority distinct from the Government, so that the prerogative of the prime minister to countersign or not a president's decree may be in contradiction with the Government's opinion, without this being of legal relevance; The Government can not oblige the Prime Minister to countersign or, on the contrary, refuse to do so. However, the solution must be nuanced, taking into account the constitutional role of the Government (Article 102 paragraph 1), which, according to the governing program accepted by Parliament, ensures the realization of the country's foreign policy, but also the relations, in a semi-presidential regime, between the government and the head of the government (the prime minister).

The assignment of countersigning the decrees belongs exclusively to the Prime Minister (be it an interim), it can not be delegated by him or by another public authority to another member of the Government (delegate potestas non delegatur)[6]. Using the same reasoning as in the case of the president of the republic, we affirm that a special law or even a practice of a constitutional character, supported by the rules of public international law, can recognize the prime minister's right to bind himself legal view of the Romanian state through some categories of international treaties other than those on behalf of Romania. In addition, the solution is also based on the position of the Head of the Executive in a semi-presidential regime.

6 Government

The government is an authority which, although not directly invested in the Constitution with a treaty making power, usually holds – in the comparative law – that competence, even if – as a rule – not for the most important treaties.

[6] Decree nr. 167/1993 approving and submitting to the Parliament the Statute of the Council of Europe, signed in London on May 5, 1949, published in the Official Gazette of Romania no. 238 of 4 oct. 1993, is countersigned not by the Prime Minister but by a State Minister, so unconstitutional.

Outside the Treaties on behalf of Romania, a special law may confer on the Government the power to decide legally binding through international treaties.[7]

In particular, this is done by Law no. 590/2003 on the Treaties. The law finds constitutional support, namely Article 102 paragraph 1, according to which "the Government ... ensures the realization of the ... foreign policy of the country ...".

From the correlation of art. 2 with art. 4 and art. 9 of the law, it follows that the rule for international treaties (except those on behalf of Romania) is the holding of the treaty making power by the Government. Whenever none of the express and limitations provided by law in Article 9 (which requires ratification by Parliament) or the exceptional case of Article 20 (concluded by the Ministry of Foreign Affairs), the Treaties are approved by decision of the Government.

Last but not least, on the basis of a special law of empowerment, using the institution of legislative delegation, the Government may be empowered to ratify, by ordinance, international treaties whose ratification is the responsibility of the Parliament (Article 19 paragraph 3 of Law 590/2003). In particular, Law No. 590/2003 on the Treaties provides for this issue only for the Ministry of Foreign Affairs (Article 10).

7 Other Authorities

For other state central government authorities (either subordinate to the government or subordinate to a ministry or autonomous to the Government), the Constitution has nothing, so a special law can invest them with treaty making power for lesser treaties.

8 Conclusions

In light of the provisions of the Romanian Constitution, Law No. 590/2003 on Treaties, Law no. 373/2013 on the cooperation between the Parliament and the Government in the field of European affairs, as well as of Law no. 276/2011 on the procedure by which Romania becomes a party to the treaties concluded between the European Union and the Member States, on the one hand, and third countries or international organizations, on the other hand, through the work of the Romanian public authorities having the competence to participate in the elaboration of the international treaties, effectively ensured the participation of Romania in international life by affirming and promoting the national interests, while respecting the principles and other generally accepted rules of international law. If the presence of a delegation at a conference reduces, in some cases, the significance of a political gesture, and in other cases, in an ephemeral echo, participation in the drafting of international treaties creates a steady, time-consuming situation and plays an essential role in the process of integrating the country into the international community; the adoption of internationally established rules (by ratifying or adhering to treaties) is the most effective way of legislating, which ensures

[7] In the case of treaties on behalf of Romania, according to art. 91 par. 1 of the Constitution, the Government has only the power to negotiate these treaties, so it does not have a treaty making power. Obviously, there are also cases of multilateral treaties already in force or those elaborated by organs of international organizations, which Romania can ratify or to which Romania can adhere, and where the issue of negotiation is no longer in place.

the most advanced level of modern, quality regulation of relations social issues in a state; is the channel through which new concepts and mentalities penetrate the contemporary world and consecrates the new legal institutions.

Therefore, the way in which the Romanian authorities with attributions in the conclusion of international treaties understand to express concern, competence and promote the national interest, it is up to the founding, deepening and development of the international relations with the other states of the world.

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Outlining the Concept of International Security

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Abstract

Security is one of the most important concepts in the theory of international law, which is based on the safety of the states and of the citizens thereof, and it is concerned with complex issues of safety and peace, which are related to conflicts and wars. The concept of security and its components have undergone essential modifications in time, as well as the attitude of the states with regard to the ways of transposing thereof into life, in relation to the changes that take place at the international level. This analysis aims at clarifying the notion of security, all the more that, in many situations, security is a perception issue and it refers less to the construction of some theories or testing hypotheses, although it is relevant in both cases.

Keywords: international security, national security, protection, territory, threats, instruments.

1 Introduction

Traditionally, the concept of security is defined in military terms, with the primary concern on the protection of the state against threats to their national interests. Thus, when Hans Kelsen published Collective Security on the grounds of international law in 1957, he limited the field of application of the concept to the "protection of people against the use of force by other people" [1]. This was indissolubly related to the national security, i.e. the protection of the territory against external threats and military attacks, which was recognized as the ultimate *raison d'être* of sovereign states. Nevertheless, such a traditional notion of security, defined by the national survival, the physical protection of the state territory, and the military power, extended its field of application in the second half of the 20th century, especially from the end of the Cold War until the present day.

The concept of international security, unlike the national or state security, appeared along with the development of a commune system of collective security. The setting up of the United Nations Security Council whose main competence is to maintain international peace and security, the implementation thereof into practice, has gradually

promoted among states an acceptance of the idea that the security of the international community, not only the security of a state, could be infirmed.

The need for a more effective cooperation in the field of security and stability is clear enough, considering the fact that the complex nature of the threats we are confronted with requires a coordinated approach and use of some resources that cannot be made available by a single state, nor by any group of states. For these reasons, the security-related issues of international organizations must represent one of the central points of debates in the international society. International organizations are an important instrument in maintaining international peace and stability, which, if ignored, may lead to serious negative consequences for the world legal order.

2 Contents

Unlike the traditional national territorial context where sovereign states are the only objects of security concerns, it is possible to find a series of various objects that raise the security issues at these new frontiers. Traditional security has been perceived as connected to the sovereignty of the state and the territorial integrity thereof, as expressed in art. 2 paragraph (4) of the UN Charter. Nevertheless, since the technological progress has allowed exploration and exploitation beyond the state frontiers, the security issued expanded geographically and spatially to various maritime areas, the outer, the Arctic, Antarctica, and even the cyberspace. These new frontiers, also, are not immune to the influence of an extended concept of security, which presents challenges to the existing legal regimes that regulate extra-territorial and non-territorial activities.

It is worth mentioning that an idea that is circulating more and more Is that the environmental decline, the natural disasters, poverty, mortal diseases, as well as the deficit of natural resources, should all be considered as serious threats to the international security. Many of these ideas fall into the wider concept of "human security", as defined in the United Nations Human Development Report of 1994. That report underlined what is now considered to be the seven fundamental elements of human security, namely: economic security, health security, food security, environmental security, personal security, community security, and political security [2].

These phenomena had been a concern of the states and of the international community even before, but they would significantly yield before political and military concerns. The flu epidemic that broke out in in the beginning of the 20th century (the so-called "Spanish flu") took approximately the same number of lives as all the fights in World War I. The present day drug trafficking does not have negative effects at a higher rate than it did a couple of decades ago. The famine in developing countries in the second half of the previous century was more extended than at present, and still, at present an international opinion was outlined with regard to the substantial increase of the priority of non-military threats an the need to include them in the concept of international security.

The Report of the UN Secretary General in 2004 qualified the economic and social issues, organized transnational criminality, as well and the interstate conflicts, internal conflicts, terrorism, and mass destruction weapons as being serious threats to the world peace and security.

In this context, there were initiated some debates aiming art widening the concept of security, and there were configured four types of extensions of that concept. The first

involves the extension of security from the security of nations to the security of groups and individuals; the second expands the term upwards, from nation to biosphere; the third extends the concepts on the horizontal, or to the types of security that we bear in mind, while the fourth category suggests that the responsibility for security assurance is diffused in all directions, from the nation states upwards, to the international organizations, and downwards, to regional and local governments, and well as to non-governmental organizations [3].

Important for the expansion of the field of the international security is the apparition and the fast development in the latest years of the concept of "human security". The most comprising definition of this concept appeared in the PNUD Human Development Report in 1994 [4]. Human security subsequently offered a theoretical basis for the development of the concept of "responsibility to protect" as a policy on the agenda, which was officially approved in the conclusions of the world summit of 2005. One of the new aspects of this concept is the fact that human populations, unlike the sovereign states and the international community, are recognized as objects that must be protected from threats of genocide, war crimes, ethnic cleansing and crimes against humanity. The supporters of this concept show that the list of the most important threats to the international security must include famine, epidemics and natural disasters, which notoriously take more lives than war, genocide, and terrorism together.

For the past years, there has been a tendency of extending the subjects of global security. During the approximately 350 years of existence of the Westphalia system, the central subjects, almost monopolists in the matter of war and peace, and subsequently of international security, have been the states. Sometimes, the non-state actors – pirates, cross-border ideological movements (such as anarchists, socialists), armed groups that were fighting for self-determination of peoples – significantly affected the state of peace and international security in various regions. International security has been almost exclusively a state prerogative. Consequently, within the generic category of international security, in the foreground there is interstate security.

The first sign of apparition of the new subjects within international security has become the fight of colonial peoples for self-determination in Asia and Africa. Thus, we can mention a global phenomenon that marked the affirmation of peace and international security – the fight of state actors and non-state actors.

The most dramatic process of destatalization appeared in the 20th and 21st centuries, when transnational terrorism affected the security of many states and of the international community as a whole. Bering dissolved in the international society, terrorist groups represent not only threats against international security and peace, but they also become active actors thereof [5].

Another non-state challenge for the international security is the proliferation of mass destruction weapons, which is closely related to the probability that such weapons fall into the hands of "social organizations" that are not controlled by the state. The possibility of access of fanatics to explosive nuclear devices still persists.

Also, the international community has reached the conclusion that internal armed conflicts represent a serious threat not only for the countries where they occur, but also to their neighbors and the entire international community, as they may rapidly affect new territories and regions. Initiators and protagonists of ethnic genocide (reciprocal destruction of the Tutsi and Hutu tribes in Rwanda), civil wars (in the Democratic Republic of

Congo), separatist movements (in Sri Lanka, on the Russian territory in Chechnya), and loss of statality and triumph of armed anarchy (in Somalia) were mostly non-state forces.

The non-state actors are not only partial bearers of threats against peace and international security. Other sources of potential or real threats the states. Preservation of nuclear weapons, as well as the increase of the number of states that possess nuclear missiles, demonstrate that they play a central part in the contemporary security.

At the same time, multinational companies, which are said to be the archetype of the "transnational actor" which weakens the primary state entity, remain, in a great majority, closely related to their territory and state of origin [6].

States essentially remain monopolist actors in the field of fighting threats, both new and old. There are a couple of examples of activities of non-state actors in the security field (a substantial expansion of private security divisions in most countries of the world, engagement of non-governmental organizations in peace maintenance operations). But the state remains the only legitimate titular of political violence.

Security is one of the most important concepts in the theory of international relations, since it is based on the safety of states and of the citizens thereof, and it is concerned with complex issued of safety and peace, related to conflicts and wars. Security is an evasive study topic, since it is said that it cannot be defined in an objective manner and any issue can become a security issue after it has been securitized by political decision-makers [7]. If we accept the fact that the security issued are among the oldest in the world, we can certainly affirm that the definition of this concept has depended and still depends not only on the epoch under analysis, but also on the actors considered to be protagonists, and most importantly, on the person that launches this definition.

The most general modern definition of international security was formulated upon the creation of the UNO, in the first article of the UNO Charter, which defines as the main objective thereof to maintain peace and international security and, for that purpose: to make effective collective steps in der to prevent and remove threats against peace and to repress any acts of aggression or other violations of peace and, by peaceful means and in accordance with the principles of justice and of the international law, to mitigate or solve the international disputes or situations that might lead to a violation of peace.

Another definition of international security characterizes it as being a system of international and politico-military relations that guarantee the external component of the national security of every country, which practically eliminates the threat of war and military conflicts in the process of solving international and regional conflicts [8].

International security is also considered as a world order in which there are created international conditions that favor the free development of the states and of other subjects of international law. In the context of international security, each state benefits from better conditions for the implementation of policies envisaging the improvement of material living standards of the people, the free development of personality, the entire application of the rights and liberties of man and citizen.

In its turn, the concept of international security represents a set of attitudes, methods, approaches, and principles which are the basis for various activities, understandings, and agreements, for the creation of some global, regional and interstate structures, and for establishing cooperation mechanisms in order to guarantee a peaceful and environment-friendly coexistence, non-interference in the domestic life and affairs of the states and peoples.

The concept of peace and international security may be approached as well as a system of international relations based on the respect by all nations of the principles and norms of international law, which excludes the solving by force of differences and disputes among them. The principles of the international security include peaceful coexistence; equal security for all states; creating effective military, political, economic, and humanitarian guarantees; preventing the arming race in the outer space, ceasing all testing of nuclear weapons and finalization of the liquidation thereof; dissolving the radical military groups; unconditional respect for the sovereign rights of each people; finding political solutions for international crises and regional conflicts; consolidation of trust among states; developing effective methods for the prevention of international terrorism; eradication of genocide and apartheid; exclusion from the international practice of all forms of discrimination, waiving economic embargoes and sanctions (without the recommendations of the international community); establishment of a new economic order, that ensures equal economic security for all states.

The present security system is dominated by political considerations, to a larger extent than other fields of the international law, because, at a first analysis, it is grounded on the feeling of indivisibility and solidarity of the states in issues related to peace, which, in essence, are more of a political, than a legal matter. Thus, all the subjects of the international society must be concerned with the security of each individual actor, and this requires the existence of a mechanism of international guarantees, set up for the common interest, in order to maintain peace at the international level. This idea got a particular tinge in the 20th century, along with the creation of the international organizations with a vocation for universality: League of Nations, United Nations Organization, whose major concern became to maintain international security with a view to safeguard the future generations from the scourge of war.

In that sense, after the two world wars, the states are only concerned with what seems imperious to them – collective security. Therefore, they agreed to bestow on the bodies of the international organization the function and the prerogative to ensure effectiveness, not of the law in general, but of the only rule that prohibits the use of force; both the law and the peace had to be supervised by the same collective action. In the face of conflicts of interests, the fundamental concern remains maintaining peace, and not justice. The United Nations Organization after the League of Nations, preferred to give a narrow sense to the "common interest" of the states [9].

In reply to the central political issue of international relations, each legal system of international security is, at the same, time, a *codification* of the previous attempts and a *correction* of the technical deficiencies thereof in accordance with the conceptions of the dominant powers at the beginning of a major conflict that justifies a new system. This duality could be verified in 1815, as well as in 1919 and in 1945. Once set up, the system evolves in dependence to the circumstances that were not foreseen by its creators. In any case, they are not legal mechanisms that guarantee international security; they can only act in political situations where a minimum consensus over the unbearable degree of violence is in place [10].

Despite all the deficiencies present today in the universal system of collective security, we cannot avoid attesting the fact that the norms of the international system of collective security contributes to the stabilization and the ordering of the interstate relationships, which will allow in future to forecast the development of such relations, as

well as of other relations in connection thereto [11]. At the same time, it is worth mentioning the progress achieved by the international community in view of ensuring collective security. Today we are in the presence of an impressive number of international treaties, both bilateral and multilateral, that retain and prohibit the manufacture and experimenting, as well as the storage or reduction of certain types of weapons which, in the end, allowed for the prevention of occurrence of certain conflicts or the evolution thereof [12].

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The concept of peace and international security may be approached as well as a system of international relations based on the respect by all nations of the principles and norms of international law, which excludes the solving by force of differences and disputes among them.

The principles of the international security include peaceful coexistence; equal security for all states; creating effective military, political, economic, and humanitarian guarantees; preventing the arming race in the outer space, ceasing all testing of nuclear weapons and finalization of the liquidation thereof; dissolving the radical military groups; unconditional respect for the sovereign rights of each people; finding political solutions for international crises and regional conflicts; consolidation of trust among states; developing effective methods for the prevention of international terrorism; eradication of genocide and apartheid; exclusion from the international practice of all forms of discrimination, waiving economic embargoes and sanctions (without the recommendations of the international community); establishment of a new economic order, that ensures equal economic security for all states. Thus, ensuring international security undoubtedly refers to one of the global issues of our time, and on its solution depends the survival of human civilization.

3 Conclusion

In conclusion, we would like to mention that the set of instruments used to ensure the international security, instituted by the norms of international law, such as: collective (universal and regional) security; means for a peaceful solution of differences; measures

taken to reduce international tensions, ceasing the arms race and disarmament; measures taken to suppress acts of aggression, peace violations, and threats against peace; non-adherence and neutrality; measures of consolidation of the trust among states, and others, represent not only a response to *ex post*, to situations occurred in time, but also a necessity, conditioned by the ever changing tendencies existing around the world.

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The Legal Framework for the Free Movement of Persons between the European Union and Turkey, Candidate Country to the EU

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Abstract

The most important right of the European citizen is and will be the right to free movement, because nothing can be more important to humans than to be free, to move freely, and to live, study, or practice wherever they want. The geographical territory of the European citizen's right to move freely extends beyond the territory of the EU Member States and extends to the territories of third countries with which the EU has concluded agreements on the free movement of persons. These agreements target mainly EU candidate countries, neighboring countries that want to promote good neighborhood relations as well as countries where there is interest in promoting and developing economic, social and cultural relations. Turkey is one of those states that has been officially a candidate for EU membership since 1999, is in close relations with EU Member States and is also involved in joint projects with the EU addressing economic issues, customs and migration so that the regulation of free movement of persons appeared as implicit.

Referring to Ankara's Acquis[1] as the collection of rights and obligations of the Ankara Association Agreement and the Protocols that followed it in regulating EU-Turkey relations, we will refer mainly to the regulations concerning the free movement of persons.

Keywords: Turkey, EU, free movement, migration

[1] The Ankara Aquis is composed of: The Association Agreement between the European Economic Community and Turkey signed in Ankara on 12 September 1963, the Additional Protocol to the Association Agreement between the European Economic Community and Turkey and the Financial Protocol signed in Brussels on 23 November 1970 and Decision no. . 1/1980 of the Association Council of September 19, 1980, which came to replace Decision no. 2/1976 of the Association Council, regarding the development of the association according to the Association Agreement between the EEC and Turkey

1 The Association Agreement Ankara 1963

Strongly shaken by the outbreak of World War I, Turkey showed a policy of neutrality both during the interwar period and the Second World War, becoming a member of NATO in 1952.

On July 31, 1959, just one year after the entry into force of the Treaty of Rome establishing the European Economic Community, Turkey applied for an association with the EEC, and the subsequent negotiations established the framework conditions for this association (David Phinnemore [8] p. 136). Although Turkey has been marked in the following years by dictatorship, coups and military governments that have led to a discontinuation of negotiations, relations have resumed each time with the ultimate goal of Turkey's accession to CEE/EU. Turkey currently holds the official status of the EU candidate country since 1999.

As for all the citizens of the Member States of the European Union that have previously joined, for the citizens the most important aspect of the negotiations is in the current international context the free movement of persons, the conditions in which they can move freely, can carry out a lucrative activity employed or self-employed, can establish their residence, study or re-establish their family in the territory of the EEC/EU Member States.

For European citizens, the importance of the provisions on the free movement of persons included in the Agreements signed with Turkey derives from the fact that, on the basis of the principle of reciprocity, all rights provided for Turkish citizens and their family members within the territory of the EU/European citizens and their family members on the territory of Turkey.

On September 12, 1963, the Association Agreement between the European Economic Community and Turkey was signed in Ankara, which established Turkey's accession plan to the EEC, the agreement entering into force on 1 December 1964.[2] Having the basic objective of establishing a customs union[3], the agreement also provided for the establishment of an Association Council setting out the details of how to enforce the regulations and deciding to prohibit discrimination on grounds of nationality[4]. The Association Agreement did not contain any regulations regarding the rights derived from the free movement of workers nor with family members of workers, but it has initiated the free movement of persons between the EEC and Turkey. Together with other authors, we appreciate that the idea of European integration was the basis for the conclusion of the European Union agreements on the free movement of persons (Eva Tanuschev [10] p. 220). As stated by the CJEU in the Demirel case, signing an association agreement with the EU gives a third state a privileged status and indicates a certain level of integration of the associated state in the EU system (Iris Goldner Lang [7], p. 26-27).

The Contracting Parties have agreed in a general and non-detailed manner that Articles 48-50, 52-56 and 58 of the Treaty establishing the Community will gradually

[2] Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara, 12 September 1963, OJ 31.12.77 No L 361 /29
[3] Idem, Art. 3, 4, 5, 10
[4] Idem, Art. 6, 9

ensure freedom of movement for workers and the restrictions on freedom of establishment will be removed.[5]

In the years that followed, based on the provisions of the Association Agreement in Ankara, other acts were adopted that clarified and extended the rights, obligations and measures conferred by this agreement, constituting together the Ankara Acquis.

2 The Additional Protocol to the Association Agreement 1970

Seven years later, on 23 November 1970, an Additional Protocol to the Association Agreement between the European Economic Community and Turkey was signed in Brussels together with a Financial Protocol covering its content and the free movement of persons and services, which entered into force on 1 January 1973.[6]

By analyzing comparatively the provisions of the Additional Protocol of 1970 with the precedents of the 1963 Association Agreement, we find that this Protocol aims to develop and clarify the provisions on accession (Richard Ball [2], p. 180), including those on freedom of movement for workers and freedom of establishment, and provides for a period between the end the twelfth and the twenty-second year after its entry into force for the progressive implementation of these regulations. Thus, the Additional Protocol contains provisions on the right to geographical and occupational mobility of workers, the right to extend work and residence permits, the right to social security and health insurance, and non-discrimination in respect of working conditions and pay for workers of Turkish nationality.[7] Social security, health insurance and pension rights are also provided for the families of Turkish workers moving within the Community.[8] Special regulation refers to exchanges of young workers between states.[9] The Additional Protocol regulates the freedom of establishment for the different classes of activity according to economic circumstances, stating that priority is given to activities that contribute in particular to the development of production and trade.[10]

The most important clauses of the Protocol are "non-discrimination" which prohibits the application of discriminatory rules on working conditions and the remuneration of

[5] Idem, Article 12: The Contracting Parties agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them. Article 13: The Contracting Parties agree to be guided by Articles 52 to 56 and Article 58 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom of establishment between them.

[6] Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey, Official Journal L 293, 29/12/1972 p. 0003 – 0056

[7] Idem, Article 36, 37, 38

[8] Idem, Article 39

[9] Idem, Article 40

[10] Idem, Chapter II Right Of Establishment, Services And Transport, Article 41 al. 2: The Association Council shall determine the pace and modalities for the various categories of activities, taking into account the similar provisions already adopted by the Community in these areas and the particular economic and social situation of Turkey. Priority is given to activities with a significant contribution to production and trade.

Turkish workers[11] and "standstill clause" which prohibits the Contracting Parties from introducing any new restrictions on freedom of establishment and provision of services.[12] It is understood from the standstill clause as from art. 41 that the rights conferred by this Protocol can no longer be restricted by their interference or by other regulations, which is why this clause has been invoked many times before the ECJ in support and defense of the right of establishment.

It is clear from the comparative analysis of the provisions of the Protocol with those of the Association Agreement that the principal right of freedom of movement for workers laid down by the 1963 Association Agreement was, on the one hand, specified with regard to the derived rights deriving from it in relation to the right of residence, the extension of the permits, geographical mobility, equal working conditions, social security, health insurance and on the other hand it has been extended to a new category of people, namely family members of workers residing in the EC territory and only related to social security, health and the right to pay pensions in the State of origin. We deduce from this that there is no question of a right to family reunification, but those rights relating to family members residing in EC territory in fact refer to those persons who initially had an individual right to stay in the EC as a worker or to the children of Turkish citizens who were born in the territory of the Member States. But it cannot be ignored that these regulations regarding family members have only appeared two years after the regulation of the rights of workers and their family members (Klaus Dienelt [4] p. 98) within the EU.[13]

3 The Decision No. 1/80 of the Association Council

The Decision no. 1/80 of 19 September 1980 came to replace the Decision no. 2/1976 of the Association Council, both concerning the development of the Association under the Association Agreement between the EEC and Turkey, a gradual evolution of the rights of Turkish workers and their family members on the territory of the Member States was laid down, provisions which were implemented from 1 December 1980.[14] Thus, the rights of Turkish workers working in the territory of the Member States gradually increase according to the period of employment: after one year they acquire the right to renew the work permit for the same employer if a job is available, after three years he/she obtains the right to employment to any employer respecting the national

[11] Idem Article 37: As regards conditions of work and remuneration, the rules which each Member State applies to workers of Turkish nationality employed in the Community shall not discriminate on grounds of nationality between such workers and workers who are nationals of other Member States of the Community

[12] Idem. Article 41 (1): The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services. (2) The Association Council shall determine, in accordance with the principles set out in Articles 13 and 14 of the Association Agreement, the pace and modalities by which the Contracting Parties shall progressively abolish restrictions on freedom of establishment and freedom to provide services in their relations.

[13] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257, 19/10/1968

[14] Idem, Article 16

priority of workers in the Member States and after four years they are recognized as having the right to pursue any gainful activity.[15]

Decision no. 1/80 of the Association Council contains provisions which provide gradual rights and regarding family members of Turkish workers, also depending on the length of stay in the territory of the Member States. Such family members of Turkish workers acquire after 3 years of residence the right to carry out a lucrative activity while respecting the national priority of workers in the host states and after 5 years of residence the right to carry out without any limitation any gainful activity. Children who have completed a vocational training course in a country where a parent has worked for at least 3 years acquire the right to work in the host state.[16]

From the analysis of all the provisions regarding Turkish workers' rights on the territory of the EEC states according to the Decision no. 1/80 of the Association Council, we notice the priority right on the Turkish citizens' labor market in report to the citizens of other third countries[17], equality in education and training for the children of Turkish workers in the territory of the Member States[18], equality in pay, working conditions and assistance in finding a job with the citizens of the host states [19].

Based on reciprocity, all rights provided for Turkish citizens and their family members in the territory of the Member States of the European Economic Community shall also apply to nationals of the EEC and their family members in the territory of Turkey.[20]

As expected in relation to European regulations on the free movement of persons, the Decision no. 1/80 also includes the limitations of the right to free movement. Thus, on the one hand, the right of the EEC member states to temporarily abstain from the application of the provisions on the right to free movement of Turkish citizens and their family members in the event of disturbances on the labor market in a specific region, from a certain area or with respect to a particular profession, restrictions that need to be notified to the Association Council.[21] However, it is tried to avoid these disturbances by exchanging periodic information on the economic, social and labor market situation.[22] A new standstill clause provides for exemptions from the application of new restrictions on the right to free movement of persons to the workers and their family members already residing in the territories of the States concerned.[23] On the other hand, the limitations of the right to free movement of persons "can be justified on grounds of public policy, public

[15] Decision No 1/80 Of The Association Council Of 19 September 1980 On The Development Of The Association, regard to the Agreement establishing an Association between the European Economic Community and Turkey, Article 6
[16] Idem, Article 7
[17] Idem, Article 8
[18] Idem Article 9
[19] Idem Article 10
[20] Idem Article 11
[21] Idem Article 12: Where a Member State of the Community of Turkey experiences or is threatened with disturbances on its employment market which might seriously jeopardize the standard of living or level of employment in a particular region, branch of activity or occupation, the State concerned may refrain from automatically applying Articles 6 and 7. The State concerned shall inform the Association Council of any such temporary restriction.
[22] Idem Article 15 (1)
[23] Idem Article 13

security or public health".[24] Without developing the phrase "grounds of public order, public security or public health", but by its similar provision, Decision no. 1/80 refers to the European legislation on limitations of the right to free movement of persons,[25] surely from the point that public security is a right of European citizens to be protected (Panos Koutrakos [6] p. 190). Thus, looking at the European legislation on the right to free movement of persons on the territory of the Member States, it is established that this right is recognized both in the primary law, art. 18 TEC[26] as initial and secondary legislation, respectively the numerous directives issued later, subject to the limitations provided for by these regulations[27]. Based on these limitations, the right of Member States to limit the right to free movement of persons is justified on grounds of public policy, public security or public health (Jan-Henning Strunz [9] p. 173).

It is expressly provided that the provisions of Decision No 1/80, a EU normative act, do not affect the bilateral agreements concluded by the EC Member States with Turkey if they provide for more favorable conditions for the free movement of their nationals.[28] As we have already shown, in the case of such bilateral agreements, more favorable conditions will apply only to the territory and to the nationals of the signatory states of the agreements.[29]

From an analysis of the provisions of the Decision no. 1/80, we notice that there are differences regarding the categories of persons enjoying the right to free movement. Thus, with regard to the Republic of Turkey, the rights conferred refer to workers, persons who work in the territory of the EEC Member States and to their family members (Articles 7 and 8), whereas in relation to the EEC Member States the reciprocal rights are conferred to the nationals of these states, respectively to all citizens who have a legal status in the territory of these states, regardless of their citizenship (art. 11).

Another distinction is made between the standstill clause provided by art. 41 of the Additional Protocol[30] and the standstill clause provided for in Article 13 of Decision No 1/80[31]. Thus, while the Protocol firmly opposes the introduction of any new restrictions on freedom of establishment and freedom to provide services, the Decision states that States may not introduce new restrictions on the employment conditions of workers and members of their families, who live legally and who are employed. In its judgments, the

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[24] Idem Article 14

[25]TFUE: Article 346 (ex Article 296 TEC)

[26] TCE, Art. 18(1) Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions provided for in this Treaty and its implementing rules. (2) The Council may adopt provisions facilitating the exercise of the rights referred to in paragraph 1; Unless otherwise provided in this Treaty, it shall act in accordance with the procedure referred to in Article 251. The Council shall act unanimously in the course of such proceedings.

[27] TEC as a primary right: Article 39, paragraph 3, Article 46, paragraph 1, Article 55, Directives as secondary law: Directive 68/360, Article 8, Directive 73/148, Article 9, Directive 75 /34, tab. 2, 2.3, 90/364, 90/365, art. 2, 2.3, 93/96

[28] Idem Article 15 (2)

[29] Bilateral agreements concluded on the basis of Article 351 TFEU (ex Article 307 TEC)

[30] Additional Protocol 23 November 1970, Article 41 al. 1: The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.

[31] Decision No 1/80 Article 13: The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.

Court of Justice of the European Union analyzed most often the provisions of the two standstill clauses but in its judgment of 17 September 2009 on the Ministry of Foreign Affairs and Integration of the Netherlands against T. Sahin on the introduction of residence permit fees the host Member State, the Court has stated that both the standstill clause provided for in Article 13 of Decision No. 1/80 and the clause in Article 41 (1) of the Additional Protocol are of the same nature and both pursue the same objective. [32]

4 The Practice of the Court of Justice of the European Union on the Ankara Acquis

CLUE considers the right to free movement of persons as the most important freedom "the greatest possible freedom" (Thomas Burri [3] p. 17), as formulated in the first preliminary case, the Hoekstra case of 1964[33]. Interpellated in 1993 by The Central Council, as the last social court in Beröp, the Netherlands, to rule on the case of Ms. M. K. H. Unger, wife of Mr. R. Hoekstra on the social security aspects of migrant workers, according to Art. 117 of the original EEC Treaty, the Court also defined the term worker. Thus, as a "worker" within the meaning of Art. 48-51 of the original EEC Treaty concerning the free movement of workers is considered by the Court to be the case, the person who is normally involved in a compulsory or even private social security system, assimilated to the compulsory one.

The legal aspects that have not ceased to defend have raised the question of the practical application of the provisions of Decision no. 1/80 as a derivative right, secondary (Gyula Fabian [5] p. 126) with regard to the right to free movement of Turkish workers and, in the case of family reunification, where this right is not expressly provided for in the 1963 Association Agreement which is the principal, originating right. It adds that the current European provisions on the right to free movement of European citizens and their family members are covered by Directive 2004/38/EC, which is not applicable to relations with Turkey.

The Court of Justice of the European Union CJEU (called Court of Justice of the European Community until the entry into force of the Treaty of Lisbon on the 1st of December 2009) has ruled that the Ankara Agreement, its Additional Protocol and the Association Council decisions form the law of the European Union and are the acts which offers rights specific to Turkish nationals and businesses, which EU Member States must comply with in accordance with EU law.

The CJEU ruled on the right to family reunification within the framework of the free movement of Turkish citizens who defined the terms and status of third-country nationals on the territory of the EU/EU Member States in the Demirel case (Joanna Apap [1] p. 112). By the judgment of the Court of 30 September 1987 it was stated that Decision no. 1/80 (including the standstill clause in Article 13), as the only decision of the Association Council to progressively achieve the free movement of workers, is not applicable in the field of family reunification.[34]

[32] Cause C-242/06, T. Sahin
[33] Case Hoekstra C-75/63
[34] Case Demirel C-12/86

The Court of Justice of the European Union was once again called upon to rule on the question of the right to family reunification of Turkish workers working in the European Union almost 30 years after the Demirel case on 5 December 2014, in the Caner Genc case against the Ministry of Integration of Østre Landsret, Denmark. By the CJUE judgment of 12 April 2016, without reference to the previous decision in Demirel in 1987, the Court ruled that the provisions of national law which make the right to family reunification of the Turkish worker living and having a right of residence conditional in the territory of a Member State, with its minor child, the requirement that the minor has a sufficient link with the Member State and that the application be submitted two years after the parent has obtained an indefinite period of residence, be interpreted as 'New restriction' within the meaning of Article 13 of Decision No. 1/80 of the Association Council, which cannot be justified.[35]

One of the most recent judgments of the CJEU on the standstill clause in Ankara's Aquis is that of 7 August 2018 at the request of the Federal Administrative Court in Germany in the case of Mrs. Ankara. Nefiye Yön v Landeshauptstadt Stuttgart, concerning the condition for the issue of a residence permit in Germany for the purpose of family reunification with a Turkish worker, by the obtaining of an entry visa, provision introduced in the German law of foreigners in October 1980. The Court has held that this new provision of national law constitutes a 'new restriction' within the meaning of Article 7 of Decision No. 2/76 of the Association Council[36], decision subsequently replaced by Decision no. 1/80 which in art. 13 has taken over these provisions. Starting from the provisions of art. 9 of the Decision no. 2/76 concerning derogations for reasons of public policy, public safety or public health, taken over by art. 14 of the Decision no. 1/80, the Court has also pointed out that such a measure may nevertheless be justified on grounds of effective control of immigrants, but only to the extent necessary to achieve that objective, which must be verified by the domestic court.[37]

In conclusion and in recent practice, the Court of Justice of the European UnionCJUE has consistently held that the provisions of the Association Council Decision of 19 September 1980 on the development of the Agreement have been and remain applicable in the EU and Member States' of the Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963, including the right to family reunification and the prohibition of the application of new restrictions by national regulations[38], considering in some decisions that the Association Agreement in Ankara confers more favorable conditions to Turkish citizens than those provided for the internal labor market of some Member States.[39]

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[35] Case Caner Genc v. Udlændingenævnet C-561/14

[36] Decision no. 2/76 of the Association Council in force on 20 December 1976, and replaced by Decision no. 1/80, Article 7: Member States of the Community and Turkey cannot introduce new restrictions on the conditions of access to employment applicable to workers who are legally resident and who are employed in their territory.

[37] Case Nefiye Yön v. Landeshauptstadt Stuttgart C-123/17

[38] Case Kocak 2000 C-102 and 211/98, Case Dafeki 1997 C-336/94, Case Ergat 2000 C-329/97, Case Wählergruppe Gemeinsam 2003 C-171/01, Case Cetinkaya 2004 C-467/02, Case Aydinli 2005 C-373/03, Gürol 2005 C-374/03, Dogan 2005 C-383/03, Güzeli 2006 C-4/05

[39] Case Derin v Landkreis Darmstadt-Dieburg C-325/05, Case Altun at al C-359/16, Case Deniz Sahin v Bundesminister für Inneres, C-551/07

There are authors who consider that Turkey's accession will contribute to a stronger European Union both economically and politically and "otherwise, the current relationship, best characterized by the phrase *"neither together nor separately"*, will continue to generate unpredictable results." (Ilter Turan [11]) Our view is that the way of solving the 2015 migration crisis by adopting a Joint Action Plan on the Protection of Refugees and Reduction of Migration, as well as the results of the European Commission's 2018 Report on Turkey, show the progress made in the accession negotiations, negotiations in which a very important role continues to be given to the right to free movement of persons.

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Considerations regarding the distribution of criminal liability between the legal person and the individual at the European level

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Abstract

At the legislative level, an essential question seeks the answer regarding the allocation of liability between the individual and the legal person and the structuring of the relationship between their liabilities. At the level of implementation in the case of an offense committed as a result of a defective organizational policy, the question is who should be held responsible: the individual whose actions directly caused the violation of the law, the employer or the legal person who issued the policies or indications on the basis of which the individual and the legal person acted, or none.

Keywords: legal person, individual, jurisdictions, criminal law, punishment, offense.

EU jurisdictions are confronted with such a problem from the practice of the criminal liability institution of the legal person. However, judicial practice is still poor or non-existent in most countries.

The answer to these questions is vital to shaping a logical, functional and efficient liability regime for the legal person both at national and EU level.

The theoretical models of substantiation of criminal liability recognize the principle of cumulating the liability of the legal person and the individual who committed the illicit deed; [1] in other words, the criminal proceedings against the legal person do not remove the possibility of initiating proceedings against the individual, the instigator or the accomplice of the act. On the contrary, the legal person and the individual can be responsible simultaneously.

Certain jurisdictions prioritize the investigation of the legal person before the individual, while other jurisdictions provide sine qua non identifying the perpetrator for engaging the liability of the legal person. Moreover, there are states where the liability of the legal person is subsidiary, limiting its liability to cases where the individual cannot be identified. Other jurisdictions promote the principle of separation of legal responsibility,

namely the freedom of the courts to punish only the legal person or only the individual, based on criteria established by law, such as the criterion "the most serious guilt". Regarding the procedural aspect, certain jurisdictions grant the prosecutor discretionary powers to investigate a possible offense for which there are clues, which often result in a non-uniform practice irrespective of the substantive law provisions. Finally, another important aspect is the structural relationship between the liability of the legal person and the individual for the commission of an offense. Thus, we ask whether engaging the liability of the legal person is dependent on finding fault with the individual who committed the act itself. Most jurisdictions provide for the need to identify an offense by an individual and the possibility of being held responsible, but not by identifying him. In this context, we will see that the liability of the legal person is now fully independent only in rare cases.

1 The principle of cumulating legal liability

An analysis of European jurisdictions indicates the adoption of the principle of cumulating legal liability of the legal person and the individual for the committing of a criminal offense committed in parallel by most states.

The debates of many European jurists coagulate around the justification of accumulating accountability through the dichotomy of the will of the individual, who, on the one hand, expresses his own will as an individual human being (the individual) and, on the other hand, expresses his will as part by an association of persons who together form the will of the legal person. [2] According to German jurist Otto von Gierke, when a legal person commits an offense, the blame of the individual is not removed, so "the punishment of the legal person, not the punishment of the guilty individual responsible for himself or with others. [3]"

At the beginning of the 20th century, Italian jurist Alfredo de Marsico developed a model of distribution of criminal responsibility between legal persons and individuals, distinguishing between three categories of offenses: (1) offenses for which the liability of the legal person, such as those resulting from the organization's objectives or resolutions thereof and linked by a causal relationship, (2) offenses for whose committing only individuals representing the organization can be held responsible, in the absence of resolutions or organizational objectives, and (3) offenses for which both legal persons and individuals can be held responsible.

Against the cumulative accountability, Gunther Jakobs emphasizes the inconsistency of the parallel punishment imposed on the legal person and its bodies, since recognition of the legal person as guilty of the act of one's organ is sufficient, and thus the punishment of the individual remains groundless. [4]

According to Italian jurist Vincenzo Mangilo, the objections raised by the lawyers of the early 20th century refer rather to the functioning of the imputation model based on the identification between the legal person's fault and the fault of the organ that committed the illicit act (*identification theory*). [5] Liability of the legal person appears as a mere duplication of individual responsibility, as the same action is attributed to two subjects.

In this context, there is a need to legitimize the principle of cumulative accountability, namely to define the liability of the legal person as distinct from the individual fault.

In other words, the responsibility of the legal person is to be made on the basis of its guilt, not always being assessed on the basis of the guilt and accountability of the individual.

The principle of cumulating accountability is supported by both the scientific community and the public opinion, in the sense that if legal persons do not allow them to hide behind individuals, then even individuals are not allowed to hide behind the organization. Thus, the idea of exclusive liability, either of a legal entity or an individual, is also rejected on the basis of the reality of organizations, as a rule, of complex ones, which exert a major influence on employees in the context of achieving business objectives. Shareholders have the power to influence a company's management, while pressure management puts pressure on subordinates in charge of operational work. The deviant culture of a company whose sole purpose is to obtain profits can lead relatively easily to facilitating illicit deeds by adopting the axiom "*the purpose justifies the means*."[6]

Thus, the lawmakers had to take into account that, by virtue of the dissuasive nature of criminal norms, individuals must feel the risk of punishment of the law in the circumstances of committing illicit acts as a part of an organization. As a matter of fact, between the legal person and the individual, the latter is more sensitive to the possibility of punishment, whether deprivation of liberty or pecuniary.

The philosophy of cumulating, dating at least to 1670 in French law, which in a criminal order explicitly stipulated "the prosecution of the principal authors of deeds alongside the administration of justice towards communities, was taken over by civilian jurisdictions as soon as the criminal responsibility of the legal person "has emerged from the forgotten centuries where it was exiled by a rigorous anthropomorphic vision of criminal law." [7]

Following the Maastricht Treaty, the European Conventions, together with the directives and decisions adopted at European level following the signing of the Amsterdam Treaties, provide for the principle of cumulating the liability of the legal person and the individual as both are guilty of committing an offense. The language of European instruments, "the liability of the legal person ... does not exclude criminal proceedings against natural persons who are authors, instigators or accomplices ... is also found in the Council of Europe Recommendation on the liability of legal persons," the liability of the legal person does not exonerate responsibility of the natural person involved in committing the crime".

Thus, the principle of cumulating is found in European national legislation, more or less expressis verbis. [8]

Despite of the general acceptance of the principle of accountability, both in civil law and customary jurisdictions, research continues to identify a "fair mix" of collective and individual responsibility for committing offenses in a corporate context, in order to mitigate the risks of enforcement automatic excessive punishment.

The risk of inequitable punishments is most often discussed in the context of applying responsibility for another's deed (respondent superior), criticizing the ignorance of measures to prevent illicit acts often taken by the legal person. The respond at superior theory fully justifies the criminal prosecution of the legal person from the moment when the offense is proven to be in the interest of the offender, even only in part. However, fair distribution should be made by paying more attention to the organizational contribution to committing the deed.

The same risk, but in the sense of exonerating the liability of the legal person, which is otherwise responsible, is also present in the application of the alter ego theory, since its liability is only involved in the commission of the offense by a person in charge.

Discussions on a broad distribution of liability also relate to the individual, the main figure of criminal law. Due to historical considerations, the issue is debated from relatively opposite angles.

Thus, in the Anglo-Saxon jurisdictions, rich in the jurisprudence of criminal liability of corporations, there is a need to increase the dissuasive effect on individuals in the hypotheses of corporate criminality; while civilian jurisdictions, characterized by the absence of corporations on the stage of criminal theatre, still focus on punishing individuals and unintentionally favouring corporations. As will be explained in a next chapter, for example, analysis of French jurisprudence, in cases of corruption involving legal persons, reveals the perception of the court that the corporation was the victim of the individual guilty of bribery, who is employed at the management level of the organization, even if the deed was committed in the interest of the corporation.

At present, almost all civilian jurisdictions apply the principle of accumulating responsibility, while adopting derivative models of the legal entity, where individual deed is a necessary condition for corporate responsibility.

Thus, to date, the emergence of corporate responsibility has not significantly influenced the individual's responsibility. In other words, as long as the liability of the legal person is conditional upon the identification and condemnation of the individual who committed the illicit deed directly, corporations will remain largely under the sign of impunity. Thus, in the case of illicit acts having major consequences within a corporation, it is much more probable to convict one or more persons in the management who are accused of organizational failures, without condemning the corporation, despite its failure as an entire mechanism to address organizational issues. In this way, individuals become scapegoats for organizational failure that far exceeds any capacity for individual mistake or personal failure.

In order to avoid excessive punishment for the individual, especially in the cases of culpable or simple negligence, several scenarios were discussed in the doctrine and applied in practice: independent liability of the legal person, negligent crimes for which it can be charged only legal person liability, non-cumulative liability mechanisms, or procedural discretion for prosecutors.

Regarding the offenses for which the law requires a form of intent, legal rationality allows the condition of finding an unlawful act for corporate responsibility, but is confused with the need to identify and/or condemn the individual. And in the case of this type of crime, the need to distribute the responsibility in a reasonable way is easily imposed in cases where the corporation, directly through resolutions or indirectly through the propagation of a certain organizational culture, exerts significant pressure on decisions and behaviours of individuals acting within the organization, which led to the commission of illicit acts. At present, no legal system has standardized the corporate pressure as an explicit attenuating circumstance, much less as a cause of exoneration from criminal liability.

2 Non-cumulative liability

Most jurisdictions are the followers of the principle of cumulating the liability of the legal person and the individual. However, both in the EU and beyond its borders, certain jurisdictions provide for non-cumulative liability models in the form of the alternative, exclusivity or subsidiarity of the liability of the legal person. Moreover, some systems deal with liability separately, in the form of autonomous or even independent liability of the legal person.

a. Alternative liability

Alternative liability appears as a significant derogation from the principle of cumulating of liability, allowing the court, sometimes even requesting, the conviction of one or other of the legal person and the individual.

The Belgian Criminal Code recognizes as a rule the principle of excluding the cumulating of liability. Moreover, in the preparatory works of the law one can easily identify the indignation of the legislator over the criminal responsibility of the natural person in charge, on the basis of shortcomings or deficiencies of his supervision, in the case of crimes for whose incrimination the form of intent is required. [9]

Art. 5 (2) shows the structure of the relationship between the legal person and the individual: "when the responsibility of the legal entity is engaged solely on the grounds of the intervention of an identified individual, only the person who has committed the deed with the most serious fault can be convicted." In other words, alternative liability becomes a defence for the one who, while obviously guilty of committing an illicit deed, can rely on the exoneration of liability by probing the least serious guilt.

The Belgian criminal law also provides for exceptions to the rule, which leads to the application of the principle of cumulating in the situation where the identified individual has committed the deed "knowingly and voluntarily", it can be condemned alongside the responsible legal person. Law requirement about committing the deed "knowingly and voluntarily" leaves room for interpretation, as it is not clear whether the legislator calls for the intentional act, the accumulation of liability, or it is enough to commit the guilty act.

It remains to be seen, in a future chapter, the practice of the courts, which have faced this "thorny" legislative uncertainty and, moreover, extremely relevant for legal security.

The construction of alternative liability has been criticized by numerous authors, from the point of exoneration of a guilty entity, even though it is characterized by the "least serious fault". According to Faure, the solution was in fact a compromise between the legislator and the Belgian business circles. [10]

Regarding the liability of the legal person, the Belgian legislation does not provide details or list the criteria for assessing its "guilt". Thus, the way of applying the alternative liability remains at the discretion of the court, a position highly criticized in the doctrine, but left unanswered by the Belgian lawmaker.

b. Exclusive liability

Unlike administrative law, where exclusive liability is well-known in both national legalizations and EU instruments, criminal law allows such liability only as an exception.

Even if the law allows the corporation's own and exclusive liability for a particular deed, individuals can be held accountable for related deeds.

French law has introduced a limited scope for the exclusive liability of the legal person in cases of easy guilt of the individual.

c. Subsidiary liability

According to the subsidiarity principle of liability of the legal person, this can only be undertaken if the conviction of the individual is impossible for various reasons. Thus, the liability of the legal person is questioned only after it is established that the individual cannot be held responsible.

The Swiss Penal Code enshrines subsidiary liability as a rule in the matter. Article 102 (1) provides that an "offense committed within an undertaking in the course of a commercial activity according to the object of business shall be imputed to the undertaking if it cannot be imputed to a particular individual as a result of the lack of organization of the undertaking".

Therefore, the legal person becomes responsible in the scenario where its organizational structure is not transparent enough to allow identification of the individual responsible for committing the offense. In other words, the corporation is punished for lack of transparency, and as such, proof of the link between organizational failure and the commission of the illicit deed is unnecessary.

What is needed, however, is to prove the existence of an offense, with all the related elements, including the form of guilt. Moreover, for the corporate liability, it is not necessary to convict the perpetrator.

The scope is a general one, with only a few exceptions, explicitly mentioned in art. 102 (2) consisting of organized crime, the financing of terrorism, money laundering and various forms of corruption.

In doctrine and practice, it has been observed that the same result of the legal person being held liable when the individual cannot be identified is also assured by the legal systems that apply the principle of cumulating while maintaining the autonomy of corporate responsibility. [11]

d. Procedural discretion

The scope of accrued liability can be significantly reduced by granting prosecutors, in certain systems of law, the freedom to choose to initiate criminal proceedings for committing an unlawful act. Thus, in the systems that allow the prosecutors discretion, unlike those that require the initiation of criminal proceedings once an offense has been committed, the situation of exclusive or alternative liability of the legal person or the natural person can be reached on the basis of the prosecutor's assessments case. Of course, the election of the prosecutor is usually influenced by a number of factors; in systems that allow for bargaining appeal, the prosecutor will declare criminal prosecution of the legal person in circumstances where the individual, in order to escape a possible punishment, provides evidence against the corporation.

A comparative study shows, however, that in the jurisdictions characterized by the obligation to start and the criminal proceedings against both the legal person and the individual, there is the practical possibility of derogating from the principle of cumulating through the exercise of the principle of opportunity.

The French Code of Criminal Procedure allows prosecutors to concentrate punishment on individuals or corporations, or on both. Since French jurisprudence is a worrying concern of prosecutors' concern largely solely for the investigation of individuals, a circular issued by the Directorate for Criminal Affairs in 2006, when the 2004-204 Law was adopted, urged prosecutors to hold accountable cumulatively for legal persons and physical misconduct for offenses committed intentionally, and the sole responsibility of the legal person for offenses of fault.

Austrian law provides for different systems for initiating criminal proceedings against the individual and the legal person while proceedings against the individual are mandatory criminal prosecution of the legal person is limited to situations where this is "appropriate". Turning to this appreciation, Austrian legislation remains deficient in terms of clarity and stability in the matter of liability of the legal person.

The scenario of German law indicates similar directions in the sense of the obligation to initiate criminal proceedings against individuals, while with regard to legal persons, the prosecutor has the faculty to choose.

While the Hungarian legislation takes an opposite stance, namely the obligation of criminal proceedings against legal persons once the authorities have been notified and the freedom of prosecutors to assess the opportunity of criminal prosecution of physical persons, [12] The Dutch system enshrines the faculty of prosecutors of appreciation for both types of entities. [13]

Denmark grants the authorities the same choice to hold accountable only to the legal person or just the individual, or both cumulatively; in 1999, however, the Prosecutor's Office issued a set of principles to underpin the exercise of discretion prosecutors, including the principle of accountability of co-financing for acts committed in specific commercial activities and related to its operation.

The persons in charge of coproduction are held accountable only when they have acted with intentional intent or serious misconduct, while subordinates who committed the act themselves are not liable.

In Finland, the law gives discretion to prosecutors in respect of corporation reimbursement, while providing for factors likely to influence the start of the investigation against them; thus, prosecutors are required to take account of corporate efforts to prevent the commission of other crimes by taking concrete preventive measures.

United Kingdom, traditionally, the investigation is left to the prosecutors for both types of entities.

Recently, special rules have been adopted for imprudence and failure to prevent transnational corruption, in order to obtain the consent of the prosecution service before carrying out criminal proceedings against a natural person. The Crown Prosecutor's Office has issued instructions on how to replace the individual liability of directors, employees or shareholders with corporate responsibility, as their conviction is a significant deterrent effect for the future.

3 Conclusions

As we can see, it is generally accepted that the liability of the legal person does not exclude the individual's responsibility for the same deed and vice versa. On the contrary,

in the context of the investigation of one of the two entities, the authorities are required at least to consider the opportunity of investigating the other.

In an efficient regime, however, an additional principle is essential: the taking of responsibility of the individual is not a prerequisite for engaging the legal person's liability. This principle has gradually become a standard of international law, and is now recognized by most of the liability regimes of the legal person. In fact, fulfilling commitments to build an effective sanctioning regime against corrupt corporations under international legal instruments would be almost impossible if corporate liability is conditional upon the conviction of the individual.

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The New Requirements of The EU General Data Protection Regulation 2016/679 GDPR

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Abstract

After 2 years since The General Data Protection Regulation entered in force, we finally face the day when it starts to apply. May 25, 2018 is the "Z" day regarding Data Protection Laws and Practices.

The necessity of this regulation is obvious and addresses both the data processed within European Union and the data transfers outside the European Economic Area. GDPR extends the scope of EU data protection law to all foreign companies processing data of EU residents. The regulations highlight the following key requirements: scope, single set of rules, responsibility and accountability, lawful basis for processing, consent, data protection officer, pseudonymization and anonymization, data breaches and sanctions.

The primary objective of the GDPR is to give citizens back control of their personal data. Since the GDPR started to apply it was necessary to harmonize previous and other data protection regulations throughout the EU. This EU compliance regulation will have a far-reaching impact for organizations throughout the world.

Keywords: The General Data Protection Regulation; scope; data protection officer, lawful basis for processing, consent, data breaches and sanctions.

1 Introduction

In January 2012 the European Commission initiated the reform of the data protection. In December 2015 the European Parliament, Council and Commission established the new rules for the private data protection, which had a unitary legal frame in the European Union as a result.

In April 2016 the Council and the Parliament adopted the regulation, about which we are to talk, this act being the normative expression of the reform in the domain of private data protection. On May 4th, 2016, the European Union Regulation Official Newspaper (EU) 2016/679 of the European Parliament and Council of April 27th, 2016 published an article on the protection of individuals with regard to the processing of

personal data and on the free movement of these data and the repealing of Directive 95/46/EC (General Data Protection Regulation).

As it is well known, the regulation is a compulsory European Union legislative act. This legislative act must be applied entirely by all the Member States of the European Union. Unlike a regulation, the directive is a legislative act setting an objective that all the Member States of the European Union must meet, but each of them has the right to decide on how to meet the established objective. The distinctions between the mode of application and the effects of the two types of European legislative act also show us why the regulation option is more effective.

The protection of personal data has the following technical cause: the development of information systems. The development of computer systems raises the following issues: memory, communication and intelligence. Computer systems have memory, computer systems allow for easy communication of stored information and information processing in a sufficiently short time for the use of processing results to be effective.

The Charter of Fundamental Rights of the European Union only concerns the rights of individuals. So is the art. 8 of the Charter, which provides: "Everyone has the right to the protection of personal data concerning him or her. 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. Compliance with these rules shall be subject to control by an independent authority [1]"

The right to data protection derives from the right to respect for privacy. The concept of private life is associated with human beings. Individuals are therefore the main beneficiaries of data protection. [2] Furthermore, according to the Working Party 29 Opinion, only human beings are protected by European data protection law. The jurisprudence of the ECHR on Article 8 of the European Convention on Human Rights shows that the complete separation of private and professional life can be difficult.

The EU General Data Protection Regulation is structured on 11 chapters that grouped 99 articles and 173 recitals, as follows:

1. General provisions (Art. 1-4)
2. Principles (Art. 5-11)
3. Rights of the data subject (Art. 12-23)
4. Controller and Processor (Art. 24-43)
5. Transfer of personal data to third countries or international organizations (Art. 44-50)
6. Independent supervisory authorities (Art. 51-59)
7. Cooperation and consistency (Art. 60-76)
8. Remedies, liability and penalties (Art. 77-84)
9. Provisions relating to specific processing situations (Art. 85-91)
10. Delegated acts and implementing acts (Art. 92-93)
11. Final provisions (Art. 94-99)

2 Regulation (EU) 2016/679 – Scope

Regulation (EU) 2016/679 is directly applicable in all EU Member States, protects the rights of all individuals within the EU, regardless of the geographic location of the data controller, and extends the scope also to data controllers established outside the EU

in the extent to which their goods and/or services are addressed to persons located within the EU.[3]

Personal data are collections of data that allow identification of individuals (Article 4 (1) of the Regulation). [4] Social interaction between people is done through exchange of information; in the absence of information exchange, the functioning of society is unthinkable.

We could say that some of this information allows us to identify the people who interact, but closer to the truth if we observe that most of the information conveyed allows us to identify the person who is talking to them. We can say that society abounds with personal data.

The information allows the holder to act effectively. That is why information is power. Information extracted from personal data is important because it allows profiling. Consequently, they enable active agents to achieve attention management through personalized interactions.

The legal definitions of personal data do not clarify when a person is deemed to be identified. Identifying clearly involves elements that describe a person in a way that he can distinguish himself from all other persons and can be recognized as a natural person. A person's name is a prime example of a description element. In exceptional cases, other identifying elements may have a similar effect to the name. For example, in the case of public figures, it is enough to refer to the position of the person, for example, the President of the European Commission.

3 How it works?

The new Regulation applies directly to all concerned entities without the need for national legislation, since it is a regulation and not a directive. It replaces Romanian law no. 677/2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data.

It is necessary to implement technical and organizational security measures through which data protection principles can be effectively implemented. It is also necessary to minimize processed data and to integrate the necessary safeguards in the processing to meet the requirements of the Regulation and to protect the rights of data subjects.

The protection afforded by the General Data Protection Regulation concerns individuals, regardless of their nationality or place of residence, in respect of the processing of personal data. Therefore, the GDPR confers on individuals more rights, which they can exercise freely with respect to the data processing entities, such as: the right to information, the right of access to personal data, rectification and erasure (the right to be forgotten), the right to restrict the processing, the right to data portability, the right to object.

4 Principles of GDPR

The principles governing the general data protection regulations are:

– lawfulness, fairness and transparency (this is an essential principle, closely linked to fundamental human rights. Personal data must be processed "legally, fairly and transparently to the data subject");

– purpose-limitations (personal data must be collected for well-defined, explicit and legitimate purposes, and subsequent processing must not deviate from these purposes);

– Minimizing the collected data;

– Appropriate, limited and relevant (this principle makes it clear that any personal data collection needs to be thoroughly analyzed before data is actually obtained, which must be the most relevant and strictly limited to what is absolutely necessary for the purposes in which they are processed);

– Verifying the accuracy of data and updating it (operators must take all measures to ensure the validity of the data, and the proven ones must be updated quickly or deleted);

– Storage-related limitations (data must be kept as long as needed for the underlying storage. Longer storage periods are exceptions associated with public archiving, research or statistical activities);

– Integrity and confidentiality – data security (personal data must be processed in its own security, including "protection against unauthorized or unlawful processing and loss, destruction or accidental damage by taking appropriate technical or organizational measures" (Ex. ISO 27001 certifications);

The operator will be accountable and able to demonstrate compliance with these principles.

5 Lawfulness of processing

Article 6 provides that personal data may be processed only if at least one of the six legal bases listed in that Article applies.

Processing shall be lawful only if and to the extent that at least one of the following applies:

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.[5]

There is no time limit specified in GDPR, for how long the consent will be valid. The duration of the consent will depend on the context, the scope of the initial consent and the expectations of the person concerned. If processing operations change or evolve considerably, the initial consent is no longer valid. In this case, a new consent must be obtained.

Article 6 (f) is provided as the last option among the six grounds that allow the personal data to be processed lawfully. It requires a comparative test: what is necessary

in the legitimate interest of the operator (or third parties) must be balanced against the interest or fundamental rights and freedoms of the data subject.

6 Who is evaluating?

In Romania, the National Supervisory Authority for Personal Data Processing – ANSPDCP [6] will carry out checks and apply sanctions on behalf of the EU.

7 Special features for a valid Consent

Article 4 (11) The GDPR defines "the consent of the data subject" as "any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her" [7]

Consent must be given through an action (unequivocal declaration or action). This means that the simple reference currently available on many sites that says "by continuing to browse this site you agree to processing your data" is no longer enough.

Thus, consent must be given by an unequivocal action which is a free expression, specific, informed and clear expression of the person's agreement. Such actions may be written statements, including in electronic form, including ticking a box when the person visits a site.

For the manifestation to be specific, informed and clear, the operator to process the data must provide clear, simple and transparent information as to the purpose of the data processing, the basis of the processing, the length of time for which the data is processed, and its right to withdraw their consent at any time.

The data subject must also be informed of the identity of the data controller and data protection officer, the data recipient and any interests and intentions to transfer them to third countries. Be carefully: If you need multiple purposes, consent must be given for each of them!

8 Special categories of personal data /sensitive data

Special categories of personal data are strictly delimited by law: race, ethnicity, political orientation, religion, philosophical or similar beliefs, sindical status, health data, sex life data and so on. In addition, sesitive data is considered:

• Personal data having a general applicability identification function such as National Identification Number (CNP);

• personal data relating to criminal offenses or contraventions.

9 Rights of the data subjects [8]

– Right of access (art. 15) it is possible to ask the operator in writing, under his/her signature and date, to communicate if he/she is processing the data, for what purpose,

what data, who he/she reveals, where they were collected, automatic machining mechanisms use.

– Right to rectification (art. 16) it may be required by the operator in writing, under signature and date, to rectify or update the data, or to block (temporarily or permanently) data processing, erase, anonymous data if it has illegally processed or communicated to third parties to whom your data has been disclosed, any requested operation (rectification, update, deletion, etc.).

– Right to be forgotten (art. 17) – individuals will have the right to require an operator to delete records of data related to them, provided there are no legitimate reasons for such data to be retained; Individuals may request that their data be "deleted" when there is a problem related to the lawfulness of the processing or the withdrawal of the consent.

– The right to be notified in case of data security breaches (art 19): companies will be obliged to immediately notify individuals of significant breaches of data security.

– The right to data portability and transfer the data to another provider (art 20) – customers will be entitled to request an electronic copy of their data undergoing processing and transmission of data required directly to another operator.

– The right to restriction (art 18): it may be required to require the operator, in writing, under his/her signature and date, not to process the data for direct marketing purposes or to disclose it to third parties for that purpose.

– Automated individual decision-making, including profiling (art 22): the right not to be subject to individual automated decisions: the operator may be required to withdraw, cancel, re-evaluate a decision he has taken solely by using the automatic means by which he assesses his professional competence, credibility or behavior under certain conditions.

Example: An important example of making automated decisions is the assessment of solvency. To take a rapid decision on the future creditworthiness of a client, certain data such as profession and family situation are collected from the client and combined with data on the person concerned from other sources such as credit information systems. These data are automatically listed into an evaluation algorithm, which calculates a total value representing the solvency of the client potential. Thus, the employee of the company may decide within a few seconds whether the data subject is acceptable as a client.

In addition to these rights, the data subject whose data is processed has the following rights:

– The right to be informed (free of charge): by the operator, when the data is collected or at the earliest at the earliest, before disclosing to third parties: who is the operator, for what purpose does your data work, to whom could reveal if you are obliged to provide him with all the required data and what the consequences of a refusal are, what rights you have and how you can exercise them.

– The right to consult the personal data processing registry (free of charge): it can be checked whether an operator has notified ANSPDCP that it processes personal data, including online, by accessing www.dataprotection.ro.

– The right to appeal to the courts (free of charge): the operator who has failed to comply with the rights or has caused damage by illegally processing the data may be sued.

10 Why it is the Regulation so important?

The regulation is important in terms of how it governs liability and because of very severe sanctions.

Its primary objective is to protect and empower all EU citizens in data privacy issues and to transform the manner in which organizations approach data privacy. It does not apply only to EU organizations but all organizations that are processing personal data of the subjects residing in European Union.

Along with this increased territorial scope, meaning an extra-territorial applicability, the new regulations bring:

– new conditions for consent, that must be clear and distinguishable from other matters and provided in an intelligible and easily accessible form, using clear and plain language. The consent must be as easy to withdraw, as it is to give it.

– modifications on data subject rights as breach notification, right to access, right to data erasure (previously known as the right to be forgotten), data portability, privacy by design and data protection officers.

11 Sanctions

For breaches of data protection obligations:

– 10 (ten) million or up to 2% of global turnover; For violations of the basic principles of data processing (proportionality, legitimacy, consent, etc.), the rights of data subjects (access, the right to be forgotten, etc.), international transfers of data or non-compliance with a data protection authority measure:

– 20 (twenty) million or up to 4% of global turnover.

12 Conclusion

According to GDPR, both data operators and their authorized processors will be held accountable for the personal data they process. However, they have different obligations, so it is important to make clear delimitation. In short, the operator determines the purpose of the data processing while the person empowered as a processor is the one who carries out the actual processing.

The most important consequence of the status of operator or person empowered by the operator as processor is legal responsibility for compliance in accordance with data protection legislation. Therefore, only those who can be held accountable under applicable law can assume these functions

The legislative adoption of EU General Data Protection Regulation, proves that the EU authorities recognize the new realities on the individual rights and liberties and tries to solve possible conflicts in current legislation. The text of the Regulation, even though not explicitly put it, brings together in the effort to protect personal data of the citizens.

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[4] General Data Protection Regulation 679/2016 GDPR: https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32016R0679&from=EN
[5] General Data Protection Regulation 679/2016 GDPR: https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32016R0679&from=EN
[6] www.dataprotection.ro
[7] General Data Protection Regulation 679/2016 GDPR: https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32016R0679&from=EN
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Trafficking in human beings: Implementation of the council of Europe Convention on human trafficking in criminal law

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Abstract

Adopted on May 3rd, 2005, following several initiatives from the Council of Europe, the Convention on Action against Trafficking in Human Beings is, even now, the most comprehensive European tool for combating and preventing trafficking in human beings. Since the ratification of the Convention on August 21st, 2006, the Romanian authorities have adopted several efective measures to prevent and combat trafficking in human beings, by periodically updating anti-trafficking legislation and adopting new legislation in the field, by creating an institutional framework for action against trafficking, and by introducing a national identification and recommendation mechanisms. This article aims to analyse the progress that our country has made in the fight against this terrible crime, and especially the way in which it has fulfilled its obligations at a European level.

Keywords: Trafficking in Human Beings, the Convention on Action Against Trafficking in Human Beings, European Union.

1 Introduction

The exploitation of human beings for profit is a phenomenon as old as history itself. The efforts of the international legal community to address this issue have begun a century ago, long before the birth of the modern human rights system.

Following the fall of the Iron Curtain, in the last decade of the twentieth century, Europe faced a new challenge that affected both the economic and the social spectrum, and had a serious impact on human rights – namely trafficking in human beings. Even now, the amplitude of this criminal phenomenon is extremely worrying, with its most visible forms of women and/or children exploitation in the sex and begging industry, as well as in forced labour.

As for Romania, in the early 1990s, the evolution of the economic and social context created the perfect premises for the development of social disparities that led to the fragmentation of the population, so that a section of it became vulnerable to the exploitation and trafficking in human beings. The geographical proximity and socio-cultural ties with the former Yugoslav republics conflict zones have led, since the fall of communism to the early 2000s, to an increased incidence of trafficking in Romania. Combating and preventing trafficking and exploitation among vulnerable population segments was the subject of a general framework of action designed by the Romanian government, the implementation of which was to be carried out by state authorities, with the help of representatives of the civil society.

After joining the European Union in 2007, Romania became a beneficiary of the European migration policies that opened the European borders for Romanian citizens. From this point up to the present moment, Romania has maintained its status as one of the main countries of origin for victims of trafficking in human beings, both in the form of exploitation through labour and sexual exploitation. Statistics are clear in this respect. In 2018, 662 people were identified as victims of trafficking, the smallest number identified in the last decade, from 757 victims identified in 2016 and 880 in 2015[1]. These estimates were based on the number of victims that were identified in the investigations and prosecutions initiated in the reference years. Of these, 51% of the victims were minors, 76% were women, of whom 69% were subjects of sex trafficking [2]. The numerous international reports on this issue[3] identify as one of the distinct features of our country that the children of Romanian origin, as an age group, are particularly vulnerable, becoming victims of the sex industry and forced labour trafficking, as well as forced begging. Thus, the new paradigms of migration have determined the need to create a legislative framework in order to combat, prevent and protect the rights of victims of trafficking in human beings.

Starting from these premises, we propose an analysis of how Romania, as a signatory state of the Council of Europe Convention on Action against Trafficking in Human Beings, as well as a member of the European Union (EU), has assumed its obligations and transposed the European provisions into the national legislation on combating and preventing trafficking in human beings, making reference in particular, to the implementation of the provisions of the Convention.

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2 Recent developments of the legislative framework in the field of trafficking in human beings

At national level, trafficking in human beings is incriminated by a special law, namely Law no. 678/2001[4], while the general framework of the response of state and civil society institutions is determined by a series of Government Decisions (GDs) which adopted the main governmental strategies in the field (the National Action Plan)[5] or the implementing rules of Law no. 678/2001– HG 299/2003[6]. These normative acts constantly update and describe in detail the list of responsibilities for each ministry and state institution in preventing and controlling trafficking in human beings so as to include all provisions of the special law and all areas of activity that the National Action Plan includes.

Concerning the investigation and prosecution of suspects and defendants of trafficking in human beings, there are some additional normative acts, which supplement those mentioned above. These are Law no. 565/2002 on the ratification of the UN Convention against Organized Crime and its Additional Protocols[7], Law no. 682/2002 on the protection of witnesses[8] and Law no. 211/2004 on certain measures for the protection of crime victims[9]. The latter transposes into national law the provisions of the European Convention on Compensation for Victims of Violent Crimes[10] and Recommendation R/85/11 on the Victim Position of the Criminal Procedure[11]. At the same time, the provisions of Law 211 harmonize the internal legal framework with the European *acquis*: the European Commission Communication on Victims of Crime in the European Union[12],

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[4] *Law no. 678 of 21 November 2001 on Preventing and Combating Trafficking in Human Beings, as subsequently amended and supplemented,* published in the Official Gazette no. 783 of 11 December 2011.

[5] Here we mention *Decision no. 1216 of 27 November 2001 approving the National Action Plan for Combating Trafficking in Human Beings*, published in the Official Gazette no. 806 of 17 December 2001; *Decision no. 1295/2004 approving the National Action Plan for Preventing and Combating Trafficking in Children*, published in the Official Gazette no. 802 of 31 August 2004.

[6] *Decision no. 299 of March 13, 2003 for the approval of the Regulation for the application of the provisions of Law no. 678/2001 on Preventing and Combating Trafficking in Human Beings,* published in the Official Gazette no. 206 of 31 March 2003.

[7] *Law no. 565 of 16 October 2002 for the ratification of the United Nations Convention against Transnational Organized Crime, the Protocol on the Prevention, Suppression and Punishment of the Trafficking in Persons, Especially Women and Children, in addition to the United Nations Convention against Transnational Organized Crime and the Protocol Against Trafficking illegal immigration by land, air and sea, in addition to the United Nations Convention against Transnational Organized Crime, adopted in New York on 15 November 2000,* published in the Official Gazette no. 813 of November 8, 2002.

[8] *Law no. 682/2002 on the protection of witnesses with the subsequent amendments and additions,* rectified in the Official Gazette, Part I, no. 117 of March 1, 2013.

[9] *Law no. 211/2004 on certain measures for the protection of victims of crime,* published in the Official Gazette no. 505 of 4 June 2004.

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[11] *Council of Europe Committee of Ministers Recommendation No. R(85) 11 to the Member States on the position of the victim in the framework of criminal law and procedure*, 28 June 1985, https://polis.osce.org/node/4651, accessed on 10 October 2018.

[12] *Communication on Crime victims in the European Union standards and action*, Bruxelles, 14 July 1999, http://europa.eu/rapid/press-release_IP-99-511_en.htm, accessed on 10 October 2018.

the European Commission's Green Paper[13], the European Council Decision on the Position of Victims in the Criminal Procedure[14], and the European Council Guidelines on Victim Compensation offenses[15].

The issue of social protection THB victims and their families is subject to a number of provisions included in legislative acts such as Law no. 116/2002 on the prevention of social marginalization[16] and Law no. 76/2002 on the unemployment insurance system and the promotion of employment[17].

Following the ratification of the Council of Europe Convention on Action against Trafficking in Human Beings, a series of amendments to the relevant normative acts were made at national level, especially to the Law no. 678/2001 on preventing and combating trafficking in persons, which maintains its status as the main legal document regarding the prevention of trafficking in human beings and the protection of victims of trafficking in human beings. Government Emergency Ordinance (GEO) no. 79/2005 of July 2005 amended Law 678/2001, so that victims of trafficking who were not Romanian citizens also benefited from a period of recovery and reflection that was not conditioned by their cooperation with the judicial bodies[18]. It also made a clearer distinction between trafficking in human beings and child trafficking and introduced some aggravating circumstances. Law 287/2005, the normative act through which the provisions of GEO no. 79 were implemented, made some further amendments. Of the most important is the provision that exonerates victims from the responsibility of committing offenses while they were subjected to trafficking[19].

Law no. 508/2004 on the organization and functioning of the Department of Investigation of Organized Crime and Terrorism (DIICOT) establishes the material competence of this Department in investigating cases of trafficking. According to the provisions of Law no. 508/2004, DIICOT also has jurisdiction over some crimes related to human trafficking, such as: fraudulent border crossing[20], criminal acts committed by

[13] https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52005DC0669, accessed on 10 October 2018.
[14] *Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings*, 22 March 2001, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001F0220, accessed on 10 October 2018.
[15] *Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims*, 6 August 2004, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0080, accessed on 10 October 2018.
[16] *Law no. 116/2002, the Law on Preventing and Combating Social Marginalization,* published in the Official Gazette, Part I no. 193 of 21 March 2002.
[17] *Law no. 76/2002 on the unemployment insurance system and promotion of employment,* published in the Official Gazette no. 103 of 6 February 2002.
[18] Article 38, *Government Emergency Ordinance no. 79/2005 for amending and completing Law no. 678/2001 on preventing and combating trafficking in human beings*.
[19] Article 13, paragraph (1), *Law no. 287/2005 regarding the approval of Government Emergency Ordinance no. 79/2005 for amending and completing the Law no. 678/2001 on preventing and combating trafficking in human beings,* published in the Official Gazette no. 917 of 13 October 2005.
[20] Incriminated by the *Government Emergency Ordinance no. 105 of June 27th, 2001*, published in the Official Gazette no. 352 of 30 June 2001.

Romanian citizens or residents of Romania on the territory of other states[21], other types of organized crime[22].

With the entry into force of the New Criminal Code (CC) and the Criminal Procedure Code (CPC) in February 2014, the incrimination of trafficking in human beings, which was part of the Law on Combating Trafficking in Human Beings, is now set in articles 182 (exploitation of a person), 210 (trafficking in persons), 211 (trafficking in minors) and 367 (constitution of an organized criminal group) of the CC[23]. The CPC also contains some provisions on serious crimes, including trafficking in human beings, which are under the jurisdiction of DIICOT.

In addition, Law no. 272/2004 on the protection and promotion of the rights of the child was amended and supplemented by Law no. 257/2013, which now provides for some special rules regarding the protection of children that have parents working abroad[24]. Law no. 292/2011 on social assistance also contains provisions on social services for victims of trafficking in human beings[25]. Amendments and additions were also made to the provisions of Government Ordinance no. 25 of 26 August 2014 on the employment of foreigners in Romania and other documents regarding the status of foreigners in Romania[26], which entered into force on 28 November 2014.

3 The leading concepts and definitions of the Convention integrated in the national legislation

The Convention on Action against Trafficking in Human Beings entered into force on February 1st 2008, after its signature in 2005. This is a legally binding instrument for the signatory States, which is based on the already existing international instruments. At the same time, the Convention exceeds the minimum standards agreed in other international instruments and seeks to strengthen the protection afforded by them.

According to Article 4 paragraph (a) of the Convention, the definition of trafficking in human beings includes three elements: an action – "recruitment, transport, transfer, housing or reception of persons", the use of coercive means – "threats or use of force or other forms of coercion, kidnapping, fraud, deception, abuse of power or vulnerability, or the granting or receipt of payments or benefits to prejudice the consent of a person who has control over another person" and the purpose of exploitation – "at least exploiting in prostitution of others or other forms of sexual exploitation, forced labor or services,

[21] *Law no. 252/2002 approving the Government Emergency Ordinance no. 112/2001 on the sanctionning of acts committed outside the territory of the country by Romanian citizens or by persons without citizenship domiciled in Romania,* published in the Official Gazette no. 549/3 September 2001.
[22] *Law no. 39 of 21 January 2003 on the prevention and combating of organized crime*, republished in the Official Gazette no. 757 of 12 November 2012.
[23] *Law no. 286/2009 – Criminal Code* published in the Official Gazette, Part I no. 510 of 24 July 2009.
[24] *Law 257/2013 for amending and completing the Law no. 272/2004 on the protection and promotion of the rights of the child, published in the Official Gazette, Part I no. 607 of September 30,* 2013.
[25] Article 62, 63, *Law no. 292/2011 on social assistance,* published in the Official Gazette no. 905 of 20 December 2011.
[26] *Government Ordinance no. 25 of 26 August 2014 on employment and detachment of foreigners on Romanian territory and on the modification and completion of some normative acts regarding the foreigners' status in Romania* published in the Official Gazette no. 640 of August 30, 2014.

slavery or practices similar to slavery, servitude or organ harvesting"[27]. As for minors, Article 4 paragraph (c) of the Convention states that it is irrelevant if the coercive means mentioned above have been used[28].

As far as the Romanian legislation is concerned, as already mentioned, trafficking in human beings is now incriminated by Articles 210 and 211 of the new CC. Thus, Article 210 defines THB as: "(1) Recruiting, transporting, transferring, harboring or receiving a person for the purpose of exploitation, committed: a) by coercion, kidnapping, deception or abuse of authority; b) taking advantage of the impossibility of defending or expressing the will or the apparent vulnerability of that person; c) by offering, giving, accepting or receiving money or other benefits in exchange for the consent of the person having authority over that person; shall be punished by imprisonment from 3 to 10 years and the prohibition of the exercise of certain rights. (2) Trafficking in persons by a civil servant in the performance of his duties shall be punished by imprisonment from 5 to 12 years. (3) The consent of the victim of trafficking is not a justifiable cause"[29]. Article 211 defines child trafficking as "(1) The recruitment, transportation, transfer, housing or reception of a minor for the purpose of exploitation shall be punished by imprisonment of 3 to 10 years and the prohibition of the exercise of certain rights. (2) The punishment shall be imprisonment from 5 to 12 years and the prohibition of exercising rights when: a) the act was committed under the conditions of Article 210 paragraph (1); b) the offense was committed by a civil servant in the performance of his duties; c) the crime threatened the minor's life; d) the crime was committed by a family member of the child; e) the act was committed by a person in whose care, protection, education, guard or treatment the child or the person who abused his or her position of trust or authority over the minor. (3) The consent of the victim of trafficking is not a justifiable cause"[30]. Article 182 of the new CC defines the exploitation of a person, and then Articles 214 and 215 of the Criminal Code criminalize the exploitation of adults and children for the purpose of begging.

It should be noted that exploitation of criminal activities does not appear among the forms of exploitation listed in Article 182 of the new Code of Criminal Procedure. However, according to the Romanian legislator, the term " subjection to the execution of a job or the execution of services, forcefully"[31] also includes the exploitation of criminal activities.

We mention here Decision no. 1940/2011 of the Supreme Court[32], whereby members of an organized criminal group who recruited detainees by borrowing them money while they were detained and who were obliged to pay their debts by committing

[27] *Council of Europe Convention against Combating Trafficking in Human Beings, Warsaw,* 16 May 2005, https://rm.coe.int/168008371d, accessed October 10, 2018.
[28] *Ibidem*.
[29] *Law no. 286/2009 – Criminal Code*...
[30] *Ibidem*.
[31] Article 182 (a), *Law nr. 286/2009 – Criminal Code*...
[32] Supreme Court, Decision no. 1.940 of 12 May 2011, http://82.79.40.9:82/intrale-gis/spete/afiss.php?f=82015&diez, accessed October 10, 2018.

offenses were convicted for the crime of trafficking in human beings based on Article 12e of the Law on combating trafficking in human beings[33].

Another element that was incorporated into national law refers to the aggravating circumstances contained in Article 24 of the Convention which fall under Article 210 of the CC – when the active subject is a civil servant, Article 211 CP – where the passive subject is a minor and by the article 367 CC – involvement of a criminal group[34]. Government Emergency Ordinance no. 18/2016, adopted on May 17th 2016, brought new amendments to the criminal codes, adding to the aggravating circumstances listed in Article 211 paragraph (2) of the Criminal Code – committing the offense by endangering the life of a minor; when the offense is committed by a family member of the child; and when the offense was committed by a person in whose care, protection, education or treatment the minor is, or by a person who has abused his or her position of trust or authority over the minor[35].

The acts of forgery of identity papers and related documents listed in Article 20 of the Convention are not specifically incriminated in the Romanian legislation on trafficking in human beings, but falsification of documents is incriminated in general terms by Article 327 of the new CC[36]. The provisions of Article 216 CC refer to the use of the services of an exploited person, but the number of those prosecuted, and then convicted under this provision is still relatively small, mainly because of the difficulty of proving that the services of an exploited person are being purchased. We mention here a recent case involving 20 victims of trafficking in human beings and a total of 14 defendants. By Decision no. 38 from February 12th 2016 of the Timişoara Court of Appeal, a judge was convicted for using the services of an exploited person[37].

3.1 *Legal measures to protect and promote victims' rights*

One of the most valuable elements of the Convention is its attention to human rights, namely the protection of victims of trafficking in human beings. Thus, the Convention clearly defines trafficking in human beings as primarily a violation of human rights and an offense that affects the dignity and integrity of the human being. Therefore, the document becomes a true ally in protecting all the victims of this so brutal crime. With an extremely broad scope, covering all forms of trafficking (national or transnational, whether or not linked to organized crime) and all persons who are victims of trafficking in human beings (women, men or children), the Convention provides the necessary legal basis to create an effective protection and rehabilitation system for people who have become victims of trafficking.

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[33] "to carry out any other activity that violates human rights and fundamental freedoms", *Law no. 678 of 21 November 2001 on preventing and combating trafficking in human beings, as amended and supplemented ....*

[34] *Law no. 286/2009 – Criminal Code...*

[35] *Government Emergency Ordinance no. 18 of 18 May 2016 for amending and completing the Law no. 286/2009 on the Criminal Code, Law no. 135/2010 on the Criminal Procedure Code, as well as for the completion of art. 31 par. (1) of the Law no. 304/2004 on judicial organization,* published in the Official Gazette no. 389 of 23 May 2016.

[36] *Law no. 286/2009 – Criminal Code...*

[37] Sentence no. 38/2016 pronounced by the Timişoara Court of Appeal on 12 February 2016.

In Romanian legislation, the legal framework for measures to prevent the trafficking of human beings and the protection and assistance of their victims is included in the Law no. 678/2001 which provides for the establishment of centres for the temporary accommodation of victims of crime. Moreover, Article 63 of Law no. 292/2011 on social assistance includes provisions on the social services to which victims of trafficking in human beings are entitled, including access to residential, care, assistance and protection centres, day care centres providing counselling, support, information and social reintegration, but also community-based services – social assistance services, legal counselling, professional guidance, psychological counselling or social reintegration[38].

Despite of the favourable legislative framework, there are still many shortcomings in ensuring *de facto* protection for the trafficking victims in Romania. One of the biggest challenges is the provision of funding, where the legislation is especially unclear. The Law on Combating Trafficking in Human Beings stipulates that counties can set up assistance centres, but does not provide for the establishment of such centres or for the situation when the centres are closed or the use is changed. Another difficulty is that in the centres there are only the victims that are residents of the county, which is due to the Law 678/2001 stipulating that the shelters will be financed by the counties, and the majority of the administrative units do not want to use funds for victims from other administrative units[39]. Article 38^1 of the same law establishes that protection and assistance measures granted to victims of trafficking who are nationals of EU Member States are the same as those available to victims of Romanian origin. However, these provisions do not apply to nationals from third country[40].

Government Decision no. 1443/2004 on the repatriation of unaccompanied children and/or victims of trafficking in human beings[41] establishes the procedure for the repatriation of Romanian minors, victims of trafficking in human beings, as well as the financing of the travel expenses and the special protection services that are provided to them. Furthermore, Law no. 300/2006 on the ratification of the Council of Europe Convention on Action against Trafficking in Human Beings[42], minor victims will be given specific protection measures.

The legal basis for issuing residence permits for victims of trafficking in human beings is laid down in Article 39 of the Law on Combating Trafficking in Human Beings and Government Ordinance no. 25/2014 of November 28th 2014. The right to temporary stay may be granted by the General Inspectorate for Immigration if the presence of a foreigner in Romania is necessary for any type of criminal proceedings, and whenever the presence of the foreigner does not pose a threat to public order or national security. We recall that Article 14 of the Convention allows parties to choose between granting a residence permit in exchange for cooperation with the authorities or due to the victim's needs, or even opting for them simultaneously.

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[38] *Law no. 292/2011 on social assistance …*
[39] Article 32, paragraph 10, *Law 678/2001…*
[40] *Ibidem*.
[41] *Government Decision no. 1443/2004,* published in the Official Gazette no. 873 of 24 September 2004.
[42] *Law no. 300/2006 on the ratification of the Council of Europe Convention on Action against Trafficking in Human Beings,* published in the Official Gazette no. 622 of 19 July 2006.

3.2 *International judicial cooperation*

Although important progress has been made in recent years, Romania still has a number of steps to take in order to strengthen cooperation with destination countries in areas such as prevention, victim protection and criminal prosecution, on the basis of the existing mechanisms, but also through the introduction of new procedures. Currently, Romania has concluded bilateral agreements on mutual legal assistance with several countries, such as the Republic of Moldova, Turkey, Italy, Belgium and the Netherlands[43]. Cooperation in the criminal field with the states with which Romania has not signed a bilateral agreement, is regulated by Law no. 302/2004 on international judicial cooperation in criminal matters, which recognizes the principle of reciprocity and covers surrender on the basis of a European arrest warrant, extradition, the recognition and enforcement of foreign judgments, the transfer of criminal proceedings, the transfer of sentenced persons and judicial assistance in criminal matters[44].

With the entry into force on February 1st 2014 of the new criminal codes, several changes have been made to the provisions governing international judicial cooperation in criminal matters. Here we enumerate – the procedure for transferring criminal proceedings, requests made through international channels (such as locating and identifying persons, hearing the suspect or accused, injured parties and other participants in criminal proceedings), searching and confiscating objects and documents, executing special or expanded confiscation, interception of telephone conversations, examination of documents and other procedural acts and videoconferencing hearings[45].

4 Conclusions

Trafficking in human beings is a transnational phenomenon with a strong impact on society, affecting most countries in Europe today. At the same time, it is a growing problem, with multiple manifestations – from sexual exploitation, to forced labour and other serious forms of abuse. Victims of trafficking are children, women or men. Being a problem with which Romania began to face in its transition period after the communist era, trafficking in human beings came to the attention of the authorities in the late 1990s. From an international perspective, today Romania is one of the first countries of origin for trafficking in human beings, being also on the routes used for transiting and exploiting victims into Western and Central European countries. The number of Romanian victims has risen sharply in recent years, and the legislative evolution, and especially its effective implementation by the state institutions, seems to have not followed the same pace of development. As a result, the number of final convictions is still low. Another unfavourable element is the difficulty of prosecuting offenders, caused by the reluctance of victims to testify against their aggressors and the lack of adequate resources within the specialized police and prosecution bodies to ensure victims' protection.

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Although the Romanian authorities have continued to develop the legal framework for combating trafficking in human beings, there are still issues requiring immediate action, such as the victim protection framework, the level of European cooperation, concrete measures to prevent THB by informing and aiding vulnerable groups. Since the Convention came into force in 2008, the Romanian authorities have adopted a series of documents, policies and action plans in the areas of gender equality and child rights protection, which have the potential to prevent trafficking in human beings by addressing the root causes of this phenomenon. But the fight against THB involves a continuous effort. And Romania needs to be aware of its ever so important role in combating this scourge, even at European level, as traffic continues to have a negative impact on millions of people each year. Trafficking, like global warming, is everyone's problem. As the world has opposed collectively slavery, we believe that a similar collective effort will be needed again to eliminate the practice of trafficking in human beings.

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Medically assisted reproduction with a surrogate mother in the jurisprudence of the European Court of Human Rights

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Abstract

Surrogacy, substitute maternity or assisted reproduction with a surrogate mother has become a widespread practice in nowadays society. However, third-party assisted reproduction involving a surrogate mother is a sensitive matter for many people due to the ethical arguments and legal issues it has raised and is always a challenge for both practitioners of international private law and advocates of human rights. This article is intended to analyse the assisted reproductive technology which involves a surrogate mother in a human rights perspective, more precisely through an analysis of the relevant case-law of the European Court of Human Rights in matters of substitute maternity.

Keywords: human rights, surrogacy, substitute maternity, assisted reproductive technology, European Court of Human Rights, right to respect for private and family life, right to reproduce

1 Conceptual clarifications of surrogacy

1.1. The current technological progress in the field of medicine has created and has driven some vast and various case-law and doctrine collection concerning the application of the new medical findings to humans. In this context, assisted reproductive technology (hereinafter ART) is a scientific and technological breakthrough designed to revolutionise the entire human perception of how human reproduction takes place. The category of assisted reproductive technology includes, among others, in vitro fertilization (hereinafter IVF) and assisted reproduction with a surrogate mother.

Surrogacy is one of the assisted reproductive technology frequently used both throughout the European area and on other continents, mainly the American one. Nevertheless, at this moment, of all the ART, surrogacy poses the biggest ethical or legal issues arising either from a lack of consistent regulation at international or European level,

or from a total lack of legislation in some countries, like Romania. This has given rise to the so-called concept of "**reproductive tourism"**[1], to which more and more couples turn so that they can have a child. Couples travel to countries where the legislation is surrogacy friendly, like Ukraine and Russia, and they contract the services of a surrogate mother either in exchange of a sum of money or not. The **legal consequences** of such practices are mostly concerned with **a refusal by the home country to recognise the foreign birth certificates of children who were born in the host country through a surrogate mother** and **a refusal of national authorities to transcribe the certificates in their registers of births, marriages and deaths**, and consequently they do not grant citizenship to the children and even separate children from their parents and place them in foster care, as seen in the recent case of Paradiso and Campanelli v. Italy[2], which was settled by the European Court of Human Rights (hereinafter ECtHR).

1.2. The lack of consistent national regulation among the European countries in matters of surrogacy is emphasised by the rulings pronounced by ECtHR. The most relevant of them will be analysed in this article. The Court based in Strasbourg assumed the role of guarantor of human rights in the European area through an extensive interpretation of the provisions of the European Convention on Human Rights[3] (hereinafter ECHR or the Convention) also in the area of assisted reproduction with a surrogate mother. The historic reality of the period when the Convention was signed, that is on 4 November 1950, in relation to the medical technological progress of that time, is the reason why ECHR has, neither in its preamble part, nor in its body of provisions and in its subsequent protocols, no actual mentions to assisted reproductive technology and the less any specific mentions to the concept of surrogacy. It was necessary that almost three decades pass since the Convention was signed for the first birth through IVF[4] to happen and almost four decades had passed before the first case referring to surrogacy was settled by a court in the United States. It was the Baby M[5] case judged by the New Jersey Supreme Court in 1988 which brought to the attention of practitioners and philosophers everywhere the possibility to overturn the Latin apothegm *mater in iure semper certa est,* which says that the mother is always the one who gave birth to the child, and the filiation of the child in relation to his/her mother is simply a natural consequence of birth.[6]

The phenomenon of substitute maternity has extended beyond the American continent reaching also Europe, where it was perceived and approached differently by the European countries. For this reason, ECtHR had to adapt to the present conditions and circumstances of life, continuing to apply Article 1 of the Convention – which secures for everyone within the jurisdiction of the 47 signatory states the rights and freedoms defined in the Convention – also to surrogacy cases.

The Convention is by far the most important international legal instrument adopted at regional European level which intends to establish a "European public order in matters of fundamental rights and freedoms".[7] Independently of the legal means used by each state, at national level, to apply the provisions of the Convention, the Convention is the central and determinative point for defending and fostering human rights.

With regard to **surrogacy cases brought before the Court**, we should mention that **they have been settled in the light of Article 8 of the Convention referring to the right to respect for private and family life**, a right recognised both for the couple who want to conceive a child through assisted reproductive technology using gametes from

third party donors, as we can infer from the Case S.H. and others v. Austria[8], and for the child conceived abroad by a surrogate mother. Pursuant to Article 8 paragraph 1 of the Convention "everyone has the right to respect for his private and family life, his home and his correspondence".

1.3. Generally, the judgments pronounced by ECtHR with regard to Article 8 of the Convention – the right to private and family life –, referring specifically to surrogacy, not only have the role to shed light on the cases brought before the Court, but also to influence indirectly the conduct of the other signatory states in this respect, either at the time when new laws are drafted, or when national courts are called to pass a judgment. Thereby, the mission assumed by ECtHR acquires a double role, namely, to raise the standards for the protection of human rights and to extend the human rights jurisprudence to all the member states of the Convention. [9]

As regards Romania as part of this process, by the time this article was written, there had been no cases involving surrogacy brought before the Court in Strasbourg; there had been only cases concerning medically assisted reproduction, but without a surrogate mother. One example is the recent Case of Nedescu v. Romania[10], where the Court found that there was a violation of the right to private and family life provided for by Article 8 of the Convention by a refusal of the national authorities to make available for the couple the embryos that had been preserved 6 years before, which led to the loss of the possibility for the couple to have a biological child. However, it is necessary to mention that the case-law of ECtHR in matters of surrogacy is of great significance both for Romania and the other signatory states due to the effect of *res interpretata erga omnes* of the ECtHR judgments with which the signatory states must comply.[11]

This also comes out from the first judgment pronounced in Romania in 2013, whereby the Court of Appeal of Timișoara ruled in favour of the couple who followed an in vitro fertilization procedure with a surrogate mother and changed the filiation of the child so born, contrary to the Latin apothegm *mater in iure semper certa est* and implicitly contrary to Romanian law, consecrating therefore substitute maternity for the first time in our country.[12] The Romanian Court found that the legal impossibility for minors born through a surrogate mother to have the maternity of their biological mother recognised – i.e. their true genetic identity – infringed on their right to private life, which was granted by Article 8 of ECHR. The Court also showed that since the consequences of such a legal act which concerns the fundamental right to private life of those involved – and primarily of the minor children so born – found no just and fair solution in the domestic law, therefore, taking into account the foreground provisions of ECHR and other international acts to which the Romanian state is a part, the Romanian courts could not deny the right of children born through such medical techniques to have their true genetic identity recognised, otherwise they risked to infringe on their best interests. Although there have been more than 6 years since the first judgment favourable to surrogacy was pronounced in Romania, our country has not adopted a special law referring to assisted reproductive technology and surrogacy yet. Consequently, as long as surrogacy is not expressly forbidden in Romania, it is the principle applied to the interpretation of civil law saying that everything which is not prohibited is allowed that helps judges when they have to make a ruling on the filiation of a child conceived through medically assisted reproduction with a surrogate mother. This principle is supplemented by the international legal

instruments in the field of human rights, such as ECHR, which must be primarily taken into consideration by the Romanian civil courts at the expense of national provisions, by virtue of Article 20 paragraph (2) of the Constitution of Romania[13] and of Article 4 of the Romanian Civil Code.

We can only see this legislative drawback as a positive aspect for Romanian couples or single people who want to become parents through a surrogate mother and do not have the financial means to follow this procedure in a country with legislation in this area. However, this is not an efficient legal solution in the long term.

2 Forms of surrogacy. The need for a legal framework

2.1. Surrogacy is one of the assisted reproductive technology whereby a woman accepts, based on a surrogacy agreement, to carry in her uterus a child for another person or for a couple.[14]

Basically, surrogacy is a contract. In other words, in an extensive formulation and keeping in mind the procreation possibilities of the 21st century and the diversity of contemporary families, we can say that surrogacy is an onerous or free of charge understanding between two parties; on one hand, those who want to conceive a child – hereinafter referred to as intended parents -, this category including both couples, married or not, irrespective of their sexual orientation, and single people, no matter if the genetic material of the child belongs to them or comes from a third party/third parties; and on the other hand, the surrogate mother who will undergo a medical procedure involving in vitro fertilisation or artificial insemination in order to get pregnant and who consents to carrying the child in her uterus on condition that the child is returned to the intended parents after birth; with a proviso that the surrogate mother will waive all parent rights on the child so conceived. It is also worth mentioning that if the surrogate mother is married, the consent of her husband is also necessary for carrying out the medical procedure and, then, to return the child to the intended parents.

The definition above has, in my opinion, a purely scientific value, as it covers all possible situations for appealing to a surrogate mother. Across countries, different approaches to surrogacy contracts have been taken. On one hand, we can see a restrictive approach to these practices in jurisdictions such as France, Bulgaria, Germany, Italy, Malta, Portugal or Spain, where surrogacy is not allowed, no matter if it is commercial surrogacy or altruistic surrogacy. On the other hand, there are states like the United Kingdom or Greece that allow the surrogacy as long as it has no commercial purposes. Nevertheless, in most European states, surrogacy is practiced due to a legislative void corresponding to the principle "everything which is not prohibited is allowed". These are countries like Romania, Poland, Slovakia, Slovenia, Czech Republic, and Cyprus where there is no legislation specific to surrogacy and, consequently, it is up to every individual to assume the legal consequences, especially those referring to the determination of the filiation of a child born with help from a surrogate mother.

2.2. We need to mention that there are two distinctive categories of surrogacy. On one hand, there is **traditional surrogacy** and **gestational surrogacy**, and on the other hand, there is **commercial surrogacy** and **altruistic surrogacy**.

Traditional surrogacy presumes a situation whereby a surrogate mother becomes pregnant naturally with the intended father or is artificially inseminated with his sperm or the sperm of a third-party donor. The best-known example of traditional surrogacy is that of Rachel from the Bible, who could not conceive and her maidservant Bilhah who gave birth to two children with Rachel's husband, because Rachel had asked her to. "*And she said, behold my maid Bilhah, go in unto her; and she shall bear upon my knees, that I may also have children by her"* (Genesis 30:1-3). So, we can see that there is still a genetic relation between the child born this way and the surrogate mother.

On the other hand, gestational surrogacy presumes the existence of a surrogate mother and the transfer in her uterus of embryos created through the fertilisation of the sperm and ovules of the parents who will raise the child (donated gametes may also be used) through the technique of in vitro fertilisation. So, in most cases, there will be no genetic connection between the carrying mother and the child she carries in her uterus. Even if the surrogate mother is the one who ensures that the child grows and develops in her uterus through the fluids which get to the foetus, and which, of course, carry DNA, the child will not assimilate the DNA of the carrying mother, but he or she will be genetically akin to the parents who will raise him or her up, meaning those from whom the gametes have been taken.[15]

As regards the second distinction, surrogacy may be in practice both altruistic and commercial. Because it involves making a profit, it is commercial surrogacy which raises most issues and controversies referring to the exploitation of the surrogate mother, simply because she trades in her own body, and there is also the special protection which must be granted to the child by observing his or her rights and especially the minor's best interests.

3 Solutions of the ECtHR regarding the application of Article 8 of the Convention to surrogacy

A controversial aspect in the ECtHR practice refers to the determination of maternity and paternity in respect of those who appealed to the services of a surrogate mother. Therefore, an inevitable question arises: Who are the parents of a child born by a surrogate mother? The surrogate mother and possibly her partner? The child's genetic parents or the intended parents?

3.1. Given the lack of consistent regulation among the national laws or even the lack of any provisions in this area, each state has applied individually the legislation in force to matters of surrogacy. Therefore, states like France or Italy refused to recognise children born through a surrogate mother as belonging to the intended parents. Such cases were brought before the Court based in Strasbourg – the Case of *Mennesson and others v. France* [16] and *Labassee v. France* [17], which are cases where the State French refused to recognise the parent-child connection which had been legally established in the United States as a result of medically assisted reproduction through a surrogate mother. The applicants alleged that their right to respect for private and family life, granted by Article 8 of the Convention, had been infringed on because they could not have their filiation to the children – legally established abroad – recognised, and that the

best interests of the child was affected. In both cases, the conclusion of the Court was that Article 8 of the Convention regarding applicants' right to respect for family life had not been violated, however there was a violation of Article 8 with regard to children's right to respect for private life. The Court held that through the refusal by France to recognise the legal situation created in the United States between children and parents, the identity of children in the French society had been affected.

3.2. In another case, *Paradiso and Campanelli v. Italy,* one of the principal issues was the refusal by the Italian state to recognise the birth certificate of a child born in Russia based on an agreement of human assisted reproduction with a surrogate mother, entered into by the couple and the surrogate mother. The refusal was followed by a removal of the child from the environment where he had grown up and given for adoption to another couple.

This case is about a married couple who, after many unsuccessful attempts at in vitro fertilisation, decided to resort to the technique of assisted reproduction with a surrogate mother. In Italy, this procedure is forbidden, so the spouses addressed to a specialised clinic in Moscow and concluded a surrogacy agreement for that purpose. The baby was born in February 2011 and was registered as the applicants' son, the carrying mother giving her written consent thereto. In the Russian birth certificate there was no mention of surrogacy. Later, in May 2011, the couple requested the Italian state to register the birth certificate, but because of this, the applicants were subject to criminal investigation for "misrepresentation of civil status" and breach of adoption laws. The child was considered as being in a state of abandonment and an adoption procedure was opened. The court also requested a DNA testing, which showed that there was no biological connection between the applicants and the child, which was contrary to what they had said. In October 2011, the court ordered that the minor be removed from the applicants, and the applicants were forbidden any kind of contact with the minor. In April 2013, the Italian court considered that the refusal to transcribe the Russian birth certificate was legitimate and ordered that a new certificate be issued, mentioning that the child was born of unknown parents. Subsequently, the child was adopted by another family.

Initially, one of the chambers of the Court found that the removal of the child from the applicants was a breach of Article 8 of the Convention. However, at the request of the Italian Government, the case was taken before the Grand Chamber which concluded by eleven votes against six that there was no violation of Article 8 of the Convention. The Court, taking into account that there was no biological connection between the child and the applicants, the short period of their relation with the child and the uncertainty of their legal relations and in spite of their desire to become parents and the quality of their affective ties, found that the conditions for the existence of a family life were not met. Nevertheless, the Court considered that the contested measures fell within the scope of the right to private life, and although those measures amounted to an interference with the applicant's private life, their purpose had been to defend public order and to protect the rights and freedoms of others.

Unquestionably, in the case of *Paradiso and Campanelli*, the principle of the child's best interests take primacy over the applicants' interest to continue their relationship with the child conceived through an assisted reproductive technique with a surrogate mother. Nevertheless, the case gives rise to a series of questions of an ethical and, especially, a

legal nature, concerning the determination of a child's maternity and paternity, such as: Who are the legal parents of the child? The parents who consented to this technique? The surrogate mother and possibly her partner? Or the biological parents of the child? We can see that in those states where the legislation prohibits surrogacy there is a tendency to apply the adoption legislation. However, the institution of adoption is concerned with some specific categories of abandoned children, children without a family, whereas, in case of surrogacy, the intention is a clear one, that of becoming a parent and to raise and educate a child born through a surrogate mother.

As viewed by the European court, the concept of "private life" covers the physical and psychological integrity of a person and, implicitly, the right to personal identity, in other words the right of a person to know their biological origins and to look for and know those who conceived him or her.[18] At the same time, the Court considered that in the Case of *Paradiso and Campanelli v. Italy*, the notion of "private life" does not exclude the emotional ties created and developed between an adult and a child in situations other than classic filiation.

4 Conclusions

Undoubtedly, surrogacy is one of the medically assisted techniques that is increasingly used as a way of procreating and establishing a family. Nevertheless, at present, there is no consensus in respect of the practice of the signatory states of the Convention on substitute maternity. Banning surrogacy in one of the European countries only hinders the legal situation of those who intend to become parents with the help of a surrogate mother and travelling to a country where this practice is allowed. Also, the legal situation of the children born through this procedure is subject to legal uncertainties, especially regarding the establishment of the child's kinship and the rights arising from it. The lack of national regulations in this field is capable of generating legal uncertainties, such as the situation of Romania, country that has so far no special legislation regarding the surrogate or other assisted reproductive technology, but nevertheless the altruistic surrogate is practiced. As can be seen from the relevant case-law of the ECHR in the cases concerning surrogacy, the Court`s intervention is capable of harmonizing national practices in this area. It is undeniable that the Court based in Strasbourg has recognised the right to become a parent as a result of using assisted reproductive technology with a surrogate mother, a right safeguarded by Article 8 of the European Convention of Human Rights with regard to private and family life. However there are still some aspects to be clarified and questions which have not been answered by the Court in Strasbourg, such as those referring to the existence of a reproductive right to access medical services involving surrogacy, the violation of human dignity when the future child becomes the subject matter of a surrogacy contract or even controversies referring to the exploitation of the surrogate mother and the facilitation of the possibilities of same sex couples to have a child.

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[13] Article 20 (2) of the Constitution of Romania states: "Where any inconsistencies exist between the convenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favorable provisions."

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Public dignities incompatibilities in european and national public institutions

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Abstract

In the context of Romania's membership of the European space since 2007, and taking into account the need and desire to align the State in the European legal order, we consider it appropriate to discuss the question of incompatibility of public office at national level in relation to intra-Community context.

Moreover, in accordance with international requests against Romania on decision-making transparency, independence of judiciary, fight against corruption, etc., we want to point out a precarious legal regulation that can generate conflict of interest and which results in a state of vulnerability in Europe for our country.

Thus, this article aims to present the importance of respecting the principle of separation of powers in a state of law, to clarify situations of incompatibility public dignities, and finally to understand the need for a draft revision of the Romanian Constitution, all compared and accordance with Community law.

Keywords: Incompatibilities, public offices, European institutions, constitutional law.

1 Preliminary issues

1.1 *The importance of addressing the topic*

It follows precisely explain the concept of separation of powers, the governance model of democratic states. According to this principle, power should be divided into different sectors with powers and responsibilities separate and independent. The tripartite is the most widely encountered in modern nations and which assumes a legislative, executive and judicial, noting that they should not be in the hands of the same person. John Locke ("Two treatises on government", 1690) and C. de Montesquieu ("De l'esprit des lois", 1748) enshrines this principle as the basis of modern constitutional state and also fight against the absolutist state.

Although the reality of today, there is no democratic system with a complete separation of powers, Member States shall ensure that the transfer of functions to the parliament, government and administration, as well as by independent judges, the power to be kept in balance through mutual controls (balance of power), citizens thus shielded from potential despotic state intervention. Achieve the stated purpose of the democracies of the world is currently done actually by linking and merging of the three levels of power.

The main factor that can endanger the functioning of the state is just confusing duties and responsibilities of these powers and placing two or three of them under the authority of the same person, preventing and sanctioning democratic control of errors committed by the village authorities.

1.2 *Definition and explanation of concepts*

According to constitutional law ([2] Muraru, I., Tănăsescu, ES, Constitutional and political institutions, Vol. I, XI edition, All Beck, 2003, p. 165), and the functions of public dignity, although it is inside a close bond, be confused. Thus, a better understanding we define public function as "all duties and responsibilities established by the public body under the law in order to achieve its powers, the appointment the following contest or promotion examination held for the position public", while in public office we understand" complex duties and responsibilities established by the Constitution, laws and other regulations, which assumed an individual by his inauguration following the outcome of the electoral process directly, by choice, ([1] Alexander I., Treaty Administration, Legal Publishing House, Bucharest, 2008, p. 510).

The difference between the two notions express results from art. 94 para. 1 of Law no. 161/2003 on measures to ensure transparency in exercising public dignities, public functions and in the business environment, preventing and sanctioning corruption (Published in the Official Gazette of Romania, Part I, no. 279 of April 21, 2003, as amended subsequently), which states that a public servant is incompatible with any other public Funt, except it was called, as well as political positions.

The constitutional text also uses a concept that the public position of authority, in which case we assume that the legislature considered similar functions of Minister, which falls outside of public office ("the functions of Secretary of State and Secretary of State the specialized bodies subordinated to the Government or ministries, the Presidential Administration, the apparatus of the Parliament and Government, senior specific ministries, other authorities and public institutions, local councilors and county councilors, prefects and sub-prefects and other management positions of prefects, the mayor, deputy mayor and secretary of the administrative-territorial units, positions and execution of decentralized public services of ministries and other bodies of administrative units and apparatus and public services of county councils and local councils, and the functions which, by law, do not allow people that we have to stand elections").

Another problem that often occurs both in the administrative system and in the public space, is the confusion created between conflict of interest and incompatibility. If the conflict of interests, public figures must take a decision to influence interest pursued, to be in a situation of incompatibility a public official should not take any decision or to perform any act it is sufficient that that simultaneously hold two or more functions whose overlapping is prohibited by law.

2 SYSTEM ISSUES compare national and European

Currently, legislation in Romania allows, under the rules of art. 71 Constitution ([4] *Constitution of 1991 amended by Law Review no. 429/2003*, Title III Public authorities, Cap. I, Section II, published in the Gazette. no. 767 of 31.10.2003) and art. 15 Status of Deputies and Senators ([5] *Law no. 96/2006 on the Statute for Members and Senators, updated and republished in 2017,* Cap. IV. Incompatibility prohibitions and conflict of interest), holding simultaneous quality of MP/Senator and member of the Government. Although this contradicts the principle of separation of powers and art. 109 Constitution ([6] Constitution of 1991 amended by Law Review no. 429/2003, Title III Public authorities, Cap. III, published in the Official Gazette. No. 767 of 31.10.2003), and recommendations Romanian Constitutional Court issued Decision No. 799/2011, national legislation has not been amended accordingly.

A possible model legislative inspiration is offered in the European area, where the Community institutions meet a clear delineation of functions and duties of public office. To understand exactly what we mean we achieve a parallel institution at European level. So, note that in the EU Parliament and the EU Council is the legislative decision-making bodies, the two institutions co practicing system in areas such as the adoption of legislation, democratic control, etc. Union budget approval, which means that the power is equivalent to the two constitute the European legislative power. In a bicameral legislative system, like the National Council of the EU it is the Senate and Chamber of Deputies meets Parliament. Government

The Management Committee or employee of the European Investment Bank and officials or agents of the EU institutions or of the specialized bodies attached to them. "Furthermore, in 1997 and 2002 are added incompatibilities additional performance of the members' and respectively member Executive Board of the European Central Bank, European Ombudsman, and in particular member of a national parliament. It is clear that an MEP can not hold together and the quality of commissioner, which shows just the specimen separation of powers, independence and democratic order. 1997 and 2002 are added further incompatibilities to perform their functions as members' respectively, member of the Executive Board of the European Central Bank, European Ombudsman, and in particular member of a national parliament. It is clear that an MEP can not hold together and the quality of commissioner, which shows just the specimen separation of powers, independence and democratic order. 1997 and 2002 are added further incompatibilities to perform their functions as members' respectively, member of the Executive Board of the European Central Bank, European Ombudsman, and in particular member of a national parliament. It is clear that an MEP can not hold together and the quality of commissioner, which shows just the specimen separation of powers, independence and democratic order.

So if for Romania are not talking about a conflict concerning simultaneous possession of two dignities only limited practical problem remains smooth and sometimes difficult to demonstrate the determination of a conflict of interest in relation to one of the two qualities.

Therefore, pursuant to a lack of efficiency of art. 109 of the Constitution and a dispute over the separation and control of powers, and in the context of the overtone European legal system by which we strive and should prevail in the legislative process,

we only have to further analyze the impact social qualities of overlapping the two public sector.

3 SOCIAL IMPACT on incompatibility

First, the existence and maintenance of such situations on the possibility of overlapping of functions or minister and parliamentarian, would result in a violation of art. 109 par. (1) of the Constitution, which states that "Government is politically responsible only to Parliament its entire business", which would lead to a lack default and efficiency standard ([7] *Constitutional Court Decision no. 799/2011 on the draft Law on Revision of the Constitution, published in the Official Gazette no. 440/23.06.2011). Thus, we are in the presence of a complete lack of democratic control and especially the almost absolute power which can occur either within parliament or the executive, according to the political interests pursued.*

Furthermore, this situation affects indirectly the whole parliamentary activity as given that a parliamentary government member can not physically participate simultaneously in the activities of the legislature (commission meetings the permanent, plenary sittings, etc.) and those of the executive, we understand here and the impossibility of documenting and preparing concomitant subjects on the agenda at an appropriate professional level. We must take into account that a vote or no vote due to lack of time or insufficient information may cause a disservice parlametar entire system state.

Art. 46 Chapter X of the Statute of Deputies and Senators, which provide that the exercise period of the parliamentary term the length of service, with all rights in conjunction with the provisions of GEO 116/2017 on the abrogation of art. 51 para. (4) of Law 263/2010 unitary public pension system, stating that "the pension from the public pension system can not be cumulated with a service pension/retirement allowance by the laws of a special nature" leads to hypothesis that in addition to the possibility of overlapping quality of parliamentarian with the Minister and that of allowances during the two mandates, talk and subsequent accumulation of pension, which can be interpreted advantages obtained by virtue of elective offices held.

The danger of a conflict of interest in professional activity is another situation with negative impact on the holding simultaneously two qualities by the same person. according to the OECD ([8] *Recommendation of the Committee of Ministers EU*, On May 11, 2000, https://wcd.coe.int/wcd/ViewDoc.jsp?id=353945&Site=CM), conflict of interest involves a conflict between duty to the public and the interests of a public official. Conflict of interest occurs when interest as a public official affects or could affect improperly obligations and official responsibilities. Looking at each individual part of the definition, it follows that participation in a decision that condition is satisfied so when "the decision depends solely on the will of the public official in question, and when the action public official that is only a link in making decision. The condition is met when the public official is part of a collective body that decides by vote and it participates in debates and vote "and that interest may be explained by the existence of a" benefit to the public official or a person close it obtains as a result of the decision. So, to be in a conflict of interest, public official must take part in decision making affecting its interest" ([9] The National Integrity Agency, Guide on incompatibilities and conflicts of interest, edition 2018). Even if the conflict of interest is just misbehavior quality of deputy or

senator and sanctioned only pecuniary it applies to avoid such a situation. Article 19 of Law no. 96/2006 provides that the act of deputy or senator of violating legislation on conflict of interest constitutes misconduct and is punishable by reducing the allowance by 10% for a period not exceeding three months, while according to art. 70 of Law no. 161/2003, define conflict of interest as "where the person exercising a public office or a public official has a personal interest patrimonial, that could influence objectivity fulfillment of its duties under the Constitution and other laws, and according to Art. 71 of the same law, the principles underlying the prevention of conflict of interest in exercising public and public functions are: impartiality, integrity, transparency and the rule of decision public interest".

However, lack of transparency in the state apparatus can induce citizens insecurity and distrust in institutions and state authorities create chaos, disgust and attitude reprehensible, reflecting sometimes in disinterest and disengagement of citizens for exercising the right to vote, so a civic attitude junk.

4 Conclusions

While supporting the view set out above, we should mention that previous examples of incompatibilities institutions and public functions and dignities can not be taken literally, given the form and structure of the two entities. On the one hand the European Union is a unique group of sovereign states in the world, and on the other hand, according to art. 1 par. 1 of the Constitution ([10] Constitution of 1991 amended by Law Review no. 429/2003, Title III Public authorities, Ch. I, Section II, published in the Official Gazette. No. 767 of 31.10.2003) "Romania is a national, sovereign, independent, unitary and indivisible state".

In conclusion, in the context of legislative vulnerabilities, but also practical situations with high interpretability, we consider necessary and appropriate to a legislative initiative aimed at amending the Constitution, to provide transparency and trust in the state administration.

Taking as an example the operating model of the European Parliament, held in election procedures of the institution and the recommendations of the Constitutional Court of Romania, we consider that there are sufficient resources to develop a coherent constitutional text, clear and adapted to current social uninterpretable.

Moreover, an improvement in legislation on this matter could have significant effects in society, as all indicators negative impact outlined above in our analysis, would acquire a contrario, a positive character, and restore the balance of powers would lead to a transparent and consolidated democracy.

So, now we are in a situation in which a parliamentarian may participate in the legislative process by providing a law, that all he will have to implement and to respect and if it commits a violation or infringement on non-standard he will have to justify himself in Parliament. This fact is not only an absence or lack of effective democratic control of Parliament, but a serious constitutional error allowing interfering spheres three democratic powers.

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FRANCOPHONE DEVELOPMENT OF ROMANIAN LAW

Unité de l'État et sécession dans l'Union Européenne

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1 Introduction

L'Union européenne (UE) bien qu'ayant un caractère particulier demeure essentiellement une Organisation internationale régionale composée d'États au sens du droit international. En à ce titre, elle constitue une association volontaire des États européens constitué par un accord international[1], donc sa nature est conventionnelle et non constitutionnelle[2]. Le nombre d'États s'est accru, mais la nature juridique de l'État n'a pas changé. En ce qui concerne la situation de ces États, le traité de Lisbonne a réglementé leur statut plus précisément que par le passé, qu'il s'agisse de leur entrée (art. 49 TUE), de leur maintien (art. 7 TUE) ou de leur départ de l'Union (art. 50 TUE). En revanche, les traités fondateurs de l'Union restent muets sur la sécession d'une partie du territoire de l'un de ses États membres.

L'appartenance et la participation d'un État membre à l'UE ainsi qu'un éventuel retrait reposent sur un acte de souveraineté, un acte volontaire. Le principe de souveraineté est à la base des règles européennes et nationales sur lesquelles repose le statut d'État membre. En outre, l'art. 4.2 TUE consacre le principe d'autonomie institutionnelle et procédurale des États membres inhérente à leurs structures fondamentales politiques et constitutionnelles et garantie le respecte des fonctions essentielles de l'État, notamment celles qui ont pour objet d'assurer son intégrité territoriale, de maintenir l'ordre public et de sauvegarder la sécurité nationale.

Par conséquent, la réalité est que l'État, en tant que sujet international, et son unité demeurent un élément central de la construction européenne, ainsi que le respect de sa souveraineté. En d'autres termes, c'est l'État en tant qu'unité politique qui est membre de

[1] L'Union européenne a été créé par le Traité sur l'Union européenne (TUE) et le Traité sur le fonctionnement de l'Union européenne (TFUE), dans leurs versions actuelles, depuis le 1er décembre 2009 et l'entrée en vigueur du traité de Lisbonne. Par conséquent L'Union procède de la volonté des États qui ont agi conformément à leurs règles constitutionnelles. L'UE donc n'a pas été et n'est pas non plus une entité originale créée par un acte constitutif populaire. Mangas Martín, A. et Liñán Nogueras, D.J.: *Instituciones y Derecho de la Unión Europea*, Ed. Tecnos, 9ª éd., Madrid, 2016, p. 47 .

[2] Diez de Velasco, M.: *Organizaciones internacionales (Coord. J.M. Sobrino Heredia)*, 16 ed., Ed. Tecnos, Madrid, 2010, p. 43.

l'Union, et cela résulte d'ailleurs de la pratique de la Commission européenne et de la jurisprudence de la Cour de justice de l'UE en ce qui concerne l'application du droit européen, qui montrent une approche unitaire à l'égard des États membres[3].

Si les États membres détient toujours les clés essentielles du processus d'intégration, et si leur souveraineté est bien présente dans la construction européenne, est-ce que les aspirations à l'indépendance qui se manifestent dans plusieurs régions européennes vont remettre en question cette situation[4]? Peuvent-ils affecter l'unité des États membres? Et quel rôle l'UE est-elle appelée à jouer en ce qui concerne l'intégrité territoriale et l'unité nationale de ses États membres?

C'est sur la base de cette confrontation des idées que nous allons aborder les problèmes soulevés par les prétentions sécessionnistes qui prolifèrent en Europe et l'unité des États membres dans le cadre de la construction européenne. Etant donné que l'Union Européenne n'intervient pas dans le fonctionnement interne des États membres, les questions qu'à notre avis se posent sont, d'une part, la portée que dans le droit de l'UE aura l'invocation par le territoire d'un État membre d'un droit à la sécession qui découlerait du droit à l'autodétermination (A). Et, d'autre part, la situation dans laquelle cette nouvelle entité « indépendante » serait en relation avec l'UE en tant qu'organisation internationale (B).

A. L'invocation par le territoire d'un État membre d'UN droit à la sécession fondé sur le droit à l'autodétermination et sa portée dans le Droit de l'UE

Les dirigeants de mouvements séparatistes dans diverses régions européennes invoquent à l'appui de leurs revendications l'autorité du droit international et la place que le « droit des peuples à disposer d'eux-mêmes » occupe dans ce système juridique[5]. En outre, ils considèrent que l'UE et ses États membres, en tant que sujets internationaux,

[3] Par exemple, le comportement constituant un manquement est imputable à l'État lorsqu'il est exercé par l'un de ses organes (exécutif, législatif et judiciaire), y compris les organes d'entités territoriales autonomes (régions, communautés autonomes) Arrêt de la CJCE, Commission c. Bélgique (77/69, EU:C:1974:34), par. 15. Chaque État membre est seul responsable devant l'Union et les autres États membres de l'application nationale du droit de l'Union (Arrêt de la CJCE du 13 Décembre 1991, Aff. C-33/90, Commission c. Italie, Rec. 1991, p. I-5987. Par ailleurs, la Cour dans son Arrêt de la CJUE du 29 novembre 2007, Rafael de Bustamente Tello (C-10/06P, Rec., P.I-10385), a notamment établi que même si la répartition des compétences au niveau de l'État interne varie en fonction de la structure institutionnelle de chaque État, celui-ci doit être considérée, en droit international public, comme un sujet à caractère unitaire » (point 39).

[4] Des mouvements séparatistes existent dans la plupart des pays de l'Union, mais avec différents soutiens populaires à l'autodétermination. Certains États membres sont plus sensibles que d'autres à la question du séparatisme, étant eux-mêmes confrontés à des risques plus ou moins similaires. Outre le Royaume-Uni (Écosse) et l'Espagne (Catalogne, Pais Basque, Galice) cas bien connus, c'est notamment le cas de la Belgique (Flandre), de l'Italie (Sud-Tyrol, Vénétie, Padania et Sardaigne) et dans une moindre mesure de la France (Corse) ou de la Finlande (îles Åland), mais également Roumanie et Slovaquie (les minorités hongroises) ou les pays baltiques (minorités russes), etc.

[5] Par exemple, la Loi 19/2017 du 6 septembre organisant le référendum d'autodétermination en Catalogne (qui a été suspendue) dans son exposé des motifs, proclame que la Catalogne a "le droit imprescriptible et inaliénable à l'autodétermination" (dans un sens "favorable à l'indépendance"), et qui aurait été reconnu par le droit international. Mais les situations relatives à l'autodétermination des peuples colonisés n'ont guère de points communs avec celle de la Catalogne.

sont liés par les conséquences découlant de l'exercice de ce droit. Il convient donc d'examiner cette affirmation.

Comme on le sait, le droit à l'autodétermination est inscrit dans la Charte des NU, et il est fréquemment mentionné dans diverses résolutions des organes de cette Organisation et aussi dans des décisions de la Cour internationale de justice. De manière très synthétique, on peut voir comment le champ d'application de ce droit est limité aux territoires soumis aux régimes coloniaux (en général, territoires séparées par une mer de l'État central et avec une population ethniquement différente), et aux peuples soumis à l'assujettissement, à la domination ou à l'exploitation étrangère[6]. En effet, l'Assemblée Générale des Nations Unies dans nombreuses résolutions a limité l'application du droit à l'autodétermination à des situations telles que la domination coloniale étrangère ou raciste. En outre, ces résolutions ont mis en opposition à ce droit qui pourrait amener à l'indépendance, le principe de l'intégrité territoriale, qui confère à un Etat souverain, le droit et le devoir inaliénables, de préserver ses frontières. Ainsi, l'Assemblée Générale, dans la Déclaration sur les principes du droit international touchant les relations amicales et la coopération entre les Etats (Résolution 2625 (XXV[7]), après avoir proclamé le droit de tous les peuples à déterminer leur statut politique en toute liberté et le devoir de tout Etat de respecter ce droit, souligne que cette affirmation «ne sera interprété comme autorisant ou encourageant une action, quelle qu'elle soit, qui démembrerait ou menacerait totalement ou partiellement, l'intégrité territoriale ou l'unité politique de tout Etat souverain et indépendant se conduisant conformément au principe de l'égalité de droits et du droit des peuples à disposer d'eux-mêmes (…) et doté ainsi d'un gouvernement représentant l'ensemble du peuple appartenant au territoire sans distinction de race, de croyance ou de couleur »[8]. Cette affirmation est confirmée dans plusieurs résolutions et déclarations de l'Assemblée générale, à titre d'exemple dans la Déclaration et le Programme d'action de Vienne de 1993[9], dans la Déclaration du 50e anniversaire de l'ONU en 1995[10], dans la Déclaration du millénaire[11] de 2000, ou dans la Déclaration du sommet mondial de 2005[12]. En outre, l'Assemblée générale a rappelé, dans la Déclaration des droits des peuples autochtones (2007), que le droit à l'autodétermination ne signifiait pas un droit à la sécession. Plus récemment, et en relation avec les graves problèmes touchant

[6] Depuis 1945, si l'on excepte le processus de libération des peuples vis-à-vis des diverses puissances colonisatrices, les phénomènes de démembrement d'un Etat étaient relativement rares. Ils connaissent une nouvelle vigueur depuis la fin des années 80 avec la disparition de la Yougoslavie, de l'URSS, de la Tchécoslovaquie et d'une certaine manière de la République Démocratique d'Allemagne, auxquels il faut ajouter les sécessions de l'Erythrée et du Kosovo, la fusion des deux Yémen, La sécession du Monténégro de l'Union étatique de Serbie-et-Monténégro et la séparation du Soudan du Sud du Soudan.
[7] Résolution 2625 (XXV), du 24 octobre 1970.
[8] En ce qui concerne les Etats issus de la décolonisation, il faut aussi tenir compte du §6 de la résolution 1514 (XV): « toute tentative visant à détruire partiellement ou totalement l'unité nationale et l'intégrité territoriale d'un pays est incompatible avec les buts et les principes des Nations Unies ».
[9] A/CONF.157/24, 25 juin 1993.
[10] Résolution 50/6, 9 novembre 1995.
[11] Résolution 55/2, 8 septembre 2000.
[12] Résolution 60/1, 24 octobre 2005.

l'intégrité territoriale de l'Ukraine, l'Assemblée générale a condamné tout acte visant à violer totalement ou partiellement l'unité nationale et l'intégrité territoriale de ce pays[13].

Par ailleurs, on peut voir comment ces résolutions et déclarations en provenance des Nations Unies et la pratique des États montrent comment le principe de l'autodétermination est un principe polyédrique ou composite[14]. De cette manière, l'accès à l'indépendance, au statut d'Etat, n'est que l'une de ses composantes. À cet égard il est intéressant de constater que l'Assemblée Générale ainsi que le Conseil de Sécurité n'ont jamais à ce jour invoqué le droit à l'autodétermination en faveur d'une minorité nationale religieuse ou linguistique à l'intérieur d'un Etat. Ainsi, il faut insister dessus, pour les Nations Unies, ce n'est que dans les cas où un peuple est soumis à la subjugation coloniale étrangère ou raciste que le droit à l'autodétermination pourrait être assimilé à l'indépendance. Dans les autres cas il s'agit du droit d'exercer le droit à l'autodétermination dans sa dimension interne, c'est-à-dire le droit pour que les citoyens puissent se réaliser politiquement, voter aux élections démocratiques et participer aux institutions, ainsi qu'avoir leur propre vie culturelle, professer et pratiquer leur propre religion ou employer leur propre langue[15].

Cette dimension interne du droit à l'autodéterminations est, à notre avis, celle également reconnue par le droit de l'UE quand il se réfère tant à la protection des droits des minorités (art. 2 TUE) comme à l'autonomie locale et régionale dans les États membres (art. 4, 2 TUE). En outre, on peut voir comment l'UE dans son action extérieur a déployée tous ses efforts, par exemple, dans sa politique de bon voisinage, pour surmonter la contradiction entre le séparatisme et l'intégrité de l'Etat en préservant celle-là grâce au renforcement de la protection des minorités et de l'autodétermination interne.

De ce qui précède, on pourrait soutenir que dans le cadre de sociétés démocratiques telles que celles des États membres de l'UE, l'exercice du droit à l'autodétermination se limiterait à sa dimension interne, à savoir le droit de choisir librement sa forme de gouvernement et son développement économique, social et culturel. Cependant, différents mouvements séparatistes dans les États membres de l'UE affirment que le droit à la sécession en tant qu'ultime remède peut être invoqué en cas de violation grave et persistante des droits fondamentaux dans une partie du territoire d'un État membre pour se libérer de cet État oppresseur et constituer un nouvel État et ce au mépris du principe de l'intégrité territoriale et de l'unité de l'État membre. Et sur cette base, ils estiment qu'ils jouissent du droit de sécession et de déclarer unilatéralement l'indépendance.

Pour les défenseurs du recours à la sécession remède pour se séparer unilatéralement de l'État central, lorsque cet État se livre à une répression à l'encontre d'une partie de sa

[13] Résolution 68/262, 27 mars 2014.

[14] Jean-François GUILHAUDIS, « Autodétermination », *Dictionnaire Dalloz de droit international*, Paris, 1998.

[15] Afin de surmonter les limites évidentes présentées par l'invocation du droit à l'auto-extermination, les dirigeants politiques des régions européennes enclines à l'indépendance recourent à la formule du droit de décider fondé sur la légitimité démocratique, caractère politique et juridique souverain de cette région. Ce qui permettrait, sur la base de majorités claires et formées librement dans un exercice de consultation populaire, la sécession. Sur le soi-disant droit de décider, on peut consulter, Carrillo Salcedo, J. A.: "Sobre el pretendido derecho a decidir en Derecho internacional contemporáneo", *El Cronista del Estado Social y Democrático de Derecho*, Madrid, nº. núm. 33, pp. 20-22

population, alors il ne pourrait plus se prévaloir de son intégrité territoriale. Ainsi, la minorité réprimée pourrait légalement user d'un droit à faire sécession et ce en invoquant le droit des peuples à disposer d'eux-mêmes. Ce sont les idées de sécession-punition ou sécession-remède qui ont été évoquées dans l'arrêt de la Cour suprême du Canada de 1998[16].

À cet égard il convient de rappeler tout d'abord que le droit international n'accorde pas expressément aux parties constituantes d'un Etat souverain le droit de faire sécession unilatéralement de l'Etat central, au contraire il a toujours privilégié l'intégrité territoriale des Etats[17]. Il est intéressant ensuite de constater comme, devant la Cour internationale de justice, des Etats participant à la procédure consultative relative à la conformité au droit international de la Déclaration unilatérale d'indépendance du Kosovo du 17 février 2008 se sont référés au droit de sécession remède. Et à ce propos, la Cour a relevé que des divergences se sont manifestée au sujet de la question de savoir si le droit international prévoit un droit de sécession remède. La Cour, tenant compte de ces divergences qui montre l'absence d'une *opinio juris* en la matière, et face au refus de la mission d'enquête sur le conflit en Géorgie de reconnaître un tel droit, a décidé, dans son Avis consultatif du 22 juillet 2010, de s'abstenir de se prononcer sur la question[18].

Selon nous, cette théorie de la sécession remède reste très marginale, elle n'a pas été reflétée dans la pratique des États. En effet, ce n'est pas possible de faire ressortir un seul précédent étant donné qu'à ce jour aucune sécession ne s'est fondée sur ce concept. A quoi il faut ajouter un autre élément fondamental, à savoir que cette sécession ne serait envisagée en tant ultime remède qu'uniquement dans des situations d'extrême gravité caractérisée par une violation grave, persistante et systématique des droits fondamentaux de la population qui habite la partie du territoire en question (on peut imaginer un crime de génocide) et, en outre, l'existence de tels cas extrêmes doit être validée par le Conseil de sécurité des Nations unies). Cependant, cette situation de violation massive des droits et libertés fondamentaux ne s'est produite jusqu'à présent dans aucun État membre de l'Union et il est très improbable que cela puisse se produire. Car si cela se produisait le

[16]Arrêt de la Cour suprême du Canada. Renvoi relatif à la sécession du Québec, [1998] 2 R.C.S. 217.

[17] C'est ce que fut amenée à constater la Cour suprême du Canada, en soulignant qu'il est clair « que le droit international n'accorde pas expressément aux parties constituantes d'un Etat souverain le droit de faire sécession unilatéralement de l'Etat parent » (§111) et « le droit à l'autodétermination est censé être exercé par des peuples, à l'intérieur des Etats souverains existants, et conformément au principe du maintien de l'intégrité territoriale de ces Etats » (§122) ou encore « le principe de l'autodétermination en droit international a évolué dans le respect de l'intégrité territoriale des Etats existants » (§127). Dans la doctrine, voir également, parmi d'autres, CRAWFORD, J.: « State practice in international Law in relation to sécession », *BYIL*, n° 69, 1998. Pour qui: « la sécession unilatérale n'implique pas l'exercice d'un droit conféré par le droit international. Le droit international a toujours privilégié l'intégrité territoriale des Etats et, par voie de corollaire, le gouvernement d'un Etat a le droit de s'opposer à la sécession unilatérale d'une partie de l'Etat par tous les moyens licites », (pp. 86-87). Selon la Commission d'arbitrage pour l'ex-Yougoslavie (Commission Badinter), « le droit à l'autodétermination ne peut entraîner une modification des frontières », à moins que les Etats y consentent.

[18] Avis consultatif de la CIJ du 22 juillet 2010 sur la conformité au droit international de la déclaration unilatérale d'indépendance relative au Kosovo. Une analyse critique de la doctrine espagnole de l'avis peut être consultée dans, Borras, A. (ed.): *La independencia de Kosovo ante la Corte Internacional de Justicia: la opinión consultiva de la Corte Internacional de Justicia de 22 de julio de 2010 sobre la conformidad con el derecho internacional de la declaración unilateral de independencia de Kosovo*, Marcial Pons, Madrid, 2011; et aussi dans le numéro monographique de la *Revista Española de Derecho Internacional,* 2011, vol. 63, núm. 1.

mécanisme prévu à l'art. 7 TUE interviendrait, car il s'agirait d'une violation grave par un État membre des valeurs indiquées à l'art. 2 TUE, et si une telle violation est constatée on pourrait suspendre certains des droits découlant de l'application des traités à l'État membre en question.

Cependant, à notre avis, l'invocation de l'article 7 du TUE n'est pas envisageable dans le cas où un État membre rejette le prétendu "droit de décider"[19] d'une partie de son territoire et prend si c'était nécessaire des mesures conformément à son ordre constitutionnel pour empêcher une déclaration unilatérale d'indépendance. Dans ce contexte, nous pensons que le droit de l'Union oblige à l'État membre d'une part à respecter et à faire respecter l'État de Droit, donc toutes les compétences publiques qui exercent à cet effet doivent être soumises à la constitution, aux lois et à leur application par les tribunaux. Mais, d'autre part, le droit européen le permet d'exercer leurs droits souverains y compris le recours à la force dans le respect des droits de l'homme et du droit international humanitaire pour rétablir l'ordre et défendre l'unité nationale et l'intégrité territoriale[20]. De plus, les traités de l'UE lui autorisent de ne plus appliquer les normes européennes qui l'empêcheraient de faire face à des menaces contre son intégrité territoriale (arts. 42.7 y 50 TUE ; arts. 72, 78.3, 82.3, 222 et 347 TFUE). De plus, pour défendre leur intégrité territorial il pourrait même rechercher la solidarité de l'Union et de ses États membres[21].

En connexion avec cette idée des États membres en tant qu'États démocratique on peut rappeler que la Cour suprême de Canada dans l'arrêt précité de 1998 « a jugé que, puisque le Canada remplissait les conditions d'un Etat démocratique, garantissant la participation complète de l'ensemble de la population à la vie politique et à l'administration publique, la population du Québec ne disposait pas d'un droit de sécession unilatérale ». Si cette affirmation de la Cour canadienne est transposée à la situation politico-constitutionnelle des États membres de l'UE, il faut reconnaître que tous ces États sont démocratiques et garantissent la participation complète de l'ensemble de la population à la vie politique et à l'administration publique. Par conséquent les régions des États membres ne disposent pas d'un droit de sécession unilatérale. Ce qui diffère, bien entendu, de l'existence d'un droit à la séparation négocié avec l'État central lorsque son système constitutionnel le permet.

Par ailleurs, l'invocation d'un droit à la sécession remède est, à notre avis, dangereuse pour la construction européenne, car aucun des États membres est aujourd'hui à l'abri des groupes qui peuvent transformer les rues dans des scénarios de confrontation pour pousser les autorités nationales à utiliser la violence à un niveau conduisant au seuil exigé de violation des droits de l'homme pour revendiquer l'exercice du droit à la

[19] Sur le soi-disant « droit de décider », voir l'analyse très pertinent de Pons Rafols, X.: *Cataluña: Derecho a decidir y Derecho internacional*, Ed. Reus, Madrid, 2015.

[20] Face à une sécession inconstitutionnelle d'un territoire d'un État membre, leurs constitutions prévoit généralement de mécanismes de « coercition étatique ou fédérale » (art. 155 Constitution espagnole 1978 ; art. 37 de la Loi Fondamentale de Bonn). Par exemple, dans le cas de l'Espagne, il s'agirait d'appliquer l'article 155 de la Constitution ou de décréter l'état de siège si une insurrection ou un acte de force contre la souveraineté ou l'indépendance de l'Espagne était produit ou il existerait une menace à son intégrité territoriale ou l'ordre constitutionnel, qui ne peut être résolu par d'autres moyens (art. 116 de la Constitution et des arts. 32 à 36 de la loi organique 4/1981, du 1er juin, des états d'alarme, exception et site (BOE n ° 134 du 5 juin 1981). Voir, Martin Pérez de Nánclares, J.: op.cit., pp. 28 et 29.

[21] Mangas Martín, A. et. Liñán Nogueras, D.J.: *op. cit.*, p. 58

sécession remède. Plus la situation est mauvaise, mieux ce sera pour nombreuses causes indépendantistes. C'est un danger réel comme on peut malheureusement constater dans certaines régions européennes et, actuellement, en particulier, dans la Catalogne[22].

Question bien différente est celle concernant la possibilité qu'une partie d'un territoire d'un État membre invoquant un soi-disant droit de sécession réussi et proclame l'indépendance[23]. Dans ce cas le droit international qui est neutre n'interdit pas cette sécession, la constate et examine les moyens d'accession de cette nouvelle entité à l'indépendance et ceux mis en place par l'Etat central pour empêcher d'y parvenir. Il appartiendra aux autres États de décider de reconnaître ou non cette nouvelle situation car le droit international est un droit essentiellement inter-États[24]. En effet, bien que la naissance d'un État soit une question de fait suffisant pour cela qu'une population installée sur un territoire et dotée d'un gouvernement souverain et stable propose et parvienne à s'affirmer comme un État pour qu'il jouisse de la personnalité juridique internationale, la réalité est que la reconnaissance pour les autres États, il demeure fondamentale pour lui permettre de faire partie de la communauté internationale et de ne pas rester isolé.

Une sécession réussite produit la substitution d'un État à un autre dans la responsabilité des relations internationales d'un territoire. Cela provoque un problème de succession international autant pour le nouvel État que pour l'État résiduel. Les règles juridiques concernant cette situation à multiples facettes ont été en grande partie objet de codification dans les Convention de Vienne de 1978 sur la succession d'Etats en matière de traités, celle-ci est entrée en vigueur en 1996[25], et dans la Convention de Vienne sur la succession d'États en matière de biens, archives et dettes d'État de 1983 (non encore en vigueur). De ce corps normatif, il s'ensuit que la perte d'une partie de leur territoire dont l'Etat est victime suite à une sécession ne porte pas atteinte à son identité juridique, l'Etat résiduel ou amputé est considéré comme juridiquement identique à l'Etat prédécesseur dont il continue la personnalité internationale, il est souvent qualifié d'Etat continuateur. La partie démembrée, suite à une sécession, est considérée comme substantiellement différente de l'Etat prédécesseur au point de lui refuser la reconnaissance d'une personnalité juridique identique, cette partie résiduelle étant alors considérée comme un nouvel Etat.

Lorsqu'un État perd une partie de son territoire, il est d'usage, conformément au droit international, que le principe de la continuité de l'État soit appliqué à l'État membre d'origine; conservant sa personnalité internationale, elle conserve ses droits et obligations

[22] Dans certains médias, universités et forums s'est répandue l'histoire d'une Catalogne opprimée, victime d'un État répressif qui l'exploite, l'empêche de s'exprimer librement et l'utilisation normale de sa langue. Une Catalogne colonisée, subjuguée et pillée dans le cadre d'une "crise humanitaire".

[23] En 1971, le futur Bangladesh fit sécession du Pakistan, de même en 1993 pour l'Erythrée vis-à-vis de l'Ethiopie, en 2006 du Monténégro vis-à-vis de la Serbie ou en 2011 du Soudan du Sud par rapport au Soudan

[24] Cependant, cette liberté trouve des limites. Tout d'abord, il n'y a pas de place pour une reconnaissance prématurée. Et, deuxièmement, de la doctrine des Nations Unies, il résulte que, si l'émergence de l'État a été effectuée illégalement les États devraient s'abstenir de procéder à une reconnaissance.

[25] Rappelons d'abord que, même si l'Espagne, le Royaume-Uni et la Belgique ne sont pas parties à la convention de Vienne de 1978, la pratique récente a montré que les principes posés par cette convention seront de toute façon utilisés comme base de référence, de nombreuses dispositions de celle-ci ayant déjà force de coutume.

et, par conséquent, son appartenance à des organisations internationales (voir l'UE). Le principe de continuité de l'État d'origine n'est pas un obstacle empêchant le nouvel État de demander l'adhésion à une organisation international (voir à l'UE). Mais c'est une décision souveraine, c'est le droit de décider en tant que nouveau État. Mais cette décision est conditionnée, surtout dans les organisations internationales régionales (voir l'UE), à la reconnaissance préalable par les États membres de sa condition en tant que nouvel État[26].

Ainsi, une déclaration unilatérale d'indépendance d'une partie du territoire d'un État membre conduisant par la voie des faits à l'émergence d'un nouvel Etat soulèverait tout d'abord la question de sa reconnaissance par les États membres de l'UE. Et ensuite l'interrogation sur ses possibilités de continuer automatiquement dans la UE comme nouveau membre ou y adhérer.

Si les règles du droit international protègent les territoires qui quittent l'ensemble précédemment constitué, en lui assurant la continuité des traités internationaux en vigueur. En revanche, la question de l'adhésion à une organisation internationale est bien différente du moment où il appartient à cette organisation d'établir les règles d'admission d'un nouvel État, et à cet égard les règles dans la majorité des organisations sont très claires dans le sens où tout nouvel État est obligé de demander son admission en qualité de membre, même si une procédure simplifiée peut lui être concédée[27].

Mais l'UE n'est pas une organisation internationale comme les autres, elle accorde des droits aux citoyens, elle impose des normes juridiques communes, elle a établi un espace de liberté, de sécurité et de justice, etc. Ces particularités permettraient-elles à une région qui a été intégrée à l'UE en tant que partie du territoire d'un État membre, de continuer automatiquement dans l'Union en tant qu'État souverain? Ou même cela permettrait-il à cette région de bénéficier d'une procédure d'adhésion plus simple et plus souple que celle établie dans l'art. 49 TUE et dans la déclaration de Copenhague? A notre avis, le droit de l'Union donne une réponse négative aux deux questions, comme nous allons essayer de démontrer ensuite.

B. Qu'adviendra-t-il de la nouvelle entité qui se sépare d'un État membre par rapport à l'UE en tant qu'organisation internationale particulière ?

En ce qui concerne ces questions, il convient tout d'abord de constater comment les mouvements indépendantistes qui veulent la séparation (unilatéral ou négociée) de ses régions des leurs États centraux (qui sont déjà membres de l'Union), ils manifestent, en même temps et paradoxalement[28], le désir de continuer à appartenir à l'UE. En d'autres

[26] Une étude approfondie de la pratique internationale en la matière peut être consultée dans Bühler, K. G.: *State succession and membership in international organizations: legal theories versus political pragmatism*, Kluwer, The Hague, 2001.

[27] Les exemples sont très nombreux, Érythrée, Soudan du Sud, les pays issus du démembrement de l'ex-Yougoslavie ou de l'URSS, etc.

[28] Cette prétention de sortir pour une porte pour rentrer par une autre nous semble paradoxale. Il n'aurait aucun sens qu'une région européenne, après l'indépendance à l'égard de l'État membre au sein duquel elle participait à l'intégration européenne, exprime la prétention de retourner à nouveau dans l'Union Européenne, cette fois-ci comme État souverain. Si cette entité voulait vraiment être intégrée à l'Union européenne, elle l'était déjà par l'intermédiaire de l'État dont elle faisait partie auparavant. Et ce serait un détour non nécessaire de sortir par une porte pour rentrer par une autre.

termes, ils veulent quitter un État membre sans quitter l'Union. En effet, la généralité de ces mouvements partage l'idée que cette indépendance ne signifierait pas la sortie de l'Union mais au contraire leur continuité plus au moins automatique dans cette Organisation. À cet égard ils évoquent une sorte d'élargissement interne de l'UE [29].

Ces affirmations répétées par les médias indépendantistes ont pour mission bien entendu de rassurer l'opinion publique de ces territoires dans le sens que tout ce qui touche à la citoyenneté européenne, au marché intérieur et aux politiques européennes ne devrait pas subir de changement à leur égard suite à la sécession d'un État membre. Mais nous croyons que ces déclarations se heurtent à une réalité juridique bien différente, tant sur le plan du droit international que sur le droit de l'UE. En effet, comme nous le verrons plus loin, pour ce deux système juridiques du moment où le changement de statut de région en nouvel État indépendant se produit, soit par une sécession unilatérale, soit par une séparation convenue, leur appartenance à l'UE prendre fin, le droit international et surtout le droit de l'Union rend toute continuité automatique impossible[30]. L'alternative qui resterait donc pour cette nouvelle entité serait la présentation de sa candidature pour devenir un État membre de l'Union, ce que représente la soumission à la procédure établie à cet effet dans l'art. 49 TUE.

Etant donné que les changements territoriaux qui peuvent se produire dans un État membre, voir une éventuel sécession, ce sont des questions qui ne sont pas de la compétence de l'Union mais de chaque État membre, c'est tout à fait logique que les traités constitutifs de l'UE ne contiennent aucune référence à la sécession. Ils renvoient ces problèmes aux solutions existantes dans les systèmes internes de chaque État membre. C'est donc dans ce cadre, qui est celui de l'Etat de droit, que la question de la sécession doit être envisagée. Par conséquent, tout processus de sécession ou de retrait qui affecte un État membre de l'Union doit être mené dans le cadre constitutionnel de cet État afin qu'il puisse être invoqué dans l'UE.

Il s'ensuit que toute tentative de sécession qui ne trouve pas sa place dans le système constitutionnel d'un État membre ou qui n'est pas négociée et admise par l'État membre concerné n'aurait pas sa place dans la construction européenne. Au contraire si cette possibilité est envisagée par l'ordre constitutionnel de cet État, l'Union ne s'y opposera pas. Ce serait l'hypothèse qui verrait l'Etat membre organiser lui-même son démembrement, dans le respect de ses règles constitutionnelles, comme ce fut le cas du territoire du Groenland ou des Iles Féroé sans que la qualité étatique y soit attachée. Ou bien, cette séparation est le résultat d'un processus de décolonisation conduisant l'ancienne colonie à quitter l'orbite communautaire, comme cela il est arrivé à certains territoires d'outre-mer de la France, des Pays Bas ou du Royaume Uni. Ou, même, cela aurait pu être le cas en Écosse vis-à-vis du Royaume Uni, bien que la séparation n'a pas eu lieu en raison du résultat négatif du référendum effectué. Dans tous les cas où la nouvelle entité est devenue un État indépendant celle-ci est devenue un État tiers para rapport à l'Union.

De notre point de vue, avec ces prétentions on assiste également à une érosion du principe de solidarité (article 3 TUE) qui inspire la construction européenne.

[29] Matas, J., González, A., Jaria, J. et Roman, L.*: L'ampliació interna de la Unió Europea. Anàlisi de les conseqüències jurídico polítiques per a la Unió Europea en cas de secessió o dissolució d'un estat membre*, Fundació Josep Irla – CMC, Barcelona, 2010.

[30] Mangas, A.: *op.cit.,* pp. 47-68.

Bien que, comme nous l'avons vu, le droit originel de l'Union reste muet en ce qui concerne la sécession d'une partie du territoire d'un État membre, en revanche, les institutions de l'Union elles si se sont positionnées à cet égard, en particulier la Commission européenne qui depuis 2004 défend une doctrine à ce sujet: la "doctrine Prodi", du nom de Romano Prodi, ancien président de l'exécutif européen. Cette doctrine établit le principe selon lequel un État né d'une sécession au sein de l'UE ne serait pas automatiquement considéré comme faisant partie de l'Union. Cette région nouvellement indépendante deviendrait, du fait de son indépendance, un pays tiers par rapport à l'Union et tous les traités ne s'appliqueraient plus à son territoire dès le premier jour de son indépendance [31].

Plus récemment, en 2013, l'ancien président de la Commission européenne, Jose Manuel Barroso, a réaffirmé ce point de vue en signalant que l'Union est une union d'États, donc s'il existe un nouvel État, cet État doit poser sa candidature pour adhérer et négocier les conditions avec les autres États membres. Si un pays devient indépendant, c'est un État nouveau et il doit négocier avec l'UE. Selon lui, les traités européens ne s'appliquent qu'aux pays qui les ont ratifiés. Si une partie d'un des pays de l'Union venait à acquérir son indépendance, les traités ne s'appliqueraient plus à ce territoire[32].

L'actuel président de la Commission, Jean Claude Juncker a réaffirmé, en 2017, que la Commission Prodi, la Commission Barroso et la sienne, ont toujours dit en la matière que si une région (il s'agissait du cas catalan) devienne indépendante elle ne pourra pas se transformer le lendemain matin, le jour après le vote, membre de l'Union européenne. Elle sera soumise à un processus d'adhésion comme l'ont été les États membres qui ont rejoint l'Union. A quoi il a ajouté que même si un référendum était organisé d'une façon qui serait conforme à la Constitution (espagnole) cela signifierait que le territoire qui partirait se retrouverait en dehors de l'Union européenne[33].

En conséquence, et en respectant les lignes marquées par cette doctrine, si une partie d'un territoire d'un État membre devenait un État indépendant et souhait adhérer à l'UE, cela ne se ferait pas automatiquement, mais devrait présenter sa candidature à cette fin, conformément à l'art. 49 TUE. Demande qui devraient être validée par les 28 États membres, y compris l'État dont ce territoire est séparé. Il s'agit, bien entendu, d'une procédure qui est assez longue et complexe dans une situation normale, mais qui le sera encore beaucoup plus si la séparation était unilatérale et contraire à l'ordre constitutionnel d'un État membre. De plus, il ne s'agirait pas d'une expulsion (comme dénoncé par les médias indépendantistes), puisque cette nouvelle entité n'a pas ni signée ni ratifiée les traités de l'Union donc elle ne fait pas partie de cette organisation.

Quand cette entité devient un État dans l'ordre international, elle le fait avec toutes les conséquences: c'est un nouvel État. Et, immédiatement son territoire ne fait plus partie du marché intérieur et les citoyens du nouvel État cesseraient d'être citoyens de l'Union

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[31] Cette position se trouvé dans la déclaration de M. Prodi en 2004. Une analyse des déclarations des responsables européennes concernant ces question on peut le trouver dans Galán Galán, A.: «Secesión de Estados y pertenencia a la Unión Europea: Cataluña en la encrucijada», *Istituzioni del Federalismo, Rivista di studi giuridici e politici*, núm. 1, 2013, pp. 115-133.

[32] JOCE 6 novembre 2013, C 320 E p. 185. Précédemment il s'avait positionné dans le même dans une lettre envoyée par le Président de la Commission en 2012 en en réponse à une interpellation de Christopher Tugendhalt, membre de la Chambre des Lords du Royaume Uni concernant la situation de l'Ecosse.

[33] www.lemonde.fr. 2.10.2017

européenne[34]. Sur ce point, le droit européen ne comporte ni « droit acquis » ni « principe de continuité ». L'article 20 TFUE est clair: « Est citoyen de l'Union toute personne ayant la nationalité d'un État membre. La citoyenneté de l'Union s'ajoute à la citoyenneté nationale et ne la remplace pas ». Nul ne peut avoir la citoyenneté de l'Union sans avoir la nationalité d'un État membre. La Cour de justice de l'Union européenne souligne que la citoyenneté européenne a vocation à être le « statut fondamental des ressortissants des États membres » [35].

Et s'il est vrai que le droit de l'UE ne réglemente une sécession ou un changement territorial d'un État membre, il réglemente, par contre, d'une manière très détaillé le processus d'accession au statut de membre de l'UE. Certes, chaque organisation a une procédure d'admission et ses États membres sont, en bref, ceux qui contrôlent l'accès des nouveaux membres. Dans l'Union la position sur l'admission ou non d'un nouvel État membre est une décision discrétionnaire de chaque État, d'abord, au sein du Conseil, qui requiert l'unanimité et, après la négociation des conditions d'adhésion, au sein de son parlement national.

Dans le droit de l'UE, seule l'adhésion d'un État est prévue dans un cadre juridique précis, avec l'accord unanime des États membres, en respectant certains critères, définis à Copenhague en 1993 (démocratie et état de droit, économie de marché, respect de l'acquis communautaire). Le candidat a membre doit tout d'abord être un Etat au sens du droit international, il doit ensuite voir reconnue cette condition juridique par tous les États membres et, finalement il doit remplir les critères pour devenir membre. La vérification de la capacité réelle d'intégration du candidat et de la capacité d'absorption de l'UE (critères de Copenhague) entrave, à notre avis, les automatismes et laisse dans la capacité d'appréciation de chaque État membre de l'Union la décision finale sur l'entrée d'un État candidat.

De ce qui en découle que tout processus d'adhésion d'un État à l'Union européenne implique au minimum la reconnaissance de son indépendance par tous ses États membres. Et pour que cette reconnaissance ait lieu, les conditions de l'accession à l'indépendance, et donc les relations avec l'ancien État, sont donc essentielles. La décision de reconnaître comme nous venons de le dire est un acte unilatéral discrétionnaire de chaque État membre. Ni le droit de l'UE ni le droit international obligent à reconnaître un nouvel État. Bien entendu, un Etat qui ne reconnaît pas le demandeur ne l'admettra pas comme Etat candidat[36].

L'article 50,5 TUE vient renforcer à notre avis cette perspective de non automatisme puisque dispose que, si un « État membre qui s'est retiré de l'Union demande à nouveau l'adhésion, sa demande est soumise à la procédure prévue à l'article 49 ». Cela signifie

[34] En effet, la séparation d'un territoire d'un État membre impliquerait, de facto, la création d'un nouvel Etat et donc la sortie de la zone euro. Cela entraînerait notamment la rupture des liens avec la Banque centrale européenne, la création d'une nouvelle monnaie, le refinancement de la dette publique et vraisemblablement une limitation des retraits bancaires pour éviter la fuite massive des capitaux. Devenant non européens, L'Europe devrait taxer les produits procédant de ce territoire et celui-ci taxer ses importations pour protéger ses propres entreprises

[35] Arrêt de la Cour de Justice de l'Union Européenne du 20 septembre 2001 (Grzelczyk).

[36] Si l'UE n'est pas prête à accepter des modifications de la frontière impliquant des violations de l'ordre constitutionnel interne d'États tiers étrangers à l'Union, comme cela s'est produit en mars 2014 avec la Crimée (absence de dialogue avec les autorités ukrainiennes, convocation unilatéral d'un référendum illégal ...). A fortiori, l'Union ne devrait pas l'admettre quand cela se produit pour l'un de ses États membres.

que tout État qui n'appartient pas à l'Union, même dans le cas où il en faisait partie auparavant, devrait entreprendre la seule procédure d'adhésion prévue, celle de l'art. 49 TUE.

Face à cette évidence, deux situations peuvent se présenter. Une première quand la sécession est librement acceptée par l'État continuateur, et dans ce cas on pourrait envisager une procédure rapide, avec même une dérogation qui permettrait au nouvel État de continuer à bénéficier des règles de l'UE durant un brève période transitoire. Mais, même dans de tels cas, nous ne doutons pas que des problèmes de nature technique, mais aussi politique se poseront en ralentissant ou en empêchant l'adhésion[37]. Cela aurait pu être le cas en Écosse, puisque la possible sécession avait été acceptée par les deux parties, dans un processus pacifique. Mais, même dans le cas d'une sécession décidée en conformité avec le droit, à moins qu'un un traité prévoit des dispositions intérimaires, l'indépendance va briser les liens d'appartenance à l'UE en le transformant en État tiers.

