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ID THEFT IN CYBERSPACE

Maxim DOBRINOIU*

Abstract

Obtaining personal data, identification data, including data which allow the use of a electronic payment instrument, or any other data generated in the context of one person's activities in the social, economic or financial life, without its consent or by deceit, if this occurs in computer systems or through electronic means of communications, should be considered as a crime and punished accordingly.

Keywords: *ID Theft, Cybercrime, Social Engineering, Phishing, Computer-related Forgery*

1. Introduction

Like other countries, nowadays Romania need to face, more and more, a exceptionally serious phenomenon, which, unfortunately, haven't got a relevant and comprehensive attention from the legislators.

It is about "Identity Theft" (or ID Theft), with its aggravated form when the action is committed by the use of computer systems or electronic means of communication.

As a notion, the „identity theft" has an improper name, because the identity of a person is not actually stolen, but rather taken over (or assumed, acquired) illegally and further used generally to commit other offences. In other words, we are not dealing with a crime against property, but with a crime against the person (as stated in the New Criminal Code, Title 1, Chapter IX – crimes against the residence and private life of a person).

By „identity theft" one could understand the obtaining, illegally (unauthorized), of personal data or other data related to the social or professional activity of a person or data resulted from the person's interaction with a financial institution, if later on the use of this acquired data is capable to generate legal consequences or to cause a loss of property to that person.

2. Paper Content

From a technical perspective, the „identity theft" could be performed by one of the following methods:

Social Engineering is defined as a collection of means, HW and SW tools and communication strategies by the use of which the victim is deceived related to a situation or a fact and thus manipulated to provide personal data, confidential or financial information, or determined to act in the manner required by the attacker.

The manipulation techniques are used by the attacker in the conversation with the victim (directly, by telephone or through any other electronic mean of communication), while the deceiving is performed with the aim to infringe the victim's psychological „barriers", and make her disclosing data or doing actions that, in other conditions, would have not been done.

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Pharming is a special type of computer-related attack which takes place when the attacker insert certain computer data in a Domain Name System's IP allocation table responsible with routing the victim's personal computer browser requests to fake webpages or to other internet resources controlled by the attacker.

The Domain Name System (DNS) initiates the process which allow a certain user to connect to a webserver (or a webpage) by typing the desired URL (web address) in the browser address area. It is known that, in Internet, computers communicate only based on IP addresses, and the equipments in charge with the translation of the domain names into IP addresses and back are the DNS servers. These servers store databases with relevant details like <domain name – associated IP address> of the numerous active networks, and have the capacity to memorize new such connections, in order to facilitate the user's fast access to the needed resources. DNS servers are organized on a hierarchical structure, the most important of them (called *root*) being generically named from „A" to „M" and hosted by the significant Internet providers from US, Japan, UK and Sweden.

By methods like DNS ID Spoofing or DNS Cache Poisoning, an attacker has the possibility to modify the DNS allocation table records, and, thus, to redirect the victim's web traffic towards a fake resource or to a server he controls.

Phishing is, maybe, one of the most known crime activity. It is used by the cyber-attackers to steal personal data or identification data related to electronic payment instruments. The victim is lured, often by a convincing email message, to click on a provided hyperconnexion (link) and, through it, to access a fake webpage, imitating almost perfectly the genuine one the user expects to find, hosted on a server controlled by the attacker. Once browsing on the forged webpage, the victim is tricked into providing its personal data, identification data or other kind of information used in financial transactions or online shopping.

Skimming to a ATM is that method by which the perpetrators mount and conceal outside of a cash dispenser (Automated Teller Machine) a device especially designed to read and copy the data stored on the magnetic stripe of the credit cards. While at the ATM, the victim doesn't notice the forged surface (cover) attached and uses its own credit card to perform a certain financial operation. Technically, before the victim's card actually enters into the ATM, its magnetic stripe is read by the microcontroller's head (like reading a videocassette or an audiocassette) and the data is then copied to a storage mean (also concealed in the attacker's equipment). After a variable number of such „read&copy" (depending on the capacity of the storage mean), the attacker comes back to recover the equipment and the masking cover.

Over time, many opinions have been expressed in the criminal doctrine related to the correct indictment of such an action (skimming), but only recently, following an „appeal in the interest of the law" from the Romanian General Prosecutor's Office (the Public Ministry) for the unification of the courts' decisions in this kind of criminal cases, the High Court for Cassation and Justice issued the Decision no. 15 of 14 October 2013, published in the Romanian Official Gazette no. 760 of 6 December 2013, stating that the only applicable legal solution is the one generically called *illegal operations with equipments and computer data*, with the provisions of Article 365 2nd alignment of the new Criminal Code, respectively *the detaining, without right, of a device, a computer program, a password, an access code or other computer data, line those mentioned in paragraph 1, with the aim to commit one of the offences from Articles 360 to 364.*

In this case, the solution issued by the High Court of Cassation and Justice is incomplete, because it doesn't map entirely on the technical reality and ignores the specific link requested by the offence of *illegal operations with equipments or computer programs* (as tool-crime) in connection with another offence (as end-crime or target-crime) which the High

Court fails to nominate in its above-mentioned Decision, but which is obvious and it consists of the crime provided by the Article 364 of the Criminal Code, namely *the unauthorized transfer of computer data from a computer data storage* (the credit card).

In this moment, with the exception of the Skimming (which seems to be in a way solved by the High Court Decision), the „identity theft" is legally regarded as a computer-related forgery (Article 325 of the new Criminal Code), and, in some scenarios when the data has been already used, ID Theft is regarded as a crime against the property or a crime of forgery (the acquiring of personal or financial data being just a preparatory act for those crimes) – which is a false conclusion.

In what regards the computer-related forgery, we find that, in Phishing, the perpetrator actually do realize the specific material acts of the crime provided by Article 325 Criminal Code only on the header of the luring email (the header is modified by *spoofing* in order to trick the victim about the real source of the email) and on the fake webpage (clone). For all that, in order to have an indictment based on Article 325 is strongly necessary that the outcome of the forgery to be able to produce legal consequences.

In the case of email header spoofing (aka *email spoofing*) we could not find any legal consequence, only if the act of taking over another person's identity would occur in dealing with a state authority or an institution among those mentioned in Article 175 Criminal Code. Thus, the legal consequence would be represented by a „identity-related forgery".

Much significant is the legal consequence when faking a webpage, the final place where the victim discloses its personal information. In this case, by cloning the webpage, the perpetrator is guilty of infringing the copyright related to the original (real) webpage, which is the kind of legal consequence requested by Article 325.

In other words, strictly from the perspective of the committed acts, in this very moment, there is no criminal offence to be used against an attacker who, illegally, obtains the computer data related to a person, and seems that this criminal behaviour may be not punishable.

Regarding the activity of the victim while present on the forged webpage, the conclusion is that he/she, misled (tricked, fooled), personally chooses to disclose the information (personal data, financial data, data necessary for the use of an electronic payment instrument and so) „requested" by the attacker. The victim is not constrained in any kind and has the right representation of his/her actions. Misleading (fooling, tricking) is, on one hand, the „fruit" of the attacker's performance as social engineer and as the creator of an almost perfect faked webpage, but, on the other hand, is the result of the lack of education or essential training in security (personal security, computer security etc.) as well as an effect of not knowing or not taking the appropriate security measures the victim knew or had to know.

The victim culpable behaviour related to the protection of its own personal information is not, however, a reason for the Romanian legislator to fail in sanctioning, by not creating an appropriate legal provision, the attacker's overall criminal activity of misleading, luring or manipulating the victim, followed by obtaining, illegally, the data he was looking for.

A *de lege ferenda* proposal could have the following text[1]:

Obtaining personal data, identification data, including data allowing the use of an electronic payment instrument or any kind of data generated by a person's social or economic activity, without its consent or by misleading, if such an action has been performed in computer systems or using electronic means of communication, shall be punished with imprisonment from „x" months to „y" years or a fine.

[1] Similar proposals have been issued in article *Considerations on the Efficiency of the new Criminal Code in Combatting Cybercrime*, Challenges of the Knowledge Society eBook 2013, ISSN 2068-7796, p. 33

Irrespective of the chosen form of criminalisation, shall be absolutely necessary that such a criminal provision exists in a potential future amendment of the Criminal Code.

Is not appropriate, in this context, an amendment to the Law no. 677 of 2001 regarding the protection of personal data, because this legal provision does not regulate the situation when the personal data are processed by an individual (the perpetrator) for its own use and without to be disclosed to third parties.

This analysis only refers to the „essence" of the „identity theft", namely the phase of obtaining, unauthorized, computer data related to a person.

In what regards the electronic storage of the stolen data or the future use (use of identity), these kind of actions are comprised in the materiality of other offences in the Criminal Code, such as: Article 240 – computer fraud, Article 250 – illegal performing of financial operations, Article 251 – the acceptance of illegally performed financial operations, Article 313 – circulating forged values, Article 314 – possession of instruments to perform value forgery, Article 325 – computer-related forgery, as well as Article 365 – illegal operations with equipments or computer programs or Article 388 – the fraud to electronic vote).

3. Conclusion

Taking into consideration that "*nullum crimen sine lege*", the overall conclusion is that the Romanian legislator needs to take, in the near future, certain measures in order to be able to efficiently combat the ID Theft, by creating a comprehensive legal provision, with no or little space for interpretations or different understandings, a real tool for prosecutors and judges. Being a reactive measure, this need to be completed with a proactive one - represented by a Cybersecurity-related awareness campaign, as well as (extra) professional training for all those involved in the prevention, prosecuting, judging or defending in cybercrime cases.

References

- The New Criminal Code of Romania (adopted with modifications by Government Emergency Ordinance no. 3/2014, Law no. 286/2009 and Law no. 187/2012)
- Council of Europe Convention on Cybercrime (Budapest, 2001) and the Explanatory Report
- V. Dobrinoiu and collaborators, *The New Criminal Code Commented*, Universul Juridic Publishing House, 2012, p.725-726

THE PRE-TRIAL CHAMBER JUDGE

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Abstract

The importance of this work lies in important changes in the new Code of Criminal Procedure, amendments justified by the new realities of a democratic society in which criminal procedural rules must be adapted according to the daily realities in the achievement of justice.

The purpose of the paper is given by the need of approaching at a theoretically level the institution of The Pre-Trial Chamber Judge, given that so far there have not been developed any works on the subject. This paper addresses both practitioners and litigants.

Keywords*: judge, Pre-Trial Chamber, legality of sending trial ordered by the prosecutor, the legality of evidence and to perform procedural acts of the criminal investigation, complaints against non-traceable solutions or not to proceed in judgment.*

Introduction

For reasons of simplification and systematization of the trial, the Romanian legislator has introduced in the new Code of Criminal Procedure[2], art. 3, providing the principle of separation of judicial functions. Judicial body exercising the verification of the legality of the arraignment or exculpation is The Pre-Trial Chamber Judge.

In The old criminal procedure law, between 1953 and 1957, there was the institution "preparatory meeting" governed by art. 269-280 of The Criminal Procedure Code adopted in 1936, amended by The Decree no. 506 of 1953, published in Official Gazette no. 53 of 14 December 1953. Preparatory meeting held at the end of the examination phase, while in the first instance to go to trial only those cases in which evidence was necessary, sufficient and legally produced. Article 272 established the judge who was to preside over the preliminary hearing required to study previously, detailed, the case file in the light of the above. The panel of preparatory meeting was stiffing broader than pre-chamber judge having the power to order the prosecution, to return the case for prosecution or completion or restoration of disposal and termination dismissal of criminal proceedings, if it set one of the causes that prevented the beginning or continuation of criminal proceedings. With the arraignment, the court was ruling also over taking, maintaining, replacing or revoking of preventive measures, over taking the insurance measures, over any requests made by the parties, was fixing the place of trial and summon the parties, witnesses, experts and interpreters.

In the system of The Criminal Procedure Code of 1968, in force until 31 January 2014, there wasn't a separate procedure for verifying the legality of the arraignment or exculpation, procedural acts necessary for such checks being made by the first instance judge or judge resolve the complaint against solutions of exculpation under art. No. 278¹.

The Pre-Trial Chamber Judge is a judge at the court competent to hear the case in the first instance according to the rules of substantive, territorial and personal jurisdiction

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[2] Law no. 135/2010 on the Code of Criminal Procedure, published in the Official No. 486 of 15 July 2010 and amended by O.U.G. No. 3/2014 and Law no. 255/2013.

established by law, without ruling on the merits of the case, verifies the legality of the procedure carried out by bodies prosecution and the legality of this data solutions to end criminal prosecution, on concerning the arraignment or the exculpation. These verifications are made to eliminate the vicious criminal acts, to comply with the fairness of the trial and to give a thorough and legal judgment.

Functional competence of The Pre-Trial Chamber Judge is provided by art. 54 Criminal Procedure Code., he fulfills the following tasks:

a) verifies the legality of sending trial ordered by the prosecutor;
b) verifies the legality of evidence and conduct procedures documents by the prosecution;
c) solves complaints against non-prosecuting or exculpating solutions;
d) resolves other cases provided by law.

The composition of the pre-trial chamber panels is established by The Law no. 304/2004[3] on judicial organization, as amended and supplemented. Thus, according to art. no. 54, cases given by law in the jurisdiction of first instance of the court, the court of law and the court of appeal shall be heard by a panel of one judge, and appeals against judgments in criminal matters of Pre-Trial Chamber Judges from the courts and the courts of law shall be resolved by a panel of one judge. Article 31 para. (1). b) shows that for the complaints lodged against the decisions of The Pre-Trial Chamber Judges in the Courts of Appeal and the Military Court of Appeal, the panel consists of one judge.

According to art. 31^1, in the cases given, by law, in the jurisdiction of first instance of The High Court of Cassation and Justice, the pre-trial chamber procedure is carried out by one of the three judges who form competent tribunal to hear the case in the first instance. Appeals against the decisions of The Pre-Trial Chamber Judges at The High Court of Cassation and Justice shall be settled in full by 2 judges, as art. 31 para. (1). d) says.

The pre-trial chamber panel is composed with a registrar, the procedure being carried out, usually without the prosecutor. The Code requires obligatory participation of the prosecutor in the situations when the judge decides on preventive measures, on the provisional application of safety measures of medical nature, on taking measures to protect a witness or the resolution of the appeal falls within the competence of The Pre-Trial Chamber Judge.

Unless incompatibility attracted the facts set out in art. 64 para. (1) Criminal Procedure Code we find that he is incompatible to judge in the pre-trial chamber the person who served, in the same case, as the prosecution or served as a judge of the rights and freedoms. The Code provides, however, in the Article 3 para. (3) and Art. 346 para. (7) , that The Pre-Trial Chamber Judge is incompatible with the function of law in case[4], unless he has resolved the complaint against non-prosecuting or exculpating solutions, ruling under art. 341 para. (7) point 2 letter c). Moreover, as a rule, The Pre-Trial Chamber Judge begins performing the function of law in question, according to art . 346 para. (7). However, The Pre-Trial Chamber Judge is incompatible to resolve the appeal brought against the decision given by himself, as shown in the art . 64 para. (6). Instead, he is compatible to conduct the pre-trial chamber works again when case gets back to court after it returned at the prosecutor because he, under art. 346 para. (3), failed to adjudicate.

Abstention or recusal of a Pre-Trial Chamber Judge shall be settled by a Pre-Trial Chamber Judge from the same court, in accordance with art. 68 para. (1), but the panel in

[3] Law no. 304/2004 was published in the Official No. 827 of 13 September 2005.

[4] Prior to the amendment of the Code of Criminal Procedure Law. 255/2013, art. 64 para. (4) provides that "The Judge of Rights and Freedoms and The Pre-Trial Chamber Judge cannot participate in the same case, the judgment on the merits or remedies." Article 3. (3) show that the same criminal conduct, exercising judicial disposition of fundamental human rights and freedoms is compatible with the Legality reference of sending or not sending to court.

front of which the objection was made with the participation of the challenged judge, decides on preventive measures.

The Pre-Trial Chamber Judge operates during trial, at his onset, being notified by the prosecutor who ordered the prosecution by indictment. He shall operate outside the trial phase, when hearing the complaint against filing solution or waiver of prosecution , arranged by order or indictment. The Pre-Trial Chamber Judge can be approached by the administration of the detention in order to establish termination of law and the immediately release of the person remanded, by the specialist doctor to raise the measure obliging the defendant to medical treatment or by the doctor physician to commission an expert forensic psychiatric hospital care to raise interim measure. At the request of the civil party may take measures in order to repair the damage caused by the offense and the enforcement of the legal costs .

These ways of investing a court judge are the primary modes by which The Pre-Trial Chamber Judge is being seised, but he can be seised also on derived paths through the controller to the jurisdiction or competence. Criminal Procedure Code contains conflicting provisions on the transferring of the case during The Pre-Trial Chamber procedure, art. 72 para. (1), following the completion brought by Law no. 255/2013, provides that in the course of the pre-trial chamber no one can apply for resettlement. Instead, art. 75 para. (2) and (3) show that the displacement can be ordered in this proceeding, these inconsistencies will be rectified at the next change.

Although The Pre-Trial Chamber Judge is starting the judgment, the court is not seised by him through his decision, but by the indictment issued by the prosecutor. As an exception, the court judge is seised with the conclusion of The Pre-Trial Chamber Judge when he, addressing the complaint against filing solutions or waiver of prosecution, according to art. 341 para. (7) point 2 letter c) Criminal Procedure Code, admits the complaint, dissolves the solution and starts the trial on the facts and persons in the criminal investigation has been made criminal action when administered legally sufficient evidence to prosecute case.

The Pre-Trial Chamber Judge is solving, not judging. He does not rule on the merits, the power to decide on penal action only returning to the court. He cannot move, extend or extinguish the criminal action or civil action cannot solve.

Verifying the legality of sending trial ordered by the prosecutor, The Pre-Trial Chamber Judge examines the formal conditions of the indictment, the jurisdiction of the body that drafted a complaint, and if it was started the prosecution for the accused person. On the legality of evidence, he verifies whether the samples were taken during the trial, after the prosecution, whether the principle of loyalty of evidence was respected or whether they have complied with the provisions concerning mandatory legal assistance of the accused or the suspect. In relation to the lawfulness of procedural documents by the prosecution, he takes into account the compliance of the competence of the criminal investigation and the conditions of the form of procedural documents. The Pre-Trial Chamber Judge decides preliminary issues raised by both the prosecutor and the parties and the issues that he raised in the motion.

Following these verifications, The Pre-Trial Chamber Judge gives the following solutions:

- returns the case to the prosecution if the indictment is issued irregularly, and no irregularity has been remedied by the prosecutor in the term that was given for this purpose, if the irregularity attracts the impossibility to establish the boundaries of the object or judgment or if excluded all evidence gathered during the investigation or prosecutor himself sought restitution case or does not respond within the time limit to remedy irregularities act of referral.

- opens the trial, in all other cases in which he found irregularities document instituting ruled one or more samples taken or sanctioned by absolute nullity relative or criminal acts carried out in violation of the law.

Exercising the verification of legality of the exculpation, according to art. 341 para. (6) Criminal Procedure Code, in cases where it was not ordered the initiation of criminal proceedings, The Pre-Trial Chamber Judge may order one of the following solutions:

a) dismisses the complaint, as late or inadmissible or, as applicable, as unfounded;

b) admits the complaint, appeal and send dissolved solution, sends the case to the prosecutor motivated to start or complete the prosecution or, as applicable, to bring criminal action and full prosecution;

c) admits the complaint and under the law of the solution changes the classification appeal, if this does not create a situation worse for the person who made the complaint.

In cases in which it was ordered the initiation of criminal proceedings, The Pre-Trial Chamber Judge, in accordance with art. 341 para. (7) Criminal Procedure Code . :

1) Rejects the complaint as late or inadmissible;

2) Verifies the legality of evidence and criminal prosecution, exclude evidence unlawfully taken or, where appropriate, sanctioned by nullity criminal acts carried out in violation of the law and :

a) dismisses the complaint as unfounded;

b) admits the complaint, appeal and sends dissolved solution before the prosecutor motivated to complete prosecution ;

c) admits the complaint, dissolves the solution and starts the trial on the facts and persons in the criminal investigation was set in motion proceedings, when given sufficient legal evidence, sending the file to the random distribution;

d) allows the complaint and under the law of the solution changes the classification appeal, if this does not create a situation worse for the person who made the complaint.

The Pre-Trial Chamber Judge also holds adjacent merits following activities:

1. Settles abstention or recusal Registrar participating in the pre-trial chamber procedure (art. 68 par. (4));

2. Automatically or on the notification of the prosecutor orders witness protection measures referred to in art. 127, if the state of danger arose during the pre-trial chamber procedure (art. 126 par. (7));

3. Takes preventive measures of judicial review, judicial review on bail , house arrest and arrest (art. 203 par. (2) and (3)) and issues the warrant;

4. Verifies, by default, the legality and validity of the preventive measure taken against the defendant prosecuted by indictment (art. 207 par. (2));

5. Automatically, verifies periodically, but not later than 30 days that remain grounds for the preventive arrest and house arrest (art. 207 par. (6));

6. Revokes remand and release the defendant, if not arrested in another case (art. 207 par. (5));

7. Decides over a preventive measure to replace judicial or judicial review on bail with house arrest or detention, if the duration of the measure, the defendant breached in bad faith his obligations or there is a reasonable suspicion he intentionally committed a new crime for which he was the initiation of criminal proceedings against him (art. 215 para. (7) and art. 217 para. (9)). In some cases, has to replace house arrest with detention (art. 221 para. (11));

8. Decides on imposing new obligations on the defendant who is serving a preventive measure judicial or replacement or termination of the initial ordered (art. 215 par. (9)). May order during house arrest defendant to permanently wear an electronic surveillance (art. 221 para. (3));

9. At the motivated request of the accused under house arrest, he permits him to leave his estate to be able to present in some places (art. 221 par. (6));

10. Can order the provisional medical treatment of the defendant, if in case provided by art. 109 para. (1) of the Criminal Code (art. 245 par. (1)) and the lifting of the measure;

11. Takes precautionary measures, consisting of unavailability of movable or immovable property, by establishing a lien on them to avoid concealment, destruction, disposal or removal of tracking goods may be confiscated or extended confiscation or which serve the enforcement of the fine or court costs or to repair damage caused by the offense (art. 249 par. (1));

12. Requires competent organ notation mortgage on property seized (art. 253 par. (4) and (5));

13. Decides to return the things lifted from the suspect, defendant or any person who has received them in order to keep them, if they are shown to be the property of others or have been taken unjustly from its detention (art. 255 para. (1));

14. Heads obvious clerical errors in the content of procedural documents that we prepared (art. 278 par. (1));

15. Applies judicial misconduct penalty during the pre-chamber procedure (art. 284);

16. At the prosecutor notification, in case of filing, takes special security measure of forfeiture and decide on the total or partial dismantling of a document (art. 315 par. (2) letter c) and d));

17. Decides on the legality and validity of the ordinance ordering the reopening prosecution, confirming or infirming it (art. 335 par. (4));

18. Appoints a mandatory for legal person among insolvency practitioners authorized by law, where the same act or acts related to criminal action set against the legal representative of the legal person, and this has not appointed a trustee to represent (art. 491 par. (3));

19. Can take preventive measures against the legal person (art. 493);

20. Establishes unlawfulness of imprisonment, to repair the damage caused by unlawful deprivation of liberty in criminal proceedings (art. 539 par. (2));

21. Enforces rulings that ordered safety measures, precautionary measures and preventive measures (art. 553 par. (4));

22. Appoints a lawyer in cases of mandatory legal assistance provided in art. 91.

The Pre-Trial Chamber Judge operates in the in the council chamber in a closed hearing and just the resolution of the appeal against his judgment takes place in a public procedure, as required by art. 425¹ par. (5).

The Pre-Trial Chamber Judge operates in the beginning phase of trial proceedings expeditiously, the law imposing a maximum period of 60 days from the date of registration of the case to the court, to determine whether proceedings can begin. If the defendant is serving a preventive measure, The Pre-Trial Chamber Judge shall submit the matter to the court at least five days before the expiration of the preventive measure, according to art. 208 para. (1) Criminal Procedure Code.

In carrying out his duties, The Pre-Trial Chamber Judge has the right to know the true identity of the undercover investigator and contributor to professional secrecy, as required by art. 149 para. (2) Criminal Procedure Code.

The Pre-Trial Chamber Judge rules by a motivated conclusion, but we consider that he resolves the jurisdiction by sentence, according to art. 370 para. (1), as it is an act by which the court is disinvesting without hearing the case.

Against a decision given by a judge in the pre-trial chamber procedure, the prosecutor and the defendant may appeal on how to handle requests and exceptions raised by them, and against the solutions given at the end of the procedure, in accordance with art. 347 Criminal

Procedure Code. The procedure for resolving the complaint against non-prosecuting or exculpating solutions ordered by the prosecutor, the prosecutor and the defendant may appeal only against the conclusion in which the complaint is accepted, he dissolves the solution and starts the trial in the requirements of art. 341 para. (7) point 1 letter c), of how to handle exceptions on the legality of evidence and criminal prosecution, according to art. 341 para. (9). Instead, it cannot be appealed the decision through which he declined jurisdiction, the conclusion ordering a witness protection measures or the conclusion which dismissed the complaint in accordance with Art. 340 or the conclusion which admited the complaint with the consequence of sending the case to the prosecutor.

Conclusions:

We consider useful the work done by The Pre-Trial Chamber Judge, given the fact that it will avoid prolongation of the trial due to the illegality of acts of criminal conduct or violation of evidence during the criminal investigation, which hindered judicial investigation, leading to delays of criminal cases and violations of the right to a fair trial.

References

- Law no. 135/2010 on the Code of Criminal Procedure, published in the Official No. 486 of 15 July 2010 and amended by O.U.G. No. 3/2014 and Law no. 255/2013
- Law no. 304/2004 that was published in the Official No. 827 of 13 September 2005
- The Code of Criminal Procedure of 17 march 1936, published in the Official No. 66 of 19 march 1936 and amended by the Decree no. 506 published in the Official No. 53 of 14 december 1953.
- The Code of Criminal Procedure of 1968 amended by the Law no. 15/1969, published in the Official No. nr. 79-79 bis of 21 june 1968.

STUDY ON THE COMPULSORY BRINGING OF PERSONS IN FRONT OF THE JUDICIAL AUTHORITIES IN CRIMINAL MATTERS[1]

Radu - Florin GEAMĂNU[*]

Abstract

The study will try to perform an in-depth analysis of the measure of compulsory bringing, assessing both the national legislation and the legislation of some European countries, namely: Austria, Bulgaria, Poland and the Netherlands.

Due attention will be granted to the provisions of the current Criminal Procedure Code, which entered into force on the 1st of February 2014, as this piece of legislation brings some important changes regarding the compulsory bringing, some of them being the consequence of the convictions of Romania in front of the Strasbourg Court.

Also, the paper will focus on case-law established by the European Court of Human Rights regarding articles 3 and 5 relating to the compulsory bringing.

To close with, the study will give some conclusions regarding the conformity of the current Criminal Procedure Code of Romania with the standards imposed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and by the case-law of the European Court of Human Rights.

Keywords: *Compulsory bringing, ECHR, case-law, Criminal Procedure Code, trial, pre-trial, Romania, police.*

1. Introduction

Over the last years, Romania has undergone a structural legislative reform, the essential pieces of legislation (the Codes) in criminal matters being drafted and adopted.

The adoption of the new criminal Codes represented for Romania a necessity and a consequence imposed by the evolution of the Romanian society and economy during the more than two decades that have passed since the December 1989 Revolution. Furthermore, the evolution of the Romanian society was significantly influenced by the accession to a number of international organisations, especially the *Council of Europe* and the *European Union*.

As a result new Codes entered into force on the 1st of February 2014, replacing the old ones (in force since 1969), namely *the new Criminal Code (Law No. 286/2009) – N.Cr.C.*[2] and *the new Criminal Procedure Code (Law No. 135/2010) – N.Cr.P.C.*[3]

The package that made up the reform in criminal matters also required the elaboration and adoption of 5 new pieces of legislation, alongside with the new Criminal Code and the

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[1] This paper is based on the expert report presented at the Compulsory bringing of persons to judicial authorities Workshop on 24th – 26th of October 2013, in Sofia (Bulgaria), as part of the "*Capacity building of General Directorate Security staff in line with international standards to achieve a more effective judicial system*" Project, General Directorate "Security", Ministry of Justice (Bulgaria), implemented under the *Norwegian financial mechanism* (NFM 2009-2014), Program area 14 Judicial capacity building and Cooperation, in a partnership with the *Directorate General I – Human Rights and Rule of Law of the Council of Europe.*

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[2] Published in the *Official Journal of Romania*, Part I, No. 510 of 24th of July 2009, as subsequently amended and completed.

[3] Published in the *Official Journal of Romania*, Part I, No. 486 of 15th of July 2010, as subsequently amended and completed, which abolished Law no. 29/1968 regarding the Criminal Procedure Code (*Cr.P.C.*), republished in the *Official Journal of Romania*, Part I, No. 786 of 30th of April 1997, as subsequently amended and completed.

new Criminal Procedure Code, which were meant to facilitate the implementation of the two codes, but also covered aspects concerning the enforcement of custodial and non custodial sanctions or measures and last, but not least, the organization of the probation system.

The following laws were elaborated and came into force on the 1st of February 2014:

- Law No. 187/2012 on enforcing the application of the new Criminal Code[4];
- Law No. 252/2013 regarding the organization of the probation services[5];
- Law No. 253/2013 on the execution of penalties and educative measures implying deprivation of liberty [6];
- Law No. 254/2013 on the execution of penalties, educative measures and other measures ordered by the judicial body during the criminal trial, which do not imply deprivation of liberty[7];
- Law No. 255/2013 on enforcing the application of the new Criminal Procedure Code[8].

A presentation of the existing legislation in Romania, a brief analysis of the legislation of certain European states and an overview of the European Court of Human Rights (ECtHR) case-law will help us to assess more accurately the current situation regarding the order of appearance (compulsory bringing)[9] and the enforcement of such order, consequently allowing us to look at the whole picture, having all the elements, thus drawing the best fitting solutions regarding the order of appearance (compulsory bringing), in full compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms[10] (ECHR) standards.

2. Paper Content

I. National legal framework regarding compulsory bringing of persons in front of the judicial authorities in Romania

1. The fundamental law of the Romanian state, the Constitution[11], contains certain provisions which refer to the limitation of the individual freedom by stipulating, in art. 23, the principle according to which the *"individual freedom and security of a person are inviolable".* However, the fundamental law, as it is normal, focuses on cases in which the person's individual freedom is very severely affected, namely those situations in which the person is deprived of his/her liberty, be it during the criminal investigation, as a preventive measure, or later, following the issuing of a final court decision which imposes imprisonment (or life imprisonment). Romania's Constitution does not provide for specific norms concerning the enforcement of orders of appearance.

The right to life, as well as the right to physical and mental integrity of persons is guaranteed by article 22 of the Romanian Constitution, which also provides that no one may

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[4] Published in the *Official Journal of Romania*, Part I, No. 757 of 12th of November 2012, as subsequently amended and completed.
[5] Published in the *Official Journal of Romania*, Part I, No. 512 of 14th of August 2013.
[6] Published in the *Official Journal of Romania*, Part I, No. 513 of 14th of August 2013.
[7] Published in the *Official Journal of Romania*, Part I, No. 514 of 14th of August 2013.
[8] Published in the *Official Journal of Romania*, Part I, No. 515 of 14th of August 2013.
[9] Also named "warrant to appear".
The terminology is not unitary. *"Order of appearance"* is used in the ECtHR *Case of Ghiurău v. Romania*, 20 November 2012, final: 29.04.2013, p. 17, while the *"warrant to appear"* is used in the ECtHR *Case of Creangă v. Romania*. Grand Chamber, 23 February 2012, final, p. 9.
[10] Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on November 4, 1950, as amended by Protocol no. 11, together with Protocols no. 1, 4, 6, 7, 12 and 13, were ratified by Romania through Law no. 30/1994, published in the *Official Journal of Romania*, Part I, no. 135 of May 31, 1994.
[11] Republished in the *Official Journal of Romania*, Part I, No. 767 of 31th of October 2003.

be subject to torture or to any kind of inhuman or degrading punishment or treatment. Death penalty is prohibited.

So, in this context, considering the compulsory bringing as a form of limitation or even deprivation of liberty in the sense of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitution provides for safeguards regarding the protection against torture and inhuman or degrading treatements.

2. Although the study will focus on criminal matters, it is important to stress out that in Romania there is no unitary reglementation regarding compulsory bringing of persons in front of the judicial authorities; instead there are specific provisions regarding criminal matters, civil matters and mental health matters. Furthermore, none of the legal provisions contain a legal definition of the compulsory bringing, but rather some principles concerning orders of appearance, the institutions in charge and practical issues on the enforcement of these warrants.

The legal framework regarding the compulsory bringing is to be found in: the new Criminal Procedure Code (Law No. 135/2010); the Civil Procedure Code (Law No. 134/2010); Law No. 487/2002 on mental health and protection of people with mental disorders.

II. Compulsory bringing of persons in front of the judicial authorities in criminal matters.

1. Sedes materiae. General remarks. To date the order of appearance is provided for both as related to the defendant and other parties in the new Criminal Procedure Code: art. 108 para. 2.a), art. 120 para. 2.b), art. 184 para. 4 and 20, art. 209 para. 4, art. 258 para. 2, art. 265-267, art. 283 para. 1.b), art. 364 para. 5 and art. 381 para. 8.[12]

The order of appearance was meant to be in the Romanian legal system an order issued by the criminal prosecution authority or the court to the police or other enforcement authority to bring a person in front of them, at the headquarters of the respective judicial authority, having been labelled initially in a way a compulsory measure due to the fact that the person whose presence is necessary within the criminal procedure is brought in front of the judicial authority.[13]

Before analysing the provisions which refer to the order of appearance, mention should be made of the fact that *the law does not provide for a legal definition* of it.

In accordance with the provisions of *art. 265 para. 1-2 N.Cr.P.C.*, a person can be brought in front of the criminal prosecution authority or in front of the court by virtue of an order of appearance if, having been previously subpoenaed, the person did not appear without reason in front of the judicial body and it is necessary for the person to be heard or present or if the proper subpoenaing has not been possible and the circumstances indicate unequivocally that the person is absconding the reception of the subpoena.

The suspect or the defendant can be brought by virtue of an order of appearance even if it was not subpoenaed, if this measure is needed for settling the case.

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[12] The previous piece of regulation, found in the Law no. 29/1968 regarding the Criminal Procedure Code (*Cr.P.C.*), did not lack in criticism. One possible explanation which emerges from literature is based on the historical and teleological interpretation of the institute of the order of appearance: at the moment in time when it was regulated it was unconceivable for the totalitarian state that one of its citizens does not obey an order of appearance, this being the reason why they did not insist on a detailed regulation of this institute; this is how it became perhaps the most incomplete institute covered by the Criminal Procedure Code, even though it actually should be a legislative work with mathematical logic and accuracy. [Ghe. Neacşu, *Consideraţii privitoare la emiterea şi executarea mandatelor de aducere (Considerations regarding the issuance and enforcement of the order of appearance) (I),* Dreptul Magazine, No. 9/2003, p. 173]

[13] N. Iliescu in V. Dongoroz, C. Bulai, S. Kahane, N. Iliescu, G. Antoniu, R. Stănoiu, Explicaţii teoretice ale Codului de procedură penală român. Partea generală (Theorethical explanations of the Romanian Criminal Procedure Code. General part), Vol. I, Romanian Academy Publishing House, Bucharest, 1975, p. 378.

In spite of the fact that the legal text does not provide for a legal definition, the specialist literature agrees that it offers enough elements to allow for the determination of the legal nature of the order of appearance, namely *"a compulsory measure which resides in the obligation imposed to a person to let itself being brought in front of the judicial authority which issued the measure, accompanied by the person who was vested with the enforcement of the measure."*[14]

It should be mentioned that the legal provisions regulating the order of appearance have been looked at by the *Constitutional Court* quite frequently, both in relation to the provisions of the Fundamental Law and to the provisions of the international conventions and treaties concerning human rights to which Romania is a party**,** being found in compliance with these instruments.[15]

By Decision No. 885/2007[16], the Constitutional Court decided that the legal provisions invoked were not in breach of the Constitutional standards for the following reasons: *"The Court acknowledges that the procedure rules stipulated in art. 183 and art. 184 Cr.P.C.* [corresponding to *art. 265-266 N.Cr.P.C.*] *are meant to ensure the good functioning of the criminal proceedings, without delays caused by the absence or refusal of the persons whose hearing or presence is considered by the court to be necessary. By the criticised provisions there is no violation of the individual freedom because the institution of the order of appearance is not equivalent with the institution of the custodial measures, as erroneously the claimant asserts. As a matter of fact, the exercise of some rights and freedoms can be limited for the accomplishment of the criminal instruction, so that the coercion of a person to appear in front of the court when the latter considers it necessary, does not affect in any way the principles of the rule of law."*

For the reasons shown in the decision, the Court concluded that "the provisions of art. 183 para. 1 and 2 Cr.P.C. [corresponding to art. 265-266 N.Cr.P.C.] are in accordance with the provisions of art. 23 para. 1 and 2 of the Constitution, of art. 5 para. 1 and 4 of the European Convention on Human Rights, of art. 9 of the Universal Declaration on Human Rights, as well as with the provisions of art. 9 para. 1 and art. 14 para. 3.g) of the International Pact on Civil and Political Rights."[17]

Mention should be made of the fact that this measure *is different from the right of the police to detain (hold) a person for up to 24 hours for investigative purposes.* This is a general administrative measure that can be taken by the police on the basis of Law no. 218/2002 (on the organisation and functioning of the Romanian police) only if the person cannot be identified in another way; it is not taken with the aim of investigating a criminal offence.[18]

As regards the deduction of the time necessary for the enforcement of the order of appearance and the remand, unlike the previous regulation which led to inconsistent practice and literature, the N.Cr.P.C. expressly provides that, if a suspect or defendant has been brought in front of the criminal prosecution body or in front of the prosecutor in order to be heard, by virtue of a legally issued order of appearance, the term of the custody (24 hours at the most) shall not include the time period in which the suspect or the defendant were under the power of that warrant. (*art. 209 para. 4 N.Cr.P.C.*)

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[14] I. Neagu, Tratat de procedură penală. Partea generală. (Criminal procedure treaty. The General Part.), Universul Juridic Publishing House, Bucharest, 2010, p. 368.

[15] Although the analysis was made on the basis of the previous Criminal Procedure Code (art. 183 – 184), the findings of the Consititutional Court are equally applicable to the new legal framework: art. 265-266 N.Cr.P.C.

[16] Constitutional Court Decision No. 885/2007, published in the Official Journal of Romania, Part I, no. 750 of 5th of November 2007, concerning the incident of constitutionality of the provisions of art. 183 and art. 184 Cr.P.C.

[17] Constitutional Court Decision No. 1401/2009, published in the Official Journal of Romania, Part I, no. 855 of 9th of December 2009.

[18] A.M. van Kalmthout, M.M. Knapen, C. Morgenstern (editors), Pre-trial detention in the European Union, Ed. Wolf Legal Publishers, Nijmegen, The Netherlands, 2009, p. 798.

It should be stressed out that the legal framework does not expressly provide for the possibility of deprivation of liberty of a person as a precautionary measure for ensuring its appearance in front of the judicial authorities, so the order of appearance remains the only possibility to compel a person to appear in front of the judicial authorities.

It is worth mentioning the fact that by virtue of art. 271 *N.Cr.C. – obstruction of justice*, justified by the realities of the judicial practice which often times is faced with a lack of cooperation from the part of the persons who are requested to lend their support to the judicial authorities, so that the refusal of one person to appear in front of the judicial authorities in spite of having been subpoenaed to or to obey to the enforcement of an order of appearance can make up the elements of this crime.

2. The body that issues the order of appearance. Conditions. As with the previous Criminal Procedure Code, the current Code provides that the order of appearance is issued only by the criminal prosecution body (criminal investigative body[19] - the judicial police; special investigative bodies – and the prosecutor) or by the court.

The order of appearance as any order can be issed only within a current criminal proceeding (no matter if this is part of the criminal prosecution or the trial), not during the preliminary phase, when a criminal proceeding is not commenced.[20]

The order of appearance is issued following *a resolution* (in case of the criminal prosecution authorities) or *court minutes* (in case of the court)[21]. Subsequently the procedural act is also used – the order of appearance as such, drafted according with strictly regulated requirements.

To date, in order to be able to enforce an order of appearance against the suspect or defendant or any other person, the following conditions shall be met**:**

- there has to be an enforceable legal obligation to appear before the court;
- there has to be an order of appearance issued by the competent authority;
- the order of appearance has to have the contents provided for by law;
- the person has been previously subpoenaed. By way of derogation, the suspect or defendant can be compulsory brought even before being subpoenaed based on one simple condition – this measure is needed for settling the case.
- despite having been subpoenaed, the person did not appear on the date and at the place indicated in the subpoena;
- the hearing or the presence of the person is needed;
- the measure must not be unproportional in relation to the significance of the matter;
- the measure has to be carried out with a minimum of interference in terms of intensity and duration.

According with the general provisions, the resolution issued by the criminal prosecution body can be contested with the chief prosecutor in observance of the provisions of art. 370 para. 3 N.Cr.P.C.; the court minutes can be contested on the same occasion as the subject matter of the trial.[22]

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[19] For the opinion according to which criminal investigative bodies (police) cannot issue order of appearance see Ghe. Neacşu, *op. cit.*, p. 167.

[20] See the Constitutional Court Decision No. 210/2000, published in the *Official Journal of Romania*, Part I, No. 110 of 5th of March 2001.

[21] Although the N.Cr.P.C. introduced an intermediate phase between the pre-trial stage and the trial stage, namely the preliminary chamber, an order of appearance cannot be issued, since this stage is an *in camera* procedure.

[22] According with *art. 370 para. 3 N.Cr.P.C.*, in the Romanian legal system the court minutes are court decisions rendered during the trial by which the subject matter of the case is not judged or settled, but rather incidental matters; they can also mark the ending of a court hearing, etc, the rule being that they can be challenged with the next upper court only with the subject matter of the case *(art. 408 para. 2 N.Cr.P.C.).*

Having regard to the fact that the enforcement of an order of appearance implies a maniphest limitation of the person's individual freedom, in 2003 (by virtue of Law No. 281/2003) two provisions were introduced in *art. 183 para. 3-4 from the previous Cr.P.C.* with the role to ensure that no abuse is committed by the state agents on occassion of the enforcement of these warrants. This means that persons compulsory brought cannot stay at the disposal of the judicial authority longer than the time which is strictly needed for their hearing, except the case in which the arrest or pre-trial detention of these persons was ordered. Similarly, the person who has been compulsory brought shall be heard immediately by the judicial body.

Unlike the previous regulation, *art. 265 para. 11-12 N.Cr.P.C.* expressly provides that compulsory brought persons shall stay at the disposal of the judicial body only for the time needed for their hearing or for effecting the act that made their presence necessary, however *not longer than 8 hours*, except the case when their arrest or pre-trial detention was ordered. The judicial body shall hear the compulsory brought person immediately or, as case may be, it shall effect immediately the act that made the person's presence necessary.

- In ***Austria,*** the enforcement organs are the *security police forces* and concerning the performance of the compulsory bringing *art. 47 of the Austrian Security Police Act* stipulates that it has to be carried out with respect to the human dignity of the concerned person in a most lenient way.

The enforcement organs are the security police forces who act on the grounds of *court or prosecution authority orders*.[23]

In view of the performance of the compulsory bringing (and other coercive measures encroaching the right of personal freedom) the Supreme Court of Austria repeatedly held that the measure must be implemented in a way that the interference with the right to personal freedom is kept to the necessary minimum in terms of intensity and duration. Therefore it would be considered a violation of the right to personal freedom, as guaranteed by *art. 5 ECHR*, if a person were brought with considerable time prior to the fixed hour of the court session (at least in the absence of justifying organisational circumstances).[24]

The conditions under which compulsory bringing may be conducted lawfully are as follows:

- there has to be an enforceable legal obligation to appear before the court;
- the person has to be duly subpoenaed and cautioned about the consequence of compulsory bringing in case of non-obedience;
- the compulsory bringing must use the most lenient means to achieve the intended result;
- it must not be unproportional in relation to the significance of the matter;
- it has to be carried out with a minimum of interference in terms of intensity and duration.[25]

- In ***Bulgaria,*** in criminal proceedings, the failure of a defendant or of a witness to appear before a judicial system body or an investigating pre-trial authority (for the purpose of the court proceeding or the pre-trial proceedings) is ensured by compulsory bringing.[26]

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[23] See *„Compulsory Bringing of Witnesses and Accused Persons from an Austrian Perspective",* Dr. G. Walchshofer, p. 14, expert report presented at the Compulsory bringing of persons to judicial authorities Workshop on 24th – 26th of October 2013, in Sofia (Bulgaria), as part of the "*Capacity building of General Directorate Security staff in line with international standards to achieve a more effective judicial system*" Project, General Directorate "Security", Ministry of Justice (Bulgaria).

[24] See *„Compulsory Bringing of Witnesses and Accused Persons from an Austrian Perspective",* Dr. G. Walchshofer, *op. cit.*, p. 12.

[25] See „Compulsory Bringing of Witnesses and Accused Persons from an Austrian Perspective", Dr. G. Walchshofer, op. cit., p. 12-13.

The competence for issuing an order of appearance in criminal matters rests upon the judicial system bodies, namely, the court during the trial or the prosecutor and the investigating bodies (investigating magistrates and investigating police) during the pre-trial stage.

The preconditions for issuing an order for compulsory bringing are as follows:

- the person whose testimony or appearance is requested has been duly summoned by serving of a writ of summons;
- the person fails to appear before the judicial system body;
- the person has been warned about the consequence of not complying or not appearing;
- the person fails to provide good excuse for not making a show, thus obstructing justice.

➢ In ***the Netherlands***, a court order for the transfer of a person to a court session can be issued by the presiding judge if the conditions set out in the law are met.

In the Dutch criminal system the measure of compulsory bringing is considered a coercive measure and it implies deprivation of liberty, being used for the establishment of the truth, ensurance of a fair trial and compliance with the adversarial procedure rules.[27]

➢ In ***Poland***, the competent legal authorities which can issue a compulsory bringing order[28] are high ranking legal authorities: during the trial - *the court* conducting proceedings in a given case and - during the stage of pre-trial penal proceedings - *the public prosecutor*, the form of their decision being the order (issued by the court) or the ruling (issued by public prosecutor).[29]

The measure of compulsory bringing is considered as a kind of deprivation of liberty for a short period of time of a person who, after being correctly subpoenaed and warned about the legal consequences of not appearance, failed to perform his/her procedural duty, namely to be physically present in due time in the place indicated in a subpoena and who didn't provide reasonable excuse. This kind of deprivation of liberty, aiming to force the person's appearance at the place of performing the procedural activities with his/her obligatory presence, shall be treated as *ultima ratio,* and is always based on competent legal authority's written decision which can be a subject of an interlocutory appeal and which is executed by the police or another legal enforcement agencies.[30]

The conditions provided by the Polish law are as follows:

- the accused was correctly cautioned in writing about his duties;
- the accused was dully subpoenaed and warned that his/her presence is mandatory;
- the accused failed to appear;
- the accused failed to provide excuse or the excuse was not accepted by the court.[31]

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[26] It is considered that the implementation of compulsory bringing constitutes a lawful limitation of the freedom of movement (Art 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms).

[27] See „Court orders for the transfer of persons to court sessions", R. Steinhaus, p. 3-4, expert report presented at the Compulsory bringing of persons to judicial authorities Workshop on 24th – 26th of October 2013, in Sofia (Bulgaria), as part of the "Capacity building of General Directorate Security staff in line with international standards to achieve a more effective judicial system" Project, General Directorate "Security", Ministry of Justice (Bulgaria).

[28] Special regulations concerning immediate compulsory bringing during the trial are provided for in art. 276§1 of the Polish Criminal Procedure Code (immediate compulsory bringing to the trial of the accused who, after giving testimony, left the trial without permission of the presiding judge) and art. 282 of the Polish Criminal Procedure Code (immediate compulsory bringing to the court of the accused who did not attend the trial - within the competence of the presiding judge).

[29] See „Compulsory bringing of persons to judical authorities on the ground of Polish legal system", D. Mazur, p. 10, 14, expert report presented at the Compulsory bringing of persons to judicial authorities Workshop on 24th – 26th of October 2013, in Sofia (Bulgaria), as part of the "Capacity building of General Directorate Security staff in line with international standards to achieve a more effective judicial system" Project, General Directorate "Security", Ministry of Justice (Bulgaria).

[30] See „Compulsory bringing of persons to judical authorities on the ground of Polish legal system", D. Mazur, op.cit., p. 5.

[31] See „Compulsory bringing of persons to judical authorities on the ground of Polish legal system", D. Mazur, op.cit., p. 14.

3. Persons against which the order of appearance can be issued. In the Romanian legal system (art. 265 N.Cr.P.C.), the issuance of the order of appearance in criminal matters can be effected against any person who has been previously subpoenaed, has not appeared without reason in front of the judicial body and whose hearing or presence is needed. Also, the Code provides for a new situation in which the person can be brought by virtue of an order of appearance – if the proper subpoenaing has not been possible and the circumstances indicate unequivocally that the person is absconding from the reception of the subpoena.

Concluding, it can be said that the issuance of an order of appearance is not restricted to witnesses only. From this point of view the order of appearance can be issued for witnesses, but also for experts, interpreters, aggrieved parties or damaged third parties etc.

The wording *„any person who has been previously subpoenaed"* employed in the law text allows for a broad interpretation of the persons who can be brought by virtue of an order of appearance in front of the judicial authorities, the issuing authorities having to decide on the need of ordering the compulsory bringing of a person, whereas the need and the justification for the issuance of the order of appearance have to be found in the document by virtue of which the order of appearance is issued (prosecutor's resolution or the court minutes).

By way of derogation from the general rule, the suspect or the defendant can be brought by virtue of an order of appearance even if he/she was not subpoenaed, if this measure is needed for settling the case, as it is provided for in *art. 265 para. 1 N.Cr.P.C.* If the judicial body considers that the presence of the suspect/defendant is needed, it can also order his/her bringing *by virtue of an order of appearance even in those cases in which* the law allows for the representation of the suspect/defendant according with *art. 96 N.Cr.P.C.*

Also, the Code contains a more than welcome provision, namely the obligation of the judicial authority to notify the *suspect/defendant* about his/her obligation to appear in front of the judicial bodies, being warned that in case of default of appearance an order of appearance can be issued against the person and that in case of absconding from justice the court can order the person's arrest *[art. 108 para. 2.a) N.Cr.P.C.]*.

During the trial, the court can order the bringing of the defendant by virtue of an order of appearance, if it considers that his presence is needed (*art. 364 para. 5 N.Cr.P.C.*).

The Romanian law does not provide for any derogation from the common law of the civil law systems concerning the compulsory bringing of underaged children. However, the Code provides for some special rules which regulate the behaviour of the underaged child who is a suspect or a defendant.

When the suspect/defendant is an underaged *child who is younger than 16*, on occasion of any hearing or appearance of the underaged child in front of the criminal prosecution authority, it shall subpoena the parents and, if case be, the legal custodian, guardian or the person who is in charge with the upbringing or monitoring of the underaged child, as well the General Direction for Social Assistance and Child Protection from the town where the hearing takes place. When the suspect or the defendant is an underaged child older than 16, these persons shall be subpoenaed if the judicial authorities consider this appropriate. In any case, the fact that the persons who have been legally subpoenaed to assist at the hearing or confrontation of the underaged child do not appear, does not hinder the performance of these acts. (*art. 505 N.Cr.P.C.*)

Similarly, *during the trial*, except to the parties, subpoenas shall be sent to the Probation Office, the underaged child's parents or, as case be, the legal custodian, guardian, the person who is in charge with the upbringing and monitoring of the child, as well as other persons who have the right and are obliged to give explanations, come up with requests and proposals concerning the measures which shall be taken. The fact that the persons who have

been legally subpoenaed do not enter the proceedings does not hinder the judgment. (*art. 508 N.Cr.P.C.*)

With regard to the *witness*, similary to the provisions set out for the suspect or defendant, the judicial body must inform him/her about the obligation to appear in front of the judicial authorities, being warned that in case of non-compliance with this obligation an order of appearance can be issued against him/her *[art. 120 para. 2.b) N.Cr.P.C.]*.

According with the applicable legal provisions which regulate the hearing of the witness, expert or interpreter during the trial - art. 381 para. 8 and 11 N.Cr.P.C., if one or more *witnesses* are not present, the court can order either the continuation of the trial or the postponement of the case. The witness whose absence is not justifed can be brought by enforcing an order of appearance. These provisions apply correspondingly also in case of the hearing of *the expert or the interpreter.*

The order of appearance (as well as the judicial fine) can be ordered against *the representative of the legal person or its mandatary*.

Art. 283 para. 2 and 4.b) N.Cr.P.C. concerning judicial infringements allows for the sanctioning of the unjustified default of appearance of the witness, aggrieved party, civil party or damaged third party with a judicial penalty ranging from 250 lei to 5.000 lei and if the unjustified default of appearance is commited by the expert or the interpreter, the judicial penalty ranges from 500 lei to 5.000 lei.

A fine from 250 lei to 5.000 lei can also be applied for leaving without permission or a justified reason the place where the person is to be heard. (*art. 283 para. 2 N.Cr.P.C.*)

- In ***Austria***, individuals who by law have to appear before the court and fail to do so eventually have to be brought by force. Compulsory bringing, of course, will constitute regularly an infringement of the fundamental right to personal freedom, since this act includes, as the case may be, the application of immediate force and thus the limitation of movement for the concerned person. The legal framework regarding compulsory bringing, indeed, provides for rules where and in which cases compulsory bringing has to be applied, but remains silent on the act (execution of this coercive measure) itself.[32]

In principle, *the witnesses and the suspects or defendants* who are on the loose have to be subpoenaed for hearings, which applies both for the pre-trial and the main-trial (*art. 153 of the Criminal Procedure Code of Austria*). Compulsory bringing only is admissible if the duly subpoenaed person does not appear and if he/she was cautioned about the consequences. An exception is made for suspect or accused if there are sound reasons for the assumption that he/she may elude justice by fleeing or in cases of danger of collusion. In these cases the compulsory bringing may be ordered without prior subpoena.[33]

Compulsory bringing can be applied also for court *experts and interpreters* in cases of unjustified default of appearance. In this sense, according to *art. 242 of the Criminal Procedure Code of Austria*, if witnesses or experts, despite having been subpoenaed, do not appear at the court trial, the president can order their immediate bringing.

- In ***Bulgaria,*** in criminal proceedings, the failure of *a defendant or of a witness* to appear before a judicial system body is ensured by compulsory bringing.

According to *art. 71 para. 1 of the Criminal Procedure Code of Bulgaria,* where the *accused* fails to appear for interrogation without good reasons, he/she shall be brought in by compulsion where their appearance is mandatory, or where the competent body finds this to

[32] See „Compulsory Bringing of Witnesses and Accused Persons from an Austrian Perspective", Dr. G. Walchshofer, op. cit., p. 1.
[33] See „Compulsory Bringing of Witnesses and Accused Persons from an Austrian Perspective", Dr. G. Walchshofer, op. cit., p. 15.

be necessary. The accused may be brought in by compulsion without prior subpoenaing[34] where he/she have absconded or has no permanent residence.

- In ***Poland***, a compulsory bringing order can be issued against *the suspect, accused, witness, expert, interpreter or specialist*.[35]

Compulsory bringing of the *accused* is done according to the general provision of *art. 75§2 of the Polish Code of Criminal Procedure*, the measure being applied only in respect to the accused who was correctly cautioned in writing about his rights and duties prior to his/her first examination during preparatory proceedings or by the court. Compulsory bringing can be ordered for any kind of procedural action with mandatory presence of the accused at the stage of preparatory proceedings or at the stage of court proceedings.[36]

Polish Code of Criminal Procedure introduces a wide range of measures aiming to force subpoena persons to perform their procedural duties or to punish them for wrongdoing in this respect. Those provisions are applicable to *witnesses, experts, interpreters and specialists*. Amongst those measures there is the compulsory bringing measure, applicable to the *witnesses*. Only in exceptional cases it can be applied to *experts, interpreters, specialists*. For example when there is no possibility to replace expert's opinion by opinion of another expert or there is no possibility to hire another interpreter or specialist, than those who were originally subpoenaed.[37]

4. Enforcement of the warrant. Concerning the enforcement of the order of appearance, we would like to note that the new Code has a more flexible approach of the institutions competent to enforce them and does not detail expressly these institutions, but merely mentions the fact that they are represented by the judicial police forces and any other public order authorities [such as the police[38], gendarmerie (riot police) or local (community) police[39]]. No matter which of these authorities enforce the warrant, the activities carried out on occassion of the enforcement of the order of appearance shall be recorded in a minutes which has to provide information about: full name and capacity of the person who drafts the minutes; the place where it is drafted; mentions about the activities carried out (art. 266 para. 1 and 6 N.Cr.P.C.).

The police force vested with the enforcement of the order of appearance goes to the address indicated in the warrant, presents the warrant to the person who shall be brought in front of the judicial authority[40] and accompanies the person to the place indicated in the warrant. The enforcement of the order of appearance involves, as a matter of principle, the

[34] According to art. 178 para. 1 and 2 of the Criminal Procedure Code of Bulgaria, subpoenas, notifications and papers shall be served by officials of the respective court, the pre-trial authorities, municipality or mayor's offices. Where service cannot be performed in such a way, it shall be carried through the services of the Ministry of the Interior or of the Ministry of Justice.

[35] See „Compulsory bringing of persons to judical authorities on the ground of Polish legal system", D. Mazur, op.cit., p. 7.

[36] See „Compulsory bringing of persons to judical authorities on the ground of Polish legal system", D. Mazur, op.cit., p. 13-20.

[37] See „Compulsory bringing of persons to judical authorities on the ground of Polish legal system", D. Mazur, op.cit., p. 21, 23.

[38] Art. 31 para. 1.d) of Law No. 218/2002 concerning the organisation and functioning of the Romanian Police, published in the *Official Journal of Romania*, Part I, No. 305 of 9th of May 2002, as subsequently amended and completed, provides for the obligation of the *police* to enforce the orders of appearance issued in accordance to the legal provisions.

[39] Art. 6.j) of the Local Police Law No. 155/2010, published in the *Official Journal of Romania*, Part I, No. 488 of 15th of July 2010, as subsequently amended and completed, provides for the obligation of the *local police* to enforce only orders of appearance issued by the criminal prosecution authorities and courts within a certain jurisdiction and which refer to persons residing within that jurisdiction.

[40] It should be noted that the place where the person has to be brought does not necessarily have to be the headquarters of the issuing authority, but rather the place where the issuing authority odered the person to be brought (for example a secondary headquarter, territorial office, crime scene, etc.)

actual bringing of the person to the issuing body and in case of refusal, the use of public force.[41]

If the person referred to in the order of appearance cannot be brought because of medical reasons and if the person vested with the enforcement of the order of appearance does not find the person referred to in the order of appearance at the address indicated, he shall make inquiries and if not successful, in both situations he has the obligation to draft a record about the impossibility to enforce the order, which is to be forwarded immediately to the criminal prosecution body or to the court[42] (*art. 266 para. 3 and 4 N.Cr.P.C.*).

Finally, *art. 266 para. 5 N.Cr.P.C.* provides for special rules applying to armed forces staff, stating that the enforcement of the orders of appearance concerning military staff is performed by the commander of the military unit, the commander of the garrison and by the military police.

It should be mentioned that, according with the provisions of *art. 283 para. 1.b) N.Cr.P.C.* concerning judicial infringements, non-fulfillment or wrong fulfilment by the judicial police forces or by any other public order authorities of the duty of the personal delivery or service of subpoenas or other procedure acts, as well as the non-enforcement of the order of appearances, during the trial is considered to be judicial infringement and is sanctioned by judicial fine ranging from 100 lei to 1.000 lei.

- ***Austria***. Since court organs do not exert by themselves immediate force for criminal proceedings the Austrian judiciary relies throughout on the *police*. The legal and doctrinal basis for this co-operation between the judiciary and the police is *art. 22 of the Austrian Federal Constitution Law* and *art. 76 para. 1 of the Criminal Procedure Code of Austria*.[43]
- In ***Bulgaria,*** in criminal proceedings, the failure of a defendant or of a witness to appear before a judicial system body is ensured by compulsory bringing.

The General Directorate *"Security"*, a body which is organised under the Minister of Justice, has the competence to render assistance to judicial system bodies in subpoenaing of persons in cases where the implementation of this obligation has been obstructed, on the one hand and to bring individuals to a judicial system body by compulsion where this has been ruled by a judicial system body, on the other hand. *(art. 391 para. 1 and 3 Judicial System Act of Bulgaria)*

The competence of the General Directorate *"Security"* to enforce compulsory bringing when this measure is ordered by a judicial system body concerns both trial and pre-trial stage.

During the pre-trial stage, the compelled attendance of persons, witnesses and defendants, before the investigating police is ensured by the police.

Military service officers shall be brought in by the respective military bodies.

The procedure for enforcing an order of appearance for the witness is the same as the one prescribed by the law for the accused.

- In ***Poland***[44]**,** the *police and other authorized law enforcement agencies* have the competence to enforce the compulsory bringing of a person, having the right to check the

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[41] Ghe. Mateuț, Tratat de procedură penală. Partea generală. (Criminal procedure treaty. The General Part.) Volume II, C.H.Beck Publishing House, Bucharest, 2012, p. 783.

[42] The new text is much preciser and clearer, as the previous Code made mention about *„any other reason".* The previous wording was criticized just because of the use of the *„any other reason"* had the order of appearance not essentially different from the subpoena, as the police agent as enforcement authority could not use, except for the situation provided for in art. 184 para. 3^1 Cr.P.C., compulsory means against the person who refused to be picked up and brought by virtue of the order of appearance. (Ghe. Mateuț, *op. cit*, p. 784)

[43] See, *„Compulsory Bringing of Witnesses and Accused Persons from an Austrian Perspective",* Dr. G. Walchshofer, *op. cit.*, p. 2.

Art. 22 of the Austrian Federal Constitution Law: "All authorities of the Federation, the Länder [federal states] and the municipalities are bound within the framework of their legal sphere of competence to render each other mutual assistance."

[44] See „Compulsory bringing of persons to judical authorities on the ground of Polish legal system", D. Mazur, op.cit., p. 46-57.

identity of concerned person[45], apprehend persons in cases indicated in Criminal Procedure Code and other statutory regulations[46], conduct a search of persons and premises in cases indicated in Criminal Procedure Code[47] and the right to use coercive measures and firearms[48] in cases indicated in the Coercive Measures Act[49].

5. Use of force. The possibility of entering a person's domicile or company's headquarters. Unlike the previous Code, the N.Cr.P.C. stipulates expressly that the means of coercion can be used against any person: the person vested with the enforcement of the warrant serves the warrant to the person who is the subject of the order of appearance and requests the person to accompany him. In case the person indicated in the warrant refuses to join the person invested with the enforcement of the warrant or tries to flee, the person shall be brought by coercion[50] (*art. 266 para. 1 N.Cr.P.C.).*

The *coercion* that can be used with a view to enforcing the order of appearance can only be physical coercion, the mental coercion being inherent to the voluntary compliance with the enforcement of the order of appearance. The use of force by the enforcement bodies is performed with a clear aim, that is as much as needed for the enforcement of the warrant, namely for bringing the subject of the order of appearance in front of the criminal prosecution authority or in front of the court which subpoenaed or notified him, in compliance with certain limits, as for example those imposed by article 3 of the European Convention.[51]

The conventional character of the legal provisions which allow for the enforcement of the order of appearance by using means of coercion has been looked at in the specialized literature[52], which noted, on the one hand, that in case the suspect or defendant refuses to enter the hearing or tries to flee, the police or gendarmerie forces can order within the enforcement of the order of appearance the detention of the persons in the sense of art. 5 para. 1 of the European Convention and the compulsory bringing of the persons in front of the criminal prosecution authority or in front of the court. On the other hand, there is a deprivation of liberty, strictly subject to the aim of the hearing by the criminal prosecution authorities or by the court, given that according with *art. 265 para. 11 N.Cr.P.C.* persons brought by virtue of order of appearances are ”*at the disposal"* of the judicial body. The author considers that only if the order of appearance is ordered by the court, the measure of the deprivation of liberty complies with the requirements of art. 5 para. 1.b) of the European Convention. Having regard to the fact that by this measure a deprivation of liberty in the sense of art. 5 para. 1.b) can be achieved, the court is obliged to justify the decision by which it orders the issuance of the order of appearance, in order to remove any free will in the field of deprivation of liberty.

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[45] Art. 15.1.1 of the Polish Police Act - Act of 6 April 1997 about the Police; consolidated text published in Official Journal of Law 2011 No 287, item 555 and § 1 p.4-7 of "Polish Police Selected Powers Ordinance" - Ordinance of Council of Ministers from 26 July 2005 about way of exercising selected powers by police force, published in Official Journal of Law 2005 No 141, item 1186.

[46] Art. 15.1.2 of the Polish Police Act.

[47] Art. 15.1.4 of the Polish Police Act.

[48] Art. 16 of the Polish Police Act.