La deuxième hypothèse correspond à celle d'une sécession unilatérale, non négociée, violant l'État de droit et imposé à l'Etat membre continuateur. Dans ce cas qui se rapprocherait à ce qui pourrait arriver en Catalogne, le scénario serait bien différent, puisque la négative de l'État affecté qui serait très probablement rejoint par celles des autres États membres empêcheraient non seulement la continuité de la nouvelle entité dans l'Union, mais elles bloqueraient probablement une procédure rapide d'entrée en tant que nouvel État[38].

Dans la mesure où le nouvel État serait reconnu et qu'il estimerait remplir les conditions des articles 49 et 2 TFUE, il pourrait se porter candidat à l'adhésion. Mais on retrouve de défenseurs des autres possibilités, ainsi les partisans de la sécession de l'Écosse prétendaient qu'un traité d'adhésion (sur la base de l'article 49 TFUE) ne serait pas nécessaire[39]. Selon eux, un traité de révision des traités (sur la base de l'article 48) serait plus approprié. À notre avis on ne peut pas contourne l'art. 49 TUE qui permet de vérifier qu'un État candidat respecte les conditions pour devenir membre de l'UE (respect des valeurs, acceptation et capacité d'appliquer et de faire appliquer l'acquis communautaire, etc.). Ces conditions font l'objet d'un accord entre les États membres et l'État candidat et provoquent une série des modifications aux traités. Ces modifications qui doivent être ratifiées par les États membres et par l'État demandeur, ne pourraient pas être adoptées sur la base de l'art. 48[40]. Par ailleurs certains auteurs ont également évoqué la possibilité d'utiliser l'art 49 bien que modulée par l'adoption de mesures "ad hoc"

[37] Même si le processus respectait le cadre constitutionnel de l'État central, l'entité sécessionniste devrait présenter une demande d'adhésion à l'Union, ce qui serait sans doute entravé par l'exigence de l'unanimité des États membres et un vote favorable du Parlement européen et, évidemment, parmi eux, celui des États qui pour de raisons internes sont contraires à toute sécession. À cet égard, il convient de rappeler la position des certains pays membres face au processus d'indépendance de l'Ecosse et la possibilité de son adhésion a l'UE.

[38] Si l'UE n'est pas prête à accepter des modifications de la frontière impliquant des violations de l'ordre constitutionnel interne d'États tiers étrangers à l'Union, comme cela s'est produit en mars 2014 avec la Crimée (absence de dialogue avec les autorités ukrainiennes, convocation unilatéral d'un référendum illégal, déclaration unilatéral d'indépendance). A fortiori, l'Union ne devrait pas l'admettre quand cela se produit pour l'un de ses États membres.

[39] Brölmann, C. et Vandamme, Th.: *Secession within the Union*, Amsterdam Centre for European Law and Governance, Amsterdam, 2014.

[40] Il existe des autres obstacles, par exemple, dans le cas de la France, la Constitution prévoit que la ratification d'un traité d'adhésion (après l'adhésion de la Croatie) doit, en principe, être autorisée par référendum, ce qui n'est pas prévu pour une révision des Traités.

simplifiées et transitoires, qui entraîneraient l'exclusion initiale de l'Union pour le nouvel État, mais permettraient son intégration rapide dans l'Union et une application du droit de l'Union tant qu'il n'aurait pas eu lieu l'adhésion[41]. Envisager une « adhésion ad hoc » risque évidement de se confronter à la réalité du droit de l'Union européenne: on ne peut pas se soustraire au respect des exigences posées par les traités pour admettre un nouvel Etat membre. Á notre avis, une "adhésion à la lettre" adaptée aux caractéristiques de l'entité candidate serait absolument contraire au droit de l'Union et porterait atteinte à l'unité de ce système juridique. Il a également été proposé de recourir à l'article 50 TUE, de sorte que le nouvel État et l'Union puissent négocier pour une période maximale de deux ans, y compris l'adoption de mesures provisoires pour la période pendant laquelle le nouvel État devient provisoirement membre de l'Union européenne, utilisant parallèlement l'article 49 TUE pour négocier les conditions d'entrée[42]. À notre avis, ces idées faussent les procédures de retrait et d'adhésion à l'UE, qui répondent à des circonstances différentes et comportent des exigences différentes (y compris l'unanimité).

Si on écarte la voie de l'art. 48 TUE ou d'une application modulée de l'art. 49 TUE il faudrait revenir à la procédure établit dans l'art. 49 TUE pour toute entité qui souhaite présenter sa candidature à l'UE. Cet article dispose que tout « État » européen qui respecte les principes énoncés à l'article 2 du traité sur l'Union européenne peut demander à devenir membre de l'Union. Pour apprécier cette exigence il conviendra, tout d'abord, vérifier si le droit de l'État qui subit la sécession et sa constitution ont été respectés par l'entité sécessionniste lors de la déclaration d'indépendance. S'il s'agit d'une déclaration unilatérale, nous pensons que la réponse est non, puisque en violant le droit ne respecterait les valeurs visées à l'art. 2 TUE[43]. En effet, toute tentative d'imposer l'indépendance sans négociation risquerait de ne pas être conforme à l'État de droit, aux principes démocratiques et aux droits de l'homme, voire de violer les droits des minorités (la partie de la population du territoire contraire à cette possibilité)[44].

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[41] Ridao Martín, J. et González Bondia, A.: *op.cit.*, p. 383

[42] *Ibid.*, p. 384

[43] La Catalogne a officiellement déclaré unilatéralement son indépendance le vendredi 27 octobre 2017, peu avant que le Sénat espagnol vote la mise sous tutelle de la région. Elle est basée sur un vote qui a été déclaré illégal par les tribunaux espagnols. Dans le cas de la Catalogne, comme souligne Henri Labayle, « que cela plaise ou non, c'est bien au regard du droit espagnol et de sa Constitution, adoptée librement par les habitants de Catalogne en 1978, que toute évaluation doit se faire, notamment lorsque ce texte déclare que l'Espagne est indivisible. Là encore, une simple déclaration unilatérale d'indépendance ne saurait suffire à établir ne serait-ce que la recevabilité de la demande catalane (…) » En premier lieu, le caractère illégal de la consultation organisée le 1er octobre 2017 et celui de son déroulement paraissent difficiles à contester en l'état du dossier. Les conditions du vote de la loi catalane par le parlement régional, sa contrariété avec l'ordre juridique espagnol et sa suspension légitime par le Tribunal constitutionnel espagnol constituent des obstacles infranchissables du point de vue du droit de l'Union », Labayle, H.: « La Catalogne et l'Union européenne: une question de légalité », *Réseau Universitaire européen dédié à l'étude du droit de l'Espace de liberté, sécurité et justice*, octobre 2017, www.gdr-elsj.eu..

[44] Assemblée parlementaire du Conseil de l'Europe: *Pour une approche démocratique des questions d'autodétermination et de sécession (Rapporteur: A. Destexhe)*, Doc. 14392, 4 septembre 2017. Comme on le sait, le 23 janvier 2018, le parlement de Catalogne a approuvé une déclaration de souveraineté et du droit à décider de la Catalogne qui commence ainsi:« Selon la volonté majoritaire démocratiquement exprimée par le peuple de la Catalogne, le Parlement de la Catalogne convient d'initier le processus visant à rendre effectif l'exercice du droit à décider afin que les citoyens et les citoyennes de Catalogne puissent décider de leur avenir politique collectif, selon les principes suivants: Premièrement. Souveraineté. Le peuple de Catalogne a, pour des raisons de légitimité

Si le futur candidat ne les respecte pas les États membres ne devraient pas ni le reconnaître comme État ni l'admettre comme candidat à cette nouvelle entité[45]. Antonio Tajani, président du Parlement, a fait un pas dans ce sens en déclarant que « n'importe quelle action contre la Constitution d'un État membre est une action contre le cadre légal de l'UE »[46]. En d'autres termes, du principe de l'État de droit, on peut en déduire que toute tentative de la part d'une partie du territoire d'un État membre de se séparer unilatéralement en violation du droit interne du dit État, constitue en soi une violation du droit européen, car respecter la primauté du droit et les limites qu'il impose à ceux qui gouvernent n'est pas un choix mais une obligation.

2 Considérations finales

La construction européenne est devenue actuellement le scénario ou prolifèrent des aspirations indépendantistes qui remettent en cause l'unité des Etats membres et entraînent l'UE sur des terres politiquement et juridiquement inexplorées. Cependant, nous pensons que le droit européen offre des instruments juridiques permettant de faire face à ces situations sans précédent dans l'histoire ce cette organisation internationale.

Tout d'abord, on ne saurait, hors cotexte colonial, déduire du droit à l'autodétermination un droit à la sécession pour un territoire intégré dans un État démocratique comme c'est le cas des États membres de l'UE, et encore moins le recours à une sécession remède. Et non plus, on ne saurait extraire la légalité d'une déclaration unilatérale d'indépendance du droit à l'autodétermination. Cela s'explique, car dans les États membres de l'Union ce droit à l'autodétermination se projette uniquement dans sa dimension interne, et seulement et dans cette unique dimension sera possible évaluer le respect par le système constitutionnelle d'un État membre des possibilités qu'il offre pour que les citoyens puissent sans discrimination se réaliser politiquement, voter aux élections démocratiques et participer aux institutions.

Ensuite, nous avons vu comment le fonctionnement de l'Union repose sur l'unité et la stabilité de ses Etats membres. Le droit européen reconnaît l'identité nationale de ses États membres et le droit dont ils jouissent pour protéger leur intégrité territoriale, maintenir l'ordre public et sauvegarder la sécurité nationale. L'État, en tant que sujet international, et son unité demeurent un élément central de la construction européenne, ainsi que le respect de sa souveraineté. En ce sens, l'appartenance d'un État à l'UE constitue, à notre avis, un plus, une protection et un renforcement de l'intégrité territoriale, de son unité en tant qu'État souverain.

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démocratique, le caractère de sujet politique et juridique souverain. […] » Quelle valeur accorder à une déclaration d'indépendance adoptée par une assemblée représentative à une courte majorité et qui représente 47% de la population catalane ? Songeons que si les partis favorables à l'indépendance catalane ont obtenu la majorité en sièges aux élections de dimanche, ils n'ont pas obtenu la majorité en voix. Nous sommes en présence d'une région coupée en deux moitiés de poids plus ou moins équivalents

[45] Le président du Parlement européen a souligné que toute action contre la constitution d'un Etat membre allait à l'encontre de l'ordre juridique de l'Union.

[46] www.la-croix.com. 18 septembre 2017.

En outre, face à la conviction partagée par de nombreux mouvements indépendantiste selon lesquels la séparation d'un État membre ne signifie pas quitter l'Union, mais au contraire cela n'empêcherait pas de continuer automatiquement au sein de l'Union, par le biais d'une procédure d'élargissement interne, nous soutenons une position très différente. Un territoire d'un État membre dont la sécession (unilatérale ou pactée) réussie devient dès lors un nouvel État et, en tant que tel, doit présenter, s'il le souhaite, une demande d'adhésion à l'UE. Cela nécessitera tout d'abord de passer par un filtre préalable: la reconnaissance de leur nouveau statut juridique par tous les États membres. Et puis, poursuivre la procédure complexe établie dans l'art. 49 TUE. En effet, le droit de l'UE établit que seul un État puisse adhérer à l'Union et que toute scission d'un Etat entraîne la sortie de l'Union. Une continuité automatique dans l'UE ne semble pas possible donc la nécessité d'un nouveau traité d'adhésion avec les difficultés et incertitudes que cela implique.

Finalement, le processus de sécession, à notre avis, interfère avec la continuité du territoire séparée dans l'Union et doit être mené dans le cadre constitutionnel de l'État membre afin qu'il puisse être invoqué dans l'UE et en avoir au moins la possibilité que la demande d'adhésion ne soit pas rejetée dès le départ par certains États membres. En résumé, une déclaration unilatérale d'indépendance qui irait à l'encontre de la constitution d'un Etat membre est une action contre le cadre légal de l'UE et aurait très peu de chance de prospérer. La conséquence qui en résulte est que l'appartenance d'un État à l'UE, sa participation à la construction européenne, la solidarité qui en découle deviennent finalement une forme de bouclier qui garantit son unité et son intégrité territoriale.

Access to Maritime Genetic Resources in the International Seabed Area. Freedom of access *versus* the Common Heritage of Mankind? Some reflections

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1 Introduction

The sea is essential for life in planet Earth. Around 70 per cent of our planet's surface is covered by water. As said by some scholars, perhaps, instead of Earth, we might have called ourselves Water, or Ocean, or something similar. Of this 70 per cent, around 65 percent corresponds to waters (and submerged land) beyond national jurisdiction, joining the so-called "Global Commons" or, attending to their function, spaces of common interest of Mankind.

Both the maritime space as a whole and, specifically, the areas and spaces beyond national jurisdiction, contain an impressive ecological richness albeit characterized by a notorious fragility. Both the species constituting their biological diversity and the habitats where they spend their respective life-cycles are exposed to the tension and threatens resulting from natural evolution, including the capacity to transform (and destroy) the environment by the human beings.

As regards the Area, that is "seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction" (Art. 1.1 UNCLOS), discoveries during the 70s of the Twentieth Century, continued and completed in later decades, evidenced that the abyssal zone, far from being an almost dessert an inhabited world, constitutes the home of milliards of life forms, milliards of animals, vegetables and microorganisms gathering and living around habitats then unexplored, such as the hydrothermal vents, the anoxic areas or the seamounts.

This novel ecological reality, certainly, requires an appropriate and updated legal reply. United Nations Convention on the Law of the Sea (UNCLOS or the Convention),

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as a result of the Third United Nations Conference on the Law of the Sea (1973-1982) was coetaneous to some of the first discoveries but, for obvious reasons, was unable either to rule them in their vastness and complexity or to anticipate future developments. In fact, more than 40 years after, the ecological richness of the Area still offers new findings and is far from being completed.

One of the key-points for updating the current international law in force, or for approving a "brand-new" regulation to rule this reality, is that regarding the access to marine genetic resources (MGR) located in the seabed Area. Considered by a number of States as belonging to the Common Heritage of Mankind and, opposing them, by other States, as submitted to the freedom regime of the high seas, MGRs and, particularly, their legal nature and access, are one of the main topics in discussion nowadays. This will focus our attention in this paper.

2 A new and fascinating ecological reality demanding an international response

Up to the 70s in the Twentieth Century, living and non-living resources of abyssal areas were barely known. Then, in late 1960s and early 70s, the interest for exploring the current international seabed Area turned to non-living resources and, particularly, the so-called "polymetallic nodules", that is "nodules which contain manganese, nickel, cobalt and copper"[2], originally discovered in 1873, during the historic voyage of *Challenger*[3], and subject of deeper studies in those decades of the past century. In addition to economical expectations, the exploration of such nodules by those years had also repercussions in the international political and juridical arena. As explained by the current Secretary-General of the International Seabed Authority, Michael W. Lodge: "Serious attention was focused on deep seabed minerals in the 1960s, when American geologist John L. Mero published a book entitled *The Mineral Resources of the Sea*, in which he made the case that the seabed could become a major source of supply for meeting the world's mineral needs. This in turn led Ambassador Arvid Pardo of Malta to deliver a speech to the First Committee of the United Nations General Assembly, in which he called for the resources of the deep seabed to be designated as the "common heritage of mankind" and urged the creation of a system of international regulation to prevent technologically advanced countries from colonizing the seabed and monopolizing these resources to the detriment of developing States."[4] No wonder, for this reason, an important part of marine technology and research was mostly focused on them.

Despite the fact that the main focus was centered in those decades on non-living resources, the technological advances in marine scientific research, along with an

[2] This definition is taken from the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, approved by the International Seabed Authority. According to its Regulation 1.3.(d) "Polymetallic nodules" means one of the resources of the Area consisting of any deposit or accretion of nodules, on or just below the surface of the deep seabed, which contain manganese, nickel, cobalt and copper.

[3] https://www.isa.org.jm/mineral-resources/55.

[4] Lodge, M., "The International Seabed Authority and Deep Seabed Mining", *UN Chronicle*, Volume LIV Nos. 1 and 2, 2017 (https://unchronicle.un.org/article/international-seabed-authority-and-deep-seabed-mining).

incipient preoccupation, at a global level, for the state of the environment and, specifically, for that of the marine environment, provoked an increase in the interest for a better knowledge of living resources of the seabed. As a result of several expeditions carried out in the Galapagos Rift since 1974, in 1977, an American expedition, with both public and private sponsors, by using the *Angus* (Acoustically navigated geophysical underwater system) sled and the now famous *Alvin*, a manned research submarine, discovered the so-called "hydrothermal vents". Since then, almost 700 have been confirmed, a majority of them being located in the International Seabed Area[5].

The extraordinary richness and potential of the hydrothermal vents (and cold seeps) has been outlined in *The First Global Integrated Marine Assessment*.[6] As explained by its authors:[7]

Hydrothermal vents and cold seeps constitute energy hotspots on the seafloor that sustain some of the most unusual ecosystems on Earth. Occurring in diverse geological settings, these environments share high concentrations of reduced chemicals (e.g., methane, sulphide, hydrogen, iron) that drive primary production by chemosynthetic microbes (Orcutt et al. 2011). Their biota are characterized by a high level of endemism with common specific lineages at the family, genus and even species level, as well as the prevalence of symbioses between invertebrates and bacteria (Dubilier et al., 2008; Kiel, 2009).

Both vent and seep ecosystems are made up of a mosaic of habitats covering wide ranges of potential physico-chemical constraints for organisms (e.g., in temperature, salinity, pH, and oxygen, CO2, hydrogen sulphide, ammonia and other inorganic volatiles, hydrocarbon and metal contents) (Fisher et al., 2007; Levin and Sibuet, 2012; Takai and Nakamura, 2010). Some regions (e.g., Mariana Arc or Costa Rica margin) host both types of ecosystems, forming a continuum of habitats that supports species with affinities for vents or seeps (Watanabe et al., 2010; Levin et al., 2012).[8]

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[5] See *InterRidge Vents Database*, ver. 3.4, http://vents-data.interridge.org, at 12 June 2019. Particularly, to date, 688 vents were listed, with 632 confirmed or inferred active and 56 inactive

[6] United Nations, *The First Global Integrated Marine Assessment. World Ocean Marine Assessment I,* Cambridge University Press, 2017. As recalled in its publication, "The *World Ocean Assessment* – or, to give its full title, the *First Global Integrated Marine Assessment* – is the outcome of the first cycle of the United Nations' Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socioeconomic Aspects. The *Assessment* provides vital, scientifically-grounded bases for the consideration of ocean issues, including climate change, by governments, intergovernmental agencies, non-governmental agencies and all other stakeholders and policy-makers involved in ocean affairs. Together with future assessments and related initiatives, it will support the implementation of the recently adopted 2030 *Agenda for Sustainable Development*, particularly its ocean related goals." As it is also recalled therein: "is the culmination of the work of nearly 600 scientists and experts from many countries, representing various disciplines and steered by a 22-member Group of Experts. The *Assessment* examines the current state of knowledge of the world's oceans and the ways in which humans benefit from and affect them. The *Assessment* indicates that the oceans' carrying capacity is near or at its limit. It is clear that urgent action on a global scale is needed to protect the world's oceans from the many pressures they face."

[7] Le Bris, N. (Convenor), Arnaud-Haond, S., Beaulieu, S., Cordes, E. Hilario, A., Rogers, A., van de Gaever, S. (Lead Member), and Watanabe, H, "Chapter 45: Hydrothermal Vents and Cold Seeps", in *The First Global Integrated Marine Assessment, World Ocean Assessment I*, cit., pp. 854 and 855.

[8] References are (in order of quotation and according to their own citation style):
Orcutt, B.N., Sylvan, J.B., Knab, N.J., Edwards, K.J. (2011). Microbial Ecology of the Dark Ocean above, at, and below the Seafloor. *Microbiology and Molecular Biology Reviews* 75, 361-422;

In dealing with their implications for services to ecosystems and humanity, authors of Chapter 45 of the *World Ocean Assessment I* recall:[9]

Chemosynthetic communities are functionally distinct from other marine communities, with capacity to form very high biomasses relative to other deep-sea ecosystems, though many questions remain open about their distribution, diversity, functioning and environmental features that limit the ability to estimate associated ecosystem services (Armstrong et al., 2012).

[These] ecosystems [form] a vast genomic repository of unique value to screen for highly specific metabolic pathways and processes. The vent and seep biota thus constitute a unique pool of potential for the provision of new biomaterials, medicines and genetic resources that has already led to a number of patents (Gjerde, 2006; Arrieta et al., 2010; Thornburg et al., 2010). This great potential value to humankind is accounted for in the public awareness of potential threats and acceptability of deep-sea conservation programmes (Jobstvogt et al., 2014).[10]

The case of hydrothermal vents is probably the most important example of this novel and fascinating reality but is not the only one. To this, we can sum up, as other promising examples, the *canyons*, situated at the continental margins, acting as path ways for organic matter transportation from the land to the deep-sea[11]; The *seamounts*., situated in different

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Dubilier, N., Bergin, C., Lott, C., (2008). Symbiotic diversity in marine animals: the art of harnessing chemosynthesis. *Nature Reviews Microbiology* 6, 725-740.

Kiel, S. (ed.) (2009). The Vent and Seep Biota: Aspects from Microbes to Ecosystems, *Topics in Geobiology* 33, 1

Fisher, C.R., Takai, K. and Le Bris, N. (2007). Hydrothermal Vent ecosystem. *Oceanography* 20 (1) 14-23.

Levin, L.A., Sibuet, M. (2012). Understanding Continental Margin Biodiversity: A New Imperative. *Annual Review of Marine Science* 4, 79-112.

Takai, K., Nakamura, K. (2010). Compositional, Physiological and Metabolic Variability in Microbial Communities Associated with Geochemically Diverse, Deep-Sea Hydrothermal Vent Fluids, in: Barton, L.L., Mandl, M., Loy, A. (Eds.), *Geomicrobiology: Molecular and Environmental Perspective.* Springer Netherlands, Dordrecht, pp. 251-283.

Watanabe, H., Fujikura, K., Kojima, S., Miyazaki, J.-I., Fujiwara, Y. (2010). Japan: Vents and Seeps in Close Proximity. In: Kiel, S. (Ed.). *The Vent and Seep Biota*. Springer Netherlands, Dordrecht, pp. 379-401.

Levin, L.A., Sibuet, M. (2012). Understanding Continental Margin Biodiversity: A New Imperative. *Annual Review of Marine Science* 4, 79-112.

[9] Le Bris, N. (Convenor), Arnaud-Haond, S., Beaulieu, S., Cordes, E. Hilario, A., Rogers, A., van de Gaever, S. (Lead Member), and Watanabe, H, "Chapter 45: Hydrothermal Vents and Cold Seeps", in *The First Global Integrated Marine Assessment, World Ocean Assessment I*, 2017, pp. 856 and 857.

[10] References are (in order of quotation and according to their own citation style):

Armstrong, C.W., Foley, N.S., Tinch, R., van den Hove, S. (2012). Services from the deep: Steps towards valuation of deep sea goods and services. *Ecosystem Services* 2, 2–13.

Gjerde, K.M. (2006). International Union for Conservation of Nature and Natural Resources, United Nations Environment Programme. *Ecosystems and biodiversity in deep waters and high seas*, UNEP regional seas report and studies. UNEP; IUCN, Nairobi, Kenya: [Switzerland].

Arrieta, J.M., Arnaud-Haond, S., Duarte, C.M., (2010). What lies underneath: Conserving the oceans' genetic resources. *Proceedings of the National Academy of Sciences of the United States of America* 107, 18318-18324.

Thornburg, C.C., Zabriskie, T.M. and McPhail, K.L. (2010). Deep-Sea Hydrothermal Vents: Potential Hot Spots for Natural Products Discovery? *Journal of Natural Products*, 73(3), 489-499.

Jobstvogt, N., Hanley, N., Hynes, S., Kenter, J., Witte, U., (2014). Twenty thousand sterling under the sea: Estimating the value of protecting deep-sea biodiversity. *Ecological Economics* 97, 10–19.

[11] IFREMER, Deep Sea Genetic Resources, 2007, p. 4.

areas of the sea, including the international seabed Area, which are considered as "islands" of shallow sea floor, providing a range of depths for different communities;[12] the *anoxic areas (Oxigen Minimun Zones)*, that typically occur between 200m and 1000m, as areas where mid-water oxygen minima intercept the continental margin or other geological features, resulting in sediments with very low oxygen concentrations where microbial and metazoan life thrive[13]; the above mentioned *cold seeps*, characterized by seepages of cold fluid with high concentration of methane that may have biogenic or thermogenic origins[14]; the *massive inputs of organic matter* at the deep water/sediment interface (e.g. whale carcases, wood, kelp remains) as used by scavengers, wood-borers and other opportunistic species simultaneously enriching the local sediments[15], etc.

In front of this new, fascinating and fragile reality, current International Law in force offers a response that might be qualified as fragmentary and insufficient. Most of the applicable law is previous or coetaneous to those discoveries and is thus focused on mining and fisheries activities. On the other hand, the interpretation of the few treaty provisions or customary rules applicable to this situation is far from being unanimous. This reinforces the need for an update in the law applicable to MGRs in the Area or even a brand-new regulation for the matter.

3 International law applicable to Marine Genetic Resources in areas beyond national jurisdiction. The "never-ending" debate

To tackle this new and complex reality, International Law appears fragmentary and insufficient. There are conflicting views as regards the interpretation of important rules applicable to MGRs in the Area. In turn, those rules, customary or conventional, are insufficient for giving an adequate response to ecological realities and recently discovered forms of life halfway the seabed and the water column above it.

1. The "never-ending" debate on the juridical nature of MGRs located in the international seabed Area

As anticipated above, the nature and access to MGRs in the international seabed Area is subject to conflicting views, clashing for years in different international (and intergovernmental) fora. In fact, this argumentation might be seen as a follow up to the original discussion held on the own characterization of the Area as the Common Heritage of Mankind.[16] Trying to summarize them, the three main approaches or views in conflict are as follows:

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[12] *The First Global Integrated Marine Assessment, World Ocean Assessment I*, cit., p. 693
[13] IFREMER 2007, cit., p. 4.
[14] IFREMER 2007, cit., p. 5.
[15] *Id.*
[16] On this prior and intense debate concerning the Area itself, see SALAMANCA AGUADO, E., *La Zona Internacional de los Fondos Marinos. Patrimonio Común de la Humanidad*, Dykinson, Madrid, 2003, pp. 279 ss.

A. The "liberal" approach, headed by the United States of America and followed by several industrialized countries, claims that access to MGRs is subject to the legal regime applicable to the high seas, that is, to the freedoms applicable to this maritime space.

B. In front of them, what we could call the "common heritage" approach, supported by the States forming the G-77, among others, affirms that these resources are, as the Area itself, the Common Heritage of Mankind and, consequently, their access must be subject to the international regime applicable to this submerged space.

C. Halfway the opposite sides, there might be found an "intermediate" position, held by the European Union, that could be open to establish a new regime with elements of one approach and the other.

These approaches, encompassing their own interpretation and/or understanding of the international customary and conventional law applicable to this reality, have been explicitly explained for years in several fora since the topic of MGRs in areas beyond national jurisdiction emerged. One of the first times (if not the first) it was explicitly subject to debate was during the *Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction* (Ad Hoc Working Group), established by the General Assembly of the United Nations.[17] On its Meeting held at the UN Headquarters from 13 to 17 February 2006, on the topic of "Genetic Resources", debate could be summarized as follows:

In support of the common heritage interpretation:

Several delegations reiterated their understanding that the marine genetic resources beyond areas of national jurisdiction constituted the common heritage of mankind and recalled article 140 of the Convention, which provides that the activities in the Area shall be carried out for the benefit of mankind and that particular consideration shall be given to the interests and needs of developing States, including the need for these resources to be used for the benefit of present generations and to be preserved for future generations. The provisions under article 145 of the Convention, regarding the protection of the marine environment in the Area, were also recalled. Several delegations suggested that urgent cooperation was needed to consider a new or improved legal and/or institutional mechanism in this regard and to develop options and approaches to address genetic resources in the Area, in particular current and possible modalities for access to them and sharing of benefits arising from their use.[18]

Opposing them, in support of the liberal interpretation:

Other delegations reiterated that any measures that may be taken in relation to genetic resources in areas beyond national jurisdiction must be consistent with international law, including freedom of navigation. In their view, these resources were covered by the regime of freedom of the high seas, which provided the legal framework for all activities relating to them, in particular marine scientific research. These delega-

[17] United Nations General Assembly, Resolution 59/24, para. 73.

[18] *Report of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction Transmittal letter dated 9 March 2006 from the Co-Chairpersons of the Working Group to the President of the General Assembly*, doc A/61/65 (20 March 2006), para. 71.

tions did not agree that there was a need for a new regime to address the exploitation of marine genetic resources in areas beyond national jurisdiction or to expand the mandate of the International Seabed Authority.[19]

Finally, anticipating an intermediate position:

Some delegations affirmed the need to better understand this issue before developing legal, policy and institutional options. In addition, they indicated the need to encourage compliance with existing obligations, in particular in relation to marine scientific research and the protection of the marine environment. It was suggested that the issue could be addressed, taking into account the legitimate interests of all States, through the development of guidelines, codes of conduct, including internationally agreed codes of conduct, and impact assessments.[20]

In addition to the of the Ah Hoc Working Group, this controversy was also evident in further meetings convened under the *aegis* of the United Nations,[21] such as the *VIII UNICPOLOS* (United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea)[22] held at the UN Headquarters in New York in 2007[23], the *Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction* (2016-2017)[24] and the still active *Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (General Assembly resolution 72/249)*, inaugurated in September 2018 and whose fourth session will take place in the first half of 2020.[25]

2. Freedom of Access versus Common Heritage of Mankind?

In my opinion, a big part of the stubbornness of the parties in their conflicting views comes from the fact that, beyond their respective negotiating strategies in pursuing their unilateral interests, they are sincerely convinced that their position truly corresponds to the correct interpretation of the customary and conventional rules currently in force.

As regards the *common heritage* position, the proclamation that both the international seabed Area and its resources are the Common Heritage of Mankind is generally accepted as reflecting international customary law in force. Certainly, the United Nations Convention on the Law of the Sea, that reaffirms this proclamation

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[19] *Report*, cit., para.72.
[20] *Report*, cit., para.73.
[21] See, in this respect, SÁNCHEZ RAMOS, B., "La explotación de los recursos genéticos marinos fuera de las zonas de jurisdicción nacional: buscando respuestas para un nuevo escenario", in CARBALLO PIÑERO, L. (Coord.), *Retos presentes y futuros de la Política Marítima Integrada de las Unión Europea*, Bosch Editor, Barcelona, 2017, pp. 429-454.
[22] The UNICPOLOS process was established by United Nations General Assembly Resolution 54/33. Since 1999, it has held twenty meetings.
[23] See doc. A/62/169, paras. 71 ss.
[24] On this Preparatory Committee, see https://www.un.org/Depts/los/biodiversity/prepcom.htm
[25] On this Intergovernmental Conference, see https://www.un.org/bbnj/

(Art. 136), defines the resources in the Area as mineral resources (Art. 133), but it is also true that there is no reason to interpret that States negotiating and celebrating this treaty had the intention to exhaust the regulation of this important international space, and its core principle, by limiting it to its mineral resources and the activities related to them. In fact, Article 133 constrains its definition of resources "for the purposes of this Part [XI]." On the other hand, UNCLOS is deemed to be declaring a customary rule that was in force before the adoption (and, of course, the later entry into force) of this important international treaty. The departing point of the customary rule, still in force, wouldn't be UNCLOS itself (that merely declares an existing customary rule) but the solemn proclamation made by the United Nations General Assembly in its Resolution 2749 (XXV) of 17 December 1970, where such explicit association between the Area and its resources and mineral resources does not exist.

According to Resolution 2749 (XXV) the UNGA solemnly Declares:

1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), *as well as the resources* of the area, *are the common heritage of mankind*.

2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.

3. *No State or person*, natural or juridical, *shall* claim, *exercise* or acquire *rights with respect to* the area or *its resources* incompatible with the international regime to be established and the principles of this Declaration.

4. *All activities regarding the exploration and exploitation of the resources* of the area and other related activities *shall be governed by the international regime* to be established.

5. The area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination, in accordance with the international regime to be established.

6. States shall act in the area in accordance with the applicable principles and rules of international law (...) in the interests of maintaining international peace and security and promoting international co-operation and mutual understanding.

7. The exploration of the area and *the exploitation of its resources shall be carried out for the benefit of mankind as a whole*, irrespective of the geographical location of States, whether land-locked or coastal, *and taking into particular consideration the interests and needs of the developing countries*.

8. The area shall be reserved exclusively for peaceful purposes (...).

9. On the basis of the principles of this Declaration, *an international regime applying to the area and its resources* and including appropriate international machinery to give effect to its provisions *shall be established by an international treaty of a universal character, generally agreed upon*. The regime shall, inter alia, provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use thereof, and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries, whether land-locked or coastal.

10. States shall promote international co-operation in scientific research exclusively for peaceful purposes (...)

11. With respect to activities in the area and acting in conformity with the international regime to be established, States shall take appropriate measures for and shall cooperate in the adoption and implementation of international rules, standards and procedures for, inter alia:

(a) The prevention of pollution and contamination, and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment;

(b) The protection and conservation of the *natural resources* of the area and the prevention of damage to the *flora and fauna* of the marine environment.

12. In their activities in the area, including those relating to its resources, States shall pay due regard to the rights and legitimate interests of coastal States in the region of such activities, as well as of all other States, which may be affected by such activities. Consultations shall be maintained with the coastal States concerned with respect to activities relating to the exploration of the area and the exploitation of its resources with a view to avoiding infringement of such rights and interests.

13. Nothing herein shall affect:

(a) The legal status of the waters superjacent to the area or that of the air space above those waters;

(b) (...).

14. *Every State shall have the responsibility to ensure that activities in the area, including those relating to its resources (...) shall be carried out in conformity with the international regime to be established*.

15. (...).[26]

In my view, it clearly appears that the solemn Declaration is implicitly (and mainly) focused on mineral resources but not limited to them. Natural resources, including flora and fauna, are also explicitly mentioned therein and the voice "resources", with no other supplement, necessarily includes them too.

On the other hand, the liberal approach has also reasons in support of its interpretation of the customary law in force. From the very beginning of the proclamation that the Area and its resources (all of them) are the Common Heritage of Mankind, since the emergence of the own customary rule, the ideal of a freedom of access to those resources, whatever they be, was present. Even Ambassador Arvid Pardo, the Maltese Ambassador before United Nations at the time this State successfully proposed what became General Assembly Resolution 2749 (XXV), explicitly associated the freedom of access and use of the resources of the Area by those sharing such common heritage to the future international regime.[27]

However, are these two apparently confronting views completely incompatible? In my view, an in depth research on the basis upon which both of them are based would lead us to the conclusion that they are not, that the most correct interpretation of the international law, conventional and customary, applicable to this complicated reality, makes them compatible and workable in conjunction. In my view, such an in depth research would lead us to the conclusion that MGRs in the international seabed Area are

[26] Emphasis added.

[27] SALAMANCA AGUADO, cit., p. 283.

the Common Heritage of Mankind and, simultaneously, subject to a freedom of access regime under certain limitations and principles applicable to the entire Area. Both, the current regime applicable to mineral resources established by UNCLOS and the Agreement on Part XI, on the one hand, and the freedoms of the high seas, on the other, are *per se* insufficient and inadequate to rule the reality of MGRs in the Area and its consequences for Humanity. However, an intermediate position combining elements of one regime and the other might offer a constructive solution to this long debate.

4 Concluding remarks: the need of a new, special and urgent regime for MGRs in the seabed Area

Whatever is the most accurate, correct or endorsed interpretation on the legal nature and access of MGRs in the international seabed Area, among those in conflict described above, the complex reality of such living resources and their ecosystems evidences that the international rules in force, currently applicable to them, appear insufficient and inadequate.

Just attending to the current regime, and limiting our reflections to hydrothermal vents, as a paradigm, we must divide between species that live in the water column filling up or surrounding the vents, and those living inside the smokers or in their subsoil. Legally speaking, the firsts are species under the high seas regime and, accordingly, under the traditional freedoms of this international space; they wouldn't be, *stricto sensu*, MGRs of the international seabed Area. On the other hand, those MGRs living within the solid structure of the vents or in their subsoil would belong to that category (MGRs of the Area) and, therefore, would be under its international regime, whatever are the rules applicable to them. Contrary to what is intended by some States, the high seas regime is not applicable in this case. There is no reason, no legal basis for extending the rules applicable to a maritime space (the high seas) to another space distinct to it (the Area). To my knowledge, no rule in force, either conventional or customary, avails such operation, and, in my opinion, there is no legal basis for making such application by analogy.

What rules of the international regime applicable to the seabed Area might be applicable to MGRs in that maritime space? Apart from those protecting the environment in respect to the mining activities provided in UNCLOS Part XI (Art. 145) as amended by the 1994 Agreement, no specific and adequate rules can be found. There is a legal gap that should be filled. On the other side, rules governing the exploration and exploitation of living resources in the high seas are basically conceived for fisheries and, therefore, for achieving goals that in part differ from those that an international regime on the MGRs in this marine space should pursue.

The underlying and overall problem is that the reality of MGRs living in areas beyond national jurisdiction (high seas and the international seabed Area) is far more complicated than that the current regime in force (even counting its gaps) would require for being operative and satisfactory. For example, in addition to the artificial division explained above, another major problem is that we can find species living in contact with the ocean floor, either permanently or in motion, either in permanent contact or spending part of their respective life cycles in the water column. For those among them located in the continental shelf, International Law has provided a category called "sedentary"

species that would coincide, only partially, with the aforementioned. They are described and regulated in Article 77 UNCLOS (*Rights of the coastal State over the continental shelf*) as follows:

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to *sedentary species*, that is to say, organisms which, *at the harvestable stage*, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.[28]

As evidenced by the reference to their harvestable stage, this category of sedentary species is basically conceived for fisheries, not in relation to their potential as MGRs. Moreover, assuming that this rule would cover all the variety of species in contact with the ocean floor in the continental shelf, and having value as MGRs, which is not the case, the fact is that no similar category is established in UNCLOS for the international seabed Area. Nor it would be wise, in my opinion, to use it, either by analogy or by adopting new rules in this regard. As explained by some scholars, it is difficult to bring species associated with hydrothermal vents within the definition of sedentary species contained in Article 77.[29]

Furthermore, and apart from species in contact with the ocean floor, there are also species in the hydrothermal vents that live in the fluid that is expelled by the smokers and merges with the water column to form a liquid different from water, while others live in the water seeping in the subsoil just before merging with those fluids. For them, and their complex ecological reality, the current rigid divisions between the ocean floor, the water column and so on, appear clearly insufficient and inadequate.

Furthermore, the problem of establishing (or even determining) a legal regime for marine genetic resources in areas beyond national jurisdiction is closely linked to other juridical problems affecting the conservation and sustainable use of biodiversity in those maritime spaces, such as the establishment of marine protected areas, the environmental impact assessments and the transfer of marine technology. All of them are interconnected and, accordingly, form a package that requires a complete and urgent treatment.

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[28] Emphasis added. As provided in Article 68 UNCLOS for *Sedentary Species* in the high seas "This Part [V] does not apply to sedentary species as defined in article 77, paragraph 4."

[29] See, in this respect, LEARY, D.K., *International Law and the Genetic Resources of the Deep Sea*, Nijhoff, Leiden, 2007, ALLEN, C. H., "Protecting the Oceanic Gardens of Eden: International Law Issues in Deep Sea Vent Resources Conservation and Management", (2001) 13 *Georgetown International Environmental Law Review*, pp. 563-660; KORN, H, FRIEDRICH, S., and FEIT, U., *Deep Sea Genetic Resources in the Context of the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea*, Bundesamt für Naturschutz (BfN) and Federal Agency for Nature Conservation, Bonn, 2003.

La succession D'états dans les Organisations Internationales Universelles

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1 Introduction

La pratique internationale sur les changements incessants, occasionnés par la naissance de nouveaux États ou l'extinction de ceux déjà existants, mais également par l'émergence de modifications au sein des territoires de ces derniers est très abondante. L'apparition et la disparition d'États ne sont pas des phénomènes se déroulant tous les ans. Normalement, une fois l'apparition de nouveaux États au sein de la société internationale (par exemple, les États d'Amérique latine au début du XIXème siècle, les États de l'Europe de l'Est après la Première Guerre mondiale, la décolonisation des années 60 du siècle dernier et la dissolution de l'ex-URSS, de l'ex-Yougoslavie et de la Tchécoslovaquie il y a presque une trentaine d'année, les regroupements de l'Allemagne, le Vietnam et le Yémen...), il peut s'écouler une longue période de temps sans naissance ou disparition d'États.[1] La séparation de l'Érythrée de l'Éthiopie en 1993, les tentatives de créer des États indépendants au Kosovo, en Ossétie du Sud ou en Abkhazie en 2008, la constitution du Soudan du Sud au sein d'un État indépendant en juillet 2011, ainsi que les situations actuelles auxquelles continuent de faire face la Palestine et le Sahara occidental, à cela s'ajoutent de nombreuses tentatives sécessionnistes dans différentes régions du monde (la Crimée, l'Écosse, la Catalogne, le Kurdistan irakien...), nous pousse à nous demander dans quelle mesure le droit international (DI) dispose des outils nécessaires afin de traiter de la succession des États dans le cadre des organisations internationales (OI).

Le présent article traite de la succession d'États dans les OI universelles. La thématique générale de la succession d'États ne sera pas abordée dans le cas de cet article et il n'y aura aucune référence à la situation spécifique de la succession d'une OI par une

[1] R. Müllerson, « Law and Politics in Succession of States: International Law on Succession of States », in B. Stern (ed.), *Dissolution, Continuation and Succession in Eastern Europe*, Kluwer Law International, 1998, p. 5.

autre OI. Il y a également lieu de mentionner qu'à l'heure actuelle, il este unanimement accepté que la succession d'États se défini comme « le remplacement d'un État par un autre dans la responsabilité des relations internationales d'un territoire »[2]. Il s'agit d'une définition controversée et qui se caractérise par une grande incertitude.[3] En outre, au cours des dernières décennies, on peut constater que la Commission de droit international (CDI) n'a pas réalisé de travaux spécifiques de codification et/ou d'évolution progressive du DI dans ce domaine.

Au vu de ces considérations, cet article se divise essentiellement en deux Parties principales. La Première Partie traite des travaux développés par la CDI sur la succession d'États plus spécifiquement, concernant la succession d'États dans les OI durant ces six dernières décennies. La Deuxième Partie porte sur des exemples concrets de succession d'États dans les OI universelles (générale ou spécifique).

2 Les travaux de la Commission de droit international sur la succession d'États dans les organisations internationales

La CDI a contribué dans ses travaux de manière significative au développement de la succession d'États dans les OI, néanmoins à l'heure actuelle les travaux spécifiques de cette Commission sur la succession d'États dans les OI sont inexistantes. Lors de sa première réunion de travail en 1949, la CDI avait déjà sélectionné la succession d'États et de gouvernements parmi les thèmes à codifier sans toutefois le considérer comme un domaine prioritaire. La situation changea en 1962 quand la CDI pris en compte la recommandation de l'Assemblée générale des Nations Unies (AGNU)[4] visant à intégrer ce thème parmi les plus importants à traiter lors des prochaines réunions de travail. Cependant, au vu des différences d'opinion concernant la portée et l'orientation devant être données par la CDI à la succession d'États et de gouvernements, il fut décidé de créer un sous-comité ayant pour fonction principale la rédaction d'un rapport préliminaire présentant des suggestions sur la portée du concept de « succession d'États et de gouvernement », la méthode à suivre pour l'étudier, etc.[5]

Ce sous-comité présenta son rapport dans le cadre de la session de la CDI ayant eu lieu en 1963.[6] Ce rapport, largement soutenu par la Commission elle-même, recommandait la division du thème de la succession d'États et de gouvernements en 3 sous-thèmes indépendants, à savoir: (1) la succession d'États en matière de traités, (2) la succession d'États en ce qui concerne d'autres thèmes que les traités (ce qui revient à, en matière de biens, archives et de dettes d'États), et (3) la succession d'États en ce qui

[2] Voir: art. 2.b) de la Convention de Vienne sur la succession d'États en matière de traités ; art. 2.a) de la Convention de Vienne sur la succession d'États en matière de biens, archives et de dettes d'États ; art. 2.a) du Projet d'articles sur la nationalité des personnes physiques en relation avec la succession d'États.

[3] I. Brownlie, *The Principles of Public International Law*, Oxford University Press, 1987, p. 652; W. Czaplinski, « La continuité, l'identité et la succession d'états – évaluation de cas récents », *Revue Belge de Droit International* 1993, p. 392.

[4] Résolution 1686 (XVI), 18 décembre 1961.

[5] Annuaire *de la Commission de Droit International 1962*, volume II, documents A/CN.4/149 et Add.1, A/CN.4/150 et A/CN.4/151.

[6] Annuaire *de la Commission de Droit International 1963*, volume II, document A/5509, Annexe II.

concerne la condition de membre d'OI. C'est Manfred Lachs qui fut nommé Rapporteur spécial pour le thème général de la succession d'États.[7]

Lors de la 19ème réunion de la CDI (1967), suite à la démission du Rapporteur spécial, il fut décidé de nommer un nouveau Rapporteur spécial seulement pour les deux premiers sous-thèmes, en laissant de côté la troisième question car on considérait que cette dernière concernait aussi bien la succession d'États en matière de traités que la relation entre les États et les OI.[8] Depuis ce jour, les travaux de la CDI ont essentiellement porté sur l'adoption de deux traités internationaux: d'une part, la Convention de Vienne sur la succession d'États en matière de traités (1978) et, d'autre part, la Convention de Vienne sur la succession d'États en matière de biens, archives et de dettes d'États (1983). À cela s'ajoute le Projet d'articles sur la nationalité des personnes physiques en relation avec la succession d'États (2000). Il est considéré que l'art. 4 de la Convention de Vienne de 1978 et l'art. 74 de la Convention de Vienne de 1986 sont des articles revêtant une grande importance en la matière.[9]

À ce jour, des lacunes subsistent encore dans le DI surtout en ce qui concerne la succession d'États dans les OI.[10] Il existe cependant des études doctrinales approfondies consacrées à la pratique spécifique des Nations unies (NU) et d'autres OI lorsque se sont produits, comme nous le verrons, des cas de succession d'États sur la scène internationale.[11] Une nouvelle opportunité manquée pour l'introduction du thème de la succession d'États dans les OI à l'agenda de travail de la CDI, se produit en 1993, lorsque AGNU décida finalement de ne pas l'inclure dans l'agenda de travail de la CDI malgré le positionnement préliminaire en faveur de cette dernière de la part de la Commission.[12]

La problématique de la participation aux traités constitutifs des OI est intimement liée à l'admission de membres à ces Organisations. Il est considéré que, lorsque la qualité de membre d'une OI est acquise selon la procédure formelle d'admission prévue par son traité constitutif, un nouvel État ne peut prétendre devenir membre simplement en tant qu'État successeur. Il devra pour se faire se soumettre aux procédures prévues par les traités constitutifs de ces OI. À ce jour, en matière de succession d'États dans les NU et dans d'autres OI, la règle traditionnelle réside dans le fait que l'adhésion à ces dernières

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[7] Résolution 1902(XVIII), 18 novembre 1963.

[8] *Rapport de la Commission de Droit International*, UN-Doc. A/6709/Rev.1 et Rev.1/Corr.1, A/CN.4/199, p. 368, para. 41. Voir aussi para. 38-40.

[9] Voir le texte de l'acte final de la Conférence de Vienne (1986). *Documents officiels de la Conférence des Nations Unies sur le droit des traités entre États et organisations internationales ou entre organisations internationales*, volume II, A/CONF.129/14.

[10] Concernant les sujets non abordés par les Conventions de Vienne de 1978 et 1983 sur la succession d'États, voir: M.K. Yasseen, « La Convention de Vienne sur la succession d'états en matière de traités », *AFDI* 1978, pp. 72-74.

[11] Voir, par example: R. Bermejo García et C. Gutiérrez Espada, *La disolución de Yugoslavia*, Ediciones Universidad de Navarra, 2007; P.M. Eisemann et M. Koskenniemi (dirs.), *La succession d'états: la codification à l'épreuve des faits*, Martinus Nijhoff Publishers, 2000 ; H. Ruiz Fabri et P. Boniface (dirs.), *Succession d'états en Europe de l'est et avenir de la sécurité en Europe*, Éditions Montchrestien, 1995.

[12] *Annuaire de la Commission de Droit International*, UN-Doc. A/48/10; UN GA-Res. 48/31 (1993), 9 décembre 1993, para. 7. Voir: K.G. BÜHLER, *State Succession and Membership in International Organizations. Legal Theories versus Political Pragmatism*, Kluwer Law International, 2001, p. 2; V. Mikulka, « State Succession in Respect of Membership to International Organizations », in *Outlines Prepared by Members of the Commission on Selected Topics of International Law*, UN-Doc. A/CN.4/454, 9 novembre 1993, 34 et s.

ne peut pas s'obtenir à travers la succession d'États. Ceci est désormais considéré comme une norme du DI coutumier, même si à l'avenir on peut envisager l'apparition d'une nouvelle norme coutumière, ce qui marquerait un tournant en la matière. Or, cette règle s'assouplit lorsqu'un État est considéré comme représentant la continuité de l'État précédent ; dans ce cas, l'État continuateur poursuit sa qualité de membre de l'OI. À l'inverse, l'État considéré comme successeur du prédécesseur, ne bénéficiera d'aucun transfert de droits et d'obligations de l'État prédécesseur dans la participation à l'OI dont l'État prédécesseur était membre et, par conséquent, il devra se soumettre à la procédure d'incorporation établie par chaque OI.

En somme, l'État continuateur continue à être partie au traité constitutif et à être membre de l'OI, tandis que l'État successeur doit solliciter son admission à l'Organisation à laquelle l'État prédécesseur était membre dans le cas où il souhaiterait y adhérer.[13] De plus, le principe précédemment mentionné concernant la non succession quant au statut de membre d'une OI par l'État successeur est à nuancer dans le cas de l'unification (comme dans le cas du Yémen) où la continuité de la participation des États prédécesseurs fut admise d'après une formule combinée.[14]

Actuellement, la CDI bénéficie d'une nouvelle opportunité afin de travailler sur la succession d'États dans les OI. Cette opportunité lui est offerte à travers l'étude sur la succession d'États en matière de responsabilité de l'État.[15] Ainsi, lors de sa 69ème session en 2017, la CDI a décidé de créer un comité de rédaction sur ce sujet et de l'inclure dans son programme de travail en nommant M. Pavel Sturma Rapporteur spécial.[16] Le 6 avril 2018, M. Struma présenta son Deuxième Rapport sur la succession d'États en matière de responsabilité de l'État.[17] La Troisième Partie de ce rapport est consacrée à une vaste et profonde étude des cas de succession d'États, lesquels conservent une relation intrinsèque avec la succession d'États affectés en qualité de membre d'une OI.[18]

3 La pratique relative à la succession d'États dans les organisations internationales universelles

En raison du manque d'une règle générale dans le DI actuel en ce qui concerne la succession d'États dans les OI universelles,[19] il existe une abondante pratique de ces

[13] « Rapport final sur la succession en matière de traités », International Law Association, New Delhi Conference 2002, p. 29.
[14] P. Pazartzis, *La succession d'états aux traités multilatéraux à la lumière des mutations territoriales récentes*, Pedone, 2002, p. 186-187.
[15] http://legal.un.org/ilc/guide/3_5.shtml
[16] *Rapport de la Commission de droit international*, A/72/10, para. 211-252. http://legal.un.org/docs/index.asp?symbol=A/72/10&referer=http://legal.un.org/ilc/reports/2017/&Lang=S
[17] "Deuxième rapport sur la succession d'États en matière de responsabilité de l'État. Présenté par Pavel Sturma, Rapporteur spécial », A/CN.4/719, 6 avril 2018.
[18] *Ibid.*, para. 77-190.
[19] Opinion partagée avec: J. Crawford et A. Boyle, « Annex A. Opinion: Referendum on the Independence of Scotland – International Law Aspects », 2012. Voir egalement: P. Schmitt, « States, Aspiring States and the European Union », in C. Brölmann et T. Vandamme (eds.), *Secession within the Union. Intersection Points of International and European Law*, Amsterdam Centre for European Law and Governance, 2014, p. 4.

mêmes Organisations suite aux divers problèmes qui se sont présentés à elles à l'occasion de la succession de leurs propres États membres. En ce sens, il convient de distinguer, d'une part, la succession d'États dans les OI universelles à vocation générale (comme, par exemple, les NU) (a), et, d'autre part, la succession d'États dans les OI universelles à vocation spéciale (comme, par exemple, la FAO ou les Organisations financières ou à caractère surtout technique) (b).

Les OI universelles à vocation générale

L'ONU s'est toujours souciée de la succession d'États existants en son sein, pratiquement depuis ses débuts et son positionnement à ce sujet coïncide avec l'apparition de nouveaux États à la suite du processus de décolonisation dans les années 60 au XXe siècle. La sollicitude d'admission du Pakistan en 1947 une fois séparé de l'Inde, membre des Nations unies, la constitution de la RAU en 1958 au travers de l'union de l'Égypte et de la Syrie, ainsi que le retrait de la Syrie de la dite République trois ans plus tard ont entraîné la préparation d'un mémorandum, de la part du secrétariat de la CDI, sur la succession d'États et la condition de membre des NU.

Dans ce mémorandum (1947)[20] se résument les principes adoptés en ce qui concerne l'admission d'un État en tant que membre des NU ou celle d'États résultant de la division d'un État déjà membre de cette OI.[21] Sept décennies plus tard, ces normes restent valables au sein de cette OI. Ainsi: (1) en règle générale, un État membre des NU demeure membre même si sa constitution ou ses frontières subissent des changements ; (2) lors de la création d'un nouvel État, celui-ci ne pourra pas proclamer sa condition de membre des NU, sauf s'il a été préalablement élu en vertu de l'art. 4 de la Charte ; (3) dans les autres cas, chacun devra être considéré conformément à ses antécédents.

Si l'on tient compte de ces principes, les exemples auxquels ont dû se confronter les NU, peuvent se regrouper en 3 grandes catégories: l'adhésion des nouveaux États émergents de la sécession ou de la séparation d'une partie du territoire d'un État membre de cette OI (par exemple, la séparation du Pakistan de l'Inde en 1947,[22] l'admission du Mali et du Sénégal suite à la division de l'ancienne Fédération du Mali en 1960,[23] la

[20] Annuaire *de la Commission de droit international*, volume II, A/CN.4/149 et Add. 1, p. 117. Voir: P. Schmitt, *loc. cit.*, p. 2-3.
[21] *Ibid.*, p. 117.
[22] L'Inde, membre des Nations unies, fut considérée État continuateur au sein de cette OI, tandis que le Pakistan fut admis en tant que nouveau membre en vertu de l'art. 4 de la Chartre, conformément à la recommandation formulée par le Conseil de sécurité le 18 août 1947.
[23] Bien qu'il ne s'agisse pas de la succession d'un précédent membre de cette OI, il convient de signaler ce cas car il s'agit d'une Fédération d'État – la Fédération du Mali – ayant sollicité l'admission en tant que membre des Nations unies et qui, peu de temps après, se divisa en deux nouveaux États indépendants (le Mali et le Sénégal). Lorsque le Conseil de sécurité recommanda l'admission du Mali et du Sénégal en tant que membre de l'ONU (Le Conseil de sécurité recommanda le 28 juin 1960 l'admission du Sénégal et du Mali conformément aux résolutions S/4543 et S/4544. Le même jour, l'Assemblée générale approuva ces admissions conformément aux résolutions 1490(XV) y 1491(XV). Voir également « La succession d'États et la qualité de membre des Nations unies. Mémorandum préparé par le secrétariat », document A/CN.4/149 et Add. 1er, 3 décembre 1962, *Annuaire de la Commission du Droit International 1962 vol. II,* points 26-31), il considéra comme nulle la recommandation antérieure se référant à la Fédération du Mali (l'admission initiale de la Fédération du Mali s'était produise conformément à la résolution S/4357, du 28 juin 1960).

séparation de l'Érythrée de l'Éthiopie en 1993,[24] la séparation du Monténégro de la République Fédérale de Yougoslavie en 2006,[25] et la séparation du Soudan du Sud de l'État du Soudan en 2011[26]) ; l'adhésion des États issus de l'unification de deux États membres de cette OI (la création de la RAU suite à l'unification de l'Égypte et de la Syrie en un unique État en 1958,[27] la fusion du Vietnam en 1976,[28] la fusion de la République arabe du Yémen et de la République démocratique populaire du Yémen en 1990,[29] et l'incorporation de la République démocratique d'Allemagne à la République fédérale d'Allemagne ayant des effets juridiques en 1990[30]) ; et l'adhésion des États continuateurs et des États successeurs dans le cas d'une dissolution d'un État membre de cette OI (la disparition de la Fédération du Mali en 1960, la dissolution de la RAU en 1961,[31] la dissolution de la Fédération de Rhodésie et du Nyassaland ou la Fédération d'Afrique

[24] L'Éthiopie fut considérée État continuateur et, par conséquent, n'eut pas besoin de solliciter à nouveau son entrée dans l'ONU, tandis que l'Érythrée, en tant qu'État successeur, du solliciter son admission conformément à l'art. 4 de la Chartre.

[25] La Serbie fut considérée État continuateur, ce qui explique pourquoi sa condition de membre des Nation Unies a été conservée, tandis que le Monténégro a du solliciter son entrée dans l'ONU et fut admis le 28 juin 2006. Comme le signale la Cour internationale de Justice dans l'affaire *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro)* le Monténégro n'avait pas suivi et continué la personnalité juridique de la Serbie et, par conséquent, ne pouvait pas acquérir la condition de demandeur dans cette affaire.

[26] Suite au résultat du référendum sur l'indépendance tenu cette année du 9 au 15 janvier 2011. Le Soudan continue à être membre de l'ONU, tandis que le Soudan du Sud a suivi la procédure habituelle d'admission d'un nouvel État. Il s'agit d'un cas de sécession, le premier du XXIème siècle et le premier également à ne garder aucun lien ni avec le processus de décolonisation ni avec celui de la désoviétisation du continent européen des années 90 du siècle dernier. Ce fut considéré un cas unique dans le DI contemporain puisque, pour la première fois, un mouvement sécessionniste réussissait et ce, malgré le manque de légitimité de ce dernier car il ne cherchait pas à reconquérir des frontières coloniales préexistantes au moment de l'indépendance du Soudan en 1956.

[27] Jusqu'au 27 septembre 1961 – date de dissolution de cette fédération -, la RAU fut l'unique membre des Nations unies n'ayant pas eu à solliciter à nouveau son entrée en vertu de l'art. 4 de la Chartre.

[28] Les deux États prédécesseurs – Le Viêt Nam du Nord et le Viêt Nam du Sud – cessèrent d'exister et furent remplacés dans l'adhésion à l'ONU par le nouvel État créé.

[29] Un nouvel État fut créé, successeur de deux États prédécesseurs membres de Nations unies (le Yémen du Nord avait été admis en tant que membre des Nations unies le 30 septembre 1947 ; la République Populaire Démocratique du Yémen ou Yémen du Sud fut admise en tant que membre des Nations unies en décembre 1967).

[30] Il représente un cas de continuité d'un État (c'est à dire la République fédérale d'Allemagne) suite à l'incorporation des *länders* que formaient la République démocratique d'Allemagne, selon l'art. 15 de la Convention de Vienne de 1978 sur la succession d'États en matière de traités, laquelle préserva son adhésion aux Nation unies. Dans une lettre adressée au Secrétaire général des Nations unies, il été annoncé que les deux Allemagnes s'étaient unies pour former un unique État souverain, lequel deviendrait membre des Nations unies sous le nom de « Allemagne ». L'ancienne RD d'Allemagne avait été admise en tant que membre des Nations unies le 18 septembre 1973.

[31] Lors du rétablissement de l'indépendance de la Syrie le 27 septembre 1961, elle fut à nouveau considérée membre des Nations unies de par son caractère de membre fondateur en vertu de l'art. 3 de la Chartre. Une fois la RAU dissoute, à partir du 2 septembre 1971, l'Égypte se fit appeler « République arabe d'Égypte » et la Syrie, « la République arabe de Syrie ».

centrale en 1963,[32] le démembrement de l'Union soviétique en 1991,[33] la dissolution de la Yougoslavie en 1992,[34] la dissolution de la Tchécoslovaquie en 1993[35]).

Ces mêmes principes ont également été suivis par les institutions et les organismes spécialisés des Nations unies.

Les OI universelles à vocation spéciale

Les OI universelles à vocation spéciale pour leur part, ont contribué à la création d'une abondante pratique sur la succession d'États en ce qui concerne le statut de membre de ces derniers dans ces Organisations. Comme l'affirme la International Law Association dans son rapport final publié lors de la Conférence de New Delhi en 2002 sur la succession d'États en matière de traités, dans la plupart des cas de ces OI, à l'heure d'établir si les États successeurs peuvent être ou non considérés États continuateurs des États prédécesseurs ayant été membres de ces Organisations, les raisons politiques motivant cet acte ont davantage de poids.[36]

Dans le cas des unions d'États ou dans le cas où un État s'incorporerait à un autre, la FAO, face à la possible confusion entre les termes « succession » et « continuation », opta pour l'application du principe de remplacement de la qualité de membre. Cela dans

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[32] Cette Fédération regroupa les colonies britanniques du Nyassaland, de Rhodésie du Nord et de Rhodésie du Sud, lesquelles correspondent actuellement aux États de Zambie, Zimbabwe et Malawi. La Zambie et la Malawi furent admis en tant que nouveaux membres des Nations unies en 1964 et le Zimbabwe en 1980.

[33] Le 24 décembre 1991, à travers un communiqué, le président de l'époque de la Fédération de Russie informa le Secrétaire général de l'ONU que cet État allait devenir le continuateur de l'Union soviétique. Pour appuyer son annonce, les Accords de Alma-Ata furent mentionnés. Ces derniers avaient été adoptés trois jours avant par les États membres de la Communauté d'États indépendants. Le Secrétaire général informa chacune des délégations des membres des Nations unies de cette annonce et, n'ayant reçu aucune protestation, il fut convenu de manière tacite que la Fédération de Russie deviendrait l'État continuateur de l'Union soviétique. Il s'agit là, sans aucun doute, d'une situation anormale en ce qui concerne la pratique des Nation unies en la matière puisqu'elle est contraire au Mémorandum préparé en 1962 par la Sixième Commission de l'Assemblée générale sur la succession d'États et la qualité de membre de cette Organisation.

[34] Il s'agissait d'un membre fondateur des Nations unies. Les républiques de l'ex-Yougoslavie déclarèrent leur indépendance respective aux dates suivantes: La Slovénie le 25 juin 1991, l'ancienne République Yougoslave de Macédoine (ARY de Macédoine) le 17 novembre 1991, la Croatie le 8 octobre 1991, la Bosnie-Herzégovine le 6 mars 1992: à partir de ces dates, elles furent considérées États successeurs de l'ex-Yougoslavie. De son côté, la République fédérale de Yougoslavie (La Serbie et le Monténégro), déclara son indépendance le 27 avril 1992 et déclara aussi être continuateur de la République fédérative socialiste de la Yougoslavie; cependant, les autres républiques de l'ex-Yougoslavie ne furent pas d'accord. L'Assemblée générale et le Conseil de sécurité ne la reconnurent pas non plus comme État continuateur dans les résolutions de 1992, et la Commission d'arbitrage (connue aussi sous le nom de Commission Badinter) se manifesta dans le même sens; sa position changea en 2000 lorsqu'elle sollicita son entrée dans les Nations unies en tant que nouvel État et fut admise en tant qu'État successeur de l'ex-Yougoslavie le 1er novembre de cette même année. Le 29 juin 2001, l'Accord sur les questions de succession entre les États issus de l'ex-Yougoslavie fut signé à Vienne.

[35] À partir du 1er janvier 1993, la République Tchèque et la Slovaquie furent considérées États successeurs de la Tchécoslovaquie dans les Nations unies et, par conséquent, elles durent solliciter leur entrée dans cette Organisation ainsi que, de l'avoir voulu, dans toutes les autres OI desquelles était membre la Tchécoslovaquie.

[36] « Rapport final sur la succession en matière de traits », *doc. cit.*, p. 31-32.

les cas où au moins un des États de l'union aurait été auparavant membre de cette Organisation. Ce fut le cas, par exemple, pour l'Allemagne ou le Vietnam dans la FAO.[37]

Un exemple intéressant en la matière me parait être le cas des îles Cook et Niue. Il s'agit d'États ayant une auto-administration en libre association avec la Nouvelle-Zélande. En 1984, les îles Cook furent admises en tant que membre de l'Organisation Mondiale de la Santé (OMS), en 1985 elles furent admises dans la FAO et l'UNESCO et, un an plus tard, dans l'Organisation de l'aviation civile internationale (OACI). Pour sa part, Niue fut admise en tant que membre de l'UNESCO en 1993 et de l'OMS en 1994. C'est pourquoi il fut estimé que les îles Cook, depuis 1992, et l'île Niue, depuis 1994, disposent de la personnalité juridique internationale nécessaire pour participer en tant que partie à un traité international. Preuve en est la signature en 1992 de la Convention-cadre des Nations unies sur les changements climatiques et la Convention sur la diversité biologique par les îles Cook.

La position des OI de nature financière et économique en ce qui concerne la succession d'États en tant que membre de ces dernières mérite une attention particulière. En effet, on considère que ces Organisation se sont éloignées de la règle générale de non succession car elles privilégient, dans la plupart des cas, leur propre intérêt et non le pacte conclu par les propres États successeurs.[38]

Un cas exemplaire à cet égard est le rapprochement réalisé par la Banque européenne pour la reconstruction et le développement (BERD) en ce qui concerna la dissolution de l'ex-Yougoslavie, ce fut le premier à se prononcer sur le sujet.[39] Par la suite, le Fonds monétaire international (FMI) adopta une série de principes pouvant s'appliquer à ce cas concret[40] et établit une procédure de succession ad hoc, se composant de quatre conditions cumulatives devant être acceptées par chacun de ces États afin de pouvoir bénéficier du statut de membre du FMI.[41] Cette pratique du FMI fut également suivie par la Banque mondiale.[42]

Par ailleurs, la dissolution de la Tchécoslovaquie et la participation de ses deux États successeurs dans les institutions spécialisées du Système des NU et dans les OI desquels avait été membre la Tchécoslovaquie ont contribué à la diversification des questions soulevées par la succession d'États dans les OI. À ce titre, il convient de se référer à l'accord tripartite signé le 12 décembre 1992 entre la Tchécoslovaquie, la République Tchèque et la Slovaquie. La solution juridique convenue fut rejetée par les Services juridiques des NU et par d'autres OI qui comprenait que ce type d'accord soit valide

[37] K.G. Bühler, *op. cit.*, p. 86; A. Tovares de Pinho, « La pratique de la FAO en matière de succession d'états », in *La successione degli stati nel diritto internazionale: atti di Convegno, Roma, 14 novembre 1997*, 1999, p. 85-91.

[38] « Rapport final sur la succession en matière de traits », *doc. cit.*, p. 36 et 38. Sur la succession des États dans le OI financières, voir: A. Gioia, « State Succession and International Financial Organizations », in P.M. Eisemann et M. Koskenniemi (dirs.), *La succession d'états: la codification à l'épreuve des faits/State Succession: Codification Tested against the Facts*, Martinus Nijhoff Publishers, 2000, p. 327-383.

[39] « Rapport final sur la succession en matière de traits », *doc. cit.*, p. 36.

[40] La Slovénie s'est vue attribuer 16,39%, la Croatie 28,49%, la Bosnie-Herzégovine 13,20%, la Macédoine 5,4% et la RF de Yougoslavie (la Serbie et le Monténégro) 36,52%. Voir: « Rapport final sur la succession en matière de traits », *doc. cit.*, p. 37.

[41] « Rapport final sur la succession en matière de traits », *doc. cit.*, p. 37.

[42] *Ibid.*

conformément au principe *res inter alios acta* seulement inter partes mais, sans que cela ne crée aucune sorte d'obligation juridique au sein d'une OI spécifique.[43]

De manière exceptionnelle, il existe aussi des cas de succession automatique à travers l'envoi d'une notification de succession en qualité de membre de certaines OI de nature technique. Comme il est bien connu, ces Organisations se caractérisent par un cadre institutionnel plus léger, ce qui explique une certaine flexibilité à l'heure d'appliquer le principe de non succession en ce qui concerne le statut de membre d'une OI. Je fais référence à l'Organisation mondiale de la propriété intellectuelle (OMPI), à la Conférence de La Haye de droit international privé, à l'Organisation des Nations unies pour le développement industriel (ONUDI), à l'Union internationale pour la protection des œuvres littéraires et artistiques, etc. Cette position est considérée comme se fondant sur un certain pragmatisme dont le but est de protéger l'intérêt général d'un groupe d'États face à l'intérêt particulier de l'État successeur.[44] Dans tous les cas, l'État dépositaire (concrètement, le gouvernement Suisse) accepta les déclarations de succession réalisées à l'époque par les États intéressés.

4 Observations finales

La succession d'États dans les OI universelles mérite qu'on lui accorde une attention plus grande que celle reçue jusqu'à présent dans le domaine de la codification et du développement progressif du DI puisque les difficultés sont nombreuses. Actuellement, il n'existe aucun texte juridique qui n'établisse de règles générales pouvant être prises en compte par l'OI universelles lorsque l'on aborde la question de la succession au statut de membre de l'un de ses États membres.

Sur la scène internationale, il s'agit d'un thème qui semble avoir été surmonté, mais l'épanouissement de mouvements séparatistes dans beaucoup de pays partout dans le monde a rendu ce thème plus actuel que jamais en suscitant des questions qui remettent en cause l'unité de l'État dans un monde globalisé où les petites solidarités et les identités étroites semblent être devenues plus attractives que les propres États qui les contiennent aux yeux de nombreuses collectivités humaines.

Puisqu'il n'existe pas de règle générale unanimement acceptée en ce qui concerne la succession au statut de membre d'une OI universelles, cette question se résout dans chaque Organisation à travers la pratique concrète et le contexte politique dans lequel se produit cette succession.

[43] K.G. Bühler, *op. cit.*, p. 286-287.
[44] « Rapport final sur la succession en matière de traités », *doc. cit.*, p. 38. Voir: P. Pazartzis, *op. cit.*, p. 187.

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[13] K. Yasseen, « La Convention de Vienne sur la succession d'états en matière de traités », AFDI 1978, pp. 59-113.

La protection constitutionnelle de la santé dans le système juridique italien, en référence au droit de l'Union européenne et à la CEDH

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1 Le droit à la santé comme droit social fondamental

Le droit à la santé est proclamé par la Constitution italienne comme « droit fondamental de l'individu » (art. 32 de la Constitution).

Deux aspects se distinguent. Sur la base du premier aspect, le droit à la santé est entendu comme droit individuel à l'intégrité psycho-physique en tant qu'expression de la liberté individuelle (tant comme liberté positive, c'est-à-dire comment se soigner, que comme liberté négative, c'est-à-dire si se soigner). Selon le deuxième aspect, le droit à la santé est entendu comme droit social de prestation.

Au droit général aux prestations sanitaires correspond le devoir de tous les niveaux institutionnels de la République de rechercher une solution (d'ordre normatif, structural, gestionnaire, mais aussi judiciaire) en mesure de garantir la protection effective de la santé des personnes, ainsi que de garantir, comme le prévoit ledit art. 32, « des soins gratuits aux plus démunis ».

La référence aux soins gratuits doit être considérée comme expressément liée au principe d'égalité substantielle affirmée par l'art. 3, al. 2, de la Constitution, où il est affirmé que la République a le devoir « d'éliminer les obstacles d'ordre économique et social qui, limitant de fait la liberté et l'égalité des citoyens, empêchent le plein développement de la personne humaine et la participation effective de tous les travailleurs à l'organisation politique, économique et sociale du pays ».

Il convient toutefois de préciser ici que le mot « fondamental » ne permet pas de placer le droit à la santé dans une position de prédominance par rapport aux autres droits solennellement proclamés par notre Constitution.

En effet, à cet égard, la Cour constitutionnelle s'est constamment exprimée dans le sens de retenir le droit à la santé comme étant un des droits protégé par la Constitution, lesquels se trouvent dans un rapport d'intégration réciproque sans qu'un d'eux n'ait la prédominance absolue sur les autres.

L'attribut « fondamental » ne ferait donc pas autre chose que de placer le droit à la santé dans le cadre des droits que la République, aux termes de l'art. 2 de la Constitution italienne, reconnaît et garantit en tant que droits inviolables de l'homme, tant comme individu que dans les formations sociales où évolue sa personnalité et, en tant que tels, auxquels on ne peut absolument pas déroger.

Il reste toutefois le fait que le droit à la santé a une valeur de droit social, caractérisant la forme d'État social désigné par la Constitution.

Depuis plus de quarante ans, par la promulgation de la loi no 833 du 23 décembre 1978 (instituant le Service Sanitaire National) et les modifications subséquentes et fréquentes, il a été veillé à attribuer une effectivité au principe contenu dans l'art. 32 de la Constitution italienne, prévoyant la réalisation d'un système empreint des principes d'universalité des destinataires, d'égalité d'accès aux services et de protection globale contre les risques, en affirmant que la République protège la santé comme droit fondamental de l'individu et l'intérêt de la collectivité justement par l'institution du Service Sanitaire National.

Une nature relationnelle et plurale est attribuée au bien « santé ». En effet, la santé n'est plus simplement considérée comme l'absence de maladie ou d'infirmité, mais elle est définie comme un état de bien-être physique, mental et social total, dépendant étroitement de l'interaction de l'individu avec les différents contextes de vie.

Un aspect particulier à prendre en considération est celui concernant la gratuité des soins pour les personnes les plus démunies.

Le fait même que l'art. 32 de la Constitution italienne envisage cette situation signifie que le droit (social) de recevoir des prestations sanitaires ne peut pas se traduire dans une gratuité générale de celles-ci. En effet, les prestations doivent être garanties aux soins du Service sanitaire national, mais ceci n'exclut pas que les frais correspondants sont mis à la charge, totalement ou partiellement, des destinataires, avec la seule limite représentée par l'obligation de garantir la gratuité des soins pour les personnes les plus démunies.

Ceci pose le problème du conditionnement financier du droit à la santé.

2 L'incidence du conditionnement financier sur la configuration du droit à la santé comme droit social

En instituant le Service sanitaire national, le législateur a, dès le départ, tenu compte du fait que le droit à la santé, dans son application concrète, est un droit social dont la mise en œuvre exige une programmation de gestion soutenue financièrement par la solidarité fiscale.

La législation sanitaire s'est articulée, surtout à partir des années 90 du siècle dernier, en une série de normes en vue d'affirmer graduellement une législation visant à garantir une fourniture prudente de prestations sanitaires et qui a trouvé sa plus haute expression de principe dans l'identification des Niveaux essentiels d'assistance.

Ces développements ont été déterminés par la nécessité d'en arriver à une rationalisation des dépenses pour régulariser un secteur, justement celui de la santé, grevé de charges excessives causées depuis plus d'une décennie, après l'institution du Service

sanitaire national, par des gaspillages d'argent public pour la fourniture de prestations sans limite de dépense.

En particulier, la loi italienne 421/1992 a introduit l'institution des « Niveaux d'assistance sanitaire uniformes et obligatoires exprimés par les activités adressées aux individus en termes de prestations », dont la détermination permet de préciser avec certitude ce à quoi la personne peut prétendre de la République et, en même temps, ce que cette dernière est tenue à fournir aux termes de l'art. 32 de la Constitution.

L'introduction des niveaux des prestations a tracé la distinction entre les prestations dues par le Service Sanitaire National et à mettre totalement ou partiellement à la charge de ce dernier et les prestations non dues et, donc, à la charge de chaque individu.

L'introduction par la suite de l'expression « Niveaux essentiels d'assistance » (loi no 449 du 27 décembre 1997) utilisée par le décret-loi italien 229/1999 a rendu encore plus claire la situation.

En effet, l'expression « niveaux essentiels d'assistance » ne se réfère pas au contenu minimal des prestations sanitaires à fournir, mais bien à leur nécessité et à la leur caractère approprié.

À la suite du processus de réforme lancé au début des années quatre-vingt-dix, la réorganisation du système sanitaire a abandonné le modèle concentré sur la gestion des services sanitaires confiée aux municipalités et a suivi le modèle de la régionalisation, avec la conséquence que le droit social à la santé en est arrivé à se configurer comme droit financièrement conditionné sur la base d'une série de particularités qui peuvent être ainsi résumées:

– l'identification des objectifs de protection de la santé étroitement liée à l'entité des financements attribués ;

– l'introduction, par le biais du système de l'accréditation, d'éléments de compétition entre les structures publiques et privées (même si le secteur privé reste soumis à la programmation régionale et que son activité est soumise à la surveillance de la Région) ;

– l'élaboration d'un système de financement des services basé sur des tarifs prédéterminés.

À partir des années deux mille, le siège de définition du système de gouvernance du secteur sanitaire est identifié dans les ententes entre l'État et les Régions par lesquelles le montant des ressources destinées au financement du Service sanitaire national est déterminé.

La première décennie des années 2000 a été marquée par l'impulsion en sens fédéraliste empreinte par la réforme du Titre V de la Constitution (loi no 3 de la Constitution du 18 octobre 2001).

Par la fixation des Niveaux essentiels d'assistance, on parvient à la détermination des standards des prestations sanitaires qui doivent être garantis sur tout le territoire national par le Service sanitaire national, avec l'identification concomitante des ressources à mettre à la disposition du Service sanitaire national, sur la base des compatibilités avec le cadre économique et financier du pays.

Dans ce cadre normatif, des manœuvres financières se sont succédées lesquelles, inspirées également du principe de l'équilibre budgétaire, introduit dans la Constitution par la loi no 1 de la Constitution du 20 avril 2012, ont tenté de répondre aux exigences de réduction de la dette sanitaire régionale.

Parallèlement à la norme législative, qui est constamment à la recherche d'un équilibre entre le rapport qui vient à s'instaurer entre l'application concrète du droit à la santé et les exigences financières, il faut également rappeler les interventions de la Cour constitutionnelle, laquelle a plusieurs fois affirmé la double exigence de la limitation des dépenses sanitaires et de l'équilibre raisonnable de la protection de la santé avec les autres intérêts constitutionnels pertinents.

3 La législation de l'UE en matière de protection de la santé et, notamment, en matière de mobilité sanitaire transfrontalière

La directive 2011/24/UE du 9 mars 2011 (transposée et mise en application dans notre législation par le décret-loi italien no 38 du 4 mars 2014) a fixé les critères auxquels doivent d'inspirer les normes étatiques empreintes du principe de garantir aux patients la possibilité de se faire soigner dans un État membre qui n'est pas celui d'appartenance.

Bien que s'agissant d'une mesure pouvant être définie comme « d'harmonisation minimale », elle vise à garantir la mobilité des patients conformément aux principes sanctionnés par la jurisprudence de la Cour italienne de Justice (Corte di Giustizia).

Ce faisant, la directive s'inspire du principe de subsidiarité en imposant substantiellement à l'État membre d'accorder l'autorisation au patient, son citoyen, de se soigner dans un autre État membre de l'UE quand l'assistance sanitaire ne peut pas être fournie dans un délai justifiable d'un point de vue clinique.

Sur le plan pratique, le problème s'est posé face à des carences de l'appareil sanitaire national qui ont incité le patient à se faire soigner dans un autre État.

Lorsqu'il s'agit de carences simplement occasionnelles et qu'il n'est pas possible de garantir une assistance sanitaire appropriée, il n'y a pas de doute que le patient a le droit d'obtenir l'autorisation préalable à se faire soigner à l'étranger, avec le remboursement correspondant.

En revanche, quand la carence est structurale, la disposition de l'art. 7, al. 7, de la directive susmentionnée qui permet à l'État membre de faire prévaloir la « volonté de garantir le contrôle des coûts et d'éviter, en autant que possible, tout gaspillage de ressources financières, techniques et humaines » pourrait faire obstacle à l'exercice du droit aux soins à l'étranger.

Le point le plus critique dans l'application de la Directive est constitué sans aucun doute par l'équilibre entre la durabilité des systèmes financiers nationaux et la protection du droit à la santé, là où la satisfaction de l'exigence du patient de recourir à l'assistance sanitaire dans un autre État membre est susceptible d'avoir une incidence sur les ressources financières, techniques et humaines du système sanitaire de l'État d'appartenance.

À cet égard, il convient toutefois de rappeler le contenu du jugement de la Cour de Justice de l'UE du 9 octobre 2014 (affaire C-268/2013 Petru) qui, devant une carence structurale et organisationnelle du système sanitaire d'un État, a admis le droit du patient à être autorisé à la mobilité sanitaire, avec remboursement correspondant des dépenses.

Cette décision a été considérée dans la doctrine comme un moment significatif qui pourrait accélérer un processus, en matière de droit aux soins transfrontaliers, par lequel

la protection du droit à la santé du patient constitue un intérêt prépondérant par rapport également auxdites demandes de durabilité économique et financière des systèmes nationaux individuels.

De la décision de la Cour de Justice européenne, il semble donc provenir un signal d'évaluation attentive et renouvelée de l'importance fondamentale du droit à la santé, au point de délimiter une prospective « simili-fédérale » en matière de protection du droit à la santé fondée sur le principe de subsidiarité, dans le sens que le patient doit toujours, en premier lieu, d'adresser à son État d'appartenance pour obtenir les soins médicaux et, par la suite, il peut s'adresser au système sanitaire d'un autre État membre en obtenant le remboursement des frais engagés si, dans son propre État (que la législation européenne définit d'« affiliation ») il ne réussit pas à obtenir dans des délais raisonnables, en raison de carences occasionnelles ou structurales du système sanitaire, les soins dont il a besoin.

La législation nationale italienne sur la mobilité sanitaire transfrontalière est contenue dans le décret-loi no 38 du 4 mars 2014, qui a donné application à la Directive 2011/24.

En outre, le décret du président du conseil des ministres (d.p.c.m.) du 12 janvier 2017, portant « définition et mise à jour des niveaux essentiels d'assistance visés à l'art. 1, alinéa 7, du décret-loi italien no 502 du 30 décembre 1992, appelée la disposition sur l'assistance transfrontalière.

Le cadre d'application de l'assistance sanitaire transfrontalière à fournir aux citoyens résidant dans les autres États membres qui choisissent de venir en Italie pour se soigner est constitué par les Niveaux essentiels d'assistance prévus par le décret-loi italien 502/1992 et redéfinis par le d.p.c.m. du 12 janvier 2017.

Pour des motifs impératifs d'intérêt général (liés à des exigences de planification pour garantir une gamme équilibrée de soins de qualité élevée et de contrôle des coûts pour éviter le gaspillage), des mesures limitant l'accès aux soins peuvent être prises, pourvu qu'elles soient nécessaires et proportionnées et qu'elles ne constituent pas un moyen de discrimination arbitraire.

Les patients provenant d'un autre État membre ont le droit de recevoir du Point de contact national (institué par l'art. 7 du décret-loi italien précité, en application de ce qui est prévu par la Directive 2011/24) les informations relatives à la qualité et à la sécurité des soins et de l'offre sanitaire fournie en Italie, y compris celles relatives aux fournisseurs d'assistance sanitaire.

Quant aux citoyens résidant en Italie qui se rendent dans un des pays membres pour se faire soigner, ils peuvent également s'adresser au Point de contact national pour demander des informations sur leurs droits, en particulier en ce qui concerne les conditions et les délais de remboursement.

Le remboursement des coûts constitue justement l'essence de l'assistance transfrontalière dont les citoyens résidant dans notre pays peuvent profiter et le principe que « les coûts engagés par une personne assurée en Italie qui s'est servie de l'assistance sanitaire transfrontalière… sont remboursés si et dans la mesure où la prestation fournie est comprise dans les Niveaux essentiels d'assistance » est établi (art. 8 du décret-loi italien 38/2014).

L'Italie a jugé bon de se prévaloir de la disposition contenue dans la Directive européenne visant à identifier les cas d'assistance transfrontalière soumise à l'autorisation préalable, en réglementant leurs conditions et modalités.

En conclusion, le décret-loi italien 38/2014, en transposant la Directive 2011/24, concrétise dans le système juridique italien la possibilité pour le patient d'opérer son libre choix du lieu des soins dans le cadre de l'UE.

Il n'y a pas de doute qu'avec la transposition de la Directive 2011/24, par le biais du décret-loi 38/2014, les bases pour rendre praticable la mobilité sanitaire transfrontalière, tant en entrée (dans notre pays des citoyens de l'UE) qu'en sortie (de citoyens qui résident dans notre pays vers d'autres pays de l'UE) ont été établies.

Toutefois, compte tenu de notre organisation sanitaire et surtout de la législation concurrente qui est en vigueur en matière de protection de la santé, il est devenu nécessaire de développer, aux fins de l'application des principes contenus du décret-loi 38/2014, un engagement constant et partagé entre le niveau national et le niveau régional, encore en œuvre.

4 La protection du droit à la santé à l'égard des citoyens étrangers extra-communautaires

Un dernier aspect à illustrer est celui relatif à la protection du droit à la santé des ressortissants étrangers extra-communautaires dans notre pays.

Sur la base du principe solennellement déclaré par la Constitution, le législateur italien a préparé une série d'instruments normatifs pour réglementer l'application du droit à la santé également à l'égard du ressortissant étranger.

Le premier de ces instruments qui constitue la base normative toujours en vigueur est le décret-loi italien no 286 du 25 juillet 1998, intitulé « Texte unique des dispositions concernant la réglementation de l'immigration et des normes sur la condition du ressortissant étranger ».

Les articles 34 et 35 du Texte unique sur l'immigration prévoient une nette distinction entre le ressortissant étranger en situation régulière et le ressortissant étranger en situation irrégulière.

Les ressortissants étrangers qui vivent en situation régulière sur le territoire national et qui sont des travailleurs, ainsi que les membres de leur famille, jouissent d'égalité de traitement et de la pleine égalité de droits et devoirs dont jouissent les citoyens italiens et ils sont inscrits sur les listes du Service sanitaire national. Il convient de préciser que l'inscription sur les listes du Service sanitaire national constitue une obligation pour l'étranger et de cette obligation découlent les droits à l'assistance sanitaire égaux à ceux des citoyens italiens et de l'UE.

Si le ressortissant étranger vit légalement en Italie, mais qu'il n'exerce pas une activité de travail, (p. ex. un étudiant, un touriste, etc.) il a le droit, mais non l'obligation, de s'inscrire Service sanitaire national et il peut, en alternative, souscrire une police d'assurance.

S'il ne souscrit pas une police d'assurance et qu'il ne s'inscrit pas au s'inscrire Service sanitaire national, il pourra quoi qu'il en soit recourir aux prestations fournies par le s'inscrire Service sanitaire national conformément aux modalités prévues par les deux premiers alinéas de l'art. 35 du Texte unique sur l'immigration.

Une norme particulière est établie pour le cas des étrangers qui sont en situation d'irrégularité par les dispositions qui régissent l'entrée et le séjour sur le territoire national.

Justement, la récente loi no 132 du 1er décembre 2018 a délimité le cadre d'intervention de l'État.

Pour l'étranger en situation d'irrégularité, les soins essentiels sont ceux indispensables, dont on ne peut se passer.

Ce qui peut être défini comme un écart est quoi qu'il en soit compatible avec le cadre constitutionnel italien, dans la mesure où la protection du noyau essentiel du droit à la santé du ressortissant étranger en situation irrégulière répond au principe de l'inviolabilité des droits fondamentaux de l'individu, tandis que le contenu différent à attribuer au niveau essentiel de la prestation sanitaire, selon qu'il s'agisse de citoyen ou d'étranger en situation irrégulière, semble être conforme à la teneur de l'art. 10 de la Constitution, conformément à laquelle « le système juridique italien se conforme aux normes du droit international généralement reconnues. La condition juridique de l'étranger est régie par la loi conformément aux normes et aux traités internationaux ».

La Cour constitutionnelle a affirmé à ce propos qu'« il ne peut être exclu qu'entre citoyen et étranger, bien qu'égaux dans la titularité de certains droits de liberté, il existe des différences de fait qui peuvent justifier un traitement différent dans la jouissance de ces dits droits », signifiant que ces différences sont attribuables à la « différence de base existant entre le citoyen et l'étranger, consistant dans le fait que, tandis que le premier a avec l'État un rapport habituellement d'origine et quoi qu'il en soit permanent, le second en a un acquis et généralement temporaire » (jugement no 104 du 19 juin 1969, dont l'orientation a été confirmée par les décisions subséquentes, récemment par le jugement no 245 du 20 juillet 2011).

Cependant, le traitement différencié n'a pas lieu lorsque que l'on se retrouve devant des étrangers d'âge mineur non accompagnés.

Ceux-ci sont ceux qui se trouvent pour quelque motif que ce soit sur le territoire de l'État, sans assistance ni représentation de la part de leurs parents ou d'autres adultes légalement responsables.

La loi no 47 du 7 avril 2017 a introduit une disposition qui, en prévoyant des protections accrues par rapport au passé, a établi la pleine assistance sanitaire pour les étrangers d'âge mineur non accompagnés. En ce qui concerne ces derniers, l'inscription obligatoire au Service sanitaire national est prévue.

5 La protection de la Convention européenne des Droits de l'Homme (CEDH) et de la Charte sociale européenne (CSE)

Il convient de remarquer au préalable que la CEDH se concentre presqu'exclusivement sur la protection des droits civils et politiques et ne prend pas en considération les droits sociaux.

Toutefois, la jurisprudence de la Cour européenne des droits de l'homme a eu l'opportunité d'affirmer justement en matière de santé, et notamment en matière

d'immigration, la valeur du droit à la santé des citoyens extra-communautaires, bien que de façon indirecte.

Cela semble évident dans le jugement de l'affaire D. contre le Royaume-Uni du 2 mai 1997, alors qu'en se prononçant sur la suspension des soins terminaux à un étranger à expulser, elle s'est occupée, précisément seulement par extension sur la santé de de la partie requérante, en décidant devoir intervenir à ce propos pour éviter que soit infligé, même si indirectement et non intentionnellement, un traitement inhumain à l'individu.

D'autre part, dans une autre affaire substantiellement analogue, mais de moindre intensité (affaire N. contre le Royaume-Uni du 7 mai 2008), la Cour européenne des droits de l'homme a affirmé ne pas pouvoir empêcher l'expulsion d'un immigré en situation d'irrégularité, bien que gravement malade, dans son pays d'origine là où, théoriquement, il pouvait être soigné. Ceci, bien que plusieurs droits affirmés dans la Convention aient des implications de nature sociale ou économique, la Convention vise toutefois essentiellement à la protection de droits civils et politiques et par conséquent, l'article 3 de la Convention ne peut pas être actionné afin de garantir des soins gratuits et illimités à tous les étrangers en situation d'irrégularité qui se trouvent sur le territoire d'un État signataire de la CEDH.

De plus, en général, la jurisprudence de la Cour européenne des droits de l'homme s'est occupée plusieurs fois de la question de la protection du droit à la santé à l'égard des personnes en prison.

Il faut dire ensuite que plus récemment, la Cour a souligné la violation par un État de l'art. 2 de la Convention quand, à cause d'une faute professionnelle (malpractice) médicale, l'intégrité physique du patient n'est pas garantie (en ce sens, le jugement du 15 décembre 2015 est emblématique, dans l'affaire Lopes de Sousa Fernandez c. Portugal, recueil no 56080/13).

Quoi qu'il en soit, il reste le fait que le droit à la santé ne reçoit de la CEDH et de la Cour de Strasbourg qu'une protection indirecte ou par ricochet.

Par rapport à la CEDH, le cas de la Charte Sociale Européenne (CSA) adoptée en 1961 et revue en 1996, laquelle contient des références différentes à la protection du droit à la santé (en particulier, les articles 11, Droit à la prestation de la santé, et 13, Droit à l'assistance sociale et médicale), est différent.

Toutefois, contrairement à la CEDH, le respect de la Charte n'est pas confié à une véritable Cour, mais à un Comité de 15 membres nommés par le Conseil d'Europe.

Il s'agit, comme affirmé avec autorité dans la doctrine, d'un instrument de soft law qui agit surtout comme levier sur le discrédit qui pèse sur un État qui a violé les principes de la Charte.

Toutefois, elle indique une voie à suivre si l'on souhaite garantir l'uniformité sur le Continent européen à la valeur de la protection de la santé de la personne, perçu toujours plus comme un droit fondamentale de tous et auquel personne ne peut renoncer.

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Land-locked states in the International Law of the Sea

Artak Mkrtichyan

Leaving aside technical aspects relating to statehood, the term 'land-locked State' (LLS) gives rise to no particular problems of definition. In both law and geography, it connotes a State which has no sea – coast and which must therefore rely on one or more neighboring countries for access to the sea[1]. By this criterion, there are currently forty-four land-locked states in existence: 16 in Africa, 14 Europe, 12 in Asian, and 2 in Latin America[2]. These states have obviously had diverse historical experiences and, this together with their differences relating to factors such as size, population, and topography, indicates that their political unity in international relations cannot be presumed as a matter of course.

Land-locked countries are also among the most destitute and underprivileged countries in the world. As the assessment of global economic activities throughout the past decade will disclose, being detached from the sea has imposed huge repercussions on their socio-economic development. Despite the fact that all developing countries have some way to go to economic and social welfare, the landlocked states have done worse as a result of their distinctive geographic handicaps[3]. Apart from relatively well-off States in Western and Central Europe (Switzerland, Austria, the Czech Republic, Hungary and Slovakia), they are all deprived and can truthfully be classified as landlocked countries facing obstacles that are very hard to overcome. It can also be stressed that coastal economies enjoy higher income than landlocked ones. Indeed, there is not a single high-income landlocked country outside of Europe[4].

Land-locked countries do have many striking similarities. None can be considered geographically large; most are indeed quite small (Mongolia, with an area of 1,567,000 square kilometers is the largest). Furthermore, access of LLDCs to the sea and ports is dependent on their immediate neighbors, and is thus subject to their ability to establish

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[1] Vasciannie, S. "Land-Locked and Geographically disadvantages states in the international law of the sea" Clarendon Press Oxford. 1990, p. 5.

[2] South America has just 2 landlocked countries: Bolivia and Paraguay; Europe has 14 landlocked countries: Andorra, Austria, Belarus, Czech Republic, Hungary, Liechtenstein, Luxembourg, Macedonia, Moldova, San Marino, Serbia, Slovakia, Switzerland, and Vatican City; Africa has 16 landlocked countries: Botswana, Burundi, Burkina Faso, Central African Republic, Chad, Ethiopia, Lesotho, Malawi, Mali, Niger, Rwanda, South Sudan, Swaziland, Uganda, Zambia, and Zimbabwe. Lesotho is unusual in that it is landlocked by just one country (South Africa); Asia has 12 landlocked countries: Afghanistan, Armenia, Azerbaijan, Bhutan, Laos, Kazakhstan, Kyrgyzstan, Mongolia, Nepal, Tajikistan, Turkmenistan, and Uzbekistan.

[3] Chowdhury, Anwarul K. "Geography against development: a case for landlocked developing countries" New York, United Nations. 2006, p. 3.

[4] *Ibid*, p. 4.

appropriate political and commercial relationships with them. For example, Bolivia is dependent on Chile, with which it has not had diplomatic relations for more than a century, following the War of the Pacific that cost Bolivia its coastline[5].

Evidently, the main point of unity among landlocked states is their remoteness form the sea. However, even in this respect, it should not be assumed that there are no substantial differences among landlocked countries. Remoteness from the sea is largely a question of degree, and for this reason it may be said that some LLS are less geographically handicapped than others. For example, travelling along the main commercial route, the distance between Mbabane, Swaziland, and its outlet to the sea at Maputo, Mozambique, is just over 200 kilometers, in stark contrast, the distance between the Fort Lamy in Chad and its nearest port at Lagos, Nigeria, is 2,050 kilometers[6]. Notwithstanding, distance is not the only determinant of the degree of disadvantage of LLSs. It is also influenced by factors such as the availability of adequate transport facilities and by the actual number of outlets the state may utilize to reach the sea. Burkina Faso and Uganda are located far inland, but they possess direct railways to important ocean ports. There would appear to be no clear standards for determining relative disadvantage in cases of this nature. Another clue here is that landlocked States with access to navigable waterways are often less disadvantaged than other LLSs that are obliged to rely on railways and road networks.

In Africa, only East African LLSs (Uganda, Burundi, Rwanda) benefit from relatively affordable lake transportation, using Lake Victoria and Lake Tanganyika. In Central Africa only the Central African Republic benefits from river transportation, using the Bangui and the Congo rivers. However, even this advantage is limited: Because the Congo is not navigable beyond Brazzaville, goods must be transported by rail from Brazzaville to Pointe-Noire on the Atlantic Ocean. In Asia, only the Lao PDR is blessed with navigable waterways that lead to the sea, and these will only be fully harnessed after the Mekong Project is completed. Otherwise, in most LLS, river transportation is either nonexistent or cannot be used for geographical, financial, or technical reasons[7]. The States with the easiest access to the sea are mostly in Europe, where a maximum of 500 kilometers separates their capitals from the main ports. They are linked to the sea by navigable rivers that have long been internationalized by bilateral or multilateral treaties. Nevertheless, despite significant ideological diversity, all LLS have common interests. All are conscious of their geostructural handicaps and realize that their needs differ from those of their coastal neighbors[8].

The rights of LLSs are regulated in detail in the 1982 International Convention on the Law of the Sea. In this term, the Article 125 of this Conventions states: "Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind"[9].

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[5] UNCTAD "FDI in Landlocked Developing Countries at a Glance", United Nations, 2003, p. 2.
[6] VASCIANNIE, S. "Land-Locked and Geographically…" Op. cit., p. 5.
[7] Uprety, K. "The Transit Regime for Landlocked States" Law, Justice, and Development Series, The World Bank, 2006, p. 7.
[8] Uprety, K. "The Transit Regime for Landlocked States", op. cit., p. 11.
[9] UNCLOS III Convention, art. 125.

Due to the geographical position, land-locked states are in constant dependence from the neighboring coastal states to be able to access to and from the sea. That is why they are interested in the development in international law of such rules that would ensure the effectiveness of this access.

The doctrine of international law has developed doctrines in regard to the LLSs. In this sense we can mention the doctrine of Freedom of the Seas, which dates back to the 17th – 18th centuries, was quite widespread. According to the views of H. Grotius, E. de Vattel, no distinction should be made between coastal and non-coastal states, since they all have the same natural right of unhindered passage through the territory of neighboring states. The meaning of this doctrine was the limitation of the territorial supremacy in terms of a transit in favor of another state or group of other states. This doctrine was based on the principle of high seas freedom, which conduct to the right of land-locked to get access to the sea through territories of neighboring countries.

Years later, during the Paris Peace Conference of 1919, no one disputed the right of land-locked countries to have access to the sea. Moreover, Hungary and Austria gained access to the Adriatic Sea on the basis of Article 294 of the Trianon Peace Treaty[10] and Article 311 of the Saint-Germain Peace Treaty[11]. The texts of multilateral conventions that regulates various aspects of transit were prepared during the Barcelona (1921) and Geneva (1923) conferences, which were convened in accordance with article 23 of the Statute of the League of Nations. The Convention and the Statute on Freedom of Transit, the Convention, the Statute and the Additional Protocol on the regime of navigable waterways of international importance, the Convention and the Statute on the international regime of railways, the Convention and the Statute on the international regime of seaports have been adopted.

Twelve land-locked states convened a conference in Geneva from February 10 to 14 of 1958, during which disagreements emerged between these states in their approach how to resolve the problem of access to and from the sea[12].

The concept of the right of access to the sea as a consequence of freedom of the high seas was officially recognized and conventionally enshrined during the 1958 Geneva Conference on the Law of the Sea. This concept was based on the principle that the right of every land-locked country to free access to the sea on the basis of the principle of freedom of the high seas.

The right of land-locked states to free access to and from the sea means its right to a full path from the territory of that State to the waters of the open sea port. This right is usually formalized by an agreement between concerned states, which is based on the principles and norms of international law.

The Article 14 of the 1958 Convention on the Territorial Sea and the Contiguous Zone establishes the right of ships of all states, whether coastal or not to innocent passage

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[10] The Article 294 of Trianon Peace Treaty states: *Free access to the Adriatic Sea is accorded to Hungary, who with this object will enjoy freedom of transit over the territories and in the ports severed from the former Austro-Hungarian Monarchy.*

[11] The Article 311 of Saint-Germain Peace states: *Free access to the Adriatic Sea is accorded to Austria, who with this object will enjoy freedom of transit over the territories and in the ports severed from the former Austro-Hungarian Monarchy*

[12] See more in Document A/CONF.13/C.5/SR.1-5, United Nations Conference on the Law of the Sea, Summary Records of the 1st to 5th Meetings of the Fifth Committee, available http://legal.un.org/diplomaticconferences/1958_los/docs/english/vol_7/sr_1_5.pdf (30/08/2019).

through the territorial sea. In this way highlights the right of a land-locked State to access the sea are guaranteed by international law.

It is also worth mentioning that the Article 278 of the Versailles Peace Treaty, the Article 265 of the Sevres Peace Treaty, and the Declaration on the recognition of the flag rights of states without a sea coast, signed on April 20, 1921 at the first General Conference in Barcelona on means of communication and trans General Conference on Communications and Transit, states the right of land-locked countries on a sea flag. This right was confirmed also in the 1958 Geneva Conventions.

The content of the law of the land-locked states has been enriched by the provisions of the 1965 Convention on Transit Trade of Land-locked states. In this regards the Article 2 on the Convention mentioning: "The Contracting states shall permit the passage of traffic in transit across their territorial waters in accordance with the principles of customary international law or applicable international conventions, and with their internal regulations"[13].

The Geneva Conventions on the Law of the Sea of 1958 and the Convention of Transit Trade of Land-Locked states of 1965 were both based on draft articles complicated by the International Law Commission. There was a lack of status of landlocked countries in the matter of maritime status.

The ten among total of ninety states that participated in the 1958 Conference on the Law of the Sea were land-locked. A special commission dealt with this particular problem. Article 3 of Convention on High Seas 1958[14]. States that "in order to enjoy the freedom of the seas on equal terms with coastal states, states having no sea-coast should have free access to the sea". This article was in favour of land-locked states however it depended on contingent agreement and on the good will of the coastal states concerned. In review, it is quite clear that the most important decision concerning maritime resources taken at the 1958 Conferences was preserved in the Convention on the Continental Self[15].

In 1965 the pressing demands of newly-independent land-locked states led to the elaboration within the framework of UNCTAD of the Convention of Transit Trade of Land – Locked states[16]. This Convention in its preamble sets forth a number of principles reflecting the main aspirations of the land-locked countries, including inter alia free access

[13] Convention on Transit Trade of Land-locked states 1965, art. 2

[14] The Convention on the High Seas is an international treaty created to codify the rules of international law relating to the high seas, otherwise known as international waters. The treaty was one of four agreed upon at the first United Nations Convention on the Law of the Sea (UNCLOS I). The treaty was signed 29 April 1958 and entered into force 30 September 1962.

[15] The Convention on the Continental Shelf was an international treaty created to codify the rules of international law relating to continental shelves. The treaty, after entering into force 10 June 1964, established the rights of a sovereign state over the continental shelf surrounding it, if there be any. The treaty was one of three agreed upon at the first United Nations Convention on the Law of the Sea (UNCLOS I). It has since been superseded by a new agreement reached in 1982 at UNCLOS III.

[16] The General Assembly of the United Nations at its 1328th plenary meeting on 10 February 1965 decided to convene an international conference of pleni potentiaries to consider the question of transit trade of land-locked countries and to embody the results of its work in an international convention and such other instruments as it might deem appropriate. This decision was taken in pursuance of a resolution adopted by the First United Nations Conference on Trade and Development at Geneva in June 1964

to the sea, identical treatment for vessels flying the flag of land-locked states to those of coastal states, free and unrestricted transit-however, on the basis of reciprocity[17].

The 1982 UN Convention on the Law of the Sea (UNCLOS) tried to correct this shortcoming, taking into account the principle of sovereignty, as well as regulating the conditions and procedure for the provision of transit to land-locked states.

In this sense, during the III UN Conference on the Law of the Sea, the LLSs expressed the view that their right to access to and from the sea, the provision of which is absolutely necessary to achieve comprehensive economic development, is a universally recognized and legally binding principle of international law. In this terms LLSs demanded confirmation of this question in the process of a new codification of international law of the sea. The realization of this right is necessary to ensure that the land-locked states have a real opportunity to participate in the use of the freedoms of the sea on equal terms with the coastal states. This particular need of land-locked states stems from their common geographical location, from the fact that they do not have their own coast and in many cases are significantly remoteness from the sea.

Questions related to access to the sea were discussed in the framework of the Committee on the Seabed and in the process of preparation for the III UN Conference on the Law of the Sea. The Declaration of principles governing the regime of the bottom of the seas and oceans and its subsoil beyond the limits of national jurisdiction, agreed at the XXV session of the UN General Assembly and contained in its resolution 2749 (XXV) of December 17, 1970, gave a positive answer to the question of ensuring access of the land-locked states to the seabed area and their participation in the operation of this area, as well as their fair share in the benefits derived from exploration and development of the resources of the bottom of the seas and oceans and its subsoil.

The UN General Assembly Resolution 2750 (XXV), adopted simultaneously with the Declaration of Principles on December 17, 1970, in Section C, guided the work of the Seabed Committee to the preparation of the new Seabed Conference and defined its program broadly. An important point is the fact that section "B" of this resolution was devoted to the specific problems of land-locked states. It requested that the UN Secretary-General, in collaboration with UNCTAD and other competent authorities, prepare a report on the issues mentioned in the Memorandum of January 14, 1958 on the free access to the sea of land-locked countries.

Discussion of issues relating to the right of land-locked countries to access the sea, and later their participation in the use of biological resources of the economic zone, was concentrated in the II Committee of the Conference. But questions regarding the participation of these states in activities at the bottom of the seas and oceans and in the future international body on the seabed were addressed to the I Committee. Similarly, the discussion of issues related to the participation of land-locked countries in marine scientific research, as well as in the protection and preservation of the marine environment, took place within the framework of the III Committee.

The positions of land-locked states were supported by a large number of participants in the Conference (1). But some coastal states sharply opposed this project, as well as against another project of a group of land-locked states and geographically disadvantaged states regarding their participation in the exploitation of living resources of economic

[17] TUERK H. and HAFNER G., Law of the Sea, the library of essays in international law, edited by Caminos, Hugo, The Cromwell Press, 2001, p. 357.

zones (2). After the Conference's Revised Negotiating Consolidated Text for Negotiations, the disagreement among the participating states on the regulation of the rights of land-locked states necessitated a new consideration of all the controversial issues in the Informal Negotiating Group formed at the fifth New York session of the Conference in the summer of 1976.

In this group, consisting of the most interested LLSs and transit states, it was possible to reach an agreement both on the main issues discussed and on the general version of the text. The results of the discussion were then included in a new version of the Informal negotiation consolidated text, in which the legal regulation of access to the sea of land-locked states were transferred to an independent section – part X (1). The provisions of this part were no longer amended and subsequently entered the final text of the 1982 UN Convention on the Law of the Sea.

A particular importance for the legal regulation of access of land-locked states to the sea has the provision of Art. 125 of the 1982 Convention. Clause 1 of this article explicitly confirms that "Land-locked states shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked states shall enjoy freedom of transit through the territory of transit states by all means of transport."

It should be noted that the 1982 UN Convention on the Law of the Sea explicitly recognizes land-locked states as the right to access the sea. As we see above the text of the new convention mentions "Land-locked states shall have the right of access to and from the sea…" applies, whereas the 1958 Geneva Convention stated: "states having no seacoast should have free access to the sea..." Here we can see the basis difference between these two Conventions in regard to the land-locked states.

Another important point is the establishment of an inextricable link between the right of land-locked countries to access the sea and the purpose of granting this right. The 1982 Convention as a whole clearly states that this right is recognized by land-locked states "with a view to exercising the rights provided for in this Convention, including rights relating to freedom of the high seas and the common heritage of mankind" (Art. 125, par. 1). Consequently, this wording covers both the right of land-locked countries to access the sea for the purpose of using it in traditional forms, and the right to access the sea with a view to exercising rights within the established legal regime of the seabed.

Substantial progress has been made regarding the construction of freedom of transit for land-locked states through the territory of transit states. Unlike the Geneva Convention in the 1982 Convention, this freedom is not "granted" by transit states to land-locked states, but belongs to the latter directly, by virtue of the Convention. The situation does not change at all due to the turnover applied in this case. Moreover, the used "freedom of transit" used in the new Convention means more than the "free path through the whole territory" contained in the Geneva Convention, since the term "freedom" in international law means nothing more than "right" or even whole set of rights.

According to the par. 1, Article 125 of the 1982 Convention, the freedom of transit of land-locked states through the territory of transit states may be exercised "by all means of transport." The concept of "transport" is disclosed in more detail in the definition contained in Art. 124 of the 1982 Convention, and this article does not limit the ways in which these transport can be used. Thus, we can conclude that the 1982 Convention,

naming, for example, sea, lake and river vessels, provides for the possibility of their use on all waterways, through which they can be used to transport for access to the sea. Consequently, freedom of transit should extend to sea, river, and lake vessels, regardless of where they sail – by sea, by natural navigable waterways, or by artificial linking natural waterways and the sea.

Recognizing the freedom of transit for land-locked countries. The 1982 Convention simultaneously takes into account the fact that this transit must take place through a territory that is under the sovereignty of the transit state. Therefore, in paragraph 3 of Art. 125 confirms that "Transit states, in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this Part for land-locked states shall in no way infringe their legitimate interests". In this sense it should be mentioned that UNCLOS recognizes the importance of bilateral, sub-regional and regional agreements in application of provisions of "freedom of transit"[18] of the land-locked states.

Thus, we can conclude that, although part X of the 1982 Convention, which regulates the "right of access of land-locked states to and from the sea and freedom of transit" is small in scope and concerns a relatively narrow problem, it is important for the development of all international law of the sea. However, these convention provisions take into account the legitimate interests of transit states and the needs of the entire international community. Consequently, the 1982 UN Convention on the Law of the Sea does not provide any unilateral or inadequate privileges to land-locked states, and therefore should be acceptable to all State governments as a mandatory legal basis for a reasonable and fair settlement of relations between land-locked and transit states.

The new codification of the law of the sea regulates some of the fundamental rights of these land-locked states. The guiding rule is already contained in the title of this part of the Convention: "right of access of land-locked states to and from the sea and freedom of transit". Even more par. 1 of art. 125, which gives an unambiguous positive answer to the question of whether land-locked countries have a right to access the sea.

In addition to these fundamental rights, the Convention also establishes other rights of LLSs, which correspond to the respective obligations of transit states. This is the exemption of transit traffic from customs duties, taxes and other charges, the restriction of fees charged for the use of vehicles, the implementation of appropriate measures to avoid delays or other difficulties of a technical nature in transit traffic, the provision of the same treatment with ships of other states to ships sailing under flag of land-locked states.

The 1982 UN Convention on the Law of the Sea not only clearly establishes the rights of land-locked states, but also defines their regulatory content in detail, which can be extended by agreements concluded between these states and transit states.

[18] The Barcelona Convention and Statute on Freedom of Transit is an International treaty signed in Barcelona on 20 April 1921; the treaty ensures freedom of transit for various commercial goods across national boundaries. It was registered in *League of Nations Treaty Series* on 8 October 1921. It went into effect on 31 October 1922. the convention is still in force at present.

PUBLIC LAW

Concept of crime in modern criminal doctrine

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Abstract

In relation to their position on the conditions that led to the criminalization of a deed, the contemporary criminal doctrine divides the theoretical approaches into two categories: formal conceptions, for which an offense exists only within the limits of an incriminated act and the material conceptions for which the substantial processes that led the legislator to criminalize an act and attribute to it a socially dangerous character are important.

The author tries to determine which of these two concepts better represents the interests of society.

Keywords: offense, crime, formal conceptions, material conceptions.

1 Contemporary criminal doctrine

Formal conceptions and material conceptions

It is easy to define the offender, but it is less easy to define the offense as a conceptual entity, says Professor Roger Merle[1], and Professor Jean Pradel has the same view[2], arguing that such a definition should include the views of the moralist, sociologist and jurist.

What is of interest is the legal definition of the offense and not an ethical or sociological one.

"From a formal point of view, in all countries of the world, the crime can be defined as a punishable act[3]."

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[1] R. Merle, A. Vitu, Traité de droit criminel, tome 1, septième edition, Editions Cujas, Paris, 1997, p. 22.
[2] J. Pradel, Droit penal general, 15e edition, Edition Cujas, Paris, 2004, p. 20.
[3] R. Merle, A. Vitu, op. cit., p. 23.

"A crime, broadly understood, is a legally prescribed conduct punishable by a punishment"[4] or "an act punishable by a criminal sanction and causing prejudice to another[5]."

Obviously, the legal concept of crime is distinguished from sin and deviation. Sin is a religious notion linked to personal morality and thus detached from social morality, and deviance in the broad sense includes crime and uninvited behaviors, even if they are immoral or socially dangerous[6]."

The distinction between offense and deviance is based on a global analysis of antisocial or associal conduct, some of which are incriminated, and others, very numerous, remain, for various reasons, outside of a criminal sanction.

While some criminologists, such as Filippo Gramatica, would like to submit all forms of deviance and antisocialism to criminal law, many legislations are pronounced to decriminalize prostitution, vagabondage, suicide, alcoholism, juvenile delinquency, which are less and less penalized[7].

In addition to deviance, crime is also distinguished from blamable conduct: the concept of crime is much more restrictive than that of blamable conduct and we could define the offense as the act justifying a punishment[8].

In other words, we add, any offense implies a blamable conduct, not any blamable conduct is an offense.

The distinction between crime and problematic situations, a concept brought into question by Western doctrine, is based on some attempts by criminologists to substitute the offense with "problem situations", a neutral notion, without moral resonance, on the basis of which any system of institutional or spontaneous responses can be built, as opposed to the offense that leads to the designation of a culprit[9].

Once delimitations against other social phenomena have been made, R. Merle and A. Vitu have established three characteristic features: the ultravalidity of the offense, the offense produces social disturbances and the need for social reaction against the offense[10].

Thus, by delimiting the offense from other similar phenomena and by enumerating the constant features, a definition of the offense is implicitly made.

The legal definition of the offense, as a premeditated fact and punished by law, based only on legalism, aims to prevent arbitrariness and to protect the individual from the society but also the society from the individual[11].

These type of definitions, which only refers to the presentation of the formal conditions of the offense (a fact stipulated and punished by the criminal law) were called formal definitions in the doctrine[12].

In a **formal conception**, the offense exists only within the limits in which the fact was incriminated, in the sense that the criminal law creates the offense by describing and

[4] J. Pradel, op. cit., p. 21.
[5] M. Cusson, Criminologie actuelle, P.U.F., 1998, p. 20.
[6] J. Pradel, op. cit., p. 21.
[7] R. Merle, A. Vitu, op. cit., p. 37.
[8] Ibidem, p. 38
[9] Ibidem, p. 38
[10] Ibidem, p. 31
[11] G. Stefani, G. Levasseur, B. Bouloc, Droit pénal général, 17e edition, Dalloz, Paris, 2000, p. 7.
[12] R. Gassin, Criminologie, 5e edition, Dalloz, 2003, p. 41.

sanctioning it[13]. The provision in the law criminalizing an act contains all the conditions for an act to constitute an offense. The definition of offense as a fact incriminated by law is a formal definition because it relates to the legal (formal substance) aspects of the act and not to its material content (the real substance)[14].

In a formal conception, the notion of crime has the content indicated by the rule of criminalization, it only highlights the formal aspect of the offense, its external aspect, the contradiction of the concrete act with the precept of the criminalization rule.

In a **material or substantive** conception, what characterizes the actual act as a crime is not the norm of criminalization, but the realities, the substantive processes that led the legislator to criminalize an act and to attribute to it a socially dangerous character, that is, unconvenient in relation to the interests of society[15].

Thus, one of the most well-known French criminal law treaties defines the offense as the act foreseen and punished by the criminal law because of the disturbance it causes to the social order[16].

Similarly, *Dictionnaire des sciences criminelles* defines the offense as an act contrary to the social order provided for and punished by criminal law[17].

2 Mixed concepts

A careful analysis of the stated definitions leads us to find that formal conceptions are not so far removed from material conception.

This is because, as we have seen, many definitions of the crime contain, besides strictly formal elements ("the act prescribed and punished by criminal law") material elements as well ("the act contrary to social order").

The presence of material references in the definition of crime is the consequence of social realities that can not be neglected: the elaboration of criminal laws involves the evaluation, grouping, systematization of the most important values in society: life and physical integrity, human dignity, reputation, property, etc.

Criminological doctrine accepts the idea that criminal laws have a *repressive function first*, consisting in the provision of a sanctioning system based on the protected social values.

A second, expressive function is based on a system of values recognized by collective consciousness.

These values are protected by prohibitions and the guarantee of these prohibitions is achieved by punishments imposed on those who violate them. Thus criminal law is related to its sanctions on the value system of society[18].

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[13] G. Antoniu, C. Bulai, B. N. Bulai, C. Duvac, I. Griga, I. Ifrim, Gh. Ivan, C. Mitrache, I. Molnar, I. Pascu, V. Pasca, O. Predescu, Explicațiile noului Cod penal, Universul Juridic, București, 2015, p. 148.
[14] V. Dongoroz, Drept penal, București, 1939, p. 195.
[15] G. Antoniu, C. Bulai, B. N. Bulai, C. Duvac, I. Griga, I. Ifrim, Gh. Ivan, C. Mitrache, I. Molnar, I. Pascu, V. Pasca, O. Predescu, Explicațiile noului Cod penal, Universul Juridic, București, 2015, p. 148.
[16] G. Stefani, G. Levasseur, B. Bouloc, Droit pénal général, Paris, Dalloz, Paris, 2000, p. 5.
[17] G. Lopez, S. Tzitzis, Dictionnaire des sciences criminelles, Dalloz, Paris, 2004, p. 542.
[18] R. Gassin, op. cit., p. 41.

For this reason, there are a few authors who have successively defined formal definitions and definitions without being disturbed by their apparent contradictions and attempting to combine them.

Durkheim thus defined the offense as an act that offends the strong and defined states of collective consciousness in his work "On the Division of Social Work" in 1893 (material definition), and two years later, in 1895, in the "Rules of the Sociological Method" the offense is defined as an act that has this external character that, once fulfilled, determines from society the specific reaction we call punishment (formal conception)[19].

Even recognized criminal professors, such as R. Merle and A. Vitu, when defining the offense as "the act that the law punishes with a punishment" refer to the objective social realities which the legislators regard as crimes and refer to the essential values behind which collective feelings that attach affectively the members of a group can be found. It also refers to a criminal threshold triggering a sufficiently intense emotion within society to provoke a punishing reaction[20].

Michèle – Laure Rassat recognizes that French law has circumvented the difficulty of defining the offense by choosing a purely formal and legal definition: the offense is any act prescribed and punished by criminal law. In doing so, the greatest inconvenience of a definition, the arbitrariness, was eliminated, but it retained a major defect, namely the excessively schematic character, which loses sight of the fact that the offense is a human deed, a social act. If a legal definition has to meet a predominantly technical need, it must not exclude the moral and social coloration of the act. The author concludes that an exact definition of the offense should be any act foreseen and punished by the criminal law because it *shocks morals or disturbs social order*[21].

In the Italian criminal doctrine, the formal definition of the offense, according to which the offense is "any human deed to which the law associates a criminal sanction"[22], is accepted.

However, it is emphasized the need for a material definition of the offense, such as: "A crime is the human behaviour, provided by the law, which is contrary to the purposes of the state and requires, as a penalty, a punishment[23]."

Or "is an offense an inhuman deed causing injuries to a social value protected by the law in accordance with constitutional principles, provided that the injury is of such a nature that it is inevitable to punish with punishment and that non-criminal sanctions prove to be insufficient"[24].

The mixed definitions, mostly used in doctrine, attempt to compensate for the excessive schematic nature of formal definitions by introducing intrinsic elements that delimit the criminal illicit of other forms of illicit.

Thus, Professor F. Antolisei introduced the phrase "contrasts with the purposes of the state" by understanding the general representative of the society to be the state. Therefore, the goals of the state are not those that concern the management of

[19] Ibidem, p. 42.
[20] R. Merle, A. Vitu, op. cit., p. 32.
[21] M. L. Rassat, G. R. de Boubée, Droit pénal général, Ellipses Edition, Paris, 2006, p. 264.
[22] F. Antolisei, Manuale di diritto penale, Milano-Dott Giuffre Editure, 2003, p. 167; G. Fiandala, E. Musco, Diritto penale, Zanichelli Editure, 2006, p. 133.
[23] F. Antolisei, op. cit., p. 170.
[24] G. Fiandaca, E. Musco, op. cit., p. 136.

political power, but those that concern the good administration of society, the creation of a climate of safety and social comfort[25].

Professors G. Fiandaca and E. Musco have formulated a more complex definition in which they have introduced as a distinctive element the consequence of illicit human conduct: the violation of a social value that requires protection under the constitutional order.

The need to introduce elements of distinct character into the notion of offense is determined by the historical evolution of society, by the fact that a certain act considered as a criminal offense in a law at a given moment could be lawful in another society, another moment.

The definition of offense is a subject of study for criminal doctrine and less for criminal law, except for the central and eastern European states that are concerned with the definition of the offense in criminal law.

In these states, the offense is defined as a socially dangerous act (Russian Criminal Code 1961, Russian Criminal Code 1997, Chinese Criminal Code 1980, Vietnamese Criminal Code 1999, Polish Criminal Code of 2003), which violates a system of social values enunciated starting with those of general interest (social or state regime, economic system, property) and ending with personal interests (person and rights).

The offense must cause actual harm to society or a third party (Croatian Criminal Code 1997, Polish Criminal Code 1999), a principle inspired by the French doctrine (indispensability theory) where incrimination is legitimate only if it tends to avoid serious harm to society and from the Italian doctrine (the principle of offense) where the incriminated behavior must damage or endanger a legal good[26].

We find, therefore, that material and mixed definitions are consistently related to a system of values that are threatened or harmed by human conduct prohibited by criminal law.

According to these concepts, the offense as an act of conduct can not be studied in an abstract environment, isolated from social life, because crime is a social reality[27].

3 The Criminological Concept

Classical criminology[28] expressed reservations about the legal notion of crime, but also about classification in crimes, delinqencies, offenses, that were considered purely formal concepts of no scientific nature due to the extreme variability of the time and space criminality that make the offense a relative phenomenon, but also because of the very disparate nature of the incriminations contained in the national legislation that gives them heterogeneity.

To avoid the relativity of the notion of criminal offense as the human and social reality before any incrimination consisting of an aggression led by one or more persons against the most important values of the social group.

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[25] F. Streteanu, Tratat de drept penal, Editura C.H. Beck, București, 2008, p. 198.
[26] J. Pradel, Droit penal compare, 3e édition, Dalloz, Paris, 2008, p. 55.
[27] G. Stefani, G. Levasseur, B. Bouloc, op. cit., p. 9.
[28] Garofalo, op. cit., p. 1-52; Ferri, op. cit., p. 80-95; Durkheim, Les regles de la methode sociologique, p. 15-46.

The heterogeneity of offenses has been remedied by establishing new contours for the various categories of crimes, and some criminologists have proposed rejecting the qualifications used in criminal law and replacing them with categories of criminology such as the utilitarian apropriation of the good of another instead of theft, abuse of trust[29].

These attempts to develop new concepts to replace the notion of criminal offense have in the end resulted in numerous dissatisfactions leading to a return to the concepts of criminal law that have these advantages mainly because they use more clearly defined and user-friendly notions.

However, the criminological conception reveals the inefficiency of using formal criteria in defining the basic notions of criminal law, among which the offense.

4 The concept of crime in Romanian criminal law

4.1 *Legal definition and doctrinal definition*

The problem of defining a crime in criminal law is controversial.

Professor I. Tanoviceanu found in 1912 that the current criminal laws avoided having a definition of the offense and they are doing very well because the legislator has to avoid definitions[30].

Commenting on the definition of the crime provided in Criminal Law, Traian Pop is favorable to such a definition[31].

Similarly, N.T. Buzea believes that defining crime in criminal codes is a necessity for criminal science, and it is absolutely necessary for both interpreters and citizens to know what the crime is and what it is[32].

The European criminal doctrine, after finding that many European criminal codes do not contain a definition of this concept, considers that the solution of not providing a definition of the crime has the advantage of an open list of developments in the criminal doctrine concerning the different models on the basis of which the offense can be defined. The contrary solution could, in the author's opinion, lead to the "freezing" of legal literature, which will hardly endure the temptation to anchor in the wording chosen by the legislator[33].

A first legal definition of the offense is found in the Sturza Code of 1826: "The criminal act is any deed prohibited by the law or not following the indications of the law.[34]" In other words, the offense is the act or inaction provided by criminal law.

The Criminal Code of 1865 and the Criminal Code of 1936 did not provide for definitions of the offense, leaving this task exclusively to doctrine.

With the adoption of the 1968 Criminal Code, the Romanian legislator's orientation is changing in the sense that in Art. 17 par. (1) the offense is defined as an act that presents

[29] R. Gassin, op. cit., p. 39.
[30] I. Tanoviceanu, Curs de drept penal, vol. I, Atelierele Grafice Socec&CO. sa., Bucureşti, 1912, p. 163.
[31] Tr. Pop, Drept penal comparat, Institutul de Arte Grafice <<Ardealul>>, Cluj, 1923, p. 190.
[32] N.T. Buzea, Infracțiunea penală și culpabilitatea, Tipografia Sabin Solomon, Alba Iulia, 1944, p. 14.
[33] F. Streteanu, Tratat de drept penal, Partea general, vol. I, C.H. Beck, București, 2008, p. 327.
[34] I. Tanoviceanu, op. cit., p. 162.

a social danger, comitted with guilt and provided by the criminal law. The explanation of this change is found concisely but clearly in the paper "The New Criminal Code and the Previous Criminal Code – Comparative Presentation": "The provision in Article 17 states that they are the essential features of the offense." This provision enshrines the material conception of a crime, according to which only the offense which poses a social danger is a criminal offense and is provided for by the criminal law. Such a provision is not provided in the original version of the previous Criminal Code, which implicitly accepts the formal design of a crime.

Later, in 1949, it was introduced at Art. 1 a new paragraph of final care devoted to the material conception of the offense[35].

Therefore, the provision of a definition of an offense in the 1968 Criminal Code is not accidental, but corresponds to the adoption of a new concept, material, on the offense, and aims to guide the legislator in drawing up criminal norms or decriminalizing facts, but was also of a nature to delimit the sphere of criminal offense from other forms of legal illicit[36].

Under the terms of this legal provision, the doctrine refrains from developing new definitions, with the definition given by the legislator being preferred[37].

Law no. 301/2004, a Criminal Code that never entered into force, kept the material conception of the crime, defining in art. 17 similarly, the offense is the act provided by criminal law, which presents social danger and is commited with guilt.

In this wording, the social danger no longer occupies the first place, but the second, giving priority to the requirement that the act be provided by the criminal law, the guilt being mentioned later, since the guilt involves the objective existence of an act provided by the criminal law[38].

The editors of the 2004 Criminal Code did not motivate the remaining on the positions of the material definition of the crime.

Only with the adoption of the Criminal Code in force, by Law no. 286/2009, will we return to the formal conception of the definition of the crime.

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The incidence of the principle of non-retroactivity in the case of the decisions of the Constitutional Court of Romania (CCR)

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Abstract

The principle of non-retroactivity of laws and its exceptions regarding more favorable criminal and contraventional law were raised to a constitutional level. Also, the law concerning organization and functioning of the Constitutional Court of Romania (CCR) provides that its decisions are mandatory only for the future.

In spite of all these, CCR decisions can also have, directly or indirectly, retroactive effects. These mainly concern decisions solving constitutionality exceptions raised in courts during judicial procedures finalized before completion of constitutional control, but also, to some extent, procedural laws which change due to the need for alignment to constitutional provisions during a trial.

What happens, though, with the provisions of criminal law abrogated as a result of acknowledging their unconstitutionality or due to the inaction of the legislative forum for accomplishing conformity to the Constitution? Also, what happens with "tamed" criminal laws under the impact of CCR decisions? Of course, they fall under the impact of the "*mitior lex*" principle and will become retroactive.

Is the solution the same when CCR does not *de plano* declare unconstitutionality of a law but states that a certain interpretation of the latter, of the many possible, is contrary to the Constitution? We believe that yes, the effects of a so-called "interpretation" decision being the same with those of a standard decision of "acknowledging" unconstitutionality.

Even if CCR decisions are not retroactive, could they be considered as new evidence during an action of reviewing a final judicial decision? Our opinion is affirmative.

What will be the incidence of CCR decisions pronounced for solving a legal constitutional conflict? In principle, they also apply only to the future. But what happens with acts committed by breaching Constitution within that conflict and which are hit by absolute nullity? The CCR decision is not retroactive, but nullity is; and absolute nullity cannot be covered in any way but it can be invoked at any time. Are the legal provisions

placing a time limit upon invoking these nullity causes constitutional? The answer can be positive only if we are talking about recommendation deadlines.

Finally, what is the relation between these retroactive manifestations of CCR decisions, the principle of legal relationships' stability and the need for respecting human rights? Any retroactivity questions stability. The balance tilts in favor of one or another in relation to the protection of human rights. All retroactive measures that can be conceived on the basis of and following CCR decisions must and can be conceived only as reparations of human rights directly or indirectly violated by legislative or institutional/administrative actions which, through their unconstitutionality, affected fundamental human rights. That is why, such remedies are provided only to victims of such breaches and function under the principle *non reformatio in pejus*.

Keywords: retroactivity, non-retroactivity, unconstitutionality, more favorable law, Constitutional Court, human rights, stability of legal relationships, decriminalization, absolute nullity.

1 The principle of law's non-retroactivity in Romanian law

1.1. The law's non-retroactivity is consecrated by Article 15 (2) of the Constitution of Romania. Thus, as it is well noticed in the doctrine, raised to a constitutional level "the principle of law's non-retroactivity acquires effects and content totally different from the same principle consecrated by civil law… even if, essentially, the ideas overlap: the law only provides for the future"[1] [Stângu, L., *Neretroactivitatea legilor în statul de drept* (*Non-retroactivity of laws in the rule of law*), communication to the scientific session of the Bucharest Ecological University Law School on 20 November 2009, in Buletinul CCR no. 1/2010, p. 49].

Within the principle of law's non-retroactivity several opposing interests are clashing. On one hand, the need for predictability of the legal norm action and for security of legal relationships. On the other hand, the need to adequate the norm to the temporal evolution of social realities it is called to manage and order [2] [Puskas, V-Z and Chiorean, I.M., *Principiul neretroactivității legii civile – doctrina reflectată în jurisprudența Curții Constituționale* (*The principle of civil law's non-retroactivity – doctrine reflected in the Constitutional Court's jurisprudence*), Buletinul CCR no. 3/2015, p. 13]**, but especially to proceed so that stability does not get into collision with human rights. The rule marked prevalence of the former; exceptions tend to favor the latter.**

"In Romania, the principle of civil law's non-retroactivity was mentioned in the Civil Code of 1865, in Article 1 of the Preliminary Title, 'On the general effects and application of law in general', as follows: 'The law does not provide but for the future; it cannot have retroactive effects', according to the French Civil Code of 1804. The principle is exclusively regulated by the Civil Code and the obligation of ensuring the law's non-retroactivity exclusively belonged to the judge of each case; the legislator could make exceptions to it during the legislative activity." [2] [Puskas, V-Z and Chiorean, I.M., *Principiul neretroactivității legii civile – doctrina reflectată în jurisprudența Curții*

Constituționale (*The principle of civil law's non-retroactivity – doctrine reflected in the Constitutional Court's jurisprudence*), Buletinul CCR no. 3 /2015, p. 13].

After the adoption of the 1991 Constitution, constitutionalization of that principle made the "legislator bound, during the legislative activity, to respect the law's non-retroactivity"[2] [Puskas, V-Z and Chiorean, I.M., *Principiul neretroactivității legii civile – doctrina reflectată în jurisprudența Curții Constituționale* (*The principle of civil law's non-retroactivity – doctrine reflected in the Constitutional Court's jurisprudence*), Buletinul CCR no. 3 /2015, p. 13] (the only exception allowed concerning the more favorable civil or contraventional law). "Before raising non-retroactivity to the level of constitutional principle… it was inoperative and non-opposable to the supreme structure having to elaborate the law." [3] [Stângu, L., *op. and loc. cit.*; Cosmovici, P., coord., *Tratat de drept civil* (*Civil Law Treaty*), vol. I, General part, Ed. Academiei, București, 1989, p. 118].

1.2. The doctrine allows without exception the relation between the law's non-retroactivity principle and protection of human rights, as it is unconceivable that a person is requested to abide by a law that did not exist at the time when he/she acted in a certain manner. "If an individual, who submits to the provisions of law, could be disturbed under the pretext that a subsequent law changed the terms of regulation existing before, the law would lose any power, as nobody would dare to fulfill its provisions, for fear that some acts, be they even legitimate, could be contested afterwards by a new and unknown law." [4] [Terre, F., *Introduction generale au droit* (*General Introduction into Law*), ed. 5, Dalloz, Paris, 2000, p. 468].

For identity of reason, Romanian law consecrated non-retroactivity also concerning decisions in which CCR establishes unconstitutionality of some laws. Until such a decision, the law is presumed to be consistent with the Constitution and its subsequent alignment to the constitutional norm operates only for the future.

The question remains about what happens to the effects of acts contrary to the Constitution committed by state institutions involved in legal conflicts of a constitutional nature solved by CCR decisions. Are the CCR decisions operating only for the future in their case, too? We will come back concerning this aspect in a following section.

2 Exceptions from the law's non-retroactivity principle

2.1. Within the same article proclaiming the law's non-retroactivity, the 1991 Constitution of Romania also introduces the principle of retroactivity concerning more favorable criminal or contraventional law (*mitior lex*), as an exception to the general principle. Thus, both principles (the general rule and the criminal law exception), previously regulated by various organic laws, were raised together at the level of constitutional norm, so that they should block attempts of abusive derogations from them through normative acts inferior to the Constitution.

2.2. ***But who is favored by the more favorable criminal law?***

It is obvious that the more favorable criminal law cannot but "favor the offenders". But this cannot be a constituent element of the favoring the offender crime, as some lawyers and non-lawyers rushed to claim.

Any more favorable law puts into practice the abovementioned constitutional norm and this cannot be considered a criminal offence in any circumstance.

While a legislative project does not produce any legal effects before being adopted, it cannot favor or disadvantage anyone; not even the offenders. As any law is adopted following a vote in the Parliament – or in Government, in cases of legislative delegation – censoring a vote by judicial action would mean to subject the elected legislative assembly to the control of appointed magistrates, which is totally unconstitutional.

The only form of control provided by the Constitution is that of CCR, which aims to establish conformity between current legislation and the fundamental law. Members of Parliament are not criminally punished in this case either for unconstitutionality, nor are they forced to change their option; at most the unconstitutional provisions they voted could remain without consequences.

2.3. Criminal sanction cannot become an act of vengeance against people having deviating behaviors, but is only a means of their social recovery and reintegration. The punishment is applied only when the deed presents a social danger of a certain nature or intensity and it has to be proportional with the dimension of that danger. When a deed has all the constituent elements required by law for being qualified as a criminal offence, but the practical social danger it generates is minor (for example stealing one bread or offering a jam jar as bribe), it is no longer punished.

In time, a deed which used to be dangerous can totally or partially lose its damaging effect for the public order, balance and safety. In such situations, it is totally or partially decriminalized. On the contrary, if a deed, which used to have low gravity, becomes threatening for social interest according to the context, it can be incriminated or criminalized, according to each case.

Because we start from the impact of the deed and not from the offender's personality, immediately after a deed stopped having a criminal character or received a lesser punishment, the person previously committing it does not have to bear the treatment of the old law anymore.

On the other hand, if the new criminal law is harsher, it does not make sense for it to become retroactive, as the danger incurred by the deed is the one at the date of its commitment. Additionally, the offender could not know that what was legal then would become illegal later. If he committed then the deed which is only now incriminated, he did it without any guilt. [4] [Terre, F., *Introduction generale au droit* (*General Introduction into Law*), ed. 5, Dalloz, Paris, 2000, p. 468].

3 The Constitutional Court: neither appeal body nor legislative chamber

3.1. One of the most debated subjects, on the occasion of writing the 1991 Constitution, was that concerning the laws' constitutional control. The alternatives were to conceive a parliamentary procedure by which the parliament itself could check conformity of laws in process of adoption to the Constitution, leaving to competent judicial courts the decision regarding unconstitutionality exceptions raised by disputing sides before them; creating a Constitutional Committee, as is the case in many western democracies, which would perform control with administrative tools; or establish a *sui generis* institution with special authority, called Constitutional Court. The last formula was recommended and warmly supported by the great French constitutionalist Robert Badinter, also with the hope that he could do in Romania what he had not done in France. Ultimately, the formula of the Constitutional Court was adopted. [5] [Urs, R.I., Duțu, M., Severin, A. (coord.), *Enciclopedia juridică română* (*The Romanian Legal Encyclopedia*), vol. I, Ed. Academiei and Ed. Universul Juridic, București, 2018, p. 1020 and following].

3.2. During the discussion related to the statute of the Constitutional Court two major dilemmas were emphasized.

The first concerned the power ratio between Court and Parliament. Could the Court's decisions, an institution which was not formed following direct elections, mandatory for the Parliament, resulting from direct and universal suffrage? The Parliament was the supreme body by which the people exercised its power. It was – as it should also be today – the synthetic expression of popular will and the essential image of the nation. It was therefore not possible that appointed members of the Constitutional Court impose their point of view over the elected Parliament and give it an imperative mandate; not even citizens had the right to give such a mandate. As a consequence, it was decided that Parliament could overcome the Constitutional Court's position if an absolute majority of MPs decide so.

Then, the democratic ideological purity made place to oligarchic political opportunism and the Constitution was revised in the sense in which ***decisions of the Constitutional Court became mandatory for Parliament. But this does not mean that these decisions are replacing the unconstitutional law, but only prevent its enforcement until the Parliament aligns it to constitutional provisions.***

3.3. The second dilemma concerned enforcement in time of the Constitutional Court's decisions.

The law's non-retroactivity serves predictability of the rule of law. People will establish more easily legal relationships and will fix more easily their attitude knowing that the law governing the birth of their acts or deeds continues to be valid until the exhaustion of their effects.

Non-retroactivity of decisions taken by the forum controlling laws' constitutionality is meant to safeguard stability of legal relationships. This means that the legal relationship emerging as a result of a manifestation of will, guided by a certain law, be it even unconstitutional, will remain under its regime until the date when its unconstitutionality

is ascertained. Thus, sides to this relationship will be sure that nothing from what they offered, did or did not do, is not put again into discussion and revised for the reason that the law which they respected was not in conformity with the Constitution.

The principle adopted for pragmatic reasons, related to the stability of legal relationships between citizens, state and citizens and state institutions, was therefore that the Court's decisions operate only for the future. The exceptions concerned decisions referring to unconstitutionality issues raised during a concrete judicial trial which could benefit the very people which raised them, even when the Court decided after the trial ended.

This does not mean that the law had previously been constitutional, as it is obvious unconstitutionality existed from the beginning, but only that Parliament is not bound that, once the constitutionality deficit is remedied, it also repairs effects already produced by the unconstitutional law whose previous enforcement is presumed to have been made in good faith. (A presumption which is not absolute, but resists until the opposite evidence is provided.) Attempting revision of all legal acts born from a law's entry into force until ascertainment of its unconstitutionality would have meant both maintaining a state of uncertainty concerning validity of those acts, before constitutionality control, and, after that control, a disturbance of social relationship built in good faith on their (constitutional) legality presumption. A presumption canceled by the decision of the Constitutional Court, which ascertains unconstitutionality of that law.

All this construction is shaken when non-retroactivity of the Court's decisions hurts the feeling of justice. ***Non-retroactivity does not mean and cannot mean injustice, inequity and discrimination.*** Such situations emerge when unconstitutionality manifests in the field of criminal and criminal procedural law. In those fields the biggest collision can take place between the principle of legal relationships' stability and that of respect for human rights. [6] (Lang, M., *Limitation of Temporal Effects of CJEU Judgements: Mission Impossible for Governments of EU Member States*, in *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in national case-law* (coord. J. Gerards, J. Fleuren), Ed. Intersentia, Bruxelles, 2014, p. 115).

3.4. The Constitutional Court is not part of the judicial system. In any case, it is not an appeal court which checks upon law's interpretation by courts of first instance and appeal. It is also not a cassation court able to abolish unlawful court decisions. Unlike courts of justice, which apply the law as it, without having the right to criticize it, the Constitutional Court censors the law and stops its enforcement when it is not in accordance with political options consecrated by the "law of all laws". To this end, it is closer to the legislative power than to the judicial one.

The judge of a court of justice is the only one having competence of interpreting the law with mandatory force and draw logic conclusions resulting from comparing the major premise of juridical reasoning (legal norm) with its minor premise (state of fact). Even when the interpretation concerns a general legal issue and not a concrete case, the only competent authority for formulating it is the High Court of Cassation and Justice and not the Constitutional Court.

The interpreting decisions of the Constitutional Court are in fact decisions concerning constitutionality/unconstitutionality. **The judge of the Constitutional Court does not relate the law with the facts, but the law with the Constitution, ensuring**

convergence of the legislative system with the political system synthesized in the "fundamental law". He does not sentence the legal subjects, but "sentences" the law (sic!). [7] (Also see Ciobanu, A.S., *Deciziile Curtii Constitutionale* (*Decisions of the Constitutional Court*), Ed. Universul Juridic, 2010).

A law susceptible of an interpretation, from the several possible, which puts it into conflict with the Constitution, is unconstitutional in that interpretation and, therefore, must be changed in order to make that interpretation impossible. The decision establishing this is not an "interpretation decision" but an unconstitutionality decision, which has the same effects as decisions ascertaining pure and simple unconstitutionality of a law in all its possible interpretations.

3.5. But the Constitutional Court is neither a chamber of Parliament. It does not legislate, but only censors the legislative act and, according to each case, leaves laws without effect, blocking their enforcement. In Romania, this blocking initially has a provisional character (for the first 45 days from ascertaining unconstitutionality, during which the legislator can put the law in agreement with the Constitutional Court's decision), and then a permanent character (lack of harmonization leads to caducity of the unconstitutional law).

If it was a legislative body, the Constitutional Court could directly alter or repeal laws. As this is not the case and, on the other hand, because the imperative mandate is forbidden it can only initiate a parliamentary procedure. During this procedure, the Parliament can choose between amending the law, which is its decision and not the Constitutional Court's decision, and repealing the law, which it can decide (and not the Constitutional Court) even by passive attitude.

3.6. ***The Parliament's intervention as a result of the decision formulated by the Constitutional Court is under the incidence of the constitutional principle of the law's non-retroactivity, with its exception concerning more favorable criminal and contraventional law. Therefore, it is not the decision of the Constitutional Court that makes things retroactive, but the decision of the legislative which establishes what consequences are attached to the first.*** Otherwise, there would be a situation of ascertaining a constitutional inadvertence concerning the issue of action in time of the Constitutional Court's decisions and the Parliament's normative decisions, with the absurd effect that people committing the same deed at the same date could some be criminally convicted and others acquitted, if by chance, in the case of the first, courts would rule before a decision of the Constitutional Court, while in the case of the latter courts would rule later.

A fundamental law principle presumes in an absolute manner that the legislator cannot be absurd, unfair or negligent. At the same time, the law must always be interpreted in the meaning producing effects and not in the one that would lack consequences; and those effects cannot be illogical, discriminatory or inequitable. To the extent to which those being applied a law would have a common interest, it is also presumed that the legislator wanted to protect (positively discriminate) the weak one (marginalized, excluded, vulnerable) against the strong one or the one fighting to avoid loss against the one that seeks to get a benefit. Even if reality were different and the legislator adopted unwise norms which, applied strictly and understood literally, lead to

inequities, blockages or tensions in social relations, the test of such a situation is inadmissible; things have to be improved in the act of evaluating, interpreting and applying the law concretely. Otherwise, facts would revolt against the law.

Starting from these intrinsic principles of our Constitution, it is to conclude that ***whenever harmonization of laws with Constitutional Court's decisions (regardless of what kind of decision are concerned or what meaning others would like to attribute to them) leads to a more favorable criminal norm, this norm is retroactive. Obviously, to the extent to which the Parliament chooses to remain passive and not proceed with the abovementioned harmonization, it is presumed that it wanted to end that norm as being outdated. To this end, referring to criminal and contraventional law, we can talk about decriminalization as a consequence of automatic but also assumed caducity.***

3.7. As we have previously mentioned, a law is not unconstitutional only from the moment the Constitutional Court ascertains its unconstitutionality. It is unconstitutional from the very moment of its adoption (of course, to the extent to which the same Constitution was in force at both moments).

From this point of view, the Constitutional Court's decision has the character of a "constitutional informality certificate", amounting to evidence. As this "evidence" did not exist at the date of a judicial trial, it can constitute the legal ground for a revision action.

Those who claim the law must not be proven, as its knowledge is presumed ("nobody can invoke not knowing the law"/"*nemo censetur ignorare legem*"), can be answered that this does not concern the content of law whose interpretation and enforcement is the judge's task ("give me the facts and I will give you justice"/"*da mihi factum, dabo tibi ius*"), but its conformity with the Constitution, which can be censored only by the Constitutional Court.

Following an abnormal formulation imposed by the European Commission through the Cooperation and Verification Mechanism (CVM), raising an unconstitutionality exception and summoning the Constitutional Court do not interrupt the course of trial within which it was formulated and the court can even pronounce an unconstitutional judgment, of course, under the resolution condition of ascertaining unconstitutionality by the constitutional control forum. ***The incidence of the resolution condition cancels the* ab initio/ex tunc *unconstitutional judgment to the exclusive benefit of the one raising the exception, but acts as a revision ground for all verdicts based on provisions contrary to the Constitution. This especially happens when unconstitutionality has the consequence of breaching fundamental rights, such as freedom.***

Unfortunately, on the basis of an *ad litteram* interpretation of law, the jurisprudence currently goes in an opposite direction: decisions of the Constitutional Court are not accepted as new evidence within the extraordinary appeal procedure.

3.8. Such legal reasoning must be set at the foundation of solving controversies related to incrimination/decriminalization of the abuse of office. Saying that the Constitutional Court's decision pronounced concerning the "abuse of office" is just an "interpretation" would mean confirmation of illegality. Anyhow, saying that the definition of abuse of office provided by the Criminal Code "is constitutional to the extent to which it is interpreted like this..., is the same with saying that the definition is unconsti-

tutional to the extent to which... it is interpreted otherwise". Or, ***as the judge does not submit but to law and the Constitutional Court's decisions do not automatically change the law, as they are "generally binding" only for the legislator who was negligent concerning the Constitution, the only possibility in order to provide them a meaning would be either to turn them into laws or abolish the unconstitutional texts (even passively), leaving then the principle of more favorable criminal and contraventional law to function.***

4 Formal and causal in the legal logic

4.1. In a judgment pronounced by the Bucharest Tribunal, 1st Criminal Section, one can read the following text: "Even if the decision no. 450/2016 of the Constitutional Court of Romania produces *ope legis*, in the conditions stipulated in Article 147, alignment 1 of the Constitution, a cessation for the future of provisions declared unconstitutional (incurring, in the case of trials which are not finally judged, the analysis of changing incrimination conditions in the process of identifying the more favorable criminal law, according to Article 5 of the Criminal Code), it cannot be considered as equivalent to a criminal law of decriminalization in the meaning of Articles 4 of the Criminal Code, with a retroactive enforcement, as it cannot substitute by itself the very will of the legislator (original – Parliament, or delegate – Government) to partially decriminalize abuse of office by removing from the jurisdiction of Article 297, alignment 1 of the Criminal Code normative acts with power inferior to laws, ordinance or emergency ordinance, a will expressed only by aligning the unconstitutional criminal provisions to the provisions of Constitution".

The court recalls that Article 297, align. 1 of the Criminal Code is contrary to the provisions of the Constitution of Romania, to the extent to which, by its enforcement, someone is punished for committing an abuse of office without breaching a law, ordinance or emergency ordinance. Not only that it is the CCR opinion, but also common sense tells that an action which does not breach a law cannot be illegal, as a deed that the law does not call an offence cannot be an offence ("*nullum crimen sine lege*").

From this point, it is going further stating that the unconstitutional legal norm cannot be a ground for convicting anyone, after its unconstitutionality has been officially ascertained. This happens not only because common sense (a minimal formal logic) imposes it, but also as Article 147, alignment 1 of the Constitution provides it.

The judgment also adds that a CCR decision is not equivalent to changing the unconstitutional law. This is also true, as CCR cannot replace the legislative power, the (original or delegate) legislator. Aligning the criticized law with the Constitution's text, as they were interpreted and confronted/compared by CCR, is, thus, the Parliament's (or, according to the case, the Government's) attribute.

When harmonization takes place by the manifestation of will corresponding to the legislator, the criminal law thus corrected will retroactively apply to all those criminally convicted by the effect of the old unconstitutional legal text, on the basis of retroactivity of the more favorable criminal law, consecrated both by the Constitution and the Criminal Code. Until then, as judges of the Bucharest Tribunal conclude, the unconstitutional criminal law, unchanged by the legislator – in other words without a new criminal law – cannot have different effects. The victims of

unconstitutional convictions remain, therefore, convicted and their appeals against law execution are rejected.

4.2. This is an unquestionable logic and legal argument reaching an apparently incontestable conclusion. However, it raises a small problem: ***the conclusion of the analyzed criminal judgment leaves in prison some innocent people, thus canceling their fundamental right to freedom. Does the resolution of such a problem exceed the judge's competence, which would only concern enforcing the law and not evaluating the moral, social, economic and other effects of its enforcement?!***

Exactly in this meaning, ever since the Middle Ages, at the intersection of Roman law with Christian religion, a rhetorical question emerged: "*Quid leges sine moribus?*" ("*What is law without morality?*"). It was thus suggested that a well interpreted and enforced law which reaches shocking conclusions for the society's moral conscience does not have any value and is not good. Along this reasoning, the question is: "How just can be a decision resulting from an apparently impeccable legal reasoning, but having as effect an obvious inequity?"

The succession of laws also allows the legislator to tacitly change provisions declared unconstitutional. A text which CCR found as inconsistent with the fundamental law is abolished in 45 days from this conclusion if the legislator did not alter it until then. ***Such an abolishment by the effect of a law, and not of the CCR decision, operates while the legislative power manifested its will not to act in another direction.*** As a result, ***decriminalization – total, partial or concerning only the ambiguous thesis susceptible of unconstitutional interpretation – results from the legislator's will and, according to the law, as this concerns facts that are no longer criminally punishable, operates retroactively.***

In another case, judged by a panel of the High Court of Cassation and Justice (ICCJ), acknowledging the situation when, for an identical deed committed at the same time, an offender was convicted to prison while the other was acquitted, the difference being explained by the event that between the conviction date of the first and the conviction date of the second CCR established that the legal text at the origin of their incrimination had been interpreted and enforced against constitutional norms, refused to set free the one unjustly incarcerated for the reason that the CCR decision, according to the law, is not retroactive; as if a judgment which shocks common sense can be legal, or as if the Romanian legislator is so absurd that he wanted a judicial decision to be valid even if its is clearly unjust, so that law enforcement was unpredictable, depending on hazard, or people convicted by breaching the Constitution remained to fulfill an undeserved sentence.

Between two alternative legal reasoning, a real judge will choose the one leading to moral (equitable) consequences, susceptible to safeguard justice and social harmony and not the one destroying innocent people, affecting public conscience, generating social fears and blockages, creating confusion of values. Otherwise we cannot talk about the rule of law anymore, but about a "rule of madness". [8] (Popellier, P., Verstraelen, S., Vanheule, D., Vanlerberghe, B., *The Effect of Judicial Decisions in Time: Comparative Notes in the Effect of Judicial Decisions in Time*, Ed. Intersentia, Bruxelles, 2014, p. 54 and following).

5 A legal aberration: null legal decisions with valid effects

5.1. The problem of retroactivity also concerns CCR decisions solving constitutional legal conflicts between state institutions. In such cases, it can be ascertained that some acts, being unconstitutional, are absolutely null and, as a result, they can no longer produce effects. Normally, the affected people must be reinstated in the situation before the occurrence of acts affected by constitutionality flaws.

The current Romanian procedural legislation, as well as the jurisprudence based on it, nevertheless adopted an opposite opinion. The first imposes temporary limits to the right of invoking nullity by means of an appeal for annulment. The latter adds the argument of CCR decisions' non-retroactivity. We will further analyze the arguments and effects of such approaches starting from a concrete case.

5.2. Former Senator O.I. and former minister D.S. lived in the same cell at the Jilava Penitentiary. There, they found out that the CCR Decision no. 685 of 7 November 2018 solved the constitutional legal conflict between the Parliament of Romania, on one side, and the High Court of Cassation and Justice (ICCJ), on the other side, stating that **from 1st February 2014, the date when the New Code of Criminal Procedure (C.p.p.) entered into force, and until 29 November 2018, the date of publication of the abovementioned Decision in the Official Journal no. 1021/2018, all – I repeat ALL – five judges panels were illegally formed.**

As the breach of legal provisions concerning composition of judging panel is sanctioned with absolute nullity, according to Article 281 of C.p.p., it became obvious that verdicts on the basis of which the two persons were in detention became null. The CCR had raised this rule to a constitutional level by stating that "**respect for legal provisions concerning composition of judging panels expresses *a public order necessity, whose breach leads to absolute nullity of acts pronounced by the latter***". As a result, the ground for annulment of conviction decisions concerning D.S. and O.I., both pronounced by five judge panels, was double fold: legal (C.p.p.) and constitutional (Constitution of Romania).

In these conditions, the two persons formulated, on the same day, appeals for annulment in which they demanded ICCJ that, on the basis of Article 426, letter d, of C.p.p. (according to which appeal for annulment can be initiated in case the *appeal court was not formed according to the law*), starting from ascertaining absolute nullity of conviction decisions, to order their placement in the legal situation before judgment of the appeal, its re-judgment and, until a legally and constitutionally valid decision was pronounced, their release. **ICCJ, in the same panel and during the same session, accepted the request of former Minister D.S., ordering his release from the penitentiary, but rejected the demand of Senator O.I., keeping him in detention.**

5.3. The rejection of former Senator O.I.'s appeal was pronounced on the ground of lateness. Indeed, according to Article 428 of C.p.p., unlike other cases in which the appeal for annulment is justified, this extraordinary appeal procedure cannot be pursued but in maximum thirty days from the appeal decision communication to the convicted person. Or, by hazard, Mr. O.I. was communicated that decision a year before Ms. D.S.

But is hazard a part of the justice process?! Then, when law is enforced according to hazard, it is unpredictable; the law's unpredictability is a constitutional flaw which cannot be excused by invoking the principle of legal relationships' stability.

In this case, this obviously regards the hazard of communicating a judicial decision at a date or another, outside any control of the concerned person, a simple citizen under justice. Because **only the hazard made it that D.S. was communicated the conviction decision pronounced by an illegally formed judging panel a year later than it was communicated to O.I.** ***Can this hazard cover up for the absolute nullity of O.I.'s conviction?!*** Obviously not! And still … **No logic and legal reasoning shattered the soul of ICCJ judges in order to tell them that** ***a legal syllogism leading to an absurd and immoral conclusion, such as the one discriminating between former Senator O.I. and former Minister D.S., cannot be correct.***

5.4. Such a manner of enforcing the law in the case of appeals for annulment concerning decisions pronounced by ICCJ panels of five judges between 2014 and 2018 violate constitutional provisions concerning equal access to justice. We are also talking, in this context, about breaching the fundamental right to a fair trial as well as the one concerning equality before the law. About what equality can we talk when absolutely null decisions remain to produce effects in the case of some and stop their effects in the case of others?

This led to ***discrimination between persons which were communicated the conviction pronounced by illegally formed panels, more than 30 days before publication of the CCR Decision uncovering the illegality*****,** and which missed the deadline provided by Article 428 of C.p.p. related to Article 426 of C.p.p. concerning formulation of the appeal for annulment, ***and persons who received the communication of conviction less than 30 days before that deadline*** and who could invoke nullity in order to resume the appeal; this happened while none of the concerned persons had a procedural fault for exceeding the legal deadline regarding appeal for annulment, as ***all*** conviction decisions had been declared null by CCR.

It is true that CCR decisions do not have retroactive effects, but nullity does; this is the essence of that institution. Absolute nullity is absolutely retroactive.

The Criminal Code's provisions are limiting the exercise of the right to demand ascertainment of absolute nullity by means of an appeal for annulment. But ***absolute nullity is characterized by the very fact that it can be invoked at any time and by anyone. This results from the event that the value defended by annulment of the act violating it belongs to the public order sphere.*** CCR says it itself: the illegal formation of five judge panels is bound by absolute nullity, as their establishment and composition are related to public order.

Can defense of public order be limited in time?! Not at all! This is stated, apart from the Constitution of Romania, in all the science of law.