[49] Act of 24 May 2013 about the Coercive Measures and Firearm, published in Official Journal of Law 2013, item 628 ["the Coercive Measures Act"].

[50] The new provisions are very much different from the repealed Code. In the previous law, despite the fact that the text stipulated that the order of appearance can be issued against any person, it expressly regulated the case in which the accused, defendant or witness refused to obey the order of appearance or tried to flee; in such cases, the person shall be brought by coercion in front of the criminal prosecution authorities or in front of the court. This means that the Romanian law-maker, despite the fact that it allowed for the issuance of an order of appearance against any person who needed to be heard or to be present within the criminal proceedings, the use of means of coercion for the enforcement of the order of appearance could only be legitimate against the accused or defendant and witness.

[51] Ghe. Mateuț, *op. cit*, p. 780.

[52] M. Udroiu, O. Predescu, Protecţia europeană a drepturilor omului şi procesul penal român (European protection of human rights and Romanian criminal trial), C.H.Beck Publishing House, Bucharest, 2008, p. 406-407.

Based on the provisions of the repealed Code, the literature[53] has noted, justifiably, some deficiencies in the regulation of the procedure of the enforcement of the order of appearance. If the provisions introduced by Law No. 281/2003 did respond to the practical needs of the compulsory enforcement of an order of appearance, in cases in which the accused or defendant refused to obey the warrant, the situation was not the same when any other person than the accused or defendant or witness refused to obey the warrant or when the subject of the warrant was found at his place of residence or even at another person's place of residence and refused to allow for the police agent to enter the premises[54], thus implicitly defying the warrant, cases in which, according to former regulations, the enforcement of the order of appearance was in practice impossible.

In this sense, *art. 265 para. 4-9, N.Cr.P.C.* solved the difficulties met in the practice concerning the enforcement of the warrant, as it provides for the possibility of entering a person's domicile or company's headquarters without the subject's consent with a view to enforce the order of appearance, which can be ordered during the criminal prosecution stage at the justified request of the prosecutor by the so called *„liberty and custody judge"* (French system: *juge des libertés et de la détention*) from the court which would be competent to judge the case in first instance or from the same level of jurisdiction court where the prosecution office is situated where the prosecutor comes from or, during the trial, by the court.

The request filed during the criminal prosecution stage concerning the issuance of an order of appearance is looked at in closed session (not public) without having subpoenaed the parties, the judge ordering the admission or dismissal of the request by virtue of a final minutes.

With a view to enforcing the warrant issued by the *„liberty and custody judge"* or by the court, the competent authorities can enter the home or headquarter of any person where there is an indication that the person sought for is likely to be found, in case the person refuses to cooperate, hinders the enforcement of the warrant or for any other grounded reason in proportion with the aim of the warrant (*art. 266 para. 2 N.Cr.P.C.*).

The performance of a house search with a view to catching the suspect is provided for expressly in *art. 157 para. 1 N.Cr.P.C.*

This situation in which there is no information on the suspect or defendant's location has to be distinguished from the order of appearance where there is a suspect or defendant in the case and his domicile or residence is known. The house search can be ordered during the criminal prosecution by the *"liberty and custody judge"* and within the trial by the court (*art. 158 N.Cr.P.C.*).

6. Mandatory forensic expertise. Criminal Procedure Code. *Art. 184 N.Cr.P.C.* provides for certain cases in which the performance of a psychiatric assessment is mandatory and should be done in specialized medical facilities.

In case the suspect or defendant refuses during the criminal prosecution or the trial the performance of the mandatory psychiatric forensic assessment (*art. 184 para. 4 N.Cr.P.C.*) or does not show up for the examination with the psychiatric forensic commission, the

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[53] Ghe. Mateuţ, op. cit, p. 785; I. Rusu, Executarea mandatului de aducere. Opinii ciritice. Propuneri de lege ferenda (The enforcement of the order of appearance. Critical opinions. Lege ferenda amendments) (I), Dreptul Magazine, No. 6/2004, p. 189-192; T. Hâj, Executarea mandatului de aducere. Opinii ciritice. Propuneri de lege ferenda (The enforcement of the order of appearance. Critical opinions. Lege ferenda amendments) (II), Dreptul Magazine, No. 6/2004, p. 192-195.

[54] In this context the text of art. 27 para. 1 of the Romanian Constitution is relevant, saying that „the domicile or residence are inviolable, so that no one can enter or stay in the domicile or residence of a person without the person's consent". The exceptions are strict interpretations and are provided for in para. 2 of art. 27 of the Constitution: a) carrying into execution a warrant for arrest or a court decree; b) removing a risk to someone's life, physical integrity, or a person's assets; c) defending national security or public order; d) preventing the spread of an epidemic.

prosecutor, the „liberty and custody judge" (at the request of the criminal investigation authority) or the court will *ex officio* issue an order of appearance for the appearance in front of the psychiatric forensic commission.

If it considers that an exhaustive examination is needed, which requires the hospitalization of the suspect or of the defendant in a specialized medical facility and the person refuses the hospitalization, the forensic commission has to inform the criminal prosecution authority about the need for the measure of involuntary hospitalization for a period of maximum 30 days, which can be extended only once, for 30 days at the most. The period in which the suspect or the defendant was hospitalized in a special facility for the performance of the psychiatric assessment will be deducted from the duration of the penalty according with *art. 72 of the Criminal Code.*

As mentioned in the case-law of the Constitutional Court[55] „the examination of art. 117 Cr.P.C. [currently, art. 184 N.Cr.P.C.] reveals the fact that this does not introduce a criminal law sanction, but a process related measure which judicial authorities have to enforce when there are doubts concerning the mental state of the accused or defendant and when the performance of a psychiatric assessment is considered to be necessary. The need for hospitalization is determined by the fact that the assessment is carried out in specialized medical facilities, (…) and the hospitalization and examination of the accused or defendant are carried out both in his interest and for «the accomplishment of the criminal instruction» referred to in art. 49 para. 1 of the Constitution [which became art. 53 after the republication of the Constitution in 2003]."

If the person against whom the measure of placing in a medical facility for the purpose of performance of the assessment was ordered considers that the measure was ordered illegally or that the hospitalization period exceeded the necessary time and has thus led to harming his legitimate interests, the person can complain against the measure in compliance with *art. 339-341 N.Cr.P.C.* or can go directly to court. In such circumstances, the measure of hospitalization for the time necessary is in compliance with art. 53 para. 1 of the Constitution which says that the exercise of some rights and freedoms can only be restricted by law and only if it is necessary, among other things, for the accomplishment of the criminal instruction. Furthermore, the provisions of para. 2 of art. 53 of the Constitution are also met, the limitation being proportional with the situation which caused it.

Concerning the procedure for placing the accused/defendant in a hospital for the performance of the mandatory psychiatric assessment, the specialized literature[56] considers that this is a deprivation of liberty in the sense of the ECHR and that the *de lege lata* regulation violates the provisions of art. 5 para. 1.b) ECHR because:

- it is not a deprivation of liberty ordered by a judge;
- it has a punitive character and does not aim at executing an obligation which a person has and which the person did not meet, even though it could have met;
- it does not offer any guarantee against the arbitrary, as the custodial measure can extend over an uncertain period of time;
- it does not regulate the possibility of a control of the legality or opportunity of the deprivation of liberty by a judge.

- In ***Bulgaria***, according to *art. 337 para. 1 of the Civil Procedure Code of Bulgaria,* the person whose interdiction is sought shall be heard by the court in person and, if necessary, shall be brought by compulsion. Where the person is in hospital and the state of their health state does not permit to be brought in person at the hearing, the court shall be obliged to acquire immediate impression of the person's condition.

[55] Constitutional Court Decision No. 76/1999, published in the Official Journal of Romania, Part I, no. 323 of 6th of July 1999.
[56] M. Udroiu, O. Predescu, *op. cit.*, p. 409-410.

The Health Act, in art. 165 para. 2, regulates the execution of a court order for compulsory commitment of a person for treatment or of a court ruling for performance of expert. In this sense, the effective court order for compulsory commitment and treatment, as well as the court ruling to appoint a forensic psychiatric examination shall be implemented by the respective medical facilities, and where necessary with the assistance of the Ministry of Interior.

III. European Convention for the Protection of Human Rights and Fundamental Freedoms. European Court of Human Rights case-law.

1. European Convention for the Protection of Human Rights and Fundamental Freedoms. Human rights protection is of paramount importance in the present days. In this respect, special attention needs to be given to the protection of the persons deprived of their liberty as they are in a fragile position and it is the duty of the state to ensure the full respect of their fundamental rights. The European system established by the Council of Europe constitutes a bulwark in protecting the fundamental rights and freedoms of the persons deprived of their liberty.[57]

The unconditional terms of article 3 also mean that there can never, under the Convention or under international law, be a justification for acts which breach the article. In other words, there can be no factors which are treated by a domestic legal system as justification for resort to prohibited behaviour – not the behaviour of the victim, the pressure on the perpetrator to further an investigation or prevent a crime, any external circumstances or any other factor.[58]

In assessing some cases of use of force or instruments of restraint, the European Court of Human Rights defined the conditions in which the policemen or prison officers may use these means. On the one hand, it is obvious that the use of a certain amount of force in case of resistance to arrest, an attempt to flee or an assault on an officer or fellow prisoner may be inevitable. On the other hand, the form, as well as the intensity of the force used should be proportionate to the nature and the seriousness of the resistance or threat.[59]

In its jurisprudence the ECtHR stressed out repeatedly that persons deprived of their liberty are vulnerable and it is the duty of the national authorities to protect their physical well-being, whereas the use of physical force or other means of restraint have to be strictly necessary and have to be required by the prisoner's own conduct. In other words, in respect of a person deprived of his or her liberty any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in article 3 of the Convention.[60]

The use of means of restraint in other circumstances than those provided by the Convention or by the Strasbourg case-law diminishes human dignity and is, in principle, an

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[57] R.-F. Geamănu, *Use of force and instruments of restraint – an outline of the Romanian legislation in the European context*, The International Conference CKS-CERDOCT Doctoral Schools, Challenges of the Knowledge Society, Bucharest, April 15-16, 2011, CKS-CERDOCT eBook 2011, Pro Universitaria Publishing House, 2011, p. 112, available at: http://cerdoct.univnt.ro/index.php?option=com_content&view=article&id=54&Itemid=63&dir=JSROOT%2FCKS%2F2011_15_16_aprilie&download_file=JSROOT%2FCKS%2F2011_15_16_aprilie%2FCKS_CERDOCT_2011_eBook.pdf, accessed 01.03.2014.

[58] A. Reidy, *The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights.* Human rights handbooks, No. 6, Directorate General of Human Rights, Council of Europe, 2002, p. 19, available at: http://echr.coe.int/NR/rdonlyres/0B190136-F756-4679-93EC-42EEBEAD50C3/0/DG2ENHRHAND062003.pdf, accessed 25.02.2014.

[59] P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak, editors, *Theory and practice on the European Convention on Human Rights*, 4th edition, Intersentia Publishing House, Antwerpen-Oxford, 2006, p. 426.

[60] ECtHR judgement from December 4, 1995, final, in the case of Ribitsch v. Austria (1), para. 38.

infringement of the right set forth in article 3 of the Convention. In this sense, Romania was convicted in some cases before the European Court, as the use of force or other instruments of restraint was not legal and proportionate to the nature and the seriousness of the resistance or threat.[61]

According to the well-established case-law of the Court, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, *inter alia*, *Price v. the United Kingdom*, no. 33394/96, § 24, ECtHR 2001-VII). In order for a punishment or treatment associated with it to be *"inhuman"* or *"degrading"*, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECtHR 2000-IV).[62]

From the *procedural point of view*, where an individual raises an arguable claim that he has been seriously ill-treated in breach of article 3 of the Convention, the member state has an obligation to initiate a thorough, prompt, independent and effective investigation, which should be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible. This means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence etc. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or to identity the persons responsible will risk falling foul of this standard. For an effective investigation into alleged ill-treatment by state agents, such investigation should be independent.[63] In considering all these aspects, the Court found a violation of article 3 of the Convention under its procedural head in several cases against Romania, as the national authorities failed to fulfilll their obligation to conduct a proper official investigation into the applicant's allegations of ill-treatment, capable of leading to the identification and punishment of those responsible.[64]

Article 5 of the Convention sets out a fundamental right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty.

Persons deprived of their physical liberty shall mean, in accordance with the ECtHR case-law, persons who are deprived of their liberty in accordance with a procedure prescribed by law by arrest or detention. So, in this sense, all the principles set out by the Strasbourg Court regarding the use of force and instruments of restraint against persons deprived of their liberty will apply in all the cases mentioned in art. 5 para. 1 of the Convention.[65]

In proclaiming the *"right to liberty"*, paragraph 1 of art. 5 contemplates the physical liberty of the person; its aim is to ensure that no one should be deprived of that liberty in an arbitrary fashion. Sub-paragraphs (a) to (f) of art. 5 para. 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty, and no deprivation of

[61] R.-F. Geamănu, *op. cit.*, p. 116.
[62] ECtHR, judgment from November 20, 2012, in the case of *Ghiurău v. Romania*, para. 52-53.
[63] ECtHR judgement from January 26, 2006, final, in the case of Mikhenyev v. Russia, para. 107-108 and 110.
[64] *Barbu Anghelescu v. Romania*, ECtHR judgement from October 5, 2004, final, para. 70; *Bursuc v. Romania*, ECtHR judgement from October 12, 2004, final, para. 110; *Dumitru Popescu (no.1) v. Romania*, ECtHR judgement from April 26, 2007, final, para. 78-79; *Cobzaru v. Romania*, ECtHR judgement from July 26, 2007, final, para. 75; *Alexandru Marius Radu v. Romania*, ECtHR judgement from July 21, 2009, final, para. 47 and 52; *Boroancă v. Romania*, ECtHR judgement from June 22, 2010, final, para. 50-51.
[65] R.-F. Geamănu, *op. cit.*, p. 114.

liberty will be lawful unless it falls within one of those grounds. The Court also reiterates that in order to determine whether someone has been *"deprived of his liberty"* within the meaning of Article 5, the starting point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance (see *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 57, 15 March 2012).[66]

Regarding the deprivation of liberty with a view to guaranteeing the enforcement of a legal obligation,[67] the European Court of Human Rights showed[68] that there has to be a violation of an obligation which a person has and which the person could have met and the deprivation of liberty has to be imposed in order to ensure the execution of that obligation and is not of a punitive nature. The obligation has to be a lawful obligation, it has to have a specific and concrete, not a general character, it has to meet the requirements of the European Convention and it must have emerged prior to the date of the deprivation of liberty. Furthermore, there has to be some proportionality between the importance within a democratic society of ensuring the immediate enforcement of an obligation and the importance of the right to liberty, the term of the detention being a relevant factor in establishing this proportionality. Other key factors in this respect are: the nature of the obligation arising from the relevant legislation including its underlying object and purpose; the person being detained and the particular circumstances leading to the detention; and the length of the detention.[69]

In the Romanian law, for example, there can be such a limitation or even deprivation of liberty in case of an order to bring the person in front of the criminal prosecution authorities or in front of the court or in case of hospitalisation with a view to performing the compulsory psychiatric expertise.

2. European Court of Human Rights case-law. As regards Romania's convictions by the European Court of Human Rights we would like to note that they mainly concerned the enforcement of orders of appearance [ECtHR judgement from 23 February 2012, Grand Chamber, final, in the case of Creangă v. Romania; ECtHR judgement from 20 November 2012, final, in the case of Ghiurău v. Romania].

Of course, the study will also assess other ECtHR judgements given against other Member States on the topic of compulsory bringing in criminal matters (ECtHR judgement from March 27, 2012, final, in the case of *Lolova-Karadzhova v. Bulgaria).*

Further below we will present some of the essential elements concerning subject matters and legal issues considered by the Court in Strasbourg in the cases brought against Romania concerning the violation of art. 5 of the Convention, but also some subject matter related to elements extracted from the communicated cases regarding Romania *(Gabriel Aurel Popoviciu v. Romania. Application no. 52942/09, lodged on 16 September 2009; Iustin Robertino Micu v. Romania. Application no. 41040/11, lodged on 22 June 2011; Valerian Dragomir v. Romania. Application no. 51012/11, lodged on 3 August 2011).*

- In the case of ***Creangă v. Romania (Grand Chamber)*** the applicant alleged, in particular, that his deprivation of liberty from 9 a.m. to 10 p.m. on 16 July 2003 had been unlawful, as had his subsequent placement in pre-trial detention. He relied in particular on art. 5§1 of the Convention. *(para. 3)*

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[66] ECtHR, judgment from November 20, 2012, in the case of *Ghiurău v. Romania*, para. 76-78.
[67] For details see M. Udroiu, O. Predescu, *op. cit.*, p. 404-406.
[68] See ECtHR, judgment from March 24, 2005, in the case of *Epple v. Germany*, para. 43-45; ECtHR judgement from September 25, 2003, in the case of *Vasileva v. Denmark*, para. 36-37; ECtHR, judgment from February 22, 1989, in the case of *Ciulla v. Italy*, para. 36.
[69] See ECtHR judgement from September 25, 2003, in the case of *Vasileva v. Denmark*, para. 38.

What is relevant in relation to the present study is the fact that the Court found that there had been a violation of *art. 5§1 of the Convention* on account of the applicant's deprivation of liberty on 16 July 2003, at least from 12 noon to 10 p.m. and, also, on account of the applicant's placement in pre-trial detention on 25 July 2003.

The Court (Grand Chamber) reiterated its established case-law to the effect that art. 5§1 may also apply to deprivations of liberty of a very short length (see *Foka v. Turkey*, no. 28940/95, § 75, 24 June 2008) and noted that in the instant case, it is not disputed that the applicant was summoned to appear before the National Anti-Corruption Prosecution Service headquarters (NAP) and that he entered the premises of the prosecution service at 9 a.m. to make a statement for the purpose of a criminal investigation. *(para. 93, 94)*

The Court noted further that the applicant was not only summoned but also received a verbal order from his hierarchical superior to report to the NAP. Subsequently, the Court stated that, while it cannot be concluded that the applicant was deprived of his liberty on that basis alone, it should be noted that in addition, there were other significant factors pointing to the existence of a deprivation of liberty in his case, at least once he had been given verbal notification of the decision to open the investigation at 12 noon: the prosecutor's request to the applicant to remain on site in order to make further statements and participate in multiple confrontations, the applicant's placement under investigation during the course of the day, the fact that seven police officers not placed under investigation had been informed that they were free to leave the NAP headquarters since their presence and questioning was no longer necessary, the presence of the gendarmes at the NAP premises and the need to be assisted by a lawyer. *(para. 97)*

Concluding, the Court found that the applicant did indeed remain in the prosecution service premises and was deprived of his liberty, at least from 12 noon to 10 p.m. *(para. 100)* and at least from 12 noon, the prosecutor had sufficiently strong suspicions to justify the applicant's deprivation of liberty for the purpose of the investigation and that Romanian law provided for the measures to be taken in that regard, namely placement in police custody or pre-trial detention; however, the prosecutor decided only at a very late stage to take the second measure, towards 10 p.m. *(para. 109)*

Finally, the Grand Chamber considered that the applicant's deprivation of liberty on 16 July 2003, at least from 12 noon to 10 p.m., had no grounds in domestic law[70] and that there has therefore been a violation of *art. 5§1 of the Convention. (para. 110)*[71]

The conclusion was the same regarding the applicant's placement in pre-trial detention on 25 July 2003: the Court agreed entirely with the Chamber's conclusions that the applicant's deprivation of liberty on that particular date did not have a sufficient legal basis in domestic law, in so far as it was not prescribed by *"a law"* meeting the requirements of *art.*

[70] For comparison, see the ECtHR judgement from June 24, 2008, in the case of *Foka v. Turkey*, para. 86 – 89: The Court was of the opinion that the applicant was deprived of her liberty in accordance with a procedure prescribed by law *"in order to secure the fulfilment of any obligation prescribed by law"* within the meaning of *art. 5§1.b) of the Convention* and reiterated that in this case nothing proved that the deprivation of liberty at stake exceeded the time necessary for searching the applicant's bag, imposing a fine on her and fulfilling the relevant administrative formalities. It accordingly found no appearance of arbitrariness.
Finally, it was to be observed that both at the Ledra Palace crossing point and at the police headquarters, the applicant was clearly requested to give her bag to the police officers who declared that they wanted to search it. Even assuming that the applicant was not given any other oral or written explanation, under these circumstances, the reasons of her arrest should have been clear to her.
Accordingly, the Court ruled that there had not been a violation of *art. 5§1 and 2 of the Convention* in the case.

[71] The ruling of the Court was the same as the one of the Chamber. In this sense, the Chamber noted in that, having been issued on the basis of a prosecutor's order in accordance with domestic law, the warrant for pre-trial detention could cover only the same period as that specified in the order. In the instant case, although it did not indicate the time from which the measure took effect, that warrant could not constitute a legal basis for the preceding period, which was not mentioned in the order. Consequently, *the Chamber considered that the applicant's deprivation of liberty from 10 a.m. to 10 p.m. on 16 July 2003 had had no basis in domestic law and that accordingly, there had been a breach of art. 5§1 of the Convention*. *(para. 66, 67)*

5§1 of the Convention. For the reasons given by the Chamber, it considered that there had been a violation of that provision. *(para. 121)*

➢ A similar situation was acknowledged by the Court in the case of ***Lolova-Karadzhova v. Bulgaria***, where the applicant alleged, in particular, that her detention from about 10 a.m. on 18 October to 3 p.m. on 19 October 2006 had been in breach of *art. 5§1 of the Convention*. *(para. 3)*

The District Court observing that it was necessary to complete the proceedings within a reasonable time held that the applicant should therefore be brought before it for the next hearing with the assistance of the police. It did not specify any legal ground for this order. It scheduled the next hearing for 19 October 2006 at 3 p.m. Since the applicant's lawyer was present at the hearing, the applicant was considered duly informed of the order. *(para. 13)*

Around 10 a.m. on 18 October 2006 the applicant was detained[72] by the police and taken to Sofia Prison, where she remained until the next morning. In the morning of 19 October 2006 the applicant was escorted by train and car from Sofia to Asenovgrad (160 km), attended the hearing at 3 p.m. and made submissions, after which she was released. In a judgment of the same date the District Court acquitted her. *(para. 14, 15)*

The Court held that it was not disputed that the applicant remained under the constant supervision and control of the police authorities from about 10 a.m. on 18 October until 3 p.m. on 19 October 2006, or twenty-nine hours, and that she spent a considerable amount of that time in Sofia Prison. The Court was therefore satisfied that she was "deprived of her liberty" within the meaning of *art. 5§1 of the Convention*. *(para. 27)*

The Court noted that the domestic court did not specify the legal grounds for its order and did not state expressly that the applicant's attendance was necessary for establishing the truth pursuant to *art. 269 (2) of the Criminal Procedure Code of Bulgaria* but rather justified it with the need to secure her own procedural rights. Furthermore, the application of *art. 71 (2) of the Criminal Procedure Code of Bulgaria* also appeared problematic since the applicant neither absconded nor was without a permanent address. *(para. 31)*

The Court observed that the applicant was arrested on the day before the hearing and remained in custody for almost thirty hours. The distance between her home town and the town where the hearing was held, 160 km, was not such as to justify such a long period of detention. The Court was not persuaded that the authorities could not have taken less radical measures in order to secure the applicant's attendance in court. Moreover, by arresting her one day earlier they did not even give her a chance to show good faith and comply with the court order of her free will. In view of these circumstances, the Court considered that the authorities failed to strike a fair balance between the need to ensure the fulfilment of the applicant's obligation to attend a court hearing and her right to liberty, thus it considered that there has been a violation of *art. 5§1 of the Convention*. *(para. 32, 33)*

➢ In the case of ***Ghiurău v. Romania*** the applicant alleged, among other matters, that he had been subjected to ill-treatment in violation of art. 3 of the Convention and that the authorities had not carried out a prompt and effective investigation of that incident. Relying on *art. 5§1 of the Convention*, he claimed that he had been unlawfully held in police custody between 4 p.m. on 27 November 2006 and 2 a.m. on 28 November 2006. *(para. 4)*

The compulsory bringing of Mr. Ghiurău raised allegations regarding the eventual violation of *articles 3 and 5§1 of the Convention*.

Regarding the alleged violation of *art. 5§1 of the Convention*, the Court concluded that the measure complained of started at about 4 p.m. on 27 November 2006 and lasted until 1.52

[72] According to *art. 71 of the Criminal Procedure Code of Bulgaria*, if the accused party fails to appear for interrogation without good reasons, he/she shall be brought in by compulsion where his/her appearance is mandatory, or where the competent body finds this to be necessary. The accused party may be brought in by compulsion without prior subpoenaing where he/she has absconded or has no permanent residence.

a.m. the following day. Further, it noted that the applicant was guarded by police officers continuously and that at no point during the journey from Borş to Cluj was the applicant allowed to leave of his own free will. It also notes that the applicant was guarded by the police officers also while in hospital and in the ambulance transporting him from Huedin to Cluj Hospital. The Court therefore considered that the applicant was under the authorities' control throughout the entire period, and concludes that he was deprived of his liberty within the meaning of *art. 5§1 of the Convention*. *(para. 79, 80)*

The Court observed that the prosecutor's order of 27 November 2006 issued on the basis of art. 183§2 of the Romanian Code of Criminal Procedure did not contain any reason justifying the measure. The Court therefore concluded that by omitting to specify the reasons on which it was based, the prosecutor's order failed to conform to the rules applicable to domestic criminal procedure. Furthermore, the Court doubted whether the applicant's deprivation of liberty and his transport to a city located 200 km from his home, escorted by ten police officers, was necessary to ensure that he gave a statement and considered that the above circumstances disclosed that the applicant was not deprived of his liberty in accordance with a procedure prescribed by domestic law, which renders the deprivation of the applicant's liberty between 4 p.m. on 27 November 2006 and 2 a.m. on 28 November 2006 incompatible with the requirements of *art. 5§1 of the Convention*. *(para. 85 - 88)*

Concluding, the Court found that there has therefore been a violation of *art. 5§1 of the Convention*.

Regarding the alleged violation of *art. 3 of the Convention*, the Court noted that the applicant was in possession of two medical certificates attesting that he had sustained injuries while in police custody. He lodged a criminal complaint against the police officers whom he accused of subjecting him to degrading and ill-treatment, but the complaint was twice dismissed by the prosecutor on the grounds that there was a lack of evidence that the offences in question had been committed. Furthermore, the Court observed that essential evidence was not gathered or was gathered with delay by the prosecutor, despite clear instructions in this respect from the Ploiesti Court of Appeal, which had twice remitted the case to the Prosecutor's Office.[73] *(para. 59, 65)*

Having regard to the mentioned deficiencies identified in the investigation and to the fact that after more than five years since the applicant had lodged his criminal complaint not a single final judicial decision had been taken on the merits of the case, the Court concluded that the State authorities failed to conduct an effective investigation into the applicant's allegations of ill-treatment, thus there has accordingly been a violation of *art. 3 of the Convention*. *(para. 69, 70)*

Short key elements need to be addressed regarding some of the ***communicated cases against Romania*** dealing with the compulsory bringing measure in criminal matters.

In this sense, in the ***Valerian Dragomir v. Romania*** case (application no. 51012/11, lodged on 3 August 2011), invoking *art. 5§1 of the Convention*, regarding the compulsory bringing order, the applicant complained that there was no legal basis for his detention from 9.30 p.m. on 8 February 2011 to 10.30 a.m. on 9 February 2011. In this respect he claimed that a person deprived of liberty on the basis of an order to appear should be immediately brought before the investigation body and heard.

[73] In particular, the Court noted that the prosecutor questioned the police officers and the applicant's lawyer who had been present at the scene of the incident, but no other witnesses. There is no explanation as to why the medical staff and/or patients of the two hospitals where the applicant was hospitalised, the driver of the ambulance, or the nurse who accompanied him from Huedin to Cluj, had not testified before the domestic authorities. Also, the Court was concerned about the way the prosecutor disregarded the statements made by the applicant's lawyer, who was present when the events of 27 November 2006 occurred and noticed that the prosecutors did not explain why her statements would be less credible than those of the police officers. *(para. 66, 67)*

On 8 February 2011 police officers belonging to the National Anticorruption Directorate carried out a search at the applicant's home[74]. The search started at 6 a.m. and lasted about three hours. At about 9 a.m. the police officers informed the applicant that an order to appear before the National Anti-Corruption Prosecution Service had been issued on his behalf, at 9.15 a.m. he was taken to the headquarters of the Timiş County Police Inspectorate, at about 2 p.m., he was embarked with one hundred other police and customs officers on a bus trip to the National Anti-Corruption Prosecution Service headquarters in Bucharest (he alleged that during their trip to Bucharest he could not get off the bus and could not use his mobile phone or contact his lawyer) and at about 9.30 p.m., after a trip of almost 600 km they arrived in Bucharest, at National Anti-Corruption Prosecution Service headquarters.

After almost thirteen hours, at 10.30 a.m., on 9 February 2011, he was taken to the prosecutor's office and he was informed in the presence of his lawyer about the charges against him.

At about 10.55 a.m. he was informed of the prosecutor's order to remand him in custody for twenty-four hours, subsequently being kept standing in a corridor until 8 p.m., when he was taken to the Bucharest Court of Appeal for the examination of the prosecutor's request concerning his pre-trial detention; the hearing started at 10.30 p.m. and lasted almost one hour and the court granted the prosecutor's request and ordered the pre-trial detention of the applicant for twenty-nine days, namely from 9 February until 10 March 2011.

3. Conclusions

As it can be noted, after drafting a short overview on the Romanian legislative reform in criminal matters, the study makes an extensive analysis of the institute of compulsory bringing, looking at the problem both on national level (with focus on the Romanian system, but also providing relevant information about Austria, Bulgaria, Poland and the Netherlands) and on international (European) level.

In this sense, the paper focuses on the presentation of the national legal framework regarding the compulsory bringing of persons in front of the judicial authorities in Romania, followed by the compulsory bringing of persons in front of the judicial authorities in criminal matters.

To close with, the paper dwells on the standards of the European Convention for the Protection of Human Rights and Fundamental Freedoms, providing some ideas about relevant judgements given by the European Court of Human Rights.

Having a look at the national legislative provisions in the context of the case-law of the Strasbourg Court, one can note that the previous provisions comprised in the Criminal Procedure Code did not lack criticism. Moreover, the same provisions created difficulties into day-to-day practice, as the institute of compulsory bringing had quite a few shortcomings (e.g. no maximum length of the measure provided in the law, there was no possibility to enter someone's home in order to enforce the bringing order).

In assessing the current legal provisions, it can be noticed that the new Criminal Procedure Code has indeed overcome the gaps and difficulties encountered by the previous Code, as the new one contains some clarifications and also some new provisions (some of them imposed by the difficulties encountered in daily practice, some demanded by the convictions of Romania in front of the Strasbourg Court – as it was the case with establishing a maximum length of the measure).

[74] The applicant was a customs officer at the Moraviţa border checkpoint at that time and was considered to be part of the criminal group by the investigation authority. On 3 February 2011 a criminal investigation was initiated against him for suspected adhering to a criminal group and bribery.

References

1. Legislation

A. National Legislation

- Constitution of Romania, republished in the *Official Journal of Romania*, Part I, No. 767 of 31th of October 2003.
- Law No. 218/2002 concerning the organisation and functioning of the Romanian Police, published in the *Official Journal of Romania*, Part I, No. 305 of 9th of May 2002, as subsequently amended and completed.
- Law No. 286/2009 – Criminal Code, published in the Official Journal of Romania, Part I, No. 510 of 24th of July 2009, as subsequently amended and completed.
- Law No. 135/2010 - Criminal Procedure Code, published in the Official Journal of Romania, Part I, No. 486 of 15th of July 2010.
- Law No. 255/2013 on enforcing the application of the new Criminal Procedure Code (Law No. 135/2010), published in the Official Journal of Romania, Part I, No. 515 of 14th of August 2013.

B. International Legislation and Documents Adopted by International Bodies

- Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on November 4, 1950, as amended by Protocol no. 11, together with Protocols no. 1, 4, 6, 7, 12 and 13, ratified by Romania through Law no. 30/1994, published in the *Official Journal of Romania*, Part I, no. 135 of May 31, 1994.

2. Doctrine. Treaties, courses, monographs, studies published in specialized magazines

- N. Iliescu in V. Dongoroz, C. Bulai, S. Kahane, N. Iliescu, G. Antoniu, R. Stănoiu, Explicaţii teoretice ale Codului de procedură penală român. Partea generală, (Theorethical explanations of the Romanian Criminal Procedure Code. General part), Vol. I, Romanian Academy Publishing House, Bucharest, 1975.
- A. Reidy, The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights. Human rights handbooks, No. 6, Directorate General of Human Rights, Council of Europe, 2002.
- Ghe. Neacşu, Consideraţii privitoare la emiterea şi executarea mandatelor de aducere (Considerations regarding the issuance and enforcement of the order of appearance) (I), Dreptul Magazine, No. 9/2003.
- I. Rusu, Executarea mandatului de aducere. Opinii critice. Propuneri de lege ferenda (The enforcement of the order of appearance. Critical opinion. Lege ferenda amendments) (I), Dreptul Magazine, No. 6/2004.
- T. Hâj, Executarea mandatului de aducere. Opinii critice. Propuneri de lege ferenda (The enforcement of the order of appearance. Critical opinion. Lege ferenda amendments) (II), Dreptul Magazine, No. 6/2004.
- P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak, editors, Theory and practice on the European Convention on Human Rights, 4th edition, Intersentia Publishing House, Antwerpen-Oxford, 2006.
- M. Udroiu, O. Predescu, Protecţia europeană a drepturilor omului şi procesul penal român (European protection of human rights and Romanian criminal trial), C.H.Beck Publishing House, Bucharest, 2008.
- A.M. van Kalmthout, M.M. Knapen, C. Morgenstern (editors), Pre-trial detention in the European Union, Ed. Wolf Legal Publishers, Nijmegen, The Netherlands, 2009.
- Neagu, Tratat de procedură penală. Partea generală. (Criminal procedure treaty. The General Part.), Universul Juridic Publishing House, Bucharest, 2010.
- Ghe. Mateuţ, Tratat de procedură penală. Partea generală. (Criminal procedure treaty. The General Part.) Volume II, C.H.Beck Publishing House, Bucharest, 2012.
- R.-F. Geamănu, Use of force and instruments of restraint – an outline of the Romanian legislation in the European context, The International Conference CKS-CERDOCT Doctoral Schools, Challanges of the Knowledge Society, Bucharest, April 15-16, 2011, CKS-CERDOCT eBook 2011, Pro Universitaria Publishing House, 2011.

3. Papers presented at a meeting or conference

- *Compulsory Bringing of Witnesses and Accused Persons from an Austrian Perspective*, Dr. G. Walchshofer, expert report presented at the Compulsory bringing of persons to judicial authorities Workshop on 24th – 26th of October 2013, in Sofia (Bulgaria), as part of the "*Capacity building of General Directorate Security staff in line with international standards to achieve a more effective judicial system*" Project, General Directorate "Security", Ministry of Justice (Bulgaria).
- *Court orders for the transfer of persons to court sessions*, R. Steinhaus, expert report presented at the Compulsory bringing of persons to judicial authorities Workshop on 24th – 26th of October 2013, in Sofia (Bulgaria), as part of the "*Capacity building of General Directorate Security staff in line with international standards to achieve a more effective judicial system*" Project, General Directorate "Security", Ministry of Justice (Bulgaria).
- *Compulsory bringing of persons to judical authorities on the ground of Polish legal system*, D. Mazur, expert report presented at the Compulsory bringing of persons to judicial authorities Workshop on 24th – 26th of October 2013, in Sofia (Bulgaria), as part of the "*Capacity building of General Directorate Security staff in line with international standards to achieve a more effective judicial system*" Project, General Directorate "Security", Ministry of Justice (Bulgaria).

4. Case-law

A. National Case-law

- Romanian Constitutional Court Decision No. 76/1999, published in the Official Journal of Romania, Part I, no. 323 of 6th of July 1999.
- Romanian Constitutional Court Decision No. 210/2000, published in the Official Journal of Romania, Part I, No. 110 of 5th of March 2001.
- Romanian Constitutional Court Decision No. 885/2007, published in the Official Journal of Romania, Part I, no. 750 of 5th of November 2007.
- Romanian Constitutional Court Decision No. 1401/2009, published in the Official Journal of Romania, Part I, no. 855 of 9th of December 2009.

B. European Court of Human Rights Case-law

- ECtHR judgement from December 4, 1995, final, in the case of Ribitsch v. Austria (1).
- ECtHR judgment from September 25, 2003, in the case of Vasileva v. Denmark.
- ECtHR judgement from January 26, 2006, final, in the case of Mikhenyev v. Russia.
- ECtHR judgement from June 24, 2008, in the case of Foka v. Turkey.
- ECtHR judgment from February 23, 2012, in the case of Creangă v. Romania. Grand Chamber.
- ECtHR judgement from March 27, 2012, final, in the case of Lolova-Karadzhova v. Bulgaria.
- ECtHR judgment from November 20, 2012, in the case of Ghiurău v. Romania.

AN ECONOMIC ANALYSIS OF THE PRISON SYSTEM

Luciana Ioana GRUIA*

Abstract

The article presents a short cost analysis related to the prisoners of Romania in comparison with other countries. The purpose of the article is to present the current situation of the costs and expenditures, the state is taking when imprisoning a delinquent and to draw future lines for the improvement of the prison system and Criminal Code. Data is used from online available governmental sources worldwide and is statistically worked and interpreted. The analysis is corroborated with the laws from the old and new Romanian Criminal Code and conclusions are drawn. The article presents partial results of the author's yet not published work.

Keywords: *costs, prison, delinquent, criminal, analysis*

1. Introduction

Since early times, people were divided into two classes: rich and poor. The antagonism of these classes made possible the emergence of prisons. The existence of these sites was determined by the need to punish those who were violating the rules of conduct established and, therefore, the entire evolutionary process of the prisons, of various prison systems should be viewed as a social and historical phenomenon. In the era of slavery, the main penalties were the body punishments and imprisonment had a very limited scope of application. The prison was considered more a preventive measure and not a punishment, which was provided in the Roman law. As time passed, the prison became a place of torture for those who disobeyed state laws. Thus, deprivation of liberty in the Feudalism Era was characterized by torture and agony, all applied by order of the Inquisition. Prison law aims to establish the imprisonment regime and also the means of using this regime. Under the prison law we should first establish the term "prison treatment", which designates the social reaction against those who commit acts that are contrary to the laws of society. The importance of prison law is that it fights against crime and criminality. Imprisonment applies to all those who have committed violations and are convicted by criminal laws. It should be noted that imprisonment primarily involves harm and secondly - suffering.

William Churchill said: "Show me your prisons and I'll tell you how your society is." These famous words of a British politician capture the fact that the material conditions in any prison system, the achievement and the possibility of developing new perspectives are a kind of representation of cultural and economic development of the whole society, and even of the state. The treatment of prisoners expresses the relationship of the state to the individual and to the rights and civil liberties.

The paper presents a short analysis of the prisons' system in Romania in comparison with selective countries, in order to help the reform of the European prisons, which like in a company should be managed and controlled based on not only social key productivity indexes but also economical ones. The studied problem in this paper can positively influence in my opinion the lawmakers in order to provide better laws in terms of the social and economic impact on the individual (delinquents, as well as innocent people). There are different papers

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in the specialized literature (Sorensen[1], Walters[2], etc.)regarding the increasingly grade of occupancy in the prisons worldwide and how the prison lost its main purpose, i.e. of reeducating the inmates and became a place from where the delinquents come out worse or remain longer than the initial sentence due to problems which appeared in the prison. All these "delays" due to the problems post-sentence should be looked from the social as well as from the economical point of view. The necessity for my research comes from the main management idea, that if we have a problem, we cannot control it, nor solve it, unless we measure it. Thus there is a need within the juridical and economical state system, of finding out how much does an inmate costs the taxpayers' money, if we want to regulate and improve this system.

In an Europe where reforms are introduced in all branches of the state apparatus, the prisons' system should be also included and costs related to the maintenance of the prisons at the highest standards, aimed mainly at the purpose of reeducation, and costs with each delinquent per month should be analyzed and controlled in a strictly manner. The costs influence the quality and finally the result of the reeducation.

2.1. The Romanian prison system

A research was made of the prisons worldwide with a focus on their operational costs. The author tried to find answers to research questions like: How much does an inmate cost the state? What is the occupancy rate in the prisons? and How is this financial problem solved worldwide or is it just a local problem in Romania? Based on these questions, the scientific databases were used as well as the "grey" literature. An analogy is made between a company and a prison and based on this analogy the author uses comparative analysis in order to understand why and how much does an inmate costs the state. The research included juridical, social as well as economic aspects of the problem; however I will further focus on the financial problem of the prison system.

Gruia[3] considers that the prison system of a state should be connected and managed accordingly in order for the public policies to be understood at the highest as well as at the lowest level of the administrative system. As a result the level of corruption can be prevented and thus decreased at the administrative level.

In the same time, if we look at ways of increasing the productivity of the "company" called "the prison system", we can make an analogy with the ideas of Gruia[4], who considers that the company's productivity can be managed and improved by fulfilling the tasks Just-In-Time with a focus on the Quality Management System and on the lifecycle of the final products, which in our case are the inmates after they have finished the educational and correctional part of their lives in prisons. In another article, Gruia and Gruia[5] provide an analysis of state powers in the context of today's business environment both nationally and internationally, and this can be considered as an important starting point in my research regarding how the state can and must influence the prisons' system. This considered article is part of a more complex work of the authors on improving social relations that occur in the work of state administration in relation to the Romanian business environment and provide a connection between the business environment and the state apparatus, which can be applied

[1] Sorensen, J., Davis, J.: „Violent criminals locked up: Examining the effect of incarceration on behavioral continuity", Journal of Criminal Justice, [online], vol. 39, no.2, March–April 2011, p.151-158.

[2] Walters, G.D., Crawford, G.: „In and out of prison: Do importation factors predict all forms of misconduct or just the more serious ones?", Journal of Criminal Justice, [online], vol. 41, no.6, November–December 2013, p.407-413.

[3] Gruia, George, *Politici publice*, Ed. Sitech, Craiova, 2014, p.186, ISBN 978-606-11-3764-0.

[4] Gruia, C., George:„Methodology development for implementation of quality management system within SME from the products' lifecycle point of view". Manager Journal. [online]. 2012, vol. 15, p. 92-104. ISSN 1453-0503.

[5] Gruia G. and Gruia, C., George: „The role of state powers in the development of business environment", Perspectives of Business Law Journal, [online], vol.2, no.1, November 2013, ISSN 2286 – 0649, ISSN–L 2286 – 0649.

also in the relations between the prisons and the business environment, when the prisoners do work outside the penitentiary and they receive money as well as the penitentiary (from non-state sources and increase the prison's budget).

In Romania, according to the old Criminal Code[6], imprisonment can be classified into life imprisonment and imprisonment from 15 days to 30 years - both main punishments. However, according to Article 63 index 1 of the current Criminal Code imprisonment can be applied if the convict avoids voluntarily payment of the fine and the court replaces the sentence with imprisonment for the offense committed within the limits and according to the proportion of fine that has not been paid.

An alternative to life imprisonment is the imprisonment of 15 to 25 years and the prohibition of certain rights. If there are inhumane offenses of treatment in time of war (Article 358, paragraph 4, the current Criminal Code), the only main applicable punishment is life imprisonment.

In the case of plurality of crimes in which one or more prison sentences or a fine have been established, the main penalty shall be life imprisonment.

Under the new Criminal Code[7], life imprisonment "is the indefinite imprisonment and is executed according to the law on execution of sentences." This penalty applies only for particularly serious crimes such as crimes against persons, crimes against humanity, against life, against morality, against property, against state security, against the national economy, terrorism or crimes against the public interest, etc. and runs under maximum security, prisons specifically designed for special sections of prisons or county. Along with life imprisonment, it is accompanied by additional punishment by banning certain rights for constraining effect is particularly strong.

The new Criminal Code introduced also some changes in the sentences for the same offences. For example, theft and deception which until now were punishable by a maximum of 12 years will be assigned up to three years in prison. Punishment for cheating with serious consequences for those found guilty drops from 20 years to a term between one and five years. Sentences with execution will have alternatives. One of them is suspend of the punishment, under surveillance. Another novelty is the notion of fine-days. It means if a convict receives its punishment, and is not serious nor from the very serious category of offenses, he may pay the bail. Bribery in the old Criminal Code was punishable with imprisonment up to 12 years, while in the new Code it will be the maximum punishment of seven years.

	Prison population total (no. in penal institutions incl. pre-trial detainees)	Date	Estimated national population	Prison population rate (per 100,000 of national population)	Source of prison population total
Central and Eastern Europe					
Belarus	**31,700**	1/10/12	9.45m	**335**	NPA
Bulgaria	**10,996**	10/12	7.3m	**151**	US State Dep't human rights report
Czech Republic	**16,257**	30/8/13	10.54m	**154**	NPA
Hungary	**18,388**	13/6/13	9.9m	**186**	NPA
Moldova	**6,710***	1/4/13	3.56m*	**188**	NPA
	*Does not include the internationally unrecognised Transdniestria/Transnistria/Pridnestrovie.				
Poland	**83,610**	31/8/13	38.55m	**217**	NPA
Romania	**33,015**	24/9/13	21.25m	**155**	NPA
Slovakia	**10,152**	31/8/13	5.42m	**187**	NPA
Ukraine	**137,965**	1/9/13	45.21m	**305**	NPA

Tab. 1 - World Prison Population List per year 2012

Source: http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf

[6] Old Criminal Code of Romania, introduced in the year 1969 and modified with the latest version of 2008, was applied until February 1, 2014.

[7] New Criminal Code is applied and valid from February 1, 2014.

According to the World Prison Population List[8], the prison population rate per 100 000 of national population is for Romania 155, with a total of prison population of 33 015, in year 2012. However if we compare Romania with smaller countries like Czech Republic we see a difference of 1 in prison population rate, even though the population of Romania is double than the Czech one. On the other hand the prison population rate is higher with 32 for Slovakia than for Romania. If we look on the table above we can calculate that Romania is on 3rd place from 8 countries from Central and Easter Europe regarding the prison population rate per 100 000 of national population.

In year 2013, more exactly until April 2013, the Romanian Ministry of Justice shows that, on 16 April 2013, recorded a total of 33 060 of inmates housed in premises that provide a total capacity of 27 700 seats, according to criteria established by the Minister of Justice no. 433/C/2010 (index of occupancy - 119 %) and 19 738 seats, according to the standards of the European Court of Human Rights (ECHR), resulting in a 167% occupancy index.

My focus is mainly on the financial implications the European states take while imprisoning a delinquent. In this manner, I focused my research on this aspect of the problem. For example, the Vera Institute of Justice developed a report for American prisons showing how much incarceration costs taxpayers money. According to this report[9], "Vera determined that prison costs outside the corrections budget fall under three categories:

1. Costs that are centralized for administrative purposes, such as employee benefits and capital costs;
2. Inmate services funded through other agencies, such as education and training programs;
3. The costs of underfunded pension and retiree health care plan".

Their findings were that the actual costs of incarceration are usually higher than the budget corrections. Of course, we cannot compare the European prison system with the American one in terms of legislation, but in terms of costs, the costs per inmate contain the same categories everywhere in the world.

Another conclusion of the Vera report was that "putting more lower-risk offender in prison is yielding increasingly smaller improvements in public safety and may cost more to taxpayers than the value of the crime it prevents….it is essential to assess the benefits and costs of incarceration."[10]

I interpret the findings of Vera Institute of Justice that there is a need of a reform in terms of cost savings in direct relationship with the prisons' productivity in educating the inmates and a cost – benefit analysis of this situation based on the type of offences committed by the inmates.

In Romania, according to the Ministry of Justice, the monthly cost of an inmate, for the year 2013, in a prison is 2 397 RON (approx. €533), where the most part of the money 1 619 RON (approx. €360), represent the expenses with the personnel. If we look more careful at these costs we find out that the average cost for care with one convicted fellow is 417 RON (approx. €92) per month and 77 RON (approx. €17) for medical and social insurance. In total, the state is spending with each prisoner per month an average of €109. But there is an extra of €64 for costs with different activities related to the imprisonment program for each of the inmate, according to the nature of their sentence.

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[8] Walmsley, Roy: World Prison Population List, 10th edition, International Centre for Prison Studies, available online at http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf

[9] Christian Henrichson and Ruth Delaney, The Price of Prisons: What Incarceration Costs Taxpayers. New York: Vera Institute of Justice, 2012.available online at http://www.vera.org/sites/default/files/resources/ downloads /Price_of_Prisons_updated_version_072512.pdf

[10] Idem 6.

2.2. The American and European prison system: short comparison

The United States of America are the cradle of the modern democracy and accordingly I have considered as relevant to the theme of this article the history of the American prison system. Accordingly I will further present a part of this history, which I consider the most relevant one.

There are well known the Salem witch trials from 1692, which took place in the Salem Village (now Danvers, but then the rural part of Salem, Massachusetts) and spread through 22 other communities in three counties. As the author of the book "Six Women of Salem" relates, there were some struggling times when these trials appeared due to the witchcraft panic from those areas. I will further relate a part of the author's ideas, which were part of the research made in her book.

The region was already beset by frontier raids from French Canada, privateer attacks on coastal shipping and fishing, a struggling economy hampered by war, political uncertainty due to England's nullification of the Massachusetts Charter, and the threat of deadly untreatable illness from smallpox outbreaks. Also the local quarrels of Salem Village's wanted to split from Salem and the Salem Village congregation was in disagreement over the choice of minister. Then the minister's daughter and niece developed an unexplained illness, which was first treated with home remedies and prayer and eventually diagnosed by a medical doctor: the girls were "under an evil hand." Once the girls' symptoms appeared to be the result of bewitchment, neighborhood speculation dredged up long-simmering suspicions and old grudges as suggestions led to names and accusations.

Among the first three suspects arrested and questioned was the minister's slave, Tituba, who, bullied into confession, described a conspiracy of witches working against the already beleaguered community. The number of accused and the number of supposedly afflicted victims increased as the panic spread throughout Salem and adjacent towns.

Local magistrates conducted the preliminary hearings, and most of the surviving dialogue comes from notes from those hearings. To relieve the crowded jails, Massachusetts (once the new charter arrived) established a special temporary Court of Oyer and Terminer, and in the summer of 1692, thirty defendants faced a grand jury in Salem and proceeded to jury trials. All of these suspects were found guilty and sentenced to death.

From June to September 1692, nineteen people were hanged in four batches—yet the number of suspects and afflicted only grew. And more people were considered to be afflicted than testified in court.

Finally, the sheer quantity of suspects and the growing opposition suspended the trials in October 1692. After heads cooled, and the court—now the Superior Court—rejected spectral evidence, the trials resumed and found only three guilty, none of whom would hang.

In 1697, Massachusetts apologized with a public fast, and in 1711 it reversed the attainder on those found guilty who had been named in the various petitions, and then made *monetary restitution* to survivors or their families. In 2001, Massachusetts cleared five more not named in the 1711 act, leaving only Elizabeth Johnson Jr.'s name unprotected.

Even though this was a terrible act, what is interesting for my article is the fact that in the 17th century, the convicted were obliged to pay their prison costs.

Today, in Europe, in the 21st century, convicted criminals in Netherlands might start paying 16 euro per day for accommodation as the Dutch Ministry of Security and Justice wants to introduce a bill aimed at reducing state jail costs. "Convicted criminals have broken the law and received a penalty. Offenders are being asked to make a contribution… because of high costs," the ministry said.

Under the proposal, the convicts may have to pay 16 euros per day for a maximum of two years for time spent behind bars. Parents of under-aged prisoners "would also be liable for the charge. The convicted would be given six weeks to pay", adds the statement.

If the bill is approved by the Netherlands' two houses of parliament, it would become law by the end of the year. A separate bill has been introduced by the State Secretary for Security and Justice, Fred Teeven, proposing that prisoners also "contribute to the costs of the investigation that led to their conviction."

However the requested sum of money will not cover entirely the costs per day with one prisoner. Prison time costs the Dutch government around €250 per day per prisoner, according to news agency France-Press. With this new bill the Dutch cabinet hopes to save €65 million a year from the cost of detention.

I see two major directions for reducing the costs of the incarceration:

a) To implement laws like in Holland or in medieval times of USA, in order for the inmates to support some costs regarding their detention; OR
b) To reduce the costs with the imprisonments, this can be translated as reducing the costs with the personnel or reducing the time period spent by the inmates in the cells.

This latter solution is taken in some of the European countries, like Romania, where by introduction of the new Criminal Code, some sentences were reduced considerably for the same offence. However a better analysis is necessary in my opinion in order to see if this solution is the right one and not maybe the first direction should be a better one. But this only time will tell or an analysis in comparison between the Dutch juridical system and the Romanian will also be helpful. This is in my opinion a future line in my research and with this article I want to introduce the reader into the problematic matter of prison management and its control in terms of financial, juridical and social points of view.

3. Conclusions

The article showed an analysis of the costs of incarceration the state has to pay for their inmates. These costs were taken from governmental available sources online with the purpose of showing how the prison system is worldwide in terms of costs, and the goal of helping the European prison system in developing better rules and methodologies of applying these laws during the incarceration. In America the prison system is divided in private and state owned, while in Holland the lawmakers are developing a law, which will force the inmates to support part of their incarceration and conviction costs. Also the newly introduced Romanian Criminal Code gives fewer years for several offences, than before, which can be considered as a way of decreasing the costs related with the incarceration of an inmate for not so serious offences.

The theme of my article cannot be fully presented in order to comply with the guidelines for the authors regarding the length of the article. Thus the author here presents only partial results of the initial research regarding different financial aspects of the Romanian prison system and hopes that a discussion with the academic forum will help in improving the European legislation and methodology of operation of the prisons in Romania and Europe.

Future research can be focused on social and educational aspect of the delinquents with the goal of preventing crimes before happening, with a focus on cost – benefit analysis. The economic analysis can be extended to the whole European area and centralized laws, and directives can be implemented in each country in order to reduce the number of inmates, in time, and if their number cannot be reduced, at least the costs with their incarceration to be minimized and held under control.

References

- Christian, H. and Ruth, D.: "The Price of Prisons: What Incarceration Costs Taxpayers". New York: Vera Institute of Justice, 2012.available online at http://www.vera.org/sites/default/files/ resources/ downloads/Price_of_Prisons_updated_version_072512.pdf
- Gruia, George, *Politici publice*, Ed. Sitech, Craiova, 2014, p.186, ISBN 978-606-11-3764-0.

- Gruia, C., George: „Methodology development for implementation of quality management system within SME from the products' lifecycle point of view". Manager Journal. [online]. 2012, vol. 15, p. 92-104. ISSN 1453-0503.
- Gruia G. and Gruia, C., George: „The role of state powers in the development of business environment", Perspectives of Business Law Journal, [online], vol.2, no.1, November 2013, ISSN 2286 – 0649, ISSN–L 2286 – 0649.
- Marilynne K. Roach: Six Women of Salem: The Untold Story of the Accused and Their Accusers in the Salem Witch Trials, 472 p., Da Capo Press, ISBN: 978-0306821202.
- News agency France-Presse, www.afp.com.
- Old and New Romanian Criminal Code.
- Romanian Ministry of Justice, Press News, www.just.ro.
- Sorensen, J. and Davis, J.: "Violent criminals locked up: Examining the effect of incarceration on behavioral continuity", Journal of Criminal Justice, [online], vol. 39, no.2, March–April 2011, p.151-158.
- Walters, G.D. and Crawford, G.: "In and out of prison: Do importation factors predict all forms of misconduct or just the more serious ones?", Journal of Criminal Justice, [online], vol. 41, no.6, November–December 2013, p.407-413.
- Walmsley, Roy: "World Prison Population List", 10th edition, International Centre for Prison Studies, available online at http://www.prisonstudies.org/sites/prisonstudies.org/files/resources /downloads/wppl_10.pdf

THE PUBLIC MINISTRY'S HISTORICAL EVOLUTION

Ruxandra MITICĂ*

Abstract

The general objective of the current article is to identify the Public Ministry's evolution throughout history from the perspective of citizen's fundamental rights and freedoms. To accomplish the stated general objective, we will identify and analyze the most important legal provisions that have an impact on the institution's birth and evolution.

Keywords: *Public Ministry, citizen's fundamental rights and freedoms, legal provisions, society's general interests, rule of law.*

1. Introduction

Taking into consideration the provisions of the Romanian Fundamental Law[1], which establish that the role of the Public Ministry is to guarantee respect for the society's general interests and to defend the legal order as well as the citizens'rights and freedom, we consider that it is very important to identify the Public Ministry's evolution throughout the history. In order to achieve the general objective, we will identif the relevant legislative framework and analyze the most important legal provisions that have an impact on the institution's evolution.

The establishment of the Public Ministry was not arbitrary, but determined by the cruelty of the punishments and the need for a specialized institution which would guarantee the general interests of society and would defend both the rule of law and the rights and freedoms of citizens. The founding of the Public Ministry is undoubtedly justified in the wish to put an end to the gross violations of human rights and freedoms, private justice and the wish to create an authority specialized in the punishment of violators of human rights and the rights of the state.

The evolution of the Public Ministry, beginning with the time of the institution's first acknowledgement and up until the present day, reveals the fact that the role and importance of the Public Ministry evolved simultaneously with great historical events, the development of the institution's legal framework highlighting the crucial role of the Public Ministry and its evolution depending on the social, economic, political and historical context.

2. Content

A short glance at history highlights a first acknowledgement of the institution of the Public Ministry within the Organic Statutes, veritable constitutions which brought about a series of fundamental changes by introducing a fundamental principle, that of the separation of powers in the state into the executive, the legislative and the judicial.

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[1]Constituția României din 31 octombrie 2003, published in Monitorul Oficial, Partea I, nr. 767.

The Organic Statute was a genuine progress factor, a veritable constitution that laid the foundation for the institutions of modern Romania.[2] N. Bălcescu, on the Organic Statute: "The Statute, despite all its flaws, brought useful principles and became an instrument of progress. It legally recognized the principle of commercial freedom, the separation of the judicial, administrative and legal powers and introduced the parliamentary regime."[3]

In one of its works, the liberal-oriented economist Alexandru Moruzi stated: "you are blown away by the immense development of our institutions…We owe this development, regardless of what people might say, to the dispositions comprised in the Organic Statute in 1832. Despite all the concessions made to the historical context and the country's customs and situation, the Statute has not been any less beneficial to us. It puts an end to unrestricted rule; it provides for a regulated administration; it establishes contributions; it guarantees equality before the law from a civil law perspective."[4]

The Organic Statutes were the ones to create the position of prosecutor attached to courts for the protection of law and public order.[5] The Organic Statute of Wallachia regulated the institution of the Public Ministry. This institution had prosecutors attached to every court and to judicial divan. Their main responsibilities consisted of protecting the law and drafting regular reports regarding the activity of the court which they were attached to and its needs,[6] "as defenders of the law ("pravila") and public order." Article 217 of the Statute of Wallachia provide that: "the prosecutor shall obey the ruler and monitor the rightful abidance by norms and regulations…the correct enforcement of the judgements and the assurance of good order and peace of the people." Also, acording to the article 218 of the Statute of Wallachia in case of infringement of the laws and regulations, the prosecutor was supposed to notify the great "logofat" (noble title) and the Ministry of Justice so that legal measures were taken and the guilty person was held accountable.

The Organic Statutes marked an important moment in history, a moment which impacted on organizing judicial courts, determined the transition from a state in which authority was exercised by a single organ, the ruler, to a state whose organization was based on the principle of the separation of powers. The Organic Statutes were the ones to establish the institution of the Public Ministry, the responsibilities of the prosecutors of the courts and divans in civil and criminal proceedings.

During the rule of Alexandru Ioan Cuza, the modernization of the organization and functioning of the institution of the Public Ministry took place under the law of judicial organization in 1865. According to this regulation, the prosecutors had the responsibility of judicial police, were the titulars of criminal action and were entrusted to enforce definitive and irrevocable criminal judgements. Furthermore, they had the responsibility to verify documents of civil registry, inspect prisons and other places of enforcement of punishments and security measures, monitored law abidance within the courts, reporting the difficulties observed to the Ministry of Justice.[7]

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[2]A.Oţetea, "Geneza Regulamentului Organic", Revista de Studii şi Articole de Istorie (1957): 387 apud Roxana Gherghe, „Rolul modernizator al Regulamentelor Organice în Ţara Românească şi Moldova", Analele Universităţii Constantin Brâncuşi din Târgu Jiu, Seria Litere şi Ştiinţe Sociale, nr. 3 (2009): 89.

[3]N. Bălcescu, *Opere* (Bucureşti: Editura de Stat pentru Literatură şi Artă, 1952), 180 apud Roxana Gherghe, „Rolul modernizator al Regulamentelor Organice în Ţara Românească şi Moldova", Analele Universităţii Constantin Brâncuşi din Târgu Jiu, Seria Litere şi Ştiinţe Sociale, no. 3 (2009): 79.

[4]V. Slăvescu, *Vieaţa şi opera econmistului Alexandru D. Moruzi* (Bucureşti: Academia Română. Studii şi Cercetări, 1941), 109 apud Gheorghe I. Brătianu, *Sfatul domnesc şi Adunarea stărilor în Principatele Române* (Bucureşti: Enciclopedică, 1995), 252.

[5]Cosmin Lucian Gherghe, "Regulamentele Organice şi dezvoltarea vieţii constituţionale româneşti," Revista de ştiinţe politice, no. 30-31 (2011): 15.

[6]Academia de Ştiinţe Sociale şi Politice a Republicii Socialiste România, *Istoria dreptului românesc*, (Bucureşti: Academia Republicii Socialiste România, 1980), 179-181.

[7]Ioan Alexandru, *Ministerul Public între executiv şi justiţie*, (Bucureşti: Lumina Lex, 2002), 35-36.

The criminal law unification, which marks the establishment of Romanian criminal law after the principalities were united, was made under the code of Cuza, namely the Penal Code of 1865. This aimed to establish the principle of legality before the law: "No crime shall be punished unless the punishment will be decided upon prior to its commitment. Crimes committed during the enactment of the old law will pe punished accoring to that law; and when punishments stipulated in the current law will be lighter, the lighter punighment will be enforced. Crimes committed under the old code, but not stipulated in the current code, will no longer be punished,"[8] the humanization of punishments and life-long community service.[9]

The Code did not contain the supreme punishment – the death sentence – which had existed since the establishment of the Romanian states, the most drastic punishment being life-long community service addressed to culprits of exceptional gravity.[10] It comprised drastic punishments for all those who challenged or disrupted national security, disrupted public order and tranquility, did not respect the rights and freedoms of citizens. Article 105 of the Penal Code of 1865 stipulated „civic degradation" (limiting the civil rights)[11] of the prosecutor making an attempt on the freedoms of an individual: "This is how „civic degradation" will act as a punishment for prosecutors, substitutes, judges or public servants who apprehend or issue orders of apprehension for individuals from localities other than those stipulated in the laws and rules or who send before the court an individual prior to his indictment according to the law." Furthermore, the „civic degradation" of the prosecutor was stipulated in case he broke his responsibilities as well: "Judges, prosecutors and their substitutes, police officers who interfere in the exercise of the rights of the judicial power or through regulations that comprise legal provisions or block or suspend the enforcement of one or more laws or deliberate on whether to publish or enforce a law.

Judges, prosecutors and their substitutes, judicial police officers who overstep their responsibilities, blocking the enforcement of orders given by the administration or after they allowed or summoned in court public servants for deeds relating to the exercise of their position and who persist in enforcing these measures, despite the competent authorities notifying them of the annulement of the deeds or the existence of a conflict of interests. A fine between one hundred and one thousand five hundred lei will be applied as punishment to judges who, overstepping their responsibilities, interfere with the laws created by the administrative authority. The same punishment applies to members of the Public Ministry who conclude or ask for this sort of proceedings to take place.**[12]** It seems that history brings into the spotlight a period in which 'civic degradation' was the sanction applied to prosecutors for violating freedoms of the individual and for transgressing their own responsibilities.

The Code of Penal Procedure of the United Principalities in 1864, a document of great significance for shaping the role of the institution of the Public Ministry, brings to our attention the competence of the prosecutors of the Public Ministry attached to courts in the following manner:[13] prosecutors of the correctional courts or civil courts were put in charge of discovering and monitoring every offence and criminal activity under the authority of the courts where they exercised their responsibilities and those under the authority of jury courts; prosecutors attached to the court of first instance had the authority to solicit in the exercise of

[8]Codul Penal al Principatelor Unite Române de la 1864, published in Monitorul Oficial din 30.10.1864, Partea I, Dispoziții preliminare, art. 2.
[9]Codul Penal al Principatelor Unite Române de la 1864, published in Monitorul Oficial din 30.10.1864, Cartea I, Titlul I, art. 10.
[10]Budu Ionel, "Modernizarea justiției în principatele române. De la teorie la practică" (teză de doctorat, București, 2010).
[11]Codul Penal al Principatelor Unite Române de la 1864, published in Monitorul Oficial din 30.10.1864, Cartea I, Titlul I, art. 22.
[12]Codul Penal al Principatelor Unite Române de la 1864, published in Monitorul Oficial din 30.10.1864, Cartea II, Titlul II, Cap. III, art. 108, 109.
[13]Codul de procedura penala al Principatelor Unite Române din 1864, published in Monitorul Oficial din 2 Decembrie 1864, Cartea I, Capitolul III, Secțiunea I, art. 21, art. 22, 23, 26, 28, art. 30 - art. 39.

their responsibilities the direct use of public force; in all the cases of grave offences, if these called for a criminal punishment, the prosecutor of the court had to got to the crime scene immediately, in order to fill in the fact finding document, to listen to the witnesses' statements, with the notification of the chief prosecutor; the prosecutor of the court, in cases regarding grave offences and when the deeds called for a criminal punishment, notified the accused of the charges made against him.

Furthermore, in the text of the Code, we identify the role of the Public Ministry attached to the Jury Court as follows:[14] the Public Ministry attached to the Court of appeal interrogated, either itself or through its substitute, all the persons indicted, without being able to bring a new charge, under the sanction of nullity; the Public Ministry assisted debates, demanded the application of punishment and was present at the judgement; the Public Ministry conducted in the name of the law all the indictments it considered adequate; the Public Ministry attached to the Court of appeal monitored the activity of the judicial police officers and delivered summons in cases of negligence of the judicial police officers. The text of the Code of Penal Procedure reveals essential aspects of the competence and role of the Public Ministry.

A regulatory document that leaves its imprint on the institution is the Law of 1913 regarding the instruction and judgement before the correctional court of grave offences. This regulation brings important modifications to the competence of the institution of the Public Ministry. According to this law, persons caught during the commitment of a crime of common law in the cities serving as county seat could be arrested on spot and brought before the prosecutor, who interrogated them and sent them before the local court or tribunals summoned to make an urgent judgement, without passing through preceding phases of fact finding, indictment, instruction, which the Code of Penal Procedure stipulated.[15]

Therefore, we identify changes regarding the competence of the institution of the Public Ministry – it receives the responsibility to carry on the instruction and issue the bench warrant. Furthermore, the law stipulates the introduction of a new, much more rapid procedure in which the prosecutor has the responsibility to take all the measures so that the accused can be summoned before the court even the day after the discovery of the grave offence.

The decree for the organization and function of the prosecutor's office in 1948 represents the proof of a new phase in the history of Romania, a phase of Soviet influence in the organization of judicial power. It seems that with the issuance of the Decree, the phrase "Public Ministry" disappears, this being clearly stipulated by Law no. 6 of 1952.

The 1948 Decree brings about essential changes to the institution of the Public Ministry. It disappears and, in return, the Prosecution of the Romanian People's Republic is established as a system of organs which carried on the activity of superior monitoring of law abidance. The responsibilities of the prosecution were extremely wide, which ensured the creation of a powerful instrument of control over the entire society by the political power.[16] Thus, the Prosecution of the Romanian People's Republic, under the authority of the Minister of Justice, comprised: the prosecutor general of the Romanian People's Republic, who was also in charge of the prosecutor's office, one county prosecutor and eight prosecutors attached to the Supreme Court; one county prosecutor and a number of prosecutors attached to courts; one county prosecutor and a number of prosecutors attached to tribunals;

[14]Codul de procedura penala al Principatelor Unite Române din 1864, published in Monitorul Oficial din 2 Decembrie 1864, Cartea II, Capitolul II, art. 314-317.
[15]Emil Cernea, Emil Molcuț, *Istoria statului și dreptului românesc* (București, Casa de editură și presă "Șansa" S.R.L., 1998), 223.
[16]Ioan Alexandru, *Ministerul Public între executiv și justiție*, (București: Lumina Lex, 2002), 36-37.

prosecutors attached to people's courts.[17] The Prosecution had the role to monitor the abidance of criminal law both by public servants and by regular citizens, monitor indictment and punishment of crimes against order and democratic liberties, economic interests, national independence and the sovereignty of the Romanian state.[18]

The law for establishing and organizing the Prosecution in 1952 shaped the role of the institution of the prosecutor in a time of Soviet influences. The thus newly created institution was an independent organ, exclusively subordinated to the supreme organ of state power and to the Council of Ministers, with the aim to monitor law abidance, defend social order and the interests of citizens.

According to the regulatory document, the main responsibilities of the prosecution were:[19] monitoring that orders, instructions, decisions, provisions and dispositions and other documents with regulatory character of the local organs of the state power, ministries and other central organs of the state administration, state institutions, organizations and enterprises and cooperative organizations and enterprises, as well as other public organizations are in compliance with the laws of the Romanian People's Republic and the decisions of the Council of Ministers, as well as with the other regulatory documents; monitoring that every crime is established timely and completely and sanctioned justly; monitoring the respect for citizens' individual liberties, monitoring and controlling the grounds and legality of apprehension or preventive detainment and taking measures to free the ones illegally apprehended or detained; monitoring that the laws are applied uniformly and justly by tribunals from across the entire territory of the Romanian People's Republic by overseeing their judicial activity; monitoring the activity of the organs in charge of law enforcement, as well as the activity of the institution where the punishments are enforced and medical and pedagogical measures are taken, in regards to the legality and conditions of their enforcement.

According to the text of the Fundamental Law of 1952, the Romanian People's Republic, "a state of workers from cities and villages", was born as a result of the historic victory of the Soviet Union over German fascism and the liberation of Romania by the glorious Red Army. The Great National Assembly becomes the supreme organ of state power and the only legislative forum of the country.[20]

According to the Constitution of 1952, it seems that the Prosecution did not only have a judiciary role, its involvement in the state activity being preponderent, as a body that monitored that all organs and institutions are compliant with the law.[21]

Title VII of the Constitution,[22] addressing the prosecution organs, stipulates their role within the Romanian Socialist Republic, that of monitoring the activity of organs in charge of indictment and of enforcement of punishments and monitoring, according to the law, of the respect for the legality, the defence of socialist order, legitimate rights and interests of socialist organizations, of other juridical persons, as well as citizens. The Prosecution was administered by the Prosecutor General, and the Prosecution's organs were the following: The Prosecution General, the county prosecutions, the local prosecutions and the military

[17]Decretul nr. 2 din 22 aprilie 1948 pentru organizarea şi funcţionarea parchetului, Publicat în Monitorul Oficial nr. 95 din 22 aprilie 1948, Titlul I, Dispoziţii preliminare, art. 4.
[18]Decretul nr. 2 din 22 aprilie 1948 pentru organizarea şi funcţionarea parchetului, Publicat în Monitorul Oficial nr. 95 din 22 aprilie 1948, Titlul I, Dispoziţii preliminare, art. 1-art. 3.
[19]Legea nr. 6 din 1952 pentru înfiinţarea şi organizarea Procuraturii, Buletinul Oficial nr. 8 din 4 martie 1953, abrogată de legea 60/1968 pentru organizarea şi funcţionarea Procuraturii Republici Socialiste România, Capitolul II, art. 5 -art. 6.
[20]Constituția Republicii Populare Române, published in Monitorul Oficial Nr. 87 bis din 13 Aprilie 1948, Capitolul I, art. 1-art. 3, Capitolul III, art. 22-art. 23.
[21]Andreea Simona Straub, "Plângerea împotriva măsurilor şi actelor de urmărire penală," (rezumat teză de doctorat, București, 2013).
[22]Constituția Republicii Socialiste România din 1965, published in Buletinul Oficial din 21.08.1965, Titlul VIII, art. 112 – art. 115.

prosecutions. The Prosecutor General answers of the activity of the Prosecution to the Great National Assembly and in between sessions, to the State Council.

A modification worth mentioning in our analysis is the one applied to the Constitution of 1965, according to which the Prosecution would no longer exercise a general monitoring of the legality (of the ministries and other central organs, local state organs and state administration, as well as of public servants and other citizens), but only a monitoring of the activity of organs in charge of indictment and enforcement of punishments and would monitor law abidance, according to the law.

The Constitution created in the context of the 1989 events – the collapse of the communist regime in Romania and the return to a democratic regime, combined democratic tradition and new European constitutional principles.

In December 1991, the new Constitution of Romania was adopted. It reflected the democratic changes that took place in the country in December 1989 and established a series of new principles regarding the judicial activity. The 1991 Constitution reinstated the old name of the institution, "Public Ministry", developed under section II, chapter VI of title II, within the judicial authority, eliminating the provisions that established Prosecution as a distinct state organ.

According to the Fundamental Law, within the judicial activity, the Public Ministry represents the general interests of the society and defends rule of law, as well as the rights and freedoms of citizens. The Public Ministry exercises its responsibilities through prosecutors organized in prosecutions, according to the law.

Law of judicial organization in 1992 marked an important moment in the evolution of the institution of the Public Ministry, by recognizing the capacity of the magistrate and tenure of the prosecutor, alongside that of the judge: "The following have the capacity of magistrate and are part of the magistrate body: judges of all judicial courts, prosecutors within the prosecutions attached to these, as well as assistent-magistrates of the Supremel Court of Justice".[23] With this law the responsibility of general monitoring was eliminated from the competence of the prosecutor, and only judicial responsibilities were maintained.

Currently, the law that lies at the foundation of judicial organization has the role to instate regulations that would guarantee the observance of the Fundamental law and other laws of the country, ensure the right to a fair trial and the judgement by judicial courts impartially and independently of any external influences, ensure the respect of fundamental individual rights and freedoms, mentioned namely in the following documents: the Universal Declaration of Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, the United Nations Convention for the Rights of the Child, the Charter for Fundamental Rights of the European Union, as well as guarantee observance of the Constitution and the laws of the country.[24]

Furthermore, the text of the law redefines the responsibilities exercised by the Public Ministry through prosecutors, the principles that lie at the core of their exercise and their organizational structure.

It is important to note that the current regulation of the judicial organization comprises a series of provisions aimed to increase the decisional autonomy of the prosecutor, thus minimizing the effect of politicization, generated by the intervention of the Ministry of Justice. As a result, the new legal text eliminates the provision from the old law of judicial organization according to which the Ministry of Justice had the right to issue a written disposition directly or through the Prosecutor General, to the prosecutor responsible of initiating, according to the law, of the indictment for the crimes he waas aware of and

[23]Legea nr. 92 din 1992 pentru organizarea judecatorească, published in Monitorul Oficial nr. 197 din 13 august 1992, Titlul III, Capitolul I, Dispoziții comune, art. 42.
[24] Legea 304 din 2004 privind organizarea judiciară, published in Monitorul Oficial nr. 515 din 14.08.2013.

promoting before the courts actions and channels necessary to the defence of the public interest.

Furthermore, another provision that is no longer comprised in the current regulatory framework is that according to which the control of the Ministry of Justice over the activity of the prosecutors consisted of appreciation of the activity, preparation and professional abilities of the prosecutors.[25] Concurrently, another regulation was passed regarding the possibility of the prosecutor to contest to the Superior Council of Magistracy the intervention of the superiorly hierarchic prosecutor, for influencing in any way the conclusions, thus highlighting the preoccupation of the lawmaker for ensuring the independence of the prosecutor when passing judgements.

In fulfilling its role, that of defending the general interests of the society, the rule of law and the fundamental rights and freedoms of the citizens, the prosecutor must have an impeccable conduct, both professionally and socially. To this end, the regulatory framework has established a series of rights, obligations and restraints of the prosecutor that would attract the citizens' confidence in the act of justice, create the possibility of the prosecutor to develop his activity without any external pressure and the assurance of an independent and impartial act of justice.

The Criminal Procedural Code aims to be a normative act which adresses the new realities of society, to provide in a clear manner the citizen's rights in the stages of the criminal proceeding, a better guarantee and promotion of citizen's rights, imperatives of increasing the citizen's confidence in the act of justice. Thus, the provisions of the new criminal proceeding code bring to our attention changes with impact upon the prosecutor's role in promoting and guaranteeing human rights, and also a strengthening of its role to lead and supervisee the criminal procedeeing activity carried out by the criminal investigation bodies of the judicial police or the special criminal investigation bodies. The prosecutor institution remains the warranter of promoting the citizen's fundamental rights and freedom.

Also, it seems that regarding the prosecutor's competence, the new criminal procedural code restrics the categories of crimes for which the prosecutor was required to conduct his own prosecution.

While the old Criminal Procedural Code provided the public prosecutor's competence to carry out criminal proceedings for: crimes against the security of the state, crimes against a person, crimes against personal freedom, crimes against property, crimes against authority, service crimes or crimes in connection with the service, crimes against the security of railway traffic, offenses established for certain economic activities, crimes against peace and humanity,**[26]** the current Criminal Procedural Code provides that prosecution must be carried out, by the prosecutor: for offenses where first instance judging competence belongs to the High Court of Cassation and Justice or the Court of Appeal; in the case of crimes against life, offenses against justice and crimes of corruption.[27] Thus, it seems that within the new Criminal Procedural Code we find only some of the offenses for which the prosecutor is obligated to conduct his own prosecution.

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[25]Legea nr. 92 din 1992 pentru organizarea judecatorească, published in Monitorul Oficial nr. 197 din 13 august 1992, Titlul III, Capitolul I, Dispoziţii comune, art. 34.
Traian Cornel Briciu, „Instituţii judiciare. Principiile de organizarea a justiţiei. Mgistratura. Avocatura" (Bucureşti: Ch. Beck, 2012), 185.

[26]Codul de Procedură Penală din 1997, published in Buletinul Oficial nr. 145-146 din 12 noiembrie 1968, republicat în Buletinul Oficial nr. 58-59 din 26 aprilie 1973, Versiune actualizata la data de 16/07/2012, art. 209.

[27]Legea nr. 286 din 17 iulie 2009 privind Codul penal published in Monitorul Oficial nr. 510 din 24 iulie 2009, art. 188-191, art. 279, art. 289-294.

3. Conclusions

Having arrived at end of this article, we believe that we have achieved our general objective, to identify the development of the Public Ministry institution throughout history, from the perspective of ensuring fundamental human rights and freedoms and also the specific objectives that helped to accomplish the general objective: to identify and analyze the major legal provisions impacting the birth and evolution of the institution.

Certainly, the apparition of the Public Ministry was not random, its birth being determined by the cruelty of punishments existing within the ante-state and medieval periods, by the need for a specialized agency to ensure compliance with the general interests of society, to defend the rule of law and the citizens' rights and freedoms.

The Public Ministry institution's birth certainly comes from a desire to end the massive violations of humans' fundamental rights and freedoms, to end private justice, the desire to create a specialized authority to punish offenders who violated human and state rights.

Thus, the Public Ministry institution appeared from the need for a public authority to be recognized as (by the duties and powers conferred by law) the instititution with the competence to set public action in motion, an action carried out on behalf of society and seeking to bring to justice those who break criminal law, the Public Ministry performs the so-called "service of prosecution", which means that the criminal action is entrusted to this particular body mainly because it is not possible for the same authority to deal with both the prosecution and the judgement in a criminal case.

The Public Ministry is a specialized authority of the state that initiates criminal proceedings and sets in motion criminal action, brings to justice the criminal justice report generated by a criminal offense, thus giving rise to a legal criminal procedural report, and then exercises on behalf of the state the right to punish, thereby fulfilling the „prosecution function."

References

- A.Oţetea, *"Geneza Regulamentului Organic"*, Revista de Studii şi Articole de Istorie (1957).
- Academia de Ştiinţe Sociale şi Politice a Republicii Socialiste România, *Istoria dreptului românesc*, (Bucureşti: Academia Republicii Socialiste România, 1980).
- Andreea Simona Straub, *"Plângerea împotriva măsurilor şi actelor de urmărire penală,"* (rezumat teză de doctorat, Bucureşti, 2013).
- Budu Ionel, "Modernizarea justiţiei în principatele române. De la teorie la practică" (teză de doctorat, Bucureşti, 2010).
- Constituţia Republicii Populare Române, published in Monitorul Oficial Nr. 87 bis din 13 Aprilie 1948.
- Constituţia Republicii Socialiste România din 1965, published in Buletinul Oficial din 21.08.1965.
- Constituţia României din 31 octombrie 2003, published in Monitorul Oficial, Partea I, nr. 767.
- Cosmin Lucian Gherghe, "Regulamentele Organice şi dezvoltarea vieţii constituţionale româneşti," Revista de ştiinţe politice, no. 30-31 (2011).
- Decretul nr. 2 din 22 aprilie 1948 pentru organizarea şi funcţionarea parchetului, published in Monitorul Oficial nr. 95 din 22 aprilie 1948.
- Emil Cernea, Emil Molcuţ, *Istoria statului şi dreptului românesc* (Bucureşti, Casa de editură şi presă "Şansa" S.R.L., 1998).
- Gheorghe I. Brătianu, Sfatul domnesc şi Adunarea stărilor în Principatele Române (Bucureşti: Enciclopedică, 1995).
- Ioan Alexandru, *Ministerul Public între executiv şi justiţie*, (Bucureşti: Lumina Lex, 2002).
- Legea 304 din 2004 privind organizarea judiciară, published in Monitorul Oficial nr. 515 din 14.08.2013.
- Legea nr. 6 din 1952 pentru înfiinţarea şi organizarea Procuraturii, Buletinul Oficial nr. 8 din 4 martie 1953, abrogată de legea 60/1968 pentru organizarea şi funcţionarea Procuraturii Republici Socialiste România.

- Legea nr. 92 din 1992 pentru organizarea judecatorească, published in Monitorul Oficial nr. 197 din 13 august 1992.
- N. Bălcescu, *Opere* (Bucureşti: Editura de Stat pentru Literatură şi Artă, 1952).
- Roxana Gherghe, *„Rolul modernizator al Regulamentelor Organice în Țara Românească şi Moldova”*, Analele Universităţii Constantin Brâncuşi din Târgu Jiu, Seria Litere şi Ştiinţe Sociale, nr. 3 (2009).
- Traian Cornel Briciu, „Instituții judiciare. Principiile de organizarea a justiției. Mgistratura. Avocatura” (București: Ch. Beck, 2012).
- V. Slăvescu, *Vieaţa şi opera econmistului Alexandru D. Moruzi* (Bucureşti: Academia Română. Studii şi Cercetări, 1941).

THE INCOMPATIBILITY OF THE JUDGE AS PROVIDED BY THE NEW ROMANIAN CRIMINAL PROCEDURE CODE

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Abstract

Subsequent to the coming into force of the new Criminal Procedure Code of Romania, the lawmaker brought significant modifications as regards the incompatibility of the judge. In this respect, the main observation that one can make is that the hypotheses regarding incompatibility are more numerous and, thus, there are more cases in which the judge's lack of impartiality can be invoked. In the present study we are going to analyse the situations in which a judge is considered incompatible and we are going to make suggestions as regards the improvement of the present legislative framework.

Keywords: *judge's incompatibility, lack of impartiality, criminal trial, the fairness of the criminal procedure, the new Criminal Procedure Code of Romania.*

1. Introduction

Incompatibility is the situation in which one of the official procedure subjects is in a state of inadequacy in relation to a criminal case; this situation represents an impediment as to the subject's participation in solving that criminal case1.

Moreover, incompatibility may be considered an institution whereby a certain person who belongs to a judicial body is impeded to participate in the procedure activity that a certain criminal case involves with a view to removing suspicions as to the objectivity and impartiality of the manner in which a case is solved by this subject2.

Incompatibility should not be considered as a lack that is identified in a person's professional training, but rather as a special situation in which an official subject finds oneself in a certain criminal case. Thus, it would be possible for some of the best judges of a court of law not to be able to participate in solving a criminal case due to his/her potential incompatibility according to the law.

Similarly, incompatibility strictly refers to the provisions of the Criminal Procedure Code. The potential procedure errors that might be committed by magistrates (e.g., non-admitting certain concluding and useful evidence in court, violations of the right to defence, etc.) cannot be settled outside the means of appeal and not through recusation because they do not refer to the cases of incompatibility provided by the law[3].

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[1] Traian Pop, *Drept procesual penal,* vol. II, Cluj: Tipografia Națională Publishing House, 1946, p. 271.

[2] Grigore Theodoru, Lucia Moldovan, *Drept procesual penal*, Bucharest: Didactică și Pedagogică Publishing House, 1979, p. 56.

[3] The Court of Appeal Bucharest, Section I, The Criminal Section, Decision no. 1917/2003, in Ion Neagu, *Tratat de procedură penală,. Partea generală,* Bucharest: Universul Juridic Publishing House, 2013, p. 396.

2. The cases of incompatibility of judges

2.1. The judge is incompatible if he was a representative or a lawyer of one of the parties or of the main procedure subjects in a case, no matter if this occurred in a different case [Article 64 paragraph (1 letter a) of the Criminal Procedure Code, entered into force on 1st February 2014, hereinafter named CPP]. This first instance of a judge's incompatibility corresponds to Article 48 paragraph (1) letter b) of the former Criminal Procedure Code, which extends the application of the legal text for the hypothetical situation in which a party or the main procedure subject was represented or benefited from counsel services in another case, too. Similarly, the representation or counsel services offered to a suspect fall under the provisions of this case of incompatibility; the former regulation did not specifically refer to the person alleged to be guilty.

This case of incompatibility may be explained if we consider the irreconcilable positions of a former representative / counsel for any of the parties / for the main procedure subject and the position occupied later by this person as a judge; under such a circumstance, the suspicion regarding the impartiality is justified[4]. This case of incompatibility also exists if the counsel for the defence did not exercise any of the defence activities involved by the criminal trial[5].

2.2. The judge is incompatible if he/she is a relative or an in-law up to the 4th degree including to one of the parties, to one of the main procedure subjects, to the lawyer or to the representative thereof or is in another situation that is different from the provisions stipulated by Article 177 of the Criminal Code [Article 64 paragraph (1 letter b) CPP]. This case of incompatibility has been influenced by the provisions of Article 48 paragraph (1) letter f) of the previous Criminal Procedure Code, according to which incompatibility existed if the judge was the husband, a relative or an in-law up to the 4th degree including to one of the parties or to the lawyer or to the attorney-in-fact.

The regulation provided by this case extends incompatibility for other legal hypotheses. In this respect, a judge is incompatible if he/she is a family member to one of the parties, a main procedure subject, the lawyer or the representative thereof. According to Article 177 paragraph (1), The Criminal Code, a family member is: a) extended family and descendants, brothers and sisters, their children, as well as persons that subsequent to an adoption process became, according to the law, such relatives; b) the husband and c) the persons that have established husband-wife, respectively parents-children relationships on condition that they live together.

Similarly, while the previous provision made reference to the attorney-in-fact (conventional representative), at present, under the provision regarding incompatibility, one has to include to larger procedure category of representation with all its characteristics (legal and conventional representation).

2.3. The judge is incompatible if he/she was an expert or a witness in the case [Article 64 paragraph (1 letter c) CPP]. While preserving the same form in the content as Article 48 paragraph (1) letter c) of the previous Criminal Procedure Code, for this instance, incompatibility is established, on the one hand, considering that the expert expressed his/her opinion on certain aspects of the criminal case and, on the other hand, considering that the person who produced a piece of evidence in a criminal case should not be able to evaluate that evidence later.

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[4] Vintilă Dongoroz, Siegfried Kahane, Costică Bulai, George Antoniu, Rodica Stănoiu, Nicoleta Iliescu, *Explicații teoretice ale Codului de procedură penală. Partea generală*, Bucharest: Academiei Publishing House, 1975, p. 153.
[5] The Supreme Court, The Criminal Section, Decision no. 2153/1973, in *Revista Română de Drept* no. 1/1974, p. 142.

2.4. The judge is incompatible if he/she is the trustee or curator of a party or of one of the main procedure subjects [Article 64 paragraph (1 letter d) CPP]. This case of incompatibility is similar with the one provided by Article 48 paragraph (1) letter g) of the previous Criminal Procedure Code and it is justified given the protection of the juvenile natural person through the trust or of the mature natural person who has a curator under the conditions of the Criminal Code.

2.5. The judge is incompatible if he/she completed criminal investigations in the present case or if he participated as a prosecutor in the accomplishment of any procedure before a judge or a court of law [Article 64 paragraph (1 letter e) CPP]. The comparative analysis with the previous regulation brings into evidence, once again, the significant extension of the sphere of application for the institution of the judge's incompatibility.

Thus, this case of incompatibility has a correspondent in Article 48 paragraph (1) letter a), thesis I, of the previous Criminal Procedure Code, according to which a judge was incompatible, if, as a prosecutor, he/she initiated the criminal action, decided for the case to be brought before the court of law or issued conclusions in the court of law.

The present regulation extends the judge's incompatibility to all criminal investigation acts which he/she, as a prosecutor or criminal investigation body, accomplished in that case. Similarly, incompatibility also refers to the hypothetical situations in which, in the same case, the judge participated as a prosecutor in the proceedings accomplished both during the criminal investigation stage before the judge of rights and liberties, and also during the trial stage, i.e. before the judge of the preliminary chamber or the court of law.

The lawmaker consistently extended the instance of incompatibility for this case in order to eliminate the potential suspicions related to the judge's impartiality, which are justified by the previous quality of a criminal investigation body in that case.

2.6. The judge is incompatible if there is reasonable suspicion that his/her impartiality is affected [Article 64 paragraph (1) letter f) CPP]. *This case of incompatibility is the most complex for its content can, actually, include any situation that might generate a reasonable suspicion that the magistrate's impartiality is affected.*

The generic manner of presenting this incompatibility case makes room for a lot of interpretation as to the reasonable suspicion that the judge's impartiality is doubtful.

Considering the previous regulation, we appreciate that this case is applicable, e.g., when the judge expressed his/her opinion before, in an occasional manner, outside the criminal trial or even within the criminal trial [(this hypothesis was regulated in a different way by Article 47 paragraph (2) of the previous Criminal Procedure Code].

We have to enumerate the different regulations provided for certain cases of incompatibility as regards the expression of an opinion by a judge before a case is solved (i.e. the situation when the judge expresses opinion in advance), within a criminal trial, according to Article 64 paragraph (3)-(6) CPP.

The case law developed prior to the present code, which is still applied, correctly provided that the fair labelling of a criminal act by the judge is not similar with the previous expression by the judge of an opinion that would make him/her incompatible to judge that case. In this respect, the application by the judge of a procedure provided by the law does not lead to his/her incompatibility to participate in the on-going judging of that case[6]. Contrarily, other courts of law appreciated that the modification of the fair labelling of a case for the act

[6] The Supreme Court of Justice, The Criminal Section, Decision no. 442/1992, in *Revista Dreptul* no. 12/1992, p. 92.

which led to the notification of the court, through a conclusion pronounced before solving the case in first instance, leads to the incompatibility of the judge who was a member of the panel. The invoked reasons refer to analysing the decision to modify the labelling of the act, which is seen as a manner of quickly solving the case, with the result that the judge who pronounced the decision became incompatible to take part in solving the case.

The Supreme Court, finding that the criminal procedure law was not unitarily applied, ruled, when solving an appellate review in the interest of the law, that the modification of the labelling of the criminal act upon which the legal action was grounded, due to a conclusion pronounced prior to solving the case, does not reflect the incompatibility of the judge who was a member of the panel[7]. The decision adopted by the Supreme Court was grounded on the fact that the lawmaker found the modification of the labelling of the criminal act as a procedure matter, which did not affect the solution given to the case.

Similarly, the court found that the judge who completed and grounded the notification for revoking the suspension of the probation release (considering that the convict did not observe the obligations set forth by the judgement and left the country) expressed, in this way, the opinion as regards the solution that was to be given in the case, and, thus, became incompatible with judging the case[8].

For the same case of incompatibility, we are going to include the hypothesis provided by Article 48 paragraph (1) letter d) of the previous Criminal Procedure Code, according to which a judge becomes incompatible if, due to certain circumstances, it is proved that he/she/the husband/any close relative/member of the family has an interest of any nature under the provisions of Article 177 of the Criminal Code. From this point of view, any time the judge manifests an interest in the solution given to the criminal case, the suspicion as regards his impartiality may be invoked on reasonable grounds.

Thus, as regards the circumstances that could confirm the interest of the judge (and, consequently, the reasonable suspicion as to the lack of impartiality), there have been exemplified the situations in which the judge, the husband or a close relative of the judge is financially dependent on one of the parties, as debtor or creditor of that party; the judge is trying a similar case in a different court of law; the judge is involved in a dispute or was involved in a litigation with one of the parties. As to the interests that the judge might have, they could be material or moral.

2.7. Judges who are husband and wife, relatives or affine, up to the 4th degree including, or who find themselves in a situation similar to the ones provided under Article 177 of the Criminal Code [Article 64 paragraph (2) CPP].

The lawmaker provided this incompatibility case in order to remove any suspicion that might be invoked as to the mutual influence of those who are members of the same panel and would be husband and wife, close relatives or affine or family members, as provided by the criminal law.

The incompatibility case complies with the provisions of Article 46 of the previous Criminal Procedure Code, which are enlarged by including the hypothesis of "family members".

2.8. The judge who took part in the judgement of a case can no longer take part in the judgement of the same case if an appeal is lodged against it or if that case is retried subsequent to the annulment or cassation of the judgement [Article 64 paragraph (3) CPP].

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[7] The High Court of Cassation and Justice, the Joint Sections, Decision no. 1/2006, published in the Official Gazetter of Romania, no. 291 on 31st March 2006.

[8] The Court of Appeal Iaşi, The Criminal Section, Decision no. 296/2005, in Ion Neagu, op. cit., p 402.

The previous regulation provided by Article 47 paragraph (1), according to which "The judge who solved a case cannot take part in the resolution of the same case in a higher court when a means of appeal is exercised or the case is retried after the annulment of the judgment subsequent to an appeal lodged against it or after its cassation subsequent to lodging a second appeal against it.", illustrates a case of incompatibility that is justified by the previous judgement delivered by the judge who, in this way, can no longer take part in the re-judgement of the same case no matter if a means of appeal is lawfully lodged against it or if the judgement is retried subsequent to the annulment or cassation of the appealed judgement.

Thus, the judge who was a member of the panel that solved the case in the court of first instance cannot participate in the judgement of the same case when an appeal is lodged against it or when the case is retried subsequent to lodging an extraordinary means of appeal no matter what court of law has the competence to judge these means of appeal. The same judge is not entitled to take part in the re-judgment of the case subsequent to the annulment or cassation of the judgement.

There is incompatibility only if the judge was a member of the panel that delivered the judgement in the first instance on the same case, i.e. the judge settled the matter regarding the commission of the crime and the offender's guilt. In other words, the incompatibility provided for this situation exists if the judge was involved in solving the same case in another court of law or during a different stage of the criminal trial[9].

As to the above mentioned situation, there is no incompatibility if the judge took part in the judgement of a case in a court of first instance and was involved in three deadlines during which evidence was admitted and administered without a solution to be passed for this case in any of the established deadlines; under this circumstance, the judge may take part in the judgement of the same case in a court of appeal[10].

Similarly, appellate judges who did not deliver judgement in the first instance, while appreciating that the sentence was unlawful solely due to the composition of the panel and ruled the annulment of the judgement and, thus, its re-judgement, are not incompatible to judge the appeal lodged against the passed sentence for the re-judgement of the case[11].

The judge - who took part in solving the case in a court of appeal even if the panel had diverging opinions - is incompatible in participating in the judgement of the same case in a court of appeal subsequent to the annulment of the judgement and its submission for re-judgement in the court of first instance[12].

2.9. The judge of rights and liberties cannot participate in the judgement of the same case at the preliminary chamber proceedings, at the first instance judgement or in case means of appeal are lodged [Article 64 paragraph (4) CPP]. This case of incompatibility of the judge reiterates some of the previous regulations and, at the same time, it includes supplementary hypotheses, which were not provided by the previous Criminal Procedure Code.

In this respect, Article 48 paragraph (1) letter a) of the previous Criminal Procedure Code provided that a judge is incompatible if he/she solved, during the criminal investigation stage, the proposal of preventive detention or of prolongation of the preventive detention.

In the studies published before the present regulations[13], we appreciate that – by regulating the incompatibility of the judge who settled, during the criminal investigation, the proposal to arrest a person preventively or to prolong the preventive detention – other

[9] The Court of Appeal Suceava, The Criminal Section, Decision no. 461/1999, in *Revista de Drept Penal* no. 2/2000, p. 155.
[10] The High Court of Cassation and Justicee, The Criminal Section, Decision no. 5269/2007, according to the web page of the supreme court.
[11] The Court of Appeal Cluj, The Criminal Section, Decision no. 208/1998, in Ion Neagu, *op. cit.*, p. 399.
[12] The High Court of Cassation and Justicee, The Criminal Section, Decision no. 5229/2006, in Ion Neagu, *op. cit.*, p. 398.
[13] Ion Neagu, *op. cit.* p. 403.

circumstances were excluded, e.g. the situations in which the judge was asked to express opinion on other aspects regarding the individual freedom of the supposedly guilty person or the culprit. In this respect, we referred to the judge who, during the criminal investigation, expressed opinion on the other measures of preventive detention (replacement, interruption or revocation of the preventive detention measure) or who settled applications as to the provisory release or who decided that freedom depriving preventive measures should be adopted against the person alleged to be guilty or against the culprit, i.e. the obligation not to leave the locality and the obligation not to leave the country. Considering the above mentioned hypotheses, the incompatibility case provided by Article 48 paragraph (1) letter a) was not contested. Under these circumstances, we appreciate that, *de lege ferenda,* a unitarily applicable regime should be implemented as regards the judge who, during the criminal investigation, settled applications regarding the individual freedom of the allegedly guilty person or of the culprit.

One can notice that the present regulation, justified by the principle of the separation of the judicial offices, provided by Article 3 CPP[14], can be applied in a significantly larger number of situations if we consider all the hypotheses in which the judge of rights and freedoms intervenes during the criminal investigation stage, not only as regards the suspect's/culprit's individual freedom, but also as regards the decisional acts related to other fundamental rights (inviolability of the domicile, right to private life, inviolability of correspondence etc.).

Thus, the judge who, during the criminal investigation stage, exercises the judicial office of adopting decisions as to the fundamental rights and freedoms of the persons is not entitled to participate in the procedure run in the preliminary chamber or in the first instance judgment, no matter the jurisdiction level. Thus, in the panel of a criminal case, there will be no judge who, during the criminal investigation, settled proposals, complaints, contestations or any other notifications as regards the procedure measures, upon request or ex officio, while agreeing upon searches or the use of special surveillance methods and techniques etc.

As to the decision of taking preventive measures, the judge of rights and liberties becomes incompatible to take part in the procedure of the preliminary chamber or to settle the case in first instance, first of all in compliance with the provisions of Article 202 paragraph (1) CPP, according to which preventive measures may be set forth if there are serious grounds and pieces of evidence which justify the reasonable suspicion that a person committed a crime and, similarly, if these measures are necessary in order to ensure the good pursuance of the criminal trial or to prevent the suspect's or the culprit's attempt to avoid criminal investigation, respectively the trial or, finally, to prevent the commission of another crime.

Under these conditions, the judge of rights and liberties who may adopt preventive measures is obliged to establish whether there are clues or pieces of evidence which justify the reasonable suspicions that the person who is criminally investigated is also the person who committed the crime. Considering these aspects, this case of incompatibility refers to a supposed lack of objectivity of the judge who expressed opinion as to the adoption of preventive measures.

In previous works[15], we appreciated that the procedure for adopting preventive measures (and we refer to preventive detention), although of a contentious nature, is not apparently a judgement activity, but, due to its procedure implications and to a set of aspects closely related to the merits of the case, at least from a probatory point of view, it creates a state of incompatibility for the judge who was assigned to solve this criminal case. Our pleading became consistent in the present form of Article 64 paragraph (4) CPP.

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[14] According to Art. 3 paragraph (3) of the CPP, the exercise of a judicial office is incompatible – during the same criminal trial – with the exercise of another judicial office, except for the situation when the held office refers to checking the legality of subjecting or non subjecting a person to trial, situation in which the two offices are compatible.

[15] Ion Neagu, *op. cit.*, p. 404.

We appreciate that it was justified to include into the incompatibilities category the hypothesis referring to the judge of rights and liberties who directed the technical surveillance. In this respect, the judge who decided that communication of any type should be tapped or that access to an informatics system should be ensured, or that a person should be subjected to video and audio surveillance, photographed etc., appreciates that there are reasonable grounds to suppose that the person under surveillance plans or intends to commit a crime. These value judgements, which result from the content of Article 139 paragraph (1) CPP, justify the incompatibility of the judge of rights and liberties, who is not able to take part, in the same case, in the preliminary chamber procedure or in the first instance judgement or in the appellate judgement.

In this respect, the judge who appreciates that there is a reasonable suspicion as to the commission of a crime by a person or as to the possession by this person of objects and documents that are connected to the commission of a crime is incompatible to participate in the preliminary chamber procedure or in the first instance judgement or in the appellate judgements; in consequence, the judge must decide for the domicile to be searched according to Article 157 paragraph (1) CPP.

As to the incompatibility of the judge of rights and liberties who, during the criminal investigation, decided for provisory medical measures to be taken, the legal arguments are not very convincing and the incompatibility of the judge is not fully justified.

Thus, according to Article 245 paragraph (1) CPP, the judge of rights and freedoms, during the criminal investigation stage, may decide for a provisory subjection of the suspect or the culprit to medical treatment if the latter, due to a certain illness, including to an illness caused by a chronic consumption of alcohol or of other psychoactive substances, poses a social threat. It is essential to mention that the medical procedure is accomplished by the judge of rights and liberties on the basis of a medical and legal expertise which confirms the necessity to apply a compulsory measure for medical treatment. In other words, the judge of rights and liberties, when taking this measure, cannot decide on probatory elements that could be relevant for the existence of the crime and that could make the judge incompatible to try the case in first instance. In this case, the judge of rights and liberties, on the basis of a medical and legal act, appreciates that the person subjected to a medical evaluation represents a threat to society.

Similarly, under Article 247 paragraph (1) CPP, the judge of rights and liberties, during the criminal investigation, may decide for the suspect/culprit to be temporarily treated in a hospital if the latter is mentally alienated or a chronicle consumer of alcohol or a consumer of psychoactive substances and if this measure is necessary to prevent an actual and concrete social peril.

Although the incompatibility of the judge of rights and liberties who rules that such medical measures should be taken is not obvious as to his/her participation in the preliminary chamber procedure or in the judgement of the case in first instance or in other appellate procedings, we appreciate that the present incompatibility regulation is justified given the specific nature of these measures, i.e. the suspect's/culprit's limitation of freedom or deprivation of freedom.

These two cases may be completed with the situation in which the judge of rights and liberties decides for an IT search to be performed. Thus, under Article 168 paragraph (2) CPP, the premise of deciding for an IT search to be pursued is represented by the need to investigate an IT system / electronic storage support for informatics data in order to identify and collect evidence. Although this provision does not influence the merits of the case, the lawmaker regulated this case while paying attention to the fact that by searching an IT system the suspect's/culprit's private life could be violated.

Prior to the coming into force of the present Criminal Procedure Code, the High Court of Cassation and Justice ruled, when settling an appellate review in the interest of the law, that *the judge who, during the criminal investigation, settled the proposal for preventive detention shall not be incompatible to solve, in the same case, other applications which aim at prolonging the preventive arrest period*[16]. (My translation)

We appreciate that this decision may also be applied under the present Criminal Procedure Code, in the sense that the judge of rights and liberties who decided for a preventive detention to be enforced may settle, later on, applications for the prolongation of this measure.

2.10. The judge who participated in settling the complaint against decisions of non-initiating criminal investigation or as to not-bringing a person before a court of law cannot take part, in the same case, in the first court judgement or in the appellate proceedings [Article 64 paragraph (5) CPP]. This case of incompatibility was not explicitly provided in the previous regulation but it was partly invoked by Article 47 paragraph (2) of the previous Criminal Procedure Code, i.e. "the judge previously expressed his opinion as to the solution that could be given to that case".

In this respect, the judge's incompatibility was provided through a judgement of the High Court of Cassation and Justice, which was delivered to settle an appellate review in the interest of the law[17]. Thus, it was deemed as incompatible the judge who admitted the complaint, through a closing, revoked the resolution or ordinance appealed against and held that the case should be judged, while also appreciating that the existing evidence is enough to judge the case.

The manner in which Article 64 paragraph (5) CPP is drawn up extends the incompatibility situations for this judge. Thus, the present legal framework provides lack of impartiality for the judge of the preliminary chamber who took part in the procedure laid down under Article 340 CPP no matter the solution that was found, a fact which is different from the mandatory jurisprudence of the supreme court stipulated by the previous code and according to which the situation of incompatibility is set forth only for the judge who admitted the complaint and decided for the case to be judged.

This case of incompatibility refers to the preliminary chamber judge, who, when involved in settling the complaint against the non-initiation of the criminal investigation or non-initiation of the trial, according to Article 340 CPP, can no longer take part in the first instance judgement or in the means of appeal initiated for the same case.

We consider important to underline the fact that, even if the subject in this regulation is the preliminary chamber judge who settles complaints against non-initiation of the criminal investigation or non-initiation of a trial, incompatibility refers to the activity performed by this judge as provided for the complaint procedure set forth in Article 340 CPP and not to the jurisdiction activity he/she performs within the preliminary chamber. Thus, as a procedure stage, the complaint procedure initiated against the solutions of non-initiation of criminal investigation or non-initiation of the trial has a distinct nature, *sui generis*, which is not related to the criminal investigation stage.

Under these conditions, Article 3 paragraph (1) letter c) CPP, which sets up the power of checking whether it is legal or not to bring a person before the court, should be interpreted

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[16] The High Court of Cassation and Justicee, The Joint Sections, Decision no. 22/2008, published in the Official Gazette of Romania, no. 311 / 12th May 2009. The arguments on which the High Court relied when adopting its decision, according to which there was a situation of compatibility, are maintained as valid in the present regulations, as well; original text: *judecătorul care a soluţionat în cursul urmăririi penale propunerea de arestare preventivă nu devine incompatibil să soluţioneze ulterior, în aceeaşi cauză, cereri care au ca obiect prelungirea arestării preventive*.

[17] The High Court of Cassation and Justicee, The Joint Sections, Decision no.15/2006, published in the Official Gazette of Romania, no. 509 / 13th June 2006.

as follows: the power of checking whether it is legal or not to bring a person before the court can be exercised by the preliminary chamber judge in accordance with the preliminary chamber procedure, which we consider to be a first stage in the judgement process, whereas the power of not bringing a person before the court is exercised by the same preliminary chamber judge within the complaint procedure adopted against the non-initiation of criminal investigation or the non-initiation of the trial.

The incompatibility of the judge for the last situation is established in compliance with the law.

However, we point out the provisions of Article 3 paragraph (3) CPP, according to which, during the criminal trial, the exercise of a judicial office is incompatible with the exercise of another judicial office except for the entitlement to check whether a person should be or not brought before the court, which is compatible with the office of a judge. Consequently, the power to check whether a person should be or not brought before the court of law, which is exercised by the preliminary chamber judge, as provided by Article 340 CPP, is compatible with the judging position; thus, the judge is entitled to take part in the first instance judgement or in the appellate proceedings lodged for that case.

We appreciate that the compatibility provided by Article 3 paragraph (3) CPP is different, i.e. the lawmaker referred to the preliminary chamber judge who is entitled to take part in the first instance judgment, who checked the legal nature of the initiation of the trial. This aspect is reinforced by the provisions of Article 346 alin. (7) CPP, according to which the preliminary chamber judge, who decided for the criminal investigation to be initiated, exercises the judging power in the case.

Under these conditions, we agree with maintaining the incompatibility for the preliminary chamber judge's participation in the first instance judgement of the case, subsequent to his/her settling the complaint against the non-initiation of the criminal investigation or the non-initiation of the trial; however, at the same time, *de lege ferenda*, it is fundamental to modify Article 3 paragraph (3) CPP, a text which has the value of a principle, and which may be applied for the entire criminal proceedings; the modifications we suggest are as follows: (3) during the same criminal proceedings, the exercise of a judicial office shall be incompatible with the exercise of another judicial office, except for the power to check whether it is legal or not to bring a person before the court, which is compatible with the judging power.

2.11. The judge who delivered judgement as to a measure that is contested cannot participate in solving that contestation [Article 64 paragraph (6) CPP]. In a hypothesis that is similar with the one provided by Article 64 paragraph (3) CPP, this case is justified by the opinion previously expressed by a judge as to a contestation, a fact which makes him/her incompatible to participate in solving that case.

By applying this case, we point out for exemplification the following situations:

- according to Article 184 paragraphs (14) and (15) CPP, the judge of rights and liberties who decided, during the criminal investigation, to take measures against the unwilling hospitalization of the suspect or culprit, cannot participate in settling the contestation against that closing; in this case, the contestation is submitted with the judge of rights and liberties from the higher court within 24 hours after the decision is made and is settled within 3 days from the day it was filed;

- according to Article 204 CPP, the judge of rights and liberties who decided, during the criminal investigation stage, for certain preventive measures to be taken, cannot participate in settling the contestation against that settling; the contestation is submitted with the judge of rights and liberties from the higher court within 48 hours from its filing and it is settled within 5 days;

- according to Article 205 CPP, the judge of rights and liberties who decided, during the preliminary chamber proceedings, for certain preventive measures to be taken, cannot participate in settling the contestation against that closing; the contestation is submitted with the preliminary chamber judge from the higher court within 48 hours since it was filed and it must be settled within 5 days;

- according to Article 252^2 CPP, the judge of rights and liberties who decided, during the criminal investigation, through a closing, that the seized movable assets should be capitalized, cannot participate in judging the contestation against that closing; the contestation may be submitted within 10 days and it must be judged as soon as possible;

- according to Article 367 CPP, the judge who ruled the annulment of the judgment through a conclusion cannot take part in the judgment of the contestation, which is submitted to the higher court within 48 hours since its submission and which must be tried within 3 days since the file was received etc.

In fact, the last case of incompatibility mentioned in the present paper with reference to the judge is based on the same premise provided by Article 64 paragraph (3) CPP, especially that, according to Article 425^1 CPP, contestation is defined as a *means of appeal*.

3. Conclusions

At present, one can notice that the legal regime of a judge's incompatibility has been regulated in connection with the Criminal Procedure Code of 1968 and it came into force on 1st February 2014. The present lawmaker took over, to a large extent, provisions laid down by the previous laws, completing incompatibility cases with new hypotheses. Thus, a substantial increase has been recorded for the situations in which the judge is incompatible.

We can further conclude that many of the cases of incompatibility are grounded not only on the necessity to have the cases solved by impartial magistrates, but also on the specific regulation, which is a principle of the criminal trial, that it is the rule to separate judicial powers.

The present legislative criminal framework is superior to the previous Criminal Procedure Code. However, there are examples of norms that may be criticised and that must be, *de lege ferenda*, modified in the future.

References

- Dongoroz, Vintilă; Kahane, Siegfried; Bulai, Costică; Antoniu, George; Stănoiu, Rodica; Iliescu, Nicoleta, *Explicații teoretice ale Codului de procedură penală. Partea generală*, Bucharest: Academiei Publishing House, 1975
- Neagu, Ion, *Tratat de procedură penală,. Partea generală,* Bucharest: Editura Universul Juridic, 2013
- Pop, Traian, *Drept procesual penal*, vol. II, Cluj: Tipografia Națională Publishing House, 1946, p. 271
- Theodoru, Grigore; Moldovan, Lucia, *Drept procesual penal*, Bucharest: Didactică și Pedagogică Publishing House, 1979
- The Supreme Tribunal, The Criminal Section, Decision no. 2153/1973
- The Supreme Court of Justice, The Criminal Section, Decision no. 442/1992
- The Court of Appeal Cluj, The Criminal Section, Decision no. 208/1998
- The Court of Appeal Suceava, The Criminal Section, Decision no. 461/1999
- The Court of Appeal Bucharest, The Criminal Section I, Decision no. 1917/2003
- The Court of Appeal Iași, The Criminal Section I, Decision no. 296/2005
- The High Court of Cassation and Justice, The Criminal Section I, Decision no. 5229/2006
- The High Court of Cassation and Justice, The Joint Sections, Decision no. 1/2006
- The High Court of Cassation and Justice, The Joint Sections, Decision no. 15/2006
- The High Court of Cassation and Justice, The Joint Sections, Decision no. 22/2008
- The High Court of Cassation and Justice, The Criminal Section, Decision no. 5269/2007

CONFLICT OF INTEREST OFFENCE

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Abstract

The following study aims to analyze the conflict ot interest provisions offence stipulated under Article 301 of the special part of the new Criminal Code. This adjustment aims criminal liability of public officials who, in the exercise of his duty, acquires an unjust material benefit for himself or for some people with whom he shares certain interests. Through this study we want to set a clear limit between this offence and the other service offences, as well as to highlight the need for such legislation.

Keywords: *conflict of interest, public servant, service offence, corruption offences, the Criminal Code.*

1. Introduction

Through the regulation of the conflict of interest offence, the legislator intended to incriminate those situations in which private interests of public servant unproperly influence his official duties.

The Conflict of interest offence was regulated for de first time in art. 241 of Carol Code II, Title III „Crime and delicts against public administration", Chapter I „Delicts commited by public officials", Section II " Unfair takings"[1]. With the coming into force of the 1968 Criminal Code, this offence was repealed because it was considered that this was not consistent with the communist system. Subsenquently, by Law no 278/2006, the legislator considered it necessary to reintroduce the conflict of interest offence in the Criminal Code.

Provisions relating to conflict of interest are to be found in certain special laws such as Law no. 78/2000, Law no. 161/2003 and Law no. 144/2007.

In the following we are going to perform an analysis of the contents of this crime from the perspective of the current and former Criminal Code. We will examine, among other things, whether the conflict of interest offence is a service offence or a corruption offence, whether this is a crime of public danger or one of outcome and whether the scope of active and passive subjects has undergone changes in the provisions of the new Ciminal Code. We will also try to capture some comparative aspects between the provisions of Article 301 of the Criminal Code and the regulations applicable to conflicts of interest in the criminal law of other countries.

Although the conflict offence was introduced in the Criminal Code by Law no. 278/2006, and we find its detailed analysis in the legal doctrine, we consider that, through the provisions of the new Criminal Code, some substantial changes are made which require a new examination of this crime.

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[1] Carol Code II promulgated by the high royal decree no. 471 from 17.03.1936, published in Official Gazette No. 65, part I, 18.03.1936.

2. Paper Content

2.1. Design and characterization

The conflict of interest offence was introduced by Law 278/2006 from the previous Criminal Code, art.253[1], Chapter I „Service Crimes or related service crimes", Title VI „Offences affecting public activities or other activities regulated by law" and it represented the consecration of criminal responsability of public officials who meet their personal interests to the detriment of the public ones.

In the explanatory statement of Law 278/2006 it is mentioned that the purpose of incriminating the conflict of interest offence is to make more effective the actions regarding corruption prevention and punishment.

We believe that the legislator has provided this motivation because the provisions of Art.11 of Law no.78/2000 on preventing, discovering and sanctioning corruption, which regulate a particular form of conflict of interest offence are seen as assimilated to corruption offences.

Also, in the legal literature[2] it has been emphasized that the conflict of interest offence is one of corruption because it has some similarities with the crime of bribery.

Other authors[3] have considered the conflict of interest offence is a service offence and that it actually represents a particular form of service abuse as it prejudices the legitimate interests of natural or legal persons by performing duties in a defective way.

The Italian legislature is in agreement with this latter view since Art. 323 of the Criminal Code which regulates the offence of office abuse contains specific provisions for the conflict of interest offence: „the public official or the one responsible for a public function who, as part of these functions or service, by violating the legal rules or regulations, or by failing to refrain when faced with a personal interest or with that of a close relative, or in other cases provided, intentionally procures for himself or for others an undue patrimony or unjustly causes damages to others".

The French criminal legislature also considers that this offence is one of service. Art 432-12 of the Criminal Code incriminates the offence of unlawful acquisition of benefits, an offence which is similar in terms of the legal nature, with the one of the conflict of interest of the Romanian criminal law, in its Book IV- „Crimes and delicts against nation, the state and the public order", Title III – „Crimes of state authority", Chapter II „Interference into government by persons exercising a public function".

Foreign legal literature[4] stated that, although there is a strong relationship between conflict of interest and corruption, in reality, the conflict of interest is a condition in which there is a public official and not an action.

We consider that the conflict of interest offence is a crime of service since it regulates the incompatibility of the public official's private interests with the exercise of public probity duties. In support of this allegation we bring the argument that a public official may find himself in a situation of conflict of interest without acting corruptly.

The legislature of the new Criminal Code has considered that this offence is a crime of service. The crime of conflict of interest provisions are found in article 301 of Chapter II „Crimes of service", Title V „Crimes of corruption and service".

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[2] Măgureanu llie, *Conflictul de interese* R.D.P 2/2007 p. 127 in the same sense Usvat Claudia-Florina *Infracțiunile de corupție in contextul reglementărilor europene*, Tome 6 BDPenal, Universul juridic, Bucharest, 2010 p. 202.

[3] Tudoran Mihai Viorel, Conflictul de interese din legea penală română și luarea nelegală de interese din legea penală franceză R.D.P. no. 3/2008 p. 230.

[4] Ömer Faruk GENÇKAYA, *Conflict of interest*,
http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/projects/tyec/1062-TYEC%20Research%20-%20Conflict%20of%20Interest.pdf

According to art. 301 para. (1) Criminal Code, it represents a crime of conflict of interest the „public official's deed, who, in the exercise of his duty, has performed an act or participated in a decision which was made, through which he obtained, directly or indirectly, a patrimony for himself, his spouse, a relative or a marriage up to the second degree included, or for another person with whom he was in commercial relationships at work in the last 5 years or from whom he benefited or received services or benefits of any kind". Paragraph (2) provides that „The conditions of paragraph (1) do not apply to the issuance, approval or adoption of normative acts."

2.2. Preexisting Conditions

The legal object of the crime of conflict of interest is represented by the social values related to the performance of duties by respecting the principles of impartiality, integrity, transparency of the decision and the supremacy of public interest in exercising the high positions and public functions provided for article 70 of Law no.161/2003.

As far as the material object is concerned, we consider that the crime of conflict of interest is a formal offence because by these provisions the deficient performance of duties of a public official is incriminated.

The active subject of this offence is particular as it is represented by the quality of a public servant in the sense of the article 175 of the Criminal Code.

Thus, under this article, the term „public servant" will refer to the person who, permanently or temporarily, with or without remuneration:

a) exercises the powers and responsibilities established by law in order to achieve the prerogatives of the legislative, executive or judicial power;
b) exercises a function or a high position or a public function of any kind;
c) exercises, alone or together with others, inside an autonomous administration, or of another economic operator or of a corporate owned or majority state, tasks related to achieving the object of his activity.

Also, the new Penal Code (article 175 paragraph 2) opted for the assimilation as a civil servant of the person exercising a service of public interest for which he has been vested by the public autorities or who is subject the control or supervision of the fulfillment of that public service.

According to this latter provision, the active subject of the crime of conflict of interest can be represented by the person holding for example, one of the following public services: chartered accountant, legal executor, private detective, pharmacist.

Thus, it can be seen that, unlike the old regulation, the meaning of the term „public servant" has been expanded by assimilating these people.

We consider well founded the views[5] according to which this notion also introduces in its content, the people who, in relation to the positive criminal law hold the position of simple official.

The scope of active subjects was broadened under the provisions of art. 308 Criminal Code, regulating an attenuated form of the crime of conflict of interest. Under these provisions, the crime of conflict of interest can also be commited by the individuals exercising permanently or temporary with or without remuneration, a commission of any kind to the service of an individual as provided in art. 175 paragraph. 2 or in any corporate.

In order to be subject to criminal liability it necessary for these people to have the power to perform any act or to participate in decision making .

[5] Antoniu George , *Explicații preliminare ale Noului Cod penal*, Ed. Universul Juridic, 2010, p. 532.

Under these provisions the director of a private company who takes the decision to hire his son on a particular position or who acquires a land that belongs to her husband commits the crime of conflict of interest.

We believe that these provisions are beyond the scope of the crime of conflict of interest rules , namely " to create legal preconditions for the conduct of service activities within a framework of integrity and impartiality of exercising public functions and dignities[6]".

These provisions have no equivalent in the previous criminal law because the crime of conflict of interest could be committed only by a public official .

It is true that in other conflict of interest legislations is incriminated committed in private but unlike Romanian regulations, these ones establish more restrictive conditions of application and enforcement. For example, the Italian Civil Code which regulates and sanctions the conflict of interest in the private sector in art . 2391 as well as in art . 2634 exhaustively sets out the categories of persons who violate these provisions.

Lack of the public official quality in art . 301 of the person exercising permanently or temporarly , with or without remuneration a commission of any kind to persons referred to in art.308 leads to the lack of the criminal act from a legal point of view.

The passive subject of the crime of conflict of interest is the public authority, the public institution , or an other public legal entity in which public officials operate.

Criminal participation is possible in all forms: accomplice, instigation and complicity.

For the accomplice existence is necessary that all offenders who meet the immediate act or participate in making a decision to obtain a patrimony for themselves or for the persons referred to in the text of the indictment, to be a public servant .

In the legal doctrine[7] it is considered that when a decision is entrusted to the collective body , all the members of this body who knew of the existence of conflict of interest and did not ask the person found in such a situation to refrain from participating in taking this decision or made the decision at the request of incompatible officials, are co-authors of the crime of conflict of interest, even if they have not achieved any material benefit from that act , or that decision.

We express our reservations about this view because that the provisions which incriminate the conflict of interest set the requirement to obtain , directly or indirectly, a patrimony for themselves or for the persons referred to in the Rule of incrimination . Therefore, we consider that in the hypothetical situation described above , the public official who receives economic benefits will be held responsible co-author to the offense of conflict of interest, and the other participants in the decision will be liable for complicity material.

2.3. The constitutive content of crime

2.3.1.The objective side

The material element of the crime of conflict of interest is consists in the in fact of an official who performed an act or a decision in the exercise of duties through which, directly or indirectly, patrimony was obtined.

The conflict of interest is a committed crime with an alternative content that is either in the performance of an act or in the participation in decision making .

By using the phrase "the performance of" , we believe that the legislature intended to take into account the performance by a public official of any job responsibilities that yields a patrimony for themselves or for the persons referred to in the incrimination Rule.

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[6] C.C.R. – Decision no.2, 15.01.2013.

[7] Basarab Matei, et. al., *Codul penal comentat vol. II., partea specială*, Ed. Hamangiu, 2008, p.607.

Also, we consider that "the participation in decision making " requires the public official's opinion on an issue to be solved by more people in a single decision.

For the existence typicity of the public official deed it is necessary for this one to perform that act or take part in making a decision in the exercise of his duties. If this was not entitled to take these actions , we consider that his act will not constitute the crime of conflict of interest.

Some authors[8] claim that the act also remains typical when the performance of an act or the participation in a decision was not made in compliance with the rules of procedure , which subsequently led to the invalidity of the act. To the extent that the benefit of the public officials or the persons provided by the incrimination rule is obtained a patrimony , even for a short period of time, we also consider that the conditions of incrimininating the crime of conflict of interest are met.

By cmmitting the offending actions it is necessary to obtain , directly or indirectly, a patrimony.

We can considere that direct benefit is obtained , for example , if the public official assesses his own brother for employment as a civil servant working in the unit. The benefit is achieved indirectly, for example, where an agreement advantageous is concludedor to a company, legal person, whose director is the wife of he civil servant, in this case the advantage being directly realized in the assets of the legal person and indirectly in that of close relative.[9]

As for the condition of obtaining a patrimony , we see that similar provisions are found in art. 323 of the Italian Criminal Code which provides the condition of getting a patrimony for himself or for others to achieve deed typicity scene.

Unlike criminal Romanian and Italian regulations, which limit the benefit obtained only to the patrimony, the French criminal law establishes that the benefit can be of any kind .

Former Criminal Code stipulated as a requirement that the benefit obtained should be only material. Regarding this aspect, the doctrine[10] held that there was a legislative gap as it was considered necessary to distinguish between a rather imprecise material and the immaterial benefit.

We believe that these discussions are no longer current regarding new regulations as well because clear distinction can be made between the patrimony and the non-patrimony and the patrimonial heritage with civil law.

Article 301 of the Penal Code stipulates that the patrimony must be obtained by the public officer, his spouse, a relative or a marriage up to second degree including or by another person who was in commercial relationships or work in the last 5 years or benefited from or received services or benefits of any kind .

By person who was in commercial relationships must understand, a person with whom the active subject of the offens had relationships that typically form between a natural person and a legal entity as a result of the provision of a specific work by the former in favor of the second, who in turn commits to any remuneration and create the conditions necessary for performing that work [11].

To determine the persons with whom the official was in "commercial relations " we appreciate the need to consider "the relationship between professionals as well as the relationships between them and any other subjects of civil law " (Article 3 Civil Procedure Code)

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[8] Bogdan Sergiu, *Drept penal:parte speciala* Ed. a 2-a rev.si adaug. Ed. Sfera Juridica, Cluj Napoca, 2007, vol. I p. 293.
[9] Dobrinoiu Vasile and Norel Neagu, *Drept penal: partea specială (teorie si practică judiciară,)* Bucuresti Wolters Kluwer, 2008, p. 449.
[10] Bogdan Sergiu, *op. cit.*, p. 293.
[11] Țiclea Alexandru, *Tratat de dreptul muncii*, ediția a 4-a, Ed. Universul Juridic, Bucuresti 2010 p.17.

Another category is represented by the person from whom the official has received or is receiving services or benefits of any kind . To receive services or benefits of any kind means that these ones were offered for free or at preferential prices . Benefit of any kind , unlike the patrimony one required by the legislator in the same rule can be moral, as well[12].

According to art . 301 para. (2) of the Penal Code . "The provisions of par. (1) do not apply to the issuance , approval or adoption of normative acts" . This means, with reference to the text, that the public official's act who in the exercise of duties issue , approve, or adopt a law by which directly or indirectly a patrimony benefit is made for himself, his spouse , a relative or a marriage up to grade II including or for another person with whom was be in commercial relations or employment in the past five years or from whom has he received or receives services or benefits of any kind is not a crime . The legislature chose to establish this exception because a law is impersonal and therefore it can benefit a number of countless people.

The doctrine[13] held that the result is socially dangerous , as shown in the drawing of the incrimination rule, a patrimony benefit was made, directly or indirectly.

Also, we can find in legal practice[14] as well, decisions which consider that the offence is one of result. Thus, the sentence no. 24 of 1 March 2012 the Court of Appeal from Bacau stated that, from the way in which the conflict of interest is settled, it appears that this one is a crime of material result.

Along with other authors[15], we consider that the crime of conflict of interest is a crime hazard because its consumption is affecting the smooth running of the activity of some of the public legal persons by performing acts that yield economic benefits for the public official or a person with whom he has a special relationship as indicated by art . 301 of the Penal Code.

The causal link between the adoption of the act or the decision to which the public officials participate and the material achievement must be conducted and results from the materiality of the concrete fact committed by public officials (ex re).

2.3.2. The subjective side

To constitute the crime of conflict of interests it is required that actions stipulated under the rule of criminality should be committed with direct or indirect intention.

2.3.3. Forms / ways

We believe that the crime of conflict of interest is committed when the act or the decision by which the material benefit is achieved takes place.

The attempt is possible because this offence is intended and of slow execution, but the legislature chose not to punish it.

The conflict of interest has two legal ways, more precisely, to achieve an act or the participation in decision making in the service that the active subject fulfills.

Regarding the enforcement regime, the crime of conflict of interest provided by art. 301 of the Penal Code, is punished with imprisonment from one to five years and disqualification to hold public function.

3. Conclusions

We believe that the provisions governing the crime of conflict of interest are intended to ensure the impartiality of the public official for him to fulfill his duties objectively .

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[12] Basarab Matei et all, *op. cit.*, p. 611.
[13] Pașca Viorel *Conflictul de interese* R.D.P. 8/2008 p. 169.
[14] http://legeaz.net/spete-penal/infractiunea-de-conflict-de-interese-24-1-2012.
[15] Dobrinoiu Vasile and Norel Neagu, *op. cit.*, p. 450.

In this paper, we consider that we have been able to argue that the crime of conflict of interest is a crime of service, although it has some similarities with corruption offences. We have also showed that the scope of active subjects was extended both by modifying the notion of public official and the provisions of art.308 Criminal Code.

We propose that the ferend bill should extend the application of these provisions to cases in which the public official gets a non- patrimonial benefit by performing an act or participation in decision making. We also consider that the attenuated form of the offence of conflict of interest provided by art.308 Criminal Code should be repealed.

References

- Antoniu George , *Explicații preliminare ale Noului Cod penal*, Ed. Universul Juridic, 2010
- Basarab Matei, et. al., Codul penal comentat vol. II., partea specială, Ed. Hamangiu, 2008
- Bogdan Sergiu, *Drept penal:parte speciala* Ed. a 2-a rev.si adaug. Ed. Sfera Juridica, Cluj Napoca, 2007, vol. I
- Diaconescu Gheorghe and Constantin Duvac, *Tratat de drept penal: Parte Speciala*, Ed. C.H. Beck,București, 2009
- Dobrinoiu Vasile and Norel Neagu, *Drept penal: partea specială (teorie si practică judiciară,)* Bucuresti Wolters Kluwer, 2008
- Pascu Ilie et al, *Noul Cod penal comentat,* vol.I, Ed. Universul Juridic, Bucureşti, 2012
- Pascu Ilie et al, *Noul Cod penal comentat,* vol.II, Ed. Universul Juridic, Bucureşti, 2012
- Măgureanu llie, *Conflictul de interese* R.D.P 2/2007
- Ömer Faruk GENÇKAYA, *Conflict of interest*
- Pașca Viorel *Conflictul de interese* R.D.P. 8/2008
- Tudoran Mihai Viorel, Conflictul de interese din legea penală română și luarea nelegală de interese din legea penală franceză R.D.P. no. 3/2008
- Toader Tudorel, *Drept penal român. Partea specială*, ediţia a 5-a, rev. şi actualizată, Ed. Hamangiu, Bucureşti, 2011
- Țiclea Alexandru, *Tratat de dreptul muncii*, ediţia a 4-a, Ed. Universul Juridic, Bucuresti 2010
- Usvat Claudia-Florina *Infracțiunile de corupție in contextul reglementărilor europene*, Tome 6 BDPenal, Universul juridic, Bucharest, 2010

THE CREDITOR AS PARTICIPANT IN INSOLVENCY PROCEEDINGS

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Abstract

A creditor is the party who, within a binding judicial relationship, has a claim on the services of giving, doing or not doing of the second party, called debtor.