5.5. It is not possible that, among several null decisions affected by the same flaw, some stop producing effects, determining resumption of the flawed trial, while others still produce effects… although they are null. *Quod nullum este nullum producit efectum*, is a general law principle and not only a material private law one. Especially since ***those treated differently did not have a different procedural behavior and the difference***

between the procedural situation in which they are was not determined by a relevant factor, but only by pure hazard.

Against such discrimination there is even a pronouncement of CCR in the paragraph 14 of Decision no. 67 of 26 February 2015 that, "according to its jurisprudence, *the principle of equality of rights involves establishment of an equal treatment for situation which, according to the pursued purpose, are not different"*. (See to this end also the Decision of the Constitutional Court Plenary no. 1 of 8 February 1994, published in the Official Journal of Romania, Part I, no. 69 of 16 March 1994) "*The different treatment must be based on an objective and reasonable criterion."* (to this end, for example, we refer to: Decision no. 86 of 27 February 2003, Decision no. 476 of 8 June 2006, Decision no. 573 of 3 May 2011, Decision no. 356 of 25 June 2014).

The CCR Decision no. 89 of February 2003, on its turn, very clearly stipulates: "*The Court ascertains that reference to the date when the court judgment of conviction remained final, mentioned in the criticized text, creates the premises of a discrimination between people which, although they are in identical objective situations, benefit from a different legal treatment, which is contrary to provisions of Article 16, alignment (1) of the Fundamental Law"*. (See to this end also the CCR Decision no. 67 of 13 February 2003).

This solution is also in accordance with the jurisprudence of the European Court of Human Rights, according to which "*any difference of treatment, performed by the state between individuals in analogous situations, must find have an objective and reasonable justification"* (see Marckx v. Belgium Case, 1979).

6 Stability of legal relationships, recall in due time and human rights

6.1. The issue of retroactivity was also raised on the occasion of debates concerning adoption of a normative act (Government's Emergency Ordinance/OUG) by which people missing, from the communication of decisions pronounced by five judge panels in the period of their illegal and unconstitutional formation (2014-2018) and until the uncovering of their flaw, the deadline for introducing the appeal for annulment to be re-established the right of demanding annulment of decisions pronounced by such panels. Some denounce in this case a breach of the non-retroactivity principle.

According to the Constitution, only criminal law can have retroactive effects and not procedural criminal law. Procedural law is, as a rule, of immediate enforcement. But this sheds, nonetheless, a shadow of retroactivity towards procedural relationships under way, which begin following certain rules and end following others. (This happened a few years ago, when shortening the path from the final criminal decision from three to two jurisdiction levels made some defendants lose the right to appeal, while the judgment in first instance or appeal had already begun.)

In this case, one can believe that removing some time limits, during which a certain action could be undertaken, with the desired effect of recalling in due time those previously exceeding those limits, has the character of a retroactive procedural law legal provision. (The objection falls if the right to action for nullity is treated as material law and not as procedural law, a case in which the principle *mitior lex* becomes incident.) On

the other hand, if the legislative change would be justified by ascertaining the fact that this time limit is unconstitutional, it could still not operate for the past, as CCR decisions are not retroactive.

In the analyzed situation, however, what becomes retroactive is neither the CCR decision nor the Ordinance concerning recall in due time, but the absolute nullity which affects decisions pronounced by illegally formed courts. This rule is not the whim of a legislator, but the expression of a concept which was imposed for centuries and which made the right to defense, as an essential element of a fair trial, a component part of public order.

We would like to specify that public order is even more than the sum of constitutional norms. It is the essence of Constitution; it is what determines the specificity of a societal organization system. Its breach turns a system (in this case, democracy) into another (totalitarianism).

6.2. ***The individual right to a fair trial (therefore, judged by a competent court, according to law, which would offer all the guarantee of judges' independence, neutrality and objectivity) is related to the field of material law and not to procedural law. It is part of the human rights category. These rights have their source in the Constitution which also guarantees them.*** [9] (Maartje de Visser, *Constitutional Review in Europe: A comparative Analysis*, Ed. Hart, Haga, 2013, p. 73).

The action that tends to capitalize on such a right is, consequently, imprescriptible and the act that would violate it is absolutely null; this nullity can be invoked, in principle, at any time and by anyone.

6.3. Normally, any party to a trial judged by an illegal panel has the possibility of introducing an appeal for annulment of the decision pronounced by that court. The court which is intimated by that appeal researches and, according to each case, ascertains if indeed the panel adopting the attacked decision was or not legally formed, after which it decides in consequence. According to current law (which, setting a time limit for the exercise of the extraordinary appeal procedure for hypotheses ensuing the sanction of absolute nullity, is unconstitutional anyway), the court which is intimated for judging the appeal first has to check the fulfillment of formal conditions. "Admission in principle" is the result of a procedural control.

The case of five judge panels is, however, atypical. The nullity of decisions making the object of the appeal as already been ascertained (the fact of illegal formation concerning panels pronouncing decisions is unconstitutional – therefore, more than just illegal) by the CCR in a final and mandatory decision.

In such circumstances, checking upon formal conditions is no longer a previous procedural step, but one which, in an absurd legal context, has features of material law. This makes possible the enforcement of law principles such as equal access to justice. ***What is pursued and achieved is not resuming a trial but repairing the legal status damage to those who had their right to a fair trial violated, by re-establishment of their right and recovering it.***

Only the recall in due time of the Public Ministry, which had on individual right violated, as it did not hold such a right, would have the character of a procedural law with retroactive enforcement.

6.4. That is the reason for which ***resumption of trial must be granted to those whose individual right to a fair trial (legal in form and equitable in substance) and not to all participants to the trial.***

In the case of the first, some fundamental rights must be granted, which must have absolute priority. In the case of the others, the principle of legal relationships' stability prevails.

The first are outside any procedural fault. They could not know that those judging them were illegally appointed. The others – concretely, the Prosecution Office as official defender of legality – should and could have checked the legality of panel formation. They cannot invoke their own fault for acquiring a right.

On the other hand, victims have to recover a lost right. Those who, irrespective of what reasons, were acquitted have to defend a gained right. They are all worthy of the legislator's protection.

This does not mean, though, that the first will be certainly acquitted after resumption of trial, in full legality conditions. They will be allowed, as a result of recall in due time, only to resume trial. This event also allows enforcement of the *non reformatio in peius* principle, according to which nobody can worsen his legal situation by his own procedural action, mainly by exercising the right to appeal.

Finally, discrimination among victims, according to the criterion of an entirely random situation, without legal relevance and placed outside their control (fault), mainly the date when the conviction decision was written and communicated, is inadmissible as being not in accordance to the already mentioned respect for human rights, among which equal access to justice. CCR repeatedly pronounced decisions to this end, as we have previously showed.

Doing otherwise would additionally mean that some remain to execute a null conviction. This is a conclusion which, by its absurdity, invalidates any apparently documented and logically formal legal reasoning.

6.5. This is the only common sense interpretation of legal norms and principles, in the context of an extreme and totally extraordinary social situation in which we were brought by years of legislative nonsense and judicial abuses.

The law's non-retroactivity cannot be opposed to human rights. On the contrary, it must be put in service of their defense. **Because the person is the measure of all things and he is at the center of a judiciary system that must guarantee law is and remains, according to Celsus' expression, the art of good and equitable – –** ***jus est ars boni et equi.***

What is then the meaning of the thirty days deadline provided by Article, alignment 2 of C.p.p.? ***If this was a prescription or decay term, it would be unconstitutional. The court can therefore considered it as unwritten,*** as it also has to respect Constitution; CCR intervenes only when this is not the case. ***But, if it is a recommendation tern, then the judicial court cannot be hindered by it;*** especially taking into account the requirements of the specific case concerned here. This, it can be proceeded to resuming the judgment of the appeal by a legally formed panel, without calling upon CCR.

7 Conclusions

7.1. *Although, according to the* ad literam *legal interpretation, CCR decisions do not have retroactive effects, they have at least an indirect impact upon legal situations after their adoption.*

7.2. *While raising unconstitutionality exceptions does not suspend unfolding of the judicial trial, it means that CCR decisions pronounced after the end of those trials will determine a change of verdicts which, otherwise, enjoy the authority of trial, to the extent to which they were grounded upon provisions ascertained to be inconsistent with the Constitution.*

7.3. *Whenever CCR ascertains unconstitutionality of procedural law legal regulations and, consequently, those norms change, as procedural provisions must be immediately enforced, it results that trial started under the empire of some procedural norm will end under the empire of a changed one, even if this affects the exercise of some procedural rights previously born. In such situations, we believe that the judge has, nevertheless, the capacity of adapting enforcement of the modified law in such a manner that it does not lead to a breach of some human rights and, thus, to an unfair trial.*

7.4. *Ascertaining unconstitutionality of a law by CCR, which is neither a legislative body not a judicial court, while before this ascertainment that law benefited of a constitutionality presumption, can be considered as a fact and, therefore, as a new evidence justifying introduction of an action to review a final judgment.*

7.5. *CCR's "interpretation decisions", which establish that a legal text, in principle according to the Constitution, is susceptible of an "unconstitutional" interpretation, impose that decisions of ascertaining unconstitutionality lead to correction of that legal text, so that any possibility of a faulty interpretation is eliminated. If the eliminated interpretation allows the existence of more favorable interpretations of that text, in criminal and contraventional matters these interpretations are retroactive similarly to the more favorable criminal and contraventional law.*

7.6. *Whenever, following a CCR decision, the Parliament by law or the Government by ordinance do not change the law ascertained to be not in accordance with the Constitution, it is, according to each case, abolished or changed by removal of the unconstitutional part, by virtue of law. If this leads to a more favorable criminal or contraventional regulation, it becomes retroactive.*

7.7. *If the Parliament by law or the Government by ordinance change or abolish, according to each case, a law ascertained by CCR as unconstitutional in order to ensure its conformity with the Constitution and if thus a more favorable criminal or contraventional law results, it becomes retroactive. In this hypothesis, what becomes retroactive is not the CCR decision, but the more favorable criminal or contraventional law, by enforcing constitutional exceptions from the principle of law's non-retroactivity.*

7.8. *When the CCR decision has the object of solving a constitutional legal conflict between state institutions, to the extent to which it is ascertained that some acts of those institutions are null, those acts will be retroactively abolished, concerned parties being placed in the situation before birth of those acts. In these cases, what becomes retroactive is not the CCR decision, but nullity. When absolute nullity is concerned, invoking it cannot be limited in time. Any legal deadline limiting it cannot be but a recommendation.*

7.9. *The ground for justifying the retroactive impact of CCR decisions, as an exception both to the principle of law's non-retroactivity and to the rule of CCR's decisions' non-retroactivity, is respect fro human rights which prevail over the principle of legal relationships' stability. The law's non-retroactivity, as a constitutional principle, was conceived precisely for protecting fundamental human rights in the dimension concerning law's predictability and fair trial. When enforcement of this principle turns against its purpose, retroactivity becomes a necessary remedy for putting the means in the service of the purpose.*

7.10. *Grounding retroactivity (be it indirect or unfit) of CCR's decisions upon the need to respect fundamental human rights, leads to the consequence that this exception is granted only to those whose fundamental rights were breached and who attempt to re-establish them. The legal actions available to this end will therefore be governed by the* non reformatio in pejus *rule.*

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Waiver of the punishment and prosecution

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Summary

By means of the adoption and entry into force of the penal Code and criminal Procedure on 1 February 2014, the legislature sought to meet the requirements for the creation of a modern criminal liability framework.

The waiver of punishment appears as an element of novelty, through which the court may sanction offences denoting a low degree of danger.

The waiver of prosecution is the solution which may be ordered by the prosecutor when he considers that the defendant is not justified.

The waiver of the punishment and the waiver of prosecution carry a number of common characteristics and several distinct traits that give rise to serious controversy over the framework in which these solutions can be arranged by Court and the prosecutor.

Keywords: waiver, punishment, criminal trial, prosecution.

1 Introduction

The Legislature governed in the penal Code and the Code of criminal Procedure two legal institutions having similar effects and which may be ordered by the court at the end of the judgment and by the Prosecutor upon completion of the prosecution Criminal offences, waiving of the penalty and waiving the prosecution.

The waiver of the sentence is found in article 80-82, Section 3, Chapter V, called the Individualization of the sentences in Title III, entitled Punishments of the General Part of the New Penal Code.

The waiver of the application of the sentence is a measure which the court may order, consisting in the waiver of the establishment and application of the prison sentence or the fine in respect of the defendant who has committed a criminal offence, for The purpose of which, in the light of the offence committed, the person of the offender and the conduct he has before and after committing, it is not appropriate to apply a sentence, which is sufficient to lay down a warning [1].

Thus, we can say that the legal institution of the waiver of the punishment is a novelty in the matter of criminal law in Romania, a means of individualization of the sentence, representing the attribute conferred by the legislature by the Court of Justice, where it considers that the social reintegration process can be achieved by simply applying a warning, and from a procedural perspective, constitutes a genuine means of resolving criminal proceedings, as set out in article 396 para. (3) of the C. Proc. Pen. [2].

As rightly stated in a specialized study, the new regulation constitutes an extension in the judgment phase of the principle of the opportunity of prosecution, giving the judge the possibility of not prosecuting acts as minor offenses, for which the criminal action shouldn't have been exercised in the criminal investigation phase [3].

The waiver of prosecution is laid down in article 318, Section 3, Chapter IV of Title I of the Code of Criminal Procedure, Special Part. It appears as a remedy which is made available to the Prosecutor by the legislator in order to avoid the referral of courts with offences which do not present a particular degree of danger.

The waiver of prosecution represents for the prosecution phase, the appropriate institution for waiving the application of the sentence. Thus, it is avoided to refer the courts with less serious facts, in order not to disturb their work, the legislature creating for the prosecutor the possibility of finding as a result of a report to the circumstances of the case that the deed does not have a degree of particular hazard [4].

2 Waiver of the punishment and prosecution – distinction

As we have shown in the first part of this study, the waiver of the sentence is a legal-criminal institution which refers to the procedure for the judicial individualization of the sentence, which can only be applied by the court, while The waiver of prosecution signifies the solution which may be ordered by the prosecutor, representing a reflection of the principle of opportunity, but not hiring any form specific to the judicial individualization of the penalties.

Although there are many differences between them, we cannot exclude the fact that they both present the same result, the completion of the criminal process without the criminal liability of the defendant. Moreover, in addition to that purpose, the defendant is no longer subject to the end of the criminal proceedings of any revocation, prohibitions, and it cannot be envisaged subsequently for the establishment of a possible state of recurrence or intermediate plurality.

The doctrine has shown that by regulating the waiver of punishment, the legislator has recognized the right of the courts to give up the punishment definitively, even though the defendant is guilty of committing a crime, the main reason being to not expose him to the penitentiary environment, to protect the offender from the adverse consequences that a penalty may entail, since there are other, more effective ways of achieving his re-socialization process and without involving deprivation of liberty [5].

In the same sense and in practice it is stated that "a possible application of the punishment appears disproportionate to the public interest and, without minimizing the concrete danger of the committed act, finds that the purpose of the criminal trial can also be achieved by warning the defendant to its future compliance with criminal law rules. The court considers that the application of this law has the significance of creating for the defendant a deep moral-juridical conscience regarding the guarantee of the natural

balance which must exist between the rights and obligations of each one reported to himself and to society as a whole [6].

As regards the requirements imposed by the legislator in order to be ordered by the Court of Justice for a waiver of the application of the sentence, namely by the Prosecutor a waiver of the prosecution, they are similar.

With regard to the degree of danger of the offense, it is to be established by means of reporting to several principles established by the legislator, which are similar to the general ones that are included in art. 74 paragraph (1) letters a)-d) of the Criminal Code, while the inopportunity of imposing a penalty on the person of the defendant will be determined by the evaluation of criteria which are, to a large extent, similar to the general ones of individualization of the punishment contained in Article 74 paragraph 1) letters e)-g) of the Criminal Code[7].

The Court will check according to art. 80 C. Pen. if:

– the offence committed is of limited seriousness, having regard to the nature and extent of the consequences of the products, the means used, the manner and circumstances in which it was committed, the reason and the purpose pursued;

– in relation to the person of the offender, of the conduct before the offence, of his efforts to remove or mitigate the consequences of the offence, as well as its possibilities of redress, the court considers that the application of a sentence would be inopportune because of the consequences it would have on the person concerned.

As regards the waiver of prosecution, the Prosecutor will consider for determining the public interest according to art. 318 C. Proc. Pen.:

– the content of the act and the actual facts of the offence;

– the manner and means of committing the offence;

– the purpose pursued;

– the consequences produced or which could have been produced by committing the offence;

– the efforts of the criminal prosecution authorities necessary to conduct the criminal process by reference to the seriousness of the crime and the time elapsed since the date of its committing;

– the procedural attitude of the injured person;

– the existence of a disproportion between the costs incurred by the conduct of the criminal proceedings and the seriousness of the consequences produced or which could have been produced by committing the offence.

When the author of the offence is known, the person of the suspect or defendant, the conduct of the offence, the attitude of the suspect or the defendant after committing the offence and efforts to eliminate or mitigate the consequences of the offence.

From the foregoing, I note that the requirements to be taken into account by the court when conducting the examination specific to the process of judicial individualization are similar to those which the Prosecutor is considering when determining the degree of the offence in order to dispose of the criminal prosecution solution.

By these conditions, the legislature sought to provide the Court and the Prosecutor with the opportunity to order such measures where a positive attitude from the defendant is apparent, concentrated towards minimization and the removal The effects of offences which do not indicate a particular hazard and which often constitute a mere deviation from the rules of social co-existence from those who commit them.

In a relatively recent decision, the Supreme Court stated that "the reduced gravity of the offense must be related both to the nature and extent of the consequences of the offense, to the means used, to the ways and circumstances in which the act was committed and also the reason and purpose pursued. Thus, in relation to this condition, both objective evidence (such as the mode, the means of committing) and the subjective elements of fact (the purpose, the reason for committing the deed) must be analyzed. These elements must be judged in their entirety by the judge and, if he deems it sufficient and timely to apply a warning, will order that the punishment be waived. It should also be noted that this condition concerns the act actually committed (an inherent condition of the deed) and not the behavior of the perpetrator before or after committing it"[8].

In the light of these issues, we justify our choice of presenting the two legal institutions in comparison, especially in practical terms, in order to highlight in this context possible solutions to improve the regulatory framework.

Until the amendment of art. 318 of the C. Proc. Pen, following the adoption of O.U.G. No. 18/2016 [9] in the context of the Decision of the Constitutional Court of Romania No 23 of 20 January 2016 [10] The judge of preliminary Chamber was referred only in special circumstances, only at the request of the person directly interested in challenging a non-commencement or non-trial solution ordered by the prosecutor in a criminal case.

Subsequently, the degree of loading of the courts having as their object the confirmation of the waiving of the prosecution was multiplied in a significant manner as a result of the referral of the Court in order to confirm the solutions for Prosecution promoted by prosecutors.

A first distinction which is not justified between the two legal institutions is the requirement for the special maximum of the sentence which may be the subject of such an election by the prosecutor and the Court. Thus, in the case of a solution to waive prosecution of the range of offences which the Prosecutor may take into account is significantly higher since the maximum limit is not more than 7 years, while the judge is held by a maximum limit of 5 years in prison.

The choice of the legislator to impose such conditions is not justified, which is apparent from the following, since an inequity has been created between the criminal prosecution body which is intended to carry out the criminal prosecution activity and the Court of Justice is equidistant and has the prerogative to resolve in an objective manner the causes of the judgment.

It should be recalled that initially by Law No. 187/2012 [11] for the implementation of the new penal Code the limit was raised to 5 years in prison to be correlated with the institution of the waiver of prosecution.

However, a full correlation has not been achieved, although it has been attempted to achieve this, as by adopting the Law No. 255/2013 [12] for the implementation of the new penal Procedure Code the maximum limit for which the waiver may be ordered Prosecution was increased to 7 years in prison.

Some authors have highlighted the need to lower the initial maximum threshold from 3 years to 2 years in prison [13] which, if considered by the legislator, would have led to the blocking of the application of these provisions in judicial practice. Thus, the correlation with the provisions governing the institution of the waiver of criminal

prosecution wouldn't be achievable and the courts would only be allowed to apply such solutions to a very limited range of offenses [14].

We consider that the legislature's option to limit the possibility of the court to give a solution to waive the application of the penalty for such a restricted category of offences is wrong. In this respect, it is recalled that the legislature has established in the special part of the penal Code a series of constant parameters for sanctioning offences, which are between 6 months – 3 years, 1 year – 5 years, 2 years –7 years and in the last category I have mentioned it can be found offences which do not indicate a particular hazard (example: leaving the scene of the accident, or modifying or deleting its traces provided for in article 338 C. pen).

The Court may be required not to apply such a solution in different cases where, following a thorough analysis, it follows that such an alternative measure of imprisonment would be the most appropriate.

In practice, it is emphasized the importance of the inopportunity of punishment, the courts pointing out that setting and enforcing a punishment would not be appropriate [15], this being correlated with the other criteria we have already mentioned.

The Legislature ignored the fact that the judge is called upon to settle a criminal case, and in such a situation it should be given a freedom to act as high as possible, not to restrict that possibility compared to the one existing for the prosecutor.

A pertinent explanation has not been identified justifying why the Prosecutor may promote a waiver of prosecution in the case of a criminal offence which the law penalizes with a sentence of up to 7 years in prison, while in The same situation the court will not only be able to order the waiver of the penalty being waiving, nor can the postponement of the application of the sentence [16].

The existence of that restriction may give rise to particular practical situations in which the case prosecutor may rule on a waiver of the penalty for committing a particular offence, while the court seized of the same offence, may not have such a solution, although it is a similar offence committed in the same context. For example, when are evidence of bribe giving offense, the prosecutor may give a solution to the criminal prosecution, while the judge is required to pronounce a conviction solution with the posibility of choosing in the stage of individualisation of punishment, between suspension under supervision and enforcement in detention. Another situation emerge from the interpretation of the article 270 (3) of the Penal Code, in the sense that the person caught selling 2 cigarette packs from smuggling after being sued can not benefit from the waiver punishment, although it would fulfill all the other conditions provided by the law.

In its approach to the creation of a waiver of prosecution, the legislature may have taken into account, in addition to those mentioned above, aspects of overloading of prosecution, the excessive duration of proceedings, but omitted that there had to be at least one fairness between the possibility of the Court and the Prosecutor to have such solutions which have as I have shown a common main effect.

Another important distinction between the two legal institutions derives from art. 80 para. (2) (a) C. Pen, where the legislature has held that the court may order the waiver of the sentence only if the defendant has not previously suffered a conviction.

From this rule there is only one exception, the one provided for in article 42 (a) and b) C. Pen, respectively when the offence refers to facts which are no longer provided for by the criminal law or has been the subject of a law of amnesty.

We agree with the existence of a restriction aimed at committing a deliberate crime in the past, but the current regulation excludes from the benefit of the disposition of a solution to waive the application of the sentence and the commission of a criminal offence Which was sanctioned by the Court of Justice with a non-custodial sentence, with the suspension of the execution of the sentence under supervision, for which the term of supervision was fulfilled, but no rehabilitation or sanction with the fine was carried out.

In this sense, it is clearly stated in a specialized study that the waiver of punishment should be allowed, including in the case of those previously convicted of committing crimes of negligence because they do not show criminal persistence, and there is a chance of guiding their future conduct without the need for a punishment [17].

We can note that the legislature has considerably constrained the possibilities offered to the court in order to give such a solution, considering that a criminal offence is as serious as an intentional one, namely that the penalty of the fine is equally such as that of the executing prison.

In our view, in such a situation, a distinction had to be made, as a criminal offence cannot be compared most of the time with an intentional offence, such as the fine with the prison sentence.

In addition, such restrictions also meet in the situation of postponing the application of the sentence, where the legislature has determined that the offender must not have been previously sentenced to prison sentence, except in the situations which we encounter in article 42 (a) and (b) or for which rehabilitation has occurred or the term of rehabilitation has been fulfilled.

Instead, in the event of a waiver of prosecution, the Prosecutor has a wider discretion than that of the court. Thus, the Prosecutor may promote such a solution, including where the defendant is in one of the assumptions which attracts the impossibility of the Court in order to order the waiver of the sentence to be waiving.

The prosecutor may therefore order the waiver of prosecution even if the defendant was previously convicted of an offence for which the conditional suspension of the execution of the sentence under supervision was applied, but it was not fulfilled the requirement relating to the rehabilitation period.

The art. 80 para. (2) C. Pen, it follows an imperative requirement referring to the fact that such a solution cannot be the subject of a case where the defendant has in this way been penalized in the last two years preceding the date of the offence subject to the judgment.

The imposition of this condition was judged to be opportune, considering that in the situation where the perpetrator, even if he has benefited from a waved punishment for a crime committed previously, persevered in the criminal activity, proving that the initially ordered measure did not reached the goal [18].

In the sense that this condition is deemed appropriate, by comparison with the provisions of the old Criminal Code, we realize that the choice of the legislator regarding the introduction of this prohibition of disposing of punishment has the role of helping to avoid existing situations under the old Code in which, at least theoretically, a person could enjoy an unlimited number of administrative penalties as a result of wavers due to the lack of social danger of the crime [19].

We disagree with these views, because by warning the offender draws attention to the importance of his future behavior, there may be a possibility that a penalty may prove

inappropriate even when the offender has been previously convicted. Even if committing a new offense may be considered as defiant, the court should be allowed to appreciate that.

As regards the waiver of prosecution, as I have previously pointed Out, the legislature has not established a condition that concerns the criminal record of the defendant, so that a condition of the kind that I mentioned was not included in the waiver of application of the sentence in article 318 C. Proc. Pen.

We do not understand the motifs for which the legislature imposed a separate legal regime in their regulation, which, as is apparent from those submitted, does not find any practical substantiation.

Moreover, this difference gives rise to serious inequities, with the prosecutor benefiting from a diverse range of practical cases in which he can dispose of such a solution, in comparison with the court which although it has the main role to determine the if the concrete sanction of the defendant is constrained in such a hypothesis to relate to fewer options than the prosecutor.

Even if the legislator has submitted the solution given by the Prosecutor to the confirmation of the Chamber judge for preliminary ruling in order to eliminate any doubts which would be based on it, the court may reject the solution on grounds of illegality or non- is not sufficient because in practice there are as many discrepancies as we have shown.

Another possible problem could be the wrong option of the prosecutor in charge with the case who considers that in a given hypothesis it would be necessary to prosecute the defendant, and then the court, even though he might appreciate that no such a solution, it would be unable to dispose the waiver.

In such a context, even if the judge were to consider that it would not be necessary to apply a sentence, it does not have a procedural means in which to correct the choice of the prosecutor, without having to waive the application of the sentence or order the Prosecutor's Office to apply the waiver of prosecution. Thus, the court has to rule a more severe sanction, even if it was not necessary to ensure the achievement of the purpose of the criminal proceedings.

The solution of the court by which the surrender of the sentence was ordered is subject to the rules on the ordinary appeal, which can verify the legality and merits of the sentence of the first instance.

In court practice, we find many such decisions, which show the change of the solution initially pronounced by the courts of law. For example, the Constanta Court of Appeal in a relatively recent decision acknowledged the defendant's appeal, considering the judgment of the offense of non-compliance of the arms and munitions regime (Art. 342 of the Criminal Code), there is no need to postpone the application the punishment, in relation to the reduced social danger, did not jeopardize the relations of social cohabitation, the weapon was voluntarily surrendered, the defendant is professionally and socially integrated [20].

On the other hand, as regards the waiver of the prosecution, the Prosecutor's proposal for the case is subject to the opinion of the higher-ranking prosecutor, after which it is sent to the Chamber judge for confirmation. The resolution of the proposal of the Prosecution is carried out in the Council Chamber, with the citation of interested parties, through a definitive closure.

Initially, as We said before, the legislature considered that the solution to the prosecution should not be subject to confirmation by one of the interested parties. Subsequently, in the light of the provisions of Decision No 18/2016 of the Constitutional Court of Romania, these provisions were amended, thus ensuring the exercise of a review by confirming the solution by the judge of preliminary Chamber on of the prosecution's proposal.

We consider that this solution, in the current legislative context, presents on the one hand a number of positive aspects, including the avoidance of the inconsistencies on the promotion of criminal prosecution solutions where it would not be justified such measures.

However, there are also a number of negative elements, among which we can include the high number of dossiers registered in the courts with such an object, the costs of resolving these dossiers.

A possible solution to liberate the courts for the prosecution of dossiers with such an object would be to leave the possibility of the injured person to challenge the decision ordering the waiver of prosecution when is dissatisfied.

3 Conclusions

I consider that the legislature was wrong when it chose to create this distinct framework with reference to the conditions allowing the court to give a decision to waive the application of the sentence and the prosecutor to order a waiver of the prosecution.

The current regulation gave rise to an inadmissible inequity which should be corrected as it sometimes underpins the wrong practical solutions, since the courts cannot apply the provisions on the waiver of the penalty, although such a measure would suit the much better procedural framework.

A correlation between the provisions by which the two legal institutions are governed, the waiver of the penalty and the waiver of the prosecution, would be welcomed, in the sense of raising the maximum threshold to the same level, since there is no justification for the existence of these differences which refer to the requirements which are necessary to be fulfilled for the promotion of such solutions by the Court, namely by the prosecutor.

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A few considerations regarding witness hearing according to the New Penal Procedure Code

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Abstract

The testimony of the witness is part of the means of proof provided for in art. 97, paragraph 2 CPP.

Even though in the colloquial legal language, the notion of "proof" is often used in both the sense of evidence and the means of proof, in essence, they are two distinct notions, as evidence is those factual elements that serve to find the truth., and the means of evidence represent the means by which these elements can be ascertained.

Essentially, the means of proof, so the "Witness statement" represents the source of the evidence, a source that manages to bring to light the evidence being, at the same time, a way of acquiring the knowledge that can be obtained after administering the evidence.

In criminal proceedings, witness statements have a relative character, the testimony being sometimes fragile, sometimes misleading, and with a random probative value. It is not to be understood that the witness of a bad faith, the one who can commit the crime of lying testimony, is randomly targeted, but the witness of good faith, who by the benefit can contribute to finding out the truth in question.

Since the witness is the natural person who knows the factual situation and who testifies, there is a condition regarding the acquisition of the quality of witness, a condition aimed at knowing the facts that can serve as evidence in criminal cases and which the witness highlights in front of the judicial bodies.

The Criminal Procedure Code does not impose prohibitions on the quality of the witness, on the contrary, it gives priority to the quality of the witness compared to other procedural qualities.

However, the main parties and procedural subjects do not have the capacity to witness as they have an interest in resolving the case.

If a person has acquired the quality of part or main procedural subject, he can no longer be a witness, and the person who does not acquire this quality can be heard as a witness.

In the event that a person has suffered a physical, moral or material injury and does not wish to participate in the criminal trial that an injured person can be heard as a witness, after having brought this matter to the attention of the judicial body.

Keywords: witness, hearing, statement (proof), witness evidence, evidence value of witness statement, participants in the penal trial who are allowed as witnesses, witness's right not to accuse herself in conformity with ECHR

A witness is an individual who has knowledge of the commitment of the deed, by one of her senses (sight, hearing, smell).

In the doctrine, the witness is defined as the individual (as opposed to juridical) entity, who has knowledge of a determinant circumstance with regards to the fact incriminated by the penal law [1].

In accordance with the New Penal Procedure Code (NPPC) (art. 114 par. 1), any person that has knowledge about facts or circumstances of fact that constitute evidence in a penal trial can be heard as a witness.

Also, the stipulations of art. 115, par. 1 NPPC provide that, "any individual can be summoned and heard as a witness except for the parties and the main subjects." The institution of the witness in the NPPC stipulates certain limitations. Thus, art. 309, evidence admissibility, at par. 1 provides that the witness evidence is admissible in all cases when the law does not dispose differently, and provisions of art. 2 states that, "no juridical deed can be proved by witness, if the value of its object is above 250 lei.

However, the witness proof can be used against a professional, of any juridical deed, irrespective of its value, if executed during the exercise of her professional activity, except when the special law requires written proof."

According to par. 3, "when the law requires the written form for the validity of a juridical deed, this cannot be proven by witness." Par. 4, "also, the witness proof is not admissible if for proving a juridical deed the law requires a written proof, except in those cases when:

– The party was in the material or moral impossibility to do a written deed for proving a juridical deed;

– There is a beginning of written proof, according to provisions of art. 310;

– The party lost the written proof due to a forceful or force majeure event;

– The parties convene, even silently, to use this type of evidence, but only with regards to rights that they can dispose of;

– The juridical deed is attacked for fraud, error, deception, violence or is absolutely null and void because of illegal or immoral cause, as the case is;

– The request regards clarification of clauses of juridical act.

According to par. 5, "the witness proof is never admitted against or above those written in a document as well as for what it is pretended to have been previously said, during its time, following its drawing out, even if the law does not require a written form for proving the respective juridical deed, except for the cases stipulated for in par. 4."

Besides the mentioned limitations stipulated nu NPPC, other stipulations of NPPC are not as restrictive.

From the criminalistic point of view, the testimony or the testimonial proof, is one of the oldest ways of probation and amongst the most common ones in criminal procedures.

Therefore, witness proofing, apparently simple to evaluate and administer, occupies a central place in the system of evidence, however being regarded with a certain dosage of mistrust, as it assumes passing reality through the value system of the individual that perceives it, with the possibility, frequently met, of biasing such reality. From the same

"subjective" perspective, the judicial body has the obligation to evaluate the proofing value of the witness's testimony.

At the same time, testimony is the result of a process of observing and memorizing a juridical deed with its implied reproduction in front of the criminal investigation bodies and in front of courts, in written or verbal [2].

Witnesses' testimonies have a relative characteristic, and with the help of many systematic inquiries, we can state that the testimonial proof is apparently fragile, at times decieving, as well as with quite random value. Expert authors, by the relative character of testimony, do not consider the witness in be of bad faith, the individual that commits the crime of false testimony, but the good faith witness, the individual who sincerely wishes to serve justice [2].

Therefore, witnesses' testimonies represent the statements given in front of judicial bodies by individuals who possess certain knowledge that could serve to finding the truth in a penal trial. Also, in good reason, the juridical literature show that the witness proofing constitute the rule in the penal trial and the exception in a civil trial [2].

As above mentioned, the witness is an individual who possesses knowledge about facts and circumstances that constitute the evidence in the penal case.

Therefore, attaining the quality of witness is conditioned by knowing certain facts that may serve in penal causes as evidence, in relation to which the said individual will be heard by the judicial body. In the hypothesis that the conditions stipulated by law are not met, the testimony will lack evidence value, even when given [3].

The current penal proceeding regulation does not institute any prohibition with regards to the quality of witness, to the contrary, it gives priority to it comparing to other trial qualities (expert, mediator, defender or attorney of a certain trial subject or of any of the parties).

Thus, the witness's testimony is distinctly, attentively treated, even in hypothesis that witnesses are persons who, without having any interest in solving the penal cause, due to accidental circumstances, are aware of certain elements of fact with character of evidence, and that can aid solving penal causes. "For a credible testimony, it is required that the witness is in a situation that does not allow questioning her capacity of being a witness, in a reasonable degree. If the judicial body finds that the witness is not in a good health condition, and such condition afflicts upon most of her testimony, the hearing will take place when the judicial body will find that the witness can give a state in a conscious manner." [3]

The main trial subjects and parties do not have a witness capacity since they are interested in solving the case, and therefore a person cannot be a witness in her own cause and also cannot bear more proceeding quality at the same time.

For instance, attaining the quality or trial subject or of party, does not allow an individual to be heard as a witness in a penal proceeding. At the same time, individuals who have had such quality, but lost it following a decision of the judicial body (for example, the solution of not sending to court or not investigating) can be heard as witnesses. In the hypothesis that a person suffers a physical, damage or material damage and dose not wish to participate in the penal trial, can also be heard as a witness.

The new dispositions of NPPC stipulate that persons who drew out minutes of discussions, or ship or airship commanders, can also be heard as witnesses, in their quality as finding bodies (art. 61 NPPC), according to their respective competence.

Minutes drawn out in such circumstances have the juridical nature of intimation acts to the penal investigation bodies (art. 61, par. 5 NPPC and art 62. par. 4 NPPC).

The law does not forbid the hearing of individuals with various invalidities, with the mention that in such situation the judicial body will appreciate if the affliction can alter the quality of the statement.

Also, the existence of a previous conviction for false testimony does not constitute incompatibility for the convicted individual to be a witness in a different penal case.

Also, the denouncer – who anyhow has a direct or indirect knowledge of the committed crime – can be heard as a witness.

The fact that, "testimonies of witnesses include inadvertences, is explained as the level of perception of the same event by various persons is different, and that the statements come from indirect witnesses, who were more or less interested of the respective events"[4].

Although, as mentioned before, any person can be summoned and heard as a witness (except for the main parties and trial subjects – art. 115, par. 1 PPC) according to dispositions of NPPC – art. 117 – there is a category of persons that have the right to refuse to give testimony as witnesses.

Such category include, according to art. 117, par. 1, lett. a and b:

Husband or wife, ascendants and descendants in direct line, as well as brothers and sisters of the suspect or defendant;

People who used to have the quality of husband/wife of the suspect or defendant.

According to Decision No. 562/2017 – printed in Monitor Oficial No 837/October 23, 2017, the Constitutional Court admitted the exception of non-constitutionality and finds that the legal solution comprised in art. 117, par. 1, lett. a and b PPC, that excludes the right to refuse being heard as witnesses those persons that had established relationships similar to those between husband and wife, as being not constitutional.

According to provisions of art. 177, par. 1 NPC – "a member of the family is understood to be:

Persons who established relations similar to those between husband and wife or between parents and children, in case that they live together."

Constitutional Court found the non-constitutionality by the fact that it infringes upon dispositions of article 16, par. 1 of the Constitution that regulates equality of citizens in front of the law, reported to art. 26, par. 1 regarding the family life.

Giving interpretation to such dispositions, Constitutional Court has retained that the fundamentals of the regulation regarding the refuse to be heard are in the reign of family relations protection, and the notion of 'family life' is not confined to the families based on marriage and may include other de facto relations as well. Therefore, as long as the tenets of equality in front of law supposes applying equal treatment to situations that, based on the purpose to follow, are not different, the Court found that there is no objective and reasonable motive for which concubines/former concubines of the suspect or defendant are to be exonerated from the right to refuse to give testimony as witnesses in penal proceedings."

Judicial bodies have the obligations to communicate all rights and obligations as stipulated by art. 120 PPC, to the mentioned persons, as well as to communicate to them their right to refuse to give statements as witnesses.

When the respective persons do not agree to give testimonies, they will be applied the dispositions referring to the rights and obligations of the witnesses.

Therefore, the individual that presents any of the qualities stipulated by art. 117 PPC, in relation to one of the suspects or defendants, is exonerated of the obligation to give testimony and against the other suspects or defendants, if their statements cannot be limited only to the later.

The new element introduced by the stipulations of PPC – is the express regulation, in accordance with HREC jurisprudence of the witness's right to not accuse herself.

In this regard, art. 118 stipulates that 'the testimony given by a person who, in the same case, previous to the given testimony, has had or, thereafter, attained the quality of suspect or defendant, cannot be used against her. Judicial bodies are obliged to mention, when signing the testimony, the trial quality that said person had before.

In conclusion, the right to not accuse him/herself represents a warranty to the offender, as well as for the witness, as by the given testimony, any of them may incriminate themselves.

Conclusions

In conclusion, the right to not accuse him/herself represents a warranty to the offender, as well as for the witness, as by the given testimony, any of them may incriminate themselves.

In any criminal case, the witness statements make an essential contribution to the finding of the truth, having the character of natural evidence, inevitable, as an instrument of necessary knowledge of the circumstances of the crime.

Witness protection aims to avoid certain risks regarding these persons, but also to ensure the reliability of the administered evidence.

In this regard, the New Criminal Procedure Code provides for protection measures for threatened witnesses, but also for vulnerable witnesses.

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The effects of digitalization on the legal system

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Summary

The article reviews the main features of digitization and its implications in the economic and social field. Technological perturbations on the economy, people's behavior, medicine, law, psychology and education are significant. The authors propose the establishment of a Technical-Legal Laboratory and an event entitled "Law and Digitization – Improving Legal Services" to operate within the Faculty of Law and to improve access to justice in a digitized world.

Keywords: digitization, industry 4.0, digital transformation, immersive experience, virtual reality, augmented reality, hybrid reality, machine learning, blockchain, IOT, Industrial Internet of Things – IIOT

1 Introduction

Digitization and digital technologies increasingly lead to revolutionary changes in the innovation system, affecting industries, universities and public institutions. Big Data, 3D printing, nanotechnologies, biotechnology, computer science and cognitive sciences are pushing companies to adapt or create new business models to deal with digital disruptions. The issue is not only technological or economic, but also legal. Indeed, the regulatory framework must be designed to provide a fertile and healthy land for these technological innovations to grow.

The current stage of technological development has given it the ability to generate changes at the behavioral level, the mentality and fundamental processes of functioning of society. Klaus Schwab, in his work "The Fourth Industrial Revolution," (2016), conceptually introduces Industry 4.0, the fourth industrial revolution that integrates technology into physical, biological and digital subsystems.

Digitization is defined from three distinct perspectives:

1. In business, digitization is the activation, improvement, transformation of operations or business functions, models, processes or activities, by using digital technologies and data that are responsive to a predetermined goal. Digitization refers in particular to recording, storage and management systems, digitization refers to systems of involvement and knowledge through the use of digitized data and processes.

2. Digitizing an environment, zone or stream. Digital work involves:
   - digital things; digital tools;
   - social collaboration platforms;
   - unified communications platforms.
3. The continued adoption of digital technologies in all societal and human activities:
   - digital medical care, predictive or preventive medicine;
   - governance and digital marketing; digital advertising.

In conclusion, digitization aims at:
   - Changing opportunities, operations, models, revenue streams in business.

Digital transformation is:
   - Deep and accelerated change of business activities, processes, skills and business models, in line with the opportunities of digital technologies;
   - Impact of change on cognitive-emotional activity, behavior, actions of individuals and society that lead to a new economy and society.

In terms of their impact and implementation timeline, there are: digitization, digitization and digital transformation.

Digital transformation (DX or TD) affects companies, society, communication, art, medicine, science, the way we work and have fun.

2 History and perspectives

In 1703, Gottfried Wilhelm von Leibnitz in the "Explication of l Aritmethique Binaire" introduced the concept of digitization, a numerical system based on 2, using only two values (0, 1), a system developed by George Boole (1854) Claude Shannon (1938) and George Stibitz (1940), who developed the first electromechanical computer, continued by John Atanasoff (1939), John von Neumann (1946), Edmund Berkley describing the computer Simon (1950) 1981.

The Web has changed the scale, size, scale, speed and effects across the entire society. In 2000, digitization is widely used by governments through the introduction of IT&C and the Internet: the digital single market, e-government, net city, digital globalization, the information society.

Digitization (conversion), digitization (process) and digital transformation (effect) accelerate the process of global and societal transformation.

1. Digitization is defined as the "conversion of analogical information in digital format", explained by the representation of signals, images, sounds, animations and objects, by discrete values of (0,1).
2. Digitization is the technologically induced process of change that has generated the following phenomena: Internet of Things – IoT, Industrial Internet of Objects – IIoT, Industry 4.0, Big Data, M2M Communication, Blockchain, Cryptography.

3 Specific concepts of digitalization

1. Digital transformation is the total and global effect of digitization. Digital transformation changes:

- business and consumption patterns;
- Social, economic and legal structures;
- Organizational patterns and cultural barriers,
- Business models.

2. Immersive experience is a form of penetration, immersion into another world; it stimulates our senses and translates us into another place, in another time or in another reality; we travel in time and space, in a virtual or real space. Immersion has been experimented with occult practices, with chemicals, and today with technology.

Examples of immersive experiences:

- Live concerts, sports competitions, apps;
- video games, videoconferencing;
- Cognitive and intuitive interfaces of software applications;
- Use of extended or hybrid reality (XR or HR) with the two forms: virtual reality (VR) and augmented reality (AR).

VR and AR remove the limitations, distance constraints and connect people, information and experiences.

The degree of immersion of an experience depends on:

- visual quality (resolution, color accuracy, light, contrast);
- sound quality (intensity, frenzy, amplitude);
- Intuitive interactions.

Using technology, we transform any space in reality into digital, interactive, or we can create a new digital space. In conclusion, immersive experience is a form of penetrating or immersing, partially or totally, in another world; it stimulates our senses and translates us into a place or another reality.

3. Machine Learning (ML) is an area of informatics that gives machines the ability to learn (progressive performance improvement in an activity) by using statistical data processing techniques without explicit programming.

The ML's operating principle is the construction of algorithms that receive input data and use statistics to predict an output, while updating outputs as new data enters.

4. Blockchain has gained popularity after 2009 with the emergence of Bitcoin. Stuart Haber and W. Scott Stornetta created the concept of blockchain (data Internet), data stored in chained and cryptographically secure blocks.

In 2009, blockchain became the solution for fast, secure and decentralized transactions. Blockchain technology redefines the transaction concept. In the absence of a central entity that maintains, manages and charges the information, that is, the value (lawyer, notary or other third party guaranteeing the transaction), the technology retains in the equation only the subjects of the transaction, the originator and the beneficiary, eliminating third parties.

For blockchain technology there are no transaction costs, only infrastructure costs; blockchain redefines the exchange concept, excluding transaction intermediaries, there is only the transmitter (manufacturer) and the recipient (user).

5. Industrial Internet of Things (IIOT). In the industrial field, IIoT integrates intelligent machines, advanced data and people into an efficient and fluent ecosystem.

We have two conclusions:

1. Digitization redefines technical and speculative disciplines, economies, industries and society, exerting an unprecedented impact on the way we work, live, behave and act in society;
2. The next generation of digital business models and ecosystems is driven by IA, immersive experiences, digital mirrors, event-driven thinking, and continuous adaptive security.

4 The effects of digitalization on the society

Liberal democracy is the most successful and versatile political model that people have created so far, and because it allows the debate about the shortcomings of the liberal vision of the world and the democratic system. People think in narratives rather than in facts, numbers or equations, so every person, group or nation has its own stories or myths.

Three stories marked the world after the nineteenth century:

- Fascist shattered by the Second World War;
- Communist, concluded in 1989;
- The Liberal has remained after 1990 the guide and the indispensable manual of the future of the world.

Liberalism glorifies the value and power of freedom:

- Political law, expression, movement, choice, etc;
- Economic Opportunities – Private Initiative;
- Personal freedoms – freedom of individuals, ideas, goods and capital.

People have taught to think and act alone, without listening to bigot priests and narrow traditions. Wide roads, resistant bridges, crowded airports, beaches with people from all corners of the world, virulent businesses have taken the place of walls, water ditches, barbed wire.

5 Digitalization and democracy

The democratic system has suffered and suffered new shocks and disturbances in particular from digitization:

- Developing the IA and the blockchain revolution with its virtual coins;
- The IA will take the lead and decide on issues such as transport, finance, education, health care;
- Guilders will wait humble as an algorithm to approve their budgets;
- The blockchain and cryptomonas networks will restructure the monetary system;
- Governments can no longer charge for some operations and will probably charge the data, information;
- Digitization and biotechnology will restructure the economies, societies, the human body and mind;

- The technologies will allow us to control the inner world, to conceive and to create life, to brainstorm, to prolong life, to be born and to kill thoughts and feelings. For the common man concepts such as: globalization, digitization, IA, RV, blockchain, genetic engineering, Machine Learning, are irrelevant, have nothing to do with them. In the twentieth century people revolted against exploitation of labor, now the masses fear irrelevancy (irrelevancy of labor) and do not have whom to fight against who because trade union activity is also in danger because most of the workers are either robots or sprayed anonymously.

Until the 4th Industrial Revolution, cars competed only in terms of physical abilities, and man retained the cognitive ones: learning, understanding, analysis, decision, communication.

Research on behavioral economics, cognitive ergonomics and neuroscience has enabled researchers to understand how people make decisions.

Our choices (food, partners, holiday places) are not due to a mysterious free will but a few billion neurons that calculate possibilities in a fraction of a second.

Human intuition is pattern recognition, and the biochemical algorithms of the human brain are imperfect, based on heuristics, shortcuts and outdated circuits, more suited to African savannah than the urban jungle.

The very way of evolution of the human brain required imperfections generated by the need for compatibility of versions of the brain with previous versions.

The IA will compete with neural networks in calculating probabilities and identifying patterns stored in a database of experience.

An IA equipped with the right sensors would be superior to human intelligence, and additionally, IA has two non-human abilities that give it superiority: connectivity and updating, meaning we'll have connected IA networks. In 1997 Deep Blue cheated on Gary Kasparov, an event that generated man-computer cooperation in the field. In the following years, computers have come to play chess better than their human collaborators, so they have lost value, becoming irrelevant.

Democracy disseminates the power to process information and make decentralized decisions (people and institutions), dictatorship concentrates, centralizes information and power in one place. In the present form, democracy can not survive the fusion of biotechnology with IT&C. Either democracy will be reinvigorated, or people will live in digital dictatorships. All power and wealth could be concentrated in the hands of a tiny elite, while most people will suffer not because of exploitation but of a much worse thing – irrelevancy. Property is a prerequisite for long-term inequality. People have come to accept this arrangement and to consider it naturally, even established by divinity. The hierarchy was not just the norm but also the ideal.

6 Digitalization and social values

Progress in biotechnology could make it possible to translate economic inequality into biological inequality.

For a long time, earth was the most important good in the world, politics was a struggle for control over the earth that divided society into aristocrats and common people.

In the industrial age machines and factories divided people into capitalists and proletarians.

In the 21st century, data will be the most valuable asset, and policy will be a struggle to control data flow. Google, Facebook, Baidu and Tencent are "traders of attention". We capture our attention by providing us with free information, services and entertainment, and then we pay attention to our advertising agencies. Attention is a resource and a commodity, therefore we are not their customers but their product. Politicians are like musicians and the instrument they play is the human emotional and biochemical system. In the future, the most valuable asset is personal data. Social networks overcome social fabric; people are living an increasingly lonely life on an increasingly connotated planet. Facebook's Facebook community is the first explicit attempt to use centrally planned, global-scale social engineering IA. After 4 billion years of organic life has evolved through natural selection, science opens the age of inorganic life, modeled by intelligent design.

The crisis affecting the largest multicultural experiment in the world – the European Union – based on the promise of universal liberal values, represents the conflict between global issues and local identities.

7 Digitalization and rights

The current state of affairs demonstrates a strong need for action on the digitization of the legal system. Even though the legal field undergoes a transformation, there is not much research on digitization and law. The lack of information needs to be remedied by establishing, in the faculty of law, the Technical-Legal Laboratory, whose main objective is to improve access to justice for didactic and methodological purposes. Legal digitization is a reform of all stakeholders and should therefore be reunited through a university in a manifestation titled "Law and Digitalization – Improving Legal Services".

The lab is dynamically studying influences both in law and IT&C. The digitization of legal practice is a part of social digitization. There is a severe lack of information on the consequences of digital change for practice and the study of law.

The laboratory has the following specific objectives:

- Provides insight into the current state of digital transformation in the legal field and current issues;
- Develops a laboratory agenda that corresponds to the environmental dynamics;
- Identifies disruptive technologies that fundamentally alter the traditional law practice;
- Study of the impact of a cigital tribunal on the practice of law.

The implementation of IT&C in the legal field creates fractures in law structures. These breaks can take many different forms from the corrosion of the state monopoly over violence to changing business models of law firms. In short, digitization of legal practice affects various interest groups, including law firms, meeting rooms, businesses and individuals. Change is under way in the courts, law firms and other courts of law that are facing the challenge of updating their modus operandi. According to Deloitte estimates, the peak for law firms that do not digitize will be in 2022, after which they are no longer viable.

If we need to transform the way in which the legal services are provided and, finally, to re-evaluate the structures of the law, it is necessary to assess the possibilities and con-

sequences. To this end, the Technical and Legal Laboratory is an interdisciplinary pilot project of the Faculty of Law at UTM, which examines and experiences legal techniques and the digitization of legal practices. The lab provides a place for all participants in legal digitization, produces information and research, and prepares future generations of lawyers to work in new digital environments. The objective of the laboratory is to raise awareness of the possibilities of legal (legal) technology and its implications.

These objectives refer both to the traditional functions of the university and to the facilitation of the birth of a legal culture and technological-legal launch in Romania.

Objectives can be divided into four categories:

- The academic environment and legal education;
- Creating a space for interdisciplinary dialogue;
- Promoting the adoption of legal technology and best digitization practices;
- Improving community relations and social responsibility.

The advantage of a non-profit university project is that it allows the lab to react quickly to changes in the field. This means that the goals should be broad enough to allow change, but at the same time the scope must be concise enough not to lose focus. In order to cross the division between theory and practice, the laboratory has to host concrete projects with a practical attitude.

The lab should provide education for law students who have to comply with the digitization of legal practices when they enter the labor market. Algorithmic legislation and legal technology must be developed responsibly, because we need to encourage access to justice by using technology.

At the heart of research activities is the production of information that gives an overview of the consequences of digital transformation on access to justice.

A key element here is to identify problematic areas where ordinary people have to comply with the legal system. Several studies have shown that these encounters between individuals and the legal system are often perceived as ineffective or even traumatic, as navigation in the legal system often requires specialized knowledge or access to costly legal advice.

8 Conclusions on modeling the future of legal profession

1. Legal services have traditionally been provided as personalized solutions for individual cases of individual clients. However, the profession changes as more and more cognitive tasks can be automated. For this reason, law firms reevaluate their business models, and the role of a lawyer is gradually moving away from craft work;

2. Machine Learning, Neural Networks and Automation deals with information and design (and use) of various applications of these technologies in the legal system, creating new working methods. Instead of artisans, lawyers need to have skills such as data analysis. The change of legal profession must be addressed in the field of research and legal training.

3. To implement technology in the legal system with minimal repercussions, it is necessary to develop technological-legal studies. We need to adopt a nuanced technology approach that responds to the specific needs of the legal system as a functionally differentiated societal subsystem. This means that information technology applications need to be contextualized.

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Constitutional review and the legislative procedure

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Abstract

In the entirety of constitutional norms, the provisions containing procedural rules incidental to the field of lawmaking are correlated and are subsumed under the principle of legality governed by Article 1(5) of the Constitution, and in turn this principle underlying the rule of law, which is expressly enshrined in the provisions of Article 1(3) of the Constitution. Taking into consideration the importance of the stated principles, constitutional review and, from this perspective, the dialogue with the legislator with the purpose of observing the constitutional rules applicable to the legislative procedure, they are guarantees against the abuses of power of the parliamentary majority and therefore guarantees of democracy. The present study highlights landmarks of the mentioned dialogue with reference to the jurisprudence of the Constitutional Court of Romania, taking into account recent developments, in the sense of the increase in the number of decisions to admit objections of unconstitutionality on the grounds of violation of the norms of legislative procedure. The main purpose of the present approach is to highlight the importance of the above mentioned procedures, including from the perspective of the drastic effects of the finding of their violation.

Keywords: legislative procedure, constitutional review, quality of law, rule of law

1 Introduction

The desideratum of quality legislation is achieved by observing both the substantive and formal requirements of the regulation. From this perspective, the constitutional establishment of the rules of the legislative procedure and thus the possibility of constitutional review of their observance are guarantees of the constitutional provisions contained in Art. 1(5), which enshrines the principle of legality and in Art. 2, according to which sovereignty belongs to the people, who exercise it through its elected representatives. The power given to parliamentarians by the act of election cannot be discretionarily exercised. The Parliament's regulatory autonomy as well, also enshrined at constitutional level, is subject to the same rigor of the Constitution and the law

governing the conduct of any person in a rule of law: "regulatory autonomy is the expression of the rule of law, of democratic principles and can operate exclusively within the limits established by the fundamental law. Regulatory autonomy cannot be exercised in a discretionary, abusive manner, in violation of Parliament's constitutional powers".[1]

Recent developments in the jurisprudence of the Constitutional Court bring to the fore the importance of observing parliamentary legislative procedures, and the well-established jurisprudence can, to a significant extent, be qualified as a dialogue with the legislator in the elaboration of the aforementioned constitutional norms. We note in this respect that, in the doctrine, regarding the question of how these procedures are observed [2] two main dimensions were highlighted: that of protecting the legislator, and that of partner/accompanist of the legislator. As for the first dimension, it concerns first of all the protection of the legislator "against/of himself/herself", that is, the assurance that in the exercise of constitutional attributions, parliamentarians do not abuse their rights [3]. This case-law, "apparently restrictive, is in fact protecting the Parliament". The second dimension concerns the dialogue with the legislator in order to exercise the legislative power in accordance with the provisions of the Constitution. The authors cited as examples in this respect have the right to amendments, the functioning of the Joint Mixed Committees, the link between the amendments and the regulations to which they make reference to, the parliamentary consultations, the organic/ordinary regulations, etc., demonstrating an evolution in both the volume and substance of the constitutional review of parliamentary procedures[4].

In the present study we will refer to the latter dimension, pointing out the references of the above-mentioned dialogue with reference to the jurisprudence of the Constitutional Court of Romania, also taking into account recent developments, in the sense of the increase in the number of decisions to admit objections of unconstitutionality on the grounds of violation of the norms of legislative procedure.

2 The competence of the Constitutional Court to monitor the observance of the legislative procedure

There is no doubt that the Constitutional Court, in its capacity as guarantor of the supremacy of the Constitution, is competent to analyze and sanction the violation of constitutional reference rules, regardless of whether they prescribe procedural or substantive requirements of normative acts. By distinguishing, under this aspect, between the level of rules governing parliamentary procedures, the Court has held that it can not examine the violation of statutory rules, since the latter have no constitutional relevance and are not expressly or implicitly enshrined in a constitutional rule. Thus, "in the absence of express and distinct competence, it can not extend its control over the implementing acts of the regulations, since it violates the principle of the regulatory autonomy of the two Chambers itself, established by the first paragraph of Article 64(1) of the fundamental Law."[5]. Thus, the Court has consistently held that it is not competent to rule on the application of the regulations[6].

The Romanian Constitution contains express rules for all procedural steps of initiating, debating and adopting laws in Section 3 – *Legislation,* of Chapter I – *Parliament*, contained in Title III – *Public authorities,* as follows: the legislative initiative

(art. 74), Notification of the Chambers (art. 75), Passing of bills and resolutions (art. 76), Promulgation of laws (art. 77), Coming into force of laws (art. 78). Other procedural norms concern the approval of normative acts, which are duly established in the fulfillment of the constitutional role of certain constitutional authorities such as The Legislative Council (art. 79), The Supreme Council of National Defence (art. 119), The Superior Council of Magistracy (art. 133-134), The Economic and Social Council (art. 141). The amendment of constitutional laws has a distinct regulation in the title VII – *The Revision of the Constitution*, where both substantive and formal conditions are provided.

Jurisprudential landmarks

1. The legislative initiative

With reference to the legislative initiative, we note that Article 74 and Article 150 of the Constitution lay down the applicable rules, distinctly, as is the case, as organic, ordinary and constitutional laws, respectively. The right of legislative initiative belongs, for the organic and ordinary laws, to the Government, deputies, senators and citizens; and as regards the latter category of initiators, with the obligation to respect a minimum number of supporters and territorial dispersion. In the case of constitutional laws, the initiative belongs to a quarter of the deputies and senators, to the President of Romania at the proposal of the Government and the citizens, also with the observance of a minimum number of supporters and territorial dispersion significantly higher than in the case of organic and ordinary laws [7].

The constitutional rules being of strict interpretation, it is obvious that no other person/entity can exercise this right, such as, for example, a parliamentary committee. In this regard, the Constitutional Court held that "in principle, the drafting does not mean that the Special Commission itself is to initiate the bill/legislative proposal, because it does not have the right of legislative initiative [see Article 74 of the Constitution and Decision no. 474 of 28 June 2016, published in the Official Gazette of Romania, Part I, no. 590 of 3 August 2016, paragraph 36]". Although the Commission is made up of deputies and senators – parliamentarians who, by virtue of their constitutional role, have the right of legislative initiative, the argument that the right to legislative initiative, which is inherent to the members of the Commission, *ut singuli*, can only be extended to the Commission itself as an internal working body of Parliament, cannot be accepted, because the latter has a singular identity, distinct from that of its parliamentarian members, and is not among the subjects of law listed expressly and restrictively in Article 74(1) of the fundamental Law. The reasoning that the proceedings of a parliamentary committee are preparatory, without imposing a final vote or political will before Parliament, also cannot constitute a valid argument that extends beyond the constitutional framework the scope of the legal subjects to a legislative initiative [8].

2. The advisory opinions in the legislative procedures

In the legislative procedure, an important role belongs to the constitutional public authorities with advisory powers.

In particular, we note the role of the Legislative Council as a specialized consultative body of Parliament, as well as recent jurisprudential developments in the sense that "the Legislative Council's advice can be sought not only at the start of the legislative process but also during the parliamentary procedure"[9], with reference to Art. 66 of the Regulation of the Chamber of Deputies, which provides that: *„Should their attendance be needed, both the Rapporteurs of the Committees notified for offering their opinion and the Legislative Council experts shall be invited to attend the meetings of the Committee notified on the subject matter.",* and Article 99(7) of the same Regulation, according to which "The President of the Committee notified on the subject matter may request the Legislative Council to issue a viewpoint on a number of amendments. Such viewpoint shall be given within the time limit set by the Committee. *".* Also, Article 116 of the Senate Regulation provides that *„In the case of the draft laws and legislative proposals received from the Chamber of Deputies, if substantial changes have been made to the original project, the Chair of the Permanent Committee notified as to the substance may request the Standing Bureau to request a new viewpoint from the Legislative Council".* However, at the same time, art. 2(1)b of Law no. 73/1993 provides that the institution of the Legislative Council *„shall analyze and advise, at the request of the chair of the parliamentary committee notified as to the substance, the amendments to the committee's debate and the draft laws".*

In our opinion, it would be desirable to seek the opinion of the Legislative Council and during the parliamentary legislative procedure, in order to properly valorize this institution in achieving the objective imposed by Article 1(5) of the Constitution, namely legislation quality, which complies with all the normative technical norms for the drafting of normative acts. We are of the conviction that this would also reduce the number of unconstitutionality notifications, as many of them criticize in relation to Article 1(5) of the Constitution, referring to the provisions of the Law no. 24/2000 on the norms of the legislative technique for drafting normative acts[11].

Regarding other constitutional authorities with advisory powers, the Constitutional Court has consistently held that the lack of opinion of the public authorities involved does not automatically lead to the unconstitutionality of the law on which it was not given, since what is prevailing is the legislator's obligation to request it. The fact that the authority which is required to give such an advisory opinion, although requested, has not fulfilled that task "constitutes a misunderstanding of its legal and constitutional role, but without bringing prejudice to the constitutionality of the law on which the advisory opinion was not given"[10]. However, if the request for such an opinion is lacking, the law is unconstitutional, as is the case with the lack of request for the opinion of the Supreme Council of National Defense or of the Economic and Social Council. The Court held that the obligation to request an advisory opinion regarding the criticized law is imposed by the constitutional role of the mentioned authorities embodied at the level of the organic law by establishing the advisory power.[12]

3 Adoption of the law

3.1 *The quorum of the meeting*

Regarding the quorum at the meetings of Parliament, the Court distinguished between working quorum and the voting quorum. Since only the latter is governed by the Constitution, "nothing prevents the establishment by regulation of a working quorum other than a voting quorum"[13]. The Court has also held that the constitutional provisions of Article 76(2) "take into account the final vote cast for the bill as a whole"[14]. Regarding the number of Deputies or Senators present in the meeting room at the time of the final vote on a law, the Court determined that, in the absence of a request for re-verification of the quorum after the nominal call, "its results remained valid until the end of the meeting". Failure to fulfill the obligation of the chairperson of the meeting to verify the meeting of the legal quorum at the request of a parliamentary group leader is not only an act of non-application of the Regulation, but because the quorum enshrined in the Constitution itself is in question, represents a genuine unconstitutionality problem of the act adopted by the Parliament without verifying the meeting of the legal quorum provided by Article 67 of the Constitution. According to the jurisprudence of the Court, once the legal quorum has been established at the beginning of Parliament's sitting, the rules of law establish the relative presumption of the quorum being met throughout the meeting, with the consequence of adopting acts under constitutional conditions. The relative presumption ceases to operate when the leader of a parliamentary group asks the chairperson of the meeting to verify the legal quorum and is overturned if, after counting, it results in less than half plus one of the members of the two Chambers of Parliament, or it is confirmed if a greater number results from counting. Since the quorum is a necessary condition for the constitutional conduct of the voting procedure, the consequence of non-observance of this rule leads to the unconstitutionality of the act adopted by Parliament.[15]

3.2 *Voting the law*

A recent and completely atypical cause, in which a law adopted by the Parliament was withdrawn before it was sent to the promulgation, modified and then voted again, gave rise to statutes on the meaning and consequences of art. 75(3) of the Constitution, according to which, „*After the first notified Chamber adopts or repeals it, the bill or legislative proposal shall be sent to the other Chamber, which will make a final decision"*, and of Article 77(1) regarding the promulgation of the law, in the light of the principle of legality, regulated by Article 1(5) of the Constitution.

The Court has mainly examined how to interpret and apply the phrase "final decision", contained in Article 75(3) of the Constitution, in correlation with the other constitutional texts invoked, to determine whether the said constitutional text allows the decisional Chamber to decide by voting on a bill, and then, for various reasons, before the law is sent to the promulgation, to return to its content, to resume its debate and vote. Referring to the meaning of this phrase, in the context of examining the principle of bicameralism, the Court held that Article 75 (3) of the Constitution, using the phrase "final

decision" with regard to the decisional Chamber, does not exclude, on the contrary, presupposes that the draft or legislative proposal adopted by the first Chamber notified is debated in the decisional Chamber, where it can be amended and supplemented. Regarding the cause of the judgment, the question was, however, how far such amendments and additions can be made, that is to say, until the date when the law is voted in the Chamber plenum or after that, to the extent that the law was not sent for promulgation. Proceeding, firstly, to the literal interpretation of the mentioned phrase, the Court held that "to decide" means, according to the Romanian Explanatory Dictionary (DEX) "to decide, to resolve definitively". Given this significance, it seems that the constituent legislator could only use the verb "to decide" to describe the role of the decisional Chamber in the law-making process. However, in a seemingly tautological expression, he added the term "definitive", meaning, according to the DEX, "no longer subject to change, established forever, irrevocably, absolutely, categorically." The use of both notions in the same phrase is likely to strengthen its meaning, according to which, once the decisional Chamber has decided in the procedure for the adoption of a law, can no longer revert to the ruling on that law. This decision/resolution of the decisional Chamber is materialized by the plenary vote on the law, which in turn marks the completion of a complex deliberative process regarding the content and the form of the law. The Court concluded that, in view of the literal interpretation of the constitutional reference text, it is clear that the resumption of the debates and the vote on a law upon which the decisional Chamber has definitively decided, is excluded from the constitutional point of view. As a result of this vote, the draft or legislative proposal becomes law, this is signed by the presidents of the two Chambers of Parliament and must follow the constitutional procedural course in the sense of referring to the promulgation under the terms of Article 77(1) of the Constitution. Further proceeding to the systematic interpretation of the Constitution, The Constitutional Court finds that it is likely to lead to the same conclusion as to the meaning of the phrase analyzed, as long as the constitutional reference framework is clearing clear steps in the process of adopting a law, starting from the legislative initiative until the law enters into force, all subsumed under the principle of legality, the primary requirement of the rule of law.

In conclusion, the literal and systematic interpretation of the incidental constitutional norms led to the conclusion that, by resuming the debates and the vote in the decisional Chamber on the respective law, in the conditions in which the decisional Chambers had definitively decided by voting on it on 13 February 2019, the provisions of Article 75(3) and Article 77(1) of the Constitution were violated, with the consequence of the unconstitutionality of the adopted law as a whole. The Court has also stated that even if, as explained above, the solution to the reopen of the debates, the modifications brought to the law and returning it to the decisional Chamber had a positive purpose, namely to correct the law before it leaves Parliament, any such "correction" must be carried out in compliance with constitutional provisions. Accepting the contrary thesis would give the legislator the possibility to decide whether or not he respects the fundamental law, which is in contradiction with the principle of the supremacy of the Constitution and violates the role of the Constitutional Court as a guarantor of this supremacy. [16]

3.3 *Observing the principle of bicameralism*

The Romanian Parliament is bicameral, and the law is the product of debate and adoption in both Houses of Parliament, which must also be reflected in the content of adopted acts. In this regard, the Court has built a true "doctrine of bicameralism"[17], in the sense that it outlined (cumulative) essential criteria in order to determine the cases in which, through the legislative procedure, the principle of bicameralism is violated, respectively: the existence of major legal differences between the forms adopted by the two chambers of the Parliament and, on the other hand, the existence of a significantly different configuration between the forms adopted by the two Chambers of Parliament. The Court pointed out that the application of this principle can not have the effect of "diverting the role of the reflective Chamber of the first Chamber notified [...] in the sense that it would be the Chamber that would definitively fix the content of the draft legislative proposal (and, in turn, the legislative content of the future law), with the consequence that the Second Chamber, the decisional Chambers, will not be able to amend or supplement the law adopted by the reflective Chamber, but will only have the possibility of approving or rejecting it"[18]. Article 75 (3) of the Constitution, using the phrase "final decision" with reference to the decisional Chambers, does not exclude, but on the contrary assumes that the draft or legislative proposal adopted by the first Chamber notified is to be debated in the decisional Chamber, where it can be modified and supplemented. In this case, the decisional Chamber can not, however, substantially alter the subject matter and the configuration of the legislative initiative, with the consequence of misappropriation from the endpoint pursued by the initiator. In other words, "from the premise that the law is, with the specific contribution of each Chamber, the whole Parliament's work, the Court holds that the legislative authority must observe the constitutional principles under which a law cannot be adopted by a single Chamber."[19]

In summing up the findings of principle stated, the Court has held that the principle of bicameralism is characterized by several mandatory elements, according to which one can decide its observance, namely: the original purpose of the law, in the sense of the political will of the authors of the legislative proposal or of the philosophy, of the original conception of the normative act; if there are major, substantial legal differences between the forms adopted by the two Chambers of Parliament and, respectively, if there is a significantly different configuration between the forms adopted by the two Chambers of Parliament[20].

4 Conclusions

In all constitutional norms, the provisions containing procedural rules of a legislative nature are correlated and are subsumed under the principle of legality enshrined in Article 1(5) of the Constitution, in turn, this principle underlying the rule of law, expressly enshrined in the provisions of Article 1(3) of the Constitution, prefigured in what is commonly referred to as the rule of law, a phrase that implies the subordination of the state to the law, the provision of those means that allow the right to censure political options and, in this context, to weigh the potentially abusive, discretionary tendencies of the state structures.

The Constitutional Court has emphasized that, in this context, the legislative procedure appears not as a purpose in itself but as a prerequisite for ensuring quality legislation in the sense both of the European Court of Human Rights and the Constitutional Court in a wide-ranging jurisprudence. At the same time, compliance with this procedure is a guarantee of legal certainty. The Venice Commission also notes that the procedure for adopting laws is a criterion in the assessment of legality, which is the first of the reference values of the rule of law [21]. In this respect, *inter alia*, according to the same document, the existence of clear constitutional rules on the legislative procedure, the public debates of the draft laws, their adequate justification, the existence of impact assessments before the adoption of laws, are relevant. Regarding the role of these procedures, the Commission holds that the rule of law is linked to democracy by promoting responsibility and access to rights that limit the powers of the majority. In other words, regulating clear rules on the legislative procedure, including at the level of the fundamental Law, and observing the rules thus established, is a guarantee against the abuse of power of the parliamentary majority and therefore a guarantee of democracy.

The full awareness of the importance of the procedural rules that the fundamental law establishes and the intra-constitutional legislation develops, the increasingly consistent involvement of the Legislative Council during the course of the parliamentary procedure for the adoption of a law, as well as that of other institutions with a competence in giving opinions, are just as many measures for the drafting of a quality legislation. Of course, to the extent to which the rules on the legislative procedure have constitutional enshrinement, the Constitutional Court has the power to rule on the way in which the laws adopted by Parliament respect them and to sanction their violation. However, we stress that the effects of these rules are very drastic. Being circumscribed to the extrinsic unconstitutionality of the law, the decision to admit such unconstitutional notices with such a basis determines the unconstitutionality of the law as a whole, with the consequence of the cessation of the legislative process. In the case of the initiation of a new legislative process, the statutes contained in the decision of the Constitutional Court to be admitted regarding the deficiencies of extrinsic unconstitutionality must be observed.[22]

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Duration of preventive arrest

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Abstract

The study analyses the issue of the duration of preventive arrest, in the light of actual criminal procedural regulation in force, but also in the light of case-law of the European Court of Human Rights, namely the notion and criteria for assessing the term of this preventive measure. The study aims to analyse the measure in order to facilitate its understanding and deepening, as well as to suggest any required legislative changes.

Keywords: preventive measures, preventive arrest, duration of preventive arrest, reasonable time

1 Procedural regulations

Preventive arrest is the most severe of the procedural measures reglemented by the Code of Criminal Procedure, affecting one of the most important and fundamental human freedoms, the individual freedom defined by constitutional level in the art. 23 of Romanian Constitution; limitation in time is the essence of preventive arrest – an exception to the principle of individual freedom.

Given the importance of this freedom, the original constitutional legislator[1], and then the derived one[2], consistently regulated the situations and conditions under which this human freedom may be legally affected.

Thus, art. 23 par. (5) and (6) of the basic law[3] is relevant for the present analysis, where the duration of preventive arrest is fixed during criminal prosecution, as well as

[1] Which elaborated the Romanian Constitution in 1991, published in the Official Gazette no. 233 of 21 November 1991 and approved by the national referendum of 8 December 1991.
[2] What revised the Romanian Constitution in 2003, according to the Law on the Revision of the Romanian Constitution no. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003 and approved by the national referendum of 18-19 October 2003.
[3] "During the criminal prosecution, the preventive arrest can be ordered for up to 30 days and may be extended by up to 30 days, with a total duration not exceeding a reasonable period of time and no more than 180 days. At the trial stage, the court is required, under the law, to verify periodically, and no later than 60 days, the legality and thoroughness of the preventive arrest and to immediately order the release of the defendant if the grounds that led to the preventive arrest have ceased or if the court finds that there are no grounds. "

the court's obligation is to periodically check the lawfulness and the thoroughness of preventive detention at the trial stage.

As regards infra-institutional regulation, preventive arrest's duration is consecrated in several texts in the actual Code of Criminal Procedure, namely:

– art. 207 par. (6) C.p.p.[4], which provides for the maximum time interval within wich the preliminary chamber judge periodically checks the lawfulness and thoroughness of the preventive detention;

– art. 208 par. (4) C.p.p.[5], which establishes the maximum period of time within which the court verifies regularly, during the trial, the lawfulness and thoroughness of preventive arrest;

– art. 222 par. (10) C.p., which includes the duration of home detention in the maximum duration of preventive arrest during criminal investigation and;

– art. 226 par. (2) C.p.p.[6], which refers to the maximum duration for wich the preventive detention measure can be initially aplied during the criminal investigation;

– art. 233 par. (1) and (2) C.p.p.[7], which, despite the marginal name ("Duration of the defendant's preventive arrest during criminal prosecution"), stipulates the possibility of prolonging the preventive arrest accordind to the law, without indicating the total duration of this preventive measure, as well as the starting point (dies a quo) of the duration of the preventive detention, respectively the moment for implementation measure;

– art. 236 par. (2) and (4) C.p.p.[8], which takes over the provisions of the Constitution regarding the maximumterm for which preventive arrest can be established during the criminal investigaton and the total duration of the measure in question at this stage of the trial;

– art. 238 par. (1) and (3) C.p.p.[9], which establishes the maximum duration for which preventive detention can be taken during the preliminary phase of the trial and during the

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[4] "Throughout the course of the preliminary-ruling procedure, the Preliminary Chamber judge shall, of its own motion, periodically check, but not later than 30 days, if the grounds for the precautionary arrest and home arrest measure new grounds have emerged to justify the maintenance of these measures. The provisions of paragraph (2) to (5) shall apply accordingly ".

[5] "Throughout the course of the trial, the court ex officio, by conclusion, verifies periodically, but no later than 60 days, if the grounds for maintaining the precautionary arrest and the measure of home arrest have been resolved against the defendant; if new grounds have arisen justifying the maintenance of these measures. "

[6] "Preventive arrest of the defendant may be ordered for up to 30 days. The duration of detention is not deducted from the duration of the preventive arrest. "

[7] "(1) In the course of criminal prosecution, the duration of the defendant's preventive arrest may not exceed 30 days, unless prolonged under the law. (2) The term stipulated in paragraph (1) shall run from the date of enforcement of the measure to the defendant preventively arrested ".

[8] "(2) Prolongation of the defendant's preventive arrest can be ordered for a maximum of 30 days. (4) The total length of the defendant's preventive arrest in the course of the criminal prosecution may not exceed a reasonable term and may not exceed 180 days. "

[9] "(1) The preventive arrest of the defendant may be ordered in the preliminary procedure and during the trial, by the preliminary judge or by the court before which the case is raised, ex officio or on the motivated proposal prosecutor, for a period of up to 30 days, on the same grounds and under the same conditions as the preventive arrest ordered by the judge of rights and freedoms in the course of criminal prosecution. The provisions of art. 225-232 shall apply accordingly. (3) With respect to the defendant who was previously preventively detained in the same case, during the criminal prosecution, the preliminary procedure or the trial, the measure may be resubmitted only if new grounds arise which make it necessary to deprive it of freedom".

trial, as well as the condition of new grounds for reestablishing in the same case the preventive arrest of a defendant;

– art. 239 C.p.p.[10], which regulates the total duration of preventive arrest during the first instance trial, the starting point of preventive arrest at this stage and the possibility of another preventive measure upon expiry of the periods referred to in paragraph 1;

– art. 240 par. (2) C.p.p., which includes, during the period of the preventive arrest, the time during which the defendant was hospitalized under permanent protection;

– art. 241 par. (11) lit. b) C.p.p.[11], which determines the duration of the preventive arrest during the trial on appeal;

– art. 271 C.p.p., according to which, when calculating the time limits for preventive measures or any restrictive measures, the time or the day from which the term begins and the one at which the term expires falls within its duration.

The following observations can be made from the previous regulations:

The total duration of the preventive arrest for each phase of the criminal proceedings does not imply only an invariable term, as expressly indicated in Art. 236 par. (4) C.p.p. (180 days during the prosecution) and art. 239 par. (1) last sentence C.p.p. (5 years for the first instance trial, including the preliminary chamber phase), but also a variable term, provided by art. 236 par. (4) C.p.p. (reasonable time for the criminal investigation phase), art. 239 par. (1) the second sentence (reasonable term, respectively the half of the maximum stipulated by the law[12] for the offense – subject to court referral) and art. 241 par. (11) lit. b) C.p.p. (the inprisoment's duration given in the first instance conviction).

As regards the time units from which the aforementioned durations occur, it follows that, during the criminal investigation, the starting point is the enforcement of the measure against the defendant preventively arrested and during the preliminary phase of the trial, the trial in first instance and on appeal, preventive detention starts from the date of the referral to the court if the defendant is in preventive detention or when the measure is enforced in the absence of defandant.

These time frames are substantial and are not procedural, as they protect extra-procedural rights or interests, their function being to discipline in time the measures that the judicial authorities can take regarding the deprivation or restriction of human rights

[10] "(1) During the trial at first instance, the total duration of the defendant's preventive arrest may not exceed a reasonable period and may not be more than half the special maximum provided by the law for the offense which is the subject of the court referral. In all cases, the duration of the preventive arrest in the first instance may not exceed 5 years. (2) The terms provided in paragraph (1) shall run from the date of the referral of the court, if the defendant is in pre-trial detention and, respectively, from the date when the measure was enforced, when the preventive arrest in the proceedings was ordered against him preliminary or in court or in absentia. (3) Upon the expiration of the terms provided for in paragraph (1), the court may order the taking of another preventive measure, according to the law ".

[11] "Preventive arrest and home arrest also cease in law in the following situations: b) on appeal, if the duration of the measure has reached the duration of the sentence pronounced in the conviction."

[12] According to art. 187 C.p., "punishment provided by law" means the punishment stipulated in the text of the law that criminalizes the deed in the form used, without taking into consideration the causes of reduction or increase of punishment; this meaning is also applicable to the syntax used in art. 239 par. 1, second thesis C.p.p, based on art. 602 of the same code.

assigned in the criminal proceeding[13]; at the same time, they are legal, can not be suspended or interrupted.

Regarding the duration of the preventive arrest in the appeal, we appreciate that the legal provisions in the matter [Article 241 paragraph 11 letter b) C.p.p.[14]] can also be applied by analogy to the measures of deprivation of liberty imposed on the juvenile offender by the sentence of the first instance court; this is because, contrary to criminal law rules, for which extensive analogous interpretations are not allowed, in order to guarantee the principle of the lawfulness of criminalization and punishment, in the field of criminal proceedings can also be reached at the results of extending the norm of criminal procedure or at the use of the analogue supplement, where the rules do not provide for restrictions on rights, exceptions to the rule, serious sanctions and limiting cases, such as the one in question[15]; at the same time, by resorting to norms regulating similar matters, the use of analogous interpretation is allowed to fill legal gap, given the need for the criminal process to achieve its purpose[16].

With respect to the general principle of law *specialia generalibus derogant*, we consider that the provisions of art. 399 par. (6) C.p.p. shall be applied with priority to the provisions of Art. 241 par. (11) lit. b) C.p.p., in the sense that to the calculation of the duration of the preventive detention on appeal the length of the retention will also be considered in order to check whether the measure of arrest (preventive arrest or home arrest) is lawfully terminated; in this case, it is just a matter of uncorrelation of legal texts; moreover, according to another principle of law – *ubi lex non distinguit, nec nos distinguere debemus* –, when calculating this duration, the accumulated periods of deprivation of liberty should be taken into account regardless of the phase at which they were disposed[17].

Since preventive measures against deprivation of liberty constitute an exception to the principle of individual liberty, we consider that the calculation of the maximum duration of the preventive arrest should also take into account detention periods which were established, extended and/or maintained against the same defendant in the cases in which the criminal case has reached the same stage of the criminal proceedings as a result of a resumption of criminal prosecution in the case of restitution of the case by the preliminary chamber judge, art. 346 par. (3) lit. b) C.p.p.[18], in the case provided by

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[13] See T. Pop, Criminal Procedural Law, vol. III, National Printing House SA, Cluj, 1946, p. 32, quoted by Gheorghe TV in the New Commentary on the Code of Criminal Procedure, edition 2, Hamangiu Publishing House, 2015, p. 660, author coordinator AS Uzlau.

[14] "Preventive arrest and home arrest also cease in law in the following situations: b) on appeal, if the duration of the measure has reached the duration of the sentence pronounced in the conviction."

[15] V. Manzini, Trattato di diritto processuale penale italiano, Torino, U.T.E.T., 1931, p. 106.

[16] The Gr. Gr. Theodoru, Criminal Procedure Law Treaty, Hamangiu Publishing House, Bucharest, 2007, p. 51; in the same sense, see C. Ghigheci in the New Code of Criminal Procedure, op. cit., p. 9, author coordinator A.S. Uzlau.

[17] In the same sense, see D. Atanasia in the New Code of Criminal Procedure, op. cit., p. 574, coordinator A.S. Uzlau.

[17] "Where the judgment is based on the provisions of Art. 346 par. (3) lit. a), the resumption shall be ordered by the head of the prosecutor's office or the hierarchically superior prosecutor provided by the law, only if he finds that in order to remedy the irregularity it is necessary to carry out criminal prosecution acts. The ordonance of reopening criminal prosecution shall also mention the acts to be performed "

[18] "Where the judgment is based on the provisions of Art. 346 par. (3) lit. a), the resumption shall be ordered by the head of the prosecutor's office or the hierarchically superior prosecutor provided by

art. 334 par. (2) C.p.p.[19] or in cases of reopening of the criminal prosecution provided by art. 335 par. (1)-(3) and (5) C.p.p., as well as in the situation of re-judgment of the case following the abolition, cassation or annulment of the court decision, according to art. 421 C.p.p., art. 432 C.p.p., art. 448 C.p.p. or art. 462 C.p.p.

This solution is all the more necessary since, in principle[20], the reasons for reopening the criminal prosecution or of the first instance trial or on appeal are not imputable to the defendant.

Also, it can not be considered that the lawful cessation of the preventive arrest in the cases of extinction of the criminal action, prerequisites of the aforementioned solutions, constitutes an obstacle to the cumulation of the preventive arrest durations, as the same situation is when, during a phase of the process it is ceased the measure of preventive arrest, but on the basis of new grounds this measure is again ordered against the defendant; in this case, there is no doubt that the calculation of the maximum duration of preventive arrest takes into account the cumulative number of previous arrest periods.

2 The reasonable period of preventive arrest

2.1 *Notion. Criteria of appreciation*

Under the law, the notion of "reasonable time of preventive arrest" is not defined in the Romanian criminal procedural law, its meaning being to be detected from the jurisprudence of the European Court of Human Rights, national jurisprudence and doctrine.

It is worth mentioning that this notion was introduced into the romanian positive law with the revision of the Constitution in 2003, in article 23, dedicated to individual freedom, referring to the duration of the preventive arrest during the criminal investigation, to which it was fixed with a constitutional rank also the maximum duration for 180 days; subsequently, the term was also introduced in the previous Code of Criminal Procedure, with the changes introduced by O.U.G. no. 109/2003[21], approved by Law no. 159/2004[22].

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the law, only if he finds that in order to remedy the irregularity it is necessary to carry out criminal prosecution acts. The ordonance of reopening criminal prosecution shall also mention the acts to be performed".

[19] "(1) If the hierarchically superior to the one who ordered the solution then finds out that there was no circumstance on which the classification was based, invalidate the ordonance and order the reopening of the prosecution. The provisions of art. 317 shall apply accordingly. (2) If new facts or circumstances have arisen showing that the circumstance on which the classification was based have disappeared, the prosecutor shall revoke the ordonance and order the reopening of the prosecution. (3) When he finds that the suspect or the defendant has not performed in bad faith the obligations established under art. 318 par. (6), the prosecutor revokes the ordonance and orders the reopening of the criminal prosecution. (5) If the classification was ordered, the reopening of the criminal prosecution takes place also when the preliminary chamber judge admitted the complaint against the solution and sent the case to the prosecutor in order to complete the criminal prosecution. The provisions of the preliminary chamber judge are mandatory for the criminal prosecution body ".

[20] An exception would be the reopening of criminal prosecution as a result of the breach with bad faith by the defendant of the obligations established under Art. 318 par. (6) C.p.p. on the occasion of renunciation criminal investigation.

[21] Published in the Official Gazette no. 748 of 26 October 2003.

[22] Published in the Official Gazette no. 451 of May 20, 2004.

In a constant case-law of the European Court of Human Rights, it has been emphacesed out the general principles to be taken into consideration when analyzing the reasonable duration of a preventive detention under Art. 5 (3) of the Convention[23], of which the starting point is that of placing the person in custody, and the final one is given by the judgment, even non-final, or is the moment of release[24]; at the same time, all periods of time during which the defendant was deprived of freedom in the same case will be taken into account when assessing the reasonable duration of preventive arrest; however, there were situations in which the Court analyzed the reasonable duration of the preventive arrest taken against a defendant on the basis of the same accusation for the separate periods in which he was arrested[25].

In its case-law, the Court examines, first, whether the grounds relied on by the national authorities were relevant and sufficient to justify detention and, secondly, whether the competent national authorities have made special diligence in the course of the procedure in order to avoid unjustified prolongation.

The reasonable nature of the duration of this detention can not be evaluated in abstracto, the legitimacy of maintaining detention is being examined concretely, following that the national courts will convincingly justify based on evidence the persistence of the reasons for the prolongation of the detention; they impose the holding of a public interest which must be protected to the detriment of the rule of respecting the individual's freedom and the presumption of innocence of the accused[26].

It has also been ruled that the persistence of plausible reasons for committing an offense is no longer sufficient after a certain period of time, recently[27] appreciated by the Court as being immediately after arrest, instead must be doubled by the existence escape possibility, of committing new offenses, public order disruption or obstruction of justice.

As the risk of these dangers is diminished, the grounds for taking, prolonging and/or maintaining preventive arrest change automatically, which brings reaching the reasonable duration of preventive arrest, resulting in the possibility of replacing this measure with an easier measure, respectively home arrest, judicial control or judicial control on bail.

In the case law of the European Court, as a factor in diminishing the threat of public order disruption, the flow of a period was noted, stating that, by their special gravity and by the public's reaction to their committing, certain crimes can generate social unrest, which justifying the preventive arrest, at least a certain amount of time; however, such a

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[23] "Any person arrested or detained under the conditions provided for in paragraph 1 c) of this Article shall be brought immediately before a judge or other magistrate empowered by law to exercise judicial powers and has the right to a trial within a reasonable time or issued during the proceedings. Release may be subordinated to a guarantee ensuring that the person concerned is present at the hearing. "

[24] ECHR, June 27, 1968, Wemhoff v. Germany, Alexandru Ilie v. Romania, dec. of 30 March 2006, cited by C. Bîrsan in the European Convention on Human Rights, Commentary on Articles, 2nd Edition, C.H. Beck, Bucharest, 2010, p. 321; Toth v. Austria, dec. of 12 December 1991, paragraph 66, cited by M. Udroiu in the Criminal Procedure. General Part., 5th Edition, C.H. Beck, Bucharest, 2018, p. 671.

[25] ECHR, dec. of 19 February 2008 in Yalcin v. Turkey, paragraphs 36-38; ECHR, dec. of 27 November 1991, Kemmache v. France, paragraphs 46-48, cited by M. Udroiu in the Criminal Procedure. General Part., Op. cit., p. 672.

[26] ECHR, dec. of 13 July 1995, Van der Tang v. Spain, paragraph 55, cited by C. Bîrsan in the European Convention on Human Rights, Commentary on Articles, op. cit., p. 324.

[27] ECHR, dec. July 5, 2016, Buzadji v. Moldova, paragraphs 33-43, available at https://hudoc.echr.coe.int.

danger necessarily decreases over time, and therefore the judicial authorities must provide more specific reasons to justify the persistence of detention reasons[28].

If the circumstance relied on by the national authorities are within to those identified by the Court as justification for maintaining a person's detention, it follows a second analysis which probes the special diligence that should have characterized the criminal proceedings.

Thus, it has been shown that it must be taken into acount: the complexity of the case[29], the volume of the case[30], the number of witnesses quoted to be heard and the court's insistence on bringing witnesses[31], the number of defendants, the need to administer proves through international rogatory commission[32], the defendant's procedural attitude[33] (in the sense of obstruction the conduct of the investigation, and not the lack of cooperation with the judicial bodies).

For example, with regard to the complexity of the case, the Court stated in cause Celejewski v. Poland that although crimes committed by organized criminal groups involve a complex and long-term investigation, it can not be justified neither in this matter a preventive arrest lasting longer than 5 years by reference to the requirements of art. 5 paragraph 3 of the European Convention[34] on Human Rights.

We consider that the assessment of the reasonable duration of the preventive arrest must be related to the purpose for which it was ordered, respectively the proper conduct of the criminal proceeding, the prevention of the commission of new offense, the prevention of the defendant's circumvention from the criminal investigation or trial or the preservation of the public order.

Thus, the benchmarks set out by the European Court and listed above are useful in determining the reasonable duration of preventive arrest when it was ordered for the proper conduct of the criminal instruction.

For the other potential purposes of the preventive arrest measure, we consider that must be taken into acount, on the one hand, those relative elements such as the seriousness of the imputed fact and the personal circumstances of the defendant (criminal history, health status, personality, family situation) and, on the other hand, the objective element given by the maximum duration of the preventive arrest for each process phase; a balanced analysis must be made in the light of the exceptional nature of any deprivation of liberty and the primordial nature of the assessment of the total duration of the preventive arrest through the point of vue of the reasonable period and not of the statutory maximum period reglemented by law.

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[28] ECHR, dec. April 7, 2009, Tiron v. Romania, paragraph 40, available at https://hudoc.echr.coe.int.
[29] ECHR, dec. of 26 June 1991, Letellier v. France, paragraph 51, cited by M. Udroiu in the Criminal Procedure. General Part., Op. cit., p. 675.
[30] ECHR, dec. of 18 December 1996, Scott v. Spain, paragraph 83, idem, p. 676.
[31] ECHR, dec. of 11 iulie 2000, Trzaska c. Poloniei, paragraf 68, idem.
[32] ECHR, dec. of 28 March 1990, Case B of Austria, paragraph 45, idem.
[33] ECHR, dec. of 18 September 2001, Kalashnikov v. Russia, paragraph 75, idem.
[34] Ratified by Romania through Law no. 30/1994, published in the Official Gazette no. 135 of 31 May 1994.

Thus, any detention that tends to the maximum length prescribed by law must be considered as an exception to the exception[35] and thus convincingly reasoned based on evidence.

As a last conclusion in this context, we consider it necessary to regulate in the future the notion of "reasonable period of preventive arrest" in the light of the requirements of clarity, accessibility and predictability of any legal rules, especially those governing the deprivation or restriction of the exercise of certain fundamental rights.

2.2 *Consequences of the expiry of the preventive arrest*

Starting from the content of art. 268 par. (2) C.p.p., the expiration of the duration of the preventive arrest rightful ceases the effect of the measure.

In the doctrine[36], it was stated that "the preventive measure ceases when there is a legal obstacle to its maintenance, the authority before which the case is having the obligation, under disciplinary or even criminal responsibility, to immediately release the detainee detained or preventively detained or to immediately lift the obligation not to leave the town or the country or other obligations imposed by judicial control ".

In the case analyzed, this is the expiration of the duration of the preventive arrest measure, established by the law or by the judicial bodies, under art. 241 C.p.p.

It is worth mentioning that the same sanction will also occur if at the expiry of the 30-day time limit the judge of the preliminary chamber or the court did not verify the legality and thoroughness of the preventive arrest within this period, namely at the expiry of 60 days period, if the court did not verify the legality and the validity of the preventive arrest within this period, contrary to the obligations stipulated by the provisions of art. 207 and 208 C.p.p.

As to the rightful impact of this sanction, once the measure has ceased to exist, it can no longer be extended or maintained, as the case may be, since it is not possible to prolong or maintain something what is no longer in existence; therefore, when examining the opportunity to prolong or maintain preventive arrest, it is also necessary to check whether the maximum duration of preventive arrest is respected at the preceding procedural phase or during the the trial stage, or that the legal deadlines for this examination have been respected.

Regarding the expiration of the reasonable term of preventive arrest, from art. 241 C.p.p., it is noted that the sanction of the rightful cease of the preventive arrest operates on the expiry of the time-limits stipulated by the law or established by the judicial bodies or at the maximum legal term for each procedural stage, and not at the fulfilment of the reasonable period.

In this context, it can not be considered that the reasonable period of preventive arrest is a period prescribed by law, although it is mentioned in the Code of Criminal Procedure, as it is a time-apreciated specificaly with a relatively broad margin of appreciation, so that it can not be vested with this vigorous sanction in case of expiration; in addition, its

[35] The rule from exception being the total duration of preventive arrest that is equivalent to its reasonable term, determined in concrete.

[36] Gr.Gr. Theodoru, Treaty of Criminal Law, op. cit., p. 375-376, quoted by D. Atanasia in the New Code of Criminal Procedure, op. cit., p. 565, coordinated by A.S. Uzlău.

duration, which is assessed by the court on the basis of the abovementioned criteria, reveals the nature of a judicial term, and not a legal term.

Given that the reasonable period of preventive arrest is analyzed according to the peculiarities of the case, what actually determines the fulfillment of this lenght of time is the change of the grounds of the preventive arrest, that means inclusive the considerable diminishing of the legitimate dangers in respect of which the measure was ordered; if the grounds are maintained, then the reasonable duration of the preventive arrest has not been fulfilled, requiring it to be prolonged or maintained under the law.

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[2] See T. Pop, Criminal Procedural Law, vol. III, National Printing House SA, Cluj, 1946, p. 32, quoted by Gheorghe TV in the New Commentary on the Code of Criminal Procedure, edition 2, Hamangiu Publishing House, 2015, p. 660, author coordinator AS Uzlau.

[3] V. Manzini, Trattato di diritto processuale penale italiano, Torino, U.T.E.T., 1931, p. 106.

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Cybercrimes

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Abstract

The present article aims to reveal the importance of cybercrimes in the context of modern society and of a legislation that has to keep up with the fast evolution of technology. Even though they do not occur in palpable space, crimes in the virtual world are a reality and must be regarded and qualified as such, therefore they have to be corrected by similar legal provisions as their "clasic" correspondents.

Keywords: cyberspace, technology, crime, cybercrime, criminal law, virtual information, illicit character, installation, copy, storage, running programs, publishing, software, legislation, normative act, regulation, cyberspace, computer fraud, offender, user.

1 Cyberspace – Concept and Typical Actions

1.1 *The Inconcrete Nature of Cyberspace and Its Existance In Concreto*

Virtual space or *cyberspace* is a notion as wordly known as it is vast, as well as it is perhaps insufficiently understood and explored. It can somehow be defined by the „intangible" that reunites in its contents all informatic operations that someone (generally named *user*) can access, regardless of the fact that he uses a search engine, an application, a program or a social media platform. Cyberspace is the mean by which we offer or receive virtual information.

Materialised in a „century of speed", together with other notions such as: artificial intelligence (AI), informatic system, data storage, this one brought as well a novelty element with itself. At first surprised by these new concepts, humanity had it's doubts about them, to later accept and actually integrate them in its everyday life. Parallel with the evolution of mankind, that brought with itself more and more problems in the copyright field, and throgh the prism this multitude of discoveries, inventions and innovations that appeared in cyberspace, thus came up the need of setting some common law rules that would evetually norm the situations in wich this right is violated.

In the context of more and more pronounced technology operated processes, one of the current problems is the development of a legal framework for this field. During the last decade technology reached peaks that were unimaginable in the past, fact which is most frequently present in its informatic branch. Information technology evolved with a highly accelerated rithm, granting everyone access to various virtual fields such as: research, shopping, entertainment, comunication and many other that is one „click" away from the user.

Therefore, in a state that upholds the Rule of Law, every action with illicit character entails the criminal liability of its offender, meaning that it's also normal for cyberspace actions to be regulated by law. Due to the fact that legislation always needed timing to parallel techology's evolution steps, cybercrimes could not be framed and sanctioned as such, because they weren't yet incriminated.

Once presented these statements, we are about to analyze the main actions that happen in cyberspace and the impact they have, from the criminal law point of view on the user of such services.

1.2 *Typical Cyberspace Actions and Activities*

Types of cyberspace actions are numerous and their number often varies depending on the activities that one undertakes. Having said that and considering that our analysis is mainly focused on the topic of intellectual property in cyberspace, we shall continue to bring to attention precisely those actions which are likely to tangent copyright infringement.

One of these actions is installation, meaning downloading and installing computer programs in the users's computer system. The installation can be done only under law limits, assuming this program has been illicitly obtained and it is under licence or, on the other hand, in the case where the program has been published by its author with the purpose of popularising it free of charge.

Another such action is copying. Copying a program, an application, web design items or any other element belonging to virtual space – original creation benefiting of copyright protection – translates as the multiplication of the respective program and is allowed by law only if obtaining the copy has been done without any decoding or „hacking" actions (plagiarism executed by destroying protection codes against this action).

Storage represents the action taken with the purpose of keeping a document, a program, an information, an image – „media content" so to speak, by fixing it (according to the sense offered by current legislation) on an informatic memory platform. Such an example are storage platforms like CD (compact disks) or flash disks.

Running is that action which involving using a computer program in order to obtain the results for which the respective program or application have been created.

Publishing takes place the same way as in the real environment, although in cyberspace it has a much larger impact because even though this form of presenting is also public, it is however accesible to any type of user. In comparison, publishing on physical material is usually intended for a target group.

2. Legal premises

2.1 *Normative Acts in Cyberspace*

Before presenting all normative acts with stipulations in regard to cyberspace, we must observe the limits in which the existing information in virtual space can or cannot be spread.

Thus, even if todays society makes it possible for almost any user to store a certain amount of virtual content in the computer he possesses, certain services that are used in the web field ask for the submission or transfer of personal data; however, this data musn't circulate excessively and limitless, overcoming the „warrant" of the user who disclosed it. Violation of this right gives any user the possibility of considering himself a victim of cybercrime.

In our country, in regard to cyber activity, there is an institution specifically intended for personal data protection, and that is the National Authority for the Surveillance of Personal Data Processing. This institution has been founded in the 3rd of May 2005, by the entry into force of Law no. 102/2005, concerning the organisation and functioning of the National Authority for the Surveillance of Personal Data Processing, law which consisted in fulfilling the directives of the European Union in this matter[1].

The prerogatives[2] laid down by law of this institution are the following:

– Receiving and analysing notifications that regard personal data processing;

– Authorisation of data processing in legal conditions;

– Reffering to criminal investigation forces in case of infringement upon legal dispositions;

– Temporary suspention and complete or partial deletion of data, in case of law infringement;

– Informing natural or legal entities as to respect the norms of law no. 677/2001;

– Settlement of complaints etc.

The existing law towards personal data field in Romania comprises the following normative acts: Law no. 102/2005[3]; Law no. 129/2018[4]; Law no. 190/2018[5]; The Rules of Organisation and Functioning of ANSPDCP; O.U.G. no. 131/2005[6]; Law no. 178/2007[7]; Law no. 682/2001; Law no. 506/2004; O.U.G. no. 13/2012; Law no. 82/2012; Law no. 272/2006; Law no. 365/2002; Methodic Norms from 20th of Nov. 2002; Law no. 146/2008 and Law no. 238 issued in 10th of June 2009.

2.2 *Regulations in Cyberspace*

Regarding the legal subject of cybercrime, it is defined by the sum of scrientific, literary and artistical creative ideas, belonging to creations that are under the rule of related copyright regulations, which are making the object of collective management of moral and patrimonial copyright.

As for the material object of crimes, this is represented by all artistic and scrientific creations or of those which are bearing related rights.

The active[8] subject of crime in cyberspace can be defined by any person commiting directly or in participation an action that presents criminal sides, but is also linked to virtual information and/ or data that has been the crime object.

The passive subject is, naturally, the person detaining royalties on information or data stored or used through law infringement by the perpetrator.

The Criminal Code is the most inclusive respecting the fields incidenting cyberspace. Thus, articles 180 and 181 explain the notions of „electronic payment instrument" and of „informatic system and data", which determine the hypothesis, the crime's exact deployment frame.

The actual crime of informatic fraud is explicitly regulated by article no. 249[9] of the said law. This kind of fraud aims mainly informatic data and actions headed towards their lawful holders and charges criminals with jail sentences for periods between 2 (two) and 7 (seven) years.

The Law continues with article no. 250, which sanctions financial operations performed fraudulently and primarily reffers to cash or electronic money withdrawal, through illicit means and without the holder's approval.

We consider that in certain situations, even companies and corporations are violating the right of personal data processing protection, since they create personalised data bases of the individuals, later transferring them either for a fee, either as a „concession" to other companies, or alienating them for political purposes or other illicit matters. In this regard, we will bring to your attention the recent „sale" case of personal data of Facebook platform users by th owner of the company, Mark Zuckerberg, for pollitical matters.

Not lastly, article no. 302 belonging to the same Law largely treats the problem violating the privacy of the corresponcence, phenomenon which in cyberspace is reflected by the electronic postal system, generally known as „e-mail".

2.3 *Most Frequent Frauds in Virtual Space*

The Criminal Code in force covers a relatively large aria concerning cyberspace frauds, nevertheless sanctioning this sort of offences is still at its early start, and forensic science is still not very developed.

The classes of frauds[10] in virtual space that are mostly found also in practice are:

– Crimes against personal freedom (Title I, chapter VI)

– Crimes against patrimony – Theft (Title II, chapter I)

– Crimes against patrimony – Froud done by informatic systems and electronic payment means (Title II, chapter IV)

– Duty offences (Title V, ch. II)

– Forgery (Title VI, ch. I)

– Crimes against the safety and integrity of informatic data and systems (Title VII, ch. VI)

Among these, the most serious, and also most frequent, are the following:

– Title II, ch. I – sanctions in art. 230, paragraph (2) the use with no right of a communication terminal, belonging to someone else or connecting without a permit to a network;

– Title II, ch. IV – sanctions informatic fraud within art. 249, fraudulently conducting financial operations (including also „cyberspace type" of operations) within art. 250 and acceptance of these forged financial operations within article 251;

– Title V, ch. II – incriminates through the (2)nd paragraph of its 302nd article violation of mail privacy, including illicit interception of any type of electronic communications;

– Title VI, Ist ch. – is treating throught most of its articles matters like forgery of debt securities, electronic payment instruments and ownership of these instruments in order to value counterfeits.

– Title VI, ch. III – existance in cyberspace of falsifying official documents is regulated by art. 324, which incriminates forgery of technical records and broadcasting or using them without rights, whereas art. 325 largely explains the notion, and also the crime of informatic fraud;

– Title VII, ch. VI – incriminates in its articles, starting no. 360 to no. 366, the illegal access to an informatic system, illicit interception of informatic data transmission, alteration of informatic data integrity, disturbance of informatic system operations, unauthorised data transfer and all illicit operations involving informatic software and programs.

3 *Lege Ferenda* Propositions

Firstly, we believe that a special chapter should be devoted to cybercrimes in Romania's Criminal Law set. It would be desirable if grouping all crimes that can be done in virtual space could make the object of a separate single chapter, without the incidence multiple other laws, which oftenly „fog" the norms. Another aspect regarding the utility of this change would be the faster facilitation of being up to date with these norms, to both magistrates and litigants.

Secondly, they should introduce the possibility of acting ex officio in these cases, given that it could stop cyber-criminal chain operations. For example, in case the criminal evades certain data by decrypting National Interest Information from the servers on which they are being kept, even though the fact is well-known by criminal authorities, they are not entitled to act ex officio and immediately start criminal proceedings which could stop the criminal's access to information. Of course, the authority or institution that becomes victim of this crime is allowed to lodge a complaint, but for rapidly resolving the cause and stoping the crime during its deployment, criminal investigation authorities should be able to act ex officio.

Not lastly, it would be useful if companies that produce devices and equipments which can store data or any other info (laptops, smatphones etc.) would be obliged to implement programs that prevent and alert the victim-user, by displaying a warning message, which should contain the address of the criminal or at least locate the server through which the crime is done.

4 Conclusions

Therefore, according to those presented, although not having a touchable nature, cyberspace really exists *in concreto.* Even though it drastically differs from the real environment, cyberspace implies specific actions that cannot always be followed or monitored in order to being perfectly regulated or justly sentenced. But our aim is that of highlighting that both actions and effects produced by them must be analysed and studied for an ever perfectible legal system.

We must not lose sight of the fact that cybercrime is based on a fundamentally mathematic system, where every task implies a reaction, an effect or a modification in the system.

Indeed, monitoring cyber-operations, as well as detecting or sanctioning cybercrimes can raise a few problems, but we musn't forget that, despite the environment being virtual, at „the other side of the wire" we still have a human component: the perpetrator.

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The passive subject of the assault of a public official

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Abstract

The study analyzes the issue of the passive subject of the assault of a public official from the point of view of the criminal law in force and is structured on the analysis of the cumulative conditions that are necessary for the detention of this offense, as they were dealt with in doctrine and jurisprudence. The study aims to analyze the institution in order to facilitate its understanding and deepening, as well as to suggest possible necessary legislative changes.

Keywords: Public Authority, passive subject, assault of a public official, public servant,

1 Brief History. Specific notions

Since ancient times, human society has been organized in various forms, such as gintis, tribes, tribal unions, etc. Within them there were rules imposed and accepted for the development of the common life. They were elected leaders who were given power over the other individuals. This was a form of authority. Leaders were called monarchs, and this name was preserved in some states even in the modern age of mankind.

The notion of authority comes from the Latin "auctoritas", which means the power to impose a person on obedience[1].

The notion of "monarch" originates from the neo-revered monarch and means the supreme ruler of a sovereign monarchy[2].

Depending on time and territory, the monarch was called King or Emperor; or the tsar of the Slavs; han (Persian), maharajah (India), sultan (Ottoman Empire) and caliph or emir (title used in the Arab world). In the Romanian Lands, they were called voivodes, rulers, leading a Voivodate or Principality.

The commission by the subjects of the monarch of acts against the persons who carried out the monarch's decisions was considered to be an act that could overthrow his authority and sanctioned accordingly.

To understand why the monarch enjoys authority over his subjects, we need to analyze the state concept. The definition of the state has been made since the antiquity, and this concept was addressed for the first time by the thinkers of ancient Greece. This definition was based on the evolution of human society as it was organized at that time. In Plato's view, the state was an aristocratic type-based organization. Leaders were philosophers, guards had the role of guards, and the rest of the population pursued various activities.

Theories have been formulated according to which the state appears as a divine creation, respect and submission to it being appreciated as a religious duty, hence the phrase – "the monarch reigns in the mercy of God."

Some thinkers believe that the state emerged on the basis of an understanding between power and citizens as a natural necessity, a theory backed by antiquity, but developed in the light era, especially in Ch. Montesquieu and J.J. Rousseau.

According to legal theory, relations between people are based on legal regulations.

We do not insist on the definition of the state, it is important to emphasize that state authority is an attribute conferred on the state organs that ensure the realization of the sovereign power of the people. This sovereign power was exerted at some point in the history of mankind and through the monarch.

Currently, the rule of law is the most commonly used formula, and the essential element is the fact that sovereign power is exercised by the law by the people through its representatives.

State organs enjoying authority are structured and operate in accordance with the principle of separation of powers enshrined in the Constitution, which is the fundamental law of functioning of the modern state. It is based on respect for human rights.

The regulation of the assault of a public official has emerged in the modern state as a consequence of its development and the need to strengthen the authority of its organs.

The notion of „outrage" comes from the French word "outrage"[3] which means insult, offend, threat, act of violence against one. It is derived from the Latin "ultra", which means "beyond" or "over".

The notion of „outrage" was used for the first time in the French Criminal Code from 1810[4] to Art. 224.

With the state's evolution, it was necessary to regulate outrage as a crime committed against a state official who is in office.

2 Regulations of the assault of a public official in Romania

The criminal code of 1864[5] (in force from 01.05.1865 to 31.12.1936) provided for the offense against a public servant, administrative or judicial officials, any citizen charged with a public or municipal service or a public servant acting in the exercise or on the occasion of its function (Articles 182-189).

In the Criminal Code of 1936[6] (in force from 01.01.1937 to 31.12.1968) the offense was regulated by art. 253, art. 254 and art. 255.

The Criminal Code of 1968[7] (in force between 01.01.1969 and 31.01.2014) regulated the assault of a public official at art. 239, and at art. 238 there was an offense to the authority.

The Penal Code in force, adopted by Law no. 286/2009[8], is regulated by art. 257 – assault of a public official and the art. 279 – assault on representatives of the judicial authorities.

The legal text of art. 257 from the Criminal Code is following:

(1) A threat committed either directly or by any means of direct communication, blows or any other acts of violence, bodily harm, blows or bodily harm which result in death, or murder, committed against a public servant holding an office that involves the exercise of state authority, who is in the exercise of their service responsibilities or in relation to the exercise of such office shall be punished as provided by the law for those offenses, and the special limits of the penalty shall be increased by one-third.

(2) The commission of an offense against a public servant holding an office that involves the exercise of state authority or against their property, for the purpose of intimidation or revenge, in relation to the exercise of the office, shall be punished as provided by the law for those offenses, and the special limits of the penalty shall be increased by one-third.

(3) The same penalty applies to the acts committed as set out in par. (2), if they concern a member of the public servant's family.

(4) The acts set out in par. (1)-(3), committed against a police officer or gendarme who is in the exercise of office or in relation to the exercise of such office, shall be punished as provided by the law for those offenses, and the special limits of the penalty shall be increased by one-half.

The difference between the offence provided in art. 257 and the one provided in art. 279, is given by the quality of the passive subject. Thus, if in the case of assault of a public official, the passive subject is the public servant, in the case of assault on representatives of the judicial authorities the passive subject can be a judge, a prosecutor or a counsel. The common prerequisite is that they are in the exercise of their duties or the deed committed against them to be connected with the exercise of their duties.

3 The passive subject of the assault of a public official provided by art. 257 Criminal Code

The passive subject, alongside the active subject, is a pre-existing condition or condition for committing any crime.

In criminal doctrine, there is no unitary opinion on the pre-existing elements and conditions of the offense. Thus, according to an opinion, the offense implies "1) An active subject – the offender; 2) A passive subject – the victim; 3) A material object – the being or the thing to which the offense is directed; 4) A legal object – the text of the law violated; 5) Action or inaction generating punishable result "[9]. Another author considers that the object and subjects are not part of the content of the crime[10]. In another conception, it is appreciated that four elements are identified in the crime: the object, the subjects, the objective side and the subjective side[11].

We do not insist on the controversy over the content of the offense, because the interest in the present action is what the passive subject of the offense is. The fact is that without the crime subjects we can not talk about the fulfillment of the conditions of the structure of the offense.

As far as the subjects of the offense are concerned, there are no contrary opinions in the criminal doctrine, all of whom define the subjects of the offense properly. Therefore:

a. The active subject is the natural person who committed the act or participated in the offense;

b. The passive subject is the natural or legal person who holds the protected social value and is injured by the offense.

The passive subject of the offense must meet certain general and special conditions.

As regards the general conditions, in order to be subject to the offense, the individual or legal person must be the holder of the socially protected criminal value. In many cases, the passive subject of the offense is also the person injured by the offense.

Regarding special conditions, these are provided in the content of some offenses. For example, in the case of an assault of a public official (Article 257 of the Criminal Code), the passive subject must be an official who performs a function involving the exercise of state authority.

Once clarified what the passive subject matter of a crime is, we will further analyze the passive subject of the assault of a public official provided by art. 257 Criminal Code.

In the criminal doctrine, the majority opinion is that the passive subject of the assault of a public official, provided by art. 257 The Criminal Code is composed of a main passive subject, represented by the institution exercising the state power (public authority), in which the public servant carries out his activity and a secondary or adjacent passive subject – the public servant fulfilling a function involving the exercise by the state authority in the exercise of its duties or in connection with the exercise of these duties[12].

Some authors consider that the passive subject is the organ of state power whose authority was usurped by the act[13].

We are also in favor of the majority opinion, because the legislator is considering not only the protection of the public institution, which is affected by the authority it enjoys, recognized by the members of the society, but also of the public servant, natural person.

For the existence of the passive subject of the offending offense it is necessary to fulfill two cumulative conditions:

a. the passive subject to be a public servant according to the provisions of art. 175 Criminal Code;

According to art. 175 Criminal Code: For the purposes of criminal law, public servant is the person who, on a permanent or temporary basis, with or without remuneration:

a) shall exercise the duties and responsibilities, set under the law, to implement the prerogatives of the legislative, executive or judiciary branches;

b) shall exercise a function of public dignity or a public office irrespective of its nature;

c) shall exercise, alone or jointly with other persons, within a public utility company, or another economic operator or a legal entity owned by the state alone or whose majority shareholder the state is, responsibilities needed to carry out the activity of the entity.

At the same time, for the purposes of criminal law, the following shall be deemed a public servant: the person who supplies a public-interest service, which they have been vested with by the public authorities or who shall be subject to the latter's control or supervision with respect to carrying out such public service.

In the criminal doctrine it was correctly stated that the public servant should not be interpreted in the light of the provisions of Law no. 188/1999[14] on the Statute of public servants or other legal provisions, but according to the provisions of criminal law[15].

Also, the Constitutional Court, by Decision no. 2 of 15 January 2014[16] stated that "the meaning of the concept of public servant in criminal law is not equivalent to that of an official in administrative law, the notions of public servant and official have a wider meaning than that of administrative law, the social relations defended by the criminalization of socially dangerous acts, and the fact that the requirements of defense of the beast and the promotion of the interests of the community impose the best possible protection through the means of criminal law. Therefore, in the criminal law, the public servant is defined solely by the criterion of the function one holds or, in other words, whether one is acting in the service of a unit determined by the criminal law subject to a certain statute or legal regime.

b. The passive subject fulfills a function involving the exercise of state authority.

The specialty literature has shown that a "function involving the exercise of state authority" means a function which confers on the official some duties which could not be fulfilled without the exercise of state authority, that is, without the power to issue provisions and to take measures necessary for their compliance[17].

The legislator considered that the passive subject of the assault of a public official was not merely official, but only an official carrying out an activity within the bodies exercising state authority, namely those who had the power to issue decisions, acts or lay down provisions and take binding measures.

From this point of view, it is necessary to emphasize that the essential and decisive element of the qualification of the actions listed in art. 257 Criminal Code as an offense or, on the contrary, as a common criminal offense (threat, hitting or other violence, bodily injury, harassment or injury causing death or killing) consists in the intention of the active subject to prejudice the authority exercised by the victim. Insofar as the behavior of the perpetrator does not relate to the function performed by the passive subject, but considers a particular relation to it, no specific criminal protection is justified, but it is correct to apply non-discriminatory legal treatment of the offender in relation to with other citizens.

Regarding the provisions of art. 175 par. (1) lit. a) The Penal Code, it should be mentioned that the public servant exercising duties and responsibilities in order to achieve the prerogatives of the judiciary must not be confused with the judge or the prosecutor, which is the passive subject of the assault on representatives of the judicial authorities, provided by art. 279 Criminal Code. The public servant in this situation may be the clerk or any other person who is a member of the auxiliary staff of the judiciary (the archivist, the registrar, the procedural agent etc.)

A special situation exists when the court clerk may be the victim of an offense of audience. For example, the defendant threatens the courtroom and the court clerk with committing a murder offense if one is sentenced to imprisonment in the case in which one is tried. According to the legal provisions, the court clerk is the passive subject of the assault of a public official, and not of assault on representatives of the judicial authorities. It can be seen that the legislator treats the clerk's protection in the above example in a different way.

From the provisions of art. 175 par. (1) lit. b) Penal Code, it is clear that in exercising a function of public dignity or public function of any kind, the passive subject of the

assault of a public official may be a member: of the Parliament, of the Government, of the Constitutional Court, of the Court of Accounts, etc.

As mentioned above, not any public servant may be a passive subject of the assault of a public official, in the case of persons who do not fulfill the exercise of state authority. In judicial practice it has been established that persons performing administrative acts or operations, such as statisticians, archivists, drivers, planners, porters[18], can not be passive subjects of the assault of a public official.

Also, from the provisions of art. 175 par. (1) lit. b) sentence II of the Criminal Code, it is clear that the doctor, teacher or accountant who is employed in the public system can not be the passive subject of the assault of a public official, because they are not entitled to make provisions or to take measures regarding the exercise of state authority.

Recently, in Romania, cases of extreme violence exerted on these categories of people were reported. There have been proposals in the public space that both the doctor from the emergency receiving units and the professors or teachers should be considered passive subjects of the assault of a public official provided by art. 257 Criminal Code.

At the same time, it was shown that school units or emergency services could provide more vigilant guarding in these cases, avoiding violence against these categories of people. This argument has effect as long as the passive subject enjoys adequate physical protection, but it has no support, for example, in the case of the physical stature difference between the aggressor and the victim. It is possible for the aggressor to be the pupil, if the victim is the professors or the teacher, in this case the protection is not effective.

We believe that there should be a legislative solution for these categories of people, so as to discourage crimes against them. In future, we consider that it is necessary that the legislator to reposition the criminality incrimination, which also includes these categories of persons as passive subjects.

In the case of public servants assimilated, provided by art. 175 par. (2) The criminal code, the passive subject of the assault of a public official may be: the notary public or the bailiff. We can not say the same thing about the director of an autonomous state with state majority capital, the judicial expert or the interpreter, because the legislator considered that these people did not issue mandatory and public provisions. The question arises whether the judicial expert, called upon to clarify the court on technical matters, may be the passive subject of the assault of a public official. We consider that it should be a passive subject of the assault of a public official when acting in the public interest in a trial, obviously if the actions incriminated by art. 257 Criminal Code, are exercised against it.

Once the two conditions have been met, we can speak of the existence of the passive subject of the assault of a public official provided by art. 257 Criminal Code.

It should be noted that the public servant, in order to benefit from the protection of the law, must not exceed his/her legal attributions, violate them or abuse them, otherwise we can not talk about the existence of the assault of a public official. "The provocative attitude of the public servant removes the incidence of these provisions and attracts the application of common law offenses if the conditions of incriminating texts are met" [19].

According to the variant from par. (2) of art. 257 The Penal Code also protects the law and the goods belonging to the patrimony of the passive subject when the author of the offense directs his actions against him for the purpose of intimidation or revenge.

From the provisions of art. 257 par. (3) The Criminal Code shows that the passive subject of the assault of a public official may also be a family member of the public servant. According to art. 177 Penal Code, by family member means:

a) ascendants and descendants, brothers and sisters, their children, as well as the persons becoming such relatives as a result of adoption;

b) spouse;

c) persons establishing relations similar to those existing between spouses or between parents and children, if cohabiting.

(2) In case of adoption, criminal law stipulations on family members, to the extent provided under par. (1) let. a), shall also apply to the adopted person or the descendants of the same, with respect to kin.

In this situation, the acts exercised by the author on the family member of a public servant must be connected with the exercise of his office in order to withhold the assault of a public official. Otherwise, the independent offenses listed in para. (1) of art. 257 Penal Code, namely: threats, hitting or other violence, bodily injury, harassment or injury causing death or murder.

Finally, from the provisions of art. 257 par. (4) The criminal code shows that the passive subject of the assault of a public official may be the policeman or gendarme in the exercise of one`s duties or in connection with the exercise of these duties. The legislator created an aggravated variant by which the author is more severely sanctioned, in the sense that the limits of punishment provided by the law for the offense committed by him is increased by half.

As stated in the recitals of Decision no. 446/2018 of the Constitutional Court[20], "Public servants holding the office of policeman or gendarme are, however, in a different situation from the other public servants, having with regards to the professional duties and obligations they have in securing public security, which justifies to regulate a different legal regime in terms of sanctioning the acts of violence committed against them. In view of this difference, the legislator has, in the case of an offense of aggression committed against a policeman or gendarme, imposed a greater punishment, thus ensuring greater criminal protection for the two categories of public servants mentioned above. This sanctioning regime, criticized by the author of the exception, is not, however, capable of discriminating against the rest of public servants in relation to policemen or gendarmes, since the difference in the legal regime, consisting in the increase by half and not by a third of the special limits the punishment has an objective justification, given by the different public functions that the passive subjects of the normative variants provided by art. 257 par. (1)-(3) of the Criminal Code and, respectively, Art. 257 par. (4) of the Criminal Code. "

The existence of the plurality of passive subjects attracts the existence of the crime contest and not of a continuing crime.

4 Comparative law issues

The offending offense is also criminalized in the criminal law of other European states, and the passive subject is the entire public servant.

For example, in the Italian Criminal Code[21], at Art. 341 bis, the passive subject of the offending offense is the public servant and it is necessary that the action of the

perpetrator be related to the function exercised by the public servant or to be in the exercise of the function, 342, the passive subject is a political, administrative or judicial body.

In the French Criminal Code[22], art. 433-5, the passive subject of the offending offense is the public servant, exercising public authority and exercising his/her duties. The professor or teacher is included in the category of public servant.

In the German Criminal Code[23], at art. 113, the passive subject of the assault of a public official is the public servant or the German army soldier, and the action of the perpetrator of the deed must be related to the function of the public servant or to be in the exercise of his office.

Unlike the offense regulated in our legislation in the above mentioned criminal codes, it is regulated and insulted as a way of committing the act against the passive subject of the offense. In our opinion, the act of using offensive expressions against public servants fulfilling a function involving the exercise of state authority should be criticized, both in the case of extrajudicial killings and in the case of judicial uterus.

5 Conclusions

The Romanian legislator wanted, by regulating the offense of perjury, to sanction the prejudice to the state authority, which protects the fundamental values and freedoms of man and without which the society could not function normally. The protection of the law enforcement official is necessary to respect the rule of law in a society.

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Ways to Establish Social Order in Ancient Chinese Thought

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Abstract

In ancient Chinese thought, socio-cosmic ordering presupposes human action, which is not its creator but merely responsible for its maintenance.

The moral and political-juridical order is achieved and maintained either by (non-action), by (ritual) or by law (fa).

Keywords: order, tao, ritual (li), non-action (wu wei), law (fa).

1 Ways to Establish Social Order in Ancient Chinese Thought

It is argued that the thinking of ancient China, marked by a pronounced interest in order, or more precisely for putting things into order, does not proceed from myths, nor does it exist in opposition to them, but that it was born in the bosom of the ritual spirit, which gave it form[1]. The world was conceived as being regulated by a protocol, and it was intended to organize it in the manner of a ceremony. For it, the rites were the foundations of the Order (both cosmic and social) and thanks to them a fair distribution of the tasks of social authority was achieved. The sovereigns were responsible for the order of the world, but they were not its creators [2]. When in possession of authority, they are able to maintain, with the help of the rites, an order of civilization that is consistent with the order of things. The cosmos, for them, forms only one kingdom, and universal life is presided over by a single order – the order ***Tao*** imparts.

Tao represents the Order, or rather the Principle of Order that can manifest itself in different realms (Celestial Tao, Royal Tao, Tao of the Earth or Tao of Man) [3]. Tao expresses the supreme natural law of the physical world as well as of the moral world, a principle of order, but also a reality that is at the origin of the universe, it represents universal and indefinite order, and Tao of man designates all the principles of behavior that allow it to reconcile it with the universal rhythm. In this hypostasis it evokes the

image of a way to follow, and in a derived sense, the idea of correcting behavior, of moral norm.

People should know how to reach a concordance between their behavior and the natural order. Their task was to adjust their own action to the order of Heaven (which identified with nature). Also, as partners of Heaven and active interpreters in developing an effective way through their lives, people must constantly and carefully watch the concordance between their own pattern of behavior with that of Heaven.

So, human order is not independent, broken off from the order of the Universe, it identifies itself with it, but it also differs, as far as it can come in contradiction with Tao.

The mission to draw the ways of human consent to the order of the Universe was assumed by masters of wisdom. Although the proposed paths were different, they have a common aspect: the concern to follow, or rather the care to follow ***rules and models***; they took the form (1) of the non-action model (wu wei) and nonviolence, (2) of the ritual (li), or (3) the form of a written rule (fa).

(1) In the thought of Lao Tzu (~ 604 AD), the term ***Tao*** acquires the significance of the primordial and eternal entity; this entity is preceded by visible things and even divinities. Unity of existence and non-existence, Tao is the principle that establishes and ordains at the same time. As a principle, he could not give birth to the world without imposing on himself and without respecting his own immanent order. The development of all the structures of existence must respect the way of ***Tao***, corresponding to their level: "Man follows the rule of the earth, the earth follows the rule of heaven, heaven follows the rule of Tao, and Tao follows its own nature" [4].

In a world where violence was the only way to acquire and ensure hegemony, Lao Tzu was concerned about finding a way to get out of the vicious circle of violence, of disorder. In this sense, he considered that the best means of establishing order in the human world was to "do nothing", to remain in inaction (Wu wei), to not act. People have to conform to Tao's natural law which wins without fighting.

Beyond the deliberately challenging aspect of the paradox, Lao Tzu, has started from the simple and observation accessible to all that, both in the natural world and in the human world, the force always ends by turning against itself. Because any action triggers a reaction, the natural counterbalance of an apparently benevolent act will be a detrimental act. Thus, any deliberate intervention in the natural course of things becomes, sooner or later, dangerous.

The way of non-action (wu wei) is what Lao Tzu calls "the action that does not leave traces", for "whoever is good at walking does not leave traces in the dust" [5]. Not to act means for him, abstention from any intentional activity that intervenes in the natural course of things, by virtue of the principle that an action can not be truly effective unless it goes in the sense of nature, thus, "In the works of people who follow Tao, hey are one with Tao"[6].

Inaction aims to break the circle of violence by absorbing aggression and abstaining from aggression, in order to avoid an endless escalation of conflict (violence). Non-action causes aggression to become useless. In fact, inaction defeats action more by attraction than by constraint, more by the way of ***being*** than by the way ***to do***.

Non-action causes aggression to become useless. In fact, inaction defeats action more by attraction than by constraint, more by the way of being than by the way to do. Only so do people conform to Tao, who is inactive and does everything. Because he

is the founder of the whole. Tao cannot conflict with the concrete forms of existence that he generates eternally. Instead of actively interfering, people only comply with the Tao of Heaven's natural law, who, without getting involved in the battle... succeeds. [7]

The wu wei principle therefore does not mean an ideal of non-absolute action, but rather a particularly ***effective*** attitude because "by virtue of doing no deeds, no deeds remain unfulfilled" [8]. Thus, non-involvement in the natural course of things is the principle of ***efficacy***, which works perfectly by itself. To the extent that people do not interfere and do not trouble the world through their action, the world evolves autonomously in a harmonious and effective manner.

Taoist thinking is not without political preoccupations, like all the orientations of Chinese thinking. And here is the concern about efficiency (efficacy). Good governance is achieved when the country is governed by natural rules. For this, a good sovereign is enough to call his people to simplicity, because the more bans the are, the poorer the people, the more the laws and the edicts, the more numerous thieves " [9].

(2) As a master of wisdom, Confucius (551-479 AD) is recognized as a liaison of the ritual spirit expressed by the term ***li***. It means rites, customs, social conventions, and patterns of conduct and emotional relationships between individuals. What interests him in this term is the ritualistic attitude of the one who participates in the ritual, an inner attitude penetrated by the importance and solemnity of the act, which translates into a rigorously controlled behavior. Ritualism responds, according to the ancient wisdom, to an inner requirement that man is able, through moral practice, to join the heavenly order. This moral practice has as objective the inner modeling of man, so that it becomes, through the cultivation of mankind (ren), a man of good, a chosen, superior, noble man. (jun zi).

It is argued [10] that this assessment of the rite by the Chinese wise is the result of a semantic sliding on the term ***li***, which has moved from the religious and sacrificial sense to the idea of an internalized attitude of each, an attitude that means conscience and respect for the other and which guarantees the harmony of human, social or political relationships. The field of action of the rites has shifted from the relationship between human and divine to the relationships that exist between people.

To conquer order and ritual spirit, Confucius believed that it was first necessary to make corrections of designation, through which language became appropriate and allowed each to exercise the role of his or her position in the rites[11].

Correction, which must be the basis of our entire behavior, rests in us, on the agreement between words and acts: "The chosen man when he uses names fits exactly the words with what he names, and so what he says will surely turn into facts " [12]. This match translates to others through trust relationships (***xin***), which is the social bond. For Confucius to be a man means to be in touch with others, a perceived link of ritualstic nature, and to behave humanly means to act ritually:

"To subdue one's self
and return to the rites,
is perfect virtue
.....
'Do not look unless it is in accordance with the rites;
do not listen unless it is in accordance with the rites;
do not speak unless it is in accordance with the rites;

do not move unless it is in accordance with the rites." [13].

By mastering subjectivity (selfish desires, personal interests) he finds himself in an inner modeling that results in the rebuilding of rites, that is, ritual behavior that is ***hierarchical subjection and control***. Ritualistic behavior requires a permanent distance from one's self, a careful mastery and supervision of any manifestation. Therefore, he considers that the superior man (the good man) must beware of spontaneity and personal initiatives: he must be good, but in keeping with the norms, he must master his own temperament even in his good urges, to respond to evil not with good, but in righteousness, for it is not natural to behave the same to the man of good and the face by the villain. No act must happen at will, but only by observing the rule. The coincidence between the inner life and the path of universal harmony becomes perfect when properly performed ceremonial (ritual) behavior triggers a magical-religious force: a gesture done according to norm is a new epiphany of cosmic harmony [14].

It is obvious that one who is capable of such conduct is no longer the ordinary man who he was before the teaching: "his way of existence is radically transformed, and he is a perfect man." Only if man is superior (elected, noble) can be performer of the Rite. In turn, ritual performance is modeling and provides superior human behavior. Human attitudes do not really become human unless people give them meaning when ritualizing them.

Confucianist political thought has at its core the idea of ritual harmony, not power, is at the heart of Confucian political thinking.

For him, good governance is a matter of virtue, depending both on the virtue of the one who holds the power and the virtue of those who obey. The sovereign's personal charisma and ritual possess the efficacy of the sacred by its natural and invisible ability to harmonize human relationships [15].

The sovereign who inherently embraces ***ren*** is imposed by goodwill, not by force. When governing ***ren***, the sovereign is preoccupied, above all, to educate his subjects; he is meant not to constrain, but to train and transform harmoniously. Confucius considers education to be more important and more effective than constraint. The latter only prevents mistakes, does not lead to internal motivation of behavior and no change in spiritual life. This is achieved only when "through the power of his virtue he will be deeply penetrated by reproach and will always act in accordance with the rule" [16].

If it is necessary to apply the constraint, when the chain of ritual obedience is broken, it is also done on the basis of the rites. On this basis, the arbitrary character of punishments is eliminated, since the rites are the measure of the division of punishments and, at the same time, the measure of legitimacy and their criteria:

"If the deeds are not fulfilled, the Rites and the Music cannot be perfect;

If the rites and music are not perfect, punishments and chastisement cannot be divided. And if punishments and chastisement are not given as everyone deserves, the people are confused and helpless" [17].

The originality of Confucius is that he pursued the transmutation into rites of the gestures and conduct that a complex and hierarchical society can not dispense with. Rites are the opposite of the Taoist ideal, being set up in order to establish differentiation and separation of people and to keep everyone in their given place; in the relationships between humans and their relations with the world, they represent the characterization of

those artificially hierarchical values that the official doctrine portrays as sacred and intangible.

(3) In the 4th and 3rd centuries BC, a plethora of thinkers have proposed another way of ordering the social world, an effective way of defending and strengthening the state. This orientation, which is known by the name of legism/legalism (***fajia***), it was not a school with a founder or organized around a systematic philosophy, but represented by officials and magistrates. The unit of the school is assured, first of all, by the opposition of the legislators to Confucian ritualism; they argued that governing according to the ritual (***li***) they risk arbitrariness, because what was in force at one time is not entirely valid in another. They are said to be the first thinkers in China who start from man and society ***not as they should be, but as they are in the most unacceptable reality*** [18].

Lawyers wanted to make the law the neuralgic center of social order, militating for the replacement of the ritual spirit (***li***) with what they considered an objective and absolute, self-sufficient and self-justifying principle: the law (***fa***). This is, according to them, the only means of imposing a stable and secure social order.

Their opinion is different from confucianists not so much on the form of government – the Monarchy – (there has never been a political system conceived in China other than royalty), as what concerns its legitimacy, its nature and its exertion: Confucius and his followers regard royalty as an essentially moral ascendant, as the expression of a "celestial mandate," exercising the exemplary influence emanating from a wise sovereign, from his private prestige. For lawmakers, on the contrary, royalty is not the manifestation of a higher will, but its ascendant is only the pressure that authority exerts on others. The power depends only on the effectiveness of the institutions that determine that the law be respected.

Even if they considered the law, the Confucians claimed that this was not enough and that it had to be based on an ethic of humanity and goodwill.

For lawmakers, the birth of political power is something concrete, empirical by the mere fact that a person becomes king: the law is founded on a relationship in which the sovereign imposes his will on the subjects; it is an element of reality, and can no longer invoke a symbolic and normative reservoir that surpasses man and power, but is merely the factual attribution of the power of those who hold authority. According to lawmakers, the law expresses the will of the prince, it is the expression of his power and skill, and consequently any custom or status is of no value to them. Lawmakers strongly oppose the Prince (King) tp the Wise man, the law (***fa***) to rites (***li***). The law has greater efficacy than the bonds of rites or those of blood, assuring the effective functioning of power, without taking into account the moral value and charisma of the sovereign.

The term ***fa*** (law) has, in ancient texts, the general meaning of rules to which you have to comply. The word is often associated with geometric measurement and precision instruments that serve universal references. The compass, the sketch or the lead wire appear in the lecture discourse to illustrate the accuracy and objectivity of the law. Until legism, the terms ***xing*** (criminal law) and ***fa*** (law) did not imply either the idea of obligation or the idea of constraint; it is the lawmakers who have endeavored to introduce into the idea of ***law*** (fa) an imperative meaning.

Valorizing the law as a means of imposing stable and secure social order, legism is, in essence, an ideology of the administration. Supporting the need for a ***qualified administration*** to ensure legal and social coherence, they have made the effective

instrument to achieve this goal: ***bureaucratic law***, a hierarchical right of administration, control and sanction. [19] It is no less true that Chinese thinkers in antiquity have theorized not just ***law***, but ***power***, and the power system was conceived as being placed on three fundamental notions.

First, that ***objective norm*** (fa) is the ***law*** that establishes the impartial hierarchy of rewards and punishments; it is absolute, even the prince who makes it obeys it. No one is above the law, which is the only rule for everyone and no one can evade or help another escape from punishment or reward.

The law must also be published and displayed in all administrative offices; its public character makes it mandatory, imperative. The order established by the law is anonymous and impartial; the law replaces the personal rule of the prince who can not intervene in the administrative affairs in which only the published law reigns. Personal initiatives and the interpretation of the law can not be tolerated; any possibility of divergent interpretation that should call it into question must be ruled out.

An important place in the conception of lawyers is the assertion of the idea of equality before the law. Impersonal, the law is beneficial to everyone because it applies equally to everyone. Referring to the efforts of the lawmakers, Sima Tan appreciated in the second century BC.: "They do not distinguish between the close and the strangers, they do not distinguish between the nobles and the crowd and judge them all together according to the law, so that relations based on affection and respect are abolished". [20]

The second notion is the ***position of authority*** (shi) held by sovereign. Describing power and morality, the lawyers took into account only the reality of power, disregarding the moral and personal value of the sovereign on the throne. This position is occupied by the sovereign not by personal investment, but by ***technical*** means simply by having the double lever of fear and interest. According to lawmakers, the sovereign must not count on feelings of love or devotion on the part of the subjects: the prince and the people are seen in a strictly antagonistic relationship, and the prince's first concern is to defend his monopoly of his "position" from the others.

Finally, the third notion is that of ***political technique*** (shu). It is not enough to respect the law and the position of power embodied by the sovereign, but there must also be the mechanism of transmitting power and authority between the sovereign and the people. This connection is provided by the body of officials, over which the sovereign retains its supremacy through a set of techniques (shu). Techniques consist of assigning positions according to their capacities, comparing the reality of the facts and the name of the function, holding firmly the levers that give the right to life or death, testing the worthiness of all ministers. If the sovereign does not apply the techniques, they will rely on abuses among officials, if ministers do not apply the law, the people will haunt the disorder.

Laws are the rules of administrators, and recipes (shu) are the reins that the sovereign holds; they are not transmissible by definition, but they constitute the secret and personal power of the Prince, they constitute his intimate effectiveness.

In connection with the activity of the lawmakers, the idea that they clearly conceived what might be a ***totalitarian social*** order [21]. This, because they have perfectly understood that the power held on people is essentially based on the full and rigorous character of the knowledge they have gained, and hence the forced transparency in which they are maintained.

Political power is the order of the device, it is the pure product of man's invention without any transcendent foundations. On the other hand, this power device functions alone, relatively independent of the qualities of the one who manages it, provided that it can act fully and without interdiction (without anyone being able to usurp the prince's authority). In other words, even if it is ***artificial,*** this device works ***naturally***. As for the subordinates, the two springs that the prince possesses, activate in them the two feelings that are inherent: the penalty spontaneously generates the repulsion, as the reward generates the attention. At the other end of the mechanism, the prince only needs to occupy the control station, letting the gears turn: they must neither exaggerate nor engage in any way. It is enough that the oppression reaches its extreme point, so that it seems to be the opposite of it, that it seems to go on its own, that it is part of the course of things, without having to justify it anymore. This is because the pressure exerted indefinitely creates a habit that becomes a second nature to the individuals who bear it, and because the law of people, becoming inhumane, simultaneously carries the characteristics of a natural law: insensitive and therefore ruthless in kind, ubiquitous in kind, exercising pressure on everyone at all times[22]. From the perspective of Chinese lawmakers, the human law set up by them is part of the natural prolongation of the world, Tao; its automatism only translates in the terms of social physics the inherent order of nature.

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Reflections regarding the main punishment in the case of multiple crimes

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Abstract

The starting point for the present study is represented by the observation of some particularities of the criminal acts regarding the protection of computer data, computer programs and computer systems (and others as well), namely the long period throughout which they can be carried out and the indefinite number of targeted persons, which determine the establishment of the main punishment in the case of multiple crimes according to the regulations in force to generate some less anticipated effects that exceed (we consider) the logic of the legislator when the legal text which regulates the analyzed issue is formulated.

Although the jurisprudence of the Constitutional Court of Romania was constant, considering the provisions of art. 39 of the 2009 Criminal Code as being constitutional, in relation to the criticism formulated in the constitutional exceptions which were raised, it would be possible (even desirable, we consider) for the constitutional court to change its jurisprudence in the future, just as it did in the case of art. 35 paragraph (1) from the same regulation, reevaluating the impact of these provisions through the perspective of the criticism formulated in the doctrine and the situations which appeared in legal practice.

Keywords: 1968 Criminal code, 2009 Criminal code, multiple crimes, main punishment, criminal acts regarding the protection of computer data, computer programs and computer systems, particularities, effects.

1 Introduction

As shown in the doctrine as well [1] the legislator's option concerning the cumulative sentencing system with mandatory penalty increase in the case of the establishment

of the main punishment for multiple crimes provoked criticism and even legislative proposals to amend the dispositions of art. 39 paragraph (1) letter b) of the Criminal code in force (hereinafter referred as the 2009 Criminal code) [2].

It has been pointed out rather politely but firmly at the same time regarding the logic of the legislator in formulating this text that [3] "(…) what the legislator intended through the elaboration of the Criminal code in force, among other things, was also the imposing of a milder sanction treatment for the defendants who are on their first offence and who, no matter the guilt form, commit a single criminal act, not multiple crimes. The situation of defendants who persist in their antisocial behavior by committing multiple crimes is totally different, in which case the legislator intended to establish a more severe sanction treatment whose preventive role is represented by the discouragement of those tempted to affect repeatedly the social values protected by criminal law".

Without calling into question what was stated before and without going into further details, we consider that the issue should be a bit more nuanced, taking into consideration the Romanian reality which seems to not have been fully understood by the legislator, not to say downright ignored, when the 2009 Criminal code was adopted and whose dispositions caused considerable controversy.

2 Sanction systems for multiple crimes

There are three sanction systems for multiple crimes in criminal doctrine and criminal legislation, namely: the system of arithmetical cumulation, the system of absorption and the system of cumulative sentencing [5] [6] [7] [8] [9].

(A) The system of arithmetical cumulation – as many sentences as there are criminal acts (*quot delicta tot poenae*).

This system implies the establishment of a sentence by the Court for each of the committed crimes in order for the defendant to be forced to serve the sum of all the cumulated sentences, with some particularities, namely:

– unlimited cumulation, when the defendant is forced to serve the sum of all the cumulated sentences, no matter the respective sum;

– limited cumulation, when the defendant is forced to serve a sentence equal to the sum of all the established sentences, but without surpassing a certain limit, by establishing a general maximum or by reference to the harshest punishment.

The system of arithmetical cumulation was the first one applied in legislations from ancient times, in barbarian law and in old Germanic law (for pecuniary punishments), in Medieval law, in canonical law and in modern legislations (especially for pecuniary punishments).

(B) The system of absorption – the harshest sentence absorbs the less harsh sentences (*major poena absorbet minorem*).

This system implies the establishment of a sentence by the Court for each of the committed crimes in order for the defendant to be forced to serve the harshest sentence, considering that this one absorbs the less harsh ones, with some particularities, namely:

– the Court rules on all the committed crimes, establishing punishments for each one of them and then forces the defendant to serve the harshest sentence;

– the Court rules only on the criminal act which could have the harshest sentence and then forces the defendant to serve the established sentence.

The system of absorption was applied in barbarian law and in old Germanic law (for corporal punishments), in the criminal law from the Renaissance period, in intermediary law and in modern legislations (initially).

(C) The system of cumulative sentencing – the harshest sentence plus an increment (*poena major cum asperatione*).

This system implies the establishment of a sentence by the Court for each of the committed crimes in order for the defendant to be forced to serve the harshest sentence to which an increment is added or could be added within certain limits, with some particularities, namely:

– the implementation of the increment can be optional or mandatory;

– the increment can be variable or fixed.

The system of cumulative sentencing was applied in Roman law (during the empire) and in modern legislations (for prison sentences).

3 The sanction of multiple crimes in previous Romanian regulations

The Romanian system of law was also tributary to a certain time in history.

(A) Initially, as shown in the doctrine [10]:

– some of the Romanian legislations, such as: the 1831/1832 Organic Regulation (Wallachia/Moldavia) [art. 293 letter d)], the 1852 Barbu Știrbei's Regulation (art. 43), the 1864 Criminal code (art. 40) [11], the 1864 Code of criminal procedure [art. 388 paragraph 2][12] implemented the system of absorption in the case of multiple crimes;

– other Romanian regulations, such as the 1880 Criminal code from Transylvania (art. 96 and the following ones), implemented the system of cumulative sentencing for prison sentences and the one of arithmetical cumulation for pecuniary sentences.

(B) Later on, the 1936 Criminal code [13] implements:

– the system of absorption in the case of ideal multiple crimes (art. 103);

– the system of cumulative sentencing in the case of multiple crimes for prison sentences (art. 101 and 102);

– the system of arithmetical cumulation in the case of multiple crimes for pecuniary sentences or in the case of multiple contraventions (art. 104 and 106).

4 The establishment of the main sentence in the case of multiple crimes in the regulation in force (the 2009 Criminal code), in comparison with the regulation previously in force (the 1968 Criminal code)

In the 2009 Criminal code (art. 39), *the system implemented by the Criminal code previously in force* (hereinafter referred as the 1968 Criminal code) *is maintained* [14] (art. 34), namely:

– *the system of absorption,* when the sentence of prison for life was established for one of the multiple crimes;

– *the system of cumulative sentencing*, when only prison sentences or only fines were established for the multiple crimes;

– *the system of arithmetical cumulation*, when one or more prison sentences and another or other fines were established for the multiple crimes.

However, the perspective changes in the sense that [15]:

– according to art. 39 paragraph (1) letter b) from the 2009 Criminal code, when only prison sentences are established, the *increment* is *mandatory*[in comparison with the situation laid down by art. 34 paragraph (1) letter b) from the 1968 Criminal code, where the increment is optional] and *fixed, represented by a third of the total of the other established sentences* [in comparison with the situation laid down by art. 34 paragraph (1) letter b) from the 1968 Criminal code, where it was variable, up to 5 years, if the total of the sentences established by the Court for the multiple crimes was not surpassed];

– according to art. 39 paragraph (1) letter c) from the 2009 Criminal code, when only fines are established, the *increment* is *mandatory* [in comparison with the situation laid down by art. 34 paragraph (1) letter c) from the 1968 Criminal code, where the increment is optional] and *fixed, represented by a third of the total of the other established sentences* [in comparison with the situation laid down by art. 34 paragraph (1) letter c) from the 1968 Criminal code, where it was variable, up to half of the special maximum, if the total of the sentences established by the Court for the multiple crimes was not surpassed];

– according to art. 39 paragraph (1) letter d) from the 2009 Criminal code, when a prison sentence and a fine are established, *cumulative sentencing* (with the fine) is *mandatory* [in comparison with the situation laid down by art. 34 paragraph (1) letter d) from the 1968 Criminal code, where cumulative sentencing was optional] and *fixed, represented by the entire established fine punishment* [in comparison with the situation laid down by art. 34 paragraph (1) letter d) from the 1968 Criminal code, where it was variable, the entire fine or a part of the fine];

– according to art. 39 paragraph (1) letter e) from the 2009 Criminal code, when many prison sentences and many fines are established, *cumulative sentencing* (with the fine) is *mandatory* [in comparison with the situation laid down by art. 34 paragraph (1) letter e) from the 1968 Criminal code, where cumulative sentencing was optional].

Also, an exceptional disposition was introduced [art. 39 paragraph (2) from the 2009 Criminal code], which states that when many prison sentences were established, if by adding the increment of one third of the total of the other established prison sentences to the harshest sentence, the general maximum of the prison sentence would be surpassed with 10 years or more and for at least one of the multiple crimes the punishment laid down by the law is of 20 years or more, the sentence of prison for life can be applied (the replacement of the prison sentence with prison for life).

5 Criticism brought to the current system of establishing the main punishment in the case of multiple crimes

In the literature there has been *harsh criticism* towards the lawmaker's option regarding the establishment of the main punishment in the case of multiple crimes.

In one opinion [16] it was stated that:

– regarding the dispositions of art. 39 paragraph (1) from the 2009 Criminal code "(…) the sanction modality of multiple crimes (…) exceeds the rules of principle of law amalgamation and creates serious difficulties for courts in implementing the punishment for multiple crimes (…) The imperative provisions of the Criminal code, according to which, in all situations, the punishment increment is applied compulsorily and its duration is determined strictly by the law, lead to practical solutions which are hard to accept (…) an exaggerated punishment is reached (…)";

– regarding the provisions of art. 39 paragraph (2) from the 2009 Criminal code, it "(…) infringes the provisions of art. 23 paragraph 12 from the Romanian Constitution (…) it infringes the principle of the legality of criminal law sanctions (…)".

In another opinion [17] it was stated that:

– regarding the provisions of art. 39 paragraph (1) from the 2009 Criminal code, "the Conception of the Criminal code in force concerning the sanction of multiple crimes (…) allows in certain situations the exceedance of the general punishment maximum. For this reason, the lawmaker gave up the provision from art. 34 final paragraph from the previous Criminal code (…) and, also, naming Chapter I from the third Title for punishments, it no longer referred to the Categories and *general limits for punishments*, but only to *Punishment categories*";

– regarding the provisions of art. 39 paragraph (2) from the 2009 Criminal code, "When the punishment aggravation is optional, what happens if the Court does not agree with the implementation of the sentence of prison for life? The majority of criminal law authors consider that (…) the Court is forced to apply the general maximum of the prison sentence. We have our doubts concerning the fairness of this opinion since the lawmaker, if such a solution is actually taken into consideration, is not prevented from foreseeing it *expressis verbis*".

6 Multiple crimes and continuous offences

It is common knowledge that, regarding *continuous offences,* in the text which states its existence conditions, namely art. 35 paragraph (1) from the 2009 Criminal code, there was an amendment [in comparison with the text of art. 41 paragraph (2) from the 1968 Criminal code], which targeted the introduction of the unity condition of the passive subject, through the formulation "*and against the same passive subject"*.

Through art. 238 from Law no. 187/2012, there was an attempt to "rephrase", *an attempt to decrease the absolute character of this condition*, even if it was supposed to be perceived as a "unitary interpretation", stating that "In implementing the provisions of art. 35 paragraph (1) from the Criminal code, the condition of the unity of the passive subject is considered to be met also when: a) the goods which represent the object of the crime are co-owned by several persons; b) the crime affected some different secondary passive subjects, but the main passive subject is unique".

Even with this "rewording", *law practice* has shown the incompatibility of this solution of the lawmaker, as well as of other solutions, with Romanian reality.

And the *Constitutional Court of Romania* (hereinafter CCR), in its jurisprudence, constantly considered the provisions of art. 35 paragraph (1) [and those of art. 36 paragraph (1)] from the 2009 Criminal code as being constitutional in relation to the criticism

formulated in the constitutionality exceptions (through Decision no. 54/24.02.2015, Decision no. 837/08.12.2015, Decision no. 717/06.12.2016, Decision no. 726/06.12.2016).

However, the *CCR had to modify the jurisprudence* when faced with the evidence.

Therefore, by closing, on 16.12.2015, file no. 3422/108/2015, the Arad Court referred to the CCR the matter of the unconstitutionality exception of the provisions of art. 35 paragraph (1) and art. 39 paragraph (1) letter b) from the 2009 Criminal code; this exception was made through the Court's own motion in the respective cause which dealt with the perpetrating of 46 fraud crimes, 46 forgery in deeds by private signature crimes and 46 computer forgery crimes.

The CCR *alleges* (point 4), among others, that in this case, although those 138 material acts which were qualified as multiple crimes, were committed for the realization of a common criminal resolution, the Court could not detain 3 crimes as continuous offences (each being perpetrated through 46 material acts which targeted 46 passive subjects) since the condition of the unity of the passive subject was not met (at the time) [regulated by art. 35 paragraph (1) from the 2009 Criminal code]. In addition, *it was stated* (point 4) that, if the Court established for each crime a prison sentence equal with the special minimum reduced with a third, this would mean the establishment of minimum prison punishments of 8 months each for each fraud crime, of 4 months for each crime of forgery in deeds by private signature and of 8 months for each computer forgery crime, it would mean that an increment of a third from the total (912 months) of the other established prison punishments (namely 304 months, i.e. 25 years and 4 months) should be added to the harshest punishment (8 months), so the resulting punishment (for a total damage of 22.801 lei) would be of 26 years (to which a previous punishment of 2 years in prison is added, the defendant thus serving 28 years in prison). In this context, *it was pointed out* (point 4) that by applying the rules of multiple crimes, a considerable disproportion would appear between the harshest individual punishment and the resulting punishment (on the one hand), and between the resulting punishment and all the defendant's criminal activity, including from the perspective of society's interest to give him an additional punishment for persevering in his criminal activity (on the other hand). Therefore, *it was concluded* (point 4) that such an aggravation of the criminal liability would not comply with the principle of proportionality between the social value damaged by crime and the applicable sanction regime.

By analyzing the alleged data, the CCR (point 21) understood that the defence of the constitutional order through the means of criminal law falls within the competence of the Parliament, but it emphasized the fact that it is the task of the Constitutional Court to verify the manner in which the criminal policy shaped by the lawmaker is reflected in the individual's fundamental rights and freedoms, in order to comply with a fair balance in relation to the protected social value.

Regarding the provisions of art. 35 paragraph (1) from the 2009 Criminal code, the *CCR found* (point 27) that the phrase "*and against the same passive subject"* from the provisions of art. 35 paragraph (1) from the Criminal code (which imposes the condition of the unity of the passive subject in the case of continuouos offences) creates a difference of judicial treatment within the same category of perpetrators without the existence of any objective and reasonable justification, which involves the infringement of the provisions of art. 16 paragraph (1) from the Constitution concerning the citizens' equality before the law, without privileges and without discriminations.

The CCR stated (point 28-30) that by finding the unconstitutionality of this phrase, (a) *there is a comeback to the solution adopted by the judicial practice under the regulation of the 1968 Criminal code,* in the sense of the existence of a limited compatibility between continuous offences and the plurality of passive subjects, compatibility which is to be taken into account by the Courts depending on each case, (b) *the unity of the passive subject is no longer an essential condition for continuous offences,* thus becoming again a simple criterion for the establishment of the criminal resolution's unity, left to the professional judgement of the judiciary bodies and (c) *the provisions which delimit the scope of the condition of the passive subject's unity remain without a regulation object.*

Regarding the provisions of art. 39 paragraph (1) letter b) from the 2009 Criminal code, the *CCR stated* (point 31 and 32) that it cannot take into account the criticism brought to the mentioned constitutional provisions [art. 11 paragraph (1) and (2), and art. 148 paragraph (2)-(4)] since the provisions of the Charter of Fundamental Rights of the European Union (art. 49 paragraph 3, with which the constitutional texts were compared) address the member states only when they implement the law of the Union, which is not the case and the fact that one of the mentioned constitutional texts (art. 53) would be applicable only if the Court finds a restriction in the exercise of some fundamental rights or freedoms of the citizens, restriction which was not found.

Through *Decision no. 368/20.05.2017* [18], the CCR (1.) admitted the unconstitutionality exception raised of its own motion by the Court in file no.3422/108/2015 of the Arad Criminal Court and found that the phrase "*and against the same passive subject*" from the provisions of *art. 35 paragraph (1)* from the Criminal code *is unconstitutional* and (2.) rejected the unconstitutionality exception raised of its own motion by the Court in the same case and found that the provisions of *art. 39 paragraph (1) letter b)* from the Criminal code *are constitutional* in relation to the formulated criticism.

Returning to the jurisprudence of the CCR, the Court was constant in considering the provisions of *art. 39* [paragraph (1) letter b) and c)] from the 2009 Criminal code *as constitutional*, in relation to the criticism formulated in the raised constitutionality exceptions (through Decision no. 711/27.10.2015, Decision no. 210/12.04.2016, Decision no. 740/23.11.2017, Decision no. 788/05.12.2017, Decision no. 447/28.06.2018).

However, *it would be possible* (and even desirable, we think) for the constitutional law court *to change its jurisprudence* in the future, just as it did in the case of art. 35 paragraph (1) from the same regulation, *reevaluating the impact of these provisions* through the perspective of the criticism formulated in doctrine and the situations which appeared in judicial practice and, by admitting an exception of unconstitutionality of the provisions of art. 39, to *return to the solution adopted by the 1968 Criminal code,* namely *the optional and variable increment.*

7 Conclusions and *lex ferenda* proposals

Another issue which should not be left out is the fact that *the reality of social life is much more complex than what can be foreseen by the lawmaker* when the legislation is adopted.

And, in order to highlight *the consequences of not fully understanding* (not to say ignoring) the Romanian reality by the lawmaker when the 2009 Criminal code was

adopted, we return to *the case which determined the change of the jurisprudence of the CCR*.