In insolvency a creditor is an individual or a legal entity that is entitled to claim payment of an amount of money by the debtor, in relation to whom the creditor holds an uncontested, liquid and enforceable claim.

Insolvency Law no. 85/2006 defines the concept of creditors entitled to request initiation of the insolvency proceedings, as well as the concept of creditors entitled to participate in the insolvency proceedings.

Aim of this study is an in-depth analysis of the two categories of creditors and the requirements for holding this quality.

Keywords: *Procedure, insolvency, creditor, debtor, receivables*

Introduction

The field broached by this study is insolvency, as part of the greater area of commercial law.

Although by passing of the New Civil Code and almost total abrogation of the Commercial Code the Romanian legislator has determined to unify civil legislation, we consider that commercial law continues to exist as a distinctive legal branch, part of private law.

It is true, however, that the provisions of the New Civil Code regulate the civil judicial relationships of non-professionals, as well as those of professionals or professionals and non-professionals. Concerning professionals, the New Civil Code has a number of special regulations, hence derogatory from those of common law, including merchants.

As regards merchants, these are subject to insolvency proceedings, which is a special judiciary procedure.

The institution of bankruptcy was first regulated the Romanian Commercial Code passed in 1887; nearly a century later Law no.64/1995 on judiciary reorganisation and bankruptcy proceedings came into force, and was abrogated by insolvency proceedings Law no.85/2006. At present the legislator is working on an Insolvency Code, such as to unify all legal provisions of both insolvency and pre-insolvency proceedings.

Based on specialist doctrine and relevant jurisprudence this study provides an analysis of the categories of creditors entitled to request initiation of insolvency proceedings and entitled to participate in insolvency procedure, respectively.

1. The creditor entitled *to request* initiation of insolvency proceedings

A *creditor* is the party who, within a binding judicial relationship, has a claim on the services of giving, doing or not doing of the second party, called *debtor*. In insolvency[1] a

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creditor is an individual or a legal entity that is entitled to claim payment of an amount of money by the debtor, and who by this special procedure, the *solutio debiti*[2], intends to recover their receivable. In the judicial practice of insolvency possible sources of such obligations are the most frequently encountered *contracts*, and also unilateral judicial deeds, business management, unjust enrichment, non-owed payments, illicit acts, as well as any other facts or acts tied by legal provisions to the generation of such obligation[3].

The legislator has defined the *significance*-bearing terms and phrases of insolvency proceedings of a debtor under art.3 of Insolvency Law no.85/2006.

For creditors *participating in insolvency proceedings* the law stipulates several categories of creditors, holding this quality at the same time or successively during the special procedure.

Thus, art.2 of Law no.85/2006 stipulates that the *aim* of insolvency proceedings is to initiate collective proceedings in view of covering the insolvent debtor's liabilities.

Literature establishes *collectivity*[4]*, in our opinion creditors collectivity* as one of the principles of insolvency proceedings, considering that its aim, according to art.2 of Law no.85/2006, is to initiate collective proceedings in view of covering the insolvent debtor's liabilities, thus to redeem the receivables held by the debtor's creditors. This principle follows from art. 3 par. 1 no. 3 of the Insolvency Law, which defines the collective proceedings as entailing the *joint* participation of the recognised creditors in view of recovering their receivables by the means provided by law.

Doctrine[5] also includes the opinion insolvency proceedings constitutes *a procedure of collective compulsory enforcement (foreclosure).*

A further opinion[6] asserts that judiciary reorganisation proceedings, as a stage of insolvency proceedings, is *alien* to the concept of compulsory enforcement (foreclosure), while bankruptcy proceedings, as a subsidiary phase of insolvency proceedings is a collective procedure, operating as a *remedy* or as compulsory enforcement (foreclosure), as the case may be.

In *our opinion* insolvency proceedings are neither a form of foreclosure, this being regulated by a special law, nor of judicial execution, which is a *phase of the civil process*, regulated by general law, namely the Code of Civil Procedure. The rules provided by the Code of Civil Procedure for satisfying the debtor's creditors in the case of common law judicial execution differ from the provisions of Insolvency law concerning the distribution of funds obtained by liquidation of the debtor's assets in bankruptcy proceedings. Furthermore, the authorities conducting judicial execution differ, namely court, fiscal, bank executors, etc. in the former situation, while in insolvency the authority conducting the proceedings, held to maximise the realisation of the debtor's assets and distribute the funds obtained from debtor assets liquidation is the judiciary administrator or the liquidator, depending on the phase of the proceedings, namely observation period, judiciary reorganisation or bankruptcy.

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[1] Regulated by Insolvency Procedure Law no.85/2006 Published in Monitorul Oficial [Official Journal] no.359/21 04 2006.

[2] Dicționar de adagii și alocuțiuni juridice latine [Dictionary of Latin Judicial Adages and Allocutions], *solutio debiti* = payment of debt.

[3] For details see *S. Neculaecu*, Izvoarele obligațiilor în Codul civil [Sources of Obligations in the Civil Code], art.1164-1395. Analiză critică și comparativă a noilor texte normative [Critical and Comparative Analysis of the New Norms], Editura C.H. Beck, București, 2013, pp.23-556.

[4] *I. Adam, C.N. Savu*, Legea procedurii insolvenței. Comentarii și explicații [Insolvency Procedure Law. Comments and Explanations], Editura C.H. Beck, București, 2006, p.6, *I. Schiau*, Regimul juridic al insolvenței comerciale [Judicial Regimen of Commercial Insolvency], Ed. All Beck, București, 2001, p. 23-33.

[5] *I. Turcu*, Tratat de insolvență [Treatise of Insolvency], Editura C.H.Beck, București, 2006, p. 548, *I. Băcanu*, Chap. XV, Procedura reorganizării judiciare și falimentului [Judiciary Reorganisation and Bankruptcy Procedure], in *S. Zilberstein, V.M. Ciobanu*, Tratat de executare silită [Treatise of Compulsory Enforcement (Foreclosure)], Editura Lumina Lex, București, 2001, p.556.

[6] *Gh. Piperea*, Insolvența. Regulile. Realitatea [Insolvency, Rules, Reality], Editura Wolters Kluwer, Romania, 2008, pp.349-350.

In substantiation of this opinion we show that insolvency proceedings, while conducted mostly outside the court, have nevertheless *judiciary* and *professional* character[7].

The concept of *creditor*, *in a wider sense*, as defined by art.3 par.1 no.7 of Law no.85/2006, refers to an individual or legal entity holding a claim on the debtor's assets, and who has expressly requested the court to register this claim in the final table of receivables or in the consolidated final table of receivables, and who can prove their claim on the debtor's assets according to the provisions of insolvency law. According to art. 64 of Law no.85/2006 exempt from filing a request for claim registration are the debtor's employees who are recorded *ex officio* by the judiciary administrator/liquidator in the table of the debtor's receivables.

In relation also to this definition of the creditor participating in insolvency proceedings, *we second* the opinion according to that insolvency proceedings are not merely *collective*, but *concurrent*[8], and from this viewpoint do not represent *collective foreclosure proceedings*, but a *special* and *dynamic*[9] procedure with the aim of satisfying the debtor's creditors, in accordance with the provisions of the special law.

The concept of *creditor entitled to request initiation of insolvency proceedings*, as defined at art.3 par.1 no.6 of Law no. 85/2006, refers to a creditor who has held an *uncontested, liquid and enforceable claim* on the debtor's assets *for more than 90 days*.

According to the provisions of art.379 par.3 - 4 of the former Code of Civil Procedure[10] a claim is *uncontested or certain*, when its existence follows from exactly the *deed of debt* or from other, even not notarised deeds issued by the debtor or recognised by them. The claim is *liquid* when its quantity is *determined* by the very deed of debt or *can be determined* by the deed of debt or other, even not notarised deeds issued by the debtor or recognised by or binding for them, according to legal provisions or stipulations in the deed of debt, even if such determination requires special calculations.

According to art.662 par.2 and 3 of the new Code of Civil Procedure[11] the claim is uncontested or certain when its undoubted existence follows from the *executory title* itself and is liquid when its object is determined or when the executory title includes sufficient elements for its determination.

These legal provisions that define *differently* the concept of uncontested and liquid claim have the judicial character of common law norms, as insolvency law does not define this concept expressly.

Within this context it needs mentioning that the Insolvency Law represents a *special procedural law*, and consequently its component norms are judicial procedural norms, thus being imperative, of strict interpretation and application.

According to its art.149, Law no.85/2006 is completed by the provisions of the civil Code and the Code of Civil Procedure, to the extent of provisions *compatibility*. Here from follows the nature of general judiciary and *in our opinion subsidiary* norm of the provision included by the Code of Civil Procedure and the Civil Code, respectively, unlike those included by the Insolvency Law.

Thus we *emphasize* that the provisions of the Civil Code and the Code of Civil Procedure, respectively, or of any other laws that are general in relation to insolvency law,

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[7] *St.D.Cărpenaru*, Procedura reorganizării şi lichidării judiciare [Judiciary Reorganisation Proceedings], Editura Național Imprim, Bucureşti, 1996, p.22, for details on the judiciary, unitary and professional character of the procedure.
[8] *St.D.Cărpenaru*, op.cit., p.20, *Gh. Piperea*, op. cit, pp.347-350.
[9] *M. Grosaru*, Judecătorul sindic [The Insolvency Judge], Editura Universul Juridic, Bucureşti, 2012, p.16
[10] Decreed on 9 September 1865 and promulgated on 11 September 1865, amended and updated on 20 11 2010, Editura C.H. Beck, Bucureşti 2010.
[11] Law no.134/2010 of the Code of Civil Procedure, published in Monitorul Oficial [Official Journal] no.485/15 07 2010, applied by Law no.76/2012 published in Monitorul Oficial [Official Journal] no.365/30 05 2012, amended.

under no circumstances replace the provisions of special insolvency law, but complete these where the special law makes no distinction.

Consequently the provisions of art.379 of the Code of Civil Procedure, and of art.662 of the new Code of Civil procedure are applicable within the framework of insolvency proceedings for establishing the uncontested, liquid and enforceable character of claims.

Further within this context it needs be pointed out, that insolvency law is applied to judicial relationships between either *merchants*, or merchants and non-merchants; within these judicial relationships the debtor is always a *merchant*, or a legal entity of private law conducting *economic activity*.

As regards the quality of debtor and creditor of merchants, these, as defined by the Commercial Code[12], by Law no.31/1990[13] regarding commercial companies, by Law no.26/1990[14] concerning the Trade Registry and by other special laws, represent the category of individuals or legal entities most often adopted in fiscal matters.

Within the context of the provisions of the New Civil Code[15] an issue raised in doctrine, but especially in jurisprudence is whether insolvency law will be applied to *professionals*, who according to art.3 par.2 and 3 of the New Civil Code are all those who deploy an *enterprise*, its deployment meaning systematic conducting by one or more persons of an organised activity consisting in producing and administration of goods or in providing services, regardless if for profitmaking purposes or not[16].

The concept or enterprise was defined as an agricultural, industrial, constructions, commercial, services or financial entity that conducts an economic activity[17].

In order to correlate the two concepts, namely that of 'merchant', deeply rooted in judicial mentality and that of 'professional', resulted from the monist principle related to civil legislation adopted by the legislator of the new Civil Code, transitional judicial norms were issued, respectively the provisions of art.6 and art 8 of Law 71/2011 concerning the application of the Civil Code Law.

According to art. 6 par.1 of Law no.71/2011 the legal norms applicable at the date of coming into force of the Civil Code refer to merchants as to individuals or legal entities subject to recording in the Trade Registry, with certain exceptions expressly iterated in par.2 of the same article.

According to art.8 par.1 of the same law, the concept of 'professional' introduced in art.3 of the New Civil Code includes the categories of merchant, entrepreneur, economic agent, as well as any other persons authorised to conduct professional economic activities, as these notions are provided by law at the date of coming into force of the Civil Code. Par. 2 of the same article establishes *as a principle*, that in all valid legal norms, the phrases 'deeds of

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[12] Code of Commerce of 1887, published in Monitorul Oficial [Official Journal] no.31/10 05 1887, with amendments, partially abrogated by Law no.71/2011 for application of Law no.287/2009 of the Civil Code

[13] Published in Monitorul Oficial [Official Journal] no.126/17 11 1990, amended.

[14] Published in Monitorul Oficial [Official Journal] no.121/07 11 1990, amended.

[15] Law no.287/2009 of the Civil Code, published in Monitorul Oficial [Official Journal] no.511/24 07 2009, republished in Monitorul Oficial [Official Journal] no.505/15 07 2011, amended by OUG [Government Emergency Ordinance] no.79/2011, published in Monitorul Oficial [Official Journal] no.696/30 09 2011 and by Law no.60/2012, published in Monitorul Oficial [Official Journal] no.255/17 04 2012.

[16] For a better understanding of the concepts of 'professional individual', 'professional legal entity', 'enterprise' and 'merchant' see *S. Angheni, Drept comercial. Profesioniști – Comercianți* [Commercial Law. Professionals-Merchants], Editura C.H. Beck, București, 2013, pp.2-34. For merchants – legal entities subject to insolvency procedures see *A. Capriel, Procedura reorganizării și lichidării judiciare* [Judicial Reorganisation and Liquidation Procedure], Editura Lumina Lex, București, 1995, pp.8-10, *Gh. Piperea, Drept comercial. Întreprinderea* [Commercial Law. The Enterprise], Editura C.H. Beck, București, 2012, pp.31-41.

[17] A. Buglea, R. Bufan, O.C. Bunget, C.M.Imbrescu, L.E. Stark, A. Medelean, D. Pascu, Noțiuni de economie aplicate procedurii de insolvență [Economic Concepts Applied to Insolvency Proceedings], A textbook devised by a consortium headed by Pricewaterhousecoopers as part of the programme "Support for Improving and Implementation of Bankruptcy Legislation and Jurisprudence", Phare 2012, Ministry of Justice, 2006, p.24,

commerce' and 'acts of commerce' are replaced by the phrase 'production, commerce or service activities'.

Upon analysis of the legal provisions referred to above it can be observed, that the concept of *merchant*, as defined prior to the coming into force of the new Civil Code is not replaced by the concept pf *professional*, but is *included* by the latter. Consequently the merchant is a part of the professional as a whole.

According to art.31 par.1 and 2 of Law no.85/2006 any creditor *entitled to request initiation of insolvency proceedings* needs to formulate a request indicating magnitude and grounds of the claim, possible real securities put up by the debtor, possible precautionary measures concerning the debtor's assets and to attach all documents justifying the claim and all deeds of securities.

In relation to the application of these legal provisions the opinion[18] was asserted that in view of solving a creditor's request for initiating insolvency proceedings of a debtor, any evidence other than *written deeds* is *not admissible.* This opinion has not been wholly shared by judicial practice[19]; occasionally it was deemed that the insolvency judge can administer even expert reports as evidence in order to establish that the creditor's claim is uncontested and most of all liquid.

As far as we are concerned, we *consider* that for solving the creditor's request for insolvency proceedings initiation administration of evidence other than the written deeds mentioned at art.31 par.1 and 2 of Law no.85/2006 cannot be considered *de plano* inadmissible, as such a request represents a civil suit, and until insolvency proceedings are actually initiated, the request is judged by the procedures of common law.

We *consider*, however, that for solving this request the insolvency judge need not determine the *exact value* of the creditor's claim, but needs to determine whether the creditor holds an uncontested or certain, liquid and enforceable claim that exceeds the *threshold value* provided by law and whether the debtor is in insolvency or not[20]. Upon initiation of insolvency proceedings of the debtor, the judiciary administrator/liquidator is held to verify the claim requests, including the request of the plaintiff creditor, and will record the exact values of the claims into the creditors table. Thus expert reports as evidence could prove useful for verifying state of insolvency of the debtor that has contested this state, or for aspects related to the creditor's written deeds attached to the request for insolvency proceedings initiation, like for example false deeds, etc., but not, however, for proving the very existence of the plaintiff creditor's claim, which has to be proved only by the written deeds attached to the creditor's request. Thus, in judiciary practice[21] it could be observed that if a completed *expert report* did not yield a centralised situation of the plots of land for that the plaintiff creditor has calculated a certain tax based on the concession contract closed with the debtor, and the disagreements of the parties concern the value of that tax, the claim invoked by the creditor is neither uncontested, nor liquid.

For a creditor to request initiation of insolvency proceedings of a debtor, the legislator has not imposed the requirement of the creditor obtaining beforehand of an *executory title* in relation to the debtor, but merely to attach *justifying deeds* to the request for initiation of insolvency proceedings.

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[18] *Gh. Piperea, Drept comercial vol.II* [Commercial Law vol. II], op.cit, p.232, Civil decision no.618/17 04 2012 of the Appeal Court Bacău, II[nd] Civil Section for administrative and fiscal suits, in *S.P.Gavrilă*, op.cit., p.199.

[19] Civil decision no.454/R/28 09 2007 of the Appeal Court Braşov, unpublished.

[20] In this respect see Civil decision no.167/C/23 04 2009 of the Appeal Court Oradea, in Procedura insolvenței. Culegere de practică judiciară 2006-2009, Volumul I, Deschiderea procedurii insolvenței, Participanții la procedură [Insolvency Procedure. Collection of Judiciary Practice 2006-2009, Volume I, Initiation of Insolvency proceedings. Participants in the Procedure], Editura C.H. Beck, 2011, p.50.

[21] Civil decision no.4/11 01 2007 of Constanța County Court – Commercial section, irrevocable and unpublished.

Evidently submitting an executory title attached to the request for initiation of insolvency proceedings of the debtor is bound to facilitate analysis of the admissibility requirements for the invoked claim.

In jurisprudence[22] it could be established, that in cases when the creditor attached an executory title to the request for initiation of insolvency proceedings in order to document the claim and the debtor has filed a contestation of the state of insolvency requesting the creditor to deposit a certain *security*, on grounds of art.33 par.3 of Law no.85/2006 such request of the debtor has been usually dismissed, as there is the creditor's request entails no risk of prejudice for the debtor, as long as the creditor's claim is confirmed by an executory title.

A situation frequently encountered in insolvency matters is that of a creditor submitting a request for the initiation of insolvency proceedings with an executory title attached, such as to justify the claim, which creditor has previously also filed a request for *compulsory execution (foreclosure)* by a court executor, the latter conducting common law foreclosure proceedings.

Situations were encountered when the insolvency judge has dismissed the creditor's request for initiation of insolvency proceedings, considering the request of *lacking interest*, which is a requirement for promoting any action in the justice system, as long as at the same time the creditor conducts common law proceedings of foreclosure (compulsory execution) of the debtor.

We *consider* as erroneous such court practice[23] of dismissing the request for initiation of insolvency proceedings on grounds of the deeds attached to the request for initiation of insolvency proceedings showing that the plaintiff creditor has also initiated common law compulsory execution (foreclosure) proceedings of the respondent debtor, based on an executory title consisting of a course decision, which is ongoing, as the amount of money claimed by the plaintiff is going to be recovered through common law foreclosure. Such interpretation is also in disagreement with the logical judicial rationale, according to that *he who can do more, can also do less.*

Also in jurisprudence[24] it was retained that the creditors are not obliged to prove that prior to filing the request for initiation of insolvency proceedings they have tried to recover the claim by common law compulsory execution (foreclosure) proceedings of the debtor. It was also retained[25] that when the creditor has attached an executory title to the request for initiation of insolvency proceedings, and this title had been partially enforced during common law foreclosure proceedings, the insolvency judge is held to determine the value of the *residual claim* to be recovered by the creditor from the debtor.

In support of this opinion which we *second*, we argue that in *commercial law*, which lingers even after coming into force of the New Civil Code, the creditor can deploy all judicial

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[22] Civil sentence no.1342/sind/31 05 2012 of Brasov County Court, irrevocable and unpublished, Civil sentence no.1686/sind/20 10 2010 of Brasov County Court, irrevocable and unpublished, Civil sentence no.1772/sind/06 09 2012 of Braşov County Court, irrevocable and unpublished, Civil sentence no.896/sind/12 05 2010 of Brasov County Court, irrevocable and unpublished, Civil sentence no.1436/sind/17 06 2009 of Brasov County Court, irrevocable and unpublished, Civil sentence no.281/sind/04 02 2009 of Brasov County Court, irrevocable and unpublished.

[23] Civil sentence no.371/26 03 2003 of Dâmbovița County Court, in Manual de bune practici în insolvență, Programul Phare 2012 "Suport pentru îmbunătățirea și implementarea legislației și jurisprundenței în materie de faliment [Textbook of Good Practice in Insolvency, Phare 2012 Programme "Support for Improving and Implementation of Bankruptcy Legislation and Jurisprudence", p.399, Civil sentence no.1182/sind/19 11 2008 of Braşov County Court, unpublished, Commercial decision no.458/22 05 2009 of Alba Iulia Appeal Court, in Procedura insolvenței. Culegere de practică judiciară 2006-2009, Volumul I [Insolvency Procedure. Collection of Judiciary Practice 2006-2009, volume I] op.cit., p.40, Civil sentence no.2364/14 11 2007 of Călărași County Court, in Procedura insolvenței. Culegere de practică judiciară 2006-2009, Volumul I, [Insolvency Procedure. Collection of Judiciary Practice 2006-2009, volume I], op.cit,p.79.

[24] Civil sentence no.2271/08 09 2003 of Bacău County Court, in *Manual de bune practici în insolvență*, [Textbook of Good Insolvency Practice], op.cit. p.397.

[25] Commercial decision no.477/15 06 2011 of Galați Appeal Court, published in *S.P.Gavrilă, Law no.85/2006 privind procedura insolvenței. Practică judiciară*, [Insolvency Procedure Law. Judiciary Practice], Editura Hamangiu, București, 2013, pp.146-147.

means provided by law for recovering the claim from the debtor. By the initiated proceedings the creditor will, however, not be able to obtain an amount *superior* to the claim.

In judiciary practice[26] it was further retained that when an executory title ceases to hold this judicial power, for example a bank loan contract that does not qualify as executory title for common law foreclosure, upon admitting the contestation of execution, this can represent, according to art.31 par.1 and 2 of Law no.85/2006 proof of the claim when filing a request for initiation of insolvency proceedings.

Having established that the provisions of the Code of Civil Procedure are applicable in insolvency proceedings only to the extent of compatibility of the provisions, according to art.149 of Law 85/2006 and that art.31 par.1 and 2 with application of art.3 par.1 no.6 of Law 85/2006 represent special judicial norms hence derogatory from the provisions of art.662 par.2 and 3 of the New Code of Civil Procedure, we *conclude* that the creditor entitled to request initiation of insolvency proceedings does not have to prove the existence of an executory title to confirm the claim, even after the coming into force of the New Code of Civil Procedure.

As regards the value of the claim of the creditor entitled to request initiation of the insolvency procedure, the legislator has introduced the concept of *threshold value*, regulated by art.3 par.1 no.12 of Law 85/2006, which at present is of 45,000 lei, and of 6 national average salaries for employees, respectively.

Consequently, in order to file a request for initiation of insolvency proceedings, the entitled creditor needs to have an uncontested, liquid and enforceable claim on the debtor, superior to the threshold value and more than 90 days due.

Enforceability of the claim - a requirement for claim admissibility in insolvency proceedings and for the debtor to be obliged to pay a certain amount of money – is given by the *due-date of the obligation*, as indicated in the deed underlying it[27].

The civil obligation in a wide sense was defined[28] as the judicial relationship in which one party, the creditor, is entitled to claim from the other party, the debtor, execution of the owed service.

Debt was defined[29] as the passive component of the obligational relationship, this being the service assumed by the debtor.

Comparing the provisions of the former Code of Civil Procedure with those of the New Code of Civil Procedure that came into force on 15 02 2013, it can be noticed that the provisions of art.379 of the Code of Civil Procedure did not define the enforceability of the claim, unlike the provisions of art.662 of the New Code of Civil Procedure that do include such a definition.

In relation to the *enforceability* of the claim, insolvency law includes special provisions that stipulate at art.3 par.1 no.6 that a creditor entitled to request initiation of insolvency proceedings is a creditor holding an uncontested, liquid and enforceable claim older than 90 days.

Consequently, in order to formulate a request for initiation of insolvency proceedings such a creditor needs to wait at least 90 days starting the due-date of the debtor's obligation to pay amount of money to the creditor, in other words from the date of its becoming collectible.

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[26] Commercial sentence no.28/S/24 01 2008 of Iași County Court, Commercial Section, in *Procedura insolvenței. Culegere de practică judiciară 2006-2009, Volumul I*, [Insolvency Procedure. Collection of Judiciary Practice 2006-2009, volume I], op.cit, p.43.

[27] For details see *S.M.Miloș, Creanțete sub condiție suspensivă versus creanțele nescadente. Dreptul de a participa la procedura insolvenței*, [Receivables under Suspensive Circumstances versus Not Due Receivables. The Right to Participate in Insolvency Proceedings], in Phoenix, October-December, 2011, pp.4-8.

[28] *L. Pop, Tratat de drept civil. Obligațiile, Vol.I Regimul juridic general*, [Treatise on Civil Law. Obligations. Vol. I General Judicial Regimen], Editura C.H. Beck, București, 2006, p.5.

[29] *C. Stătescu, C. Bârsan, Drept civil. Teoria generală a obligațiilor, ediția a IX-a revizuită și adăugită*, [Civil Law. General Theory of Obligations. 9th edition, revised and expanded], Editura Hamangiu, București, 2008, p.1.

As regards the *judicial nature* of the 90-day term, *we appreciate* this to be not a procedural term, although included by a procedure law, but a term including also material law provisions. We consider this term as having been introduced by the legislator in favour of the debtor, and can thus be qualified as a *legal grace period*.

We appreciate that all these judicial norms related to the claim of the creditor entitled to request initiation of insolvency proceedings are *imperative*. Consequently the insolvency judge entrusted with solving a creditor's request for initiation of insolvency proceedings is held to verify *ex officio* the admissibility requirements for the claim invoked by the creditor. It is in this sense that courts of law have ruled[30], namely that the creditor's claim will be checked *ex officio* by the insolvency judge even in the absence of debtor's defence in this regard, or of a debtor's contestation of the state of insolvency, formulated according to art.33 par.2 of Law no.85/2006.

2. The creditor entitled *to participate* in insolvency proceedings

Another concept defined by insolvency law is that of a *creditor entitled to participate in insolvency proceedings*, who, according to art.3 par.1 no.8 of Law no.85/2006 is the creditor who has filed a partially or entirely admitted request for recording the claim in the tables of receivables devised within the proceedings, and who has the right to participate and vote in the creditors assembly, including on a plan of the debtor's judiciary reorganisation, to participate in the distribution of the funds resulting from the debtor's judiciary reorganisation or liquidation of assets, to be informed or notified in relation to the status of the ongoing insolvency proceedings and to participate in any other procedure provided by insolvency law.

Analysing this legal provision *we establish* that only the creditor entitled to participate in insolvency proceedings is a *participant* in this special procedure, and is consequently granted the rights provided by this special law.

The quality of creditors participating in insolvency proceedings is not held by those *alien*[31] to this, namely creditors who have not filed a claim request, creditors who have filed a tardy request, creditors whose claim request was dismissed by the judiciary administrator/liquidator or who were removed from the table of receivables consequently to an admitted contestation of this filed by the debtor or by another creditor.

Thus any creditor can file a *claim request* according to art.64 and art.107 par. 4 of Law no.85/2006, but in order to become creditor entitled to participate in insolvency proceedings the claim statement has to be *admitted* by the judiciary administrator/liquidator with the *claim checking procedure* provided by art.66 and art.108 par.3 of Law 85/2006. Upon completion of this procedure of checking the claims, the judiciary administrator/liquidator will devise the *tables of receivables* that confirm the creditors' entitlement of participating in insolvency proceedings.

For creditors to be recorded in the table of the debtor's creditors, they have to enter a claim request in the insolvency file, according to art.64 of Law no.85/2006. In this sense all creditors recorded in the debtor's list according to art.28 par.1 lit.c of Law no.85/2006, need to be notified by the judiciary administrator/liquidator as provided by art.62 par.1 lit.b of the same law.

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[30] Civil sentence no.445/06 03 2003 of Bacău County Court, in *Manual de bune practici în insolvență,*[Textbook of Good Insolvency Practice], op.cit, p.395, Commercial sentence no.5173/27 11 2008 of the Bucharest Court, 7th Commercial Section, in *Procedura insolvenței. Culegere de practică judiciară 2006-2009, Volumul I,* [Insolvency Procedure. Collection of Judiciary Practice 2006-2009, volume I], op.cit, p.1.

[31] For details on creditors alien to insolvency proceedings see *Gh. Piperea*, Drept comercial vol.II, [Commercial Law, vol. II], Editura C.H. Beck, București, 2008, p.232.

In judiciary practice[32] it was deemed that the creditor who has filed a request for initiation of insolvency proceedings that was admitted by the insolvency judge does not have to also submit a claim request.

The claim request is checked by the judiciary administrator or the liquidator, according to art.67 of Law no.85/2006.

The checking procedure of the claim request consists in analysing the creditor's assertion related to the existence of an uncontested, liquid and enforceable claim, based only on the written deeds attached to the claim request filed by the creditor, according to art.65 par.2 and 3 of Law no.85/2006.

Consequently to checking the claim requests the judiciary administrator or the liquidator devises a *preliminary table of the debtor's receivables*, according to art.72 par.1 of Law no.85/2006. This table that renders efficient the *collective nature of insolvency proceedings* fulfils the *function* of a court decision issued in relation to "civil actions of claims", respectively to creditors' claim requests.

Interested persons can contest the preliminary table of the debtor's receivables, according to art.73 par.1 of Law no.85/2006.

The contestation represents the *legal remedy* available to mainly to the debtor and the creditors against the "decision" of the judiciary administrator or liquidator concerning the filed claim requests or the table of receivables, respectively.

The judiciary administrator or liquidator, respectively, is held to check the claim requests only based on the attached *justifying deeds*. It follows that within the checking procedure of the claim request the *insolvency practitioner*[33] does not consider any type of evidence as encountered in common law civil suits, but only written deeds, in addition to which explanations can be requested from the debtor, discussions can be conducted with each creditor, who can be asked to provide, if necessary additional information and documents, according to art.67 of Law no.85/2006.

It is thus established that similarly to the creditor entitled to request initiation of insolvency proceedings, also the creditor entitled to participate in such proceedings is not required by the legislator to provide an executory title for the analysis of the claim.

An issue was raised concerning evidence of the claim of creditors entitled to participate in insolvency proceedings, namely the issue of knowing if by contesting the preliminary table of receivables by a creditor whose claim request was dismissed because of lacking justifying documents, the insolvency judge can rule on the claim as in a *first instance court*. In jurisprudence[34] it was deemed, that in order to be recorded in the table of creditors, any creditor filing a claim request needs to hold an uncontested, liquid and enforceable claim prior to the initiation of the insolvency proceedings. Thus during insolvency proceedings claiming of damages following from the inadequate execution of contractual obligations assumed by the debtor, included in a contract closed by debtor and creditor prior to initiation of insolvency procedures but not determined by the start date of insolvency proceedings, claim based on justifying deeds, is not further possible.

In judiciary practice creditors frequently file claim requests accompanied by justifying documents like the contract closed by the parties and other deeds devised by the parties within the execution of this contract, invoices, commercial correspondence, etc. In a number of situations the legislator has established that certain justifying deeds of the claim request

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[32] Commercial decision no.14/10 01 2011 of Cluj County Court, in *S.P.Gavrilă, Law no.85/2006 privind procedura insolvenței. Practică judiciară*, [Insolvency Procedure Law no.85/2006. Judiciary practice], Editura Hamangiu, București, 2013, pp.193-196.

33 See OUG [Government Emergency Ordinance] no.86/2006 on the organisation of insolvency practitioners' activity, published in Monitorul Oficial [Official Journal] no.944/22 11 2006, republished in Monitorul Oficial [Official Journal] no.734/13 10 2011.

[34] Civil sentence no.2659/sind/29 11 2012 of Brasov County Court, irrevocable and unpublished.

represent, by effect of law, *executory titles*. This is the case of bank loans, lease contracts, promissory notes, cheques, taxation deeds, etc.

According to art.66 par.1 of Law no.85/2006, claims confirmed by *executory titles are not subject to checking* by the judiciary administrator or liquidator. According to art.66 par.2 of Law no.85/2006 *not subject to checking are budgetary receivables* following from executory titles uncontested within the terms provided by special laws.

Consequently in applying this legal provision, the judiciary administrator/liquidator will not be able to analyse and censor in any way the clauses included by a contract that, by law, represents an executory title.

The executory titles that can be attached by the creditor to the claim request are court decisions or other deeds that by law have similar judicial power.

In cases of attached to the claim request is a loan contract or a lease contract that by law represent executory titles, the issue was raised to know if the judiciary administrator or the liquidator is entitled, if requested by the debtor, to establish the certain clauses of the contract are *abusive clauses,* according to the provision of Law no.193/2000[35] concerning abusive clauses in merchant-consumer contracts.

In our opinion the judiciary administrator/liquidator cannot remove as abusive clauses of debtor-creditor contracts closed prior to initiation of insolvency procedures, as the judiciary administrator/liquidator cannot act as a substitute for a court of law.

In this sense the provisions of art.66 par.2 of Law no.85/2006 does not grant the administrator the right to check and analyse the claims confirmed by executory titles.

If the administrator records in the preliminary table of creditors a claim confirmed by executory title at the value that follows from the contract, and the debtor or another creditor contest this table, according to art.73 par.1 of Law no.85/2006, it was deemed[36] that the insolvency judge can establish, based on evidence, the existence of an abusive clause in the contract presented by the creditor.

According to art.4 of Law no.193/200 an abusive clause is "a clause that has not been directly negotiated with the consumer [...], if by itself or together with other provisions of the contract it creates to the disadvantage of the consumer and contrary to the requirements of good faith a significant unbalance between the parties' rights and obligations ".

In Law no.193/2000 the Romanian legislator has implemented into internal law Directive 93/13/EEC of the European Council concerning abusive clauses in contracts closed with consumers[37].

In this sense the supreme court[38] has established in relation to the applicability of art.4 of Law no.193/2000, that "a contractual clause that has not been directly negotiated with the consumer and that by itself or together with other provisions of the contract creates to the

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[35] Published in Monitorul Oficial [Official Journal] no.560/06 11 2000.

[36] *A.R.Adam*, Aspecte privind clauzele contractuale abuzive în procedura insolvenței, Volumul Conferinței internaționale de drept, studii europene și relații internaționale, cu titlul: „Politica legislativă între reglementarea europeană, națională și internațională. Noi perspective ale dreptului.", organizată de Universitatea Titu Maiorescu, București, [Aspects Concerning the Abusive Contractual Clauses in Insolvency Proceedings; in the volume "Legislative Policy between European, National and International Regulations. New Perspectives of Law" of the International Conference of Law, European Studies and International Relations organised by *Titu Maiorescu* University of Bucharest], 24-25 May 2013, Editura Hamangiu, 2013, pp.463-468.

[37] *I.Fl. Popa*, Reprimarea clauzelor abuzive [Repression of Abusive Clauses], in PR no.2/2004, p.194; *V.D. Dascălu*, Consideraţii privind protecţia intereselor economice ale consumatorului în contractele de adeziune cu clauze abuzive, [Considerations on the Protection of Consumer Economic Interests in Adhesion Contracts with Abusive Clauses], in RDC no.1/1999, p.51; *D. Chirică*, Principiul libertății contractuale și limitele sale în materie de vânzare – cumpărare [The Principle of Contractual Liberty and Its Limitations in Sales], in RDC no.6/1999; *I.I. Bălan*, Clauzele abuzive din contractele încheiate între comercianţi și consumatori [Abusive Clauses in Merchant-Consumer Contracts], in Dreptul no.6/2001, p.36; *C. Toader, A. Ciobanu*, in RDC no.7/2003.

[38] Civil decision no.1648/18 04 2011 of the High Court of Cassation and Justice – Commercial Section, unpublished.

disadvantage of the consumer and contrary to the requirements of good faith a significant unbalance between the parties' rights and obligations is considered as abusive".

Thus in *lease contracts* it is established that these include, in addition to a highest rank commissary pact for failure of due-date payment of the lease instalments by the lessee, also another *penalising clause* for the lessee, that stipulates that in cases contracts cancelled from the exclusive fault of the lessee, the lessor is entitled to claim full payment of the lease instalments with damages and interests for the entire duration of the contract, regardless of the recovery of the asset that is the object of the contract and/or of its subsequent realisation by the lessor.

In jurisprudence[39] it was established that the insolvency judges have admitted such contestations, deeming in essence that the clause included by the lease contract closed by debtor and creditor with identical or similar content to that presented above is abusive according to the provisions of Law no.193/2000.

Consequently to admitting such contestations the creditor-lessor will be recorded in the final table of creditors only with the value of the due lease instalments, not paid by the lessee to the date of seizing by the lessor from the lessee of the asset that is the object of the lease contract, respectively until the date of contract cancellation, and also of the interests, penalties and expenditure incurred by seizure of that asset. Thus eliminated from the claim of the creditor-lessor is the value of the lease rates for the period subsequent to the seizure of the asset from the debtor-lessee, respectively subsequent to the cancellation of the contract, until the due-date stipulated in the contract for payment of the lease instalments.

If the creditor-lessor has seized the asset that is the object of the lease contract from the debtor-lessee, and this asset was realised by the creditor in relation to a third party, *in our opinion* the creditor's claim should be diminished by the sum received as the price resulting from the subsequent realisation of the asset by the creditor-lessor.

A similar situation arises in bank loan contracts, where the insolvency judge is entitled to establish, in case of a contestation of the preliminary table of claims, that certain contract clauses are abusive, referring to bank commissions or to the undetermined value of interest during the contract.

Taxation deeds issued by the competent authorities and that, according to law, represent executory titles, cannot be censored by the insolvency judge in case of a contestation of the preliminary table of claims, as for these the legislator has provided a special contestation procedure within fiscal suits.

Conclusions

Considering the economic and financial crisis traversed by our country too, the field of insolvency is of highest actuality and interest, not only from a judicial viewpoint, but particularly from en economic one.

Insolvency procedure is not a simple modality of recovering claims, but collective proceedings of the creditors conducted in view of covering the debtor's liabilities.

From this perspective at present insolvency is no longer seen as "the end" of the merchant, but as means of "recovery".

Within the complex field of insolvency the present study aimed at a detailed and in-depth analysis of certain concepts defined by law, like: creditor, creditor entitled to request initiation of insolvency proceedings, uncontested, liquid and enforceable claim, the institution of claim checking, table of receivables, creditor entitled to participate in insolvency

[39] Civil sentence no.269/sind/31 01 2013, of Braşov County Court, irrevocable and unpublished, Civil sentence no.950/sind/11 04 2013, of Braşov County Court, irrevocable and unpublished, Civil sentence no.66/19 01 2011, of Brasov County Court, irrevocable and unpublished.

proceedings, aspects related to the concept of executory title, issues related to abusive clauses in consumer-merchant contracts, etc.

By this study we have tried to highlight and discuss the implications of civil legislation in a wider sense, and of the provisions of the Civil Code and the Code of Civil Procedure ion insolvency proceedings, as well as their application within this special procedure, in order to facilitate corroboration of the provisions of special insolvency law with those of common law.

Further, related to the discussed issues, doctrinarian and jurisprudential opinions were presented, as well as controversial aspects found in both literature and judiciary practice.

References:

- I. Adam, Drept civil. Drepturile reale, Editura All Beck, București, 2002
- I. Adam, C.N. Savu, Legea procedurii insolvenței. Comentarii și explicații, Editura C.H. Beck, București, 2006
- I. Adam, Drept civil. Teoria generală a drepturilor reale, Editura C.H. Beck, ediția 3, București, 2013
- I. Adam, Drept civil. Drepturile reale principale, Editura All Beck, București, 2004
- A.R.Adam, Aspecte privind clauzele contractuale abuzive în procedura insolvenței, Volumul Conferinței internaționale de drept, studii europene și relații internaționale, cu titlul: "Politica legislativă între reglementarea europeană, națională și internațională. Noi perspective ale dreptului.", organizată de Universitatea Titu Maiorescu, București, 24-25 mai 2013, Editura Hamangiu, 2013
- S. Angheni, Drept comercial. Profesioniști – Comercianți, Editura C.H. Beck, București, 2013
- R. Andraș, Considerații cu privire la contestația formulată de debitor împotriva cererii de deschidere a procedurii insolvenței, în Phoenix, octombrie-decembrie, 2011
- I. Băcanu, Cap.XV, Procedura reorganizării judiciare și falimentului, în S. Zilberstein, V.M. Ciobanu,
- Tratat de executare silită, Editura Lumina Lex, București, 2001
- I.I. Bălan, Clauzele abuzive din contractele încheiate între comercianți și consumatori, în Dreptul nr.6/2001
- F. Bălescu, Aspecte specifice ale analizei economico-financiare la deschiderea procedurii de insolvență, în Phoenix, aprilie – septembrie, 2012
- A. Buglea, R. Bufan, O.C. Bunget, C.M.Imbrescu, L.E. Stark, A. Medelean, D. Pascu, Noțiuni de economie aplicate procedurii de insolvență, Manual realizat de un consorțiu condus de Pricewaterhousecoopers realizat în programul "suport pentru îmbunătățțirea și implementarea legislației și jurisprudenței în materie de faliment", Phare 2012, Ministerul Justiției, 2006
- A. Buta, Anularea actelor frauduloase în procedura insolvenței, Editura C.H. Beck, București, 2012 13.A. Capriel, Procedura reorganizării și lichidării judiciare, Editura Lumina Lex, București, 1995
- St.D.Cărpenaru, Procedura reorganizării și lichidării judiciare, Editura Național Imprim, București, 1996
- St.D. Cărpenaru, Tratat de drept comercial român, Editura Universul Juridic, 2012
- St. D. Cărpenaru, Drept comercial. Procedura falimentului, Editura Global Print, București, 2000
- Chira, Clauzele abuzive în contractele de leasing. Incidența Directivei 93/13/CEE și a Legii nr.193/16 11 2000 în procedura insolvenței, reglementată de Legea nr.85/2006, în Phoenix, aprilie - septembrie 2012
- D. Chirică, Principiul libertății contractuale și limitele sale în materie de vânzare – cumpărare, în RDC nr.6/1999
- M. Deaconu, "Drepturile" creditorilor titluari de creanțe născute după deschiderea procedurii generale de insolvență, în faza de observație sau în faza de reorganizare, în Phoenix, octombrie-decembrie, 2011
- C. Duțescu, Drepturile acționarilor, ediția 2, Editura C.H. Beck, București, 2012
- I.N. Fințescu, Curs de drept comercial, vol.III, București, 1930
- C. Florea, Armele insolvenței în războiul de guerilă împotriva crizei financiare globale, în Phoenix, octombrie-decembrie, 2011
- M. Grosaru, Judecătorul sindic, Editura Univesrul Juridic, București, 2012
- L.M. Imre, Condițiile deschiderii procedurii insolvenței în lumina noului cod civil, în Phoenix, aprilie- septembrie, 2012
- I. Micescu, Curs de drept civil, Editura All Beck, Colecția Restitutio, București, 2000

- S.M.Miloș, Creanțețe sub condiție suspensivă versus creanțele nescadente. Dreptul de a participa la procedura insolvenței, în Phoenix, octombrie-decembrie, 2011
- L. Neagu, Procedura insolvenței. Răspunderea membrilor organelor de conducere, Editura Hamangiu, București, 2011
- V. Pașca, Falimentul fraudulos, Editura Lumina Lex, București, 2005
- Gh. Piperea, Drept comercial vol.II, Editura C.H. Beck, București, 2008
- Gh. Piperea, Drept comercial. Întreprinderea, Editura C.H. Beck, București, 2012
- Gh. Piperea, Insolvența. Regulile. Realitatea, Editura Wolters Kluwer, România, 2008
- L. Pop, Teoria generală a obligațiilor, Editura lumina Lex, Bcurești, 2000
- L.Pop, Tratat de drept civil. Obligațiile, Vol.I Regimul juridic general, Editura C.H. Beck, București, 2006
- Fl. Popa, Reprimarea clauzelor abuzive, în PR nr.2/2004, p.194; V.D. Dascălu, Consideraţii privind protecţia intereselor economice ale consumatorului în contractele de adeziune cu clauze abuzive, în RDC nr.1/1999
- I.R. Urs, Drept civil român. Teoria generală, Editura Oscar Print, București, 2001
- I.R.Urs, P.E.Ispas, Drept civil. Drepturile reale, Editura Universității Titu Maiorescu, București 2012
- R. Rizoiu, Garanțiile reale mobiliare. O abordarea funcțională, Editura Universul juridic, 2011
- I. Schiau, Regimul juridic al insolvenței comerciale, Ed. All Beck, București, 2001
- L.Sebe, Verificarea de către practicienii în insolvență a reflectării în contabilitate a creanțelor, în vederea acceptării lor pentru înscriere în tabloul de creanțe, în Phoenix, ianuarie-martie 2009
- L.Sebe, Verificarea de către practicienii în insolvență a creanței provenită din operații derulate de asocierile în participațiune, în Phoenix, aprilie, 2010
- C. Stătescu, C. Bârsan, Drept civil. Teoria generală a obligațiilor, Editura All, București, 1994
- C. Stătescu, C. Bârsan, Drept civil. Teoria generală a obligațiilor, ediția a IX-a revizuită și adăugită, Editura Hamangiu, București, 2008
- V. Stoica, Drepturile reale principale, Editura Humanitas, București, 2004
- I. Turcu, Procedura falimentului între tradiție și inovație, în Revista de drept comercial nr.2/1995
- I. Turcu, Insolvența comercială, reorganizarea judiciară și falimentul, Editura Lumina Lex, București, 2000
- I. Turcu, Tratat de insolvență, Editura C.H.Beck, București, 2006

THE UNPREDICTABILITY CLAUSE IN TRANSPORT CONTRACTS, ACCORDING TO THE NEW CIVIL CODE

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Abstract

Until the enforcement of the highly controversial transport law, transport companies must already observe the provisions of the new Civil Code[1] in their transport business. One of the novelties in the new Civil Code, that came into force on October 1, 2011, refers to the unpredictability clause: recurring to this clause, in certain situations to be precisely analysed by courts, parties may even be exempted from certain contractual obligations, when the court decides to rescind the contract based on objective criteria, not imputable to the party that no longer can properly fulfil the obligations that had been undertaken when the contract had been made. However, this solution only is provided after all means of negotiation and mediation between parties are exhausted. The clause meets current market requirements, under which many companies have to deal with bad paying partners.

Keywords: *unpredictability clause, bad payers, contractual obligations, transport law.*

Preliminary

Unpredictability is newly introduced into legislation, as the New Civil Code (article 1271) came into force, establishing a rule on this issue, but also an exception on contract enforcement when the circumstances considered by parties when entering the contract have changed and the contract has become an excessive burden for one of the parties. In this case, a court may interfere with the contract.

The text is placed immediately after the principle of the compulsory force of contracts and represents (along with the institution regulated under art. 1272 NCC[2] as "contract content") a limit thereof, determining an extension of contract effects that differs from the one stipulated in the contract, to the extent of the established degree of unpredictability.

Although the parties to a contract must meet their obligations, irrespective of whether their execution has become a burden, the New Civil Code (NCC) also regulates exceptional situations that may result in the adjustment of the contract, according to the debtor's possibilities.

1. The principle of unpredictability

Thus, the principle of unpredictability is stipulated under art. 1271 NCC, as follows: "contract performance has become excessively onerous because of an exceptional change in circumstances, resulting in an obvious unfairness of the debtor being compelled to meet his/her/its obligations".

Hence, in case a dispute appears where the principle of unpredictability is invoked, the court may decide ***either to adjust the contract***, for a fair sharing of losses and benefits

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[1] Noul Cod civil, Legea 287/2009.

[2] Noul Cod civil, Legea 287/2009.

resulting from the changes in the actual situation (circumstances) between parties, ***either to terminate the contract***, at the moment and under the conditions established by itself.

Analysing the principle of unpredictability, we shall understand that it shows that **all the contracts affected by unpredicted situations and circumstances will produce other effects** than those originally agreed by parties[3]. However, any situation resulting in a change in contracts, according to art. 1271 NCC, must be exceptional and the debtor being compelled to honor his/her/its obligations should be obviously unfair. The circumstances referred to under art. 1271 NCC must be the ones considered by parties when agreeing upon the contract, and their change must have occurred after the contract has been made. Thus, circumstances such as fluctuations in prices, costs or foreign exchange do not represent an unpredictable situation, as they should have been considered when the contract was made.

Moreover, the new regulations shall only apply to contracts made after October 1, 2011, when the Civil Code came into force, and only when the factors resulting in changes in the contract performance are unpredictable.

NCC states: "The change in circumstances and its extent were not and could not have been considered by the debtor in a reasonable manner, when the contract was made".

At the same time, NCC stipulates that the court may decide to adjust or terminate contracts only when the debtor needn't have undertaken the risk of changes in circumstances and he/she/it could not have been reasonably considered to have undertaken that risk.

Moreover, the debtor must have tried, within a reasonable period and in good faith, to negotiate a reasonable and fair adjustment of the contract to the new circumstances.

2. NCC regulations

Analysing NCC regulations, an analysis of unpredictability in terms of error, damage or force majeure is absolutely necessary. Thus, errors and damages may result in the **cancellation of the document** or adjustment thereof, under certain conditions, whereas unpredictability results in the adjustment of the contract or its **termination**.

Moreover, unlike unpredictability, the consequence of force majeure/acts of God is the **exemption of liability**, not the adjustment or termination of contractually agreed relations.

The rule on the performance of contracts by signatory parties is provided under art. 1271 (1) NCC, according to which "Parties are held liable for their obligations, even though their performance has become more onerous, either for an increase in the parties' own costs, or for a decrease in the value of the corresponding consideration." Thus, each party to the contract must meet its obligation according to contractual clauses, even when their own obligation tends to become or has already become more onerous that it had been when the contract was made, affecting the originally presumed balance between mutual performances.

The exception established by art. 1271 NCC is given by art. 2, that states:

"However, when contract performance has become excessively onerous because of an exceptional change in circumstances, resulting in an obvious unfairness of the debtor being compelled to meet his/her/its obligations, the court may decide:

a) t**o adjust the contract**, for a fair sharing of losses and benefits resulting from the changes in the actual situation (circumstances) between parties;

b) to terminate the contract, at the moment and under the conditions established by itself."

When contract performance has become excessively onerous because of an exceptional change in circumstances, resulting in an obvious unfairness of the debtor being compelled to meet his/her/its obligations, the court may interfere with the contract. Hence, the

[3] Jacques Ghestin, *Traite de droit civil. La formation du contract*, L.G.D.J., Paris, 1998, p. 231.

court may re-establish a contractual balance, adjusting the contract to the new situation, so that resulting losses and benefits do not create an imbalance[4].

Moreover, the court may even decide to terminate the contract (art. 1271 (1) (b) NCC), when the contract can no longer be adjusted for re-establishing a balance.

Therefore, unpredictability is a legal device aiming at protecting a contractual partner that is highly and unfairly affected by the unexpected evolution of the market, and practically sharing the risks generated by such an unexpected evolution between both contracting parties.

"The exceptional changes" that may result either in the amendment or termination of the contract (as we shall see below) are not defined by law, as they will be evaluated by the court, on a case by case basis.

When can the court interfere:

The court may not interfere with the contract for any change in circumstances, but several cumulative conditions are required:

a) the element causing an excessive character of the debtor's burden should not have existed when the contract was made, but it should have appeared after this moment;

b) the change in circumstances and its extent should and could not have been considered by the debtor, on a reasonable basis, when the contract was made;

c) the party undergoing difficulties should not have undertaken (explicitly or by nature of the contract) to bear the risk of the occurrence of the perturbing event and it cannot be reasonably considered to have undertaken such risk;

d) the debtor should have tried to negotiate the reasonable and fair adjustment of the contract, within reasonable time and in good faith.

As the final text shows, the appeal to a court is only the second step in the actions of the debtor with an obligation that has become excessively onerous. As a prior condition for appealing to a court, he/she/it should have tried to negotiate with the other party, with a view to achieving the adjustment of the contract.

3. The importance of the imbalance at stake

New circumstances must create an imbalance of a certain importance, that may be evaluated by the judge *in concreto* or by the lawmaker *in abstracto* (the latter may establish a threshold beyond which any imbalance in performances should be considered an unpredictability).

The difference between the enforcement of the rule[5] (on the proper execution of contractual obligations) and the enforcement of the exception (implying the adjustment of the contract by interference of the court) is quite difficult, as the court must discriminate situations when the obligations of a party has become "more onerous" or "excessively onerous".

New circumstances should place the debtor in a very difficult economic position. Bankruptcy may be such a situation, but the possibility of bankruptcy is not the only case that would entail the application of the unpredictability theory. The problem of an unpredictability situation may arise in contracts with successive performance, continuous performance (with a long performance term), as well as contracts subject to a rather distant suspension term. Because of this element (time), a major imbalance might appear between the performances the contracting parties are obliged to, during the performance of the contract.

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[4] Dumitru Dobrev, Impreviziunea, o cutie a Pandorei în Noul Cod Civil, in *Noul Cod Civil al României, Comentarii, ediția a II-a revăzută și adăugită*, Universul Juridic Publishing House, Bucharest, 2011, p. 47.

[5] Op. Cit., p. 79.

This imbalance usually appears regarding the obligation to pay the amounts of money, when the creditor, according to the contract, the transport contract included, must receive an amount of money which is significantly lower than the real value of the counterpart performance. However, the debtor may also face such a situation, when, according to the contract, he/she/it must pay a significant amount of money, compared to the real value of the acquired good.

Of course, unpredictability may concretely arise only when the performances or obligations undertaken by the parties have not been executed yet. If the contract has been fully performed, the parties can no longer invoke any increase in performance costs or any decrease in the value of the counterpart, for a very simple reason: if the obligation could be executed, this obligation represented, on the debtor's behalf, the proper and proportional equivalent of the correlated obligation. If the obligation was partially performed, we believe that unpredictability may be invoked for any remaining obligations.

Transport contracts may take a wide range of forms, according to the scope of the carrier's activity (transport of passengers, goods, luggage and packages), the means of transport (railway, road, water, air), the particularities implied by international transport, compared to domestic transport. For these reasons, unpredictability must also be analysed for transport contracts, according to the transport's commercial and technical management, the scope of the transport contract, the route choice, etc. In other words, transport contracts should also be evaluated in terms of concrete elements and actual situations of unpredictability.

4. Conditions required in order to invoke unpredictability

In the first place, a major and obvious *imbalance* must exist between the parties' obligations, i.e. the strength of this imbalance should place the debtor of the obligation at stake in a highly difficult and disadvantageous situation, when he/she/it fulfilled such obligation[6]. As it may be noticed, the law deals with an obligation that has become *excessively* onerous, as this is the only hypothesis when a party may invoke the unpredictability theory. In order to emphasize the importance of this concept, the law specifically states that an obligation that has become onerous (not *excessively* onerous) cannot be considered a reason for a party to invoke unpredictability. This event must cumulatively meet three conditions, so that it may be accepted as a source for an unpredictability situation:

- it must appear or become known to the disadvantaged party after the contract was made and it could not have been reasonably considered when the contract was made; hence, it is important that the source of this event entailing the imbalance of performance should occur after the contract is made (this is a material difference from damage), on the one hand; on the other hand, this event should not be known by the contracting party or, in other words, as per art. 1271 (3) (b) NCC, the change in circumstances and its extent was not and could not have been reasonably considered by the debtor when the contract was made;
- be outside the control of the disadvantaged party; when the party could have foreseen or remove the effects of this event, unpredictability can no longer be invoked;
- the risk of events should not have been undertaken by the disadvantaged party; any risks may be taken, as this situation concretely refers to a contractual clause whereby the contracting party firmly and unequivocally agrees to perform its obligations, irrespective of the changes that might appear during the performance of the contract, even though such changes affected contractual balance.

[6] Cristina Elisabeta Zamsa, *Teoria impreviziunii. Studiu de doctrină şi jurisprudenţă*. Hamangiu Publishing House, Bucharest, 2006, p. 142.

The second element is unpredictability itself, i.e. the imbalance between performances should occur in a completely *unpredicted* manner, with neither of the parties knowing what would happen in a future (by definition, a distant future) with the value of their undertaken obligations[7]. If this unpredictable element does not exist, one cannot talk of the application of the unpredictability theory; the party in a less favourable situation cannot invoke the *rebus sic stantibus* rule; hence, in such a situation, when the party does not perform the contract that has become excessively onerous for a reason it has foreseen, the issue of faulty inobservance of obligations arises, which is something completely different. Moreover, unpredictability does not exist when the performance of the obligation has been rendered impossible by a force majeure event, not by the obligation becoming excessively onerous; of course, such a situation is a case of contractual risk, not unpredictability.

On balance, unpredictability is an imbalance in the performances of parties occurring after the contract has been made, during its execution (a difference between unpredictability and damage, which, in turn, is a significant imbalance in the performances of parties, but an original imbalance, i.e contemporary to the moment when the contract is made). The text allows for the contract to be reviewed not merely because the contract must survive and be continually executed, because its execution is to the benefit of both parties.

Therefore, the New Civil Code regulates the unpredictability theory as a premiere for Romanian legislation. The law is based on the principle of compulsory contract effects, which it reiterates and emphasizes, especially for outlining that unpredictability is a *strict* exception from the contract's compulsory character.

The unpredictability theory is regulated by art.1271 NCC in a single article, which is, however, clear enough. Case law will actually concretise and establish genuine unpredictability situations to be invoked in practice.

References:

- Noul Cod civil, Legea 287/2009;
- Jacques Ghestin, Traite de droit civil. La formation du contract, L.G.D.J., Paris, 1998.
- Gabriel Boroi, *Drept Civil, Partea Generală, Persoanele,* All Beck Publishing House, Bucharest, 2001.
- Liviu Pop, *Drept Civil, Teoria Generală a Obligaţiilor*, Lumina LexP ublishing House, Bucharest, 1998.
- Liviu Pop, *Tratat de Drept Civil. Obligaţiile. Volumul II. Contractul.* Universul Juridic Publishing House, Bucharest, 2009.
- Gheorghe Beleiu, *Teoria impreviziunii-rebus sic stantibus*, in "Dreptul" issue 10-11, 1993.
- Jacques Ghestin, Christophe Jamin, Marc Billiau, *Traite de droit civil. Les effects du contract*, 3e édition, L.G.D.J., Paris, 2001.
- Dumitru Dobrev, Impreviziunea, o cutie a Pandorei în Noul Cod Civil, in *Noul Cod Civil al României, Comentarii, ediţia a II-a revăzută şi adăugită*, Universul Juridic Publishing House, Bucharest, 2011.
- Cristina Elisabeta Zamsa, *Teoria impreviziunii. Studiu de doctrină şi jurisprudenţă*. Hamangiu Publishing House, Bucharest, 2006;
- Gabriel Tiţa-Nicolescu. Excepţiile de la principiul obligativităţii efectelor contractului prevăzute în noul Cod civil, Pandectele române, issue 11/2012.
- Cornelia Lefter. Raluca Dimitriu, Ovidiu Maican, *Civil law,* Editura Economică, Bucureşti, 2000,
- Adriana Belu, Introduction in the Study of the Juridical Personality, Editura Reprograph,
- Craiova, 2007;
- Legea 71/2011;
- Ordonanța de Urgență a Guvernului 79/2011;
- Decizia Curții Constituționale 1514/2011;
- Legea 60/2012.

[7] Op. Cit., p. 173.

LEGAL CULTURES AND MEDIATION. INTERACTIONS AND EVOLUTIONS

Claudiu Ramon D. BUTCULESCU[*]

Abstract

Mediation, as an alternative dispute resolution method, is closely connected with the system of legal cultures. Mediation is an important link between legal culture and the judicial system. Mediation also acts as an interface between internal legal culture and external legal culture. This paper addresses the issues regarding the links and interactions between mediation and legal cultures, as well as the effects that arise from these interactions.

Keywords: *Legal cultures, mediation, legal systems*

1. Introduction

This study addresses the interactions between legal cultures and mediation as an alternate dispute resolution method. In a diverse and multicultural world, the most convenient way to settle disputes is by using alternative dispute resolution methods like conciliation, negotiation, mediation etc. In a culturally challenged environment, mediation is the best alternative to solve such conflicts, both in terms of time efficiency and costs. In doctrine, many papers were written that addressed the mediation process, while other papers tackled the issues concerning legal cultures. However, the resources regarding the interactions between legal cultures and mediations are scarce and should be developed further.

Etymologically speaking, the word "culture" has its origins in Latin vocabulary, where "*cultura*" represented a synonym of the verb *to grow*. In the eastern thinking, sometimes culture is similar with the concept of civilization, although not all European countries share this opinion. Germany, for instance, when talking about the content of this concept, it rather reconsiders its initial attributes, a growing factor. Furthermore, a French philosopher considered that the notion of culture (with the meaning that the Germans give), enriches the French idea of civilization (*La notion allemande, de Kultur enrichit et complète la notion française de civilisation)*[1]. Anyway, the notion of *civilization* has a different source, from an etymologically point of view as well as from a conceptual point of view. The notion emanates also form the Latin language, where the word *cives* meant the roman citizen. Furthermore, between civilization and culture concepts other parallels can be drawn. As an example, civilization can be considered as culture *in actu.*

Some similar aspects between the two notions were, apparently, even from XVIth to XVIIth centuries. For instance, it was considered that *„to civilize a nation means to make it*

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[1] Febvre L., (Editor), 1930, *Civilisation : Le mot et l'Idée*. (Centre International de Synthese. Premiere Semaine Internationale de Synthese. Deuxieme Fascicule. Paris, apud A. L. Kroeber, Clyde (*trad. Noţiunea germană de Kultur îmbogăţeşte şi completează noţiunea franceză de civilizaţie*) Kluckhohn, Wayne Untereiner, and Alfred G. Meyer, *Culture: A Critical Review of Concepts and Definitions*, New York: Vintage Books, 1952), 12.

progress from a primitive, natural country, to an evolved country, with a moral, intellectual and social culture".[2]

Mediation represents an alternative way to solve conflicts. Even though emerged later than other alternative methods, mediation's voice is getting stronger and stronger in amiably solving conflicts.

Mediation is underlined on the attentive study of conflict causality, as well as on identifying the divergent interests that lead to the emergence of conflicts. The connection between mediation and legal culture is more than obviously.

Many times, conflicts emerge as a result of cultural differences. Even between external legal culture operators (the public) and the internal legal culture operators (law specialists) there are significant differences. This is why mediation, more than arbitration or negotiation, sets as a possible interface between external legal culture and internal legal culture.

Of course, the characteristics of mediation weren't, fundamentally, so different then, than these from today, so mediation could intervene only in private law actions and implied a third person intervention, although this one didn't have by far the same power the arbitrator had.

2. Content

There is no doubt that the civilizing role of culture has a considerable age. To this end, it is interesting to remind only about the existence of ancient cultures, primitively speaking, as those indicated by the discoveries from Ciu-Ku-Tien[3]. After all, historically speaking, the only ancient plausible testimonies are the tombs, the ossuaries etc. The existence of this sort of digs logically implies the existence of some funeral observances, which presumes the existence of some common ideas and perceptions – therefore the existence of a culture. Besides, historically speaking, the relationship between culture and civilization it is interesting. Culture usually means an entire historical phase (namely Eneolithic cultures: Cucuteni, Gumelnița), during which more civilizations occurred, on the other hand, the idea of civilization it is commonly attributed to the notion of cultural identification of a people, country etc. From those above one may come to the conclusion that between culture and civilization may be a relationship as between part and whole. More than that, since we reminded of Neolithic and Eneolithic cultures, it is necessary to mention the wealth of symbols attached to different mythologies. In this period we can already discuss about notions like *"world axis" (axis mundi)* or *"the star of the sky".* Subsequently, the civilizing role is assumed by a number of heroes. The most back literary piece of work presents us the king of Uruk, Ghilgamesh, as a civilizing hero, emerged after the flood.

Returning to the aspects discussed in some XVIIIth French piece of work, it is interesting to see that, in the study *Encyclopédie Française,* published between 1780 – 1782, a legal meaning it is attributed to the verb *Civiliser,* that of conversion of a criminal action into a civil action. In this situation, we have to deal with a special terminology, of a legal nature, which presents the possibility to transform the criminal action, into a civil one.

The Merriam-Webster Dictionary[4] presents no less than six different explanations for the concept „culture", one of them refers to the agricultural aspect (to make something grow, to till), another is related to biology (the act or process of cultivating living material as bacteria or viruses), while a third one refers to specialized caring forms (*expert care*).

Finally, the other meanings the dictionary gives us are:

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[2] Kroeber A. L., Kluckhohn Clyde, Untereiner Wayne, and Meyer Alfred G., *Culture: A Critical Review of Concepts and Definitions*, (New York: Vintage Books, 1952), 16-17.

[3] Eliade, Mircea, *Istoria credinţelor şi ideilor religioase*, (Ed. Univers Enciclopedic, Bucureşti, 2000), 18 – 25.

[4] http://www.merriam-webster.com/dictionary/culture.

a) The act of developing the moral and intellectual faculties especially by education;

b) Excellence of taste acquired by intellectual and aesthetic training;

c) Acquaintance in fine arts, humanities, and broad aspects of science as distinguished from vocational and technical skills;

d) The integrated pattern of human knowledge, belief and behavior that depends upon the capacity for learning and transmitting knowledge to succeeding generations;

e) The customary beliefs, social forms and material traits of a racial, religious, or social group;

f) The characteristic features of everyday existence shared by people in the same place or time;

g) The set of shared attitudes, values, goals, and practices that characterizes an institution or organization;

h) The set of values, conventions, or social practices associated with a particular field, activity, or societal characteristic.

Congruous with some authors, culture became a central item to the human rights assembly[5], especially looked at through the spectrum of notions as: multiculturalism, cultural diversity or cultural development[6]. In what may concern the concepts of culture and civilization, the law has the binding role. According to professor Sofia Popescu[7], the law is one of the instruments hereby the social functions of the culture are carried out. In the same way, cultural models and values have, in their historical evolution, a high influence over the social life, between the lines tied by laws. Cultural values are subject of an interesting transformation process, by integrating them into human and social praxis. The finished product accomplished after this transformation process is represented by every-day life components in all its displays.

The study of comparative law and legal cultures have the potential to improve our perception regarding relevant aspects of the precise nature of culture, diversity and relevance, allowing different approaches than *self-sufficiency* and *ethnocentrism* attitudes[8].

Not all legal culture outlooks have an affirmative character. Some authors consider that it is possible to discuss about a legal anti-culture, underlined by dissension and anarchic thinking[9].

To the legal culture could be attributed a wide meaning, in connection with the perception of the rights that are considered important, not because of their possibility to solve every-day problems but for their function/ ability to allow a strong normative speech[10]. At the same time, some authors are discriminating between mass legal culture and elite legal culture. Other authors have tried to contour a theme regarding legal cultures development, distinguished by rural or urban surroundings[11].

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[5] Ciongaru Emilian, *Human rights and multiculturalism*, (Volume of International Conference „BIBLIO 2012", Central Library of Transylvania University of Brasov. Brasov, Editura Transylvania University of Brasov, 2012), 190-191.

[6] McGoldrick Dominic, Culture, Cultures and Cultural Rights, in Economic, Social and Cultural Rights in Action, (Oxford University Press, 2007), 447 – 473.

[7] Popescu Sofia, *Quelques réflexions sur le rapport entre la vie juridique et la vie culturelle de la société*, in (Memoria del X Congreso Mundial Ordinario de Filosofia del Derecho y Filosofia Social), vol. III, Mexico, 1982, 293 – 311.

[8] Tych – Puchalska Bogumila, Salter Michael, *Comparing legal cultures of Eastern Europe : the need for a dialectical analysis*, (Legal Studies, Vol. 16, No. 2, July 1996), 158.

[9] Kevelson Roberta, Dissent and the Anarchic in Legal Counter – Culture : A Peircean View, (Ratio Juris, Vol. 15, No. 1, March 2002), 16.

[10] Milner Neal, *The Denigration of Rights and the Persistence of Rights Talk : A Cultural Portrait*, (Law & Social Inquiry, Volume 14, Issue 4, October 1989), 643-649.

[11] Shingles Richard D., Shoemaker Donald J., *A Developmental Thesis of Legal Cultures*, (Law and Policy Quarterly, Vol. 1, No. 4, October 1979), 385 – 387.

The concept of legal culture is also well connected with the law schools evolution[12]. Hereby, the way that the law is perceived and acknowledged was differently approached subsequently the direction the idea of law had[13].

Besides the definitions and concepts indicated above, other reputed legal sociology specialists tried in time to find explanations regarding the concept of legal culture, starting with the ideas enunciated by Lawrence Friedman, who connected to the notion of „legal culture" ideational attributes and continuing with Roger Cotterrell's theory regarding *„legal ideology",* as well as other specialists ideas - Penissi, Blankenburg etc.

In most specialized literature, the legal culture was appointed as a key concept[14] with great legal implications or an entirety of knowledge referring to law[15].

Also, it has been theoretically proven there are two subcomponents of the legal culture – the internal legal culture and the external legal culture[16]. The internal culture represents the joint opinions of the law specialists regarding law, while the external legal culture integrates the opinions of the great public, of the outsiders regarding the legal aspect.

The same L. Friedman shows that through legal culture the ideas, the values, the attitudes and opinions, associated with law and the legal system, which the members of a community possess, must be understood. Every person has its own legal culture, as well as literacy or social knowledge. Every person has specific features, although it is in the same time part of a collective, group or social entity, sharing the ideas and habits of that group[17].

The legal culture is a system which is always developing and modifying and it builds the fundament on which a good deal of the human society's requests are founded, which are also defining the modifications of the law system.

The way in which people are communicating with each other has always been a reason of fierce and intense debates. Beginning with the myth of being a unique language to the diversity of languages there are nowadays, most thinkers and philosophers, both in Antiquity and in Modernity, they have tried to determine, using more or less scientific methods, the role of communication and language in general, in humankind evolution. But culture must always encompass the essence of law, as a German legist[18] stated.

Mediation represents a procedure that arose early in history. Apparently in Phoenician society were practiced the first causes (cases). The Greeks also knew the mediator institution and at the same time, in the Romanic world, the institution was fully developed, the mediator being called *„intercessor", „interlocutor"* etc.

After the early days (antiquity), started in Phoenician and Babylonian societies, carried on in the Greek and Romanic phases, mediation had a differentiate influence during Middle Ages, that was because in some countries was forbidden while in others favored. In the United States of America we can place the first mediation situations around 1680s. Other countries regarded mediation as an important state institution, such as China.

For conflicts that arise within culturally distinct systems, mediation should be considered the best alternative there is. Mediation is a procedure that focuses on the real

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[12] Ciongaru Emilian, *Theory of justice from the perspective of law schools, (*Volume of Annual Scientific Aession „Justice, rule of law and legal culture" of the Institute of Legal Research „Acad Andrei Radulescu" of the Romanian Academy, Bucharest, Universul Juridic, 2011), 129-134.

[13] Chiassoni Pierluigi, On the Wrong Track : Andrei Marmor on Legal Positivism. Interpretation, and Easy Cases, (Ratio Juris, Vol. 21, No. 2, June 2008), 248 – 267.

[14] Popescu Sofia, Cultura Juridică, concept-cheie în cercetarea căilor integrării europene în domeniul dreptului, (Revista de Studii de Drept Românesc, Anul 14, nr. 3-4), 251-267.

[15] Arnaud André – Jean, Dictionnaire Encyclopédique de Théorie et de Sociologie du Droit, 1993.

[16] Friedman Lawrence M., Perdomo Rogelio Perez, *Legal Culture in the Age of Globalisation. Latin America and Latin Europe*, (Stanford University Press), 2003.

[17] Friedman Lawrence M., *Is there a Modern Legal Culture?*, (Ratio Juris, Vol. 7, No. 2, July 1994), 118.

[18] Hocking Ernest William, *Present Status of the Philosophy of Law and of Rights*, p. 44, apud. Geer Le Boutillier,Cornelia *American Democracy and Natural Law*, (New York: Columbia University Press, 1950), 90.

reasons of the parties, instead of their pretended allegations. In most legal systems, the person that mediates conflicts is not a legal professional. Nevertheless, its techniques and abilities place him as an expert with specific competences. This also constitutes a distinct advantage, because as a technical expert, he is not bound by the legal professional rules. All he applies are his own methods and techniques to ease or resolve conflicts. Therefore, he applies concepts of conflict theory, conflict management, conflict solving. This configuration of his competences gives him a greater mobility than a legal professional.

Mediation is governed at this time mainly by Law No. 192 of 16 May 2006, which contains in 75 articles both cross-border provisions and specific provisions regarding the mediators and the mediation procedures.

Also, the Regulation of organization and functioning of the Mediation Council, the Code of Ethics and Professional Deontology of Mediators, as well as the Occupational Standard of the Mediator, must be taken into consideration.

As regards the international mediation regulations, it must be shown, that in private relations, including the commercial ones, there are no unitary regulations, because, unlike arbitration, where the entire activity ends with an arbitrary meeting, susceptible of execution, in mediation, the mediator does not act as a judge, so there is no question in accepting the mediation's positive effects. In fact, a good command of the culturally known paradigms would certainly add to the possibility of a favorable solution obtained through mediation.

Mediation is also in the international public law, at an interstate level, being there for the offices and the negotiation, and acting as one of the optional means of solving international differences. To such an end, the provisions of The Hague Conventions in 1899 and 1907 are incident in this area. At an international level, the mediation will always get optimal effects if the traits of the legal cultural system are known to the mediator. As noted in this paper, the mediator stands as a technical actor, that helps the parties to reach an agreement and solve a conflict.

According to article 1 of Law No 192/2006, mediation represents an amicably settlement modality of conflicts, with the support of a third person specialized as a mediator, under neutrality, impartiality and confidentiality.

The mediation characters encompass the following elements:

a) Consensualism, because the willingness of the parts is determined in choosing this mean of solving litigations. This is an important feature of mediation, as it demonstrates an important link between this procedure and legal cultures. There is no authority rule that is incident on the decision of the parties, only their common goal, which they exposed during mediation. Nevertheless, that goal is clearly dependent on the peculiarities of the legal cultures in which the actors of the mediation live.
b) Impartiality, because the mediator must not be partial. Instead, he must always act without favoring any of the parts. In certain legal systems, the mediator acts more like a conciliator or negotiator. Still, as a third party, imbued with confidence by the first two parties, the mediator cannot lose the neutrality or impartiality which is conferred upon him.
c) Positivism, because on one hand the mediator seeks to help the parties in looking for solutions, not culprits, and on the other hand, the solutions must last the future, and no sanctions for the future or the past are enacted in the mediation process;
d) Confidentiality, because all of the mediation acts are known only by the parties involved. This promotes mediation as a culturally desirable dispute resolution method, as many legal cultures are known to be closed systems. If the mediator acknowledges the specific systemic conditions of the cultural system in which he mediates, he will manage to increase the chances of success in mediation.

e) Neutrality, which completes the impartial role of the mediator. Although the mediator must know the specific cultural traits of the system from which the parties emerge, he also must remain neutral. Mediation allows the mediator to become acquainted with the cultural and legal problems of the conflict that is brought before him, but also compels him to remain neutral to all the features and traits of the mediation process.

As every process does, the mediation has a beginning, a course and an ending. Every one of these is bound to relate themselves to culturally appropriate backgrounds. In the beginning, the mediator must assess the situation and decide if it possible to mediate the conflict or not. To this end, the cultural analysis plays an important role. In certain cases, the cultural systems are closed, by standards of General Theory of Systems and therefore, mediation is not possible. However, the mediator may always find gaps in the fabric of inflexible systems to bring the conflict to an end.

The mediation process ends by: a) registering an agreement as a result of the solved conflict; b) by the mediator ascertaining the failed mediation. There are also other cases when the mediation ends, like forfeiture of the parties etc. The influence of legal culture is also important in this stage, as in many systems, the mediator must be aware to avoid any unnecessary risings of conflicts.

Supposing the agreement has a partial character or that the mediation has failed, any of the mediation parts can address to the jurisdictional or arbitrary competent court.

As proven before, in all cases, at the end of the mediation process, the mediator will close a protocol which is signed by each part, in person or through a representative, as well as the mediator.

If the parts get to an agreement, then the closing of a convention, which encompasses all the clauses that the parts agreed with, is necessary. The convention has the value of a deed in private signature, although, the convention may be attested by an attorney.

Cancelling the mediation contract can be made anytime, by any of the parts, they having the duty to notify the other parts, as well as the mediator. In this case, the mediator closes a protocol of closing the mediation. If one party is not present at the mediation, but does not cancel the mediation contract, in many cases, the mediator must take steps to confirm if this is an accidental setback or an intentional refusal to solve the conflict through mediation.

Legal cultures and mediation are irrevocably intertwined in their evolution and interactions, as mediation relies on the correct analysis of legal cultures to justly allow mediation attain its purpose, and legal cultures have their own part, being both actors and determined parties in the whole normative social system of law, acting as the means through which mediation can allow litigants to better and faster solve their disputes.

3. Conclusions

Legal culture is a social normative system that interacts with the other normative systems. Among these, the system of law is specifically connected to the system of legal culture. However, the formalism of law is better addressed through alternative dispute resolution methods, of which mediation is clearly a serious choice, when tackling issues regarding the amiable resolution of conflicts. The purpose of this paper is to find if there are any connections and interactions between legal cultures and mediation. Knowing the intricacies of legal culture certainly offers an advantage to any expert in mediation. Moreover, as mediation tends to become more and more internationalized, a correct understanding of the impact of legal cultures is extremely important. This paper intends only to scratch the surface of the complex of interactions between legal cultures and mediation. As a method of alternate dispute resolution, based on interests, mediation is ideally suited to solve conflicts in culturally challenged environments.

References:

- Arnaud André – Jean, Dictionnaire Encyclopédique de Théorie et de Sociologie du Droit, 1993, Chiassoni Pierluigi, On the Wrong Track : Andrei Marmor on Legal Positivism. Interpretation, and Easy Cases, (Ratio Juris, Vol. 21, No. 2, June 2008)
- Butculescu, D. Claudiu Ramon, *Considerații privind influența culturii juridice asupra codificării în România în perioada 1864-2009*, (Volumul Știință și Codificare în România, Ed. Universul Juridic, București, 2012)
- Butculescu, D. Claudiu Ramon, *Rolul dreptului international în uniformizarea culturilor juridice*, (Volumul Dreptul românesc în contextul exigențelor Uniunii Europene, Editura Hamangiu, BUcurești, 2009)
- Ciongaru Emilian, *Human rights and multiculturalism*, (Volume of International Conference „BIBLIO 2012", Ciongaru Emilian, Theory of justice from the perspective of law schools, (Volume of Annual Scientific Aession „Justice, rule of law and legal culture" of the Institute of Legal Research „Acad Andrei Radulescu" of the Romanian Academy, Bucharest, Universul Juridic, 2011)
- Central Library of Transylvania University of Brasov. Brasov, Editura Transylvania University of Brasov, 2012)
- Eliade, Mircea, *Istoria credinţelor şi ideilor religioase*, (Ed. Univers Enciclopedic, Bucureşti, 2000)
- Febvre L., (Editor), 1930, *Civilisation : Le mot et l'Idée*. (Centre International de Synthese. Premiere Semaine Internationale de Synthese. Deuxieme Fascicule. Paris, apud A. L. Kroeber, Clyde, Kluckhohn, Wayne Untereiner, and Alfred G. Kevelson Roberta, *Dissent and the Anarchic in Legal Counter – Culture : A Peircean View*, (Ratio Juris, Vol. 15, No. 1, March 2002)
- Friedman Lawrence M., Perdomo Rogelio Perez, *Legal Culture in the Age of Globalisation. Latin America and Latin Europe*, (Stanford University Press), 2003
- Friedman Lawrence M., *Is there a Modern Legal Culture?*, (Ratio Juris, Vol. 7, No. 2, July 1994)
- Hocking Ernest William, *Present Status of the Philosophy of Law and of Rights*, p. 44, apud. Geer Le Boutillier,Cornelia American Democracy and Natural Law, (New York: Columbia University Press, 1950)
- Kroeber A. L., Kluckhohn Clyde, Untereiner Wayne, and Meyer Alfred G., *Culture: A Critical Review of Concepts and Definitions*, (New York: Vintage Books, 1952)
- McGoldrick Dominic, Culture, Cultures and Cultural Rights, in Economic, Social and Cultural Rights in Action, (Oxford University Press, 2007)
- Meyer, Culture: *A Critical Review of Concepts and Definitions*, New York: Vintage Books, 1952)
- Milner Neal, The Denigration of Rights and the Persistence of Rights Talk : A Cultural Portrait, (Law & Social Inquiry, Volume 14, Issue 4, October 1989)
- Popescu Sofia, *Quelques réflexions sur le rapport entre la vie juridique et la vie culturelle de la société*, in Popescu Sofia, Cultura Juridică, concept-cheie în cercetarea căilor integrării europene în domeniul dreptului, (Revista de Studii de Drept Românesc, Anul 14, nr. 3-4)
- (Memoria del X Congreso Mundial Ordinario de Filosofia del Derecho y Filosofia Social), vol. III, Mexico, 1982
- Shingles Richard D., Shoemaker Donald J., *A Developmental Thesis of Legal Cultures*, (Law and Policy Quarterly, Vol. 1, No. 4, October 1979)
- Tych – Puchalska Bogumila, Salter Michael, *Comparing legal cultures of Eastern Europe : the need for a dialectical analysis*, (Legal Studies, Vol. 16, No. 2, July 1996)
- ***http://www.merriam-webster.com/dictionary/culture
- ***http://en.wikipedia.org/wiki/Mediation
- ***http://www.britannica.com/EBchecked/topic/372184/mediation

A FRESH APPROACH TO UNFAIR TERMS IN COMMERCIAL CONTRACTS: ARE THE LATEST LAW AMENDMENTS BENEFICIAL TO CONSUMERS?

Paul COMȘA*

Abstract

Mostly in consumer contracts, the economic and juridical imbalances between trade participants give the party of superior negotiating strength a considerable advantage by defining terms in advance. Consequently, an unfair business-to-consumer practice emerged in which sellers and suppliers impose a series of non-negotiable terms to the detriment of the consumer. Romanian regulations tried to efficiently tackle this problem being driven by the new European legislative trends. Law no.193/2000, which is the main regulation in this field, has been amended twice in the last two years and a series of new provisions on unfair contractual terms were introduced by Law no. 72/2013 and the new Romanian Civil Code. The main objective of the Romanian legislator was to reduce the massive number of lawsuits regarding unfair terms in consumer contracts and to provide a more effective protection for consumers. However, the new provisions also made changes which favour banks, insurance companies and other businesses that often insert predetermined terms in contracts.

Keywords: *Unfair terms, standard clauses, consumer protection, abusive clauses, contractual imbalances*

1. Introduction

The power imbalances between parties are the basis of many Romanian and European regulations on consumer protection. Still, few have generated more litigation than the unfair business-to-consumer practice when companies impose non-negotiable terms which harm the interests of the consumer. In recent years, more than 2,000 civil actions challenging possible abusive clauses incorporated into contracts were filed in Romanian courts[1].

Moreover, the number of lawsuits on this subject matter is increasing in the wake of latest jurisprudential tendencies, which were generally favourable to consumers. The courts' reasoning was based on consumer protection regulations which were adopted by Romania in order to align its legislation to the European law. These rules were designed to provide effective protection for consumers as well as to ensure their rights and fair trade competition.

However, in recent years several amendments to the Romanian consumer law were introduced and others are currently discussed. These changes may become a turning point for the surge in lawsuits on abusive clauses and are able to change the jurisprudence on this subject matter.

This paper approaches the issue of latest amendments to Romanian regulations concerning unfair commercial terms. A closer examination of these legal developments and other draft amendments leads us to the surprising conclusion that they may be to some extent less beneficial to consumers than the previous legislation in this field.

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[1] On March 7th 2014, there were 2,076 actions concerning unfair terms filed between 2005 and 2014, according to the Romanian e-Justice Portal (portal.just.ro).

Furthermore, the new provisions make certain changes which favour banks, insurance companies and other businesses that often insert predetermined terms in contracts. Consequently, these legal amendments may put a dent in the efforts to efficiently safeguard consumers' interests in the matter of unfair terms incorporated into contracts.

As regards legal literature, the analysis of current legislation on unfair terms was intensely examined from all standpoints in several books and scientific papers. In Romania, there are more than twenty studies which observe Law no. 193/2000, which is the main regulation on abusive clauses and several books which refer to abusive clauses incorporated into consumer contracts. However, little reference was made to latest legal developments in this field.

Far from thoroughly analysing the regulations in force, the aim of this study is to present the most significant regulations on unfair terms and to investigate whether the latest amendments are exclusively beneficial to consumers. Also, unfair terms laws are going to be examined from a juridical and economical point of view.

2. Relevant Legislation Review

The incorporation of unfair terms into commercial contracts is subject to several Romanian and European regulations regarding consumer protection. This section lists only the domestic and European laws on unfair terms relevant for this study and further scientific research on this topic.

The main domestic regulation in this field is Law no. 193/2000 regarding the abusive clauses in contracts concluded between professionals and consumers[2], recently amended by Law no. 76/2012[3] implementing Law no. 134/2010 of the Civil Procedure Code[4] which transposes the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts[5].

Another important regulation is Order no. 531/2001 of the National Authority for Consumer Protection[6] which establishes the Unfair Terms Commission as an independent consultative body, composed of representatives of the public administration, consumers and other relative bodies.

In addition, there are several special consumer regulations relating to unfair terms such as: Government Ordinance no. 21/1992 on consumers' protection[7] (in Articles 2, 10 and 37), Government Ordinance no. 99/2000 regarding the commercialization of products and market services[8] (in Articles 71 and 72) and Law no. 296/2004 regarding the Consumption Code[9] (in Articles 27, 78 and 79).

The unfair terms issue is not exclusively regulated by consumer protection laws. In Romania, a breakthrough in this field was made by Law no. 72/2013 regarding the measures for combating delayed payments of amounts resulting from agreements concluded between professionals and contracting authorities[10] which transposes Directive 2011/7/EU of the European Parliament and of the Council on combating late payment in commercial transactions[11].

[2] As further amended and republished in the Romanian Official Journal no. 543/2012.
[3] As published in the Romanian Official Journal no. 365/2012.
[4] As published in the Romanian Official Journal no. 545/2012.
[5] As published in the Official Journal of European Communities, L 095 from 21 April 1993, pp. 29-34.
[6] As published in the Romanian Official Journal no. 4/2002.
[7] As further amended and republished in the Romanian Official Journal no. 208/2007.
[8] As further amended and republished in the Romanian Official Journal no. 603/2007.
[9] As further amended and republished in the Romanian Official Journal no. 224/2008.
[10] As published in the Romanian Official Journal no. 182/2013.
[11] As published in the Official Journal of the European Union L48/2011.

Furthermore, there are several provisions in the Romanian Civil Code[12], which are of interest in this subject matter, such as: Article 14 (good faith), Article 15 (abuse of right), Article 1175 (adhesion contract), Article 1202 (standard terms), Article 1203 (unusual terms), Article 1221 (lesion)[13], Article 1269 (subsidiary rules of interpretation), etc.

Reference to unfair terms and practices may also be made in the next Constitution, thus highlighting the importance of this issue for the Romanian legislator. The latest draft regarding the revision of the Romanian Constitution[14] contains articles regarding fraudulent clauses (Article 134.3), unfair practices (Article 135.11) and consumer protection (Article 135.12).

The main European regulations on unfair contract terms are Council Directive 93/13/EEC of 5 April 1993[15] and Directive 2011/7/EU of the European Parliament and of the Council on combating late payment in commercial transactions (mentioned above).

However, there are several other European laws which tangentially refer to our topic, such as, for instance, Council Directive 97/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit[16], Directive 2002/65/EC of the European Parliament and of the Council concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC[17], Regulation no. 2006/2004 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation)[18], Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers and repealing Council Directive 87/102/EEC[19], etc.

3. Literature Review

As regards world literature, there are dozens of books, articles and studies regarding unfair terms in commercial contracts.

In the United Kingdom, Elizabeth Macdonald published a comprehensive guide to Britain's regulations on unfair terms in consumer contracts in the 2nd edition of her book - *Exemption Clauses and Unfair Terms* (2006). Other recommended books by English authors concerning this topic are: Richard Lawson, *Exclusion Clauses and Unfair Contract Terms*, 10th Edition, Sweet & Maxwell, 2011; Hugh Collins, *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law*, Kluwer Law International, 2008; Paolissa Nebbia, *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, Hart Publishing House, 2007 (which mainly examines English law, including the 2005 Unfair Terms in Contracts Bill and the Italian law, but frequent references are also made to French and German regulations); Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms*, Ashgate Publishing, 2007; etc.

There are plenty of books and studies on unfair terms regulations published in Germany as well, among which: Geraint Howells, Reiner Schulze, *Modernising and*

[12] Law no. 287/2009 regarding the Civil Code, as further amended and republished in the Romanian Official Journal no. 287/2009.
[13] For a detailed presentation on the relationship between unfair terms and lesion, see Emilia Mihai, *General law notions involved in the regulation of unfair terms*, in Curentul Juridic Journal no. 43/2010, pp. 96-100.
[14] Reasoning on the draft regarding the revision of Romanian Constitution from December 10th 2013, as published in the Romanian Official Journal no. 100/2014.
[15] For the implementation of Directive 93/13/EEC in several European countries, see the reports available online on http://ec.europa.eu/consumers/cons_int/safe_shop/unf_cont_terms/event29_03.pdf (Last consulted on March 7th 2014).
[16] As published in the Official Journal of the European Communities L 42/1987.
[17] As published in the Official Journal of the European Communities L 271/2002.
[18] As published in the Official Journal of the European Communities L 364/2004.
[19] As published in the Official Journal of the European Union L 133/2008.

Harmonising Consumer Contract Law, Sellier European Law Publishers, Munich, 2009, Yvonne Gehrke, *Die Richtlinie 1993/13/EG (über missbräuchliche Klauseln in Verbraucherverträgen), die Umsetzungsprobleme in Deutschland und ihre Umsetzung in verschiedenen europäischen Staaten (The Directive 1993/13/EC (on unfair terms in consumer contracts), the implementation problems in Germany and their implementation in various European countries)*, GRIN Verlag, 2007; Matthias Felix Henke, *Enthält die Liste des Anhangs der Klauselrichtlinie 93/13/EWG Grundregeln des Europäischen Vertragsrechts? (Does the Directive 93/13/EEC comply with the Principles of European Contract Law?)*, Mohr Siebeck, 2010; etc.

French doctrine is also rich in books and articles regarding abusive clauses, among which: Abbas Karimi, *Les clauses abusives et la théorie de l'abus de droit (Unfair terms and the abuse of right theory)*, L.G.D.J., 2001; Christophe Jamin, Denis Mazeaud, *Les clauses abusives entre professionnels (The unfair terms between professionals)*, Economica, 1998 (which presents specific French regulations which govern abusive clauses in contracts concluded between professionals); Gérard Biardeaud, Philippe Flores, *Le Contentieux du droit de la consommation: Clauses abusives et contrats réglementés (The litigation of consumer law: Unfair terms and regulated contracts)*, Ecole Nationale de la Magistrature, 2003, etc.

Furthermore, the Research Group on European Private Law drafted a study in 2007 on pre-contractual obligations, conclusion of contract and unfair terms (published by Sellier European Law Publishers, Munich).

As for the Romanian legal literature, there are dozens of articles which thoroughly deal with unfair terms in commercial contracts, among which we may mention: Ioan Ilieş Neamţ, *Consideraţii generale cu privire la acţiunea reglementată de art. 12 şi 13 din Legea nr. 193/2000. Analiză de drept comparat (General considerations on the action regulated by Articles 12 and 13 of the Law no. 193/2000. Analysis of comparative law)*, in Revista Română de Drept Privat (Romanian Private Law Magazine) no. 6/2013, pp. 87-113; Lucian Bercea, *Configurarea contractelor standard. O aplicație la noile acțiuni în eliminarea clauzelor abuzive din contractele de consum (Standard agreements configuration. An application to new actions for the removal of unfair terms incorporated into consumer contracts)*, in Curierul Judiciar (Judicial Courier) no. 6/2013, pp. 347-351; Romeo Glodeanu, *Clauzele abuzive în contractele comerciale (Unfair terms in commercial contracts)*, in Revista de Drept Comercial (Commercial Law Magazine) no. 2/2010, pp. 97-105; Romeo Glodeanu, *Discuții în legătură cu clauzele abuzive în contractele comerciale (Discussions referring to unfair terms in commercial contracts)*, in Dreptul (Law Magazine) no. 9/2009, pp. 47-55; Ana-Maria Lucia Zaharia, *Clauzele abuzive în contractele încheiate de consumatori (Unfair terms in agreements concluded by consumers)*, in Revista Forumul Judecătorilor (Judge's Forum Magazine) no. 3/2009, pp. 67-71; Monna Lisa Belu Magdo, *Clauzele abuzive în contractele încheiate între comercianți și consumatori (Unfair terms in agreements concluded between traders and consumers)*, in Revista de Drept Comercial (Commercial Law Magazine) no. 12/2006, pp. 9-15; Norel Popescu, *Clauzele abuzive din contractele încheiate între comercianți și consumatori (Unfair terms in agreements concluded between traders and consumers)*, in Revista de Drept Comercial (Commercial Law Magazine) no. 2/2005, pp. 47-49; Elena Maria Minea, *Clauzele abuzive în contractele de asigurare (Unfair terms in insurance agreements*), in Revista de Drept Comercial (Commercial Law Magazine) no. 10/2004, pp. 114-145; Ionuț-Florin Popa, *Reprimarea clauzelor abuzive (Repression of Unfair Terms)*, in Pandectele Române no. 2/2004; Cătălin Ciubotă, *Clauzele abuzive în contractele comerciale (Unfair terms in commercial contracts)*, in Revista Română de Drept al Afacerilor (Romanian Magazine of Business Law), no. 2/2004, pp. 26-34; Ioan Bălan, *Clauzele abuzive din contractele încheiate între comercianți și consumatori (Unfair terms in*

agreements concluded between traders and consumers), in Dreptul (Law Magazine) no. 6/2001, pp. 34-42; Camelia Toader, Andreea Ciobanu, *Un pas important spre integrarea europeană: Legea nr. 193/2000 privind clauzele abuzive, Ordonanța Guvernului nr. 87/2000 privind răspunderea producătorilor și Ordonanța Guvernului nr. 130/2000 privind contractele la distanță (An important step towards European integration: Law no. 193/2000 on unfair terms, Government Ordinance no. 87/2000 regarding producers' liability and Government Ordinance no. 130/2000 regarding long distance agreements)*, in Revista de Drept Comercial (Commercial Law Magazine) no. 3/2001, pp. 67-82; Daniel Dascălu, *Considerații privind protecția intereselor economice ale consumatorului în contractele de adeziune cu clauze abuzive (Considerations regarding consumer economic interests' protection in adhesion contracts with unfair terms)*, in Revista de Drept Comercial (Commercial Law Magazine) no. 1/1999, pp. 51-60 and many others.

There are also extensive case law books and studies in this field such as, for instance: Dana Cristiana Enache, Clauze abuzive în contractele încheiate între profesioniști și consumatori. Practică judiciară (Unfair terms in agreements concluded between professionals and consumers. Jurisprudence), Bucharest, Hamangiu Publishing House, 2012; Lucian Săuleanu, Alina Dodocioiu, Jurisprudență în materia clauzelor abuzive în contractele bancare (Jurisprudence regarding unfair terms in credit agreements), in Revista Română de Jurisprudență (Romanian Magazine of Jurisprudence) no. 1/2011, pp. 217-231.

A noteworthy contribution in this field was made by Professor Gheorghe Piperea who presented several scientific papers on theoretical and practical aspects regarding unfair terms in consumer contracts in conferences concerning commercial law. Many of his studies and legal opinions concerning this issue are available online[20].

However, even if there is plenty of material on this topic, few studies discuss the latest amendments to unfair terms regulations and whether they are beneficial to consumers or other natural or legal persons.

4. The Adhesion Contract – Controversial Source of Legal Development and Unfair Terms

The emergence of powerful enterprises which use large scale production and distribution led to the development of a new type of contract – the adhesion contract[21]. According to Article 1175 of Romanian Civil Code, "the contract is of adhesion when its essential terms are imposed or drafted by one party or in the wake of its instructions, the other party only having the option to accept them as such". However, we may add, the other party is free to refuse the contract.

As concerns their form, adhesion contracts are similar to standard form contracts, general conditions or frame contracts. Their peculiarity resides in the fact that these agreements create a power imbalance, as the terms are drafted, standardised and imposed by the party of superior negotiating strength. This generates a freedom limitation for the "weaker" party which generally has two options: either accepts the contractual terms unreservedly or refuses to conclude the contract[22].

[20] For instance, see Gheorghe Piperea, *Despre clauzele abuzive din contractele de credit (About unfair terms in credit agreements)*, available online at http://www.piperealaw.ro/ro-48-358-Despre-clauzele-abuzive-din-contractele-de-credit-bancar.html (Last consulted on March 7th 2014).

[21] The adhesion contract is also known as adhesive contract, adhesory contract, adhesionary contract, standardized contract, take-it-or-leave-it contract or leonine contract.

[22] For further explanations, see Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Tratat elementar de drept civil. Obligațiile (Elementary Treaty on Civil Law. Obligations)*, Bucharest, Universul Juridic Printing House, 2012, pp. 81-83; Dragoș-Alexandru Sitaru, *Dreptul comerțului internațional. Partea generală (International Trade Law. General Part)*, Bucharest,

Nowadays, adhesion contracts are widely spread. Complex services such as telephone or credit facilities are often linked with a comprehensive list of terms and conditions, offered on a take-it-or-leave-it basis. In most cases, large businesses (e.g. telephone operators, transport companies, banks, insurance companies, etc.) do not allow for negotiation and consumers either accept the contract or seek services elsewhere.

This type of agreement is frequently used in practice given its widely recognised efficiency. An adhesion contract considerably lowers transaction costs by simplifying negotiations, saves contractual space, reduces the juridical risk of incomplete or inadequate contractual terms and frees companies from entering into contracts uniquely tailored to each customer. These advantages facilitate commercial transactions, being in line with the principles of celerity and certainty which govern trade relations. Thus, adhesion contracts may be considered a ***legal development*** in contracting.

However, the undeniable benefits of adhesion contracts are partially shadowed by their negative outcomes. In recent years, this kind of agreements fuelled many arguments between authorities, large businesses and consumers.

The legislation concerning adhesion contracts became ***an apple of discord*** between representatives and stakeholders of civil society, particularly in the economic field. While large businesses felt adhesion contracts are over-regulated, consumers argued that the current legislation does not provide adequate protection against unfair terms to which they would not agree if given the chance.

One of the ***thorny issues*** which stirred controversy between authorities, businesses and consumers is undoubtedly the ***incorporation of unfair terms into adhesion contracts***. Romanian and European regulations already made steps towards removing abusive clauses from non-negotiated agreements.

However, ***consumer regulations in force address only the tip of the iceberg*** because they exclusively address to consumers (and not to other deprived entities, such as, for instance, small businesses) and only partially tackle the phenomenon of widespread unfair terms, incorporated both into consumer contracts and other types of agreements such as business-to-business contracts.

5. Regulations on Unfair Terms – Guardian or Assailant to Freedom of Contract?

Freedom of contract is a fundamental principle of the Romanian civil law. Article 1169 of the Civil Code provides that parties "are free to enter into any contract and determine its content".

Freedom of contract has also been recognised as a "***general principle of the civil law***" by the European Court of Justice[23]. It is also protected by Article 16 of the EU Charter of Fundamental Rights ("freedom to conduct business") and has been considered by the EU Commission "as a fundamental point of reference for the future development of European contract law"[24].

The 2010 version of UNIDROIT Principles on international commercial contracts[25] states in Article 1.1 that "parties are free to enter into a contract and to determine its content".

Universul Juridic Printing House, 2008, pp. 439-440; Flavius-Antoniu Baias *et al., Noul Cod civil. Comentariu pe articole (The New Civil Code. Comments on Articles)*, Bucharest, C.H.Beck Printing Press, 2012, pp. 1232-1233.

[23] See, for instance, Case T-170/06 (*Alrosa Company vs. Commission of the European Communities*), July 11th 2007, paragraph 49, available on http://eur-lex.europa.eu/ (Last consulted on March 7th 2014).

[24] See Simon Whittaker, *The Optional Instrument of European Contract Law and Freedom of Contract*, paper available on http://ec.europa.eu/justice/news/consulting_public/0052/contributions/333_en.pdf (Last consulted on March 7th 2014).

[25] The Principles of International Commercial Contracts is a document elaborated by UNIDROIT (The International Institute for the Unification of Private Law), intended to harmonize international commercial contracts law. These principles are

The official commentary related to this legal text explains that "the principle of freedom of contract is of paramount importance in the context of international trade. The right of business people to decide freely to whom they will offer their goods or services and by whom they wish to be supplied, as well as the possibility for them freely to agree on the terms of individual transactions, are the cornerstones of an open, market-oriented and competitive international economic order". According to UNIDROIT, the principle of contractual freedom also includes the freedom to negotiate and the lack of liability for failure to reach an agreement (see Article 2.1.15).

The provisions mentioned above are in line with the ***libertarian*** concept regarding contractual freedom. According to libertarians (among which, see the works of Ludwig von Mises, Murray Rothbard, Milton Friedman), the freedom of contract is the consequence, from a theoretical perspective, of the freedom of will theory. These theoreticians believe that the man is free by its nature and its freedom may only be limited by its will and not by law. Consequently, they believe that other limitations, such as unfair terms regulations, ***violate the principle of contractual freedom***.

However, in modern European law, ***freedom of contract is not an absolute principle***, as viewed by libertarians. Freedom is not considered freedom as such and is subject to several limitations, established for different reasons, such as to protect, for instance, the interests of one party representing a specific protected social group, the interests of third parties, public morality or equity, to enhance efficiency and rationality, etc.[26]

In Romanian law, freedom of contract has a specific content, as well. Article 1169 of the Romanian Civil Code provides that contractual freedom also includes certain limitations arising from "law, public order and morality"[27]. In addition, the Romanian Constitutional Court established that ***freedom of contract*** "***is not a fundamental freedom from the constitutional point of view***"[28]. The Court stated that contractual freedom may be protected only in the legal framework, "with respect to reasonable limits imposed by reasons of protecting public and private interests". It also added that "exercised outside this framework, without hindrance, freedom loses all legitimacy and tends to convert into anarchy".

Therefore, in my view, the current European and Romanian legislation is mostly based on the ***positivism theory*** (on this topic, see the works of Hans Kelsen and Georges Rouhette) and the ***social contract theory*** (for further explanations, see the works of John Rawls, Martha Nussbaum, Amartya Sen).

Positivists believe that contracts derive from law, regulations being the only able to ensure proportionality and the balance of rights in a society. Thus, freedom of contract may not exist without certain limits imposed by public order.

According to the social contract approach, the freedom of contract as understood by libertarianism is not basic, respectively "social and economic inequalities are to be arranged so that they are to be of the greatest benefit to the least-advantaged members of society".[29]

From this perspective, the control of unfair terms does not affect the parties' contractual freedom; ***it seeks to protect it, by avoiding abusive commercial practices***. Legal

available on http://www.unidroit.org/english/principles/contracts/principles2010/integralversion principles2010-e.pdf (Last consulted on March 7th 2014).

[26] See Maria Rosaria Marella, *The Old and the New Limits to Freedom of Contract in Europe*, in European Review of Contract Law no. 2/2006, p. 258.

[27] For a detailed presentation on this topic, see Eugenia Voicheci, *Freedom of contract and its limitations in the Romanian Civil Code*, paper presented at the CKS - Challenges of the Knowledge Society Private Law 2013 conference and available on http://cks.univnt.ro/uploads/cks_2013_articles/index.php?dir=1_Juridical_Sciences% 2F&download=cks_2013_ law_art_051.pdf (Last consulted on March 7th 2014).

[28] See Romanian Constitutional Court, Decision no. 356/2005, available on www.jurisprudenta.com (Last consulted on March 7th 2014).

[29] John Rawls, *A Theory of Justice*, The Belknap Press of Harvard University Press, 1971, p. 302.

and judicial intervention is legitimate in order to correct a partial failure of the market and to preserve the public and private interests.

To sum up, ***unfair terms regulations comply with the principle of contractual freedom***, as envisaged by the Romanian and European regulations in force. In relation to our topic, these protective regulations are considered in legal literature to be beneficial to society (seen as a whole) because they ensure proportionality and mitigate social and economic inequalities between trade participants. However, if we analyse these regulations ***from a libertarian perspective, they constitute a trade barrier*** and on the long run they are not beneficial to economy and to society as well.

6. The Emergence of Unfair Terms Regulations. Consumers, Presented as "Victims" of Large Businesses

Apart from the differences between civil and commercial regulations which are highlighted in most European legislations, nowadays we witness the emergence of another ***duality***, comprised of consumer regulations and, respectively, laws regarding professionals. Special laws that protect consumers are designed to shield them from unscrupulous market participants and raise public awareness on the market's risks in order to restore consumer confidence in the financial system[30].

Bearing this distinction in mind, we may form three categories of contracts: contracts between professional parties (also known as B2B contracts in electronic commerce operations), contracts between two individual parties (also known as C2C contracts) and consumer contracts, concluded between a professional party and a consumer. The latter category is governed by specific regulations, most of them derogatory from the general rules.

From the contracting parties' perspective, ***unfair terms regulations mostly address consumer contracts***, but there are also certain regulations which refer to contracts concluded between professionals.

Unfair terms are ***traditionally incorporated into adhesion contracts***. Since the Industrial Revolution of the 19th century, standard contracts became the rule in both domestic and international trade due to their compelling advantages (as emphasized in the previous section).

However, now it is widely recognised that adhesion contracts, which primarily contain predefined terms, may also cause negative externalities. Practice has shown that many consumers are vulnerable to unfair terms incorporated into standard contracts because of their ***lack of knowledge, age, credulity or infirmity***. Large businesses often use this opportunity to employ unfair practices which significantly distort the average consumer's freedom of choice to their advantage.

Consumer regulations on unfair terms came as a response to the abuse of economic and juridical power of the seller or supplier (usually, large businesses) and the unfair exclusion of essential rights in contracts[31].

[30] For further information on this topic in the United Kingdom, but relevant to Romanian consumer protection regulations, as regards their recognized purpose, see House of Commons Treasury Committee, *Financial Regulation: a preliminary consideration of the Government's proposals*, Seventh Report of Session 2010-11, Volume II, London, TSO Publishing House, 2011, pp. 273-274.

[31] As highlighted in the Preamble of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, paragraph 13.

7. The Flexible Concepts of "Consumer" and "Professional"

Consumer regulations apply if one party is a professional[32] (or in the words of the Draft Common Frame of Reference - DCFR[33] a "business") and the other party is a consumer.

According to Article 2 of Directive 93/13/EEC on unfair terms in consumer contracts, "consumer" means "any natural person who (…) is acting for purposes which are outside his trade, business or profession"[34]. Law no. 193/2000 on unfair terms offers a more detailed definition in Article 2, namely: "consumer" means "any natural person or group of natural persons which form an association which, according to a contract governed by the present law, act for purposes outside their trade, industrial or production activity, business or profession".

The Uniform Commercial Code[35] provides another definition of the "consumer", respectively "an individual who buys or contracts to buy goods that, at the time of contracting, are intended by the individual to be used primarily for personal, family, or household purposes".

Article 12 of the United Kingdom's Unfair Contract Terms Act 1977[36] also includes a comprehensive definition of the "consumer": "a party to a contract deals as consumer in relation to another party if he neither makes the contract in the course of a business nor holds himself out as doing so and the other party does make the contract in the course of a business and, in the case of a contract governed by the law of sale of goods or hire-purchase (…) the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption".

As a rule, ***the average consumer shall be reasonably well informed and reasonably observant and circumspect***[37]. However, the European regulations are somewhat ambiguous because the lawmaker does not expressly state what it understands to be "reasonably well-informed and reasonably observant and circumspect". The case law of the European Court of Justice established that an average consumer "is a critical person, conscious and circumspect in his or her market behaviour" and "shall inform about the quality and price of products and make efficient choices"[38].

In addition, European law does not preclude the possibility that, where national courts have particular difficulty in assessing the statement in question, they "may recourse, under the conditions laid down by its own national law, to a consumer research poll or an expert's report as guidance for their judgement"[39].

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[32] The Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts mentions in Article 1 paragraph 1 that it applies "to unfair terms in contracts concluded between a seller or supplier and a consumer".

[33] Christian von Bar et al. (editors), Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), as prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group, Munich, Sellier European Law Publishers, 2009, also available online on http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf (Last consulted on March 7th 2014).

[34] It is almost similar to the definition given by Article I. 1-105 DCFR, which states that "'consumer' means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession".

[35] See Article 2-103: Definitions and Index of Definitions. The Uniform Commercial Code (UCC) is an uniform act that has been adopted in order to harmonize the law of sales and other commercial transactions in 50 states within the United States of America (except for Louisiana which preferred to maintain its own civil law tradition for governing the sale of goods).

[36]The Unfair Contract Terms Act is available on http://www.legislation.gov.uk/ukpga/1977/50 (Last consulted on March 7th 2014).

[37] As regards the average consumer's obligations see, for instance, the reasoning made by the European Court of Justice in Case C-220/98 (*Estee Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH*), January 13th 2000, paragraphs 27, 30 and 32, available on http://eur-lex.europa.eu/ (Last consulted on March 7th 2014).

[38]See https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.guidance.showArticle&elemID=15 (Last consulted on March 7th 2014).

[39] See the Judgment of the European Court of Justice in Case C-210/96 *(Gut Springenheide GmbH and Others v Oberkreisdirektor des Kreises Steinfurt Ä Amt für Lebensmittelüberwachung,* July 16th 1998, paragraph 31, available on http://curia.europa.eu/ (Last consulted on March 7th 2014).

Regarding the concept of "professional", Article 2 of Directive 93/13/EEC on unfair terms in consumer contracts defines "seller or supplier" as meaning "any natural or legal person who (…) is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned". In accordance with Article 2 of Law no. 193/2000 on unfair terms, a "professional" means "any authorised natural or legal person which, according to a contract governed by the present law, is acting for purposes relating to his trade, industrial or production activity, business and profession, as well as any other person who is acting for the same purpose in its name or on its behalf".

As for other European countries' legislations, the French statute introduced the distinction between "professionals" and "non-professionals" into consumer regulations. However, English and German regulations on unfair terms may sanction "non-professionals" as well. According to English Unfair Contract Terms Act from 1977, Article 3, the regulation applies "as between contracting parties where one of them deals as consumer or on the other's written standard terms of business". Article 305 of the German Civil Code provides that unfair terms regulations apply to "standard contract terms" which are "drafted to apply to a multitude of contracts and set by one contracting party for the other at the time of contracting"[40].

Therefore, the ***definitions of "consumer" and "professional" are not uniform in European and American legislations***. However, while researching whether the latest amendments are beneficial to consumers or to professionals we are going to use the legal definitions provided by the Romanian regulations in force.

8. Brief Analysis of Unfair Terms Laws

Unfair terms regulations may be analysed from various perspectives.

As regards the subjects which they refer to, unfair terms laws generally prevent the incorporation of abusive clauses into contracts concluded between professionals or businesses and consumers (B2C contracts). However, there are certain rules which apply only in case of contracts concluded between professionals (B2B contracts) such as, for instance, Law no. 72/2013 regarding the measures for combating delayed payments of amounts resulting from agreements concluded between professionals and contracting authorities.

Concerning the subject matter of the regulations on unfair terms, regulations on unfair terms deal exclusively with contract law. Abusive clauses are often seen by legal literature and case law as an unfair commercial practice which creates an ***imbalance between parties at the time the contract is concluded***. These terms are usually ***non-binding*** on the weaker party in a contractual relationship, unless they are individually negotiated. Such identification is possible in any jurisdiction, provided that certain requirements are fulfilled. These particular conditions may differ from one legal system to another and represent the constitutive elements of an unfair commercial practice[41].

As for defining unfair terms, there are two different approaches commonly encountered in European and American legislations.

The first approach is to generally define abusive clauses and to provide an exemplificative list of specific terms that could be deemed unfair. This is the case of the Romanian, French, English and German legislation[42] and, respectively, the Directive 93/13/EEC on unfair terms in consumer contracts.

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[40] See James Gordlev, Arthur Taylor von Mehren, *An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials*, Cambridge University Press, 2006, p. 493.

[41] For a detailed analysis on this matter see Salvatore Orlando, *The Use of Unfair Contractual Terms as an Unfair Commercial Practice*, in European Review of Contract Law no. 1/2011, pp. 25-56.

[42] James Gordlev, Arthur Taylor von Mehren, *op. cit*., pp. 493-494.

In accordance with Article 4 paragraph 1 of Law 193/2000 on unfair terms[43], "a contractual term which has not been directly negotiated with the consumer shall be regarded as unfair if, by itself or together with other contractual terms, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer". A term "shall always be regarded as not directly negotiated with the consumer where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract or general conditions used by traders in the market of the respective product or service".

The Annex of this regulation contains a comprehensive list of specific terms which could be considered unfair, such as, for instance, terms which have the object or effect of: "enabling the professional to alter the terms of the contract unilaterally without a valid reason which is specified in the contract; binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract; requiring the consumer to fulfil all his obligations, even when the professional does not perform his; automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early; giving the professional the right to determine whether the goods or the services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract"[44]; etc.

This solution is also adopted by other Romanian regulations on unfair terms. According to Article 12 of Law no. 72/2013 regarding the measures for combating delayed payments of amounts resulting from agreements concluded between professionals and contracting authorities, "the contractual term which establishes, in an obviously unfair manner, in relation with the creditor, the payment term, a particular level of interest for late payment or amount of additional damages is considered abusive". While determining the unfairness of a term, "the court shall take into account all the circumstances of the case, in particular (a) the gross deviation from practices established between parties or usages consistent with public order or morality; (b) a violation of the principle of good faith and diligence in carrying out the duties; (c) the nature of goods or services; (d) failure to provide objective reasons to derogate from the terms of payment or interest law, in accordance with the law; (e) the dominant position of the counterparty in relation to a small or medium enterprise" (see Article 13).

Law no. 72/2013 also lists in Article 14 clauses deemed to be abusive such as terms which preclude the application of penalty interest or establish penalty interests lower than the legal penalty interest, set an obligation of formal notice to operate the flow of interest, set a term of payment higher than 60 days, eliminate the possibility of paying additional damages, establish a deadline for issuing or receiving the invoice, etc.

A different approach is not to designate particular contract terms which are deemed to be unfair, but instead to provide a general definition of unfair terms. This is the case of the Principles of European Contract Law (PECL)[45], the UNIDROIT Principles (2010)[46] and the U.S. Uniform Commercial Code. For example, in accordance with Article 4.110 paragraph 1

[43] The solution is similar to the one presented by the Directive 93/13/EEC on unfair terms in consumer contracts in Article 3.
[44] For examples of unfair terms in consumer contracts, see Elena Grecu, Oana Albu, *Ghidul contractelor pentru antreprenori (Contracting Guide for Entrepreneurs)*, Bucharest, Universul Juridic Publishing House, 2013, pp. 259-264.
[45] The Principles of European Contract Law (PECL) is a set of model rules on contract law drafted by leading contract law academics in Europe. They were created by the Commission on European Contract Law (also known as "Lando Commission"). The last version was completed in 2002.
[46] UNIDROIT Principles (2010) give a general definition of "surprising terms" in Article 2.1.20, but it also contains other provisions regarding unfair terms and practices, such as, for example, Article 3.2.7 ("Gross disparity") or Article 7.1.6 ("Exemption clauses").

of PECL, "a party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded".

As for legal remedies to unfair commercial terms incorporated into contracts, national lawmakers usually consider abusive clauses (as well as other harmful terms) to be ***null and void or non-written***, while the remaining part of the contract remains valid. In Europe, among other legislations, this legal solution was adopted by Romania, Austria, Bulgaria, Croatia, Estonia, Finland, France, Greece, Hungary, Italy, Portugal and Spain[47].

9. Amendments to Romanian regulations on unfair terms. Legislative turmoil

In Romania, prior to 2000 there were no express regulations on monitoring standard contractual terms in consumer contracts. In all cases, general contract law was applicable and parties which were harmed by alleged abusive clauses usually resorted to the abuse of rights theory in order to remove them from contracts. In 2000, the Romanian Parliament passed Law no. 193/2000 regarding the abusive clauses in contracts concluded between professionals and consumers. Since then, the legislation on unfair terms was subject to several alterations and additions.

Law no. 193/2000 was published in 2000, republished in 2006, 2008 and 2012 and amended several times - in 2002, 2007, 2010, 2012 and 2013. These alterations were sometimes consistent and significant.

First of all, by comparing the current regulation with the original version, the consumer was redefined as "any natural person or group of natural persons which form an association which, according to a contract governed by the present law, act for purposes outside their trade, industrial or production activity, business or profession" (see Article 2). The 2000 version also included in the "consumer" definition "any legal person which acquires and utilizes or consumes from traders products obtained under a contract or benefit from their services".

Thus, the scope of regulations was limited only to natural persons or groups of natural persons. However, the scope of Law 193/2000 was extended to other types of contracts. In the original version, it was provided a limitative list of contracts: contracts concluded between traders and consumers, warranty certificates, purchase orders, invoices, delivery slips or receipts, tickets and vouchers which contain references to predetermined general conditions. In accordance with the current regulation, its provisions apply to "purchase orders, delivery receipts, tickets, vouchers and other similar types which contain predetermined terms or refer to predetermined general conditions" (see Article 3).

The current version also lists specific requirements under which a clause may be considered as being abusive, unlike the original version where this aspect was not provided. The lists of terms deemed to be abusive was also significantly extended.

In addition, there were terminological alterations such as, for instance, the original concept of "trader" was replaced by "professional", in line with the recent Romanian civil law developments. The notions of "standard contract" and "standard clause" were also replaced with "predetermined standard contract" and "predetermined standard clause".

Still, the amendments brought by Law no. 76/2012 implementing Law no. 134/2010 of the Civil Procedure Code which entered into force on July 1st 2013 have greater importance

[47] For a brief analysis of comparative law on this aspect see http://ec.europa.eu/justice/contract/files/expert groups/unfair_contract_terms_en.pdf (Consulted on March 7th 2014).

than the previous ones. Essentially, only two articles were modified, respectively Article 12 and Article 13.

The alteration to Article 12 ***changes the competence of the Romanian ordinary courts regarding unfair terms issues***. According to the updated version, in the event when the existence of abusive clauses is ascertained in adhesion contracts, the competent court to settle the litigation is the tribunal from the domicile or, where appropriate, the main premises of the professional. Previously, the local courthouse was competent to resolve issues regarding unfair terms incorporated into consumer contracts. It was held that the tribunal offers more guarantees for a fair judgement in cases concerning consumer protection.

Furthermore, in accordance with the revised Article 13, in case a contractual term is deemed as unfair in court, professionals may be obliged to remove this abusive clause from all adhesion contracts concluded considering their professional activity. This amendment has significant practical consequences because courts may decide that several contracts shall be altered accordingly if they determine the existence of an abusive clause in one particular contract.

Law 193/2000 is currently under scrutiny for further amendments.

Other important changes in this legal area were brought in recent years by the new Civil Code which defined the adhesion contract (Article 1175), standard terms (Article 1202), unusual terms (Article 1203) and other aspects relevant to the subject matter of this research.

Also, the entry into force of Law no. 72/2013 regarding the measures for combating delayed payments of amounts resulting from agreements concluded between professionals and contracting authorities constitutes an ***important breakthrough*** concerning this legal aspect. It represents a small step in the way of ***extending the scope of domestic unfair terms regulations to contracts concluded between professionals***. The main beneficiaries are especially small and medium enterprises which may be easily affected by contractual imbalances.

10. Who benefits from the unfair terms regulations in force? Are the latest amendments in favour of consumers?

Mainly, unfair terms regulations aim to remove the harmful consequences arising from imbalanced contracts, where the weaker party is unable to negotiate and express its free will. The economic, juridical and technical disparities between contracting parties are the prerequisite of all laws on abusive clauses which constitute a remedy for the imbalance existing at the time when the contract was concluded.

These regulations are ***essentially inegalitarian*** because they ***limit the freedom of professionals*** which are subject to several constraints. From this point of view, unfair terms regulations have been ***traditionally favourable to consumers*** and small businesses because their declared purpose is, at least to an extent, to correct the imbalance of market power between them and large businesses. The prohibition of unfair terms is therefore a sanction for the bad faith of the party who is in an advantageous contractual position.

As regards consumer contracts, the Romanian legal system adopted both criteria of good faith and significant imbalance to characterise unfairness through Law no. 193/2000. Consumers which are harmed by unfair terms have the right to choose between filing an action or raising an exception in court, in accordance with the civil procedure regulations in force, and notifying the competent authorities to monitor compliance with the law, respectively the authorised representatives of the National Authority for Consumer Protection (hereinafter "ANPC"), as well as authorised specialists of other government bodies. Regardless of the procedure chosen by the consumer (directly or indirectly through reports

drafted by authorised specialists), the ordinary courts are the only competent authorities to establish the unfairness of a contractual term.

The latest legislative amendments to Articles 12 and 13 from Law no. 193/2000[48] grant active procedural legitimacy to ANPC and other authorities for consumer protection. The competent courts vested by these entities which defend consumers' interests may force sued professionals to remove unfair terms from all adhesion contracts concluded by considering their activity. Consequently, the new regulation ***constitutes an exception from the principle of relativity of court decisions*** – *res inter alios judicata, aliis neque nocet neque prodest*.

These alterations aimed to reduce the large number of trials which caused court congestions, delays and sometimes significant legal expenses. ***Apparently, these amendments are exclusively favourable to consumers.***

Firstly, the competent courts are empowered to declare the contractual terms deemed as abusive null and void from all adhesion contracts[49]. Thus, ***consumers may benefit from collective lawsuits*** even if they are passive and are not part of the proceedings against large businesses which harm their interests by incorporating unfair terms into their contracts.

Secondly, consumers also r***eceive specialised expertise from ANPC and other authorities for consumer protection*** and might enjoy lower trial expenses. Due to lack of legal knowledge and financial means, consumers are sometimes reluctant to directly file an action in court and prefer to rely on the help of specialised bodies to protect their interests in disputes with large companies.

Last but not least, by forcing professionals to remove abusive clauses from all adhesion contracts, irrespective of being or not sued by counterparties, the latest amendments ***encourage a more responsible behaviour on the market***. In recent years, there was a ***high rate of success for consumers*** in lawsuits against banks, insurers and other large companies which resulted in the elimination of unfair terms incorporated into various agreements[50]. Moreover, since the entry into force of the new regulations (on October 1st 2013), ANPC recorded more than 900 claims relating to abusive clauses, among which approximately 700 refer to contracts concluded with financial institutions[51]. Because of this tendency, professionals are likely to become more cautious in the future when it comes to drafting standard clauses.

Another important amendment concerns the ***competent court*** for settling the disputes arising from incorporation of unfair terms into consumer contracts. According to the new

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[48] According to Article 82 from Law no. 76/2012, these amendments apply starting from October 1st 2013.

[49] It is noteworthy to highlight that these regulations apply only to adhesion contracts. For a more detailed presentation, see section 4 of this paper.

[50] See, for instance, Înalta Curte de Casaţie şi Justiţie (Supreme Court of Justice), Decision no. 3913/2013, available on http://www.juridice.ro/313286/solutie-iccj-ref-dobanda-tipica-variabila.html; Înalta Curte de Casaţie şi Justiţie (Supreme Court of Justice), Decision no. 2421/2013, available on http://www.scj.ro and Indaco; Înalta Curte de Casaţie şi Justiţie (Supreme Court of Justice), Decision no. 1936/2013, available on http://www.scj.ro and Indaco; Înalta Curte de Casaţie şi Justiţie (Supreme Court of Justice), Decision no. 1768/2013, available on http://www.scj.ro and Indaco; Tribunalul Gorj (Gorj Tribunal), Secţia a II-a Civilă, Decision no. 110/2012, available on Indaco and portal.just.ro; Judecătoria Oradea (Oradea Courthouse), Decision no. 5590/2012, available on Indaco; Judecătoria Vaslui (Vaslui Courthouse), Decision no. 116/2012, available on Indaco; Înalta Curte de Casaţie şi Justiţie (Supreme Court of Justice), Secţia Comercială, Decision no. 1994/2011, available on Indaco and scj.ro; Curtea de Apel Braşov (Braşov Court of Appeal), Secţia Civilă, Decision no. 103/2011, published in Buletinul Curţilor de Apel (Courts of Appeal Bulletin) no. 2/2012, pp. 34-37; Judecătoria Bacău (Bacău Courthouse), Decision no. 6040/2011, available on Indaco; Judecătoria Bârlad (Bârlad Courthouse), Decision no. 1683/2011, available on Indaco; Judecătoria Oradea (Oradea Courthouse), Secţia Civilă, Decision no. 13185/2011, available on Indaco; Judecătoria Braşov (Braşov Courthouse), Decision no. 12479/2011, available on Indaco and portal.just.ro; Judecătoria Târgu Jiu (Târgu Jiu Courthouse), Decision no. 279/2009, available on Indaco; Judecătoria Mizil (Mizil Courthouse), Decision no. 1419/2009, available on Indaco; etc.

[51] See http://www.economica.net/nica-anpc-avem-11-procese-cu-bancile-pentru-eliminarea-clauzelor-abuzive-din-toate-contractele-interviu_73211.html (Last consulted on March 7th 2014).

regulations in force, the local courthouse was replaced with the tribunal from the domicile or, where appropriate, the headquarters of the professional.

Theoretically, all courts irrespective of their competence are required to ensure a fair, impartial and transparent trial. However, the Romanian lawmaker considered that tribunals ***offer higher guarantees in settling complex issues such as unfair terms*** than local courthouses due to the experience and higher specialisation of their judges.

However, practically, ***consumers are sometimes disadvantaged*** by the current regulations because they are required to file the action at the tribunal from the main premises of the professional. The majority of large businesses have their headquarters in Bucharest and this suggests that the Bucharest Tribunal is in most cases the competent court to settle this kind of disputes. This frequently incurs additional expenses for consumers which have their habitual residence outside Bucharest, especially when they choose to directly sue their counterparties.

By extending the competence of tribunals to solving litigations arising from unfair terms, ***tribunals become more crowded and packed with pending cases***. This situation often results in ***less efficiency*** and ***further delays*** in settling these kinds of disputes.

Also, ***collective lawsuits may cause extended trials***, a solution not preferable for consumers which seek to solve their dispute in a timely manner.

Consequently, in my view, this amendment is only partly beneficial to consumers.

From a different perspective, ***professionals may benefit*** from the latest amendments brought to Law no. 193/2000. According to Article 13 paragraphs (1) and (2), when the court establishes the existence of unfair terms in a contract, it forces the professional to modify all adhesion contracts being executed and to eliminate abusive clauses from predetermined contracts, which are to be used in its professional activity. However, in this case the professional is sanctioned only once. This means that companies which employ unfair terms into adhesion contracts ***have to pay only one contravention fine, irrespective of the number of lawsuits*** concerning the respective abusive clauses.

As regards Law no. 72/2013 regarding the measures for combating delayed payments of amounts resulting from agreements concluded between professionals and contracting authorities which transposes Directive 2011/7/EU of the European Parliament and of the Council on combating late payment in commercial transactions, we believe it constitutes a ***decisive shift*** in the Romanian law perspective on unfair terms which have been traditionally associated with consumer contracts.

Chapter V comprised of Articles 12, 13, 14 and 15 refers exclusively to unfair terms incorporated into business-to-business contracts. The purpose of this regulation[52] is to discourage late payment and to prohibit "abuse of freedom of contract to the disadvantage of the creditor". Therefore, this regulation aims to protect the interests of the creditor against any practice which is "contrary to good faith and fair dealing".

It is noteworthy to mention that Directive 2011/7/EU refers in particular to the protection of small and medium enterprises (see the Preamble and Articles 1 and 4). However, in Law no. 72/2013 there is only one reference to small and medium enterprises in Article 13e, which stipulates that "the dominant position of the counterparty in relation to a small and medium enterprise" is deemed to be an unfair practice. Consequently, Law no. 72/2013 ***favours creditors, irrespective of their turnover or economic and juridical power***.

To sum up, the ***latest amendments are mostly, but not exclusively beneficial to consumers***. Indeed, consumers may acquire significant advantage from collective actions, but these regulations sometimes hide additional expenses and further delays in solving these kinds of disputes. Professionals may also benefit from the latest amendments being sanctioned only

[52] See the Preamble of Directive 2011/7/EU of the European Parliament and of the Council on combating late payment in commercial transactions. As presented above, Law no. 72/2013 transposes this directive into Romanian Law.

once with a contravention fine, irrespective of the number of trials concerning the same abusive clauses. In addition, Law no. 72/2013 represents an important breakthrough in Romanian law, because it protects certain categories of professionals harmed by unfair terms.

11. Concluding Remarks

The issue of unfair terms has become a "fashionable" topic in recent years, being widely tackled by both theoreticians and practitioners. At a glance, the European and American legal literature is packed with research studies which cover unfair terms incorporated into consumer contracts. In Europe, these papers generally provide a detailed analysis of national laws which transposed Council Directive 93/13/EEC on unfair terms in consumer contracts. Jurisprudence is also rich in lawsuits regarding unfair terms and in recent years these disputes often resulted in the elimination of unfair terms incorporated into various agreements.