Initially, by *criminal sentence no. 23/25.01.2016*, in file 3422/108/2015, the Arad Court (a) sentenced the defendant for committing a number of 46 computer forgery crimes to serving 8 months in prison for each crime, for committing a number of 46 fraud crimes to serving 8 months in prison for each crime, for committing a number of 46 forgery in deeds by private signature crimes to serving 4 months in prison for each crime, (b) merged the 138 main punishments for the defendant, as follows: it applied the harshest punishment of 8 months in prison to which it added an increment of 9 years and 4 months in jail, the defendant thus serving *the resulting punishment of 10 (ten) years in prison* [to which it added the punishment of 2 years in prison applied through criminal sentence no. 15/20.01.2014 of the Alba Court, given in file no. 4749/107/2013, the defendant thus serving the resulting punishment of 12 (twelve) years in prison].

Subsequently, the same Court, through *criminal sentence no. 474/15.11.2017*, in file no. 5238/108/2017, admitted the revision request formulated by the offender, annulled the above mentioned criminal sentence and reconsidering the cause (among others): (a) changed the legal categorisation of the 46 computer forgery crimes in a single continuous computer forgery crime, of the 46 fraud crimes in a single continuous fraud crime, of the 46 forgery in deeds by private signature crimes and the 46 trafficking crimes in a single continuous forgery in deeds by private signature crime, (b) sentenced the defendant to serving 1 year and 2 months in prison for the continuous computer forgery crime (49 material acts), 1 year and 6 months in prison for the continuous fraud crime (49 material acts), 1 year in prison for the continuous forgery in deeds by private signature crime (37 material acts), (c) merged the above mentioned punishments in the harshest punishment, namely that of 1 year and 6 months in prison, to which it added an increment of a third from the total of the other punishments, namely 8 months and 20 days in prison, thus resulting the punishment of *2 years, 2 months and 20 days in prison* [to which it added the punishment of 2 years in prison implemented through criminal sentence no. 15/20.01.2014 of the Alba Court given in file no. 4749/107/2013, the defendant serving the main final sentence of 4 years, 2 months and 20 days in prison].

After a simple calculation, we notice that there is *a difference in punishment of almost 8 years* (7 years, 9 months and 10 days, to be more precise), which represents almost 4/5 (namely 79,3 %) from the initial punishment, difference which *cannot be explained in any way*.

Thus, *the implementation of the resulting sentence* which means prison for multiple crimes, under the conditions of art. 39 paragraph (1) letter b) from the 2009 Criminal code (the implementation of the harshest sentence plus an increment of a third of the total of the other established sentences), *does not allow the Court* to take into consideration the necessity of the implementation of the increment and of its amount (depending on the gravity of the committed crimes and the data which characterize the criminal), being *mandatory and fixed*.

We consider that *an amendment* (at least) of the content of art. 39 paragraph (1) letter b) from the 2009 Criminal code *would be desirable*, *in the sense of giving the increment an optional and variable character,* as it was laid down by the 1968 Criminal code [art. 34 paragraph 1 letter b)].

Therefore, we propose that letter b) of art. 39 paragraph (1) from the 2009 Criminal code should have the following content: "*when only prison sentences were established, the harshest sentence is applied, to which an increment of maximum a third of the total of the other established sentences can be added".*

Regarding the situation laid down by art. 39 paragraph (2) from the 2009 Criminal code (the possibility of the implementation of the prison for life sentence when many prison sentences were established, if by adding the increment of a third of the amount of the other established prison sentences to the highest sentence, the general maximum of the prison punishment would be surpassed by 10 years or more and for at least one of the multiple crimes the punishment laid down by the law is of 20 years in prison or more), we draw attention to the fact that *the Court* has the possibility *to apply the sentence of prison for life even if it is not laid down by the law for any of the multiple crimes.*

In these conditions, we propose *the removal of paragraph (2) of art. 39* from the 2009 Criminal code.

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Trends of the manifestation forms of the cybercrime phenomenom in Romania

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Abstract

Starting from the reality that actions in the cybercrime area represented and still represent an attraction for those who are "on bad terms with the law" and who are able to generate significant income with the least amount of effort, in a rather short amount of time and with relatively minimum risks, in the present study I emphasized the evolution and the characteristics/trends of the manifestation forms of the cybercrime phenomenon in Romania.

In attaining the proposed approach, I took into consideration the relevant aspects of the activity reports drawn up by the Directorate for Investigating Organized Crime and Terrorism (DIOCT), the structure from the Public Ministry – Prosecutor's Office attached to the High Court of Cassation and Justice, with tasks of fighting crime in the cybercrime field.

I intended to highlight and analyze (a) the statistical data regarding cybercrime and (b) the characteristics/trends of the manifestation forms of the cybercrime phenomenon apart from the law enforcement bodies within the destructured crime groups evaluation.

From the analysis of the cases recorded by the DIOCT, (a) from a statistical point of view it was shown that there is a constant increase concerning the recorded and solved cases, and also the number of defendants brought to justice (until 2017, when a decrease is noticed) and (b) from the point of view of the phenomenon manifestation forms, some substantial transformations were seen, which were synthesized and grouped in three distinct periods, namely the first two periods which correspond to the years 2007-2011 (the former) and 2012-2016 (the latter), and also a third period which seems to begin with the year 2017.

Keywords: cybercrime, manifestation forms, evolution, trends.

1 Introduction

Actions in the cybercrime area represented and still represent an attraction for those who are "on bad terms with the law" and who are able to generate significant income with the least amount of effort, in a rather short amount of time and with relatively minimum risks.

The analysis of the information presented publicly in the activity reports drawn up (starting with the year 2006) by the Directorate for Investigating Organized Crime and Terrorism (DIOCT), the structure from the Public Ministry – Prosecutor's Office attached to the High Court of Cassation and Justice, with tasks of fighting crime in the cybercrime field, allowed the identification of the evolution and characteristics/trends of the manifestation forms of the cybercrime phenomenon.

2 The apparition and evolution of the cybercrime phenomenon

2.1 *Temporal reference points regarding the apparition of the phenomenon*

The first attempts to use the information and communication technology in the criminal activity were recorded in the 90s [1].

Initially, criminal activity was not directed against the computer system or the computer data, but the result of the data processing was used to commit common law offences, (particularly) forgery (coin forgery or the forgery of other valuables, official instruments, forgery in deeds etc.) and fraud offences.

During the same period, the phenomenon of "pirating" products covered by intellectual property rights, especially computer software, intensifies.

Towards the end of the 90s, in the context of making computer systems and software "accessible" and of the interconnection of the communication networks, cases of illegal access to a computer system are recorded, as well as unauthorised transfer of computer data, disturbance of computer systems, computer fraud, illegal operations with devices or computer programs etc.

Starting with the year 2000, the cybercrime phenomenon knows a constant development (until 2017, when a decrease is noticed) and a significant diversification of the manifestation forms (detailed below).

2.2 *Statistical reference points which reveal the development of the phenomenon*

The first official public reporting records regarding the cybercrime phenomenon were presented by the DIOCT.

The statistical data provided by this structure concerning the recorded cases, the solved cases, the defendants brought to justice etc., in relation to offences from the cybercrime area, were available starting with the year 2006; thus:

– in the year 2006, the data show 959 recorded cases and 182 solved cases (59 by indictment), 127 defendants being brought to justice (54 defendants under arrest) [2];

– in the year 2007, the data show 1175 recorded cases and 364 solved cases (59 by indictment), 140 defendants being brought to justice (45 defendants under arrest) [3];

– in the year 2008, the data show 1337 recorded cases and 340 solved cases (52 by indictment), 166 defendants being brought to justice (41 defendants under arrest) [4];

– in the year 2009, the data show 1589 recorded cases and 357 solved cases (77 by indictment), 200 defendants being brought to justice (72 defendants under arrest) [5];

– in the year 2010, the data show 2210 recorded cases and 536 solved cases (103 by indictment), 272 defendants being brought to justice (148 defendants under arrest) [6];

– in the year 2011, the data show 2717 recorded cases and 873 solved cases (133 by indictment), 333 defendants being brought to justice (105 defendants under arrest) [7];

– in the year 2012, the data show 2841 recorded cases and 852 solved cases (168 by indictment), 351 defendants being brought to justice (154 defendants under arrest) [8];

– in the year 2013, the data show 3412 recorded cases and 1121 solved cases (173 by indictment), 373 defendants being brought to justice (153 defendants under arrest) [9];

– in the year 2014, the data show 5330 recorded cases and 2078 solved cases (215 by indictment and agreement on the recognition of guilt), 305 defendants being brought to justice (71 defendants under arrest) [10];

– in the year 2015, the data show 6309 recorded cases and 2677 solved cases (220 by indictment and agreement on the recognition of guilt), 373 defendants being brought to justice (94 defendants under arrest) [11];

– in the year 2016, the data show 7160 recorded cases and 2088 solved cases (273 by indictment and agreement on the recognition of guilt), 380 defendants being brought to justice (100 defendants under arrest) [12];

– in the year 2017, the data show 5329 recorded cases and 1701 solved cases (284 by indictment and agreement on the recognition of guilt), 418 defendants being brought to justice (104 defendants under arrest) [13].

– in the year 2018, the data show 4175 recorded cases and 1221 solved cases (248 by indictment and agreement on the recognition of guilt), 355 defendants being brought to justice (61 defendants under arrest) [14].

3 Characteristics/trends of the manifestation forms of the cybercrime phenomenon

Analyzing the cases recorded by the DIOCT and presented in the activity reports of this structure from the Public Ministry – Prosecutor's Office attached to the High Court of Cassation and Justice, in which the characteristics/trends of the manifestation forms of the cybercrime phenomenon were also revealed, I noticed that, apparently, once every five years (approximately) substantial transformations were recorded.

Starting from this finding, I synthesized and grouped together the characteristics/trends of the manifestation forms of the phenomenon in three distinct periods,

namely the first two periods which correspond to the years 2007-2011 (the former) and 2012-2016 (the latter), as well as a third period which seems to begin with the year 2017.

The main aspects of my findings are presented below.

3.1 *For the period 2007-2011 [15]*

– the main manifestation forms of the cybercrime phenomenon were maintained in a constant increase (the years 2007-2011);

– the mode of operation, techniques and equipments used for committing crimes in the cybercrime field were subject to significant evolutions and mutations (the year 2007);

– computer frauds (fictitious auctions for goods, compromising user accounts of certain electronic commerce web sites) were mainly recorded and also credit card frauds (compromising ATMs and capturing information from the magnetic strip of the credit cards) (the years 2007-2011);

– there was a shift from the classical computer frauds (auctions) to complex computer frauds, in which the technical factor was predominant, respectively the use of software and fraud schemes ("phishing" activities, infecting with diverse malware forms in order to obtain data, keyloggers etc.) (the years 2008-2010);

– crime groups were oriented also towards the fraud of Romanian electronic payment means (the years 2007-2009), even with informational support from other crime groups that committed frauds abroad (the year 2010);

– child pornography, through the use of computer systems or communication networks (having pornographic materials with children on computer data storage items or sharing such materials on the Internet), recorded an upward trend (the years 2009-2010);

– the migration tendency of individuals known to be part of common law organized crime towards cybercrime was maintained (mostly towards fraudulent operations with electronic payment instruments) (the years 2007-2011);

– recruiting young adults with the ability to use computers and the new technologies was realized through subordination and cointerest by the leaders of traditional crime groups (the years 2008-2010);

– recruiting "arrows" through means which are more and more sophisticated, and training them according to specific needs (opening bank accounts, transporting certain amounts of money etc.) (the years 2008, 2010-2011);

– initially, (the year 2007) specialised networks were created and placed abroad (in relation to which the Romanian prosecution offices could not carry out specific activities, because the number of the persons involved in these activities was not known with the exception of the cases in which the foreign authorities demanded information or made arrests) and later on (the years 2008-2010) money laundering networks were created by Romanian and foreign citizens;

– the transnational character of offences in the cybercrime field (given by the place in which these offences were committed or by the victims' location) represented, along with the specialized technique (of calculus and communication), a crucial element for organized crime groups with activity in this domain (the years 2007-2011);

– an actual financial investment in the creation/purchase of crime schemes could be noticed, schemes that brought significant income from only one operation (the target

being represented by companies and commercial firms) (the years 2008-2011); moreover, there was an investment in the calculus technique/communication equipment, the purchase of influence and development of counterinformative activities (the year 2011);

– initially, there was (the year 2008) an over-specialization of the group members and formation of independent cells (specialized in carrying out specific crime activities), and later on (the years 2009-2011) a technical micro-specialization took place and grouping in independent cells (with the purpose of carrying out specific crime activities), respectively the fragmentation of general crime activities (regarding preparatory activities which, in some cases, are not sanctioned by the law), as follows: (a) for making the skimming devices, certain "specialists" were called (in the domain of plastic parts, casts, electronics), and also the necessary tools were bought, original devices (which served as models), special software for encoding/uploading/downloading/processing data from credit cards etc.; (b) some of the cells (2 or 3 persons) were used only for identifying goods, uploading fraudulent posts, compromising the accounts of some legitimate users, communicating with the victims, while other cells were used for facilitating/receiving/withdrawing the financial benefit (more often than not, on the territory of other states); (c) in all aspects of the crime activity, there was no identification of the component cells or their association, which led to the inefficiency of the prosecution activity and thus to some unsanctioned activities; furthermore, this led to the material benefit that the crime group was after; (d) for optimizing the profit, the modality of committing classical cyber frauds (auctions) was automated by introducing some elaborate technical procedures, namely by using computer programs and fraud schemes (phishing activities, the infection with different types of malware in order to obtain data, keyloggers etc.);

– the identified areas with a high potential for crime (for credit card frauds and "stricto sensu" cyber frauds) are the following: (counties) Mehedinţi, Bihor, Braşov, Dâmboviţa, Iaşi, Hunedoara (the year 2007), Suceava, Timiş, Caraş-Severin (the year 2008), Olt, Dolj, Bacău (the years 2007-2009), Teleorman (the years 2007, 2010-2011), Vâlcea, Argeş, Constanţa and (the capital) Bucharest (the years 2007-2011).

3.2 *For the period 2012-2016 [16]*

– there was a rising tendency of the cybercrime phenomenon (the years 2012-2015);

– there were two main manifestation forms of cybercrime (the years 2012-2014), namely (a) the severe form which refers to actions with a strong technical character (such as access to computer systems with the override of security measures), followed or not by criminal activities (blackmail, modification/alteration of electronic data, installing malicious programs, serious disturbance of computer systems, defacement) and (b) the chronic form which is (still) represented by actions committed by groups specialized in cyber frauds (fraudulent auctions);

– child pornography recorded a rising tendency (the years 2012-2016), being highlighted by offences often committed by young adults (filming/taking photos during intercourse and posting the images on the Internet) and some serious offences (child molestation followed by filming/taking photos during the aggression and real time broadcasting or image exchange through the Internet) (the years 2012, 2015);

– initially, (the year 2012) the apparition of the first grouped cases of the "Ransomware" type was noticed or of infections with viruses derived from "Zeus" (which

raised deep question marks regarding the way in which the law enforcement bodies can actually identify the offenders given the fact that the connections with the physical space are more and more reduced, and that the evidence leads to former Soviet states), and later on (the years 2014-2015), these forms proliferated, leading investigations towards areas which are inaccessible for further enquiries (as a result of complex communication anonymising schemes on the Internet, which are efficient and exploit the lack of vigilance of computer systems users, as well as the insufficient investment in the protection of the computer systems they use);

– the records show (on the territory of Romania) the use (of groups made of foreign citizens, such as: Latvians, Ukrainians, Moldavians, Bulgarians) of some elaborate criminal schemes (consisting of attacks on individual computer systems through infecting the victims with different variants of certain banking trojans, such as "Dyre", "Tinba"), in order to obtain data which can be used in operations of subsequent financial transfer (the year 2015);

– there was an increase of the frequency of advanced computer attack threats (namely cybernetic attacks with a high degree of complexity which targeted entities from Romania, launched by groups who have the capacity and necessary motivation to attack relentlessly a certain target in order to obtain benefits), as well as of the financial malware distribution ("Ransomware", "Dyre", "Tinba","Citadel" etc.) through computer systems from Romania, in which the target was represented by users from Romania and also from abroad (the years 2014, 2016);

– most of the attacks (from a quantitative point of view) were aimed at old and outdated systems, with no native security possibilities or which had no security updates (the year 2014);

– there was a better organization of criminal groups, a better specialization on different types of activity and use of the facilities offeredby the new technologies and the free movement, as well as a permanent preoccupation of the members of the criminal groups to find new financial products and computer systems that can be compromised (the year 2014);

– new regions considered "exotic" were discovered, where such criminal activities could be carried out (USA, Mexico, the Dominican Republic, Columbia, Australia, Japan, South Korea) (the year 2014);

– the money transfer systems Western Union and Money Gram continued to be used in order to obtain the illicit financial product; also, the bank accounts opened by persons employed fictitiously through the Internet by different companies or bank accounts opened with false documents (the year 2014).

3.3 *For the period 2017-2018 [17]:*

– "Ransomware" type attacks were noticed, especially through self-propagatory forms ("WannaCry", "Petya"), which were not aimed at a certain victim profile (the target distribution range was not limited) and the obtained benefits registered high values; correlatively, the victims' injuries (with the exception of the pecuniary ones) were extremely serious (the years 2017, 2018);

– the social engineering techniques became (along with computer attacks) an essential tactical plan for committing frauds; therefore, threats of the "man-in-the-

browser" or "man-in-the-middle"type were used more and more frequently in order to obtain important pecuniary benefits (which imply the direct hijacking of the destination of certain money transfers or the interposing in the communication between traders and determining money transfers towards other bank accounts) (the years 2017, 2018);

– an evolution of the forms of abuse on devices, services and automated systems, IoT (networks of interconnected objects) took place, as well as the first massive attack made by a dedicated malicious app ("Mirai"), which transformed the respective equipments in systems controlled from a distance, part of botnet type networks (the year 2017);

– the online component was more and more significant also regarding illicit commerce, as the markets developed in "Darknet" intersect and favour all criminal areas (the years 2017, 2018);

– the cryptocoin was exploited ("Bitcoin", "Ethereum", "Monero") as main payment method for the operations on the markets developed in "Darknet" and for cashing in ransoms in the cases of "Ransomware" type attacks, but also for its mining by compromising some computer systems and using illicitly the processing power (the years 2017, 2018);

– there was an increase of the criminal groups specialized in direct and complex attacks on ATMs or on banking systems and of the recorded damages (the years 2017, 2018);

– a new tendency was noticed (in Romania) concerning equipments for copying the data encoded in the magnetic strip of credit cards, deep insert skimming (the years 2017, 2018);

– there was an increase in volume of self-generated child sexual exploitation materials (more often than not) through constraint or blackmail (the years 2017, 2018);

– cases were recorded regarding the implication of some individuals in the "Blue Whale" phenomenon, as players or as administrators (the year 2017);

– the propagation of "live-streaming" apps was recorded and also the implication of children (of early ages) in such activities (the years 2017, 2018).

4 Conclusions

Through the analysis of the cases recorded by the DIOCT, we noticed (a) from a statistical point of view, a constant increase of the recorded and solved cases, and also of the number of defendants brought to justice (until 2017, when a decrease is noticed) and (b) from the point of view of the manifestation forms of the phenomenon, some substantial transformations which could be synthesized and grouped in three distinct periods, namely the first two periods corresponding to the years 2007-2011 (the former) and 2012-2016 (the latter), and the third period which seems to have as starting point the year 2017.

Within the same analysis, it is necessary, and we insist on this aspect, to identify (and formulate some proposals regarding) the causes/factors which: (a) generate/influence the non-compliance towards the established/accepted regulations/rules in the use of computer systems/programs and networks (b) make vulnerable the users who comply with these regulations/rules, identification (proposal formulation) which is possible through carrying out some criminological studies/research.

Moreover, we consider that it is necessary to carry out some campaigns in order to (a) inform/raise awareness among young people (in particular), with a view to making

them aware of the risks they take and the criminal consequences of these acts and (b) inform/warn all types of users of computer systems/programs and networks who comply with the established/accepted regulations/rules concerning the risks they take and the patrimonial and non-patrimonial consequences of negligence in securing a certain activity which is carried out through them.

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[3] DIOCT, *Activity report 2007,* op. cit., p. 19, 66.
[4] DIOCT, *Activity report 2008,* p. 38-39, available online at http://diicot.ro/images/documents/rapoarte_activitate/raport2008.pdf (last view on 10.05.2018).
[5] DIOCT, *Activity report 2009,* p. 31, available online at http://diicot.ro/images/documents/rapoarte_activitate/raport2009.pdf (last view on 10.05.2018).
[6] DIOCT, *Activity report 2010,* p. 38-39, 194 available online at http://diicot.ro/images/documents/rapoarte_activitate/raport2010.pdf (last view on 10.05.2018).
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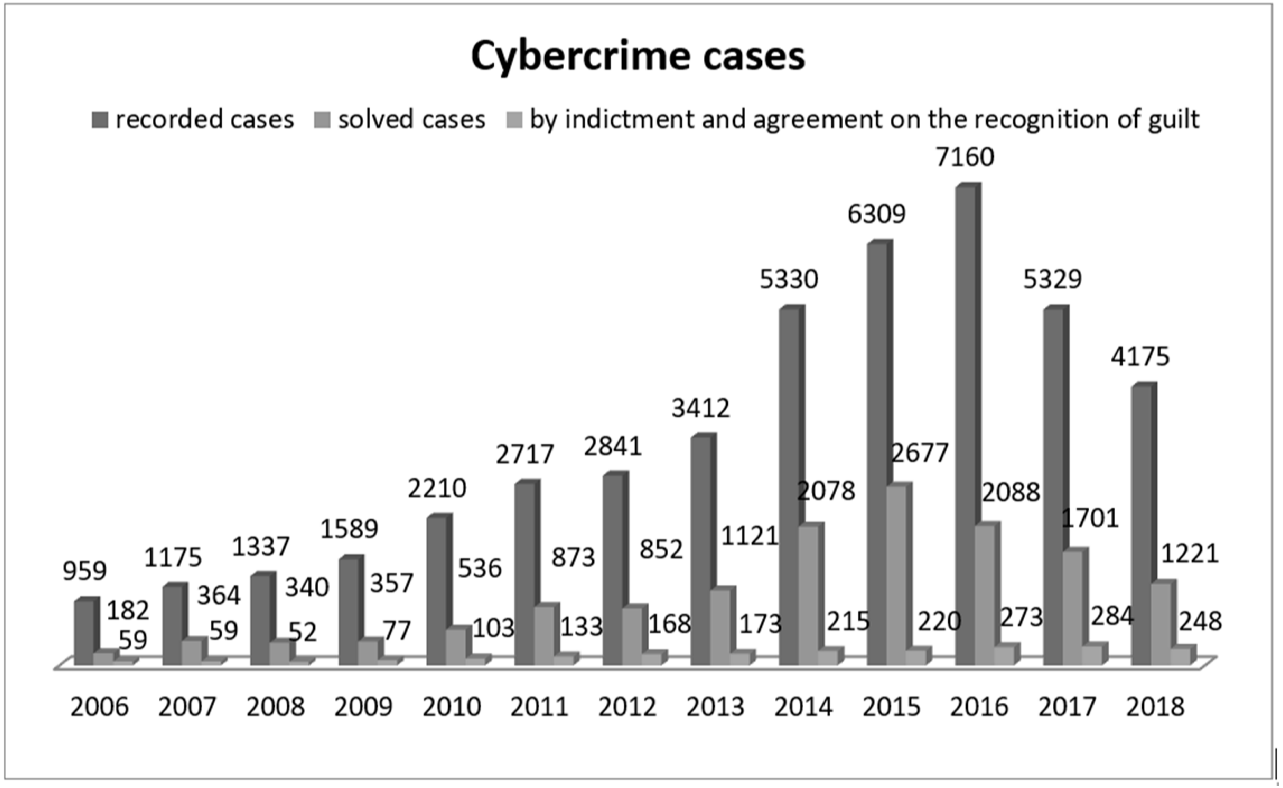
[9] DIOCT, *Activity report 2013,* p. 65-66, 143, available online at http://diicot.ro/images/documents/rapoarte_activitate/raport2013.pdf (last view on 11.05.2018).
[10] DIOCT, *Activity report 2014,* p. 74, 155, available online at http://diicot.ro/images/documents/rapoarte_activitate/raport2014.pdf (last view on 11.05.2018).
[11] DIOCT, *Activity report 2015,* p. 24, available online at http://diicot.ro/images/documents/rapoarte_activitate/raport2015.pdf (last view on 11.05.2018).
[12] DIOCT, *Activity report 2016,* p. 21-22, available online at http://diicot.ro/images/documents/rapoarte_activitate/raport2016.pdf (last view on 11.05.2018).

[13] DIOCT, *Activity report 2017,* p. 23, available online at http://diicot.ro/images/documents/rapoarte_activitate/raport2017.pdf (last view on 12.05.2018).
[14] DIOCT, *Activity report 2018,* p. 28, available online at http://diicot.ro/images/documents/rapoarte_activitate/raport2018.pdf (last view on 20.03.2019).
[15] DIOCT, *Activity report 2007,* op. cit., p. 18-20; DIOCT, *Activity report 2008,* op. cit., p. 35-37, 39; DIOCT, *Activity report 2009,* op. cit., p. 28-31; DIOCT, *Activity report 2010,* op. cit., p. 36-38, 40; DIOCT, *Activity report 2011,* op. cit., p. 39-45.
[16] DIOCT, *Activity report 2012,* op. cit., p. 39-40; DIOCT, *Activity report 2013,* op. cit., p. 64-65; DIOCT, *Activity report 2014,* op. cit., p. 72, 75-78; DIOCT, *Activity report 2015,* op. cit., p. 32; DIOCT, *Activity report 2016,* op. cit., p. 22-24.
[17] DIOCT, *Activity report 2017,* op. cit., p. 23-25, DIOCT, *Activity report 2018,* op. cit., p. 29-30.


Cybercrime cases
recorded cases
solved cases
by indictment and agreement on the recognition of guilt
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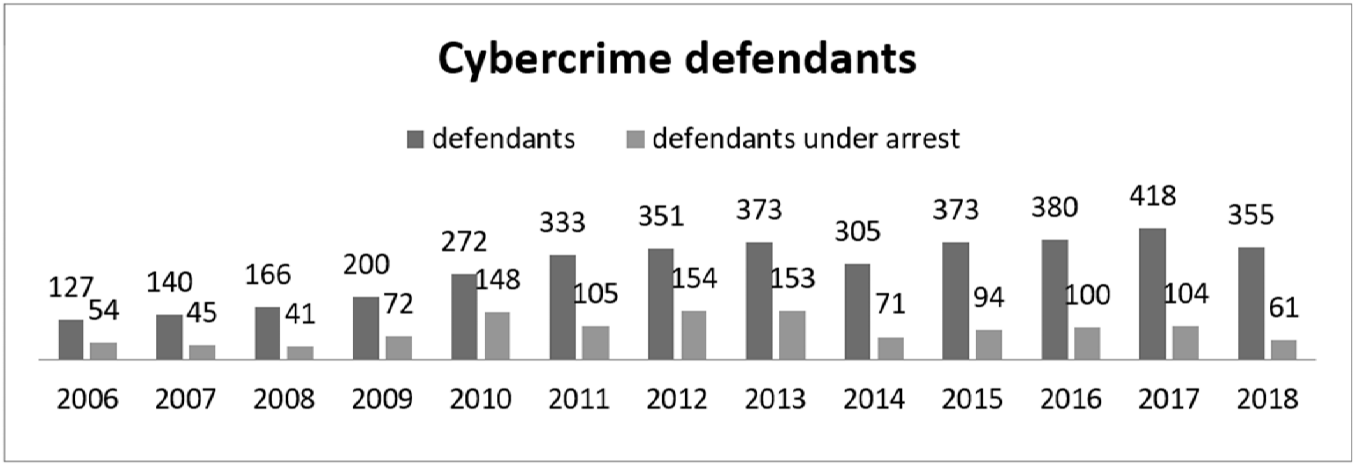
Cybercrime defendants
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defendants under arrest
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Reflections on the dignity attained. Constitutional, civil and criminal matters

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Abstract

Human dignity is an inalienable attribute of the human person, a value that imposes on each member of society a behavior of respect and protection of the other individuals and the prohibition of any humiliating or degrading attitude towards the human. In other words, each individual is bound to recognize and respect in every other human being the attributes and values that characterize him as a human being.

Keywords: dignity, honor, reputation, non-patrimonial rights.

Romania is a rule of law, democratic and social, in which human dignity, the rights and freedoms of citizens, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the December 1989 Revolution, and are guaranteed[1]. It follows that human dignity is a constitutional right, inviolable, that must be respected and protected[2].

From a legal perspective, the right to honor and the right to reputation are elements of the moral heritage[3], being included in the rights of the personality.

The special importance of human dignity[4] is unanimously recognized by international literature, which qualifies it as "the most important principle of objective law"[5],

[1] Romanian Constitution, art. 1 alin. (3).
[2] See art. 1 from Charter of Fundamental Rights of the European Union..
[3] Terré, F. Fenouillet, D. (1996) Droit civil. Les personnes. La famille. Les incapacités, 6e éd, p. 103.
[4] For details, see: Kinga, Z., Károly, B., Human dignity in the case law of the constitutional courts in Germany, Hungary and Romania. www.ccr.ro. information accessed on 15.03.2019, at 14:00.
[5] Dürig G. into the Maunz, T., Dürig G. (coord.), (1958), Grundgesetz Kommentar, vol. I, p. 6.

"the highest value of the Constitution"[6], "the fixed point of the order of law"[7], "the principle the most valuable constitutional "[8]," the fundamental principle of the constitutional system of values"[9], "the foundation of fundamental rights"[10], "a standard in the flood of constitutional discourse"[11], "fundamental norm"[12], "norm of state legitimation"[13], "guiding motive"[14], "axiom of the genesis of the Constitution"[15], "fundamental principle of natural law "[16], "Archimedes' point"[17].

In Romania, the Constitutional Court has shown that human dignity represents the supreme value of the rule of law[18], an inalienable attribute of the human person and an intrinsic value of the human being[19], thus underlining the special importance of this non-patrimonial right.

Human dignity, as enshrined in the Constitution, is not and should not be construed as instituting preferential treatment for certain categories of persons, regardless of their contributions, qualities or contribution to society. Therefore, dignity is an intrinsic value of the human being, having the same values for any individual[20].

In its decisions, the Constitutional Court has ruled that human dignity is a specific concept applicable only to natural persons, which pertains to the human nature of the individual[21].

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[6] Herdegen M. Art. 1 în Maunz T., Dürig G. (coord.), (2009): Kommentar G.G., vol. I, p. 7.
[7] Fabio, U.Art. 2. Abs. 2. în Maunz, T, Dürig, G. (coord.), (2004), Kommentar, G.G. vol. I, p. 20.
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[9] Idem, p. 28.
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[16] Idem, p. 2.
[17] Rensmann, T. (2007), Wertordnung und Verfassung. Das Grundgesetz im Kontext grenzüberschreitender Konstuonalisierung, p. 48.
[18] Decision no. 841 of 2.10.2007 regarding the exception of unconstitutionality of the provisions of art. 13 of the Criminal Code, published in the Official Gazette no. 723 dated 25.10.2007.
[19] It is a Christian value, along with the free development of human personality and justice, and rights such as the right to life and physical and mental integrity, the right to health care, the right to a healthy environment and to a decent standard of living pertain to the sacredness of life. human; see, Puskás, V.Z. Christian values enshrined in the Constitution of Romania in the Bulletin of the Constitutional Court, year XIII no. 2/2011, p. 9.
[20] Constitutional Court, Decision no. 1,576 from 7.12.2011 regarding the objection of unconstitutionality of the Law regarding the approval of the Government Emergency Ordinance no. 80/2010 for the completion of art. 11 of the Government Emergency Ordinance no. 37/2008 regarding the regulation of financial measures in the budgetary field, published in the Official Gazette no. 32 from 16.01.2012.
[21] See, Decision no. 1.109 from 8.09.2009, published in the Official Gazette of Romania, Part I, no. 678 dated 09.10.2009;

Human dignity is a fundamental right protected above all, even before the right to free expression, which may be subject to certain formalities, conditions, restrictions or sanctions, provided by law in a democratic society[22].

This value imposes on each member of the society a behavior of respect and protection of the other individuals and the prohibition of any humiliating or degrading attitude towards the human being.[23].

The right to reputation and honor of the person is not expressly enshrined in art. 8 of the European Convention on Human Rights[24], but is recognized by the jurisprudence C.E.D.O., as an element of private life[25]. However, because art. 8 to be taken into consideration, the attack on personal reputation must reach a certain level of seriousness and it should have been carried out in a way that would prejudice the personal benefit of the right to respect for private life[26].

The European Convention on Human Rights protects the moral integrity of the person, as part of the right to respect for private and family life, guaranteed by art. 8 but also the right to a good reputation, which represents a limit of the right to freedom of expression, the text of art. 10 paragraph (2) of the Convention in the sense that its exercise entails duties and responsibilities and may be subject to restrictions to ensure, among others, the protection of the reputation or rights of others. The protection of another's reputation is an element of private life protected by art. 8 of the Convention[27] and therefore under this provision it may be necessary to adopt positive measures in order to guarantee the effective respect of the private life going to the interpersonal relations of the individuals involved[28].

The European Court of Human Rights[29] considered that a person's reputation is part of his personal and physical identity[30], including in a criticism in the context of a public debate, art. 8 being fully applicable[31].

Human dignity, from a constitutional point of view[32], assumes two inherent dimensions, namely the relations between people, which concern the right and the obligation of

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[22] For detail, see: High Court of Cassation and Justice, Section of administrative and fiscal litigation, Decision no. 2047 from 18.04.2007.

[23] Constitutional Court, Decision no. 72 from 23.02.2016, published in the Official Gazette no. 362 from 11.05.2016.

[24] C.E.D.O., Judgment dated 20.10.2005, in the Gunnarsson case against Iceland, www.jurisprudentacedo.com, information accessed on 05.03.2019, at 14:20.

[25] C.E.D.O., the judgment in the case of Chauvy and others against France, dated 29.06.2004, point 70; Judgment in Case Pfeifer, cited above, paragraph 35 and Judgment of 21.09.2010, in Case Polanco Torres and Movilla Polanco v. Spain, paragraph 40.

[26] C.E.D.O., Decision of 9.04.2009, in Case A. against Norway, paragraph 64; The decision of 19.06.2012, in the Tănăsica case against Romania, www.eurolex.ro. information accessed on 07.03.2019, 08:50.

[27] C.E.D.O., the judgment in the Chauvy case and others v. France, cited above, § 70.

[28] C.E.D.O., Judgment dated 07.02.2012, in the case of Van Hannover v. Germany, § 57 and Judgment of 14.10.2008, in Case Petrina v. Romania, §35. www.idrept.ro. information accessed on 05.03.2019, at 13:20.

[29] C.E.D.O.

[30] Înalta Curte de Casaţie şi Justiție, Secția I civilă, Decizia nr. 820 din data de 6.04.2016.

[31] C.E.D.O., Decision of 15.11.2007, in the case of Pfeiferi v. Austria, §35, www.echr.coe.int., Information accessed on 10.03.2019, at 18:00.

[32] Constitutional Court, Decision no. 1 of 11.01.2012 regarding the objection of unconstitutionality of the provisions of the Law for amending and completing the Government Emergency Ordinance no. 155/2001 regarding the approval of the dog management program, as approved by Law no. 2002,

the people to be respected and, in a correlative way, to respect the fundamental rights and freedoms of their fellow human beings[33], as well as the human relation. with the environment, including the animal world, which implies, with regard to animals, the moral responsibility of man to care for these beings in a way that can illustrate the level of civilization reached.

A person's privacy and reputation are two different concepts. Someone may violate a person's right to privacy without harming his or her reputation, as the same behavior may affect both aspects[34].

Dignity is difficult to define[35], but in any case, it implies honesty, good faith and an untouched reputation. Any prejudice to the dignity of man exposes him to exclusion, to a greater or lesser extent, from the sphere of social relations. Dignity is also harmed when certain "exhibitions" are transposed by TV or other images or similar images, ignoring the respect due to the modesty of the public (indeed, easy culture TV shows, stupid or even outrageous characters as idols of the young generation, repetition and personalization of so-called sensational events, etc.). It may happen that a breach of privacy brings with it a breach of honor, dignity, or reputation[36].

The border between honor and reputation is quite difficult to establish, as they can be considered as two facets of the right to dignity rather than two distinct elements that make up this right.

Touching on a person's honor or reputation can take the form of insult, which consists in addressing offensive or abusive expressions, and slander, which consist of statements or accusations regarding the act of a fact that may subject the person to disregard or public objection. In order to be considered a violation of the honor, it is necessary for the fact to be committed with the intention of offending, with the potential offensive offenders not being punishable[37].

The notion of honor has three meanings: a) for a person who distinguishes himself by his function or merits, he evokes an exceptional sign of consideration, esteem, homage brought to his value; b) for any person, it evokes an element of his moral heritage that

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as well as, in particular, of Article I point 5 [regarding art. 4 paragraph (1)], point 6 [regarding article 5 paragraph (1) and (2)], point 8, point 9 [regarding article 8 paragraph (3) letter a) -d)], point 14 [regarding art. 131 and 134], point 15 [regarding art. 14 paragraph (1) letter b)] of the law, published in the Official Gazette of Romania, Part I, no. 96 from 15.02.2013.

[33] See, in this regard, the Decision of the Constitutional Court no. 62 of 18.01.2007, published in the Official Gazette of Romania, Part I, no. 104 from 12.02.2007.

[34] Baudouin, J.L., Renaud, Y (2011) Civil Code du Quebec annote, volume 1.14 ', p. 13, Ventola Case v. National Bank of Canada, C.S., dated 5.11.1997; Arpin v. Grenier, C.Q., dated May 7, 2004.

[35] For an exhaustive look at the subject, see also: Renucci, J.F. (2007) Treaty on European Human Rights Law; Favoreau, C.I., Gaia, P., Ghevontian, R., Melin-Soucremanien, F., Pena-Soler, A., Pfresmann, O., Pini, J., Roux, A., Scoffoni, G., Tremeau, J., (2009), Right to Fundamental Freedoms, 5th ed.; Ghestin, J., Goubeaux, G., Fabre-Magnan, M., (1994) Civil Law Treaty. General introduction, 4th ed.; Ghestin, J., Goubeaux, G., Fabre-Magnan, M., (1994) Civil Law Treaty. General introduction, 4th ed.; Malinvaud, Ph., (2008) Introduction to the study of law, Ungureanu, O., Munteanu, C., (2013) Civil law. People; Jugastru, C. (2013) Prejudice – Romanian landmarks in the European context, Montgomery, J.W. (2004) Human rights and human dignity; Terré, F., Fenouillet, D., (2012), Civil law. People, 8th ed.

[36] Ungureanu, O, Munteanu, C. (2015), Civil law. Persons. In the regulation of the new Civil Code p. 70.

[37] Timiş Tribunal, Civil Section I, Decision no. 235 from 21.02.2017, www.rolii.ro., Information accessed on 10.03.2019, at 21:00.

justifies him to be respected by others and to respect them; in this sense, it is said "man of honor", "word of honor", "debt of honor" (well, derived from a natural obligation); c) in an objective sense, rule of conduct, moral norm of behavior, ideal value to which a community or group (the honor of a people, the honor of a profession) refers, as well as to the synthesis of its essential virtues (loyalty, courage, attachment to freedoms), to make them a motto, a code (for example, a code of ethics)[38].

A person's reputation is a part of his personal and mental identity, which is the object of his private life, even in the context of a criticism in the context of a public debate[39].

In the current legislative framework, outside the Constitution, dignity is regulated by art. 72 of the Civil Code, which shows that any person has the right to respect his dignity, being forbidden any prejudice to the honor and reputation of a person, without his consent or without observing the limits provided in art. 75.

The regulation of dignity in the new Civil Code is a surprising matter, in the context where, just a few years before the entry into force of the new Civil Code, the Constitutional Court shows that "Human dignity is not assessable in money, and its damage is irreparable through sanctions. civil character, nor the penalties of a criminal nature are likely to provide more satisfaction on this level. "As a result, the Court showing that the damage of dignity is irreparable through sanctions of a civil nature, according to the law ferenda, we believe that the re-criminalization of insult offenses is required. and slander, this measure being an appropriate one to restore the legal order, in case of violation of this constitutional right.

From our point of view, by the regulation provided by the Civil Code, it is not possible to retain the existence of a real legal protection through the possibility of obtaining moral damages in the civil process, because such form of legal protection does not constitute adequate legal protection, the dishonor being, by its irreparable nature. Considering that human dignity cannot be assessed in money or compensated by useful material, we believe that the current regulation is insufficient, including criminal regulation[40].

Analyzing the legal texts in force, we find that the Romanian legislator uses the notion of "dignity", which is applicable to both natural and legal persons, but without expressly mentioning this aspect.

Faced with this legislative gap, the doctrine and the constitutional judge delimited and explained the concept of "human dignity" and dignity applicable to the legal person. Thus, the Constitutional Court has shown that "as the feeling of honor or dignity is characteristic of the natural person, in the same way one can speak of the fame and good reputation of a public institution or authority"[41]. Accordingly, it was decided by law that the phrase "dignity and honor ... public institutions" [...] subscribes to the scope of

[38] Ungureanu, O., Munteanu, C. (2015), op. cit., p. 64.
[39] C.E.D.O. The judgment of 15.11.2007, in Pfeifer v. Austria, cited above.
[40] Incriminations similar to those contained in the texts of the Criminal Code regarding crimes against dignity, although abrogated by us, are found in the laws of other European countries, such as: France, Germany, Italy, Switzerland, Portugal, Spain, Greece, Finland, Czech Republic, Slovenia, Hungary and others, some of the sanctions being even more severe than in the repealed form of our Criminal Code.
[41] See, in this regard, Decision no. 74 of 7.03.2002, published in the Official Gazette of Romania, Part I, no. 283 from 26.04.2002, as well as Decision no. 476 of 10.05.2012, published in the Official Gazette of Romania, Part I, no. 465 from 10.07.2012.

applicability of para. (6) and (7) of art. 30 of the Constitution, which establishes the limits of freedom of expression.

These conclusions are also drawn from the disposition. art. 252 and 257 of the Civil Code. Thus, on the one hand (in art. 252), the legislator shows that any natural person has the right to the protection of dignity, and on the other hand (art. 257), he shows that the provisions regarding the defense of non-patrimonial rights also apply to the legal person.

We consider this regulation insufficient, since the Civil Code must contain additional explanations and regulations, so that the national judge can easily apply the will of the legislator. The insufficient regulation of this legal issue raises the problem of outlining a non-unitary practice, as has already happened over time. E.g:

• immediately after the Second World War, the national courts totally rejected the possibility of monetary reparation of the non-patrimonial damage, claiming that it is not possible to establish an equivalence between the moral pain and a certain amount of money, or that the material compensation for the feelings of affection is immoral.

• in the 1970's it was proposed to grant monetary compensation for non-patrimonial damages, which are consequences of the injury caused to the health or bodily integrity of a person. Such an injury can result not only in a patrimonial injury (eg medical expenses). This damage can be mitigated by granting compensation, in addition to those established to cover the patrimonial losses suffered, compensations that will ensure an appropriate environment in the family or outside it. This injury was called recreational injury. The compensation offered would rather be aimed at alleviating the living conditions of the victim.

• at present, the repair of the moral damages by granting monetary damages is shared not only by doctrine and jurisprudence, but also by the legislator, who admitted the possibility of reparation of the moral or non-patrimonial damage in certain special matters, both contractual and extra-contractual, and the new Code civilly confirms this conception[42].

Analyzing the ones presented above, we find that the optics of the courts was thus (respectively erroneous), since a proper, clear and unequivocal legislative framework was completely lacking.

Currently, although in another form, we encounter the same problem, respectively, the possibility of granting moral damages for the violation of non-patrimonial rights is unanimously recognized, but the practice of the courts is different, in the sense that some courts admit that the moral damage is almost impossible to prove, noting that this is proved by the simple finding of the existence of the crime. Other courts show that moral damage is hard to prove, but nonetheless, they reject the claims, because the harm has not been proven, so that the conditions for attracting criminal liability are not met.

To solve these issues effectively, we believe that the legislator should analyze the problems encountered in practice and provide solutions and texts of law, so that their application will lead to a unitary practice.

Compared to the summary regulation of dignity in the Civil Code, we propose to modify the Civil Code, in the sense of giving a definition to the notion of dignity and to clarify that it is a notion applicable to both the natural person and the legal person. Also, it is necessary not only to clarify the notion, but also to set out some directions that the

[42] Luchin, A. (2017), Repair of non-property damage, www.juridice.ro, information accessed on 10.03.2019, at 21:20.

national judge should take into account when assessing the facts and statements that may violate the dignity. Specifically, the legislator must provide criteria for estimating such compensation and highlight the limits of appreciation of their amount.

This solution is required because, in the quantification of the moral damage, these criteria, crystallized and in the practice of the national courts, are subordinated to the condition of the reasonable assessment, on a fair basis, corresponding to the actual and actual harm caused to the victim.

As such, in the matter of moral damages, in the absence of objective criteria at the legislative level, the court can base its solution only on the considerations of the decisions of the European Court of Human Rights, which are part of the domestic law once the Convention is ratified and which offers estimation criteria. of moral damages, taking into account the seriousness of the wrongful act, the nature of the non-patrimonial value harmed, but also the need for these damages to be fair, equitable, reasonable and proportionate to the actual moral damage caused.

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The CJEU *Fastweb-PFE* line of jurisprudence on the review procedures to the award of public procurement contracts

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Abstract

The creation of a single EU procurement market is a major achievement of the Union. Therefore, the correct implementation and application of the EU law in this field bears a heavy importance The study analyses three legal issues from the field of review proceedings related to the award public procurement contracts: the devolution powers of the review body when it hears an action regarding the award of a contract, the condition regarding the interest in exercising review proceedings and the so-called "paralysing" actions. All these issues have been clarified and developed in the recent case law of the Court of Justice of the European Union and it is referred therein as "*Fastweb-PFE line of jurisprudence*". It constitutes a suggestive example on how national acts can hinder the correct implementation of EU law. The cases mentioned above originated in a contrary regulation enacted in a member state. The study aims to ease the process of application of this jurisprudential line, framing in universal legal concepts the specialized, complicated, compact EU doctrine.

Keywords: EU public procurement, review in public procurement, devolution powers of jurisdictional bodies, interest to initiate review, paralysing action, right to be heard

1 Introduction

The legal ground on which the study is developed is constituted by two directives – Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33) and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the

procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.03.92, p. 14).

The two directives contain quasi-identical provisions and aim to coordinate the legislations of the member states in order to provide an effective and independent review system in the field of public procurement.

The study will follow the relevant cases which would become known in time as the Fastweb-PFE line of jurisprudence.

2 C-249/01 Hackermüller

The jurisdictional body to deal with an action for the annulment of the decision on the award of the contract can exercise *ex officio* a devolution effect on the validity of offers. The interest to have access to review is lost if the exclusion plea is admitted. The tenderer to be excluded has to be provided with a fair opportunity to be heard on the issue of exclusion.

The case originated in a procedure where tenders were invited to participate with architectural designs and decision parameters in order to be awarded with general planning contracts for building the new Engineering Faculty for the Technical University in Vienna. The first stage of the procedure involved a competition designed to be an "open search for interested parties to identify ideas".

Several interested parties, including Mr Hackermüller and the company Hans Lechner-ZT GmbH replied to the invitation to tender and submitted projects. During the second stage of the procedure, the negotiation, the Beratungsgremium (the advisory panel) recommended pursuing the procedure in the short term with Lechner. By letter of 10 February 1999, the four other tenderers accepted for the negotiation procedure, including Mr Hackermüller, were informed that the Beratungsgremium had not recommended implementation of their project.

Mr Hackermüller brought proceedings before the Bundesvergabeamt (Federal Office for Public Procurement), which dismissed his applications in their entirety on the grounds that he did not have locus standi because his bid should have been eliminated at the first stage of the procedure. In support of its decision, the Bundesvergabeamt explained, first of all, that under Paragraph 115(1) of the BvergG, a trader may apply for review only if he risks harm or some other disadvantage. It also pointed out that under Paragraph 52(1), subparagraph 8, of the BvergG, the awarding body must, before selecting the successful bid, eliminate immediately, on the basis of the results of its examination of the bids, those which do not comply with the conditions of the invitation to tender or are incomplete or incorrect, if those errors have not been, or cannot be, rectified.

Mr Hackermüller brought an action for annulment of the Bundesvergabeamt's decision of 31 May 1999 before the Verfassungsgerichtshof (Constitutional Court of Austria). In its judgment, the Verfassungsgerichtshof held that, in view of the broad interpretation that should be given, according to the Court's case-law (see, in particular, Case C-54/96 Dorsch Consult [1997] ECR I-4961, paragraph 46, and Case C-81/98 Alcatel Austria and Others [1999] ECR I-7671, paragraphs 34 and 35), to the concept of locus standi to instigate a review procedure under Article 1(3) of Directive 89/665, it was questionable to interpret the conditions for making an application under Paragraph 115(1)

in conjunction with Paragraph 52(1) of the BVergG as meaning that a tenderer who was not eliminated by the contracting authority may be excluded from the review procedure by a decision of the body responsible for the procedure rejecting his claim for a judicial remedy, if that body finds at the outset a reason which would have given grounds for eliminating the tenderer. It therefore annulled the Bundesvergabeamt's decision for breach of the constitutional right to a procedure before the appropriate court.

It was in those circumstances that the Bundesvergabeamt decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling asking, in essence, if a tenderer's bid is not eliminated by the contracting authority, but the review body finds in the course of the review procedure that the contracting authority would have been bound to eliminate it, the tenderer has been or risks being harmed by the infringement alleged by him ─ in this case the finding by the contracting authority that a rival tenderer submitted the best bid ─ and that he must therefore be entitled to a review procedure.

The Court observed that if a review body were to refuse access to those procedures to a tenderer in a position like that of Mr Hackermüller, the effect would be to deny him not only his right to seek review of the decision he alleges to be unlawful but also the right to challenge the validity of the ground for exclusion raised by that body to deny him the status of a person who has been or risks being harmed by the alleged unlawfulness. Although in the substance of the reasons, the Court doesn't mention expressis verbis the principle of adversarial proceedings and the rights of defence, it is understood that only a procedure based on this guarantees can meet the standards of an effective review, "in which both sides are heard" (article 2, paragraph 9 in Directives).

If, following the judicial procedure thus carried out, at the end of it, the review body reaches the conclusion that the contestant's offer should have been eliminated from the stage of the admissibility of the offers, it will deliver a solution to reject the review exercised by him for the reason that, in the given circumstances, he no longer risks of being harmed by the alleged infringement (he has no interest in promoting the remedy).

Therefore the reply given by the Court states that Article 1(3) of Directive 89/665 does not permit for a tenderer to be refused access to the review procedures laid down by the directive to contest the lawfulness of the decision of the contracting authority not to consider his bid as the best bid on the ground that his bid should have been eliminated at the outset by the contracting authority for other reasons and that therefore he neither has been nor risks being harmed by the unlawfulness which he alleges. In the review procedure thus open to the tenderer, he must be allowed to challenge the ground of exclusion on the basis of which the review body intends to conclude that he neither has been nor risks being harmed by the decision he alleges to be unlawful.

3 C-100/12 Fastweb

The notion of "legitimate interest" to bring a review on the award of the contract covers also the interest to exclude the other offers. The devolution powers of the review body when hearing an action on the annulment of the award decision on the validity of tenders has to be complete, and therefore covers the validity of the tender submitted by the author of the invalidity plea. The invalidity of the Italian Council of State' interpretative decision on the paralysing action, which states that

admission of an incidental exclusion plea can determine the inadmissibility *de plano* of the principal action for review.

The National Centre for Public Administration Informatics (CNIPA) is empowered, under Italian law, to conclude framework agreements with economic operators of its choosing. Non-State-owned authorities may award contracts which are based on those framework agreements but which take into account the authorities' own requirements.

The CNIPA concluded such a framework agreement, inter alia, with Fastweb and Telecom Italia. On 18 June 2010, the ASL Alessandria invited those companies to submit a tender relating to voice and data telephony on the basis of tender specifications. By decision of 15 September 2010, it selected the bid submitted by Telecom Italia and concluded a contract on 27 September 2010 with Path-Net, that company's subsidiary.

Fastweb brought an action for review of the decision awarding that contract before the Tribunale amministrativo regionale per il Piemonte (Regional Administrative Court, Piedmont; 'the TAR Piemonte'); Telecom Italia and Path Net intervened in those proceedings and filed a counterclaim. Each of those operators challenged the validity of the bid submitted by its sole competitor on grounds of failing to comply with certain technical requirements under the tender specifications.

However, the TAR Piemonte pointed out that, by Decision No 4 of 7 April 2011 made in Plenary Assembly, the Consiglio di Stato (Italian Council of State) had held – stating a key principle of law as regards actions for the review of public procurement procedures – that a counterclaim, challenging the locus standi of a party who has brought an action for review on the grounds that that party had been unlawfully admitted to the award procedure, must be examined before the main action is considered (emphasis added, T.C.), even in cases where the applicant in the main action has a material interest in the recommencement of the award procedure in its entirety and irrespective of the number of participants competing in that procedure or the forms of order sought in the counterclaim or the needs of the authority concerned.

The Consiglio di Stato considered that only a party which has taken part lawfully in the award procedure has legal standing to challenge the decision awarding the public contract concerned. According to that court, a finding that the party seeking review of that decision had been unlawfully admitted to the procedure has full retroactive effect and the definitive exclusion of that party from the public procurement procedure would bar that party from challenging the outcome of the procedure.

In accordance with the case-law of the Consiglio di Stato, a practical interest in recommencement of the tendering procedure, as relied upon by the party which has brought an action challenging the decision awarding a public contract, does not confer on that party legal standing to do so. Such an interest is in no way different from the interest of any other economic operator in the sector which wishes to take part in a new award procedure. Consequently, the counterclaim contesting the locus standi of the party which has brought that action must always be examined first, even in cases where there were only two tenderers, namely the unsuccessful tenderer (the applicant in the main action) and the successful tenderer (the counterclaimant).

The TAR Piemonte was uncertain whether that case-law – specifically in so far as it provides that the counterclaim is unconditionally to be given priority over the main action – is consistent with the principles of equality, non-discrimination, free competition and effective judicial protection, as reflected in Articles 1(1) and 2(1)(b) of Directive

89/665. According to that court, the fact that the counterclaim is to be the first claim examined – and, possibly, the only claim examined – confers on the successful tenderer an unjustified advantage over the other economic operators who participated in the award procedure where it is found that the contract has been unlawfully awarded.

In those circumstances, the TAR Piemonte decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Do the principles of equality of the parties, of non-discrimination and of protection of competition in public tendering procedures, referred to in Directive [89/665] preclude the most recent case-law as laid down in Decision No 4 of 2011 of the Plenary Assembly of the Consiglio di Stato, according to which the counterclaim, by which it is sought to challenge the locus standi of the applicant in the main action by contesting its admission to the tendering procedure, must of necessity be heard before the main action and carry compelling implications for examination of the main action, even in cases where the applicant in the main action has an interest in the recommencement of the entire selection procedure (interesse strumentale) and irrespective of the number of competitors which took part in the procedure, with specific reference to cases where only two participants remained in play in that procedure (namely, the applicant in the main action and the counterclaimant, the latter being also the successful tenderer), each seeking to have the other excluded on the grounds that its bid failed to meet the minimum requirements for the bid to be considered suitable?'

By its question, the referring court tries to determine, in essence, whether the provisions of Directive 89/665 – and, in particular, Articles 1 and 2 thereof – must be interpreted to the effect that, if, in review proceedings, the successful tenderer raises a preliminary plea of inadmissibility on the grounds that the tenderer seeking review lacks standing to challenge the award because its bid should have been rejected by the contracting authority as not being in conformity with the technical requirements under the tender specifications, Article 1(3) of that directive precludes that action for review from being declared inadmissible as a consequence of the examination of that preliminary plea, where the applicant for review is itself contesting, on identical grounds, the validity of the bid submitted by the successful tenderer and where only those two economic operators submitted a bid.

In its answer, CJEU reiterated the solution previously stated in Hackermüller that the review procedure has to guarantee the rights of defence, which has to prevail over other formal principles of procedure. Therefore, the review of the tenderer which contests the award of the contract cannot be declared de plano inadmissible, at the same time the admissibility of both offers can be reviewed, under adversarial proceedings and rights of defence.

Therefore, this principle applies also where the preliminary plea of inadmissibility is raised, not by the review body of its own motion, but in the context of a counterclaim brought by a party to the review procedure, such as the successful tenderer which has intervened lawfully in that procedure (paragraph 30).

In the case before it, the TAR Piemonte, after checking whether the bids made by the two companies concerned were satisfactory, found that the bid submitted by Fastweb did not comply with all the technical rules under the tender specifications. It reached the same conclusion, however, with regard to the bid submitted by the other tenderer, Telecom Italia.

This situation can be distinguished from the facts in Hackermüller, inter alia because it has been found that the selected bid was, wrongly, not excluded at the stage of verification of the tenders, even though it did not comply with the technical requirements under the tender specifications.

In the presence of such a finding, a counterclaim filed by the successful tenderer cannot bring about the dismissal of an action for review brought by a tenderer where the validity of the bid submitted by each of the operators is challenged in the course of the same proceedings and on identical grounds. In such a situation, each competitor can claim a legitimate interest (emphasis added, T.C.) in the exclusion of the bid submitted by the other, which may lead to a finding that the contracting authority is unable to select a lawful bid.

The Court therefore recognized that the interest for the non-awarding of the contract is a legitimate interest, in the context of the review procedures. It would be further developed in the next case in line, PFE.

The answer to the question of the referring court was that Article 1(3) of Directive 89/665 must be interpreted to the effect that, if, in review proceedings, the successful tenderer – having won the contract and filed a counterclaim – raises a preliminary plea of inadmissibility on the grounds that the tenderer seeking review lacks standing to challenge the award because its bid should have been rejected by the contracting authority by reason of its non-conformity with the technical requirements under the tender specifications, that provision precludes that action for review from being declared inadmissible as a consequence of the examination of that preliminary plea in the absence of a finding as to whether those technical requirements are met both by the bid submitted by the successful tenderer, which won the contract, and by the bid submitted by the tenderer which brought the main action for review.

4 Case C-689/13 PFE

The devolutionary effect, to be exercised by the review body seized with an action on the award of the contract, on the validity of offers (as stated in *Fastweb*) is has to be exhaustive, with regard to all the tenderers, no matter how many had introduced a review, and with respect to different exclusion legal grounds. The legitimate interest to initiate a review procedure covers both a *direct*, *immediate interest*, which consists in the reversal at the contested decision and the award of the contract to the contester, and an *indirect, mediate interest*, for the procedure to be annulled and re-opened, due to the fact that all the tenders were invalidated.

The novelty of the issue raised by the preliminary reference in PFE, compared to that dealt with in Fastweb, was threefold: the number of tenderers participating in the procedure, which was this time more than two; the fact that only two of them initiated a review procedure; the grounds of illegality invoked were different. The main question was if the devolution effect regarding the admissibility of the tenders is exhaustive, i.e. not limited to the tenderers who submitted reviews, either principal, either incidental, and not limited to the grounds of review invoked by them.

Airgest, the company responsible for the management of Trapani Birgi civil airport (Italy), launched an open call for tenders for the award of a contract for the provision of cleaning and ground maintenance services at the airport for a period of three years. The

contract was to be awarded to the most economically advantageous tender and was awarded to the temporary joint venture consisting of GSA and Zenith Services Group Srl (ZS).

PFE (Puligienica Facility Esco SpA), which participated in the procedure and was ranked second, brought an action before the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily) seeking, inter alia, the annulment of the decision awarding the contract and, as a consequence, an order that the contract be awarded to PFE and the related contract concluded with it. The other tenderers did not challenge the decision awarding the contract.

GSA, group leader of the temporary joint venture to which the contract had been awarded, was joined to the proceedings and filed a counter-claim alleging that PFE, the applicant in the main proceedings, had no legal interest in bringing the proceedings as it did not fulfil the eligibility requirements for the tendering procedure and should therefore have been excluded from the procedure. The Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily) examined the arguments of both parties and upheld both actions. Following that decision, Airgest, as contracting authority, excluded the two applicants as well as all the other tenderers who had initially been ranked because their respective bids did not conform to the tendering specifications. Those other tenderers did not appeal against the decision awarding the contract. A further call for tenders by way of negotiated procedure was launched for the award of the contract in question.

PFE lodged an appeal against the judgment of the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily) before the Consiglio di giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily). GSA, in turn, lodged a cross-appeal before that court on the ground, in particular, that, by examining the submissions in the main proceedings, the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily) had failed to have regard to the rules governing the order in which actions are to be examined laid down by Judgment No 4 of 7 April 2011, delivered by the Consiglio di Stato (Council of State) sitting in plenary session. According to that judgment, if a counterclaim has been brought challenging the main action on the ground that it is inadmissible, the counterclaim must be given precedence and examined before the main action. Under the national legal system, such a counterclaim is classified as 'exclusive' or 'paralysing' on the basis that, where the counterclaim is deemed well founded, the court is required to dismiss the main action as inadmissible without assessing its merits.

The referring court observes that, in its judgment in Fastweb, delivered after the judgment of the Consiglio di Stato sitting in plenary session referred to above, the Court of Justice held that Article 1(3) of Directive 89/665 is to be interpreted as precluding the rules laid down by the latter judgment set out in the preceding paragraph. The case which gave rise to the judgment in Fastweb concerned two tenderers who had been selected by the contracting authority and invited to submit tenders. Following the action brought by the unsuccessful tenderer, the successful tenderer lodged a counterclaim, contending that the unsuccessful bid should have been excluded on the ground that it did not satisfy the minimum requirements laid down in the specifications.

The referring court was uncertain, first, whether the interpretation given by the Court of Justice in Fastweb is equally applicable in the present case because, in the case which

gave rise to that judgment, only two undertakings submitted tenders and both of them had conflicting interests in the main action for annulment brought by the undertaking whose bid had been unsuccessful and in the counterclaim brought by the successful tenderer, whereas, in the present case, more than two undertakings submitted bids, even though only two of them have brought proceedings.

Therefore, the national court decide to refer the following question to the Court of Justice for a preliminary ruling:

"(1) Do the principles laid down by the Court of Justice in its judgment in Fastweb [Case C 100/12, EU:C:2013:448] concerning the specific set of circumstances forming the subject-matter of the request for a preliminary ruling in that case, in which only two undertakings participated in a public procurement procedure, also apply – given the considerable similarities between those circumstances and the facts in the present case – to the case currently before this Council, in which the undertakings participating in the tendering procedure, even though more than two undertakings were admitted, were all excluded by the contracting authority without those exclusion decisions being challenged by undertakings other than those involved in the present proceedings, with the result that, in the dispute currently before this Council, only two undertakings are concerned?"

In its answer, the Court reiterated that in Fastweb it considered that a counterclaim filed by the successful tenderer cannot bring about the dismissal of an action for review brought by an unsuccessful tenderer where the validity of the bid submitted by each of the operators is challenged in the course of the same proceedings, given that, in such a situation, each competitor can claim a legitimate interest in the exclusion of the bid submitted by the other, which may lead to a finding that the contracting authority is unable to select a lawful bid.

That judgment refers to a situation in which, following a public procurement procedure, two tenderers bring an action for review, each seeking the exclusion of the other. In such a situation, both of the tenderers have an interest in obtaining a particular contract. On the one hand, the exclusion of one tenderer may lead to the other being awarded the contract directly in the same procedure. On the other, if both tenderers are excluded and a new public procurement procedure is launched, each of those tenderers may participate in the new procedure and thus obtain the contract indirectly.

Therefore, the legitimate interest to initiate a review procedure covers both a direct, imediate interest, which consists in the reversal at the contested decision and the award of the contract to the contester, and an indirect, mediate interest, for the procedure to be anulled and re-launched, due to the fact that all the tenders were invalidated (paragraph 27).

First, each of the parties to the proceedings has a legitimate interest in the exclusion of the bids submitted by the other competitors (emphasis added, T.C.). Second, as observed by the Advocate General at point 37 of his Opinion, it cannot be ruled out that one of the irregularities justifying the exclusion of both the successful tenderer's bid and that of the tenderer challenging the contracting authority's decision may also vitiate the other bids submitted in the tendering procedure, which may result in that authority having to launch a new procedure.

In conclusion, the number of participants in the public procurement procedure concerned as well as the number of participants who have initiated review procedures and

the differing legal grounds relied on by those participants are irrelevant to the question of the applicability of the principle established by the Fastweb case-law.

If all the tenders would be examined, then this examination has to be performed under the same requirements deriving from the right to be heard, meaning the adversarial principle and the rights of defence (see supra, Hackermüller).

5 C-355/15 Bietergemeinschaft

The tenderer which was excluded by a final review decision loses the interest to contest the subsequent decision for the award of the contract. The devolution effect is therefore limited by a previous review decision which is final.

The request has been made in proceedings between Bietergemeinschaft Technische Gebäudebetreuung GesmbH und Caverion Österreich GmbH ('the consortium'), and Universität für Bodenkultur Wien (University of Natural Resources and Life Sciences, Vienna, Austria, 'the BOKU Wien') concerning the latter's award of a framework contract for public services to VAMED Management und Service GmbH & Co. KG in Wien ('Vamed').

BOKU Wien issued a call for tenders in the form of a negotiated procedure with prior publication of a contract notice, with a view to conclude with a single successful tenderer a framework agreement for the technical management, maintenance, repair and servicing of its buildings and laboratory facilities.

Only the consortium and Vamed submitted a tender within the deadline set.

By a decision notified to the consortium, the latter was excluded from the tendering procedure because the original of the proof of a bank guarantee had not been submitted in good time.

The application brought by the consortium against that decision was dismissed by a judgment of the Bundesverwaltungsgericht (Federal Administrative Court, Austria). The extraordinary appeal on a point of law against that judgment was also dismissed by an order of the Verwaltungsgerichtshof (Administrative Court, Austria).

By an award decision of 14 March 2014, notified to Vamed, the BOKU Wien accepted its bid. The framework contract was subsequently concluded and Vamed began to perform the services concerned.

The consortium brought an action against that award decision before the Bundesverwaltungsgericht (Federal Administrative Court). That action was dismissed by a judgment of 8 August 2014 on the ground that the rights of a tenderer whose bid has been properly excluded cannot be infringed by illegalities relating to the procedure followed to select another bid for the purposes of awarding the contract.

In the appeal on a point of law brought against that judgment before the referring court, the consortium submits that the situation at issue in the main proceedings and the case giving rise to the judgment Fastweb are similar. In both cases, only two tenderers were present and, although the consortium was indeed excluded, it submits that the Vamed's bid ought to have been rejected because the business management calculations at key points in its bid are neither explicable nor comprehensible. Consequently, as in the abovementioned judgment, there are two tenderers both of which have an equivalent economic interest in the other tenderer's bid being excluded and could assert that interest even if their own bid must be rejected.

The referring court states that, in accordance with Paragraph 331 of the 2006 Federal Law on Public Procurement, in order for an application for a declaration that a public procurement decision is unlawful to be admissible, the economic operator bringing proceedings must have had an interest in the conclusion of the contract concerned and the unlawfulness must have harmed or risks harming it.

Examining Fastweb, the referring court observes that, in the context of that judgment, it was not the contracting authority which found, in the procurement procedure concerned, that the bid of the tenderer bringing the legal proceedings was unlawful, but that unlawful nature came to light in the legal proceedings brought by that tenderer with a view to challenging the decision to award the contract to another tenderer. The referring court notes that, in paragraph 33 of that judgment, the Court of Justice held that, where the validity of the bid submitted by each of the operators is challenged in the course of the same proceedings and on identical grounds, each competitor can claim a legitimate interest in the exclusion of the bid submitted by the other. It follows from this that, in the situation as described, the unsuccessful tenderer whose bid has been rejected enjoys judicial protection, although that bid does not comply with all the technical rules for the contract at issue.

The referring court is uncertain whether the principles laid down in the judgment Fastweb, also apply when, after two tenderers have initially submitted bids, the tenderer which intends to challenge the award decision has already been definitively excluded by the contracting authority itself. Its doubts are based on various factors which it identifies in Directive 89/665, chief among which is the concept of the 'tenderer concerned' within the meaning of Article 2a(2) of that directive.

However, although it appears to the referring court that that directive does not protect definitively excluded tenderers against the illegalities which may vitiate the decision awarding the contract after they have been definitively excluded, it asks whether the principle of equal treatment applicable to tenderers could nonetheless give grounds for granting such a definitively excluded tenderer a right to seek review of the award decision when it benefits the only other tenderer competing.

In addition, if the tenderer definitively excluded from the tender procedure still has a right to seek review of the award decision, the referring court explains, first, that the Bundesverwaltungsgericht (Federal Administrative Court) also took the view that there was no need to take into account the grounds for excluding Vamed's bid alleged by the consortium since they were not readily apparent from the case-file. However, such a position could be justified by the need for reviews to be carried out as rapidly as possible, referred to in Article 1(1) and (3) of Directive 89/665. Secondly, the referring court is unsure as to the significance, in the context of the right to effective judicial protection, of the fact that the grounds on which the two bids present should be rejected are the same or different.

In those circumstances the Verwaltungsgerichtshof (Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In the light of the judgment of the Court of Justice of 4 July 2013, Fastweb (C 100/12, EU:C:2013:448), is Article 1(3) of Directive 89/665 … to be interpreted as meaning that a tenderer whose bid was definitively excluded by the contracting authority and who is therefore not a tenderer concerned within the meaning of Article 2a of

Directive 89/665 may be refused access to a review of the award decision (decision on the conclusion of a framework agreement) and of the conclusion of the contract (including the award of damages required under Article 2(7) of the Directive), even where only two tenderers submitted bids and the bid submitted by the successful tenderer, to whom the contract was awarded, should, in the submission of the tenderer not concerned [who sought that review], also have been excluded?

(2) If the answer to Question 1 is in the negative, in the light of the … judgment of the Court of Justice of 4 July 2013 in Fastweb (C 100/12, EU:C:2013:448), is Article 1(3) of Directive 89/665 to be interpreted as meaning that the tenderer not concerned (within the meaning of Article 2a of the Directive) must be granted access to a review only:

(a) where it is apparent from the documents forming part of the review procedure that the successful tenderer's bid is not valid; or

(b) where the successful tenderer's bid is not valid on identical grounds?'

The Court acknowlegded right from the beginning of its reasoning two differences regarding the situation at issue in the main proceedings from the situations giving rise to the Fastweb-PFE line of cases.

First, the bids of the tenderers concerned in the cases giving rise to those two judgments had not been the subject of an exclusion decision of the contracting authority, unlike the bid submitted by the consortium in the main proceedings in the present case.

Secondly, it was in the course of the same, single set of review proceedings relating to the award decision that, in both cases, each tenderer challenged the validity of the other tenderer's bid, each competitor having a legitimate interest in the exclusion of the bid submitted by the other, which may lead to a finding that the contracting authority is unable to select a lawful bid (see, to that effect, judgments of 4 July 2013, Fastweb, C 100/12, EU:C:2013:448, paragraph 33, and 5 April 2016, PFE, C 689/13, EU:C:2016:199, paragraph 24). In the main proceedings in the present case, by contrast, the consortium brought an action, first, against the exclusion decision adopted in respect of it and, secondly, against the award decision, and it is in the course of that second set of proceedings that it contends that the successful tenderer's bid is unlawful.

The Court therefore concluded that the principle Fastweb-PFE does not apply to the procedure and litigation at issue in the main proceedings.

Then the Court underlined a very important aspect, that based on Article 1(3) and Article 2a of Directive 89/665, that directive ensures effective review of unlawful decisions adopted in the context of a public procurement procedure, by enabling any excluded tenderer to challenge not only the exclusion decision, but also, as long as that challenge has not been resolved, the subsequent decisions which would harm it if its exclusion were annulled.

In those circumstances, Article 1(3) of that directive cannot be interpreted as precluding a tenderer such as the consortium from being refused access to the review of the award decision, provided that it must be considered a definitively excluded tenderer within the meaning of the second subparagraph of Article 2a(2) of that directive. According to this provision, tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

In conclusion, the answer of the Court to the question referred is that Article 1(3) of Directive 89/665 must be interpreted as not precluding a tenderer who has been excluded from a public procurement procedure by a decision of the contracting authority which has become final from being refused access to a review of the decision awarding the public contract concerned and of the conclusion of the contract where only that unsuccessful tenderer and the successful tenderer submitted bids and the unsuccessful tenderer maintains that the successful tenderer's bid should also have been rejected.

6 C-131/16 Archus

The reiteration of the principle that the legitimate interest for the purpose of initiating review proceedings covers also the notion of indirect, mediate interest, consisting in the annulment of the current procedure, following the invalidity of all tenders and therefore opening the possibility to apply to the new public procurement procedure. The award of "a particular contract" within the meaning of Article 1(3) of Directive 92/13 may cover the possible initiation of a new public procurement procedure. If the contracting authority, faced with two tenders, has adopted two simultaneous decisions rejecting the offer of one tenderer and awarding the contract to the other, the unsuccessful tenderer who brings an action against those two decisions must be able to request the exclusion of the tender of the successful tenderer.

Polskie Górnictwo Naftowe i Gazownictwo published in the Official Journal of the European Union a notice of a restricted invitation to tender for the award of a public service contract for the digitalisation of documents in its central geological archives and the preparation of an electronic version of the documents available on its internal network.

Two tenders were submitted in that procedure, one jointly by Archus and Gama, the other by Digital-Center.

After examination of the two microfilm samples provided by Archus and Gama, the contracting authority finally rejected their tender as not being in accordance with paragraph 4(1)(b) of the tender specification. It took the view that the samples of microfilm submitted by those companies were not readable at a minimum resolution of 200 dots per inch (dpi) from a microfilmed copy of an A O sheet. In addition, it considered that the tender submitted by Digital-Center was the most favourable.

Archus and Gama then brought an action before the Krajowa Izba Odwoławcza (National Appeal Chamber, Poland) against the decisions of the contracting authority rejecting their tender and accepting Digital-Center's tender.

The referring court questioned, among other things, the legal interest of Archus and Gama in the cancellation of Digital-Center's tender:

"(3) Must Article 1(3) of [Directive 92/13] be interpreted as meaning that "a particular contract", as referred to in that provision in the phrase "interest in obtaining a particular contract", means "a particular procedure carried out for the award of a public contract" (in this case: that published in the notice of 3 June 2015), or "the particular subject matter of the contract" (in this case: the service of digitising the contracting authority's archive documents), irrespective of whether, as a consequence of an appeal being allowed, the contracting authority will be required to annul the procedure for the

award of a public contract and possibly to initiate a subsequent procedure for the award of a public contract?"

The referring court asks, in essence, whether Article 1(3) of Directive 92/13 must be interpreted as meaning that the concept of 'a particular contract' within the meaning of that provision refers to a specific public procurement procedure or the actual subject matter of the contract which is to be awarded following a public procurement procedure, in a situation where only two tenders have been submitted and where the tenderer whose tender has been rejected may be regarded as having an interest in seeking the rejection of the tender of the other tenderer and, as a result, the initiation of a new public procurement procedure.

The legal issue in question arose from the fact that the two decisions were simultaneous. If the decision on the rejection was to be delivered first and became final, the economic operator does not have an interest in bringing proceedings against the decision awarding the public contract. Consequently, whilst a tenderer like Archus and Gama clearly has an interest in challenging a decision rejecting his tender, in so far as in such a case he retains the opportunity to be awarded the contract, on the other hand he no longer has any interest in the result of the public procurement procedure, since his tender was definitively rejected, at least where several tenders were submitted and selected.

The Court recalled that Article 1(3) of Directive 92/13 provides that Member States must ensure that review procedures are available, under detailed rules which they themselves may establish, at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.

When called upon to interpret the equivalent provisions of Article 1(3) of Directive 89/665 the Court has previously developed the Fastweb-PFE line of jurisprudence, according to which, in a public procurement procedure, tenderers have a legitimate interest (emphasis added) in the exclusion of the bids submitted by the other tenderers with a view to obtaining the contract (see, Fastweb, paragraph 33; PFE, paragraph 27; Bietergemeinschaft, paragraph 29), whatever the number of participants in the procedure and the number of participants who have instigated review procedures (see, to that effect, PFE, paragraph 29).

Therefore, the Court reminded that, according to the PFE judgment, the interest can be direct or indirect: on the one hand, the exclusion of one tenderer may lead to the other being awarded the contract directly in the same procedure; on the other, if all tenderers are excluded and a new public procurement procedure is launched, each of those tenderers may participate in the new procedure and thus obtain the contract indirectly (PFE, paragraph 27).

Furthermore, the Court concluded that the principle of case-law Fastweb-PFE applies to the situation at issue in the main proceedings.

In a situation as the one described above, the tenderer who has brought the action must be regarded as having a legitimate interest in the exclusion of the bid submitted by the successful tenderer, which may lead, where appropriate, to a finding that the contracting authority is unable to select a lawful bid (see, to that effect, Fastweb, paragraph 33, and PFE, paragraph 24).

That interpretation is confirmed by the provisions of Article 2a(1) and (2) of Directive 92/13, which expressly provide a right of review for tenderers who are not definitively excluded against, inter alia, award decisions taken by contracting authorities.

Admittedly, the Court ruled in its judgment Bietergemeinschaft (paragraphs 13 to 16, 31 and 36), that a tenderer whose offer had been excluded by the contracting authority from a public procurement procedure could be refused access to a review of the decision awarding the public contract. However, the decision to exclude that tenderer had, in that case, been confirmed by a decision that had the force of res judicata before the court hearing the review of the contract award decision gave its decision, so that that tenderer had to be regarded as definitively excluded from the public procurement procedure at issue.

In the main proceedings, on the other hand, Archus and Gama brought an action against the decision excluding their tender and against the decision awarding the contract, which were adopted simultaneously, and cannot therefore be considered to be definitively excluded from the public procurement procedure. In such a situation, the concept of 'a particular contract' within the meaning of Article 1(3) of Directive 93/13 may, where appropriate, apply to the possible initiation of a new public procurement procedure.

It follows from the foregoing considerations that Directive 92/13 must be interpreted as meaning that, in a situation such as that at issue in the main proceedings in which in a public procurement procedure two tenders have been submitted and the contracting authority has adopted two simultaneous decisions rejecting the offer of one tenderer and awarding the contract to the other, the unsuccessful tenderer who brings an action against those two decisions must be able to request the exclusion of the tender of the successful tenderer, so that the concept of 'a particular contract' within the meaning of Article 1(3) of Directive 92/13 may, where appropriate, apply to the possible initiation of a new public procurement procedure.

7 Conclusions

The CJEU Fastweb-PFE line of jurisprudence is a reflection of two principles, one general, fraus omnia corrumpit general principle of law and one specific to the EU public procurement law, the effectiveness of the review, and enables the review body seized with an action for the annulment of the decision on the award of the contract to exercise a retroactive effect into the administrative procedure and to assess the validity of offers. This devolutionary effect is important because it can, by the exclusion of the offer, devoid the interest of the party into the review and therefore influence the outcome of the proceedings.

According to Hackermüller, the jurisdictional body can exercise these devolutionary powers on the validity of offers ex officio and therefore assess the validity of the contender' offer. If the exclusion plea is admitted, the contender has no longer interest to have access to review. The contender has to be provided with a fair opportunity to be heard on the issue of exclusion.

In Fastweb, the Court established that the notion of "legitimate interest" to bring a review on the award of the contract covers also the interest to exclude the other offers. At the same time, the devolutionary effect on the validity of offers can be exercised not only

ex officio, but also following an incidental action of the successful tenderer against the unsuccessful tenderer.

Regarding the devolutionary powers of the review body when hearing an action on the annulment of the award decision, these powers to be exercised on the validity of tenders are complete, and therefore cover also the validity of the tender submitted by the author of the invalidity plea. Therefore, the Italian Council of State' interpretative decision on the paralysing action, which states that admission of an incidental exclusion plea can determine the inadmissibility de plano of the principal action for review, is contrary to the EU law and should be disregarded. The validity of all offers has to be assessed, without an order of procedural priority which might lead to inadmissibility.

The devolutionary powers on the validity of offers (as stated in Fastweb) were further clarified in PFE, to be exhaustive, with regard to all the tenderers (when there are more than two), no matter how many had introduced a review, and with respect to different exclusion legal grounds. The Court elaborated that a legitimate interest to initiate a review procedure covers both a direct, immediate interest, which consists in the reversal at the contested decision and the award of the contract to the contester, and an indirect, mediate interest, for the procedure to be annulled and re-opened, due to the fact that all the tenders were invalidated.

In Bietergemeinschaft, the Court stated that the tenderer which was excluded by a final review decision loses the interest to contest the subsequent decision for the award of the contract. The devolution effect is therefore limited by a previous review decision which is final.

In Archus, the Court reiterated the principle that the legitimate interest for the purpose of initiating review proceedings covers also the notion of indirect, mediate interest, consisting in the annulment of the current procedure, following the invalidity of all tenders and therefore opening the possibility to apply to the new public procurement procedure. The award of "a particular contract" within the meaning of Article 1(3) of Directive 92/13 may cover the possible initiation of a new public procurement procedure. If the contracting authority, faced with two tenders, has adopted two simultaneous decisions rejecting the offer of one tenderer and awarding the contract to the other, the unsuccessful tenderer who brings an action against those two decisions must be able to request the exclusion of the tender of the successful tenderer.

Issues raised by the offense of money laundering in the ways of the acquiring, possession or use of goods, knowing that they originate from the commission of an offense

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Abstract

This Article analyzes the offense of money laundering in the normative modalities provided by Article 29 (1) c) of Law no. 656/2002 for the prevention and sanctioning of money laundering, as well as for the establishment of measures to prevent and combat terrorism financing. The analysis of this offense mainly concerns Decision no. 16/2016 issued by the High Court of Cassation and Justice, the formations of the Court for the dissolution of certain legal issues and Decision no. 418/2018 pronounced by the Constitutional Court of Romania and implications of these decisions on the provisions of Article 29 (1) c) of Law no. 656/2002. Moreover, the relation between this offense and the offense of concealment, as provided by Article 270 of the Criminal Code, is analysed.

The conclusion we reached at the end of the Article is that the provisions of Article 29 (1) c) of Law no. 656/2002 are unconstitutional not only in the case in which the active subject of the offense of money laundering in the alternative methods expressed by this normative text is also the active subject of the offense from which the goods originate, but also in the case in which the active subject of the money laundering offense is different from the active subject of the offense from which the goods originate, in particular because of the similarities between this offense and the offense of concealment. For these reasons, I believe that this normative text must be repealed.

Keywords: money laundering, committing offenses, normative means, concealment, unconstitutional

1. The legal content of the offense of money laundering in the normative modalities provided by Article 29 (1) c) of Law no. 656/2002

Regulation

The offense of money laundering is provided by Article 29 (1) c) of Law no. 656/2002 for the prevention and sanctioning of money laundering, as well as for the establishment of measures to prevent and combat terrorism financing. Thus, according to Article 29 (1) of this normative act, the following constitutes the offense of money laundering and is punishable with imprisonment from 3 to 10 years:

a) **changing or transferring goods, knowing that they originate from the commission of offenses, in order to conceal or dissimulate the illicit origin of such goods or in order to aid the person who committed the offense from which the goods originate to evade the prosecution, trial or execution of the punishment;**

b) **concealment or disguise of the true nature, source, location, disposition, movement or ownership of the assets or of their rights, knowing that the goods come from committed offenses;**

c) **the acquisition, possession or use of goods, knowing that they come from the commission of offenses**.

The main **legal object** of this crime is the social relations of patrimonial nature whose normal birth, unfolding and development depends on the natural and legal circulation of goods or other values within the financial, banking, economic or civil circuits, accomplished through the institutions and entities provided by Article 10 of Law no. 656/2002. In the case of Article 29 (1) b) The main legal object is represented by social relations regarding the right of ownership or other real rights [1]. This offense also has an **adjacent legal object**, which consists of the social relations establishing the performance of justice, the acts incriminated by Article 29 (1) preventing the truth from being learned through justice[2].

The material object is the goods resulting from the commission of the predicate offense and which are subjected to the laundering operations. These goods must be the product of the predicate offense and not the means of committing the offense.

The active subject of a money laundering offense may be any natural or legal person. As a general rule, the active subject of the money laundering offense may also be an active subject of the offense from which the goods originate, as established by the High Court of Cassation and Justice, the formation of the court for the dissolution of certain legal issues, by Decision no. 16/2016, which will be further analyzed in a distinct section of this Article.

The passive subject is the state, as the title holder of the social value protected by the norm of incrimination, but we can also have a secondary passive subject, consisting of the natural or legal person injured by the commission of this offense.

The premise

This offense has as a premise the commission of another offense from which the money or property that is the object of the laundering originate, known in the doctrine and jurisprudence as the main offense or predicate offense. Thus, it has been shown in the jurisprudence that the condition required by law to retain the offense is the illicit origin of the assets making the object of the offense of money laundering. The illicit nature of the origin of the assets is defined only by identifying them as assets pertaining to the

offense [3]. According to Article 29 (5) of Law no. 656/2002, in order to achieve the constitutive content of the money laundering offense, it is irrelevant if the offense from which the property originates was committed on the territory of Romania or abroad.

The autonomous nature of money laundering offense in relation to the predicate offense

Although this offense has as a precondition the commission of another offense from which the goods which are the subject of the laundering operation are derived, by Decision no. 16/2016 the High Court of Cassation and Justice, the formations of the Court for the dissolution of certain legal issues, it has been established that the money laundering offense is an autonomous offense, not being conditioned by the existence of a conviction for the offense from which the goods originate. Moreover, in the jurisprudence of the Supreme Court prior to Decision no. 16/2016 it was also held that for the a money laundering offense to be registered, no prior or concurrent conviction is required for committing an offense from which the goods originate [4], the author of the offense from which the goods originate not having to necessarily be known [5]. Also, by Decision no. 609/2014, the High Court of Cassation and Justice, the Criminal Chamber established that the money laundering offense provided by Article 29 (1) of Law no. 656/2002 is not conditional on the existence of a conviction sentence for the offense from which the goods originate. In this respect, according to Article 9 (5) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, adopted in Warsaw on 16 May 2005, ratified by Romania by Law no. 420/2006, the previous or simultaneous conviction for the predicate offense is not a condition of conviction for the money laundering offense. According to Article 9 (5) of the above-mentioned Convention, each signatory party shall ensure that an earlier or simultaneous conviction for a premeditated crime is not a condition for a conviction for a money laundering offense. It follows from paragraph 100 of the Explanatory Report of the Convention that Article 9 (5) of the Convention determines the nature of an autonomous offense in the case of a money laundering offense. In this respect, the Romanian legislator did not include in the constitutive content of the money laundering offense the condition of pronouncing a conviction for the predicate offense. Under these circumstances, both in the doctrine [6], as well as in the jurisprudence, it has been shown that the money laundering offense can be retained even if the predicate offense exceeds the statute of limitations [7], is amnestied [8] or decriminalised, considering that the two offenses are autonomous to each other [9]. However, it should not be omitted that the existence of a money laundering offense is conditional, on committing an offense from which the goods which are subjected to the laundering operation originate [10]. In the literature [11] it has been shown that even the acquittal by a final decision of the author of the predicate offense cannot be an impediment in prosecuting the money laundering offense, provided however that the acquittal was was not caused by the lack of a criminal act or the lack of its criminal nature [12].

The substantive element of the money laundering offense in the variant provided by Article 29 (1) c) of Law no. 656/2002, consists of the action to acquire, hold or use property, knowing that it drives from the commission of an offense.

Acquisition refers to a person's deed of obtaining a good with any title, knowing that the good comes from the commission of a crime.

Ownership means the deed of a person to have a possession of a good in temporary custody or in custody, knowing that the good comes from the commission of a crime.

Use means a person's deed to use a good, to use it and to exploit it for a determined or indefinite period of time, according to the purpose of that good, if the person knew that the good was the result of the commission of a crime.

When the material object of the offense of money laundering is the money obtained from the commission of a crime, the activities that surround the money laundering operation generally involve first of all receiving monetsry proceeds from offenses and then setting up a money laundering scheme. This money laundering scheme typically runs through three main steps:

- splitting the money obtained from committing offenses, i.e. dividing them into amounts of money less than 10,000 euro and then placing, putting these amounts into circulation through the rapporteur entities provided by Article 10 of Law no. 656/2002, such as banks, investment funds, insurance companies, consultants, etc.;

- the separation of illegally obtained money from their source through more or less fictitious financial transactions or operations or through front companies, so that money moves from the original place where they were placed to another location, through several fictitious or real operations (for example, services or sales of goods that are difficult to quantify, such as software, trademarks, intellectual property rights, etc.), so that these uninterrupted movements of money in various jurisdictions in the world make it very difficult or almost impossible to trace them;

- the integration of money obtained by committing offenses, which is achieved by re-introducing them into the financial, banking or commercial circuit by means of perfectly legal operations that do not give rise to any suspicion [13].

Essential requirements

In the jurisprudence of the Supreme Court [14] it was shown that, for the existence of the money laundering offense provided by Article 29 (1) c) of Law no. 656/2002, two main requirements must be fulfilled, on the one hand, there must be an activity of acquiring, holding or using goods and, on the other hand, at the time of carrying out that activity it must be known that these goods come from committing crimes. At the same time, it was found that it was not sufficient to simply find that the one from which the goods were acquired is being investigated for committing crimes and the author was aware of the latter, it being necessary to establish, on the basis of certain evidence, that the property acquired, owned or used derives from the commission of the offense and that the perpetrator was aware of that circumstance [15].

The main immediate result consists in creating a state of danger for social relations of a patrimonial nature regarding the natural and legal circulation of goods or other values within financial, banking, economic or civil circuits, without any suspicion of the criminal origin of these goods. The immediate adjacent consequence is the creation of a state of danger for the normal execution of the act of justice in relation to the assets acquired through committing offenses. In the case of this crime, we can also speak of a second adjacent immediate consequence, which would be to alter the factual situation of the property following the action of acquiring, holding or using, which characterizes the material element of the objective side.

The causal link between the material element and the immediate consequence derives from the substantive nature of the deed. With regard to the immediate adjacent

consequence consisting in changing the factual situation of the good, between the material element of the objective side, in any of the ways provided by Article 29 (1) c) of Law no. 656/2002 and the immediate adjacent follow-up, there is a direct and inevitable relationship, in the sense that simply receiving, acquiring or using the good is equivalent to a change in the factual situation of the good [16].

The subjective aspect

As regards the form of guilt, the offense of money laundering in the ways provided by Article 29 (1) c) can be committed both with direct intent, when the perpetrator foresees and follows the result of his deed, and indirectly, when the perpetrator provides for the result of his deed, but, although he does not pursue it, accepts the eventuality of its occurrence.

The essential requirement of the subjective side is that at the time of the act that constitutes the material element of the objective side of this offense, the perpetrator is aware of the fact that the material goods of this crime come from the commission of offenses. According to Article 29 (4) of Law no. 656/2002, the knowledge of the provenance of the goods or the intended purpose may be deduced from the objective factual circumstances.

The forms of the offense

Preparatory acts are possible but not incriminated. The attempt to commit this offense is punishable.

The consummation of the deed occurs when the material element is accomplished, in any of the ways provided by Article 29 (1) c) of Law no. 656/2002. The normative means in which the offense can be committed are the acquisition, possession or use of goods. The offense can take the a repeated form, when committed at different time intervals, but for the accomplishment of the same criminal resolution, several actions specific to the material element which each in part present the content of the offense. In such a situation, the offense is consummated at the time of the last act of money laundering.

Sanctions

This offense is punished by imprisonment from 3 to 10 years. According to Article 30 of Law no. 656/2002, the person who committed the money laundering offense, and who, during the criminal prosecution, denounces and facilitates the identification and prosecution of other participants in the offense, benefits from the halving of the penalty limits provided by the law.

Special seizure

According to Article 33 of Law no. 656/2002, the provisions on special seizure shall apply in the case of money laundering. By Decision no. 23 of 19.09.2017 pronounced by the H.C.C.J. the formations of the Court for the dissolution of certain legal issues, noted that, in interpreting the provisions of Article 33 of the Law no. 656/2002 for the prevention and sanctioning of money laundering and Article 9 of Law no. 241/2005 for the prevention and sanctioning of tax evasion, in the case of the concurrence of offenses between the tax evasion offense and the money laundering offense, it is not mandatory to apply the safety measure of the special seizure of the amounts of money that have been the subject of the money laundering offense deriving from the commission of the offense of tax evasion at the same time as obliging the defendants to pay the amounts representing tax liabilities owed to the state as a result of the crime of tax evasion.

2 The actions listed in Article 29 (1) of Law no. 656/2002 represent distinct normative modalities for the commission of the money laundering offense or are they alternative variants of the material element of the objective side of the money laundering offense?

It must be said that in reality all the actions listed by Article 29 (1) a)-c) of Law no. 656/2002 are normative modalities. The normative ways in which the money laundering offense can be committed are: the change or the transfer [art. 29 (1) a)], concealment or dissimulation [art. 29 (1) b)] and acquisition, possession or use [art. 29 (1) c)].

This issue was the object of the notification of the High Court of Cassation and Justice, the formations of the Court for the dissolution of certain legal issues, being settled by Decision no. 16/2016. In fact, the issue raised concerning the fact that if it were to be interpreted that the actions listed by Article 29 (1) a)-c) of Law no. 656/2002 are distinct normative ways of committing a money laundering offense, then it would result in the conclusion of several money laundering crimes in concurrence in the case of carrying out several actions out of those listed by this law. On the other hand, if it were to be interpreted that the actions listed by the Article 29 (1) a)-c) are alternative variants of the material element of the objective side of the money laundering offense, then one money laundering offense would be held, even if several actions were committed out of those mentioned in the law. The court has rightly pointed out that the fact that an offense can be committed in several normative ways is not the one that determines holding a certain criminal offense. In fact, the distinction to be made, with relevance as to whether the concurrence of the offenses exists or not, is between the variants of the offense, which give rise to a concurrence of crimes and the variants of incrimination, which do not give rise to the concurrence of crime.

By Decision no. 16/2016 the supreme court rightly established that the actions listed in Article 29 (1) a), b) and c) of law no. 656/2002, namely the change or transfer, concealment or dissimulation, acquisition, possession or use, are normative modalities of the material element of the single offense of money laundering. These normative modalities can also be called alternatives to the incrimination of the single money laundering offense.

3 The jurisprudential solutions as to whether the active subject of a money laundering offense can be the same as the active subject of the offense from which the items that are the object of the laundering process originate

Art. 29 of Law no. 656/2002 does not contain provisions stipulating that the active subject of the predicate offense cannot be an active subject and the money laundering offense. In the absence of such a provision, there have been many court rulings, whereby it was held that the active subject of the offense from which the goods originated can also be the active subject of the money laundering offense in the normative arrangements provided by Article 29 (1) c) of Law no. 656/2002. Thus, in a case [17] it was decided to constitute the money laundering offense provided by Article 29 (1) c) the deed of a

company's manager not to enter in the company's accounts the sale of goods to two companies, eliminating the payment of income tax and related VAT, which is the predicate offense of tax evasion, followed by cash withdrawals from the account of the company whose manager they were, of the amounts received from the two companies it acquired. Of course, the solution is wrong, since the defendant, through the actions imputed to him, has done nothing else but come into the possession of the proceeds of the crime of tax evasion, not carrying out other fraudulent maneuvers for the entry into possession of the sum. In another case [18] it is held that the the money laundering offense was committed, as provided by Article 29 (1) c) by the defendant who bought a car with money from the sale of plants with psychoactive effects. We also find this solution to be an error, since it was normal for the defendant to use the money obtained from committing a crime. Such an activity of money investment cannot be considered a crime, because it would come to the situation where the defendant would be sentenced twice for the same offense.

By Decision no. 836 of February 13, 2013, issued by the High Court of Cassation and Justice, it has been established that the acquisition, possession and use of money obtained by committing the offense provided by Article 12 a) of Law no. 78/2000 for the prevention, detection and sanctioning of corruption, by the active subject of this offense, who tried by successive bank transactions to conceal both the source and the destination of the money, meets the constituent elements of the money laundering offense as provided by Article 29 (1) c) of Law no. 656/2002. Thus, the supreme court established by that decision that the active subject of the offense provided by Article 12 a) of Law no. 78/2000, from which the money originates, may also be an active subject of the money laundering offense in the normative methods provided by Article 29 (1) c) of Law no. 656/2002.

And in this case, we consider that if the same person would be charged with both the offense from which the goods originate and the offense of money laundering in respect of the goods in question in the way of acquiring, holding or using, the *ne bis in idem* principle would be violated, where the specific money laundering offenses are not sufficiently individualized in relation to the specific actions of the offense from which the goods originate. It is normal for the person committing the predicate offense to acquire, possess or use the goods obtained from this offense, as these goods are the result of the predicate offense. However, if it is held that the active subject of the predicate offense may also be an active subject of the money laundering offense provided by Article 29 (1) c) without there being a need to identify an individualization of the specific money laundering actions, this entailing that at the time of the commission of the predicate offense from which the goods were obtained, the perpetrator also committed the money laundering offense in the ways of acquiring, possessing or using those goods, which implies that this person will be punished twice for the same deed.

In this respect, by Decision no. 16 of 8 June 2016 the High Court of Cassation and Justice, the formations of the Court for the dissolution of certain legal issues, has determined that the active subject of the money laundering offense can also be an active subject of the offense from which the goods originate. However, the supreme court has pointed out that the money laundering offense should not be automatically attributed to the author of the predicate offense, for the simple fact that in its criminal activity, one of the actions belonging to the material element of the money laundering offense, because it

would deprive the money laundering offense of individuality. Thus, the Supreme Court states that it is up to the judiciary to decide in concrete situations whether the money laundering crime is sufficiently individualized in relation to the predicate offense and whether it is necessary to hold offenses in concurrence or just a single offense. In other words, the Supreme Court has shown that the money laundering offense will not be prosecuted unless the specific money laundering offense actions are sufficiently individualized in relation to the specific actions of the offense from which the goods, object of the money laundering originate, in this specific case only the offense from which the property originated is to be held. Therefore, the mere possession or use of property obtained from the commission of a crime does not meet the constituent elements of the money laundering offense. In substantiating this solution, the High Court of Cassation and Justice has shown that Article 9 (2) a) of the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, adopted in Warsaw and ratified by Romania, points out that, for the purpose of putting into practice or applying the measures that prove to be necessary for penalizing money laundering in national law, it could be provided that money laundering offenses do not apply to persons who have committed the predicate offense. At the time of accession to this Convention, Romania did not express any reservation nor is there in Law no. 656/2002 any provision preventing the person who committed the predicate offense from also being prosecuted for the money laundering offense.

4 Decision no. 418 of 19.06.2018 pronounced by the Constitutional Court

By this decision, published in the Official Gazette, Part I no. 626 of 19.07.2018, the Constitutional Court found that the provisions of Article 29 (1) c) of Law no. 656/2002 in the interpretation given by the Decision of the High Court of Cassation and Justice no. 16 of 8 June 2016 for a preliminary ruling, as regards the possibility that the active subject of the predicate offense could also be an active subject of the money laundering offense, are unconstitutional. In motivating this solution, the Constitutional Court shows that the third normative variant of the money laundering offense, provided by Article 29 (1) c) of Law no. 656/2002, does not directly address the purpose of concealing the provenance of the goods, which the perpetrator of the offense knows derive from the commission of an offense. Also, the actions that constitute two of the alternative ways of the material element of this normative variant (i.e. acquisition and possession), are actually inevitable results of the offense from which the goods originate, and not separate actions, which is why a money laundering offense in the way of acquiring or possessing the assets can not be dissociated from the predicate offense from which the goods originate. Regarding the third alternative way of this normative version, i.e. the use of goods, knowing that they come from the commission of offenses, this can be done after the moment when the predicate offense is consummated, based on another criminal resolution, distinct from the one from which the goods originated, but the activity of using the property by a person who has committed a crime for the purpose of obtaining it is a natural activity, which does not imply the existence of another criminal resolution. This is because it is logical that the acquisition of goods, whether licit or illicit, takes place for

the purpose of using them. In conclusion, if the money laundering offense were held against the active subject of the predicate offense, under the methods provided by Article 29 (1) c) of Law no. 656/2002 they would be held criminally liable twice for the same deed. As a consequence, such an interpretation was considered to be in accordance with the H.C.C.J. Decision no. 16/2016, in the case of acquisition and possession, it would be excessive and therefore contrary to the provisions of Article 23 (12) of the Constitution, and in the case of the methods of use it would lack clarity, precision and predictability, and thus would be contrary to the provisions of Article 5 (1) and Article 23 (12) of the Constitution.

We believe that this decision is not sheltered from some criticism, as we will show below.

First of all, we cannot fail to observe that in motivating this decision, the Constitutional Court refers to two decisions of the High Court of Cassation and Justice, through which, in the opinion of the Contentious Constitutional Court, the supreme court would have held that the active subject of the money laundering offense and the predicate offense cannot be the same person, this in antithesis with Decision no. 16/2016 pronounced by the same court but in the formations of the Court for the dissolution of certain legal issues, however the Constitutional Court allegations are false.

Thus, as regards Decision no. 147 of 19.01.2011, the H.C.C.J. in no case does it give pronouncements regarding the possibility that the active subject of the predicate offense is also an active subject of the money laundering offense. The text of this decision of the H.C.C.J. to which the Constitutional Court refers in point 18 of the Decision no. 418/2018 is indeed an extract from Decision no. 147/2011 of the H.C.C.J., but it represents the view of the Sibiu Tribunal, who did not hold that there has been a money laundering offense, but this matter is not subject to debate at the High Court of Cassation and Justice at the appeal stage.

Also, with regard to Decision no. 836/2013 pronounced by the H.C.C.J. the error of the Constitutional Court is equally obvious in the circumstances in which the extract from the text is also provided in point 18 of the Decision no. 418/2018 it is the reasoning of the Braşov Court of Appeal and not the point of view of the H.C.C.J., which even in that judgment clearly shows that the participant in the main offense can also be an active subject of the money laundering offense.

Therefore, the supreme court's point of view was quite well outlined even before Decision no. 16/2016, regarding the possibility that the active subject of the predicate offense is also an active subject of the money laundering offense, the novelty of this decision, given precisely by the interpretation that, in such a situation, the money laundering offense will also be held only when specific money laundering actions are sufficiently individualized in relation to the specific actions of the offense from which the money laundering goods are derived, precisely in order to avoid the conviction of a person twice for the same deed.

In those circumstances, in the light of that interpretation given by the H.C.C.J., it is obvious that in the absence of distinct actions, specific to money laundering actions, sufficiently well individualized in relation to predicate offense, it was not possible for the person committing the offense from which the goods originated to be an active subject of the money laundering offense in the way of possession or acquisition, as the Constitutional Court claims. Therefore, we consider that the arguments put forward by the

Constitutional Court regarding the possibility of the person being convicted twice for the same deed in the ways of possessing and acquiring Article 29 (1) c), in the interpretation given by the H.C.C.J. Decision no. 16/2015 do not stand up to a more careful analysis. We also notice that even in the case of the way of use, the arguments put forward by the H.C.C.J. are valid in regards to the need to individualize the actions specific to this normative way in relation to the predicate offense, in the sense of having distinct actions specific to money laundering acts, very well individualized in relation to the predicate offense. However, in the interpretation given by the H.C.C.J., in order to be in the presence of a money laundering offense in the way of use, the actions of the active subject should consider just a concealment of the goods acquired through the predicate offense, and not a mere use that is inherent in the possession of a good.

5 The relationship between the money laundering offense in the ways provided by Article 29 (1) c) of Law no. 656/2002 and the offense of concealment

Continuing the critical examination of the Constitutional Court Decision no. 418/2018 we cannot help but notice that in the reasoning of this decision the Constitutional Court also refers to Decision no. 379 of 7 June 2016 by which the objection of unconstitutionality of the provisions of Article 29 (1) c) of Law no. 656/2002 was rejected. Without going into details regarding this decision, we cannot fail to notice an error of logic of the Constitutional Court when asserting in paragraph 14 of Decision no. 418/2018 that "the essential difference between money laundering and concealment is that when money is obtained in the case of money laundering, the funds come from illicit operations aimed at concealing dirty money, while at the time of concealment the acquisition of goods is done only with white money". It is true that this allegation was made on the grounds of Decision no.379/2016 to reject the unconstitutionality exception of Article 29 (1) c) of Law no. 656/2002, however it captures the insistence with which it is resumed, in another reasoning of a decision, a reasoning that we consider erroneous from two points of view.

Thus, first of all, we believe that we cannot accept the claim that in the way of acquiring a good in the case of a money laundering offense, the funds must come from illegal operations. On the contrary, in the case of a money laundering offense, funds for the acquisition of goods come most of all from legitimate operations, which have as a purpose precisely the concealment of the source of the illicit goods that are the object of the laundering offense, through the offense of money laundering. The goods that are subject to laundering through the acquisition come from illicit operations, and not the funds with which these goods are acquired. Moreover, in the provisions of Article 29 (1) c) there is no requirement regarding the illicit origin of the funds used to acquire the goods proceeding from the crime.

Secondly, as to the claim that in the case of concealment, the acquisition is made only with white money, this is only partially true. In order to prosecute the offense of concealment, the source of the money with which a good is purchased is irrelevant, it is important that the concealer knows or has foreseen that it comes from the commission of an offense. Consequently, in relation to the good acquired as a material object of the

offense of concealment, the offense of concealment is found irrespective of the source of the money with which the concealer acquires a good, the condition for this offense being that the person knew or predicted that this property comes from the commission of an act provided by the criminal law. On the other hand, if that person acquires that property with funds obtained from illicit operations (crimes) it is possible for the same person to also be held responsible for the offense of money laundering of illicit funds as a material object of the money laundering offense, if they are the object of the laundering offense, the provisions of Article 29 (1) b) of Law no. 656/2002 also being applicable in this situation.

6 Instead of conclusions

I believe that, in reality, the major issue raised by Article 29 (1) c) of Law no. 656/2002 is the aspect of unconstitutionality resulting from the impossibility to delimit between the money laundering offense in the normative modalities provided by Article 29 (1) c) and the offense of concealment, with consequences in terms of respecting the constitutional principle of the lawfulness of incrimination and punishment, provided by Article 23 (12) of the Constitution and, implicitly, of the principles of accessibility and predictability of the law, as these principles have been developed in the jurisprudence of the European Court of Human Rights.

Thus, the text of Article 29 (1) c) of Law no. 656/2002 overlaps over the text of Article 270 of the Criminal Code, which is why it is very difficult to make a distinction between the two rules of incrimination when the legal framing of a deed must be made. We remind that in the case of the money laundering offense the punishment stipulated by the law is imprisonment from 3 to 10 years, while for the concealment offense the punishment is one to five years imprisonment or a fine, but without the penalty imposed to the person concealing, being greater than the punishment prescribed by the law for the offense committed by the author thereof. Considering that the only difference between the money laundering offense in the ways provided by Article 29 (1) c) and the offense of concealment is made at the level of the sanctioning regime which is done more severely in the case of money laundering, the conclusion would be that the concealment offense should always be found. Otherwise, it would have violated the constitutional principle of the lawfulness of incrimination and punishment, as provided by Article 23 (12) of the Constitution. In those circumstances, I consider that the argument in paragraph 14 of Decision no. 418/2018 of the Constitutional Court, in the sense that unconstitutionality cannot be found in the case of Article 29 (1) c) of Law no. 656/2002 since the interpretation and application in practice of legal norms in the exclusive jurisdiction of the courts is incomprehensible, since the lack of clarity of the law results precisely from the impossibility of distinguishing between two texts of the law, which leads to the possibility of contradictory solutions, with important consequences in terms of applying the punishment, which leads to a clear lack of accessibility and predictability of the provisions of Article 29 (1) c) of Law no. 656/2002.

Taking into account the issues raised in the present article, I appreciate the best solution of the legislator is the abrogation of the provisions of Article 29 (1) c) of Law no. 656/2002, given that the normative modalities of the money laundering offense contained in this law are also found in the provisions of Article 270 of the Criminal Code, which regulates the crime of concealment.

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The offence of taking bribery in the new formula of incrimination

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Abstract

The offence of taking bribery is considered as an antisocial manifestation in the field to fight corruption and, in terms of the extremely high degree of social danger which characterizes such acts, they should be carefully controlled and monitored for accountability and sanctions the persons who commit them. Consequently Romania showed an increased focus on the prevention and combating of corruption and, in the context of the realities existing in our country, determined including by the integration into the European Union, it was necessary to develop an appropriate and effective legislation in order to protect the rule of law and for policing and social protection.

Current Penal Code penalizes, among other things, taking bribery, giving bribery, traffic of influence, buying influence, as crimes whose active subject is public servant. These offences set out in the Criminal Code are supplemented by the mandatory provisions contained in other laws such as the Law no.78/2000 on preventing, discovering and sanctioning of corruption, Law no. 161/2003 on certain measures to ensure transparency in exercising public dignities, public functions and the business environment, preventing and sanctioning of corruption, Law no. 7/2004 on the Code of Conduct for Public Servants etc.

Keywords: criminal law, taking bribery, public servants, corruption, material element, the active subject, the offences.

1 Preliminary considerations

Romanian legislature has seen fit to structure under Title V, entitled "Crimes of corruption and service" in two different chapters these categories of criminal offences, as follows: the first chapter criminalize the corruption offences and the second one, the service offences. We believe that the legislator should introduce in the text of the current Criminal Code also the offences affecting the financial interests of the European Union, although they are found criminalized in Law no. 161/2003. It is noted that the second chapter on, as I said, the service offences, incriminates in art. 308 the crimes of corruption

and service committed by others, increasing the criminalization field of acts of taking and giving bribery (Art. 289 and 290), traffic and buying influence (art. 291 and 292), embezzlement (art. 295), abuse in the service (art. 297), negligence in the service (art. 298), abusive using of the function in sexual purposes (art. 299), usurpation of the function (art. 300), conflict of interests (art. 301) and disclosure of secret or nonpublic information (art. 304), including cases where such offences have been committed by or regarding the persons that are exercising temporarily or permanently, with or without remuneration, a commission of any kind in the service of individuals from those set out in art. 175 par. (2) or under any legal person, but with a reduction of one third of the special penalty limits. It is true that also in the previous Criminal Code, in art. 258, entitled "Acts committed by other officials" were similar provision as regards the system of penalties applicable to perpetrators, only the current Code includes several categories of active subjects and offences to which the Article 308 of the current Code is applicable are many, being concerned and the corruption from the private sector or from the liberal professions. It should be noted that the term "public servant" as it was defined in Art. 175 par. 1 letter c) of the Criminal Code in force was limited by deleting "or of a legal person declared as being of public utility", with the entry into force of Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code [1].

2 Essential aspects regarding the offence of taking bribery

Taking bribery (art. 289) has been incriminated in the current Criminal Code, in the type variant, as the act of a public servant which, directly or indirectly, for himself or for other, claims or receives money or other benefits that not due to him or accepts the promise of such benefits in connection with the performance, failure, speeding up or delaying performance of an act falling within the duties of his office or in connection with the performance of an act contrary to these duties and shall be punished with imprisonment for 3-10 years and interdiction exercise of the right to hold public office or to practice or work in performance of the offender.

Attenuated version of the crime of taking bribery involves the act by a person exercising permanent or temporary, with or without remuneration, a commission of any kind in the service of individuals from those set out in Art. 175 par. (2) Criminal Code or under any legal person, according to art. 308 of the Criminal Code related to art. 289 Criminal Code.

The special legal object of the offence of taking bribery is to conduct properly the social relationships regarding service relationships; it is devoid of material purpose, money, goods and valuables received being only amounting goods covered by the act, not a material object.

The active subject of the offence of taking bribery in the type variant is public servant (qualified active subject), as it was defined in art. 175 par. (1) of the Criminal Code and the passive subject may be an authority or a public institution, a legal entity of public interest or even a private legal entity. Criminal participation is possible both in the co-authored form, provided that all participants meet the quality required by law, and the complicity or instigation form, this time being irrelevant if the participants whether or not a certain quality.

It should be noted that the giver bribery is the author of the offence of giving bribery, not instigator or accomplice in taking bribery, and the author of the offence of taking bribery can not be the instigator or accomplice in giving bribery. In practice, there are situations when the bribe gets to the active subject through an intermediary, circumstances in which this intermediary shall have one of the following qualities: an accomplice to the offence of giving bribery, if he committed the crime in order to provide support briber; accomplice to the offence of taking bribery, if he committed the crime in order to provide support bribed; instigator to the offence of giving bribery or to the offence of taking bribery.

When the public servants claim, receive, accept promises of money or undue advantages should be given the competece to perform, not to perform, to delay or to accelerate the performance of that act. If, in fact, they do not benefit from that competence or whether licit or illicit act is not part of the duties of his office, it will become incidents of cheating offence provisions. Conversely, if it is for the competence of the other official, but active subject affecting the fulfillment of this act in the way he fulfills his own duties, he will answer for the offence of taking bribery.

We note that in light of the current Penal Code, the legislature decided that taking bribery may be committed by the author "for himself or another" and we consider that "other" may designate another individual than active subject or even a legal person. We also note that, unlike the situation existing in the old Criminal Code, the new reglementation includes the assumption of committing the offence in relation with the speeding up the performance of an act.

The offence of taking bribery implies prompt execution, excluding preparatory acts and attempt; also, the offence of taking bribery may be committed in the continued form.

The doctrine expressed different views regarding the form of the intention as it might be committed this offence. According to some authors [2], taking bribery can take as a form of guilt, only direct intention qualified by the aim of the active subject, exactly as it was under the previous reglementation of this crime, and according to other authors, in the new incrimination form, the form of guilt can be both direct intention and indirect intention [3].

We consider it is necessary to emphasize that the reason for the request, meaning rewards or payments, does not constitute the purpose of the request, which can be either the satisfying of an existential need or illegal enrichment. The mobile of the claiming may result in an aggravating circumstance or, conversely, a extenuating circumstance.

Analyzing the offences of taking and giving bribery in terms of the degree of social danger, we express the view that, in fact, the crime of giving bribery could be regarded as an act of instigation or complicity in the crime of taking bribery. It is true that art. 49 of the current Criminal Code provides for the co-author, instigator and accomplice the applying of the same sanction regime provided by the law for the author, but on the assumption expressed above, we believe that if for the two offences would remained identical penalty limits as those originally envisaged in Law no. 286/2009 on the Criminal Code, the incrimination of such acts in different regulementations would not be found legitimacy. So, we consider auspicious that Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code were increased the limits of the punishment for the type variant of the offence of taking bribery (imprisonment from 3-10 years), unlike

the type variant of the crime of giving bribery whose punishment special limits are in 2-7 years.

We considered appropriate, especially on grounds of the need to ensure prevention of committing such acts, both introducing complementary penalty of the prohibition of the right to hold public office or to practice or to work in whose performance it was committed the crime and the confiscation of money, goods or valuables received or confiscation by equivalent when these are not to be found.

Confiscation may be ordered from any person, not just from the active subject, operating extended confiscation, and in case of criminal participation, it operates equivalent confiscation of goods which actually benefited to each of the participants in committing the act. On the other hand, confiscation may not be ordered when it becomes incident a case of non-imputability (it is about of the assuming when the briber has committed the act by coercion), in the event of denunciation [it is the situation when, for the benefit of the briber, will operate special non-punishment legal case contained in para. (3) art. 290], when the goods have been given after the denunciation was made or if they were put at the briber's disposal by the prosecutor.

3 Public servant – as an active subject of the offence of taking bribery

Criminal Code of 2009 [4] defines in General Part, Title X – "The meaning of some words or phrases in criminal law", the terms "public" and "public servant" as follows:

– article 175: "(1) The public servant, within the meaning of criminal law, is an individual who, permanently or temporarily, with or without remuneration: a) is carrying out the duties and responsibilities established by law in order to achieve the prerogatives of the legislative, executive and judicial power; b) is exercising a public dignity or public office of any kind; c) is exercising, alone or with others, in an autonomous administration, in another economical operator or in a legal entity owned totally or majority state or in a legal person declared as public utility tasks related to the achievement of the object of its activity. (2) It is also considered a public servant, within the meaning of criminal law, the person that is exercising a service of public interest which was entrusted by the public authorities or is subject to control or supervision of them on the performance of that public service. "

– article 176: "The term public means all regards the public authorities, public institutions and other legal entities that manage or exploit goods that are publicly property."

In the previous Criminal Code it was provided that the active subject of crimes such as abuse in service against the interests of the persons (art. 246), abuse in service by limiting the rights (art. 247), abuse in service against public interests (art. 248), conflict of interests (art. 253^1), taking bribery (254), receiving undue benefits (art. 256), embezzlement (art. 215^1), failure notification judicial bodies (263) or intellectual forgery (art. 289) must meet mandatory the quality of "public servant" or "official" for the existence of the crime of taking bribery. And the current Penal Code [5], for instance, in the case of the offences of corruption and service or other offences – such as theft or destruction of documents [art. 259 par. (2)] or failure notification (art. 267)] maintain this requirement, but we can see that the legislature renounced using the term "official". Although he gave

up the terminology "official" in the current Criminal Code, however, this is irrelevant because Art. 308 Criminal Code, which increases the category of active subjects, the incidence of incrimination remains unaltered.

Studying existing provisions in our domestic law through correlation with those provided for in international treaties that our country has ratified, thus becoming part of national law in accordance with art. 11 (2) of the Constitution, we express the view that national reglementations, at least until the entry into force of the Law amending and supplementing some normative acts and unique article of Law amending art. 253[1] of the Criminal Code regarding combating corruption and abuse of functions performed by public servants corresponds with international standards in this area, the terms "official" and "public servant" having the same meaning as those of "public agent", "member of domestic public assemblies," "national official" or "public officer", which are found in international documents to which we refer.

In order to determine the incidence of the term "public servant", High Court of Cassation and Justice [6] took into consideration also the Decision. 2 of January 15, 2014 of the Constitutional Court, which declared unconstitutional the provisions of the article. I pt. 5 and art. II pt. 3 of the Law amending and supplementing some normative acts and unique article of Law amending art. 253[1] Criminal Code 1969. In that decision, the Constitutional Court stated that "the significance of the concept of public servant in criminal law is not equivalent to the official in administrative law". Under criminal law, the concept of "public servant" and "official" have a broader meaning than that of administrative law. Doctrine showed that penal law defines exclusivelly the official in accordance with owned function, which means that the criminal law refers to the concept of "public authorities". But, according to the provisions of Title III of the Romanian Constitution, public authorities sums, in addition to public administration (central specialized and local), and Parliament, Romanian President, the Government and the judiciary authority (the courts, the Public Ministry and the Superior Council of Magistracy). In the same decision [7], it is stated that "the exclusion of persons exercising the liberal professions, in the field of incidence of criminal liability in relation to criminal offences of service and corruption, there is not an objective criterion by which to justify the intervention of the legislature." Also, the Constitutional Court ruled that "essential for the inclusion or exclusion of persons from within the criminal provision are criteria such as the type of service provided, the legal basis under which it is suited the activity or the legal relationship between such persons and public authorities, public institutions, institutions or other legal entities of public interest" [8].

The notion of "public function" is interconnected with the "public interest", both aiming at the general interest. So, the activity of the public servant pursues the public interest. Consequently, in exercising the public function, it should take priority the public interest, not the staff. It should be noted however, that among the services of general interest include entities whose activities are aimed at the satisfaction of the general interests of members of society. In terms of the technique of reglementation, we note that the legislature intended to define as accurately as possible in art. 175 Criminal Code the notion of public servant. Using the legislator of the term "public office" means just trying to avoid an overlap between the concepts of "public official" under the Law no. 188/1999 on the status of public servants and the expression used in art. 175 par. (1) b) the phrase II and c) Criminal Code related to art. 175 par. (2) Criminal Code.

According to art. 7 of Law 78/2000 on preventing, discovering and sanctioning of corruption [9], amended by Law 187/2012, the facts of taking bribery and traffic of influence will be punished with the punishment provided for in art. 289 or 291 of the Criminal Code, whose limits will increase by one third when the offender is performing a public dignity, is judge or prosecutor, is a criminal investigation body or is responsible for finding and for sanctioning contraventions, or is one of persons referred to in art. 293 of the Criminal Code.

In our opinion, this aggravating circumstance would have to find the foundation in even the Criminal Code, as public confidence in the authorities and public institutions is severely affected when the offenders hold such positions. In support of this view, we note that in art. 5 pt. 2 of Law no. 7/2004 on the Code of Conduct for Public Servants it is stated that "in exercising public functions, public servants are required to behave professionally and to ensure, by law, administrative transparency, and also to earn and maintain public trust in integrity, impartiality and effectiveness of the authorities and of the public institutions", and art. 7 pt. 1 – Loyalty to the authorities and public institutions – stated in para. (1) that "public servants are required to protect loyally the prestige of the authority or of the public institution in which they operate, and also to refrain from any act or fact which may cause damage to the image or to the legal interests of its". Moreover, art. 3 letter f) of Law 7/2004 amounts the moral integrity of the public servants to the degree of a principle, a principle that "public servants are forbidden to solicit or to accept, directly or indirectly, for themselves or for others, any advantage or benefit in consideration of public office they hold, or to abuse in any way by this function."

From our point of view, another criticism of the new form of incrimination would be also the sanctioning of the official with control duties only for the simple offence, unlike the former reglementation when this situation was considered an aggravating way.

Until the entry into force of the current Code, there were numerous discussions in the doctrine acquiring the status of an active subject of the offence of taking bribery of the persons exercising functions of public interest (expert, notary, bailiff, doctor, pharmacist, etc.). The fact referred to in paragraph. (2) art. 289 comes to clarify this issue, stating that if the active subject of the crime of taking bribery is an assimilated public servant, more precisely, one of the persons mentioned in art. 175 par. (2) Criminal Code, he will be held criminally liable if he commits the offence only in relation to failure, delaying performance of a legal act concerning his duties or in connection with performing an act contrary to these duties.

However, it is noted that this category of persons shall not be liable under the provisions of the type variant of the crime of taking bribery if the acts were committed in connection with the performance or with the acceleration performance of an act falling within the duties of his office, something that caused another controversy doctrine.

Some authors, in whose opinion we subscribe too, consider unacceptable this version, considering that most cases of taking bribery are committed just to fulfill acts regarding the duties [10]. Consequently, we believe that the incrimination creates discrimination against the categories of active subjects who commit offences under the first paragraph to those who commit under par. 2 of art. 289. Therefore, in our view, paragraph 2 should be worded as follows: "The act in para. (1) committed by one of the persons mentioned in art. 175 par. (2) is offence only when it is committed in connection

with the performance, failure, delaying or speeding performance of a legal act concerning his duties or in connection with performing an act contrary to these duties.

"According to art. 293 of the current Criminal Code, persons who, based on an arbitration agreement, are called to pronounce a decision on a dispute that is given to them by the parties to this agreement in order to settlement, whether the arbitration procedure is conducted under Romanian law or under any other law, they may be active subjects of the offences of taking and giving bribery, unlike the previous Criminal Code, which did not provide that legislation. Also art. 243 of Law no. 187/2012 stipulated that art. 293 of the Criminal Code finds applicability whether members of arbitration courts are Romanian citizens or foreigners.

4 Modalities of carrying out the material element

Demanding money or other undue advantages are achieved by through a request made directly or indirectly for himself or for another, being irrelevant for the incidence of the offence if the request has materialized or not.

Commiting of the offence in the way of receiving money or other benefits involves hand over them to the giver, and, if prior to receiving, the active subject had accepted the promise of receipt, it is deemed to be the time of consuming of the offence the moment of accepting the promise of receipt. However, we believe that receiving, in the purposes of the incrimination existing in art. 289 of the Criminal Code, means taking ownership, custody or possession, directly or indirectly, for himself or for another.

Accepting the promise of money or other undue benefits requires a certain understanding regarding the offer of bribes. Acceptance may be express or tacit, but when acceptance is tacit, we express the opinion that it can not be equivalent with silence also, as the silence does not necessarily mean that a person expresses an agreement. Silence can have multiple causes and meanings, including disregard, ignore and, not least, even disapproval. We believe it is important to determine whether the silence of the official was an acceptance under art. 289 Criminal Code, to analyze which will be the attitudeof the official after its "silence", because by his subsequent actions it will really result if he accepted or not the promise of undue benefits. There are situations where, despite the silence of the official when there are promises of unfair advantage under art. 289 Criminal Code, he actually not to accept the bribe giver promise, even more than that, to manifest an increased exigency in solving his duties.

We note that the the time of claiming, receiving or accepting can be previously, concurrently or after the time of the fulfilling, not fulfillling or speeding fulfilling of that act.

We see in the content of the material element that the legislature has put great emphasis on prevention, which follows unequivocally from the wording "claims" or "accepts a promise" embodiment of a crime involving a criminal convention that can reach or not necessarily reach and to the performance.

For a claim to constitute the material element of the crime of taking bribery, we consider that it has to be meet cumulatively a number of conditions as follows: demanding must be a current request, firm, serious, not to give rise to doubts and to watch something determined or determinabl; claiming initiative to be exclusively of the public servant, and claiming to target only the passive subject of the offence; claiming to be formulated in

such a manner that it can be understood by the passive subject; this condition can be seen also in the provisions of art. 28 United Nations Convention against Corruption [11], where it is stated: "Knowledge, intent or motivation required as elements of an offence established in accordance with this Convention may be inferred from its factual circumstances". If the passive subject did not understand the public servant's demanding, although it should and could do so, the act does not have the degree of social danger required for the existence of the crime. In addition, the passive subject must understand and the fact that public servant's claims are improper, unlawful; it must result from the wording of the requests credible and feasible claiming; between the pretended or received goods or benefits and the act alleged or actually realized must not be a disproportion, because otherwise, we think, act could not take the form of taking bribery offence committed under way it claiming or receiving; claiming to be motivated by an action that regards the official duties of the respectively public servants, taking the form of an award or equivalent payments for the service offered to the passive subject; claiming to be illegal, and rewards and undue payments prohibited by law, the public servant having legal obligation to perform the act or not to perform it, if the act is solicited improperly or unlawfully; claiming and the motivation of the claiming to be so formulated as to persuade the one who is addressed the request of that public servant.

The legislator has incriminated the offence of taking bribery both directly and indirectly, through intermediaries, with some specifying valid for such circumstances. Thus, the official must have initiative it claiming, the intermediary must forward completely and correctly the request and the reason for it, and claiming it must have been understood by the recipient.

Another way of committing the crime of taking bribery can take the form of "accepting the promise of such benefits" who has known the expression of both the previous Criminal Code, and the current Penal Code, although the act in this way is not provided in any convention against corruption in our country is a party.

Analyzing the text of the first paragraph of art. 289 of the current Code, we find weaknesses in terms of legislative technique. Thus, there are used two phrases "claims or receives money or other benefits" and "accepts a promise of such benefits", where the term "benefits" appears to have different meanings. The first phrase follows undoubtedly that the legislature did not include the money in the category of such benefit, and in the second phrase, going by analogy, we would be tempted to believe that accepting the promise of money would not be incriminated as taking bribery. Corroborating art. 289 by art. 290 on giving bribery, where the legislator incriminated "promise, offering or giving money or other benefits in terms shown in art. 289", we follow that, despite the poor wording, the legislator's intention was not to decriminalize accepting the promise of money. Although criminal law is for strictly interpretation, even the doctrine and jurisprudence have interpreted the third embodiment of the material element of the objective side of the crime of taking bribery in order to include the money in the category of such benefit. However, we believe that in terms of formal expression, the wording is deficient and does not include the money in the category of such benefit.

It is known that crimes of taking and giving bribery are commited both with money and real or personal assets or even with property or non-property benefits. From the legislator's wording we understand that the category of such benefit, it was sought to include both goods and benefits, but, also under this aspect, we consider criticizable the

new version of criminalization of the offence of taking bribery, as the semantically, the term "goods "it is not synonymous with" benefits ". Explanatory Dictionary of the Romanian Language explains neutral noun "good, goods" as "what it is useful or necessary to society or to individual in order to ensure his existence, well-being, wealth; all that owns one person; property, assets; wealth; consumer goods = material goods for personal or social consumption; part of the assets of a person, which may consist of a thing (tangible) or a right (intangible property); movable and immovable property; (Rare) result, benefit; economic goods = goods and services that meet the needs and exist in limited quantities". The same dictionary explains neutral noun "benefit, benefits" as "moral or material gain; advantage, charity, gift, privilege; profit cesspool, use; gain; utility; material or spiritual income. " From the semantic analysis of the two terms, we believe that the legislature would not have to introduce the concept of "goods" within the definition of "benefit" in order to avoid any ambiguity or non-uniform application of rule of law.

We believe that the term "benefits not due to him" can not assume only assumption to obtain undue material benefits, but also obtaining benefits of any kind, as the legislature has not considered just sanctioning of the circumstances in which they are violated the legal imperatives that justifies and motivates the obtaining of material benefits, but the circumstances in which the impartially exercising of official duties of the public servant could be affected.

Also, the character of "undue" of the obtained benefits would appear groundless by reference to the legal special object of the offence of taking bribery, targeting social relations regarding the proper conduct of service relationships, as this activity would become unworkable if it would be exercised impartially, with lack of integrity and transparency in the decision or to disregard the public interest in the exercise of public functions and dignities.

5 Conclusions

In view of the above, we believe that the paragraph (1) and (2) of the art. 289 of the Criminal Code must be amended as follows: "(1) The act of a public servant which, directly or indirectly, for himself or for other claims or receives money, goods or other benefits that not due to him or accepts the promise of money, goods or other undue benefits in connection with the performance, failure, speeding up or delaying performance of an act falling within the duties of his office or in connection with the performance of an act contrary to these duties and shall be punished with imprisonment for 3-10 years, deprivation of the right to hold public office or to practice or work in performance of the offe adopted in New York on October 31, 2003, signed by Romania in Merida on December 9, 2003 and then ratified by Law no. 365 of September 15, 2004, published in the Official Gazette no. 903 of October 5, 2004. (2) Act in para. (1) committed by one of the persons mentioned in art. 175 par. (2) is an offence only when it is committed in connection with the performance, failure, delaying or speeding up the performance of a legal act concerning his duties or in connection with performing an act contrary to these duties."

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Aspects of the Development of the Romanian State and Law: the Territorial-Administrative Reform in February 1968

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Abstract

The present study aims to complete the overall picture of the historical evolution of the state and of Romanian law as the authors consider that the administrative reform generated by Law 2/1968 represents a stage which needs to be mentioned. By returning to the old territorial-administrative organization between the world wars, namely the division in counties, a message of independence was transmitted to Moscow together with other major events such as the Declaration of Independence in April 1964 and the condemnation of the military intervention in Czechoslovakia, a fundamental element of Romanian national-communism. Law 2/1968 on the administrative organization of the territory of the Socialist Republic of Romania came into force on 17th February 1968[1]. It was subject to some modifications and additions, the latter being those adopted by Law 290/2018, published in the Official Gazette no. 1052 on 12th December 2018[2]. By its duration and impact, Law 2/1968 constitutes an important legal act, an axis around which Romania's contemporary history has evolved.

In the following chapters, we will briefly analyze the internal and international context, the fundamental principles underlying the initiation and adoption of the law, the main changes and the impact on the Romanian society in the period before and after the revolution.

Keywords: Ceauşescu, reform, law, administration, territory

1 Introduction

The customs, the habit, the norm, the rule and later the law represented the framework around which the institutions were built and the pre-statal formations, the

medieval Romanian states evolved and, starting with 1859, when Cuza was elected in his double role, the modern Romanian state. Each of the above-mentioned rules bears the temporal and historical footprint, the legislator adapting legal-moral norms to either personal and group needs or to the pressure of the temporal or geographical context.

Before analyzing the principles of Law 2/1968 and their impact on Romanian society, the internal and international political situation of the moment must be considered. In May 1965, Nicolae Ceauşescu came to power with the intention to continue his independence policy towards Moscow, initiated by his predecessor, Gheorghe Gheorghiu-Dej, and materialized in the withdrawal of the Soviet troops (1958) and the *Declaration in April 1964*[3]. All the politics performed by Nicolae Ceauşescu concentrated around the idea of the uniqueness of the decision, in the sense that each country in the Soviet or Eastern space needed to have its own vision on the implementation of communist ideas, its own road to the construction of socialism, which required a series of reforms, new organisms or returning to the old form of organization of the territory from the period before the establishment of the republic on 30th December 1947. Nicolae Ceauşescu's whole policy has focused internally on taking control over the structures of power within the Romanian Communist Party, which led to the establishment of personal dictatorship and the cult of personality, and internationally on the recognition and acceptance of the regime in Bucharest.

On 21st August 1965, the Constitution of the Socialist Republic of Romania comes into force, which will legally mark the establishment of the national-communist regime of Nicolae Ceauşescu. *"The Constitution was adopted by the Great National Assembly in the meeting of 21st August 1965, after discussing the draft published on 29th June 1965 by the Draft Constitution Committee, with the unanimity of the 446 Members present at the meeting, a situation certified by the President of the Great National Assembly, Ştefan Voitec. It was promulgated on 21st August 1965, under the signature of the President of the State Council, Chivu Stoica, and was published in the "Official the Socialist Republic of Romania" no. 1 of 21st August 1965. The Constitution was effective at the time of its adoption, ie 21st August 1965, expressly abrogating the Constitution of 1952 on the same date.*

In its initial form, it consisted of 114 articles in nine titles[4] of the 1965 Constitution, which was "abrogated" totally and expressly[5] on 8th December 1991 at the time when the first democratic constitution was adopted, it was going to be amended and completed 10 times over the course of 24 years of the existence of the Socialist Republic of Romania, as follows: Law 1/1968, Law 56/1968, Law 1/1969, Law 26/1971, Law 1/1972, Law 1/1974, Law 66/1974, Law 2/1976, Law 19/1979 and Law 19/1986[6]. These constitutional changes have in turn generated a series of laws, decrees and decisions that contributed to a certain extent to the modernization and development of Romania.

One of the most important reforms of Ceauşescu's regime was the one related to the territorial-administrative reorganization of the Socialist Republic of Romania, a reform that began with Law 2/1968, which we will analyze in the present study.

The present study aims to complete the overall picture of the historical evolution of the state and of Romanian law as the authors consider that the administrative reform generated by Law 2/1968 represents a stage which needs to be mentioned. By returning to the old territorial-administrative organization between the world wars, namely the division in counties, a message of independence was transmitted to Moscow together with other major events such as the Declaration of Independence in April 1964 and the

condemnation of the military intervention in Czechoslovakia, a fundamental element of Romanian national-communism. Law 2/1968 on the administrative organization of the territory of the Socialist Republic of Romania came into force on 17th February 1968. It was subject to some modifications and additions, the latter being those adopted by Law 290/2018, published in the Official Gazette no. 1052 on 12th December 2018. By its duration and impact, Law 2/1968 constitutes an important legal act, an axis around which Romania's contemporary history has evolved.

2 Law 2/1968 – Evolution and Impact on Romanian Society

The law is, as defined by Melinda Szasz and Octavian Herbei, *„the regulatory document of higher legal value, the most important source of the law emanating from the Parliament* (In this case, the Parliament of the Socialist Republic of Romania was the Great National Assembly – n.a.), *the supreme body of state power, an exponent of the sovereign power of the people"*[7] and is put in line with the constitutional provisions in force. Depending on the applicability, the law may order, regulate, allow, defend, impose payments and charges, define, prohibit and punish, by it establishing only legal relations, the technical norms being transposed into acts with a legal value inferior to the law, respectively government decisions, enforcement instructions etc.

Law 2/1968 was adopted on 16 February 1968 and published in the Official Bulletin no. 17/17 February 1968, it contained two chapters and ten articles, the first chapter defining the type and type of administrative-territorial units, while the second chapter set the number and denomination of the counties and the localities of residence, as well as the number and names of the localities with the status of the municipality.[8]

With the entry into force of Law 2/1968, the provisions of Law 5/1950 and of Law 3/1960 are repealed, the organization of Romania's territory after the soviet model is abandon, in regions and rayons, coming back to the name of „county".

The most important chapter of the law that is the subject of the analysis of this study is, in our opinion, Chapter III, which stipulates that *„the county is made up of towns and communes – the basic units of the administrative-territorial organization of the country – depending on the geographic, economic, social-political and ethnic conditions and the cultural and traditional ties of the population."*[9] The expression "social-political conditions" was a direct reference to the constitutional text of 1965, as amended by Law 1/1968, which specified that "the leading political force of the whole society is P.C.R."[10,11]. Therefore, the entire legislative, executive and judicial activity was coordinated by party and state leadership. Also extremely important is "ethnic conditions", with direct reference to the Hungarian Autonomous Region, respectively the counties of Harghita and Covasna, territorial-administrative units where the population was mostly of Hungarian ethnicity. Based on these attributes established by the constitutional act, The Executive Committee of the Central Committee of the Romanian Communist Party finalizes the discussions regarding the administrative-territorial reform of the Romanian state at its meeting on December 30, 1967[12]. At the meeting headed by Nicolae Ceaușescu, it is approved, by a majority of votes, the proposals of the Central Party Commission regarding the administrative-territorial delimitation of the country by counties.[13] The general principle according to which *„the administrative organization of the territory is a set of actions and measures considered the best at one time in order to*

implement the general rules on the management of the administrative-territorial units"[14] is underlined by Ceaușescu at the meeting, appreciating that *„of course, as far as the counties are concerned, we are not tied to number 35 or 36 (...) Only the communist society will in no way look like what Romania looks today, nor will the territorial division of Romania be the one of today, and many traditions will have to be put aside, by virtue of social and economic development"*[15]. And historical realities were to contribute to the amendments to Law 2/1968, the initial project undergoing changes in 10 stages, which we mentioned earlier, from the number of counties to the number of communes, cities and municipalities.

From the perspective of the impact on the evolution of the other fields of activity, Law 2/1968, as amended and supplemented, is an important law especially for areas that required territorial organization, respectively the local and regional institutions and directorates of the central public administration. A special case is the one of the judicial bodies of the Socialist Republic of Romania, hierarchically structured on the basis of Law 58/1968 in the courts, tribunals and the Supreme Court[16]. Subsequently, at the National Conference of the Romanian Communist Party, held between 7 and 9 December, 1977, the law on the judicial organization of RSR is modified by the introduction of a new structure at local and regional level: judgment councils for working people. They functioned under the coordination of local party structures in companies, institutions, folk councils, having responsibilities related to civil litigation and minor offenses of criminal law.[17]

3 Conclusions

Law 2/1968 continues to take effect even today, more than half a century after its entry into force, being *„a complex regulatory document adopted after a clearly regulated constitutional procedure"*[18], a tool necessary for the implementation of socio-political needs at the time of 1968 and, at the same time, an ideological tool, through which the ideas of *leadership* from Bucharest were transposed, especially Ceaușescu, who wanted complete control of internal politics. Along with other documents and attitudes, Law 2/1968 was an act of rebellion against Moscow, a proof of Bucharest's desire to act independently, to break from Soviet management, to combine Lenin's and Stalin's teachings with the customary history and traditions of the Romanian people. But this law was more than that. It was an act that generated the administrative reform and the systematization policy of the territory initiated by Nicolae Ceaușescu, generating, in turn, the forced urbanization of the whole of Romania.

Economic development, industrialization and relocation of the population from the country side into localities forcibly transformed into cities, either administratively, by artificial increase of the number of inhabitants, or by setting up factories or enterprises of the oil industry, manufacturing or in the garment industry. In the 24 years of Ceaușescu regime, the so-called mono-industrial cities appeared, generating, after the December 1989 moment, unemployment and migration. In the initial form, Law 2/1996 provided for the existence of 39 counties and 45 municipalities (articles 9 and 10 of the law)[19], and Bucharest city, organized in 6 districts, was the capital of Romania and the seat of Ilfov county (articlees 8 and 9 of the law)[20].

Through this study, the authors wanted to complement the analytical spectrum of the discipline "History of Romanian State and Law" with some considerations about the

impact that a lawful act has on the general evolution of the contemporary state. The study is just a purely historical analysis of Law 2/1968, insisting on the idea of a new direction of research into the history of law, namely the evolution of a law and its impact on society as a whole.

This analysis aims to be the beginning of an ample and complex scientific effort in the field of historical evoluation of legislation, to open/to continue a more rare research path, that of studying from a historical perspective, the legal acts and norms that have exceeded the temporal framework of a regime or period. We consider that, through its complexity, Law 2/1968 is such an act, being a norm that has also been applied both in the communist regime, for 21 years, as well as in the democratic regime.

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Issues regarding the fine punishment in our present day penal norms

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Abstract

When we compare the current provisions on the fine, a principal punishment in the Romanian penal system, represented by articles 61 to 64 in the Penal Code with the provisions in the former penal code we notice that these articles underwent essential changes.

To begin with we noticed that in the current penal system the fine is established in relation to the days-of-fine system. This legal provision constitutes a change in the manner in which the punishment is applied in the Romanian penal system. Furthermore, another element of novelty represents the possibility of the court to extend the special limits of the punishment, as well as the right to apply it together with the imprisonment punishment whenever the infraction has been committed in order to obtain a patrimonial benefit. Thus, whenever it is discovered this cause for aggravation, the court has the necessary legal major premise to resort to this alternative, instead of extending the special limits of the imprisonment punishment.

Similarly, the law provides the fine punishment for a larger number of infractions in comparison with the previous penal legislation. Furthermore, the penal law has considerably extended the general maximum of this type of punishment.

We welcome the current penal orientation towards punishing infractional behavior through methods that put a strain of a patrimonial nature on the individual, being a preferable method towards diminishing the number of cases in which the imprisonment punishment is dispatched.

Nevertheless, the provisions covering the fine punishment are far from perfect and know certain drawbacks that might result into an uneven interpretation of the law in the professional legal literature, as to this moment we lack a unitary praxis on this matter.

Keywords: The fine that accompanies the imprisonment punishment, multiple violations, postponement of penalty enforcement.

1 The staying of penalty enforcement under supervision of the superseding punishment when within the punishment there is a fine punishment

A particularly interesting issue represents the manner in which we treat the fine penalty when we encounter the staying of penalty enforcement under supervision in the likely situation that it exists within a superseding punishment composed of an imprisonment punishment, as well as a fine punishment for perpetrating multiple offences.

Whenever a court awards a fine punishment, as the main and sole punishment to a person that has perpetrated an infraction, the provisions of article 91 paragraph (3) letter a. of the Penal Code clearly establish that the fine punishment shall not be under the influence of a delay of penalty enforcement under supervision.

Similarly, whenever a court awards the fine punishment that accompanies the imprisonment punishment, in full compliance with article 91 paragraph (2) of the Penal Code the fine remains to be executed even when the imprisonment punishment has been the object of a staying of penalty enforcement under supervision.

There is an issue that has generated contradictory legal opinions concerning the situation in which the fine punishment is merged with the imprisonment punishment on the provisions of article 39 paragraph (1) letter d. of the Penal Code. This concerns the perpetrating of multiple offences and it relates to the fact that there is no express provision to what should be done regarding the fine punishment in the eventuality in which the court is inclined towards delay of penalty enforcement under supervision.

In one opinion, it has been argued that we are dealing with a superseding punishment that is made out of several punishments of different penal species, but which has an unique character, as a result it can never be established different manners of execution for the punishments that are part of this unique structure.

In support of this opinion, it has been brought into discussion the fact that the legislator wished an executional regime for the fine, creating the express provisions present in article 91 paragraph (2) of the Penal Code and an extend of these provisions to the superseding punishment made out of both fine and imprisonment would constitute a forbidden analogy that would be in the disadvantage of the convicted person.

Towards the aim of supporting this vision we bring into question the *ad literam* interpretation of the provisions of article 91 paragraph (3) letter a. of the Penal Code that stipulates the fact that it is forbidden to apply the staying of penalty enforcement under supervision whenever the punishment represents **only** the punishment of the fine. In contrast, whenever we have a multiple offence type situation the superseding punishment established according to article 39 paragraph (1) letter d. of the Penal Code will consists of a fine and an imprisonment punishment.

Finally, we note that article 96 of the Penal Code creates a situation in which the staying of penalty enforcement under supervision is revoked only in the situation in which the fine punishment that accompanied the imprisonment punishment is not executed. This article fails to provide for the situation in which the fine punishment that is part of a superseding punishment resulting from multiple offences is not executed. Out of these arguments it seems that the legislator desires to apply delay of penalty enforcement under supervision to the entire superseding punishment in the case of a multiple offence situation.

The second opinion that we also share is that the fine continues to represent a punishment that has to be executed, while the other punishment of the superseding punishment, the imprisonment punishment can be subject to the staying of penalty enforcement under supervision.

Thus, as a result of applying the provisions of article 91 paragraph (1) letter a. of the Penal Code, the court can pass decision for the staying of penalty enforcement under supervision whenever the chosen applied punishment is imprisonment for up to 4 years, including the case in which we are dealing with a superseding punishment as a result of multiple offences. It is noticeable the fact that in this particular case the legislator fails to refer to the fine punishment, in contrast with article 83 paragraph (1) letter a. of the Penal Code where it makes a point of mentioning that the postponement of penalty enforcement can be passed by the court whenever the punishment is fine or imprisonment for up to 2 years, including cases of multiple offences.

We believe that the legislator intended, through this omission from article 91 paragraph (1) letter a. of the Penal Code, to exclude the application to the fine punishment of the institution of staying of penalty enforcement under supervision, including in the case of multiple offences when the fine is together with the imprisonment punishment part of the superseding punishment. Even more so, beyond this omission we notice the real judicial fact that there is no solid legal ground to make it possible for the court to pass a decision that would result into staying of penalty enforcement under supervision of a fine punishment applied under article 39 paragraph (1) letter d. of the Penal Code.

Likewise, holding into view the fact that the fine that accompanies the imprisonment punishment is applied, in theory, for perpetrating a sole infraction and shall be at all times executed, we do not believe that it was the intention of the legislator that in the multiple offence scenario to have the possibility to stay of penalty enforcement under supervision of the entire superseding punishment. Such a solution would be unfair for the person that perpetrated one infraction, as this person would be in a worst legal scenario in comparison with the person that perpetrated multiple offences.

In what concerns the omission of the legislator to provide a distinct revocation scenario of the staying of penalty enforcement under supervision for the hypothesis in which the fine punishment, part of the superseding punishment, is not executed, we believe that it cannot represent a legal reason for applying the stay of penalty enforcement under supervision of the entire superseding punishment.

Thus, in case a person fails with ill-will to execute the fine punishment that is part of a superseding punishment, the fine punishment shall be replaced with the corresponding imprisonment days as it is provided in article 63 paragraph (1) of the Penal Code, which shall be executed in detention.

While, it is true that the execution of the imprisonment punishment shall continue to be under the stay of penalty enforcement under supervision, as there exists no legal ground to revoke it, there is entirely acceptable, under the present day Penal Code, to execute in parallel in detention another punishment as the supervision term flows towards its completion.

Regarding this topic, analyzing the provisions of article 96 paragraph (6) of the Penal Code, in the eventuality that pending the supervision term the convicted person perpetrates a new infraction with basic intent, the court can either maintain or revoke the stay of penalty enforcement under supervision. It is obvious that the court has the ability

not only to maintain the stay of penalty enforcement under supervision that was already in place, but to pass a decision of imprisonment for the new infraction. In this scenario the supervision term period shall flow in parallel with the imprisonment term that shall be served in detention.

In relation to the provisions of article 96 paragraph (3) of the Penal Code that enforces the mandatory revocation of the stay of penalty enforcement under supervision in case the fine punishment that accompanied the imprisonment punishment is not executed, we notice that such a provision is unfair to the person that received a punishment as a result of a single offence scenario, while the person that committed multiple offences known a better penal treatment.

Nevertheless, we do not believe that it is the task of the court to correct this unfair treatment by passing a decision to stay of penalty enforcement under supervision of the entire superseding punishment, but rather it is the exclusive task of the legislator to create an equilibrium through legislative changes.

Furthermore, the first opinion takes into account only the situation in which the infractions are judged together. For the purpose of this research, we shall imagine that two infractions that build a multiple offence are judged separately. In case one of the courts establishes the fine punishment it will not be able to apply the provisions of the stay of penalty enforcement under supervision under no circumstances as per the provisions of article 91 paragraph (3) letter a. of the Penal Code.

Our logical consequence is that we need to apply the same solution when all the infractions of the multiple offence are judged together. It would be impossible to have a different legal treatment depending on whether the infractions are judged together or separate.

We believe that by stipulating in an express manner the fact that whenever the fine punishment accompanies the imprisonment punishment according to the provisions of article 62 of the Penal Code the fine shall be executed no matter what happens with the imprisonment punishment the legislator did not intend for us to interpret *per a contrario* in the case of the fine punishment next to a imprisonment punishment in a multiple offence scenario. More likely, we believe that it was a solution in order to avoid distinct treatment of the same judicial situation as the conviction on the provisions of article 62 of the Penal Code incurs two main punishments for perpetrating for one infraction and the temptation that the two punishments should know the same manner of execution would be too grate.

Finally, we take notice of the fact that the courts fail to have a definite manner of solving this case, as we also face the issue of a less than numerous cases on this particular institution. For the time being, the issue has been only theoretically debated as none of the opinions are safe from critique and thus we believe that the intervention of the legislator is needed.

2 The fine that accompanies the imprisonment punishment – is it applicable to any infraction?

According to article 62 paragraph (1) of the Penal Code, whenever an infraction has been committed in order to obtain a gain, the court shall have the option of adding a fine

punishment next to the imprisonment punishment. We notice that there is the legal possibility to apply in a cumulative manner two main punishments for perpetrating one infraction.

One might believe that the provisions of article 62 paragraph (1) of the Penal Code are clear, but we wonder: can we apply these provisions to all infractions? We are particularly concerned with the application of these provisions to the infractions that exists due to the constitutive element of the special aim of obtaining a gain in an unjust manner.

Considering that the law does not make a difference between infractions we state that those that are called upon to judge cannot make a difference between infractions that have the aim of obtaining a gain and those without this specific constitutive element. There is no legal grounds to hinder the court in applying in a cumulative manner the two main punishments whenever the aim provisioned for by article 62 paragraph (1) of the Penal Code is found to exist.

A part of the existing praxis on this issue seems to support this theory, as we found that there are court decisions where the fine punishment has been applied together with the imprisonment punishment in cases of fraud.

For reasons regarding predictability, we believe that such an interpretation should be used with caution, as we need to avoid situations in which one court could apply the provision of article 62 no matter the value of the desired gain, while another could consider it necessary for the gain to be of a certain value in order to consider it.

Continuing our discussion we shall put forward different aspects of the problem. For example, considering article 74 paragraph (1) of the Penal Code, among the general criteria for the customization of the punishment we find the nature and gravity of the result or of any other consequences of the infraction, as well as the motive and aim for perpetrating the infraction. Furthermore, article 74 paragraph (2) of the Penal Code provisions that these general criteria for the customization of the punishment shall be taken into consideration whenever the law norms alternative punishments. For example, whenever an infraction has been perpetrated to obtain a gain and the law provides for that infraction fine and imprisonment as alternative punishment and the court is inclined to apply the imprisonment punishment, considering the aim desired by the perpetrator, we believe that the court cannot apply the additional penalty of the fine as the penal responsibility is already worsen.

Another peculiar situation that hold interest for practitioners is whenever the law provides a special cause for augmenting the limits of the punishment on occasion that the infraction resulted in extremely severe consequences, such as is the case with fraud (article 256^1 in relation with article 244 of the Penal Code). This is yet another case when we do not see fit to further augment the penal responsibility by allowing to combine both a fine and an imprisonment punishment, as long as the augmentation of the punishment has already taken place via augmenting with half the limits of the punishment. A different solution would not make sense as it would translate into a double punishment for the same infraction.

In relation with what was debated, we believe that the cumulating fine with imprisonment, under the provisions of article 62 of the Penal Code, is possible only when there are no other aggravating causes that take effect on the penal responsibility of the person, causes that are in nexus with the aims of the perpetrator of obtaining a gain by

committing the infraction. This statement applies also to the infractions that do not have as a constitutive element the aim of obtaining a gain via committing the infraction.

In conclusion, although we do not except *de plano* the possibility to apply both the fine and the imprisonment punishment for infractions that exist only when their aim was to obtain an unjust gain, we believe that the courts should display an increase attention so as not to contribute to a random uneven in solutions praxis.

We believe that in order to avoid situations in which uncertainty could affect the application of the law the legislator should intervene upon the reviewed legal provision.

3 The legal treatment of a multiple offence scenario in which within its structure there is a fine punishment that accompanies the imprisonment punishment

For the purpose of our research let us assume that the fine punishment was established for one infraction from a multiple offence scenario and a fine that accompanies the imprisonment punishment for the other infraction. What is the proper manner to calculate the superseding punishment with such a scenario? Analyzing the judicial praxis we find conflicting solutions to this issue.

The first opinion is that it is irrelevant whether the fine punishment has been enforced as an unique punishment, provisioned by article 61 of the Penal Code, or as an accompanying punishment next to the imprisonment punishment, provisioned by article 62 of the Penal Code resulting into the same manner of calculating the superseding punishment.

We believe that this is the sole solution that can be based on the legal provisions applicable to the punishment that can be applied in case of a multiple offence scenario.

Thus, by applying the provisions of article 39 paragraph (1) letter e. of the Penal Code the fine punishments shall be merged by applying the harshest penalty in its entirety to which we add an extra made out of a third of the other fine punishment and the final fine punishment shall be added to the imprisonment punishment, obtaining a superseding punishment that will be executed by the condemned person.

A different opinion states that in the given example we shall not know the application of the judicial adding together of the punishments, but an arithmetic adding together of the punishments, resulting into the fine punishment that was established as an unique punishment to be added in its entirety to the fine punishment that accompanies the imprisonment punishment established for the second infraction, part of the multiple offence scenario.

To support this opinion it has been stated that the two punishments know a different judicial nature because the fine that accompanies the imprisonment punishment knows a different judicial regime than the fine given as an unique punishment.

Moreover, it was considered that the application of the arithmetic adding together of the punishments would allow for the stay of penalty enforcement under supervision of both the imprisonment punishment, as well as of the fine punishment established as unique for the one of the multiple offences, resulting in the execution according to article 91 paragraph (2) of the Penal Code of only the fine that accompanies the imprisonment punishment. Towards achieving this goal, once we apply the harshest fine penalty, to

which we add one third of the less severe fine, to this superseding punishment we would not be able to apply the provisions pertaining to the stay of penalty enforcement under supervision as we have averted the fine established as an unique punishment from such a judicial treatment.

It is our opinion that these argument cannot justify a solution of conviction based on a superseding punishment that was calculated using the arithmetic adding together of the punishments.

First of all, both the fine that was applied as an unique punishment, as well as the fine accompanying the imprisonment punishment have the same judicial nature. A different opinion has no grounds as long as both are penal fines using the same days-fine determination system. The only different aspect is the distinct criterion of determining the sum of the days-of-fine, but there exists no reason for it to have a distinct judicial regime for determining the superseding whenever we deal with a multiple offence scenario.

Furthermore, article 39 paragraph (1) letter c., namely letter e. of the Penal Code states generically, "the fine punishment", without distinction between the fine as an unique punishment and the fine as an accompanying punishment to the imprisonment punishment. As long as the law does not pass judgement on this issue, those that are called to apply it do not have this right. Thus, we notice that there is no legal premise no prohibit us from applying the judicial adding together of the punishments to the fine that accompanies the imprisonment punishment.

Secondly, as we have previously demonstrated, we do not believe it to be possible to apply the stay of penalty enforcement under supervision of the fine given as an unique punishment within the structure of the superseding punishment next to the fine punishment. Thus, we do not believe that this is a valid argument that ought to be taken into consideration by the courts.

Nevertheless, just as well in the hypothesis that admits such a possibility, we cannot help but notice that this argument presents severe legal flaws.

As a result, whenever the court shall not be desire to apply the provisions regarding the stay of penalty enforcement under supervision, the person in question shall know a harsher legal treatment as the person shall execute the two fine punishments in their integrity, being left without the benefits that were put forward by those that support this opinion.

Important to note the fact that whenever the legislator does not establish expressly a differentiated judicial regime, the interpretation of the legal dispositions must be in favour of the person that is called to account in accordance with the penal law, especially when the norms subject to interpretation are clearly provisioned.

As it seems that the courts avoid to pass sentences of imprisonment accompanied by fine we found it especially difficult to identify court decisions to apply to our debate. For the time being it seems that it is a purely theoretical debate.

4 Conclusions

The fine, as it is provisioned for in the present Penal Code, seems to be an efficient alternative to the imprisonment punishment, as a result of the fact the there are numerous times when a penalty of a patrimonial nature can achieve the aim of applying a punishment.

Considering that there is no legal institution safe from different interpretation, we believe that the intervention of the legislator would be proper in order to provide the necessary clarification regarding the problems that have been identified, as well as other situations that might arise as the judicial praxis develops over the course of time.

The development of a legal system that does not allow substantially conflicting interpretations is extremely important in order to ensure the predictability of the penal norms and for avoiding creating contradicting praxis.

In conclusion, no matter which of the two opinions would be preferred in praxis, these provisions would be applied only to the infractions committed after the taking into effect of the New Penal Code, in accordance with the provisions of article 11 of the Number 187/2012 Law for the manner in which the Number 286/2009 Law regarding the Penal code shall be applied.