Still, few studies focus on the latest amendments to unfair terms laws and only tangentially express an opinion on whether they are beneficial to consumers or to other entities, such as professionals.

Abusive clauses are often seen by legal literature and case law as an unfair commercial practice which creates an imbalance between parties. This is frequently the case of weaker parties which are protected against the abuse of economic and juridical power of large businesses. There are also important differences when it comes to defining unfair terms, various solutions being adopted by domestic lawmakers. As for legal remedies to such unfair practices, abusive clauses are often considered null and void or non-written by European regulations.

Unfair terms regulations are usually linked with adhesion contracts. The emergence of standard clauses incorporated into commercial contracts opened a Pandora box. On one hand, consumers argued that adhesion contracts are the source of several unfair practices and they need adequate legislative protection. On the other hand, businesses felt that an over-regulation of standardised contracts became an assailant to the principle of contractual freedom.

From a different perspective, unfair terms laws usually prevent the incorporation of abusive clauses into contracts concluded between professionals and consumers. However, the definitions of "consumer" and "professionals" are not uniform across European and American legislations and may raise significant interpretation problems. Still, there are laws on abusive clauses which address to contracts concluded only between professionals such as Law no. 72/2013 regarding the measures for combating delayed payments of amounts resulting from agreements concluded between professionals and contracting authorities.

In Romania, prior to 2000 there were no express regulations on unfair terms in consumer contracts. Frequently, parties harmed by alleged abusive clauses resorted to the abuse of rights theory in order to remove them from standardised contracts. Since then, there was a legislative turmoil concerning this subject matter.

The latest amendments brought by Law no. 76/2012 to Articles 12 and 13 were the most significant and apparently they are exclusively favourable to consumers. Indeed, consumers may benefit from collective actions - even if they are not part of the proceedings - and receive specialised expertise from ANPC. Also, in the wake of the new regulations, professionals tend to become more cautious when it comes to insert predetermined clauses which are not individually negotiated with consumers.

However, the extension of tribunals' competence to solving litigations arising from unfair terms incurs additional expenses and sometimes less efficiency in settling these kinds of disputes. Furthermore, collective lawsuits may also cause significant delays in lawsuits against large businesses.

From a different perspective, professionals may also benefit from the latest amendments being fined only once, irrespective of the number of lawsuits concerning the same abusive clauses.

In conclusion, by providing a distinct approach to the complex issue of unfair terms, this paper raises questions to theoreticians and practitioners who believe that the latest amendments to unfair terms regulations are exclusively beneficial to consumers. Furthermore, it brings into attention the fact that unfair terms regulations do not focus solely on consumer contracts -consumer regulations being a recurring topic for legal theorists. The Romanian law literature currently offers little analysis on regulations which refer to unfair terms incorporated into business-to-business contracts.

Unfair terms regulations remain a controversial issue between economists and European lawmakers still have different approaches in this legal area. Further research on this subject matter needs to be conducted from a juridical or economical perspective. Future studies may address several layers of regulations - domestic, European and international.

References

- Books:
- Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *Noul Cod civil. Comentariu pe articole (The New Civil Code. Comments on Articles)*, Bucharest, C.H.Beck Printing Press, 2012
- Gérard Biardeaud, Philippe Flores, Le Contentieux du droit de la consommation: Clauses abusives et contrats réglementés (The litigation of consumer law: Unfair terms and regulated contracts), Ecole Nationale de la Magistrature, Bordeaux, 2003
- Christian von Bar et al. (editors), Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), as prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group, Munich, Sellier European Law Publishers, 2009, also available online on http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf
- Hugh Collins, Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law, Kluwer Law International, London, 2008
- Dana Cristiana Enache, Clauze abuzive în contractele încheiate între profesionişti şi consumatori. Practică judiciară (Unfair terms in agreements concluded between professionals and consumers. Jurisprudence), Bucharest, Hamangiu Publishing House, 2012
- Yvonne Gehrke, Die Richtlinie 1993/13/EG (über missbräuchliche Klauseln in Verbraucherverträgen), die Umsetzungsprobleme in Deutschland und ihre Umsetzung in verschiedenen europäischen Staaten (The Directive 1993/13/EC (on unfair terms in consumer contracts), the implementation problems in Germany and their implementation in various European countries), GRIN Verlag, Munich, 2007
- James Gordlev, Arthur Taylor von Mehren, *An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials*, Cambridge University Press, Cambridge, 2006
- Elena Grecu, Oana Albu, *Ghidul contractelor pentru antreprenori (Contracting Guide for Entrepreneurs)*, Bucharest, Universul Juridic Publishing House, 2013
- Matthias Felix Henke, Enthält die Liste des Anhangs der Klauselrichtlinie 93/13/EWG Grundregeln des Europäischen Vertragsrechts? (Does the Directive 93/13/EEC comply with the Principles of European Contract Law?), Mohr Siebeck, Tübingen, 2010
- House of Commons Treasury Committee, *Financial Regulation: a preliminary consideration of the Government's proposals*, Seventh Report of Session 2010-11, Volume II, London, TSO Publishing House, 2011
- Geraint Howells, Reiner Schulze, *Modernising and Harmonising Consumer Contract Law*, Sellier European Law Publishers, Munich, 2009
- Christophe Jamin, Denis Mazeaud, Les clauses abusives entre professionnels (The unfair terms between professionals), Economica, Paris, 1998
- Abbas Karimi, Les clauses abusives et la théorie de l'abus de droit (Unfair terms and the abuse of right theory), L.G.D.J., Paris, 2001
- Richard Lawson, *Exclusion Clauses and Unfair Contract Terms*, 10th Edition, Sweet & Maxwell, London, 2011

- Elizabeth MacDonald, *Exemption Clauses and Unfair Terms*, 2nd Edition, Tottel Publishing House, Haywards Heath, 2006
- Paolissa Nebbia, Unfair Contract Terms in European Law: A Study in Comparative and EC Law, Hart Publishing House, Oxford, 2007
- John Rawls, *A Theory of Justice*, The Belknap Press of Harvard University Press, Cambridge, 1971
- Research Group on the Existing EC Private Law (Acquis Group), Principles of the Existing EC Contract Law (Acquis Principles). Contract I. Precontractual Obligations, Conclusion of Contract, Unfair Terms, Sellier. European Law Publishers, Munich, 2007
- Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Tratat elementar de drept civil. Obligațiile (Elementary Treaty on Civil Law. Obligations)*, Bucharest, Universul Juridic Printing House, 2012
- Dragoș-Alexandru Sitaru, Dreptul comerțului internațional. Partea generală (International Trade Law. General Part), Bucharest, Universul Juridic Printing House, 2008
- Chris Willett, Fairness in Consumer Contracts: The Case of Unfair Terms, Ashgate Publishing, Aldershot, 2007

Scientific Papers:

- Ioan Bălan, Clauzele abuzive din contractele încheiate între comercianți și consumatori (Unfair terms in agreements concluded between traders and consumers), in Dreptul (Law Magazine) no. 6/2001, pp. 34-42
- Monna Lisa Belu Magdo, Clauzele abuzive în contractele încheiate între comercianți și consumatori (Unfair terms in agreements concluded between traders and consumers), in Revista de Drept Comercial (Commercial Law Magazine) no. 12/2006, pp. 9-15
- Lucian Bercea, Configurarea contractelor standard. O aplicație la noile acțiuni în eliminarea clauzelor abuzive din contractele de consum (Standard agreements configuration. An application to new actions for the removal of unfair terms incorporated into consumer contracts), in Curierul Judiciar (Judicial Courier) no. 6/2013, pp. 347-351
- Cătălin Ciubotă, *Clauzele abuzive în contractele comerciale (Unfair terms in commercial contracts)*, in Revista Română de Drept al Afacerilor (Romanian Magazine of Business Law), no. 2/2004, pp. 26-34
- Daniel Dascălu, Considerații privind protecția intereselor economice ale consumatorului în contractele de adeziune cu clauze abuzive (Considerations regarding consumer economic interests' protection in adhesion contracts with unfair terms), in Revista de Drept Comercial (Commercial Law Magazine) no. 1/1999, pp. 51-60
- Romeo Glodeanu, *Clauzele abuzive în contractele comerciale (Unfair terms in commercial contracts)*, in Revista de Drept Comercial (Commercial Law Magazine) no. 2/2010, pp. 97-105
- Romeo Glodeanu, Discuții în legătură cu clauzele abuzive în contractele comerciale (Discussions referring to unfair terms in commercial contracts), in Dreptul (Law Magazine) no. 9/2009, pp. 47-55
- Maria Rosaria Marella, *The Old and the New Limits to Freedom of Contract in Europe*, in European Review of Contract Law no. 2/2006, pp. 257-274
- Emilia Mihai, *General law notions involved in the regulation of unfair terms*, in Curentul Juridic Journal no. 43/2010, pp. 96-100
- Elena Maria Minea, *Clauzele abuzive în contractele de asigurare (Unfair terms in insurance agreements*), in Revista de Drept Comercial (Commercial Law Magazine) no. 10/2004, pp. 114-145
- Ioan Ilieș Neamț, Considerații generale cu privire la acțiunea reglementată de art. 12 și 13 din Legea nr. 193/2000. Analiză de drept comparat (General considerations on the action regulated by articles 12 and 13 of the Law no. 193/2000. Analysis of comparative law), in Revista Română de Drept Privat (Romanian Private Law Magazine) no. 6/2013, pp. 87-113
- Salvatore Orlando, *The Use of Unfair Contractual Terms as an Unfair Commercial Practice*, in European Review of Contract Law no. 1/2011, pp. 25-56
- Gheorghe Piperea, *Despre clauzele abuzive din contractele de credit (About unfair terms in credit agreements)*, available online at http://www.piperealaw.ro/ro-48-358-Despre-clauzele-abuzive-din-contractele-de-credit-bancar.html
- Ionuț-Florin Popa, Reprimarea clauzelor abuzive (Repression of Unfair Terms), in Pandectele Române no. 2/2004

- Norel Popescu, Clauzele abuzive din contractele încheiate între comercianți și consumatori (Unfair terms in agreements concluded between traders and consumers), in Revista de Drept Comercial (Commercial Law Magazine) no. 2/2005, pp. 47-49
- Lucian Săuleanu, Alina Dodocioiu, *Jurisprudență în materia clauzelor abuzive în contractele bancare (Jurisprudence regarding unfair terms in credit agreements)*, in Revista Română de Jurisprudență (Romanian Magazine of Jurisprudence) no. 1/2011, pp. 217-231
- Camelia Toader, Andreea Ciobanu, Un pas important spre integrarea europeană: Legea nr. 193/2000 privind clauzele abuzive, Ordonanța Guvernului nr. 87/2000 privind răspunderea producătorilor și Ordonanța Guvernului nr. 130/2000 privind contractele la distanță (An important step towards European integration: Law no. 193/2000 on unfair terms, Government Ordinance no. 87/2000 regarding producers' liability and Government Ordinance no. 130/2000 regarding long distance agreements), in Revista de Drept Comercial (Commercial Law Magazine) no. 3/2001, pp. 67-82
- Eugenia Voicheci, *Freedom of contract and its limitations in the Romanian Civil Code*, paper presented at CKS - Challenges of the Knowledge Society Private Law 2013 conference and available on http://cks.univnt.ro/uploads/cks_2013_articles/index.php?dir=1_Juridical_Sciences%2F&download=cks_2013_law_art_051.pdf
- Ana-Maria Lucia Zaharia, Clauzele abuzive în contractele încheiate de consumatori (Unfair terms in agreements concluded by consumers), in Revista Forumul Judecătorilor (Judge's Forum Magazine) no. 3/2009, pp. 67-71
- Simon Whittaker, *The Optional Instrument of European Contract Law and Freedom of Contract*, paper available on http://ec.europa.eu/justice/news/consulting_public/0052/contributions/333_en.pdf

Jurisprudence Magazines:

- Buletinul Curţilor de Apel (Courts of Appeal Bulletin) no. 2/2012
- Internet Links (Last consulted on March 7th 2014):
- http://curia.europa.eu/
- http://ec.europa.eu/consumers/cons_int/safe_shop/unf_cont_terms/event29_03.pdf
- http://ec.europa.eu/justice/contract/files/expert groups/unfair_contract_terms_en.pdf
- http://www.economica.net/nica-anpc-avem-11-procese-cu-bancile-pentru-eliminarea-clauzelor-abuzive-din-toate-contractele-interviu_73211.html
- http://eur-lex.europa.eu/
- http://www.juridice.ro/313286/solutie-iccj-ref-dobanda-tipica-variabila.html
- htttp://www.jurisprudenta.com/
- http://www.law.cornell.edu/ucc/
- http://portal.just.ro/
- http://www.scj.ro/
- http://www.unidroit.org/english/principles/contracts/principles2010/integralversion principles2010-e.pdf
- https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.guidance.showArticle&elemID=15

Databases:

- Indaco Lege4
- Legalis 2.0

Laws:

A) Domestic Laws:

- Law no. 193/2000 regarding the abusive clauses in contracts concluded between professionals and consumers, as further amended and republished in the Romanian Official Journal no. 543/2012
- Law no. 296/2004 regarding the Consumption Code, as further amended and republished in the Romanian Official Journal no. 224/2008
- Law no. 287/2009 regarding the Civil Code, as further amended and republished in the Romanian Official Journal no. 287/2009

- Law no. 134/2010 of the Civil Procedure Code, as published in the Romanian Official Journal no. 545/2012
- Law no. 76/2012 implementing Law no. 134/2010 of the Civil Procedure Code, as published in the Romanian Official Journal no. 365/2012
- Law no. 72/2013 regarding the measures for combating delayed payments of amounts resulting from agreements concluded between professionals and contracting authorities, as published in the Romanian Official Journal no. 182/2013
- Government Ordinance no. 21/1992 on consumers' protection, as further amended and republished in the Romanian Official Journal no. 208/2007
- Government Ordinance no. 99/2000 regarding the commercialization of products and market services, as further amended and republished in the Romanian Official Journal no. 603/2007
- Order no. 531/2001 of the National Authority for Consumer Protection, as published in the Romanian Official Journal no. 4/2002

B) European Laws:

- Charter of Fundamental Rights of the European Union, as published in the Official Journal of the European Union C 364/2000
- Regulation no. 2006/2004 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), as published in the Official Journal of the European Communities L 364/2004
- Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, as published in the Official Journal of European Communities, L 095 from 21 April 1993, pp. 29-34
- Council Directive 97/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, as published in the Official Journal of the European Communities L 42/1987
- Directive 2002/65/EC of the European Parliament and of the Council concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, as published in the Official Journal of the European Communities L 271/2002
- Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers and repealing Council Directive 87/102/EEC, as published in the Official Journal of the European Union L 133/2008
- Directive 2011/7/EU of the European Parliament and of the Council on combating late payment in commercial transactions, as published in the Official Journal of the European Union L48/2011

C) Other Regulations (All Internet sources were last consulted on March 7th 2014):

- The English Unfair Contract Terms Act 1977, available on http://www.legislation.gov.uk/ukpga/1977/50
- The German Civil Code BGB, available on http://www.gesetze-im-internet.de/englisch_bgb/
- Code de la consummation français (French Consumer Code), available on http://www.legifrance.gouv.fr/ affich Code.do?cidTexte=LEGITEXT000006069565
-
- **Other References** (All Internet sources were last consulted on March 7th 2014):
- Draft Common Frame of Reference (DCFR), Principles, Definitions and Model Rules of European Private Law
- The Principles of European Contract Law (PECL), available online on http://frontpage.cbs.dk/law/commission_on_european_contract_law/pecl_full_text.htm
- Reasoning on the draft regarding the revision of Romanian Constitution from December 10th 2013, as published in the Romanian Official Journal no. 100/2014
- The UNIDROIT Principles on international commercial contracts (2010 version)
- The Uniform Commercial Code (UCC) of the United States of America

MUNICIPAL INSOLVENCY

Diana DELEANU[*]

Abstract

In the current credit crunch, municipal insolvency is a much needed legal instrument for public administration.

Municipal restructuring offers distressed communities the chance to a fresh start.

Keywords: *municipal insolvency, restructuring, bankruptcy, credit crunch, public administration*

Introduction

Insolvency represents a shortage of funds available for paying liquid and due certain debts. Traditionally, it is private entities which file for commencement of insolvency proceedings.

Given the financial crisis Romania is facing for a few years now and the existing budgetary constraints, there came the need for regulating insolvency proceedings for administrative units.

Municipal insolvency is already common practice in foreign legal systems.

This study focuses on two stages: before and after the moment the nr. 46/2013 Emergency Government's Ordinance was adopted. In the first part of the paper, a project of the bill is analyzed, this being a regulation which paused at the Parliament for a while, after being filed in the spring of 2010 by the Government. The current regulation used part of this project -which nearly came to life- and abruptly appeared in May 2013, managing to leave room for improvement from the beginning.

This paper is meant to show the need for a proper working system and displays a critical comparison of the two bills, none of them being truly viable, as practice proves too well.

While much needed in practice, to relief the ever increasing burden of debts created by ever-so-unperformant authorities, the regulation attempts an unsuccessful adaptation of the anglo-saxon model to the national legislation. Too shy to import all, and too new to know it all, it resembles a beautiful frame which lacks canvas. It just exposes a situation in all its darkness, creates a worrying imperfect mechanism and leaves the local community with just as much money, but much less hope.

Just as the white smoke which rises from Vatican offering persective while trembling believers wait in need for guidance, the Romanian business environment may now say: „habemus legem!"

Content

Under these circumstances, the corporate insolvency regulation governed by Law no. 85/2006 has been adapted to the administrative units which are public entities at their best.

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At the moment, it is a worrying fact that some 200 administrative units qualify as insolvent or in financial crisis.

The initiative for this municipal insolvency regulation appeared in art. 74 and 75 of nr. 273/2006 Law.

The huge theoretical challenge is to adapt a private institution to public legal subjects.

The final compromise was that only the restructuring stage of the insolvency proceedings is to be applied for administrative units, given the fact that a state structural unit can not be dissolved without changing the current Constitution, so, the normal consequence of insolvency proceedings'failure is inappliccable here. Therefore the law states measures to overcome the financial crisis and to take the adminisrative unit on the road to recovery.

The need for such special procedures arose because mismanaged administrative units began to represent true „black holes" in the economy, thus disrupting the financial cycle for the private entities they do business with, which ultimatelly generates numerous corporate insolvency cases. One of the main purposes of this procedure is, therefore, protecting third parties (who act in good faith) .

In most cases, insolvency is caused by the untimely performance of financial obligations by public institutions. As a consequence, commercially viable traders, whose activity depends on the business relations with the poorly-managed administrative unit face their own insolvency.

Under these circumstances, the personal liability of the public servant provisions are certainly inspired by nr. 85/2006 Law on the administrator's liability. As a consequence the law regulates the fraudulent actions, as well as the mismanagement of the public entities.

Given the public law characterisics of this position and the fact that it may only be accessed by following the electoral process and not by appointment, no private law proceedings may take away what it has not given. The mayor's mandate is given by the citizens -and based on the legal symetry principle- it can only be removed by the electorate, the same way it was awarded.

In this context, the municipal insolvency proceedings shall influence only on the economic and financial governance side of the head of administrative unit's activity.

Even in the case of the mayor's personal liability, the law only strips them from their financial attributes and not from their various other tasks which the electoral mandate offered.

The purpose of the insolvency proceedings is -in an ideal situation– the full recovery. Only if the recovery proves impossible, nr. 85/2006 law move to more drastic measures (proper liquidation in the bankruptcy stage) .

Such legislation is inconceivably drastic for an administrative unit and the initial bill project suggested the dissolution of the unit whose recovery plan was not successful and its assimilation by the neighbouring performant one.

Territorial restructuring (cnstitutional) issues aside, the implementation of such measures leads to the need to obtain community acceptance from the performant unit.

Such a burdensome decision for the community's economic efficiency could only be made through a referendum. This act of direct democracy and sovereignty of the local community appears as the only solution in a situation that could make the difference between today's economic balance and possible financial failure, generated by the difficulties encountered by joining a bankrupt entity .

The main legal issue is a public law entity being subjected to an essentially private law procedure. The status of administrative unit cannot be in any way altered by the insolvency proceedings.

The purpose of regulation is not only to end the financial crisis and the insolvency status, but also to prevent other similar cases. Because the whole procedure is dominated by

public law, no drastic measures can be taken towards the administrative unit and its leaders, and a law without a sanction is rarely observed.

Some major differences between the corporate and the municipal insolvency proceedings are :

a. the head of the administrative unit is never stripped of their non-financial powers (which are provided by electoral mandate provided, and are not to be withdrawn)

b. the public entity will never be dissolved (as Law nr . 85/2006 states for trade companies) and

c. the public entity's creditors will benefit from a full recovery of the debt, because the source of funding is a budgetary one, so it is stable and constant.

In the matter of liability coverage, the public entity's assets may only be liquidate by – first and foremost- transferring them from the public to the private domain, in order for them to be sold for covering the debt, therefore limiting the insolvency practitioner's access to an easy solution.

In Romania the insolvency proceedings is a public, transparent and competitive process. In other legislations, however, the municipal insolvency is characterized by confidentiality in order to protect the business partners' trust in the entity facing difficulties.

In addition to the clear advantages this procedures has, but there is always the risk of abusing rights. In this case, the head of the administrative units may be tempted to relieve the problem of debt payments towards third parties in a time of economic crisis or just to take advantage of the fact that they may suspend foreclosures, managing to prevent unpopular measures given the fact that their access to such a position is based on trust and the public image voters may have.

The head of the administrative unit's liability is considered only in his capacity as financial decision-maker of the entity, therefore the regulation is almost identical to the liability of directors and other governing bodies of a company (see art . 138 of Law no. 85 / 2006) .

The personal liability is based on the their failure to predict a realistic level of income and expenses.

There is, also, the failure of the Auditors'Court (Curtea de Conturi) to properly control the spending of public money, since an efficient preventive control would almost eliminate the risk of financial crisis and/or insolvency.

Perhaps a cheaper and more effective solution would be to prevent insolvency by improving the public services provided by the Court, associated with a stronger enforcement of the personal liability of the public officials involved.

Another responsible entity, perhaps much closer to the work of the administrative unit is the local County Department of Finance. It is empowered to conduct the financial and tax supervision, along with the judicial review of the documents performed by the Prefect .

In this case, the only question would be to draw a line between the Court's competence and the one of the County Department of Finance's.

The insolvency proceedings will be conducted by the bankruptcy judge, the main actor in this case . The insolvency administrator may be any compatible insolvency practitioner who meets the selection criteria. Their fee will be calculated proportionally with the head of administrative unit's salary, therefore it might be an issue to attract good insolvency specialists in complex cases with a low fee. A solution could be adding a success fee, be it fixed or representing a percentage of the recovered debt, as in the similar regulation of trade procedures.

Given the impossibility to liquidate an administrative unit that has failed even in insolvency proceedings, one of the suggested solutions was at some point to dissolve this unit and add it to a neighbouring administrative subdivision.

Such a measure , however, would require prior modification of both the Constitution and the Law nr. 341/2005 .

Although such a solution could substantially reduce administrative costs, and increase organizational efficiency , it would seriously infringe the sovereignty of the local community and its right to self-manage. In our view, it would be contrary to the core principles of public administration. Basically it is a matter of balance between the principle of local autonomy and the financial and tax management .

Contrary to the opinion expressed above, there are also examples of success : Denmark reducing the number of administrative units from about 1119-90 , the same trend enrolling Poland and Great Britain.

Curent Regulation – Nr. 46/2013 Emergency Government's Ordinance

The institution was first regulated by nr. 46 EGO from May the 21st, 2013 concerning financial crisis and the insolvency of administrative units.

The decision to urgently adopt this regulation was justified by the large amount of debts public entities have, although as at the end of December 2011 oustanding debts in the national economy amounted to about 110 billion, out of which almost 82 billion (i.e. about 80 %) belonged to the private sector . A strong influence was also the stand-by agreement with the International Monetary Fund.

Comparing nr. 46/2013 EGO to nr. 85/2006 Law a few differences arise:

- the EGO does not state a nominal value of the claim (such as Lei 45,000 in another example) but a percentage calculated from the entire budget of the institution.
- the payment period is longer for public entities (120 days) than for companies (90 days)
- the second criterion for assessing the difficuly state of the public entity is somewhat ambiguous, since it does not represent a percentage of the wages, but it seems to consider the total amount of unpaid wages unpaid for more than 120 days .
- also, there is no concept of imminent insolvency situation as governed by nr. 85/2006 law (i.e.: predictable insolvency in the near future).

A local register of municipal insolvency files is to be kept, this being a public document continuously updated on the website which is administered by the Ministry, therefore this qualifies as an example of transparency from the authorities.

Basically recovery may mean mainly rescheduling / hair-cuts / adjusting claims, respecting payment waiver programs concerning essential services, cost reduction, a.s.o.

In case of restructuring plan rejection by the majority, according to art. 100 from nr.46/2013 EGO, the judge shall grant a new deadline for its adopting it. The law does not specify how many times can a plan be voted, so basically , it can be suggested over again until the majority decides to adopt it, since any other measure (such as dissolving the entity is out of the question).

Comparative Law

The Anglo Saxon (U.S.) Model

Municipal insolvency is expressly regulated in Chapter 9 of the " Bankruptcy Code" and there is an old practice for more than three decades, so far being more than 500 requests to commence the procedure involved towns, villages , districts , tax districts ,school districts and municipal utilities.

The purpose of the procedure is to ensure protection for state entities with financial problems.

The creditors attempt to develop and negotiate a plan of debt adjustment by extending the maturity , reducing the main debt or interest or by getting a new refinancing loan.

Obviously, the law does not regulate the dissolution of the administrative unit, such an assumption being inconsistent with the 10th Amendment of the U.S. Constitution . Basically the rescheduling and reduction of the debt is the way to overcome such difficuties.

The city of Detroit found itself last year very close to insolvency and recovering its viability is still a work in progress.

France, the Netherlands and Ukraine do not have such options in their legislation, even though

there could be a need for such provisions for municipalities, departments and regions.

In France, the so-called " toxic loans " contracted by local authorities are estimated at over Euro 18 billion affecting over 4,000 local entities. Currently they cannot file for insolvency and public assets can be brought as warranty. If towns are to become insolvent, the French (social) government intervenes and makes the necessary tax adjustment and facilitates negotiation with the creditors.

Conclusion

The proceedings may very well be successful, but the current legal design does not provide any solution if insolvency proceedings do not take the entity to financial balance.

Finally, the question remains: what happens if the insolvency procedure fails [since there is no other solution (even the questionable one of joining two administrative units)]? Will the proceedings restart? How many times? Was it not the purpose of the insolvency proceedings to bring better health to the economic environment by removing malfunctioning elements to –ultimatelly- protect the credit? Does the rule " survival of the fittest" not apply in this case? (survival of the performant entity and bringing back the debtor's viable assets to the trade circuit)?

The notion of insolvency, bankruptcy, to be more specific, comes from the Italian phrase "banca rotta" meaning the destruction of " platform " on which a trade is carried out inefficiently and / or incorrectly in order to maintain market viability .

Essentially, insolvency is a penalty which acts as a basis for a functioning future economic environment.

References:

In Romanian:

- Apostol Tofan, Dana - " Administrative Law " - All Beck Publishing House , Bucharest - Vol I & Vol II -2008 -2010
- Turcu, Ion , "Insolvency" CH Beck Publishing House , Bucharest , 2007
- Turcu, Ion, " Theoretical and practical handbook of commercial law " CH Beck Publishing House, 2009
- Piperea, Gheorghe " Commercial law" CH Beck Publishing House, Bucharest , 2009
- Avram, Aurica " Insolvency proceedings" Hamangiu Publishing House , 2008
- Piperea, Gheorghe - " Insolvency . Introduction" , published on the website " Juridice.ro ", 2008
- Piperea, Gheorghe - " Insolvency . Scope and purpose of the proceedings " , published on the website " Juridice.ro ", 2008

In English :

- Frederick Tung - " Hastings Law Journal " - "After Orange County : Reforming California Municipal Bankruptcy Law " , USA, 2002
- Eurofenix Magazine - published by INSOL EUROPE

Foreign case law :

- • US municipal insolvency cases (e.g.: 2009 –city of Vallejo, Orange County)

Legislation :

- The Romanian Constitution
- EGO nr. 46/2013
- Law nr. 215/2001
- Law nr. 341/2005
- Law nr. 273/2006
- Law nr. 85/2006
- EGO nr. 63/2010

GROUPS OF COMPANIES IN INSOLVENCY PROCEEDINGS - ROMANIAN AND INTERNATIONAL PERSPECTIVE

Gabriela FIERBINŢEANU[*]

Abstract

Insolvency proceedings in case of groups of companies is no longer a surprise but a reality that concerned in the last period of time the romanian and also the european lawmakers.Although at an intuitive level the understanding of this construction must not raise many questions it is proven that not always what you see is what you get, especially when insolvency proceedings are opened in case of groups of companies.The aim of this article is to offer a global image on the effort made on national and international level to codify and harmonize the insolvency law provisions in the field.

Keywords: *groups of companies, Romanian Insolvency Law, Council Regulation(EC) no.1346/2000, UNCITRAL texts*

Introduction

The economic crisis has generated increasing number of companies that have experienced failure of businesses. As the Communication no. 742/12.12.2012 from the Commission to the European Parliament, The Council and the European Economic and Social Committee *"A new European approach to business failure and insolvency "*revealed, from 2009 - 2011 an average of 200 000 companies went bankrupt per year in the Union and about a quarter of this cases have a cross-border element. In this context it was clear for the European legislator that changes need to be made in domestic insolvency legislation in areas with potential to hamper the establishment of efficient insolvency legal framework and also at the Insolvency Regulation no.1346/2000 level (the latter was presented as key action in October 2012 when the Commission launched Single Market Act II). There are some desirable changes in the national legislation to be made such as developing efficient early warning tools for prevention in the field of insolvency; promotion of a second chance to honest businesses and adoption of the measures that permit a clear distinction between honest and fraudulent bankruptcy; granting of a discharge period for honest entrepreneurs (Member States agreed on the need to harmonize the period to discharge to less than three years as stated in the Competitiveness Council Conclusion, May 2011, following the launch of the Review of the Small Business Act for Europe); harmonization of different deadlines set by national legislation required for the debtor to declare its insolvency; transparency of the claims filing and verification process; proper regulation for groups of companies; promoting restructuring plans, all aimed to increase certainty of cross-border investments by securing the legal framework and in particular by providing opportunities to recover firms in difficulty, especially small businesses.

This paper analyses one of the proposed segments of change, groups of companies, aiming to determine whether the changes regarding this subject offer a coherent answer for the difficulties faced in practice and whether the proposed definition and coordination actions in insolvency proceedings referred to insolvency proceedings of a group of companies, in EU

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provisions and also in national regulation, may conduct to better chances of recovery for the enterprises in difficulty.

1. Group of companies as subject of insolvency proceedings – the present and the future

A subject of the insolvency proceedings can be the group of companies which, in some authors' opinion, in the context of the new view regarding the professional and the enterprise, can have the quality of a professional that is exploiting an enterprise through the controlled companies within the group.1 As a comment to the expressed position, we mention that the enterprise concept considered by them in the expressed analysis pertains to the Competition Law, as the community jurisprudence confirms that the term enterprise must be understood in the sense of an economic unit, even though legally this unit is made up of several natural or legal entities, a situation which is not particular to Law no. 85/2006, the special applicable law, irrespective of the provisions of art.3 align. 3 of the New Civil Code.

In order to have an overview on this subject, it is required to note the fact that an insolvency procedure is incidental not only to the private law legal entities which are registered with the Trade Register but also for instance to the joint ventures, foundations and agricultural companies; the very item 6 of article 1 align 1 of Law no. 85/2006 referring to any private law legal entity performing economic activities supports this statement. We can presume the fact that the legislator has considered the hypothesis of the private law legal entities which are registered in registers by means of which advertising is provided (the joint venture and foundations register or the agricultural companies register), whose main purpose is not performing economic activities. Pursuing with the analysis of the debtors categories which can be subject to the insolvency proceedings with a leap in time because it is temporally obvious that, at the time Law no. 85/2006 regarding the insolvency procedure appeared, the occurrence of the monist conception of the New Civil Code could not be considered, we secondly highlight the fact that, considering the appearance of the New Civil Code, it is required to reanalyze their scope. Starting from the definition of the enterprise concept, more precisely the exploiting of an enterprise, as it is proposed by article 3 align 3 of the Civil Code, as an organized activity exerted by one or several persons having or not a lucrative purpose, and of the professional in relation to the enterprise, more precisely to its exploitation according to article 3 align 2 Civil Code, as well as from art. 6 and art.8 of Law no. 71/2011 enforcing Law no. 287/2009 regarding the Civil Code, we can state that, at the moment, speaking about professionals, we exceed the scope of the trader and find in this multitude, besides the persons subject to registration in the trade register, also the persons exerting liberal professions, the public institutions exploiting an enterprise, entities without a juridical personality (simple companies or companies without a legal personality, such as pension funds, investment funds) and groups of companies which have been appreciated by some authors as holders of the enterprise2.

We shall not insist on the questions raised in light of the new regulations by the enforcement of item 6 within art. 1 align 1 of Law no. 85/2006 under the conditions of art. 194 and the following, as well as of art.1888 of the New Civil Code for the enumerated categories of professionals, but we shall return, after this parenthesis, to the analysis of the group of companies as a subject of the insolvency procedure. De lege lata, we would however mention from the very beginning that there is no regulation of it as a debtor within the

[1] Gh.Piperea, Introducere în dreptul contractelor profesionale, Ed.C.H.Beck, 2011, p. 343.
[2] Fl.A Baias, E Chelaru, R.Constantinovici ,I Macovei , Noul Cod civil, Comentariu pe articole, Ed.C.H.Beck, Bucureşti, 2012, p. 5.

procedure. The group of companies is regarded by some authors through the companies with a legal personality which make up its structure as being the holder of a complex enterprise, while the exploitation of the enterprise takes place through the companies pertaining to the group, as it is a single economic entity for the creditors and through the single insolvency risk for them3.Although we share the need to norm the group of companies as a complex structure, we do not believe that the inexistence till now of such an analysis is due to the hypocrisy of the formalism characterizing the juridical personality of the companies within the group4, but to a remediable regulation deficiency. Economically, the steps taken in order to determine the operation manner of the group, from the perspective of the consolidated financial reporting, is an important starting model, and we consider here the categories proposed by IASB (The International Accounting Standards Board) 2008:5 the controlling entity model (where the group is made up of the mother-company which controls its subordinated branches), the common control model (where the companies making up the group are jointly controlled by an investor) and the risks and rewards model (which means that the activity performed by an entity belonging to the group affects the fortune of the shareholders of another entity belonging to this group). However, legally, we believe that the attention must be drawn on the details related first of all to the defining possibility as a group having in mind both the shareholders structure of each company, and the transparency of the decision-making policy at the level of the entire group, while removing the control or influence presumptions of a group member on the other companies either by capital sharing, or by decisions imposed in a non-transparent manner by shadow directors/investors). In consideration of the fact that, in the proposal of the European Commission to modify EC Regulation no.1346/2000 on Insolvency Proceedings, a new chapter is included, intended for the group of companies, its implementation into the Romanian legislation is exclusively a matter of time. The romanian legislator included in the Insolvency Code adopted by the Government through Emergency Ordinance no.91/2013 a chapter regarding group of companies but unfortunately after the complaint filed by the Ombudsman , the Constitutional Court ruled that the law was unconstiutional.Hope did not die in the matter of a new Insolvency Law in Romania, and also in the matter of daring regulation of group of companies having in mind that in the structure of the new Law project no.90/2014 regarding the insolvency and preinsolvency proceedings[6], this subject was retained.

Until this modification is made, however we believe that a solution of the courts of law7 by means of which a request for joining two files is admitted, where the insolvency procedure has been opened against two different debtors, even though they would belong to a group of companies structure, cannot be received in spite of any legal or opportunity reason, violating art.1, art. 2 and art. 31 of Law no. 85/2006, as the insolvency procedure is collective for the creditors, and its purpose is to cover the liabilities of the insolvent debtor.

Regarding the group of companies, it is undeniable its need of regulation. The coordination of the procedures opened against the companies belonging to the group in order to maximize the fortune of the group, without imposing successful solutions for a part of the companies to the detriment of other viable companies which shall prove to be 'collateral damages' of these solutions, the permanent cooperation between courts and practitioners involved in the open procedures, adopting an European Safeguarding Plan (the proposal

[3] Gh Piperea, Introducere în Dreptul contractelor, op.cit, p 343.
[4] Gh.Piperea, Drept Comercial.Întreprinderea , Ed C.H.Beck, București, 2012, p 367.
[5] P.Ștefea, L.I.Viașu, D.R. Gabriș, Considerații privind grupurile de societăți și situațiile financiare consolidate, Studia Universitatis Vasile Goldiș Arad, Seria Științe Economice Anul 21/2011 Partea I, p 464, www.uvvg.ro
[6] PL – x no.90-2014, http://www.cdep.ro
[7] Dismissal of 03.09.2012 returned by the Court of Galați, Civil Section II, file no. 5739/121/2011*, BPI no. 15832/07/11/2012; by decision 796R of 12.11.2012, the Galați Court of Appeal has rejected the joinder request as not grounded.

belongs to INSOL Europe) are only a few of the desiderates expressed in practice and in the specialized literature in the field of companies groups. Also, we shall not exclude the possibility of changing COMI(center of main interests) in the situation of group companies, as this could prove to be an advantage for the effective capitalization of the assets, under the reserve of conciliating the provisions of grounds 4 and 20 of the EC Regulation no.1346/2000. The approach of the center of main interests of the group of companies is of interest considering the discussions launched in the specialized literature regarding its determination, as the theories debating the differences between the place where companies directly perform their activity and the one where the administrative and decisional control is constantly and transparently exerted on them8, the place where the central management being designated ECOMI for the group9, as well as the possibility of implementing an alternative which would offer a choice between the submission of a request for opening the procedure in the state where the center of the group is located (determined depending on certain criteria, such as identifying the location with the highest level of coordination of the activity performed by the companies of the group, the research of the law applicable on the territory of the state where that location is identified regarding the norms incidental to the reorganization or liquidation procedures, considered convenient at the group level) or the benefit of coordinating the procedures opened in several jurisdictions10.

2.The Report of the European Commission regarding the enforcement of the EC Regulation no. 1346/2000

Suggestions regarding the need to modify the provisions of the EC Regulation on Insolvency Proceedings have been made as far back as the first years of its enforcement, although it was admitted the extremely beneficial impact of a rulling with a mandatory juridical force among the EU Member States.

Further to the analysis of the comments provided by the specialized literature11, the main criticism aims at the lack of a clear definition of the debtor's COMI, not treating the groups of companies within the EC Regulation, the missing part of the Regulation including the detailed procedural norms related to mechanisms of the national law of the member states, the weakness12 of art.3 align 3 which provides the fact that the secondary procedure must be a liquidation procedure13, the need to establish a manner of cooperation and information among the courts of law and all the bodies qualified to participate in the opened proceedings, the urgency of including regulations which would be incidental in situations exceeding the Union (EU)borders, and last but not least the fact that according to art.45, it is possible to only amend its annexes. The changing proposals, object of the Report of the Committee on Legal Affairs, the opinions of the Committee on Economic and Monetary Affairs and the

[8] Georg Friederich Schlaefer, Forum Shopping under the Regime of the European Insolvency Regulation, The International Insolvency Institute, International Insolvency Studies, Germany, 2010, http://www.iiiglobal.org/component/jdownloads/finish/39/5922.html

[9] Hon.Samuel l.Bufford, Revision of the European Union Regulation on Insolvency Proceedings-Recommendations, International Insolvency Law Review, IILR 3/2012, Germany, http://www.arge-insolvenzrecht.de/Speech_Samuel_BUFFORD.pdf

[10] International Insolvency Institute, Guidelines for Coordination of Multinational Enterprise Group Insolvencies, Paris, France, Twelfth Annual International Insolvency Conference, Supreme Court of France, 21-22 June 2012.

[11] Bob Wessels, Twenty suggestions for a makeover of the EU Insolvency Regulation, 2006, www.bobwessels.nl

[12] Gabriel Moss, Christoph G.Paulus, The European Insolvency Regulation - The case for urgent reform, 2005, http://www.eir-reform.eu/uploads/papers/Reforms%20EC.pdf

[13] It is interesting to note that, according to annex B of the Regulation, as modified after the accession of the new wave of states to the EU, Romania brings in a liquidation procedure, the bankruptcy procedure, although according to art. 3, item 20 of Law no. 85/2006 regarding the insolvency procedure, the liquidation of the debtor's goods can also take place within the juridical reorganization, and this contravenes the Regulation.

Committee on Employment and Social Affairs have grouped the problems identified within the analysis period into 4 directions regarding: the possibilities of harmonizing the provisions included in the national legislations, proposals whose object is to modify the Regulation, the themes of the groups of companies, as well as bringing in, at the European level, a register allowing a fast dissemination of the information on opening an insolvency procedure in a Member State, as well as the deadlines for submitting the debt statements. On 15 November 2011, further to these steps, the European Parliament adopted a resolution containing recommendations for the Commission regarding the insolvency procedures14, while the document preserved the 4 directions contained by the Report of the Committee for Legal Affairs.

In the point of view issued on 08.02.2012 on the Resolution of the Parliament15, the Commission positively noted the existence of the consensus on the need to make modifications, but also the possibility of harmonizing certain aspects from the national legislations regarding the submission of the debt statements, qualification of the liquidators or that of bringing in the provisions on the groups of companies or an insolvency register, but also drew the attention on the need to deepen other elements included in the resolution, such as defining COMI, harmonizing the content of the reorganization or competition plans of two procedures – main and secondary – in the context of the single market.

In the matter of the group of companies the coordination of the insolvency procedures regarding companies of the same group there is a new approach in the Insolvency Regulation Proposal, unlike the current Regulation which deals with each company differently, ingnoring the whole structure. The role of the liquidator is increased, acquiring the capacity to pursue proceedings regarding the other companies of the group, having the right to request the suspension of the open procedure against them or to propose the reorganization plan considered to be the most appropriate for the entire group. Although the proposal is beneficial, one must also highlight the fact that it was not intended to renounce the practice of opening a procedure within one single jurisdiction in the situation of the groups of companies with an increased level of integration, as in the case of the procedure instituted for the telecommunication group NORTEL, in which case the administration procedure was opened in England for all the companies of the group. Moreover, the Poposal establishes at art. 42 b the obligation to cooperate among courts which can directly communicate requesting their mutual assistance, and can also appoint a person or body to act according to their instructions. In the context of the manner of defining the group of companies in article 2 letters i and j of the Proposal, the court must appreciate the existence of the group starting from an extremely wide framework of elements and for this reason we believe that the solution for appointing the same liquidator for all the companies in the group would mean a less difficult starting point.

It is to be noticed in fact that, from the enforcement of the EC Insolvency Regulation, i.e. 2002, the legislations of the Member States are in a constant change, either because in some cases the attempts to stabilize the insolvency norms are in the search period, or because conception modifications are required considering the European trends to implement a culture of safeguarding the enterprise and grant new chances to the honest debtor. Under these circumstances, it can be noted that any proposal aiming at the modification of the Regulation is deeply rooted into the practices of the national legislations which have been faced with cross-border insolvency causes and in the policies established by each state in approaching this phenomenon.The permissivity of the Model Laws and the compromise they offer

[14] Resolution of the European Parliament of 15 November 2011 containing recommendations towards the Commission regarding the insolvency procedures in the context of the EU law regarding the commercial companies, www.europarl.europa.eu

[15] Follow up to the European Parliament resolution with recommendations to the Commission on insolvency proceedings in the context of EU Company Law, adopted by the Commission on 8 February 2012, www.europarl.europa.eu

precisely lies in the fact that they do not have the force of mandatory provisions and for this reason the freedom offered when sometimes adapting or adopting their provisions into the national legislation decreases the pressure of aligning the national concepts to the dispositions contained by such rules, and turns them into such appreciated harmonization means.

From the comparison of the proposals for the modification of the EC Insolvency Regulation with the objectives assumed by the Working Groups at UNCITRAL level, we can easily note that the identified problems are mainly joint (the treatment of cross-border insolvency – definition, categories of debtors, problems raised by the cross-border insolvency in the case of the groups of companies, the stringent need to cooperate and coordinate within the procedures), being anchored in the same concrete realities but, unlike the European legislator that has the duty to conciliate the transposition of these objectives in a unanimously accepted manner, so that the results are visible for a longer time, UNCITRAL can issue model norms without this pre-established mission, the Model Law regarding the cross-border insolvency 1997, the Practical Guide regarding the cooperation in the cross-border insolvency cases 2009, the Practical Guide regarding the Insolvency Law 2010, the Model Law regarding the Cross-Border Insolvency – The Judicial Perspective 2011, being the most eloquent in this respect.

Regarding the group of companies as a subject of the insolvency procedure, we shall not reiterate its importance because it has already been debated in the content of the work, but we shall focus on other aspects of the construction. It should be emphasized from the very beginning that the jurisprudence has had different approaches of the group of companies from one cause to another, starting from considering through the COMI interpretation that it is required that all the group companies be subject to the law of the state where the center of main interests for the mother-company (*Juzgado de lo Mercantil num.4.4.2009 -Hard Metal Engineering, S.L.U. : The Spanish Court of the First Instance has decided that it is competent to open the insolvency procedure against the three companies forming a group of companies - two of them are headquartered in Span, and one is registered in Hungary, based on the following reasons in order to overturn the presumption included in article 3 of the Regulation – the entire production process taking place within the Hungarian company is managed according to the guidelines imposed by the Spanish company Metasint which owns 100% of the capital; the managers of the Metasint company reside in Spain and all the commercial transactions are also performed and executed on the Spanish territory*16.) is located, which controls the decisions of the entire group, going through the interpretation according to which the appointment of the same practitioner in all the open insolvency procedures for the companies of the group would offer greater advantages in their coordination (*Nortel Networks Romania LTD part of Nortel Group - the notification announcing the opening of the foreign procedure of administration according to the English Law, was published in Romanian Insolvency Proceedings Bulletin no. 945 on 26 February, 2009; The High Court of Justice of England and Wales, Chancery Division, Companies Court rules that COMI of the group is in England and the administration procedure must be opened by the same Court against all 19 companies belonging to this group, no matter where the registered office is located*) or, in other cases, getting to the interpretation that each entity of the group should be treated separately (*C-341/04 Eurofood in paragraph 36 of the Judgment of the Court about the presumtion laid down by EC Insolvency Regulation in article 3(1) :*

"By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation").17

[16] http://www.insolvencycases.eu
[17] http://curia.europa.eu

The definition of the group of companies brought in by the Proposal of modification of the Regulation is laudably built, but only contains verifiable and formal elements which lead to assessments of an entity as a group: either through the participation of a company (qualified as a mother-company) in building other companies or the control of a company exerted on other companies by means of the owned votes, the right to appoint or dismiss the management bodies, or through the contracts signed by the mother-company with its subunit.

We also consider that the treatment applicable to the group of companies would have required a deeper approach because the forms under which they can appear exceed by far the proposed structures in complexity, and the way the cross-border insolvency procedures take place, involving such structures cannot only come down to bringing in articles providing the cooperation and communication obligations (articles 42 a, 42 b, 42 c, 42 d of the Proposal for the modification of the Regulation) and in supporting these statements a few practical comments will be made.

First of all, the constructions of the group of companies, besides the vertical ones, specific for instance to the oil industry in which the mother-company has control over the distribution and service provision companies, the horizontal ones such as those specific to the media trusts in which the mother-company develops companies providing segments of products to be found among the ones provided by it or "kereitsu"18 type, specific to Japan (vertically or horizontally organized, whose feature is the reciprocal ownership of capital among the members of the group, organized around a bank which provides the financial resources of the group companies), can also appear under the form of entities such as those meant to limit the effects of bankruptcy (Special Purpose Vehicle or SPV also known as SPE, Special Purpose Entity) constituted by a company (sponsor) through the transfer of goods within the SPV, goods which cannot be followed by the creditors of the sponsor firm (although sometimes the courts can characterize the transfer of goods as a guaranteed financing fact, and consequently instruct on reintegrating them in the balance of the sponsor)19 or under the form of income trusts (many of these companies can be found in jurisdictions such as Bermuda, Bahamas, Jersey which can refuse the repatriation of the goods20) meant for isolating the income-producing goods which could be followed within an opening of the bankruptcy procedure, belonging to another company (mechanisms similar to the fiducia contract, recently included into the Romanian legislation by means of the New Civil Code), while such offshore trusts offer, besides the rapidness of constitution, the complete confidentiality, as well as the protection of goods.21 The connections between the companies which are part of such constructions are often difficult to prove, as the formal criteria enumerated by the Regulations Proposal are not applied.

Second of all, we consider it extremely important to clarify the manner in which the request for opening the insolvency procedure shall be dealt with; from this point of view, in practice, new questions can occur which have different solutions in the legislation of the member states. Part of these questions could regard the following:

- the possibility of submitting a request which would include all the companies in the group (in which case certain courts could state that they cannot give a verdict in this manner for the need to have one single main procedure with several secondary procedures, and in the absence of a group COMI regulation we shall return to the same place of interpreting the national courts aiming at localizing the center of main interests for all the group companies);

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[18] A. Istocescu, Management comparat internaţional, Ed.ASE, Bucureşti, 2005, pag.171.

[19] Gary B.Gorton, Nicholas S.Souleles, Special Purpose Vehicles and Securisation, January 2007, http://www.nber.org/chapters/c9619

[20] Michael Sjuggerud, Defeating the self-settled spendthrift trust in Bankruptcy, Florida State University Law Review, Volume 28, Number 4, 2001, http://www.law.fsu.edu/journals/lawreview

[21] Magdalena-Daniela Iordache, Gruparea de tip trust, Revista română de Drept al afacerilor, ed.Wolters Kluwer, nr.6/2011, pag.83.

- the issue of extending the procedure also over the companies which are not insolvent or in a period of financial difficulties (such an extension could be beneficial in a reorganization procedure but has several disadvantages such as an inequitable instrumentality of the creditors, application of periods of suspending the executions which could damage the creditors of the company which is not insolvent, the possibility for the mother-company to continue its activity during the period of financial difficulty to the detriment of a solvable company, clearly affected by this action);

- the treatment of the transactions concluded inside the group from the perspective of the actions in annulment of the patrimonial transfers;

- the existence of several creditors committees or the establishment of their single committee, for all the companies of the group against which an insolvency procedure has been opened; the application of the real consolidation within the group, which implies the consolidation of the goods and debts as belonging to one single entity in the situations in which the separation of the goods is not possible because of the group construction (a fact which would imply a rearrangement of the national and European concepts regarding the identity of the legal entity);

- the appointment of a single insolvent practitioner, an apparently beneficial thing but which also has the disadvantage of the conflict of interests (the Regulation Proposal identifies the possibility of the occurrence of such a conflict within article 42 a, but the reference is made to distinct procedures, applicable to the companies of the group).

In our opinion, the definition inserted within the Proposal should be modified in the sense of defining the group of companies not only as a formal relation, but also as a structure within which the constitutive companies are contractually, financially or economically interdependent, which should be proved at the same time as the request to deal with these companies as a group because several times, this interdependence is not known by the third parties that have the certainty of contracting with separate juridical entities, and in a request for opening the insolvency procedure expressed in such situations, we consider it opportune to solve the mystery of this interdependence to the benefit of the creditors.

The European Parliament adopted a legislative Resolution on 5 February 2014 on the December Proposal of the European Commission suggesting around 60 amendments having regard to the opinion of the European Economic and Social Commitee and to the report of the Commitee on Legal Affairs(the Commitee had 69 amendments).As for groups of companies the EP legislative resolution extended the approach beyond the need for cooperation and coordination of the proceedings related to such a structure . Some of the most interesting proposed changes are22:

- a new definition of a group of companies and of the parent company (the controlling criteria of the parent company from the Article 2 point j was eliminated so that the parent company in the proposed amendment means the company which controls one or more subsidiary companies; also the parent company role is in accordance with the Directive 2013/34/EU of the European Parliament and of the Council);
- introducing a new 20aa Recital underlining that a group coordination proceedings are ment to strenght the restructuring through the coordinated conduct of the proceedings and should not have a binding role for individual proceedings ;
- an important clarification was also made in case of Article 42 a, paragraph 2, subparagraph 1, point b, so that the exercise of the cooperation referred to in the paragraph 1 of the Article 42 a shall explore, according to the new content of point b, the possibilities for restructuring the group members subject to insolvency proceedings;

[22] European Parliament legislative resolution on 5 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation(EC) No 1346/2000 on insolvency proceedings , www.europarl.europa.eu

● new provisions regulating opening of group coordination proceedings(Article 42da), tasks and rights of the coordinator(Article 42db), court approval of group coordination plan(Article 42dc).

3. The group of companies in national provisions

A new indisputable subject of the insolvency procedure is the group of companies, for which reason we consider it important to assign it some comments which would dedicate it a defined role.

According to article 127 alignment (8) of Law no. 571/2003, the single fiscal group is made up of juridically imposable independent persons, established in Romania, that are in close relations from the organizational, financial and economic point of view; the economic aspect is clarified by item 4 of the methodological norms (GD no. 44/2004) for applying article 127, by owning the capital of these companies directly or indirectly to a proportion of over 50% by the same shareholders. Starting from the structure laid down by the fiscal norms, we suggest that the group of companies be defined as two or several interdependent companies by owning most of the shares by a company in other companies exerting control or dominant influence on them. The interdependence is manifested by one company, called mother-company, owning at least 50% of the capital of another company; the control shall be manifested also by the right to appoint or dismiss the components of the executive or control bodies of the controlled company, while the dominant influence regards the decision-making contribution in the financial and operational policy of another company. It would also be very important to bring in certain dispositions regarding the coordination and cooperation within the procedure as far as the group companies are concerned, for which reason we suggest the regulation of the possibility to submit a joint request for opening a procedure, while all procedures would be opened within the same court, by derogation from the rules provided by article 6 of Law no. 85/2006, on condition that the procedure opening conditions are complied with, while the same proposal is also applicable to an introductory request expressed by the creditor against several companies of the group. Of course, there are situations in which not all the group companies are insolvent, which leads to a new proposal for derogation from the current dispositions of the insolvency law, namely granting the possibility to acquiesce to the joint request of opening the procedure. Moreover, we suggest the coordination of the procedures opened by the court for each company of the group by establishing the same deadlines for continuing the procedure to the extent to which this is possible or at least by avoiding the substantial differences between the deadlines granted in each file. For the cases in which they shall not appoint the same insolvent practitioner for all the companies of the group, we consider it opportune to regulate the manner of cooperation between the appointed practitioners, under the form of regular reports, containing the measures proposed or performed by each of them within the administrated procedure, the points of view expressed in the assemblies of the creditors, the proposals of the creditors' committees; the reports would be submitted at regular intervals within each of the ongoing procedures.

Conclusions

It is never too late to give the insolvency of enterprise groups the deserved appreciation especially when this construction is quite common and the new tendencies in national and European regulations as presented are the certain proof. What is interesting to observe is that in the case of group of companies, the economic reality was some steps ahead of the legal architecture putting some pressure on the latter so that the debate between entity law on the one hand and the recognition of a structure based on economic facts (enterprise law) on the other hand, is a subject to be followed.

References

- Gh.Piperea, Introducere în dreptul contractelor profesionale, Ed.C.H.Beck, 2011
- Gh.Piperea , Drept Comercial.Întreprinderea , Ed C.H.Beck, Bucureşti, 2012
- Istocescu, Management comparat internațional, Ed.ASE, București, 2005
- Fl.A Baias, E Chelaru, R.Constantinovici ,I Macovei , Noul Cod civil, Comentariu pe articole, Ed.C.H.Beck, București, 2012
- P.Ștefea , L.I.Viașu , D.R. Gabriș , Considerații privind grupurile de societăți și situațiile financiare consolidate, Studia Universitatis Vasile Goldiș Arad, Seria Științe Economice Anul 21/2011 Partea I, p 464, la adresa http:// www.uvvg.ro
- Magdalena-Daniela Iordache, Gruparea de tip trust, Revista română de Drept al afacerilor, ed.Wolters Kluwer, nr.6/2011
- Gary B.Gorton, Nicholas S.Souleles, Special Purpose Vehicles and Securisation, January 2007, http://www.nber.org/chapters/c9619
- Michael Sjuggerud, Defeating the self-settled spendthrift trust in Bankruptcy, Florida State University Law Review, Volume 28, Number 4, 2001, http://www.law.fsu.edu/journals/lawreview
- Georg Friederich Schlaefer, Forum Shopping under the Regime of the European Insolvency Regulation, The International Insolvency Institute, International Insolvency Studies, Germany, 2010, http://www.iiiglobal.org/component/jdownloads/finish/39/5922.html
- Hon.Samuel l.Bufford, Revision of the European Union Regulation on Insolvency Proceedings-Recommendations, International Insolvency Law Review, IILR 3/2012, Germany, http://www.arge-insolvenzrecht.de/Speech_Samuel_BUFFORD.pdf
- International Insolvency Institute, Guidelines for Coordination of Multinational Enterprise Group Insolvencies, Paris, France, Twelfth Annual International Insolvency Conference, Supreme Court of France, 21-22 June 2012
- Bob Wessels, Twenty suggestions for a makeover of the EU Insolvency Regulation, 2006, http:// www.bobwessels.nl
- Gabriel Moss, Christoph G.Paulus, The European Insolvency Regulation - The case for urgent reform, 2005, http://www.eir-reform.eu/uploads/papers/Reforms%20EC.pdf
- Resolution of the European Parliament of 15 November 2011 containing recommendations towards the Commission regarding the insolvency procedures in the context of the EU law regarding the commercial companies, http:// www.europarl.europa.eu
- European Parliament resolution with recommendations to the Commission on insolvency proceedings in the context of EU Company Law, adopted by the Commission on 8 February 2012, http://www.europarl.europa.eu
- Decision no. 796R of 12.11.2012, the Galați Court of Appeal , Romanian Insolvency Procedings Bulletin no. 15832/07/11/2012
- *C-341/04* Eurofood IFSC Ltd , http://curia.europa.eu
- Juzgado de lo Mercantil num.4.4.2009 -Hard Metal Engineering, S.L.U , http://www.insolvencycases.eu
- Nortel Networks Romania LTD part of Nortel Group, Romanian Insolvency Proceedings Bulletin no. 945 on 26 February, 2009
- European Parliament legislative resolution on 5 February 2014 on the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation(EC) No 1346/2000 on insolvency proceedings , http://www.europarl.europa.eu
- PL -x no.90 – 2014 , http://www.cdep.ro

QUALIFYING LEGACY BY PARTICULAR TITLE – A DIFFICULT TASK

Ilioara GENOIU*

Abstract

The current Civil Code in force, unlike the previous one, succeeds into making a clear and natural distinction between will – as a whole – and legacy – as the main testamentary provision. Unfortunately, it does not also provide flawless regulations in terms of the categories of legacies, which are classified according to their object (universal legacies, legacies by universal title, legacies by particular title). In what the legacy by universal title is concerned, the Civil Code in force contains some controversial provisions at article 1056 paragraph (2) letter c), which interfere also with the correct qualification of legacy by particular title. Then, the regulations of the legal regime applicable to the legatee by particular title also evince flaws, for instance at article 1114 article (3) letter b) of the Civil Code, so that it becomes more and more difficult to qualify certain legacies, as being by particular or by universal title. The current work aims to point out the provisions of the Civil Code mentioned before, which generate or can generate potential controversies, but also to propose certain remedies.

Keywords: *universal legacy, legacy by universal title, assets determined according to their nature and origin, legatee by particular title, legacy upon an inheritance collected and not liquidated yet.*

1. Introduction

1.1. The field covered by the theme of the study

The present work will discuss a topic of interest for hereditary law, more exactly for the transmission of an inheritance by will. Traditionally, the issue regarding the legacy by particular title, which constitutes the theme of this study, is approached within the context of the main testamentary provisions.

1.2. The importance of the study proposed and the objectives targeted

Legacy represents one of the provisions which a will can contain, actually the main testamentary provision. Its qualification as being universal, by universal title or by particular title is, in our opinion, a difficult task, because the Civil Code currently in force contains some contradictory provisions on this matter. These are the provisions of article 1056 paragraph (2) letter c) of the Civil Code and of article 1114 paragraph (3) letter b) of the Civil Code. Considering that a legacy can be classified, according to its object, within one or another category from the ones mentioned above, has both a theoretical and practical advantage. After a legacy is included in the category of universal legacies, legacies by universal or particular title, it will become subject to the legal regime applying to the category to which it belongs.

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The present study aims to point out the specific features of the legacy by particular title, but also its characteristic elements, so as to correctly classify it and, in consequence, establish the legal regime which is applicable to it. Moreover, the main legacies by particular title will be listed and followed by some proposals *de lege ferenda*, so as to remove the contradictions existing at the moment within the current Civil Code, which make the classification of a legacy a difficult task.

1.3. How the author will be responsible for the objectives taken upon

Given the provisions of the Civil Code in force, having incidence in the field of legacy, and the few opinions expressed within legal literature up to this moment, in relation to the topic herein analysed, there will be subsequently identified the specific elements of the legacy by particular title. In this context, we express our conviction that all these elements should guide us in our attempt to classify a legacy, according to the criterion of its object, even in the case when (and unfortunately, we are in this situation) the incident legislation has rather the role to confuse us, than to shed light upon the issue. On this ground, we will continue by enumerating the legacies which we consider to be by particular title. We will also try to propose some remedies, which we consider fit for the issue discussed and which should maybe be considered by the lawmaker, on the occasion of a future republication of the Civil Code.

1.4. How much the topic discussed is known, by referring to the contributions already existing within specialized literature

Specialized literature[1], has pointed out the contradiction between the provisions of the Civil Code regarding legacy (by universal and by particular title), but this issue has not been very much looked into and, consequently, no solution for its resolution has been proposed. This is in fact understandable, as from the entry in force of the current Civil Code only two years have passed, in which the experts could not identify all the controversies contained by this complex normative act and, consequently, propose the most appropriate remedies. We ourselves have dealt with this topic in a restrictive manner, in two previous works[2] (as their nature was demanding). Now we aim to provide a greater extension to the issue on the qualification of the legacy by particular title and to prove both the controversial character of the provisions of the Civil Code, already discussed, and the justness of the suggestions we will make in this context.

2. Content

2.1. Introductive considerations

According to the provisions of article 986 of the Civil Code, "Legacy constitutes the testamentary provision by means of which the testator states that, upon his death, one or several legatees shall acquire his entire patrimony, o portion of it or certain determined assets".

It can be thus noticed that the lawmaker has resolved several of the issues raised by legacy, through the legal text mentioned above. He consequently defined legacy, by

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[1] Codrin Macovei and Mirela Carmen Dobrilă, "Cartea a IV-a, Despre moştenire şi liberalităţi", in *Noul Cod civil. Comentariu pe articole,* ed. Flavius Antonius Baias et al. (Bucharest: C.H. Beck Publ. House, 2012), 1092.

[2] Bogdan Pătraşcu and Ilioara Genoiu, "Despre noţiunea şi felurile legatului", in *Noul Cod civil. Studii şi comentarii,* ed. Marilena Uliescu (Bucharest: C.H. Beck Publ. House, 2013), 807-832 and Ilioara Genoiu, *Dreptul la moştenire în Codul civil* (Bucharest: C.H. Beck Publ. House, 2013), 157-159.

describing its essence (testamentary provision regarding the deceased's patrimony), he correctly established the relation between legacy and will (legacy is a testamentary provision) and he also indicated the core of the main types of legacies, in connection to their object (the universal legacy entitles the inheritance of the whole patrimony, the legacy by universal title entitles the inheritance of only a portion from the patrimony, whereas the legacy by particular title entitles to the inheritance of certain determined assets).

In our opinion, legacy benefits from an accurate definition coming from the Civil Code currently in force, which makes amends for a great flaw of the former Civil Code which, at article 887, was making a confusion between the will, as a whole, and legacy, which is the main provision of the will. The former Civil Code was stating the following: *"The will can be used to make provisions for the whole or only a part of someone's patrimony, or for one or several determined objects"*. In fact, the former Civil Code was regulating legacy and not will on that occasion. But legacy represents only one of the testamentary provisions, admittedly the most frequent one (and, consequently the main one). Still, the legal literature of those times, by acknowledging the flaw of the legal text mentioned above, has defined legacy in a particular accurate manner. Therefore, according to specialized doctrine before October 1st 2011, legacy represented the testamentary provision by means of which a testator nominated one or several persons who, upon his death, were to acquire, by free title his entire patrimony, a portion of them or certain determined assets[3]. Thus, the current Civil Code takes up the former and correct definition existing within legal doctrine, at article 986.

When defining the will, the Civil Code currently in force does not bring into discussion the confusion made by the previous Civil Code (although a certain discussion could also be raised about how this normative act defines will) and, moreover, at article 1035, which is called "The content of the will", it clearly shows that legacy is the only one (but the main) provision of the last will act and enumerates, as an example, some other provisions which a will can comprise[4]. This represents a strong point of the current way in which legacy is regulated. Unfortunately, we won't be subsequently able to make such appreciations, but on the contrary, we shall put under question the controversial provisions of the Civil Code in force.

2.2. The contradictory legal regulation of the legacy by universal title – a cause for the difficulty and unjustness of qualifying the legacy by particular title

In our opinion, the correct qualification of the legacy by particular title depends, in a considerable manner, from the way the lawmaker has regulated the other two categories of legacies, resulting by considering their object: the universal legacy and the legacy by universal title. This happens due to article 1057 of the Civil Code, stating that: "*Any legacy which is not universal or by universal title is a legacy by particular title".* Thus, the legacy by particular title represents the result (the difference) of a subtraction operation in which the subtrahend (multiple, in this case) is represented by the universal legacy and by the legacy by universal title, whereas the minuend is represented by the totality of legacies, considered according to their object. Thus, the justness and correctness with which the other types of legacies are regulated determines the quality of regulating the legacy by particular title.

In our opinion, the regulation of universal legacy is just, so that it does not interfere at all with the correct qualification of some legacies as being by particular title. Not the same applies for the way in which the lawmaker has regulated the legacy by universal title. In fact,

[3] Francisc Deak, *Tratat de drept succesoral*, II edition, updated and completed (Bucharest: Universul Juridic Publ. House, 2002), 208.
[4] On the new definition of legacy, see also Mircea Dan Bob, *Probleme de moşteniri în vechiul şi în noul Cod civil* (Bucharest: Universul Juridic Publ. House, 2012), 120-126.

it is precisely the improper regulation of the latter which produces negative consequences in terms of qualifying the legacy by particular title, making this task difficult.

For the reasons mentioned above, it is useful to bring into discussion the provisions of article 1056 of the Civil Code, meant to insure the legislative background applicable to legacy by universal title. According to them, *"The legacy by universal title is the testamentary provision which provides vocation to a portion from inheritance to one or more persons"*. "Portion from inheritance" signifies, according to article 1056 paragraph 2 of the Civil Code, the following:

- either the property upon a share from the inheritance;
- either a right of property upon all or a share from the inheritance;
- or the property or a right of property upon a share from the universality of assets determined according to their nature or origin.

We would like to mention that we have no comments regarding the provisions of article 1056 paragraphs (1) and (2) letters a) and b), as we consider them appropriate. Moreover, by containing these provisions, the Civil Code currently in force resolves the issue (which was controversial in the context of the former Civil Code) of the legacy involving a right of property on the whole inheritance or only a share of the latter, including this type of legacy in the category of legacies by universal title.

Still, we will provide some considerations on the legacy having as object the property or a right of property upon the whole or a share from the universality of assets determined according to their nature and origin [regulated by article 1056 paragraph (2) letter c) of the Civil Code]; according to the Civil Code currently in force, this kind of legacy is a legacy by universal title. It seems that we encounter here, at least partially (in relation to the legacy having as object the property or a right of property upon the whole or a share from the universality of assets determined according to their *nature*) the equivalent of article 894 of the former Civil Code, according to which the legacy by universal title is the one having as object all the movable or immovable assets of the deceased, or a portion of the movable or immovable assets of the inheritance. Consequently, the lawmaker has not taken over the opinion expressed within legal doctrine before the current Civil Code entered in force, namely that all (or only a part) of the deceased's movable or immovable assets should constitute the object of a legacy by particular title on the occasion of a future regulation, as they do not constitute a legal universality (but only a universality de facto), missing liabilities.

Since the Civil Code in force contains such provisions as those mentioned above, it should be pointed out what "universality of assets determined according to their nature and origin" means. Thus, it is obvious that the term "universality" used by the Civil Code, at article 1056 paragraph 2 letter c) is different by that of "legal universality", of patrimony, the latter representing all the rights and duties with a patrimonial character belonging to a person. The text under discussion involves a universality de facto, which, unlike, the legal one, does not presuppose the existence of liabilities. But the legacy by universal title means precisely that the beneficiary of a liberality bears also the liabilities of the inheritance, within the limits of the share received from the inheritance. So how could the two aspects be reconciled?

Recent specialized literature[5], has pointed out that, in the context subject to our analysis, the term of "universality" must be perceived in a broad meaning, so that is considered legacy by universal title also the legacy upon all (or a share of) movable or immovable assets from inheritance, the legacy upon a fraction of the surplus or the share available or the legacy of all (or a share from) the movable or immovable assets from inheritance, situated in a certain place.

[5] Macovei and Dobrilă, "Cartea a IV-a", 1092.

Continuing our analysis, we believe that is useful to quote also the text of article 541 of the Civil Code, having the indicative title of "Universality de facto", according to which "*(1) A universality de facto is represented by all the assets belonging to the same person and having a common destination, established through that person's will or by law. (2) The assets composing the universality de facto can, together or separately, be the object of some acts or distinct legal relations".*

According to specialized literature[6], universalities de facto can be represented by the books reunited in a library, by art or numismatic collections, by herds of animals, commerce fund, and so on. Thus, in order to speak about universality de facto, the following conditions must be met:

- the assets reunited to belong to one and the same person;

- all the assets mentioned above must have a common destination, determined by the person's will or by law.

In respect to what has been mentioned before, we consider that the term "universality" can have a broad meaning, to include both universality by law and universality de facto, but this does not mean that the two types of universality have the same legal regime.

Continuing to analyse the text of article 1056 paragraph (2) letter c) of the Civil Code, we mention that, *according to their nature*, assets can be movable or immovable[7]. It would therefore emerge that all the movable assets of the deceased or, according to the case, all the immovable assets of the deceased can be qualified as the universality of assets of *de cuius*, determined according to their nature, and that they constitute the object of a legacy, qualified by the lawmaker as a legacy by universal title.

Then, according to recent specialized literature[8], the term of assets *origin* should mean, for instance, that these assets belong to the deceased's own assets (being those which he obtained before marriage or which he obtained during marriage with this legal regime, and, consequently, others than those resulting from liquidating the community of assets) or that the same assets come from an open inheritance, not liquidated yet.

Regarding the second variant of what has been stated above, there can be invoked the provisions of article 1114 paragraph (3) letter b) of the Civil Code, according to which the *legatee by particular title* "*…is, by exception…accountable for the liabilities of the inheritance, but only in relation to the asset or the assets constituting the object of the legacy, if:…the right bequeathed by legacy has universality as object, such as an inheritance obtained by the testator and not liquidated yet…*". It consequently results that the legacy upon an inheritance obtained by the testator and not liquidated yet, but not only (as the legal text in question does not contain a limitative enumeration, but only an exemplificative one) evinces a particular character[9]. So should it be understood that the legacy upon an inheritance obtained but not debated is a legacy by particular title? If so, what could then mean "universalities of assets determined according to their *nature*", which constitute the object of a legacy by universal title? Which should be the criteria on the basis of which the legacy upon an inheritance obtained and not liquidated is qualified as legacy by particular title, whereas the legacy upon a universality of assets determined according to their nature or origin is a legacy by universal title? The lawmaker himself, at article 1114 of the Civil Code, shows *in terminis* that the inheritance which is obtained by the testator but not liquidated has a universal character. So what does it mean the universality referred to by article 1056 of the Civil Code?

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[6] Eugen Chelaru, "Cartea a III-a. Despre bunuri, Titlul I. Bunurile şi drepturile reale în general", in *Noul Cod civil. Comentariu pe articole*, ed. Flavius Antonius Baias et al. (Bucharest: C.H. Beck Publ. House, 2012), 587.

[7] Gabriel Boroi and Carla Alexandra Anghelescu, *Curs de drept civil. Partea generală* (Bucharest: Hamangiu Publ. House, 2012), 75 and the following.

[8] Macovei and Dobrilă, "Cartea a IV-a", 1092.

[9] See for that matter also Dumitru C. Florescu, *Dreptul succesoral* (Bucharest: Universul Juridic Publ. House, 2011), 89.

Alternatively, we ask ourselves the following question: if we take into account an additional consideration of the universality of assets (other than the nature of assets and their origin, considered by law), such as all (or half and so on) of the movable assets of the deceased from the apartment owned in place "X" or all (half, and so on) the immovable assets of the deceased from the country "Y", would that legacy still be by universal title? Since an additional element to particularize assets interferes here, namely the place where they are situated, wouldn't perhaps be more just to qualify that legacy as a legacy by particular title?[10]? As pointed out before, the lawmaker refers at article 1056 paragraph (2) letter c) of the Civil Code to the criteria regarding the nature and origin of assets. But in the example provided above, the second individualization criterion regards the place where assets are situated and, together with it, assets are individualized in an additional way in our opinion and could constitute the object of a legacy by particular title.

Comparing the text of article 1056 paragraph (2) letter c) of the Civil Code currently in force with that of article 894 of the 1864 Civil Code, which seem to have the same finality overall, namely that of considering that the totality of movable or immovable assets of the deceased can constitute the object of a legacy by universal title, we consider that the second legal text mentioned above has been more advisedly drafted. This statement continues to be valid only if the current lawmaker intended to establish, by means of the expression "universality of assets determined according to their nature or origin" the totality of movable or immovable assets of the deceased, at least in part. And it seems that this exactly what the lawmaker mainly wanted to consider. Consequently, we ask ourselves whether it wouldn't have been more appropriate for the current Civil Code to maintain the expression used by the former Civil Code. It is true that, if that had been the case, the criterion regarding the origin of assets would not have been taken into account by the civil legislation currently in force, within the context subject to our analysis.

Finally, we consider that the issue subject to discussion is difficult to be handled, as the texts of the Civil Code, previously mentioned, are obviously contradictory. On the other hand, we consider that it can continue to be upheld the opinion within legal literature, according to which the totality (or a fraction) of the movable or immovable assets of the deceased should constitute the object of a legacy by particular title, being individualized and not constituting legal universalities.

The correct solution seems to be the correct qualification of the categories of legacies considered, according to the acknowledged definitions of legal universality and universality de facto. We can't see the use in not stating the type of universality and only consider the notion of universality in a generic way. This is also due to the fact that, even when is generically expressed, the term of universality cannot eliminate the different legal nature of the two categories to which is subject, nor the consequences related to the legal regime which emerge from here. Thus, legal universality, by law, constitutes all the rights and duties on the whole, whereas the universality de facto represents only a group of assets, lacking the liabilities side. Without doubt, the notion of universality de facto is useful within the legal field, but not for characterizing the object of a legacy by universal title. The latter has to involve a fraction from a legal universality, and to be correlated with some liabilities for which the legatee by universal title is accountable in a proportional way. If these liability items are absent, the solution is, in the case of a wrong legal qualification, to make o proposal *by lege ferenda* capable to insure a correct legal nature, according to which, in the case discussed, the legacy having as object the property or a right of property upon all or a share of the assets determined according to their nature or origin should be considered a legacy by particular title[11].

[10] For the contrary opinion, see Macovei and Dobrilă, "Cartea a IV-a", 1092.
[11] Pătraşcu and Genoiu, "Despre noţiunea şi felurile legatului", 891.

2.3. The current regulation of the legacy by particular title – the difference (result) of a subtraction operation, in which the subtrahend has a wrong value

As pointed out before, according to article 1057 of the Civil Code, any legacy which is not universal or by universal title is a legacy by particular title. Thus, out of all legacies (which in mathematic terms represent the minuend of our subtraction operation), we remove the legacies which are universal and by universal title (which constitute, as pointed before, the subtrahend) and we obtain the legacies by particular title (that is the difference). Yet, as we have tried to prove up to this point, this difference does not represent the correct result of the operation in question, because one of its components – the subtrahend (more precisely legacies by universal title, given that the regulation of the universal ones is exempted from criticism) is erroneous, as according to law, are considered legacies by universal title also some legacies which, through their specific elements, would rather fit in the categories of legacies by particular title. As pointed before, we are taking into account at this point the legacies concerning the property or a right of property upon all or a share of the assets determined according to their nature or origin.

We will continue by pointing out the specific features of the legacy by particular title and making a list of the legacies belonging to this category.

Thus, the legacy by particular title is that legacy which provides the right to inherit one or several determined assets, unlike the universal legacy and the legacy by universal title, which provide the right to inherit a universality or a fraction from a universality. Moreover, unlike the universal legatee and the legatee by universal title, the legatee by particular title is not accountable, in principle, for the liabilities of the inheritance [article 1114 paragraph (3) of the Civil Code]. In consequence, the difference between the legacy by particular title, on the one hand, and the universal legacy and legacy by universal title, on the other hand, is a qualitative one. The element of interest in this case too is the vocation to the inheritance and not the actual emolument obtained, as the value of the asset or of the assets constituting the object of the legacy by particular title can be bigger than the value of those constituting the object of the universal legacy or of the legacy by universal title.

Taking into account the provisions of the Civil Code currently in force, we consider the following legacies to be legacies by particular title[12]:

a) the legacy having as object movable or immovable assets, tangible assets, determined individually or according to their type;

By means of a legacy by particular title, it can be bequeathed the right of exclusive or common property (ideally only one share), the bare ownership or some rights of property (such as usufruct or homestead right).

b) the legacy having as object intangible movable assets, such as debt title (*legatum nominis*);

The testator can reward the legatee by particular title with a debt title, which has against a third person, or with other patrimonial rights, such as intellectual property rights or rights upon dividends or benefits.

c) the legacy by means of which the testator-creditor forgives the legatee-debtor of debts (*legatum liberationis*);

In this case, the debt of the legatee is extinguished from the moment the inheritance is opened.

d) the legacy upon a fact (possible and licit), by means of which the universal heir or the heir with universal title is bound to do or not to do something, on behalf of the legatee by

[12] The list does not include all the types of legacies by particular title encountered in practice and only aims to identify the main varieties of this type of legacy.

particular title (for instance the universal legatee is bound to pay the debt of the legatee by particular, in respect to a third party).

e) the legacy having as object the inheritance obtained by the testator, as universal successor or successor by universal title, not liquidated until his death (article 1114 of the Civil Code);

We mention that the inheritance obtained by the testator has a universal character only within the relation between him and the one leaving the inheritance. After receiving the inheritance, the latter can be transferred to someone else, even by means of acts *mortis causa*, representing only a particular group of assets[13], such as real rights, and not something universal. Thus, *de lege lata*, an inheritance obtained by the testator and not liquidated yet can constitute the object of a legacy by particular title.

f) the legacy of bare property upon one or several assets individually determined;

g) the legacy upon a property right involving one or several assets individually determined. *De lege lata*, qualifying the legacy upon bare ownership and usufruct is no longer controversial issue.

In conclusion, the legacy upon bare property shall be qualified as universal legacy, legacy by universal title or legacy by particular title, according to its object: the whole hereditary patrimony, only a part of the latter or only an asset or several singular assets. The legacy upon an usufruct (to which we assimilate the legacy upon any other property right), having as object all the hereditary assets, a share from the inheritance, all or a share from the universality of assets determined according to their nature or origin represents a legacy by universal title, whereas the legacy involving assets individually determined represents a legacy by particular title. Thus, the legacy upon a property right can only be by universal title or by particular title. This is the conclusion to which leads the interpretation of the provisions of article 1056 paragraph (2) letters b) and c) of the Civil Code.

We mention that the current Civil Code regulates (in some cases, even as novelty elements) some types of legacies by particular title, which evince certain specific elements. Such legacies are represented by: the legacy upon a life annuity or a maintenance debt title; the alternative legacy; the legacy upon someone else's asset; the conjunctive legacy[14].

Finally, we consider that, for the reasons expressed within the current study, the following types of legacy should also be considered legacies by particular title:

- the legacy upon all the immovable assets from a certain country or locality;
- the legacy upon all the movable assets from a certain place;
- the legacy upon a fraction from all the immovable assets within a certain country or locality;
- the legacy upon a fraction of all the movable assets from a certain place.

Then, we hope that some future civil regulations will qualify as legacy by particular title (and not by universal title, as it currently is) the legacy involving all (or a share of) the movable assets or immovable assets, as the case may be, of the deceased.

3. Conclusions

Our present study has dealt with the issue of qualifying the legacy by particular title (belonging to hereditary law), which we see as a task, a mission, an initiative evincing a certain degree of difficulty, particularly due to the fact the current Civil Code does not regulate another type of legacy appropriately, as it should, namely the legacy by universal title. As pointed before, the way that a legacy by universal title is regulated influences decisively the correct qualification of a legacy, as being one by particular title. But it is

[13] Constantin Hamangiu, Ioan Rosetti-Bălănescu and Alexandru Băicoianu, *Tratat de drept civil român* (Bucharest: 1929), 949.

[14] For more details regarding these types of legacies, see Genoiu, *Dreptul la moştenire în Codul civil,* 159-161.

precisely this aspect (regulating legacy by universal title) which the lawmaker fails to accomplish accurately. Consequently, unfairly in our opinion, some legacies are qualified, *de lege lata*, as being by universal title and not by particular title (the legacies having as object all the deceased's movable or immovable assets and, respectively, a fraction of the deceased's movable or immovable assets); in regard to the classification of other legacies (for instance the legacy upon all or a fraction of all the deceased's movable or immovable assets, from a certain country or locality or the legacy upon a universality, such an inheritance obtained by the testator and not liquidated yet), there are at least some shadows of doubt.

In conclusion, the present work has pointed out the features of the legacy by particular title, so that, guided by what it has been presented, we could make a correct qualification of a testamentary provision regarding the deceased's patrimony or assets, make a list of the main legacies belonging to this category and indicate and appreciate in a critical manner those texts of the Civil Code with incidence in the field of legacies, which evince a contradictory character or, at least, could generate controversies. We have included also some proposals *de lege ferenda* in our work (mainly that the legacies having a universality *de facto* as object are considered legacies by particular title), aimed to represent viable solutions for the issue regarding the legacy by particular title and, implicitly, the legacy by universal title, hoping that they will be taken into account by the lawmaker on the occasion of modifying the Civil Code.

References

- Bob, Mircea Dan. *Probleme de moşteniri în vechiul şi în noul Cod civil*. Bucharest: Universul Juridic Publ. House, 2012.
- Boroi, Gabriel and Anghelescu, Carla Alexandra. *Curs de drept civil. Partea generală.* Bucharest: Hamangiu Publ. House, 2012.
- Chelaru, Eugen. „Cartea a III-a. Despre bunuri, Titlul I. Bunurile şi drepturile reale în general". In *Noul Cod civil. Comentariu pe articole*, edited by Baias, Flavius Antonius, Chelaru, Eugen, Constantinovici, Rodica, and Macovei, Ioan, 579-747. Bucharest: C.H. Beck Publ. House, 2012.
- Deak, Francisc. *Tratat de drept succesoral.* II edition, updated and completed. Bucharest: Universul Juridic Publ. House, 2002.
- Florescu, Dumitru. *Dreptul succesoral.* Bucharest: Universul Juridic Publ. House, 2011.
- Genoiu, Ilioara. *Dreptul la moştenire în Codul civil.* Bucharest: C.H. Beck Publ. House, 2013.
- Hamangiu, Constantin, Rosetti-Bălănescu, Ioan, and Băicoianu Alexandru. *Tratat de drept civil român.* Bucarest: 1929.
- Macovei, Codrin, and Dobrilă, Mirela Carmen. „Cartea a IV-a, Despre moştenire şi liberalităţi". In *Noul Cod civil. Comentariu pe articole*, edited by Baias, Flavius Antonius, Chelaru, Eugen, Constantinovici, Rodica, and Macovei, Ioan, 997-1214. Bucharest: C.H. Beck Publ. House, 2012.
- Pătraşcu, Bogdan and Genoiu, Ilioara. „Despre noţiunea şi felurile legatului". In *Noul Cod civil. Studii şi comentarii,* edited by Marilena Uliescu, 807-832. Bucharest: C.H. Beck Publ. House, 2013.

INVESTMENT FUNDS ON ROMANIAN CAPITAL MARKET

Cristian GHEORGHE[*]

Abstract

National laws governing collective investment undertakings were updated as a result of European secondary law modernization with a view to approximating the conditions of competition between those undertakings at Community level, while at the same time ensuring more effective and more uniform protection for unit-holders. Such coordination intended to facilitate the removal of the restrictions on the free movement of units of UCITS in the internal market.

For the purposes of internal regulation UCITS means an undertaking: (a) with the sole object of collective investment in transferable securities or in other liquid financial assets of capital raised from the public and which operate on the principle of risk-spreading; and (b) with units which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings' assets.

The UCITS may be constituted in accordance with contract law (as common funds managed by management companies), trust law (as unit trusts), or statute (as investment companies).

Key investor information should be provided as a specific document to investors, before the subscription of the UCITS, in order to help them to reach informed investment decisions.

Investment funds enjoy in Romania a new regulatory framework: the contract of common society hosted by new Civil Code and the new Emergency Ordinance regarding UCITS.

Keywords: *capital market, investments, undertakings for collective investment in transferable securities (UCITS), financial supervisory authority, key information.*

Introduction

1. The Romanian Capital Market Act (Law no 297/2004) has regulated thoroughly the undertakings for collective investment in transferable securities (UCITS) since 2004 till 2012.

Following the amendments made on European level since 2009 (beginning with Directive 2009/65/EC of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)) Romanian legislator has chosen to recast the rules in an independent act, outside of consolidated Capital Market Act intended to comprise all the capital market regulations: GEO no 32/2012. This normative act encompasses many measures designed to rebuild the trust in a capital market continuously shaken by an endless economic crises.

The establishment of a financial supervisory authority (European Securities and Markets Authority, hereinafter 'ESMA', agreed by Regulation (EU) No 1095/2010 of the European Parliament and of the Council) is a strong signal of determination on European stage to coordinate the measures converging to build a uniform and efficient framework for capital market.

One of the new elements of the UCITS regulation is key investors information: the new law requires that an investment company and, for each of the common funds it manages, a management company draw up a short document containing key information for investors.

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Such information is intended to rapidly inform the investors on key information they need to make their investment decision.

The new law introduces specific rules and concepts which need scientific scrutiny in order to crystallize a convergent approach.

Undertakings for collective investment in transferable securities (UCITS)

2. Common forms of investment entities on the capital market are UCITS (Undertakings for Collective Investment in Transferable Securities), represented by open-end funds and investment companies. Although there are „closed" investment companies too, the law does not use linguistic form of "open" investment company, investment company designation remains to be understood implicitly as open-end investment company[1].

The essential characteristics of the UCITS are underlined by the law: the purpose of the entities (sole purpose pursued is conducting "collective investment", investing of fund money collected in financial instruments under conditions prescribed by law, including the principles of risk diversification and prudential management) and financial instruments issued (units are redeemable continuously to a value determined by reference to net assets value, at the request of holders)[2].

Redeemable character (continuous) of units issued by UCITS is an immanent mechanism, the essential element of the definition of these entities. This feature explains the open-end approach of the UCITS. Issuance and redemption of units, in a continuous manner, is the main mechanism of these investment vehicles.

The units will be issued on the capital market following the favorite principle "delivery versus payment". Symmetrically, withdrawal (redemption) implied payment of the amount of money calculated at the date of application for redemption, using a transparent algorithm designed for price fixing: by determining the net asset value per unit. Payment induced by such repurchases will be made within a "reasonable" time set by law to ten days of the filing date of redemption.

The distinction between investment funds und investment companies resides in the legal form of the entity: civil contract or incorporated company.

The law lay down a principle of non-reciprocity between large species of collective investment undertakings, UCITS and non-UCITS which are close-end funds and investment companies. Thus UCITS can turn into non-UCITS but *vice versa* transformation is prohibited[3].

Authorization of UCITS

3. Undertakings for collective investment in transferable securities are regulated entities of the capital market, subject to the approval of the authority of the market, *ASF* (Financial Supervisory Authority, former *CNVM*).

Authorization of UCITS is a gradual process that is preceded by the designated administrator authorization (such administrator being a management company), statutory documents authorization - i.e. civil contract and rules for the common fund and articles of association for the company - the choice of Depositary and approval of the prospectus[4].

The undertakings for collective investment are subject to multilevel scrutiny including their establishment, commencing of effective operations (continuous public offering of units) and continuous administrative supervision throughout the period of their existence.

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[1] See C. Gheorghe, *Capital Market Law*, Bucharest: CH Beck, 2009, p. 121.
[2] GEO no 32/2012, Art. 2, para. 2.
[3] *Ibid*., Art. 2, para. 6-7.
[4] *Ibid*., Art. 63, para. 2.

The actual authorization of UCITS is preceded by assessment of reliability and professional experience of the persons in charge within management company and their ability to impose prudential rules, the reliability of the depositary and its capacity in order to maintain accurate records of the UCITS's asset.

Operations of investment funds begin with a public offer of their own units. Authorization required for public offer of units implicates verifying the legality of the prospectus (available in a plain format and a concise and simplified form, format known as key information). In a general manner is acknowledged that prospectuses must contain all the information necessary for investors to independently assess units offered for investment, in terms of potential gains and risks involved[5].

Investment funds

4. Investment (common) funds are civil contracts, unincorporated association, directed of a management company, authorized by ASF. Titles publicly offered are fund units, redeemable continuously at a price based on the net asset value of the fund[6].

From the legal point of view the civil contract establishing the fund is an adhesion agreement whereby investors become part (of the contract) by subscribing units and signing a declaration in accordance with art. 93 par (3) of GEO no 32/2014 regarding the prospectus. In present, new Civil Code regulates extensively the "contract of society" (partnership) and "common society" (common partnership), an unincorporated association[7]. Even such rules cannot regulate entirely the articles of association, the civil contract of the investment fund. Despite contractual principles, the investment fund issues shares (units) continuously (and redeemable) ignoring the consent of the other members of the fund. Free entering and withdrawal from the contract (association) are inappropriate for "contract of society" and contractual matter in general. At their will investors can choose the time of withdrawal from investment fund, without the consent of the other parties, and without payment of compensation.

Statutory framework.

5. Along with the partnership agreement (civil contract), an investment fund has a statutory framework including the fund rules (annex to the prospectus[8]) and the prospectus itself. Capital Market Act induces statutory limitations for common funds. Units issued by open-end funds shall bee of one type, fully paid upon subscription, registered, dematerialized and shall give equal rights to their holders[9]. Holding of fund units is attested by a certificate confirming ownership. These units are purchased at the issue price and the open-end funds do not issue other financial instruments except for units.

6. *Civil contract.* The essence of the common fund rests in its unincorporated nature, in its pure contractual basis. Thus all subscribers of units shall adhere to civil contract. In this way the legal "contract of society" - a mutually binding promise, multilateral legal deed - suffers a continuous modification of the parties and its content (related strictly to extinguish or existence of rights and obligations of the parties who withdraw or adhere to partnership). The particularity of the partnership, ignored by the law, is the demand of the parties' consent in order to amend the initial contract. In Contact Law doctrine, concluding, modification or extinction of a contact rest in parties' consent, any exception being insulated with prudence.

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[5] GEO no 32/2014, Art. 93 para. 1.
[6] GEO no 32/2014, Art. 71.
[7] Civil Code, Art. 1890-1948.
[8] GEO no 32/2014, Art. 68, Art. 93 para. 2.
[9] *Ibid*., Art. 69. Old law prescribed units on material support.

Capital market law doesn't pay much importance to that old civil principles and removes easily the unanimity rules, the parties' consent; what remains is the new investor's (subscriber of the fund) consent to statutory framework of the investment fund. Legal innovation is an extreme one, but governed by rules laid down for investment funds[10].

Although the absence of express provision to compensate lack of consent of the parties is embarrassing, we cannot fail to notice that this mechanism ensure a uniform approach of the UCITS. In the case of investment company, the nature of share raises no question in purchasing or selling company's share. The nature of transferable securities permits the continuous withdrawal and entering the company without shareholders' consent. Units in investment funds are declared transferable securities too. Thus explained the functioning of the investment fund but are hard to accommodate with contractual nature of the investment fund. We have to assume that the act of subscription (entering civil contract) means consent of the person to future amendments to the articles of association of the fund, regarding the parties, without his express consent. Interpretation should be strictly limited to the parties' person of the common fund because the partnership cannot suffer other material changes, in its content or subject, without all parties' consent.

7. The minimum provisions of the partnership of the fund is fixed by the law[11] and concern: the name of the fund, the legal foundation, duration of the fund, objectives, units (definition, description, initial value), the management company and its maximum management fee, the Depositary and its maximum fee, clauses for liquidation and merger of the funds (procedure for investors protection), litigation (method of settlement, competence), termination clause, the rights and obligations of the parties (specifying in principal that investors become part of the contract by signing the subscription form and a declaration confirming that they have received, read and understood the fund prospectus.

All these provisions should be accepted as special contractual arrangements overlapping the common provisions regarding civil contract, "contract of society" from Civil Code.

8. *Fund rules*. Besides the partnership agreement investment fund is preparing a document describing its objectives and entities involved in its activities (management company and depositary company). This document is known as the fund rules.

Importance of rules does not end with declaring the management company and depositary. This document contains information of the utmost importance for investors represented by financial goals. All financial objectives - as planned capital raised, expected income, investment policies, the main categories of transferable securities suggested for investment, portfolio protection systems (hedging techniques), the minimum recommended duration of investments, risk factors associated with the investments policy of the fund - are elements of distinction among different investment funds on the capital market.

Fund rules reveal the intentions and investment policies assumed by management company of the fund, containing a reference point for assessing the result that shall be achieved in the future.

Fund rules contain also specific details of the mechanism of determining the net asset value of the fund (asset valuation method, net asset value, the frequency of calculating the net asset value and channel of publication of this value, the initial value of a unit).

[10] See C. Gheorghe, *Capital Market Law*, Bucharest: CH Beck, 2009, p. 124.
[11] CNVM Regulation no 15/2004; Annex no 4, still in force.

Financial instruments. Prospectus.

9. Units in undertakings for collective investment in transferable securities are qualified as financial instruments[12]. Units of investment funds are a type of financial instruments defined by the Capital Market Act. Investment funds, based on civil contracts ("contract of society"), are therefore entitled to issue securities, units of the fund. From the Civil Law perspective this is a notable exception. From the Capital Market Act perspective this situation is totally regulated. The document governing the issue of financial instruments by investment fund is the prospectus, subject to authorization by ASF[13].

Beyond the civil statutory framework of an investment fund, issuing units is a distinct activity of the fund, supervised by ASF. Authorization of the civil contract and the fund rules is followed by prospectus authorization and continuous supervision throughout the life of the fund.

10. Minimum information covered by the prospectus is laid down by administrative regulation (ASF)[14]. The law organizes provisions in distinctive chapter: Management Company of the fund, Depositary, preparation and distribution of financial statements, rules for the determination and allocation of income and procedure for investors' payments in case of redemption application, channel of disclosure for investment fund reports and papers. In particular prospectus include information relative to fees and other charges (fees borne by investors: purchase fees, redemption fees, fees payable to the management company, the depositary), merger and liquidation of a fund (circumstances in which a fund may merge with another fund or be liquidated, and procedure implied, unit holders' rights) but also tax system (taxes borne by the investors).

Data from prospectus contain detailed information for investors in order to have a complete picture on risks induced by the purchase of units[15]. The prospectus shall include a clear and easily understandable explanation of the fund's risk profile.

Information regarding fund's auditor and the group of companies management company or auditor belong to are also revealed by prospectus.

The prospectus of the investment fund must prevent potential investors, through a standard formula, that the investment funds "are not bank deposits", that ASF authorization "does not imply any endorsement or evaluation by ASF of securities quality" and that investment funds involves not only their specific advantages, but also the risk of failure of objectives, including losses to investors[16].

Moreover, always when past returns (including advertisements) are revealed, a warning formula, which became almost solemn, is required: „the fund's past performance is no guarantee of future results."[17]

Key investor information

11. Key investor information should be provided as a specific document to investors, before the subscription of the UCITS, in order to help them to reach informed investment decisions. Such key investor information should reveal the essential elements for making such decisions.

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[12] Law no 297/2004, Art. 2 para 10 d).

[13] See C. Gheorghe, *Capital Market Law*, Bucharest: CH Beck, 2009, p. 126.

[14] CNVM Regulation no 15/2004, Annex no 8. See also Directive 2009/65/EC, Annex 1 Schedule A.

[15] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), Art. 69: The prospectus shall include the information necessary for investors to be able to make an informed judgment of the investment proposed to them, and, in particular, of the risks attached thereto.

[16] CNVM Regulation no 15/2004, Art. 91 para. 3.

[17] *Ibid*., Art. 170.

Key investor information shall include information about the characteristics of the UCITS concerned, which is to be provided to investors so that they are reasonably able to understand the nature and the risks of the investment product offered to them.

The nature of the information to be found in the key investor information should refer to identification of the UCITS; a short description of its investment objectives and investment policy; past-performance presentation or, where relevant, performance scenarios; costs and associated charges; and risk/reward profile of the investment, including appropriate guidance and warnings in relation to the risks associated with investments in the relevant UCITS[18].

Key investor information should be presented in a short format. A single document of limited length presenting the information in a specified sequence is the most appropriate manner in which to achieve the clarity and simplicity of presentation that is required by retail investors.

Conclusions

12. European secondary law on UCITS continues a modernization process with a view to approximating the conditions of competition between those undertakings at Community level, while at the same time ensuring more effective and more uniform protection for unit-holders. Such coordination intended to facilitate the removal of the restrictions on the free movement of units of UCITS in the European internal market.

Such regulations should facilitate investment protection and national treatment in order to have a level playing field.

Romanian regulations are intended to facilitate and implement the European legislative guidelines.

References

- St. D. Cărpenaru, *Tratat de drept comercial roman*, Bucharest: Universul Juridic, 2012.
- C. Duţescu, Legea privind piata de capital. Comentariu pe articole, Bucharest: C.H. Beck, 2007.
- Francisc Deak, *Tratat de drept civil. Contracte speciale*, vol III, 4th Edition, Bucharest: Universul Juridic, 2007.
- Fuerea, *Drept comunitar al afacerilor*, Bucharest: Universul Juridic, 2003
- D. Gălăşescu-Pyk, Acţiunile privilegiate în societăţile anonime. Studiu de drept comparat şi De Jure Condendo, Bucharest: Curierul judiciar S.A., 1930.
- I.L. Georgescu, *Drept comercial român*, Bucharest: CH Beck, 2013.
- Gheorghe, Societăţi comerciale, Voinţa asociaţilor şi voinţa socială, Bucharest: All Beck, 2003.
- Gheorghe, *Drept comercial european*, Bucharest: CH Beck, 2009.
- Gheorghe, *Dreptul pietei de capital*, Bucharest: CH Beck, 2009.
- C. Hamangiu, I.Rosetti-Bălănescu, Al. Băicoianu, *Tratat de Drept Civil Român,* Bucharest: All, 1996.
- N.K. Kubasek şi a., *The legal environment of business*, Prentice Hall, Upper Saddle River, New Jersey, 1996.
- O. Manolache, *Drept comunitar*, Bucharest: All Beck, 2003.
- T. Prescure, N. Călin, D. Călin, *Legea pieţei de capital, Comentarii şi explicaţii*, Bucharest: C.H. Beck, 2008.
- M. Şcheaua, Legea societăţilor comerciale nr. 31/1990, comentată şi adnotată, Bucharest: Rosetti, 2002
- Turcu, Teoria şi practica dreptului comercial român, Bucharest: Lumina Lex, 1997.
- Ţuţuianu, Piaţa de capital. Regimul juridic aplicabil participanţilor, Bucharest: Hamangiu, 2007.

[18] GEO no 32/2012, Art. 98. See also Directive 2009/65/EC, Art. 78.

SOME CONSIDERATIONS REGARDING THE DELIVERY METHODS OF LEGATES IN ROMANIAN LEGISLATION

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Abstract

Legacies have an important influence in the Romanian law, respectively in the succession law. So that the legate was defined as the legal act encompassed in a testament by which the testator shall designate one or more persons who, at his death, will receive the entire heritage, a fraction of it or specific assets of the testator.

Precisely for this reason, the Civil Code covers a number of conditions related to teaching legacies in art. 1128-1129, which says that teaching legacy is done according to the typology, namely: universal legatee, legatee with a universal title or legatee with a particular title.

In this context, we can define the teaching of the legatee as remission of the goods forming the object of possession of the legatee.

Keywords: *universal legatee, legatee with a universal title, legatee with a particular title, succession law, possession*

Introduction

The legate is the legal document contained by a will by which the testator names one or more persons which, at his death, shall receive the whole patrimony, a fraction of it or specific assets from the testator's patrimony[1].

Legatees are not usual inheritors, and therefore can obtain possession of the goods forming the subject of the legacy with which have been gratified only by demanding the delivery of the legacy (Art. 1128 to 1129 of the Civil Code). By the delivery of the legacy, the legatee is allowed to make only by acts of conservation. He can not exercise any right or action, except the right to require the delivery of the legate. [2]

We can define the delivery of the legacy as being the remission material of possession of the goods that form the subject of the legate either in consent to their actual taking in possession.

If the object of the legate consists of generic goods or obligations, the delivery is made by payment.

It can be said that the legatee becomes the owner of the goods and also, he also acquires the status of holder of the rights contained by the legate at the date of opening the succession.

According to the civil code, in article 1128-1129, delivering the legate is made depending on its typology, respectively: universal legate, legate with universal title or legate with a particular title.

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[1] D. Macovei, I.E. Cadariu, *Civil Law.Successions,* Junimea Publishing house, Iaşi, 2005, p. 107; Fr. Deak, *Succesoral law treaty,* Ed. Actami, Bucureşti, 1999, p.126.

[2] L. Stănciulescu, op.cit., p. 204.

1. Delivering the universal legate

According to article 1055 from the civil code, the universal legate is the disposition by which it is conferred, to one or more persons, vocation to the whole inheritance.

No legatee even if universal, with universal title or with a particular title does not rightfully have the seisin[3].

By the new dispositions of the civil code, all inheritors*: surviving spouse, descendants and ascendants privileged.

In light of the law no.36/1995, entry into possession of the inheritance, by the universal legatee is made and takes effect as in the case of unseisin legal heirs, by releasing the certificate of inheritance by the public notary (after settling disagreements by the court if necessary) in all cases where the legal heirs have not consented voluntarily to the succession's dominion by the universal legatee. [4]

The Universal legatee may request coming into possession of the actual inheritance from unseisin legal heirs. If there are no such heirs or they refuse, the universal legatee comes into possession of the heritage by releasing the certificate of inheritance (art.1128 par. 1 Civil Code.).

When the deceased has no heirs that enjoy succession reserve , the legatee comes into possession of the goods contained in the will upon request by the release of the certificate of inheritance.

If the universal legatee was established by an authentic testament, the pubic notary, also to summon only by heirs that enjoy succession reserve, and in default of heirs, only the universal legatee.

If the will is handwritten, it also cites other legal heirs. In both cases the executor will also be summoned if it was appointed by will.

Based on the final conclusion of the succession debate, the public notary will draw up the certificate of heir or legatee, which will include the name and quality of heirs and their respective shares of the estate of the deceased.

The universal legatee will be sent in possession by releasing the certificate of inheritance, even when he is also the legal heirs that enjoy succession seisin reserve, for what he gains over its share of legal heir.

Making a simple observation, we can conclude that the entry of the universal legate in the possession of the actual heritage can be achieved when:

- inheritors that enjoy succession reserve willingly consent, express or implied, to the possession of the heritage by the universal legatee[5];

- in the absence of heirs in the event that they exist but refuses the heritage, the universal legatee comes into actual possession of the inheritance by issuing the certificate of heir by the competent public clerk;

- the universal legatee shall be issued by the competent public notary the certificate of inheritance, after the settlement by the court of disagreements related to the inheritance that arose between the implicated parties[6].

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[3] Dumitru C. Florescu, *The succesion law in the new civil code. Second edition, revised and completed,* Universul Juridic Publishing house, Bucureşti, 2012, p. 210.

[4] See Francisc Deak, *succession right treaty*, second edition, updated and completed, Universul Juridic Publishing house, Bucureşti, 2002, p. 473.

[5] See Ilioara Genoiu, *The right to inheritance in the new civil code,*C.H.Beck Publishing house, Bucureşti, 2012, p. 407.

[6] See Mihail Eliescu, *Succession course,* Humanitas Publishing house, Bucureşti, 1997, p. 83

2. Delivering the legate with an universal title

According to art. 1055 of the Civil Code, universal title legate represents a testamentary disposition that gives one or more persons vocation at a fraction of the inheritance[7].

Particular to the universal title fund of the legate is that it covers a part of the legacy as well as a half, a third of all buildings and all the furniture, or a fraction of the estate or movable property, or a granulation of them[8].

The text of art. 1128 par. 2 Civil Code says that the universal title legatee may request entry into possession of the actual inheritance:

- from the heirs that enjoy succession reserve if there is only this category of legal heirs;

- from the universal legatee which came into possession of the actual heritage;

- heirs that do not enjoy succession reserve from heirs who came into possession of the heritage either by law or by the release of the certificate of inheritance.

If there are no heirs, nor universal legatee or heirs that do not enjoy succession reserve that got in possession of the heritage, or they refuse entering in possession, "the universal title legatee comes into possession of the heritage by releasing the certificate of inheritance" (art.1128 paragraph 2 Civil Code.).

The universal legatee may request entering in possession, under the same conditions as the universal legatee, in addition, he can ask to be put in possession of the acquired assets also from the universal legatee. [9]

According to the doctrine[10], the text of law contains a loophole, since in the light of the new Civil Code, only heirs who are also sesin heirs and heirs that enjoy succession reserve get legally a hold of the legacy. Heirs that do not enjoy succession reserve not being seisin heirs, can not come in to rightful possession of the inheritance. Therefore, it can be said that the expression of the legislator "... heirs that do not enjoy succession reserve not who came in possession of the inheritance either rightful is ...." is incorrect.

The legatee with universal title has the right to the fruits of the succession goods from the moment he requested to come in possession or when he was handed the legate (by persons liable to execution) [11].

The request of the legatee with universal title of coming in actual possession of the inheritance will be addressed, according to article 1128 paragraph two of the Civil Code, to the public notary, by releasing the inheritor certificate, if such heirs do not exist or refuse. Also in the case of the legatee with universal title, it is possible that we see misunderstandings between parties, therefore the public notary will release the heir certificate, after solving the issue by the court.

In conclusion, in the case of the legatee with universal title, there can be seen the two methods of coming in actual possession of the inheritance, willingly or trough the public notary, if the case, after solving the misunderstandings by the court.

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[7] By law, we can list some meanings of "fraction of inheritance":
- Ownership of a share of the inheritance (half, quarter, etc..)
- Partition ownership of all or a share of the inheritance;
- Property or one partition of the totality or on a share of the universality property caused by nature or their origin.

[8] See Dumitru Văduva, *Legal inheritance. Liberalities*, Universul Juridic Publishing house, Bucureşti 2012, p. 171.

[9] See I. Popa, *op.cit.*, p. 346.

[10] Ilioara Genoiu, *The right to inheritance in the new civil code*, C.H.Beck Publishing house, Bucureşti, 2012, p. 408.

[11] L. Stănciulescu, *Civil law course. Successions*, Hamangiu Publishing house, 2012, p. 206.

3. Delivering the legate with universal title

The right of the legatee with particular title over the tied object is born on the day of death of the testator, meaning he acquires ownership of an individual item determined from the date of opening the inheritance. (Article 1059 Civil Code)

The Civil Code does not define positively the legate with particular title but negatively, specifying in article 1057 that any other disposition other than those limitedly qualified will be a legate with universal title is a legate with particular title[12].

According to article 1129 of the Civil Code, the legatee with particular title comes in possession of the object of the legate from the day this has been given to him willingly or in absence, from the day of submission to the court of the delivery request.

For example[13], if the legate has as object the liberation of the legatee from a debt to the deceased (legatum liberation) there are no problems imposed at the execution of the legate because the debt disappears from the date of the opening of the succession. And in case of big amounts deposited at CEC and for which the legatee was designated by testamentary clause, he can request the release of the amounts in the account, based on the clause, from the moment of the succession's opening.

We specify that the legate with particular title will be submitted by the legal heirs or universal legatees or with an universal title. So that the delivery of the legate can be requested from the moment of the succession's opening, without waiting for the partition of the heritage[14].

The delivery of the legate will be requested from the legal heirs, or from the universal legatee or with universal title, if the case, and when the testator has instructed another legatee with particular title with the payment of the legate, delivery will be requested from him. In case of amounts of money deposited at CEC, when the legatee was instructed by testamentary clause, he can request the amounts deposited in the account from the moment of the succession's opening[15].

The term "delivering the legate" has the same terminology used in the Civil Code from 1864, therefore in what concerns the legatee with particular title, the language used by the new Civil Code, is the same.

Making a difference between the universal legatee or with universal title and the legatee with particular title, we can observe that the legatee with particular title can not use the petition of heredity or the action for partition for gaining the object of the legate.

The legatee with particular title can use two methods which are:

- a personal action whose object are generic goods or obligations.

- a real action, which may be an action for recovery, if the object of the legate is a proprietary right over an individually determined object, or the confessor action[16] (if it has been let for him another real right) [17].

The delivery of the legate with particular title is not necessary when the object of the legate with particular title is represented by the liberation of the legatee of a debt to the deceased, in which case the debt disappears from the date of the succession's opening[18].

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[12] See Dumitru Văduva, *op.cit.*, p. 172.

[13] See Francisc Deak, *Succession right treaty*, second edition, updated and supplemented, Universul Juridic Publishing house, Bucureşti, 2002, p. 475.

[14] See M. Eliescu, *op.cit.*, vol. II, p. 83-84.

[15] Fr. Deak, op. cit., p. 532.

[16] The real action by the plaintiff asked the court to set the judgment that will decide that he is the holder of a real right dismemberment of ownership (usufruct, use, habitation, servitude or superficies) on the property of another and to oblige the defendant, who may be the owner or other person, to enable the pursuit of full and undisturbed. It is a INTERPLEADER as questioning the actual existence of the right applicant. Unlike the other suitors actions, it is prescriptive period of 30 years.

[17] See Trib.Suprem, s.civ., dec. Nr. 875/1969, în R.R.D. nr. 2/1970.

[18] See I. Rosetti-Bălănescu, Al.Băicoianu, op. cit., p.583.

The delivery of the legate with particular title is not necessary when the object of the legate with particular title is represented by an individually determined object, in which case, the legatee receives its propriety, based on the dispositions of article 1059, paragraph 1 of the Civil code from the moment of the succession's opening[19].

According to article 1049 paragraph 2 of the Civil Code, the delivery of the legate with particular title is not necessary when the object of the legate is represented by amounts of money, valuables or valuable titles, deposited at specialized institutions, and the legatee was designated trough the testament of the amounts and valuables deposited, in which case the specialized institutions will not be able to proceed in delivering the legate, unless based on a court's decision or of the heir certificate, which establishes the validity of the testamentary disposition and the legatee quality.

Although the legatee with particular title is not held by the payment of the heritage liabilities, he can not request the delivery of the legate until the full payment of the debts of the inheritance, even if unsecured, the application being made based on the principle *nemo liberalis nisi liberatus. The creditors of the inheritance are prefered in favor of the singular legatee*[20]. *If it's about the* heirs that enjoy succession reserve and they consider that their succession reserve has been violated they can request the reduction of the legate limit of the available shares[21].

The legatee with particular title will come in possession of the legate object from the date of release of the legatee certificate(notary act) or after the release of the legal decision of the court(to the right of usufruct for example) or a personal action in the event that the singular legatee has a right to claim[22].

In conclusion, the delivery of the legate with particular title shall be made by the rules of the universal title legate. But in the case of the legate with particular title, delivery can be requested also from the legatee with universal title and even from the legatee with particular title, instructed by the testator with its payment.

Unlike the Civil Code from 1864, which contains express and direct references to seisin only in one legal text, the new civil code dedicates to this legal institution five articles, regulating it under all aspects that it presents[23].

So law number 287/2009 offers first of all an appropriate definition of seisin. Also the new civil code assigns seisin to the surviving spouse.

A very important thing represents the change and use of some terms, such as "actual possession of heritage" in stead of "possession of heritage" and "coming in possession of the ingeritance" in stead of "sending into possession", with the purpose of avoiding any confusion between seisin and rightful common possession.

The universal title legatee can harness the successional rights within the notarial succession procedure, obtaining the inheritor certificate(legatee) as proof of the legatee quality that the notary establishes based on the testament that fulfills legal shape conditions, does not contain dispositions that are against the law and does not bring harm to the rights of heirs that enjoy succession reserve or their approval exists.

Law number 36/1995 expressly states that, under the circumstances, "the notary could have established the rights of the legatee particular, of the goods specified by will" and can proceed with the consent of the heirs, even to reduction of liberalities, up to the limits set by law[24].

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[19] Ilioara Genoiu, *The right of inheritance in the New Civil Code*, CH Beck Publishing House, Bucureşti, 2012, p. 409.
[20] See Trib. Suprem, col. civ., decizion nr. 1192/1957, în Repertoriu I, p. 443.
[21] See Trib. Suprem, civil section, decizion nr. 1393/1978, în C.D. 1978, p. 129-131.
[22] See I. Popa, *op.cit.*, p. 346.
[23] See Ilioara Genoiu, *op.cit.*, p. 409.
[24] See Francisc Deak, Treaty of succesoral law, the second edition, updated and supplemented Legal Publishing House, Bucureşti, 2002, p. 476.

References

- Boroi G., Liviu Stănciulescu, *Civil institutions in the regulation of the new Civil Code*, Hamangiu Publishing House 2012
- Deak Francisc, Treaty of succesoral law, the second edition, updated and supplemented Legal Publishing House, Bucharest, 2002
- Fr. Deak, *Treaty of succesoral law*, Ed Actami, Bucharest, 1999
- Dumitru C. Florescu, Succession law in the new Civil Code. Second edition revised and enlarged, Legal Publishing House, Bucharest, 2012
- Eliescu Mihail, Course of succession, Humanitas Publishing House, Bucharest, 1997
- Genoiu Ilioara, The right of inheritance in the New Civil Code, CH Beck Publishing House, Bucharest, 2012
- Macovei D., Cadariu I.E., *Civil Law. Succession*. Junimea Publishing House, Iași, 2005
- Popa I. *Course of succesoral law*, Legal Publishing House, Bucharest, 2008
- L. Stănciulescu, *Civil law course. Successions*. Publishing House Hamangiu 2012
- Văduva Dumitru, *Legal heritage. Liberties.* Legal Publishing House, Bucharest, 2012
- The project of the New Civil Code, Bucharest: CH Beck, 2006.
- Civil Procedure Code, republished in the Official Gazette of Romania, Part I, no. 45 of February 24, 1948, as amended and supplemented.
- Civil Code of 1864, published in Official Gazette no. 271 of December 4, 1864, no. 7 of January 12, 1865, no. 8 of January 13, 1865, no. 8 of January 14, 1865, no. 11 of January 16, 1865, no. 13 of January 19, 1865, as amended and supplemented.
- Law no. 36/1995 on public notaries and notary activities, republished in the Official Gazette of Romania, Part I, no. 732 of October 18, 2011, as amended and supplemented.
- Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, published in the Official Gazette of Romania, Part I, no. 409 of 10 June 2011.

ASPECTS CONCERNING THE PUBLICITY OF MOVABLES AND IMMOVABLES IN THE MARITIME FIELD

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Abstract

This document presents elements of publicity for a specific category of goods, namely, ships. It also analyzes the recording and registration of Romanian flag ships. Each of these items requires special procedures, depending on the operation recorded where the ship is registered.

The registration of ships under construction and especially of Romanian flag ships, the granting, suspension and withdrawal of the right to navigate under the Romanian flag, the registration and removal of ships from records, the acquisition, transmission, transcription and extinction of real rights and/or obligations regarding ships and the procedure for issuance, extension of validity and renewal of the nationality documents require compliance with certain procedures.

The present article may interest professionals concerned with these notions that are often met in maritime law and, to a lesser extent, in common law.

Keywords: *ownership right, movable and immovable, publicity, ships, recording and registration of flag vessels*

Introduction

The chosen topic is rather vast, since in the maritime field there is a wide category of goods that are being used and transported by water. In this article I will use the term "maritime" with a general meaning, referring both to the maritime and to the fluvial sphere.

My attention has focused on the publicity of goods, since I have observed that in the field of maritime law, the theory speaks little of the goods publicity operations, while legal practice faces different cases in this field.

My study has emerged based on discussions held with several persons working in the maritime field, not necessarily in the field of maritime law. I have thus come to the conclusion that, when talking about maritime law, we first think about the concept of "ship" and then about its utility. For this reason, I will begin my article with a definition of the "ship" and I will continue with some discussions regarding the ownership right, and the ownership right over a ship. I will end my article with notions in the field of the publicity of movable and immovable property, as well as aspects regarding the publicity of ships.

1. The concept of "ship"

The "ship" is a good, an object which the Romanian legislation, especially the one before 1989, has not specifically defined, having only referred to it and having let it to the doctrine to find an appropriate definition for it. I this respect, we mention the provisions of article 490 of the Comm. Code (the former commercial code), which stated that the *ships are movable goods. The boats, tools, instruments, weapons, ammunition, supplies and, in general,*

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all things intended for its permanent use are part of the vessel[1]*, even when they are separated from the vessel for a certain period of time.*

The "ship" was given a definition among the provisions of the Government Ordinance [O.G.] no. 42/1997, which stipulate that there are ships, for the purpose of this ordinance, maritime and fluvial ships of any kind, propelled or unpropelled, sailing on the surface or submerged, designed for the transport of goods and/or persons, for fishing, towage or propelling, floating devices such as: dredgers, floating elevators, floating cranes, floating grips, floating grabs and the like, propelled or unpropelled, as well as floating facilities which are normally not intended to be moved or for performing special works, such as: floating docks, floating wharves, pontoons, floating hangars for ships, drilling platforms and the like, floating lighthouses, small crafts and crafts intended for leisure activities[2].

The same legislative act, Government Ordinance [O.G.] no. 42/1997, also regulates the legal status of the installations, machines and engines which propel the ship or which produce another mechanical action, of the mechanisms and means necessary for the transmission of the mechanical action, as well as of all the equipment necessary for navigation, for the different manoeuvres, for the safety of the ship, for saving human lives, for the prevention of pollution, for hygiene and for the exploitation of the ship according to its intended use, including the legal nature of supplies.[3]

The legal classification of ships in the category of movable/immovable goods has raised issues regarding the identification of the category of goods the ships belong to. There are several instances in which ships are assimilated to immovable goods or they are governed by the rules regarding immovable goods. However, they cannot be classified with certainty as belonging to the category of immovable goods since that would be in violation of the explicit provision of the legislation in force, according to which ships are movable goods.

Each ship has to be registered administratively, in order to be distinguishable from the other ships, but also for the proper recording of the mentions and privileges of the respective ship. The doctrine has ruled that there are four elements necessary for the identification of a ship, namely: the name, the tonnage, the port of registration and its nationality. According to the current legislation, in order to correctly establish the elements of identification of the ship, it is necessary to consider the category of the respective ship.

We have to keep in mind that maritime ships, propelled inland waterway vessels, self-propelled floating devices and installations are distinguishable by a name proposed by the owner and approved by a competent authority, which is the Romanian Naval Authority [Autoritatea Navală Română] (A.N.R.). Unpropelled inland waterway vessels, leisure vessels, and unpropelled floating devices and installations are distinguished by a registration number issued by the A.N.R., and may carry a name, on request by the owner and with the approval of the harbour master of the registration harbour.

The first element of identification of the ship is, depending on the case, the name or the registration number, which has to be painted on the body of the ship and has to stand out. The records of the maritime ships under Romanian pavilion is kept in the Registry of maritime ships [Registrul matricol al navelor maritime] by the harbour masters established by the decision of the general manager of the A.N.R. Inland waterway vessels are registered in the Registry of inland waterway vessels [Registrul matricol al navelor de navigaţie interioară] by the harbour masters established by the decision of the general manager of the A.N.R. A.N.R. keeps record of these ships in the Central Registry [Registrul de evidenţă centralizată].

[1] Meaning "ship".
[2] Art. 23 of Government Ordinance [O.G.] no. 42/1997 republished.
[3] Art. 24 of the same legal document.

The ships under construction are inscribed in the Registry of ships under construction [Registrul de evidenţă al navelor în construcţie], which is kept by the harbour master on whose territorial jurisdiction the shipyard is located.

The nationality of the ship is the second element of identification. And this element is important in terms of the advertisement of movable goods, for the same reasons as the first element.

Pursuant to Government Ordinance [O.G.] no. 42/1997, ships have the nationality of the state in which they are registered and whose flag they are authorized to fly. The nationality of the ship represents the feature of belonging to a state whose flag it flies, whose protection it enjoys and under whose jurisdiction it is. In order to achieve or to be granted Romanian nationality, two conditions have to be met cumulatively, namely the ships have to be registered in Romania ant to have obtained the right to fly under the Romanian flag.

Regarding the use of the ships, it also regards the cargo of the ship, as well as the document showing the loading of the cargo on a ship (the loading policy), known as the *bill of landing*. There is the need to first establish what good is referred to before establishing the person in whose patrimony the respective good belongs.

Nevertheless, we will only analyze the ships in this research, as mentioned in the beginning of the material.

2. The ownership right and other real rights over the ship

2.1. When talking about the ownership right, we think about normative acts regulating property, as well as of a common definition for all the goods over which property s bore. Thus, the fundamental law regulates ownership in two articles, art. 44 and art. 136. These legal provisions do not define ownership; they only show its types and its place in the Romanian legal system.[4]

The old regulation provided for in the 1864 civil code, defined ownership as *the right someone has to enjoy and to command over a good exclusively and absolutely, but within the limits imposed by the law*[5]. The doctrine in the field has extended the definition, adding to it, in the sense that the ownership right has started to be considered the real right that entitles the holder to use the good according to its nature or purpose, to use and to command over the god absolutely, exclusively and perpetually, within the limits of the law and to the extent there is no prejudice to someone else's right.

From this definition have also been drawn the attributes of the ownership right, respectively the right to possess the good, the right to use the good, as well as the right to command over the same good. All these three attributes are recognized for the owner of the good.

The new civil code regulations delineate the types of ownership in art. 552 and subsequently, in art. 555 ownership is defined through its very attributes, namely the scope of the ownership right[6]. Starting from this definition, the new regulation of the ownership right

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[4] Art. 136 of the Constitution of Romania
(1) Property is public or private.
(2) Public property is guaranteed and protected by the law and belongs to the state or to territorial administrative units. (...).
(5) Private property is inviolable, under the organic law.
Art. 44 of the Constitution of Romania.
(1) The ownership right, as well as state bonds, are guaranteed. The contents and the limits of these rights are established by law.
(2) Private property is equally guaranteed and protected by the law, regardless the owner. (...)
(7) The ownership right requires compliance with the duties regarding environmental protection and good neighbourliness, as well as of the other duties incumbent upon the owner by law or by custom.

[5] Art. 480 of the 1864 Civil Code.

[6] Art. 555 – The scope of the right to private property

brings into question the attributes of the right to property, respectively possession, use and control.

Nevertheless, according to some authors, the attributes are possession, use, the right to capitalization, as well as control. This enumeration does not substantially alter the composition of the attributes; it only prepares for the discussions which follow on the division of the ownership rights, thus on the other main real rights.

This approach is also useful to us in the study of ownership over ships, as well as of other real rights that can be encountered in this field.

It is also appropriate to mention here the existence of legal provisions regulating the publicity of movable and immovable property, since the adoption and come into force of the new civil code have brought together the commercial code, part of the legislation in the field of transports and in the maritime filed, the publicity of goods and part of the old civil code.

2.2. In what concerns the ownership of the ship or other real rights over it, the property deed and the owner have to be identified, after which the attributes of the ownership right and the movable publicity operations specific to the maritime filed can be discussed.

We keep in mind that before 01.10.2011, the Romanian legislation on maritime law and, implicitly, on the legal status of ships, consisted in the Commercial Code (Book I, Title 12, "On the transport contract", Book II, "On maritime commerce and on navigation", Book IV, "On carrying out commercial activities and their duration"), the Civil Code, the Code of Civil Procedure – all these represented the *common law* in the field of maritime law. Other special laws added to these, which completed the initial regulations.

Currently, it is still applicable the Government Ordinance [O.G.] no. 42/1997, which is the normative document regulating the registration of ships, the creation, transmission and extinction of real rights over ships[7]. In order to speak of these legal operations, a few specific elements for ships in the maritime field have to be considered.

In what concerns the ownership right over ships, there are two known ways of gaining property, namely: main means (such as: the construction of the ship and the sale and purchase of the ship) and derived means (such as, for example: the dissolution of the legal persons the ship belongs to, the seizure of the insured good by the insurer etc.)

Romanian legislation situates the building contract of the ship in the category of the leasing category, as it is regulated in the civil legislation. This legal relation may take the form of a contract for works. In relation to the complexity of the issues involved in the construction of a ship, this contact may be considered a contract for works and involves several particularities.

The contract for works is a mutually binding contract, by onerous title, commutative, of successive performance and consensual. In the common law, the law does not require a specific form for the validity of the contract for works. However, when talking about contracts for the construction of vessels, such agreements must be concluded in writing and cannot be enforced against third parties unless transcribed in the registries of the harbor masters or of the maritime authority where the construction takes place.

The contract for works is a *intuituu personae* type contract in what concerns the organization and management of the works. The contractor has to carry out the work itself, if there is a specific clause in the contract regarding this aspect or if this results from the circumstances.

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(1) Private property is the right of the owner to possess, use and control a good exclusively, absolutely and perpetually, within the limits established by the law.

(2) Under the conditions of the law, the right to private property is susceptible to arrangements and divisions, depending on the case.

[7] Section 3 of the Government Ordinance [O.G.] no. 42/1997, republished, in art. 30-43.

Under the legislation in force[8], *the right to fly under the Romanian flag* is closely connected to the ownership of the ship. *This right is granted:*

a) to maritime ships and to inland waterway vessels either owned by or in the lease of Romanian legal or natural persons;

b) to maritime ships and to inland waterway vessels owned by natural persons having the citizenship of a member state of the European Union or belonging to the European Economic Area or to legal persons established in the European Union or in the European Economic Area;

c) to maritime ships and to inland waterway vessels owned by foreign natural persons domiciled in Romania or to the Romanian branches of the foreign legal persons, other than the ones mentioned at letter b);

d) to maritime ships and to inland waterway vessels owned by foreign legal or natural persons, hired through bareboat agreements or leasing, for periods over one year, by Romanian legal or natural persons.

Thus, we can find in the mentioned legal document references to ownership and to ship ownership, but to other real rights as well. We mention here the leasing, which is a form of loan, thus a contract through which the owner only transmits an attribute of ownership, namely the use of the good (the ship).

Both the legislation and the doctrine in the field mention persons in different capacities, other than the owner of the ship. Among these, we encounter the concept of "ship-owner". The ship-owner is the person who equips the ship, appoints the commander and chooses the crew. We have to keep in mind that the capacity of ship-owner is not necessarily connected to the capacity of owner of ships.

Thus, the ship-owner can be the owner of the ship, namely, the legal or natural person who has gained the right of ownership over the ship, if this is the person who exploits the ship directly and immediately. But another legal or natural person can be the ship-owner, with the power of attorney of the owner of the ship to exploit the ship in its name, who falls under the obligation to equip the ship for the voyage.

The ship-owner is the one who provides the charterer with the full or partial transport capacity of the ship directly or through representatives such as: brokers or brokerage companies, shipping companies, forwarding companies etc. This is done under a shipping contract which may take a variety of forms.

3. Publicity of movable and immovable goods. Publicity in the maritime field

From the legislation governing publicity in general, as well as from the doctrine, emerges the idea that publicity has not been organized for the transmission and encumbrance of all movable and immovable, tangible and intangible assets. The law generally distinguished between immovable and movable goods, since in this former case publicity is and remains a problem.

Regarding movable goods, there is the opinion that the attribute of possession, seen as a *status quo*, is the best mean of publicity, and the need to advertise movable operations has an exceptional character. The publicity of movable transfers must be limited to certain categories of movable goods, susceptible to individualization.

The real estate publicity represents a set of means provided by the law, ensuring the recording, security and enforceability against third parties of legal acts constituting, transmitting or extinguishing real immovable rights.

[8] Art. 45, paragraph. 2 of Government Ordinance [O.G.] no. 42/1997, republished.

The norms of the civil law not only regulate the issuance, modification or termination of civil legal relations, but also the protection, preservation and guarantee of the subjective civil rights.

Over time, in our country, real estate publicity has been performed by several means, the two main systems being the one of the registries of transcriptions and registrations, on the one hand, and the one based on land registers, on the other hand. Aside from the two main systems, some intermediate systems have been regulated, such as: land book publicity, with a limited scope (for Bucharest and a few surrounding towns) and the land record book system, applicable in certain localities in Transylvania.

Regarding the publicity of movable items, the real security interest of the creditor is enforceable against third parties only by fulfilling publicity formalities. The publicity requirement is considered met upon the registration of the security interest notice in the Electronic Archive of Real Security Interests [Arhiva Electronică a Garanţiilor Reale Mobiliare], a computer tracking system of the priority of security interests structured on persons and goods. It is a public system and it can be accessed free of charge.

The archive is an electronic registry, accessible by all through an internet connection, which is managed only by authorized operators. The moment of the registration of the security interest confers its degree of priority over security interests registered subsequently, even on the same day.