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The Roman Republic – an application model of the theory of separation and balance of powers within the state

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Abstract

The theory of separation and balance of power in the state is not only one of the architects of democratic construction worldwide, but also one of the first concepts with which the beginners in the research of legal sciences become acquainted. Not coincidentally, a significant part of the disciplines of law mentions this theory, since law goes beyond the limits of science, being a living organism, whose pulsations are in fact vital instruments in achieving and maintaining the idea of well-being of society. The existence and effectiveness of any legal relationship (irrespective of the branch of law that enshrines them) depends organically on the observance of the separation of the judiciary by the other two powers. While it is undeniable that by promoting the theory of separation of powers in the state in the ideology of the bourgeois-democratic revolutions, it has become the foundation of modern constitutions, a careful look in the distant past will highlight a surprising reality: the Romans, in the edification of the Republic, actually applied the separation of powers in the state many hundreds of years before the appearance of the theory.

Keywords: separation of powers in the state, the Roman republic, magistrates, socio-political organization.

1 The theory of separation of powers in the state – creation of the illustrious Enlightenment theoreticians

The theory of separation and balance of power in the state is not only one of the architects of democratic construction worldwide, but also one of the first concepts with which the beginners in the research of legal sciences become acquainted. Not coinci-

dentally, a significant part of the disciplines of law mentions this theory, since *law* goes beyond the limits of science, being a living organism, whose pulsations are in fact vital instruments in achieving and maintaining the idea of *well-being of society*. The existence and effectiveness of any legal relationship (irrespective of the branch of law that enshrines them) depends organically on the observance of the separation of the judiciary by the other two powers. For instance, Montesquieu states that there is no liberty if the judiciary is not separated from the legislative and executive powers [1].

It is already known that the theorizing of the separation of powers is the product of the sustained effort of the great Enlightenment thinkers to combat the abuse of power, this virus almost ineradicable when socio-political climate allows for the concentration of all powers within the competence of a single person, entity, institution. Thus, in this epoch, personalities are emerging as forming a new model of political (and legal) thinking: John Locke, Montesquieu, Voltaire, Jean-Jacques Rousseau, who outlined the model of the rule of law in which the will of the citizens, expressed through laws, became sovereign. This pattern proves to be, even after centuries, the most successful in preventing the achievement of a *particular well-being* with the price of undermining the general good of society, the proof being the modern legal doctrine, which further agreed upon the importance of respecting the boundaries between state powers, as well as the consecration of the idea of sovereignty of the people at constitutional level in all democratic states[1]. In this respect, the great law professors note that "political freedom exists only in states where the three powers are not concentrated in the hands of the same person; All would be lost if the same man or the same body would exercise the three powers: the same body of rulers would possess, as enforcers, the powers they have conferred to themselves as law-makers." [3].

While it is undeniable that by promoting the theory of separation of powers in the state in the ideology of the bourgeois-democratic revolutions, it has become the foundation of modern constitutions, a careful look in the distant past will highlight a surprising reality: the Romans, in the edification of the Republic, actually applied the separation of powers in the state many hundreds of years before the appearance of the theory.

2 The Roman Republic and the separation of state powers

Rome did not have an original philosophy, but as in the Orient the supreme object of spiritual activity was religion, and in Greece it was philosophy, in Rome it was the law, and in it, the Roman wisdom excelled [4]. The Roman people were essentially a people of jurists, not of theorists or philosophers. Although the heritage left to mankind is an

[1] The Constitution of Romania ; Art. 1(4) "The State shall be organized based on the principle of the separation and balance of powers – legislative, executive, and judicial – within the framework of constitutional democracy."; Art. 2(1) "The national sovereignty shall reside within the Romanian people, that shall exercise it by means of their representative bodies, resulting from free, periodical and fair elections, as well as by referendum." Art. 2(2) "No group or person may exercise sovereignty in one's own name."; The Constitution of France, art. 3: "La souveraineté nationale appartient au peuple qui l'exerce par sesreprésentants et par la voie du référendum.Aucune section du peuple ni aucun individu ne peut s'en attribuer l'exercice."; The Constitution of Spain, Art. 1: 1." España se constituye en un Estado social y democrático de Derecho, que propugnacomo valores superiores de su ordenamiento jurídico la libertad, la justicia, laigualdad y el pluralismo político.2. La soberanía nacional reside en el pueblo español, del que emanan los poderes delEstado.", etc.

original system of law, it should be noted that Roman law is not the result of creative efforts of a theoretical order, but on the contrary, the product of innovations in procedural matters. The Romans did not have the mania of theorizing, excessive law-making or codification, the jurists of the times, profoundly pragmatic and with a remarkable practical sense [5] preferring instead to permanently attune legal instruments to the requests of social reality. „Roman jurists, moreover, were not great in theoretical abstractions, in purely philosophical ideas, but in transposing them into the practice of positive law, in their application, always satisfying, with a brilliant cleverness, the logical exigencies and changing needs of reality" [6]. The protagonists of the elaboration process by way of actions in justice of Roman law were the praetors, which whenever they found that the claimants had legitimate claims, created a formula by which they could valorise certain subjective rights, even in the absence of normative regulations. However, this creative freedom of the praetors is specific to the epoch of the republic only, in which the political organization of the state was based on what we now know as the theory of the separation of state powers.

2.1 *The premises of the edification of the Republic*

From the perspective of the form of government, the political history of the Roman state is divided into three great epochs: *The Period of Kings* (from the middle of the 6th Century BC. up to 509 BC), *Republican* Rome (509 BC – 27 BC) and *Imperial* Rome (in the form of the Principality up to 284 AD).

In the period of Kings, the leading state institutions were: The assemblies of the people (the Curiate Assembly and the Centuriate Assembly), the King and the Senate. This tripartite institutional structure denotes at least the intention to create a representative system of government in which the *people* constitute a component of equal weight to that of the King and the Senate. We resume to call it "intent", as there is a substantial discrepancy between the theoretical and factual limits of the jurisdiction and powers of the three institutions. Thus, if the Centuriate Assembly exercised the most important administrative and judicial powers, the Curiate Assembly exercised some of the religious and private field attributions, and while the King held the judiciary, administrative and military powers, the role of the Senate was a purely consultative one, its decisions having no binding power onto the king [7].

In the middle of the 6th century AD, King Servius Tullius initiated two reforms: a social one and an administrative-territorial one with the aim of harmonizing the class of the plebeians and that of the patricians, in order to build a representative system, in which the interests of the people are reflected in the acts and measures taken at the level of the state's governing institutions. However, the social climate was extremely tense, where plebeians, already subject to multiple social, economic and legal discrimination, also faced with the reality of a low relevance of their vote in the People's Assembly. On the other hand, although the Senate's decisions have no binding force in determining the will of the King, this does not prevent senators from exerting influence over members of the People's Assemblies. Thus, although theoretically, the three institutions have different spheres of competence, in reality, the only decision-making power in all areas remained the King.

In 509 AD amid a controversy that questioned his morality, the last king, Tarquinus Superbus is banished and the people proclaim the Republic. The new form of state organization was more than welcome, given that Servius Tullius's reforms, though only partially fulfilling its purpose, managed to ignite two desiderata in the consciousness of the Roman people: gaining sovereignty and stopping the concentration of all powers in the hands of a single person.

2.2 *The Ascension of the Republic – effect of the separation of powers in the state*

The Roman Republic was gradually built on the foundation of an idea: in order to prevent the return to what the Romans had already eliminated – the vocation for abuse of power, the attributions, competencies, and powers must be distributed in a balanced manner between several institutions. Thus, the constitutional factors become: *the People's Assembly*, *The Senate and the Magistrates*.

The People's Assembly during the period of the republic is distinguished from the gatherings of earlier times not only by number (four Assemblies: Comitia curiata, Comitia centuriata, Concilium plebis and Comitia tributa), but also by the equitable representation of the two social classes, the plebeians and the patricians. Initially, the decisions taken by the plebeian in the Concilium plebis (called plebiscites) had no binding force against the patricians, they soon acquired the same coercive value over the Roman citizens, regardless of their class, a uniformity in the representation of the social classes being observed.

The Senate became the main political power. Although the powers of the Senate are not regulated in any express and limitative manner, in achieving its goal of an inter-institutional balance factor, it intervenes, *de facto*, in all spheres of the state organization. The superiority that the Senate had before the other state government bodies was due to several circumstances; First, unlike magistrates who were elected every year by the people, the Senate conferred on the people, through their permanent character, a sense of stability and continuity. Secondly, the senators came from among those who had previously been elected by the people in other positions, official dignities, thus benefiting from a preexisting vote of confidence and implicitly of great credibility [8]. Among the main tasks of the Senate we recall: protecting and respecting old habits (mos majorum), in the area of public finances – treasury administration, in matters of worship – the mediation of consultations between sacerdotal colleges and magistrates, in the legislative field – last stage of the adoption of a law constituted their ratification by the Senate. In addition, the senators ensured the governance and administration of the Roman provinces, and they were responsible for diplomatic relations with other peoples, being entrusted with everything that was involved in the coordination of foreign policy.

Although in the era of the republic the People's Assembly and the Senate adapt the exercise of their duties to the requirements of society, they are, however, institutions taken over from earlier epochs, and cannot be considered a creation of the new model of government. The real novelty is the appearance of the *magistrates*, which will prove to be genuine instruments of maintaining the separation and balance of powers in the Roman state.

Magistrates were high officials of the state exercising administrative, judicial and military powers [9]. The basic characteristics of the magistrates make them symbols of the Roman people's aversion to the centralization of power. Specifically, they were

elected by the people for a fixed term (the magistrate's mandate, with few exceptions, was of one year), exercising their duties within a collegial system, which implied that within each magistracy there would be at least two magistrates with the same competencies. Through this multi-party structure of each magistracy, the elected representatives had the opportunity and at the same time the obligation to consult, verify and correct each other, thus guaranteeing the fulfillment of the purpose of the institution, without allowing the imposition of a unilateral vision in the respective field. In addition, the magistrates had an honorary character and there was no remuneration for the magistrates' work. Some of the magistrates were invested with *imperium* – the right to order Roman legions and the right to convene the people in assemblies, and others only benefited from *potestas* – rights for administration. One aspect worthy of note is the desire of the Romans to make the activity of the state institutions transparent, in order to strengthen society's trust in the representative authorities. To this end, at the beginning of their mandate, magistrates issued an edict to show the people the rules they would apply in the exercise of their future powers. These edicts of magistrates, especially those of praetors, are today recognized as some of the most important sources of Roman law. Thus, it is also necessary to mention that although there were many types of magistrates, they were not organized hierarchically, their constructions, non-subordinated to each other, making any attempt to disrupt the balance of state powers at least extremely difficult.

Considering that the epoch of the republic marked an efflorescence of the Roman society, creating avant-garde institutions, concepts and principles, it is obvious that magistrates were gradually created, over time, in the rhythm imposed by the dynamics of social reality. On this basis, individual analysis of magistrates will be done in the chronological order of their conception.

The Consulate was the first magistracy of the new government. In the full transition from the kingdom to the republic, in order to avoid an imminent void of the state power, the Romans needed an institution which, on the one hand, would assume the attributions of the former kings but would be incompatible with the abuse of power. Thus, consuls appear as an embodiment of these requirements. They keep the sphere of royal attributions, being inviolable, enjoying the *imperium* as well as the right to appoint senators [10]. Although the powers of the consuls are seemingly unlimited, in reality the general features of the magistrates compel them to exercise their attributions in good faith. Unlike the kings, they did not acquire the quality of leadership on hereditary criteria, being elected by the people, and the dignity of the consul was not of a lifetime nature, the mandate being limited to one year. The collegial nature of the magistrate Caracterul makes it possible to cancel any potential abusive measure of a consul by the other, the two consuls being mandated to collaborate in making any decision. Last but not least, in order to overcome any temptation of abusive exercise of the mandate, after being released from office, they could be tried by the people for any measure contrary to the interests of society, and even sentenced to death.

The tribunate was created in the year 494 BC in order to protect the interests of the plebeians. Because over the centuries the plebeians had been subjected to many forms of discrimination, considered it fair that they would benefit from an additional form of political and legal protection. Thus, the tribunes – the five representatives of the plebeians were the only magistrates who had the "right of veto" by which they could annul the legal acts that were harmful for the plebeians.

The censors were those magistrates invested with *potestas*, whose main task was to perform the census of goods and people. Taking into account that for the Romans the census was made every five years, they were the first exception to the one year mandate of the magistrate. Of course, this did not mean that the realization of the census involved five full years of work, the actual activity being usually accomplished in about 18 months, but only that the election of new censors for the remaining time until the next census would have lacked an object (and sense). Over time, the scope of their attributions has expanded, eventually gaining the right to appoint senators.

The praetors, magistrates invested with judicial prerogatives, through their creative activity, embodied the catalyst of the progress of the Roman law system. Although they lacked legislative powers, the importance of their role in the evolution of Roman law is explained by the very features of the Roman people, a profoundly pragmatic people, adept of the priority analysis of practical cases, with the nature of a case, and only in subsidiary the doctrine research. Roman law, in its entirety, was not the product of the law-making process, with the Romans giving theorizing a much lower position than that of judicial practice. Not without reason, Marcianus stated that Praetorian law is the living voice of civil law (*nam et ipsum ius honorarium viva vox est iuris civilis*) [11]. Thus, the Roman legal institutions evolved purely in a procedural manner, the subjective rights being sanctioned by means of legal actions brought by the praetors to the applicants with legitimate claims. The actual activity of the praetors was to organize civil processes whose rules were predetermined by their own edicts. With the help of praetors, the Romans were able to use their subjective rights even in the absence of laws, since where there was no normative act but there was a legitimate claim, they referred to equity and good faith, praetors created *formulas* (veritable actions in justice) adapted to the factual situation which occurred between the two sides.

The quaestors, invested with *potestas,* ensured the collection of taxes (based on census conducted by the censors) and the administration of state archives.

The aediles, also invested with *potestas*, were responsible for the good activity of the trade fairs, from supplying and securing the police, to the settlement of the lawsuits that dealt with the violation of legal acts concluded in those trade fairs.

A very particular magistracy was constituted by the *Dictator*, viewed as a tool for rescuing the people in cases of force majeure. Thus, in situations where the very survival of society was put into danger, the activity of all magistrates was suspended, the Romans choosing a dictator in whose person all the state powers were concentrated. The mandate of the dictator lasted six months, as the hope was that they were sufficient to take society out of the crisis, however the mandate could be prolonged until the threat was completely overcome.

2.3 *The Disruption of the Balance of the State Powers and the Decline of the Republic*

The fall of the Republic was the result of a combination of factors such as the huge expansion of the state's territorial boundaries (occasion on which the republican form of government, extremely operative as a city policy, became insufficient), the class wars and the establishment of the symptoms of corruption at institutional level, which ultimately

did nothing but lead into oblivion the very purpose for which it was proclaimed: the sovereignty of the people.

From the point of view of social stratification, if at the beginning of the republic the Roman citizens were divided into *patricians* and *plebeians*, new social classes such as *nobles*, *knights* and *the proletariat* emerged.

The nobles were called those persons holding the extraordinary magistrate titles as well as their descendants. Until the founding of the *tribunes*, noble status belonged exclusively to the Patricians. Even after that moment, the access of the plebeians to the magistrates did not become a generality, as although they were not forbidden to candidate, most plebeians could not afford the costs that such honorary position (unpaid) implied. From among the ranks of high dignitaries members of the Senate were appointed.

The development of the economy generates the formation of a new social strata, *the knights*. These "new people" were not beneficiaries of a privileged political status, they did not have access to the position of magistrate, but instead enjoyed social privileges, due to their considerable wealth, more or less licit businesses[12]. Whether they became rich as a result business conducted during the war, slave trade, the lease of the conquered lands that were entered into the property of the state (*ager publicus*), usury, maritime trade or banking operations, people holding assets of more than four hundred thousand sesterces acquired the title of knights by being written down by *censors* on special lists.

The clash of interests of the two social classes degenerated into a civil war that definitively altered the socio-political configuration of the Roman state. While the *nobles* vehemently supported maintaining the republican form, the *knights* fought for the centralization of state powers. It is difficult to fully assume one or the other of the two visions, since both ideologies were fueled both by solid arguments as well as personal interests. In this respect, it is noticed that the foundation of the nobility – maintaining the republic as a standard of democracy – was doubled by their obvious interest in not losing the monopoly over the high state dignities, the magistrates. In contrast, the knights advocated for the centralized state as an antidote against corruption at institutional level, as well as a business development environment, clearly aiming for unhindered personal enrichment. This was the moment when the theory was in contradiction with social reality; whereas, yes, at the theoretical level, the republican, democratic form, based on the separation of powers in the state, was still the only way of stopping potential abuses of power, in fact all those honorific institutions, non-subordinated hierarchically, were already profoundly corrupt, and thus completely irrelevant in fulfilling the purpose for which they had been designed. Just as the survival of democracy is dependent on the quality of the perception of the masses of it, so the success of centralized powers depends on the individual quality of the leader upon which they converge (and from this point of view, opting for "supreme" leaders resembles a game of chance). Although direct combatants in this class battle were *nobles* and *knights*, paradoxically, *proletarians* had an important role in its outcome.

The proletarians were the poorest of Roman citizens, whose only wealth was their own children (*proles*). The fulminating increase of their number on the territory of the Roman state is in itself a paradox, for, if in the old age the gates of the city remained shut before strangers (who automatically fell into slavery if they came to Rome), together with the huge expansion of the territory of the Roman state and the evolution of political strategies there has been a so-called launch of an open invitation to all the inhabitants of

Italy who have been ruined by the wars, to come to live on behalf of the state [13]. The exchange between proletarians and the state was clear: the Roman state ensured their subsistence by granting them social benefits and Roman citizenship (thus gaining the right to vote), *and the proletarians* firmly exercised their right to vote. Thus, although they were the beneficiaries of the fewest social privileges, their presence in Roman society was decisive in the fall of the Republic, being the holders of the most important right (which was converted into currency): that of voting.

The victory of the *knights* meant the fall of the Republican form and the establishment of the Empire in the form of the Principate. This era was characterized by political ingenuity, materialized in maintaining the appearance of the separation of powers in the state concurrently with the consolidation of all powers in the sphere of competence of the *princeps*. Thus, while the old magistrates as well as the Senate are preserved (only formally, for they were stripped of decisional freedom), only one new institution, another magistrate, is created to eliminate the remnants of the corruption of the old magistrates, namely the *Princeps* – the first of the equal. The genius of Octavianus in the field of political strategy makes the concentration of all powers in the hands of a single person inscrutable and harmless. Gradually, by self-proclaiming himself as *tribune* and *consul for life* as well as by appropriation of titles of *Imperator* (the glorious commander of the Roman legions) *Caesar* (a worthy follower of Caius Iulius Caesar) *Augustus* (worthy of being worshiped), Princeps does nothing but embody all the attributes and the foundations of power. The consuls enjoyed the powers of the old kings, but what compelled them to exercise these powers in good faith was precisely the one year long term of office and the possibility of being judged by the people at the end of their mandate, however being proclaimed as consul for life, the *princeps* is exonerated from this obligation. By being proclaimed a tribune for life, the princeps acquires a lifelong veto right.

In the judicial field, during this period, by the order of Emperor Hadrianus, the Praetor's Edict was codified. Under the pretext of preserving procedural rules at its peak, Salvius Iulianus writes *Edictum perpetuum,* the final form of the Praetor's Edict, from which no praetor can deviate. Although this codification marks the end of the creative freedom of the praetors, who will only read at the beginning of the mandate the same edict, it proves to be an ingenious artifice through which the comfort of the Roman people has been maintained, used to the transparency of the anual presentation of these edicts.

The powers of the head of state have an absolute character in the era of the *Dominate*, the emperor becoming *Dominus et Deus* (lord and god). Thus, while in the world, the Roman Empire becomes an unstoppable force, internally, the sovereignty of the people is transformed into an ever more distant memory, and any attempt to return to the separation of powers in the state is doomed to failure.

3 Conclusion

Considering that the era of the Republic was characterized by the distribution of powers within the competence of distinct and non-subordinated hierarchical authorities (the People's Assemblies, the Senate, the Magistrates), it can be said without any reluctance that it has presented, in concrete form, a later abstract idea: the theory of separation and balance of state powers.

The century of lights, through the theory of separation and balance of power in the state, brought with it the theoretical model of future democratic constructions; Antiquity, through the political structure of the Roman Republic, presented to history a concrete prototype of the theory, centuries before it was elaborated. It is noticed, both from the theoretical research of law and from the history that the separation of powers in the state is the foundation of a democratic structure. However, the stability of such a structure is dependent on the state of symbiosis in which the theorizing and transposition into the social reality must be found.

Destabilizing the complementary relationship between the theoretical and the practical side favors the emergence of a vulnerability, and as widespread exposure of vulnerabilities can mean an invitation to attack, the persistence of powerful constitutional systems, such as those inherited by the Enlightenment theorists and the Roman people is consistent with giving the same degree of attention to both sides.

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Considerations regarding the institution of the provisional protection order, regulated by Law no. 174/2018 regarding the amendment and addition to Law no. 217/2003 for preventing and combating domestic violence

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Abstract

Law no. 174/2018 amends the old regulation regarding the prevention and combat against domestic violence, bringing as a novelty element The provisional restraining order, by means of which an authentic preventive measure has been implemented against domestic violence. The amendment is welcomed, as it is much easier to grant a protection order in domestic violence situations but one must clarify to which extent this new regulation breaks the fundamental human rights or not.

Keywords: domestic violence, protection order, provisional protection order, search, seizure of objects, human rights, Istanbul Convention, Directive 2012/29/EU, Law no. 174/2018, Law no. 217/2003.

1 Introduction

Law 174/2018 on the amendment and addition to Law no. 217/2003 on preventing and combating domestic violence has appeared due the need to transpose Directive 2012/29/EU of the European Parliament and of the Council of 25.10.2012, which aims at setting a legal framework that would provide protection and support to the victims of delinquency and due to the fact that Romania has ratified, by means of Law no. 30/2016, the Council of Europe Convention on preventing and combating violence against women and domestic violence, also called the Istanbul Convention.

This new regulation has substantially changed Law no. 217/2013, redefining concepts such as: physical violence, verbal violence, psychological violence, sexual violence, economic violence, social violence, spiritual violence, attempting to practically adapt the previous definitions to the social reality of the latest years, but perhaps the most important change brought about by Law no. 174/2018 is the introduction of the institution of the provisional protection order.

2 Domestic violence – pursuant to LAW no. 174/2018

Analyzing by comparison the definition of domestic violence forms provided by art. 4 of Law 217/2003 prior to the enforcement of Law no. 174/2018, as well as the amended ones, it can be noted that the changes brought about only regard the psychological violence, psychological violence, economic, social and spiritual violence.

Thus, the new facts introduced in the definition of forms of violence are:

a) Psychological violence: blackmail, unwarranted pursuit, supervision of the house, workplace or other places attended by the victim, making phone calls or other types of communication using remote transmission means, which, because of their frequency, content or timing, cause fear;

b) Physical Violence: subjecting somebody to exhausting physical efforts or high-risk activities for the life or health and bodily integrity, other than those under letter e);

c) Social violence: prohibition of attending the workplace, prohibiting/limiting professional achievement, imposing isolation, including in the joint dwelling, deprivation of access to the living area, dispossession of identity documents;

d) Spiritual violence: prohibition of the right to speak one's mother tongue and to teach children to speak their mother tongue.

Also, align. 2 of the same article expressly stipulated the fact that the custom, culture, religion, tradition and honor cannot be considered as justification for any type of acts of violence (as defined in Law 217/2003) in any form and in any circumstance.

The need to regulate these new forms of violence has derived both from the fact that Romania has ratified by means of Law 30/2016 the Istanbul Convention, and from the fact that, in practice, these forms of violence have been manifested more and more acutely, thus imposing the taking of additional measures in order to protect victims of domestic violence.

3 The provisional protection order

The institution of the provisional protection order was introduced in Chapter III[1], of Law no. 217/2003. Article 22[1] attributes to the police officers exerting their job duties the competence to issue a provisional protection order when it is found that there is an imminent risk that the life, physical integrity or freedom of a person is endangered by an act of domestic violence, with the purpose of diminishing this risk.

[1] Imakayeva v. Russia, 9 November 2006, Guţu v. Moldova, 7 June 2007, Camemzind v. Switzerland, 16 December 1997.

The provisional protection order is issued further to the assessment of the factual situation based on the form of the Order of the Minister of Internal Affairs and of the Minister of Labor and Social Justice no. 146 of 11 December 2018 on the manner of managing the domestic violence cases by police officers and according to the methodology provided by the law.

In order to verify the notifications regarding the cases of domestic violence, police officers have the right to obtain evidence, as follows:

– Finding by means of their own senses and recording the findings in a document, or recording the findings using technical means;

– Consulting the databases to which they have access according to their job duties, and recording the findings in a document;

– Declarations of the persons involved in the domestic violence acts, of the persons who have witnessed the domestic violence acts and of other persons who can communicate information about the persons involved in the domestic violence acts;

– Video or audio recordings or photos, regardless of where they come from;

– Documents, including electronic and/or mobile telephony messages or posts.

Also, in order to obtain evidence in the cases of domestic violence, police officers have the right to enter the domicile or residence of any natural person, without their consent, as well as the headquarters of any legal person, without the consent of their legal representative, if the notification expressly indicates that acts of domestic violence occur or have occurred in those areas.

If it is found that the conditions for the issuance of the protection order are met, the police unit to which the police officer who has issued this order belongs, shall submit it, within 24 hours, to the Public Prosecutor's Office attached to the competent territorial court. It shall be issued for a period of maximum 5 days, a period which is calculated in terms of hours, i.e. 120 hours from the date of issue.

After confirming the provisional protection order, the prosecutor immediately submits the provisional protection order, together with the documents based on which it was issued, and a request for issuing a protection order to the competent territorial court for issuing a protection order. In this situation, the 5-day period for which the provisional protection order is valid, shall be extended *de facto* until the request made by the prosecutor for issuing the protection order, has been solved.

The obligations and prohibitions that may be ordered by the provisional protection order are:

a) Temporary evacuation of the aggressor from the joint dwelling, regardless of whether he is the holder of the property right;

b) reintegration of the victim and, where appropriate, of the children into the joint dwelling;

c) obliging the aggressor to keep a minimum determined distance from the victim, from the members of their family, as defined according to the provisions of art. 5, or from the residence, workplace or educational establishment of the protected person;

d) obliging the aggressor to permanently wear an electronic surveillance system;

e) obliging the aggressor to submit his weapons to the police.

The failure to comply with the obligations or prohibitions ordered by the provisional protection order constitutes the crime provided by art. 32 align. 2 of Law 217/2003, and shall be punished by imprisonment from one month to one year.

The person against whom the provisional protection order has been issued may dispute this measure in the court of the territorial jurisdiction in which the order was issued within 48 hours of the communication. The appeal is resolved as a matter of urgency, before the term for which the provisional protection order has been issued is fulfilled, while summoning the ascertaining body and with the mandatory participation of the prosecutor; the pronounced solution is final.

4 Inviolability of the domicile

Analyzing the procedure and the rights that Law 174/2018 has introduced in the matter of the provisional protection order, one can identify situations in which the rights of the defendant could be violated, which would cause Romania to be convicted by ECHR.

Thus, we draw your attention to art. 22^2 align. 2-5 of Law 217/2003, which stipulates:

"(2) For the purpose of verifying the domestic violence complaints and in order to obtain evidence of the matters covered by the complaint, police officers have the right to enter the domicile or residence of any natural person, without their consent, as well as the headquarters of any legal person, without the consent of their legal representative, if the complaint clearly indicates that acts of domestic violence occur or have occurred in the respective areas.

(3) The police officers can use force and the means they have available, adequately and proportionally, in order to enter the areas provided in align. (2).

(4) The actions of the police officers in the areas provided by align. (2), including those of getting in, may be recorded using audiovisual or photo equipment in their possession, without the consent of the persons, while the records or photographs constitute evidence in the sense of align. (1) letter a) and comply with the evidence policy provided by Law no. 134/2010 on the Civil Procedure Code, republished, as subsequently amended, or by Law no. 135/2010, as subsequently amended and supplemented, as the case may be.

(5) The police officers collect the evidence according to the provisions of Law no. 135/2010, as subsequently amended and supplemented, when, in the course of verifying the domestic violence complaints, they find that the conditions stipulated by the law are met in order for the committed domestic violence acts to be investigated as a crime."

It can be noticed that police officers notified about domestic violence acts can enter, without consent, the domicile or residence of any person in order to obtain evidence. Also, it is stipulated that, if further to the verifications performed by the police officers, criminal offenses are identified, the evidence is collected in accordance with the Criminal Procedure Code, but the intrusion by force, without consent, into the domicile or residence of a person for the purpose of obtaining evidence is equivalent to a home search which, according to the Criminal Procedure Code, is only carried out based on a search warrant ordered by a judge.

[2] Buck v. Germany

According to art. 27 of the Constitution of Romania, the domicile and residence of a person are inviolable; therefore, no person can enter their domicile or residence without consent. They also provide the express situations in which this right may be violated:

– the execution of an arrest warrant or a court order – which can only be ordered by a judge and is performed under the law;

– removing a danger to a person's life, physical integrity or assets;

– defending the national security or public order;

– preventing the dissemination of an epidemic.

Art. 158 of the Criminal Procedure Code regulates, in accordance with art. 27 of the Constitution, the fact that the home search is only ordered by a judge, at the request of the prosecutor or *ex officio*. Moreover, this request must include certain elements such as: the description of the place where the search is to be carried out, the indication of the evidence or data suggesting an offense, the indication of the offense and the evidence proving that in the respective location there is evidence on committing offenses, etc.

Thus, one can note the violation of art. 27 of the Romanian Constitution regarding the inviolability of a person's domicile. Also, the procedure to be followed in the cases provided by art. 22^2 of Law 217/2003 is one deprived of rigours, as compared to the one stipulated in the Criminal Procedure Code, while the only conditions to be fulfilled are the reporting of domestic violence acts and the indication of the circumstance that these have occurred in a certain area.

Moreover, considering align. 5, it can be concluded that, if, as a result of verifications performed by the police officers, the conditions laid down by law are met, in order to attract the criminal responsibility of the inspected person, as regards the evidence, the provisions of the Criminal Procedure Code are enforced, which imply obtaining a warrant from a judge, but if the found facts do not constitute offenses, this form of search may be carried out under legal conditions. Thus, the policy of obtaining evidence in the case of committing offences would be much more restrictive as compared to committing domestic violence acts.

It should be noted that art. 27 of the Constitution provides the possibility of entering a person's domicile without consent, in the absence of a search warrant, in order to remove a danger to a person's life, physical integrity or assets. However, in the manner in which the procedure provided in the case of the provisional protection order is regulated, the purpose of entering one's domicile by force and without consent is to verify the notifications and obtain evidence, which is not permitted by the Constitution.

It has also been established in the ECHR[1] jurisprudence that such interference by the state can only be justified in cases where the national legislation expressly permits it, and its purpose is to prevent crime. Also, national legislations must be capable of providing the necessary guarantees for the observance of human rights and not merely provide such a procedure, requiring an authorization/judicial review of the procedure.

Moreover, the Court has indicated that this interference must be proportional to the seriousness of the deed, its circumstances, the repercussions that such a procedure might have on the searched persons, etc.[2]

We believe that the intrusion into the home of a person that commits acts of domestic violence can only be justified if the facts are flagrant, and the entering is only performed in order to remove the danger to a person's life or physical integrity.

Also, not all forms of domestic violence, as they are called in the law, would justify such a measure, but only those that would endanger the physical integrity or life of the abused person; in the case of the others, a provisional restraining order should be required, without having to affect the inviolability of the aggressor's home.

As a conclusion, the Court has found that the search of a home without a search warrant usually entails the violation of art. 8 of the Convention.

5 Conclusions

The Provisional Protection Order was a long-awaited institution in national legislation in view of the social reality and the multitude of domestic violence cases. The adoption of Law no. 174/2018 is an important step in providing the prevention and protection of the victims of domestic violence, but Law 217/2003 must provide guarantees regarding the compliance with the human rights, i.e. the inviolability of one's domicile and the evidence policy, requiring clear stipulations to provide these guarantees and avoiding possible abuses by the authorities.

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Considerations on the legislative proposals to amend the Criminal Procedure Code concerning the lawyer's right to consult the case file during the criminal proceedings in the context of the European Commission Recommendations

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Abstract

The draft law amending and supplementing Law no. 135/2010 on the Criminal Procedure Code seeks to harmonize the criminal procedural provisions with the decisions of the Constitutional Court, the European Union Directives and the Decisions of the European Court of Human Rights. Among the proposed amendments one also lists those concerning the lawyer's right to consult the case file during the criminal proceedings which, under certain conditions, may be restricted by the criminal prosecution body.

Keywords: Amendments to the Criminal Procedure Code, Law 135/2010, lawyers' rights, consultation of the criminal prosecution file, Constitutional Court, European Court of Human Rights, European Directives.

1 Introduction

On 22.06.2018, the draft law on the amendment of the Criminal Procedure Code was sent for promulgation, but the President of Romania notified the Constitutional Court to carry out the constitutional review of the amendments and additions proposed by the draft law. Further to the constitutional review, the Constitutional Court, by means of Decision 633/2018 dated 12.10.2018, considered that some amendments were unconstitutional, which is why the Law on amending and supplementing the Criminal Procedure Code was resubmitted to Parliament in order to be harmonised with the Court's decision, a process

that has begun, while this draft is currently being adopted by the Senate. Also, at the end of 2018, the European Commission, by means of the Report prepared within the Cooperation and Verification Mechanism on Romania, recommended "freezing" the enforcement of the amendments to the Criminal Procedure Code.

2 The lawyer's right to consult the case file

The right of the lawyer to consult the case file is provided by art. 94 of the Criminal Procedure Code, but the provisions to be analyzed are those for which amendments were proposed by the draft law amending and supplementing the Criminal Procedure Code, while these are the dispositions of align. 1, 4 and 7.

2.1 *The form in force*

Currently, align. 1, 4 and 7 of art. 94 of the Criminal Procedure Code read as follows:

"(1) The lawyer of the parties and of the main procedural subjects has the right to request the consultation of the case file throughout the criminal proceedings. This right cannot abusively be exerted or restricted.

(4) In the course of the criminal prosecution, the prosecutor may reasonably restrict the consultation of the case file, if this could prejudice the proper development of the criminal prosecution. Once the criminal action has been initiated, the restriction may be ordered for maximum 10 days.

(7) In order to prepare the defense, the attorney of the defendant has the right to acquaint himself with the entire material of the criminal investigation file in the proceedings before the judge of rights and freedoms concerning the restrictive measures or involving the deprivation of rights, in which the lawyer participates."

The analysis of these provisions shows that the lawyer of the suspect, the injured party, the defendant, the civil party and the civilly responsible party has the right to consult the case file, regardless of the procedural stage of the criminal trial, only if he requests it. However, if the prosecutor considers that the grant of this right may prejudice the proper development of the criminal prosecution, he may reasonably restrict this right as follows:

– unlimited in duration, if the criminal prosecution has begun and the criminal proceedings have not been initiated;

– 10 days, if the criminal proceedings have been initiated.

Also, in the case of proceedings concerning possible restrictive measures or involving deprivation of freedom taking place before the judge of rights and freedoms, the lawyer has the right to get acquainted with the entire material of the criminal investigation file.

2.2 *The form currently proposed through the draft law amending and supplementing the Criminal Procedure Code*

The form of the draft law amending and supplementing the Criminal Procedure Code currently adopted by the Senate, at art. 1 item 44, provides for the following changes:

"(1) The lawyer of the parties and of the main procedural subjects has the right to request the consultation of the case file throughout the criminal proceedings. This right cannot be restricted. (...)

(4) In the course of the criminal prosecution, the prosecutor may reasonably restrict the consultation of the case file if this could prejudice the proper development of the criminal prosecution, for a maximum of 20 days, from the date of the request. (...)

(7) In order to prepare the defense, the lawyer of the defendant has the right to acquaint himself with the entire material of the criminal investigation file in the proceedings taking place before the judge of rights and freedoms concerning the restrictive measures or involving deprivation of rights, in which the lawyer participates. The ruling of the requests for the preventive measures cannot begin until the lawyer is given the necessary time to prepare the defense and only after the judge has ensured that he had enough time to go through all the material of the criminal investigation file but not less 4 hours. The time limits run from the moment when the criminal investigation bodies or the court communicates to the parties the measure taken."

Analyzing the proposed changes, substantial changes can be observed, meant to ensure the compliance with the criminal procedural rights of the parties and procedural subjects involved.

Thus, the first paragraph does not present substantial changes to the current form, while the phrase "This right cannot abusively be exerted or restricted" is replaced by "This right cannot be restricted". As the draft amending and supplementing the Criminal Procedure Code provides situations in which it may be restricted, the meaning of the two phrases has remained unchanged, in the sense that it cannot be restricted, except for the cases expressly provided by law and motivated.

As for align. 4, it can be noticed that there has been a major change in the time limit and procedural phases in which the right to consult the case file can be restricted. Thus, the different treatment from the starting phase of the criminal prosecution and initiation of the criminal action was eliminated, and the newly introduced time limit is applicable to the entire criminal investigation phase.

On the other hand, the period for which the prosecutor may restrict the consultation of the case file has been extended from 10 days to 20 days from the date of the request.

Therefore, the possibility that the prosecutor may restrict for an unlimited time the consultation of the case file in the criminal investigation phase was removed, being limited to the maximum time limit of 20 days stipulated by the law.

Finally, align. 7 was supplemented with an interdiction regarding the start of the court hearing in which possible preventive restrictive measures or involving deprivation of freedom would be ordered. The supplementation stipulates that the court hearing may not begin before the lawyer has been given the time to prepare the defense, i.e. going through all the criminal investigation material, but not less than 4 hours, this time limit

starting from the moment the parties and procedural subjects involved are notified of the measure.

This supplementation brings a minimum time limit of 4 hours, in which the lawyer is provided with the criminal prosecution file, prior to the commencement of the court hearing in which a preventive restrictive measure or involving deprivation of freedom will be ordered.

3 The reasons for Decision no. 633/2018 of 12.10.2018 on the Constitutional Court and the modifications introduced in the form adopted by the Senate on 10.12.2018

As stated above, the Constitutional Court, by means of Decision 633/2018, stated certain amendments and supplements proposed in the initial draft amending the Criminal Procedure Code, but some changes passed the constitutional review, among which one can mention those related to art. 94 align. 1 and 4.

Thus, the Constitutional Court considered that the replacement of the phrase in align. 1 "cannot abusively be exerted or restricted" with the phrase "cannot be restricted", is constitutional, and the interpretation to be given to this text is that this right cannot be restricted, except for the situations provided by the law, a provision similar to the previous one.

As for the amendments made to align. 4, the Constitutional Court considered that they did not contravene any constitutional norm or principle, this option being within the scope of the legislator's consideration.

It should be noted that, as compared to the current version adopted by the Senate, in the version sent for promulgation, the content of art. 7 was different, in the sense that the sanction of absolute nullity was provided in case of violating the right provided by art. 94 align. 7, and art. 10 stipulated that the minimum time required for the preparation of the defense in case of taking or judging preventive restrictive measures or involving deprivation of freedom was 6 hours.

Thus, the proposed addition for par. 7 was declared unconstitutional in view of the fact that it could not be correlated with the amendments provided by art. 10, which provided for a 6-hour term for studying the case file in case of ordering, being in conflict with the 4-hour one stipulated by art. 94 align. 7. Another reason that led to this decision was the fact that the sanction provided for non-observing this right was absolute nullity, and as long as absolute nullities are expressly provided by Art. 281 align. 1, this sanction had to be brought within the scope of this norm.

Analyzing the draft amended and adopted by the Senate, it can be seen that, with respect to align. 7, the required changes, necessary to bring this amendment into line with Decision no. 633/2018, pronounced by the Constitutional Court, have been made.

In this respect, at align. 1 item 6 of the draft, the minimum time limit provided for the preparation of the defense in case of taking or judging the preventive restrictive measures or involving deprivation of freedom from 6 hours to 4 hours has been amended, being in line with the one stipulated by align. 7.

Also, at align. 1 item 163 of the draft for amending and supplementing the Criminal Procedure Code, they have provided the supplementation of art. 281 align. 1, which

regulates the absolute nullities with the letter g, that introduces in the scope of absolute nullities the non-observance of the right provided by art. 94 align. 7, which provides for a minimum of 4 hours for preparing the defense, in the situation of taking or judging preventive restrictive measures or involving deprivation of freedom.

In conclusion, in the present form of the draft law amending and supplementing the Criminal Procedure Code, adopted by the Senate, the amendments to art. 94 are in line with the reasons for Decision no. 633/2018.

4 Aspects regarding amendments and supplements to art. 94 of the Criminal Procedure Code adopted by the Parlament

The issue of the right to consult the case file was the subject to Directive 2012/13/EU of 12 May 2012 on the right to information in criminal proceedings, which has led to the need to develop internal norms for the member states.

Under this Directive, the right to consult the case file should be ensured for the lawyer if a preventive measure is ordered to effectively challenge its lawfulness. The access to the criminal investigation file should also be provided in a timely manner, in order to enable the effective exertion of the right to defense, at the latest at the time of the arraignment.

While observing the right to a fair trial and the right to defense, access may be restricted to elements which could endanger the life or fundamental rights of another person or if access to certain evidence in the file would endanger an important public interest, such as those related to national security, under the Directive, provided that this restriction can be subject to judicial review or ordered by a judicial authority.

The jurisprudence of the European Court of Human Rights also shows that access to the criminal prosecution file cannot be restricted, except for very special and duly substantiated cases.[1]

Under the current regulation, the case prosecutor may restrict access to the criminal prosecution file of the parties and the main procedural subjects who have this right in an unlimited manner during the criminal prosecution, until the criminal action is initiated. This limitation of the right provided by art. 94 of the Criminal Procedure Code is often abusively used in practice, violating the right to defense and a fair trial.

Thus, very often, the case prosecutor proceeds with the initiation of criminal prosecution, administering all the evidence, without initiating the criminal action, restricting the attorney's access to the case file throughout this period. When the prosecutor considers that the criminal prosecution is complete, by administering all the necessary evidence, he/she initiates the criminal action, and then immediately orders the arraignment by indictment, so that throughout the course of the criminal prosecution, the suspect cannot actually exert his right to defense, and the time at which he can have access to the criminal investigation file is after he is sued in the directions hearing procedure, which is very often restricted as a duration, so the lawyers are frequently placed in the position in which

[1] ECHR cases: Vermeulen vs. Belgium, Rowe and Davis, Jespers vs. Belgium, Kamasinski vs. Austria, Kuopila vs. Finland.

they cannot succeed in going through the entire criminal investigation file and therefore cannot ensure an effective defense in this procedure.

This method is also used to the detriment of the injured person or other participants who have the right to consult the case file, who may also be restricted from access to the criminal investigation file, while the criminal action is not initiated. Thus, if the dismissal or termination of the criminal proceedings is ordered and the injured person wishes to challenge this measure by formulating a complaint against the solution ordered by the prosecutor, the person finds it impossible to actually challenge the reliability or lawfulness of the measure. It is true that he will have available the order of dismissal as it is communicated to the person who made the complaint to other interested persons, but in its content one can omit essential aspects regarding the development of the criminal prosecution that would entail the illegality or non-reliability of the solution. In the case of the rejection of the complaint against the measure ordered by the case prosecutor, the persons who can file a complaint against the non-prosecution or non-arraignment decision to the directions hearing judge will be placed in a situation where they will have to motivate the complaint in the absence of the criminal prosecution file, while the only issues that they will be able to criticize are those contained in the ordinance of classification; the right to consult the case file will be exerted after the file is submitted for judgment to the competent directions hearing judge.

Regarding the cases where preventive restrictive measures or involving deprivation of freedom are ordered by the judge of rights and freedoms, the lawyer is entitled to become familiar with the entire criminal investigation file, but there is no stipulated minimum period in which he may have access to the file. In practice, the lawyer has a very short time limit to consult the case file, usually half an hour before court sessions, which often makes it impossible to ensure the defense. In complex cases, criminal prosecution files are voluminous, so they cannot be gone through within a few hours, and in such cases both the judge of rights and freedoms and the lawyer are unable to read the entire file in order to ensure a fair trial.

5 Conclusions

In the Cooperation and Verification Mechanism report, the European Commission recommended suspending the process of amending the Criminal Procedure Code, but nevertheless the changes proposed in the current form regarding the lawyer's right to consult the case file should be taken and would add value to the act of justice. The current form does not provide sufficient guarantees against possible abuses by the prosecutor regarding the lawyer's right to consult the case file, which inevitably leads to the violation of the right to a fair trial and the right to defense. These changes would provide, for the first time, a reasonable time of minimum 4 hours to consult the case file, as compared to the one encountered in the current practice, when taking a preventive measure is judged. Also, the 20-day deadline during which the prosecutor can restrict access to the criminal investigation file provides a guarantee against possible abuses by the case prosecutor in respect of the restriction of access to the case file during the criminal prosecution phase for an unlimited period of time.

In order to make these measures more effective, it would be necessary to regulate the procedure for the preparation of the electronic case file as early as the time when the

complaint was registered at the criminal prosecution body or the self-referral body, so that when a participant in the criminal proceedings has the right to get acquainted with the content of the criminal file, it can be made available immediately in electronic form; this measure also provides both the judge of rights and freedoms and the lawyer with a reasonable time to consult the criminal investigation file in the case of procedures for taking preventive measures.

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Criminal Law Fight against Money Laundering

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Abstract

Money laundering means "cleaning" the products coming from committed crimes in order to hide their illegal origin. The products of the illicit markets that stand currently for 1% (approximately EUR 110 billion) out of the Union's GDP money are washed to great extent in the legal economy of Europe. The money laundering systems are sometimes also used for source of financing terrorists. The EU has recently improved the legislation in order to fight this cross-border phenomenon. The new directive is going to harmonise money laundering related crimes and sanctions by providing sanctions equally severe throughout the EU with at least 4 year-deprived of freedom custodial sentences.

Keywords: money laundering, criminal law, European Union, financing of terrorism, illegal activities, criminal offences

1 Introduction

The first elements for protection of the Union financial interests by means of criminal law were introduced in 1995 when Convention on European Community financial interest protection and accompanying protocols (hereinafter collectively referred to as "PIF Convention") were adopted. The PIF Convention was further ratified by almost all member states and came to force concerning such[1]. Among the general relevant actions conducted to the EU level in the criminal law field there is the Council's Framework-Decision 2005/212/JAI of February, 24th 2005 concerning seizure of products, instruments and assets related to the crime[2], which the Commission would like to replace by a directive concerning freezing and seizure of products coming from

[1] The second report of the Commission referring to enactment of the Convention on European Community financial interest protection and its protocols, 14.2.2008, COM(2008) 77 final, to section 4.1. Since that date other several member states have ratified Convention and its protocols. Only the Czech Republic has not ratified it yet but they have initiated the domestic constitutional procedure to such respect.
[2] JO L 68, 15.3.2005, p. 49.

infringements committed in the European Union[3] designed to the participating member states. This framework was supplemented with general criminal law actions conducted to the Union level in order to fight certain illegal activities being particularly harmful for the licit economy such as money laundering[4] and corruption[5], which actions even if not specific to protection of the Union's financial interests, bring their contribution to protecting them. Money laundering and financing of terrorism and organised crime related to money laundering are still standing for significant issues to the Union level, thus affecting integrity, stability and reputation of the financial sector and threatening the domestic market and domestic security of the Union. In order to settle such issues and to complete and consolidate the enforcement of Directive (EU) 2015/849 of the European Parliament and Council[6], has for target to fight money laundering by criminal law proceedings, by allowing a more efficient and quicker cross-border cooperation between the competent authorities.

A functional and efficient financial system in a country represents a significant factor contributing to the economic development. Using this financial system for criminal purposes such as money laundering and terrorism financing undermines and destabilizes the functionality and integrity of the system thus affecting both the good run of economy and the entire population of the said state.

The criminal offenders seek for new modalities of laundering the funds obtained illicitly and for methods of financing terrorism, deliberately attempting at corrupting bank officers or freelancers and population's confidence in financial market is taken away by corruption, generating levers for evolution of new forms of fraud.

Money laundering and terrorism financing are "overall" crimes with no borders, no limits. Money laundering and those financing international terrorism focus on obtaining economic advantages and multiple financial sources.

2 Methodology

The Union shall defend the tax-payers' money in the most efficient manner by using for such purpose all possibilities offered by the European Union Treaty. In case of prejudices brought to the EU budget, EU steps are required to be taken so that to ensure equivalent and efficient protection of the Union's financial interests including by means of the criminal law in so far as this proves to be necessary. In spite of the development of a EU „acquis" in this field that includes fraud, corruption and money laundering[7]

[3] COM(2012) 85 final of12.3.2012

[4] Directive 91/308/CEE, abrogated and subsequently replaced by Directive 2005/60/CE of the European Parliament and Council of October, 26th 2005 concerning prevention from use of financial system with an aim at money laundering and terrorism financing, JO L 309, 25.11.2005, p. 15.

[5] Commission's Decision of 6.6.2011 for establishment of a reporting mechanism to fight against corruption to the EU level, C(2011) 3673 final.

[6] Directive (UE) 2015/849 of European Parliament and Council of May 20th 2015 concerning prevention from use of financial system with an aim at money laundering or financing terrorism, for amendment of the Rules (EU) no. 648/2012 of European Parliament and Council and abrogation of Directive 2005/60/CE of European Parliament and Council and of Directive 2006/70/CE of Commission (JO L 141, 5.6.2015, p. 73)

[7] Convention of July 26th 1995 (JOC316, 27.11.1995, p. 49) (fraud); first protocol dated on September 27th1996 (JOC313, 23.10.1996, p. 2) and Convention of May 26th 1997 (JOC195, 25.6.1997)

applicable steps to take, the member states adopted divergent rules and consequently the protection levels are often divergent within their national legal systems. This state of facts shows there is no equivalent protection of the Union financial interests and steps taken against fraud failed to reach the necessary deterrent effect.

By a common set of offences to be identified by all member states, an even interpretation could be ensured and a homogeneous mode of fulfilment of all the requisite in matter of instrumenting cases, thus mitigating the risks associated to divergent practices. Also, the dissuasive effect of relevant provisions could be enhanced, the potential of ensuring their due observance could be improved and the possibility could be lowered for the potential authors to move their intended illegal activities to more permissive jurisdictions across the Union's territory.

The steps exclusively taken to national level or even to the Union's level without considering an international coordination and cooperation, cause very limited effects. The current legislative framework of the Union is neither comprehensive nor sufficiently coherent to be fully efficient. Although money laundering is discriminated to the level of member states, there are significant differences between them as for the money laundering definition, concerning which of them stands for main crime, as well as to the level of sanctions. The differences between national legal frameworks may be exploited by offenders and terrorists who may choose to conduct their financial operations in those member states that they deem to hold the weakest money laundering fighting rules. Therefore the actions adopted by the Union in money laundering field should be consistent with other actions conducted in international forums and at least as stringent as such. This way a legal framework consolidated to the level of the Union would be established to make possible a more efficient approach of the issues concerning terrorism financing and mitigation of threatening coming from terrorist organisations, thus limiting their capacity to finance their activities. The framework-decision 2001/500/JAI of the Council[8] establishes requirements on money laundering incrimination. The said framework-decision is not however sufficiently comprehensive and the current money laundering incrimination is not coherent enough to efficiently fight money laundering throughout the entire Union and determines gaps in ensuring compliance with the law and obstacles in the way that various member state competent authorities' cooperate between each other. An example of such gap in ensuring law compliance is represented by the increase of money laundering related cybercrime and use of digital coins, a type of crime almost non-existent in the past.

Defining the criminal activities that stand for premeditated money laundering infringements can be sufficiently extended and even in all member states. They ought to ensure that all infringements punished with imprisonment such as stated in directive 2018/1673[9] are deemed to be premeditated money laundering crimes.

Directive 2018/1673 of October, 23rd 2018 comes to support, supplement and ensure a better understanding of money laundering criminal activity in the European Union

(corruption); protocol of November 29th 1996 (JOC151, 20.5.1997, p. 2) (construing by the Court of Justice); the second protocol of June, 19th 1997 (JOC221, 19.7.1997, p. 12) (money laundering)

[8] Framework Decision 2001/500/JAI of the Council dated on June 26th 2001 concerning money laundering, identification, trace, freeze, seize and confiscate the instruments and proceeds of crime (JO L 182, 5.7.2001, p. 1).

[9] DIRECTIVE (UE) 2018/1673 OF THE EUROPEAN PARLIAMENT AND COUNCIL of October, 23rd 2018 on money laundering by criminal law actions

member states, where they should enact the money laundering crime issue to all infringements punished with deprivation of freedom to a defined level. In so far that enforcement of punishments fails to provide such, the member states should provide a series of crimes in each of the categories designed by the GAFI (Financial Action Task Force)[10], including evasion and tax fraud, avoidance of tax obligations as well as any fraudulent behaviour involving income or profit dissimulation. Any kind of involvement punishable in committing a main crime or in performing a money laundering activity, as well as participation, association or agreement in view of committing crime, attempt to commit crime, complicity, facilitating and counselling, should be deemed criminal activity.

The Directive should not be enforced to money laundering activities as for the assets coming from committing crimes that harm the Union's financial interests because these assets are subject to specific norms, such as provided in the Directive (EU) 2017/1371[11]. Nevertheless, it ought to be possible for the member states to transpose the two directives (2017/1371 and 2018/1673) by adopting a sole comprehensive framework to the national level. According to article 325 para. (2) of TFUE, the member states shall adopt such fraud fighting actions against offences harming the Union's financial interests to be the same as those adopted to fight fraud harming their own financial interests. As a consequence, the member states should assure that certain types of money laundering activities are punished also when committed by the author of the criminal activity who had generated the respective assets („money self-laundering"). Should in such cases the activity of money laundering not consist in the simple holding or utilisation, but supposes also transfer, conversion, hiding or dissimulating assets by means of the financial system and bringing to higher damages than those already caused by the main crime, such as affecting the integrity of the financial system for an example by putting the assets obtained from criminal activities in circulation and thus hiding their illicit origin, the respective activity ought to be also punishable by sanctions. In order that the criminal law actions should be efficient against money laundering, a conviction ought to be possible without being necessary to clearly establish which criminal activity has generated the assets, or without existence of a previous or simultaneous conviction for the respective criminal activity, while considering at the same time all relevant circumstances and evidence. It ought to be possible for the member states according to national legal systems to ensure that by other means than legislation. Criminal prosecution for money laundering ought also not to be encumbered by the fact that the criminal activity was committed in another member state or third country.

Fighting money laundering by criminal law actions has for target to incriminate money laundering whenever committed intentionally and knowing that the assets have come from criminal activity. Within such context, the Directive 2018/1673 should not make difference between situations that assets have directly come from criminal activity versus situations that they have indirectly come from criminal activity. In either case,

[10] The Financial Action Task Force (GAFI) on Money Laundering control (FATF), fr:Groupe d'action financière – GAFI) is an inter-governmental organisation established in 1989 by the initiative of states within G7 in order to create an efficient police authority capable to fight money laundering and terrorism financing. The headquarter of this organisation is located in Paris, at the premises of OCDE General Headquarters. The current president is Roger Wilkins.

[11] Directive (UE) 2017/1371 of the European Parliament and Council dated on July 5th 2017 concerning fighting fuards directed against the Union financial interests by means of criminal law (JO L 198, 28.7.2017, p. 29

whenever analysing whether assets come from criminal activity and whether the respective individual has known it, the specific circumstances of the case should be taken into respect as well as the fact that the value of assets is disproportionate compared to the legal income of the accused individual and the criminal activity and the purchase of assets took place within the same time-frame. Intention and knowledge of facts can be deducted from objective factual circumstances. At the same time, the member states should provide punishments or additional actions such as fines, temporary or permanent exclusion from access to public funds, including procedures of public acquisitions, subsidies and concessions, temporary interdictions to exert trade activity or temporary interdictions to run for elective or public positions.

Although there is no obligation to increase punishments, the member states should ensure that the judge or the court have the possibility to consider aggravating circumstances established in the new directive on the occasion of convicting the crime authors. It is at the judge's or court's discretion to state whether the punishment shall be increased due to some specific aggravating circumstances, while considering all deeds of a specific case. The member states should not be forced to foreseen aggravating circumstances in case that domestic law provides that crimes established in the Framework Decision 2008/841/JAI of the Council[12] or infringements committed by natural persons acting as mandated entities in exerting their professional activities are punished like separate crimes and can bring about more severe punishments.

Preservation and seizure of committed crime-based instruments remove the financial incentives that had motivated crimes to be committed. The Directive 2014/42/EU[13] states minimum standards concerning unavailability and seizure of instruments and products originated in committed crimes. Also the respective directive provides for Commission to report to the European Parliament and Council regarding its enforcement and to file adequate proposals, as applicable. The member states should ensure as minimum requirement the committed crime-based instruments and products to be made unavailable and under seizure in all cases that criminal procedures cannot be initiated or concluded, including the cases that the author of the crime has deceased. Therefore, as requested by the European Parliament and Council in the statement accompanying the Directive 2014/42/EU, the Commission shall submit a review report on the feasibility and possible benefits from introducing additional joint standards concerning seizure of assets coming from criminal kind of activities, including in absence of conviction that a certain individual is subject to for such activities. This review will take into respect the difference existing between legal traditions and current law systems of the member states.

Given the mobility of authors and products coming from committing criminal activities, as well as the complexity of cross-border investigations necessary to fight money laundering, the member states should determine their competence in order to allow the relevant authorities to investigate and prosecute such activities. The member states should therefore ensure that their competence also applies to situations that a crime is

[12] Framework-decision 2008/841/JAI of the Council of October, 24th 2008 concerning organised crime fighting (JO L 300, 11.11.2008, p. 42).
[13] DIRECTIVE 2014/42EU OF THE EUROPEAN PARLIAMENT AND COUNCIL of April 3rd 2014 concedrning freezing and seizure of instruments and products of crimes committed in the European Union

committed by means of information and communication technology in force on their territory, no matter if they are placed or not across their territory. To assure success in enquiries and prosecution, in case of money laundering crimes, the people in charge with criminal investigation or prosecution should make use of efficient and improved investigation means, such as those used in fighting organised crime or other severe crimes. These instruments should be adapted to the most advanced evolutions in cybercrime and money laundering including money laundering by means of using the bitcoin type virtual coins, cryptocurrency and ransomware software type attacks. Using such instruments according to domestic law ought to be specific, to consider the proportionality principle, as well as the kind and severity of the investigated offences and to observe personal data protection rights. The member states shall ensure that the personnel benefit by adequate training. Moreover, the cross-border feature of money laundering activities requires solid response and cooperation within the member states and between each other, as well as cooperation with agencies and competent authorities of the Union, including Eurojust and Europol, and between each other, to fight money laundering. To such respect, instruments and resources available for cooperation should be efficiently used, such as joint enquiry teams and Eurojust facilitated coordination meetings. The overall character of money laundering requires international action, which invites the Union and its member states to consolidate cooperation with relevant third countries.

Money laundering, corruption, illegal financial flows, tax evasion and avoidance of tax liabilities stand thereafter in the way of sustainable development, affecting disproportionally the developing countries and represents a severe threatening for their future. Union, member states and third countries have joint responsibility to improve coordination of the steps taken to counteract such negative and harmful behaviours and put them in line with their development strategies and policies.

3 Result

The new legal document came to force on December, 2nd 2018 and shall be transposed in national law until December, 3rd 2020. Also on December, 3rd 2022, the Commission will submit the European Parliament and Council an assessment report on the implementation degree required for „Fighting money laundering by criminal law actions" and in December 2023 a report assessing the value added of the directive, as well as its impact on the main rights and liberties.

For developed countries or developing countries, money laundering and terrorism financing are activities compromising stability, transparency and efficiency of financial systems. Money laundering and terrorism financing are mainly simple concepts. If money laundering is the process by which incomes obtained from illicit activities are converted so that to remove their illegal origin, terrorism financing stands for financial support under any form of terrorism or for actions encouraging it or involving in it. Often, both money laundering and terrorism financing are concerned with similar transactions, the majority of which are related to hiding funds. Money launderers send illicit funds through legal channels with the aim at hiding their criminal origin, while those financing terrorism transfer funds that may be legal or illegal, using a way by which to hide the source and purpose of their utilisation – that of supporting terrorism. The techniques used for money

laundering are essentially the same as those used to hide the source or purpose in financing terrorism. The funds used to support terrorism may come from legal sources, criminal activities or both. No less important is to disguise the source of terrorism financing, no matter that the source is legal or illegal. If the source may be hidden it remains available to next financing of terrorist activities. Similarly, it is important for terrorists to hide utilisation of funds so that the financing activity could stay untraceable.

4 Conclusion

The new directive on fighting money laundering introduces new provisions of criminal law that will disrupt and block offenders' access to financial resources, including to those used for terrorist activities. The Directive establishes minimum standards on defining crimes and sanctions related to money laundering. The money laundering activities will be sanctioned by at least 4 year imprisonment maximum punishment, to which judges may require additional sanctions and actions and in case of criminal organisations or crimes committed during exercise of certain professional activities aggravating circumstances will be enforced. Also the possibility to hold accountable the legal entities for certain money laundering activities, these ones being liable for a series of sanctions (e.g. exclusion from public aid, placing under judicial oversight, compulsory liquidation, etc.) as well as removal of obstacles in the way of cross-border judicial and police cooperation by introducing joint provisions aiming at improving investigations. For cross-border cases, the new norms clear-up which member state has got jurisdiction and the mode that the involved member states cooperate, as well as Eurojust's modalities of involvement.

In Romania's case, the prevention and enforcement of money laundering laws, as well as the establishment of measures to prevent and combat financing terrorism, is ensured by the National Office for the Prevention and Combating of Money Laundering (N.O.P.C.M.L.). Law no. 656 of December 7, 2002, republished in the Official Journal of Romania on June 6, 2017, including all amendments to the initial act and those stipulated by Law no. 125/2017[14], needs to be brought in line with the new European Union Directive No. 2018/1673 on the fight against money laundering by using criminal laws. The directive brings new key elements in combating money laundering, such as Article 3 Paragraph 3, which provides that a conviction is possible without the need to establish all the facts or all circumstances surrounding the criminal act, including the identity of the author. Also, in the case of offenses provided for in Article 3 Paragraphs 1 and 2, where the acts constitute a criminal offense if they had taken place internally, the law extends to property arising from acts occurring in the territory of another Member State or of a third country where the Member States, including Romania, may request that the act in question be a criminal offense under the domestic law of the other Member State or of the third country in which the act was committed.

[14] Law No. 125/2017 of May 30, 2017 regarding the modification and completion of the Law no. 656/2002 on the prevention and sanctioning of money laundering, as well as for the introduction of measures for the prevention and combating of terrorist financing

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[1] The second report of the Commission referring to enforcement of the Convention on protection of European Community financial interests and its protocols, 14.2.2008, COM(2008) 77 final.
[2] JO L 68, 15.3.2005.
[3] COM(2012) 85 final din 12.3.2012.
[4] Directive 91/308/EEC, abrogated and replaced subsequently by Directive 2005/60/EC of the European Parliament and Council of October, 26th 2005 on prevention from financial system utilisation in view of money laundering and terrorism financing, JO L 309, 25.11.2005.
[5] Directive (EU) 2015/849 of the European Parliament and Council of May, 20th 2015 on prevention from financial system utilisation in view of money laundering or terrorism financing, for amendment of the Rules (EU) no. 648/2012 of the European Parliament and Council and of abrogation of Directive 2005/60/EC of the European Parliament and Council and of Directive 2006/70/EC of the Commission.
[6] Convention of July 26th 1995 (JOC316, 27.11.1995, p. 49) (fraud); first protocol of September, 27th 1996 (JOC313, 23.10.1996, p. 2) and Convention of May, 26th 1997 (JOC195, 25.06.1997) (corruption); protocol of November 29th 1996 (JOC151, 20.05.1997, p. 2) (interpretation by the Court of Justice); the second protocol of June, 19th 1997 (JOC221, 19.07.1997, p. 12) (money laundering).
[7] Framework Decision 2001/500/JAI of the Council of June 26th 2001 on money laundering, identification, prosecution, freezing, sequestration and seizure of the crime instruments and product.
[8] Directive (EU) 2018/1673 of the European Parliament and Council of October, 23rd 2018 on money laundering fight by criminal law actions.
[9] Directive (EU) 2017/1371 of the European Parliament and Council of July 5th 2017 on fighting by criminal law means frauds directed against the Union's financial interests.
[10] Framework Decision 2008/841/JAI of the Council of October 24th 2008 concerning fighting against organised crime.
[11] Directive 2014/42/EU of the European Parliament and Council of April 3rd 2014 on freezing and seizure of instruments and products of crimes committed in the European Union.

Documents issued by the Alternative Dispute Resolution Entity in the non-banking financial field (SAL-FIN)

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Abstract

The settlement of a dispute between the consumer and a trader can also be conducted outside the litigation procedures, by a much simpler, faster procedure and within the reach of the parties. This procedure can be carried out by the Alternative Dispute Resolution Entity in the Non-Financial Banking Field (SAL-FIN), an entity without legal personality, established within the Financial Supervisory Authority.

One of the main advantages of this non-contentious procedure is that it is free of charge for the consumer and the trader who decide to submit the dispute to SAL-FIN, as opposed to the litigation procedure which entails payment of court fees or attorneys' fees. Moreover, another advantage is that the dispute is resolved within reasonable time, as the law stipulates a term of maximum 90 days, which can be extended.

The dispute between the parties can be resolved by the conciliators through a decision or a conclusion, issued after the completion of one of the two procedures, namely the procedure of proposing a solution and that of imposing a solution.

If the parties are dissatisfied with the decision/conclusion issued by SAL-FIN, they can submit a request with a general jurisdiction court to annul the said decision and settle the dispute between the parties.

Keywords: SAL-FIN, consumer, trader, conciliators, Financial Supervisory Authority, administrative action, dispute, court of general jurisdiction, administrative court, material and territorial jurisdiction.

The Alternative Dispute Resolution Entity in the Non-Banking Financial Field (SAL-FIN) is a body established by the Financial Supervisory Authority (ASF) with the purpose of settling [1] disputes between a consumer of non-banking financial products and a trader monitored by ASF which operates on the capital market, the insurance market or in the private pension system [2].

SAL-FIN has been established based on both primary and secondary legislation, issued according to the field of competence of the Financial Supervisory Authority. Thus,

SAL-FIN is established according to Government Ordinance no. 38/2015 on the alternative settlement of disputes between consumers and traders, which provides a general framework for the alternative settlement of disputes [3], and according to ASF Regulation no. 4/2016 on the organization and operation of the Alternative Dispute Resolution Entity in the Non-Banking Financial Field (SAL-FIN) [4].

Regarding the organization of SAL-FIN, according to the above-mentioned regulations, the entity is managed by a collegial body, namely the Coordination College. This collegial body comprises 5 members who are appointed by an administrative act issued by ASF, namely a decision of the Council of ASF, for a five-year term, which can be renewed. According to art. 6 of Regulation no. 4/2016, the Coordination College comprises 2 members appointed by A.S.F., 1 member proposed by the National Authority for Consumer Protection and 2 members appointed by the associations for consumers and associations in the non-banking financial sector.

We must mention that this extrajudicial alternative for settling a dispute does not limit the rights of the consumers to resort to mediation procedures or the right to take the dispute to competent courts (this is specifically mentioned in art. 4 of Government Ordinance no. 38.2015). Furthermore, the prescriptive period on the consumer's right to act does not start to run/is suspended if it started running for the duration of the procedure within SAL-FIN.

As a precondition for the SAL-FIN procedure, according to legal norms, it is the obligation of the consumer to prove that they have previously tried to resolve the dispute directly with the party with whom they have contractual relations (art. 4 paragraph (2) of Regulation no. 4/2016). According to provisions of art. 10 of Government Ordinance nr. 38/2015, cumulated with art. 4 paragraph (3) of Regulation no. 4/2016, the SAL-FIN procedure is finalized either by proposing a solution, either by imposing a solution for the disputing parties, depending on what the consumer opted for. Within the SAL-FIN entity at ASF both mechanisms can be implemented, each having a separate procedure.

Thus, for the mechanism of imposing a solution, annexed to the Regulation no.4/2016, ASF has issued the *Procedure for the alternative resolution of disputes by imposing a solution within SAL-FIN.* This procedure is based on the dispositions of art. 12 of Government Ordinance no. 38/2015 regarding the mechanism of imposing a solution which stipulate that the parties must be informed on the obligation of the adopted solution, the impossibility of the parties to accept or reject the imposed solution, the impossibility to withdraw from the chosen option, the fact that the procedure does not limit the right to claim damages in court, that the solution can be different from that issued by the courts, and the legal consequences deriving from accepting the solution. In this case, the solution will be imposed by a conciliation commission comprising 1 or 3 conciliators appointed by the disputing parties.

Regarding the mechanism for proposing a solution to the parties, ASF has issued the *Procedure for the alternative resolution of disputes by proposing a solution within SAL-FIN.* This procedure is based on the dispositions of art. 11 of Government Ordinance no. 38/2015 regarding proposing a solution. According to this procedure, as opposed to the previously mentioned one, the parties may accept or reject the solution proposed by the conciliator.

The resolution of the dispute between the consumer and the trader by means of one of the two procedures mentioned above, is carried out by the conciliators [5], entirely

natural persons, according to Government Ordinance no. 38/2015 and Regulation no. 4/2016. The conciliators are registered in the Register of Conciliators, held by SAL-FIN, and must meet several cumulative conditions such as professional competence in the field in which they need to solve disputes or certain requirements regarding integrity and good reputation. At the same time, conciliators must be independent and impartial, they must refuse to work on causes where incompatibility arises or if there's a conflict of interest, as provided by the law [6]. The Council of ASF decides on the registration, revocation and deletion of conciliators from the registry, based on the proposal of the Coordination College of SAL-FIN.

Depending on the procedure that the consumer has chosen, the resolution of the dispute is finalized by a decision or a conclusion, and both types of documents must include an explanatory statement [7]. Thus, according to art. 13 of Government Ordinance no. 38/2015, SAL-FIN issues a decision in two situations, namely if the parties have followed the procedure of imposing a solution, and when the parties, opting for a proposed solution, accept the said solution. According to the same legal provision, SAL-FIN issues a conclusion, which will necessarily include the factual explanatory statement, the proposal formulated by the conciliator and the decision of the parties regarding the settlement of the dispute, when the parties do not agree with the solution proposed by the conciliator. Moreover, according to art. 13 paragraph (2) of the said ordinance, when the trader does not agree with the solution, the conclusion will also comprise information for the consumer regarding the appeal procedure that they can follow to solve the dispute.

In this context, the legal nature of the documents issued by the conciliators of SAL-FIN comes into question. Can they be considered administrative acts? To answer this question, we must consider on one hand, the legal status of SAL-FIN, the nature of the dispute submitted for the extrajudicial procedure, the status of the conciliators, and on the other hand, the notion and characteristics of the administrative act.

According to art. 2 paragraph (1) letter c) of Law 554/2004 on Contentious Administrative, with subsequent amendments, an administrative act is "*the unilateral act of individual or normative character issued by a public authority, having a public power character, with the purpose to organize law enforcement or the concrete law enforcement which creates, amends or terminates legal relationships*". In the specialty literature, starting from the definition of the administrative act, its characteristics have been underlined and analysed extensively. Thus, the administrative act is a legal form pertaining to the activity of the public administration, comprising a unilateral legal will of the public administration, and its legal nature is established specifically by the administrative contentious law [8].

Regarding the legal status of SAL-FIN, this entity has been established according to art. 15 and 17 of Government Ordinance no. 38/2015 and ASF Regulation no. 4/2016 operating within ASF according to the Regulation on the Establishment of SAL-FIN and the procedures issued in this regard. The SAL-FIN entity within ASF is managed by a Coordination College, comprised of members from within ASF and outside of it (as we have already mentioned, together with the two members of ASF, the Commission is also composed of representatives of the National Authority for Consumer Protection and members of consumer associations and associations in the non-banking financial sector). The fact that the entity SAL-FIN operates within ASF and that it is financed by

this authority does not lead to the conclusion that it is an administrative authority or a specialized department within ASF. Even Government Ordinance no. 38/2015 stipulates at art. 6 paragraph (4), that these entities operate independently of the structures within the authorities which have supervisory and control duties on regulated markets. This entity is autonomous, and it has a special operating legal framework under the aforementioned normative acts and procedures.

One important aspect deriving from art. 1 of the Regulation on the Establishment of SAL-FIN is that the entity has no legal personality. This is a legislative gap, which should be covered in our opinion. For instance, the ADR entity in the banking system, namely the Centre for alternative dispute resolution in the banking system, has legal personality, according to art. 21 of Government Ordinance no. 38/2015 [9].

On the status of the conciliators, as previously mentioned, they are natural persons, registered in the Register of Conciliators, they are independent and impartial, and have the necessary expertise to solve the disputed cases. Moreover, according to art. 13 paragraph (5) of Regulation nr. 4/2016, the conciliators are not allowed to receive remuneration from the disputing parties, as the rules regarding incompatibility, recusal and conflict of interests also apply to them. The conciliators are specialists in the field, and they do not have an employment contract with ASF. According to art. 10 of Regulation 4/2016, the mandate stipulates especially the duties of the conciliators during the resolution process of the dispute they are handling, as well as their duties within SAL-FIN.

In what regards the dispute submitted to the extrajudicial procedure within SAL-FIN, it does not have the same significance as the administrative contentious act. Moreover, the SAL-FIN procedure does not handle matters related to the duties and measures adopted by ASF as specialized central authority. The role of SAL-FIN is to resolve, by means of specific procedures, the disputes between consumers and traders, which arise as a result of non-compliance with the clauses in the contracts concluded between them [10].

Finally, we must underline that, though SAL-FIN is established within ASF, documents issued by SAL-FIN conciliators are not documents belonging to ASF, they are not issued as carrying a public power character, by the specialized central authority in the non-banking financial sector. The documents issued by ASF in fulfilling the regulatory, supervisory and control duties of the capital market, the insurance market and the private pension system are expressly listed in the normative act for the organization and operation of the authority. Thus, according to art. 6 paragraph (2) and (3) of Emergency Government Ordinance no. 93/2012, with subsequent amendments, ASF issues normative acts as decisions orders, regulations, norms and instructions as well as individual acts as authorizations, certificates, notices and decisions. As previously stated, ASF cannot issue decisions (the SAL-FIN conciliators are issuing decisions on resolved disputes) as individual administrative acts, thus the document issued by the conciliators to solve the dispute is not in any way a decision as administrative act.

Considering all these aspects, we hereby conclude that the decisions and other documents issued by the conciliators related to the disputes within SAL-FIN are not administrative acts. In our opinion, these can be seen as acts under private signature, as they are issued by an impartial and independent conciliator for the resolution of the

dispute and who is liable according to the applicable common law, according to art. 22 paragraph (1) of Regulation ASF no. 4/2016 [11].

Hereinafter, we will demonstrate that the decision issued by SAL-FIN can be contested in 15 days since its communication date to the parties, otherwise this act becomes an enforceable title (art. 13 paragraph (3) and (4) of Government Ordinance no. 38/2015). In this context, the question that arises is, who is the competent court to judge the request regarding the cancellation of the decision issued by the SAL-FIN conciliators.

One answer is provided by art. 13 paragraph (3), Thesis II of Government Ordinance no. 38/2015 which states that the SAL-FIN decision can be appealed with the competent court. Since the decision is not an administrative act issued by a public authority bearing a public character, the material competent court cannot be the contentious administrative court.

In the absence of a comprehensive rule and contrary provisions, the material and territorial jurisdiction of the competent court must be established according to the rules of common law, namely according to the norms of the Code of Civil Procedure.

These types of disputes can be essentially evaluated financially, which calls for the need to establish the material jurisdiction according to art. 94 pct. 1, letter k), and subsequent, of the Code of Civil Procedure. This text provides a criterion based on value, namely that the court, as an exceptional court in the new regulation [12], is competent to rule on requests assessable within the limit of 200.000 RON. The summons that exceed this amount do not fall under the competence of the tribunal, according to art. 95 Code of Civil Procedure. In other words, the summons requesting the annulment of SAL-FIN decisions fall within the material jurisdiction of the court or tribunal, depending on the value criterion also stipulated by art. 98 Code of Civil Procedure [13].

Regarding the territorial jurisdiction, common law rules apply as well. The competent court is established according to dispositions of art. 107 paragraph (1) Code of Civil Procedure, namely that from the circumscription where the defendant has its headquarters or domicile.

Regarding the possibility that SAL-FIN can be taken to court, even if it doesn't have legal personality [4], considering that it is established based on provisions of Government Ordinance 38/2015 and Regulation no.4/2016, we deem applicable the provisions of art. 56 paragraph (2) Code of Civil Procedure, according to which entities with no legal personality can be taken to court if they are established according to the law.

Regarding ASF, as SAL-FIN is established within this authority, in practice, parties who are dissatisfied by SAL-FIN decisions, are sometimes filing a complaint even against ASF. However, the authority does not have a passive legal standing in such cases, since it does not cover administrative acts and operations which fall under the competence of the authority. In such a case, ASF could have an active legal standing at most, and not a passive one [15].

REFERENCES

[1] According to art. 18 paragraph (3) of Regulation no. 4/2016 on the organization and operation of SAL-FIN, the costs of carrying out the expertise, translations of documents and other additional evidence necessary to resolve the dispute are the responsibility of the party requesting them.

[2] According to art. 1 paragraph (2) of Government Ordinance no 93/2012 on the establishment, organization and operation of ASF, published in the Official Journal of Romania Part I no. 874 of 21/12/2012, with subsequent amendments, ASF *"shall be established as an autonomous specialized administrative authority, holding legal personality, independent, self-financed, which exercises its duties according to the provisions hereof, by taking over and reorganizing all the duties and prerogatives of the National Securities Commission (NSC), the Insurance Supervisory Commission (ISC) and the Private Pension System Supervisory Commission (PPSSC)*". According to art. 2 paragraph (1) of said normative act, ASF *"exercises authorization, regulatory, supervision and control duties*" over all entities operating on the capital market, the insurance market and in the private pension system.

[3] The normative act has been published in the Official Journal, Part I no. 654/28.08.2015 and, according to art. 35, transposes the provisions of Directive 2013/11/EU of the European Parliament and the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) published in the Official Journal of the European Union, series L, no. 165 of 18 June 2013.

[4] Published in the Official Journal, Part I no. 383/19.05.2016.

[5] According to art. 3 paragraph (1) letter h) of ASF Regulation no. 4/2016, the conciliator is a "natural person who possesses the necessary knowledge and skills in the field of alternative dispute resolution procedures or judicial resolution of consumer disputes, as well as a good general and specific understanding of the legislation on the financial sector where such person resolves the dispute and of the consumer protection legislation; such persons are independent and impartial."

[6] Art. 24 paragraph (5) of Government Ordinance no 38/2015 and art. 13 paragraph (5) and art. 22 of Regulation no 4/2016.

[7] In what regards the settlement terms within the SAL-FIN procedure, according to art. 13 of Government Emergency Ordinance 58/2015 the law provides a term of 90 calendar days from the moment when the documentation is complete, which can be extended according to the complexity of the cause. On the resolution of the dispute by means of the procedure of proposing a solution, the ASF procedure provides a different term, of 60 calendar days, from the moment when the documentation is complete, which can be extended by SAL-FIN. We must mention that, though the legislation provides terms for dispute resolution within the SAL-FIN procedure, however it does not mention financial penalties for the conciliator

who, for imputable reasons, does not solve the dispute within the terms provided by the law. In such case, the measure to be taken is stipulated at art. 14 of Regulation no. 4/2016, namely, the removal and deregistration of a conciliator from the Register of Conciliators.

[8] Antonie Iorgovan, Treaty of Administrative Law, Volume II, 4th Edition, All Beck Publishing House, Bucharest, 2005, p. 28

[9] According to art. 21 paragraph (1) of Government Ordinance no 38/2015, "For the banking field the Alternative Banking Dispute Resolution Center, hereinafter referred to as the ADR Center, is established as autonomous, non-governmental, apolitical, non-profit legal entity of public interest in order to ensure access of banking customers to resolution, via ADR procedure, of their disputes with traders the business of which is regulated, authorized and supervised/monitored by the National Bank of Romania, as well as with the branches of foreign traders pursuing a banking business on the territory of Romania. The head office of the ADR Center is in Bucharest.

[10] For example: as a result of a risk procedure covered by CASCO insurance, an obligation for compensation arises between the client and the insurance company, as provided by the contractual clauses between the parties. After analysing the request for damage, the insurer proposes the insured an amount of money as compensation, but this amount does not cover the costs paid by the insured to the auto shop for fixing the car. As the insured is dissatisfied with the amount proposed by the insurer, seen that the amount does not cover the total cost of the repair, and that the latter refuses to cover the total amount of the cost of repairs, a dispute arises between the insured and the insurer which can be submitted to SAL-FIN for resolution.

[11] Art. 22 paragraph (1) of Regulation ASF no. 4/2016 – When resolving the disputes submitted to them, the conciliators shall be impartial and independent and shall be directly and personally liable under the applicable law.

[12] Gabriel Boroi, Mirela Stancu, Civil procedural law, Hamangiu Publishing House, Bucharest, 2015, p. 193

[13] In this regard, the courts have ruled by recent judgments no. 2865/02.10.2018 (cause 22509/3/2018), no. 2752/30.06.2018 (cause 4339/2/2017), no. 1233/16.03.2018 (cause 6183/2/2017), no. 4881/12/12/2018 (cause 5153/2/2017), no. 4656/29.11.2017 (cause 3467/2/2017), unpublished.

[14] Just like the Alternative Dispute Resolution Center in the banking system has.

[15] According to art. 7 paragraph (3) of Emergency Government Ordinance no. 93/2012, "ASF has an active legal standing and can intervene in any process regarding the adopted norms or the individual acts issued by it, as well as in any process against the regulated entities or the persons who are in a legal relationship with them, either directly or indirectly, when such action is necessary in order to protect the interests of investors, insurers,

beneficiaries of private pension funds and financial stability." Moreover, in the insurance field, art. 165 paragraph (3) of Law no. 237/2015, stipulates that "ASF dos not have a passive legal standing and it cannot be called into court in trials against companies, even if they are in the process of financial recovery or banktrupcy, or in trials against the Insurance Guarantee Fund to be held liable for not fulfilling the obligations assumed by these according to the law and/or international conventions."

Abuse of Rights and Abuse of Power

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Abstract

The social, economical and political realities in our country have determined the more and more frequent use, in public, of the notion of "abuse of rights". Is the abuse of rights an abuse of power, in the sense of art. 15 of the Civil Code, according to which "no right can be exercised for the purpose of causing injury or damage to another or in an excessive and unreasonable manner, contrary to good faith"? Starting from this question, we will separate the two notions and will emphasise their particularities, including in terms of the legal liability drawn by the "excess" in exercising the law or in accomplishing the act of public power

Keywords: abuse of rights, abuse of power, the principle of legality, discretionary power, civil servant, employer, legal liability.

1 Abuse of rights and abuse of power. Conceptual separation

Abuse of rights was and continues to be a controversial notion. If prior to the 2011 Civil Code this term was a creation of the interpretations of the specialized doctrine and of the case-law, today the abuse of rights finds its express regulation within the provisions of art. 15 of the Civil Code, according to which "no right can be exercised for the purpose of causing injury or damage to another or in an excessive and unreasonable manner, contrary to good faith". Prof. I. Deleanu underlined that "the use of rights for other purposes than those taken into consideration by the legal standards which they are based on – purposes considered incompatible with the public interest and the exigencies of social coexistence standards – represents not the use, but the abuse of rights, passing the exercise of rights from normal to abnormal, taking it out of the legal protection and exposing it to sanctions [1].

The social, economical and political realities in our country have determined the more and more frequent use, in public, of the notion of "abuse of rights". Is the abuse of rights an abuse of power?

The activity of public administration authorities cannot be completely regulated by the legislator. Therefore, any public administration authority enjoys, rightfully, the so-called "right of assessment" or "discretionary power" or "margin of freedom", so that the public administration authority, within its activity carried out "for the purpose specified by the legislator, can use any action means within the limits of its competence" [2]. The law is general, unique, and enforceable in all areas of the country. The administration is multiple, it brings people together, gathers the information means. The law is intended for a long existence. It is closed, firm and always stable and needs to be dedicated exclusively for permanent and solid interests and leave the momentary and accidental interests for the administration [3]. The law is not reserved for the issues implying an immediate solution. Solely, the administration, having a constant activity, seconded by own instruments, can always intervene. The law must not decide on issues which solution entails a discretionary assessment and it can be amended, according to circumstances. Solely, the administration, under the real and effective guarantees it offers to its citizens, is capable to verify and adapt itself [4].

We reiterate the question of Prof. A. Iorgovan: where does the discretionary power end and where does the abuse of power begin, where does the legal behaviour of the administration end, materialized by its right of assessment and where does the breach of a subjective right or a legitimate interest of a citizen begin? [5].

The limits of the discretionary power can be analysed in close concordance with the principle of legality, which governs the public administration activity, implicitly the opportunity – legality relation, with the principle of proportionality and the principle of citizens' equality before the law.

For that matter, legality is one of the fundamental principles according to which the public administration authorities are carrying out their activity, in compliance with the Constitution, the laws and the other normative acts according to the principle of normative acts hierarchy, taking into consideration the position occupied by the authority, body of institution of the public administration within it, but also in compliance with their competence, as well as with the specific procedure provided by the normative acts, the aim being the enforcement organisation and the actual enforcement of the law [6].

Prof. A. Teodorescu considered that "Except the cases when the law is imperative, when it definitely commands, in all the other cases it leaves to the sovereign choice of the administrative authority the possibility to carry out or not to carry out the act, for which it was authorised by the law we are speaking of. In other words, the authority is given the largest power of assessment over the opportunity of the act. In both cases, the situation remains legal, because if the administrative authority carries out the act, it has used the right given to it by the law; if it does not carry out the act, it does not violate the law, as the law ordered nothing to it" [7].

Prof. Ioan Santai underlined the "need for any administrative measure to be not only legal, but also opportune. If there is the possibility that in the relation between the two categories mismatches may occur which could lead to the adoption of a legal, yet inopportune act, the contrary shall not be allowed, namely the existence of an illegal, yet opportune act, all the more so on an illegal and inopportune act, whereas it would be in conflict with the principle of legality in the executive activity... Without the two categories mutually excluding or summing themselves up, the interference between

legality and opportunity leads to the provision of the best conditions to issue and carry out a valid act, adequate to a given situation" [8].

Prof. A. Iorgovan, in the opportunity – legality relation analysis, argued for the support of the majority doctrinaire opinion according to which "legality is the corollary of the validity conditions and opportunity is a requirement (a dimension) of legality [9], saying that "the opportunity conditions appear to us as a subsystem of the legality conditions, in the broad sense of the term" [10].

The principle of proportionality is correlated with the principle of legality. The proportionality of a decision must be established in relation with the circumstance which implied the decision to be made, the necessity, its finality, the fundamental rights and liberties that were violated etc., which actually implies the verification of the opportunity requirements of the act, whereas an act can be illegal in normal conditions, yet it can be considered legal in certain exceptional circumstances (e.g., natural disasters, a state of siege or war etc.).

The Contentious Administrative Law no. 554/2004, with subsequent modifications and additions, defines in art. 2 paragraph 1 letter n) the excess of power as "the exercise of the assessment right of the public authorities by breaching the limits of the competence provided by the law or by breaching the rights and liberties of the citizens", by competence understanding "the totality, set of rights and obligations pertaining to a public administration authority or to a civil servant for which it also has the ability to adopt or issue administrative legal acts" [11].

In our opinion, discretionary power ends where the principle of legality is breached (circumvention of the validity conditions of the act) or where, within the limits of the granted prerogatives, the public authority carries out the act by breaching the principle of proportionality, assessed in the light of the performed act, of the circumstances which implied it and the purpose of the law (*ratio legis*), having as finality the breach of the citizens' rights and liberties, provided by the Constitution or by the law.

Even if the abuse of power can be met more often in the area of the executive power, it can also be found in the area of the legislative power or of the judiciary.

In the area of the executive power, we mention the recent controversies regarding the assessment of an abuse of power circumstance, alleged to have been manifested by the members of the Romanian Government by issuing the Emergency Ordinance no. 13/2017 as of 31 January 2017 for the amendment and supplement of Law no. 286/2009 on the Criminal Code and of Law no. 135/2010 on the Criminal Procedure Code [12]. Besides the opportunity criticism brought to this normative act, it was asserted that, based on the numerous criminal files under investigation for committing some offences while in office (mainly, abuse of office and negligence on duty), this normative act was issued in view of some personal interests of the Government members and of the governing alliance. The Emergency Ordinance no. 13/2017 as of 31 January 2017 was repealed, shortly after, by the Emergency Ordinance no. 14/2017 as of 5 February 2017 [13], also under the public pressure concentrated in large street protests. According to the reasons shown within the contents of this act, the need to repeal the Emergency Ordinance no. 13/2017 as of 31 January 2017 was determined by "many reactions, not only as regards the substance of the normative act, but also as regards the manner in which it was adopted, considering that these reactions come both from the judiciary system institutions – Superior Council of Magistracy, High Court of Cassation and Justice, Public Ministry,

as well as from some state authorities – President of Romania, Romanian Ombudsman, finding that the normative act has raised a real interest among the Romanian citizens, as they understood to be actively involved not only by taking part in the public debate carried out prior to its adoption, but also by supporting the ideas within some public manifestations which were present in the entire country and in some cities abroad...".

Likewise, we can identify in the activity of the President some circumstances that may raise controversies as regards an abuse of powers being committed. Mainly, the provisions of art. 80 of the Romanian Constitution (marginally called Role of the President) are considered, according to which "the President represents the Romanian state and is the guarantor of the national independence, of the territorial unity and integrity of the country" (paragraph 1), and "the Romanian President shall ensure the compliance with the Constitution and the good functioning of the public authorities. For this purpose, the President mediates between the powers of the state, as well as between state and society" (paragraph 2). The abuse of power circumstance may concern, mainly, the fact that the President exceeds his role as mediator between the powers of the state. According to the opinion of Prof. I. Deleanu, "the mediation function of the President, morally based on the principle of the widely and authentically democratic legitimacy, as well as on the principle of non-partisanship, does not grant him the capacity of "supreme magistrate", but only a simple "influential magistracy", of "good offices" that may become a "regulating factor" in the state mechanism, as well as in the mechanisms between state and society [14].

The recent activity of the Romanian President represented also a discussion topic regarding an exceedance of the discretionary power limits. The Constitutional Court was referred to regarding a potential legal conflict of constitutional nature between the Romanian President, on one hand, and the Romanian Government, represented by the Prime Minister, on the other hand, when, as a result of a government reshuffle, the Romanian President issued the Decree no. 925 as of 20 November 2018 on the termination of some functions and the appointment of new members of the Government. Once with the proposals for cessation of functions, the Prime Minister requested also the revocation of the Deputy Prime Minister, of the Minister of Regional Development and Public Administration and of the Minister of Transport, proposing new titular holders. Regarding these requests, the Romanian President did not issue any act, publicly saying that these requests are "inappropriate" and that he will refuse them, without mentioning any deadline. The Constitutional Court delivered the Decision no. 875 as of 19 December 2018 by which it allowed the request submitted by the Prime Minister, it found that there is a legal conflict of constitutional nature between the Romanian President, on one hand, and the Romanian Government, represented by the Prime Minister, on the other hand, generated by the refusal of the Romanian President to issue de decrees for the revocation of two ministers and/or to issue the decrees for finding the vacancy of the minister positions as a result of the resignation of the two ministers and it also decided that the Romanian President has to issue immediately the decrees for finding the vacancy of the two minister positions and has to respond, immediately, in writing and with reasons, to the proposals submitted by the Romanian Prime Minister regarding the appointments for the minister positions.

At the level of the judicial authority, the magistrate has discretionary power, especially in situations when he/she is to enforce a punishment, provided between a

minimum and a special maximum limit, as the legislator cannot regulate, concretely and completely, all situations which imply a certain quantum of the sanction. Also, the judge has discretionary power when assessing the evidences, based on which he is to deliver a solution in the case submitted for judgement. We can talk about an abuse of power committed by the judge, to whom art. 124 paragraph 2 of the Romanian Constitution acknowledges his independence and submission only before the law, if he delivers a decision which is not based on the analysed evidences and on the case circumstances. We also mention the circumstance in which, as a result of issuing the Emergency Ordinance no. 13/2017 as of 31 January 2017 for the amendment and supplement of Law no. 286/2009 on the Criminal Code and of Law no. 135/2010 on the Criminal Procedure Code, which we mentioned above, the National Anticorruption Prosecution Office begun an *in rem* criminal prosecution for facts over which the Constitutional Court has decided, by Decision no. 68 as of 27 February 2017, that they are not under the jurisdiction of the prosecutors, respectively they cannot be the object of a criminal prosecution, referring to the circumstances under which the normative act was adopted, to the contradictory public positions of the Minister of Justice and of the Prime Minister, followed by the decision to adopt the normative act – aspects related to the legality and opportunity of the criticised act. In this situation, can it be said that the representative of the Public Ministry committed an abuse of power, as part of the judicial authority, who ordered, as a result of a denunciation, the beginning of the *in rem* criminal prosecution, but for facts which can only be subject to a parliamentary control over the administrative act having force of law, under art. 61 paragraph 1 of the Romanian Constitution ("88 point ... in case of emergency ordinances, the Parliament approval, in an emergency procedure, is mandatory, precisely because, in the latter case, the legislative event occurred outside a delegation from the holder of the right to legislate, so the parliamentary control over the administrative act with force of law is required, according to art. 61 paragraph 1 of the Constitution". Decision no. 68 as of 27 February 2017 of Constitutional Court of Romania)? Legality in the activity of prosecutors is provided as principle by the provisions of art. 125 paragraph 1 of the Romanian Constitution, according to which "Prosecutors are carrying out their activity according to the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice".

Regarding all the above mentioned, in our opinion, the abuse of power can be an equivalent, in the area of public power, of the abuse of rights regulated by art. 15 of the Civil Code, without denying, nevertheless, the particularities of the abuse of power – the unequal position of the subjects of the legal relation, the required capacity of those who are exercising the public power prerogatives, the legal liability that may be drawn by the fact that an abuse of power is committed, the rights are extended and the liberties are affected.

Either we are talking about an abuse of rights or an abuse of power, the common elements are the "excess" in exercising the rights or in carrying out the act and the end point of this "excess" – violation of someone else's right.

2 Abuse of rights and abuse of power in the legal relationship pertaining to the labour law?

If we have appreciated, in the above mentioned, that the abuse of power may occur in the activities of authorities vested with public power prerogatives, can we claim that in the legal relationship pertaining to the labour law, with the subjects on unequal positions, an abuse of rights or an abuse of power may be committed?

Any organisation is based on a certain authority and responsibility system. Authority means the right of a leader to make decisions and to ask its subordinates to comply with them in order to achieve the organisational purposes [15]. Power is the ability to determine or to influence the behaviour of others. It comes from the position a person holds within the organisation, from the personal influence which he has over others or from both. Persons who are able to convince the others to do something due to the position they have within the organisation have a position power. The individuals who earn their power from the subordinates influence hold personal power. Certain persons can hold both the position and the personal power [16].

In our opinion, regardless if the employer has a position power within the legal relationship pertaining to the labour law and, through its leader, manifests this power, it cannot be held that an abuse of power is committed, in the sense of this term identified above.

Even the abuse of rights which can occur in this matter must be assessed with maximum diligence, whereas the circumstances claimed by the employee to be abusive may actually be acts committed by the employer outside the law, namely in the area of a tort. Therefore, court decisions were held by which certain circumstances were wrongfully interpreted as being an abuse of rights. As an example, we are showing the wrongful consideration of a situation as an abuse of rights when a decision was made to rehire the employee on a different position than the one he had when he was fired [17]. At the same time, the specialised doctrine emphasised that, in the matter of work relationships, the abuse of rights issue cannot be connected with the rights that the law leaves to the exclusive determination of one of the employment contract parties. For example: the employer's right to resign, by termination the contract (we mention that in agreement with the provisions of art. 55 letter c) in conjunction with art. 81 of Law no. 53/2003, republished – Labour Code, resignation is a unilateral act of will which leads to the termination of the contract, without implying a fault, as it is required in case of a termination); the right of the employee to refuse, in accordance with art. 38 of the Labour Code, any reduction of his rights acknowledged by the law; the right of the employer to set, with no interference, his business plan (which also produces effects on the situation of his employees) or the organisation and operation of his unit [18].

The courts of law are often referred to by employees with disputes where it is claimed that the employer has committed an abuse of rights. Nevertheless, in relationships pertaining to the labour law, the abuse of rights can be committed also by the employee who exercises his right acknowledged by the law or by the collective labour agreement un an excessive and unreasonable manner, contrary to good faith and in order to harm the employer. An example in this regard is the situation when all employees agree to resign, a unilateral act of will, for the obvious purpose to harm the employer, the latter being forced to temporarily close the activity due to the lack of staff.

3 Legal liability

In the matter of the abuse of rights, the opinions on the legal liability are not unitary, the doctrinaire disputes concerning mainly the assimilation of the notion "abuse of rights" with "tort". According to the majority opinion, the abuse of rights cannot be considered a tort. These two terms are mutually excluding each other, whereas the tort implies the inexistence of a right (excludes the right), and the abuse always implies the exercise of a right, but in a harmful, excessive and unreasonable manner or contrary to good faith. According to another opinion, the abuse of rights is not different from the tort, whereas when the limits of the right are exceeded we find ourselves in the field of the tort [19]. Other authors have considered the two terms to be synonymous [20]. In our opinion as well, the legal liability for the abuse of rights is not a proper civil liability in tort, but "a special form of the civil liability in tort" [21]. As the abuse of rights can be found also in matters relating to a contract, we cannot exclude a civil contractual liability as well, taking into consideration, or course, the provisions of art. 1350 paragraph 3 of the Civil Code, according to which "except otherwise provided by the law, none of the parties can remove the application of the contractual liability regulations in order to opt in favour of other regulations which may be more favourable".

In all cases, an analysis is required regarding to general conditions of legal liability, namely: the existence of a fact claimed as being an abuse of rights (excessive or unreasonable exercise of the right in order to cause harm to the other one or the exercise of the right contrary to good faith), the occurrence of a damage, the existence of the causality relation between the abuse and the claimed damage, the guilt of the holder of the right that was abusively exercised [22].

The judge, called upon to find the existence of an abuse of rights, shall rule the termination of the abusive exercise of the right and the return of the right within the limits of a reasonable, non-excessive exercise and with good faith. If the abusive exercise of the right also caused damages, their coverage shall be ruled as well.

As regards the abuse of power, the legal liability can be wider.

The competence to settle the disputes arising from an abuse of power can belong to the contentious administrative judge, who is called upon to investigate the legality of the performed act and who can rule the cancellation of the entire or part of the administrative act, the repair of the caused damage and the awarding of repairs for the moral damages, but it can also belong to the criminal court, if the abuse of power is circumscribed to an offence while in office. In the latter situation, the judge can settle also the civil claims filed by the injured party, which is a civil party in a criminal trial.

The non-legality of the individual administrative act issued by an abuse of power can be investigated also by way of exception, according to the provisions of art. 4 of the Contentious Administrative Law no. 554/2004, with the subsequent amendments, case in which the court vested with the substance of the dispute shall remove the legal effects from the illegal act, "settling the case without taking into consideration the act which non-legality was found". Note that, besides the civil servant who acted by way of abuse of power, the public authority which issued the act can also be held jointly and severally liable. The act carried out by breaching the principle of legality (either we are referring to the validity conditions, or to the opportunity conditions) can be revoked, totally or

partially, in a prior procedure, by the issuing authority or by the hierarchically superior authority.

The abuse of power can lead also to the enforcement of a disciplinary sanction, according to the provisions of Law no. 188/1999 on the Statute of the civil servant, republished, with the subsequent amendments.

The most severe form of liability, which can be drawn for committing an abuse of power, is the criminal liability. The criminal liability for offences committed while in office, such as abuse of office provided and sanctioned according to art. 297 of the Criminal Code or the negligence on duty provided and sanctioned according to art. 298 of the Criminal Code, can be determined by an abuse of power committed by a civil servant. This form of liability was of real interest during the recent years in Romania, given the high number of those held liable for committing such criminal actions. The Constitutional Court has "settled" the practice of the courts of law, explaining through the Decision no. 405 as of 15 June 2016 that the phrase "in a defective manner" is constitutional to the extent in which it means "carries out by violation of the law". Until this decision was delivered, in absence of some clear criteria, the courts of law were generally limiting themselves only to the decision that the active subjects of the offences of abuse of office or negligence on duty have carried out office responsibilities in a defective manner, either by reference to the provisions of the law, either by reference to mentions found in Government decisions, orders of ministers, organisation and functioning regulations, deontological codes or job descriptions. As it was held in the reasons of the above mentioned Decision, the lack of clarity, precision and predictability of the phrase "carries out in a defective manner" within the criticised provisions has created the premise of some arbitrary interpretations or assessments.

4 Conclusions

Abuse of power can be equivalent with abuse of rights in the area of the public power, with the particularities implied by each of these notions. Even if the subjects of the legal relationship are on unequal positions, if one of them is not an authority exercising the public power of if it is not a civil servant, in the line of duty, in our opinion we cannot speak of abuse of power.

We can conclude that the abuse of rights is a consequence of the awareness and mentality of the individuals forming society, as they reflect without fail in the habits of those exercising the public power.

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Some aspects regarding the applicability of the *non reformatio in peius* principle through the appeal in cassation

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Abstract

The increase of one of the punishments in the content of the crime contest, by the court invested only at the defendant's request, equals the violation of the special limits of the punishment and the violation of the *non reformatio pejus* principle. The phrase *"...limits other than those prescribed by law"* contained in Art. 438 paragraph 1 point 12 of the Code of Criminal Procedure refers to the limits of punishment established including through procedural law. The verification of the formal circumscription of the grounds of the appeal in the cassation, with the provisions of Art. 438 parag. 1 of the Code of Criminal Procedure, in the council chamber, without quoting the parties and without the participation of the prosecutor, presents unconstitutional valences.

Keywords: *non reformatio in peius, l*imits provided by law, appeal in cassation, formal circumlocution, unconstitutionality

1 Present case

The defendant was sued for the offense of incitement to the attempted qualified murder, as provided by the art. (hereinafter *art.)* 25 referring to art. 20 referring to art. 174-175 paragraph (hereinafter *parag*.) 1 letter (a) of the Criminal Code (hereinafter referred to as *CC*), in compliance with the offense of instigating the non-observance of the arms and ammunition regime, provided by art. 25 referring to art. 279 parag. 3 of the CC.

By Criminal Sentence 637/21.04.2015, he was convicted for each of the two offenses, with punishments of 12 years, respectively 4 years in prison. Each one of them has been added to a previous 3-year prison sentence, resulting in 15-year and 7-year imprisonment respectively. The penalties thus obtained were merged according to the rules of the offense contest, without the application of a increase, and the defendant would execute the resulting 15-year prison sentence.

The defendant has appealed against that judgment without the prosecutor or the civil party doing the same.

During the trial of the appeal, documents were filed showing the applicability of art. 19 of Law 682/2002 as regards the defendant, the cause of halving the special limits of the applicable punishments. As a result, the new special limits of the sentence that could be retained in relation to the legal framing of his deeds were 3 years and 9 months – 6 years and 3 months (for the offense provided for in art. 25, referring to art. 20, referring to art. 174-175 parag. 1 letter a), respectively 1 year and 6 months – 5 years (for the offense provided by art. 25 referring to art. 279 parag. 3 of the CC).

However, the court of appeal ordered the conviction for the first offense to be 8 years and 3 months imprisonment, and for the second offense to 2 years and 6 months imprisonment. Each of these punishments was preceded by three years imprisonment, the new punishments were merged, again without the application of an increase, and the defendant would execute the resulting 11 years and 3 months. Also, the precautionary measure of special confiscation was ordered regarding a number of goods attributed to the defendant.

On the occasion of receiving the final decision *in extenso*, it was found that the minute of the previously mentioned judgment did not correspond to the content of the judgment. Thus, in order to justify the exceeding of the special maximum limit of 6 years and 3 months imprisonment (for the offense referred to in art. 25 referred to art. 20 referred to art. 174-175 parag. 1 letter a of the CC), the appeal court stated that, in fact, the penalty for this offense only was increased by 2 years, thus considering that this process is the efficiency of *"... the cause of the aggravation of the criminal responsibility of the crime contest"*.

2 Contents

Admitting absurdly that this was the original will of the appeal court[1], this paper is about to address some of the sensitive issues arising from the example mentioned, namely:

– if by raising the main sentence by 2 years, the limits provided by the law still apply (1)?!

– whether the application of the bonus in the manner outlined above represents or not a violation of the principle of *non reformatio pejus* (2)?!

– if this infringement can be analyzed by way of appeal (3) and, if so, at what stage of the appeal should the check be carried out (4)?!

– how can a unitary interpretation of the incidental legal provisions can be ensured (5)?!

1. By reference to the concrete data of the particular case in question, I consider that by increasing by two years one of the constituent punishments, the appeal court has taken it beyond the maximum prescribed by the law, 6 years and 3 months imprisonment.

The argument for making the *"... the cause of worsening the criminal responsibility of the crime contest",* used by the court of appeal in motivation, is an alien one. The legal

[1] as this increase is not mentioned in the contents of the minute, although it should have been, it can be considered that it was not the object of the initial deliberations of the appeal court.

regime of the offense contest is expressly regulated in the disputes by art. 33-36 of the previous CC (hereafter *PCC*). The effect of its detention on the legal situation of the defendant is that provided by art. 34 parag. 1 letter b) PCC, according to which what increases is the result of the crime contest, not the component punishment that comes into its content.

As such, the contest does not behave as an aggravating circumstance that affects one of the offenses, but as one that reflects on the resulting punishment. The will of the court of appeal was, however, to only increase one of the punishments, as it results from the textual expression mentioned above.

Another argument in this respect is that if the will of the court was to apply a merger increase, even in this flawed manner, it would have assumed that both punishments had been increased, not just one of them, which did not happen.

However, the defining definition of the court's will to increase the punishment and not the application of any increase of merger, is based on the analysis of the situation of co-defendant M.R.N., judged for the same facts and under the same legal framing. Thus, if it were really aimed at applying a 2 year merger increase according to art. 34 parag. 1 letter b) PCC, the court should have found that in fact the more favorable criminal law applicable to him was the new law, the mandatory increase provided by him being less than the voluntary increase set by the court: [6 years and 3 months + (1/3 x 2 years and 6 months)] = 7 years and 1 month, which is obviously lower than that actually applied, 8 years and 3 months.

Concluding, it is obvious that the court intended to increase one of the punishments and not to apply an increase of the merger. As such, the special limits of punishment, as set out in the substantive rules governing it (legal classification, attempt, special causes of limitation, attenuating circumstances), in which the appeal in cassation based on the provisions of art. 438 parag. 1 point 12 of the Code of Criminal Procedure (hereinafter referred to as the *CCP*) would be admissible.

2. The reason for the regulation of the *non reformatio pejus* principle in the provisions of art. 418 CCP concerns the very essence of the existence of remedies, the need to reform the judgment at the request of the dissatisfied and at the same time entitled person. It is precisely for this reason that the legislature has set up numerous limitations in the exercise of appeals, without, however, providing for the possibility of *ex-officio* control in all aspects of the case.

These limitations include those provided by the provisions of art. 417 parag. 1 CCP, according to which the court of appeal will only judge the person who has declared and referred to the appeal and only in relation to the caller's quality. In fact, the above-mentioned regulations are nothing more than expressions and extensions of the provisions of the CCP's general part concerning the holders of criminal proceedings and the limits of their referral. Through these, the legislator understood to express it’s view on the national criminal law system, limiting the steps that a procedural subject can exercise in relation to his or her own justified interest.

Thus, the prosecutor, the injured party, the civil party, and sometimes the civilly responsible party, in their capacity as a holder or protected by criminal proceedings, are the only ones that can trigger and uphold the main action, and the defendant is the only one to whom it may be opposed. Since the court can not justify its own similar interest,

the court can not be self-conscientious and can not dispose of the applicant's procedural interest in the case, since that prohibition is moreover an express manifestation of the principle of the separation of judicial functions, according to which the role of the court is more of a referee, not of a player.

In addition, the principle of non reformation in peius defeats even the principle of legality and of truth, constituting a derogation from them[2].

Reporting these theoretical considerations to the data of the case, I appreciate that, by not prosecuting the civil prosecutor or the civil part of his or her own appeals, there was no triggering of the total devolution in favor of the appeal court, this devolution summing up to be a partial one – in relation to the defendant's appeal and procedural interest.

As such, it is more than obvious that we are in the presence of an aggravation of the legal situation in the defendant's own remedy, contrary to the provisions of art. 418 parag. 1 CCP, worsening that occurred in three distinct ways:

a) first of all, in that of by not being invested with a complaint from a procedural subject that could justify such an interest, the appeal court applied a two-year prison increase.

The prosecutor and the civil party, the only ones entitled under the law, were satisfied with the punishment that was imposed on the defendant (this being only 6 months below the maximum prescribed by the law), for which they understood not to use their procedural prerogatives reforming the judgment on this issue.

As such, any derogation from the will of these procedural subjects, other than any of those expressly permitted by the law[3], insofar as it has consequences to the detriment of the one who has triggered the reforming path, is *per se* a violation of the *non reformatio in pejus* principle.

In this respect, both the doctrine of the previous regulation[4] and the current law[5], as well as the consolidated case law under the previous regulation[6], which remains valid under the current one, also stand on the matter under discussion without interfering with substantive changes.

b) secondly, the aggravation of the situation in his own appeal was manifested also by the fact that the algorithm for calculating/individualizing the punishments, an algorithm established by the court of first instance and not disputed by the interested trial subjects, the only ones having of procedural vocation in this respect.

Thus, although the punishment applied by the court of the first instance for the offense provided by art. 25 referring to art. 20 referring to art. 174-175 letter a) of the CC was 12 years imprisonment, thus oriented to the maximum, however, it is not confused with it (being less than 6 months than the specially applicable maximum).

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[2] Dongoroz, V. (1976). *Explicații teoretice ale Codului de procedură penală român. Partea specială.* Editura Academiei, p. 228.

[3] For example, the statute on complementary issues according to art 422 CCP, which implies a determination of legality that exceeds the will or interest of the procedural subject of the notification.

[4] Mera, L., Rog, L., Savonea, L., Budăi, R., (2008). Codul de procedură penală adnotat. Editura C.H. Beck, p. 1064.

[5] Tudor, G. în Volonciu, N. și colaboratorii (2017). Codul de procedură penală comentat, ediția a 3-a, revizuită și adăugită. Editura Hamangiu, p. 1181.

[6] Curtea de Apel Ploiești, Secția Penală, Decizia 445/2005, unpublished.

However, although it had not been invested in this way and therefore did not open the legal process to order such a measure, the court of appeal re-individualized the punishment, applying the very new special maximum, as it resulted from the efficiency of the provisions of art. 19 of Law 682/2002.

The argument used in applying this mechanism is an artificial one. It is irrelevant that the penalty as a whole has been reduced, as this reduction was a legal imperative, not a faculty of the appeal court.

By doing an imaginative exercise, we can see that if the court of first instance had itself retained the applicability of the cause of reduction of the punishment limits provided by art. 19 of Law 682/2002 and would have delivered its solution in relation to the new special maximum result (6 years and 3 months), using the same algorithm, would have reached a six-year penalty, not the special maximum but towards it.

In this situation we ask rhetorically, could the court for judicial review, invested only with the defendant's appeal, increase the punishment applied by the first instance?! The answer is obviously negative because it implies a clear extension of the appeal to the detriment of its holder.

As a result, the calculation algorithm established by the court of first instance[7] has been definatly won to the case, by failing to appeal from the owners interested in increasing the penalty. The court of appeal could only make a legal re-individualization of the punishment, in relation to its new special limits, not a judicial one, of oscillation between these new limits. The fullness of jurisdiction from the appeal court was limited, and it did not work on this component of the court's substantive solution.

c) thirdly, the application of the special confiscation measure directly în the appeal may also be circumscribed to an aggravation of its own legal situation. While admitting the impossibility of interfering with the cassation appeal on this component[8], we will not develop it on the path of this case study.

3. The tighter legal issue could however be given by the possibility of analyzing violations of the principle of *non reformatio pejus* on the cassation appeal. This issue derives from the way of regulating the cassation case provided by the provisions of art. 438 parag. 1 point 12 CCP, respectively if the phrase *"... limits other than those prescribed by law"* refers only to the substantive or also the procedural dimension of the notion. In other words, the question is whether only the substantive law can set limits on punishment, or that these limits can be governed by procedural rules as well.

The relevant doctrinal studies on the subject matter[9] have been reluctant to deal with this issue in some way, and the case-law developed in relation to the new configuration of this extraordinary remedy is not applicable to the present case.

In my opinion, the above-mentioned phrase refers to the limits of punishment established, including through procedural law, in the light of the following arguments:

[7] The attenuating circumstances that led the judge not to apply the special rule applicable at that time.
[8] Since the precautionary measures can not circumvent the notion of "punishment" contained in the provisions of art. 438 par. 1 point 12 CCP.
[9] Lefterache, L. (2017). Interpretarea noţiunilor de faptă care nu este prevăzută de legea penală şi de pedeapsă în alte limite decât cele prevăzute de lege, în calea extraordinară de atac a recursului în casaţie. Caiete de Drept Penal nr. 3/2017.

a) this results in a systematic interpretation, following the use of the *ubi lex non distingvit nec no distingvere debemus* reasoning. If the legislature had opted for the admissibility of the cassation appeal only in the case of breaching the penalty limits set by the substantive rules, it could easily had statute so[10], but chose not to. As such, the rule of not agravating the legal situation in its own remedy, provided by law (be it a procedural one), establishes even such a limitation of punishment.

b) irrespective of the fact that it is included in the body of a procedural norm, it has a genuine substantive character, affecting some of the fundamental pillars of this system itself – criminal liability/punishment;

c) according to the provisions of art. 433 CCP, the appeal in cassation is an extraordinary way of appeal by which the conformity of final judgments with the applicable rules of law is examined, and the legislator also makes no distinction as to whether they are rules of procedural rank (such as the case in point 1 of art. 438 CCP) or of substantial rank (such as the cases in points 7, 8 or 11 of art. 438 parag. 1 CCP);

d) since the alleged violation occurred in the only ordinary appeal, its failure to remedy it by the way of the appeal in cassation is equivalent to the denial of the right to an effective remedy, guaranteed by the art. 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the *Convention*). As such, it is difficult to accept that a contrary argument can withstand a conventional test. In this line of ideas, an interpretation of the provisions of art. 438 parag. 1 point 12 of the CCP in the sense that it refers to limits of punishment drafted exclusively by substantive rules of law, would have pronounced valences of unconstitutionality, by reference to disputes. art. 20 parag. 2, art. 21 parag. 1 and 2, art. 129 of the Constitution.

4. The fourth law issue that may be of interest is given by the procedural stage of the cassation appeal in which the *non reformatio pejus* principle is to be analyzed.

The legal norm contained in the provisions of art. 440 parag. 2 CCP regulates the legal solutions that can be taken at the stage of the admissibility of the appeal in cassation in principle, a stage in which certain conditions of procedure regarding the exercise of this extraordinary appeal are examined, namely:

– the delay in demand (compliance with the deadline provided by art. 435 CCP),

– the reclassification of the rectified decision between those appealing in this way (from those provided by art. 434 CCP),

– the procedural vocation to appeal [in accordance with the provisions of art. 436 (1) and (6) of the CCP],

– fulfillment of the formal requirements of the petition (within the meaning of art. 437 CCP);

However, the provisions of art. 440 parag. 2 CCP confers to the court/panel filter including the attribute of checking the compatibility of the cassation appeal with the provisions of art. 438 CCP, the latter regulating the cases in which this appeal can be exercised.

[10] For example, by simply reconfiguring the phrase in the sense of *"... other limits than those provided by criminal law;"*.

The jurisprudence of the High Court of Cassation and Justice (hereinafter *HCCJ*) seems to favor such an interpretation[11], and it is assumed that at the admissibility stage, in principle, *"only formal circumscription"* of the grounds contained in the application can be censored, to the case of cassation appeal invoked.

As such, the panel may also carry out a check on the classification of the grounds stated in the cassation appeal on one of the assumptions in art. 438 parag. 1 CCP, which, in fact, equates to a real test of solidity. This is because the law does not provide for predetermined limits of this examination, which implies that the filtering court may also examine the substantive non/incidence of any of the cassation cases, which is, în fact, the substance of this appeal.

The criminal procedural law does not make the proper distinction, thus not presenting several types of examinations on the merits of the cassation appeal, namely some formal and some substantive ones, for which the norm contained in the provisions of art. 440 parag. 2 CCP gains unpredictable valences, and it is not clear what is being considered in each of the stages of the cassation appeal. In other words, if the formal circumscription of one of the grounds of appeal in cassation equates to substantive admissibility, but may still be censored at the admissibility stage in principle, what is the meaning of the regulation in art. 441-451 CCP of the substantive proceedings of the appeal in the cassation?!

Moreover, this verification is carried out, as appropriate to art. 440 parag. 1 CCP in the council chamber, without the parties being summoned and without the prosecutor's participation, in the absence of two of the fundamental guarantees of fairness of the proceedings (publicity and contradictory), and the decision so pronounced is final.

However, the considerations regarding the importance of the guarantees of contradictory and publicity have already been extensively developed in the jurisprudence of the Romanian Constitutional Court (hereinafter *RCC*), both in other judicial proceedings[12], and in the extraordinary ways of appeal[13], for which, for reasons of concision, we will not resume them again.

The issues referred to above have already been the subject of a constitutional review, the RCC being already pronounced by Decision 591/01.10.2015 on the non-compliance of the provisions in force at that time[14], with the fundamental law.

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[11] Criminal Decision 415/RC of 21 November 2018, delivered in case file 7637/3/2015, unpublished. In its recitals, reference is also made to other cases in which the court censured the formality of circumscribing a ground of appeal in cassation, at the admissibility in principle stage, also indicating Conclusion no. 13/RC of 20.01.2016, case file 2106/246/2014, Conclusion no. 76/RC from 09.03.2016, case file 9315/121/2012, Conclusion no. 92/RC from 01.03.2017, case file 3750/104/2013, Conclusion no. 103/RC from 30.03.2016, case file 1044/273/2014, Conclusion no. 80/RC of 14.03.2018, case file 2083/250/2016; By checking the HCCJ portal, however, we have found that neither these decisions are published.

[12] RCC Decision 599/2014, RCC Decision 641/2014, RCC Decision 663/2014, etc.

[13] RCC Decision of 14.07.2015 regarding the admissibility in principle of the appeal for annulment, RCC Decision 506/2015 on the examination of the admissibility in principle of the application for review.

[14] *(1) The admissibility of the appeal in cassation shall be examined in the council chamber by a judge consisting of a judge, after the submission of the report of the assistant magistrate and when the communication procedure is legally fulfilled.*
(2) If the petition for cassation appeal is not made within the time limit prescribed by the law or if the provisions of art. 434, art. 436 par. (1), (2) and (6), art. 437 and 438 or if the application is manifestly unfounded, the court shall reject, by final decision, the appeal in cassation.

Thus, in paragraphs 18-22 of the above-mentioned decision, the RCC ruled on the necessity of the prosecutor's and the parties' participation in the stage of admissibility in principle of the appeal for annulment or review, considering that the rules in force at that time concerning the admissibility in principle of the appeal the cassation guaranteed these components of the fairness of the proceedings, and that the contradictory interpretations given by the HCCJ are wrong, but at the same time they can not be censored by the constitutional review (parag. 23).

The RCC also shows that, in the case of a purely legal and formal matter, the admissibility of the appeal in cassation is not necessarily subject to the guarantees of the prosecutor's participation and the parties' summoning, unless at this stage will also conduct an examination of the substance of the appeal in cassation (parag. 28-29).

Following this case-law, the legislator tried to reconcile these legal provisions with the reasons expressed by the RCC, but the result was an absolutely disastrous one.

Thus, by the provisions of art. I point 17 of the Government Emergency Ordinance (hereinafter *O.U.G.*) no. 82/2014 were introduced express provisions in the art. 440 parag. 1 CCP prohibiting the participation of the prosecutor and quoting the parties to the examination of the admissibility in principle of the appeal in cassation, and by the provisions of art. I point 6 of O.U.G. 70/2016 the content of art. 440 parag. 2 CCP was also modified by removing the phrase *"if the application is manifestly unfounded"*. However, the reference to compliance with the provisions of art. 438 CCP was preserved.

As such, all the substance of the findings and arguments from the RCC was ineffected by the will of the delegated legislator to grant them, reversing the issue in its previous situation.

Therefore, finding that there is a relative sedimentation of judicial practice in the sense of permissiveness of such substantive examination at the stage of admissibility in principle of appeal in cassation, I appreciate that the defect of unconstitutionality is as present as possible, meaning that it must be established and sanctioned, again, through the specific instruments of this type of jurisdiction.

5. Lastly, a last issue of interest concerns the way to ensure a unitary interpretation of the possibility of invoking the principle of *non reformatio in pejus* through the cassation appeal, in which I consider that it would be necessary to refer the HCCJ for a preliminary ruling for the principle of separation of the questions of law consisting in whether, in the interpretation of the provisions of art. 438 parag. 1 point 12 CCP, the phrase *"... limits other than those stipulated by the law"* refers only to the limits established by the substantive rules of law or those established by procedural rules (with specific reference to the provisions of art. 418 parag. 1 CCP).

However, for this matter, it is necessary to prioritize another legal issue, as whether the court dealing with an appeal in cassation may or may not invest the panel for rulling on issues of law in criminal matters.

I do not appreciate the fact that there is any real impediment to this, but only a formal one, namely that given by the interpretation of the phrase *"full of judgment ... invested with the solution of the case as a last resort"* included in the provisions of art. 475 CCP if this would mean that it is exclusively one of the ordinary ways of attack.

Such an interpretation would be manifestly flawed on the basis of at least two considerations: firstly, as it could only intervene in an appeal, the violation of the *non*

reformatio in pejus principle would remain unanswered, although it is a major deficiency of the judgment so pronounced. The HCCJ (invested with a cassation appeal) behaves in this case just as a court of last resort on the component of the appeal court's solution on the legality of the sentence.

Secondly, the text contained in the provisions of art. 475 CCP refers to issues of law on the clarification of which the substance of the case depends, which arises during the trial. The notion of "judgment" is that given by the title of CCP Title III, which includes several subdivisions organized on chapters, including Chapter V related to the extraordinary ways of attack, its second section being dedicated to cassation appeal.

Therefore, following the filiation of the latter institution, I consider that it is part of the generic category of "judgments", which is why it circumscribes the hypotheses in which the court that solves it can request the clarification of certain matters of law on which the substance of the case depends.

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The legal regime of cash-pooling operations

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Abstract

The phenomenon of globalization does not exclusively concern the commercial component of the activity of a/a company, or groups of companies, but also the financial activities that are beginning to expand and diversify more and more, especially through cash-pooling operations. Thus, in view of the precarious economic framework manifested on a growing scale, one of the financing solutions for companies in groups that may have difficulties in lending, is the money loan contract, in the context of the concept of cash pooling.

Therefore, in the present article we intend to explain the significance of the notion of cash-pooling, its implications and particularities, so that in the end we can understand the legal regime, the limits and the purpose of this phenomenon. As such operations have not been promoted, as they are not often used in practice, we emphasize that this financial product is very useful, modern and complex, and one must be avoided due to the lack of expressive regulation, or the lack of knowledge of the implementation mechanism.

Moreover, the legal regime applicable to cash-pooling operations is that of the money loan agreement concluded between legal persons, regulated according to the provisions of the Civil Code, Law 31/1990- on companies and respecting the norms of Law 656/2002- for the prevention and sanctioning of money laundering.

Keywords: cash-pooling, capital markets, cash management, loan agreement money, contracts.

1 General considerations

1.1 *The importance of approaching the theme*

Is that the main objective of the groups cash is to optimize and use the surplus of funds of all companies in a group, to reduce external debt and increase liquidity available. In addition, during the cash-pooling operations significant benefits can be obtained by the

participants in this operation, such as advantageous interests, centralized management of financial resources, as well as the access of all companies to the group's liquidities.

An additional argument on the importance of operations of cash pooling is that, on the one hand it can reduce the group's need for lending from outside sources, but more important is that if a company is not eligible for direct lending by an external financial institution, it can attract funds from within the group through cash-pooling, where the parent company can grant a loan from its own funds, or even come from an external lending.

For all these arguments, but also for the existence of the structures of the type of cash groups in the life of any group of companies, having sufficient legal implications, it is important to summarize the operating mechanism of cash-pooling and to justify its classification and legality, legal and fiscal, in the category of money loan agreements concluded between legal entities.

1.2 *The concept of cash-pooling*

It represents a structure through which the centralized management of the liquidities of a group of companies is realized, consisting of the use of the financial resources available of some companies to cover the necessary financial resources of other companies of the same group, being a way to reduce the costs related to an eventuality financing from external sources (*[1] Chicu, C. (2009)*, Introduction to Cash Pooling*, Bank Watch Magazine, no. 7*). In other words, cash pooling represents a loan of money between affiliated companies, realized indirectly through a financial company that operates the accounts of the companies, being governed by the rules of the Civil Code according to the provisions of articles 2158 and following. and of Law no. 31/1990, modified and updated, regarding the companies.

We consider it important to delimit the notion of cash pooling, within the meaning of the money loan agreement between companies, by the concept of credit agreement. We will analyze, briefly, the linguistic definition of the two notions, respectively: "loan, sn, (Offering someone or) taking from someone for a certain period of time a good to be returned later; (Object or) amount of money that (is given to someone or) is taken from someone for a certain period of time, to be returned later" (*[10] Romanian Academy – Institute of Linguistics "Iorgu Iordan" (2009)*, Explanatory Dictionary of the Romanian language, *3rd edition, Universe Encyclopedic Publishing House*) and "credit, sn, (economic) monetary relationship which is established between a natural or legal person (creditor), who gives a loan of money or who sells goods or services on debt, and another natural or legal person (debtor), who receives the loan or buys on debt; loan granted (with a repayable title and usually conditional on the payment of an interest)" (*[10] Romanian Academy – Institute of Linguistics "Iorgu Iordan" (2009), Explanatory Dictionary of the Romanian Language, ed. III, Encyclopedic Universe Publishing House*). Therefore, even without defining the two terms legally, we can observe significant differences between the two notions. On the one hand, the credit implies a quality of the parties (lender and debtor), while the loan does not condition it even more, although both the loan and the credit are repayable, only the credit carries in most cases interest.

1.3 *The parts of the cash-pooling operation*

As can be seen from the definition of the notion of cash pooling, participants in this cash pooling structure can be:

1. The pool leader, generally represented by the parent company, or another company in the group, responsible for these operations and who manages the main account.

2. The participants, represented by all the other companies that are members of the group, whether or not their headquarters are located in the same state.

3. The bank, where the participants opened the accounts and through which they operate the cash pooling.

2 Categories of cash pooling. Advantages and disadvantages

The structures of cash groups can be meeting in different forms, depending on the complexity and particularities, we distinguish between:

– Cash pooling concentration (real) – method that involves the physical transfer between the participants' accounts, in order to compensate for a negative balance, a transfer that is made through the main account, where credit balances are to be transferred to debtor balances. As a result of these operations, through settlement, the balances of all participating companies become zero, the deficit or surplus of liquidity being found exclusively in the main account (*The main account reflects the total of the credit balances from which the total of the debtor balances was deducted. Thus, the amount in the parent account will always be higher than the amount in the account of each participant*). This kind of activity erases several intra-group operations (deposits and loans), in the ratio of which some participants receive interest and others pay interest.

At the end of the settlement operations, we can talk about only two situations of the respective main account, if there is a surplus of liquidity – these will turn into a deposit at the bank where the cash-pooling takes place, and if there is a deficit of liquidity-pool the leader will need to access a bank loan to cover it.

– Notional cash pooling (notional) – represents the simplified method of real cash pooling, due to the fact that, physically, the cash transfer one more takes place, the accumulation of balances being realized virtually by the pool-leader. Settlements do not take place anymore, which means that the balances of the participants one reaches zero, being important only the situation of the main balance as a result of the calculations of the pool-leader, finally reaching one of the two situations presented above.

– Cash-pooling with foreign exchange – respectively, the automatic conversion into a single currency, the balances of the accounts in different currencies being transformed into the currency that constitutes the basis of interest calculation.

Benefits. Cash groupings have as a first benefit a lower degree of external debt, which implies more favorable rates of financing interest, which improves the economic position of the group, to which additional interest income is added, through the amounts placed by pool leader in the bank. On the other hand, the centralized management of the group's resources offers all affiliated companies access to liquidity, and the centralization of financial information also gives transparency regarding the control of resources.

Moreover, affiliated entities that cannot be eligible for a loan or loan from external sources, have the possibility to access the group's resources, under easier conditions. Thus cash-pooling simply becomes a loan, where the source of financing is internal to the group, being represented by a company and not by a financial institution.

Disadvantages. The main disadvantages of this method stem from the fiscal implications it implies. Thus, the larger the geographical area of the participating countries, the higher the costs of the different tax systems, and the legislation in the field of cash pooling in each country may represent a barrier to the development of these structures. Thus, the transfer price of intra-group transactions must be at the actual market value, and a prior methodology also involves the costs of specialized consulting services. For all these reasons, it is imperative to analyze the costs and risks of cash pooling, in relation to the benefits generated by the subsequent implementation.

3 Fiscal implications

The fiscal factors and implications that must be taken into account before making the decision to set up a cash pool are valid and applicable to any group of companies. Specifically, they are represented by withholding taxes, transfer prices, corporate income tax, VAT, stamp fees and/or reporting obligations applicable in some states and even, in the opinion of the tax authorities regarding such activities.

The withholding tax refers to the income obtained in a state by a non-resident, and as regards cash-pooling, it applies to the interest obtained by participants in the states where they are not residents. Here, we can apply the provisions of conventions/directives on avoiding double taxation, in order to reduce or even eliminate withholding taxes.

Transfer pricing, while respecting the principle of market value, are represented mainly by interest rate first and you/paid by participants, remuneration pool leader, documentation, provided bank guarantees etc.

The interest rate. The first case is one in which a participant receives a sum of money from his/her principal account to cover his/her deficit (loan access), the interest rate paid by the participant to the pool leader being comparable to the interest rate that the same participant could have to obtain it by borrowing directly from the bank. However, for a more objective and conclusive comparative analysis, we must take into account the factors mentioned in the Guidelines on transfer prices issued by the Organization for Economic Cooperation and Development (*[4] OECD Guidelines*, page 43).

Another method of determining the interest rate at the market value is the credit rating analysis, regarding the assessment of the credit risk of those who apply for loans and who will pay interest based on the degree of risk. The data analyzed in this case are personal data concerning the parties, but also factors such as the duration of the loan, the political risk, etc.

However, there are also internal benchmarks of comparison such as, the interest rate received/paid by the pool leader from/to the bank. For example, if we determine the interest rate received by a participant, by virtue of the interest received/paid by the pool leader from/to the bank, its value should be the same for all cash pooling participants. The only variable that can influence the comparison in these cases is the risk, because depending on the entity that assumes the interest rate level, it may differ substantially.

The services provided by the pool leader require a remuneration from the participants. In order to determine the market price of the services provided, we must distinguish between the two types of functional profiles of the pool leader:

– service provider, typology according to which the pool leader performs only routine functions and for which he remuneration will be established by reference to the price of such services paid between non-affiliated companies, by reference to the price of the services that the pool leader has it also performs against third parties or even through the cost plus method;

– of the entrepreneur, profile in which the pool leader performs not only routine functions, but also risk-taking or value-added creation, in which case the remuneration will be determined by the method of price comparison or that of profit sharing.

The documentation in the case of cash-pooling includes comparability studies, functional analyzes, contracts regarding intra-group transactions, etc., and involves different costs in each state.

In case of financing some activities within the cash pooling, the guarantees requested by the bank are granted by the parent company. Thus, as we have explained before, some companies in the group, participants of these operations, gain from the solvency of the parent company, which meets the conditions of an external credit.

Income taxes generated some income (interest, warranties etc.) and expenses (services of pool leader, interest) is done according to the tax law is in each country. Thus, one of the problems encountered is "the deductibility of the expenses, which being highly specialized, can generate situations in which different operations performed for the benefit of the participants are considered to be similar or identical" (*[11] Case study*, Cash pooling – advantages and disadvantages, June 23, 2014, www.transferpricing.ro). Thus, if the operations involve the contracting of different types of services that can be confused, the problem is posed of duplicating them and, therefore, the classification of the expenses in the category of the non-deductible ones.

Another situation in the case of the corporate tax is the degree of indebtedness, against which some states have stipulated in the legislation that if they exceed the indebtedness limit, not all the interest expenses are deductible, which has as a consequence the increase of the taxable base.

Value added tax is one of the additional expenses that cash groups can generate, as a result of the different laws specific to each state.

Moreover, all of tax perspective, in the context of the legally cash pooling is a loan contract money between personnel of our legal regulation should be considered and included in Article 11, para. (1) Fiscal code, according to which the authorities may not take into account a non-economic transaction, and may re-frame the operation to reflect the economic content of the activity. At the same time, considering the same article, the fiscal body must justify its decision of taxation issued and justify it with all the means of proof that it considered. However, even so, we consider it an abuse, because, as long as the operation is lawful and not prohibited by law, the re-framing or disregard of such operations is a limitation of the parties' freedom of will, a limitation of rights and a disregard of the civil law, which allows such operations.

4 Conclusions

In conclusion, in the context of a precarious economy at national level, the needs of companies consist in focusing on the level of liquidity, efficient intra-group financing, fast and efficient debt collection, retention of the availability in companies and even, the sale of debt. Thus, the solutions in turbulent times have proven to be cash pooling, debt securitization, debt assignment, and even innovation contracts (*[3] Oanea, N.*, Trends in efficient business structuring, *www.business-review.eu*).

We agree with the opinion already expressed that "operations carried out within a cash pooling activity generate a series of intra-group transactions whose transfer prices must respect the principle of market value and be documented. At the same time, in the process of implementing a cash pooling structure, consideration should be given to the issue of transfer pricing and the impact of the other tax provisions specific to each country to which the participating companies belong, such as the provisions regarding the tax on profit, the rules regarding the degree of indebtedness, withholding tax, value added tax and reporting obligations" (*[2] Luca, A., Hondru, A.*, Cash pooling structures and transfer prices, *www.transferpricing.ro*).

In our opinion, the most important and impactful legal aspect in question is the fact that the cash-pooling operations, although based on a lending activity, are totally distinct from the bank or financial non-banking credits, having a specific and different legal regime.

Moreover, an important clarification is that the cash-pooling operations are, in fact, money loan agreements concluded between legal entities, regulated according to the provisions of the Civil Code, Law 31/1990- on companies and complying with the norms of Law 656/2002- for the prevention and sanctioning of money laundering, legal documents, allowed by the legislation in force, but little used in the practice of companies as a result of an interpretable and insufficient regulation. Terms of the National Bank expressed that these operations do not fall either under Ordinance 28/2006, thus not lending business professionally. However, on the other hand, for cash pooling activities it is sometimes necessary to register (when the operation is not occasional and involves repeatability) and authorization in the object of activity of the CAEN 6492 code – corresponding to the lending activities and from the fiscal perspective this structure involves two operations (granting and borrowing), which clearly places cash pooling in the area of pure loans between two or more companies. Therefore, according to the Civil Code, respectively the provisions of art. 2158 paragraph (2), when a person grants a loan without doing it professionally, the legal provisions regarding banking or non-bank credit institutions are not applicable. Thus, if the loan of money granted between entities has an occasional character, the operation is allowed within the limits of the established ceilings and in compliance with the legal conditions.

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Domiciliary arrest – aspects of judicial practice

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Abstract

The study examines the issue of house arrest, from the point of view of the criminal law in force, as well as the relevant case law of the European Court of Human Rights, namely the problems encountered in the judicial practice, regarding the execution of this preventive measure in the real estate where the defendant lives and the permission to leave home. The study aims to analyze the institution in order to facilitate understanding and deepening it, as well as to support any necessary legislative changes.

Keywords: Preventive measures, domiciliary arrest, real estate where he lives, obligations imposed on the defendant

1 Introductory remarks

Until the date of the admission of the customs Code of Penal Procedure, through Law no. 135/2010, which was published in the Official Gazette of Romania, Part I, nr. 486/15 July 2010 and its implementation since 2014 in the legal system of our country, the preventive measures regulated by the law were the following: retention, the obligation not to leave locality, the obligation not to leave the country and the preventive arrest.

In the new Penal Procedure Code a number of new institutions have been introduced, among them the the measure of domiciliary arrest will be analyzed.

As is apparent from the provisions of Art. 202 al. 4 of the Penal Procedure Code, at present preventive measures are: retention; judicial control; judicial control on bail, **domiciliary arrest**; preventive arrest ".

The manner in which preventive measures are generally ordered and in particular the measure of home arrest, and the maintenance thereof, must be done in accordance with the general provisions laid down by the criminal procedural law.

Domestic arrest involves the deprivation of liberty of a person and it is ordered to assess whether it is proportionate to the seriousness of the facts and necessary to achieve the purpose provided by art. 202 par. (1) C.p.p.

With regard to the fact that the introduction of preventive measures prejudices individual freedom, both national and European legislation have introduced a series of "legal safeguards" to prevent abuse and arbitrariness in taking and maintaining them.

Thus, whenever the issue of taking, maintaining, extending or confirming a preventive measure goes beyond the provisions of the Criminal Procedure Code, other provisions applicable in the matter, the provisions of the Constitution of Romania (art. 23) and those of art. 5 on the right to liberty and security in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

There is a fair balance between the defendant's rights and the purpose of the criminal proceedings, in the Romanian criminal procedural law.

Obligations imposed on the defendant ensure that the criminal cases are carried out in an optimal and optimal manner.

2 Settlement of domiciliary arrest

In Title V – Preventive Measures and Other Procedural Measures in the Penal Procedure Code, preventive measures are regulated.

Domiciliary arrest is a new institution regulated in the Code of Criminal Procedure. The regulation of domiciliary arrest was taken from the Italian Code of Criminal Procedure and inspired by the French Code of Criminal Procedure, stating that if the French judge orders a consignment at home or residence, it is compulsorily accompanied by a supervisory electronic system.

According to the provisions of Art. 203 al. (3) C.p.p., "the preventive measures provided for in Art. 202 al. (4) lit. d) (the domiciliary arrest) and e) (preventive arrest) **may be taken into account during the prosecution by the judge of rights and freedoms in the preliminary proceedings by the Preliminary Chamber Judge in the course of the judiciary trial, by the court.** "

It is clear from the above-mentioned provision that the measure of the arrest at home can be taken only against the defendant, meaning the person against whom the act of punishment was imposed in the conditions of art. 82 C.p.p., and not against the suspect.

According to the provisions of art. 220 al. 1 C.p.p.:

"The Preliminary Chamber Judge shall establish a court in whose jurisdiction the prosecution is to be held, the court may order the defendant's domicile at the request of the prosecutor or ex officio."

This text of the law was declared partially unconstitutional on 17.01.2017, by Decision no. 22/2017, regarding the admission of the unconstitutionality exception of the provisions of art. 220 para. 1 C.p.p.

In this respect, the Constitutional Court found that "is unconstitutional the legislative solution regulated by the provisions of art. 220 para. 1, from C.p.p. which allows the house arrest measure, provided that the defendant has previously been retained in custody or at home in the same case, in the absence of new grounds that make his deprivation of liberty necessary. "

The Court retained that *"by varying the rules of home arrest in relation to preventive arrest in the matter of the prohibition of having again a custodial preventive measure against the defendant previously arrested at home or preventively arrested in the same case, no new grounds have arisen that necessitate the deprivation of liberty, the legislator*

has fulfilled its constitutional obligation to regulate the safeguards that must accompany the preventive custodial measures only with regard to the preventive arrest, and not with regard to the arrest at domicile, although the latter, by its nature of a precautionary measure deprived of liberty, must be accompanied by the same safeguards as preventive arrest."

During the criminal prosecution, the measure of domiciliary arrest can be taken for a period of maximum 30 days, according to the provisions of art. 222 C.p.p., and prolonged only if the reasons for this measure are maintained and only if necessary, each extension not exceeding 30 days.

By Decision no. 361/07.05.2015, published in the Official Gazette no. 419/ 12.06.2015, regarding the objection of unconstitutionality of the provisions of art. 218-222 and art. 241 alin. (11) lit. a) C.p.p., the Constitutional Court states that the rules of the criminal proceedings art. 222 with the title "Durata arestului la domiciliu" in that it does not regulate either the time limits for which it may be ordered and the maximum duration of this measure in the preliminary and trial proceedings at first instance is unconstitutional as long as the judicial bodies can order the measure of domiciliary arrest for an indefinite period of time, as a result of which the exercise of the fundamental rights and freedoms covered by the content of that measure is limited in time. In those circumstances, the Court found that such a restriction is unconstitutional, since it infringes the principle of proportionality by affecting the substance of the fundamental rights in question, and does not prejudge the restriction of their exercise.

As a result of the Decision, by Emergency Ordinance no. 24/2015, published in the Official Gazette, Part I, no. 473/30 June 2015, paragraph 21 was introduced. (12) of art. 222 C.p.p., with the following content: *"In the preliminary and trial proceedings, the measure of house arrest may be ordered for a period not exceeding 30 days".*

Domiciliary arrest may be ordered at the stage of criminal prosecution by the judge of rights and freedoms, in the preliminary chamber stage by the judge of the preliminary chamber, and in the course of the trial by the court.

Since domiciliary arrest is a preventive measure of freedom, it can only be taken by the judge. The house arrest measure is ordered by court order.

The conclusion drawn from the above-mentioned text is that the measure of domiciliary arrest can only be taken by the judge, not by the criminal prosecution bodies.

In the doctrine, regarding the preventive measure of domiciliary arrest, it is appreciated that "The measure consists in the obligation imposed on the defendant, for a certain period of time, not to leave the real estate in which he lives, without the permission of the judicial body that has or to which the cause lies, and subject to restrictions set by it. "

In the field of preventive measures, an international document underlying the regulations of European criminal law is the European Convention on Human Rights. In the view of the European Court of Human Rights, the measure of domiciliary arrest is a measure with a sufficient degree of constraint for it to be considered a "deprivation of liberty" within the meaning of Art. 5 of the European Convention on Human Rights.

As regards domiciliary arrest, the Grand Chamber of the European Court of Human Rights (ECHR or the Strasbourg Court) in the Buzadji case against the Republic of Moldova (Application No 23755/07) has unanimously decided that there has been a violation of art. 5 paragr. 3 (Freedom and Security) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention).

Invoking in particular Art. 5 paragr. 3 of the Convention, the applicant complained about the insufficiency of the reasons which led to his arrest. The Strasbourg Court examined two issues in this case, namely: the requirement for national authorities to justify the prolongation of detention (paragraphs 85-102 of the judgment of 5 July 2016) and domiciliary arrest (paragraphs 103-110 of the Judgment of 5 July 2016).

Thus, in the case-law of the Strasbourg Court, the justifications that were considered "relevant" and "sufficient" – in addition to reasonable suspicion – included reasons such as the danger of absconding, the risk of pressure exerted on witnesses, falsification of evidence, collusion risk, relapse risk, risk of public disorder, and the need to protect the detainee.

Similarly, with regard to domiciliary arrest, the Strasbourg Court has confirmed its case-law according to which the house arrest measure is a deprivation of liberty within the meaning of Art. 5 of the Convention.

Under Italian law, a person who is arrested at home is considered to be under preventive custody, even if it is allowed to leave the premises where he lives to go to work (see Mancini v. Italy, cited above). supra, paragraph 17).

The Strasbourg Court expressly reiterated it. 113 of the Judgment of 5 July 2016 (Buzadji case against the Republic of Moldova) that the provisions of Art. Article 5 of the Convention does not regulate the conditions of detention, but states that all the criteria set out in this article refer only to the level of restrictions on freedom of movement and not the differentiation of comfort or the internal regime of places of detention. As a result, the Strasbourg Court applied the same criteria for the entire period of detention, regardless of the place of detention.

The justification given for the provisional detention of the applicant by the Court in Strasbourg considered [parag. 122 of the Judgment of 5 July 2016 (Buzadji case against the Republic of Moldova)] is that "the reasons given by the national courts for ordering and extending the arrest were stereotyped and abstract, as well as contradictory."

3 Taking the domiciliary arrest measure

According to the provisions of Art. 218 C.p.p., the measure of the domiciliary arrest is ordered so that the conditions provided for in Art. 223 and the taking of such preventive measures is necessary and sufficient to achieve one of the aims set out in Art. 202 al. 1 C.p.p.

The manner in which preventive measures are generally ordered and in particular the measure of domiciliary arrest, and the maintenance thereof, must be done in accordance with the general provisions laid down by the criminal procedural law.

The preventive measure of domiciliary arrest can only be ordered against the defendant, therefore, only after the prosecutor has put in motion the criminal case against the suspect.

Disposition of this measure can only be made if the evidence reveals reasonable suspicion that the defendant has committed an offense and one or more of the following situations are met:

– the defendant fled or hid in order to evade the prosecution or trial or took steps on this matter;

– the defendant attempts to influence another participant in committing the offense of which he is accused, a witness, an expert, or to destroy, alter, hide or evade material evidence or cause another person to do so;

– the defendant exerts pressure on the injured person or tries to make a fraudulent deal with him;

– if there is reasonable suspicion that, after the criminal proceedings have been instituted against him, he is preparing a new offense or the defendant intentionally committed a new offense.

According to an opinion expressed in the literature, a negative condition with regard to the house arrest measure is that it can not be ordered with respect to the defendant against whom there is reasonable suspicion that he committed a crime against a family member and against the defendant who has been finally convicted of the crime of escape. In the first case, when there is reasonable suspicion that the defendant has committed an offense against a family member, the legislator has considered protecting the family member because the arrest is being executed in his home with the other family members. At the same time, the legislator has established that domiciliary arrest can not be ordered against a defendant who has been finally convicted of committing the crime of escape, as this measure of domiciliary arrest can not be achieved through permanent supervision, 24 of 24 hours, all the more so as domiciliary arrest is more "an obligation" not to leave the territorial limit of residence and the defendant may violate this obligation.

When taking the preventive measure of domiciliary arrest, it is possible to take into account, besides the concrete gravity of the act and the impact on public order, the stage of criminal investigation and the administration of evidence, the defendant's state of health, the existence of minor persons or serious or potentially fatal maintenance, the nature of the crimes detained, and the fact that the judicial practice outlined in the individualization of preventive measures in similar situations is very diverse.

An especially important aspect to be observed in relation to the institution of domiciliary arrest is that no specific criteria are specified for taking the measure by referring to the provisions of art. 223 C.p.p., concerning pre-trial detention.

We shuffle the opinion of the av. Adrian STAN, and we consider that it is necessary to provide for both own detention and bailiffs separate criteria as in the case of preventive arrest.

The domiciliary arrest measure consists in the obligation that the defendant is required not to leave the real estate where he lives for a specified period without the permission of the judicial body.

Prior authorization may be given by the judicial body which has ordered the measure or, if the case is no longer in place, the case in which the case is pending.

The defendant, during domiciliary arrest, must also comply with the following obligations:

– to appear before the criminal prosecution body, the judge of rights and freedoms, the judge of the preliminary chamber or the court whenever he is called

– not to communicate with the injured person or his/her family members, other participants in the offense, witnesses or experts, as well as other persons established by the judicial body.

The procedural act by which the court decides on requests, proposals, complaints and appeals concerning preventive measures in the course of criminal proceedings, in the preliminary or in the course of the trial, is the reasoned court pronouncement.

If the defendant or the prosecutor is absent from the pronouncement, the court pronouncements shall be communicated to them.

Against the sentences by which the measure of house arrest is ordered, irrespective of the trial stage – criminal prosecution, preliminary chamber proceedings or trial -, appeal can be formulated, the procedural quality of the contestation being recognized by the defendant and the prosecutor.

Thus, the legislator, trying to eliminate existing institutional homogimisms under the 1968 Code of Criminal Procedure, replaced the appeal of the recourse with the litigation.

4 Execution of house arrest

In the chapter "Execution of the preventive measure of domiciliary arrest" of Law no. 254/2013 regarding the execution of sentences and measures of deprivation of liberty ordered by the judicial bodies during the criminal proceedings, it is mentioned the basis of execution of the domiciliary arrest.

Thus, according to the provisions of art. 124 par. (1) C.p.p.:

"Domestic arrest is executed on the basis of the conclusion of the judge of rights and freedoms, the judge of the preliminary chamber or the court, pronounced under the conditions provided by the Criminal Procedure Code".

Paragraph 2 of art. 124 of Law no. 254/2013 provides as follows:

"In the event that, when ordering the house arrest measure, it is established that the defendant should wear an electronic surveillance device, according to art. 221 par. (3) of the Code of Criminal Procedure, the manner of its use, as well as the conditions regarding the transmission, modification and storage of the data obtained through the electronic surveillance shall be established by the regulation for the application of this law ".

At present, although the previous Code of Criminal Procedure and the current Code of Criminal Procedure have been foreseen, in practice the electronic surveillance system is not operational.

The house arrest measure is executed in the property where the defendant resides.

According to the provisions of art. 126 of the Law no. 254/2013 on the execution of sentences and measures deprivation of liberty, by real estate is understood "the dwelling, the room, the dependence, or the place enclosed by them".

According to the provisions of art. 221 par. (1) C.p.p.:

"The domiciliary arrest measure consists in the obligation for the defendant to stay for a fixed period not to leave the real estate where he lives without the permission of the judicial body that has ordered the measure or the cause of the case and subject to restrictions imposed by it".

Domiciliary arrest implies a deprivation of liberty of a special nature, since the person subject to the measure has the freedom of freedom in a certain space **(within the perimeter of the real estate where he lives)**, but inside this space is manifested freely, without restrictions such as detention, so that, although it is forbidden for the accused to leave the home for a limited duration, he remains in the social sphere of the family or his or her relatives. The substance of the house arrest measure is basically the restriction of

the person's rights to move according to his own will, his freedom of movement being limited to the perimeter of the real estate where he lives.

Regarding the facility regulated by art. 221 par. (6) C.p.p. *"leaving the building for work, education or training"* or *"other similar activities or for the purchase of essential means of subsistence, as well as in other well justified situations"* is not an unconditional, mandatory the judge invested with an application based on this law, but is only a possibility that the judge, by analyzing the content of the request, his urgency and purpose, will solve it in the sense of admission or rejection, always having to balance the interest of the good development the criminal process and the purpose of the preventive measure in question.

Although the measure of domiciliary arrest is also a measure of deprivation of liberty, as is the measure of preventive arrest, the distinction between them is given by the severity of coercion, which is greater in the case of the latter.

Given that the measure of preventive arrest is and must remain an exceptional one, the judge may appreciate that the purposes provided by art. 202 C.p.p., including in the normal course of criminal proceedings, can be provided by a less restrictive measure, namely domiciliary arrest.

We are in favor of the view that *"although the legislature included in the category of deprivation of liberty measures (one of the legal consequences being the deduction of its duration during the period of deprivation of liberty imposed on the defendant), it may be appreciated that domiciliary arrest is a close measure non-custodial measures, being in fact a particular form of judicial control, in which the defendant restricts his freedom of movement. "*

The Court of Justice (Fourth Chamber) of 28 July 2016 states that Article 26 (1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States thus as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, is to be interpreted as meaning that "*measures such as nine hours' domiciliary arrest, accompanied by supervision of the person concerned by means of a bracelet the obligation to present themselves daily or several times a week at a police station at fixed hours and the prohibition to request the issue of documents to allow travel abroad are not, the type, duration, effects and modalities of the implementation of all such measures, so compelling that they have a comparable to the one resulting from the imprisonment, and thus be classified as "detention" within the meaning of that provision"* which must, however, be examined by the referring court.

5 Problems encountered in judicial practice

5.1 *The defendant has a domiciliary address but has no living conditions*

A first situation that is important to be considered in the taking of the house arrest measure by the judge of rights and freedoms, the judge of the preliminary chamber or the court is the one in which the defendant has a home address but no living conditions, as is also the case here.

By Criminal Decision no. 436/2018 of 21/12/2018 – Penalty – verification of preventive measures, art. 205 Court of Appeal, pronounced by the Suceava Tribunal – Criminal Section, the subject of the case being the settlement of the complaints formulated by the prosecutor's office and the defendant, the court found that the judge of the fund admitted the application and ordered the replacement of the preventive custody measure with the house arrest measure, which the defendant was to execute at his home address in the town of Siret, str. X, nr. 43, Suceava County.

The defense showed that there are no living conditions in that building, they are not utilities, so the defendant could not live there. Moreover, his family is in Ukraine, so he has an interest in executing house arrest at a home with some human conditions.

The question arises how the domiciliary arrest is being carried out in this situation, given that, as is apparent from the documents and case files, the court of first instance has delivered a "compromise" solution, replacing the preventive arrest with the domiciliary arrest, but this measure, as claimed by the defendant's lawyer, "is not anchored in the materiality of the case".

In support of the settlement of the case, a declaration authenticated by the notary stating that he would take the defendant to execute the domiciliary arrest measure was filed to prove his "domicile", the person being interested in the deprivation of liberty being executed.

In these circumstances, analyzing the legal situation of the defendant in the context of the case, the Suceava Tribunal found that "in order to achieve the purpose of the preventive measures, related to the current stage of the criminal trial, to its evolution so far, to the actual allegations made to the defendant, the inconveniences that such a state entails in the detention environment, and also from the principle of humanism that must govern the execution of preventive measures in criminal matters, no longer deprivation of the defendant's freedom in an environment of state detention, being deemed necessary, sufficient and proportionate to the purpose which is to be achieved by the provision of such a preventive measure and domiciliary arrest. "

Thus, the court, based on art. 206 C.p.p., admitted the complaint brought by the defendant, partly dismantled the contested conviction and, in re-judgment, ordered the alteration of the immovable property to which the defendant was to execute the measure of domiciliary arrest.

5.2 Defendant no longer has the owner's consent to live in the building where the execution of the domiciliary arrest was ordered

In the case analyzed by the Criminal Decision no. 267/13.07.2015 issued by the Constanţa Tribunal, it was noted that the judge from the court of first instance considered the proportionality of the preventive measure, accepted the defendant's request and modified the previously imposed obligation, given that the defendant made a request for the replacement of the place where the deprivation of liberty was actually carried out in relation to the concrete circumstances of the case: the lack of means of subsistence and the refusal of the owner of the property in O city to allow the defendant to live here.

Based on art. 362 par. (1) C.p.p., related to art. 221 par. (1) C.p.p., the court accepted the defendant's request for the replacement of the initially ordered obligations and as such replaced the obligation not to leave the building in O city, established by the conclusion no. 283 from the Chamber of Deputies dated April 19, 2015, pronounced by the Constanţa Court, with the obligation not to leave the building from Lumina commune, the supervision being to be carried out by the body where the defendant resides without legal forms.

5.3 *Changing the place of execution of domiciliary arrest by the court*

In order to give efficiency and substance to the procedural provisions regulating the content of the domiciliary arrest measure, exercising according to art. 3 of the Code of Criminal Procedure the disposition of the person's fundamental rights and freedoms, the judge may order the change of the place of execution of the domiciliary arrest, in exceptional circumstances, independent of the will of the defendant.

By the criminal conviction no. 15 of 20 March 2018 of the Gorj Tribunal was allowed the request made by the defendant G.E.A. and it was ordered to change the place of execution of the arrest at home of the defendant, established by the conclusion no. 13 of March 13, 2018, delivered in File no. 6422/95/2017/a2 of the Gorj Tribunal, from the address in Bumbeşti-Jiu, Gorj county, to the building located in the commune of Brădeşti, Dolj County. At the same time, it has been established that the supervision of the defendant's observance of his obligations during the domiciliary arrest will be exercised by the police body in the district where he lives, respectively the Dolj County Police Inspectorate.

When taking the preventive measure of domiciliary arrest, it is possible to consider, besides the concrete gravity of the act and impact on public order, the stage of criminal investigation and the administration of evidence, the state of health of the defendants, the existence of minor persons or serious diseases or with a fatal maintenance potential, the nature of the detained offense, which, although it may have a high degree of social danger, is not an offense concerning national security, acts of terrorism or offenses of violence (against life, health or bodily integrity, rape or deprivation of liberty) and the fact that the judicial practice outlined in the individualization of preventive measures in similar situations is very diverse.

On 11.06.2014, the proposal of the Prosecutor's Office attached to I.C.C.J. – D.N.A. – S.T. Constanţa regarding the taking of the preventive measure of the arrest at home against the defendant X and the measure of the preventive arrest against the defendant Y for a period of 30 days.

By order dated 10.06.2014 of D.N.A. – S.T. Constanţa ordered the criminal action to be brought against the defendant X in terms of committing trafficking offenses, namely that in September 2012 she claimed and received from witness V the sum of EUR 20,000, making him thinking that she has an influence on the judges of the Criminal Division of the Court of Appeal C and that she can intervene with them in order to determine them to carry out acts that were their job duties or to dispose a solution for the file to be remitted to the General Court, and blackmail.

It was requested that X's deprivation of liberty be made at her domicile, this claim being based, and on the fact that the defendant suffers from several medical conditions requiring specialized medical treatment to be administered daily.

Taking into account the defendant X's claim that in order to perform the medical treatment, she has to travel to three medical units in Bucharest, the judge considered that it is not necessary to order the granting of the defendant's permission to move the building to move any of the medical units mentioned, given that, from the interpretation of the provisions of art. 221 par. (6) of the NCPP, it appears that this permission is granted by the judge of rights and liberties through a subsequent conclusion following a request by the defendant requesting permission to leave the building, provided that a certain program is established of performing this medical treatment.

Defendant X was unable to specify the exact dates when medical treatment had to be made and to which of the three sanitary units, so that the provisions of Art. 221 par. (7) NCPP.

In conclusion, the defendant's follow-up of medical treatment at several hospital units, the court found, does not prevent the taking of the house arrest measure, since it is then possible to make a request for permission to leave the building under the conditions of a certain program of medical treatment, and in urgent cases may leave the building for travel to the hospital, with the subsequent notification of the court.

5.4 *Exit the defendant from home when he is summoned to court*

By the decision no. 6/16.01.2018, issued by the Court of Minors and Family B, it was rejected the ex officio notification of replacing the preventive measure of domiciliary arrest with defendant C with another heavier preventive measure.

In order to pronounce this decision, the court held that the complaint filed by IPJ B – the Criminal Investigation Service regarding the fact that defendant C, without justification, left the building – the dwelling in B, where it is under the measure preventive domiciliary arrest, although he knew that any travel should be announced to the supervisory body and justified, otherwise his behavior could be interpreted as a breach in bad faith of his obligations under the precautionary measure he is under.

Analyzing the documents and the papers, the court found that the conditions laid down by law were not met in order to replace the measure of domiciliary arrest with the measure of preventive arrest.

Also, on January 5, 2018, his removal from the domicile under the preventive measure of the domiciliary arrest was made at the request of the court, being quoted in file no. 17/a6 with the purpose of replacing the preventive measure of domiciliary arrest with the defendant with a heavier preventive measure, C being present in court and heard.

In view of the above, the court rightly considered that the conditions provided by art. 221 paragraph 11 of the CCP, in the sense of ordering the replacement of the domiciliary arrest measure with the preventive arrest and, as a consequence, dismissal of the notification ex officio.

5.5 *Request of the defendant to be allowed to leave the building for employment and subsequently to be present at the workplace*

By concluding no. 582/CO/CP of 04.06.2015, pronounced by the Bucharest Court of Appeal, Criminal Section II, analyzing the complaint declared by the defendant G.A.G. against the conclusion of 26.05.2015 of the preliminary judge of the Bucharest Tribunal pronounced in file no./a1., considered that the defendant's request to allow him/her to leave his/her home in order to travel to the work schedule the employer would impose may fall within the notion of achieving legitimate rights or interests of the defendant, his right to work.

However, the law requires the exact presentation of the places and the program during which the defendant asks to move from home, the request can not be a generic one, without the precise specification of an exact work program in order to assess the number of hours that represent the activities lucrative and travel times to and from work.

The Court considered that this request could be part of the notion of achieving the legitimate rights or interests of the defendant, namely the respect for his right to work. He also indicated exactly the duration of this grant, namely 08.06.2015 between 11:00 and 14:00.

The permission to temporarily leave for a determined period of time the real estate where he lives for the defendant on 08.06.2015 between 11:00 and 14:00 to go to SC Discovery Clinic SRL with headquarters in Olteniţa Road, nr. 38A, sector 4, Bucharest.

The defendant has taken into consideration the provisions of art. 221 par. 11 C.p.p. which stipulate that the violation in bad faith of the obligations imposed on him/her will entail the replacement of the house arrest measure with the preventive arrest.

Regarding the second part of the defendant's request, although the rigors of the law require the exact presentation of the places and the program during which the defendant asks to move from home, the request is generic, there is no work program established precisely in order to assess the number of hours that represent the lucrative activities and the period of travel to and from the service, so that the effective oversight activity assumed by the domiciliary arrest could not be carried out.

As regards the request made by the defendant G.A.G. to allow him to leave the building for employment and subsequently to be present at work, the Court found that he first asks to be allowed to go to a clinic to obtain a medical certificate necessary for employment and then be allowed to do so to move on to the work schedule that your employer will impose.

5.6 *Request of the defendant to be allowed to leave the building for presentation at the workplace*

The request of the defendant to be allowed to leave his home in order to move to the work schedule the employer will impose may fall within the notion of achieving legitimate rights or interests of the defendant, such as respect for his right to work.

However, the law requires the exact presentation of the places and the program during which the defendant asks to move from home, the request can not be a generic

one, without the precise specification of an exact work program in order to assess the number of hours that represent the activities lucrative and travel times to and from work. [Bucharest Court of Appeal, Criminal Section II, Conclusion no. 582/CO/CP dated 04.06.2015, portal.just.ro]

Regarding the assent of leaving home for workplace presentation, we appreciate that the court correctly held that the provision to allow the defendant to perform workplace activities on a daily basis for 12 hours contravenes the provisions of Art. 221 par. 6 C.p.p., but also the essence and purpose of this restrictive preventive measure, emptying it practically of content.

In the appeal filed by the defendant, the contested conviction was abolished and, on the basis of Art. 221 par. (6) The Criminal Procedure Code was approved by the defendant V.P.O.M. to leave home during the preventive measure of arrest at home from 30.10.2015 on Mondays, between 15.00-16.30; Tuesday, between 07.30 and 13.00; Wednesday, between 15:00 and 16:30; Thursday, between 07.30 and 13.00 and Friday, from 15.00 to 16.30, for presentation at DGASPCB's workplace.

The court considered that the conditions provided by art. 221 par. (6) Code of Criminal Procedure, since the carrying on of a gainful activity, more than two months after the ordering of the domiciliary arrest measure, on the basis of and during the contract no./2014 concluded by the accused with DGASPCB is a good reason to lead to a derogation from the execution of the domiciliary arrest measure in order to respect the right to work of the defendant who is subject to this preventive measure in order to obtain the necessary financial resources for subsistence.

Given the personal circumstances of the defendant, the court considered that the temporary derogation from the domiciliary arrest regime (two and a half hours and three and five-and-a-half days respectively) does not, in the specific circumstances of the case, constitute a measure which would deprive of substance the preventive measure depriving of liberty, which will continue to be with the rest of the imposed restrictions. Allowance for temporary exemption from the domicile arrest regime was granted only for the duration of contract no./2014 concluded by the accused with DGASPCB.

In another case, by the conclusion of the hearing of 04.02.2016 pronounced by the Bucharest Court, based on art. 221 par. (6) C. Proc. pen, was rejected the request by the defendant CM to allow the temporary leave of G.'s residence from 8: 30-12: 30, from Monday to Friday every week, in order to serve as a train driver in the city of G, as unfounded.

Correctly, in order to dispose of it, the court found it inappropriate to file the application at the time considered, given that the measure of the domiciliary arrest was taken against the defendant by the closing of the sitting of 17.12.2015 and enforced on December 23, 2015 (the date when the sitting of 17 December 201 ended) was final by the conclusion of the sitting no. 1417/C dated 23.12.2015 issued by the Bucharest Court of Appeal – Criminal Section I, thus as previously noted), and the short time (17 days) spent is insufficient to verify the defendant's conduct and the fulfillment of the prev. by art. 202 C. proc. pen, as well as to convinced that this goal can also be fulfilled by agreeing to leave home every working day to perform lucrative activities.

Against that end, within the legal deadline, the defendant CM appealed, criticizing the illegality and indiscriminateness of the prohibition of the exercise of the right to work,

namely the provision on the rejection of the request for permission to leave the residence, stating that the defendant agrees with the measure of domiciliary arrest.

By analyzing the documents of the case and the disputed conclusion, in relation to the reasons invoked and ex officio, the Court held, in agreement with the court of first instance, that the measure of domiciliary arrest was taken against the defendant by the pronouncement of the sitting from 17.12.2015 and in execution on December 23, 2015, and an application similar to this was filed by the defendant on 8.01.2016, the conclusion of the Court of First Instance by which it was dismissed, remaining final by the conclusion of the Bucharest Court of Appeal dated 14.01.2016.

The Court considered that, since the rejection of the previous application, a short period of time had elapsed, allowing for an analysis of the defendant's compliance with the preventive measure of domiciliary arrest and the repeatability at very short intervals of the applications for modification of the preventive measure, prove that the defendant did not understand the nature and content of the preventive measure.

The Court recalled that, according to Art. 221 par. (1) from C. proc. The of the applications arrest consists in the obligation for the defendant, for a certain period of time, not to leave the real estate in which he resides without the permission of the judicial body that has ordered the measure or the cause of the case and subject to restrictions established by this. Thus, unlike the judicial control or bailiffs, where the prohibition to leave the country or a certain locality, which is a restriction of the exercise of free movement, in case of the domiciliary arrest, the defendant is obliged, during the preventive measures, to be in a designated place.

The house arrest measure has the effect of staying at the personal residence in the presence of his or her own family, and leaving the home of his own home can only be done for his or her appearance before the judicial bodies, and for other reasons only if the judge of rights and the freedoms, the preliminary chamber judge or the court, through the conclusion, allowed this.

The Court has shown that by its conduct, by formulating successive requests to change domiciliary arrest at short intervals, all aimed at giving the possibility of leaving the dwelling daily in a 4-hour period, except for the weekend, the defendant tends to the practical measure of domiciliary arrest is lacking.

In conclusion, in practice the courts face a series of situations in which the judge must analyze in concrete terms and in relation to each case the way in which the obligations imposed as a result of the arrangement of the domiciliary arrest are to be fulfilled.

We reiterate the views expressed so far, as mentioned above, that it is necessary for both domiciliary arrest and judicial review on bail to provide separate criteria for taking action as in the case of preventive arrest.

Also, the content of domiciliary arrest should specifically specify the conditions under which replacement or change of the place of execution of domiciliary arrest and removal of the property, the realization of the defendant's rights or legitimate interests, view different situations arising from practice, as well as interference with individual's individual freedom.

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The surrogate mother and criminal law. Preliminaries

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Abstract

This article aims to promote a new perception regarding the confluence between criminal law and crimes containing a provision that refers to the pregnant woman or the biological mother. We are trying to establish a starting point for future debates on ways and means of criminalizing offenses related to pregnancies and mothers, and on how criminal laws can have a significant impact on discriminatory or problematic situations that are not taken into account at first glance. The ultimate goal of this study is to make an introduction to the problems that a surrogate mother may face within a criminal court and to become a concept – example for later studies in this niche.

Keywords: mother, pregnant woman, pregnancy, birth, surrogate, foetus, criminal law.

1 Introductions

Starting from paragraphs (4) and (7) of article 202 of the Romanian Criminal Code, which concerns the crime of *Foetus harming*, there can be found an unfortunate (although culpable, as it could easily be avoided) choice of words of the legislator within this crime, a terminology that has consequences also on the crimes of *Killing or harming the new-born by the mother* and *Interruption of pregnancy*.

Taking a step further from the problems regarding the incrimination of the *Foetus harming*, *Killing or harming the new-born by the mother* and *Interruption of pregnancy*, that we discussed on another occasion [1], we noticed at the subtlety level that while the word "woman" is used within the rows of the crime of *Interruption of pregnancy*[1], and also within the crime of *Foetus harming*, the word "mother" is used within the crime of *Killing or harming the new-born by mother* and also within a single paragraph of the *Foetus harming*, paragraph (4).

[1] § 79 StGB Tötung eines Kindes bei der Geburt. Eine **Mutter**, die das Kind während der Geburt oder solange sie noch unter der Einwirkung des Geburtsvorgangs steht, tötet, ist mit Freiheitsstrafe von sechs Monaten bis zu fünf Jahren zu bestrafen.

The problem we have raised is not just purely semantic, as it is well known that the rules of criminal law are strictly interpreted [2] and the complications that may arise in the context of a criminal case having its object the crime of either *Foetus harming* or of *Killing or harming the new-born by the mother* can become unbelievable alongside the increased speculation of the criminal norm, considering not only the words chosen by the legislator, but also the grammar chosen by him in formulating the three crimes.

Even though this study came to life from the analysis of the Romanian criminal provisions, it cannot be said that this issue that we have raised in the debate is not useful throughout the European continent. On the contrary, as pregnancy and childbirth are social values that are protected by criminal norms all across Europe in different ways, this analysis should serve as a starting point for a concrete debate on a case-by-case discussion in most European countries.

Despite the fact that the crimes are not exactly the same as in Romania, similar provisions, which refer to mothers, are to be found in most European countries, such as:

– **Austria** ("A mother who kills the child during birth or while still under the influence of birth is to be punished [...]"[2]),

– **Italy** ("The mother who causes the death of her new-born immediately after birth, or of the foetus during childbirth, when the fact is determined by conditions of material and moral abandonment connected to the birth, is punished [...]"[3]),

– **Poland** ("A mother who kills a child during childbirth under the influence of its course, is punished [...]"[4]),

– **Republic of Moldavia** ("The murder of a new-born child committed during birth or immediately after birth by a mother who is in a state of physical or mental disorder, with the diminished judgment, caused by the birth, is punished [...]"[5]),

– **Switzerland** ("The mother who killed her child during childbirth or while still under the influence of the puerperal state will be punished [...]"[6]).

Therefore, any legislation that deals in criminal legal terms in any way with any element of the pregnancy – woman – mother trinomial may inherit the problems presented in this paper for the future.

2 Interpreting the duo "pregnant woman – mother"

From the beginning, it should be noticed how, using two different words, mother and woman, most probably to refer to the same female human being who is or was pregnant,

[2] Art. 578 – Infanticidio in condizioni di abbandono materiale e morale. La **madre** che cagiona la morte del proprio neonato immediatamente dopo il parto, o del feto durante il parto, quando il fatto è determinato da condizioni di abbandono materiale e morale connesse al parto, è punita con la reclusione da quattro a dodici anni.

[3] Art. 149. **Matka**, która zabija dziecko w okresie porodu pod wpływem jego przebiegu, podlega karze pozbawienia wolności od 3 miesięcy do lat 5.

[4] Articolul 147. Pruncuciderea. Omorul copilului nou-născut, săvîrşit în timpul naşterii sau imediat după naştere de către **mama** care se afla într-o stare de tulburare fizică sau psihică, cu diminuarea discernămîntului, cauzată de naştere, se pedepseşte cu închisoare de pînă la 5 ani.

[5] Art. 116 CPS Infanticide. La **mère** qui aura tué son enfant pendant l'accouchement ou alors qu'elle se trouvait encore sous l'influence de l'état puerpéral sera punie d'une peine privative de liberté de trois ans au plus ou d'une peine pécuniaire.

[6] We want to use this term "mother of embryos" for as much distance as possible from the birth.

through a grammatical interpretation of the criminal legislation, interpretation which is primarily concerned with the usual and common understanding of the terms, these two words do not always overlap to designate that female human being.

Therefore, a pregnant woman isn't necessarily the (single) mother of the foetus: the surrogate mother is a woman who accepts to become pregnant, with the objective of giving birth to a child who will be raised by another family or person as their own son. In this case, the embryo, respectively the foetus, which is carried in the womb by the "carrier" (surrogate) mother may be her biological son, or might actually be the beforehand fertilized ovum of an another woman. In this second scenario, the surrogate "mother" has no genetic connection with the child she is bearing, so it can be said that this she is not in fact the foetus' mother, but the simple birth "environment" of the future child. Consequently, the surrogate mother is in fact the pregnant woman, and also no one can deny that the woman who "supplied" the embryo, or the foetus, is not his/her (depending on the foetus' sex) mother. Essentially, the surrogate mother is the pregnant woman, and the mother of the embryos[7] is the mother *per se*. It can therefore be observed how on one hand the surrogate mother would not normally be the mother of the child, but she would always be the pregnant woman, while on the other hand the mother of the embryo, although she is the mother of the child, is not the pregnant woman.

Certainly, grammatical interpretation does not always bring to light the meaning of criminal law [2], because a term used by a legislator can always have more meanings, so other methods of interpretation would also be needed. By logically-systematic interpretation [2] and linking the three crimes between them, we can say that the two words, mother and woman, were chosen intentionally different, to make clear the distinction between mother and woman. Otherwise, if the term "pregnant woman" were to have always been used, a such problem of speculation, of differentiation between mother and woman would not have existed in the first place.

The teleological interpretation [2] would help a lawyer reach the same conclusion: the development and expansion of medical operations involving surrogate mothers was in fact considered by the legislator when defining these criminal norms, so the difference between the mother and the pregnant woman ("gravid" is totally synonymous with any interpretation, but for the lack of consistency it is criticisable the use of this last word in the criminalization of the *Qualified homicide*, different from the incriminations within articles 201 and 202) is as desirable.

It could be hard to believe that this was the intention of the legislator when he drafted the rules of articles 200-202, but in a criminal case, the above arguments can reasonably serve as the basis for, maybe, surprising acquittals (the rules for which a defendant is being taken to trial for example not being applicable). This could be due also to the fact that the criminal legislator in the drafting of the special criminal rules begins with the action (part of the objective component of the incrimination) and not with the active subject – *e.g.* killing, determining or helping, hitting, interrupting, injuring, depriving of liberty, and so on. – as is the case with the crimes in question. Thus, it can be argued that by not using the reflexive[8] pronoun "her", that would grammatically determine the noun, which is in fact the active subject described by the criminal rules in question, the norms of art. 200-202 are applicable or not, as the case may be. This would have major

[7] N.B.: it is a reflexive pronoun in the Romanian grammar.
[8] Extremely theoretical, but practically plausible nevertheless.

consequences in terms of the actual punishment applied and of the incriminating rule under which the punishment is applied.

3 Crime – by – crime analysis

Examining the crime of *Killing or harming the new-born by the mother* is first targeted for our following "reflexive" analysis. We can see how the punishment for killing or harming, in special circumstances, done by the (psychologically disturbed) mother is attenuated.

Choosing words can be extremely important. Thus, in the same case of the surrogate mother, leaving aside for a moment the difference between the pregnant woman and the mother of the child and accepting, for the moment only, that they are synonymous, the non-use of the determined pronoun "her" as in "the pregnant mother/mother who **kills her new-born** child", may lead to the interpretation that the mother who **kills the new-born** can be both the mother of the embryo as well as the surrogate mother, since no distinction is made between the mothers, and *ubi lex non distinguit, nec nos distinguere debemus* (where the law does not distinguish, we do not have to distinguish). Thus, the active subject of the crime contained in the article 200 could also be the mother of the embryos, not just the "mother" who gave birth.

Of course, the first counter argument to this thesis is that the mother who gives birth is required to be in the state of psychological disorder. However, it is not foreseen that the state of psychological disorder must be caused by birth, nor is it foreseen how the disorder should be caused, physically or mentally – it is only provided that the psychological disorder must exist in the person of the mother.

Even if the scholarly and practically it would be accepted that the birth should cause the state of psychological disorder, it can later be argued that since there is no norm conditioning that only the mother who is giving birth shall be the one who may be in the state of psychological disorder due to the birth, then the mother of the embryos may also be in a state of psychological disorder caused by the birth[9]. Although the mother of the embryos is not the one giving birth, but the surrogate mother is the woman who delivers the new-born, it can be imagined that the mother of the embryos may be in a state of psychological disorder. After all, the mother of the embryos, to have her ovum fertilized and then implanted into the uterus of the surrogate mother (the pregnant woman), was required to be subjected to medical hormonal procedures[10] that have the potency of disturbing her psychologically. After the child was born, it can be imagined that she could have gone, simply put, insane, being psychologically disordered, simply because another woman gave birth to her child.

[9] We must take into account the traumas that the mother of the embryos had first of all after the shock given by the news that she cannot bear her own baby in her womb; or the shock that she is going to have during the childbirth, when she realizes that the child is not "hers" entirely, but rather just from a genetic point of view. This fact cannot be overlooked, even though for third parties would matter the person who gives birth, because such circumstances, among many other, certainly warrant the possibility of a major psychological disorder also in the person of the not-pregnant woman (mother of the embryo).

[10] Disorder caused by the fact that, for example, another woman gave birth to her child.

In this way the condition of being a mother is respected – she is the mother of the embryos, the condition of psychological disorder is accomplished as well, and a (doctrinal) requirement is satisfied also: that the disorder is due to childbirth. In this case, the judge would be in a position to consider the application of article 200 Criminal Code, and not the crime of *Homicide*, for example, if the mother of the embryo, within 24 hours from the birth of the child by the surrogate mother, being in a state of psychological disorder[11] kills the (her) new-born child.

In paragraph (4) of the *Foetus harming* we meet again the mother's action (not woman). We again have the condition of psychological disorder, which will support the same arguments as above. This time we have the temporal mark of birth in itself and the action of harming. Following the above logic, according to paragraph (4) of article 202, it can be deduced that the mother of the embryos, in a state of psychological disorder, who harms the foetus while it is born by the surrogate mother/pregnant woman, will be able to receive an attenuated sanctioning treatment instead of the punishment provided by article 194, which describes *Bodily harm*. Then, it can be highlighted, that conceptually, we face a *sui generis* form of bodily harm recognised for the mother of the embryo, who will also benefit from the halving of the penalty limits. Even more, if the mother of the embryo commits the harming by negligence, the next paragraph applies, which again reduces the (already halved) penalty limits by half again.

Also interesting would be the following example: imagine that the mother of the embryo, being in a state of psychological disorder, is also the attending doctor who assists the birth, doctor who meets the requirements of paragraph (6) of *Foetus harming*. While paragraph (4) criminalizes the harming of the foetus during birth by the psychologically disturbed mother, who in this case is also the mother of the embryos, paragraph (6) tells us that her action would not constitute a crime if all of the paragraph's requirements are met. The question would be as follows: if the mother of the embryo, who is also the assisting doctor, during the birth, harms the foetus who is delivered by the surrogate mother/pregnant woman, while at the same time being in a state of psychological disorder (disturbed during the medical assistance/delivery), and that harm was committed by negligence, what will be the framing of the deed? In order to answer the question, it should also be considered that two of the paragraphs are excluded [paragraph (4) and (6)], and that negligence must be excluded for the action of the doctor only, but not for the mother.

Even after a discussion of the determination of the active subject with the reflexive pronouns that has a possessive sense, while using "her" it can be noticed that if the terminology used would still mention the "mother", the matter would still not be fully solved: "the mother [of the embryos] kills **her** new-born" or "the [surrogate] mother kills **her** child", will have the same result, that a mother will kill her child, the child being, theoretically, genetically and practically of both. We acknowledge that the issue would not be fully resolved because the legislator most likely wanted only the woman who gives birth to be the one who benefits from the attenuating sanctioning treatment, wanting most likely to exclude from mitigation, implicitly, along with the rest of the women who have no biological connection with the birth, also the mother of the embryos, and if the term "mother" would still remain in the criminal provision, then she could also benefit from the reduced sanctioning of her liability. Thus, the terminology that should be used could

[11] Retrieved on 13.03.2019 from: https://www.hotnews.ro/stiri-esential-16587975-premiera-justitie-femeie-fost-declarata-mama-naturala-copiilor-nascuti-sora.htm.

gravitate around the collocation of "woman who gave birth", thus eliminating from the sphere of the active subjects of the crimes in case the mother of the embryos, who is not the one who gave birth.

4 What makes a mother a mother in a criminal law sense?

What remains to be debated is how just is that the mother of the embryo shall be perceived as a mother. Of course, nothing discussed in this subchapter is relevant if we admit the counter-arguments of the principle *"mater semper certa est, pater incertus",* enshrined in the current Civil Code [article 408 par. (1)], which tells us that "the affiliation to the mother results from the fact of the birth" and not bring upfront the auxiliary ramifications brought by the conceptual autonomy [2] of criminal law.

Even so, starting with the problem imposed by the conceptual autonomy of criminal law, although criminal law is not bound by the meaning certain terms have in the context of other branches of law from where those terms would have been taken (such as the acquisition of the concept of mother in civil law), this autonomy should not be understood in the absolute sense. The occasions in which criminal law takes specific terms from other branches of law, but retains the meaning, are considerable.

In this sense, we can admit that in the absence of concepts in the legislation or the criminal doctrine regarding the two mothers, criminal law has to borrow the definitions of the terms from the special legislation, or at least to draw inspiration from the special legislation related to the issues of the two mothers, to define by its own autonomy what the mother means from a criminal point of view. Even so, despite the fact that the actual Civil Code reminds us through article 447 that "the human-assisted human reproduction with a third party donor, its legal regime, the confidentiality of the information related thereto, and the manner of their transmission are established by a special law", this special law does not exist in the Romanian positive law. Then, as a last resort, we only have to ask ourselves whether the concept of a mother should be borrowed from the vision of society as a whole.

Therefore, it might be argued that the phrase with which we can operate, that of the "mother of the embryos", is just one of our own concepts that cannot belong to the vision of society. On the other hand, although our intention has been methodologically oriented, in order to make the distinction between the surrogate, bearer mother and the mother whose ovum has been inseminated and implanted in the surrogate mother as clear as possible, we can also use other concepts, that also have as a common element the "mother", just as they are seen by: news and media – the biological **mother**[12], studies and

[12] Craiova Court of Appeal, Civil Division I, decision no. 1048 of February 17, 2016, available on www.rolii.ro.

gender analyses – the genetic **mother** [3] and even court decisions – the donor **mother**[13]/ beneficiary **mother**[14] [4].

Thus, one can apprehend that society itself, at some of the most important levels (news and the media, the academic environment and the legal professional environment), circumscribes the notion of mother that of a woman who is the biological parent of the future child or the woman whose genetic material is used, that is, the woman who donates the ovum to become a foetus in the pregnancy of the woman who accepts the pregnancy, the surrogate mother. So from this perspective, of the concepts with which we operate, there is no room for question as to the fairness of considering the donor mother, the mother of the embryos, as a mother who can be an active subject of the above crimes.

However, a critique to the thesis of considering the mother of embryos as a mother also in the sense of criminal law could be the argument in the field of civil law evoked at the beginning of this debate. One may question the counter-hypothesis that, since criminal law has not come to define legally or scholarly the concept of a mother, civil law comes to remedy this shortcoming, indirectly by establishing only the woman who gives birth as being mother (alone), so defining the mother as the woman who delivers the new-born. Any other "mother", even the donor of eggs, the mother of the genetic material, might not be regarded as a mother either for the purposes of civil law and therefore not for the purposes of criminal law also.

On the other hand, the judgement of a Court of Appeal based on the absence of an internal positive legislation regarding the hypothesis of human medical assisted reproduction and on the provisions of article 8 of the European Convention on Human Rights found that: a woman was recognized as a natural mother of two twins conceived by the mentioned woman and her husband, but brought into the world by another woman, namely the woman's sister [4][15].

Thus, in the appeal, the court resolved the case by recognizing as a natural mother of the children the woman from which the ova were sampled, without her bringing the children to the world. Among the most important arguments underlying the decision there were: the use of the gestation procedure for another, assumed by the parties in the lawsuit (although not explicitly regulated by law, it cannot be regarded as an unlawful procedure as long as in the matters of civil law, everything which is not forbidden is allowed) and the legal impossibility for minors to have their maternity recognized towards their

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[13] Civil Sentence no. 112/12.03.2001, pronounced by the Iasi Tribunal, which approved the adoption of the child of her husband, provided that the carrier mother was the plaintiff's sister and the biological father was the spouse of the beneficiary mother. Retrieved on 13.03.2018 from: https://www.juridice.ro/311847/cateva-consideratii-privind-implicatiile-juridice-ale-tehnicilor-de-reproducere-umana-asistata-medical-ruam.html, endnote no. 48.

[14] Civil decision no. 1196/26.09.2013 of the Timisoara Court of Appeal. From the study to which reference is made: "By civil decision no. 1196/26.09.2013, the Timisoara Court of Appeal admits the appeal thus declared, partially modifying the judgment under appeal, in the sense that: – finds that the plaintiff V.D. is not the biological mother of the minor plaintiffs [...]". Retrieved on 13.03.2018 from: https://www.juridice.ro/311847/cateva-consideratii-privind-implicatiile-juridice-ale-tehnicilor-de-reproducere-umana-asistata-medical-ruam.html.

[15] 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, p. 543-546; *S. Angheni*, Commercial law – between traditionalism and modernism, in „Curierul Judiciar' no. 9/2010, p. 483-485; *L. Tuleașcă*, Commercial Law. Commercial Enterprises, Universul Juridic Publishing House, Bucharest, 2016, p. 20 et seq.

biological mother – that is, their true genetic identity – primarily affects their right to private life guaranteed by article 8 of the European Convention on Human Rights.

In our opinion, along with the others mentioned above, the arguments put forward by the appeal court are justified to consider that the donating woman, from a civil point of view, and then from the point of view of criminal law, can be considered a mother.

Thereby, both the woman who gives birth and the woman who is the biological mother of the inseminated egg carried in the womb by the surrogate mother can be considered mothers in the sense of criminal law, both of which are capable of becoming an active subject of the crime of *Killing or harming the new-born by the mother* or *Foetus harming* [paragraph (4)].

5 Conclusions

The legal area is very complex. In this sense, it also offers us a series of relationships that require objective clarification. Such a complex relationship is that in which it is necessary to establish the criminal law dimensions in which the issues related to the *surrogate mother – pregnant woman – foetus' mother* relationship fall.

Anchoring, of course, in earlier doctrinal studies related to the matter [5] [6] [7] [8] of crimes of *Aggressions to the Foetus* and *Killing the new-born*, the present study attempts to set a starting point in an area of analysis of the confluence of special criminal law and the medical field, in this case the one concerning the medical assisted human reproduction with the "supplier" mother (third party donor), the mother of the ova. In order to prevent the emergence of situations which have a high potential to give birth to difficulties into practice, the rules should be adjusted in such a way that there is a consistency that removes the big questions, but perhaps even more importantly, we should ask when will we pay attention to the details that do not seem to have the impact of waking the enactment *yet*.

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PRIVATE LAW

Arguments for the autonomy of commercial law

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Abstract

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[1].

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 emphasized and analyzed.

Keywords: commercial law, autonomy, duality, unity, civil law, professionals, traders

1 Introduction

Almost 10 years after the entry into force of the Civil Code adopted by Law no. 287/2009[2] and of Law no. 71/2011 for the application of Law no. 287/2009 regarding the Civil Code[3], modified, a law that repealed the Commercial Code, there is a requirement for a new approach to " commercial matters," an analysis we take from the perspective of the unification of private law.

The new approach starts from the social and economic realities and, above all, the legal realities that are based on the existence of "commercial matters" and **a special**

[1] The Official Gazette of Romania no. 505 of 15 July 2011.
[2] The Official Gazette of Romania no. 409 of 10 June 2011.
[3] 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.

category of professionals, namely the traders whose production, trade, services fall within the category of trade.

Thus, ***trade*** is 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**[4] **of private law and the unitary system**[5].

2 The system of the duality of private law

The dual 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[6], concept based on the French Commercial 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 can not 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 duality of private law and, therefore, the recognition of the autonomy of commercial law **are essentially the following**:

a) the features specific to commercial activity (speed, credibility, and consequently the simplicity of regulations by removing, as much as possible, formalism)[7];

b) the existence of special provisions on the status of traders, such as the obligation to register the company or to register and authorize the activity in the Trade Register, as well as their particular obligations in the fields of taxation, accounting and honest competition;

c) the existence of particularities of commercial obligations (solidarity of debtors, the entry in default by operation of law of the debtor) and evidence in commercial matters;

d) the existence and conclusion of contracts that are specific to the trade activity and are practiced by the traders: sale-distribution, commission, mandate, agency, consignment, insurance, workshop, deposit, bank credit etc.;

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[4] M. Nicolae, The Unitary System of the Law of Obligations in the New Civil Code System, op. cit., p. 398 et seq.

[5] 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.

[6] See S. Angheni, M. Volonciu, C. Stoica, Commercial Law, 4th Ed., C.H. Beck Publishing House, Bucharest, 2008, p. 4-6.

[7] 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.

e) the existence of legal institutions such as: the trading fund, the debt securities, 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 being understood "the disappearance" of commercial law.

3 The system of unity of private law

Unlike the system of duality of private law based on the dichotomy of commercial law and civil 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 (the second half of the 9th 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"[8] in its sense 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)[9].

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:

a) difficulties in qualifying acts of "trade" and "danger" as facts that do not come under the clear notion of "trade deeds" should be so qualified with the consequence of applying commercial rules to non-traders as well;

b) commercial law does not have its own regulatory principles, often resorting to the principles of civil law;

c) wear (trader creation) would also apply to non-traders, which would be excessive;

d) difficulties in interpreting and qualifying a legal relationship (commercial or civil) if the same category of contract is governed by both the Civil Code and the Commercial Code.

What is important to note is 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[10].

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[8] Idem, p. 20.

[9] Y. Guyon, Droit des affaires, Tome 1, 12eme, edition, Economica, Paris, 2003, p. 11.

[10] 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, p. 543-546; S. Angheni, Commercial Law – Between Traditionalism and Modernism, in "Curierul Judiciar" no. 9/2010, p. 483-

4 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[11].

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 (art. 3 of the Civil Code), Leaving out of regulation an important category of them, that of professional-traders.

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.

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 activities" does not mean that, in fact, but also in law, they have disappeared.

In fact, almost all 20 trade deeds listed by the legislator in art. 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.

485; L. Tuleașcă, Commercial Law. Commercial Enterprises, Universul Juridic Publishing House, Bucharest, 2016, p. 20 și urm.

[11] 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".

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 [art. 8 (2) of Law no. 71/2011].

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

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 Art. 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].

The solution adopted by the Commercial Code solves many practical problems, including the competence 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 professional quality of one of the subjects involved in the legal relations[14], but also about the nature of the matter, of 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 Register 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.

[12] See, H.C.C.J., Decision no. 24/2015 (The Official Gazette of Romania no. 76 of 02 February 2016); Decision no. 18/2016 (The Official Gazette of Romania no. 237 of 6 April 2017).
[13] See also art. 226 (2) and art. 228 (2) of Law no. 71/2011.
[14] See Gh. Piperea, Commercial Law, vol. 1, C.H. Beck, Bucharest, 2008, p. 10.
[15] Law no. 287/2009 on the Civil Code was republished in the Official Gazette of Romania no. 505/15 July 2015

Bringing arguments for the real existence of certain legal institutions specific to commercial law, even in the context of the unification of the law, I 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 "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.

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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 appreciate that **commercial law**, as a subject of study, must analyze, 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.

The legal regulations that form the substance of this study discipline exist in rich special legislation, as well as in the Civil Code, which makes numerous references to special provisions.

Against the fact that the substance of commercial law – as discipline of study – contains the regulations applicable to professionals-traders, we consider that commercial law could be renamed "**the right of professionals-traders**".

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The Internship Contract, The Source of an Employment Relationship

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Abstract

The internship contract is a contract that involves the performance of an activity under the authority of the host organization. That is why, in many respects, it could assume that it presents as a common law the labor legislation. However, there are specific rules that strengthen the specificity of the contract, all of which lead to the achievement of the purpose for which such a contract is created. To what extent are the rules of protection and the principles underlying them incident to the intern?

Keywords: internship, host organization,employment contract, authority

1 General aspects

Labor relations have always had a great contractual basis from which to find their legal sources. The individual labor contract can be considered the rule for labor relation legal sources. Lately, the traditional individual contract has started to be replaced by more specific contracts, based on labor relations, adapted to the modern labor demands. If the 20th century was the century of the individual labor contract, now, due to the speed at which technology grows, there must be changes in labor relations as well. Furthermore, besides the contract between the employee and his employer, there are now also supporting contracts that seek a specific work regime, either training of specialists, or the results of labor. In this context, in Romania of 2018, the first internship law is passed: Law 176/2018, published in the Official Journal no. 626 from 19 July 2018. The purpose of this law is, as stated by the lawmaker:

- to develop certain professional skills
- to do certain activities in an organized fashion
- to receive minimal work experience and skills.

Even if art. 1 par. 1 of Law no. 176/2018 tells us the purpose for an internship contract, giving us 5 reasons, in reality, the main reason for internships is to ensure the transition from the traditional educational system to the organized provision of labor.

2 The parties of the Internship Contract

Through an internship, a young adult goes from the status of student to the status of laborer. The main subjects of internships are:

- the interns, as in the person who offers his labor through the internship contract
- the host organization, the one that benefits from the labor

The host organization also offers education in the branch of labor for the interns.

Any physical person from the age 16 onward can be an intern. As in the individual labor contract, so in the internship contract there is a restricted capacity for labor for persons between 15-16. The host organization can only be a judicial person (a company), regardless if it has a lucrative purpose or not. Romanian law forbids individuals from hiring interns. This is understandable since the intern needs to learn of life within an organization.

Regarding the legal capacity of the intern, it can be observed that the legislator imposes the existence of a general work capacity, in the sense of being able to perform a job, and to assume obligations and exercise rights. We cannot question a special capacity of the intern, but what is especially related to the civil capacity of common law at the conclusion of an individual employment contract is also valid in the case of the internship contract. It results, therefore, that one could conceive of the existence of a common capacity for all those who perform a job, regardless of the contractual result of that employment relationship.

The civil capacity of the host organization is subject to the general rules of common law, the capacity of use being subordinated to the principle of capacity of use. A host organization may conclude an internship contract insofar as it is capable of carrying out an internship program in which to operate the internship, in order to realize the purpose for which such a specific type of contract exists.

Moreover, art. 5 paragraph (7) of Law no. 176/2018 also establishes some incompatibilities for the host organization. Thus, in principle, once an internship contract between the same parties is concluded, a second contract of the same type between the same parties is no longer possible. The legislator was so interested in the unique character of an internship contract that the prohibition does not work only in the case of direct labor relations between the same party, but also if there is such an addiction indirectly.[1]

From our point of view, the provisions of art. 5 paragraph (7), although starting from a laudable idea, they tend to determine rigidity and absurd solutions in practice. Thus, in an *ad literam* interpretation it would be as if a person is a minority shareholder, holding shares below 1% in a Company with which a person interested in becoming an intern has had employment relations and also holds shares of less than 1% in the Host Organizing Company, this second Company cannot conclude the internship contract with that person, because the provisions become incidental art. 5 paragraph (7) lit. b) of Law no. 176/2018. However, it is understandable that the main purpose for which there are the interdictions / incompatibilities established in art. 5 paragraph (7) of the law is found in the rule of

[1] According to art. 5 paragraph (7) lit. b) of Law no. 176/2018, "*it is forbidden to conclude a new internship contract for the host organizations in which the quality of administrator / associate is held by one or more natural or legal persons who have the quality of administrator / associate compared to other employers / host organizations with which people have been in work or employment relationships ";*

principle established by art. 5 paragraph (5) of the law, provisions that prohibit in principle the conclusion of an internship contract in order not to conclude an individual employment contract. In other words, the main idea that results from the rule imposed by art. 5 paragraph (5) of Law no. 176/2018 is in the sense of strengthening the main source of labor relations, respectively the individual employment contract. Whenever an individual employment contract can be concluded, it will be the source of the employment relationships and not the internship. The one who employs the work of a worker must be the employer, and the worker must benefit from all the rights and protection conferred on him by the labor law, applicable to the employees employed with an individual employment contract. Consequently, a traditional employment report cannot be "hidden" behind an internship and only because, for example, for the work performed an employee benefits from a basic salary, which cannot be lower than the minimum national basic salary per employee, as it is established by law, while in an internship contract, the allowance that the intern can benefit may not be less than half of the minimum basic salary established by normative act, at national level.

However, even if it is normal for any legislation to advocate for the individual employment contract, so that the employees benefit from the protection of the law in their employment relationship, to question the legality of an internship contract, considering that it is actually behind it is hidden an individual employment contract.

Article 5 paragraph (7) of Law no. 176/2018 imposes the uniqueness of the labor relations between the same parties and, not only the absence of an individual employment contract between the host and internal organization. Any employment relationship is considered, including, for example, an employment relationship that would result from a civil or commercial service contract, in which the provider would, for example, be an authorized person. Compared to the current Romanian legislation, it is assumed that the concept of "employment and service relationship" took into account the employment relationship of employees and public servants. [2]

If, however, we refer to the European provisions and to the concept of worker, it would result that must be considered all the relations that suppose the object of the provision of work. It would be questionable to what extent the existence of authority in this report could not be considered as an additional condition, given that in the case of traditional labor relations the trait of the authority of the beneficiary of the work is essential (which is why in the case of labor law, and in case of the tax law is used the concept of dependent employee). However, as we will show later, in the case of the internship contract, there is the subordination of the intern to the host organization, so in this respect, the internship contract, even if it is not a specific form of an individual employment contract, is the source of a labour relation in which one of the parties is invested with authority and, consequently, should be found between the contracts that are the subject of specific regulation of labor law.

[2] We also considered the legal definitions found in the content of art. 1 of Law no. 62/2011

3 Form, registration and control within the internship contract

The labor relation between intern and the host organization has at its basis the internship program.

The internship contract is done in written form, the form being a condition of validity. The internship contract is not a consensual contract such as the individual labor contract, and because of this the lawmakers decided to impose a strict written form as a condition for validity. Adding to this, the language of the contract must be Romanian in order to ensure validity. The internship contract must also be registered. For this purpose, the law creates an electronic registrar. Registration is done in the order in which the internship contracts were done and has personal identification elements of the intern, the date at which the contract was signed and the date at which the intern begins activity, the pay given, the field of work in which the internship program takes place, and the date the internship contract ends. The obligation to register the contract belongs to the host organization, the deadline for registration being no later then one day before the intern begins his work. The electronic registry is based in each county's Employment Agency of the Territorial Labor Force .Not respecting the form of the contract and the registration can attract misdemeanor charges against the host organization.

It can be observed a number of issues that also lead to a clear approach between the traditional employment contract and the internship contract. Thus, the internship contract is registered in the electronic registry drawn up by a labor authority (the Employment Agency of the Territorial Labor Force).

Also, according to art. 24 et seq. of Law no. 176/2018, the internship activity is under the control of the Territorial Labor Inspectorate, (hereinafter referred to as ITM). Basically, such a solution leads to another idea of principle value: the ITM is not called to analyze exclusively the employment relationships that arise from the individual employment contract, but any employment relationship. From this point of view it could be that at this moment Law no. 108/1999 regarding the Labor Inspection to be considered anachronistic, as long as when the specific attributions regarding the labor relations are stated, as they are specified in art. 6 paragraph (2) point A, refers, each time, expressly to the individual employment contract. There is a separate text, art. 6 paragraph (3), which, in addition, refers to any other attributions given to ITM by special laws. We can expressly consider that, pursuant to art. 24 of Law no. 176/2018, the ITM has powers to control and apply specific sanctions for the internship activity. However, this aspect only reinforces the general idea that the employment relationship that results from the internship contract is a labor report subject to the special rules and in their absence, the general ones, within the labor law.

The internship contract is done for a limited amount of time. Art. 19 par. 2 from Law 176/2018 sets the maximum duration of the contract to 6 months, underlining the fact that there is no possibility of extension. Exceptionally, the law does allow an internship contract of maximum 12 months for the year 2019 and only for activities related to Romania's presidency of the European Council[3].

[3] O.U.G. no. 13/2019 completes law no. 176/2019 with an extra chapter, chapter *II*[1] *"Organizing the official internship program of the Romanian Government",* which allows the Romanian

Throughout the duration of the internship contract, there is an *internship program* which can be no longer than 720 hours in the course of 6 consecutive months. According to art. 8 par. 3 from law 176/2018, the duration of work time for an intern is established in the internship contract, but, as is the case in the individual labor contract, cannot be longer than 48 hours per week.[4] Taking into account art. 5 par. 2 and art. 19 par. 2 from law 176/2018 we can see a discordance between the maximum duration of the internship and the maximum duration of the internship program in working hours. If the maximum allowed work period is 40 hours per week, which would make a median working schedule of 168 hours per month, the internship program which is limited to 720 hours, would always go for a shorter period than the 6-month maximum permitted by the law. Can it be considered that what goes above the 720 hours but is still within the maximum limit of 6 months will be used to evaluate the intern or other activities outside of the internship program? For the duration of these outside activities, does the intern benefit from pay? Does the internship program has to fit accordingly with the internship contract? Here are just some questions caused by the discordance of the law regarding the length of the internship program when compared to the length of the internship contract. Taking into account the legal definition of these concepts[5], the only possible interpretation is that within the period of 6 months for which the internship contract is done, the intern must abide by the internship program as well as any other previous or ulterior activities required to reach the purpose established in the contract.

The internship program is established by the host organization. More than 1 intern can participate within one internship program. Limiting the maximum duration of the internship program to 720 hours affects the host organization, which can organize such a program whenever it wants. There can only be one internship contract between intern and host organization. Art. 5 par. 4 from law 176/2018 allows for more internship contracts between the same parties under the condition that these contracts are from separate internship programs. Even in this situation, the cumulative duration of the internship contract cannot be longer than 6 months. The labor relationships between the intern and the host organization cannot be longer than 6 months regardless if the relationship springs from one or more internship contracts. The internship contract is a concrete and reciprocal obligation. Therefore, the intern has the obligation to comply with his obligations according to the internship program under the authority of the host organization, and the host organization is obliged to ensure the necessary conditions for the intern's labor and to provide the necessary payment for the intern. The internship payment cannot be lower than 50% of the national minimum wage. The national minimum wage is of 2080 lei for

Government, through the General Secretary of the Government, to simultaneously have internship contracts which are no more than 50% of the total number of government employees

[4] For people between the ages of 16-18, the duration of the work week is reduced to 30 hours, and the working day can be no longer than 6 hours.

[5] The internship program is defined in art. 2 letter B of law 176/2018 as being: "*the specific activity done by the intern for a limited amount of time for the host organization which has the purpose of expanding the theoretical knowledge, developing practical abilities, and/or gaining new skills or abilities".* Art. 2 letter E defines the internship contract as being: *"the contract done between the intern and the host organization for a limited amount of time by which an intern is obligated to prepare professionally and to give specific labor for and under the authority of the host organization in return for payment."*

2019, corresponding to the wage an employee with no upper education receives.[6] Art. 8 par. 2 refers to internship payment "proportional to the number of hours of labor." Internship payment cannot be established by the month, but only by number of hours, and the reference to 50% of the national minimum wage will take into account it's hourly rate: 12.43 lei per hour.[7]

The biggest similarity between an internship contract and an individual labor contract is that the intern does his labor under the authority of the host organization.

To the extent that it refers to the authority of the host organization, it would be necessary to consider whether all three specific prerogatives of the employer authority, namely the organizational authority, the normative authority and the disciplinary authority, are found in this authority.

Regarding the normative prerogative of the host organization, the intern must comply with the provisions of its internal regulations. In addition, the internship program, which practically materializes the duties of the intern, and also norms his work, implies the normative intervention of the employer.

The disciplinary prerogative is even better emphasized in the law. Thus art. 15 paragraph (2) of Law no. 176/2018 establishes the prerogative of the host organization to order the sanctioning of the intern in case it violates the internal regulations and / or the provisions of the internship contract. The sanctions applicable to the intern, are close to those regulated for the employee in the art. 248 of the Labor Code, respectively: written warning, reduction of the internship allowance by 5-10% over a period of maximum 2 months and termination of the internship contract. Although the special law, no. 176/2018 does not regulate a specific disciplinary procedure, the sanctioning of the intern is not possible until after conducting an internal investigation. Compared to the general reference of the law, it can be considered that an internal investigation must be carried out in such a way as to allow the determination of the deed, the perpetrator, the violation of the internal regulation or a contractual clause of a nature to allow the sanction and, obviously, the subjective element of the internal guilt. Although the law does not expressly provide, in order to meet the general requirement of conducting a proper internal investigation, the hearing of the intern seems to be mandatory. Moreover, such a hearing would imply the exercise of the right of defense which the intern must enjoy in the internal investigation.

If the host organization is entitled to sanction the intern in the two express hypotheses regulated by art. 15 paragraph (2) of Law no. 176/2018 (respectively the violation of the internal regulations and / or the non-observance of the clauses of the internship contract), the liability of the intern can be:

a) Be a specific disciplinary liability, expressly regulated by the specific law (a type of disciplinary liability derived from the liability of common law, such as the disciplinary liability of the military, or a specific disciplinary liability of those who are in a form education);

[6] We apply art. 2 from GD 937/2018 which states that all rights and obligations established by law will be determined by the national minimum wage.

[7] There is specific regulation for internship payment in the activities the Romanian Government conducts abroad.

b) It is a liability of common law, in which case it could be considered that the liability of the intern is a contractual one, which does not comply with the clauses of his contract either directly or by non-repeal of the internal regulation.

The second hypothesis could also be supported by the fact that one of the sanctions that the host organizer can apply is precisely the termination of the contract. However, since the internship contract is a bilateral contract, and involves successive benefits, the common law sanction in the case of not executing the contractual obligations may consist in terminating that contract. However, the termination of the contract, a specific effect of the signaling contracts and which intervenes in the case of the non-execution of the obligations by one of the parties, is analyzed by art. 15 paragraph (2) of Law no. 176/2018 as a sanction within the reach of the host organization and which can be applied, after a disciplinary procedure is carried out only by the host organization. On the other hand, this form of termination is treated together with other types of sanctions, specific to any disciplinary liability, namely the warning and the reduction of the internship allowance. For these reasons, we consider that the intern can respond disciplinarily to the host organization, just as the employee responds to his employer, the host organization, within the authority he exercises towards the intern, demonstrating a disciplinary prerogative. As a consequence, we are faced with a disciplinary liability arising from an employment relationship, and not with a contractual liability under common law, even if the intern's liability really results from the internship contract.

If the disciplinary and normative prerogative of the host organization are obvious, the organizational prerogative, the most important prerogative of an employer in relation to its employee, is not at all obvious to the intern. Thus, according to art. 6 paragraph (2) of Law no. 176/2018 "the delegation of tasks to the intern" is forbidden, tasks that would imply the performance of activities other than those that have the theoretical and practical training according to the internship contract. So, once an internship contract is signed, the duties and activities that the intern performs are determined concretely. On the other hand, the duration of an internship contract is relatively short (maximum 6 months), and, in principle, a single internship contract can be concluded within an internship program. If the general purpose of concluding such a contract, namely the preparation of the intern so that he can carry on activities in a certain field, is added to the above, it is clear that the organizational prerogative in terms of the right to structure and reorganize the activity with effects on the intern would be devoid of interest. There is, however, a manifestation of the organizational prerogative of the host organization, as long as it is the one that practically organizes the activity of the intern, establishing the conditions under which he will perform the work under the internship contract. So the host organization directs, it is true from the moment of the conclusion of the contract, the activity of the intern.

In conclusion, it can be appreciated that the authority of the host organization presupposes the prerogatives available to the employer under the authority of which an employee would be present, but obviously circumstantial to the specific of the internship.

Also in the sense of approaching the internship contract to a specific contract that should be subordinated to the principles of labor law, the regulations included in art. 21 of Law no. 176/2018, provisions governing the suspension of the contract. It is interesting to note that the legislation regulates a single cause of suspension of the contract, namely temporary incapacity for work, a cause which, in common labor law, leads to the suspension of law of the individual employment contract. Does this mean that in other

cases the internship contract cannot be suspended? It would require an analysis at least for some of these causes of suspension regulated by common labor law. Thus, it is obvious that a suspension of the internship contract cannot take place if the intern is to perform a paid position in the union, in the event of the expiration of the period for which an opinion, authorization or attestation has been issued, necessary for the exercise of the profession , or in the event of a preventive arrest under the conditions specified by the Criminal Procedure Code. For the last two cases it is obvious that art. 50 of the Labor Code makes express reference only to employees. In the case of performing a paid position in the union, as in the case of exercising a position within an authority, it is debatable whether the correct solution would be to suspend the internship contract or to terminate it. However, we consider that, in such cases, the internship contract should normally terminate and not suspend it. Thus, if the intern is to be in the hypothesis regulated by art. 50 lit. e) of the Labor Code, he will perform a paid position in the union. Art. 23 of Law no. 176/2018 establishes that the termination of the contract of employment is an internship when an individual employment contract is concluded, but, expressly, between the intern and the host organization. On the contrary, if an intern enters into a labor contract with another employer, it would not be possible to automatically terminate the internship contract, from those regulated by art. 23 of Law no. 176/2018. It is true that the role of a regulation such as the Law of the internship is to promote the interests of early career people, who need this formula in order to succeed in occupying a position on the basis of an individual employment contract, or to develop employment relations that will find their source in other contractual relationships. However, analyzing the content of the regulations in Law no. 176/2018, it should be noted that the law nowhere prohibits the provision of work on the basis of an individual employment contract, outside the internship program, even on the basis of an individual employment contract, with the sole condition that this employment contract is not concluded with the host organization. We can appreciate that, perhaps, this is not the spirit of Law no. 176/2018 (questionable even this aspect!), But, anyway, the broad legal solution is clear: nothing prevents an intern from being hired on an individual employment contract with another employer, other than the host organization, as long as he or she fulfills the obligations specific to each of the two contracts.

Returning to the cases of suspension, as they are regulated by the provisions of art. 50 of the Labor Code, it may be appreciated that there may be causes for suspension of the internship contract, except for the hypothesis of the medical leave (expressly regulated and in article 21 of Law no. 176/2018), the situation of force majeure and quarantine, respectively the causes regulated in letter. b), c) and f). The causes regulated by letter no. d), e) g) and h) from art. 50 - Labor Code are not suspension causes.

The cause regulated in art. 50 lit. a) of the Labor Code, respectively maternity, can still be discussed. Indeed, it could be admitted that, as long as Law 176/2018 does not contain an express regulation regarding the possibility of suspension of the internship contract for this situation, and as art. 21 of Law no. 176/2018 is of strict interpretation, we cannot add to the law the meaning of an extensive interpretation. On the other hand, the general idea for which there is a regulation for any person of protection in the case of the pregnant woman, or of the one who is breastfeeding, considers the protection of the maternity. However, if it is assumed that the principle that the maternity should be protected, it would be difficult to admit that in the case of the woman performing an

activity under the internship contract, the intervention of a maternity leave would be a cause that could allow the host organization to unilaterally terminate the contract .

However, other arguments are worth mentioning. Maternity leave is a specific hypothesis of temporary medical leave (work incapacity). The pregnant woman and / or immediately after birth is in a state of temporary work incapacity, but determined by a clearly known cause, namely motherhood. So, if we were to consider the concept of temporary incapacity for work, *lato sensu*, so that would also include the cause of incapacity determined strictly by the state of pregnancy or immediately after birth, it could be considered that the hypothesis provided by art. 50 lit. a) it is found in the hypothesis of temporary incapacity of work regulated by art. 21 paragraph (1) of Law no. 176/2018.

In addition, all this interpretation must be observed and under the assumption considered by art. 21 paragraph (3) of Law no. 176/2018. Thus, according to the aforementioned text, if the cumulative duration of the suspension periods is greater than one third of the internship program, the contract will cease lawfully, the host organization being entitled to conclude a new internship contract even with the intern whose contract has previously lawfully ceased.

Analyzing this text, it is obvious that the legislation sought to regulate the internship so that the labor relations between the parties are active, the option of suspension, being strictly exceptional. Given that an internship contract can, in principle, be concluded for a maximum period of 6 months, it would result that if one or more medical leave within the same program would exceed 2 months, then that contract would automatically lawfully cease, in fact, at the moment when one third of the duration of the contract could no longer be used by the parties, corresponding to the purpose for which the contract exists, namely to develop certain skills, specific skills of the intern for his future professional life.

However, given that the maximum duration of the maternity leave is 126 days, but there is a mandatory leave of 42 days that the employed mother must benefit after birth, it is quite difficult to imagine in practice a situation where an intern would benefit from a suspension of his internship contract for the cause of maternity leave, strictly referring to the provisions of art. 21 paragraph (3) of the Law no. 176/2018.

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From National Insolvency Law to Global Insolvency Law. A Universal Approach to Cross-Border insolvency

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Abstract

Through this study we aim to provide a realistic perspective on the complex legal environment in which "companies" fail and not only, with different legal systems interacting dynamically but often "disorderly" in cases of cross-border insolvency. In this controversial context of globalization, with obvious consequences on the national and international legislation, it becomes necessary to streamline and coordinate the regulatory procedures in the field in a more precise manner, as there is currently no fully effective mechanism for settling an insolvency procedure, related, for example, to a multinational company, which can lead to investors' panic, lower confidence in the economic system, and destabilization of financial markets around the world. The attempt to outline a common law or at least a common pattern of common principles in the field of insolvency at both regional and global level is becoming increasingly apparent, which is why we can say that we are witnessing the evolution of an international law of insolvency, arising from the international trade law with possible aspirations to tackle universalism, the latest legislative inputs of UNCITRAL that complete the cross-border insolvency law model, striking up, in fact a discussion about the likely way towards adopting these regulations on a global scale.

Keywords: insolvency, internationalization, globalization, universalism, territorialism, legislative harmonization.

1 Internationalization or globalization of insolvency law? A new identity of insolvency on the global scene

"Coming from the economy, globalization has not been limited to economy. It has driven, by virtue of inner links, an increasing number of fields. Communications, scientific research, education were the first ones. The globalization of all fields has not been achieved yet, but the trend is present everywhere. Pressure is exerted on all of them when entering the global market and thus to make competitiveness the key to self-understanding and the understanding of the social and individual life ... This being the case, you cannot figure out globalization without taking contact to the analyses devoted to economics, sociology, and without detecting its consequences. We live, as people born afterwards, the age of globalization, with its enormous changes and the great problems it poses"- Prof. Andrei Marga. [1]

Over the last three decades, processes linked to globalization and rapid technological change have created multiple opportunities for the emergence of alternative business forms and innovation has become one of the main driving forces of the contemporary economy. Globalization can indeed fuel inequality and dissatisfaction around the world, the prospect of the next economic crisis being recently debated at the Davos Annual Meeting, organized by the World Economic Forum [2] in the period 22-25 January 2019, under the main theme "Globalization 4.0: Shaping a New Architecture in the Age of the Fourth Industrial Revolution",[3] discussing the negative effects of globalization on the tertiary sector of services, under the magnifying glass of these concerns being shrink in comparison global inequality as well as the new revolution of artificial intelligence that will be able to replace people in most working areas [4], Klaus Schawab, the founder of the Forum of Davos specifying that "The physical world will to a new interconnected digital world". At the same time, within the IMF summit, it reduced its prospects for growth in the global economy and stressed the need for urgent action by strategists and governments to solve the problems. In fact, according to a recent report published by the Organization for Economic Co-operation and Development (OECD) – *Global Growth Weakening as Some Risks Materialise* [5], global trade growth has slowed sharply in many countries, a 6% drop in China being estimated, which is going to affect the economic outlook throughout the world, while political uncertainty in Europe, including the Brexit case, and the possible chaotic outflow could substantially increase the costs for European economies. In this respect, multilateral dialogue should be enhanced in order to avoid new harmful trade restrictions, the monetary policy and liberalization decisions largely depending on advanced economies. As stated by the Chinese Vice President Wang Qishan at the Davos Meeting, we need an important platform to learn about the world, exchange views, state its position and seek common understanding, just one year ago, a real break in the process of globalization took place when the People's Republic of China became a supporter of globalization and market liberalization while the USA relaunched a rhetoric of introducing customs duties and denouncing free trade treaties such as the Trans-Pacific Partnership". By accessing the OECD website, we meet precisely this idea of "global gravity change" [6], of power game, the Centre for Educational Research and Innovation of OECD focusing on the idea of innovation in a global world of international mobility, where solutions can be hidden in the sector of energy and artificial intelligence itself. We are also highlighting herein the opinion of a

Nobel laureate economist Joseph E. Stiglitz, according to whom globalization can be ruinous for a badly managed economy, which is why "we need a global social contract" that can provides real global security [7]. Indeed, this "contract" already takes the form of international treaties, multilateral and bilateral agreements, and regional agreements as well that shape the new international economic order, but which at the same time organizes power games in global trade and strengthens the roles of global actors. For this reason, perhaps the French doctrine speaks of the so-called "*l'epuisement of democracy*" – the exhaustion of democracy [8], which is due to this "internationalized society", the world becoming more and more global and interconnected through economic, digital and genetic evolutions. The finality is "the deep mutation of the normative chain" through the "constant pollution of the constitutional norm". Nevertheless, the great philosophers of the contemporary age [9], with strategic approaches, including the philosophy of law, consider that globalization does not bring about a uniformity, on the contrary, it may encourage "fragmentation" and "particularisms", stating that globalization and diversity do not exclude each other and that is possible to create a "dense network of relationships that link cultures to each other in the context of global interconnection" through *mutual accommodation* but which subjects diversity to a difficult test by placing it in the competitions of the global market [10].

Starting from this philosophical reality in the sense that, in its evolution, the law has oscillated between fragmentation and unification, the tendency of fragmentation ensuring the depth of legal interpretation and the multiplication of perspectives through the "birth" of transcendental matters following the cohesion of law with other sciences, and from a broad research through which we set out to create a new identity for the insolvency law [11], namely the emergence of a special law, independent of commercial law, despite the tendencies to incorporate it into a new business law or into an economic law in a multidisciplinary manner (a measure already implemented in other EU states such as Belgium, which has been applying a Code of Economic Law ever since 2013, and which was redimensioned and republished on 13 July, 2017 by inserting the draft law Book XX – "Insolvency of Enterprises" that revolutionizes the insolvency regime by adopting new measures and expanding the scope to liberal professions, a category still excluded in our legal system, while incorporating numerous principles and practices promoted by the European Commission in the field [12]), we go further and dare outline an international or even global identity of the insolvency law. The "thirst" for internationalizing and claiming autonomy or for outlining an independent status in the national or international law system is not a novelty, but it is a necessary reality in a globalized society. The evolution from a national law to a global law, about which the specialized literature also speaks including in relation to the administrative law [13], is a consequence of the continuous mechanism of codifying the rules of the international law, doubled by rich jurisprudence in the general framework of the international economic relations that underlie multi-party and bilateral agreements for their effective implementation and the emergence of what is called international economic order in a globalized world, that is, a universal system, which codification is automatically reflected in the system of the domestic law at all levels, branches, sub-branches, institutions of law, etc. and is actually the reality of the "deep mutation of the normative chain". The new normative set related to insolvency both at national and international level exceeds that commercial law from which it has been detached, because it is no longer limited to inter-company relations, as

those sub-branches of public or private international law claim the autonomy of distinct branches such as the international economic law, the international trade law, the international law of foreign investment, the international competition law, etc. In this context of normative redimensioning at international level, we can dare justify the existence of an international law of insolvency, individualized into a new field of law that has reached the remodelling stage in relation to the international public and private law, with an edifying role in building, why not, the international economic order. The development of these new fields of law strengthens the philosophical idea of the abovementioned specialized literature developed, according to which globalization does not bring about a uniformity, on the contrary. it may encourage "fragmentation" and "particularisms".

This new international identity of the insolvency law, which obviously exceeds the international trade law, is outlined through normative complexity. We are no longer speaking only about the insolvency of companies, enterprises, but also about the insolvency of individuals and administrative-territorial units, on the insolvency of this latter law subject OECD providing a recent study (2018) [14] on the different approaches and possible solutions of debt restructuring, fiscal consolidation and bankruptcy of some cities, communes, etc. in Colombia, Hungary, South Africa, Switzerland and the USA, identifying the benefits of implementing an insolvency regime on administrative-territorial units to complement the existing budget rules and procedures, their indebtedness being susceptible to lead to serious dangers and even to threatening the global financial stability (such an example being given in Brazil, and respectively the case of Rio de Janeiro, which was declared in 2016 a "financial disaster"). On the one hand, at national level, the insolvency law has been steadily outlined and seems to have revolutionized the legislation in the field, in recent years a genuine autonomous insolvency law being outlined, seeking to unify and consolidate a complex and complete insolvency code meant to incorporate, in a common body of legislation, the entire legislation on insolvency and general legislation applicable to all economic operators, the special legislation applicable to credit institutions and insurance companies, to groups of companies as well as the rules on cross-border insolvency, to which the insolvency prevention instruments should be added as well, more specifically, the ad hoc mandate as well as the arrangement with creditors, as regulated by Law no. 85/2014, as well as the provisions of Law no. 151/2015 on the insolvency of natural persons, and the insolvency of the administrative-territorial units respectively, as regulated by Government Emergency Ordinance no. 46/2013 and approved by Law no. 35/2016 and, on the other hand, this new field of law is in harmony with the European rules and with the international principles, which we will develop in the following sections.

As mentioned in the specialized literature [15], globalization has incorporated, in various degrees, certain areas such as economics, scientific research, security, etc., while in the case of other fields, we can only speak about internationalization or even less than that. If we can say with certainty that insolvency has reached the stage of internationalization, it remains to be seen whether it has reached the stage of globalization, the boundary between these terms being very fine. Without going into irrelevance, we are strengthening the idea of globalization of insolvency by the very creation of "a new global platform for collaboration" [16] and we cannot say that progress stops at any moment, globalization being always subject to a correction configured by the variable geometry of superpowers, which, as mentioned above, defines an international law order that is

inevitably redimensioning all the national law systems which come into inter-connection in this way. Internationalization represents an evolutionary phase towards globalization, and the achievement of this stage by the international law of insolvency could mean applying the principle of universalism, which has recently been promoted by UNCITRAL and which we will develop in the final section. Moreover, if we visit the INSOL International website, we can see that it is in the process of launching its new project on granting a certificate in the international law of insolvency, which begins on 1st September, 2019, the course entries being opened from 1st March, 2019, which course mistaken for the one obtained from the Global Insolvency Practice Course (GIPC), which remains the INSOL International [17] flagship educational offer for people with more than five years of experience, which idea is overlapped with the opinion we adhere to in relation to the direction of, or rather, the ascension of the insolvency law, from the international to the global one. This is a very interesting trend due to the fact that it creates a number of projects in this respect, such as GLOBAL INSOLvency [18], set up under the aegis of the American Bankruptcy Institute, which provides real-time information on the current problems of the international law on insolvency and restructures, analyses daily news about the insolvency developments around the world. With more than 13,000 members, the American Bankruptcy Institute is the largest American multidisciplinary organization dedicated to research and education on insolvency issues.

2 "The crossing" of insolvencies at the border. BREXIT – a new challenge of legislative harmonization

The globalization of business and the evolution of the international law in general have dramatically increased the complexity of insolvency practice. At global level, it has been recognized that differentiating and crossing national insolvency systems at the "border" prevents the debtor's assets from being protected against dissipation and certainly maximizing wealth and saving businesses by the absence of a fair and efficient management. Moreover, the lack of predictability in the management of cross-border insolvency cases obstructs the capital flow and is a deterrent to cross-border investment [19]. Few enterprises are purely domestic and almost all significant restructuring involves operations in several jurisdictions and presents creative opportunities to use different restructuring regimes. The instruments required to succeed in the new world of the global insolvency practice are continuously being improved and are on the agenda of the interests of international and EU bodies and institutions, such as the World Bank, the Organization for Economic Co-operation and Development, The United Nations Commission on International Trade and Law, the World Trade Organization, the European Commission, and the European Parliament. In this context, the international cooperation on insolvency becomes a real necessity for the legislative authorities, for justice, but also for practitioners and for the other specialists.

At regional level, we take into account the newly enacted provisions of Regulation (EU) 2015/848 [20] which extended its scope by including pre-insolvency procedures and those requiring the early restructuring of a company at a stage where there is only a likelihood of insolvency, but without achieving a sufficient harmonization of the laws in the field of insolvency of the Member States. In Romania, the aforementioned Regulation

is directly applicable in relation to the regulation of international relations in the field of insolvency in the relationships with the Member States of the European Union, while in the case of the non-EU third countries, the rules of the private international law stipulated in Law no. 85/2014 on "Cross-border insolvency" are applicable, as Romania has taken over UNCITRAL's Model law on the international insolvency. Mention should be made of the fact that the insolvency procedures of the administrative-territorial units, which aim to overcome the financial imbalance situation, a special legal regime regulated by Government Emergency Ordinance no. 46/2013 and approved by Law no. 35/2016 does not fall within the scope of the Regulation and only individual or corporate debtors, traders or private persons, are included, subject to the existence of an extraneous element, the provisions applying only to insolvency proceedings in which the centre of main interests (COMI) is located in the European Union. Nevertheless, in the context of globalization, the territorial limitation of the application of the Regulation becomes an impediment to the administration of international insolvency proceedings, the interests of both the debtor and the creditors alike being destabilized by the lack of clear, coherent and harmonized rules, with very few countries transposing the Model law at domestic level (Romania has fully transposed them, but countries such as Germany, Austria and Portugal have not shown interest in this international instrument), although the Regulation makes reference, through recital (48), to the principles and guidelines adopted by the European and international organizations active in the field of the insolvency law, especially the guidelines developed by UNCITRAL.

At global level, the United Nations Commission on International Trade Law plays an essential role in substantiating the strategy on the approach of insolvency. In the July 2018 session, UNCITRAL adopted and enacted the Model law on recognition and enforcement of insolvency-related judgments, developed over the past four years by UNCITRAL Working Group V and designed to complement the UNCITRAL Model Law of Cross-Border Insolvency. The new law provides a simplification of the procedures and greater clarity as to when a judgment must be recognized, its main objectives being to ensure the rapid recognition and enforcement of insolvency judgments, avoiding the overlapping of insolvency proceedings and increasing the level of security of the debtor's and creditor's rights in insolvency proceedings, such as protecting the debtor's assets and optimizing their value. In a special report drafted in March 2019 by INSOL International, temporarily accessible on its access page [21] – "SPECIAL REPORT UNCITRAL's Model Law on Recognition and Enforcement of Insolvency-Related Judgments – a universalist approach to cross-border insolvency – "INSOL specialists – Evan J. Zucker and Rick Antonoff Blank Rome LLP, USA – bring into discussion the likely way to adopt the UNCITRAL Model law around the globe, the latter law enacted representing a universalist approach to cross-border insolvency. A common theme in the cases settled in compliance with the Model Law is the tension related to the recognition of the universal insolvency principles, namely whether a country should enforce a foreign judgment, even if that decision is contrary to local laws and local customs. Despite the modest progress made towards universalism in cross-border insolvency, a court in England has recently reaffirmed the application of the domestic law as a priority in relation to universalism in the Rubin v. Eurofinance case [22]. The case concerned the enforcement in England of an insolvency judgment passed in the United States against Rubin, an English citizen. Although the first instance deemed that the USA judgement could be recognized and

applied directly and internally, based on the principle of universalism – "*As a matter of policy, should the court, in the interests of universality of insolvency proceedings, devise a rule for the recognition and enforcement of judgments in foreign insolvency proceedings which is more expansive, and more favourable to liquidators, trustees in bankruptcy, receivers and other officeholders, than the traditional common law rule embodied in the Dicey Rule, or should it be left to legislation preceded by any necessary consultation",* the Supreme Court of the United Kingdom ruled that Roman, as an English citizen, is entitled to national proceedings, with the application of the English law on insolvency. Such proceedings increase administrative costs and risk obtaining inconsistent results, the Rubin decision reflecting how differences between national legal systems and the mistrust between courts hamper the progress towards a more effective management of transnational insolvencies. The principle of universalism implies a single insolvency procedure that has a universal effect so that creditors can be treated equally irrespective of their location, and the judgments of a court are taken into account worldwide. The new UNCITRAL Model Law clarifies the issues raised by jurisprudence and facilitates the fair and predictable enforcement of foreign law in the field of insolvency, providing a predictable global basis with the purpose of facilitating the international trade and business through the modernization and harmonization of the international trade law. Thus, as mentioned by the INSOL International specialists, the adoption of this new Model law in the Member States can be achieved, especially through the support of the global institutions who recommend the application of these rules, the mediation at international level through coordination by international expert committees in the field being encouraged as well in this respect. The International Insolvency Institute, an international organization dedicated to enhancing the coordination in international bankruptcy law, has set up a Committee on International Alternative Dispute Resolution with the purpose of promoting the use of mediation and other alternative forms of bankruptcy litigation. In 2014, the European Commission also issued a recommendation for the enhancement of the use of mediation in insolvency proceedings. INSOL International also set up the College of Mediation, which offers a group of mediators specializing in international insolvency. The vision related to the new harmonization and legislative uniformity in the field of insolvency at a global level concerning the ways of incorporating the new law in the already existing regulatory system at national level (expanding the chapters in the domestic codes by absorbing the new law) or maintaining it as an independent law, through a separate regulation, is also becoming a sensitive issue anticipated by specialists, who also fear, on the other hand, a delay in implementation due to the local policies. Singapore remains at the top of the countries that truly anchor the laws on restructuring and insolvency in a globalized world. According to recent news (March 2019) accessible on the INSOL International website [23], the High Court of Singapore recognized, in the Zetta Jet case, in compliance with Article 17 paragraph (2) of the Singapore Law (The Singapore Companies Law was amended in May 2017 to introduce a few improvements to the laws on debt restructuring in Singapore), the applicability of the main procedure initiated in the USA where COMI Zetta Jet was present, although the company was incorporated in Singapore.

The study of the international laws and practice in the Romanian jurisdiction is, of course, carried out in relation to the EU Regulation and the UNCITRAL Model Law, the expanded development in terms of determining the law applicable to an international

private law relationship in the insolvency field, either in relation to the Member States or in relation to third countries, the scope of model law and the procedural mechanisms for streamlining cross-border insolvency procedures, the coordinating principles, the conditions for establishing COMI and accessing these mechanisms through international cooperation on insolvency, as well as the novelties introduced by the Regulation on the insolvency of a "group of companies" which enjoys the possibility of opening a "group coordination procedure", which can be found in the recent national studies reflecting the doctrinal efforts to interpret concepts and identify solutions related to the particularly complex cross-border insolvency. Moreover, mention has been made in the specialized literature of the fact that there is still a fear in interpreting and using the legal terms and concepts in the field, due to a "formalist" national law, which necessarily implies an increase in the forms of education in this field starting from to the existing international experience and the solutions tested in cross-border insolvency cases [24]. In fact, not long ago, the European Central Bank proposed the introduction, in addition to legislative reforms in the field, of a code of good practice or principles to encourage convergence and harmonization, especially through the adoption by the Member States of the Model law proposed by UNCITRAL [25].

A new legislative harmonization challenge is also represented by BREXIT due to the consequences of the exit of the United Kingdom from the EU, which becomes a third country in terms of the applicability of Regulation 848/2015 and of all the European legislative instruments. Consequently, the insolvency proceedings opened in the United Kingdom after its withdrawal will not be recognized in the Member States in compliance with the provisions of the Regulation which constitutes a first step in the development of a common European insolvency body. INSOL Europe specialists [26] assume that business relationships, including the relationships between the Member States and the United Kingdom, will continue to be extremely strong and therefore the cooperation concerning the insolvency between both jurisdictions will be as relevant as before. Nevertheless, we must take into account that although the EU Regulation (EIR) was designed, implemented and developed by all parties, it is not known whether the United Kingdom will still accept the jurisdiction of the CJEU after Brexit. However, there are two expected ways in which recognition and assistance at EU level can be provided, either by concluding a bilateral treaty between the United Kingdom and the European Union, or by applying the UNCITRAL Model as a legal instrument generally adopted by the European Union that provides for the recognition and facilitation of the insolvency proceedings opened in third countries. In relation to a possible bilateral treaty, two possibilities can be distinguished: the CJEU retains its competence in its current form and its interpretation remains mandatory before the British courts, which means that the bilateral treaty could contain the same provisions as the EIR, or the CJEU does not retain that competence. At this time, it is not known whether the United Kingdom will be prepared to accept the retention of the competence of the CJEU, therefore the question arises whether a bilateral agreement/treaty with the United Kingdom could be designed without the quasi-supervision of the CJEU. An eloquent example would be the Lugano Convention [27], which is applicable to the recognition and enforcement of judgments between the EU Member States and Iceland, Norway and Switzerland, without any obligation for any court to refer the matter to the Court of Justice of the European Union for interpretation. We consider it difficult to implement such a convention on insolvency,

much more advantageous being the possibility to have a common regulation on the recognition of the insolvency proceedings from third countries across the European Union, a regulation adopted based on the UNCITRAL Model law on cross-border insolvency, which creates a regime of recognition in the absence of an international supervisory body. Moreover, INSOL Europe believes that it is desirable to incorporate the Model Law into a regulation, regardless of Brexit, but especially if an EIR Brexit treaty is not feasible.

3 Why global harmonization? Impediments and solutions. Between territorialism and universalism. Government Emergency Ordinance no. 88/2018 – aspects reflecting the principle of territorialism

Starting from some examples of complex cross-border insolvency that revolve around international literature studies [28], we will try to understand why we need concrete legislative harmonization, given the reality of globalization that encourages new systems and legal practices which would bypass national legal systems. For example, in the case of the US Lehman Brothers financial services company, which operated as a large international group of corporations, in a complex network of subsidiaries where the holding company manages the assets of the subsidiary entities, the insolvency procedure (launched in 2008) took place "in a spiral manner", more specifically, there were more than one hundred separate liquidation proceedings. Eventually, the bankruptcy of Lehman Brothers (LB) comprised eight thousand branches, more than one hundred thousand creditors and twenty-six thousand employees in more than forty jurisdictions. The completion of the bankruptcy procedure eventually served to highlight the failure of harmonizing efforts, the inefficiency of insolvency proceedings in the case of multinational companies, with emphasis on the need for cooperation between national courts and coordination between the legal systems, the bankruptcy of LB proving that there is no fully effective harmonization mechanism, which was why panic was created among investors, confidence in the economic system decreased, and financial markets around the world were destabilized. As a matter of fact, the differences make it difficult to coordinate between jurisdictions, and national and international regimes fail to provide appropriate assistance, in the case of LB, unfavourable national proceedings preventing the exchange of information and the distribution of asset, leading to contradictory judgements, national courts tending to protect local creditors by giving priority to the domestic law. Without adequate coordination, multiple insolvency proceedings can cause losses, may hinder the restructuring/reorganization of an enterprise by depriving them of assets and can generate inequalities in securing creditors of the same rank, in the analysed case both the European regulation and the UNCITRAL Model law proving to be inefficient and insufficient in the coordinated regulation of complex insolvency proceedings, being known that not all jurisdictions have adopted and integrated these regulations, thus affecting the health of the world economy.

An example influenced by the values of universalism could be case of the bankruptcy of the Bank of Credit and Commerce International (BCCI), the seventh largest private bank in the world, which, although it was liquidated in several jurisdictions, the national

liquidators from Luxembourg, England and Cayman agreed to cooperate despite the differences between the national laws by pooling the assets of the bank in a common central pool and coordinating their distribution equally, the creditors of banks and branches in other countries, also taking part into the trial. A similar situation of successful coordination can also be seen in the Maxwell case, a case that is remarkable through successful cooperation between judges in 44 different jurisdictions, so that England's insolvent parent company managed to reorganize itself through the assets of its US subsidiaries, where through the cooperation of the courts, the assets of the subsidiaries were preserved – the assets of the subsidiaries that later involved funding for the reorganization of the company. It is obvious that a mechanism for modelling the national law according to an international uniform and universal law of insolvency will lead to successful reorganizations by avoiding the sale of assets in individual national insolvency proceedings. An attempt and an effective coordination solution were also represented by the Protocols developed through the efforts of international organizations to enhance the harmonization of the law of insolvency. Such a protocol led the insolvency of the Swiss commodity trading company – AIOC in the United States and Switzerland, with the stated aim of "establishing a coordinated claim reconciliation process" and "a coordinated dispute resolution strategy in relation to any issue can be resolved by efforts made in good faith", for this purpose, the parties agreeing that the claims recognized in a procedure should be recognized in the others without the submission of additional petitions [29].

We can also take into account the Guidelines for Communication and Cooperation Between. Courts In Cross-Border Insolvency Matters – the CoCo Guidelines [30] drawn up by Insol Europe, which set out eighteen independent principles to facilitate the coordination of the insolvency proceedings involving several European jurisdictions, and have highlighted the standards for cooperation. In fact, the American financial services company L.B. incorporated the CoCo Guide into a protocol comprising sixteen separate jurisdictions, including both common jurisprudence and civil law jurisdiction, which facilitates the exchange of data and the recognition of intra-group claims [31. Another eloquent example of efficacy in the application of the principle of universalism and effective coordinated management would be the case of Dubai World and its subsidiaries, a company established by a decree of the Sheikh of Dubai, for which reason the reorganization/insolvency proceedings were not applied in the "Emirates" legal system, customized proceedings being created instead through a new special law, known as Decree no. 57, as well as an exclusive tribunal composed of international judges requiring a rapid resolution due to the global dimension and importance of Dubai World as well as the large number of international investors that would have involved controversial, expensive proceedings and a prolongation in progress [32].

Despite efforts to formulate global standards and rules to reform and shape internal laws, and to facilitate the uniformity of an international law on insolvency, this normative system has not reached complete universalism. Why? Because nationalism remains an obstacle to universalism, as is the case of LB, which despite the fact that the highest jurisdiction was related to the United Kingdom and the USA, both sharing common values and trying to apply the principles of the UNCITRAL Model law, the national courts issued contradictory judgements. Nationalism prevents the creation of Universalist tools that go beyond local customs and practices, the Rubin case indicating how prioritizing the application of national law by national courts has made Universalist goals

less and less appealing. Achieving universalism depends on the national participation in the international framework and the compliance with foreign court judgements. In the specialized international literature [33], harmonization solutions were proposed through an initial unification of the private international law, which could also increase the predictability of the creditors of insolvent international companies, this unification being easier to assimilate due to the fact that that it does not require bringing changes to the national law, the salvation of private international law affecting nationalist concerns to a lower extent in relation to the harmonization of the substantive insolvency legislation. Such tendencies have manifested itself in the Hague Conference, which sought to create binding principles in the private international law, and reached a consensus, subsequently regulated by the Brussels Regulation, concerning the facilitation of the access to justice, especially by providing rules on the court jurisdiction, the rapid and simple recognition and enforcement of civil and commercial judgments issued in the Member States, and the European Insolvency Regulation introducing competence rules, the choice of law and recognition in insolvency cases. We also mention the 1988 Lugano Convention, revised in 2007, reflecting the Brussels Regulation and linking the countries of the European Communities and the European Economic Area. The foreign doctrine also opts for bilateral cooperation that could allow for a much deeper negotiation, since the parties are directly involved in drawing up and gaining greater control over the terms of the agreements, the multilateral treaties giving rise to concerns about maintaining national control through the involvement of many actors such as the UNCITRAL model of law. We believe that mediation and protocols can be solutions for harmonizing and effectively coordinating insolvency proceedings, but we do not agree with the opinion of specialists that the uniformity of a private international law and the conclusion of bilateral treaties would avoid formal universalism in international insolvency, because that would be an involution and a multilateral dissemination of the law of insolvency, which law is now at the border between private international law (we are talking about insolvency of individuals and professionals) and public international law (insolvency of administrative-territorial units), exceeding the international economic/commercial order and increasingly claiming a new universalist identity, that of a law of global insolvency, which cannot function effectively only by reference to a private international law.

The Romanian legislation is also in contrast to this tendency to create a universalist legal order in the field of insolvency, which, although promising a revolution in the matter and enjoying a surprising ascension, seems to be in a regress due to the adoption of Government Emergency Ordinance no. 88/2018 amending and supplementing some normative acts in the field of insolvency deemed as being a legislative reform following the new changes that do not fit into the principles and legislative coordinates drawn up and outlined with great efforts in recent years at European Union and global level, thus giving rise to numerous doctrinal debates [34] concerning the new statute granted to the state as the main creditor in insolvency proceedings. Consequently, the new Ordinance affects precisely the essence of the insolvency proceedings, namely the fundamental principles such as concurrency and unity, by allowing for the enforcement of current claims in the procedure, greatly unbalancing the reorganization process by contradicting the international practices in the field that recommend avoiding the enforcement. According to the new regulation, Art. 143, para. (1) of the Law no. 85/2014 is amended, being supplemented as follows: "... For the debts accumulated during the insolvency

proceedings which have a length of more than 60 days, enforcement can be initiated." In practice, any beneficial change remains overshadowed by the systemic effect created by the possibility to enforce current claims. The legislator, thus "demolishes" the entire legislative construction carried out in recent years that emphasized a "rescue culture", adding a new condition for the opening of the procedure, namely: "When the petition for opening the insolvency proceedings is submitted by the debtor, the amount of the budgetary receivables should be less than 50% of the declared amount of the debtor's claims." The new regulation is contrary to the new international guidelines due to the fact that it prevents not only the initiation of preventive insolvency ("early actions") but also of an established insolvency ("hopelessly insolvent"), which is contrary to the UNCITRAL Legislative Guide on Insolvency Law, which criticizes the law systems of the states that allow for the voluntary introduction of insolvency proceedings only for the very late stages of insolvency. Thus a visible but denied discrimination is created in favour of the budgetary creditor in relation to all the other creditors participating in the proceedings, an internal adoption of the provisions of the UNCITRAL Legislative Guide on Insolvency Law concerning the adverse effect that can be generated by the creation of a legal privilege in terms of effects: "The greater the number of creditors receiving priority treatment, the less beneficial that treatment becomes", being necessary to make the insolvency procedure more efficient. The new internal legislative reform becomes an obvious example of prioritizing national interests in the spirit of the principle of territorialism and at the expense of common universal values based on real studies, research indicators and examples of good practice in the field, this principle of national sovereignty leading to major economic imbalances in the absence of a global balance of the legal systems.

4 Conclusions

Unlike the convergence of the international trade law, the harmonization of the insolvency laws is a phenomenon we can say fairly new, especially at the level of the European Union, although this process started a long time ago in the world through multilateral conventions and treaties as well as the creation of international and regional bodies that have had and have on the agenda, including the field of insolvency, by establishing common directions, principles and values. In fact, it is a very well-known fact that there is an accelerated process carried out in recent years by the European Commission to harmonize the fields of law in relation to insolvency by many Guidelines and Recommendations which propose a renewal of the national legislation on the development of a "rescue culture". Nevertheless, it becomes essential to understand the specific place of the insolvency law in the harmonization spectrum. The European Law Institute speaks about "*a fast-paced and sometimes even incessant of the reform of the insolvency law*", which needs really consistent harmonization of the rules and standards at the European Union level and at international level without getting into conflict with the major principles, values and traditions in the national systems, due to the fact that universalism in its dynamics would involve identifying a single set of rules that would increase the global welfare in perfect balance with the multilateral strengthening of the international trading system. As forecast by OECD in a report recently published review (March 2019), illustrative scenarios from 2019 based on the global macro NiGEM model

highlights the benefits that can be obtained from coordinated action between countries, liberalization and elimination of trade barriers across borders.

Carrying out business is indeed a global phenomenon, and the call to improve the rescue rules for businesses in financial difficulty is heard around the entire world. As we have seen, many recommendations and regulatory tools have been developed to align the insolvency legislation either at regional or global level. Nevertheless, some have remained only at the stage of recommendations or regulatory inspiration, and have not been adopted at domestic level by all the countries that are still reluctant in relation to this aspect, due to the loss of national peculiarities. Indeed, we cannot fail to recognize that insolvency is an intrinsic part of the system of the national law, constantly reshaped by the inevitable connection and interference with other branches of the law, such as the civil law, the labour law (at EU level there are numerous directives in the legal system of insolvency, such as Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer, Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, amended by the European Parliament and Council Directive (EU) 2015/1794 of 6 October 2015, etc.), the criminal law, the administrative law, etc., but all of them are in a process of harmonization by reference to the EU rules (Directives, Regulations, etc.) and international rules (treaties, conventions, etc.) that "direct" somehow the entire system of the national law in substantiation, which tends in its evolution towards perfection, rational equilibrium and coherent legislative harmonization.

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[16] Friedman, T.L.(2006). The world is flat, *apud* Marga, A. (2018). op. cit., p. 16.

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[18] https://globalinsolvency.com/about-us

[19] See Cotiga-Raccah, A., Sautonie-Laguionie, L. (2018). Le nouveau droit europeen des failletes internationales, Au-dela du reglement UE 2015/848 – Insolvabilite BIS – A global dimension, Bruylant, Brussels – Belgium, pp. 120-130.

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The Bermuda Triangle in respect of historic monuments: law, the right of first refusal and culture

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Summary

Someone can expect in any dialogue where we meet the word "law", "norm", "rule", "social interest", "national interest" – institutions, laws, contracts to be transparent and equal for all the involved parties, although we meet among them the Romanian state, as a participant. When they are private law related, it is a "MUST", or, when the state is declared interested by the protection through laws of the historic monuments and by creation of a national cultural patrimony designated to cultivate the national respectively local identity, traditions, culture and education of the new generations, one might think to exercise his declarative and rules concern with determination, initiative, transparency, ensuring himself/herself about the envisaged result. We are trying to clarify in this study how things are in fact and according to what laws they are acting, that is far of being an exhaustive one.

Keywords: pre-emption right, Sale agreement, law no. 422/2001, historic monuments, Romanian state

1 General considerations regarding the legal pre-emption right of the state at the historic monuments' sales

1.1 *Short history review*

Pre-emption right can be both a contractual symbiosis of the parties' interests to generate a priority right, as well as a civil subjective right, generated by the law that grants with priority a certain right to the pre-emptor. This institution is not an innovation of the modernism, but an archaic scaffold that we've seen in the Antiquity, based upon tombs' redemption, agriculture common property or based upon the idea of protection of the state's interests. The present law maker has ruled the Law no. 422/2001 also in relation to the protection of the common interests, of the state or its citizens regarding the protection of the historic monuments, being initial as an Emergency Ordinance, but later

on passed as a law, through which they followed to correct the effects of the laws for restitution of land or houses properties, controlling the future urban vision of economy high increase and estates pressure control, by administrative means that had and they have traditions, history and local entities preservation as scope, by historic monuments preservation, providing symbols and proximity of valuable architectural churches, transmittal of a cultural fund to the next generations, preservation of cultural values through a patrimony of the current generation and future one for estates, but also creation of bodies with a scientific proper training so that to provide classification of certain estates as protected monuments [1].

1.2 *Objectives of Law no. 422/2001 regarding the historic monuments' protection*

Thus, in the light of the above mentioned, in order to complete the cultural patrimony, the law maker has ruled, through this norm, the way to sell historic monuments being the ownership of natural or legal persons of private law, showing that these ones can be only sold after the prior information regarding the sale intention of the Ministry of Culture and Cults [2]. (in case of historic monuments under group A) deconsolidated public services of the Ministry of Culture and Cults, territorial-administrative units for historic monuments under group B and exercise by these ones of the pre-emption right protected by the law [3]

Thus, according to the same law, landowners, private law natural or legal persons, owners of historic monuments, if they have identified a buyer with whom they negotiated and jointly agreed a price, they shall be obliged to delay the deal, with or without a bilateral sale-purchase commitment, in order to inform the Ministry of Culture and Cults or, after case, inform the specialized services of this ministry about the intention and sale conditions, accompanied by a complex documentation [4], unilateral established by the pre-emption right beneficiary. [5]

2 Procedure of the legal pre-emption right for historic monuments' sales

Legally, through these institutions, the state has a 25 days term since the "notification date of information, documentation and draft of the response" [6] to exercise its right of first refusal.

Emotions are not over in the end of these 25 days, because, in case the state didn't opt for buying the historic monument offered for sale, a new pre-emption right is born in the favor of the public local authority who has the obligation to express its option to buy or not the historic monument in another term, this time a shorter period of only 15 days [7]. One has to remark that, in this case, the Lawmaker does not make the same statement regarding the date this term is starting, so that through analogy, we appreciate that the term starts with the registration date of the notification of this authority about the intention to sell and sale conditions and complete set of documents attached to them (including the negative response of the state through the Ministry of Culture and Cults).

In contrast with any other legal provision from the field of legal pre-emption rights (*in the affirmative case being characterized by tale quale agreement by the preemptor of the sale conditions and the price proposed by the Seller)* one has to notice that determination of the author of Law no. 422/2001 regarding the protection of historic monuments to keep the owner, either natural or legal person of private law, far of any offeror determined to buy the property. Thus, according to this law and we are repeating, derogatory to the provisions of the common law in the field of pre-emption subject, the Seller is totally limited in his right to sell its property, being obliged to negotiate with the pre-emptor the price already proposed and for which in most of the cases he already has a proposal, the negotiation being compulsory for the owner, limited for the offeror and unbeatable even though the owner could make the prove of an offer from a Buyer or even the conclusion of an agreement. Going on, only if following the negotiations, the state, through its institutions, does not reach the proposed price, he can declare the end of negotiations, when he considers, at his total discretion, and either give up the property acquisition or to agree the price and sale conditions proposed by the seller owner.

Again, we are witnessing another gap of the law, out of which the pre-emptor state takes advantage again, determined by the omission of the Lawmaker to regulate the negotiations duration. The law does not state any period of time for negotiations so that they can take from a few days to months or years (as we could see in the case of "Cumintenia Pamantului" [8]), period during which the Buyer shall certainly give up the acquisition of the property classified as historic monument, and the owner shall register all the possible negative effects: loosing the Buyer, maintenance costs, taxes for the property declared historic monument etc.

They looked for solutions in the doctrine in order to replace this lack of will of the Lawmaker through the possibility to unilateral insert a negotiation period or interval. Obviously, it is only a trying in the field of unilateral legal documents (such as notification of the intention to sell) to create obligations to the other party.

Once fulfilled this procedure for the right of first refusal in case of historic monuments, it is certain and beneficial the fact that the answer of authority through which it understands not to exercise this right is valid for the whole calendar year when the proposal has been submitted [9], so that if the new Buyer shall be willing to sell too the property within this calendar interval, he shall be able to do this thing without exercising a new pre-emption right.

There is no other exemption, derogation from the obligation of the first right of refusal in case of a sale of a property classified as being a historic monument, not even determined or justified by the lack of an institutional budget in that year allotted for the purchase of historic monuments during the budgetary execution year, although such an exception would be at least natural and honest to save valuable time and money at least for the Seller.

In addition, the law is not clear not even with regards to the object of the pre-emption right, meaning the legal protection is related to the goods *ut singuli* in its existence or any other of his dismemberments.

Practically, art 1 par. 2 from the law is only referring to the sale of estates, constructions and lands located in Romania, but in common law, Civil Law more precisely, the Lawmaker shows that through the Sale-Purchase agreement a person called *Seller* transmits, or after case, commits himself to transmit to the other party called *Buyer,*

the ownership of a *goods,* over a dismemberment of the ownership right or *any other right,* in exchange for a price that the buyer commits to pay.

Thus, according to the common law, real rights can become object of the sale besides the credit rights, companies' rights, intellectual property rights or inheritance rights when the sale is known as assignment, a kind of sale that shows intangible rights' transmission.

We are considering that we are assisting at a limitation of the rights of natural or legal persons owners over the goods owned by them and more specific over the derived attributes of this right, the interpretation ought to be a restrictive one, reason for which we are on the opinion that only in case of an *in integrum* sale of a property, Law no. 422/2001 should apply, if this property is classified as a historic monument.

3 Legal nature of the pre-emption right of the state in sales of historic monument buildings

As legal nature, the right of first refusal in respect of historic monuments is a legal debt right, indivisible and which may not be transferred, that is for the owner who wants to sell his property historic monument, a "*to do*" legal obligation, namely to notify the competent authority with regards to the sale intention, to annex the requested documentation, to negotiate the price and payment conditions and to sell in the end the property in pre-emption conditions, under the extreme sanction of civil matter, that one of absolute nullity of the concluded document, in case the priority of state in the acquisition of such is infringed.

4 Sanction in case of infringement of the notification obligation for sales of historic monument buildings. Remedy-solutions

There is no way to escape this sanction and no recognized method by the Lawmaker to diminish extreme effects of this one, such as similar provisions from other legal pre-emption rights such as subrogation of the pre emptor in the rights of the Buyer, interesting from the law's view and especially from the limits of the price from the sale's offer negotiation point of view.

The Lawmaker is not sending to the common law and he does not inform the recipients of the law with regards to the possibility to sell to a third party of the buildings subject to pre-emption right under suspensive condition of not exercising the pre-emption right by the pre-emptor.

However, jurisprudence did not put equal sign between the right and its exercise, so that Courts have sanctioned the dominant position of the administrative-territorial unit that expressed its option to buy a historic monument building but although notified with regards to the date and time of the sale contract's execution, this one became passive and it didn't present in order to conclude the sale, and further on, to try to get its right by declaring absolute nullity of the building's sale for which it has expressed but not exercised the acquisition right. [10]

Absolute nullity can be anytime invoked, without time limitation, by any interested person and assuming the return of prices. The envisaged classic result can be cumulated with damages. We have to keep in mind that the legal envisaged document but not sanctioned yet by absolute nullity is considered as valid concluded and it has no suspended legal effects. More precisely, although the document is weaker because of the absolute nullity's sword, legitime threatening with this sanction does not suspend its legal effects, so that the derived rights exercise shall keep on for the future (we agree that taxes and duties asked by the uat-s shall be paid for the ownership rights, rents for spaces shall be cashed etc) until the title affected by nullity will be cancelled for ever.

We can't, in the context of exercising a weak right affected by absolute nullity, to hope in a stronger right in terms of civil circuit stability. We intuit as a safeguarding solution from *restitutio in integrum* but also as a solution for title's strengthen, in principal with respect to the good faith Buyer with onerous title, prescription institution, in terms disposed by provisions of art. 931 Civ. Code [11], adverse tabular possession being able to be invoked by any subsequent buyer of the historic monument. Another omission of the good faith third party can be missing the term for rectification of the land book – regulated by the lawmaker in art. 909 of the Civil Code, the three years term starting with the date of the sale registration, but the hypothesis is applicable only in the particular case of existence of another previous agreement over the building concluded with no pre emption right, otherwise the decision pertaining the absolute nullity of the Sale agreement gives birth to the imprescriptible right to rectify the Land book with regards to the initial Buyer.

If these exceptions can't be applied, the remedy solution would be the renegotiation of the agreement, but here the state's position becomes really reluctant, by refusing to express its position in case the affected documents by the nullity because of the infringement of the pre-emption right are redrafted.

Rewording of the Sale agreement is not easy, the parties are tensioned, bringing faults to each other, one of the parties may die or may be dissolved, liquidated and cancelled losing its legal capacity, laws may be changed in respect of the case[12], so besides the uncommon procedure not facile to everybody, a new challenge related to the change of the factual situation on the execution moment of the Sale Agreement is added.

The parties' position in such a diligence must be equal and acceptable.

Exemption of the public authority, namely of the Ministry of Culture and Cults, by the complete advertising obligations for the historic monument and transferring such advertising duties to the private owner is not a worthy initiative of the Lawmaker.

Eloquent is the way in which the advertising for ranking a building on the list of historic monuments that remains obscure and inaccessible to the interested persons is done (published in the Official Journal) as far as the state has solid means to advertise such an extremely important measure through the Land Book advertising system (service for which the state is exempted from any taxes) or through the fiscal statements system – both systems of evidence being always interrogated for the authentication of a building Sale Agreement by the public notaries under the sanction of absolute nullity of the sale transaction – occasion on which this particular situation of ranking on the list of historic monuments of the respective building can be easily discovered and the state's interest and right as preemptor can be protected. These are not the only means, but they are the most popular and we can also add other options such as owners associations or display of an

updated list of historic monuments at each new rank on the site of the Ministry and obviously, the list can go on.

Do they want indeed opposability for this ranking of a building as historic monument or not? We are wondering if this updated list once in a 5 years time and uncorrelated with other services of the UAT-s (city hall, Land Book etc) with respect to mail (postal number, street, complete address: floor, apartment etc) and cadastrial number does not have a hidden purpose and it is not against the state's interests.

Lack of any liability and transfer of all the responsibilities to the owner's shoulders [13] are only weakening and endangering this right owned by all of us to a protected cultural patrimony, thus rising at maximum rate the chances to alien, with or without bad faith, some historic monument buildings, without respecting the pre emption right.

This is not natural and it is against the state's interest to pass the advertising of an administrative measure liability to the owner and to ask to this one to limit himself/herself his/her right/s (otherwise there is no sanction for the infringement of this obligation) written in the Land Book [14]. These legal abnormalities are not a state challenge in order to prove our good citizens quality, but an attack to the preservation instinct of the citizen (*we remind the fact that even in criminal law self defense is not incriminated, besides the deed retained to be occurred in case of necessity)* who is asked to voluntarily advertise his limitation to exercise his ownership right. Joint work between the private person and the state should be at spiritual level and should be the order word in civic life, and the obscurity of ranking and advertising should be punished and the Lawmaker must be informed that he can't protect at his discretion the rights of a state because the protection of one party can't serve as discretionary reason for the infringement of rights of another party or even worst, for the damage of interests of that party.

5 *De lege ferenda* (Proposals for the future law)

Passivity of titleholders of the pre-emption right from the Law no. 422/2001 to register in the Land Book of a property the decision to declare the respective building as a historic monument or to respond within 45 days must not prevent the exercise of the disposal right over the historic monuments.

The solution of considering the sale as valid concluded is a constructive one and it does not damage our interests, the community's interests, because the building is not leaving anywhere, there are measures that can be taken against the owners for the preservation of the cultural patrimony, and the state remain with the opportunity that, next time, if it keeps its interest, to act and opt for the offer's acceptance in same conditions and at equal price with other offerors in favorable conditions offered by the guarantee of the legal pre-emption, to obtain with more diligence the ownership title of the historic monument building.

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[1] Art. 1 par. (1) Law no. 422/2001 – The present law is regulating the legal regime of historic monuments.
(3) Historic monument regime is given through ranking these buildings according to the procedure stated in the current law.

[2] Changed name, at the present the name is Ministry of Culture and National Identity (http://www.cultura.ro/despre-minister)

[3] Historic monuments owned by natural or legal persons of private law can be sold only provided that they exercise the pre-emption right of the Romanian state, through the Ministry of Culture and Cults, for historic monuments ranked in group A or through deconsolidated public services of the Ministry of Culture and Cults, for historic monuments ranked in group B or of territorial-administrative units, after case, according to the current law, under absolute nullity sanction of the sale (art. 4 par. 4 from Law no. 422/2001)

[4] Among which: ownership title, Land Book extract, cadastrial no. etc

[5] Owners, natural or legal persons of private law that have in intention to sell historic monuments buildings, transmit to deconsolidated public services of the Ministry of Culture and Cults the notification regarding the sale intention, accompanied by the documentation established through order of the ministry of culture and cults [Art. 4, par (5) of Law no. 422/2001].

[6] Art. 4 par. 7 of Law no. 422/2001.

[7] If the Ministry of Culture and Cults or the deconsolidated public services of the Ministry of Culture and Cults do/does not exercise their pre emption right within the term stated by par. (7), this right is transferred to the local public authorities, that can exercise in maximum 15 days [Art. 4, par (8) from Law no. 422/2001]

[8] "One of the most significant national projects dedicated to Romanian culture, "Brancusi is mine" campaign has been built around the idea of social cohesion, civility and commitment of cultural-historical identity. The echoes of this campaign have reflected in the positive answer of the civil society that responded to the appeal to exercise the right to access to culture. "Brancusi is mine" has generated several speeches in the public space, bringing again in the first line the importance of society to be close to the cultural patrimony and finding of benchmarks that are so needed for its favorable development and evolution.
"Brancusi is mine" campaign, developed during five months period, enjoyed the contribution of over 100 000 natural or legal persons, amounting Eur 1.273.668 for "Cumintenia Pamantului" sculpture.
http://www.cultura.ro/cumintenia-pamantului-brancusi-e-al-meu

[9] Art. 4 par. 9 of Law no. 422/2001.

[10] Decision no. 4776 of 04.12.2012 of the I.C.C.J. (H.C.C.J.)

[11] Art. 901 and 909 Civil Code.

[12] For instance at the sale moment, a tax on income resulted from the ownership transfer was cashed, and at the redrafting moment, this tax is

not required any longer or there is another percentage asked by the Lawmaker.

[13] Although through special law the state is empowered to preserve its interests (art. 204 from the Approval Rules, Reception and Registration in cadastrial records and Land Book, approved by Order no. 700/2014 of the President of the National Agency for Land Registration and Property Advertising) and the Ministry of Culture and its annexed services have the right to ask the registration in the Land Book of a building ranking as a historic monument.

[14] Art. 16 par. (2) from the Law no. 422/2001 regarding protection of historic monuments. In the same view a new criticism can be identified: an uninspired term of 30 days instead of a more proper and natural "as soon as possible" wording.

Could an estate be sold (*alienated*) within such an interval, respecting all the legal provisions?

Some considerations regarding the amendments to the Law no. 85/2014 on insolvency prevention and insolvency procedures through GEO no. 88/2018

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Abstract

The Emergency Ordinance for amending and supplementing certain normative acts in the field of insolvency and other normative acts entered into force on October 2, 2018, the date from which its provisions take effect.

The main stated purpose, which led to the adoption of the ordinance, was determined by the need to take measures designed to avoid damaging the competitive environment, by using insolvency proceedings abusively by some debtors, who were thus trying to evade the payment of the amounts owed to the general consolidated budget.

Adopting GEO no. 88/2018 has triggered a whole series of criticisms, so that at present it is considered unconstitutional by a large part of the insolvency specialists.

Among the "charges" brought to the ordinance are the fact that it does not comply with the provisions of art. 115 paragraph (4) of the Romanian Constitution, it does not take into account the principles of UNCITRAL, which establish a fair and unified equal treatment within the insolvency procedure, its amendments favor the fiscal creditor, it does not have the attribute of clarity and quality of the normative act, the legislator showing inconsistency regarding the terms used, and that finally creates the possibility of a continuous state of insolvency, with the increase of the debts and the accessories due.

Last but not least, the fact that another attempt to change the insolvency law through GEO no. 91/2013 was declared unconstitutional by the Decision of the Constitutional Court no. 447 of October 29, 2013.

Keywords: insolvency, debtor, tax creditor, threshold value, simple bankruptcy.

1 The amendment made to point 72 of art. 5 paragraph (1) of Law no. 85/2014

According to the provisions of art. 5 paragraph (1) point 72 of Law no. 85/2014 "*The threshold value represents the minimum amount of the debt, in order to be able to introduce the application to open the insolvency procedure. The threshold value is 40,000 lei for both the creditors and the debtor, including for the requests made by the liquidator named in the liquidation procedure provided by Law no. 31/1990, republished, with the subsequent modifications and completions, for debts of a different nature than the salaries, and for the employees it is 6 average gross salaries per economy/employee*" [1].

Paragraph 72 in art. 5 paragraph (1) of Law no. 85/2014 was amended by the provisions of GEO no. 88/2018 for the purpose of introducing the following text: "When the application to open the insolvency procedure is submitted by the debtor*, the amount of the budgetary claims must be less than 50% of the declared total of the debtor's debts*"[2].

The modification brought by GEO no. 88/2018 has resulted in blockages for debtors who want to benefit from the insolvency law. Thus, if the debtor makes a request to open the insolvency procedure, the syndic judge will reject the request, if the amount of the budgetary claims is more than 50% of the total debts. Even if the debtor is insolvent, and registers significant debts, in the absence of budgetary claims, or if he registers debts to the budget in an amount greater than the one established by the ordinance, he will not be able to benefit from the provisions of the law. The result of this inability to access such a procedure will be the increase of debts and accessories, a situation that will considerably diminish the chances of the debtor to benefit in the future from a judicial reorganization procedure.

As a result, in such a situation, the question arises: what can such a debtor do? Pay the budgetary debts as a priority, to the detriment of the various debts, in order to fulfill the conditions established by the ordinance in order to formulate an application to open the admissible procedure? Even if in the situation in which the procedure will be opened and it will be found that it has violated other provisions of Law no. 85/2014, is it possible to formulate revocation actions and/or to request the patrimonial liability of the members of the management bodies of the company?

Thus, a creditor who meets the condition established by the ordinance, will be able to access this procedure only because the amount of the budgetary claims is lower than the value of the other non-budgetary claims, which will lead to unfair situations between the debtors.

According to the provisions of art. 169 para. (1) point g) one of the facts for which the liability of the debtor's governing bodies may be committed is the payment of a creditor, to the detriment of the other creditors, in the month preceding the termination of payments.

And, art. 67 paragraph (1) lists the documents to be filed by the debtor attached to the application to open the insolvency proceedings. Thus, in point d) it is stipulated that the request of the debtor must be accompanied by the list of payments and patrimonial transfers made by the debtor in the 6 months prior to the registration of the application.

If the debtor is in a state of insolvency, but does not meet the condition set by the threshold value, he may be tempted to pay from the budgetary claims, so that he can make a request to open the procedure, according to the amendments brought by the ordinance.

However, it is obvious that these payments made with priority in favor of one of the creditors, is in the detriment of the other creditors, and can lead to other disputes in the situation in which the insolvency procedure will open.

Moreover, the provisions of art. 3 of Law no. 85/2014 establish that the procedures provided by Law no. 85/2014 applies to **professionals**, as defined by art. 3 paragraph (2) of the Civil Code, with the exception of those exercising liberal professions, as well as those with special provisions regarding their insolvency regime, and autonomous municipal companies.

According to art. 4 paragraph (1) point 2, the second principle that governs the insolvency proceedings is to give the debtors an effective and efficient recovery of the business, either through the insolvency prevention procedures or through the judicial reorganization procedure.

Thus, the amendments made by the ordinance lead to the application of a differentiated treatment for the debtors who are in insolvency, but nevertheless they cannot resort to the insolvency procedure that can pave the way for them to a judicial reorganization and finally, to their reinsertion in the economic and business environment.

Paragraph 72 in art. 5, as amended, is not correlated with other incidental provisions of Law no. 85/2014. According to the provisions of art. 5 point 29, the state of insolvency is determined according to the money funds available for the payment of debts, and not by reference to the amount of budgetary claims [3].

The modification brought by the ordinance leads to the decriminalization of the offense of simple bankruptcy, provided by art. 240 of the Penal Code, considering that in the absence of fulfillment of the legal conditions, the debtor can no longer make a request to open the admissible procedure. As a result, the criminal law will no longer have effects, the sanction will no longer be able to intervene, so that the debtor natural person or the legal representative of the debtor legal person, can no longer be held responsible due to the fact that they did not introduce the request to open the procedure.

Article 240 of the Penal Code regulating the offense of simple bankruptcy [4] imposes the formulation of the request to open the procedure within a period calculated from the appearance of the insolvency state. However, the insolvency status concerns all the debts of the debtor and does not strictly refer to the debts to the budgetary creditor, meaning, both the criminal norm and the one included in the provisions of art. 5 point 72 does not include differentiations according to the nature of the debt, budgetary, or otherwise.

In view of the amendments brought by the ordinance, the debtor who is in a state of insolvency, but has a budgetary debt of more than 50% of the total liability, if he introduces the request to open the procedure risks the request being rejected by the syndic judge for not fulfilling the requirement of art. 5 point 72, and if he does not introduce the application he risks violating the provisions of the criminal law.

The provisions of art. 25 para. (2) of the Fiscal Procedure Code [5], establish that for the outstanding payment obligations of the debtor declared insolvent according to art. 265 paragraph (1) of the Fiscal Procedure Code, some persons (management bodies or other natural or legal persons) respond jointly with it for acts or deeds prior to the opening of the insolvency procedure. The provisions of art. 265 paragraph (1) of the Fiscal Procedure Code establish that: "*(...) the debtor is insolvent if his incomes and/or assets are of a*

lower value than the tax liabilities of payment or who have no incomes or assets. (...)" [6].

It can be easily observed that the provisions of art. 5 point 72 are not aligned with the ones mentioned in the Fiscal Procedure Code, so there is the risk of assuming the patrimonial liability for the aggravation of the insolvency status, even if the debtor is unable to make an application to open the admissible insolvency procedure, in relation to the failure to meet the threshold-value condition established by the ordinance.

The provisions of art. 117 of Law no. 85/2014 regulates the possibility of canceling fraudulent acts or transactions concluded by the debtor to the detriment of the creditors' rights, in the two years prior to the opening of the procedure.

And, par. (2) let. b) from the same article refers to the situation of some operations in which the debtor's performance clearly exceeds the one received, and these were performed in the 6 months prior to the opening of the procedure [7].

As a result, there is the risk of concluding acts considered by Law no. 85/2014 as „acts or *fraudulent operations of the debtor to the detriment of the creditors' rights*" [8], in the situation when the company is insolvent but cannot benefit from the provisions of the law regarding the impossibility of fulfilling the conditions established by GEO no. 88/2018.

Maintaining a company in the economic and business environment without giving it the possibility to benefit from the procedures regulated by the insolvency law, even though the state of cessation of payments is installed, can generate imbalances among the other participants in the market, the debtor being forced to continue activity, not actually being able to take on new obligations. Thus, during this period, the acts concluded by the governing bodies could be interpreted as fraudulent.

The unanimous opinion expressed in the doctrine regarding this modification is that it would have been necessary to preserve the previous form of the threshold value definition. By imposing a threshold for filing the application for insolvency (budgetary claims of up to 50% of the total value of the debts), the state of difficulty of the companies concerned is perpetuated, and the debtors will no longer be obliged to submit an application to open the procedure, perpetuating the state of insolvency that will, implicitly, attract the insolvency of other suppliers, customers.

Keeping these debtors out of insolvency will not improve their situation, but, on the contrary, the difficulties they will face will increase, diminishing the chances of recovering the creditors' claims.

Promoting this change of the threshold-value definition will implicitly cause the partial decriminalization of the bankruptcy offense regulated by art. 240 Criminal Code.

2 The amendment brought by para. (3) and (4) of art. 75 of Law no. 85/2014

The provisions of para. (3) in art. 75, with the amendments brought by GEO no. 88/2018, establish the following: "*They are not subject to the suspension provided in par. (1) the legal actions for determining the existence and/or the amount of some debts on the debtor, born after the date of opening the procedure. For such actions, it may be formulated during the observation and reorganization period,* ***a request for payment to***

***be analyzed by the judicial administrator, within 10 days from the date of submission**, in compliance with the provisions of art. 106 paragraph (1), which is applied properly, without these claims being entered in the debt table…*".

And, according to the provisions of para. (4) in art. 75, as amended: "***The holder of a current, clear, liquid and claimable debt that has been recognized by the judicial administrator or on which he failed to give a ruling within 10 days from the date of the submission of the payment request or recognized by the syndic judge according to para. (3),** if the amount of the debt exceeds the threshold value, it may request during the observation period to open the debtor's bankruptcy procedure if these debts are not paid within 60 days from the date of the measure of the judicial administrator admitting or omitting the ruling on the request for payment or the judgment of the court…".*

By the amendments brought in par. (3) and (4) of art. 75 of Law no. 85/2014 the responsibilities of the judicial administrator were increased by the fact that, on the one hand, a 10-day deadline was introduced, calculated from the date of filing the request for payment of current claims; on the other hand, it was stipulated that if the insolvency practitioner failed to analyze and rule within this term on the payment request made by the holder of a current debt, if the amount of the debt exceeds the threshold value, the creditor in question may request during the observation period to open the debtor's bankruptcy procedure if his current debt is not paid within 60 days from the omission of the ruling on the payment request.

Thus, a simple calculation shows that the request to open the bankruptcy procedure can be formulated after a total period of 70 days has elapsed from the date of the request for payment of the current claim, if the amount that is the subject of the payment request has not been paid or it has been partially paid, and the unpaid difference exceeds the threshold value.

As a result, if the court administrator expresses his agreement with the payment request formulated, the debtor is obliged, within a maximum of 60 days from the date of approval of the request, to pay the amount he owes. On the other hand, if the judicial administrator failed to analyze the payment request, after the expiry of the 70-day period from the date of the application submission, the interested creditor has the right to request the debtor's bankruptcy procedure to be opened.

In the doctrine, opinions were expressed in the sense that the 10-day deadline, calculated from the date of the application for payment of current debts, can lead to difficulties or bottlenecks, this being an extremely short term, given that the applications for payments can also be sent through the postal services or courier companies, which leads from the beginning to reduce the term of solving and analyzing such a request.

In practice, it is often the case that payment requests are not accompanied by supporting documents or involve complex business relationships that involve the need for information and documents that are not always within the reach of the practitioner designated in the file.

As a result, the practitioner may be put in the situation where he has the obligation to respond within a few days, but does not have all the information and documents necessary to analyze the payment request.

The deadline set for giving an answer is considered insufficient, especially in the case where the request is sent through the postal or courier services, since from the transmission of the request and until its receipt it may take a few more days, so that the

practitioner analyzing the application will be unable to give a relevant answer, within the given deadline.

Moreover, the situation can be complicated if the organization form of the practitioner managing the file is an individual practice or a single-person enterprise, where only one practitioner works, or in the case where he is unavailable, motivated by health problems.

In the doctrine, opinions were expressed in the sense that it would be much more useful for the 10-day term to begin from the date on which the practitioner actually takes possession of the payment request.

According to the provisions of par. (4), the omission of the judicial administrator to rule on the payment request, when the amount of the debt exceeds the threshold value provided by art. 5 pt. 72, entitles the creditor to request the opening of the bankruptcy procedure, provided that the respective debt has not been paid within 60 days. As a result, the lack of response will be equivalent to an acceptance of the claim, which will generate difficulties in practice.

Regarding these provisions, opinions were expressed in the doctrine, in the sense that, the insolvency practitioner being assimilated to a body with jurisdictional powers in the entire process of verification of claims, the lack of an answer from him cannot mean the validation of a claim, which it may be unjustified and that would affect the other participants in the procedure. Failure of the practitioner to rule on a current claim should lead to the possibility of filing an appeal, which will be settled by the syndic judge. [9].

3 The amendment brought by para. (2) in art. 52 of Law no. 85/2014

In the unchanged form, the provisions of art. 52 established that: "After the opening of the procedure, the general meeting of the shareholders/associates/members of the debtor will appoint, at their expense, the special administrator".

By the modification brought by GEO no. 88/2018 para. (2) was added to art. 52 [10], which establishes that: **"*A natural or legal person who also has the status of a creditor cannot be designated as a special administrator*".**

The special administrator is a natural or legal person designated by the general meeting of the shareholders/associates/members of the debtor, empowered to represent their interests in the procedure and, when the debtor is allowed to administer his activity, to carry out, on his behalf and on his account, the necessary administrative acts.

Thus, the special administrator acts on behalf of the debtor, and indirectly on that of the shareholders/associates/members of the debtor.

And, in case the right of administration of the activity and assets of the debtor has not been lifted, the one who will lead the activity of the debtor, is the special administrator, under the supervision of the judicial administrator.

Regarding the modification adopted by GEO no. 88/2018, the doctrine was expressed in the sense that this provision is excessive and that it would be justified if it were mentioned that a natural or legal person having the status of an affiliated creditor cannot be designated as a special administrator [11].

4 The amendment brought by para. (2) in art. 61 of Law no. 85/2014

In the unchanged form, the provisions of art. 61 established that: "*In order to carry out its duties, the judicial administrator will be able to designate specialized persons such as lawyers, accounting experts, evaluators or other specialists. The appointment and the level of remuneration of these persons will be subject to the approval of the creditors' committee, if they will be paid out of the assets of the debtor, or will be subject to the cost standards established by the National Union of Insolvency Practitioners in Romania, according to the provisions of the Government Emergency Ordinance no. 86/2006, republished, with the subsequent modifications and completions, in case they will be remunerated from the liquidation fund established according to the provisions of art. 39 paragraph (4)*".

By the modification brought by GEO no. 88/2018, art. 61 a paragraph was added, namely para. (2) [12], which establishes that: "*on the basis of para. (1) those persons who are in a contractual relationship capable of creating a conflict of interest or are affiliated persons, as defined in the Tax Code, with the judicial administrator, with the judicial liquidator, with the debtor or with any of the creditors will not be able to be designated*".

The provisions of art. 36 paragraph (1) of Chapter IV *Drafting the normative acts*, of Law no. 24/2000 regarding the legislative technique [13], regulates the compulsory drafting of normative acts in a specific normative, concise, sober, clear and precise legal language and style, which excludes any equivocation.

Regarding the modification brought by GEO no. 88/2018, in the doctrine were expressed opinions in the sense that an expression of the type "*...in a contractual relationship that creates a conflict of interest...*" it is vague and will give rise in practice to contrary interpretations, the legal norm not being drafted in such a way as to exclude any ambiguity, and as a result, it violates the provisions of Law no. 24/2000.

Moreover, the contractual relationship referred to in the amendment brought by the ordinance should generate a current conflict of interest, and not a potential one, or a future one.

5 Conclusions

According to the opinions expressed by the majority of the doctrine, the amendments brought by GEO no. 88/2018, section 72 in art. 5 paragraph (1), paragraph (3) and (4) of art. 75, para. (2) in art. 52 and para. (2) in art. 61 of Law no. 85/2014 does not ensure the purpose stated by GEO no. 88/2018 and not even that of the insolvency law, as they tend to impose rules, rather, to attract the bankruptcy of the company and to restrict its right to recover, impose a conduct for the debtor who seems to limit his right to benefit from the protection offered by the insolvency law, violates the rights of the creditors to whom they reduce chances of redressing (according to art. 5 pt. 72) or which, if they hold claims prior to the opening of the proceedings, are or may be disadvantaged against the creditors whose claims were born during the procedure, and also violate the rights of the debtors by limiting the right to request the opening of the procedure, ensuring the proper protection of the insolvency law.

The project to amend the Law no. 85/2014, launched by the Ministry of Public Finance, raised question marks regarding the purpose of these changes, the manner in which they were designed and the extent to which they have been sustainable since its inception. In the doctrine opinions were expressed in the sense that, the provisions of the Ordinance no. 88/2018 violates provisions of the Romanian Constitution and the European Directive on granting the second chance [14], that they do not have the attribute of clarity and quality of the normative act required by art. 1 of the Constitution, having unclear and confusing provisions, and that in the end the result is not the expected one.

By the amendments brought by GEO no. 88/2018, a discriminatory treatment is created in favor of the budgetary claims, and the collective procedures are obstructed to the detriment of the fiscal execution procedure. Thus, a preferential treatment of the budgetary creditor is found, to the detriment of the other creditors participating in the procedure, in violation of the principle of insolvency and the unity of the insolvency proceedings. The budgetary creditor is favored, he has certain rights that the other creditors do not have, so that most of the doctrine considers that the amendments made by the Ordinance no. 88/2018 are made exclusively in favor of the fiscal creditor, and to the detriment of the other creditors.

SOURCES

[1] Law no. 85/2014 on insolvency prevention and insolvency procedures, as amended, published in the Official Gazette of Romania, no. 466 of 25 June 2014.

[2] GEO no. 88/2018, for amending and supplementing certain normative acts in the field of insolvency and other normative acts, published in the Official Gazette of Romania, no. 840 of 2 October 2018.

[3] According to the provisions of art. 5 pt. 29 of Law no. 85/2014: „*Insolvency is that state of the debtor's assets which is characterized by the insufficiency of the available monetary funds for the payment of certain, liquid and due debts".*

[4] According to the provisions of art. 240 of the Penal Code, Regulating the simple bankruptcy offense: „*The failure to submit or the late submission, by the individual debtor or by the legal representative of the legal entity debtor, of the request for the opening of insolvency proceedings, within a period of time not exceeding by more than six months the period of time provided by the law since the occurrence of the insolvency, shall be punishable by no less than 3 months and no more than 1 year of imprisonment or by a fine.*".

[5] Law no. 207/2015 regarding the Fiscal Procedure Code, published in the Official Gazette of Romania, no. 547 din 23 July 2015.

[6] The provisions of art. 265 par. (1) of the Fiscal Procedure Code, establish that: "For the purposes of this Code, the debtor whose incomes and/or assets are worth less than the tax liabilities of payment or who has no

incomes or assets is bankrupt. *In this sense, the fiscal body communicates to the debtor the insolvency report".*

[7] According to the provisions of art. 117 par. (2) let. b) of Law no. 85/2014: *„(2) The following acts or operations of the debtor may be canceled, for the return of the transferred assets or the value of other services executed: ... b) operations in which the debtor's performance clearly exceeds the one received, performed in the 6 months prior to the opening of the procedure".*

[8] See in this regard: Simona Maria Miloș, Andreea Deli, *Analysis of the novelty aspects brought by GEO no. 88/2018 to the Insolvency Code*, in Phoenix, The Insolvency Review, no. 66, October-December 2018, pp. 9, https://www.unpir.ro/documents/phoenix/pdf/revista-phoenix-66.pdf

[9] According to the provisions of art. 117 par. (1) din Law no. 85/2014: *„(1) The judicial administrator/judicial liquidator may bring to the syndic judge actions for the cancellation of fraudulent acts or operations of the debtor to the detriment of the creditors' rights, in the 2 years prior to the opening of the procedure".*

[10] par. (2) of art. 52 was introduced by art. I section 3 of GEO no. 88/2018.

[11] See in this regard: Simona Maria Miloș, Andreea Deli, *Analysis of novelty aspects brought by GEO no. 88/2018 to the Insolvency Code*, in Phoenix, The Insolvency Review, no. 66, October-December 2018, ppa. 8, https://www.unpir.ro/documents/phoenix/pdf/revista-phoenix-66.pdf

[12] par. (2) of art. 61 was introduced by art. I section 6 of GEO no. 88/2018.

[13] Law no. 24/200 regarding the norms of legislative technique for the elaboration of normative acts, republished in the Official Gazette of Romania, no. 260 din 21 April 2010.

[14] The European Parliament voted on March 28, 2019 the legislative resolution on the proposal for a Directive on preventive restructuring, second chance frameworks and measures to increase the efficiency of the restructuring, insolvency and debt repayment procedures and amending Directive 2012/30/EU, to promote insolvency and pre-insolvency solutions for rescuing troubled European companies. http://www.europarl.europa.eu/doceo/document/TA-8-2019-0321_RO.html

The possibility of triggering enforcement in the insolvency proceeding in view of the amendments brought to Law no. 85/2014 by GEO no. 88/2018. Relevant aspects of the case law

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Abstract

After being in public debate for only two weeks, in the Official Gazette of Romania, Part I, no. 840 of October 2, 2018 GEO no. 88/2018 for amending and supplementing certain normative acts in the field of insolvency and other normative acts was published [1].

Even if it has not been long since the entry into force, the changes made by the new legislative provision do not seem to have the expected impact on insolvency proceedings and on the business environment, even if the stated main purpose was considered to be the need to take measures, meant to avoid affecting the competitive environment, by the use of the procedures provided by Law no. 85/2014 in an abusive way by some debtors [2].

In the doctrine opinions were expressed in the sense that certain changes in the ordinance will only prevent the achievement of the purpose of Law no. 85/2014 – establishing a collective procedure for covering the debtor's liabilities, granting, when possible, the chance of restoring his activity.

One of the most controversial changes brought by the ordinance is the introduction of the possibility that, for debts accumulated during the insolvency proceedings that are more than 60 days old, the enforcement proceedings can be opened.

This modification creates the premises for starting an individual enforcement proceeding within a collective judicial procedure, with the risk of failure of a reorganization plan or the impossibility of successfully completing it, at the expense of the business environment.

Keywords: insolvency, debtor, tax creditor, collective procedure, individual enforcement, reorganization plan.

The so-called Insolvency Code, Law no. 85/2014 regarding pre-insolvency and insolvency proceedings, arose from the need to correct the deficiencies found in the application of Law no. 85/2006 [3], of codifying the provisions on insolvency and meeting all the rules that apply to professionals, credit institutions, insurance/reinsurance companies, groups of companies, insolvency prevention and insolvency procedures, as well as the rules on cross-border insolvency, in one law.

The opening of the insolvency procedure, both at the request of the debtor, as well as at the request of the creditor, or of the persons or institutions expressly provided by law, produces certain legal effects, regulated both by the provisions of Law no. 85/2006, as well as those of Law no. 85/2014, amended by the provisions of GEO no. 88/2018.

These effects concern the assets of the debtor, and refer to the rights and obligations of the debtor, as well as to the rights of the creditors regarding the recovery of the debts held against the insolvent debtor.

In the literature, the effects of the opening of the insolvency procedure were classified into two main categories:

a) **patrimonial effects**, consisting of: suspension of legal and extrajudicial actions, as well as forced enforcement measures, suspension of the limitation period for actions for making claims against the debtor, suspending the flow of interest on debts that do not benefit from a cause of preference, closing the accounts of the debtor, and opening the accounts of the debtor, the single insolvency account, and the non-availability to the creditors of the entries and any other similar formalities carried out after the opening date of the insolvency procedure;

b) **non-patrimonial effects,** namely: the lifting of the debtor's right of administration, the obligation to advertise the insolvency status, the obligation of the debtor to provide data and information on his activity, and the suspension of trading on the regulated markets of the shares issued by the debtor.

Thus, the main immediate effect of the opening of the procedure is the suspension of the judicial and extrajudicial actions, as well as the enforcement measures. This patrimonial effect of the opening of the insolvency procedure, is regulated both by the provisions of Law no. 85/2006, currently repealed, as well as those of Law no. 85/2014, currently in force.

1 The suspension of judicial, extrajudicial actions or measures of enforcement and of the period of limitation, in the light of the regulations included in Law no. 85/2006, currently repealed, and of Law no. 85/2014

The regulation contained in the provisions of **art. 36 of Law no. 85/2006 regarding the insolvency procedure,** established that, from the date of the opening of the procedure, all judicial, extrajudicial or forced enforcement measures for the fulfillment of the claims on the debtor or his assets are legally suspended.

As a result, under this regulation, the suspension was legally active, by virtue of the law and aimed at all the judicial, extrajudicial actions and measures of individual enforcement, both those initiated before the opening of the procedure and those formulated during the procedure.

In certain situations, however, strictly regulated by law, the creditors could ask the syndic judge to lift the suspension provided in **art. 36** regarding their debt and the immediate use of the asset on which they had the guarantee or the right of retention in the procedure, with the appropriate application of the provisions of **art. 116-118** and with the condition that the expenses stipulated in **art. 121 paragraph (1) section 1.**

However, lifting the suspension does not mean resuming the individual enforcement of the property affected by the guarantee or over which there is a right of retention, but the possibility of requesting that the judicial administrator or the liquidator immediately use the goods, at any stage in which the procedure might be in, and to have them immediately distributes the price collected after the deduction of the related execution costs.

The provisions of **art. 40** of the same law, established that, the opening of the procedure suspended any terms of prescription of the actions provided for in **art. 36.**

According to this regulation, both the limitation periods for the right to action and the limitation periods for the right to request enforcement were suspended.

The suspension of the individual execution, however, does not mean the cancellation of the legally executed acts performed before the opening of the procedure, but the stopping the course of the enforcement in the phase in which it was.

Entry into force of **Law no. 85/2014 on insolvency and insolvency proceedings**, has brought significant changes to pre-insolvency and insolvency proceedings.

Thus, art. 75 paragraph (1) establishes as a novelty that the exploitation of the rights of the creditors with claims prior to the opening of the procedure can be done only within the insolvency procedure, by submitting applications for admission of receivables, and that the restitution of their actions is possible only in case of the cancellation of the decision to open the procedure (in the appeal) or the revocation of the decision to open the procedure: following the admission of a creditor's opposition, according to **art. 71 (2)**, or in case of closure of the procedure under the conditions of **art. 178** (payment of all receivables during the observation period or renunciation of all creditors at trial during the observation period).

However, the new provisions do not change the regulation contained in **art. 36 of Law no. 85/2006**, as only an ongoing procedure suspends these forced actions and enforcement. Thus, if this procedure no longer exists, the actions, and enforcements may be resumed. The novelty that changes the solution, however, is the provision of the **final sentence of par. (1)**, according to which *"at the date of the definitive stay of the decision to open the procedure, both the judicial or extrajudicial action, as well as the suspended enforcements cease*" [4].

In the previous regulation, they remained suspended while the procedure was ongoing and were resumed at the time when it was no longer in progress.

As a result, taking into account the regulation in **the final sentence of par. (1)**, In the files that have the object of judicial actions against the debtor, the solution of the cessation of the process must be arranged after the definitive stay of the decision to open the procedure, and, the judicial executor, in the enforcement files, must have the measure of the cessation of the enforcement arranged.

Considering that on the date of the definitive stay of the decision to open the procedure the actions and enforcement cease, in case the procedure would be closed under the conditions of **art. 178** (payment of all debts during the observation period or the

renunciation of all the creditors in the court during the observation period), they can no longer be replayed/resumed, which leads to difficulties in practice.

The remedies promoted by the debtor against the actions of the creditors, solved before the opening of the procedure, and the actions in the criminal proceedings directed against the debtor, are not suspended.

According to par**. (3)**, are not subject to the suspension provided in **par. (1)**, "*judicial actions to determine the existence and/or the amount of debts owed to the debtor, born after the date of opening the procedure*", but with the mention that they will be solved by the syndic judge, within the insolvency file and of an appeal against the insolvency practitioner's measure that denies the creditor's request for payment [the equivalent of the notion of "*non-recognition of the receivable*" of **par. (4)**].

If, within 60 days from the due date, the payment of the debt born during the procedure has not been paid, in the situation of acknowledgment of its existence and demandability by the insolvent practitioner, within the payment request or by the judgment of the syndic judge who solves the appeal against the refusal, the respective creditor is entitled to request the bankruptcy, if the debt meets the threshold value, which is at least 40,000 lei. This provision is applicable both during the period of observation and during the period of judicial reorganization.

Law no. 85/2014 uses in **par. (4)** the notion of "current, reliable, liquid and receivable debt". However, according to the definition of the current debt, the current debt is a certain, liquid and demandable debt [5].

As a result, the current debt is the one that was born during the insolvency procedure, so during any stage of it – observation period, reorganization period or bankruptcy period.

To be payable at maturity, according to **art. 75 par. (3)**, the current debt must be certain, liquid and demandable, in the sense of **art. 5 pt. 20** [6].

Moreover, the current debt must also refer to the notion of "current activity", as defined by **pt. 2 art. 5** [7].

All these activities must take place in the normal course of the debtor's activity, confined to his statutory object of activity.

According to the provisions of **art. 105 par. (1) of Law no. 85/2006**, of **Section 6, entitled *Reorganization***, in the event that the debtor does not comply with the plan, or the carrying on of the activity results in loss of his assets, the judicial administrator, the creditors' committee or any of the creditors, as well as the special administrator may at any time request the syndic judge to approve the bankruptcy. The provisions of **par. (2)** establish that the registration of such a request does not suspend the activity of the debtor, until the settlement given by the syndic judge, by way of conclusion.

In the new regulation contained in the provisions **art. 143 of Law no. 85/2014**, before being amended by GEO no. 88/2018, to the two alignments that existed in Law no. 85/2006, a new paragraph has been added, namely **par. (3)**: "*The holder of a current, reliable, liquid and receivable debt older than 60 days and an amount above the threshold value, may request, at any time during the reorganization plan or after fulfilling the payment obligations assumed in the plan, the bankruptcy. His request will be rejected by the syndic judge in case the debt is not due, paid or the debtor enters into a payment agreement with this creditor".*

Art. 143 regulates the cases in which the conversion of the reorganization into bankruptcy can be done, namely the cessation of the reorganization procedure and the transition to bankruptcy.

In par. (1) a new condition is introduced for the conversion of the reorganization into bankruptcy, together with those provided by the old regulation, Law no. 85/2006, namely *"(1) (...) new debts accrue to the creditors in the procedure, (...)"*. It should be noted that according to the new regulations, the creditors committee is no longer the title holder of the action for the conversion of the reorganization into bankruptcy, the holder being any of the creditors. [8].

2 The amendments brought by GEO no. 88/2018

The Emergency Ordinance for amending and supplementing certain normative acts in the field of insolvency and other normative acts entered into force on October 2, 2018, the date from which its provisions take effect.

Art. 9 par. (1) of GEO no. 88/2018 establishes that *"The **terms** provided in art. 75 paragraph (3) and art. 143 para. (1) and (3), as well as the **provisions** of art. 75 para. (4) of Law no. 85/2014 on insolvency prevention and insolvency procedures, published in the Official Gazette of Romania, Part I, no. 466 of June 25, 2014, with subsequent amendments and additions, as modified by this Emergency Ordinance, also applies to requests made in the processes initiated before the date of its entry into force, including those not resolved until the date of entry into force of this emergency ordinance*". We can see that the text differentiates between *terms*, and *provisions*.

The provisions of **art. 143 para. (1) of Law no. 85/2014**, have been modified by those of **GEO no. 88/2018**, by adding at the end of the paragraph thus: **"***For debts accumulated during the insolvency procedure that are older than 60 days, **enforcement can be started***".

Provisions similar to the one mentioned can also be found in art. 75 para. (4) of GEO no. 91/2013 on insolvency prevention and insolvency proceedings [9]: *"Enforcement is not subject to suspension due to claims born after the date of opening the insolvency procedure. If the debtor does not make the payment of the debt born after the date of the opening of the procedure within 90 days from the due date, the creditor is entitled to start the forced execution, according to the law*", which has been declared unconstitutional [10].

In the specialized doctrine opinions were expressed in the sense that the only creditor who can actually execute is in fact the tax creditor.

Thus, in relation to the provisions of **art. 75 para. (4)**, **art. 143 para. (3) of Law no. 85/2014** and **art. I pt. 14 of GEO no. 88/2018, *the tax debt qualifies as the only current debt that can be enforced directly***, without going through a *control filter* by the insolvency practitioner and/or the syndic judge, as in the case of all other current claims, considering that from the moment of issuing the taxation decision, the fiscal debt is an enforceable title [11].

As a result, even if the legal provision allows any holder of current unpaid receivables to demand the forced execution of the obligation, in reality, the beneficiary cannot be any creditor, but only the creditor who holds an enforceable title according to the law, most often, the budget creditor.

Thus, a discrimination is created in favor of the budget creditor in relation to all other competing creditors participating in the procedure.

In addition to the above, in practice there may be other aspects that need to be considered regarding the concrete way in which the individual enforcement will take place. Thus, an acknowledgment of the insolvency debtor's money availability is impossible to ascertain, given the provisions of **art. 163 para. (3) of Law no. 85/2014**, which prohibits any civil, criminal or administrative measure of unavailability of the debtor's unique account by the administrative bodies or the courts.

As a result, the current creditor will have to request the initiation of other forms of movable or immovable property enforcement on the debtor's assets or the enforcement of third parties from which the debtor in insolvency proceedings has to receive money.

And as to these ways of enforcement, confusion or inequity may arise, as long as those goods or incomes are affected by preferential causes in favor of pre-existing creditors, and with respect to the creditors registered with the credit bureau with previous debts, the legal suspension of the right to demand the forced execution of the assets of the insolvent debtor operates, and the holder of current debts with enforceable title will be opened such possibility of enforcement.

The practice will bring other problems related to the way in which the judicial or fiscal executor, as the case may be, will proceed, under the conditions in which he will be obliged to notify the beneficiaries of certain preferential causes, and they have the right to suspensively enforce, according to the provisions art. 75 para. (1) of Law no. 85/2014. The question is natural: how will a judicial executor proceed in the case of distributions? What are the norms to which it will refer? Those of Law no. 85/2014, those in the Fiscal Procedure Code or those in the Civil Procedure Code?

The claims are analyzed by the insolvency practitioner, who will draw up the claims table following their analysis. It is also the practitioner who finds out if a creditor is deprived of the right to carry out his claim, according to the provisions of art. 114 para. (1), decay that operates both within and beyond the insolvency procedure. Any action taken by the creditor who is deprived of the right to pursue his claim outside the insolvency procedure would be suspended according to the provisions of art. 75 para. (1) of the law, regulation which establishes that, from the date of the opening of the procedure, all the judicial, extrajudicial actions or measures of enforced execution for the fulfillment of the claims on the debtor's assets are legally suspended. The same regulation establishes in the second sentence that the exploitation of their rights can be done only in the insolvency procedure, by submitting claims for the admission of debts. Their return to the roll is possible only in case of the cancellation of the decision to open the procedure, of revoking the conclusion of opening the procedure or in case of closing the procedure under the conditions of art. 178. If the decision to open the procedure is cancelled or, as the case may be, revoked, the judicial or extrajudicial actions for the realization of the claims on the debtor's assets can be put back on the roll, and the enforcement measures can be resumed. At the date of the final stay of the decision to open the procedure, both the judicial or extrajudicial action, as well as the suspended enforcement cease.

In this context, there may be situations in which the creditor benefiting from preferential causes noted in the opposition records has not been registered within the legal term at the credit board, situation in which it is deprived of the right to carry out its claim. An eventual challenge to enforcement before a tax litigation court or common law

court, which do not have essential information about creditors and the stage of insolvency proceedings, will generate chaos and will affect the entire balance of insolvency proceedings. [12].

In the doctrine, opinions were expressed in the sense that the most affected will be the creditors who approved a reorganization plan, which became by the effect of the confirmation by the syndic judge, an enforceable title, since, in the reorganization procedure, they will see reduced "indentation quotas" established by the plan.

Moreover, in the case of creditors benefiting from preferential causes, who have accepted within the reorganization plan the use of that guarantee at a later time, in order to allow the debtor to produce income from that asset, they are obliged to either join in the enforcement triggered by another creditor, to preserve their cause of preference, or to file for bankruptcy.

The new regulation will lead to the creation of situations that have nothing in common with the insolvency procedure that is collective and concurrent, the creditors will each adopt a position that allows them to protect their personal interests, so that finally the purpose of the procedure, as regulated by the provisions of art. 2 of Law no. 85/2014, will not be reached.

The provisions of art. 163 para. (3) of Law no. 85/2014 have not been modified, and those provided in para. (3) prohibit any civil, criminal or administrative measure of unavailability of the debtor's unique account by the administrative bodies or by the courts.

As a result, if we refer to these provisions, the debtor's money availability will not be affected, so that the current creditor will try other forms of enforcement, such as enforceable movable or immovable property on the assets of the debtor or forced execution of third parties from which the debtor in insolvency proceedings has to receive money.

Other discrepant situations that are incompatible with the collective and insolvency proceedings will also appear in the procedure, such as those in which the goods or incomes requested to be enforced are affected by preferential causes in favor of pre-existing creditors, and with respect to the creditors registered at the credit bureau with previous debts, a de jure suspension of the right to demand the enforcement of the assets of the insolvent debtor operates, During this time, the holder of current debts with enforceable title will be open to such possibility of individual enforcement.

According to art. 1 para. (5) of the Constitution of Romania, *"In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory".*

Art. 2 of Law no. 85/2014 establishes the purpose of the law, this being the establishment of a collective procedure that gives, when possible, a chance to recover the debtor's activity.

Art. 143 para. (1) establishes the possibility of a enforcement procedure in parallel with the collective procedure, which means that the purpose of the insolvency procedure is diverted.

Thus, apart from the fact that this new regulation leads to a state of confusion and distrust in the national legislation that should provide solutions for professionals who want to reorganize themselves, a major breach is created in connection with the insolvency nature of the procedure, the possibility of emptying the assets of the insolvent debtor on the basis of individual enforcement procedures and which make recovery impossible, being apparently allowed.

According to the provisions of art. 163 para. (3) of Law no. 85/2014, the insolvency account opened under the conditions of art. 39 para. (2) it will not be in any way made unavailable, by any measure of a criminal, civil or administrative nature, by order of by the criminal investigation bodies, the administrative bodies or the courts.

Art. 39 para. (2) establishes that payments will be made from an account opened at a bank unit, based on provisions issued by the debtor or, as the case may be, by the judicial administrator, and in the course of bankruptcy, by the judicial liquidator.

As a result, the provisions contained in art. 143 para. (1), in the sense that the availability of the single insolvency account could be pursued, they contradict the provisions of art. 39 and 163 of Law no. 85/2014.

Art. 159 of Law no. 85/2014 establishes the order in which the funds obtained from the sale of the debtor's goods and rights will be distributed, in favor of the creditor, of causes of preference.

According to art. 227 para. (9) of the Fiscal Procedure Code [13], regarding third parties, including the state, a real guarantee and the other real burdens on the goods have a high priority which is established at the time when they have been made public.

And, according to the provisions of art. 2328 of the New Civil Code [14], the preference granted to the state and to the administrative-territorial units for the debts they hold is regulated by special laws. Such a preference may not affect the rights previously acquired by third parties.

As a result, the interpretation that the assets affected by preferential rights, constituted in favor of the creditors prior to the opening of the procedure could be pursued is illegal and conflicts with the mentioned legal provisions.

The great majority of the doctrines argue that the provisions of art. 143 para. (1) in the modified form, create a discriminatory treatment, as follows:

– The creditor holding an enforceable title, holder of a historical debt, is prevented from initiating an individual forced execution, according to the provisions of art. 75 of Law no. 85/2014;

– The creditors of the same debtor, holders of current receivables are entitled, according to art. 143 para. (1) to start such an execution, and which, depending on the interpretation given to the legal text, may also affect any preferential rights of the previous creditors,

and

– An unjustified advantage is created in the recovery of the receivables of the creditors with current receivables.

In conclusion, the property rights of the other creditors can be affected without any legitimate and proportionate justification for such interference.

Moreover, according to art. 115 para. (6) of the Constitution of Romania: "*Emergency ordinances cannot be adopted in the field of constitutional laws, or affect the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution, the electoral rights, and cannot establish steps for transferring assets to public property forcibly.*".

The regulation contained in art. 143 para. (1), in the form modified by GEO no. 88/2018, produces or may produce the following effects that contravene the provisions of art. 115 para. (6) of the Constitution:

– Created the framework for creditors to proceed to individual enforcement in a collective procedure, contrary to the purpose proposed by GEO no. 88/2018 (creating the premises for a viable business recovery), suppressing the effective chance of recovery;

– It is an interference in the configuration of the substance of the creditors' rights in the insolvency procedure, to the detriment of the previous creditors,

and

– It even changed the insolvency regime of the insolvency procedure, and its reason.

The provisions of art. 135 para. (1) and (2) lit. a) of the Constitution of Romania establish the following:

"*(1) Romania's economy is a free market economy, based on free enterprise and competition.*

(2) The State must secure:

a) a free trade, protection of fair competition, provision of a favourable framework in order to stimulate and capitalize every factor of production;".

As a result, it can be easily observed that the provisions of art. 143 para. (1) of Law no. 85/2014 contravene the constitutional norm because:

– Protecting economic freedom and fair competition means avoiding discriminatory conditions for different professionals;

– The new regulation creates a differentiated treatment between creditors with previous debts and creditors with current debts,

and

– Economic freedom is not ensured under the conditions under which the debtor, who should be under the protection of Law no. 85/2014, it is enforced through individual execution procedures, parallel to the collective procedure.

It is obvious that in the case law, the changes made by the GEO provisions have led to contradictory decisions, the practice being non-uniform.

Thus, in some situations, the judicial authorities admitted the requests for presidential ordinance, lifting the measures of imposition instituted by the fiscal creditor on the debtor's single insolvency account. [15].

In other cases, the court rejected the exceptions of material incompetence and inadmissibility of the presidential order, admitted the order and cancelled the enforcement initiated by the tax creditor [16].

And, other courts have admitted the exception of the material lack of competence of the tribunal, declining the power to resolve the enforcement challenge against the measure of impeachment in court, as an executing court. [17].

3 Conclusions

The insolvency procedure regulated by Law no. 85/2014 is a collective and concurrent, and egalitarian procedure.

The collective character of the procedure consists in the fact that, following the opening of the procedure, any individual forced prosecution ceases, and the provisions from pt. **44 art. 5 para. (1)** establish that the collective procedure is the procedure in which the creditors participate together in the pursuit and recovery of the debts, in the modalities provided by the Law no. 85/2014. As a result, in the regulated insolvency procedure Law no. 85/2014, the creditors participate "together" in the procedure,

acquiring the rights and obligations established by law, with the main purpose of recovering their debts.

Even the provisions of **art. 2** which regulate the purpose of the law, establish that it is ***establishing a collective procedure to cover the debtor's liabilities***, with granting, when possible, the chance of recovering its activity.

The concurrent nature of the insolvency procedure consists in the fact that the patrimonial interests of the creditors will be satisfied ***not individually***, as in the enforcement procedure regulated by the 5th Book of the Civil Procedure Code, but ***proportionally according to the order established by law***, creditors entering the competition in the same procedure in which they will submit their claims for verification of the receivables.

The amounts realized in the collective procedure are distributed to the creditors in proportion to the share held by the debt held in the total of the credit mass, and the creditors of the same rank benefit from an equal treatment.

As a result, the procedure is concurrent because the individual interest of each creditor competes with the interests of the other creditors.

The egalitarian character arises from the collective and insolvency nature, as all interested creditors participate in the procedure regulated by Law no. 85/2014, constituting itself in ***the creditor board***, following that they will be satisfied at once and in proportion to the size of the debts held, in the order of priority established by the law, regardless of the nature of the claims. According to the terms of **art. 4 para. (1) pt. 4**, one of the fundamental principles of insolvency prevention and insolvency proceedings is "*ensuring equal treatment of creditors of the same rank*".

As a result, the amendment made to the provisions of **art. 143 para. (1)**, is a flagrant violation of *The principles of pre-insolvency and insolvency proceedings,* regulated in **art. 4**, which are the basis of the whole conception of Law no. 85/2014.

The possibility of appealing to individual enforcement proceedings, within a collective and insolvency enforcement procedure, such as insolvency, is actually a diversion from the true purpose of the law, mentioned in **art. 2**.

SOURCES

[1] GEO no. 88/2018, for amending and supplementing certain normative acts in the field of insolvency and other normative acts, published in the Official Gazette of Romania no. 840 of 2 October 2018.

[2] Law no. 85/2014 on insolvency prevention and insolvency procedures, as amended, published in the Official Gazette of Romania no. 466 of 25 June 2014.

[3] Law no. 85/2006 on insolvency prevention and insolvency procedures, as amended, published in the Official Gazette of Romania no. 359 din 21 April 2006, currently repealed.

[4] See in this sense: Nicoleta Țăndăreanu, *Codul insolvenţei adnotat*, Universul Juridic Publishing House, Bucharest, 2014, pp. 154.

[5] Pt. 21 art. 5 of Law no. 85/2014 establishes the following: "Current creditor or current creditor is the creditor who holds certain, liquid and receivable debts, born during the insolvency procedure, and who has the right to pay his claim as a priority, according to the resulting documents".

[6] Pt. 20 art. 5 of Law no. 85/2014 establishes the following: "(...) By a certain debt, for the purposes of this law, is meant that debt whose existence results from the act of the debt itself or from other acts, even inauthentic, emanating from the debtor or recognized by him. (...)".

[7] Pt. 2 art. 5 of Law no. 85/2014 establishes the following: "current activities are those activities of production, trade or provision of services and financial operations, proposed to be performed by the debtor during the observation period and during the reorganization period, during the normal course of its activity, such as:
a) the continuation of the contracted activities and the conclusion of new contracts, according to the object of activity;
b) carrying out collection and payment transactions;
c) ensuring the financing of working capital within current limits.".

[8] Art. 143 para. (1) of Law no. 85/2014 establishes the following: "*(1) if the debtor does not comply with the plan or the carrying on of his activity brings losses or new debts are accumulated to the creditors during the procedure, any of the creditors or the judicial administrator may at any time request the syndic judge to order the debtor to file for bankruptcy. The request is judged immediately and preeminently".*

[9] GEO no. 91/2013 on insolvency prevention and insolvency proceedings, published in the Official Gazette of Romania no. 620 of 4 October 2013, being repealed by Law no. 1/2015, published in the Official Gazette of Romania no. 18 of 9 January 2015.

[10] GEO no. 91/2013 was found to be unconstitutional by Decision no. 447/2013 on the admission of the exception of unconstitutionality of the provisions of the Government Emergency Ordinance no. 91/2013 on insolvency prevention and insolvency proceedings.

[11] See in this sense: Simona Maria Miloș, Andreea Deli, *Analiza aspectelor de noutate aduse de OUG nr. 88/2018 la Codul Insolvenței*, in Phoenix, the Insolvency Magazine, no. 66, October-December 2018, pp. 6-7, https://www.unpir.ro/documents/phoenix/pdf/revista-phoenix-66.pdf

[12] See in this sense: Simona Maria Miloș, Andreea Deli, *Analiza aspectelor de noutate aduse de OUG nr. 88/2018 la Codul Insolvenței*, in Phoenix, the Insolvency Magazine, no. 66, October-December 2018, pp. 7, https://www.unpir.ro/documents/phoenix/pdf/revista-phoenix-66.pdf

[13] Law no. 207/2015 regarding the Fiscal Procedure Code, published in the Official Gazette of Romania no. 547 of 23 July 2015.

[14] Law no. 71/2011 for the implementation of Law no. 287/2009 privind Codul civil, published in the Official Gazette of Romania no. 409 din 10 June 2011.

[15] The Brasov Tribunal, The Second Civil Chamber, of Administrative and Fiscal Litigation, the civil sentence no. 1511/Sind/14.12.2018. The

aforementioned sentence allowed the application for a presidential order and it was ordered to lift the measure of impeachment established by the defendant on the debtor's unique insolvency account, opened at Garanti Bank S.A. And later, the Brasov Court of Appeal, by the civil decision no. 42/R of 23.01.2019 rejected the appeal declared by the creditor A.J.F.P. Brașov, the decision being final.

[16] The Dâmbovița Tribunal, The Second Civil Chamber, of Administrative and Fiscal Litigation, the civil sentence no. 81/19.03.2019. By the mentioned sentence the exceptions of material incompetence and inadmissibility of the presidential order request invoked by the tax creditor were rejected, the presidential order made by the applicant (the insolvent company) was admitted and the forced execution annulment was ordered.

[17] The Gorj Tribunal, The Second Civil Chamber, the civil sentence no. 48/12.02.2019. The said sentence admitted the exception of the material incompetence of the Gorj Tribunal, The Second Civil Chamber, the competence to solve the request has declined, in favor of the Târgu-Jiu Court.

Considerations regarding the modifications made by Law no. 310/2018 on the opposition to enforcement

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Abstract

The opposition to enforcement represents the procedural way by which, in the second phase of the civil process, the parties or third persons injured by execution, invoke in front of the competent court, irregularities regarding the acts of execution committed in the case, in order to cancel, the correction of the challenged execution act, or to obtain the cancellation or cessation of the enforced execution itself, or, where appropriate, to clarify the enforceable title. The modifications made by the Law no. 310/2018 have attracted a series of questions regarding the reasons that can still be successfully invoked on the way of the opposition to enforcement in the context in which the cause of termination of the enforceable title can be invoked other than a court decision if the party has a common law action at hand.

Keywords: opposition to enforcement, debtor, enforceable title, court decision, common law action

1 General aspects. Application in time of Law no. 310/2018

The provisions of art. 713 paragraph (2) CPC were amended by Law no. 310/2018 [1], replacing the condition that for the admissibility of the contestation when the execution is aimed at the cancellation of the enforceable title, other than a court decision, there should be no specific way of appealing it [2], with the absence of a procedural way for its abolition, including a common law action. The addition of the phrase "an action under common law" has the consequence that, if the forced execution is made under an enforceable title which is not a judicial or arbitral decision, the interested party, specifically the debtor, can no longer invoke defenses in the contest to the execution consisting of cases of invalidity of the legal document established by the document that constitutes an enforceable title, being obliged to initiate, for the use of these reasons, an

action for annulment of common law with all the consequences regarding the material competent court and territorial, the stamp court fee, the court procedure, the legal regime of the judgment pronounced, etc. [3].

This amendment almost eliminates the scope of the enforcement appeal when it seeks to invoke defenses regarding the right contained in the enforceable title. This is because, in any case, the interested party could no longer attack the enforceable title on the way of contestation, since, always, it will have a common law action available.

Therefore, only the irregularities related to the forced execution can be invoked by means of the challenge to the execution, respectively, reasons of fact and law concerning the conditions of the execution, the execution procedure or the execution acts [4].

Regarding the application in time of the provisions of the new law, from the analysis of the provisions of art. 24 CPC, according to which, the provisions of the new procedural law apply only to the forced processes and executions started after its entry into force and according to art. 25 paragraph (1) CPC., in relation to which, (...) the forced executions started under the old law remain subject to that law, the provisions of art. 713 paragraph (2) CPC will be applied only to the files which were registrated after the entry into force of Law no. 310/2018, respectively, December 21, 2018. Therefore, if the executive file is registered with the court executor before December 21, 2018, including the challenge to enforcement executed after the entry into force of the new Law, it will be subject to the law in force on the date of registration of the file, so the changes will not be considered art. 713 paragraph (2), the interested party being able to invoke substantive defenses against the enforceable title, other than a judicial or arbitral decision under the conditions of art. 713 paragraph (2) CPC in the form preceding the modification made by Law no. 310/2018.

2 The invocation of the extinguishing prescription – by way of the opposition to enforcement or through an action of common law?

After the modification operated by Law no. 310/2018, in the doctrine [5] was also discussed the situation in which, with regard to the action that was available to the debtor in order to cancel the title the prescription operated.

Considering the legal regime of private order of the prescription, which implies the invocation of the prescription only by the one for whose use it flows (art. 2512 C. civ.), we must distinguish between several hypotheses [6], thus:

- in the case in which the debtor has taken the action in order to cancel the enforceable title through a common law application, and the prescription has been invoked by the creditor, insofar as the court finds the prescription intervened, the debtor can no longer invoke the respective reasons in fact or by the right to challenge the enforcement, his right being extinguished as a result of the prescription; if the court rejects the limitation exception, the debtor's action on the merits of the case will be resolved, without being able to reiterate the defenses against the title in the appeal.

- in the event that the debtor exercised the common law action with the purpose of abolishing the enforceable title, and the prescription was not invoked by the creditor, this failure to invoke the prescription does not equate with the tacit waiver of the prescription

(regulated by art. 2507 C.C.), since the provisions of art. 2508 para. (2) the Civil Code has regarding the tacit waiver of the prescription that it must be doubtful and can only result from unequivocal manifestations; as such, failure to invoke the prescription in the context of the common law dispute will lead to its resolution, so that the prescription could no longer be invoked on the way of the enforcement challenge;

- in case the debtor has not exercised the common law action with the object of abolishing the enforceable title, and the limitation period is not fulfilled, the factual and legal reasons cannot be invoked by way of the challenge to the execution, being inadmissible. the debtor did not exercise the action for the cancellation of the enforceable title, and the limitation period is fulfilled; In this case, similar to the previous hypothesis, we believe that the executing court, observing the non-exercise of the common law way, will be able to plead the inadmissibility of the appeal, containing reasons of fact or law regarding the enforceable title, regardless of whether the creditor respondent will rely on this defense or not; the argument we are considering also this time is the imperative character of the current form of art. 713 para. (2) CPC.

3 The situation of the check, the bill and the promissory note [7]

The modified intervention on art. 713 paragraph (2) CPC. does not affect in any way the contestation to the specially regulated execution in the matter of the exchange, the promissory note and the check. (former opposition). A separate way of contesting the title is the one established by art. 62 of the Law of the bill of exchange and ticket to order no. 58/1934, which provides in par. (1) (3) (in the currently applicable form): "Within 5 days from the communication of the order, the debtor may appeal the execution. The appeal will be submitted to the executing court, which will judge it according to the Code of civil procedure, urgently and especially, before any other case. The decision given on the appeal may be appealed only by appeal within 15 days of the ruling ".

The element of differentiation from the challenge to the execution in the matter of the execution started on the basis of a ticket to the order is found in the content of art. 63 paragraph (1) of Law no. 58/1934, which stipulates that, in the exchange proceedings initiated, either by way of action or by way of opposition to the execution order, the debtor will be able to oppose to the holder only the exceptions of invalidity of the title.

In other words, if the debtor wishes to invoke issues regarding the annulment of the order/exchange note, he has at his disposal exclusively the exchange opposition, which has a shorter period of exercise than the common law enforcement challenge. If, on the other hand, the appeal concerns reasons for invalidity of the execution acts independent of the content and the effects of the title, the debtor will have only open the way of the challenge to the execution of common law. Therefore, if the enforceable title represents the promissory note or changes it, the debtor never has the way of contesting the title, but only the way of opposition to the execution. In the practice of the courts, the applications called contestation to execution, but which also invoke issues related to the legality of the ticket to order and aspects of illegality of the acts of execution, are treated as two requests in one, the term of exercise being verified separately with regarding each individual support. It is worth noting that the lack of the certain, liquid and demandable character of

the debt arising from the promissory note/bill of exchange is due to the defenses formulated in the contest to the execution itself.

4 The situation of the minutes of finding and sanctioning the contraventions

With regard to the report of finding and sanctioning the contraventions, the legislator has provided a specific way of abolishing it, so that, if the interested party does not use it, directly appealing to the execution, against the provisions of art. 713 para. (2) CPC., it will be rejected as inadmissible. Thus, according to the provisions of art. 37 of O.G. no. 2/2001 [8], the record of finding and sanctioning the contraventions, not addressed within the term provided by the law, constitutes an enforceable title. Therefore, the non-exercise of the appeal procedure against the report within the time limit stipulated by the law determines the inadmissibility of filing an appeal to the execution in which to be invoked reasons of fact and of legal nature that lead to the cancellation of the report, since the law provides for it specific appeal, respectively the contraventional complaint.

Thus, considering that against the contravention minutes the contestant has opened the way of the contravention complaint to prove its illegality or unreasonableness, the execution challenge exercised in order to abolish the enforceable title that invokes the nullity of the contravention report that was the basis for its issuance., for reasons that could have been raised in the complaint against the contravention report, becomes inadmissible [9].

5 The invocation of the abusive clauses on the way of the challenge to execution

A special situation is the possibility to invoke, on the way of the challenge to the execution, the abusive character of the clauses in the contracts concluded between consumers and professionals following the modification of art. 713 paragraph (2) CPC. As such, we consider that we must distinguish between the possibility of attacking the abusive clauses on the way of the enforcement challenge for the files registered before the modification of the art. 713 paragraph (2) CPC and for those registered after December 21, 2018, when Law no. 310/2018 came into force. Thus, the abusive clauses in the case of the executive files registered before December 21, 2018, will be solved by reference to the form of art. 713 paragraph (2) CPC before the modification, respectively, if the enforced execution is made on the basis of an enforceable title other than a judicial decision, they can be invoked in the enforcement appeal and for reasons of fact or law regarding the merits of the right contained in the enforceable title, only if the law does not provide in connection with that enforceable title a specific procedural route for its termination. Law no. 193/2000 regarding the abusive clauses in the contracts concluded between professionals and consumers [10], on the one hand, does not establish a specific way by which such cases could be attacked, on the other hand, it does not expressly provide for the cancellation of the sanction. clauses of an abusive character, but the lack of their effects in relation to the consumer. In view of these aspects, the invocation by

way of the challenge to the execution of the abusive character of the clause in a contract is fully admissible [11]. Regarding the legal regime of the clauses, I.C.C.J. has ruled that this is identical to that of absolute nullity [12]. The abusive character of the contractual clauses can be invoked by means of an action of common law or by way of the opposition to the execution [13].

Regarding the situation of the abusive clauses in the case of the executive files registered after December 21, 2018, from the wording of Article 713 paragraph (2) CPC it follows that, in the event that the application for the finding of abusive character of some clauses in the credit agreement would be requested, the appeal for execution would be inadmissible, given that the interested party has the possibility of taking a common law action.

However, we appreciate that, even after the legislative change, the finding of an abusive clause by means of an appeal or enforcement is admissible, since they have a special regime, their analysis being required by reference to the European case law in this matter [14]. However, the Court of Justice of the European Union has ruled in this regard, stating that, the national court, invested with the resolution of an appeal to the execution, if it observes the possible abusive nature of a clause, regardless of conditions, must invoke it and ex officio, not being bound by a certain provision contained in a special law or in the Code of civil procedure [15]. Moreover, the Court has considered that it is necessary to invoke ex officio the abusive character of a clause, although the national law does not contain rules that regulate this aspect or even expressly prohibits the intervention of the judge ex officio, the only situation in which the court is not obliged. to invoke it ex officio being that in which there is opposition expressed by the consumer. Therefore, although the provisions of art. 713 paragraph (2) CPC. I prohibit the invocation of the defenses on the way of the opposition to the execution, we consider that, in the matter of the abusive clauses, the European jurisprudence in the matter prevails over the internal disposition. The situation of the abusive clauses and the possibility of invoking them on the way to opposition to enforcement was discussed during the meeting of the presidents of the specialized sections (former commercial) of the High Court of Cassation and Justice and the courts of appeal, dedicated to the debate of the problems of non-unitary practice in the litigation with professionals and insolence. from June 21, 2018, considering that, the analysis of the abusive clauses will be carried out under the law and European jurisprudence in this matter, but under the condition of observing the national procedural law regarding the legality of the court's investment including under the aspect of the term in which it can be formulated the appeal on execution. As such, the only requirement for analyzing abusive clauses in the opposition to enforcement challenge is that it be formulated within the legal term.

6 The situation of enforced executions when the enforceable title is attacked according to the common law other than a Court decision after the entry into force of Law no. 310/2018

In the hypothesis in which a common law action is formulated having as object the abolition of the enforceable title other than a judicial or arbitral decision – in the con-

ditions in which the forced execution began, the provisions of art. 638 paragraph (2) CPC, so that the court notified with the action having as object the cancellation of the enforceable title will be able to order the suspension of the forced execution with the corresponding application of art. 719 CPC [16].

7 The inadmissibility of a new opposition to enforcement for reasons that existed at the date of the first one

The provisions of art. 713 para. (3) thesis I CPC institutes the inadmissibility of filing a new appeal on execution by the same party, for reasons that existed at the date of the first appeal. We could argue that, in the event that the contestant does not invoke all the reasons of illegality of the execution at the time of the first appeal, it operates a decay of the right to subsequently invoke them by the way of a new challenge to the execution, a solution previously established in the case of the execution extraordinary appeal of the appeal in the annulment.

From the analysis of art. 713 para. (3) thesis I CPC we observe, on the one hand, that the inadmissibility is incident whether or not the reasons were known by the party at the time of the first execution, but on the other hand, whether the court invested with the opposition to enforcement was pronounced by exception or in substance. In the absence of a distinction in this regard, we consider that for both situations the sanction that intervenes in case of a new appeal to be enforced for reasons existing at the date of the first appeal is inadmissibility. Of course, the interested party has the possibility of making an application under the common law, insofar as the ground of illegality invoked could be the subject of such request.

The direct consequence of these provisions is that the aspects related to the illegality of the title or of the enforced execution for reasons existing from its inception (the lack of competence of the executor, the misapplication of the enforced execution, the lack of investment with the formula of the title, the full payment of the debit before the beginning of the execution, the incidence compensation or prescription of enforced execution, etc.) will no longer be invoked by the appeal formulated against acts of execution subsequent to the date of the communication of the order and the enforceable title (or, if the execution is performed without summons, after the communication of the enforceable title).

The effects of the inadmissibility of the contestation during the execution are mitigated by the provisions of art. 713 para. (3) thesis II to CPC, which establishes the possibility for the contestant to modify his initial request, adding new grounds for appeal, provided that, for the latter, the deadline for lodging the appeal is enforced. In other words, if the contestant finds out about the existence of other grounds for contestation after the moment of its formulation, but which existed at this time, he has the possibility to modify the request under the conditions of art. 204 CPC, that is, until the first court term at which the contestant is legally summoned, the only condition imposed being that the new grounds of opposition to enforcement invoked at the first term should be formulated within the term of exercising the opposition. By referring to the provisions of art. 204 para. (3) CPC the modification of the challenge to the execution may also take place after the first court term at which the contestant is legally summoned, but for this hypothesis it is necessary the express agreement of all parties. For both hypotheses,

however, the court will check whether the new grounds for appeal are formulated within the term of the execution of the appeal, referring to the term at which the amending request is formulated.

We mention that art. 713 para. (3) does not introduce a derogation from the provisions of art. 204, so that the express agreement of the parties is necessary, if the application is filed after the first court term at which the contestant is legally summoned. At the same time, it should be emphasized that the effect of art. 713 para. (3) occurs only before the first court. The invocation of new grounds for contestation or of the illegality of new acts of execution, even in compliance with the terms provided by art. 715 CPC, directly in the appeal is prohibited by the effect of the provisions of art. 478 CPC.

The hypothesis provided by art. 713 para. (3) C. proc. civ. considers only reasons existing at the time of the first appeal and which were not invoked within it, and not the hypothesis of new reasons after the appeal is formulated, in which case a new appeal can be filed against the unlawful execution act, intervened after the time of the first opposition to enforcement.

8 Conclusions

The modifications made by the Law no. 310/2018 reconfigured the reasons that can be invoked through the challenge to enforcement when the enforceable title is not a judicial or arbitrary decision restricting until the elimination the reasons for invalidity of the executing title, considering that, by the ones several times, the party has at hand a common law action to invoke them. However, the issues that may appear commented on in the study remain current until the time when the judicial practice will outline certain directions for applying the legal texts in the matter.

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Discussion of the need to classify contracts under the qualification of the parties

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Abstract

The present study under the clasification of the contract taking into consideration the qualification criterion represents an epistemological approach that pleads by invoking some legal, practical and doctrinal arguments for the necessity and timeliness of the doctrine's recognition of this criterion of classifying contracts. The scientific approach also subsumes the criteria of acuity and relevancy, taking into consideration the pertinent and useful argument of the documented thesis.

1 Introduction

Starting from the idea of skill, in the sense of the ability of the qualified contracting party, the need to recognize a new classification of contracts, namely the existence of the category of contracts concluded by professionals, is a legal reality with many applications but also generates a number of practical problems.

By reaching the norm for the necessity of such classification, the Romanian legislator elaborated the text of art. 1177 Civil Code regarding the contract concluded with the consumers, specifying that this contract is subject to special laws and, in their absence, to the common civil provisions.

2 Qualification of the contractor and contextualization of the practical need for classification

The consideration that the category of "contracts concluded between professionals and professionals"[1] is discussed in the literature, and the fact that the provisions of the Civil Code referred to above concerning the "contract concluded with the consumer" lead us to believe that a study in the matter is required to be started with an appropriate terminological fixation and a substantiation of the practical need for such a classification.

A first observation would be that if we discuss about a contract between "professional and profane," we qualify the obliging party, the debtor of the obligation, and if we discuss about a contract concluded with "the consumer", we qualify the creditor of the obligation.

Another observation should be made about the area of the concept of "professional" used in the doctrine, respectively by the legislator. In the national doctrine and normative [2] the reference to the species of the contract concluded with the professional, respectively with the consumer appeared later, both to the orientation of the French[3] law which, more advanced in the matter, provides, according to the quality of the parties, a different legal regime for the contracts and the provisions as well as for the union orientation. Moreover, into the French law[4], are analyzed both, professional contracts and contracts with consumers[5]. The same concern also derives from the text of Directive no. 93/13 EEC of 5 April 1993 (European Communities), on unfair terms used into the consumer contracts[6].

The argument of the classification suggested by the legal text is added to the argument of the practical effects of classifying the contract by reference to the qualification of the parties. In commercial matters, the appreciation of the subject's qualification determines a number of legal consequences with a major impact on the negotiation, conclusion and execution of contracts, as well as on how to settle disputes arising in connection with them. The criterion is practically relevant for determining such aspects as: how to determine the price, the assessment of guilt and implicitly the amount of damage, the knowledge of the uses, the appreciation of the reasonableness of the term in which information on hidden vices, the determination of the term of the lease etc.

3 Considerations on special rules provided by the text of the Civil Code on professional matters

The discussion on the special rules provided in the Civil Code in the field of professionalism must be preceded by the scrutiny of the general provisions which are found in the texts of art. 3, 1233 and 1358 C. civ., The content of which refers to the applicability of the Civil Code (art. 3), to the pricing of professionals (Article 1233) and to the particular criteria for assessing guilt when the damage is generated by a professional in the operation of the enterprise (art. 1358).

Thus, the text of art. 3 (General Application of the Civil Code) states that the provisions of the Code are also applicable to "the relationship between professionals and their relationship with any other subject of civil law". We note that a professional is considered to be a person who is exploits an enterprise, systematically or non-profit-making, an organized activity of producing, administering or forfeiting goods or rendering services.

If, in general, it is relevant in the legal relationship of one of the parties as a professional, in order to impart the trade to that report, in particular, the qualification of the creditor or the debtor, respectively both of the professional/professional contractors, determines the application of specific rules.

Art. 1233 C. civ. (Determining the price between professionals) establishes a presumption of determination regarding the undetermined contractual price between

professionals. The presumption arises from the fact that the professional experience of the professional enables him, if he has not contracted at a fixed price or indicating a method of determination, the price can be determinate by reference to the price normally practiced in the same field for the same benefits under comparable conditions and, in the absence of such a price, the price can be determinate taking in consideration a reasonable price.

Another text, art. 1358 C. civ. (Particular criteria for assessing guilt) provides for a distinct criterion for the assessment of guilt, namely that the damage was caused by a professional in the operation of an undertaking, in other words, establishes a so-called legal aggravating circumstance consisting in the qualification of the author as a professional.

On the bases allowed by the general rule are then developed, with special character, norms such as art. 1709, 1778, 1785, 2097, 2172, 2520 establishing rules on the sale, hiring, intermediation, registration of claims and the right of action of public catering professionals or hoteliers.

Thus, in the matter of the sale contract (Article 1709 Denunciation of Violations) it is stipulated that if the professional contractor buys tangible movable goods affected by hidden vices, under the sanction of denial of the right to request the rescission of the sale, he must notify the vendor of the existence of vices within 2 business days. We remember that when the buyer is profane, the term available to claim these vices is reluctant, to be appreciated *"in concreto",* the legislator opting for the term "reasonable time".

In the field of renting (art. 1778, The categories of renting contract) of the spaces for the activities of an profession are applicable both the provisions of the General Provisions section of Chapter V of the Hire Agreement and those of Art. 1824 on contracted rentals without determining the duration, the rental tenor's preference right (Article 1828) and the eviction of the tenant (Article 1831).

In particular, the law provides that if the parties have not indicated into the contract the period in which they have been hired to pursue the activity of a professional, and from the content of the contract results that they have not even wished to contract for an indefinite period, in the absence of usage (Article 1785 letter a C. Non-fixed placement) the lease is considered contracted for one year. The citation of the text to usages is, of course, correct, without being necessary, because art. 1 C. civ. states that usage is the source of matter, being considered if there is no applicable legal provision.

Another reference to the qualification of the party and the application of the customary use is found in the legal text on the determination of the intermediary's remuneration [Article 2.097 (2) of the Intermediary's Remuneration]. The provision indicating that, in the absence of conventional or legal provisions, the intermediary's indemnity is established between professionals, taking into account existing uses. Thus, remuneration will be established either by reference to the uses between the parties, to the extent that they exist, or by reference to the remuneration required by the intermediary for similar services rendered to third parties or by reference to the intermediary remuneration paid in the field or in the area.

Regarding to the claims, another special provision is stipulated in respect of those claims receivables (Article 2172, paragraph 2, Civ., Excluded Credits) deriving from the contract concluded between professionals. The law stating that unless there is a contrary

express provision, only accounts receivable from the exercise of professional activity are recorded into the account.

In terms of prescribing the right of action of the professionals who are developing activities into the areas of public food or hoteliers, for the services they provide, the law (Article 2520 C.I.V.) establishes a special prescription term of one year.

All these special provisions, established in considering the qualification of the subject as a professional, strengthen the conviction that a classification of the contracts according to the qualification of the part exists already from a normative and practical point of view, leaving only the consecration of this criterion by the doctrine.

4 The qualification of the subject as a "consumer" in accordance with the provisions of Law no. 193/2000

Unlike the civil provisions that actually use only the concept of professional the provisions of Law no. 193/2000[7] on unfair terms in contracts between traders and consumers defines and operates with the terms of consumer and trader. An additional argument for the current "merchant – merchant" (trader) terms is also the existence of the Commercial Code for the wholesale electricity market, a framework document on the national electricity market.

From the point of view of this normative act, a special law, it is clear that we consider the subject trader as the debtor of the obligation to do, respectively the consumer as the creditor of the same obligation.

The special law states that it is a consumer [Article 2 (1)] "any natural person or group of natural persons constituted in associations which, in commercial practices subject to this law, acts for purposes other than its commercial, industrial or productive activity, craft or liberal "and that he is a trader [8] [Article 2 (2)] a natural or legal person" who, in commercial practices covered by this law, acts in the course of its commercial, industrial or production, craft or liberal activity, as well as any person acting for the same purpose in his or her name ".

However, we have to point out that there are situations in which, for traders, qualification is not only a "supplementary responsibility", but is also likely to provide additional security to the authorities, facilitating administrative procedures. So, into the French law, there is a general obligation to authorize the trader but all those who possess a special identity card with the trader's mention at the time of the publication of the Ordinance of 25 May 2004[9] are exempted from obtaining the authorization provided for in Art. L 122-1 of the Commercial Code**.** The authorization is required for traders who carry out trade in France and are obtained from the prefecture of the department in the territorial area in which they are assigned, with the indication that a trader belonging to a Member State of the European Union, the European Economic Area or the Swiss Confederation is exempt by this procedure.

A relevant aspect from the point of view of the classification of contracts in relation to the qualification of the subjects is also conferred by the specificity of the doctrine and practice in the field of abusive clauses**.** We note not only the adaptation of the judicial practice to the socio-economic realities, but also a salutary trend regarding the motivation of judgments in the sense that the magistrate makes a fair and complex appreciation, based

on principles and arguments of law, invoking more and more little in his motives, the absence of a special norm, and a plenary assumption of his active role.

The problems we have faced in recent years in the field were complex because on the one hand there was a real "abuse of abusive clauses" imposed by the professionals to the profanes [10] and on the other, all the subjects interacting with the norm of private law had to adapt to profound changes in the matter[11].

Changes in judicial practice have been given the necessary support through regulatory changes. For example, if the admissibility of actions in factual situations indicating that, in exceptional circumstances, the performance of the contract became overly burdensome for one party, had to be realized on various reasons in the absence of express regulation of the unpredictability, in present the motivation can be made on base of the express provision of unpredictability (art. 1271 C. civ.).

The motivation of the judgments can be made in concrete by indicating this text. Previously, in court practice there were reasons that were based on invoking the principles of law, the fault of the lesion or the existence of the immoral cause, and implicitly the violation of the principle of contractual equilibrium.

Starting from the substantiation of the right as an art of balance and well-being, I consider that a more appropriate support is the one which invokes the attainment of the contractual equilibrium and the existence of the immoral cause, starting from the qualification of the professional contractor. This professional contractor is supposed to intends to break the contractual equilibrium because its qualification gives him a vision of the risks and, implicitly, of the potential damage that a profane can not anticipate.

It should also be specified that in practice the actions were admitted by invoking the immoral case, on the basis of the principle of inadmissibility of the action for resuscitation among the majors set up by the provisions of art. 25 paragraph 1 of the Decree no. 32/1954.

5 Conclusions

The protection of the profane must be balanced with the aim of the trader to obtain profit under the auspices of the principle of good faith**.** The comparative study of norms, practices and doctrines concludes that the existence of a classification of contracts according to the qualification of the parties is necessary, up to date and useful.

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[8] For example, according to art. L 121-1 Commercial Code, I. Qualification. 2 The usual profession, in the sense of the French mercenary, is not a trader of insurance agents, a director of a driving school, SACEM, the person doing business in isolation (unusual), etc. Practice has consistently held that the jurisdiction of the French Court of Cassation (Court of Cassation, Commercial, October 20, 1984, Civil Bulletin IV, No 249) is a matter for the right to qualify as a trader.

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Specific Operations of the Land Registry

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Abstract

Specific operations of the Land Registry represent a great theoretical and practical interest, taking into account the legislative changes that have occurred as a result of the entry into force of Law no. 287/2009 on the Civil Code, but also by Law no. 71/2011 on the implementation of the provisions of the Civil Code. Problems related to the Land Registry appear mainly in practice, aspects that we will highlight during the course of this paper.

Keywords: real estate advertising, enrollment, notations, Land Registry

1 The advertising of rights, Documents and legal deeds. General aspects

Advertising has as object, according to the provisions of art. 18 of the Civil Code[1] rights, documents and deeds relating to the status and capacity of individuals, those relating to the assets belonging to them, as well as any other legal relationship. As methods of advertising, the contemporary legislator chose the Land Registry, the Electronic Archive of Security Interests, the Trade Register, and other forms of advertising prescribed by law. In this article we will refer exclusively to the advertising of real estate rights which, as the legal provisions adopted in the matter show, are made through the Land Registry[1].

In order to give effect to the general provisions governing advertising, the Romanian legislator regulated entries in the Land Registry, differentiating these legal transactions specific to the advertising of real rights over buildings.

[1] Law no. 287/2009 on the Civil Code was republished in the Official Gazette of Romania no. 505/15 July 2015

2 Registration in the Land Registry

In order to fulfill the role that the specific Land Registry operations have in the Romanian legal system, the legislator regulated several forms of registration. Entries in the Land Registry can be viewed in a narrow sense, that is, the mentions made in the Land Registry itself: Part I on the description of the real estate, Part II on property rights registration records and Part III on the dismantling of property rights and charges, or in the broad sense, in this sense the entries representing all the entries in the Land Registry, usually arranged by closing, from the time of the opening of the Land Registry to the moment of its closure [2].

Returning to the applicable legal provisions in the field of legal transactions specific to the Land Registry, the Civil Code regulates, in art. 881 that the entries are of three kinds: real estate registration, provisional registration and notation.

2.1 *The Real Estate Registration*

By registration, the real estate right is registered in the Land Registry [3]. As a result of the registration, the real rights are acquired, changed or terminated, starting with the date on which the application for admission was accepted.

For a complete analysis of the situations giving the right of the interested person to request registration of a real right, the provisions of art. 881 (2) must be observed, according to which registration and provisional registration are subject to real estate registration rights, while real estate registration rights are, according to art. 877, the real estate rights listed in the Land Registry. In order to move forward and analyze the category of real estate registration rights, it is necessary to analyze the provisions of the Civil Code which list the category of real rights that are implicitly subject to registration in the Land Registry, being real estate registration rights in the concept of civil law regulation.

The provisions of art. 551 The Civil Code enumerates the real rights as follows: the right of ownership, the right of superficies, the right of usufruct, the right of use, the right of occupation, the easement right, the right of administration, the right of concession, the right of use, real security rights, and other rights which this law recognizes.

For real estate registration, it is necessary to fulfill several conditions, some conditions being considered, in the literature, general conditions, and other special conditions [2]. In the category of general conditions, it is necessary to analyze first of all the categories of documents that give the possibility to register in the Land Registry. According to art. 888 Civil Code, the entry in the Land Registry is made on the basis of the authentic notary's document, the final court decision, the certificate of inheritance or another act issued by the administrative authorities, in cases where the law provides for it. Regarding the provisions of the Civil Code, we ask ourselves whether any final court decision is likely to give the interested party the possibility of requesting an entry in the Land Registry. In our opinion, only if the court decision commits to the birth, modification or termination of a principal real right for the benefit of the party requesting registration will it be possible to give effect to the legal provision which entitles the

interested party to request, by virtue of the court judgment, the inclusion in the Land Registry of a civil real estate right, we ask ourselves whether any final judgment is capable of giving the interested party the opportunity to apply for a registration in the land register. For example, it seems meaningless to me to admit an application for registration of the public property right in favor of X under the court judgment which had the object of finding the absolute nullity of a contract, X having the capacity to intervene in the case whose judgment at the basis of the application. Thus, with regard to court judgments which subsequently entitle the person to enter the Land Registry in the form of the real estate registration, in view of the strong effects which arise as a result of such registration, the court decision must meet the requirements of the law in order to give birth, to change or to extinguish a real estate right of registration.

Regarding the special conditions to be considered for real estate registration, these are regulated in concrete cases [2] when the law expressly requests it. For example, with regard to the rectification of entries in the Land Registry, it can be made amiably by an authentic notary statement of the holder of the right to be radiated amicably or by a court order in case of misunderstanding of the parties. Another situation is the question of the existence of special requirements for real estate registration [1] is the incidence of artificial real estate accession, in which case the registration in the Land Registry as the owner of the building will be made, according to the provisions of the Civil Code, either under the agreement of the parties expressed in an authentic document or by the court decision, if the parties disagree on the relative issues of accession.

As to the effects that the real estate registration produces, they must be analyzed according to the category of rights that are born as a result of the registration in the Land Registry or whether these rights are born even without registration in the Land Registry. The Civil Code establishes in Art. 887 that the real rights are acquired without enrollment in the Land Registry when they come from inheritance, natural accession, foreclosure, expropriation for a public utility cause, as well as in other cases expressly provided by law. Thus, the effects of the real estate registration are different as real rights are acquired with or without enrollment in the Land Registry; if the right is acquired by enrollment, the real estate registration has a constitutive effect, whereas in the case of the real rights acquired without enrollment, the effect will be a declarative, strictly opposing third parties of the right thus born. It is true that with regard to the real rights acquired without registration in the Land Registry, art. 887 (3) of the Civil Code provides that in case of acquisition of a real right without registration in the Land Registry, the holder of the so-born right will not be able to make acts of disposition regarding the right, only until after the enrollment has been made. Regarding the legal regulation, we consider that in the case in which the title holder of the right acquired without registration in the Land Registry wishes to alienate the right thus born, the claims required by the law will be made in the Land Registry also with a declarative nature, without putting into question the constitutive effect of rights of real estate registration.

2.2 *Provisional registration*

The second category of Land Registry specific operations whereby real estate rights can be registered is given by provisional registration. This method of registration was regarded as representing the registration by which a real estate right is acquired, changed or extinguished, under the condition and to the extent that it is justified [4].

With regard to provisional registration, this legal transaction specific to the advertising of immovable property rights is the operation by which the transmission, creation, modification or termination of a real immovable property right becomes opposed to third parties, under the condition and to the extent that it is justified; in other words, unlike real estate registration, which is a final registration, provisional registration is the entry in the Land Registry of certain conditional real estate rights, which retroactively turns into the real estate registration if this measure is justified [4].

The justification of a provisional registration is made with the consent of the person against whom the provisional enrollment was made in an authentic form or final court order and also on the basis for the termination of such provisional registration, respectively, the final decision of validation, the consent of the creditor given in authentic form, the report given by the bailiff confirming the acceptance of the payment or the final conclusion made by them that the payment was made.

Provisional registration is a conditional entry or, if applicable, imperfect (committed in order to preserve a right acquired under a court decision which is not irrevocable). As the name implies, this form of registration is provisional and is only available in cases where the enrollment is prescribed by law. Thus, art. 898 The Civil Code provides that provisional registration may be ordered a) if the acquired real right is affected by a precedent or resolutive condition or whether it concerns or imposes a future construction; in the case of provisional registration having as object a future construction, its justification is made under the law; b) if, on the basis of a court decision which is not yet final, the losing party has been obliged to a change of venue, the establishment or extinction of a real estate registration right or the one administering the assets of another person has been obliged to give a guarantee of mortgage; c) if the debtor has recorded the amounts for which the mortgage was registered; d) if a temporarily registered real estate registration right is acquired; e) if both parties consent only to make a provisional registration.

Regarding the effects of provisional registration, the Civil Code establishes in Art. 899 that provisional registration results in the acquisition, modification or termination of a real estate registration right from the date of registration of the application for registration and to the extent that it s justified. As has been argued in the literature, the effects of provisional enrollment, once justified, are the same as those of real estate registration [1]. Under these conditions set forth by the provisions of the Civil Code in force, we consider that what should be considered when the application for provisional registration is registered, the cases that may give rise to the effects provided by the law must be considered. As an example, we ask ourselves whether, by receiving an application for registration of a principal real right following the resolution of a request for reconsideration made by the person registered in the Land Registry, the person responsible for giving a resolution to the application may admit the request for reexamination and provisionally register the right that was the subject of the application for real

estate registration. In my view, given that any registration in the Land Registry is made at the request of the person concerned and only when the law expressly provides for it, registration will be done *ex officio*, and for the previous question should be negative.

The arguments that we can present in this respect are even the legal provisions which do not provide that if it is found that the request for real estate registration cannot be received, then the real estate registration right will be provisionally registered *ex officio*. Moreover, the difference between the forms of registrations in the Land Registry is given by the subject matter of the registration. We appreciate that confusion may occur in the application of the legal provisions, starting from art. 881 (2) Civil Code according to which real estate registration and provisional registration have as object the real estate registration rights, however, the persons responsible for analyzing the applications for registration must consider paragraph (3) of the same Article, according to which provisional registration and notation are made only in the specific cases provided by the law. As a proposal of *lege ferenda*, we appreciate that it is necessary to clarify the provisions of art. 881 of the Civil Code in the sense of the explicit regulation of the impossibility of the Land Registrar to dispose ex officio the provisional registration of a real estate registration right, provided that the law expressly provides that provisional registration may be made only in the specific cases provided by law.

2.3 *The Notation*

The last form regulated by law to make entries in the Land Registry is given by notation. Notation, such as provisional registration, can only be made in the specific cases provided by the law in order to ensure the opposability to third parties or simply informing them of rights, acts or other legal relationships, other than actual relationships, related to the real estate registered in the Land Registry.

According to the provisions of art. 902 and 903 of the Civil Code, a number of acts and deeds are subjected to notation in the Land Registry, which can be divided into several categories [1], as follows: a) **the notation relates to the person holding the real estate registration right** – the notation on the prohibited person, the notation on the declaration of death by court order, the notation for the insolvency procedure, the notation on civil capacity; b) **the notation relates to personal rights and other legal relationships in relation to the buildings listed in the Land Registry** – notation in matters of family relations, notation in the matter of the lease, notation in the matter of the company contract, notation of the inalienability clause, notation of the right of property reservation, notation of the pre-contract, notation of the the option pact, notation of the conventional preemption right, notation of the intention to alienate or mortgage; **c) the notation relates to legal actions in relation to the buildings listed in the Land Registry.**

Regarding the effects of this specific operation in the Land Registry, it must be differentiated according to the categories of acts and deeds which are subject to notation, the ones that we have highlighted above.

The acts, deeds, and other legal relationships subject to the notation referred to in Art. 902 of the Civil Code become opposable to third parties exclusively by notation, unless it is shown that third parties have had knowledge of these aspects in another way,

except in situations where it is clear from the law that their mere knowledge is not sufficient to compensate for the lack of publicity. Regarding the above-mentioned provisions, there is a need for more clarification: the legal norm is not very clear from the perspective of legal acts, deeds and relationships that need to be recorded in the Land Registry in order to effectively achieve the effect of opposability regarding third parties. The way of regulating is flawed, because within the same paragraph we have a rule and two exceptions, without the exceptions being nominated with respect to those acts, deeds and relationships that do not necessarily have to be noted in the Land Registry, in order to give effectiveness to the basic principle of civil law according to which the exceptions are of strict interpretation and application. Regulation is objectionable and entitles many erroneous interpretations and applications of this legal text, which is why, in the light of the above considerations, it should be the subject of a legislative amendment.

Regarding the notation in the Land Registry under Art. 903 of the Civil Code, as governed by the legal norm to which we refer, the notation is not mandatory for effects to third parties to occur, since Art. 903 provides that in the Land Registry it may be noted, however that its opposition to third parties does not depend on these entries: 1. the incapacity or restriction, by law, of the legal capacity of exercise or of use ; 2. the declaration of public utility for the expropriation of a building; 3. any other facts or legal relations relating to the building and which are provided for this purpose by law.

In our opinion, art. 903 includes exceptional situations in which the exceptions to art. 902 Civil Code I have already referred to should also be included. Thus, the legislator should lean on these two articles, systematize them and make the necessary distinction between the application of the rule in the subject matter of notation and the exceptions to this rule. The review of these articles is of overwhelming importance in terms of the effects that notation in the Land Registry produces, when the opposability of acts, deeds and other legal relationships can only be achieved as an effect of notation, in relation to the situation in which the opposability to third parties may intervene in other ways than as an effect of notation, in which case this legal operation is no longer binding, but it is optional.

3 Conclusions

The manner in which the contemporary legislator understood to regulate entries in the Land Registry has many gaps, a regrettable point in view of the fact that, with the entry into force of the provisions of the current Civil Code, it was desired to simplify and clarify these technical concepts in order to establish a uniform working procedure.

The fact that, in an inexplicable way, the legislator did not intend to clarify the issues that generated practical problems and under the old regulation in the matter under consideration which is currently still applicable in view of the provisions of Law 71/2011 on the implementation of Law 287/2009 on the Civil Code, will lead to the same heterogeneous application of the legal provisions analyzed, which is contrary to the principles underlying the regulation of entries in the Land Registry.

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Topical issues on testamentary forms

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Summary

There are times when the legal institutions regulated from a legislative point of view and filtered by legal practice show their limits or are exceeded by the general evolution of social life or by the emergence of particular social realities with hardly classifiable effects and difficult to settle through the existing legal institutions. The more acute is the question of the exclusion from a new lawmaking of certain legal institutions that have proven their viability and efficiency

However, regarding the legal status of testamentary inheritance in general and of will institution in particular, from the time of their regulation by the new Civil Code a sufficient period of time has passed long enough so that jurisprudential and doctrinal sedimentations allow *lege ferenda* analyses.

Keywords: will, succession, inheritance, jurisprudence, legal document, doctrine.

I General considerations on the will

1.1 *Brief analysis from a diachronic perspective*

It is beyond any doubt that the manifestation of will in the sense of making a will is one of the most important decisions that a person takes throughout his life and at the same time with an impact that goes beyond the relevance of a simple inter vivos document.

The manifestation of testamentary will is the reflection and at the same time the consequence of an attitude of the disposer, characterized by generosity and responsibility. Generosity because, on the one hand, the disposer seeks in principle to create free benefits for a moment, that is his posterity, a moment that excludes any expectation of the return of services, and on the other hand most of the times the beneficiaries of the testamentary disposition learn of its existence only after opening the succession. Responsibility, because this act of will is a decision by which the testator "takes his life in his own hands" and decides, by way of derogation from the legal provisions, which will be the fate of his

patrimony, who will be the beneficiaries, in what order and what shares, but also what other effects mortis causa are to occur.

The possibility of derogating from the legal status of inheritance and the change by de cujus in the way of deferring the inheritance is generated by the fact that most of the legal norms that circumscribe and circumstantiate the legal inheritance are supplementary.

This possibility of derogation is limited by the legal rules governing the inheritance reserve and the forced heirs, rules which are imperative and allow only a partial derogation from the legal regime of succession, up to the limit of the legally recognized succession reserve.

Under the aspect of legal formalization, the will as a means of materializing the last will derogatory manifestations of de cujus manifests itself as a solemn legal act with varying degrees of complexity, as the testator wishes to ensure only the transmission of the succession heritage or the production of other mortis causa or only the production of these last effects.

In a deeper analysis, it can be seen that few legal documents and even few law institutions have such a complex content and relevance, involving a personal perspective of the testator, both familial and social, these realities being parallel, but each of them having an axiological and volitional charge and own consequences, and each allowing a separate analysis.

As such, it is not surprising that the will, as a social and legal reality, represents an element of permanence that has accompanied the history of humanity, starting with its early dawn, and continuing at every stage of society development, in increasingly articulated forms and with more detailed regulations.

Practically, the origin of the will is lost in the darkness of time, the right of man to leave his property by acts of ultimate will being found in the most ancient laws, such as the Egyptian, Jewish and Greek, and later in the old Germanic law [1].

Thus, logically and in accordance with the general evolution of human society, we can assume that the first testing methods are precursors to the appearance of writing, being therefore oral forms. The first written forms are certified with certainty in ancient Greece and have proliferated in Roman law, where "the right to leave by testament was solemnly proclaimed by the law of the 12 tables: *Uti legassit super pecunia tutelave suae rei, ita jus esto*" [2].

In the old Romanian law, the primordial and long-used form of the testament was known as the "dying wishes", a form in which the testamentary provisions were transmitted only orally, from the disposer to the family members, in the presence of witnesses.

The general evolution of the Romanian society and the development of an infra-structure of writing, primarily in ecclesiastical environments, ensured the prerequisites for the appearance of written testamentary forms, first in archaic forms, bearing various names such as diata, zapis, book or izvod, for later to develop in more elaborate and more evolved legal forms, which regained their regulation in early normative acts such as in "The Legal Manual of Andronache Donici, in Alexandru Ipsilanti's Code or in the Calimach Code from 1816" [3].

Under the Civil Code of 1864 there has been a real paradigm shift, the internal law system connecting to the Western civil code system under the aspect of succession regulation and, in particular, of the institution of will.

1.2 *Will in the current civil code*

Under the Civil Code of 1864 there has been a real paradigm shift, the internal law system connecting to the Western civil code system under the aspect of succession regulation and, in particular, of the institution of will.

In order to be able to detect some theoretical and practical problems raised or generated by the inheritance succession in general and the institution of will in particular in notary practice and in national jurisprudence, it is necessary to start from a brief analysis of the law regulation of this institution in the national and foreign legislation and to detect possible inadequacies existing in the internal legislative plan.

The will is regulated in the New Civil Code exhaustively by the provisions of art. 1034 and art. 1043-1046, legal provisions defining it, establishing its legal regime and designing it as a legal institution. Thus, according to art. 1034 Civil code, the will is: "*the unilateral, personal and revocable act by which a person, called the testator, orders, in one of the forms required by law, for the time when he will no longer be alive*."

Although the provisions of Art. 1034 Civil code would seem to suggest it, the will is not a homogeneous legal act, but it is a simple form in which several separate legal acts can be dressed, each with its specific legal regime.

The main object of the will is the legacy, that is, the ultimate will of the testator regarding the transmission of his patrimony after his death.

However, the existence of a legacy in the testament is not a sine qua non condition, the Civil Code permitting the existence of the will, even without establishing heirs, but including other last will provisions of the testator.

In other words, the testament may include only legacies or legacies and other provisions or also only testamentary provisions, including disinheritance (removal from the inheritance of legitimate heirs), the establishment of a testamentary executor, the imposition of duties on legatees or legal heirs, the revocation of a previous will or retraction of the previous revocation, testamentary parental partition inter vivos, recognition of a child outside the marriage, funeral arrangements, etc.

In order to be valid and produce effects, the testator's will must be manifested, under sanction of absolute nullity, in the forms prescribed by law. The law establishes two conditions of form, general and common to all wills, namely the written form and the form of the separate document.

The written form is required for the validity of the entire will, of the testament as a whole, and not only of the legacies.

The written form of the will is required by law, regardless of the type of will and the circumstances in which it was drafted. The written form is provided by law ad solemnitatem (for the validity of the will) and not just ad probationem (to prove it) situation in which the will by word of mouth (nuncupative) is striken by absolute nullity.

The condition of the written form is also reflected on the evidence level, meaning that the existence and content of the testament cannot be proved by other means of evidence (eg witnesses), but only by the document incorporating the manifestation of will

of the testator in one of the forms provided by law, even if there was a beginning of written proof or if it was prevented from leaving a will because of a force majeure event.

By way of exception, according to art. 1037 Civil Code, if the will disappeared through a fortuitous or force majeure event or by the deed of a third party, either after the death of the testator or during his life, but without his knowledge of its disappearance, the validity of the form, and the content of the will will be proven by any means of proof.

Regarding the form of the separate document, art. 1036 Civil Code forbids, under the penalty of absolute nullity, the mutual testament, that is to say, "*two or several persons to leave their inheritance by the same testament, one in favor of the other or in favor of a third party*".

The mutual will is contrary to the unilateral, personal and individual character of the will and it is sanctioned with absolute nullity. Failure to comply with the conditions of form for the preparation of the will is sanctioned by the absolute nullity of the document. The Civil Code stipulates various written forms whereby the testator's ultimate will may be manifested, but in all cases, in order to produce legal effects, the will of the testator must be expressed in writing.

Depending on the written form required by law, wills can be ordinary (ordinary) wills and privileged (exceptional) wills. Finally, the special law allows for the use of special forms of will for the legacies dealing with certain amounts of money or for the wills of the Romanian citizens living abroad.

The enumeration of the types of wills is limitative and any other form used with the purpose of expressing the testator's ultimate will is absolutely null and void and does not produce the effects of the will.

There is no hierarchy between the different types of will, they have equal legal value, expression of the principle of the testamentary forms equivalence.

The category of ordinary or regular wills includes those testamentary forms of full legal force on an unlimited period of time and includes the handwritten will and the authentic will.

The handwritten will is the testamentary form in which, ad solemnitatem (for the validity of the will), the will is written in its entirety, dated and signed by testator's hand.

The handwritten will must be dated by testator’s hand, that is, it should show proprio manu, with the graphical impression, the day, the month, and the year of the will. The will’s date shall be written in figures or letters, or even by reference to an event whose date can be established with certainty.

In the case of this testamentary form, the testator must sign the act proprio manu, testator’s signature certifying the fact that the provisions of the will represent his last will, that he emanates from him and that it has a final character and it is not a simple draft. The lack of signature or the signature of a person other than the person who wrote the text of the document shall invalidate the will.

The authentic testament is authenticated by a public notary or by another person invested with the public authority by the state, according to law, which therefore supposes the manifestation of testator's will before a person invested with public force and with the power to authenticate documents. According to art. 1043 Civil code, on the occasion of authentication, the testator may be assisted by one or two witnesses.

Authentication of the will is done according to the notarial norms on documents authentication. If the will has not been authenticated in accordance with the legal provisions, the sanction would be the absolute nullity of the authentic will.

The privileged or extraordinary will is the authenticated simplified will which, because of the exceptional circumstances in which it is made, is exempted by the law from the compliance with the usual formalities, allowing for their replacement in simplified forms of authentication, derogatory from the document authentication rules.

Art. 1047 Civil Code states that: a testament can be validly drafted in the following special situations:

(a) before a competent official of the local civil authority in the event of epidemics, catastrophes, wars or other such exceptional circumstances;

(b) before the commander of the ship or his replacement, if the testator is on board a vessel under the Romanian flag, during a sea or river voyage. The will drafted on board an aircraft is subject to the same conditions;

c) before the commander of the military unit or his replacement, if the testator is a military or, without having such quality, he is employed or provides services in the interest of the armed forces of Romania and cannot address to a notary public;

d) before the director, the chief physician of the sanitary institution or the chief doctor of the service, or in their absence, before the doctor on duty, while the ordering person is hospitalized in a sanitary institution where the notary public does not have access.

In all the above-mentioned cases it is mandatory that the will be made in the presence of two witnesses.

With regard to all legal forms of will, art. 1050 Civil Code stipulates the principle of testamentary form conversion by stating that "*A testament which is null because of a defect in form produces effects if it fulfills the conditions provided by law for another testamentary form*."

2 Shortcomings and inaccuracies regarding current testamentary forms

Excluding the privileged wills, which underlie the hypothesis of special situations, in the case of ordinary wills, each of these two testamentary forms presents a number of advantages and disadvantages from the perspective of their use by potential testators.

Given the fact that since the entry into force of the new Civil Code a sufficient period of time has passed to allow for assessments and analyses, it can be appreciated that the status of the regulated and legally recognized testamentary forms can and should be subject to an analysis, including in terms of their efficiency and viability.

First of all, as far as the handwritten wills are concerned, this, besides a number of clear and obvious advantages, also has some disadvantages, some of them major, which can and often puts into question the effectiveness of this testamentary form.

Thus, given the simple modality of writing, which allows an intimate manifestation of testator's will, the handwritten testament, being much easier to falsify, raises the question of the reality of testator’s will manifestation, which in practice puts the one who

invokes the will in his favor in the situation of providing the proof that it emanates from *de cujus* [4].

In the same context of writing form simplicity, the absence of a third entity that takes over and filters out the testator's manifestation of will causes that this testamentary form, on the one hand, be sensitive to suggestion and capture, and on the other hand, in the case of a testator without legal knowledge and possibly with a precarious cultural level, the will may have a faulty or even erroneous wording, with the consequence of the difficulty in interpreting testator's will. All of this weakens this testamentary form and makes it easily disputable by the interested parties [5].

Finally, as the secret character of testator's manifestation of will is often doubled by an occult preservation of the written act, it can easily be stolen and destroyed or lost or accidentally destroyed, so that the testamentary will no longer reaches its recipients and no longer produces legal effects.

As for the authentic will, although the authentic way of recording testator's will confers a multitude of advantages, which in principle counteract the drawbacks of the handwritten testamentary form, however, this testamentary form is not devoid of deficiencies.

Thus, the authentic will has at least two disadvantages in relation to the handwritten testament, namely the difficulty of keeping the testamentary secret and the difficulty of accessing this form by any person at all times.

Under the first aspect, once the authentic will is concluded before the notary public, and other persons in the notary's staff are acquainted with the manifestation of will, it is obvious that it cannot remain secret, and this desideratum remains an illusion.

From the second perspective, it must be borne in mind that because of the formalities to which it is subjected, the authentic will cannot be drawn up in any place and at any moment, but presupposes a waiting time and, moreover, involves a certain amount of costs, which seriously limits the sphere of people willing to use this form of will and the times in which they can do it. Moreover, the multitude of formalities accompanying the recording of the testamentary will in authentic form materializes in so many vulnerabilities, meaning that the absence of any of the formalities may represent a lack of a condition of validity and may expose it to the danger of annulment.

3 Possible solutions of *lege ferenda*

Given the above, we can conclude in the sense that the current testamentary forms, although functional and creating a consistent testamentary practice, are far from perfect and the regulatory framework governing them is able to support amendments or supplements.

A first possible legislative intervention could be to legislatively explain the notion of will dating, within the meaning of Article 1041 of the Civil Code [6], in the sense of defining it and delimiting what may be the meaning of will date of that which cannot have this value. This because, under the old civil code, serious jurisprudential and doctrinal developments [7] were required to clarify and qualify concrete practical situations, and in the context of new, modern legislation, it is imperative that the legislator, to the extent possible, capitalize the solutions crystallized in practice and doctrine, and incorporates these solutions into the law.

Regarding the authentic will, although several situations with potential for perfection could be approached, we will stop here only on the legal situation of the witnesses, a regulated situation of a general but optional nature of art. 1043 paragraph 2 Civil Code [8].

Given the mortis causa nature of the will, we appreciate that it would not harm the notary authority and it would not in any way affect the credibility of this institution, if the legislator transformed the voluntary nature of witnesses, institution governed by the Civil Code art. 1043 paragraph 2, into a binding nature for all situations of will authentication.

But the main shortcoming identified with regard to the regulatory framework that governs the succession *de lege lata* and in particular the institution of the will is the non-inclusion among the testamentary forms recognized by the new legislation of the mystical or secret will.

The mystical or secret will was governed in the Civil Code from 1864 in Art. 864-867 Civil Code and represented the testamentary form in the case of which testator's manifestation of will was recorded in writing, but not necessarily in the handwritten form, signed by him and submitted to the authority in an envelope, another container, or other means to ensure the secrecy of the content, in order to perform overwriting formalities.

The mystical or secret will could be written by the testator or by another person, or it could be typed or written with the alphabet for the blind, but in all cases it had to be signed by the one who ordered it [9], after which the document thus constituted was, according to Article 864 of the Civil Code from 1864, tightened and sealed or enclosed in an envelope that was sealed and then presented as such to the competent authority in order to perform the act and the overwriting formalities or sealed before that authority.

The overwriting, reflected in the act or in the overwriting report, represents the formality whereby the competent authority confirmed testator's identity and personal presence and will record his statement in the sense that the document closed and sealed represents his will and that he is personally written and signed or at least signed by him.

The authority competent to carry out the overwriting document was the territorially competent court and the formalities were carried out as a rule at the court's premises and, by exception, where the testator was, if he could not be present at the court premises because of a disease. In any of these places, the judge draws up the report in which he finds testator's personal presentation, the date of presentation, the status of the document submitted and testator's declaration that this document incorporated his last will manifestation.

Once the act of overwriting drawn up and signed by both the judge and the testator, the will was either kept at the court's registry, or it was handed over to the testator and kept by him.

Under the old law, the use of this testamentary form has fluctuated over time, and even though, in the postwar period, this will has been used the least, it was at least regulated.

In this context, it is difficult to find an explanation for the failure of the editors of the New Civil Code to include this form of will among the testamentary forms recognized and regulated by the new legislation. This is all the more so since this testamentary form has a maximum of advantages for the testator:

– it is as hard to forge as the authentic will and provides the same protection against capture and suggestion;

– provides the keeping of the secret just like the handwritten will or even in safer conditions than it;

– it does not question the reality of testator's manifestation of will, since it undoubtedly emanates from *de cujus*;

– even if it involves some costs, these are obviously and incomparably lower than in the case of the authentic will;

– the access to this form is much easier than in the case of the authentic will.

Under these conditions, a future legislative change in the legal status of testamentary inheritance in general and of the institution of will in particular should not only avoid the situation of the mystical will, but it should have as subject, first of all, the reintroduction of this testamentary form in specific internal civil law.

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Current conceptual references regarding fraud to law and public order in the field of private international law

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Abstract

Mankind goes through a time when the manifestations of public order violations and defrauding the law relating to private international law have become increasingly frequent, the security of the citizens and businesses, and certain fundamental social values are seriously threatened.

This study deals with a key issue regarding fraud to law and the concept of public order in private international law, issues known, but very important and topical. Although legal doctrine and case law pays special attention to studying and investigating cases of defrauding the law and violation of public order in private international law, they are processes very complex, that continues to face all countries of the world and whose unintended consequences are sought to be limited as much as possible, their eradication being impossible.

Keywords: fraud to law, public order, international private law, international element, fundamental rights, legal system.

1 Definition, modalities, conditions and sanctions of the fraud to law

In the field of private international law, it is considered[1] that there is fraud to law when the parties to a legal report, using in fraudulent purposes (illegal) lawful means (by nature) of private international law, there will become applicable to this legal report other than the normal legal system competent to apply.

As in the case of the domestic law, when it comes to defrauding the law in the sphere of private international law, we must note that the parties of the legal report use legal means to circumvent competent legal provisions, creating this way conditions due to which their legal report will be governed by the provisions of other laws more

favorable. We find that, practically, breaking the law will not be done directly, but it will be done indirectly, if we consider that the parties of the legal report creates deliberately the necessary conditions to may become incident the provisions of other law. According to Art. 2564 par. (1) Civil Code, "foreign law is removed (...) if the foreign law has become competent by defrauding Romanian law".

Usually, in the field of private international law, the fraud to law is carried out by the interference of a public authorities belonging to another state, that will create a seemingly lawful for the legal situation, by applying legal norms convenient for the parties of that legal report.

Fraud to law it constitutes as a fund defence and can be invoked by any interested part or ex officio by the court until a final and irrevocable court ruling.

There are known two main categories of modalities you can make fraud to the law in the sphere of private international law, namely: by introducing fraudulent of an international element in a domestic legal report, situation which triggers a conflict of laws (defrauding the law will materialize from the application of a norm of conflict, which becomes incident in the new deliberately created circumstances instead of the law which should have been applied normally), or – if there is already an international element – by modifying fraudulent of a specific element of the legal report (this way, the parties determine the incidence of a law other than that which had to be considered naturally, using the competent conflict law).

For example, there is fraud to law when there is fraudulently inserted an international element: by changing the personal status, meaning the citizenship or domicile, it may be committed frauds relating divorces or to establish filiation of a child born out of wedlock; regarding movable national heritage that can not be marketed in the country, by passing them fraudulently abroad, where alienation is possible; regarding the acquisition by prescription of movable property, by passing them illegally in another country whose legal provisions are less stringent; for circumventing the national tax laws by changing headquarters of companies in a country where tax rules are more favorable. Practice has shown that defrauding the law by legal entities generally aims to achieve unlawful goals, especially in terms of avoiding the payment of taxes and duties, so we would think that the concept of fiscal fraud and could be confused with the one of evasion.

Regarding the second largest category of modalities to commit fraud to law, the fact that there is already an international element, we appreciate as relevant a case, well known in the doctrine dating back to 1875. It is about the case Princesse Bauffremont, with great importance for the legal literature, because that it seems it would be the one that represents the starting point in recognizing and analyzing fraud to law. Under the French law of 1875 which did not recognize divorce, court has pronounced the separation of the body of spouses princess and prince Bauffremont. Later, the princess was established for a period in the territory of the duchy of Saxe-Altenbourg, making all the necessary efforts to acquire German citizenship. After the princess had acquired German citizenship on May 3, 1875, under that German law, it was considered that the princess is divorced because there is a legal document whereby the separation of the body of a Catholic person was treated as divorce. Thus, on October 24, 1875, it becomes possible to Berlin the marriage of Princess of Bauffremont to Prince Bibescu. For this reason, the Prince of Bauffremont addresses to French court, indicating that the princess sought fraudulently to remarry,

purpose what for she has applied for German citizenship. French court did not recognize divorce and new marriage, even after exercising of the legal remedies.

The existence conditions of fraud to law in the sphere of private international law that must be met are the following: desplacement fraudulently of the connection point regarding a legal report by an act of will of the party/parties; using a legitimate means of public international law; the parties pursue an unlawful purpose; achieving an illegal result.

So, defrauding the law involves, unlike simulation, a declaration of intent deliberately fraudulent of the parties of a legal report, in order to get a material change of the connection point of that report. Of course, there can be no fraud to law when the conection point is invariable (for example, the location of a building), but only when the legal incident norm of conflict has a variable connection point (for example, citizenship, the headquarters of a legal entity, the location of a movable property). If a person changes his domicile in another state, the parties will sign a legal act in its territory, not in the state where previously they resided. These actions are lawful, but they lead to the application of a conflict rule which, by its connection point, results in the incidence of a law other than that which was natural to apply to the legal report in question. And thereby, the parties pursue an unlawful purpose.

In other words, defrauding the law requires as an existence condition the intention to defraud, meaning that, for certain reasons, vary from case to case, they seek to apply legal rules of another legal system than that it would be normal and competent to apply. So, we see that, this way, it results a violation of the legal norm of conflict but not directly, but indirectly, through its diversion from the purpose for which it was created. Consequently, the result is considered illicit because of the unlawfull purpose sought to materialize it. The result became advantageously only by applying the legal norm of conflict, this being the reason why the parties have committed defrauding the law.

Defrauding the law may be invoked only when there is no other way to remove the effects of a legal act signed by circumventing the laws natural incidents. The sanctioning of the defrauding the law would cause uncertainty about the legal reports, which is why it might say that defrauding the law should be left unpunished or only in certain areas sanctioned. On the one hand, the parties having a subjective position, it is very difficult to prove the motive had in mind by the parties when they signed the legal act, and on the other, the sanctioning of defrauding the law should be made only when it is covered as an act or a contract, because in any other case it would not be justified the fraud, given that it is a consequence of the change of connection point. However, in our opinion, since this is a fraud, we believe that it should be sanctioned.

In the field of private international law, the applicable penalties for defrauding the law is nullity, the declaration of unenforceability of the legal act in question. It might be considered that the applicable sanction should be the nullity of that legal act, as infringed legal norms of conflict are mandatory, consequently, the parties can not benefit that provisions in their sole discretion. In the same time, nullity is contrary to the principle under which legal acts must be interpreted as applying them, and not the non-application, and in this context should be applied the competent norm, which would exclude reality, namely that the law has been hijacked. On the other hand, it is inconceivable that an act concluded in a state to be invalid in another, but possibly not be recognized, more precisely to be unable to produce legal effects, either entirely or only relating to the

consequences pursued by signing that legal act. Given the foregoing, we express our opinion that it is best to consider as unenforceable in its entirety that legal act fraudulently concluded.

It is interesting to note the position of the Court of Justice of the European Union regarding the fraud to law, so that we intend to present case Centros (Case C-212/97), where the Court decided that the setting up of a company in a Member State without pursuing there economic activities (rules of law in the field of constituting companies is considered less stringent by European nationals who founded that company), and constituting subsequently a branch in another Member State, in order that branch to allow for the operation of the company, in case the company conducted all its activity in the State where it was established the branch, are not abusive and fraudulent.

2 Differences between defrauding the law into national law and defrauding the law in private international law

When the defrauding the law is committed in national law, only operate the rules of national law, and the deed is committed directly, by changing the factual content of the legal report in question. Unlike the defrauding the law into national law, in the sphere of private international law, it goes out of the incidence of national norms and it will become applicable the rules of the other State. In this case, the defrauding the law will be commited mediately, by changing conflict factual content, which is nothing but the very way in which it is hijackered the legal norm should have been applied naturally to that legal report. The first commits defrauding of the norm of conflict, and in this way will get the illicit result of defrauding the domestic law.

Also, another difference between the two cases of defrauding the law is that, in case of the fraud to law encountered in the field of private international law, it will be eliminated the incidence of the national law (own) or the incidence of foreign law. Defrauding the national law may materialize by including an international element in that legal report, element which initially was not contained in that legal report. So is it moving legal report within the purview of foreign law to which it relates through that international element. Illicit result is obtained compared with the content of the norm of conflict. Defrauding the foreign law which is natural incident on that legal report is accomplished by changing the connection point, and consequently, the international element, due to which it will be applied another law different from that which was initially considered.

The main areas where it can be materialized or defrauding the foreign law or defrauding the national law within private international law are:

a) The individual's status (marital status, capacity and family relationships) – defrauding the law is here to change fraudulently the citizenship or the domicile, but this is quite difficult to make in the current context, because Law no. 21/1991 republished[2], which expressly regulates the conditions for changing citizenship. Moreover, all countries expressly regulates these conditions. Art. 2596 par. (1) Civil Code states that "the law of common habitual residence of the spouses or the law of common citizenship of the spouses continues to regulate the effects of the marriage if one of them changes habitual residence or nationality", and art. 2605 par. (1) Civil Code provides that "filiation of the child out of wedlock is determined according to national law of the child's birth date. If

the child has more than one citizenship, other than Romanian, it will be applied the law of citizenship which is most favorable."

b) Heritage – defrauding the law in this area becomes possible by changing the habitual residence of those having inheritance vocation, to increase the available quota, to change certain conditions relating to inheritance option etc. Our Civil Code stipulates in art. 2633 that "inheritance is subject to the law of the state where the deceased had at the time of death, the habitual residence."

c) Organic statute of the legal entity – often, defrauding is done by changing the social headquarters of the company from the home state, within a state considered "tax haven" in order to circumvent the law of the home state, by committing acts that constitute as tax evasion. It should be noted that the company continues to operate in the home state, but having the status of foreign company, therefore becoming one fraudulently even the social headquarter. Current Civil Code fails to restrict committing such defrauding and, in fact, it never could do it because it works the principle of autonomy of will of the company's founder, under which there are recognized their right to establish its social headquarters independently. Thus, art. 2571 par. (1) states that "the legal entity has the nationality of the state of whose territory it has set, according to the articles of incorporation, social headquarter". From what has been stated, we see that tax fraud is a phenomenon that goes beyond internal borders of a state, manifesting and internationally. The companies choose by various techniques to be placed in tax protected areas. In Europe, there are three categories of companies installed in "tax havens": holdings (with the social headquarters in the Netherlands, Switzerland, Luxembourg and Liechtenstein, they generates the portfolio of securities for companies and procure financing sources), the parent body (created in the areas where the tax is reduced, for example, in the Swiss cantons, which are aimed to focus the commercial benefits achieved in the world by the branches of the founding group) and fictitious companies (constituted as a structure of convenience in order to prevent tax audits)[3].

d) Legal Regime of movable property – in this case, defrauding the law is done by moving a movable property in another state, for the purpose of subjecting that property to a legal regime more favorable in contentious cases and then to introduce it back in the home state after the settlement of a dispute by the foreign court. We must point out that, in the event that such property would remain permanently in the state where it was pronounced the judgment of the court, we won't be in a position to defraud the law. Art. 2617 Civil Code orders that "the creation, transmission or extinction of a right in rem on a property that has changed the settlement are governed by the law of the place where it is at the time when the legal fact which generated, modified or ended that right has produced. " Another situation that can materialize defrauding the law is when there are registered merchant ships entered a port of a country with which the owners have no connection, in order to disapply the law of the country where there actually touch[4].

e) Form of the legal acts – theoretically, defrauding in these circumstances would be materialized by signing of a legal act in a state where is incident a law more favorable than that which would otherwise apply in the country of origin. But, art. 2639 Civil Code eliminates such fraud to law, stating that "if the law applicable to the substance conditions of the legal act requires, under penalty of nullity, some solemn form, no another law as referred to in paragraph (2) can not remove this requirement, regardless of where the legal report was signed. "

f) The content of contracts – that the parties may, under Romanian law, to choose consensual law incidental to the contract that they are going to signed it, makes this area to be one of the defrauding the law can be materialized very often.

3 Public order in private international law

Defrauding the law in private international law constitutes an exception from the application of foreign law that is competent incident to a legal report with an international element, indicating that the exception may be used only in the conditions of the absence of any other ways to allow the removal of foreign law acquired by defrauding the law, as may be, for example, public order.

Concept of public order can be found in a number of international conventions such as: New York Convention (June 10, 1958) on the recognition and enforcement of arbitral awards, which states that a reason for refusing of the recognition and of the enforcement of arbitral awards may be the violation of public order in private international law (art. V); Rome Convention (1980) on the law applicable to contractual obligations, which in art. 16 states that "the application of a rule of the law of any country specified by this Convention may be refused only if its application is manifestly incompatible with the public order of the forum"; Hague Convention (1986) on the law applicable to contracts of international sale of goods, which in art. 18 stipulates that: "applying one of the law designated by the Convention may be refused only if such application is manifestly incompatible with the public order". A formulation that we could believe it revolutionary as envisaged and fundamental human rights, is found in the German Law on new rules of private international law. Thus, art. 6 provides that: "A legal provision of another state does not apply if its application leads to a result which is manifestly incompatible with the basic principles of German law[5]. It is not applicable especially when the application is incompatible with fundamental rights. "Romanian Law on Private International Law, Law no. 105 of September 22, 1992[6] had stated in the art. 8 that, "The application of foreign law is removed: a). if it violates public order of Romanian private international law; b). if it became competent by fraud."[7]

Rome Convention (1980) makes speech in six articles on the concept of mandatory provisions, category of rules that are circumscribed to domestic law, being, in the same time, rules of substantive law which describes the application area of the law in their own space. The norms of immediately implementing, whether civil, whether they are civil procedural law or even criminal, they were introduced in order to protect certain vulnerable categories or the national interest, their necessary immediate incidence, of their priority application to other rules, springing precisely from their social, economical or political importance.

It is up to the court judging whether or not a rule is necessary imposed to a legal report having an international element. The fact that it admits the application of mandatory provisions of a foreign norm, when a contract is subject to a whole other laws, it has given rise to much debate and controversy, since they are not specified the cases where prescribing the use of mandatory provisions is imposed. In fact, in reality, it could not be specified all these cases because you can not know in advance when a provision of an international agreement could come within the incidence of the mandatory

provisions of another state. From the above, we find that, there may be differences between the types of national mandatory provisions of immediately implementing.

Public order in private international law constitute an exception to the application of foreign law applicable, as a sort of reserve clause which practically restricts foreign law. This is due to the principle that no particular agreement can be signed in violation of public order and morals. We consider it necessary to specify that if, in domestic law, public order is related to private will, controlling legal acts of the parties and setting the limits of the freedom of contract, in private international law, public order acts on foreign law, indicating the limits of application in state forum. So, naturally competent foreign law shall be apply only if it is not breaking public order. In other words, invoking public policy in the sphere of private international law may result in exclusion of the application of a foreign law that become competent applicable in the state forum by defrauding the law.

However, we express the view that invoking public order should be done only in exceptional cases in order to ensure stable legal reports. Also, in private international law, invoking public order can be done only if there are mismatches between the provisions of the foreign law and the rules of substantive law and procedure existing in the state of the forum and only after it was being applied domestic law, resulting in the removal of foreign norms competent applicable.

National doctrine[8] revealed the following key features of public order on private international law: a) the national character, because public order shall be construed according to Romanian law, namely the law of forum; b) the actuality character, meaning that the forum's state court must take as a reference the content of public order since the judgment and not that since the time of signing of the legal act or that since when was given in another country under another law system the foreign court decision, whose recognition is requested in Romania; c) the exception from the rule that foreign law, normally competent must be applied to the legal report with an international element.

Public order specific to the private international law might be defined as an exceptional modality by the court has the opportunity to replace foreign law competent applicable to other mandatory provisions of immediately implementing that existing in the national context, while the foreign law would be likely to violate fundamental principles of the law governing respective court. The effects of the invoking public order will eliminate the application of foreign and domestic law will be applied. According to national doctrine, public order in Romanian private international law consists of "all the fundamental principles of law of the Romanian state, applicable in legal reports with an international element".[9] The rule of law is established as an exception to the application of the international law competent applicable, a fund defence (exception of substantive law) of public order of private international law.

In our opinion, the concept of public order must be seen as a set of a legal norms of public and general interest, necessary and aqurequired to recognition and guarantee principles and social values specific to a democratic society, whether we refer to the existing one at the state level, either that at EU and international level. And if we gradually talk about a democratic society at State, EU and international level, we will automatically have to talk about a state, EU and international public order. In addition, we believe that we can not discuss the existence of a democratic society, regardless of the level to which we refer, except the legal order. In our opinion, between these concepts there is an

inextricably linked, and the public order subscribes legal order and completes it fundamentally. On the other hand, we must not ignore any conventional public order, part of conventional legal order.

We believe that the public order of the state must be in a relationship of subordination with the EU public order, because as an effect of the integration into European Union, Member States are required to transpose into national law the provisions of European or to apply them directly and also internal public order to respect the EU public order. Although EU public order influences and limits the content of the public order of the state, we must not understand that this this way it will be affected the sovereignty of the Member States of the European Union, given that even the European Union Court of Justice ruled in Case C-41/1974, Yvonne van Duyn vs. Home Office, that Member States are free to decide about "their demands regarding public order" and by "their national concept", and to decide on the limits of interference according to the legitimacy of the aim pursued. We consider important to note that the European Union Court of Justice has held that "the specific circumstances that can justify the concept of public order may vary from one state to another, from one era to another and it must be recognized to national authorities a discretion, within the limits imposed by the Treaty"[10]. Internal public order of each Member State may appear as a complement to EU public order, about this being made direct reference in the Treaty on European Union[11]. Also, once the European Union, according to Art. 6 para. (2) of the Treaty on European Union, joined the European Convention on Human Rights and Fundamental Freedoms, assuming [according to Art. 6 para. (3)] that the general principles of EU law are the fundamental rights as they were guaranteed by the European Convention and as resulting from the constitutional traditions common to the Member States, we consider that the EU public order is subject to conventional public order in this matter. That the European Convention on Human Rights and Fundamental Freedoms had as inspiration or were taken from international norms standard, demonstrates that EU public order and conventional public order are subordinated and/or are complement norms of public order international in this matter.

Thus, public order in private international law is a concept quite abstract and inflexible, impossible to define accurate or exhaustive, controversial in the doctrine, a concept that goes beyond the concept of public order of internal law and also it is not to be confused with it, acquiring different significances from one state to another at the level of doctrine and jurisprudence. We believe that even if it were possible to make an exhaustive list of cases of public order, it would be lack rigor as this kind of circumstances require such specific assessment in the current context.

Invoking public order can be done when a law is violated or or when it is disregarded a social reference value, which it does not find the expression in a law. In the European Union Court of Justice vision, public order involves "a genuine and sufficiently serious threat, affecting the fundamental interests of society"[12], as this results from the Case C-30/1977, The Queen c. P. Bouchereau. Public order of private international law regards the fundamental values of the state, undergoing a continuous change in order to adapt to the needs of society. EU juridical order caused a remodeling of the content of public order into legal reports with an international element.

A foreign law normally competent becomes unenforceable if it violates public order of private international law or it defrauds the law. We consider that the foreign law must

be removed to avoid affecting the fundamental rights and, moreover, a large number of European regulations prohibit the application of foreign law if there is an obvious inconsistency with the public order of the forum state. We express our opinion that no matter how it was applied in a case the competent applicable foreign law, the only aspect of interest is that any effects of it should not occur if it is contrary to public order of private international law. We also believe that, in the event that an international arbitral tribunal would decide applying the law of a state, it would be impossible to invoke public order of private international law against the law of that state.

If, when a dispute is settled by an arbitral tribunal, it is determined that a foreign law naturally competent is incompatible with the public order of a state, the foreign law will be removed and replaced with the relevant rules of the state concerned, the situation is completely different regarding its recognition and its execution, when it exists a decision of a foreign court. A decision pronounced by a court of a state shall be recognized and enforced in another state under the condition of its conformity with the public order of state forum. This is due to the authority of res judicata that benefits the decision of the court, a fact that makes the decision to be mandatory. Consequently, no court in the requested State has no right to intervene on the solution given by the arbitral tribunal in the country of origin. So, a legal norm can not be replaced with another. European courts rulings are mandatory on Member States of the European Union.

4 Conclusions

We find from the above that, unlike the case of breaking public order of private international law, when competent foreign law applicable will be replaced with the forum law, as it is contrary to fundamental principles of the law of that state, in the case of fraud to law from international private law, there will be removed or the forum law or the foreign law, as it became incident by fraudulent parties will, following to be applied the legal norm circumvented.

The concept of public order suggests that its essence is respecting the fundamental human rights, that no one should be above the law, and that individuals and institutions should exercise a honest conduct, upright and fair in any legal report of private international law. Contrary to the integrity and to the sovereignty lies manifestations of defrauding the legal norms.

Defrauding the law manifests itself in many forms because, basically, it means all it placed outside the legal limits, by circumventing legal norms competent applicable. All countries have the duty to be concerned systematically and efficiently in order to prevent and limit these phenomena and control remains the primary way of combating manifestations of defrauding the law in matters of private international law.

At the legislative level, it must be assessed national legal norms of private international law and also the legal norms related to public order and their correlation with EU and international legal system, especially for the transposition of the international legal instruments into national legislation. We believe that an unitary legislation at least at EU level would succeed in discouraging the proliferation of the defrauding the law attempts in order to illegally gain privileges, advantages or benefits.

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The Bradford Factor. Another point of view on the application of the criteria for determining the order of priority for dismissal

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Abstract

Although in the current legislation we do not have a detail of the selection criteria applicable to collective redundancies, or in the case of an effective prioritization of dismissal, each employer, as a rule, in the collective labor contract or in individual employment contracts of the employees includes certain criteria that they have considered for a comparison if there is a need for a selection procedure.

Between the classical criteria, which relate either to the performance of the employee at the workplace or to the social side, the jurisprudence of the national courts reveals more and more the tendencies of the employers to consider different aspects of the employees' activity in the eventual selection required a collective dismissal procedure.

Our paper goes beyond the "conventional" barrier of national practice and offers an openness to the practice of other EU Member States that can be applied soon and internally, ie highlighting the Bradford factor in the selection procedure for dismissal.

Keywords: dismissal, criteria, selection, Bradford factor, absenteeism

1 Selection criteria and their application in national law

If we are discussing a reorganization at the level of an employer, it is very likely that, following a decision to discontinue positions whose activity was considered redundant or whose retention was deemed to be too onerous for the employer, according to the quantitative criterion applicable, the provisions of collective redundancy may be incident.

Thus, if we encounter a situation where similar positions are found at the level of the employer in terms of the specific activity pursued, the procedure of the collective redundancy is applicable, when the positions of the same kind are existing, in order to

determine the order of priority to dismissal there must take place a serious selection of the employees who occupy the positions referred to dismantle the basis of criteria.

The criteria taken into account by the employer for the prioritization of dismissal are applicable to employees with identical or similar positions and positions and only a part of these positions are targeted to cancellation. There is thus a question of applying criteria to determine which of the employees will have priority in the dismissal. [1]

Although at this moment the Romanian legislation, namely Law 53/2003 – Labor Code, republished, transposing the European Directive in the field – 59/98/EC – does not regulate a definition of this notion and no clear procedure to follow or examples of the criteria applicable to the employers who are in the same situation, in the doctrine we may find some general principles to follow in these cases. Also, practice is not neglected, a field that abounds in "inventiveness", which is why many courts often have to sanction these practices of the employers, which are considered abusive.

The only mention of applicable law, art. 69 par. (3) of the Labor Code does not define in clear terms what would be the procedure to be followed or which would be criteria that would serve as a means of grading, but it is specified that according to the law and/or collective labor agreements, for the establishment of the order of priority to dismissal applies to employees' salary after evaluation of achievement of performance goals. Thus, during the course of this procedure, we are considering the professional criteria with priority and only in the alternative the social ones.

2 Absenteeism. A new European criteria applied in the collective redundancies procedures

Our analysis has emerged from some of the very interesting solutions from the Belgian jurisprudence on the selection criteria for establishing the order of priority for dismissal:

This case concerns the situation where, on 10 January 2017, the Labor Court of Mons decided that in the case of collective redundancies an employer may use absenteeism measured by the Bradford factor [2] as criteria for the prioritization of dismissal, but not to be considered a breach of the anti-discrimination law [3].

Even if the provisions of Directive 2000/78/EC of 27 November 2000 prohibit discrimination on grounds of religion, belief, disability, age or sexual orientation, it is clear that discrimination on the basis of health, does not fall within its scope. However, the Law of 10 May 2007 transposing the Directive into Belgian law also prohibits discrimination based on current and future health status.

In that case it took into account the provisions of collective labour contract that promotes equal treatment at all stages, working relationships based on criteria that include the medical history of an employee.

In the Belgian case that we are considering [4], the defendant, the employing company, faced with a drastic decline in production, decided to lay down the measure of collective redundancy. In this respect, the social worker was joined with the employees, who signed four collective agreements. Under these agreements, the selection criteria for the employees to be laid off were set.

A total of 32 employees were made redundant, thus falling under the rule of the European Directive in the field, which is of course also transposed into Belgian law.

Thus, the dismissal plan was implemented and one of the employees affected by this measure challenged his dismissal in court, requiring the employer to state all the reasons for the dismissal. The employer said the 32 redundancies were caused by restructuring and that the plaintiff was fired because of his extremely high rate in terms of absenteeism, compared with other colleagues in the department.

It is thus a premise to present absenteeism as criteria that laid the foundation for dismissal, even if it is attracted to medical leave, drawing a fine line between objective treatment and discrimination.

In support of his position, the employer asserted that all these criteria had been agreed upon in the negotiation and signing of the applicable social plan, thus agreeing with the employees' representatives that employee absenteeism, measured using the "Bradford Factor" was one of the criteria which may be the basis for determining the order of priority for dismissal.

Analysis of absenteeism on the return to work was determined by defining factor Bradford as a tool that is often used in human resources as a means of measuring absenteeism workers. The theory thus seeks situations where short absences, frequent and unplanned employees are more disruptive activity than longer absences employer. When there is a high rate of short, frequent, and especially unplanned absences, the Bradford factor increases and thus increases and risks interrupting activity or slowing labour productivity.

By the action brought before the Charleroi Labour Court, the employee invoked, first of all, the discriminatory treatment which violated the provisions of the Law of 10 May 2007. In the light of the above arguments and the reasoning presented by the employer, the Court dismissed the action, the employee also formulating an appeal before the Court of Labour Disputes in Mons.

The Superior Court said that in terms of real and serious cause the dismissal was justified by the need to process properly the business aspect considered in the light of the provisions of Article 63 of the Law of 3 July 1978 on employment contracts, since the employee was dismissed as part of a restructuring that led to a collective redundancy process.

On the other hand, the Court found that the law and agreements had been respected because, when determining the order of priority for dismissal, it served as criteria itself the employee's absence rate but only after it was clear that none of the other three criteria set out in the agreements (ie the fact that there were no other suitable jobs within the company, there was no mutual agreement to terminate the contract and not there was access to unemployment benefits with additional allowances for the company) could not be applied.

However, in relation to the employee's claim that he had been discriminated against, the Court first stated that the objective of the law was to promote equal treatment at all stages of the employment relationship. As an extension of these, we also refer to the conditions of dismissal. Thus, the employer will not be able to distinguish between employees on the basis of the criteria set out in the agreements, including aspects related to medical history, if those criteria are not related to the activity or nature of the company.

Finally, the Court referred to the Bradford factor as a way of measuring absenteeism – especially short, frequent and unplanned absences. It was considered that, in harmony with the provisions applicable through agreements, the employer calculated the employee's "*Bradford* " for a reference period of two years prior to collective redundancy. The criteria, as applied, was also agreed by employee representatives.

It was appreciated that an employer does not deal abusively an employee by setting up a low productivity cohabitation measure or a high rate of absenteeism due to illness or temporary incapacity to work. The Court found that the defendant fully complied with the criteria set out in the collective agreement applicable at the level of the unit. That is why the absence based on the Bradford factor was the fourth and final criteria used only after the employer could not apply any of the first three criteria, as agreed with the employees' representatives. Given that the applicant's absenteeism was the highest in relation to the other employees of the department, regardless of the reason why the employee was absent (although we are talking about medical leave), the employee was proposed to be dismissed following the application of the procedure selection.

Analyzing the case, in relation to the direction in which the labour laws in the European Union are generally conducted, it can be argued that it was the first time that a Belgian court had made such a decision among the only ones in the EU, namely the premiere use of the Bradford factor as a selection criteria for collective redundancies and the maintenance of such a solution as legal.

We have to mention that four years earlier, on January 7, 2013, the Bradford factor was mentioned in a decision of the Labor Court in Brussels. In that case, an employee was fired because of frequent absences and the impact these it – had on activity in the Department where he worked.

However, there was an essential difference between the two situations, Brussels because it referred to a single dismissal, in which case should not necessarily apply selection criteria to determine priority order to the dismissal. The Mons Labor Tribunal, in the case we are talking about, found that a frequent absence of employees clearly affects the functioning of a company, and using the Bradford factor as the ultimate criterion for redundancy is not a discriminatory act. It should be noted that long-term absences and absences caused by serious illness were excluded.

3 Absenteeism – a criteria applicable in the Romanian legislation?

We cannot make a parallel between Belgian legislation and practice with national law – in Romania. For reasons related to the expression used by the legislator, amid the collective agreement at national level (abrogated) but also in relation to the practice of national courts, it is clear that at the level of the employers in Romania, the use of the Bradford factor for collective redundancy or why not individual. The use of such a criteria would be perceived as discriminatory and in no way applicable.

More specifically, in our jurisprudence [5], in the case of collective redundancies, the courts considered the application of such a criterion to be discriminatory, especially as regards the medical leave that an employee suffering from a serious illness suffered during the period before the start of the procedure of collective redundancies caused by

the employer's insolvency. Even though there were certain criteria negotiated and applied in the dismissal procedure at the level of those employers, the absenteeism caused by temporary incapacity was considered a discriminatory criterion in the collective redundancy process.

However, we also appreciate the time period in which absenteeism is assessed. Namely, in the Belgian jurisprudence analysed absenteeism was evaluated over a period of more than two years and was long ruled disease criterion was used only as a last resort, thus giving it a touch more objective criteria.

Then, we must mention that it is for the first time that a Belgian court has decided to apply the Bradford Factor to collective redundancies. While the Court of Mons seems to have considered that a high Bradford factor is sufficient, other courts may require additional proof that an employee's absence actually affected a business, the activity of the employer.

As we mentioned, in relation to the practice in Romania, as in other European countries, the so-called "Factor Bradford" could not be used at the moment, referring to his subjectivism but also to the fine line drawn to discrimination.

In Italy, for example, this criterion could not be used because the law provides for mandatory selection criteria for collective redundancies, while trade unions may propose alternative criteria (normally the retirement age), but certainly absenteeism could not be applied as a selection criterion because the right to sick leave is recognized by law, as is the case with our country.

In the case referred to above, the Court examined the damage alleged by the plaintiff in the context of the applicant's claim for moral damages in relation to discriminatory dismissal based on the situation of leave for temporary incapacity for work. The Court of Appeal found that the damage was not due to the lack of income due to the existence of employment relationships, but to the application of discriminatory and unlawful criteria which considered the temporary incapacity to work due to a non-consensual chronic illness violation of the principle of equal treatment and all prohibitions of discrimination in employment relationships. Thus, according to our legislation, obedience to a type of abusive treatment has been such as to affect dignity and has produced profound emotional consequences with effects on physical health, which is why the court considered and founded the applicant's claims, and admitted them.

It is practically inconceivable in Romanian legislation and jurisprudence to consider the medical condition of an employee or the number of absences if they are motivated as a criterion for determining the order of precedence in dismissal. Can we, however, discriminate against the conduct of an employer who selects for firing an employee who has a number of days of sick leave in a year? But are these absences related to the number of days of rest leave?

As presented in the Bradford Factor in the case referred to above, it is clear that we are talking about motivated absences or days of sick leave, which, in Belgian law, do not appear to be a criterion that would be the basis for dismissal.

We appreciate that no matter how advanced the legislation in the matter is, given the fact that a subjective element, an element related to the person of the employee, when determining the order of priority of dismissal, we can not consider the procedure of dismissal to be objective, as the article in the law under which the dismissal is granted, art. 65, is one that prioritises objectivity.

In this respect, in the event of a dismissal based on the provisions of Art. 65 of the Labor Code, when the position is abolished, the employer cancels a sum of duties, so an abstract thing that does not have or, more correctly, should not be directly related to the employee who gets dismissed, except for the situation in which the decision to discontinue/reduce/restructure envisages a single job (in the sense of no similar or identical one within the same department/department/division/branch/work point or, even in some cases, at the general level of the employer's structure), in which case this direct link, for objective reasons, becomes inherent. Therefore, it cannot be considered that in the event of such dismissal, especially in the collective redundancy proceedings, absenteeism that is strictly related to the employee (especially when talking about medical leave) cannot serve as an objective criterion in the procedure selection.

If the above conditions are not met, a dismissal (individual or collective) based on Art. 65 of the Labor Code (for reasons not related to the person of the employee), would become practically subjective, depending on the person of the employee. In this sense, the law protects, as outlined above, in no way the employer can "dispense" with uncomfortable employees, or perceived as such, by inventing "job reorganizations" and "reductions". However, it should be noted that in such situations, the position occupied by the respective employee perceived as an inconvenient must be analysed in relation to the composition of the other positions in the Society. Thus, if within the same employer, there were several identical or similar positions occupied by other employees in the same department/department/division/branch/workstation, which, in their turn, fulfilled identical or similar tasks to those fulfilled by the employee the post has been proposed to be abolished, this selection procedure must be carried out for the sake of clarity of the objectivity of the measure and not to consider that, in reality, they are all but measures aimed at a well-targeted purpose, namely the removal, from the employer, of the type of employee mentioned above.

4 Conclusions

Thus, regarding to those stated above, we consider that it is obvious that in the case of any reorganization followed by collective redundancies affecting the occupants of similar posts and the maintenance of a post in the structure of the society, it is necessary to apply a careful selection procedure for the staff to determine the order of priority for dismissal.

Regarding the dismissal of the employee and the dismissal of the position occupied by the employee, the selection procedure for determining the order of priority of the dismissal must be as objective as possible, respectively criteria must be established with due involvement of Trade Unions and employee representatives under the specific information and consultation procedure for collective redundancies and to consider issues as clear about the employee – performance, social, age etc.

Considering the absenteeism regarded as a criterion by the "eyes" of the Romanian legislator, we consider that at this moment the legislation does not allow the treatment of the number of days absent as a result of the sick leave taken by the employee, from various problems, as a criterion in the selection procedure view that it is considered discrimination on the basis of disease.

On the other hand, alonside the review made by the courts of law in determining the lawfulness of the collective redundancy procedure, the analysis of the selection procedure which took place at the level of the company in order to determine the order of priority for dismissal, it can not be ruled out that an employee who has repeatedly been absent has not received a positive evaluation, and thus reaches the interpretation of the employee's performance at the workplace in terms of the number of days actually worked. At this point, however an interpretation of the legislation through the interpretation of the Belgian courts is quite far from the rules applicable in the collective redundancy procedure at national level. In that regard, in relation to the provisions related to the objectivity of the dismissal procedure for reasons other than the employee, a solution for the purposes of taking account of sickness absences – as evidenced by sick leave certificates – would be a violation of procedure. However, it is not far from a future interpretation in our legislation, an application of the Bradford Factor related to the abusive use of medical leave only for teasing purpose in order to prevent more and more employers from disposing of the dismissal measure. Because, at this time, legislation does not prevent an employee from taking sick leave for various illnesses, even for consecutive days, perhaps in the future, given the abusive behaviour of many employees, a way to verify the veridicity of the illnesses for which are granted those sick leaves, thus exceeding the formal control over the number of days of sick leave, provided today in the law.

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Considerations on trusts and fiducias with special regard upon the liability of trustees and fiduciaries

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Abstract

The fiduciary institution in European continental law represents a variety of the fiduciary institution from the Anglo-Saxon law. In both cases, a person named the settlor transfers to a fiduciary (or trustee) a series of assets, rights or guarantees present or future for him to manage and transfer after a determined period of time to another person. Taking into account that over time the trustee institution has been more frequently used in common law than was used the fiduciary institution in our continental law (the regulation of fiducia was introduced in Romania by the new Civil Code in 2011) and considering that there are laws that recognize and apply both institutions (like the Suisse law), we must ask ourselves what is the extent of the personal liability of these persons that have a granted power to manage and handle a patrimony that doesn't belong to them and that was entrusted to them.

Keywords: fiduciary, trustee, fiducia, trust, liability

1 Introduction

Fiducias and trusts are two institutions belonging to the two principal law systems in existence that are the continental law system and the common law system. They are very different in several considerations, but seeing the development of the economy and of law and the transformation of classic economies in a global and globalizing economies, we must understand that these law systems must not be thought in an isolated manner, and their intermingle by using concepts of both systems, or the conclusion of commercial contracts that bring together parties that are otherwise submitted to different law systems is not to be considered the exception anymore, but the new rule. In this optic, it is important to understand each institution individually, as well as the possibility to its direct appliance in another law system than its system of origin. There are already countries,

such as the Switzerland, that apply and regulate in the same time both institutions, thus offering services of trust and fiducias regardless of the country of origin of the constitutor.

Fiducia was first introduced in the Romanian law by regulation of the new Civil Code in articles 773-791, entered into force in 2011. As it is regulated, fiducia in our rule of law constitutes a transposition of the provisions of the French Civil Code, with slight differences, that don't affect the nature of the institution and don't fundamentally change its traits. Given that the fiduciary institution is regulated similarly in the vast majority of the continental law systems, we shall analyze the fiducia as it is regulated in the Romanian Civil Code.

The trust in common law is an old institution that emerged in light of the interpretations given by the English courts to contracts in which the parties pursued to give patrimonial masses into administration to other persons, generally specialist. The trust institution cannot be understood without taking into consideration the importance of the concept of *equity* that was the basis of the establishment of the trust institution. The concept of equity must be understood as the set of rules established by the British Courts of Chancery, by which it was aimed to correct the strictness of the regulated law. Thus, the trust was initially formed as an addition to the right to own property, in the situation inn which a person owned the legal title on the property, but the courts decided that it was equitable or just that this person use it for the benefit of another person. This led to an obvious separation between the legal property ownership, detained by the trustee (to which was entrusted the management of the property) and the right of the person who was going to benefit from this property – the beneficiary.

As such, in common law, following the transmission of the rights by trust, the trustee is recognized by the written law as the holder of the title to ownership, and by equity as the holder of the so called "legal title", which grants him a specific role, very rigorously regulated regarding the fiduciary tasks that the management of the property claims only for the benefit of the beneficiaries. The latest, in their turn, are the holders of the so-called "equitable title", which entitles them to benefit from the management of ownership by a trustee in their service. [1]

2 Definition of notions

The fiducia is defined by article 773 of the Civil Code as "the juridical operation by which one or more constitutors transfer real rights, debt rights, warranties or other patrimonial rights or ensemble of such rights, present or future, to one or more fiduciaries that exert them in a determined purpose, for the use of one or more beneficiaries". In other words, the fiduciary operation implies three parties – the constitutor that separates a part of his patrimony that he gives into administration to one or more persons named fiduciaries, that will manage the said part of the patrimony for the use of one or more third parties, named beneficiaries, in exchange of a remuneration given to the fiduciary. The Code imposes a rule, that of the separation of the rights transferred by fiducia from the patrimony of the fiduciary "These rights form an autonomous patrimonial mass, distinct from the other rights and obligations in the fiduciary's patrimony."

The complexity of the contractual operations of the fiducia is given by the set of contractual relations that it includes and which form a single set of rules: the transfer of

rights against payment, the atypical mandate with irrevocable character, the administration of dedicated assets for the use of the beneficiary. [2]

The regulation in the Civil Code leaves the possibility for a person to cumulate more than one capacity: the constitutor can also act as a fiduciary (if he meets the conditions imposed by the law) or the beneficiary of the fiducia. The fiduciary operation is concluded between the constitutor and the fiduciary, and in case the beneficiary doesn't cumulate this capacity with that of the constitutor or fiduciary, he will not be part of the operation, but merely a third party of it, upon which shall reflect the effects of the operation (see article 777 of the Civil Code). This constitutes exemption from the law principle that states that the effects of a contract shall take place in the patrimony or upon the persons that conclude the contract. We note that for as long as the beneficiary has not accepted the fiduciary contract, it can be modified, revoked or unilaterally terminated (otherwise withdrawn) by the constitutor. After the acceptance form the beneficiary, these operations may only take place with the agreement of the beneficiary or with authorization from the court (article 789 Civil Code).

The rights transferred by the fiduciary contract can be real rights, rights of claim, warranties or other patrimonial rights or any ensemble of such rights, present or future. In other words, the legislator has introduced in this fiduciary patrimonial mass the possibility to insert any type of rights, of any kind and extent. We estimate that thus it comes very close to the regulation of trusts in common law. As regards to the activity that the fiduciary is obliged to perform upon the fiduciary patrimony, we estimate that the use of the notion "exercise" in the regulation of the Civil Code is auspicious, as it grants the fiduciary a larger possibility to maneuver, as opposed to the right to "administer", that can lead to the limitation of the fiduciaries rights to the simple administration and preservation of the assets and rights contained in the fiduciary patrimonial mass. The fiduciary shall act as the real owner of the goods placed in the fiduciary patrimonial mass, meeting all of the attributes of property (see article 784 paragraph 1 of the Civil Code) and stating, in some cases, that he is the real owner of the goods and rights managed. In this regard, we underline that the constitutor has the possibility to ask the fiduciary to declare that latest is the real owner, so not making any mention of his quality as a fiduciary – "When the fiduciary is acting for the account of the fiduciary patrimonial mass, he can make an express reference for this purpose, except the cases when this is forbidden by the fiduciary contract."(article 782 Civil Code). However, the fiduciary has an obligation to act in accordance to the purpose in which was constituted the fiducia and such, in the purpose of managing a certain patrimony and exert all rights and actions in order to administrate such patrimony, for the benefit of a third person, called beneficiary. Even if the constitutor can't claim or revoke the actions of the fiduciary upon the patrimonial mass that he constituted, the constitutor can designate a third party that shall represent his interest in the fiduciary contract (article 778 Civil Code) or he can hold unto account the fiduciary for the fulfillment of the contract (article 783 Civil Code).

In accordance to the provisions in force, the capacity of fiduciary can be detained only by the persons expressly and limitedly listed by the Civil Code in article 776, specifically: credit institution, investment and management of investment companies, companies that provide services of financial investments, insurance and reinsurance companies and also public notaries and lawyers, regardless of the for in which they exercise their profession.

Regarding trusts, we must mention that they have been created a long time before the modern institution of the fiducia, as it was explained above, by the intervention of courts. The trust was first regulated by the English Trustee Act in 1925 (amended in 2000), and then sustained by the Recognition of Trusts Act in 1987 that allowed the recognition of trusts created in other states on the United Kingdom's territory. A definition of the trust in the United Kingdom is that given by the Recognition of Trusts act in provision two of this law: the term "trust" refers to the legal relationship created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. A trust has the following characteristics: (i) the assets constitute a distinctive patrimony (fund) and are not a part of the fiduciary's patrimony; (ii) the holder of the assets of the fiduciary patrimony shall be either in the name of the fiduciary, or in the name of another person, but on the account of the fiduciary; (iii) the fiduciary has the power and the obligation, in which respect he is obliged to mange, use or dispose of the assets in accordance with the terms of the trust and the special obligations imposed upon him by the law. [3] As specific characteristics of the trust we retain that: a trustee shall detain goods and rights for a third party (either natural or moral) for a specific purpose, and in exchange shall receive a commission. Generally, although the trustee holds the assets, he may not exploit the benefits of these assets for himself. Also, the settlor can not access the trust during the management period by the trustee, but he can hold the trustee accountant or he can sue the trustee for wrongful administration of the trust, thus eventually also asking for the replacement of the trustee.

In common law the possibility of cumulating more capacities, such as settlor and beneficiary or trustee is also recognized. Unlike the continental law that imposed limitations regarding the status of the person who can be a fiduciary (trustee), common law doesn't impose such limitations; as such, any person, natural or moral, can in principal obtain the capacity of trustee. There are small exceptions for certain types of trusts that are for instance formed by demand of the court, in which case the trustee must be a lawyer accredited by the said court. The nature of the trustee institutions varies in accordance with the nature of the trust, as such there is a wide range of rules regarding the naming, replacing and cessation of the capacity of trustee. The latest have a great variety of powers granted as a result of the trust, and the failure to fulfill the mandate or exceeding the powers granted by it will lead to the breaching of the trust. Also in common law the possibility that the trustee doesn't declare his capacity towards third parties exists retaining his possibility to conclude valid agreements, but only if this fact is specified at the moment of the institution of the trust.

Regarding the goods and rights that can be included in a trust, there is no legal or jurisprudential limitation on this matter – ant good, right, claim, warranty, ancillary right can be included in a trust, as long as they are in the civil circuit and are not contrary to the law or public order.

Given that the trust is essentially a jurisprudential creation, it differs very much depending on the regulation to which we relate. For this purpose, we must mention that there are types of trusts that allow a higher or smaller control of the settlor upon the trustee. The main types of trusts that we can find in almost all legislations under the influence of common law are: simple trusts, charitable trusts, property trusts, inheritance trusts, life insurance trusts or pensions trusts.

As regards to manners of establishing a trust, unlike the fiducia establishing manner, that can only be accomplished by the will of the constitutor, by contract, we must stress out that the trust can be set up in several ways. Firstly, the trust can be set up by will of the settlor, in which case we can discuss of a professional trust, a charity trust, a pensions trust etc., or by will of a third party, such as a court of law, in which case we refer to judicial trusts, trusts administered by a custodian (whom even thought hasn't got permission to make administration acts upon the trust, has the right to take conservation measures upon it and must report his actions to the initial trustee), trusts publicly administered by an officer of the court etc. In addition, case-law has created a third way of establishing trusts, thus gaining the capacity of trustee and becoming *trustee de son tort* – meaning gaining such capacity by the persons action or fault. It's the case when the person hasn't been appointed trustee neither by the settlor, nor the court, but acted in such a way that is characteristic for a trustee and thus must discharge for such capacity. The main trait is that the person that becomes trustee has interacted in a certain way with the trust and has become in this manner responsible for it. Even if the French term "*de son tort*" suggests a wrongful or culpable action of the trustee, we must not consider that such capacity can be earned only by negligence or error of the trustee; in order to acquire such capacity no form of wrongful action, error, fraud, violence or lesion is required, or in general, no form of misconduct of the person who is granted the capacity of trustee. There are two manners of becoming trustee de son tort: (i) by assuming this position and acting accordingly even if the person is not designated as such, and (ii) by the fact that the person has gained an enhanced control of the trust, in such a manner that he can ask for this capacity. [4]

Pertaining the essential differences of establishment of the fiduciary and trust institutions, we underline the following: (i) the trust can also be constituted *mortis causa*, while fiducias can only be established by an *inter vivos* act; (ii) the trust requires an unilateral, explicit, even verbal manifestation of will for its establishment, while the fiducia must be constituted as a bilateral agreement between two contracting parties, and there must be a written act; (iii) depending on the trusts purpose, the settlor can maintain a certain control upon the goods included in the trust, while in the fiducias case, they are placed in a distinct patrimonial mass and may not be accessed by the constitutor.

3 The liability for fiduciaries and trustees

Pertaining the liability of the fiduciary, we believe that the Civil Code, especially in articles 778, 783, 787, 788 and 790, regulates it. Firstly, the constitutor has the possibility to assign a third party to represent his interests and exert his rights issued from the fiduciary contract, if this is not expressly forbidden by the contract. We consider this provision not only useful, but also necessary as the constitutor might be any natural or moral person, that might not have the experience necessary to oversight the carrying out of a fiduciary contract, especially since the fiduciary will always have the capacity of a professional (either a banking institution, an investment institution, insurance institution, a lawyer or a public notary). To this end, substituting the constitutor as regards to exerting the rights issued form a contract concluded with a qualified person is necessary in order to correctly and completely exert all the potential rights that the constitutor might claim from the contract.

The Civil Code imposes the obligation for the fiduciary to account to the constitutor or to the constitutors' representative, when he was designated under the conditions stated above, and also account to the beneficiary at their demand, in accordance to the terms stated in the contract. These provisions are taken from the French regulations (article 2022 French Civil Code) and, in our opinion, refer to an extended obligation to explain and prove all the management that was lead for the fiduciary patrimony administered for the use of the beneficiary. As the extent of the fiduciary contract is vast and slightly precise, seeing how the obligations of the fiduciary in the administration of the patrimonial mass that is entrusted to him are not specified, we consider that the obligation to "give account" should cover all the aspects that the fiduciary took into consideration when he acted for the account of the patrimonial mass. We consider that in these cases the fiduciary must act both taking measures as a good owner, but especially taking into consideration the capacity of the persons who can act as fiduciaries according to the law, with measures of a good professional. Thus, we believe that both the provisions from the simple administration (article 795 Civil Code, where "The person authorized with the simple administration is bound to perform all acts necessary for the conservation of the goods, as well as the useful acts in order for the goods to be used in accordance to their usual destination") are enforceable, as well as the provisions from the absolute administration (article 800 Civil Code: "The person authorized with the absolute administration is bound to preserve and exploit in a profitable manner the goods, to enhance the patrimony or to carry out the dedication of the patrimonial mass, in such a way that is in the interest of the beneficiary").

In case the fiduciary causes damages to the fiduciary patrimonial mass by the acts of conservation and/or administration that he undertakes, he will answer with the assets from his own patrimony. This provision regulated by our Civil Code is taken up from article 2026 French Civil Code and we consider that it is an appropriate sanction in case a professional doesn't fulfill his attributions resulted from an assumed contract. As additional sanction in case the fiduciary doesn't fulfill his obligations from the contract or places in danger the interests that have been entrusted to him (article 788 Civil Code), the constitutor, his representative or the beneficiary can ask a court for the replacement of the fiduciary. Until the final ruling is given, the replacement of the fiduciary with a temporary administrator for the patrimony is to be ordered. The new fiduciary or the temporary administrator can only be named by the court with their approval, and if they accept they will have all the rights and obligations that arise from the initial fiducial contract. The fiducia contract will also cease in case the insolvency procedure has been ordered against the fiduciary, in case there are effects of the reorganization of the moral person, or we add, when the capacity of lawyer or public notary is lost. We find that this sanction is an evident consequence that arises from the wrongful exercise of the profession. As long as the Civil Code expressly lists the capacities that a person must have in order to become a fiduciary, and as long as these capacities belong only to professionals that normally should have the ability to exert much more productively the rights and obligations born out of a patrimonial mass, when these professionals loose their capacities, or they become reorganized or insolvent, it is obvious that their management qualities are not adequate and in this manner, they can't execute the management obligations of another patrimony, in the interest of a third party.

With regards to the liability of the trustee, we mention that he can answer to the beneficiary and actions can be taken by the beneficiaries or the co-trustees in order to obtain the reparation of damages towards them personally or towards the trust.

The main rule is that the trustee is liable for any lack of compliance in actions undertaken in regard with the trust. If he committed an act with negligence, but without guilt, the judge may grant him a discharge on the actions undertaken, and thus the trustee will not be held accountant with his own patrimony. Even if the trustee is also the settlor, he will continue to be held liable for the mistakes made in the management or in the exert of the rights and obligations that arise from the trust. If the lost of the trust has benefited to the trustee personally, he will be held liable to reimburse the increased profit with the gain that he obtained. If he didn't gain any profit from the loss brought upon the trust, he will be obligated to compensate the loss with the related interest. In case the loss of the trust is due to the action of more trustees that were empowered jointly to administer the trust, they will be held accountant for the reparation of the prejudice caused jointly but also severally; in this case, the joint liability of the trustees is presumed, and as such the settlor or the beneficiary will be able to pursue either all the trustees or one of them for the reparation of the whole prejudice. [5] In case the trustee acted willingly and knowingly, with the desire of acquiring the assets in the trust and thus produce damage to the trust, this action will be sanctioned by the British Penal Code firstly for theft and subsequently for breach of trust. Also, there are aggravating provisions in case the trust contained immovable goods.

With regards to the actions that can be exert by the beneficiaries or the co-trustees, these vary depending on the extent of the unexecuted obligations by the co-trustee. Thus, in case the trustee doesn't execute the obligations arising from the trust, a court can oblige him, at the demand of the beneficiary or a co-trustee, to execute these obligations, in order to avoid any potential damages to the trust. In case the damage has already been made, the beneficiaries or the co-trustees can ask in front of the relevant jurisdiction the reparation of the prejudice. In general, the beneficiaries have the right either to obtain the injunction for the exertion of the obligations, or the right to restore the parties to their pre-agreement position, or damages from the trustee who didn't execute, or wrongfully executed his mandate. The Court of Appeal ruled that the trustee who didn't execute his obligations could repair the prejudice thus created by pursuing the persons who profited by his non-execution or miss-execution of obligations. [6] We must retain that the right to pursue the assets in common law allows on one hand the retrieval of the said asset, as well as the fruits that it generated on the period that it was alienated. In other words, the reparation of the prejudice will be formed both from the retrieval of the asset (or its equivalent) as well as the unrealized profit it generated.

We remind that in common law, the trust must be understood in accordance with the principal of equity, and as such the liability of the trustee can not be set apart from this concept. In this respect, in accordance with each infringement or breach of an obligation in the trust, the trustee will be liable, from case to case, depending on the severity of the breach, of his will (culpa or intent) and of the background or training of each trustee (we underline that common law doesn't impose certain capacities in order to become a trustee), the circumstances will be appreciated from case to case by the judge.

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The capacity of usage of the legal personality

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Abstract

An intrinsic part of the civil capacity, the capacity of usage of the legal personality represents the aptitude to have rights and obligations, i.e. to be the subject of the civil right. Thus, by the capacity of usage we mean the possibility for every individual to take part in civil juridical relationships.

1 Beginning of the capacity of usage of the legal personality

Not all aspects regarding the capacity of usage of the legal personality are subjected to national laws. Some of the matters are governed by the law which applies to the juridical relationship in question. Taking into account these differences, we will mention the law that applies for each of the aspects comprised by the capacity of usage.

Beginning of the capacity of usage of the legal personality is determined, as a general rule, by the date of birth of the individual – Civil code, article 35.

In order to apply the exception of acquiring the capacity of usage at the date of conception, two conditions must be met at the same time:

- The child must acquire rights as well as obligations.
- The child must be born alive, even a few minutes of life being sufficient.

The acquirement in anticipation of the capacity of usage is accomplished from the date of conception of the child.

The date of conception could be designed as any day in the 121 days interval between the 300th (maximum duration of the pregnancy) and 180th day of the gestation (minimal duration of the pregnancy). If the conception was natural, the presumption regarding the minimal and maximal duration of conception cannot be overthrown. If the conception was performed by the procedure of assisted reproduction, the date of conception is known, but the presumption can be challenged with respect to minimal and maximal limits of this interval.

In these circumstances, private international law applies the national law of the physical personality: the juridical personality of the conceived child is not a juridical fiction; it is and actual physical individual, detaining rights and limited by obligations corresponding to them[1].

Content of the capacity of usage of the legal personality:

❑ ***Composition of the capacity of usage of legal personality***

The definition and generality of the capacity of usage which result from dispositions of article 34 in the Civil code: "the capacity of usage is the aptitude to have civil rights and obligations", state, in summary, the contents of the capacity of usage of the legal personality. In the doctrine it is constantly admitted that all civil rights and obligations of the individual give contents to the capacity of usage. The physical individual acts, in all civil relationships, on the basis on its capacity of usage, within which we describe the following: the capacity to contract, the capacity to dispose for free, the capacity to receive for free, the capacity to respond, the succession capacity.

The contents of capacity of usage may be defined by relating to the legislative system of the state in which the person in question is a citizen, taking into account regulations included by international treaties ratified by the Parliament, limits imposed by law, normative acts from other branches of law which regulate civil rights as well[2].

Contents of capacity of usage contains two aspects: the active side (the aptitude of the physical individual to acquire subjective civil rights) and the passive side (the aptitude of the physical individual to take on civil obligations).

❑ ***Limits of capacity of usage of legal personality***

Generally speaking, the capacity of usage of the individual embraces all categories of civil rights and obligations, except for civil rights forbidden by limitations of the capacity of usage, stated specifically by law. Only natural and legal persons may be subjected to law. Limitations of capacity of usage result from specific dispositions of the law, since the norm is represented by unlimited capacity.

Limitations of capacity of usage of the natural person can be qualified as civil right incapacities. By incapacity we mean the state of an individual which was deprived by law of using certain rights. Incapacity can be characterized as a juridical inaptitude stated by the law in a specific case[3].

The incapacity of usage generates an irremediable impossibility to conclude the respective act prohibited by law by the person in question, both in person as well as by representative, as opposed to incapacity of exertion, which is remediable and may be complied by the institution of representation or that of assisting the incapacitated individual to the conclusion of the act. Furthermore, incapacity of usage also implies incapacity of exertion, since the individual to which a right is not recognized is not allowed to exert it. The converse situation is not valid, due to the relationship between the two components of civil capacity[4].

❑ ***Classification of incapacities of usage of the legal personality***

The basis of establishing an incapacity is different, from the point of view of the two components of civil capacity. Only in the case of incapacity of exertion the basis of establishing limitations is represented by lack of discernment of the individual, either due to young age, or to mental illness. Regarding incapacity of usage, the basis of establishing limitation is represented either by the need to sanction or to protect these individuals.

According to the purpose of their establishment, we can differentiate between limitations with sanctioning purpose and limitations with protective purpose. The basis of establishing these incapacities is represented by the infringement, by the individual in question of norms by which an interdiction was instituted. Incapacities with sanctioning purpose are delineated with respect to the domain of the norms that were infringed, therefore we may discern between: limitations with penal sentence character and limitations with civil sentence character.

The category of limitations with character of penal sentence is formed by the complementary sentence of interdiction of rights and the accessory sentence of right interdiction such as termination of parental rights.

The category of limitations with character of civil sentence comprises in the first place, the termination of parental rights exertion, under the circumstances stated by article 508 in the Civil code: "(1) …if the parent endangers the life, health or development of the child by ill treatments, consumption of alcohol and drugs, by abusive conduct, by gross negligence in fulfillment of parental obligations or by serious damage to the superior interest of the child.

The petition is to be tried in emergency circumstances, with citation of the parents and on the basis of the report of psychosocial investigation. The participation of the prosecutor is mandatory."

❖ *Extent of termination*

Article 509 in the Civil code states "(1) Termination of exertion of parental rights is complete and is extended to all children born at the date of judgment.

However, the court may dispose termination of specific parental rights or regarding specific children, but only if, in this way, the growth, education, learning and professional training of the children are not endangered"

❖ *Obligation of financial support*

"Termination of parental rights does not exempt the parent from his/her obligation to provide financial support for the child." (article 510 of the Civil code)

❖ *Limitations in probate sphere*

According to article 958 in the Civil code, the legal heir (and his/her descendants which would come to succession by representation) guilty of serious misconduct towards the deceased or to his/her memory is unfit to succeed and therefore excluded from the succession. There are two types of disqualification: rightful and judicial.

❖ *Rightful disqualification*

Article 958 in the Civil code states that "it is rightful disqualified to inherit:

a. the individual criminally convicted for a crime with the intent to kill the individual leaving the inheritance;

b. the individual criminally convicted before the opening of the succession for a crime with the intent to kill a succession act who, if the succession would have been opened at the date of the crime, would have removed or limited the vocation to the inheritance of the criminal",

❖ *Judicial disqualification*

Article 959 in the Civil code states that "it can be disqualified to inherit:

a. the individual criminally convicted for the committing with intent of serious violent acts, either physical or moral, against the individual leaving the inheritance, or, if applicable, of acts that led to the death of the victim;

b. the individual who with ill faith hid, damaged, destroyed or falsified the testament of the deceased;

c. the individual who, by fraud or violence, prevented the individual who leaves the inheritance to draw up, to modify or to revoke the testament"[5]

❖ *Limitations with protective purpose*

This category of incapacities includes those through which the Romanian legislative intended to protect the interests of a specific category of individuals. With respect to the protective character, this resides in the fact that the acts fulfilled unruly will be struck by nullification (often relative nullification, which is destined for protection). These are special incapacities, since they limit the right to conclude specific acts or to acquire specific rights[6]. Starting from the classification of civil juridical acts after their intended purpose, in acts against payment and acts for free, it is known that the importance of this classification, amongst other, regards the capacity to conclude the act as well, i.e. the law is more pretentious when acts for free are taken into consideration.

Regarding the incapacities stipulated by normative acts, article 2 paragraph (2) in Law 54/1998 comprised a "special incapacity to acquire land between living individuals, namely that the property of the acquirer and his/her family cannot exceed 200 acres agricultural land in arable equivalent. With respect to this usage incapacity, we must underline that, although the law stated that the applicable sanction is "reduction of the act up to the limit of the legal surface", in fact, since it is the infringement of a norm that protects a general interest, the applicable sanction is absolute nullification, partial or even total, if the seller proves that he/she would not have contracted the sale if he/she would have known that the acquirer could not acquisition the entire surface of land. However, the interdiction did not regard juridical acts for cause of death, nor other methods of gaining the right to property (usucaption). Through Title X in Law 247/2005 regarding the reform in the field of property and justice, as well as some adjacent measures, these incapacities were excluded."[7] Moreover, there are some temporary incapacities, such as: "article 32 paragraph (1) in Law 18/1991 states: "The land attributed according to article 19 paragraph (1), article 21 and article 43 cannot be alienated by acts between living individuals for 10 years, calculated from the beginning of the year following that in which the registration of the property was performed, under the sanction of absolute

nullification of the alienation act", while article 9 paragraph (1) and (8) in Law 112/1995, with later modifications, states that residences acquired by tenants, holding contracts for the apartments which are not restored in kind to the former owners or to their heirs, cannot be alienated for 10 years since the date of the acquisition. However, article 44 in Law 10/2001 regarding the legal regime of specific buildings seized abusively between the 6th of March 1945 and the 22nd of December 1989, republished with later modifications and completions, brings a modification to this article, allowing for the alienation of the residences before the completion of 10 years since the acquisition, but only if the estrangement is performed towards the entitled individual, former owner of that residence. Concomitantly, according to article 48 paragraph (1) "under sanction of absolute nullification it is forbidden the estrangement in any manner of the buildings acquired on the basis of law 112/1995, with later modifications and completions, until the definitive and irrevocable solution of the legal actions formulated by the entitled individuals, former owners or, if applicable, their successors, according to article 50."[8]

The new Civil code regulates the following incapacities:

a) "The incapacity of the individual deprived of exertion capacity or with limited exertion capacity to dispose of his/her goods through generosities. Article 988 in the Civil code establishes in paragraph (1): "The individual deprived of exertion capacity or with limited exertion capacity cannot dispose of his/her goods through generosities, except in the cases stated by the law". The reason for this statement resides in the fact that the generosity is a noneconomical act, through which the individual is impoverishing himself or his/her heirs, without receiving compensation. Therefore, generosity represents an act more damaging than estrangement. This is why the legal representative/guardian of the minor cannot fulfill this type of acts (in fact, the representative/guardian could not, under no circumstances, draw up a testament in the name of the minor). Furthermore, between donation and testament, the law regards donation more adversely, since through it the donor is depriving himself/herself of the donated goods, while living."[9] "Consequently, according to the new Civil Code, the minor cannot dispose of his/her goods through generosities (article 988 paragraph 1), the difference from article 806 in the 1864 Civil code being that minors between 16 and 18 years old cannot perform generosities as well. Moreover, they cannot dispose not even of half of their goods, as it was previously regulated in article 807 in the Civil code from 1864"[10]

b) The incapacity of the legal representative/guardian to receive generosities from the minor who came of age, before receiving discharge from the family court judge. Article 988, paragraph (2) states that: "Under sanction of relative nullification, not even after gaining full exertion capacity, the individual cannot dispose through generosities for the benefit of the individual who detained the quality of his/her legal representative or guardian, before he/she received discharge from the family court judge for his/her management." Thus, a special protection is intended, where the for free disposition act is not forbidden unless it is concluded by the incapacitated for the benefit of a determined individual, who will be attained by the same incapacity to receive from the incapacitated.[11]

c) "The incapacity of physicians, pharmacists or other individuals, during the time when they, directly or indirectly, provided professional care for the disposer for the illness that caused his/her demise, to receive donations or inheritances from the individual treated who died from the respective illness. Towards this end, article 990 in the Civil code states:

"(1) Generosities to physicians, pharmacist or other individuals performed in the period when they provided directly or indirectly professional care for the disposer for the illness that caused his/her demise are nullifiable. (2) Exceptions from the provisions of paragraph (1) are: a) generosities to the spouse, direct relatives or privileged collaterals; b) generosities to other relatives up to the fourth degree included, if, at the date of the generosity, the disposer has no spouse or direct relatives or privileged collaterals."[12] The same article, in paragraph (4) and (5) specifies that if the disposer deceased due to the respective illness, the term of prescription of the right to action in nullification is running from the date when the heirs acknowledged the existence of the generosity, and if the disposer is reestablished, the inheritance becomes valid, while the legal action to annul the donation may be introduced for up to 3 years from the date when the disposer was restored. Same rules are applicable for priests.[13]

"Remunerative donations represent an exception from the incapacity to receive through generosities; they signify a reward for disinterested services, made by the donor in the favor of the recipient (article 1150 paragraph (1) section c of the Civil Code)"[14]

d) The incapacity of trustees, parents, guardians, curator, provisional receiver and of civil servants, according to article 1654 paragraph (1) in the Civil code, which states: "(1) The following individuals are unable to buy, directly or through interposed individuals, even by public auction: a) trustees, for the goods they are entrusted to sell; the exception provisioned by article 1304 paragraph (1) remains applicable; b) parents, tutor, curator or provisional receiver for the goods of the individuals they represent; c) civil servants, syndic judges, practitioners in bankruptcy, executors as well as other such individuals, who could influence the conditions of the sale performed through them or which has as object the goods they administrate or whose administration they supervise".

e) The incapacity of judges, prosecutors, clerks, executors, lawyers, notaries public, juridical consultants and practitioners in bankruptcy to buy contentious rights which fall under the jurisdiction of the court in whose constituency they are running their activities. "Assignment of contentious rights has as object one or more debts which are the object of an already opened litigation. In other words, cession or sale of contentious rights means that the owner of a contentious right may sell this right before the solution of the litigation. As has been pointed out, in such cases, the buyer pays a smaller price than the real value, hoping to obtain ulterior gains by valorization of the bought right to its true value. Judges of the High Court of Cassation and Justice and the public prosecutors attached to the High Court of Cassation and Justice cannot obtain contentious rights in the entire country."[15]

f) The incapacity of usage of the minor with limited exertion capacity to make donations or to guarantee obligations to another individual. "According to article 146 paragraph (3) in the Civil code, "the minor cannot make donations other than usual gifts appropriate to his/her material condition, and neither guarantee the obligation of a third party". The text refers to the minor who became 14 years of age."[16]

With respect to the incapacity stipulated by the Constitution, "article 41 paragraph (2) in the Constitution (prior to the revision) stated: "Foreign citizens and stateless persons cannot obtain property rights over pieces of land". Through the revision of the Constitution in 2003, article 44 paragraph (2) thesis II establishes: "Foreign citizens and stateless persons may obtain property rights over pieces of land only in the circumstances resulting from the adhesion of Romania to the European Union and other international treaties Romania is a part of, on the basis of reciprocity, in the circumstances stipulated

by organic law, as well as through legal inheritance."[17] "Towards this end, Law 312/2005 was adopted, regarding gaining private property rights over pieces of land by foreign citizens and stateless persons, as well as by foreign legal persons. This law establishes that the citizen who is a member of the European Union and the stateless person residing in a member state or in Romania may obtain property rights over pieces of land in the same circumstances stated by law for Romanian citizens (article 3); the same principle operates for legal persons. Furthermore, according to article 4 in the law, obtainment of property rights over pieces of land for secondary residences for natural and legal persons non-residents, mentioned in article 3 of the law is permitted after the fulfillment of a 5-year term since the adhesion of Romania to the European Union. Finally, according to article 5, paragraph (1) in Law 312/2005, natural and legal persons mentioned above may obtain property rights over agricultural lands, forests and forest lands after the fulfillment of a 7-year term since the adhesion of Romania to the European Union. However, according to the law, foreign citizens and stateless persons could obtain property rights over specific goods through inheritance."[18] "A necessary clarification: the incapacity stipulated by the Constitution is no longer maintained for the citizens of a state member of the European Union, or for stateless persons residing in a member state, as well as for legal persons residing in a state member of the European Union may obtain property rights over pieces of land for secondary headquarters since the 1st of January 2012. Moreover, since the 1st of January 2014, citizens of a member state or stateless persons residing in a member state, as well as legal persons with headquarters in a state member of the European Union may obtain property rights over agricultural lands situated outside buildable terrains in the circumstances of Law 17/2014 regarding some measures for the regulation of sale and purchase of agricultural lands situated outside buildable terrains and of modification of Law 268/2001 regarding the privatization of commercial enterprises that administer terrains in the public and private property of the state with agricultural destination and the founding of State Domains Agency. Article 4 in this law states that estrangement by sale of the agricultural lands situated outside buildable terrains is performed in compliance with the conditions of substance and procedure stipulated by the Civil Code and with the right to pre-emption of the co-owners, tenant farmers, neighboring owners as well as of the Romanian state, through State Domains Agency, in this order, for the same price and conditions. Failure to respect this preemptive right is sanctioned by relative nullification (article 16)."[19]

"With respect to the sanction of usage incapacities, we believe, in agreement with the majority, that a nullification will be absolute or relative according to the interest protected by the juridical norm, which establishes a certain incapacity. For example, relative nullification will be incident in the case of the incapacities stipulated by article 988, article 990, article 1654 paragraph (1) section a) and b) in the Civil Code, etc., while absolute nullification in the case of article 1653, article 1654, paragraph (1) section c) in the Civil Code, article 44 paragraph (2) of the Constitution, etc."[20]

2 Termination of usage capacity of the natural person

❑ *Preliminaries*

Condition humane: to be born, to live, to die. This is the law of nature, our blessing and our burden. A. Camus said that "*people walk with their tomb open"*, while one of the characters of J.L. Borges said that "*in order to die one only needs to be alive"*. This very old accident, which we believe happens only to others aroused not only the minds of philosophers and theologians, but also those of legal experts. Termination of usage capacity is established in the moment of death, when – as Malraux used to say – "*life may become destiny, but the human body becomes a thing*". Death is – as an individual phenomenon – the absolute evil, not only for the deceased, but also for his/her relatives and for those who loved him/her. Death means not being. It carries each one of us into oblivion and takes us closer to all things that ceased to exist. We will find out in this way that the entire life is an intense flight towards nothingness, a moment of light before death will brings us closer to the true meaning of things and of their value. Death is a fact, easily recognizable (ceasing of breath and blood flow). This fact is also a legal fact, which marks termination of the quality of subject of law, the disappearance of the legal personality.

❑ *The moment of death*

Determination of the moment of death varied during history. For a long time, it was said that stopping of the heart and of the blood flow is the moment when a person is dead. However, medical data revealed that heart massage allows for the revival of the sick persons whose heart had stopped. Later, it was noticed that in certain individuals the survival of specific organs (especially the heart-lungs ensemble) could be maintained through artificial devices, even if other organs essential for life (nervous system) may be in irreversible death. Therefore, the moment of death is considered that point in which the brain is dead. This observation will consequently be based on the presence of an irreversibility incompatible with death of the central nervous system. In medical doctrine, there is a distinction between brain death, clinical death, biological (real) death and apparent **death**. The latter, also known as *lethargy* or *catalepsy* is characterized by the diminishing to the minimum of all vital functions, anaesthesia and coma. On the other hand, from the point of view of Christianity, death has two meanings:

a) Estrangement of man from God through sin, death which can be temporary or eternal

b) Physical death, characterized by the separation of the soul from the body

Euthanasia (assisted clinical death). In fact, this is a killing, despite the express expectation of the victim (active euthanasia). Some legislations regulate euthanasia, but only for animals. More than ever, today there are increasingly more people asking for its decriminalization in favor of a euthanasia called compassion. Thus, it would be a *passive euthanasia*, through which the physician would be exonerated from any responsibility regarding his/her therapeutic absence. Surely, if such a treatment of death would be allowed, it would be irrevocable. For sure, we must make a distinction between terminating a treatment destined to preserve or to prolongate life (and therefore bringing about

death) and fulfilling simply an act without medical justification only with the intention to end another person's life.

Suicide. It is hard to imagine a more individualistic act than suicide. This is a particular type of death, since it is caused by the act of the victim itself. As a definition, it is called suicide any case of death that results either directly or indirectly from a positive or negative act, performed by a victim, who knows the result it will provoke.

❑ ***The procedure of declaring the dead***

The solution for a petition of declaring a death by a court of law is performed according to the dispositions in article 944-951 in the Procedural civil code, which implies the fulfillment of several phases: the preliminary administrative phase; the trial phase and the phase after the trial – article 51 in the Civil code.

The preliminary administrative phase The petition to declare a death by a court of law for a missing person may be formulated by any interested person, as well as by the prosecutor. The competence for the solution of such a petition is attributed to the court from the last known residence of the person to be declared dead – article 94 paragraph (1) section i) in the Procedural civil code -, or the court in the circumscription of which the individual died, when the death is certain. After receiving the petition, the president of the court disposes that through the institution of the Mair and of the police to gather as much information as possible on the individual whose disappearance is requested to be declared and, concomitantly, to publish the petition at his/her last known residence, at the City Hall and at the court of law, so that any individual who could give information may be free to communicate to the court – article 945 paragraph (1) Procedural civil code.

Furthermore, it will be disposed the publishing in a newspaper of wide circulation of the opening of the procedure, with the invitation for all the individuals that have information to come forward and share the knowledge with the court – article 945 paragraph (2) Procedural civil code. Also, the family court may be notified at the last known residence of the missing person in order to name a curator for the administration of his/her goods – article 945 paragraph (3) Procedural civil code. Moreover, the judge shall require of its own motion to inscribe the petition in the land registry, if in the patrimony of the missing person there were immobile goods – article 645 paragraph (4) Procedural civil code. Concurrently, if the person in question was an entrepreneur, it will be requested to record the petition in the registry of commerce – article 945 paragraph (4) Procedural civil code.

In the special case of the death of a person whose ceasing of life is ascertained, but whose body cannot be found or identified, there will be no gathering of information on the person whose death is to be declared and also the petition will not be published. No interval of time is required until the appointment of the court date.

❑ ***The trial phase***

The court date is established after two months since the date of the publications and after receiving the results of the investigations. The individual whose death is requested to be declared will be cited at the last known residence and, if applicable, also his/her

mandatary or curator, in order to provide clarifications. The participation and the conclusions of the prosecutor are mandatory – article 946 paragraph (4) Procedural civil code.

❑ ***The after the trial phase***

The disposition of the definitive ruling to declare the death will be displayed for two months at the court and at the City Hall on whose territory the individual declared dead had the last known residence. The ruling will be communicated: – to the civil status service (the local community public service for the evidence of the individuals) in order to record the death in the civil status registry – to the family court at the last known residence in order to appoint a curator, if applicable, as well as a tutor for the minor children left without protection. If necessary, the disposition of the ruling will be recorded in the land registry, the Registry of commerce, in the Registry of successions and other public registries – article 947 Procedural civil code.

❖ *Establishing the time of death by court order*

❖ *After analyzing the evidence in the file, the court will establish:*

– Termination of usage capacity of the person in question
– The most probable moment of the termination of usage capacity

The ruling that declares the death causes retroactive effects, namely that the person will be considered dead beginning with the date and the time established by court order. If it is impossible to determine the day of the death, the time of death will be considered the last day of the following terms:

– Two years since the last known information – in the general case of article 49 paragraph (1) in the Civil code or
– Six months since the production of a specific event – article 52 paragraph (1) Civil code – in the special case established by article 50 paragraph (1) in the Civil code.

If the date of the last news: information or leads on the missing person cannot be established with accuracy, or the day when the special event cannot be established, then the corresponding terms of 2 years and 6 months, respectively, will be calculated from the end of the month when the last pieces of information or leads were received, and in the case where neither the month cannot be established, from the end of the calendar year – article 52 paragraph (2) Civil code.

With respect to the date of death intervened in the special case stipulated by article 50 paragraph (2) in the Civil code, when the death is ascertained, even if the body could not be found or identified, no calculation rule is established. Most likely, in these situations, it will be considered that the death occurred at the date of the incident that was established as a cause of death.

❖ *The material requirements of the establishment of death of a natural person by a court of law*

The issue of declaring a person dead by a court of law is risen in correlation with a missing person, who is unjustifiably missing from his/her domicile or from the place where he/she should be normally encountered.

1. The general case of declaring a person dead by a court of law intervenes:

- When a person is missing and there are indications that he/she ceased to exist. After a period of 2 years since the date of the last pieces of information or leads from which resulted that the missing person was alive, he/she may be declared dead by a court ruling, at the request of any interested party – article 49 Civil code. The term of two years is calculated from the date when the last pieces of news were received and not from the date of their issue. In the case were the disappearance was not followed by any news that should indicate that the missing person is alive, the term will be calculated since the date of disappearance.

2. The special cases for declaring a person dead by a court of law are the following:

- When the disappearance of the person occurred under special circumstances, such as: flood, earthquake, railroad catastrophe, shipwreck, during acts or war or other similar circumstances, pertaining to cases of force majeure, which rightfully lead to presuming death. In these cases, the individual in question may be declared dead after *at least 6 months since the date of the event when the disappearance occurred*[2] – article 50 paragraph (1) in the Civil code;
- When the person disappeared in circumstances that render survival impossible, so that the demise is certain to have happened, even if the body cannot be found or identified, such as: traffic accidents, when the car in which the victims were caught fire. In these cases, death can be declared by a court of law, without waiting for the fulfillment of any term since the disappearance – article 50 paragraph (3) in the Civil code. Even if the legislator does not refer by enunciating to the circumstances in which the person in question may have disappeared, it is implied that it can be one of the circumstances indicated by article 50 paragraph (1) in the Civil code, or other similar circumstances, which can bestow certitude on the occurrence of the demise, implying the existence of direct evidence referring to the occurrence of death in such circumstances.

❑ ***Rectifying the date of death***

There is a distinction between the action of rectifying the date of death and the request to rectify the documents in the Civil Registry according to article 58 in Law 119/1996, which is destined only to eliminate material errors produced in the event of registration in the Civil Status Registry, but not similar to the petition to rectify rulings of a court of law.

Rectification of the date of death refers to the fact that if, after the ruling of death, it is proven that the date of death is not that established by the court, since it was not possible that the individual would have been deceased at that time, the ruling may be rectified, at the request of any interested party, in the circumstances of article 52, paragraph (3) in the Civil code. In this case, the date of death will be that established by the rectification decision, which can be prior or ulterior to the date established by the initial ruling.

There are cases when by the rectification decision the date of death was established at a later date than the initial ruling, similar effects will produced to a partial annulment of the declarative death ruling, since the person declared to be dead will be considered to have been alive between the date established initially as that of the death and the new date of death.[21]

The effects of declaring death by a court ruling

The missing person is considered to be alive until the date that the definitive ruling of the court was established as being that of the death – article 52 paragraph (1) in the Civil code. It is not possible to conclude any juridical act to presume the termination of the usage capacity of the person.

Two relative presumptions will be established by the declarative ruling of death. Their relative character results from the possibility of admitting a rectification request of an annulment action for the declarative ruling of death:

– That the person died at the date established in the ruling as being that of death'

– That the person was alive until that date.

The ruling that declares death produces declarative effects and it is considered to have a constitutive character. Thus, it produces declarative effects, since the person will be believed deceased for the period prior to its maintaining as definitive, namely beginning with the date established in its dispositive as being that of the death of the person. It has a constitutive character because it creates the state of deceased person for the missing person.

The main effect of the ruling that declares the death is termination of usage capacity. Thus, as an effect of termination of usage capacity of the individual, his/her marriage also is terminated. Also, since the date established as being that of death, viager rights are extinguished (viager rent, usufruct). In the case of inheritance, the succession procedure for the deceased is opened, and the term of acceptance of the succession is running from the date of registration of the death in the Civil Status Registry, except for the case when succesible knew the fact of death or the ruling to declare death from a previous date, case in which the term will be calculated from that date – article 1103 paragraph (2) section b) Civil code [22]

In conclusion, we can state that the natural person and the usage capacity form an unified entity, absolutely mandatory in the dynamics of the civil circuit, based on the person regarded individually or as an essential element for the existence of the legal personality.

The manner in which the legislator regulated the institution of the usage capacity in our legislation bestows certainty for the natural person as a subject of law, through the rights it has, as well as for the other participants in civil juridical relationships by establishing specific elements for the protection and limitation of the usage capacity.

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[21] Luiza-Cristina Gavrilescu, op. cit., p. 98.
[22] Ibidem, p. 120.

"I swear by Apollo Physician, by Asclepius, by Hygieia, by Panacea, and by all the gods and goddesses, whom I take as witnesses, that I will carry out this oath and its commandments, according to my ability and judgment: To hold the one who taught me this art equal to my own parents learned this art as my own parents, to share with him what I possess and to take care of him when in need, consider his descendants as brothers and teach them the art, if they want to, without obligation and without payment, to pass on the teachings of this art to my sons, to my master's sons, and only to those disciples who swore by the doctors' practice and to no one else, as much as my forces and judgment help me, my prescriptions to be made only to the benefit and well being of the sick ones, to prevent them from any damage or violence, I will never prescribe a substance with deadly effects, even if required, nor will I give any advice in this respect. Also, I will not give a woman an abortive remedy, sacred and clean I will keep my art and lead my life, I will not operate the stone from the blister, but I will leave this surgery to those who do this job, in every house I will enter, I will do it only for the benefit and well-being of the sick, I will keep away from any harmful action and intimate contacts with women or men, with free people or slaves, anything I will see or hear during a treatment I will keep in secret, as silence here is a duty, if I respect this oath and I will not tread it, my life and my art to enjoy the fame and respect from all the people; if I betray it by becoming perjury, then the opposite,"[5]

Liability of medical staff in case of malpractice

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Abstract

The medical staff, by exercising this noble profession, contribute to the observance of fundamental human rights, which are acknowledged in Article no. 22 of the Romanian Constitution.

Exercising the profession of physician implies respecting both deontological and legal norms, which regulate the damage of the values defended by the law.

In order to engage the legal liability, there must be a cumulative legal conduct, a prejudice, the causal link between the culpable conduct and the injurious result and the guilt, from the part of the subject of the offense.

With regards to the medical acts, we mention that they do not exclude intentional misconduct, this is why, the most of the acts of malpractice committed by fault, often being the kind of guilt that the medical staff operates.

Keywords: medical staff, malpractice, criminal-law liability, deontological norms, social relations

1 Defining the concept of "malpractice"

From a legal point of view, malpractice is a violation by the physicians (by medical staff in a broad sense) of obligations stipulated under legal norms.

The term "malpractice" comes from the Latin words "malus" (bad) and "praxis" (practice) and is used to describe "an incorrect or negligent treatment applied by a doctor to a patient causing him damage of any kind, in relation to the degree of impairment of physical and mental capacity, "and may also refer to" bad practice "or" inappropriate practice".

Considering the definition of this concept, we can state that medical responsibility exists from ancient times, being contemporary to the profession, and corresponds to the social system of each historical period.

Thus, the first provisions regarding the criminal and civil responsibility of the physician are found in the Code of Hamurabi (1725 BC), the laws of Manu, Vedele (India), which refer to the ethical, moral and professional aspects of the physician.

In ancient Greece, Plato claimed that the role of medicine is predominantly prophylactic and that the doctor must have professional immunity; Aristotle, on the other hand, argued that physicians should be held accountable for their professional misconduct, provided that the magistrates' appreciation is based on the expertise of some specialists in the field.

The oath of Hippocrates contained humanistic principles of medical ethics and rules of professional morality; the doctor's responsibility as a legal and professional institution was imposed.

Regarding the above-mentioned provisions, we also highlight the fact that in the Romanian Lands, the rules of Vasile Lupu (1646) in Moldavia and Matei Basarab (1652) in Wallachia contained provisions regarding doctors, in the sense that they were recommended to be moral, modest in counseling, and treat the sick people with care.

At present, in Romania, medical activity is regulated mainly by Law no. 95/2006 on health reform, Law no. 46/2003 regarding the rights of the patient, but also by different orders of the Minister of Health.

According to article no. 653 paragraph (1) letter b) of Law no. 95/2006 on healthcare reform, "malpractice is the professional misconduct committed in the exercise of the medical or pharmacy-medical act, generating damages to the patient, involving the civil liability of medical staff and the provider of medical, sanitary and pharmaceutical products and services."

2 The rules violated by medical staff by committing the act of "malpractice"

The deontological rules (medical disciplinary liability) are governed by the Code of Ethics of the College of Physicians in Romania. It complies with the international standards of medical deontology contained in the 1948 Geneva Declaration after the Nurernberg Code (1947) and amended in 1983 by the World Medical Association.

The legal norms are regulated in the Civil Code, Law no. 95/2006 on health reform, article no. 642 and the subsequent as well as the Methodological Norms of 14 March 2007, for the application of Title XV of the Law. According to article no. 642 paragraph (1) letter b) from the aforementioned normative act, "malpractice is the professional misconduct committed in the exercise of the medical or pharmacy-medical act, generating damages to the patient, involving the civil liability of the medical staff and the provider of medical, sanitary and pharmaceutical products and services".

Also in the category of legal norms are included those regulated in the Criminal Code. These rules aim at breaking of a social relationship protected by law, such as the right to health, the right to life, etc.

The rules set out in the Penal Code are violated when a culpable offense (personal injury, negligence in service, murder, violation of professional secrecy, etc.) is found and there are no legislative provisions specific to the medical profession.

3 Legal Liability

As regards of the legal liability in the case of malpractice, this is usually divided into three categories, namely:

• Disciplinary liability: refers to the provisions of the Labor Code, mainly to the provisions of article no. 450 and the subsequence of Law no. 95/2006, in secondary. According to article no. 450 of the aforementioned normative act *"The Doctor is disciplinarily responsible for non-observance of the laws and regulations of the medical profession, of the Code of Medical Deontology and the rules of good professional practice, of the Statute of the Romanian College of Physicians for non-observance of the mandatory decisions adopted by the governing bodies of the Romanian College of Physicians, as well as any acts committed in connection with the profession which are likely to prejudice the honor and prestige of the profession or of the Romanian College of Physicians".*

• Civil liability involves matters of a tort or contract nature that are the basis of the medical-patient relationship resulting from the physician's obligation to answer for the injuries caused to the patient, but also from the fact that he must provide the patient with "conscious, careful care, according to the current data of science".

• criminal liability, which is a fundamental institution of criminal law, which implies the obligation of a person to answer both the criminal prosecution bodies and the court for the act provided by the criminal law, which he has committed, to bear the criminal coercive measures provided by the law for committing the offense and the obligation to execute the punishment applied.

In particular, the doctor may be an active subject of a criminal law act such as:

– The murder, the act provided by article no. 188 of the Criminal Code;

– The culpable killing, the act provided by article no. 192 of the Criminal Code;

– Killing at the request of the victim, an act provided by article no. 190 of the Criminal Code

– Mischief or other violence, a precondition of art. 193 of the Criminal Code

– Body injury, action provided by art. 194 of the Criminal Code

– Interruption of pregnancy, act provided by article no. 201 Criminal Code

– Injury to the fetus, act provided by article no. 202 of the Criminal Code.

Considering that the subject of the analysis refers to "criminal-law liability", we consider that we should only draw attention to certain categories of offenses provided for in the Criminal Code, namely, the offense of killing and bodily injury.

The manslaughter provided by article no. 192 Criminal code is regulated as follows:

Article no. 192 paragraph (1): "The manslaughter shall be punished by imprisonment, from one to five years".

Article no. 192 paragraph (2): "The manslaughter as a result of non-observance of the legal provisions or of the provisions for the exercise of a profession or profession or for performing a certain activity shall be punished by imprisonment from 2 to 7 years. When violation of legal provisions or precautionary measures constitutes through itself an offense, the rules on the concurrent infringements are applied".

Article no. 192 paragraph (3): "If the deed has caused the death of two or more persons, the special limits of the punishment provided in paragraph (1) and paragraph (2) are increased by half".

The judgment for incrimination lies in the need to protect human life against those who do not have the necessary provision and caution, especially in the conduct of activities that can cause the death of a human being [1].

This identifies as a result the crime of murder, the manslaughter distinguishing it by its guilt. In the case of murder, the law requires the existence of direct or indirect intent. In case of manslaughter, it is necessary to exist as a form of guilt, the guilt under any of the two ways [2].

Regarding the structure of the incrimination of the offense, regulated by the provisions of article no. 192 of the Criminal Code, it is regulated in a type of order, stipulated in paragraph (1), where the active subject can be any person, a first aggravated variant, provided by paragraph (2), where the active subject must be of a certain quality, namely a person in the exercise of the profession or profession, and a joint aggravated variant provided for in paragraph (3) which consists in committing one of the deeds stipulated in paragraph (1) and paragraph (2) causing the death of two or more people.

The bodily injury provided by article no. 196 Criminal Code:

Body integrity, as well as the person's life, is defended by the law not only against intentional acts, but also against manslaughter.

Unlike the previous regulation, where the act was a crime in the conditions of a simple victim's strike with the consequence of an injury requiring for healing more than 10 days of medical care, the type of offense of bodily damage, in the present regulation, makes retention the offense in the case of the occurrence of specific facts, specific to the variant of the offense of offense or other violence only if the act is committed by a person

under the influence of alcoholic beverages or a psychoactive substance or in carrying out an activity constituting a crime itself.

In this respect, it has been raised in the judicial practice whether the facts incriminated by the article no. 184 paragraph (2) theses I and paragraph (4) previous criminal code, finds the correspondent in the new criminalization of article no. 196 Criminal Code, the Supreme Court decided, by means of a preliminary ruling on the resolving of legal issues, that would be retained the lack of peculiarity of the act, in the hypothesis of which, the active subject directly of the bodily injury was not at the time when the act was committed, under the influence of alcoholic beverages or a psychoactive substance or in carrying out an activity that constitutes itself an offense if the injury required between 11 and 90 days of medical care. Under these circumstances, the Supreme Court has determined that the offense of bodily injury under Article no. 184 paragraph (2) Thesis I [the deed had one of the consequences provided by Article no. 182 paragraph (1)] and paragraph (4) of the Criminal Code of 1969, in the event that the deed caused an injury that required between 11 and 90 days of medical care and does not fulfill one of the consents required by the paragraph (1) of article no. 196 of the Criminal Code is decriminalized as of February 1, 2014 (High Court of Cassation and Justice, Criminal Law Enforcement Unit, decree no. 4/2015, published in the Official Gazette no. 244 of April 9, 2015) [3].

The offense provided by article no. 196 of the Criminal Code, is structured in a standard version and three aggravated variants.

As far as the type version is concerned, the text of incrimination refers to the offense of hitting or other violence (article no. 193 paragraph (2) of the Criminal Code, when there is no more than 90 days of medical care and the subject is under the influence of alcoholic beverages or of a psychoactive substance or in carrying out an activity that constitutes a crime itself.

The first aggravated version relates to the offense of bodily injury and not to the offense of hitting or other violence, such as the type of variant, and is conditioned only by the consequences produced. It is an aggravated variant, according to paragraph 2), the act provided in article no. 194 paragraph (1) committed by fault.

The second aggravated variant concerns the above-mentioned bodily injury committed by default due to non-observance of the legal provisions or the provision of measures for the exercise of a profession or for carrying out an activity.

With regard to this aggravated variation, it may be the legal framework for medical personnel who, within their profession, are damaging by fault the bodily integrity of a patient, the sanction being imprisonment from 6 months to 3 years or a fine.

We mention that the most important difference related to the offense of manslaughter and the offense of personal injury from fault of the offense of bodily injury is the form of guilt.

In murder, the act is committed with direct intent, that is, the perpetrator provides and follows the result of his deed, or indirectly, that is, the perpetrator provides the result of his deed, does not pursue it, but accepts the possibility of his occurrence.

In manslaughter, the act is committed by guilty by providence (ease), when the perpetrator foresees the result of his deed, but does not pursue its occurrence and believes without foundation, that this result does not occur, or by fault without provision (simple

guilt or error), when the perpetrator did not foresee the outcome of his deed, though he should have been able to foresee it.

There is also a difference in error and mistake.

The error is regulated by article no. 30 of the Criminal code and states that *"the offense provided for by the criminal law committed by the person who, at the time of the offense, was not aware of the existence of a state, situations or circumstances on which the criminal nature of the deed depends."* These provisions also apply to acts of negligence which the penal law punishes them only if the lack of knowledge of the state, situation or circumstance is not itself the result of the guilt. It is also one of the causes of the inaccuracy of the deed.

In order to establish all the circumstances of a medical malpractice, the criminal prosecution body resorts to medical specialists, with the provision of forensic expertise.

At the same time, the criminal prosecution body requests relations from the County or National Medical Colleges, which have the task of examining the committed act and communicating the conclusions reached.

These forensic acts are crucial in achieving the conviction of the criminal prosecution body or the court.

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Unfair competition in Romanian law

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Abstract

The paper aims to present the unfair competition in the Romanian Constitution. In this approach we will refer to the constitutional and legal consecration of the unfair competition in Romania and we will show how the accession of our country to the European Union influenced the competition policy. We also want to highlight the benefits and obligations that have an effect on the mechanisms employed by the Romanian state as a member state of the European Union.

Keywords: trade, competition, Romania, European Union.

1 The course of the legal consecration of unfair competition between 1991 and 2003

Since 1991, the Romanian legislator has established a legal framework to protect and encourage competition in the consumer market under the auspices of market economy principles. Firstly, unfair competition concerned the relationship between traders and their impact on end-users as well as the evolution of market services and, secondly, the relationship with the evolution of services on the market and the influence of prices and the quality of goods and services.

Law no. 11/ 1991[1] on unfair competition, in its original form, states the obligation for traders to carry out their business in good faith and in accordance with honest practices. According to art. 2 of the law, "unfair competition is any act or fact contrary to honest practices in the commercial or industrial activity". Art. 6 and 7 in conjunction with Art. 8 also establish the legal procedure according to which an act, action or deed of unfair nature is sanctioned. Thus, "the trader carrying out an act of unfair competition will be obliged to terminate or remove such act and, as the case may be, to pay penalties for the damages caused." It also states that "actions arising out of an act of unfair competition shall lie within the jurisdiction of the court of the place where the act was committed or

[1] Published in the Official Gazette of Romania, Part I, no. 24 of 30.10.91.

in the territorial jurisdiction of which the defendant or the respondent is located; in the absence of a seat, the court of the defendant or respondent's domicile shall be competent." Last but not least, it is stated that "the criminal action is initiated at the complaint of the injured party or at the notification of the Chamber of Commerce and Industry or of another professional organization".

Law no. 298/2001 amended and supplemented Law no. 11/1991[2], so that the traders were obliged to carry out their activity in good faith, in accordance with honest customs, in compliance with the interests of consumers and the requirements of fair competition". Among the facts that are considered contrary to honest commercial usage are the following:

- the unfair use of a merchant's business secrets, the unilateral non-execution of the contract or the use of unfair procedures;
- breach of trust;
- incitement to offense;
- the acquisition of commercial secrets by third parties, such as to affect the position of traders on the market.

Unfair competition also means "any act or fact contrary to honest practices in the industrial activity and the marketing of products, the execution of works and the performance of services".

1.1 *Legislative evolution of unfair competition as a result of the 2003 constitutional review*

Law no. 346/2004 on the stimulation of the establishment and development of small and medium-sized enterprises[3] has clarified the meaning of the term "enterprise", that is to say, "any form of organization of an economic activity and authorized to do business acts and deeds in order to obtain profit, under competitive conditions, respectively: companies, cooperative societies, self-employed individuals and family associations authorized under the legal provisions in force ".

Another normative act is Law no. 363/2007[4] on combating the misconduct of traders in relation to consumers and harmonizing the regulations with the European consumer law. Law no. 363/2007 ratified the Directive 2005/29/EC of the European Parliament and of the Council on unfair commercial practices[5].

The normative act regulates the unfair commercial practices of enterprises towards consumers, in the domestic market. In the ratification law of the Directive, we come across the phrase "unfair commercial practices" and the expression "deceptive commercial practices". Among the incorrect commercial practices, art. 4 of Law no. 363/2007 defines the following: "Contrary to the requirements of professional diligence"; "distorts or is likely to fundamentally distort the economic behaviour of the average consumer to whom it is addressed or to the average member of a group, when a commercial practice is addressed to a particular group of consumers", "are misleading", "are aggressive."

[2] Published in the Official Gazette of Romania, Part I, no. 312 of 12.06.2001.
[3] Published in the Official Gazette of Romania, Part I, no. 681 of 29.07.04.
[4] Published in the Official Gazette of Romania, Part I, no. 899 of 28.12.07.
[5] Published in OJ L 149, 11.6.2005, p. 22-39.

Art. 5 of Law 363/2007 distinguishes between "misleading actions" and "misleading omissions", both of which being part of misleading commercial practices. In this respect, Art. 6 sets out the typology of facts that can be regarded as deceptive commercial practices:

- when they contain false information, mislead the consumer by leading him directly or indirectly to make a transactional decision that he would not otherwise have taken against one or more criteria (the existence or nature of the product, the main characteristics of the product, mode and date of manufacture or supply, delivery, suitability, use, quantity, specification, geographical or commercial origin, etc.
- whether they cause the average consumer, directly or indirectly, to make a transactional decision that he/she would not otherwise have taken (any marketing activity on the product, including comparative advertising, creating confusion with another product, brand, name or other distinctive signs of a competitor.
- non-compliance by the trader with the obligations set out in the code of conduct he has committed to observe.

Art. 7 par. (1) of the law establishes that a commercial practice is considered to be a misleading omission if there is no information that may be considered essential and necessary for the average consumer to make an informed trading decision and determines or is likely to determine that the consumer takes a transactional decision that he would not otherwise have taken.

Par. (2) of Art. 7 of the law attests that a commercial practice falls into the category of misleading omissions when a trader hides or delivers an essential information in an unclear, unintelligible, ambiguous or delayed manner, or does not indicate the commercial intent of the practice if it does not follow already in the context, and when in either case the average consumer is determined or is likely to be determined to make a transactional decision he would not otherwise have taken. Also included are the limits of communication that need to be overcome in order to properly inform the consumer. According to the law, all product presentation information must be transparent, including the trader's premises and trader identification data, the price and taxes included, or the method of calculation, the shipping costs, delivery or postal charges, payment methods, delivery, performance and investigation of complaints, if they differ from the conditions required by professional diligence. There must be a right of renunciation or termination, as well as the mention of this right.

Art. 8 of the Law identifies the aggressive commercial practices. They may limit or be likely to significantly limit the freedom of choice or behaviour of the average consumer with regard to the product – by harassment, coercion, including the use of physical force or undue influence – causing the consumer to make a transactional decision which otherwise he would not have taken. The elements by which such a practice can be identified are set out in Art. 9 of the Law, as following:

a) the time, place, nature and/or duration thereof;
b) recourse to threats, abusive language or behaviour;
c) exploitation by the trader of an unfortunate situation or of a particular circumstance of such gravity as to affect the average consumer's judgment and

which the trader is aware of in order to influence the consumer's decision on the product;

d) any pecuniary or disproportionate obstacle, not provided for in the contract, imposed by the trader when the consumer wishes to exercise his contractual rights, including the right to terminate the contract or to change the product or address to another trader;

e) any threat with measures, if they can not be legally taken.

By Government Decision no. 162/2016[6] the Interinstitutional Council on Combating Unfair Competition, which has an advisory role, was set up. The Council ensures consistency in the substantiation and implementation of public policies in areas that have a relevant impact in maintaining a fair competitive market. The Council also delivers advisory opinions in its area of competence in order to maintain a fair competitive market.

Government's Emergency Ordinance no. 75/2010[7] modified the operation, organization and attributions framework of the Competition Council, preparing this institution for its role in a Member State of the European Union.

In this respect, we mention the regulation of the engagement procedure, according to which, under certain conditions, an investigation can be completed either by finding a breach of competition law and by undertaking by the investigated companies of measures that promptly correct the behaviours at the base of the investigation. In the literature, it was appreciated that "the emergence of commitments has a deeper meaning, in the sense that it signals, in line with the new paradigm of the European Union, a fundamental change of the competition policy, seen as a tool for correcting the markets, for the benefit of consumers, no matter how this is achieved"[8].

Also, the Emergency Ordinance 75/2010 clarifies the legal regime of contravention and civil sanctions. It is considered in the doctrine that this measure is welcomed, as it brings "an added certainty to the economic agents, which will allow them to more accurately assess the consequences of their behaviour and thus increase the preventive effect of sanctions"[9].

Anticompetitive behaviours are further regulated by Art. 5 and Art. 6 of the Competition Law, but are reformulated to take into account the provisions of the Treaty on the Functioning of the European Union and the secondary legislation. In this respect, the specialized doctrine noted that "the Community Block Exemption Regulations are to be applied directly, not only in the case of community-based practices but also in those where the relevant market is of a national size"[10].

Law no. 117/2015 approving the Government Ordinance no. 12/2014 for amending and completing the Law no 11/1991 on combating unfair competition and other acts in the field of competition protection[11]. This law specifies that the normative act becomes applicable to any natural person both as a former employee and as a current employee or

[6] Published in the Official Gazette of Romania, Part I, no. 209 of 22.03.16.
[7] Published in the Official Gazette of Romania, Part I, no. 459 of 6.07.2010.
[8] V.V. Mircea, *Reforma legislației românești în domeniul protecției concurenței economice*, in Concurența – Studii, cercetări și analize privind protecția concurenței economice, Consiliul Concurenței – România, no. 2-3 – 2010, p. 55 and the following.
[9] Ibidem, p. 55 and the following.
[10] Ibidem, p. 55 and the following.
[11] Published in the Official Gazette of Romania, Part I, no. 355 of 22.05.15.

representative of an enterprise as well as to any other person who practices unfair competition practices.

By the Emergency Ordinance no. 39/2017[12] damages actions have been established in cases of breach of the competition law provisions. In fact, the Emergency Ordinance transposes into the national law the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for compensation under national law for infringements of the provisions of the competition law of the Member States and the European Union. According to art. 1 par.(1) of the Emergency Ordinance, any person who has "suffered harm caused by a breach of competition law has the right to ask the competent courts to compensate fully for the damage suffered." Compensation seeks to restore the prejudiced party to the situation in which it would have been if there was no violation. Compensation may consist either in repairing the damage or in the loss of profit as well as in the payment of the related interest for the period between the date of the payment of the price and the compensation. Settlement of claims is a matter for the Bucharest Court, whose judgment may be appealed against at the Bucharest Court of Appeal, and the High Court of Cassation and Justice ruled on appeal.

2 Instead of a conclusion

In the Romanian law, the constitutional litigation case law is not very rich in our country, meaning that there are no texts that have been appealed to the Constitutional Court and have been admitted as unconstitutional. Over time there have been attempts to lift exceptions of unconstitutionality, but the Constitutional Court of Romania rejected these complaints as unfounded[13].

We note that through the 1991 Constitution, the Romanian legislator wanted the economy of our country to become a market economy, by legally supporting the principle of unfair competition, the balance between offer and demand, consumer protection, and so on. After the constitutional review in 2003, these principles have exceeded their desideratum, becoming a reality, and the Romanian state has assumed the role of guarantor and protector of the market economy.

[12] Published in the Official Gazette of Romania, Part I, no. 422 of 08.06.2017.
[13] To this end, see Decision no. 289/2007, published in the Official Gazette of Romania, Part I, no. 543 of 11.07.2017, Decision no. 152/2007, published in the Official Gazette of Romania, Part I, no. 462 of 20.06.17, Decision no. 568/2015, published in the Official Gazette of Romania, Part I, no. 844 of 12.11.2015 and others.

State as owner – Limits of compliance of national legislation with corporate governance principles of state-owned enterprises

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Abstract

The article analyzes national legislation in the light of recommendation number two of the 2015 edition of the Guideline of the Organization for Economic Co-operation and Development (OECD) on Corporate Governance for State-Owned Enterprises, which deals with the role of the State as a major or sole shareholder of state-owned enterprises. Thus, the following aspects were studied: the registration and functioning of state-owned enterprises, their operational autonomy, the independence in decision making and the freedom of action of the members of the boards of directors or supervisors, the central tutelary public authority, the responsibility of the state-owned enterprises towards the institutions representing the public interest, as well as the exercise of the majority or sole shareholder rights of the State in view of implementing the recommendations of the aforementioned guideline.

The paper concluded that there is a high degree of implementation of recommendations on corporate governance of state-owned enterprises in terms of procedures and regulation of specific processes, but there is insufficient institutional development, incomplete structuring or even the absence of organizational entities associated with the field. At the same time, the unclear allocation of attributions and responsibilities to the organizational structures of the corporate governance system of state-owned enterprises leads to the impossibility of ensuring guarantees for the application of the principles of corporate governance at the level recommended by OECD documents.

Keywords: corporate governance legislation, corporate governance of state-owned enterprises, the OECD Guidelines on corporate governance, state as owner.

1 Introduction

The systematic collection of data, access to information relevant to corporate governance has enabled the Organization for Economic Cooperation and Development (OECD) to synthesize a body of principles and recommendations, drawn from lessons learned and the practice of Member States, to express an integrated concept on corporate governance of companies.

Socio-economic changes and financial crises have added elements of knowledge, but have highlighted the need for transparency, integrity, elimination of risks associated with negative economic phenomena, and less vulnerability to political pressure, corruption or other forms of influence over management bodies, and management of companies with a major impact on the economy and, in particular, companies where the state or territorial administrative units are major shareholders or owners.

The intention to achieve a high degree of standardization at international level, of corporate governance regulations and practices is confronted with specific national perspectives, interests and capabilities, and the intersection of these trends offers the possibility of researching, analyzing, developing and selecting tools and ways to comply with recommendations to deliver the hope of getting the best results for each party involved or affected by the application of corporate governance.

The study proposes an analysis of compliance with national legislation in relation to recommendation[1] number two of the OECD Guidelines on Corporate Governance of State-Owned Enterprises[2], hereinafter referred to as the OECD Guidelines, which refers to the role of owner, namely major or sole state shareholder of the state-owned enterprises, including the territorial administrative units.

The set of recommendations made available by the OECD Guidelines is the reference to which we have analyzed the degree of compliance with the national legislation on corporate governance of state-owned enterprises, with particular reference to Emergency Ordinance no. 109/2011 on corporate governance of state-owned enterprises (hereafter GEO 109/2011), as subsequently amended and supplemented, the normative acts for implementation, as well as other provisions regarding corporate governance.

At the same time, the methodological guideline[3] for assessing the implementation of OECD principles on corporate governance has provided an analysis framework that provides consistency and balance of comparisons made.

[1] Guideline: II. The state's role as an owner: "The state should act as an informed and active owner, ensuring that the governance of SOEs is carried out in a transparent and accountable manner, with a high degree of professionalism and effectiveness". OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 edition, p. 18.

[2] OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 edition.

[3] OECD (2017), Methodology for Assessing the Implementation of the G20/OECD Principles of Corporate Governance, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264269965-en

2 The form of registration and operation of state-owned enterprises

One of the main requirements of the OECD Guidelines is the standardization and simplification of registration forms under which the companies in which the State is a single or major shareholder operate. From this perspective, the main legal framework applicable to the registration and operation of the companies in which the state holds majority or control holdings includes, in particular: Law no. 31/1990 on Companies, Law no. 15/1990 on the reorganization of state economic units as autonomous entities and commercial companies (Law 15/1990), and GEO 109/20011, with their additions and amendments. It is relevant that the Law no. 31/1990 on Companies is the common reference standard for both private companies and state or territorial administrative units controlled companies, and references to this law are made in all other laws or government decrees under the OECD Guidelines.

Regarding the establishment and operation of state-owned enterprises, by direct reference to the Law no. 31/1990 on Companies, to indicate the specific organizational and operational modalities, the national legal provisions can be assessed as transparent and their application is predictable and in accordance with the criteria of equilibrium and fairness of the economic environment, in the sense that they do not offer disproportionate competitive advantages in relation to competitors on the market in which they operate.

Also, Law no. 15/1990 stipulates at art. 16 the fact that "the state economic units, except those that are constituted as autonomous entities[4], will be organized in the form of joint stock companies or limited liability companies under the conditions stipulated by the law", and the law regulating the establishment and operation of the limited liability companies and joint stock companies is the Law no. 31/1990 on Companies, which also applies to private initiatives to set up these types of companies.

At the same time, the fact that GEO 109/2011 regulates also the state-owned enterprises in the field of financial investment services, whose operating legislation is very much based on the obligations to transpose European directives[5] into the national legislation, as well as insurance and reinsurance companies, which benefit from an independent supervisory body, namely the Financial Supervisory Authority[6] (FSA), provides an additional guarantee for the application of corporate governance legislation to a broad spectrum of companies in which the State is a majority or sole shareholder.

[4] Law no. 15/1990 on the reorganization of the state economic units as autonomous entities and commercial companies, Chapter II, article 2: "The autonomous entities are organized and operate in the strategic branches of the national economy – the weapon, energy, mining and natural gas mining, post and rail transport industry – as well as in some areas belonging to other branches established by the government".

[5] Directive no. 2006/48/EC of the European Parliament and of the Council of June 14th 2006 on the taking up and pursuit of the business of credit institutions. Directive no. 2006/49/EC of the European Parliament and of the Council of June 14th 2006 on the capital adequacy of investment firms and credit institutions.

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3 Operational autonomy versus intervention in the administration and management of state-owned enterprises

According to the OECD Guidelines, one of the instruments by which the tutelary public authority should exercise its shareholder rights is the issuance of shareholder policies and the general objectives of state-owned enterprises. The letter of expectations[7], the document by which the tutelary public authority presents the level of performance required of the administration and management bodies of state-owned enterprises, is the main way in which the state or territorial administrative units make known their ownership policies, the directions of action that the state-owned enterprises want to follow and the objectives to be reflected in the company's management evaluation criteria.

State public policies and general objectives of state-owned enterprises are also made available to the public through the Annual Reports on state-owned enterprises under the subordination, in coordination, under the authority or in the portfolio of the public supervisory authorities, which are drafted for the application of the provisions of article no. 58 of GEO 109/2011.

In order to ensure the autonomy and decision-making autonomy of the management and administration bodies of the state-owned enterprises, in the legislative plan, the delimitation introduced by art. 4 of GEO 109/2011 specifying that "(1) the tutelary public authority and the Ministry of Public Finance cannot intervene in the activity of administration and management of the state-owned enterprises". In order to strengthen this position and to exonerate the representatives of the tutelary public authority from liability, in the aforementioned article, par. (2) stipulates that the administration and management decisions are the competence of the management boards, directors, supervisory boards, directorate, as the case may be and the responsibility, according to the law, for the effects of the decisions taken. At the same time, by art. 3, par. (2) of the Regulation[8] on procedures for the elaboration, monitoring and evaluation of public policies at central level, Public Policy Units were set up at the level of the ministries and other specialized bodies of the central public administration. These structures could help to identify, develop and implement public policies covering the identified issues, including through their own corporate governance structures.

Thus, at least at the level of the legal provisions, the requirements of the OECD Guidelines on non-interference of the state in the management of state-owned enterprises benefit from a consistent legal implementation. Good co-operation of public policy units within public supervisory authorities with corporate governance structures, including on procedurally regulated bases, could help increase accuracy in defining objectives and directions for action by state-owned enterprises and increasing the correlation between needs the of the state shareholder and the possibilities of the economic context.

[7] The letter of expectations is defined in Article 2, paragraph 6 of GEO 109/2011.
[8] Approved by: Government Decision no. 775/2005 approving the Regulation on procedures for the elaboration, monitoring and evaluation of public policies at central level.

4 Independence and ethics of members of the management and administration bodies for state-owned enterprises

An important aspect of the independence of the members of the management and administration bodies is the two-way connection between the concerned individual and the tutelary public authority. This relationship can be analyzed in order to determine the degree of influence of the authority on opinions and participation in the decision-making within the administrative and management bodies by the appointed person or through the use of the information inside the public company, requested by the representative of the tutelary public authority or provided by it.

Similarly, this mechanism of influencing the opinions and decision-making behavior of members of the administrative and management bodies or the use of information inside can appear in the situation of altering the process of selection and nomination by involving political factors or interest groups.

In order to create the conditions under which the administration and the management of state-owned enterprises can be carried out by professionals in conditions of independence, respecting high standards of morality, pursuing economic efficiency and fulfilling the objectives established by the public policies of the public supervisory authorities, the OECD Guidelines recommends the development of an objective selection, nomination and appointment system, as well as the observance of an ethical code that allows the identification and elimination of conflict of interest.

The analysis of national legal provisions on corporate governance of state-owned enterprises provides a dual perspective on the subject. On the one hand, legal provisions can be identified in GEO 109/2011 and the subsequent legal norms that meet the requirements of the OECD Guidelines, and on the other hand, these provisions contain elements or ways in which the selection of members of the management bodies and decision-making independence can be influenced. Thus, art. 15, 64 and art. 29, par. (13) of GEO 109/2011 refer to the limitation of the number of representatives of the tutelary public authority in the management and administration bodies and provide clarification on incompatibilities, conflict of interest and the development of ethical codes. Implementation is done through the Methodological Norms for establishing the selection criteria, drawing up the short list of up to 5 candidates for each position, their ranking, the final appointment procedure and other measures necessary to implement the provisions of the Government Emergency Ordinance no. 109/2011 on the corporate governance of state-owned enterprises of 28.09.2016, hereinafter referred to as Methodological Norms for selection and appointment.

Although theoretically all regulatory requirements are fulfilled, the implementation process of the stated provisions is particularly complex, and the elaboration of the selection criteria and the application of the candidates' dossier analysis allow significant deviations of the final score by subjective interpretation. Thus, according to art. 42 of the Methodological Norms for Selection and Appointment, Selection Boards or Nomination and Remuneration Committees, may judge that a candidate does not meet the evaluation criteria and may be rejected or may be deemed to be accepted subject to the completion of the application file and the nature of the differences that can be tolerated is not specified in any regulation.

Also, the possibility of employing the services of an independent expert, a natural person, specialized in the recruitment of human resources, by decision of the management of the tutelary public authority, according to the provisions of art. 5, par. (5) and (6), art. 35, par. (4), and art. 29, par. (2), (4) and (5) of Government Emergency Ordinance 109/2011 to conduct the process of selection of the members of the management and administration bodies may be a means of influencing the outcome of the selection, under the cover of compliance with the legal provisions.

The situation of the conflict of interest, the mechanism of reaction and the personal responsibility of the members of the management and administration bodies is regulated by art. 15 and 52 of GEO 109/2011. At the same time, the relationship between the representatives of the authority and the authority itself, respectively the way of using the information in the reports, official or informal, about their activity in the board of directors or supervision does not benefit from legal clarification. Also, the possibility for the representatives of the supervisory authorities to receive a punctual, official or just suggested mandate, affecting the independence of their decision within the councils of the state-owned enterprises in which they were nominated or elected is not analyzed and solved by the provisions of GEO 109/2011 or by subsequent methodologies, but could be avoided if the selection would be made unitary, under the supervision of a central committee, as recommended by the OECD Guidelines.

5 Central tutelary public authority – a guarantee of objectivity and impartiality

The OECD Guidelines proposes the creation of an institution to fulfill at national level the role of the Central tutelary public authority. This institution could, according to the recommendations mentioned, be under the authority of a ministry or be an independent institution. The minimum criterion for complying with this principle is interdepartmental coordination that allows a strategic vision to be fulfilled and reporting specific to corporate governance of state-owned enterprises according to a set of unitary criteria. At the same time, in order to believe that this recommendation is implemented, the entity once constituted should benefit from the human and material resources as well as from the legislative levers for the fulfillment of its tasks.

In this conception, the central tutelary public authority could exercise, in an integrated way, some of the attributions requiring strict specializations, capitalize the experience and know-how accumulated at the institutional level, and allow for greater protection against potential local influence attempts. Thus, this institution could integrate, for all state-owned enterprises, the selection and nomination of persons for the administrative and management bodies, the establishment and harmonization of the state shareholder's policies, the interpretation and the unitary application of the legal provisions regarding the corporate governance.

Also, the training and specialization of staff, the consolidation of a set of lessons learned and good practices regarding corporate governance, the increase of the integrity of the members of the administrative and management bodies regarding the application of the procedures by removing the direct influence of the management of the tutelary public authorities and of the local interest groups, the elimination of the risk of

interference between the market and industrial policy components and the enforcement of corporate governance rules are among the arguments for the establishment of the central tutelary public authority.

The legal provisions contained in GEO 109/2011, by art. 3 and 5, par. (2), namely art. III of Law no. 111/2016 for the approval of Government Emergency Ordinance no. 109/2011 specifies that the tutelary public authority is obliged to set up a corporate governance structure, whose tasks consist in particular in data collection activities and reporting on financial and non-financial performance indicators, monitoring indicators in the contract mandate, but also have the responsibility to write the expectation letter, select key performance indicators that determine the variable component of the remuneration of the members of the management board or, as the case may be, of monitoring board, as well as the directors and members of directorate.

Apart from the fact that the personnel included in the corporate governance structures within the tutelary public authorities have the status of a public servant[9], no further details are given regarding the specialization of the staff, the minimum or maximum number of positions related to the number and size of the state-owned enterprises that are coordinated by the tutelary public authority or if these organizational entities need to be separated from other structures, such as those that have attributions in privatization or public policies, or need to be integrated.

Comparing the capacity of ministries to allocate specialized staff and provide additional expertise for corporate governance structures in relation to the territorial administrative units, that are tutelary public authorities, can provide us with another reason to strengthen the need for a central institution to manage a large part of the processes of corporate governance of state-owned enterprises. Creating a distance between local interest groups and members of corporate governance structures involved in the selection, nomination of members of administrative and management bodies, and in developing and implementing shareholder policy by interposing institutional networking and removing the experts, who apply the legislation on the corporate governance of state-owned enterprises, of the local public authority, would be a guarantee of transparency and objectivity of law enforcement for the benefit of citizens.

6 Accountability of the tutelary public authority

Analyzed from the perspective of motivating their establishment, state-owned enterprises are a form of growth, making the use of state resources or local public authorities more efficient through participation in the economic circuit, under conditions of transparency in relation to the institutions that represent and protects the public interest. Thus, according to OECD Guidelines, the relationship between the state-owned enterprises and the public interest should be characterized by transparency, integrity, fairness and openness to the various forms of supervision and control.

The Romanian Parliament, from the point of view of complying with the guidance of the OECD Guidelines, partially provides the legal and institutional framework for the supervision and the implementation of parliamentary control over the corporate

[9] According to the provisions of art. III of Law no. 111/2016 for the approval of Government Emergency Ordinance no. 109/2011 on corporate governance of State-Owned Enterprises.

governance of state-owned enterprises, policies and initiatives through two standing committees. Thus, in the Senate, through the Economic Commission, industries and services, according to the provisions of art. 3 of the Regulation on the organization and functioning of the Commission, powers are exercised regarding parliamentary control over "industrial policies, business environment, commercial companies". At the same time, according to art. 59, par. 1 of the Chamber of Deputies Regulations, the commission for economic policy, reform and privatization of the Chamber of Deputies has powers of parliamentary oversight and control over the economic activity of "autonomous entities and fully state-owned companies or mixed ownership companies".

The way of reporting the legislation on corporate governance of the state-owned enterprises to the auditing issues is an essential aspect of compliance with the guidance of the OECD Guidelines. Thus, Government Emergency Ordinance 109/2011, within Chapter IV – Statutory audit and internal audit, deals with issues related to the regulation of the audit activity for the achievement of corporate governance. From the point of view of the analysis of compliance level, the provisions of art. 47, par. 1, which states that "the financial statements of the state-owned enterprises are subject to the statutory audit carried out by statutory auditors, natural or legal persons authorized under the law", as well as those of art. 50, which states that "state-owned enterprises organize internal audit in accordance with the provisions of Law no. 672/2002 on the internal public audit, as subsequently amended and supplemented. Internal auditors report directly to the management board." At the same time, the provision in art. 48 of GEO 109/2011, which specifies that the award of the contract for the statutory auditor services is carried out through the general procedure applicable at national level for the contracting of similar services, corroborated with the provisions of art. 49, which records the use of the statutory national reference framework on conducting audits, provides the compliance safeguards pursued by the OECD Guidelines.

7 Exercise of the rights conferred by the status of majority or sole shareholder of the state

The OECD Guidelines contains requirements that help protect the public interest by considering the exercise of majority or sole shareholder rights of the state or territorial administrative units within state-owned enterprises. Thus, avoiding political influence on the administration and management of state-owned enterprises or staying in a state of passivity leading to negative economic outcomes are issues that can be eliminated through regulations of the processes and concepts of corporate governance. The provisions of Government Emergency Ordinance 109/2011 provide for regulations and instruments to enable the exercise of the rights and duties of the supervisory authorities, such as: the organization and exercise of the voting rights in the general shareholders' meetings provided for in art. 32, art. 42, art. 45 of GEO 109/2011; access to relevant information on a regular basis, as provided for in art. 9, par. 2, point g), k), art. 17, as well as in Chapter V – Transparency. Reporting obligations from GEO 109/2011; the control of extraordinary transactions, regulated by art. 52, art. 53 of GEO 109/2011.

At the same time, ensuring the legal conditions for the selection and appointment of members of the administrative and management bodies of state-owned enterprises, as well as ensuring a mix of competences and capabilities within these bodies, is a recurrent requirement under the OECD Guidelines. From this point of view, GEO 109/2011, by art. 29, par. (9), art. 35, par. (4) and (8) provide the principled clarifications and the subsequent normative acts, the methodologies and the procedures present in detail the process of selection and appointment, the attributions of each involved structure, the ways of applying the legal provisions.

The methodological norms for selection and appointment are the legal framework specifying the procedures and conditions for the selection of the members of the administrative and management bodies, the creation of the profile of the candidate and the council, respectively the council matrix, which must ensure the diversity of the candidates' competencies necessary for achieving the objectives of the council.

As a result of observing best practices established in different countries, the OECD Guidelines recommends the establishment of an independent and specialized commission to issue recommendations and supervise the process of selection and nomination of board members or supervisors. In national legislation on corporate governance of state-owned enterprises, there are no provisions allowing the establishment and functioning of a commission with the task of supervising the selection and nomination processes of the members of the administrative and management bodies of state-owned enterprises.

The provisions on drafting the mandate contract from the perspective of the OECD Guidelines should take into account the long-term objectives of the state, be specific so that they can be quantified and evaluated in order to avoid the situation in which the members of the administrative and management bodies set their own objectives, ignoring the interest of the majority or sole shareholder. Regarding the procedure on drafting the mandate contract, the GEO 109/2011, mainly by the provisions of art. 3 and the subsequent methodological norms ensure the traceability of the indicators, criteria and procedures necessary for the requirements of the letter of expectation to be reflected in the qualitative and quantitative composition of the financial and non-financial performance indicators to be annexed to the mandate contract.

8 Conclusions

After comparing the requirements of the OECD Guidelines with the framework and subsequent legislation, specific to corporative governance, can be identified the areas where national regulations meet the compliance criteria, elements that do not have a correspondent in the national regulation, and some instruments that can be improved or clarified to eliminate the possibility of arbitrariness or subjective interpretations.

The analysis of national legislation, made in the light of the Recommendation regarding the state as owner, in the OECD Guidelines, has demonstrated that the legal framework largely complies with requirements that relate to processes and procedures. Thus, issues relating to: the registration and operation of state-owned enterprises, the audit of operations, the selection and nomination of members of boards of directors or management, the mandate contract, to list only some of the most important areas of interest, in terms of potential effects on the corporate governance of state-owned

enterprises, benefit from sufficient legal and procedural regulations, although improvements can be made in the form of clarifications and details.

The research of the legislative framework also highlighted the fact that, from the point of view of the organizational entities and the institutions with specific roles regarding the corporate governance of the state-owned enterprises, there are deficiencies regarding the implementation at the institutional level, manifested in the form of a low organizational representation, unclear dividing and clarification of responsibilities and attributions, incomplete coverage of the spectrum of state-owned enterprises in the field of activity of the organizational entities involved in the realization, supervision or control of the application of the principles of corporate governance of state-owned enterprises. Thus, in order to support this conclusion, the following can be mentioned: the lack of a central tutelary public authority; the absence of a supervisory commission of selection boards; the general, non-specific description of the duties of the standing committees in the Romanian Parliament; adding supplementary tasks to organizational entities with corporate governance responsibilities within tutelary authorities; and the supervisory committee on corporate governance of state-owned enterprises, which we can see as exists only for companies listed on the capital market, such as the Financial Supervisory Authority, which also has supervisory and control functions for state-owned enterprises listed on the stock exchange.

The conclusion of this study is that, although at the level of the regulation of processes and procedures regarding the application of the principles of corporate governance at the level of the state-owned enterprises, it can be considered that there is a high degree of compliance of the national legislation in the matter, however the capacity to implement them is low due to the cause of the incompletely developed institutional framework to ensure the fulfillment of specific corporate governance functions.

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Approches Regarding Equal Treatment and Non-Discrimination of Women in the Labor Market

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Abstract

This study aims to give an overview of the relationship between women and the labor market. Starting with The International Labour Organization this article presents a short history of the formation and development of the legal framework in which the equal rights of women on the labor market are asserted, with emphasis on the principle of equal pay. Actions taken in favor of women in the workplace, called affirmative action or positive discrimination, have the effect of balancing certain labor market imbalances that exist in the workplace.

Keywords: women, equal work, equal pay, non-discrimination, positive discrimination

1 Introduction: Integration of Women in The Labour Market

Traditionally, women's main role was that of faithful wives and perfect mothers. Perhaps for this reason too, over time, women have also enjoyed fewer legal rights than men in the workplace.[1]

The Age of Enlightenment and The Industrial Revolution have deterimined not just economic and social changes, the European enlightenment speech led to the formation of a movement whose aim was fighting for women's rights, workplace included – The Feminist Movement.[2] Feminists understand and support the fact that "liberty – equality – fraternity" must be applied in gender relations, even though, at that time, codes of laws such as the Napoleonic Civil Code, which was based on Roman law, maintained the legal incapacity of women and the omnipotence of the husband and father.

Starting with the industrialization, women are increasingly forced to integrate as a workforce in industry, especially for economic needs. However from the outset, they will face a problem: for the same amount of work they will receive half or less of the men's salary. Despite this, women begin to acquire a status and an economic independence,

realizing that they no longer depend on marriage and a husband to support them, which leads to an adequate increase of their social independence as well as the need to recognize certain rights.[3]

An important moment in the massive integration of women into the labor market is the First World War, which simply changed the traditional way of life of women. Now they were seeing themselves in the position of assuming new social responsibilities. The outbreak of war and the mobilization declared in 1914, led to a disorganization of the economy as a result of the incorporation of men and the requisition of the means of transport by the army. Therefore, until the end of the war, in some countries, women come to represent more than half of the workforce in some industry compartments, an integration that has proven to be irreversible.[4]

In Romania, the role that women assumed or had to assume with the outbreak of World War I had the effect of changing the status of women in society.[4] We have in mind not only the nurses mobilized in the campus hospitals behind the front, the female workers in the Romanian factories who were forced to bear the war effort but also the peasant women from the Romanian villages in whose care the entire household remained. Certainly, the psychological assumption of new engagements has caused changes in the minds of Romanian women, who were aware that they were capable or that they could do much more than they were allowed to not only by the legislation that kept them handcuffed but also by the whole mentality of a patriarchal society[5] (that has changed little until today).

Therefore, starting with the 20th Century, women have begun to integrate more and more into the labor market despite difficult and dangerous conditions. This issue has forced states to adopt a legal framework that regulates not only the length of working time for women but also the conditions and limits within which they can operate. Nowadays, most constitutions of the world's states include the principle of equal treatment for men and women in the workplace. However, we can't always speak of genuine equality.

2 The International Labour Organization and Women's Protection

The International Labour Organization (ILO) was created in 1919 as part of the Treaty of Versailles[6] in order to show the belief, reflected in its Constitution, that universal and lasting peace can only be achieved if it is based on social justice.

The ILO Constitution was developed at the beginning of 1919 by the Labor Commission, led by Samuel Gompers, the head of the American Labor Federation in the United States and made of representatives of nine countries: Belgium, Cuba, Czechoslovakia, France, Italy, Japan, Poland, the United Kingdom and the United States.[7] ILO founders, understanding the importance of social justice in peace assurance, recognized the need for a broad global economic interdependence and the need for cooperation to achieve similarities in terms of working conditions.

In the preamble of the Constitution, areas of improvement are listed such as working time, job offer, unemployment prevention, adequate wages, social protection of workers, children, young people and women. The preamble also recognizes a number of key

principles, such as equal pay for equal value of work and freedom of association, and underlines, among other things, the importance of vocational and technical education.

In 1944, Government delegates, employers and workers from 41 countries adopted The Declaration of Philadelphia as an annex of the ILO Constitution that establishes the key principles for ILO activity. These include principles such as "labor is not a commodity" or "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity".[7]

In 1946, ILO became a specialized agency of the United Nations, the oldest institution of the UN system.

Referring to the protection of women's rights, the first conventions of the ILO concerned the protection of women against manual labor, night work, job security, maternity and, after 1950, equal access to work and equal treatment became priorities.[8]

Therefore, in 1919, *The Maternity Convention No. 3* was adopted[9], which can be considered the first international normative act on the protection of women in the workplace. Subsequently, additional protection measures in the case of maternity are covered by *Connvention no. 103 of 1952* and *Convention no. 183 of 2000.* [9] It is also worth mentioning in this context *Convention no. 89 of 1948* concerning night work for women and *Convention no. 45 of 1935* prohibiting underground work for women.[9]

Notions such as equal treatment and equal opportunities for women and men are becoming more common as the ILO adopts in 1951, *Convention No. 100 concerning Equal Remuneration* and in 1958 *Convention No. 111 concerning Discrimination in Respect of Employment and Occupation*.[9]

An important step in promoting equality for women is also the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly Resolution 34/180 of 18 December 1979.

Principles such as equal pay or equal opportunities and treatment in the work field will be broadly and carefully developed later by European Union rules.

3 European Union and Equal Opportunities for Women in the Field of Labor Relations: The Enforcement of the Principle of Equal Pay

From the beginning, the European Union has supported the so-called vulnerable groups, women being one of these target groups. In this respect, the application of the principle of gender equality and non-discrimination is an important part of the European Union's social policy.

In the workplace this principle is transposed into the Treaty on the Functioning of the European Union, in article 153 letter i it is shown that "*the Union shall support and complement the activities of the Member States in the fields of equality between men and women with regard to labour market opportunities and treatment at work"* and in article 157 "*Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied."*[11]

The first state to introduce the principle of equal pay in its own constitution was France, a state which later advocated the need to adopt a normative act at the European

level to regulate this principle. This is reflected in the famous Article 119 of the 1957 Treaty of Rome. The reasons why France advocated the consecration of this principle at Community level was far from being based on feminist considerations, even though the application of this principle proved to be of major importance to women in terms of access to employment and working conditions. At that time, France was trying to eliminate Italy's competition in the leather and shoe industry because Italy was using a cheap female work, which gave it a competitive advantage that France wanted to eliminate.[12]

According to Article 157, paragraph 2 from the Treaty on the Functioning of the European Union, this principle of equal pay regardless of sex, requires, on one hand, that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement and, on the other hand, equivalent employment should be taken into account in the case of remuneration paid for the same hour-paid work.[11]

Other aspects of equal pay are detailed in Directive 2006/54/EC in whose Preamble, at point 11 it is mentioned that Member States should, "*in collaboration with the social partners, should continue to address the problem of the continuing gender-based wage differentials and marked gender segregation, an issue that is and remains evident on the labour market".* Also, in article 4 of that directive it is mentioned that "*for the same work or for work to which an equal value is attributed, direct or indirect discrimination based on sex is eliminated from all the elements and conditions of remuneration."*[13] Article 2 of the said directive defines notions such as direct discrimination, indirect discrimination, sexual harassment, remuneration, occupational social security schemes, concepts of major importance in the field of equal treatment.

The Court of Justice of the European Union, the legal authority of the European Union, is the one that oversees the uniform application and interpretation of Union law, its role in implementing gender policies is of the utmost importance. Therefore, starting from the economic sector of remuneration, from one analysis to another, courts have had to extend the area of protection of women's rights.

In a known case, Case 43/75 Defrenne v. Sabena, the European Union Court of Justice has established that "*the principle of equal pay for male and female workers laid down in Article 119 (now 157 TFEU) can be invoked before national courts."*[14] In that case, Ms Defrenne, employed by Sabena, a private aviation company, was paid less than the male employees and had to retire earlier than men. The Court has ruled the prohibition of discrimination between the two sexes regarding the remuneration made in the same establishment or service, whether public or private.

In Romania, by article 14 of The 1972 Labour Code of Romania, women were guaranteed equal work with men and their equal remuneration for similar work in an age-specific formulation: "*Women are given wide opportunities of affirmation in full social equality with the husband, enjoying with him equal work, equal pay, special protection measures. Women were guaranteed the right to take up any position or job in relation to their preparation, in order to make their contribution to the development of material production and spiritual creation, while ensuring the necessary conditions for raising and educating children."*[15]

The principle of equal pay for equal pay work is now provided at constitutional level in art. 41 paragraph 4 "for equal work women have equal pay with men."[16] In the current Romanian Labour Code, this principle was introduced by GEO no. 55/2006,

article 6 paragraph (3) in the form "*for equal work or equal value, any discrimination on the basis of sex is prohibited for all elements and conditions of remuneration*."[17]

Also, Government Ordinance No. 137/2000 on combating and sanctioning all forms of discrimination [18] and Law 202/2002 on equal opportunities for women and men[19] include the provisions of the European Directives on the principle of equal treatment of women and men in the workplace.

When talking about equal treatment in the workplace for women, we can't fail to take into account social protection measures for pregnant women, a vulnerable category of workers that requires a special protection regime. It is no coincidence that the ILO and the EU have adopted rules for the protection of pregnant workers, which the Romanian legislator has incorporated into a series of regulations.

Without insisting (this may be the subject of a future study), we can still list the rights of pregnant workers, who have recently given birth and who are breastfeeding, rights deriving from the quality of work: the right to maternity leave, entitlement to benefits for various prenatal consultations, work contract rights and maintaining the remuneration, the right of the employee who can't meet normal working hours for health reasons (hers or that of her fetus), the reduction by one fourth of the normal working time, while keeping the salary incomes, the right to contest the employer's decision to terminate the employment or service relationship for reasons which they consider to be related to their status at a competent court.[20] These social protection measures have sometimes been included in positive measures or positive discrimination.[21]

4 Positive Discrimination – means of protecting the rights of women in the workplace

To help certain categories considered discriminated, including women, the state intervenes in legislation and, trying to restore balance, implements a set of laws in order to reduce existing social imbalances. These temporary actions are called generic positive discrimination and aim at ensuring full and effective equality in all areas of public. [22]

Therefore, the purpose of positive actions is to promote a real equality either by encouraging poorly represented groups or by broad measures such as setting specific quotas for these groups.[23]

If we relate to equality between men and women and actions taken to the advantage of women in the workplace, these measures, called in some states affirmative actions, can refer to employment, working conditions, salary payment, professional training, etc. Its result is to increase the number of women in those areas of work where they are under-represented numerically.[24]

The system of social protection for women starts precisely from these measures and actions meant to balance some existing imbalances in society.[23] States within the European Union have introduced in their own legislation, with regard to women's legal employment relationships, measures such as the mandatory number of jobs for women. There are also political parties in which the joint system applies, according to which women are going to occupy a certain percentage on the lists of that party.[24]

If, in the beginning, the positive measures aimed firstly to establish a full equality between men and women by eliminating the disadvantages faced by women in the labor

market and by compensating for discriminatory preferential treatment from the past, the Treaty of Amsterdam promotes a radical form of affirmative measures, namely gender mainstreaming or integrated approach to gender equality. This approach attempts to include the principle of gender equality in all community policies. [23] This approach is initiated by a release from the Commission dated 21 February 1996[25] and begins to be applied with the Council resolution from 20 December 1996.[23]

In primary law, EU treaties, provisions which allow positive measures, without imposing, can be found in article 157 paraghraph (4) of TFEU (former article 141 EEC): "*With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."*[11] A similar statement is also provided in article 23 of the Charter of Fundamental Rights of the European Union: "*The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex."*[26]

The first provision on positive measures or actions in EU secondary legislation is introduced by article 2, paragraph (4) of Directive 76/207/EEC on the implementation of the principle of equal treatment which allowed measures to be taken by removing "*existing inequalities which affect women's opportunities."*[27] This article has become article 2, paragraph (8) of Directive 2002/73[28] and then article 3 of Directive de reformed 2006/54/EC *("Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life")*.[13] The content of these directives is in fact in line with the provisions of Article 157 paragraph (4) of TFEU.

Based on article 19 of the TFEU, similar provisions on positive action also appear in the two anti-discrimination directives, namely Directive 2000/3/EC (article 5) and Directive 2000/78/EC (article 7) in which it is mentioned that with a view to ensuring full equality in practice, "*the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to."*[29] Mentions on positive actions also appear in other directives such as Directive 2010/41 and Directive 2004/113.

Although these regulations exist, Community law does not contain a very clear definition of positive measures, for which the European Court of Justice intervened to set the limits of the concept. The most important and, in the same time, the most controversial cases of the ECJ on positive measures for women in the workplace were those that concerned women's access to employment or those that concerned workplace promotion. Among the most famous cases in this area we have Case C-450/93 – Kalanke and Case C-152/84 – Marshall. [30] These cases highlight the fact that positive measures are only a last resort, with the ECJ being generally cautious about the extent to which positive measures or actions prevailed over the principle of equality.

In this context, it should not be forgotten that the recognition of women's dignity in the labor market has not been achieved spontaneously. It was also the result of the efforts made by a number of representatives of this type who have imposed their views before the ECJ. [12] For example, we can be mention in this context Case C-127/92 Dr. Pamela Enderby, Case C-207/98 Mahlburg, Case C-595/12 Napoli, Case C-109/88 Danfoss.[30]

In Romania, affirmative actions are defined by Law 202/2002 for Equality of Opportunities between Women and Men, article 4, paragraph (e) as "those special actions that are undertaken temporarily in order to accelerate the achievement in fact of gender equality and are not considered to be discriminatory".

It can be said that at this point in time the opinions are divided into the need for measures and actions of positive discrimination against women employed. Therefore, while some support the need for them to be applied, others argue that these measures are in fact violations of the principle of equality. Many times the feminist movement has been against positive discrimination, which, according to feminists, puts more emphasis on victimizing women than on integrating them into society with equal and full rights and duties. At the same time, feminists claim that equality of women is necessary to be recognized as a right and should not be conceded in the form of concessions.[22] However, the need for affirmative actions and their temporary nature must not be missed. Positive discrimination comes to protect the interests of those categories of citizens considered disadvantaged in a given time or in a particular business sector. Also, it should not be forgotten that the Community provisions on positive measures allow, but do not require the adoption of such measures, leaving it to the discretion of the States where and for how long it is necessary to apply such measures.

5 Conclusions

If we are to analyze slightly the evolution of human rights, we can easily observe that women's rights had a slower and more difficult evolution than men's rights, despite the generic term "human rights" as they are mentioned in the first international conventions. This is also due to the relatively late integration of women into massive numbers in the labor market.

In this article, I wanted to briefly present, hopefully without subjectivism, another vision on the situation of women in the labor market in contemporary society.

If we consider that women represent half the population of a country, the importance of their participation on the labor market can’t be ignored. In the current society, there are legal norms and mechanisms that provide women with rights, including the right to work and, despite this, women still have to face many difficulties in the labor market, in particular those relating to lower remuneration in relation to men and also the lack of mechanisms to put them in a position to harmoniously combine professional and family life. However, with all these shortcomings, the figures show a gradual increase in the representation of women in general.[31]

The Romanian society can’t ignore this important human resource – women – and it is still necessary to promote measures to support their inclusion on the labor market. Romania still needs concrete measures, various information campaigns, mediation or psychological counseling which contribute to the necessary information of the population regarding the necessity of a modern labor market, an inclusive market where women can regain and reposition their role. This is because, although at first glance we tend to appreciate that equality of opportunity is the norm of today, if we look at the statistics[32], we notice that, in 2017, Romania is at number 26 out of the 28 EU states.

Therefore, we appreciate that it is still a necessity to reconsider the role of women, taking into account, as far as possible, the elimination of sexual stereotypes, which, in a patriarchal society, only emphasizes the privileged role of the man. These stereotypes are even more obvious when we relate to the labor market, employment, best-paid jobs or easy access to such jobs.

We conclude by saying that while Romania has aligned itself with the acquis communautaire on equal and gender opportunities in labor relations, statistics and everyday life show that Romanian women are still being discriminated in the field of legal employment relationships. This is the reason why the need to adopt and practice affirmative, stimulating actions in the field of work still arises, so that conceptual equality becomes a real and practical one and women can occupy any kind of function.

I could have ended differently, but I prefer to write this: the struggle for equality is still being waged every day.

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Theoretical and practical issues related to dissolution and liquidation of companies

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Abstract

The field of corporate law is marked by many changes, by development of judicial and arbitration practice, as well as by important European influences. Companies are the core of a performing market economy, but what needs to be understood is that companies are payers of taxes and duties to local and general budget.

Thus, dissolution and liquidation are the two compulsory phases of the process of a company's cessation of business, regardless of how it was formed, which phases have raised over time different controversies in specialty practice, some of them originating from incomplete regulation by legislation or from non-uniform interpretation of legislation in the matter, which interpretation has led to emergence of some practical issues that aggravated both the two procedural phases and the opposability of this procedure to third parties, most of them being affected by non-recovery of debts from the company being wound up as a result of termination of the liquidation proceedings.

Keywords: dissolution, liquidation, coercive measures, budgetary claims

1 Introduction

The emergence of companies has been driven by economic causes, by development of trade, of contractual relations, as well as by the need for an independent legal construction able to assume all commercial rights and obligations, thus becoming the general, most widely used and complex form of exercising business activities.

The field of corporate law is marked by many changes, by the development of judicial and arbitration practice, as well as by important European influences.

Companies are the core of a performing market economy and the main forms of companies that are set up are the joint stock company and the limited liability company.

Construction of the united Europe was and still is the desire of its peoples to create a continent where wars, disorder and poverty are cast out once and forever, so that the "old continent" should be given the shine to which it is entitled. The European Union was created with the aim of putting an end to the great number of bloody wars carried by neighbouring countries that culminated with the Second World War.

Today's Europe, the Europe of the treaties of Paris, Rome and Brussels, the Europe of the Single Act, of the treaties of Maastricht and Amsterdam, the Europe of tomorrow, could not have been conceived without understanding of the efforts made over centuries by those who anticipated it in one way or another [1].

The European Union is a unique economic and political partnership in the world that brings together 28 European countries and covers almost the entire continent. What began as a strictly economic union has gradually developed into an entity with activities in countless areas, from development aid to environmental policy. This change was reflected in the modification of the name of the European Economic Community (EEC), which in 1993 became the European Union (EU).

In the context of current regulations, the subject matter of companies has a special position, as it is regulated both at national level, by legislation of European states, and at the community level, by directives of the European Union. Thus, a relationship of interdependence between the two forms of legislation is developed, the main effect of which is the primacy of Community legislation over the national one. These normative provisions complement each other, but Community legal rules generally regulate matters relating to capital companies and limited liability companies.

In the field of companies, national legislation has become an integral part of the harmonization process, as the framework provisions have been brought together at the level of Community directives and regulations.

European company law is one of the cornerstones of the internal market and it has been evolving significantly over the last 40 years.

The European legislation referring to companies provides a common set of rules offering equivalent protection to shareholders, creditors and to other interested parties throughout the European Union that are affected by companies' activities. Legislation referring to companies is essential for providing legal certainty and for protection of shareholders' rights. While respecting legal traditions and structures of companies, which differ from one Member State to another, harmonization of basic rules facilitates provision of services and products by companies to all customers from the Union. Intensification of cross-border trade and development of e-commerce offer many opportunities for businesses and consumers, but they also create problems for the current legal framework in the field of companies' activity. This is why we need to reflect upon how the existing framework can be adapted to the new realities of the 21st century. In addition, current challenges require us to look at corporate law not only from a purely legal perspective, but also in the wider context of corporate governance, of corporate social responsibility and of the key role of companies in innovation and growth.

2 Dissolution and liquidation of companies

2.1 *Dissolution of companies*

Dissolution of companies is a stage in the process of terminating their legal personality, consisting of a set of operations that result in liquidation of patrimony of the companies concerned [2].

At the same time, by analysing Law no. 31/1990 it can be noticed that the legislator established from the first articles (articles 7 and 8) that the associates may establish, from the company's very formation, the general or specific causes of company's dissolution. This clause on company's dissolution and liquidation is one of the mandatory clauses to be mentioned in the constitutive act.

One aspect to be mentioned is that the legislator provided the general causes of companies' dissolution and the specific causes of each type of company and the dissolution of companies in any of the cases provided by law has as first effect the opening of the liquidation procedure, and once this procedure has been open company's directors can no longer undertake new operations, but it should be noted that the company has not yet lost its legal personality, being kept for the liquidation operations.

We can also assert that dissolution is a precursor to liquidation, in which case the company suffers restrictions on the object of activity, and company's directors can no longer undertake new operations, otherwise they could be personally liable for the acts concluded.

According to the provisions of Law no. 31/1990 on commercial companies, dissolution has to be entered in the Trade Register and published in the Official Gazette, except for company's dissolution at the expiry of its lifetime.

It is necessary to enclose these entries in the Trade Register and to publish them in the Official Gazette as this is the only way in which dissolution of the company becomes enforceable to third parties and creditors may oppose the dissolution decision within 15 days from the date of publication.

2.2 *Liquidation of companies*

Liquidation of a company is the second phase of its legal personality's disappearance, and it comprises a set of operations required to conclude the running business of the company at the time of dissolution, which operations are necessary for the establishment, identification and quantification of the assets and their transformation into cash, establishment of liabilities, payment of creditors, and sharing between associates of liquidation's results [3].

Also, according to legal provisions, at the time of liquidation it is necessary to appoint or designate a liquidator (natural or legal person) who will take all necessary steps in order to conclude company's business.

At the same time, it should be noted that there is also an exception to this rule, since it is not necessary to appoint or designate a liquidator, for example, in the event of the merger or total division of the company.

Another exception to this rule can arise when speaking of societies in a collective name, a limited partnership and a limited liability partnership where associates may decide, with the quorum and majority provided for the amendment of the constitutive act, and the manner of liquidation of the company when agreeing on the distribution and liquidation of the company's assets and when securing the settlement of the liability or its settlement in agreement with the creditors.

In this case, it should be noted that it is possible to dissolve without the appointment of a liquidator only if there is a unanimous agreement of the associates regarding the way in which the assets remaining after the creditors' payment are transferred, otherwise the liquidation procedure will be used by appointing a liquidator.

At this stage, the company's scope is changed from making of profit to completion of liquidation, which finalization will be accomplished through a liquidator who will replace company's directors, and the general assembly of associates will no longer exist.

Moreover, liquidation regulated by Law no. 31/1990 differs from liquidation governed by Law no. 85/2014 on insolvency prevention and insolvency procedures, considering that this is a voluntary liquidation (as decided by the associates), and bankruptcy is a judicial liquidation (as ordered by the syndic judge).

Thus, we can state that the law of companies is the general law on liquidation and the law of insolvency is the special law, given that when liquidation does not arise from associates' will but from the impossibility of making payments to company's creditors, the insolvency procedure will be applied, thus excluding the winding-up procedure as regulated by Law no. 31/1990.

I also consider that the liquidation procedure regulated by Law no. 31/1990 is much more disadvantageous to company's creditors, considering that the actions taken by the liquidator in this procedure are not transparent to them and they cannot be subject to judicial review.

In this case, the issue of company liquidation without its creditors being aware of this issue is often encountered, given that they were not notified on this procedure, and the means by which they can recover their claims after company's legal capacity has ceased are minimal, and they will remain with a prejudice that they will no longer be able to recover.

Under the Companies Law, the liquidation procedure involves three clear principles laid down by the legislator: the winding up is in favour of the associates, it is mandatory and at this stage it ceases to be a subject of law of the commercial company.

After termination of winding-up proceedings, it should be noted that the main effect of the liquidation proceedings is termination of the legal status of the company.

During the liquidation procedure as based on Law no. 31/1990, the appointed or designated liquidators, as well as those appointed or designated according to the provisions of the insolvency law, have a set of obligations, namely: to make the inventory and to conclude a balance sheet, to preserve the company's patrimony, to compile a register with all liquidation operations and to request removal of the company from the Trade Register [4].

Moreover, it should be noted that, in addition to the powers offered by the associates to the liquidator, the legislator expressly established the following rights of the liquidator, namely: to execute and complete the operations related to liquidation, to appear in

lawsuits on behalf of the company, to sell, by public auction, the real estate and any movable assets of the company, to make transactions, to liquidate and collect company's receivables, to negotiate bills of debts, to make non-mortgage loans, and to carry out any other necessary acts. [5]

It should also be noted that the winding-up procedure must be completed within one year from the date of dissolution, with the court having the possibility, for good reason, to extend the term with periods of 6 months but not more than 24 months, as cumulated[6].

After all the operations have been completed by the liquidator, he/she is obliged to request removal of the company from the Trade Register, and at the date of completion of removal formalities the company's legal personality ceases.

3 Theoretical and practical issues related to dissolution and liquidation of companies

Companies are a pillar of economic life, both in Romania and in the other EU Member States, yet they do not have an eternal existence, even though when companies are established their associates set them up in the opposite direction.

As it is well known, the lawmaker gave the associates the possibility to decide on the modality of company's termination, as they also decide on how the company is set up and operates.

Thus, dissolution and liquidation are the two compulsory phases of the process of company's cessation, regardless of how it is formed, which phases over time have raised different controversies in the specialty practice, some of them originating from incomplete regulation of legislation or from non-uniform interpretation of legislation in the matter, which interpretation has led to emergence of some practical issues that aggravated both the two procedural phases and the opposability of this procedure to third parties, most of them being affected by non-recovery of debts from the company being wound up as a result of termination of the liquidation proceedings.

Firstly, I would like to point out that, at the time of a company's dissolution and liquidation, regardless of the form in which it was made up (joint stock company, limited liability company, etc.), liability of members of its governing bodies is totally absent, taking into account that even if the decision of dissolution is opposed to third parties (creditors), most of the times they are unaware that the company is in this procedural state, and when referring to creditors I mean that category of budgetary creditors, especially impairment of local budgets of administrative-territorial units.

Considering that, on a daily basis, we are struggling with this kind of issues and the legislator allowed, by existence of a legislative vacuum, by uncorrelation of normative acts in force, that responsibility of members of the governing bodies to be limited when referring to their liability for non-payment of debts owed by the company to the local budget, all the more so as in practice there are many cases of dissolution and liquidation of a company even if it has debts to the local budget of an administrative-territorial unit.

I have to mention that this issue arises because, in the process of dissolution and liquidation of commercial companies, the associates do not have the obligation to submit

to the Trade Register a document issued by a local fiscal body for verification of the declared patrimony as well as for payment of debts owed, with the Trade Register requesting only a certificate of fiscal attestation issued by the central fiscal body.

Thus, it is very difficult for the local tax office to be aware of dissolution and winding-up proceedings of the company, as long as it has not been notified about these matters, which notification is not made even in those cases when a liquidator was called or designated in the procedure.

It is necessary to analyse whether members of the governing bodies are responsible or not for the decisions they make when referring to payment of local taxes and fees for the goods in company's patrimony, whether we are talking about movable or immovable assets, respectively means of transport, buildings and land, or other taxes that the company owes to local budget, that is, the fee for using means of advertising and publicity, the tax on shows, the fee for using public places, etc.

In specialty practice, when we face dissolution and liquidation of a company, whether it is dissolution and termination of the company according to provisions of Law no. 31/1990 by decision of members of the governing bodies, or it is the dissolution and liquidation of the company following closure of the insolvency procedure according to provisions of Law no. 85/2014, there are many cases where there are assets in company's patrimony, be they identified or not, but it is certain that they appear in company's accounts and they have been declared for taxation purposes.

Given these circumstances, a pertinent question would be *"What happens to these goods when the company no longer exists and the judicial liquidator states that they could not be identified, even though they are active (identifiable) in different databases of public institutions or when by the dissolution decision members of the management bodies failed to refer to them, and the delegate judge at the Office of National Trade Register ordered dissolution and deletion of the company?"*

The answer to this question can raise a lot of controversies both at theoretical and at practical level. It is difficult to explain how these assets could have been removed from company's property as long as the administrator/judicial liquidator could not identify the person or persons guilty of illicit acts that led to the state of insolvency of the debtor company and to the same extent it is difficult to explain whether the person or persons guilty can be held accountable.

Thus, in view of the above, liability of members of the management bodies for debts accrued to the local budget and for their default until dissolution and liquidation of the company is completely absent, for which reason the legislator needs to cover this legislative vacuum.[1]

This is of utmost importance in view of the following question which may arise in practice: "Are tax obligations owed by a company taken over by the natural persons having the capacity of associates as a result of company liquidation according to provisions of Law no. 31/1990?" taking into account the fact that, according to provisions

[1] By the decision of the general meeting, it was decided the following: *"Dissolution and simultaneous liquidation of the company according to art. 227 par. 1 lit. d corroborated with art. 235 par. 1 of Law no. 31/1990. We mention that the debt was settled in agreement with the creditors,* ***the company has no debts to the state budget****, the assets remaining after the liquidation will return to the single associate. "*

of art. 7 letter f of Companies' Law no. 31/1990 from the articles of incorporation of the limited liability companies the share of each associate in benefits and losses will mandatorily be specified.

Another common issue faced in practice is that on the ONRC website dissolution and liquidation resolutions are not published or displayed and they are also not published in the Official Gazette so that they could be opposable to third parties.

Thus, according to provisions of article 6 paragraph 3 of the Government Emergency Ordinance 116/2009 a complaint against the resolution may be filed within 15 days from the date of publication in the Official Gazette of the act amending of constitutive act or from the date of its publication on the Trade Register's website in the case of resolutions on registrations that do not make changes to the constitutive act, *but what happens to those Resolutions that could not be opposable to third parties?*

Most of the times in these cases courts admit the exception for lateness in filing the complaint against the ONRC Director's Resolution, and it is natural to do so, but courts do not take into account the fact that those budgetary creditors cannot take any legal action in order to cover their claims.

Thus, they do not understand under what circumstances ONRC ordered dissolution and liquidation of the company, then its removal from the Trade Register, without checking first whether the company paid its overdue debts and without checking whether it is debited to the local budget.

It is easy to understand that in these cases there is no fault of courts and the judges delegated to the Trade Register, but it is the legislator's fault, as it has not taken any steps to regulate these issues.

Another commonly encountered case in practice is when a liquidator is appointed or designated to undertake all necessary operations to liquidate a company and to cover its liability, and the liquidator knows the debts owed to local budgets but it does not take any measures in order for them to be paid.

Thus, it is clear that neither in this case the courts do not take into account the documents issued by public institutions referring to mentions on the extinction of liabilities, respectively the indications regarding the non-existence of debts to state budget, unambiguously resulting that the company did not comply with the legal provisions and did not extinguish its liabilities following liquidation.

Moreover, it is mandatory to attach, in original, the proof of creditors' agreement regarding extinction of liability or its settlement, with these documents not being deposited at the same time with the decision of associates' general assembly, which is why I do not understand the conditions under which the ONRC resolutions are issued, as company's creditors do not agree with company's dissolution and they require opening of insolvency proceedings under Law no. 85/2014 on insolvency proceedings.

Also, according to provisions of article 7 paragraph 4 and paragraph 6 of Government Emergency Ordinance no. 116/2009 a deadline for completing of deficiencies may be granted and failure to meet them in due time may lead to rejection of the complaint, but in reality these things do not happen, with the requests continuing their natural procedure and reaching the limit of company's removal from the Trade Register.

It is also normal that in case of ordering to open a dissolution and liquidation procedure the whole dissolution and liquidation procedure that is governed by Law no. 31/1990 should be suspended.

Moreover, we point out to the court that, according to provisions of art. 237 para. 3 of Law 31/1990 *"The associate who, in fraud of the creditors, abuses of the limited character of his/her liability and of the distinct legal personality of the company, is indefinitely responsible for the obligations unpaid by the dissolved, respectively liquidated company"*, which is why I consider that the sole person guilty of issuing the liquidation decision is the associate.

Thus, I consider that the Trade Register must be held accountable jointly with the associates, given that it has issued a resolution to admit dissolution and liquidation of the company without first checking if the company may be liquidated and dissolved.

In order to cover the current legislative vacuum, in 2018 the legislator passed an Emergency Ordinance (Government Emergency Ordinance no. 88/2018) for amending and completing some normative acts in the field of insolvency and other normative acts, by which it was proposed to increase efficiency of mechanisms for recovering budget claims from insolvent companies, given that in most cases public creditors are aggrieved and the level of debt recovery by state is very low [7].

From a legislative point of view, at first reading of the amendments brought by the legislator to Law no. 85/2014, it may be noticed that there is a need for increasing recovery of budgetary receivables (receivables that have always been disadvantaged in the specialty practice, as well as by the legislator), and also for introducing coercive measures on both the debtor and the insolvency practitioners.

Thus, through this amendment, the legislator streamlined both the mechanism for recovering fiscal receivables established according to provisions of Law no. 227/2015 on the Fiscal Code, but at the same time compelled debtors to pay the taxes and duties due in order to prove that the state of insolvency did not arise only in relation to budgetary receivables but there are other creditors who have not paid their debts.

With this initiative, budgetary creditors can obtain an increase in collection of debts due to local budgets and to central budget, taking into account that the causal link between the state of insolvency and members of the governing bodies existed and would always exist for the companies that no longer have sufficient funds to cover outstanding debts.

4 Conclusions

The field of corporate law is marked by many changes, by the development of judicial and arbitration practice, as well as by important European influences. Businesses are the core of a performing market economy, but what needs to be understood is that companies are payers of taxes and duties to local and general budget.

Thus, we need to understand that not only constitution of a company is important but also that it has a strong impact on the national economy and that responsibility of members of the governing bodies towards the coercive power of the state is very high.

It is easy to understand that the main purpose for which a trading company is established is for the entrepreneur to become its own employer, but this issue must also

be seen from the perspective of state institutions, and from the perspective of local tax directorates, which have very little legislative means that they can use when dealing with dissolving and liquidating of a company.

It is also necessary for the company to understand that there is a responsibility of members of the management bodies for company's liabilities, namely for the taxes and duties owed by it, because as it can easily be seen in the situation where the company has assets in its patrimony, shareholders want to remain with those assets, but without covering the claims due for the assets previously owned by the company.

It goes without saying that in a utopian society everything would work in optimal conditions and at a high level both in terms of legislation and economy, but we cannot say that we are part of a utopian society, although we tend to perfection and to normalization and legislative harmonization that should provide social comfort for all participants in this report.

As to the points raised above, I consider that this theme is of current interest and it provides a great deal of difficulty and analysis of the proposed topic, which is why the legislator needs to find a solution to solve the methods and means by which public institutions can recover debts owed by companies without this recovery creating discomfort to members of management.

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The correlation between tort liability and contractual liability

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Abstract

Civil liability is the common law in the field of patrimonial legal liability, contributing to the protection of the legitimate rights and interests of all persons. Civil liability is manifested in its two forms, tort liability and contractual liability, both having the same purpose – the full reparation of the damage caused -, but the distinctive elements raise the question whether, in the process of recovering the damage, it is possible to choose the most advantageous form of civil liability or favourable provisions of each species of liability. The answer is negative, argued both on the relevant legal texts and on practical considerations.

Keywords: civil liability, tort liability, contractual liability, the relationship between forms of civil liability, cumulating and distinctive features of the two forms of civil liability.

1 Preliminary considerations

In general, responsibility is the human behavior that implies the assumption by one person, in relations with the others and with the rules of conduct accepted by the society in which he lives, of the consequences of his own deeds, *lato sensu*, being initially only an ethical moral precept, but through legislation a legal one, too.

Liability is the consequence of the incompatibility between the conduct of a law subject and the provision of the legal norm[1]. In doctrine[2], it is considered that responsibility or legal liability is a fundamental or general principle of Romanian law, the principle of responsibility being valid for the entire system of law, irrespective of the branch, because it is characterized by the possibility of applying, if necessary, the constraint of the state, towards other forms of social responsibility. In the specialty literature[3] it is considered that the principle of responsibility or legal liability falls within the category of *corrective or regulatory principles* as it sanctions illicit behavior in general, as opposed to the category of *guiding principles or informants* influencing the normative activity of the legislator or of the litigants.

In Romanian civil law, responsibility or liability, through its importance and wide applicability is manifested under the guise of the principle of civil liability, which is a fundamental principle, regulator of civil law as a whole, which has its foundation in the general duty not to injure or injure on the other (*neminem laedit*[4]) and which corresponds to both ethical and social demands, as well as to legal security requirements[5]. And in French civil law, this principle is enshrined: *on ne doit pas va nuire à autrui*[6].

Individual rights must be exercised to the limit of non-violation the others rights. Passing over this limit falls within the scope of the unlawful act of the offense, and the person violating this rule becomes responsible for the consequences that may arise. In civil liability, who violates this moral rule and elementary social justice act is obliged to make good the damage it causes, the existence of the damage being the essential condition of civil liability, unlike other forms of social responsibility, for example moral liability, political liability, disciplinary liability etc., which does not automatically require the existence of damage.

2 General considerations on civil liability. Regulation

By law, civil liability is governed by Chapter IV of Title II – Sources of obligations of the 5th Book – About Obligations of the Civil Code in 2009[1], by the general provisions of Articles 1349-1395 Civil Code, being established as a unitary legal institution, a complex legal source, but also a legal sanction, which encompasses all the legal norms that regulate the obligation/duty to repairs in full the damages caused to other persons by the person who fails to observe the rules of conduct agreed by the contract or imposed by the law or the custom of the place, thereby harming the legitimate rights or interests of the others. Specific provisions also include the matter of *Execution of the obligations*[2] in terms of contractual liability, but also in related legislation, for example in the field of environmental law, insurance, consumer protection or the health of individuals. The provisions of the ordinance distinguish mainly the reparatory function of liability, but also the preventive function, which is activated even without certain damage, where the liability implies the obligation to guarantee the repair of the potential damage by its anticipation and evaluation.

The purpose of civil liability is to repair the damage caused, the repair done in kind or, when it is not possible, by the equivalent of money, the damage author having the obligation to cover both the effective damage (*damnum emergens)* and the unrealized benefit (*lucrum cessans*), but also the advanced expenses for the avoidance or limitation of the damage, as the case may be, as well as the eventual non-patrimonial damage (art. 1391, art. 253-256 and art. 1531 Civil Code).

As a legal nature, civil liability is a civil sanction, which applies to the patrimony of the author of the damage and not to his person's consideration, unlike punishment, which is personal, and cannot be passed on to the heirs.

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[1] Civile Code, Law no. 287/2009, M.Of. no. 505/15.07.2011.

[2] The 5th Book of Civil Code, About obligations. V Title *Execution of the obligations,* Chapter II, Art. 1516-1557 Civil Code.

Civil liability, through the principles it derives, the basic conditions on which it is based and its functions constitute the common law in the field of patrimonial responsibility, contributing to the protection of the legitimate rights and interests of all persons.

3 Forms of civil liability. The relationship between civil liability and contractual liability

Depending on the source of the breached obligation, civil liability may be *contractual* (Article 1350 Civil Code), when the unfulfilled obligation results from a contract or *tort* (*extracontractual*, Article 1349 Civil Code), in other cases in which violation of the duty to observe the rules of conduct imposed by law or the custom of the place is prejudicing the rights or legitimate interests of others.

Both forms of liability have a common essence given by the same purpose, the full reparation of the damage caused and suppose the same conditions: the existence of a *damage* caused by (*causal link*), non-observance of a conventional conduct rule or imposed by law or the custom of the place (*illicit deed*), with *guilt*, by the one who has the capacity to respond. The community of purpose and essential elements is considered in the doctrine as "*a diversity in the unity of civil liability*"[7] or, more recently, "*a unity in the diversity of civil liability*"[8].

Referring to the field of application, tort liability is the common law in the matter, stemming from non-compliance with a rule of conduct imposed by law or the habit of everybody's place, namely not to prejudice the legitimate rights and interests of others, thus having a general *erga omnes* nature over contractual liability arising from non-observance of a specific, individual duty to the known contractor in a pre-existing contract concluded between the two subjects and thus a special, limited liability which operates just *inter partes*.

Coming from the common trunk of civil liability, as well as tort liability, contractual liability cannot be considered a subdivision of the last one of the whole-part type, because it does not derive from it, but represents an autonomous "self-standing" branch, which is why we do not agree with the opinion expressed in the recent doctrine[9] regarding the complement of the rules of contractual liability, where appropriate, with those of tort liability, which, however, represents the common law for all those situations not mentioned and not covered by the legal texts but which meet the conditions necessary for the engagement of this form of liability.

However, the relationship between the two forms of liability – special-common – determines the form of civil liability applicable according to the following rule: contractual liability will be committed only in the relations between the contractors in case of non-performance or inadequate performance of a contract obligation, and in any under other circumstances, tort liability will apply. This simple rule is also reinforced by the obligation to apply the rules of contractual liability, which is the result of the *iure novo* provision of contractual liability expressly stipulating that "*neither party can override the application of the contractual liability rules in order to opt for other rules, would be more favourable*" [Article 1350 (3) of the Civil Code]. Difficulties may, however, arise in determining the birth of contractual liability, so we will point out the following remarks:

– *ab initio*, contractual liability presupposes the existence of a contract, even in the form of a bilateral promise to contract; problems in determining contractual liability may arise in the case of consensual contracts, unwritten contracts or those that may be considered tacitly concluded. In this case, if the proof of the conclusion and validity of the contract can be made, we shall be in the presence of contractual liability, and the clauses governing the obligations between the parties shall also be proved. At the same time, liability for damages caused at the pre-contractual stage, through the inadvertent cancellation of the offer or the abusive rupture of the negotiations will be tortuous, in the absence of a pre-existing agreement. The same regime of tort liability will also apply in the case of non-compliance with obligations arising from legal acts that are not contracts;

– *contractual liability* may arise out of a contract with a determined validity by a start and an end time, as a result of the non-execution or inappropriate performance of an obligation, the duration of which coincides with that of the contract. Thus, the facts exceeding the duration of the contract only attract tort liability. The problem of not identifying the exact duration of the obligation or the contract may come. For example, in the case of the rail freight contract, the French case-law has adopted two guidelines over time; it has long been considered that the contract releases the carrier's safety obligation as long as the traveller is on the train and during his journey through the train station. Later on, it was considered that the security obligation existed as soon as the passenger boarded the train and until it descended; outside this range, the liability of the carrier to the passenger is tortuous;

– *contractual liability* can only be covered only by a valid contract; thus, the liability for the return of benefits under a contract which has been terminated because it was null or void is always a tort/delict liability;

– *contractual liability* may be invoked only by the contracting parties and their successors in accordance with the principle of relativity of the effects of the contract (Article 1280 Civil Code), third parties to the contract but who suffer damage as a result of non-enforcement of the obligations of the contract concluded by other parties will be able to use the tort liability for its repair. For example, in legal relationships created in the entrepreneur-sub-contractor-beneficiary chain, the latter having no contract with the subcontractor can only act on under the limit of tort liability;

– in the matter of stipulation for another, the beneficiary has a direct right, *ex lege*, to require the promisor to execute the obligation (Article 1284 of 2 Civil Code), so that between them will be incident the contractual liability;

– contractual liability will be engaged for non-observance of any contractual obligation *lato sensu*, since the content of the contract is both what is expressly stipulated, but also the usual clauses which are not expressly stipulated but are understood as well as the consequences that the established practices between the parties, law or equity give them the contract by its nature (Article 1272 Civil Code). In the process of distinguishing between the forms of civil liability applicable, the rules of legal and contractual interpretation of contracts will be important, because for violation of a non-contractual, damaging obligation not foreseen in the contract concluded by the previous parties, liability will be delicate, even between the same contractual parties.

The possibility of cumulating the two forms of civil liability may arise in the case when the injured party has a valid contract concluded between the injured party and the injured person and the damage occurred to the creditor as a result of the failure of the

debtor to fulfil his obligations commitments. The question arises whether this creditor has the power to choose between the two forms of liability or to combine the elements of each form of liability according to their own needs. The cumulus of forms of civil liability should not be understood as meaning that two compensations may be accumulated on different grounds because both the principle of full reparation of the prejudice could be breached by exceeding the assessed amount of the damage and the victim would be in the situation of unjust enrichment and the principle *electa una via non datur recursus ad alteram*, but refers to the possibility for the creditor to choose the most advantageous form of civil liability or to choose the favorable provisions of each species of liability.

These issues settled differently in the old judicial practice of the former Civil Code have been definitively settled by the express *iure novo* regulation of contractual liability which states that "*unless otherwise provided by law, neither party may waive the application of the rules of contractual liability in order to eight in favour of other rules that would be more favourable to them"*, thus stating the position of the doctrine and jurisprudence in the matter which concluded at the time of the emergence of the current Civil Code that it is not possible to combine, in case of mixed action, the rules applied to the liability tort or contractual liability, and it is not possible to appeal in the alternative to the tort action after the use of the contractual action – according to the *electa a via...* principle.

In a contrary situation, if the contractual creditor would be allowed a right of option, he would have the opportunity to bring an action on a tort even if the right to action on a contractual basis had ceased or to claim compensation for any although the contractual debtor is liable only for direct and foreseeable damage, which would undermine many substantial provisions governing contractual liability. Also, the contractual debtor, when consented to the conclusion of the contract, is sure that he understands that his liability will be committed only within the legal and contractual terms of contractual liability. It is therefore inadmissible to apply the rigors of liability which is more severely sanctioned. By synthesizing the possibility of the option between the two forms of liability, the provisions specific to each branch of civil liability would be rendered ineffective, therefore, although the mentioned rule regarding the obligation to apply the rules of contractual liability also allows the exception – when the law provides otherwise – should be revised *de lege ferenda* in order to preserve the specificity of each form of responsibility, to eliminate ambiguity and potential instances of inequity and to enshrine the principle of non-admission of the choice between the two forms of liability.

In the positive law, the exception is permitted if the non-execution of the contract constitutes at the same time an offense under the criminal law, such as deception in conventions, abuse of trust by refusal to return the goods received in the deposit etc. In these cases, the injured person has the possibility to obtain compensation by way of a tort liability or contractual liability. The civil action brought before the civil court will be based on the provisions of contractual civil liability, but if it is joined to a criminal action, the law – Article 19 (1) and (3) Code of Criminal Procedure[3] – provides that it will be based on the provisions of tort liability, without distinction.

The provision regarding the obligation to substantiate the civil action in the criminal proceeding on the provisions of tort liability is a reminiscent of the old legislation,

[3] Code of Criminal Procedure of 2010 (Law no. 135/2010), M.Of. no. 486/15.07.2010.

uncorrelated with the new provisions in the field matter and in disagreement with the suggestion of the doctrine on the old Civil Code which indicated the possible solutions for the change of the provision in question, in the sense of the possibility of an option. In this exceptional case it is also possible to accumulate the compensations obtained through the two forms of liability, but in the limits of the damage caused. Thus, the damages obtained on the basis of tort liability in the criminal trial can be compensated with the damages obtained at the civil court, respectively on the basis of contractual liability, if new evidence is found that the damage was not fully covered by the court's decision criminal proceedings, but only if the civil action in the criminal proceedings was exercised by the prosecutor [Article 27 (5) of the Code of Criminal Procedure], that is to say, for the injured persons who lack the capacity to exercise or exercise limited capacity [Article 19, paragraph 3, art. 27 (5) Code of Criminal Procedure]. Or, as a rule, these people are usually not subjects of the contracts, so the hypothesis in practice can rarely occur, but in this regard, they are not discriminated in relation to the majorities, who are acting alone and can choose between exercising it in the criminal court or before the civil court, thus the provision was maintained in the actual Code of Criminal Procedure[4].

We reiterate the proposal that the provisions of Article 19 (1) and (3) Code of Criminal Procedure be reviewed to indicate that the civil action in the criminal proceedings has as its object civil liability, without indicating the form of specific liability. The fact that tort liability for damages would lead to adequate compensation of the victim of the offense does not subsist under the conditions in which the incidental contractual civil liability would correspond more to the same purpose of the full reparation of the damage by the specific pre-existing clauses for assessing the prejudice (ex.: the penalty clause, penalties etc.).

4 The distinctive elements of the two forms of civil liability

The distinction between the two forms of responsibility is of practical significance in terms of particular legal consequences.

Regarding the *capacity* to respond in tort liability, no age is set by the law from which the person is to be an active subject, and therefore the capacity belongs to any person who has acted with discernment in committing the tort, the minor over 14 being presumed to have a discernment (Article 1366 Civil Code), while in the case of contractual liability, the capacity is identical to the exercise capacity and is acquired at the age of 18 (Article 38 Civil Code).

With respect to *guilt*, in terms of intentional intent and negligence, as a common element of both forms of liability, in the matter of tort liability, in principle, the victim must prove the fault of the author of the damage, except where the liability is engaged without fault[10], while in the matter of contractual liability, the creditor must prove only the existence of the contract and the mere fact of non-execution, benefiting from the presumption of fault of the debtor (Art. 1548 Civil Code) and thus having an easier situation.

[4] In the previous regulation, Code of Criminal Procedure of 1968, M. Of. no. 78/30.04.1997), the legal provision was Art. 20 (2).

Regarding *the extent of the reparation* it is noted that in the case of tort liability the extent of the repair is higher than in the contractual liability. Thus, while in the case of contractual liability, the contractual debtor is liable only for the damage foreseen or which was foreseeable and therefore evaluable at the conclusion of the contract, unless the non-execution is intentional or is due to his serious fault (Article 1533 Civil Code), in in the case of tort liability, liability is integral, the damage will be sustained for all damages caused, both foreseeable and unpredictable, direct or indirect, and future, if their production is unquestionable (Article 1385 Civil Code). At the same time, if in the case of tort liability, the reparation will also include the costs incurred by the injured party to avoid or limit the damages without establishing any legal criteria, in the case of contractual liability of such expenses, the extent of the damage will be taken into account only in a reasonable limit (Article 1531, paragraph 2 of the Civil Code).

The nature of liability, *jointly or divisibly*, has the following distinctions: in tort liability, in the case of co-author, we have the solidarity of repayment (Article 1382 Civil Code), whereas in contractual liability the character of the obligation is, in principle, divisible (conjunct), in the case of the plurality of debtors, their liability will be jointly only if it was expressly stipulated by law or contract (Article 1445 Civil Code) with the exception of debtors of an obligation contracted in the course of business of an enterprise where solidarity is presumed unless otherwise provided by law (Article 1446 Civil Code).

As for the *delay* in the case of tort/delict, the active subject is considered to be late, without any formalities (*dies interpellat pro homine*), while in the case of contractual liability it is necessary that the person who does not – has fulfilled the contractual obligation to be delayed, by the forms provided by the law, because the delay does not operate by law (*dies non interpellat pro hominen*), except in the hypotheses provided by art. 1523 Civil Code or according to the contractual clauses issued in this respect.

Exclusion, limitation or worsening of liability arrangements are governed by the following rules:

– in tort/delict, unilateral unlawful conventions or acts committed before the act is committed are in principle null and void, as in the case of the offense of exclusion or limitation of liability for damage caused to the physical, mental or health of another, an act committed intentionally or by gross negligence, but those that exclude liability for damages caused to the victim's goods by a simple recklessness or negligence are valid (Article 1355 Civil Code). Exclusion or limitation of tort liability cannot be brought to the attention of the public by a notice of liability [Article 1356 (2) of the Civil Code]. Such an announcement does not have any effect, but it may have the value of signalling a hazard, a circumstance that may contribute to the holding of a possible common guilt.

– in contractual liability, the non-liability clauses are valid, including those of total exclusion, except material damage caused by an intentional or grossly fatal act, or where the damage consists in the attainment of the physical integrity or health of the person, irrespective of the psychic position the author of the detrimental act; at the same time, the parties may also agree in advance on the means of repairing the possible damage – the criminal clause, the clause or the clauses regarding the modification of the duration of the prescription periods or its course. An announcement concerning the exclusion or limitation of contractual liability may have effect if the claimant proves that the injured person knew the existence of the notice at the time of the conclusion of the contract,

whether or not it was brought to the attention of the public (Article 1356, paragraph 1, Civil Code).

The *prescription of the right to action* flows differently: in the matter of contract, the limitation period starts to run from the date when the creditor is entitled to demand the performance of the contractual obligation (Article 2524 Civil Code), and in the matter of tort, prescription begins to run from the date when the injured person had known both the damage and the person responsible for it (Article 2528 Civil Code). We note that in the case of tort liability, the right to reparation arises from the day of producing the damage, even if it cannot be immediately recovered (Article 1381, paragraph 2 of the Civil Code), so that from the date of its birth the legal provisions on execution, transmission, transformation and termination of obligations are applicable. In civil liability, the 3-year general limitation period (Article 2517 Civil Code) or the 10-year period in the cases provided by Article 2518[11] Civil Code, while in contractual matters the law provides in addition to the general term other terms[12]. At the same time, the limitation period in civil liability can be extended with the term of prescription of criminal liability where the illicit act also constitutes an act subject to criminal law (Article 1394 of the Criminal Code[5]), and the institution of the prescription suspension knows a specific case in the matter of liability civil damages, when the damage is caused by injury to body and health or the death of some persons, the prescription is suspended until the pension or benefits that would be due, in the social insurance, to the person entitled to the reparation (Article 1395 Civil Code).

Forms of civil liability may also entail a different *territorial jurisdiction* of the courts, in the matter of jurisdiction, which may lie outside the court of the defendant's domicile or residence and the court of the place provided for in the contract for the performance of the obligation or the court chosen by the parties under the pre-existing contract, and in the matter of tort will also be the jurisdiction of the place where the offense was committed or the place where the damage occurred (Article 113 of the Civil Procedure Code[6]).

5 Conclusions

Civil liability, although manifested under its two forms, tort liability and contractual liability, the similarities and differences of which they approach but at the same time remove from one another, remain a unitary institution, both because of the unitary way of the system of legal norms that enshrine it, especially by its purpose – restoring the victim's patrimonial situation – but also by its political and legal significance, expressing the social condemnation of illicit conduct.

The relevant differences between the two branches of civil liability lead to the conclusion that we are in the presence within the same unit of independent and autonomous subdivisions with respect to each other, between which there is no subordinate relationship of principal-secondary, important-more or less important, superior-inferior, because each form of responsibility is suited to specific social needs, serving the same common purpose – reparation of the damages.

[5] Criminal Code of 2009, M. Of. no. 510/24.07.2009.
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[9] Belu Magdo M.-L., q.v., p. 42.
[10] In the case of liability for damages caused by the deed of another, of the things or animals under guard, we are in the presence of an objective responsibility, in which it does not concern the fault of the author but the result of the injuries.
[11] In the case of environmental damage or moral or material damage to a person through torture or acts of violence, sexual violence or aggression committed against a minor or a person unable to defend himself or to express his or her will.
[12] E.g.: 2 years in the insurance relations (Article 2519 Civil Code), 1 year in the relations of certain professionals (Article 2520 Civil Code) etc.

Termination of the labour relation by mutual agreement. The existence of the employee's consent

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Abstract

The case of the termination of the individual labour contract by mutual agreement is stipulated within the provisions of article 55 letter b) from the Labour Code. Nevertheless, the Labour Code does not contain other provisions with respect to the conditions to be fulfilled in order to terminate the individual labour contract by mutual agreement, therefore the form or the nature of the document attesting the termination of the individual labour contract by mutual agreement are not regulated. With respect to the parties consent, the provisions of the Civil Code are applicable, based on the provisions of article 278 from the Labour Code, which stipulate the nature of common law of the civil legislation.

Keywords: termination, mutual agreement, consent

1 The termination of the individual labour contract by mutual agreement

The provisions of article 55 from the Labour Code stipulate the modalities of terminating the individual labour contract, respectively the termination (a) de iure, (b) as a result of the mutual agreement and (c) as a result of the sole will of one party.

Although for the first and last category there are detailed regulations with respect to the cases which circumscribe to these modalities and to the form which has to be respected by the document which expresses the measure of termination, in the case of the individual labour contract termination by mutual agreement, the legislator did not stipulate supplementary provisions with respect to the nature and the content of the document attesting the parties will of terminating the individual labour contract.

The termination of the individual labour contract by mutual agreement corresponds to the provisions of article 1270 alignment 2 from the Civil Code, according to which all

conventions which are legally concluded may be revoked by mutual consent (*mutuus dissensus*) and that is an effect of the liberty of work principle and of the symmetry of legal acts principle.

With respect to the consent expressed by the parties in order to terminate the individual labour contract by mutual agreement, the provision of article 1179 from the Civil Code will be applicable, taking into consideration the civil legislation's nature of common law.

According to the speciality doctrine, the mutual agreement must fulfil the general conditions for the validity of any legal act, respectively (i) the consent for the termination of the individual labour contract must belong to the same parties who agreed upon the conclusion of that contract, (ii) there must be certain proof that the parties intended expressly and exactly to terminate de labour contract, (iii) not to be affected by an error, dolus or violence. There had been stated that the legitimate threat made by the employer with the exercise of a right does not represent a vice of consent.

Although, the termination of the individual labour contract must be based on a parties unambiguous expression of will and cannot be a result of the interpretation given by the employer with respect to some actions or inactions of the employee.

With respect to the possibility of one party to withdraw its offer for the termination of the individual labour contract, the provisions of the civil legislation are applicable regarding the irrevocable effect of the unilateral acts, reason for which the offer may be validly withdrawn by the tenderer only before the moment the recipient receives the offer. After the moment the offer reaches the recipient, the one who made the offer will be obliged to respect his intention as written and communicated and also the term written within the offer.

With respect to the validity of the termination agreement, there must be underlined that in the case of an employer legal entity, the will to terminate the individual labour contract will be expressed validly only by the person or persons who are specially empowered in this respect.

2 The validity of the consent. the need of the existence of a clear will of the employee with respect to the termination of the labour relation by agreement

According to a case addressed in first court to the Bucharest Tribunal and for appeal to the Bucharest Court of Appeal, the employee essentially requested the annulment of the measure of its individual labour contract termination by mutual agreement, the reinstatement with the position occupied before the intervention of the termination measure and the coercion of the employer company to pay damages representing its salaries rights which he would have earned in case the contract did not terminate, calculated until the date of its effective reinstatement.

With respect to the fact situation, the employee marked that he had been an employee of the defendant company for approximately 6 years, when he received and accepted an offer for a position located outside Romania, within the group companies of the defendant company.

No contract had been concluded between the employee and the company where he was about to perform his activity, and also, there were no formalities in order to return to the defendant company the goods he used in order to perform his duties, before starting the job with the company abroad, reason for which the employee assumed that his labour relation with the employer company in Romania was still in force.

While the employee performed his duties abroad, the defendant company requested the employee via messenger, that he should agree upon the termination of its labour contract from Romania.

During this conversation held by electronic means of communication, the employee did not have a ferm position with respect to his agreement for the termination of its individual labour contract with the defendant company, understanding to condition its assumed future agreement on the position expressed by the abroad company. During the same conversation, the defendant's company representative communicated to the employee that he will receive via email a draft of a request document in order to demand the termination of the labour contract by mutual agreement, which the employee had to sign and then, send it back as a scan to the defendant company. The employee didn't sign the request to terminate his labour contract and therefore, he did not send anything to the employer company in Romania.

Nevertheless, in the same day the employee should have sent his signed by hand request to the Romanian company's representative, although this never happened, the defendant company decided to register within the REVISAL the measure of the individual labour contract termination, based on article 55 letter b) from the Labour Code. The company justified its decision by invoking the conversation help via messenger, the day before. The termination measure was not communicated to the employee.

Following this moment, the company from abroad informs the employee about its own decision to terminate the cooperation with immediate effect and the employee has to return to Romania, where the defendant company refuses to give him access to work and informs him about the termination of its individual labour contract by mutual agreement.

The problem of this situation aims the validity and quite the existence of the employee's consent with respect to the termination of its individual labour contract by mutual agreement.

The Tribunal dismissed the action as groundless and retained that following the interpretation of the provisions of article 55 letter b) from the Labour Code, the termination of the individual labour contract is governed by the principle of consensual acts, therefore the parties agreement regarding the termination of the labour reports does not have to take a certain form, since the parties agreement may be proved by any mean of probation. Furthermore, the first court also stated that both parties expressed their consent clearly and explicitly as an intention, any doubt being excluded, since the consent was expressed in writing on an electronic format.

The first court solution was appealed and the employee requested the second court to reanalyse the cause and to admit the appeal and to change the first court's decision.

With respect to the main critic, respectively the lack of the unambiguous will of the employee, the employee stated the fact that during the messenger conversation there had been used terms as "local contract on Romania" and "transfer", which strengthen the position according to which the employee who did not have legal studies, understood that

there will operate a temporary change of its place of work and not a termination of its contract with his employer. With respect to the facts, there was marked the fact that within the pay stub received by the employee from the abroad company where he performed his duties, there is used the same identification code of the employee, as the one assigned in Romania by the defendant company. Therefore, both the defendant company and the company abroad used the same identification number for the employee, this being an important factor for the continuity of the labour relation.

The Appeal Court considered valid the critic according to which, based on the evidence, there is no unambiguous will of the employee with respect to the termination of the labour relations by mutual agreement, reason for which the Court admitted the appeal and annulled the individual labour contract termination measure and reinstated the employee and decided the company has to pay the requested damages.

Within the considerations of the appeal decision, the Court stated that the employee showed that there is possible a termination of its individual labour contract at a future date to the messenger communication, based on the clarification of the labour relation with the company abroad.

Analysing the validity of the consent with respect to the termination of the individual labour contract, the Court stated that the provisions of the Labour Code are completed by the provisions of the civil legislation, according to article 278 align. 1 of the Labour Code, respectively with the common law – the Civil Code, therefore with respect to the validity conditions of the individual labour contract termination agreement, since there are no provisions within the Labour Code, we shall apply the provisions of article 1179 from the Civil Code, according to which, "*(1) The essential conditions for the validity of a contract are: 1. Capacity to contract; 2. Parties consent; 3. A determined and lawful object; 4. A lawful and moral cause.*

(2) In case the law stipulates a certain form for the contract, that must be respected, otherwise legal sanction should apply."

According to article 1204 Civil Code " The consent of the parties must be serious, free and informed*".*

As a consequence, the Court decided that within this case the validity conditions of the consent are not fulfilled, according to article 1204 form the Civil Code. And in this respect, the will expression is too vague, since the employee did not clearly indicated that he agrees with the termination of the individual labour contract at the date the termination was registered, but he showed that considering the lack of information from the abroad company, there was not possible a termination of the individual labour contract, but he could see a possibility for the next day and only if the information received from the abroad company with respect to the place of work are clear.

This vague character of the will expression is confirmed also by the fact that the employer, via email, sent to the employee a draft of the request for the individual labour contract termination, which the employee had to sign but he never did.

Also, the Court stated that within this case there is a mental reserve of the employee, well known by the defendant employer, because according to the conversation, the employee understood that the termination of his individual labour contract with the Romanian employer is a formality in order to allow him to perform his duties with the employer abroad, but this formality does not represent a termination of the labour

relations with the Romanian company, taking into consideration that the employer used, during the conversation notions like local contract for Romania and transfer request. Therefore, the court states that the abroad company used the notion transfer within the group and temporary work mission, which confirm the assumption that the employee did not understand that the labour relation with the defendant company will terminate, after the termination of the temporary work mission.

Whereas the annulment of the termination agreement of the individual labour contract had been found, there was also noted that the individual labour contract existing between the parties continues to produce effects and the employee has the right to be reinstated to work. Also, the Court decided that the employee has the right, according to article 253 from the Labour Code to receive damages equal to his salary rights calculated until the effective reinstatement, in order to cover the prejudice determined by the employer's unjustified refusal to allow him to continue his labour relation based on the individual labour contract which continued to produce effects, taking into consideration the fact that the Court decided to annul its termination agreement.

In case the consent expressed by the parties is clear and unambiguous, the intention of the employee being expressly manifested in writing, the termination of the individual labour contract may occur even at a future term, as long as this is specifically mentioned within the written request of the employee and the employer agrees with the date as proposed by the employee as a date of terminating the individual labour contract.

In conclusion, the written form is necessary both to prove the will and consent of the parties as expressed in order to terminate the individual labour contract by mutual agreement.

3 With respect to the written form

According to the provisions of article 16 align. 1 from the Labour Code, the individual labour contract must be concluded based on the parties consent, in written, in Romanian language, no longer than the day before the date of starting the activity by the employee. The obligation of concluding the individual labour contract in written belongs to the employer.

Therefore, the individual labour contract is concluded in written form and this obligation belongs to the employer. Applying the principle stipulating the symmetry of forms for the civil legal acts, also applicable within the labour law according to article 278 from the Labour Code, which establishes the role of common law of civil law (according to this principle the form needed to perfect a legal act must be respected also if the legal act in abolished), the conclusion is that the termination of the individual labour contract must have the written form and the parties consent must also be expressed in written.

According to another case addressed to the Bucharest Court of Appeal, the Court stated that the termination of the individual labour contract must be made in written. It is true that the provisions of article 16 align. (2) of the Labour Code stipulates the possibility for a labour contract not be perfected in written form, but in this case any mean of probation may be administrated in order to prove the existence of the contract.

Nevertheless, the legislator did not stipulate expressly this possibility, to use all means of probation to also prove the termination of the individual labour contract. This means that, in case a termination of the individual labour contract occurs, the existence of the employee's consent cannot be proved by any means of proof, since the written form is the only one acceptable in this case.

According to the same interpretation, the existence of the employee's agreement in order to terminate the individual labour contract cannot be proved with witnesses.

Moreover, the amendment of the individual labour contracts clauses must also be made in written, according to article 17 align. 5 from the Labour Code, and also respecting the principle of the symmetry of forms of the legal acts. Therefore, the parties consent with respect to the termination of the individual labour contract must be expressed in written.

A verbal agreement expressed by the employee before the termination of the labour reports cannot be considered as a legal ground for the termination of the labour reports based on article 55 letter b) from the Labour Code, especially if the employee contests in writing the existence of such an agreement, at the date the decision of the termination of the individual labour contract was communicated.

The labour law courts underlined that the parties agreement with respect to the termination of the labour reports must be unambiguous and must exist at the time the termination decision is issued and certifying this modality of terminating the individual labour contract.

4 Conclusion

Although the Labour Code does not stipulate necessary conditions to be fulfilled in order to obtain a valid agreement of the parties in order to terminate the individual labour contract by mutual agreement, we must consider the provisions of the Civil Code and mostly the provisions of article 1204 regarding the cumulative conditions that must be fulfilled by a consent in order to be validly expressed.

As stated within the case law, the employee's consent must be freely expressed and also clear, unambiguous and informed, otherwise the termination agreement of the contract will not be valid.

It is important to state that it is not a flawed consent, the case when the employer "threats" the employee with dismissal, in case the employee will not agree upon the termination of the individual labour contract by mutual agreement, since the dismissal is another modality of the termination of the individual labour contract, respectively as a result of the unilateral will of the employer.

Nevertheless, considering the provisions of the Labour Code which do not stipulate the possibility to prove by any means the termination of the individual labour contract, we consider that the parties will manifestation in order to terminate the individual labour contract by mutual agreement must be in written form. Plus, the written form will be able to prove both the consent and the conditions and terms of its expression.

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Smart Contracts: Terminology and Legal Nature

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Abstract

Blockchain technology and smart contracts are regarded by some authors as the greatest innovations since the advent of the Internet, while other authors are skeptical about them, arguing that they can only be considered a "technological bubble" that will burst in a short period of time. Despite the opposite views on these innovations, the legal literature has given them considerable attention. Due to the early stage of development and the lack of widespread adoption, there are numerous questions regarding this new way of contracting. This article aims to answer some of these questions such as what are smart contracts and what is their connection with the blockchain technology.

Keywords: blockchain technology, smart contract

1 Definition of smart contract

The concept of smart contracts is not new, but the interest for the use cases of smart contracts has grown exponentially with the advent of blockchain technology. The idea of a smart contract is attributed to Nick Szabo (scientist, lawyer and cryptographer). According to one of his early writings, a smart contract can be described as *"a set of promises, specified in digital form, including protocols within which the parties perform on these promises"* [1]. In a later publication, Szabo proposed another definition that smart contracts are *"digital, computerized contracts, in which the execution and performance take place automatically, without the need for human intervention."* [2]

Szabo compared the concept of smart contracts with a soft drink vending machine: *"When money is paid, an irrevocable action is put in motion. Money is retained and a drink is vended. The transaction cannot be stopped in the middle of the process. The terms are, in a sense, embedded in the hardware and software that runs the machine."*[2] At its core, vending machine is the primitive ancestor of smart contracts according to Szabo. [3]

Except Szabo's publications [4], the concept of smart contracts has not been of interest after its launch in the early 90s, mainly due to lack of technology to support their use. However, with the advent of blockchain technology, the focus on smart contracts has increased. Explaining how blockchain technology works goes beyond the scope of this

article, but it is necessary to broadly understand the principles of this technology and become familiar with the concepts with which it operates.

Currently, there are many definitions of smart contracts, but there is no consensus on their meaning. Some of these definitions are purely technical and associate smart contracts with autonomous computer code, which operate on a blockchain [5] or with "*systems that can automatically transfer digital assets in accordance with predetermined arbitrary rules*". [6]

Other definitions associate smart contracts with the automatic expression and execution of legal contracts through computer programs that transpose the contractual agreements into contractual language [7], with protocols that "*facilitate, verify, execute and incorporate the terms of a contract*" [8] or with incorporating contractual clauses in hardware and software to prevent breach of contract or to control assets by digital means[2].

Another set of definitions starts from a technical description, then concluding that the protocol gives rise to important legal effects [9]. In certain writings, the word "contract" in the phrase "smart contract" has no connection with the legal meaning of the term. In other writings, mainly technical, the notion of "contract" is used inappropriately, being emptied of its legal content.

Synthesizing the opinions expressed in the legal writings, we observe that part of the doctrine promotes the idea that "code is contract" [10]. According to this vision, the entire contract written in natural language can be codified. Contrary to the idea of transforming the code into contracts in natural language, part of the doctrine shares the view that smart contracts consist in automating the execution of business logic (for example, payment), which may or may not be associated with a written contract. Between these two extreme visions there are many nuanced opinions, including the one that promotes the idea of a "split" smart contract model, in which the contract clauses expressed in natural language are connected to the computer code through parameters that feed the computer system for contract execution. [11].

This terminological confusion has led to the need to differentiate between, on the one hand, the smart contracts represented exclusively in code or computer programs, called smart contract codes, and on the other, the smart contracts in the legal sense, called smart legal contract. [12] Although in the current speech and in most of the non-legal doctrine the distinction is not made between the smart legal contract and the smart code contract, both being generically referred to as the "smart contract", we consider that this distinction is necessary because the two concepts designate different things. Our analysis aims at the "smart legal contract", and for ease of expression, we will agree to call it simply "smart contract".

2 The blockchain technology underlying the smart contracts

Blockchain is a distributed ledger and a computing technology managed in a decentralized (often autonomous) manner. It became known as the technology behind the Bitcoin virtual currency in early 2008. [13] Like smart contracts, the idea of a cryptographically protected blockchain dates back to 1991, but it was relaunched with the publication of an article by Satoshi Nakamoto [14] in 2008, being implemented and

popularized with the launch of the first Bitcoin blockchain and the eponymous virtual currency. [13]

The simplest form of blockchain technology involves a distributed database that autonomously maintains a constantly growing list of public records in "blocks" of information, secured against further changes. Each block of information contains a timestamp and is linked to the previous block. [13] The fundamental purpose of the blockchain is to create a database system that parties can maintain and edit in a decentralized manner, without anyone exercising central control. [13] A defining feature of the blockchain is the ability to maintain in a relatively inexpensive way a uniform picture of the state of affairs and the order of events – a (decentralized) consensus, a type of information that determines individuals or organizations with divergent perspectives and interests to accept and act as if it were the truth. [13] This decentralized consensus is probably the most important objective of the blockchain, which ultimately makes it possible for the information transmitted to be accepted by all participants through rules and protocols, without the need to trust or rely on a centralized authority. [13]

Blockchain technology can have many practical applications. One of the possible applications and probably the best known is related to decentralized virtual currencies, such as Bitcoin or Ether. Another application is the implementation of computer programs that automatically execute the terms of a contract if the obligations have been fulfilled. These computer programs are called "smart contracts". The Bitcoin platform was the first blockchain that allowed the use of basic smart contracts. The Bitcoin network can transfer virtual currencies from one person to another, if certain conditions are met, but only if the "nodes" of the network can validate the transaction. [15] For example, if a person wants to send two Bitcoins to another person, the nodes check the entire Bitcoin network to validate that the Sender holds the two Bitcoins in his wallet and has not sent any of them before. Once this information is confirmed, the new transaction will be included in a "block". This block will be attached to the previous block.

These blocks are linked together and form a "chain", hence the name "blockchain". In the example mentioned above, the previous block contains information about the Sender and its virtual currencies, while the new block contains information regarding the transaction and the Recipient of Bitcoins. Each block in a blockchain contains a "hash function" and a so-called "hash pointer" that refers to the previous block in the chain and can be viewed as a reference to the data location.

The stated purpose of the Bitcoin blockchain was to create and record transfers of its own token (Bitcoin). However, coding applications using Bitcoin programming language was too difficult and too limited due to its resemblance to machine code. Machine code is a strictly numeric language designed to be executed directly by a computer, which is difficult to read or directly programmed by humans. The following numeric string represents an example of writing in the Bitcoin language [16]:

OP_DUPOP_HASH16062e907b15cbf27d5425399ebf6f0fb50ebb88f18OP_EQUALVERIFYOP_CHECKSIG

The programming language of the Bitcoin blockchain was therefore discouraging to developers, unfriendly to the user and also not Turing-complete. [17] Each computation that can be performed can be expressed and implemented in a Turing-complete programming language. This allows a computer to execute a "loop" and process its own

output by repeating complex terms. [18] The programming language of Bitcoin did not have this ability and could only make "simple" payments.

This has changed with the launch of the first Turing-complete blockchain, Ethereum. Ethereum is a virtual currency invented by Vitalik Buterin and launched in 2015. It was built from scratch using its own blockchain network and was designed to be a better protocol than the Bitcoin blockchain. [16] The stated purpose of Ethereum as described in the white paper is *"to create an alternative protocol for building decentralized applications, offering a different set of tools useful for a large category of decentralized applications (...) Ethereum does this by building what which is, in essence, […]a blockchain with a built-in Turing-complete programming language, allowing anyone to write smart contracts and decentralized applications where they can create their own arbitrary rules for ownership, transaction formats and state transition functions*."[6]

The Ethereum blockchain contains, like the Bitcoin blockchain, a ledger in which users send the specific token of the network (Ether). Unlike the Bitcoin programming code, the Ethereum programming language does not look like a machine code, but is similar to other common programming languages. [16]

With the advent of Ethereum, the framework for writing any type of code on the blockchain has been created, more easily than on Bitcoin. Smart contracts are an example of an application that can be built in a much simpler way than in Bitcoin. Because a smart contract is a distributed contract that is represented in the code and must clearly state in its code "if this condition is met, then execute this instruction" [16], it has become easier for programmers to write smart contracts using the programming language of Ethereum rather than the machine code of Bitcoin. Unlike the programming language of Ethereum, it can be assumed that it is almost impossible to program a smart contract directly with the Bitcoin machine code and at the same time clarify what needs to happen automatically if more obligations have been fulfilled. Smart contracts may accept and store Ether and data and may send Ether to other accounts or other smart contracts. In essence, the emergence of Ethereum has made it possible in theory to make smart contracts easier for programmers.

Smart contracts do not require a decentralized blockchain network in order to function, but they need a reliable network or mechanism to support them, provided by the blockchain. [19] Smart contracts can work on both public (decentralized) blockchains and private (trusted centralized) blockchains.

3 The distinction between public and private blockchain

Blockchain technology provides a convenient and efficient core network for smart contracts. However, a noteworthy aspect of blockchain technology in terms of smart contracts is the distinction between the so-called "permissionless" blockchain and the "permissioned" blockchain, also known as the "public" and "private" blockchain. Although essentially they both store data in the same way, by building cryptographically linked data blocks, many important differences can be distinguished between the two that could have a major impact on the parties' participation and their legal identification.

A public blockchain can best be described as a network where everyone is free to participate anonymously. Therefore, whoever wishes may participate in this network,

either as a simple user or as a "node". [20] Because public blockchains are accessible to everyone without exception, each participant can download the blockchain to their own computer and view the entire history of previous transactions, send and receive virtual currencies, store information, and even create smart contracts within the blockchain community. The most popular public blockchains are Ethereum and Bitcoin. In addition, public blockchains are characterized by the fact that it is not necessary to identify or authenticate the parties (participants), who are practically anonymous in the public blockchain. [20] To perform transactions, two different sets of so-called cryptographic key pairs are used: a public key and a private key. The private key is personal to each participant and should remain secret. The public key, as the name suggests, is known to the other participants. All information within the blockchain is public and all participants can bid. Although each participant can bid on a public blockchain, an update to the ledger will only occur if the majority of participants agree to this transaction. [20] This leads to the conclusion that no participant can be considered the central authority within the blockchain (which means that it is decentralized).

Private blockchains, on the other hand, are not accessible to everyone. They are protected by the so-called "access control". [20] If someone wishes to participate in a private blockchain, that participant will have to apply for approval. Within a public blockchain there is no central authority, instead within a private blockchain there is something similar to a central trusted authority (which could be labeled as a "trusted third party") to which participants must seek approval to have the right of access to the network: writing privileges and reading privileges may also differ between participants. Unlike public blockchains without central authority, private blockchains perform identification and authentication of each participant. In short, the trusted third party can be described as an independent entity or person providing services that enhance the reliability of smart contracts by applying security measures: for example, identifying or authenticating the parties.

4 Differences and similarities between smart contracts and traditional contracts

Smart contracts are, like other solutions derived from technology, the product of computer programming. These computer programs create and execute a convention between the parties, just like traditional paper-based contracts. The most obvious difference is the creation of smart contracts on the computer through a programming language and, therefore, the code itself expresses the obligations of the parties. While most traditional contracts are written in the language of the country where the contract was drafted, smart contracts are written in a programming language that most contracting parties and even programmers themselves do not know and/or understand. As we have shown in the previous paragraph, the programming language of a smart contract is very difficult to understand without some basic programming knowledge.

While the language of traditional paper-based contracts has been developed over decades of legislative and jurisprudential developments, the language of smart contracts (or rather code) is still in its infancy. As a consequence of this fact, the current legislation regulates the traditional contracting methods, and not the smart contracts. In some cases,

the Romanian legislation provides that a third party, for example a notary, must authenticate a transaction, in order for that contract to be considered validly concluded. For example, whenever someone wants to buy a real estate, the contract must be concluded in authentic form, must be registered in the land registry and signed in front of a notary. A smart contract, which implies the lack of third parties involved in the contracting process and self-fulfillment of obligations, is incompatible with the aforementioned legislation. Therefore, smart contracts cannot in all cases be used as an alternative to traditional paper-based contracts. This is because the legislation was adopted for traditional paper-based contracts, and can only be applied to smart contracts by analogy.

Despite the obvious differences in design and language, smart contracts do not differ significantly from traditional contracts on their purpose. In both cases, the parties establish in advance the mutual rights and obligations, the execution of which may be conditional on the fulfillment of certain trigger conditions. Drafting traditional contracts on paper is significantly different from the programming of smart contracts, but the fundamental idea is still the same: to conclude agreements in advance and to exclude unwanted scenarios.

However, smart contracts differ greatly in terms of execution and design when these contracts are compared to the execution and design of traditional contracts. Traditional contracts reflect the will of the parties expressed with the intention of producing legal effects. Smart contracts have some additional features that distinguish them from traditional contracts: they are automatable and immutable.

4.1 *Smart contracts are automatable*

Traditional paper-based contracts are usually written agreements between parties that contain their specific rights and obligations. While most contracts are bilateral, being characterized by reciprocity and interdependence of the parties' obligations, other contracts are unilateral, in that they give rise to obligations only to one of the parties [21] People have drafted written agreements since ancient times to preconstitute evidence in case of non-performance of obligations. Therefore, from their origin, the contracts are binding and reflect the intention of the contracting parties to assume obligations.

Execution of traditional contracts is based on the specific action of each contracting party. The obligation of the parties to comply precisely with the contract has its origin in the moral obligation to respect the promise made. However, the fact that the parties have undertaken certain mutual obligations does not guarantee their compliance. Therefore, it is not surprising that most countries have developed a rich law for settling disputes regarding the execution of contracts. The breach of contractual obligations by one party confers the right of the other party to appeal in courts.

Unlike the traditional contracts whose execution depends on the human action, the execution of the smart contracts is performed automatically by the computer, without the direct intervention of the parties. [22] As we have shown above, smart contracts consist of computer programs that record the parties' agreement. As a result, the rights and obligations of the parties are already implemented in the smart contract just before it begins to take effect. These agreements transformed into computer programs consist of conditions and consequences associated with the fulfillment or non-fulfillment of these conditions: if conditions A and B are met, consequence C will be carried out automatically

by the smart contract. Smart contracts therefore act like autonomous agents that run entirely on the blockchain and do not require human intervention in the process of executing the contract. [16] Therefore, the smart contracts are executed automatically, based on the instructions implemented in the smart contracts code. In this context, if the criteria defined by the parties are met, the execution of the contract will be performed by the smart contract itself.

Due to the fact that smart contracts are executed automatically, it can be said that the parties do not have to take any action in order to fulfill their contractual obligations and neither should they invoke the contracting party to perform the obligations. In the case of traditional contracts, failure by one of the parties can lead to long-standing disputes. In contrast, in the case of smart contracts, the risk of non-compliance is theoretically impossible because they will be executed automatically (or not) based on the instructions pre-defined by the parties.

It is important to emphasize that a smart contract is different from a traditional contract concluded by electronic means. To illustrate the differences between the two types of contracts, we will use an automatic bank transfer as an example. Currently, most banks provide customers with Direct Debit services through which they can schedule automatic payment of monthly invoices to the service providers with whom the bank has a payment commitment. This direct debit service is useful to people who want to get rid of recurring payments. For example [23], for the payment of mobile telephony services, the customer can use the direct debit option available within the internet banking platform to authorize the mobile provider to collect the money directly from the client's account, on the due date of the invoice. In this case, the control over the payments made using this facility is exercised by the client who has the possibility at any time to deactivate this option. In contrast, in the case of a smart contract, the parties do not have the opportunity to intervene in the execution of the contract. [24] In essence, the smart contract code will automatically pay for the service on the due date, without the possibility of any intervention (customer, bank or supplier). Consequently, the autonomous nature of self-execution of rights and obligations represents the principles that qualify these contracts as "smart". [24]

The impossibility of third parties intervention in a smart contract is, according to the majority opinion of the technical literature, a great advantage of using smart contracts. The arguments most frequently invoked in favor of these opinions are the reduction of costs and the reduction of the dependence on the intervention of third parties. Accordingly, smart contracts will protect the party against unintentional changes to the agreement by the contractor. In the case of a dispute, reversing the burden of proof is a key differentiation from traditional contracts. Thus, due to the automated execution, the injured party in a smart contract will have to submit the request to restore to the previous situation, instead of requesting the execution of the obligations. [19]

4.2 *Smart contracts are immutable*

In addition to their self-executing nature, smart contracts differ from traditional contracts by their immutable nature. Due to the fact that the agreement is incorporated into a computer program run on a blockchain, this agreement will not be changed later either unilaterally or by the common will of the parties. The smart contract code governs

its operation for the entire duration of the smart contract, which means that the agreement expressed in the smart contract cannot be interpreted differently by external factors or by third parties.

The code of the intelligent contract prevents its interpretation based on the internal (real) will of the parties. Accordingly, in order to avoid the situation where the result of the execution of the smart contract code is contrary to the will of the parties or does not reflect their will, the contracting parties should conclude before or at the same time as drafting the smart contract, a separate agreement in natural language. Therefore, in order to prevent further problems of interpretation or the impossibility of interpreting the code of the smart contract, a solution may be to record the parties' will in a natural language written document that "translates" the code of computer.

The immutability mentioned above can be explained starting from the example offered by Szabo, respectively the soft drinks vending machine. According to his description, in the event that a person wishes to buy a soft drink from the vending machine, he will introduce a coin and select the desired product. Therefore, it is not necessary for the seller to intervene to complete the transaction. The transaction is autonomous and the seller has no possibility to intervene in its execution (it is "immutable"). [22]

The same principle can be applied to a transaction with virtual currencies: if a person sends a valid instruction for transferring a virtual currency, the transaction is registered in the blockchain, and the new block attached to the existing blockchain will no longer be able to be modified later. [22] Therefore, the execution of a smart contract depends on an "if ... then" instruction whose execution is immutable. This means that once the computer program expressing the will of the parties is initiated, it cannot be modified subsequently by the unilateral will of one party. [22]

Due to the fact that the programming language in which the smart contract is written is the one that governs the contractual relationship between the parties, and cannot be modified subsequently, this has led to the opinion that in an ideal system, the computer code could govern the legal system, ideas synthetically expressed by the phrase "the code is the law". This idea has been interpreted in two different ways.

A first interpretation of the phrase "the code is the law" refers to the fact that no human intervention will be possible, as it is not possible to obtain legal protection due to the fact that only the code represents the law. In another interpretation, the parties to the smart contracts may regulate their legal relationships through the code, and not by legal rules, but retain the fundamental right to be able to address a court, as provided for in Article 6 of the ECHR.

5 Conclusions

Smart contracts are an application of a technology that is in its infancy, but which has an important potential in changing the paradigm regarding the way of contracting. The lack of clarity regarding the significance of the term smart contract, which can receive different meanings depending on the context in which it is used (legal, technical or economic) represents an important challenge in understanding the way they work. Also, the technical characteristics of the platforms (public or private) on which these contracts can operate can influence the way we define smart contracts.

The specific characteristics of smart contracts such as automation and immutability can both be advantages and disadvantages compared to the classic way of concluding contracts. The automation of certain stages in the contractual relationship does not mean the complete elimination of human intervention. In order to prevent situations in which the code returns results different from the will of the parties, it is necessary to draw up in parallel a contract in natural language setting out the real intentions of the parties.

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Binding Effect of Smart Contracts

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Absctract

The emergence of blockchain technology and its applications, such as smart contracts, is a challenge for lawyers to rethink the classic institution of contract law. The most common question associated with the concept of smart contracts is: are they contracts or not? The present paper attempts to provide an answer to this question starting from the classical acceptance of the contract term, by reference to the validity conditions provided by the Romanian Civil Code.

Keywords: smart contract, blockchain technology, validity conditions

1 Introduction

The principle of the binding force of the contract, enshrined in art. 1270 para. (1) Romanian Civil Code, represents the rule of law according to which the legal conventions made have the power of a law between the contracting parties. In other words, the execution of the contract is mandatory and not optional.

Applying the principle of binding force in the case of the smart contract implies the verification of the conclusion of a valid contact. [1] In other words, is the smart contract a valid contract or not?

In order for a contact to be validly concluded, it is necessary to comply with the four essential conditions provided by art. 1179 of Romanian Civil Code (C. Civ.), respectively: (1) the capacity to contract, (2) the consent of the parties, (3) a determined and lawful object and (4) a lawful and moral cause.

Sometimes, the observance of a certain form is added to these conditions. But the rule of law, provided by art. 1178 C. Civ., consecrates the principle of consensualism according to which *the contract is concluded through the mere agreement of the parties unless the law requires a certain formality for its valid conclusion*. Therefore, the Romanian civil law does not require compliance with some formalities for the valid conclusion of a contract. The contracts for which the law expressly requires compliance with certain formalities are exempted from this rule, for example conventions that transfer or constitute real estate rights to be entered in the land registry (art. 1244), sale of an inheritance [art. 1747 paragraph (2)], the maintenance contract (art. 2255) etc. Sometimes

the document establishing the conclusion of the contract is necessary only to prove its existence, and not for the validity of the contract itself.

In order to be able to answer the above question, we must check if these conditions are applicable to the smart contract and what are their particularities.

We will start our analysis from the legal definition of the contract offered by art. 1166 Romanian Civil Code according to which the contract is the agreement based on the free wills of two or more persons with the intention of establishing, modifying or extinguishing a legal report.

2 Consent

From the etymological point of view, the consent (*cum sentire*) represents the agreement of wills that is the basis of the conclusion of any contract, with the purpose of reconciling the divergent interests of the contracting parties. [2]

According to Romanian civil law, consent is an essential condition for the conclusion of the contract. Each party must express its intention to be bound by the contract, respectively the intention to establish, modify or terminate a legal report. In the absence of this intention, an agreement of will cannot be reached. [3]

The smart contract is a contract concluded and executed on the blockchain, meaning through a computer network. Therefore, the smart contract is a contract concluded by electronic means, so that the provisions regarding the "distance" contracts are applicable to it. This implies that the parties are at a distance and communicate by correspondence, a circumstance from which a number of particularities arise.

The decisive element for the qualification of the contract as a contract concluded at a distance is the lapse of a time between the offer and the acceptance. The only way to conclude the smart contract is by unreservedly accepting an offer, as specified by art. 1182, and not by negotiation.

If the parties negotiate the clauses of a contract, either physically being simultaneously in the same place, or communicating by electronic means that transmit the information in real time (such as video, audio or even the transmission of the text if both parties are online), with the intention that the result of the negotiation be subsequently transposed into a smart contract, this cannot be considered as such a contract. This conclusion is drawn from the interpretation by analogy of the provisions of the Government Emergency Ordinance no. 34/2014 and of the recital no. 20 of Directive 2011/83/EU. [4]

In the case of the conclusion of the smart contract by an offer made by one party and its acceptance by the other party, similar to the classic way of concluding the contracts, the offer must be firm, sufficiently precise and complete, so that its acceptance constitutes the contract. [5]

Another essential condition of validity of the conclusion of the contract established by art. 1187 C. civ. is that the offer and acceptance must be issued in the form required by law for the valid conclusion of the contract.

The contract is concluded when and where the acceptance reaches the tenderer, even if the tenderer is not aware of it for reasons that are not attributable to it. Also, the contract is considered concluded when the recipient of the offer commits a conclusive act or fact.

The will agreement is always essential for the conclusion of the contract, but it is not sufficient. For the valid conclusion of a contract, the cumulative fulfillment of the following conditions is necessary.

3 The capacity to contract and the virtual identity of the parties

According to art. 1180 Civil Code, *"any person can contract provided that it is not declared incapable by law and is neither stopped to conclude certain contracts*". The subjects of civil law that can enter into legal relationships are therefore only natural or legal persons. In order to be able to validly conclude a contract, they must have the necessary civil capacity.

According to the new doctrinal orientation [1], the civil capacity is closely related to the quality of a civil law subject, but these are not confused, being distinct notions.

Exercise capacity is the ability of the person to conclude civil legal documents by itself, being acquired at the age of 18, when the natural person becomes of age.

Until the age of 14, if the minor is over 14 years old, he has a limited exercise capacity that allows him to conclude legal acts by itself, with the approval of the parents (guardian), and sometimes, in the cases provided by law, with the authorization of the court of law. Also, it can make conservation acts alone, administrative acts that do not prejudice it, as well as acts of disposition of small value, of current character and that are executed at the date of their conclusion (art. 41 New Civil Code).

Persons without exercise capacity, respectively the minor who did not reach the age of 14 and the judicial prohibition, cannot conclude legal acts alone, these being concluded on their behalf by the legal representatives. Exceptionally, they may conclude certain legal acts themselves, provided that these acts are of conservation or disposition of small value, of a current nature and which are executed at the time of their conclusion.

As for the smart contract, the main problem is not the capacity to contract of the parties, but their identity. [6] Blockchain transactions are pseudonymous because the authentication of each participant in the network is achieved by using a public key, without the need to reveal the true identity. The services of trusted third parties that verify the identity of the parties are not required in a transaction through the blockchain network.

Therefore, we consider that the law should regulate *de lege ferenda* transactions made through a distributed register. The Romanian legislator will have to pay special attention to the authentication methods, as well as to the security conditions in which the distributed registers will work in order to allow the transactions to have effect through the use of this technology.

4 The object of the obligation

The identification of the object is a disputed subject in the doctrine. Also, the relationship between the object of the contract and the object of the obligation is difficult to define. According to art. 1225-1234 of the New Civil Code, the object of the contract concerns three different notions: the good, the benefit and the legal operation.

In order to delimit the object of the obligation, we consider that the following general specifications are required:

– the content of the legal will is given by the object and its cause;

– the contract is the result of several concordant wills, each having a distinct content;

– the object is important as it constitutes the binder of the concordant wills.

According to art. 1225 C. Civ., "the object of the contract is the legal operation, such as the sale, the lease, the loan and the like, agreed by the parties, as it appears from the whole of the contractual rights and obligations".

The new Romanian Civil Code distinguishes between the object of the contract and the object of the obligation. Thus according to art. 1226 para. (1) C. Civ., the object of the obligation is "*the benefit to which the debtor undertakes*", and the object of the benefit (the derivative object of the obligation) is the goods (the material object). Thus, we observe that there is a close connection between the object of the contract and the object of the contractual obligation.

According to art. 1179 paragraph (1) point 3 of the Romanian Civil Code, the object of the contract must be "*determined and lawful*". From this regulation emerge the requirements that the object of the contract must meet, respectively it must exist, be determined or determinable, be possible, as well as be lawful and moral.

The object of the obligation of each party, both in the case of classic contracts and in the case of smart contracts, must be determined or determinable at the time of the conclusion of a contract. This obligation does not extend to establishing the price, with the exception of sales contracts where the price is the essence of the contract, and it is necessary to determine it for the validity of the contract.

If in a smart contract the obligations of the parties are clearly determined, either through a classic contract previously concluded (which is then "translated" or saved in the block chain network), or directly encoded in this network, we consider that there is no legal impediment to deny the binding force of this smart contact. [7]

5 The cause of the obligation

According to art. 1235 C. civ., the cause is the reason that determines each party to conclude the contract. The cause of the contract is not confused with consent, but together with it forms the legal will.

In the bilateral contacts, the obligation of each party has its legal cause in the obligation of the other. For example, the cause of the buyer's obligation to pay the price in a sales contract would be the seller's obligation to deliver the good.

In order to be valid, the cause of the contract must comply, according to art. 1236 C. civ., the following cumulative requirements: to exist, to be lawful and to be moral. These conditions are also applicable to smart contracts for their legal effects to be recognized.

6 Electronic form of the contract

The Romanian legislation contains specific provisions regarding electronic contracts. The new Civil Code expressly provides for the possibility to conclude a contract by electronic means. Thus, according to art. 1245, the contracts concluded by

electronic means are subject to the form conditions provided by the special law, respectively by Law no. 365/2002

In business-to-business (B2B) relationships, there are no restrictions on the use of electronic means to conclude a contract that, for example, could be concluded exclusively through e-mail exchanges. Therefore, the smart contracts could be validly concluded according to the Romanian civil law, provided that the essential terms of such a contract are accessible and easily understood by each party, as well as a technical mechanism that allows each party to express their consent through the use of cryptographic means.

Law no. 455/2001 expressly provides for the validity of an electronic signature. Such a signature is made using asymmetric cryptography [8] which allows the consent of each contracting party to be expressed.

Typically, distributed ledger technology (blockchain technology) uses asymmetric cryptography, which can also be used in smart contracts. Therefore, the current rules on electronic signature could be applied by analogy to smart contracts. But the current legislation could be adapted to the new contracting methods so that it corresponds to the demands of the modern world. In this sense, the Romanian legislator could consider the French model.

For example, we mention the decision of the Supreme Court of France which adopted a decision in 2015 [9] regarding the formation of contracts by e-mail exchange. An authorized accountant was requested by e-mail to offer tax advice by a company. After the services were provided by the accountant, the company refused to pay for these services, claiming that the email sent to the accountant did not represent a contractual offer, but was only a request for an offer. The Supreme Court of France decided that the email sent was accurate and firm enough to be considered an offer and a confirmation of the order. The contract was considered concluded when the accountant accepted this offer, when the latter sent his fiscal opinion to the company that requested it.

In a more recent judgment [10], the Court of Appeal of Paris issued a similar ruling on the conclusion of a service contract. A client sent an offer via email requesting that the supplier perform some renovation work on his home. The court decided that the precise and firm offer sent by e-mail indicated the client's intention to be bound by the offer if it will be accepted by the supplier.

Also in France, the legal framework [11] applicable to bonds ("bons de caisse") has been recently amended, which allows their issuance, subscription and allocation using a distributed register. Article L223-12 of the French Monetary and Financial Code [12], applicable from October 1, 2016, defines a distributed ledger as "*a common electronic registration mechanism that allows the authentication of these transactions under security conditions*", which will be defined in a future decree.

According to the new articles 1322 and 1323 of the French Civil Code [12] introduced by the reform of the contract law of 2016, the assignment of the debt must be recorded in writing and the debtor must be informed about the assignment. The French civil code was amended in 2016, and the new French civil code will apply to contracts concluded from October 1, 2016. The contracts concluded before October 1, 2016 will continue to be governed by the old civil law.

The new article L223-13 of the French Monetary and Financial Code recognizes the validity of a debt assignment using distributed ledger technology. A distributed register

is considered to replace the written form *ad validitatem* of the assignment, the debtor being notified of a transfer directly through the distributed register.

7 Conclusion

Our analysis shows that in the Romanian legislation in principle there were no impediments to the valid conclusion of the smart contracts, as long as they meet the essential conditions imposed on any contract.

Given the potential presented by this new form of contract termination, and taking into account the model of other European countries that have chosen to insert in their laws in certain regulatory areas regarding the technology of the distributed register, we consider that it is necessary to connect the Romanian civil law to new technological advances.

The conclusion of a smart contract can produce all the effects that the law recognizes in the classical contracts, but only when the conditions required by the law for their validity are met.

We considered that *de lege ferenda* the legislature should impose on the providers of smart contracts the obligation to make available to interested parties at least the following information: the technical steps to be followed in order to conclude the contract; whether this contract, once concluded, is stored or not by the smart contract provider and whether it is accessible or not; the technical means that the supplier of intelligent contracts provides to the parties to identify and correct the errors that occurred when entering the data; the language in which the contract can be concluded; relevant codes of conduct, as well as information on how these codes can be consulted electronically; any other conditions.

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Risks related to the non-fulfillment of the requirements provided by the legislator in the procedure for verifying and regularizing the request for legal action

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Abstract

The purpose of setting up the procedure for verifying and regularizing appeals was to seek to relieve the courts of requests that do not meet the formal requirements and also to discipline the participants in the civil process. Also, an important role achievable through regularization is the optimization and reduction of the length of the civil process, thus reducing the cases where the process is tergiversate. Thus, as a rule, no exception can be made in this procedure because it is contrary to the principle of contradictory law at the present time, since the defendant is not aware of the dispute.

Keywords: cancellation, regularization, review, exceptions.

1 The procedure for verifying and regularizing the request for legal action

This is provided by Article 200 of the Code of Civil Procedure, although it was presented as an absolute novelty introduced with the new procedural regulation, it was also in the old regulation in slightly different form. The Old Code of Civil Procedure regulates, in the framework of Article 114, a procedure similar to the current but very rarely applied in practice.

Although a penalty is not applicable where a claim for legal proceedings does not go through this procedure for objective reasons, from where it would appear that the absence of a sanction would be optional, having regard to the principle of law that the rules are designed to produce effects and not to produce legal effects, the procedure for verifying and regularizing the application is binding. This procedure is a administrative judicial procedure that is guided by its own rules and is not a novelty in the civil procedure.

Another argument is the necessity of a precursor phase between the time of filing the petition for bringing a lawsuit and putting it in court, which presupposes the making of a written correspondence only with the author of the petition to sue, in order to cover all its deficiencies; the necessity of the existence of the administrative phase having the role of accelerating the settlement of the civil process.

The procedure for verifying and regularizing the application is a guarantee of compliance with the principle of the low to a fair trial and the settlement of the case within an optimal and predictable timeframe, regulated both in national law and by Article 6 paragraph 1 of the E.C.H.R. "*Establishment of the procedure for regulating the application is intended to avoid the loading of instances of trial with incomplete requests, requiring repeated deferrals in order to supplement them (...) leading to a retrial, with negative consequences in terms of the optimal and predictable term.*"[1]

1.2 *The elements analyzed by the court and the sanctions that can be applied in the procedure*

Article 200 of the Code of Civil Procedure lays down the obligation for the tribunal to verify whether the request to sue is inconsistent with the nullity of the request. With regard to the other articles strictly stipulating the requirements that the request for a court must fulfill to be admissible, leaving the judge's altitude if it is necessary to impose a specific sanction, Article 196 of the Code expressly provides for one-off criteria need to be recovered and sanction if it is found missing.

Although Article 194 provides for the obligation to retrieve certain elements in the claim, Article 196 recalls some of them and highlights the sanction to be applied in the absence thereof. Thus, in paragraph 1 the legislator states that the judge will check in particular whether "the request for a court summons the name and surname or, as the case may be, the name of any party, the subject of the request, the reasons for it, the signature of the party or its representative" the sanction in case of non-compliance is the nullity of the application under the terms of Article 200 of the Code of Civil Procedure. It is noted that the legislator did not absurdly apply the sanction, summing it up to its application only as regards the condition concerning the name, surname, name of the parties, object, factual grounds or signature. We draw attention to the fact that the nullity will not be found at the time the judge checks the conditions, but will apply the provisions of Article 200, the sanction being applied only if the shortcomings will not be fulfilled within the time allowed. Therefore, by the existence of this article, the legislator distinguishes between essential conditions and non-essential conditions, categorized by doctrine. Paragraph 2 of Article 196 is a procedural derogation from the case where the request for a court action does not bear the signature of the party. Thus, the judge will check that the application is signed by the party and if this condition is not fulfilled, he will notify the party by summons, and the irregularity will be covered until the first following term. The article also highlights the time to which this irregularity can be covered, that is to say, throughout the course of the trial before the court of first instance, stating that when the irregularity was brought to its notice, the applicant will even sign the request at that time, and if he is not present at the first term to which it is quoted.

2 Exceptions in the process of regulating appeals

Usually, no exception could be made possible in this procedure because it is contrary to the principle of contradictory law at the present time, since the defendant is not aware of the dispute. Thus, even in the case of the **exclusion of the extinctive prescription, the deferment and even the exception of the absolute incompetence of the courts**, these means of extinguishing the civil action cannot be solved because of the reasoning shown; exceptions will be settled only after the parties have been consulted, for observing the principle of contradictory and respecting the rights of the defense.

However, the principle of contradictory may suffer exceptions in relation to the settlement of some procedural exceptions in the stage of regulating appeals. Thus, corroborating the provisions of Article 200 with those laid down in Articles 194-197 of the Code of Civil Procedure, it follows that the Court of Appeal's plea of incompetence (Article 200 (1) of the Code) can be resolved in this procedure, the non-deletion or inadequacy (Article 197 of the Code) and the exception of lack of proof of representation.

This derogation from the principle of contradictory principle therefore supports the effective implementation of the principle of celerity and settling the case within an optimal and predictable timeframe as laid down in both the Romanian Constitution and national legislation and in Article 6, paragraph 1 of the ECHR.

It is clear from the provisions of Article 196 of the Code that the judge has certain discretion as regards the application of the sanction for the annulment of the request for an appeal, in order to meet the conditions other than those provided for in Article 196 which implicitly imply a penalty for the nullity of the application. Thus, if the judge considers the procedural framework already presented as sufficient to resolve the case, he may proceed to the fixing of the first term of judgment even if, after having made the claimant observe certain gaps, he has failed to fulfill his obligation. It should not be borne in mind that the first hearing cannot call into question elements which could constitute a cause of cancellation of the claim in the regularization procedure, since the request can be canceled even after this stage for similar reasons but on the basis of different legal grounds.

One aspect of novelty is the provisions of Article 129 pt. 2, lin. 2, introduced by art. 1 pt. 14 of the Law no. 310/2018, by which the exception of functional non-compliance is categorized by the legislator as an exception to public policy, fitting it into the typology of substantive jurisdiction. Therefore, it follows that this exception of functional lack of competence, unless it is invoked *ex officio* by to the court, may be invoked by the parties, by way of a meeting or even later. But can this be invoked for the first time in a way attack?

3 The legal nature of the 10 – days limitation period to complete the gaps – Article 200 pt. 2

Pursuant to Article 200 (2) of the Code of Civil Procedure, after completing the procedure for verifying the request for a summons, if the panel assigned to the case finds that the application fails to meet the conditions laid down in Articles 194-197 of the Code, will communicate to the plaintiff all shortcomings required to be filled in order for the

application to be admissible. Also, at the same time, the plaintiff will know that within 10 days he has the obligation to fill the gaps provided or the demand is canceled.

It follows from the wording that the 10-day time-limit referred to in Article 200 (2) is an imperative legal term which can not involve changes in either the restriction or the extension. The court cannot shorten this term because the effect of the law was considered reasonable by allowing the complainant to regularize his claim within this time frame.

Both the doctrine [2] and the case-law [3] have held that the 10-day period provided for in Article 200 (2) of the Code of Civil Procedure is an imperative legal term, and it is not accepted that it is "*a recommendation, given that, in such a case, the 10-day time-limit for completing the application would be deprived of legal efficiency and the applicant could thus complete the application when it wished, which would be contrary to the purpose for which the stage of the settlement of the request was instituted." [4]*

In the *Broke v. Romania [5]* case, the European Court of Human Rights ruled that if the party was informed that within 10 days of receipt of the communication it had to fill the shortcomings and raised the applicable sanction in case of non-compliance and it did not comply, a solution for demand cancellation is perfectly legal and in line with the European Convention on Human Rights. Regarding the clarity of the provisions of the Code of Civil Procedure concerning the content of an application as regards its elements, the Court noted that since the applicant was informed by the court of its omission and of the need to submit the evidence within 10 days no it may be a violation of the right to a fair trial under Article 6 section 1 of the Convention.

4 The appeal against the termination of the cancellation of the application

The legislator regulates the appeal against the termination of the petition for legal action as a result of the non-fulfillment of the conditions laid down by law and the manner of settlement in Article 200, paragraphs 2-7 of the Code of Civil Procedure.

Article 200 (4) of the Code is the legal rule that provides for a remedy against the termination of the petition for failure to comply with its legal requirements. The lawmaker denotes *expressis verbis* the appeal by pointing out that *"against the termination of the annulment, the applicant will only be able to make a* ***request for a review*** *requesting a motivation to revert to the cancellation measure."* Here, the remedy against the annulment is the re-examination. We draw attention to the fact that the legislator is strictly in regulation and points out that this is the only way to appeal the court's decision by the phrase *"only"* and so removing any doubt.

The application for review is a special remedy so the provisions governing it must be interpreted contextually for the purposes of the regularization procedure. There is no doubt that the request of review is a genuine remedy. In support of this assertion, we put forward the argument that it is against a judgment imposing a sanction as a result of the applicant's failure to fulfill the obligations which were raised to him. Another argument demonstrating that the review request is undoubtedly a remedy is that it is settled by another panel of the court which initially solved the request, thus ensuring a system that guarantees impartiality in dealing with the case. Perhaps the strongest argument in support of the idea that the petition for a review is a genuine remedy is that the judgment

given is of a definitive nature, this being the very nature of the judgments against which an appeal has been lodged or which has been resolved last resort.

A peculiarity of this appeal is represented by the person who may be the holder. Thus, the only party who can exercise such a remedy is the applicant, and no other participant justifying an interest in promoting such an appeal. We point out that the doctrine has held that the request for reconsideration is a way of withdrawing.

We draw attention to the fact that the request for review provided for in Article 200 must not be confused with the request for a review of the method of setting the stamp duty. Article 200 (4) of the Code provides for a remedy against the termination of the action for annulment of the application for failure to comply with the settlement obligations within the time-limit laid down by the court, namely the first form of the review. Article 197, second sentence, governs another form of the review application, namely the request to reconsider the manner in which the amount of the stamp duty was established. It should be noted that the time limit within which these remedies can be exercised, 3 days after the notification of the due fee, respectively 15 days from the notification of the cancellation.

According to Article 200, paragraph 5, the time-limit for exercising the remedy of the review is 15 days from the date of notification of the termination of the request for a petition. Also, according to the following paragraph, it is settled by the court a final judgment given in a council chamber. The panel to resolve such a request is a body belonging to the same court to which the request for a review is randomly assigned. *"The judgment is conducted only with the applicant's quote, not the defendant."* [6] Although the review is a genuine remedy, it is also settled by the first instance but by another body, the composition of which is the one stipulated by Law no. 304/2004, respectively in the capacity of a judge, and in the cases of work conflicts by a judge and two judges under Article 55 (1) of the same statutory instrument.

5 The reasons leading to the admissibility of the review request

It is clear from the provisions of Article 200 (6) of the Code of Civil Procedure that, in order to be admitted and ordered to be returned, the measure of cancellation of the application must be wrongly ordered by the court or the irregularities alleged to be covered within 10 days of receipt of the communication. The complainant cannot rely on his own fault as a reason for returning to the measure, so the error must belong to the court, being the only one who could order the measure of annulment. Also, the non-fulfillment of the conditions set out in Articles 194-197 exclusively by the complainant or their late fulfillment beyond the given time limit is irrelevant because they do not fall within the two cases provided by the law. We consider the second condition to be the case when the applicant has completed the shortcomings within the 10-day time limit, but instead of filing them personally at the court registry, he communicated the fulfillment of the irregularities by postal mail.

We point out that the request for reconsideration is subject to the timetable, the tax due being in the amount of 20 lei.[7]

Given that the judge ordering the cancellation of the request in the settlement procedure does not rule on the substance of the case, the rejection being based exclusively on appearance and form, the solution regulated by the legislature in paragraph 7 of Article 200 of the Code in the event of the application being accepted is perfectly justified. Thus, if the application for reconsideration is admitted, the application will be sent to the initial pleadings filed with the case.

We recall that the conclusion of the request for review *"can no longer be the subject of the appeal since it has a definitive character. It was dismissed, the applicant has the possibility to make a new appeal, in compliance with the legal provisions, not being considered as a judgment, since the courts did not proceed, under Art. 200 of NCPC, on the analysis of its claim fund." [8]*

6 Request for review against the method of setting the judicial stamp duty

As we have pointed out in the previous sections, the application for review against the method of setting the judicial stamp duty should not be confused with the procedure for reconsidering the application as a result of its annulment of the initial plea for failure to fulfill the conditions laid down in Articles 194 to 197 of the *Code.*

We point out that this kind of review has its source in O.U.G. no. 80/2013 and not in the Code of Civil Procedure. Pursuant to Article 39 (1) of that Act, against the method of determining the judicial stamp duty, the applicant may file a request for review at the same court within 3 days from the moment of the notification of the tax due. Thus, as can be seen, the time-limit for exercising is different from the request for review provided for in Article 200 of the Code of Civil Procedure.

It follows from the interpretation of those provisions that a complainant who has doubts as to the veracity of the amount of the stamp duty or the manner in which it is established may lodge this appeal and not seek a return to the sanction of the cancellation of the application. We point out that, according to Article 39, paragraph 1, second sentence of O.U.G. no. 80/2013, that application for review is exempt from the stamp duty, contrary to the application for review provided for in Article 200 of the Code, to which it relates a judicial stamp duty amounting to 20 lei.

7 Conclusions

The process of verifying and regulating the call to sue is a mechanism that has been designed to speed up the process. Thus, the interpretation and enforcement of the law will be achieved by the courts, the only competencies to assess, in particular, to what extent certain grievances of the petition for appeal are sufficiently serious, in the sense that they can not be compiled from the documents filed, to justify the cancellation of the request in the regularization procedure. [9]

However, we draw attention to the fact that, if the judge orders the annulment of the application in the proceedings, he does not rule on the merits of the case, and the judgment can not be res judicata, and the applicant may reiterate his request.

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Theories regarding the basis of civil liability

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Abstract

This study deals with the theories regarding the basis of civil liability. The contents of this paper are opinions expressed in the specialized literature on the theories that represent the basis of civil liability in general, theories that have been formed along the evolution of society, especially due to its development. Various factors such as social, economic, cultural, legal factors have led to permanent changes in the law on compensation for damage.

Keywords: liability, civil, theories, basis

1 The basis of civil liability

1.1 *The notion of civil liability*

The social or legal freedom coexists with natural freedom, as well as with other forms of freedom. Social freedom is also called the legal freedom because it is the direct expression of legal regulations, of the law governing human behavior in the social environment. From the Romanian Constitution to the normative acts, we identify that all these regulate the social relations constituting, acknowledging and guaranteeing human freedom, but not in its ontological form, especially as legal liberties. But it is not enough to consecrate and guarantee these rights, but it is also necessary to have a "free and effective justice whose purpose is not only the letter of law enforcement, but also the justice as value beyond the bounds and conditions of the law." [1]

Social freedom means the capacity and the judgment of a person to choose, to decide and to achieve. In the situation when the manifestation of the individual social liberty violates the normative general then the legal liability and the legal sanction will intervene.

Ethnologically, the word "liability" comes from Latin, in which the verb "respondeo, -ere" means "to answer".

The explanatory dictionary of the Roman language [2] assigns several connotations to the verb "answering" among which "to account, to be liable, to take responsibility for their deeds or for someone else, to guarantee for someone."

"Liability is an essential condition of freedom, both at the macro and the micro level: an irresponsible power is tyrannical and decadent, an irresponsible individual is a disturbing factor and a degraded being. On the contrary, a free man is one who is aware of the consequences of his actions and is responsible for them. "[3] One of the fundamental principles of law is liability. "He who is guilty of violating the social values protected by the legal norms affects public order and morals, disturbs the good development of social relations, and affects the legitimate rights and interests of his peers. For these reasons, he is bound by the law to be liable." [4] "Liability is a corollary of freedom because only a free man can be liable for his acts." [5]

Civil liability is a form of legal liability, as it is an integral part of it. "... by civil liability we understand one of the forms of legal liability that consists of the obligation of any person to repair the damage he has caused to another." [6]

"The field of civil unlawfulness is not strictly limited to violations of the legal norms of civil law, but encompasses all the facts that violate legal norms of civil nature .... Meeting all requirements of civil liability requires restoring the equilibrium broken by committing the illicit deed. Ultimately, civil liability means repairing the damage illegally caused or contractually generated." [7]

1.2 *Theories underpinning the basis of civil liability*

The explanatory dictionary of the Romanian language [8] defines the verb "to underlie" as follows: "to lay the foundations for an idea, a theory, a program, etc.; to establish, to consolidate; to demonstrate with scientific arguments", as a consequence substantiating the assumption of identifying the elements underlying a theory.

Analyzing the basis of civil liability, it has been established that over time it has been based on objective elements: on the idea of risk, warranty, equity or subjective elements: fault, mistake, guilt/culpability, or a combination of these elements.

Theories that have been formed on the basis of the above-mentioned elements are: subjective liability theory, objective liability theory, and mixed theories that are based on the basis of responsibility on a mixed ground.

1.2.1 Subjective liability theory

Subjective civil liability reflects the idea of the culpable, which means that in order to engage civil liability it is necessary to prove all the characteristic elements (damage, illicit deed, causal relationship between the illicit deed and damage) and also the culpability. Consequently, in subjective civil liability, "the prejudicial act must necessarily be guilty". [9]

"This is the culpable illicit act, the basis of subjective civil liability, because its source is sought and located in the will of an individual, a thinker and observer [10], who is fully conscious of his antisocial deeds and their negative consequences." [11]

In the event the causes that exempt from liability occur, respectively the force majeure and the fortuitous case, it falls under the victim's responsibility to repair the

damage. "If, on the contrary, among the events that contributed to the damage, one of them is due to a guilty act of a person, then that person will be liable to the extent of their direct participation in the occurrence of the damage." [12]

Article 1357 of the Civil Code [13] contains the conditions of civil liability, namely that the person who is at fault for the damage that was caused, to repair it. The conditions of civil legal liability must be proven by the victim of the damage as follows: they must prove the existence of an illicit act, of the damage, the causal relationship between the two and the perpetrator's fault (the subjective element), an element that links the person to their act and its consequences.

In this theory, civil liability applies only in the case where an illicit act is committed with guilt. This kind of liability appears to be a civil law reparative sanction. As it can clearly be noticed, article 1357 of the Civil Code [14] becomes incident only to the extent that the perpetrator's fault can be proved against the prejudicial act and its consequences.

Regarding civil liability for another's act, for various things or for animals, we note that the person is presumed to be guilty, and as a consequence, can be held liable without proof of their intention, negligence.

In conclusion, the theory of subjective liability is based exclusively on guilt. Guilt is the essential element without which it cannot be conceived to incur civil subjective liability.

1.2.2 Objective liability theory

The industrial evolution at the end of the 19st century led to the identification of civil legal liability as inadequate for social needs, therefore it was deemed necessary to incur civil liability on other grounds than the guilt, fault. Thus the objective civil liability theory appeared; liability that was to have other grounds than the subjective civil liability, namely fault to be abandoned as sole basis of civil liability.

"The concept of objective liability appeared for the first time in modern law in the German legal doctrine. Among the objective grounds proposed by the German authors, the specialized literature emphasized the principle of causality, the principle of active interest, the principle of predominant interest and the idea of risk". [15] As a consequence, civil liability is no longer subjective but objective based on the fact material act of causality: the person who caused the damage by their act is liable. Thus the risk theory of profit appeared, "Ubi emolumentum, ibi onus." [16]. "Ubi emolumentum, ibi et onus" means that "since it is not allowed to prove the diligence, the only prove is the fortuitous case or the force majeure and the victim’s fault, we cannot speak of the fault anymore, but of risk, erroneous terminology of "absolute presumption of fault", which should not mislead us. Therefore, the one who has "custody" of the thing assumes the risk of all the damages that the thing is susceptible to produce." [17]

This theory has proved to have applicability limited only to lucrative activities, which has led to the widening of the scope of this theory. As a consequence, the risk theory has emerged as the form of risk theory. The theory of risk created is driven by the idea that any profit (both pecuniary and moral) obliges a person to repair the damage created by profitable activity. Many doctrines have been criticized for the theory of risk, criticism regarding the effects of profitable activities; of judicial practice which in most cases requires proving the wrongful illicit act. Thus, the activity risk theory appeared,

according to which "where there is authority, there is also the risk of repairing the damages created by the activity of the subordinates." [18] (the liability of the moral author for servants, the liability for the prejudicial acts of minors and of those under interdiction).

"The scope of objective liability cases is closely related to the degree of cognoscibility; as the development of the technique, on the one hand, generates sources of increased danger and, on the other hand, restricts their sphere, the content and categories of great danger sources are determined continuously by the development of science and technology, by the widening of the human control over the application and use of the technique; the cognoscibility and the sources of great danger appear therefore as two correlative logical categories, generated by this dialectical process of knowledge.

Since the use of the technique implies a certain probability of causing damage without fault (being the source of a special danger to those around), it is necessary – in a harmonious combination of personal interests with the interests of the community – to create conditions that exclude the possibility of producing such consequences."[19]

The objective civil liability is based on the idea of risk being a causal liability, i.e. the grounds of this liability lies in the objective causal relationship created between the damage and the illicit act, without taking into account the fault of the perpetrator.

The differences between the two types of liability are essential, subjective liability is based on the culpability of the person or the author of the damage, fault that must be proven, whereas in the case of objective liability the fault must not be proved, being based on the causal relationship between the damage and the illicit act, this type of liability intervening as a guarantor for the victim of the damage because the one who is supposed to supervise guarantees the risk of the authority exercised over the servant, the minor or the mentally ill under interdiction.

1.2.3 Mixed (eclectic) theories

Taking into consideration the basis of each theory on the evolution of society, it was found that they complement each other hence a new mixed theory arose. Some authors have argued that guilt is the key element of civil liability, "the risk only intervenes in the subsidiary, when equity demands the contest to help the victim." [20] Other authors [21] consider that civil liability occurs both for fault and for risk, without subordination from one element to the other.

Also, this theory has been criticized given the fact that the two elements, namely the guilt and the risk cannot be strictly distinguished, therefore they returned to the idea of guilt. "This theory is responsible for deforming the meaning of the word "fault", to which a totally different connotation is attributed than the usual one. Two pieces of criticisms have been made against this conception: first, it is in contradiction with itself; rejecting the risk theory in the name of morality, considering it materialistic, and admitting, on the other hand, that civil guilt is distinct from moral guilt, are two irreconcilable ideas; the consequences of an illicit act committed with fault (intentional, imprudent or negligent) are not the same as those of the morally impeccable acts they designate; guilt in the proper sense of the word, has, in law and jurisprudence, consequences that cannot be attached to the concept of civil guilt without moral content or social fault."[22]

1.2.4 Warranty theory

The author of this theory, Boris Starck, has a new vision of civil liability, namely that based on the notion of warranty, considering that one can speak of objective liability for material and corporal damages and a subjective liability for economic and moral damages. This theory has also been criticized in terms of its basis, and no classifications of this type could be made either in doctrine or in jurisprudence.

1.2.5 The precautionary principle as the basis of civil liability

This principle applies to environmental law mainly in view of environmental liability with regard to the prevention and repair of environmental damage, but later gained more valences being considered as a general principle of civil liability. The idea of preventing and repairing the damage is in fact a future-oriented civil liability offense, even talking about repairing a future damage, predictable or not, whether or not it is evaluable. The liability for events that have already taken place is based on the idea of sanctioning and repairing, while the precautionary principle takes into account the idea of prevention and precaution. Has the question of whether the precautionary principle may be the future of civil liability been asked in the specialized doctrine?

2 The Basis of Civil Liability in Current Roman law

Taking into consideration the doctrine and the judicial practice, the idea of fault was supported as a sole basis for the civil liability.

In 1921, the idea of warranty was dissolved whereas it applied to situations of liability for the act of another person, for things, animals and the ruin of the edifice. In the interwar period, the idea of risk is emerging in the basis of liability for things and animals.

Since the 1960s, the national jurisprudence has admitted cases of objective civil liability in cases of liability for things, the liability of the moral author for the actions of their servants.

Currently, civil liability, especially for one's own act, is based on the idea of guilt as the general rule. The objective civil liability is a deviation from this rule in the case of those who are held liable for the act of a juvenile person or a person under interdiction, the liability of the moral author for the acts of the servant, the liability for damages caused by things in general, animals and ruining the edifice for damage caused by aircraft, nuclear accidents, for damages caused by an illegal act of a public authority, through legal errors, by defective products, for environmental damages, these being regulated outside the New Civil Code. The provisions of article 1349, paragraph 4 of the new Civil Code states: "The liability for damages caused by defective products is established by special law."

In the New Civil Code, the liability for one's own act is regulated by articles 1357-1371; articles 1372-1380 that set forth the liability of certain people categories for the illicit act committed by another person, the liability for damages caused by things or animals, the owner's liability for the damages caused by the ruin of some buildings belonging to him.

We consider that the New Civil Code solves the question of the basis of civil liability mainly based on the solutions offered by the doctrine and confirmed by the judicial practice.

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The special evacuation procedure of buildings occupied without right

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Abstract

In order to protect the right of use in a more efficient manner, the legislator has adopted a special procedure that gives easy access to its means of defense. The special evacuation procedure brings quickness and promptness while the creditor of the right of use has to follow. The regulation is given in Book VI, Title XI of the Code of Romanian Civil Procedure. The legal characters show us that the evacuation procedure is: special, optional, summary, urgent and contentious. The adverse parties in the trial are on the one hand the owner or the lessor and on the other hand the lessee, respectively the tenant. The competence in solving the case having as object the evacuation of the buildings used or occupied without right belongs exclusively to the court within the district of which the building is located. According to the legal provisions before addressing to the court, the plaintiff must notify the defendant asking him to vacate the building. The legal contest is not compulsory, and the debates are summary and take place in the council chamber. The decision of evacuation given in the first instance is enforceable. The forced execution started on the basis of an evacuation decision given in this procedure in principle cannot be suspended.

Keywords: special procedure, evacuation procedure, property defend, right to use, illegal occupied buildings.

Starting from the need to simplify the necessary procedures for the resolution of legal situations that are often recurrent but quite clear and which required a consistent procedural effort, with long terms and possible suspensions, the new code of civil procedure proposed in the matter of evacuation, a special procedure, but optional for the possession of those entitled to use a building. Thus, following the implementation of a procedural and legislative novelty, a protection of the right of use and implicit ownership of the property was envisaged by shortening the time and avoiding unnecessary delays in acquiring possession. The right to defend and maintain an equity between the parties was also taken into consideration because the passive procedural parties are given the possibility that by indicating a valid title they will keep the use of the good.

The headquarters of the Matter

The settlement of the procedure can be found in articles 1034-1049 of the New Code of civil procedure and is applied in disputes regarding the evacuation of the buildings used or occupied without right by the former tenants or other persons. It is structured on 3 chapters, respectively: General provisions; Evacuation procedure and Special provisions.

Legal characters

First of all, regarding this procedure, we can see that it is framed in the special procedures of civil procedural law, which indicates to us, the fact that it presents some derogations from the common procedural norms and therefore it is by definition a special procedure. The application of this procedure is done successfully when the legal situation is quite clear, which is why the legislator has opted that in order to protect the property right, the owner has at his disposal such an efficient instrument that will give him the possession of his good. The fact that it is a special procedure imposes suppleness, adds regulations that are different from the common procedure. Here are some differences that can be highlighted, namely: the need for prior notification regarding evacuation; the non-obligatory legal contest, judged in the council chamber, the decision regarding the evacuation is enforceable from the first court.

The evacuation procedure is an optional procedure that leaves open the possibility for the plaintiff to also choose the most difficult route to the common law procedure. The option of evacuation in this special way does not prejudice the right of the owner or lessor to pay the rent, lease or compensation for the lack of use. Moreover, the active procedural party will be able to ask for the achievement of the contractual rights once the payment of the rent or the rent has become demanding during the trial.

One of the characteristics of the special evacuation procedure is the summary, according to Article 1042 paragraph 2 this implies summary debates. It must be said here that the court will have to see whether or not the defendant has a housing title under which he occupies the building in question. That is why the documents are determinant in making a decision. The plaintiff must prove that he has the right to own the building and the defendant has a valid title. We see that from this perspective the debates need not be expanded in any way. The plaintiff is not allowed to make in this procedure a request for the cancellation, resolution, finding of invalidity or termination of the title of the defendant, and the defendant cannot make a counterclaim or a request for guarantee. However, taking into account the importance and effect of this decision, the summary of the debates does not mean that they are superficial especially on the merits of the legal relationship between the parties, but only prevent further formulation of requests.

The urgent character of the procedure is also highlighted by Article 1042 paragraph 2 "*The evacuation request is judged as an emergency, in the council chamber"*. The implications of an emergency judgment also contain the possibility of the judge to shorten the term of handing over the summons or of a procedural document, the first term is fixed after verifying the request with the possibility of compression, and not after the expiry of the submission deadline of counterclaim. The domicile of the defendant will be considered at the address of the building that is being evicted, thus simplifying the summons procedure. The fact that the judgment of the first court is enforceable denotes in the same

urgent way because it brings to the owner the possession of the good before the final completion of the trial.

The eviction procedure is a contentious procedure because the court verifies the defendant's right to use the building in contradiction with the plaintiff. The purpose of the procedure is to issue an enforceable title, i.e. to establish a right against the defendant who will have a correlative obligation to hand over the building.

Competence

The competence from the material point of view in the first instance belongs to the court, in this way it has absolutely no relevance the value of the building or the accessory's claim to pay any amount of money for rent or lease. From the territorial point of view, it is the jurisdiction of the court under which the building is required to be evacuated. The competence is exclusive to the parties not having the possibility to agree in contrary to the legal provisions.

Active procedural quality

In the specialized literature, it has been shown that: "*From the analysis of Article 1033 NCPC" (n.n. currently 1034) "the active or passive procedural quality also results in this special procedure. In this respect, the active procedural quality may be held (by the plaintiff) the owner [who may be in this procedure both the owner of the property right on the building, as well as the tenant – Article 1033 paragraph (2) letter f) NCPC], the main lessor, the sub-lessor, the assignee or the acquirer of the building – Article 1033 paragraph (2) letter c) NCPC.*"[1]

The same considerations were repeated in the doctrine[2], considering, justly, that only the owner or lessor may use the special evacuation procedure.

"Article 1033 para. (2) The NCPC enumerates in a limited way the persons who have an active procedural quality in the special procedure: the lessee when he wants to evacuate a third party, the main lessor, the sub-lessor, the assignee or the acquirer of the building"[3].

Thus, in order to have the active procedural quality, the plaintiff must be the owner or the lessor of the building.

According to Article 1034 paragraph (2) letter c) Civil procedure code, by "lessor" is meant "the main lessor, the sub-lessor, the assignee and the acquirer of the building;".

The main lessor is the one who in exchange for a rent gives up the use of his good.

Sub-lessor is the person who rents the property to another person.

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[1] Claudiu Constantin Dinu, Special Procedures in the new Code of Civil Procedure, Universul Juridic Publishing House, Bucharest, 2013, p. 241.

[2] Viorel Mihai Ciobanu, Traian Cornel Briciu, Claudiu Constantin Dinu, Civil procedural law. Law civil execution. Arbitration. Notary law. Basic course for Bachelor and Master, seminars and exams, National Publishing House, Bucharest, 2013, p. 449.

[3] Ruxandra Adina Gingărașu, Action in claim, action in evacuation of buildings occupied abusively, the owners' requests – similarities and differences, in the Romanian Business Law Magazine no. 9/2015, available on: https://www.juridice.ro/413644/ruxandra-adina-gingarasu-actiunea-in-revendicare-actiunea-in-evacuare-din-imobilele-ocupate-abuziv-cererile-posesorii-asemanari-si-deosebiri.html

The assignee is the holder of the right to use the immovable property from an assignment.

The acquirer of the building appears when the main lessor sells the property to a third party and this new party exercises his right of use under the conditions provided by the former owner.

Letter f) of the same article defines "the owner" as "the owner of the property right on the building, including the tenant". Thus, we observe that the tenant can also use this procedure when he wants to evacuate a third party.

Passive procedural quality

As regards the passive procedural quality, this can be assigned by:

– lessee – the main lessee, tenant or lessee, sub-lessee or an assignee of to the lessee, whether the person requesting the eviction is the lessor or sub-lessor or the acquirer of the building;

– occupant – any person, other than the owner or the lessee, who actually occupies the building with or without the permission or approval of the owner;". It should also be mentioned in the case of the occupant that between him and the owner there should be no contract on the use of the good.

Also, *"occupant means any person other than the owner or the lessee, who actually occupies the building with or without the permission or approval of the owner, without that a contract regarding the use of the good has been concluded between these persons. Person who occupies the building with the permission or approval of the owner is named in the doctrine and in judicial practice as tolerated. From the definition of this term, as well as from the entire regulation, it concludes that the special evacuation procedure can also be used in the event of non-existence of previous housing relationships between the parties, the only condition being that the defendant (the occupant) to occupy the building in fact, without being able to oppose to the plaintiff a title that justifies the use of good in question"* [4].

"From the analysis of Article 1033 NCPC" (n.n. currently Article 1034) "the active or passive procedural quality also results in this special procedure. (...) Passive procedural quality (held by the defendant)

can return to the former lessee [within the meaning of Article 1033 paragraph (2) letter b) NCPC – that is to say, the main lessee, tenant or lessee, sub-lessor or assignee of tenant or third party – occupant, without a property right]"[5].

When a person occupies a building without the permission of the owner it bears the name of usurper. Thus, there are two categories of occupants: tolerated persons and usurpers.

We can only conclude from the analysis of the procedural parties that a procedural and substantive dichotomy is formed on 2 pairs, one comprising the lessor versus lessee and the other one comprises the owner versus occupant.

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[4] Coordinator Gabriel Boroi, New Code of Civil Procedure. Comment on articles. Vol. II. Art. 527 – 1133, Hamangiu Publishing House, Bucharest, 2013, p. 642.

[5] Claudiu Constantin Dinu, Special Procedures in the new Code of Civil Procedure, Universul Juridic Publishing House, Bucharest, 2013, p. 241.

As we consider it is necessary a consolidation of this classification we will expose some of the particularities of each pair.

Therefore, the relationship between lessor and lessee is largely regulated by the civil code, and if it is concluded for a definite period and expires, and the contract is authentic or registered with the competent fiscal body, it represents the enforceable title regarding the obligation to return the good given in lease. The same thing happens in the case of the lease contract concluded for an indefinite period upon the expiration of the term from the notice of the party denouncing the contract. So, the use of this procedure will be made, when we do not find ourselves in the situations described above, because otherwise already having an enforceable title, the action will be rejected as lacking of interest.

The generic orientation towards this procedure is made then there was a valid lease signed and it ceased before the court was notified. In order to make the plaintiff's step effective, the lessee's right to use the building must have already been extinguished. There is no possibility to request the court to interrupt or find any reason for termination or nullity of the contract that gives the lessee the right to use the building. Therefore, the lessor will have to prove from the point of view of the contractual content, that the lessee loses any right of use of the building. If we take into account the legal practice, we observe that the possibilities for a lessor to get in the situation to use this special procedure keep the structure of the contract. We first consider the terms and the duration of the contract. The most common situations are when the contract has reached the termination and has not been extended anymore. However, the lessee must be notified of the lessor's wish to terminate the contract if it is for an indefinite period or with an automatic extension.

The commissoria lex has a fairly widespread applicability to the lease agreement, and it is as we know a clause that leads to the termination of contract when one of the parties culpably fails to execute an obligation. By inserting a commission clause, the main aim is to terminate the contract without the intervention of the court. We think that by the way a commissary clause is structured this rule represents an application of the term as a modality of the legal act, because as a rule it is necessary to execute an obligation within a certain period of time, and if this interval is exceeded, the commissory clause is activated. As we know the commissaria lex is classified in 4 degrees: the first requires the intervention of the court in order to terminate and even a judicial term of grace can be granted; for the second degree the court will intervene to find out whether or not it is appropriate to terminate according to the contractual conditions; the third degree will limit the court only to find out whether or not the termination took place, however, it is necessary to delay the debtor; under the conditions of the fourth degree, the termination takes place in full right without the intervention of the court and without delaying the debtor.

Like the contractual terms, the other modalities of the act of giving into use respectively the condition and the task must be considered. Of course, lease agreements affected by modalities can be concluded in this way a very wide range of possibilities can be distinguished. Moreover, some of them may also take the legal form as it is the lessee's task to carry out the repairs that come from the current use of the building. But what is relevant for the studied procedure is whether and under what form the right of use disappears when performing them. Because if the intervention of the court is necessary, going through the special evacuation procedure, it remains somewhat meaningless – when

in the common procedure it will be required the termination of the contract or its most likely termination due to legal efficiency will require the eviction of the lessee.

Regarding the other pair, it should be emphasized the lack of any legal relationship that would give the defendant a right of use over the building, practically for the action to be admitted the occupation must be simply abusive. Even in the situation in which the defendant holds a null or void title but without this being established by a court decision, the action will be rejected. In the event that the defendant is prevailing on a title of property over the occupied property, the plaintiff can exclusively promote the action in the claim, in which the court will proceed to compare the titles of property exhibited by the parties, not having at hand the special procedure for defending his right. The action in claim has in the foreground the plaintiff who claims to be the real owner of a good but who has lost possession and asks to compel the defendant to recognize his right of ownership and to return the good. Obviously, it is not permissible for the claim action to be disguised as an eviction action.

In the specialized literature, it was mentioned that: *"However, if the defendant is not a tolerated person, in court practice it was decided that any other action brought by the alleged non-owner against the non-owner is an action in the claim"* [6]

the relevant doctrine held that: "*In the matter of the eviction action, the property right on the building is not questioned, but only its use, the use violated by the defendants, following the occupation with no ownership title of the building"* [7]

The eviction action is a personal action whose opportunities are born when the right of use is violated and from here the obligation to return, to hand over the good to the holder of the right of use is born.

The specialized literature mentioned that "*unlike the action in the claim which defends the property right and which is a real action, the eviction action is a personal action"*[8].

As far as the prescription of the right to action is concerned, this is prescriptive within the general term of limitation of 3 years if it is based on a right of claim and impracticable if it is based on a real right.

When the defendant opposes a title, the eviction action will be rejected as unfounded. The only appropriate option in this case is to promote an action in the claim.

Regarding the prior procedure between the lessor and the lessee, the notification of obligation to leave the building will be made based on an evacuation term of 30 days from receiving the notification in the case of contracts with the determined period or according to the notification of termination that accomplishes the role of notification on evacuation for those of indefinite duration.

Thus, the specialized literature considered that "*The appeal to the analyzed procedure is only possible if the lessor/owner has completed the prior procedure*

[6] Claudiu Constantin Dinu, Special Procedures in the new Code of Civil Procedure, Universul Juridic Publishing House, Bucharest, 2013, pages 237-238.
[7] Coordinators Viorel Mihai Ciobanu, Marian Nicolae, New Civil Procedure Code, commented and annotated, Vol. II. Articles 527-1134, Universul Juridic Publishing House, Bucharest, 2016, p. 1535.
[8] Claudiu Constantin Dinu, Special Procedures in the new Code of Civil Procedure, Universul Juridic Publishing House, Bucharest, 2013, p. 238.

(notification of lessee/occupant) and only in cases where eviction is requested for lack of title to the person who uses or occupies the building"[9]

For the lawless occupants the law imposes a period of only 5 days for the evacuation of the building.

The summon and communication of the procedural documents will be made to the address of the building to be evacuated for both the lessees and occupants. They are considered to have the domicile at the building that is the subject of procedure and if it is closed, the procedural documents will be displayed at the door of the building.

Evacuation can be voluntarily achieved, without the need for any judicial procedure if the lessees or occupants have left the building. It is presumed that the building will be abandoned if the economic activity previously carried out by the lessee or occupant or the persons under their control ceased, in the event of termination of use, when the keys to the building were returned, or the equipment, the goods were lifted in their entirety or other movable property that was in the building.

If the evacuation was not voluntarily made and it has come up by the refusal of the lessee or the occupant to leave the building, the court on the area of which the building is located will be notified in order to submit by executive decision on the immediate evacuation of the building.

The request for evacuation is judged by the summons of parties, except in the case when the building is demanded to be evacuated for non-payment of the rent or the lease on the basis of a contract representing the enforceable title. The legal contest is not compulsory, and the debates are summary, in the council chamber and are judged urgently.

The evacuation decision is enforceable, it can be appealed only by appeal within 5 days from the pronouncing if it was given with the summons of the parties or from the communication when it was given without their summons.

The admissible defenses that can be formulated by the defendant are those regarding the substantiation of the factual and legal reasons of the introductory application, as well as those regarding the lack of title by virtue of which the plaintiff requests the evacuation.

The forced execution and the possible legal contests to the execution are subject to the regulations of common law. However, the suspension of execution of the eviction decision is not admissible, being only allowed in the event of eviction for not accomplishing the obligation to pay the rent or the lease, the suspension can be requested by appeal or by legal contest of the execution only after the payment of the amounts that the creditor is liable to pay, the amount established to insure the rates of rent or the lease due up to the date of request for suspension and that related to the rates of rent or lease that would become due during the trial. The suspension ceases de jure if at the expiration of the term for which the rent or lease was covered the debtor does not deposit the amount to be established for the coverage of new installments.

By special provisions the new code of civil procedure provides for some other cases in which this procedure can be followed: when the lessee commits abuses of use, against the owner when it disturbs the good coexistence in the building with several floors or apartments, or in order to carry out repairs, the lessee or sub-lessee, may be obliged to restrict the use or even the evacuation of the building.

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[9] Coordinators Viorel Mihai Ciobanu, Marian Nicolae, New Civil Procedure Code, commented and annotated, Vol. II. Articles 527-1134, Universul Juridic Publishing House, Bucharest, 2016, p. 1561.

Finally, we can conclude that by making available by the legislator this procedure was envisaged a strengthening of the modalities of exercising the prerogatives of the right of property but also of sanctioning the abuse of law. The urgent nature of the procedure, the short deadlines, the enforceable character of the decision for evacuation from the first instance, the lack of possibility to suspend the forced execution even during the 3 months of winter are solid positive reasons to go through this procedure when necessary and relevant.

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