Regarding publicity in the maritime/naval field, we note that for the transcription of the right of ownership there is a dedicated procedure, with certain specificities. Thus, for the transcription of the right of ownership over a ship the following documents are required: a request for the transcription of the ownership right in which three names will be listed, in the preferred order, if the change of the name of the ship is also in view; the property deed, in legalized copy; the registration certificate of the owner legal person in legalized copy or the normative act of establishment of the legal person in simple copy or the identity card or other official document showing citizenship in legalized copy, for natural persons.

For operations of registration, inscription, transfer of property, transcription of tasks or the change of the technical characteristics of the ship, such as: the type of ship, engine power, tonnage or load capacity of the ship, standard requests will be added.

The request for any operation will be made by the owner / operator of the ship or, depending on the case, by the interested parties. The related documents, in Romanian language, will be submitted in one copy, in original or legalized copy, except for the maritime ships that fall under the provisions of international conventions and which carry out international voyages, submitted in view of the granting, suspension or withdrawal of the right to fly the Romanian flag, which will be presented in two copies.

Legal documents concluded abroad are not enforceable against third persons unless transcribed in the registers of the Romanian diplomatic missions. The documents concluded in Romania in a different language than Romanian will be translated by an authorized translator whose signature will be certified by a notary public.

In the event in which it is requested to perform operations for a ship currently carrying out an international voyage, the mention in the document f nationality can be made diplomatically, through the consular office of the state on whose territory the ship is found.

Conclusions

Analyzing the materials at hand in the study of the proposed topic, we have come to the conclusion that the study of this topic can be furthered and developed. The information itself is of interest for professionals, whether we are talking about lawyers, economists or other professionals.

I believe that the elements mentioned above have managed to open a gateway to the study of this field and to raise interest for a special activity, which can take place in full legality. Furthermore, the publicity operations regarding ships strengthen the stability of the civil circuit and help knowing the owner or the person in whose favour a privilege is constituted, including in the maritime field.

References

- Government Ordinance [O.G.] no. 42/1997, republished, regarding maritime and inland waterway transport
- Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macove, *Noul Cod civil. Comentariu pe articole [The New Civil Code. Comments by articles]*. 1st Edition. Revised, C.H. Beck Press, Bucharest, 2012
- Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, Curs de drept civil. Drepturile reale principale [Civil Law Course. The Main Real Rights], Hamangiu Press, Buchares, 2013
- Szilard Sztranyiczki, Drept civil. Drepturile reale principale conform Noului Cod civil [Civil Law. The Main Real Rights According to the New Civil Code], C.H. Beck Press, Bucharest, 2012
- Florica Braşoveanu, *Ways To Resolve Maritime Disputes*, International Scientific Conference dedicated to the European maritime day, 20 May, published in "Maritime Scientific Forum" (ISSN 1310 9278), Varna, 2013
- Constantin Anechitoae, George Serban, Adina Laura Pandele, Florica Brasoveanu, "Seamen welfare at sea and in ports – social assistance issues", 15th International Congress of the International Maritime Association of the Mediterranean IMAM 2013 - Developments in Maritime Transportation and Exploitation of Sea Resources, Guedes Soares&Lopez Pena (eds) 2014 Taylor& Francis Group, London, ISBN 978-1-138-00124-4, 14 – 17 October 2013, in Coruna, Spain. http://www.imamhomepage.org/imam2013/programme.aspx
- Florica Braşoveanu, *Dreptul european al mediului [European environmental law]*, Pro Universitaria Press, Bucharest, 2013, ISBN 978-606-647-859-5
- Adina Laura Pandele, *Conosamentul [The bill of landing]*, C.H.Beck Press, Bucharest, 2006
- Adina Laura Pandele, Several theoretical and practical aspects of the transportation contract: the reglamentation within the new Civil Code**,** Addleton Academic Publishers, New York, 2011, ISBN 978-1-935494-25-6.
- http://www.magazin-nautic.ro/?p=2322
- http://www.rna.ro/servicii/Inmatriculari%20Nave.html

THE AGENCY AGREEMENT IN THE NEW CIVIL CODE

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Abstract

Although not for the first time, the new Civil Code regulated separately the agency agreement in art. 2072 - 2095. As a consequence of the monist concept, the new Civil Code includes many agreements from now on, including those considered up to present proper to the commercial activity. It is also the case of the agency agreement, previously regulated by a special normative document that is Law no. 509/2002, based on a Directive of the European Union.

The rules comprised in the present regulation define a separate agreement, stand-alone agreement, with its own features, in agreement with the part it plays in achieving the intermediation activity, a part legally established by the law of the European Union.

The present study is focused on the analysis of the legal regime of the agency agreement, in accordance with the new Civil Code, dealing with the following aspects: its legal frame, its legal definition and features, the content of the agreement, its effects and the termination of the agency agreement.

Keywords: *intermediation, principal, agent, exclusivity, non-competition clause*

1. Introduction

The present study aims to analyse the current legal regime of the agency agreement, which is regulated by the new Civil Code, Book V "On the obligations", Title IX "Various special contracts", Chapter X "The Agency Contract", articles 2072-2095. Once the new Civil Code entered in force, there have been abrogated the provisions of Law No. 509/2002 on the permanent commercial agents[1]; the new Civil Code represented a progress in the field when it emerged, having the role to cover a lack of legislation within internal law. In fact, this aspect has been pointed out by the legal literature, which at the moment was preoccupied with the analysis of this kind of contract[2]. Although it takes up most of the provisions of Law No. 509/2002, the regulation contained by the new Civil Code also comprises significant differences which we shall underline in the following pages. For this reason, we shall point out the novelty elements in this study, in relation to the former legal regime. On the other hand, the similarity between the two regulations is natural, as both had as source of inspiration and legal ground the EEC Directive No. 86/653/1986 on the coordination of legislations related to permanent commercial agents[3]. Moreover, for defining the agency contract there must not be forgotten the provisions of the model of contract issued by the

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[1] Published in Romanian Official Gazette No. 581 from August 6th 2002, Law No. 509/2002 was abrogated by article 230 letter w) of Law No. 71/2011 on the enforcement of Law No. 287/2009 on the Civil Code, published in the Romanian Official Gazette No. 409 from June 10th 2011.

[2] For that matter, see Stanciu D. Cărpenaru, *Drept comercial român,* VII edition, revised and updated, Editura Universul Juridic Publ. House, Bucharest, 2007, p. 503; Stanciu D. Cărpenaru, Liviu Stănciulescu, Vasile Nemeş, *Contracte civile şi comerciale*, Hamangiu Publ. House, Bucharest, 2009, p. 367, Olia-Maria Corsiuc, *Unele consideraţii privind auxiliarii comercianţilor,* în Revista de Drept Comercial nr. 4/2010, pp. 23-25.

[3] As a new category of intermediation contracts, the commercial agency agreement represents a creation of the British law system, from which it has been taken over by the American law and, starting with the XX century, it was taken over by the Europeans.

International Chamber of Commerce from Paris – Publication ICC No. 644/2002 – Second edition[4].

2. Definition, features, legal nature

2.1. Definition

Unlike Law No. 509/2002 which was not defining the agency agreement in a direct way, the lawmaker has established a legal definition of this contract, comprising the main elements which define the quality of an agent as a legal or natural person. Thus, within an agency agreement, a party called principal empowers the other party, called agent, either to negotiate or to negotiate and conclude contracts on his behalf and account, in the exchange of a payment, in one or several determined regions, on a lasting term[5]. Therefore, the parties of the contract are the principal[6] – the master of the affair, who gives the empowerment and the agent[7] who, by his profession, complies with the empowerment (either having or not representation powers), in the exchange for a payment. Consequently, the agency agreement is concluded between two independent professionals – the principal and the agent. It must be noticed the role provided by the lawmaker to this contractual mechanism which, ever since its beginnings, has been conceived as a convention perfectly adjustable to the various forms of affairs, a fact which indicates flexibility as main feature, but also the enhancement of some commercial operations in conditions of increased efficiency[8].

2.2. Legal features

The agency agreement has the following legal features:

- *is a synallagmatic contract*, the contracting parties taking upon themselves mutual and interdependent duties;
- *is a contract by onerous title*, both parties aiming to obtain a patrimonial advantage;
- *is a commutative contract*, the existence and length of parties' obligations being determined and known ever since the conclusion of the contract;
- *is a contract with subsequent enforcement*, the agent being empowered on "a lasting term";
- *is a consensual contract*, which is validly concluded at the simple manifestation of will by the parties, but the proof of the convention can only take a written form;
- *is a intuitu personae* contract, as for its conclusion are important precisely the agent's business contacts or the knowledge in the field.

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[4] Dragoş Alexandru Sitaru, Claudia Paul Buglea, Şerban Alexandru Stănescu, *Tratat de Dreptul Comerţului Internaţional – Partea specială,* Universul Juridic Publ. House, Bucharest, 2008, p. 312.

[5] For other definitions of the contract see, Stanciu D. Cărpenaru, *Tratat de drept comercial român. Conform noului Cod civil,* Editura Universul Juridic, Bucureşti, 2012, p. 548; Florin Moţiu, *Contractele speciale,* II edition, revised and updated, Universul Juridic Publ. House, Bucharest, 2011, p. 267.

[6] Just like Law No. 509/2002, the new Civil Code uses the notion of principal. The legal doctrine has pointed out ever since the former regulations that the use of this term is not exactly suitable, as it could enforce the idea that the agency contract could be a version of the commission contract, which is not the case in reality. For that matter, see Titus Prescure, Radu Crişan, *Contractul de agenţie – un nou contract numit în dreptul comercial român,* in the Law magazine No. 7/2003, p. 44. Just like Law No. 509/2002, the new Civil Code uses the notion of principal.

[7] In the Romanian law, a first definition of the agent emerged in 1946. For that matter, see I.L. Georgescu, *Drept comercial român,* vol. I, Socec Publ. House, Bucharest, 1946, p. 652-653.

[8] G.C. Chesire, C.H.S. Fifoot, M.P. Furmston – *Law of contract,* Butterworts Publ. House, Eight Edition, London, 1972, p. 451.

2.3. Legal nature of the contract

According to article 2072 paragraph (1) of the new Civil Code, the agent is empowered by the principal either to negotiate or to negotiate and conclude contracts on his behalf and account. The agent is an independent intermediary person who acts by professional title and cannot be the principal's official in charge [article 2072 paragraph (2)].

When the agent is empowered only to negotiate contracts for the principal, we can speak about a mandate without representation, as negotiations only aim to establish the conditions of some contracts which will be concluded directly between the principal and third parties.

If the agent is empowered to negotiate and conclude contracts with third parties, on behalf and account of the principal, he does this on the basis of a trust mandate, and will take action within the limits of empowerment received from the principal.

In conclusion, the legal relations between the agent and principal are, in essence, mandate relations (with or without trust)[9] but its specific characteristics on the whole make from the agency contract a self-standing one, which the new Civil Code treats accordingly[10].

As a novelty element in respect to the provisions of Law No. 509/2002, the current regulations show that the legal provisions applicable to the agency agreement shall be completed with the provisions regarding the commission contract, if they are compatible (article 2095 thesis 1). At the same time, the new Civil Code provides that, if an agent has the power to represent the principal at perfecting contracts, the legal provisions related to the agency contract are dully completed with the ones regarding the trust mandate contract (article 2095, 2nd thesis)[11].

3. The content and form of the agency agreement

3.1. The content of the contract

As a rule, the clauses of the agency agreement are established by the parties, but the specific character of this contract makes so that also in the system of the new Civil Code there are compulsory provisions regarding certain clauses related to the parties of the contract, the exclusivity or the non-competition clause. Thus, the current regulations contain novelty elements regarding the non-competition clause, the latter occupying an important role within the agency contract[12]. According to the provisions of article 2075 paragraph (1) of the new Civil Code, the *non-competition clause* refers to that contractual stipulation having the effect of limiting the agent's professional experience during the period of the agency contract or after it ceases. Introducing a non-competition clause in the agency contract can limit the professional activity of the agent during the implementation of the contract or after its termination, but in the second hypothesis mentioned above the restriction of the activity cannot operate for a period bigger than 2 years. Yet, if the contract provides for a term longer than 2 years, this will be reduced *by law* at the maximum legal term. Since it limits the agent's rights, the clause of non-competition must be drafted in written, under the sanction of absolute

[9] Representation regards the nature and not the essence of the mandate contract. For that matter, see Claudia Roşu, *Contractul de mandat în dreptul privat intern,* C.H. Beck Publ. House, Bucharest, p.102.

[10] Regarding the differences between the agency contract and the mandate and commission contract, see Liviu Stănciulescu, Vasile Nemeş, *Dreptul contractelor civile şi comerciale, în reglementarea noului Cod civil,* Hamangiu Publ. House, Bucharest, 2013, pp. 379-380.

[11] Regarding this aspect, the new Civil Code preserves the former regulation of article 26 of Law No. 509/2002.

[12] Regulated as a clause of commercial interdiction by the Directive 86/653/EEC. See D. Florea, Aspecte teoretice şi practice privind clauza de neconcurenţă în activitatea agenţilor comerciali, în revista Curierul Judiciar No. 2/2010, p. 79 and the following.

rephrase [article 2075 paragraph (2)][13]. As a novelty element in relation to the former regulations [14], the law limits the field of this clause only to the geographical region or the group of persons and geographical region to which the agency agreement refers and only for the assets and services in relation to which the agent is empowered to negotiate and conclude contracts. As it can be noticed, the non-competition clause refers both to the assets and services of the principal negotiated by the agent. The expansion of this clause beyond the legal limits will culminate with considering it as not written [article 2075 paragraph (3), second thesis][15].

The new Civil Code regulates the inefficacity of the non-competition clause at article 2093. Thus, the lawmaker institutes the possibility that, upon the agent's request, taking into account also the legitimate interests of the principal, the court can remove or limit the effects of the non-competition clause, when it causes serious and obviously unfair prejudices to the agent. In relation to the similar provisions of Law No. 509/2002, article 2093 of the new Civil Code provides, in addition, the request for the effects of the non-competition clause to produce "serious" and "obviously" unfair prejudicial consequences to the interest of the agent. In the absence of a definition given by the lawmaker to the serious and obviously unfair prejudicial consequences, the assessment on the matter shall be done by the court summoned to censor the effects of the non-competition clause[16]. Thus, the lawmaker institutes the possibility for a court to limit the effects of the non-competition clause on the demand of the agent, on the condition of observing the equity principle, in accordance to the legitimate interests of the parties. It rests with the judicial practice to confirm that the regulation above is an equilibrium one or if it maintains an advantage for the agent.

3.2. The form of the contract

According to article (1) of the new Civil Code, the agency agreement is concluded either in a written authentic form, or under private signature. The written form is requested *ad probationem,* so that the absence of the written document does not affect the validity of the contract, but only the proof of its existence. As a novelty element, the law provides that, on demand, any party can request a written signed document from the other contracting party, in which are specified both the content of the contract and its modifications. Moreover, the law institutes the interdiction for the contracting parties to give up on this right [article 2087 paragraph (2) second thesis][17].

4. The effects of the agency contract

The ground of this topic is represented by articles 2079 and 2080 of the new Civil Code, which contain imperative norms [18]. Aside from the parties' duties, the new Civil Code regulates, just like Law No. 509/2002, also the effects of the agency agreement in relation to third parties.

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[13] Stanciu Cărpenaru, *Contractul de agenţie în reglementarea Legii nr. 509/2002,* în revista Curierul Judiciar No. 11/2003, p. 84.

[14] Article 4 of Law No. 509/1992.

[15] According to the regulations of Law No. 509/2002, any expansion of the scope of the non-competition clause was annullable, on the agent's demand (article 4).

[16] Regarding the prerogative of the court to censor the effects of the non-competition clause, see Irina Liana Iacob, *Reglementarea europeană a contractului de agenţie comerciala (II),* in Revista de Drept Comercial No. 2/2010, p. 69.

[17] The text transposes article 13 point 2 from the Council Directive No. 86/653/EEC from December 18th 1986, which leaves to the assessment of member states whether imposing the written form for the validity of the agency agreement.

[18] For this matter, article 2094 provides that no derogation can be made on the disadvantage of the agent's interests, from the provisions of articles 2079 and 2080.

4.1. The effects of the agency agreement in relation to third parties

According to article 2079 paragraph (1) and article 2080 paragraph (1) of the new Civil Code, both the agent and the principal must fulfil their duties resulting from the contract, in good faith and with loyalty[19]. The general obligation of the agent, to carry out his activity in good faith and with loyalty in respect to the principal, expresses the strictness which the agent must show when fulfilling the duties to which he is bound as a result of the agency contract. A novelty element in relation to Law No. 509/2002 is the replacement of the diligence concept of a professional with the loyalty duty. The law also refers to the officials in charge of the agent, who can have the same authority as the agent, being authorized by law either to negotiate or to negotiate and conclude contracts on behalf and the account of the principal.

I. According to article 2079 paragraph (2), the agent is bound in particular:

a) - to obtain and to communicate to the principal the information which could interest him, regarding the regions established by contract, but also to notify the other necessary information which he has. This is an information duty with a broad content (the demand and supply for the assets and services offered by the principal, the prices applied, the level of competition in the region where the agent is empowered to act, the information on the geographical zone established by contract, legislative norms and so on)[20];

b) - to make all the necessary efforts for negotiating and, if the case may be, concluding the contracts for which he is empowered, in conditions as advantageous as possible for the principal. Taking into account the provisions of the first alignment, we consider that the agent is bound to act as he himself were the master of the affair[21] and not to put his interests above those of the person from which he got the empowerment.

c) - to comply with the reasonable instructions received from the principal. From this perspective, the new Civil Code no longer makes any distinction between the types of the instructions given by the principal to the agent[22]. By reasonable instructions there must be understood the normal instructions, which are typical to the agency activity on the basis of an agency contract.

d) - to keep separate entries in his registers for the contracts regarding the principal;

e) - to store the assets or the samples in a way to permit their identification. The assets and samples received by the agent from the principal, so as to be used as test samples for negotiations or, according to the case, for concluding contracts with third parties, must be stored in conditions to preserve their qualities, so as not to damage the "image" of the principal. If the agent is empowered by more principals, the assets or samples must be stored so as to permit the identification of those belonging to each and every principal.

In what the obligations of the agent are concerned, it can be noticed that these are related to diligence and not result, and have to be performed by the agent in conditions as advantageous as possible for the principal. According to article 2079 paragraph (4) of the new Civil Code, the agent who cannot fulfil his duties must notify the principal immediately, otherwise he will have to pay damages.

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[19] Through imperative provisions, the new Civil Code acknowledges good faith as the general principle governing the field of contracts, both regarding negotiation and the period of the contracts enforcement (article 1170). See Ioan Adam, *Drept civil. Obligaţiile Contractul,* Editura C.H.Beck Publ. House, Bucharest, 2011, pp. 324-327.

[20] Stanciu D. Cărpenaru, *quoted work, Tratat...*, p. 552.

[21] Claudia Roşu, *Reglementarea agenţilor comerciali potrivit Legii nr. 509/2002,* in Revista de Drept Comercial No. 12/2002, p. 194.

[22] According to article 5 paragraph (3) of Law No. 509/2002, when observing the instructions received from the principal, the agent had to take into account the imperative, indicative or facultative character of such provisions.

II. The principal is particularly bound to:

a) - render available for the agent trials, registers, fees and any other document, within the due time and in an appropriate quantity, in order for the agent to carry out his mandate. Since the latter acts on behalf and account of the principal, he uses those trials, registers, fees and any other document rendered available by the principal. This way it can be explained the principal's duty to render available for the agent trials, registers, fees and any other document, within the due time and in an appropriate quantity, so as for the agent to be able to carry out his mandate.

b) - to provide the information necessary for enforcing the agency contract to the agent. Apart from the instructions given to the agent for carrying out his mandate, the principal must also provide him with the information required for applying those instructions. In this context, we refer as well to the provisions of article 2081 of the new Civil Code, including the situation in which the agent negotiates the conclusion of a contract, but does not receive the principal's accept in due time, for the conclusion of the negotiated contract. In this case, the law institutes the presumption according to which the principal has given up to the conclusion of the contract involved, if he does not communicate its acceptance within a reasonable term. Since law does not define the expression "reasonable term", several litigations can emerge from here, case in which it must be underlined the role of usages as law sources.

c) - to notify the agent, within a reasonable term, his anticipation that the volume of contracts will be significantly smaller than that to which the agent would have normally expected;

d) - to pay the money to the agent, according to the conditions and terms established by contract or provided for by law. The amounts of money agreed to be paid to the agent, on the basis of the agency contract, include the commission, allowances and damages granted at the end of the contract. The right of the agent to receive the commission is regulated by articles 2080 paragraph 2 letter d) and articles 2082-2086 of the new Civil Code. In fact, the independence of his professional activity and the right to be paid a commission constitute elements which are significant for delimiting the position of the agent in respect to the other employees of the principal. According to article 2083 of the new Civil Code, the agent is entitled to receive the commission for the contracts concluded during the agency contract, if such contracts are concluded:

- as a result of his intervention;
- without the intervention of the agent, but with a customer previously found by the agent for contracts or similar commerce acts;
- with a customer within a region or group of determined persons, for which the agent received an exclusive empowerment.

Moreover, the agent is entitled to receive a commission for the contracts concluded after the agency contract terminates, if these contracts are concluded within a reasonable term from the moment the agency contract has been terminated and are mainly due to the activity carried out by the agent during the contract [article 2084 paragraph (1) letter a]. Another situation in which the agent is entitled to receive a commission after the contract has ceased refers to the case in which the order of the third parties has been received by the principal or by the agent before the agency contract has ceased [article 2084 paragraph (1) letter b]. In these two circumstances clearly and restrictively provided for by law, it emerges the agent's right to receive the commission after the contract has ceased, precisely as a result of his contribution to the conclusion of the contract, at a short time from when the agency contract has ended. Article 2085 of the new Civil Code acknowledges the right of the agent to receive the commission if the contract was enforced. The rule is that parties can establish, through the agency agreement, the moment when the right to receive the commission emerges. On the

contrary case, the right to receive the commission emerges according to the subjective or objective moments instituted by the lawmaker. The law establishes that the last day when the commission has to be paid is the last day of the month following the trimester for which the commission is due. Article 2086 clearly provides for the right to commission in terms of contracts concluded by the parties, but not enforced. Thus, the law protects the agent whose rights cannot be affected by the fact that the contract has not been executed by the parties. Only in the circumstance in which the contract is not applied due to the agent's actions is the right to commission extinguished or reduced proportionally with the lack of enforcement. At the same time, the right to commission is also proportionally affected by the partial lack of execution of the contract concluded, by a third party. For protecting the agent, the law rules that the parties cannot stipulate contractual clauses on the disadvantage of the agent. These provisions have a novelty character in relation to the former regulations, and such clauses are considered as not written.

Under the circumstances in which the new regulations do not provide either for a guarantee of the agent when recovering his debt titles against the principal, but taking into account the provisions of article 2095, acknowledging the character of common law of the provisions regulating the commission contract and the trust contract with representation, we can state that the agent has a right of reservation upon the principal's assets which he owns[23].

4.2. The effects of the contract in relation to third parties

As it results from the definition of the agency agreement, the object of the empowerment consists either in the negotiation or in the negotiation and conclusion of contracts on behalf and the account of the principal. In the first case, the contracts are concluded directly and without intermediaries between the principal and third parties, the role of the agent being that of finding third parties interested in such contracts and negotiating the conditions of the future contracts which the principal will personally conclude with third parties. In the second case, the contracts are negotiated and concluded by the agent, on behalf and the account of the principal. Applying the rules specific to mandate, at the conclusion of contracts between the agent (the mandatory) and third parties are established direct legal relations between the principal and third parties.

The agency contract does not generate legal relations between the agent and third parties[24].

Just like the former regulations, the new Civil Code contains certain provisions regarding the enforcement of the duties resulting from the contracts concluded on the basis of the agency contract, which involve the agent. For that matter, according to article 2076 of the new Civil Code, if the agency agreement does not provide anything regarding the possibility of the agent to sell on credit, to grant discounts or payment postponements, then he cannot carry out any of the actions previously mentioned. Consequently, he will be able to perform such acts only if he is clearly allowed by contract. Moreover, according to article 2077 paragraph (1), the agent can receive complaints regarding flows of the assets sold or the services offered by the principal, having the duty to notify the latter immediately. The second paragraph of article 2077 establishes that the agent can take any measure of insurance in the interest of the principal, but also any necessary measure for preserving his rights.

[23] Stanciu D. Cărpenaru, *Tratat de drept comercial român,* Universul Juridic Publ. House, Bucharest, 2012, p. 555.
[24] Stanciu D. Cărpenaru, *quoted works, Tratat…*, p. 555.

5. Termination of the agency agreement

We shall present the special rules regarding the expiration of the term and the unilateral denunciation of the contract.

a) Expiration of the term.

The agency agreement can be concluded both on a determined and undetermined period. In what the contract concluded on a determined period is concerned, it ceases when the term established by the parties ends. Nonetheless, if an agency contract is concluded on a determined period, but it continues to be enforced by the parties even when this period has passed, then it will be considered that the contract in question has been concluded on an undetermined period (art. 2088).

b) Unilateral denunciation.

According to the provisions of article 2089, the agency agreement concluded on an undetermined period can be unilaterally denunciated by any of the parties, with a mandatory notice. The contract can be unilaterally denunciated in advance by any of the parties even when is concluded on a determined period, on the condition that parties clearly provide for this possibility in the contract. Law also regulates the period of the notice. Thus, during the first year of contract, the period of the notice must be equal with at least one month. If the contract is concluded for a period longer than one year, the minimum term of notice is expanded with one month for each additional year added, but the maximum length of the term must not exceed 6 months. The provisions mentioned above have a suppletive character. The contracting parties can establish longer terms, on the condition that the notice terms which the agent has to establish are not longer than those established by the principal. If the parties do not make any other convention, the notice term expires at the end of a calendar month.

Article 2090 paragraph (1) of the Civil Code provides for a special case of unilateral denunciation of the agency agreement. Thus, the contract can be denunciated immediately, without notice and by any of the parties, making amends for the prejudices caused to the other, in those circumstances making collaboration impossible, other than force majeure or fortuitous case. For the conclusion of the contract, no matter that this is concluded on a determined or undetermined period, it is required the written notification of the intention to denunciate the contract, without there being necessary to show the reasons which determined it.

5. Conclusions

Ever since the Law No. 509/2002 appeared, the agency agreement acquired its own legal configuration, commercial agents being traditionally acknowledged as a specific category of intermediaries for carrying out affairs. The new Civil Code modernises the legal regime of the agency agreement, recognising the important role which this contractual mechanism has for the development of internal and international commerce. As seen before, even if it takes over most of the provisions of Law No. 509/2002, the Civil Code in force, taking into account the deep changes experienced by the market, contains also novelty aspects, the knowledge of which contributes to the various uses of the agency agreement. Moreover, considering that the lawmaker proceeded with the new regulations to the adaptation of Romanian legislation to the European legislation of the agency agreement, it is expected for uniform judicial practice to appear and become – for the first time in Romania – a law source. For this reason we have considered useful to approach the agency agreement according to the Civil Code currently in force, making an analysis on articles and being convinced that new interesting aspects will be pointed out in the future by the legal doctrine.

References

Books:

- Ioan Adam, *Drept civil. Obligaţiile Contractul.* Editura C.H.Beck Publishing House, Bucharest, 2011.
- Cărpenaru, Stanciu, *Drept comercial român.* VII edition, revised and updated, Editura Universul Juridic Publishing House, Bucharest, 2007.
- Cărpenaru, Stanciu, Stănciulescu, Liviu and Nemeş,Vasile. *Contracte civile şi comerciale,* Hamangiu Publishing House, Bucharest, 2009.
- Cărpenaru, Stanciu, *Tratat de drept comercial român. Conform noului Cod civil.* Editura Universul Juridic Publishing House, Bucharest, 2012.
- Chesire, G.C., Fifoot, C.H.S., Furmston, M.P. – *Law of contract.* Butterworts Publ. House, Eight Edition, London, 1972.
- Georgescu, I.L., *Drept comercial român.* vol. I, Socec Publ. House, Bucharest, 1946.
- Moţiu, Florin, *Contractele speciale.* II edition, revised and updated, Universul Juridic Publ. House, Bucharest, 2011.
- Claudia Roşu, *Contractul de mandat în dreptul privat intern.* C.H. Beck Publishing House, Bucharest, 2008.
- Sitaru, Dragoş Alexandru, Paul Buglea, Claudia, Stănescu, Şerban Alexandru *Tratat de Dreptul Comerţului Internaţional – Partea specială.* Universul Juridic Publishing House, Bucharest, 2008.
- Stănciulescu, Liviu, Nemeş, Vasile, Dreptul contractelor civile şi comerciale, în reglementarea noului Cod civil. Hamangiu Publ. House, Bucharest, 2013.
-
- Articles:
- Corsiuc, Olia-Maria. *Unele consideraţii privind auxiliarii comercianţilor.* Revista de Drept Comercial 4 (2010): 19-26.
- Florea, D. Aspecte teoretice şi practice privind clauza de neconcurenţă în activitatea agenţilor comerciali. revista Curierul Judiciar 2 (2010): 79-82.
- Prescure, Titu, Crişan, Radu. Contractul de agenţie – un nou contract numit în dreptul comercial român. revista Dreptul 7 (2003): 43-52.
- Roşu, Claudia. Reglementarea agenţilor comerciali potrivit Legii nr. 509/2002. Revista de Drept Comercial 12 (2002): 193-200.

RECENT CHANGES TO THE RULES GOVERNING THE LEGAL STATUS OF FOREIGN NATIONALS IN ROMANIA

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Abstract

The past decade has seen an unprecedented surge in the number of people leaving their home countries in search of economic prosperity, freedom, happiness etc., and settling – permanently or temporarily – on the territory of another state. The rights and obligations of these foreign nationals (or "third-country nationals" in EU legal jargon) define their legal status and constitute – in the case of European Union – a matter that concerns both the Union and its member states.

The present article endeavors a brief analysis of the recent changes to the main statutory instruments governing the legal status of foreign nationals in Romania, introduced mainly due to necessity of implementing various EU regulations into domestic law. The analysis will not be limited to a strictly legalistic approach, recent national and international political and economic trends will also be taken into consideration to better explain law in context.

Keywords*: third-country nationals (TCN), rights and obligations, long-term resident status, immigration, EU Directive*

Introduction

Keeping abreast of new legislation is a must in our legal profession, if jurists forget it, than our clients will definitely remind us of this necessity in a heartbeat. But keeping up to date in our Romanian legal system with such a high turnover of government emergency ordinances, government decrees, acts of Parliament, binding Constitutional Court decisions etc., is sometimes a very challenging undertaking, recently complicated by the ambitious replacement within a span of less than three years of all four "pillars" on which our legal system is built: the civil code, the criminal code, the civil procedure code and the criminal procedure code[1].

Though the New Civil Code (hereinafter referred to as NCC) was designed to bring together all legal norms pertaining to our private law, including those related to the private international law, there is much relevant legislation that did not make it into this monumental codification of 2664 articles. The legal status of aliens, otherwise known as third-country nationals (for brevity purposes hereinafter also referred to as TCN), viewed traditionally as part of the Romanian private international law, has been left outside the scope of the codification and continues to be governed by the Government Emergency Ordinance (recast) no. 194/2002[2]. Other important statutory instruments relating to issues such as asylum seekers rights, working rights etc., enlarge the framework pertaining to the legal status of TCN.

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[1] The (New) Civil Code, adopted by Law no. 287/2009 concerning the Civil Code, re-published in the Official Journal of Romania no. 409/10.06.2011, Part I, entered into force on **October, 1st, 2011**; The (New) Civil Procedure Code, published in the Official Journal of Romania no. 465/15.07.2010, Part I, as Law no. 134/2010, entered into force on **February 15th**, **2013**; The (New) Criminal Procedure Code, published in the Official Journal of Romania no. 486/15.07.2010, entered into force on **February 1st, 2014**, together with The (New) Criminal Code, published as Law no. 286/2009 in the Official Journal of Romania no. 510/24.07.2009. All four codes were amended several times after their first publication.

[2] Second recast published in the Official Journal of Romania no. 421/05.06.2008.

The TCN legal status has been under constant review, due to the necessity of harmonizing domestic legislation with the EU binding regulations. The Government Emergency Ordinance (GEO) no. 194/2002 was revised periodically to comply with the EU law, three of these recent changes taking place within a period of less than a year.

The purpose of this article is to highlight and analyze the recent changes introduced into our domestic law in connection with the relevant EU legislation, with references (whenever possible) to court decisions and other relevant jurisprudence. One consequence of the introduction of the new codes seems to be that little attention is currently been paid to other equally important aspects of law, which are now beginning to reemerge due to various external factors, such as the European policies aimed at fostering economic growth, debates within the EU over the liberalization of the employment market for Bulgarian and Romanian nationals, international events that took place in the vicinity of our borders in Ukraine etc., but also due to internal factors, such as changes taking place in the economic and social conditions in Romania.

This article is divided in *four sections*, as follows: **(1)** a brief presentation of the relevant facts that underline the legislation in this subject-matter; **(2)** an overview of the legal framework on the status of TCN in Romania; **(3)** an outline of the most recent changes to the rules governing this status and a short review of the relevant court cases decided in the recent years and **(4)** concluding remarks.

We hope that this article could sparkle an interest in this often overlooked legal topic, by integrating the recent legal changes to the status of TCN into a broader framework, and thus providing a useful insight that invites additional research, especially in relation to future EU draft legislation proposals that will ultimately impact our national law.

1. The third-country nationals' status – why does it matter?

In our opinion, this is a (rarely asked aloud, but often thought of) question that one should always address when teaching private international law to fourth-year students or when one is confronted with the argument that today we suffer from overregulation. This is the perfect time when the dry "legalese"[3] should give way to down-to-earth questions like: "do any of you employ a housemaid from Philippines?", "when is the last time you have shopped at the *Red Dragon*[4]?", "do you think we should let Chinese workers help us build our roads?", and the list can go on. And, of course, one should also hint that all the categories mentioned above make great potential clients for earnest and dedicated lawyers. These questions highlight the changes that took place in our economic and social environment since 2007, when Romanian became a full member of the EU.

It is a very rare occurrence when law precedes facts. In issues related to immigration and TCN rights and obligations, facts should be evaluated first, to better understand the law, or – in other words – it is always a good idea to put law into context.

After the fall of the Iron Curtain in 1989, Romania was for more than a decade a country that mainly exported immigration. Many of our countrymen have left for Spain, Italy or Germany, to name the most popular destinations, in pursuit of a better life. In fact, according to official statistics[5], from 1989 to 2012 the population of Romania has decreased

[3] "*Legalese*" is defined as "the conventional language in which legal documents, etc., are written", according to Collins English Dictionary, 3rd ed., HarperCollins Publishers, Glasgow, 1992.

[4] *Dragonul Roşu* (*The Red Dragon*) is a famous commercial complex on the outskirts of Bucharest, founded and run by Chinese businesspeople. It regularly makes headlines in the media when the Internal Revenue Authorities (*Garda financiară*) apply sanctions in a commendable attempt to stop tax evasion in this complex.

[5] Data provided by *Institutul Naţional de Statistică* (*The National Statistics Institute*) in its recent report available online at: http://www.insse.ro/cms/files/publicatii/pliante%20statistice/Migratia%20internationala%20a%20Romaniei.pdf

by more than 3.1 million people, counting 20.01 million inhabitants as of January, 1st, 2013. According to the same source, the migration of resident Romanians to other states contributed in excess of 77% to this dramatic population decrease. This situation created shortages of labour and is predicted to cause increasing strain on our underfunded social security system, because the overwhelming majority of those who have left represent active working population. The unfortunate consequences of this international migration taking its toll on our healthcare systems have been echoed recently in the international media[6].

This data highlights the need to compensate the shortages of labour by adequate measures, such as making sustained efforts to attract regulated (legal) immigration. Because of our accession to EU in 2007, the nature of immigration to Romania has changed, our country becoming ever more not just a transit point, but also a country of destination for international migration.

According to one of the few existing studies on immigration to Romania, the extent of this phenomenon was relatively modest a decade ago, the immigrants - mostly males - coming from Egypt, Jordan, Syria, China, Turkey and the Republic of Moldova, mainly for studies or business investment purposes[7]. After 2007, there has been a shift in the pattern of immigration, most migrants coming to Romania either for family reunification, studies or for employment purposes, and significantly fewer coming here for investment purposes.

The OECD 2013 Report on immigration[8] also gives an insight into the changing nature of immigration to Romania, by noting that the number of asylum seekers for the first five month of 2012 has increased by 166% compared to the same period in 2011, but that the absolute numbers remain low. The OECD Report credits the legislative changes undertook in 2011 by the Romanian government with the increase in the number of asylum seekers. Other measures to ensure the legal stay of the immigrants were adopted as well, such as an informative campaign on the risk of illegal employment, free hotline to report undeclared (illegal) work, new social integration measures involving a training program for 20 Romanian language teachers, trained to teach Romanian to asylum seekers (in 2011 there were actually 300 beneficiaries of this program).

Though the term of "third-country nationals" generally refers to both economic migrants and asylum seekers and their respective families, the present article is focused primarily on those holding or applying for a long-term residence permit, due to the fact that they constitute the overwhelming majority of the total immigrants to Romania and hence most of the court cases decided in the recent years concern this category.

According to official data compiled by the Romanian Inspectorate for Immigration (*Inspectoratul General pentru Imigrări*), the number of foreign nationals legally residing in Romania as of June 2012 was slightly over 100,000 people, out of which 57,259 were third country nationals and 42,953 were from another EU state[9]. The biggest category of third-country nationals coming to Romania was represented by those with family ties to a Romanian citizen, followed by those holding a long stay residence permit and by those who came to study in Romania. Only 9% of the legally residing third country nationals came for employment purposes, in stark contrast with the official goals stated by the Government through the relatively unknown National Strategy for Immigration[10], adopted in 2011, to

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[6] *"Romanians despair that wealthy Britain is taking all their doctors"*, by James Fontanella-Khan, Financial Times online edition, available at: http://www.ft.com/cms/s/0/f4c0b734-7c70-11e3-b514-00144feabdc0.html#ixzz2vtWPX4eC

[7] "Study on immigration to Romania. The integration of foreigners into Romanian society" (Studiu asupra fenomenului imigraţiei în Romania. Integrarea străinilor în societatea românească), report coordinated by Iris Alexe & Bogdan Păunescu", p. 24-25, available online at: http://ec.europa.eu/ewsi/UDRW/images/items/docl_20205_22190363.pdf

[8] *International Migration Outlook 2013*, p. 290, available online at http://www.oecd.org/els/mig/imo2013.htm

[9] Buletin statistic în domeniul imigraţiei şi azilului, semestrul I, 2012, ("Statistics on immigration and asylum, Semester I, 2012"), p. 8-10, available online at http://ori.mai.gov.ro/api/media/userfiles/analiza%20statistica%20sem%20I.pdf

[10] *Strategia Naţională pentru Imigraţie 2011-2014*, adopted by Government Decree (HG) no. 498/2011, published in the Official Journal of Romania no. 391 from 03/06/2011.

regulate and encourage legal immigration as a tool to benefit the economy and to replace the shortage of labour in key areas of our economy.

The goals on paper, good as they may sound, are implemented by the annual adoption through a Government Decree of an Action Plan for the Implementation of the above-mentioned Strategy. The Government Decree also sets the number of work permits to be issued every year and, because of the economic downturn, these have been kept at 5,500 for the past three years.

2. Brief overview of the legal framework on the status of TCN in Romania

2.1. Domestic and European law

The immigration phenomenon brings forth a host of legal challenges and opportunities related to the rights and obligations of the foreign nationals residing in Romania. These aspects are not new to the Romanian legal system, the status of foreign nationals has been an object of legislation ever since the 18th century[11].

At present, the notion of "***foreign nationals***" designates[12] - according to art. 2 of GOE no. 194/2002 - the person who does not hold the Romanian citizenship or the citizenship of another European Union member state or of a state belonging to the European Economic Area[13] or the citizenship of the Swiss Confederation. The ***status of foreign nationals*** is consensually defined by our doctrine as the totality of legal rules that refer to the rights and obligations of the foreign nationals in our country[14]. The legal sources of these rules are both internal and external (international).

The general protection of foreign nationals' person and possessions is enshrined as a constitutional principle by art. 18 s. (1) of the Romanian Constitution and is subsequently detailed in the main statutory act regarding the foreign nationals, GOE no. 194/2002. The asylum seekers status is governed by the Law no. 122/2006[15], which takes precedence over the GOE no. 194/2002, with the exception of those situations pertaining to the public policy and national security[16]. The social integration of the foreign nationals is regulated by the Government Ordinance no. 44/2004[17] and the employment and posting of foreign nationals in Romania are subject to the provisions of the Government Emergency Ordinance no. 56/2007[18]. These acts should be construed in conjunction with the *National Strategy for Immigration for 2011-2014*, mentioned in section 1 of this paper. As indicated before, these acts were constantly amended, in order to keep up with the relevant EU law in this area. In addition to these acts, there are other TCN aspects regulated by important statutory instruments: the articles 1083-1086 of the (new) Civil Procedure Code deal with the procedural rights of the TCNs in a civil suit, stating, among other things, that the foreign individuals and the foreign legal persons ("*persoane juridice"*) have – with respect to the proceedings conducted in a Romanian court - the same procedural rights and obligations as

[11] For a brief overview of the transformations in the legal status of foreigners in Romania, see Ion P. Filipescu, Andrei I. Filipescu, *"Tratat de drept internaţional privat" (Treatise on Private International Law)*, ed. Universul Juridic, Bucharest, 2007, p. 174-175.

[12] All quotes from GOE no. 194/2002 in this article are based on the electronic version of the act, maintained by Indaco Systems SRL.

[13] EEA comprises 27 EU member states plus Iceland, Lichtenstein and Norway.

[14] Dan Lupaşcu, Diana Ungureanu, *Drept internaţional privat*, (*Private International Law*), ed. Universul Juridic, Bucharest, 2012, p. 447-448; Dragoş-Alexandru Sitaru, *Drept internaţional privat* (*Private International Law),* ed. C.H. BECK, Bucharest, 2013, p. 27-28; Ion P. Filipescu, Andrei I. Filipescu, idem 12, p. 199.

[15] Published in the Official Journal of Romania no. 428 from 18/05/2006, with subsequent modifications.

[16] Dan Lupaşcu, Diana Ungureanu, idem.15, p. 491.

[17] Published in the Official Journal of Romania no. 93 from 31/01/2004, with subsequent modifications.

[18] Published in the Official Journal of Romania no. 424 from 26/06/2007, with subsequent modifications.

the Romanian citizens and the Romanian legal entities[19]. There is another part of legislation that is of utmost importance to the status of TCN, especially when decisions to grant a long-term resident status are to be made by the relevant authorities – the legislation regarding the national security ("*siguranţa naţională*", expression replaced with *"securitate naţională"* by the latest amendment to the law in 2013). In the past five years, many a Court of Appeal and Supreme Court decisions had to deal with this particular aspect in relation to foreign nationals, as will be outlined in section 3. The main statutory instruments that regulate these aspects are: the Law no. 51/1991 concerning the national security of Romania[20], the Law no. 535/2009 concerning the prevention of terrorism[21] and the Law no. 182/2002 concerning the classified information[22]. In its capacity of both EU and NATO member, Romania has assumed the obligation to strengthen its borders and combat terrorism, a particular sensitive task since its geographical position puts it on the transit route for illegal immigration from the Middle East and its pre 1989 history of close ties with many Middle Eastern countries that are now involved in various regional crisis or conflicts had resulted in a relatively high proportion of TCNs from these states.

All of the above mentioned legislation is, in fact, a transposition of the European law. The main external legal sources defining the status of TCN in Romania are, of course, the EU directives and regulations, in addition to covenants of the European Convention for the Protection of Human Rights and the Charter of Fundamental Rights of the European Union, which has become binding on all EU member states with the coming into force of the Lisbon Treaty on the 1st December 2009.

For the past 10 years, the EU legislation has been geared to ensure greater equality between third country nationals and the citizens of the EU, to foster a common stance on immigration between member states by promoting legal (regulated) migration and to facilitate the social integration of these TCNs in their host countries. Perhaps one of the most important pieces of legislation in this respect has been the Council Directive 2003/109/EC concerning the status of third country nationals who are long-term residents, amended by the Directive 2011/51/EU of the European Parliament and of the Council to extend its scope to beneficiaries of international protection[23].

Other significant developments to the rights of TCNs were brought by the Directive 2011/98/EU (otherwise known as *Single Permit Directive*), which defines a common set of rights to legally residing TCNs workers, with the explicit intention - as stated in the art. (19) of its Preamble - to narrow down the rights gap between citizens of the Union and such foreign nationals, in order to prevent the possible exploitation of the latter and to recognize the important contribution these workers bring to the economic development of their host countries[24]. Council Directive 2003/86/EC on the rights to family reunification[25] has played a significant role in facilitating the integration of TCNs, by protecting the family unit and harmonizing the national legislation of EU member states (although Ireland, Denmark and United Kingdom opted out of this Directive).

Consistent with its long-term goal to gain valuable work force to aid the economy and increase competitiveness and productivity, the EU also passed legislation aimed at attracting highly qualified TCN workers, namely the Council Directive 2009/50/EC on the conditions of

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[19] Art. 1083 form the (New) Civil Procedure Code, published in the Official Journal of Romania no. 465/15.07.2010, quoted from "*The Code of Civil Procedure*", edition coordinated by dr. Viorel Mihai Ciobanu, ed. C.H.Beck, no.500, Bucharest 2013, p.337-358.

[20] Published in the Official Journal of Romania no. 163 from 07/08/1991, with subsequent modifications.

[21] Published in the Official Journal of Romania no. 1161 from 08/12/2009, with subsequent modifications.

[22] Published in the Official Journal of Romania no. 248 from 12/04/2002, with subsequent modifications.

[23] Directive 2003/109/EC was published in the OJ L 16 from 23/01/2004; Directive 2011/51/EU published in OJ L 132 from 19/05/2011.

[24] Published in the OJ L 343 from 23/12/2011.

[25] Published in the OJ L 251 from 03/10/2003.

entry and residence for the purposes of highly qualified employment (the so-called *Blue Card Directive*)[26]. In the area of refugees and asylum seekers, the legal framework has been defined by the Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers[27], the Council Directive 2004/83/EC on minimum standards of qualification and status of third-country nationals or stateless persons as refugees or as persons as otherwise need international protection and the content of the protection granted[28], the Council Directive 2008/115/EC on common standards and procedures in member states for returning illegally staying third-country nationals[29] (the so-called *Return Directive*), etc.

The European Commission constantly monitors the progress in the transposition of these directives and the degree their goals have been achieved in practice – sometimes with mixed results[30].In Romania, the latest efforts to transpose such EU directives have resulted in the repeated amendment in 2013 of the GOE no. 194/2002, concerning the status of TCN, and of the Law no. 122/2006 concerning the asylum seekers, on the issue of the rights of legally residing third-country nationals to acquire long-term residence.

2.2. The status of TCNs according to the Romanian law

Enshrined in the Romanian Constitution and reiterated by art. 3 s. (1) of the GEO no. 194/2002, the rights of the third-country nationals in Romania include not only the fundamental rights that all Romanian citizens enjoy (the right to life and to the integrity of person, the right to liberty and security of person, the right to the freedom of religion, the right to respect for his or her private and family life, etc.), but also other categories of civil rights. Third country nationals, legally residing in Romania, have the right to established their residence or domicile anywhere on the Romanian territory, while those with residence or domicile in Romania can enjoy social protection measures from the Romanian state, under the same conditions as the nationals themselves – article 3 s.(3) - (4) GEO no. 194/2002.

The rights of TCNs are differentiated according to categories, the holders of a long-term residence permit enjoying extended rights, similar to those of the nationals[31], such as: access to employment and self-employment activities - provided such activities do not entail the exercise of public authority, educational and vocational training, recognition of professional diplomas, certificates and other qualifications, social security, social assistance and social protection, tax benefits, the freedom of association and affiliation to a professional organisation or union, access to goods and services made available to the public. Additional rights are granted by other statutory provisions, such as: the right to obtain, if certain conditions are met, the Romanian citizenship, the right to social and economic integration, etc.[32] The most important limitations to these rights are set in the domain of political rights, third-country nationals being precluded from founding, joining or financing political parties, participating in the national election processes or exercising a position that entails the exercise of public authority.

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[26] Published in the OJ L 155 from 18/06/2009.
[27] Published in the OJ L 31 from 06/02/2003.
[28] Published in OJ L 304 from 30/09/2004.
[29] Published in OJ L 348 from 24/12/2008.
[30] Latest efforts to evaluate the impact of directives in practice are mentioned in the "4th Annual Report on Immigration and Asylum (2012) {SWD (2013) 210 final}, as set forth in the "Communication from the Commission to the European Parliament and the Council", available online at http://ec.europa.eu. An informative collection of studies on the impact of the EU Directives concerning immigration in practice, in various EU countries, could be found in the Integration for Third-Country Nationals in the European Union: The Equality Challenge", coordinated by Sonia Morano-Foadi, Micaela Malena (eds.), Edward Elgar Publishing Ltd., UK, 2012.
[31] According to art. 75 ("Equal Treatment") from GOE no. 194/2002, which is the Romanian transposition of art. 11 of the Council Directive 2003/109/CE. All quotes from the EU or Council Directives in this paper are from the .html version of the texts, available at: http://eur-lex.europa.eu.
[32] Dan Lupaşcu, Diana Ungureanu, idem 15, p. 492.

Correlative obligations to these rights are set out for all categories of third-country nationals under article 4 s. (1) of the GEO no. 194/2002 - both general obligations, that apply to nationals and TCNs alike, such as the general obligation to comply with the Romanian law and the obligation not to engage in activities which might represent a threat to the public policy and public security, and specific ones, such as the obligation to respect the original purpose for which they have been given permission to entry the country, to register their stay with the relevant Romanian authority upon their arrival in Romania, to declare any change in their personal status or in their employment status with the Romanian Inspectorate for Immigration (*Inspectoratul General pentru Imigrări*), the relevant authority in immigration matters, etc. Another limitation that differentiates the status of various categories of TCNs refers to the access to employment, based on the issuing of a work permit (*"autorizaţie de muncă"*) which should be requested by the private person or company wishing to employ a TCN. Article (5) s.(a)-(h) of GOE no. 56/2007 exempts some categories of TCNs from the obligation to acquire this work permit: the holders of a long-term residence permit - s. (a), those whose access to employment is stipulated by bilateral agreements between Romania and third countries - s. (b), the beneficiaries of protection in accordance with the national law - s. (c), the third-country nationals undertaking research, teaching, scientific activities or other temporary activities for a relevant national institution, based on bilateral agreements with third countries - s.(d), third-country nationals that are to undertake temporary activities for a Romanian local or central authority – s. 5 (e), the TCNs who are posted for as long as they are posted - s. (f), the family members of the Romanian citizens - s. (g), the intra-corporate transferees of the legal bodies with their registered place of business in one of the European Union member states or of the European Economic Area – s. (h).

It should be noted that the EU Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State expands the protection of the TCNs with the right to equal treatment in the fields specified by the Directive, that "should be granted not only to those who have been admitted to Member State to work but also to those who have been admitted for other purposes and have been given access to labour market of that Member State in accordance with other provisions of Union or national law" (article 20 from the Preamble). These rights have been specified in article 12 (*Right to equal treatment*) of the above-mentioned Directive and are essentially the same as those granted to long-term residents, under the provisions of Council Directive 2003/109/CE, as amended by EU Directive 2011/51/EU.

The national legal framework is still a work in progress, driven by the necessity to further amend the legislation to minimize the differences of status between the third-country nationals holding a long-term residence permit and those holding a temporary residence permit in relation to access to employment[33], "irrespective of the initial purpose of or basis for admission" (art. 20 from the Preamble of the EU Directive 2011/98/EU), in order to comply with the EU relevant legislation.

3. An outline of the most recent changes to rules governing the status of TCNs

The most recent changes to the national legislation in this subject-matter were introduced by the Law no. 376/2013[34], with respect to the provisions governing the status of foreign nationals and to those governing the status of the asylum seekers, in order to transpose

[33] See note 32 above.
[34] Published in the Official Journal of Romania no. 826 from 23/12/2013.

the EU Directive 2011/51/UE which extends the scope of Council Directive 2003/109/EC to beneficiaries of international protection.

The modifications concern terminology, substance and procedure (the latter referring to the format and additional information to be inserted in the permits issued to the beneficiaries of international protection). Throughout the GEO no. 194/2002, the notions of "refugees" and "asylum seekers" have been replaced with the broader notions of "beneficiaries of (or applicants for) international protection" or "beneficiaries of (or applicants for) national protection, other than international protection". The aim of these changes in line with the EU Directive has been to extend the benefits of long-term resident status to disadvantaged categories, such as refugees, asylum seekers, or other assimilated categories qualifying for protection under EU law or under national law. As the article 2 and article 3 from the Preamble of the EU Directive state "the prospect of obtaining long-term resident status in a Member State after a certain time is an important element for the full integration of beneficiaries of international protection in the Member State of residence." "Long term resident status for beneficiaries of international protection is also important in promoting economic and social cohesion, which is a fundamental objective of the Union as stated in the Treaty on the Functioning of the European Union".

In Romania, the acquiring of a long-term residence permit is for most TCNs an intermediary (and necessary) stage in the process of applying for Romanian citizenship. As such and with regard to the implications which the granting of such a status to a foreign national will have, the legal conditions under which a TCN can obtain long-term residence in Romania are stricter than those for other categories of foreign nationals. If requested, the status of long-term resident is granted, according to article 70 s. (1) of the GEO no. 194/2002, to those entitled to the right of temporary stay (received when legally entering the country with a long-stay visa or if they fall into a visa-exempt category) or to the beneficiaries of international protection.

An adjustment of the law has been made in article 70 s (1) with the clarification of the specific moment when the applicants for long-term resident status must hold the right of temporary stay or benefit from international protection, namely the moment when a decision concerning the application for said status has been made by the relevant authority, eliminating the previous reference to the moment when such a application has been lodged. Changes have been made to the conditions that a foreign national must meet in order to be granted long-term residence, so they become applicable to the beneficiaries of international protection as well. The general conditions that must be cumulatively met by the categories mentioned in article 70 s. (1) are: the applicant must be a beneficiary of a right to temporary stay or of international protection and must have resided legally and continuously on Romanian territory for five years immediately prior to the submission of the application; the applicant must provide evidence that has stable resources to maintain himself/herself, with the exception of the family members of a Romanian citizen; the applicant must provide evidence of social security and of appropriate accommodation; the applicant must possess reasonable knowledge of the Romanian language; the applicant does not represent a threat to the public policy and national security (according to article 71 s.1).

Among other newly introduced changes to the provisions of GEO no.194/2002, the ones regarding the removal procedures of the beneficiaries of international protection, in case such protection has been revoked or lost, should also be mentioned. Correlative adjustments have been effected to the Law no. 122/2002, so as to define the "international protection" as including the refugee status or other status offered by way of subsidiary protection"[35]. The Romanian state offers immediate readmission on its territory to the beneficiaries of

[35] Idem 35.

international protection and their family members, if there has been a decision taken by another Member State to remove them from its territory, if they held long-term resident status in that Member State.

The GOE no. 194/2002 has been modified two more time in 2013, through Law no. 158/2013[36], which introduced specific regulations as to the obligations of the foreigners hosted in refugee and immigration centers (such as the obligation to submit to fingerprinting and health examination, the obligation to conform to the administrative schedule of the center, the obligation to refrain from consuming alcohol or other intoxicating substances etc.), and through GEO no.109/2013[37], which instituted travel facilities for third-country nationals in possession of an multiple-entry uniform visa issued by a Schengen Member State.

The process of clarification of the status of TCN has been taken place not only with regard to the legislation, but also with regard to the court jurisprudence, in particular with regard to the instances when the long-term resident status has been refused on grounds of national security. Many a case have been brought for review by the Supreme Court of Justice by disgruntled foreign nationals, that have been deemed a national security threat by the relevant public authority, i.e. MAI (*Internal Affairs Ministry*), in collaboration with other public authorities with prerogatives in matters of national security (such as SRI – *Romanian Information Agency*).

For instance, in the *ICCJ* (*Supreme Court*), Fiscal and Administrative Chamber, *Decision no. 258 from 18/01/2013*, the Supreme Court upheld the ruling passed by the Court of Appeal, which has material jurisdiction in cases relating to the status of TCNs, to declare undesirable and to take into custody four Chinese nationals on grounds of national security. The Supreme Court decided that the defense based on the fact that no criminal proceedings have been started with respect to these nationals and the fact that they have been legally residing in Romania for the past 20 years does not void or mitigate the evidence presented by the relevant authorities against them[38]. In the *ICCJ* (*Supreme Court*), Fiscal and Administrative Chamber, *Decision no. 3949 from 04/10/2012*, the Supreme Court upheld the ruling of the Court of Appeal to refuse the long-term residency status to a Turkish national, married to a Romanian citizen and legally residing for the past 15 years, on grounds of national security. The defense invoked by the plaintiff, namely that for the past 15 years he had been the beneficiary of temporary residence, granted only to those who did not pose a threat to public policy or national security, has been rejected, the Supreme Court pointing out that the conditions for granting and renewing the temporary residence and those for long-term residence (article 71 from GOE 194/2002) may be similar, but not identical, in the latter case the compliance with these conditions must be stricter, to mirror the benefits conferred by the long-term resident status.

Though not binding, the jurisprudence of the Supreme Court is highly persuasive. There seems to be a consensus as to the interpretation of the conditions under which a decision of taking into custody and subsequent removal from the Romanian territory can be granted, with respect to the relevant ECHR (*European Convention of Human Rights*) principles and jurisprudence of the European Court of Human Rights. One of the most frequently invoked arguments by the plaintiffs accused of being a threat to the national security is the infringement of the article 6 (*the right to a fair trial*) and article 8 (*the right to respect for private and family life*) of the ECHR. A careful examination of these objections has been undertaken by the Supreme Court in *ICCJ* (*Supreme Court*), Fiscal and Administrative Chamber, *Decision no. 5747 from 29/11/2011*, which upheld the ruling of the

[36] Published in the Official Journal of Romania no. 280 from 17/05/2013.
[37] Published in the Official Journal of Romania no. 796 from 17/12.2013.
[38] The Supreme Court Decisions in this paper quoted in this paper are available at www.legalis.ro, unless otherwise stated.

Court of Appeal to take into custody and subsequently remove from the national territory a legally residing Egyptian national, suspect of engaging in terrorist activities.

The jurisprudence of the Romanian courts regarding the status of TCN is not limited to cases similar to those discussed above. For instance, the Court of Appeal Bucharest has ruled in *The Civil Decision no. 4644 from 05/07/2011* that the conditions for renewing the right to temporary residence are not met, when the plaintiff - a Moldavian national married to a Romanian citizen - failed to provide convincing evidence of appropriate accommodation, submitting a bailment contract for a property where another 930 persons (!) were already registered with bailment contracts.

4. Conclusions

The status of TCN will continue to be amended in the near future, due to the necessity of transposing the EU law into the national legal framework. In this context, it should be noted that there is, until now, no reference to the transposition of the Single Permit Directive (Directive 2011/98/EU) into the national legislation. The GEO no. 56/2007 concerning the employment and posting of foreign nationals in Romania should be reviewed in accordance with this Directive. Due to the many changes to the GEO no. 194/2002, it should be perhaps advisable if a second recast of this act could be envisaged by the relevant authorities.

Given the aims of the European and national policies on immigration of addressing labour market shortages, spurring investment and becoming more economically competitive, the Romanian authorities should perhaps take a greater interest in the proposed EU draft legislation, namely the *Intra-Corporate Transferees Directive* and, even more importantly for our country, *the Seasonal Workers Directive.* For an effective way to combat the shortage of labour and its ensuing consequences, we need more legal instruments in addition to a well meaning, but relatively unknown *National Strategy for Immigration*. As highlighted in the first part of this paper, there is a need to attract both blue collar workers and skilled workers in the healthcare system, industry and agriculture, and the quota of 5500 work permits for 2014 seems insufficient for achieving such lofty goals.

The immigration problems and the status of third-country nationals will only continue to grow in importance in the coming years. More in-depth analysis of the appropriate legal and public policy measures are therefore necessary and should attract more attention from both jurists and laymen. We hope that this paper could contribute to a better understanding of the legal framework and its underlying facts with respect to foreign nationals in Romania.

References:

- **Dan Lupaşcu, Diana Ungureanu**, Drept internaţional privat, (*Private International Law*), ed. Universul Juridic, Bucharest, 2012;
- **Dragoş-Alexandru Sitaru**, Drept internaţional privat. Partea generală. Partea specială, (*Private International Law. General Section. Special Section*.), ed. C.H. BECK, Bucharest, 2013;
- **Dan Lupaşcu, G. Mihuţ,** Regimul străinilor în România, *(The Legal Status of Foreign Nationals in Romania*), ed. Universul Juridic, Bucharest, 2006;
- **Dan Lupaşcu, Nicoleta Cristuş,** Practică judiciară şi legislaţie în materia dreptului internaţional privat (*Judiciary Decisions and Legislation in the Area of the International Private Law*), ed. Wolkers Kluwer, 2009, Bucharest, Romania;
- **I.P. Filipescu, A.I. Filipescu**, Tratat de drept internaţional privat, (*Treatise on Private International Law*), ed. Universul Juridic, Bucharest, 2008;
- **Sonia Morano-Foadi, Micaela Malena (eds.),** "Integration for Third-Country Nationals in the European Union: The Equality Challenge", Edward Elgar Publishing Ltd., UK, 2012.
- **Petre Catrinciuc,** Regimul juridic al străinilor**,** (*The Legal Status of Foreign Nationals*), ed. C.H. Beck, Bucharest, 2008;
- **Adrian Constantin Tătar,** Străinul rezident în România, (*The Foreign national residing in Romania*), ed. C.H. Beck, Bucharest, 2008;

- **Codul de procedură civilă,** (*Code of Civil Procedure*), edition coordinated by dr. Viorel Mihai Ciobanu, ed. C.H.Beck, no.500, Bucharest 2013;
- www.legalis.ro;
- www.insse.ro;
- www.oecd.org;
- http://ec.europa.eu;
- http://ori.mai.gov.ro.

GENERAL CONSIDERATIONS ON THE DISCIPLINARY LIABILITY OF ARCHITECTS

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Abstract

As well as other liberal professions in Romania, also the profession as an architect is regulated by special norms, the Law No 184/2001, whose provisions are amended by the Rules governing the functioning and organization of the Romanian Order of Architects and the Code of Ethics of Architects. The specificity of the disciplinary liability of the architects towards the common law is given by specific sanctions, by the authorities competent in performing the disciplinary investigation of the disciplinary offences, as well as by the specific procedural rules. The present study aims to offer a brief analysis of these aspects which differentiate the disciplinary liability of architects towards that of the employees performing their activities under an employment contract.

Keywords: *architect, disciplinary liability, offence, procedure, sanctions*

1. Introduction

The liberal profession as an architect is regulated in Romania by the Law No 184/2001[1], whose provisions are amended by whose provisions are amended by the Rules governing the functioning and organization of the Romanian Order of Architects[2] and the Code of Ethics of the architects[3].

According to Art 2 of the Law No 184/2001 "the activity in the area of architecture is an act of culture of public interest, with urbanistic, economic, social and ecological implications. The architectural creation is meant to functionally and esthetically organize the built space, having the obligation to harmoniously insert it within the environment, respecting the natural landscapes and real-estate patrimony".

Within this study we shall analyze, without claiming to end this subject, the particularities of the disciplinary liability[4] of this liberal profession[5], as form of the legal

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[1] Republished in the Official Gazette of Romania, Part I, No 77/23 August 2004, with subsequent modifications and amendments.

[2] Approved by the National Extraordinary Conference of the Romanian Order of Architects, on 26-27 November 2011 and published in the Official Gazette, Part I, No 342/21 May 2012.

[3] Approved by the National Extraordinary Conference of the Romanian Order of Architects, on 26-27 November 2011 and published in the Official Gazette, Part I, No 342/21 May 2012.

[4] For an analysis of the Constitutional Court's decisions solving the controversies regarding the regulations on disciplinary liability see: C. C. Nenu and A. Drăghici, *Contractul individual de muncă – elemente definitorii* (Pitești: Pământul Publishing-house, 2007), 137-140.

[5] For an analysis of the disciplinary liability of architects see also Ș. Beligrădeanu, „Probleme și efecte specifice ale răspunderii disciplinare și ale jurisdicției acesteia în cazul salariaților care, în temeiul unor legi speciale, exercită anumite profesii organizate în corpuri profesionale", in *Dreptul Review*, No 9 (2005): 78-96.

liability[6], starting from the specific sources of the architects 'obligations, disciplinary offences[7], disciplinary authorities and throughout the particular disciplinary procedure.

The disciplinary liability[8] of architects does not exclude the other forms of legal liability, given the possibility to cumulate it with one of them, this form of liability being specific to labor relations[9].

As well as in the common law, also in the majority of the professional statutes, neither the specific legislation of architects offers a definition for the disciplinary offence, but just enumerates the sources of the architects' obligations.

According to Art 38 Para 1 of the Law No 184/2001 and Art 95 Para 1 of the Rules governing the functioning and organization of the Romanian Order of Architects, the members of the Order are disciplinary liable for breaching the special law no 184/2001, the Rules governing the functioning and organization of the Romanian Order of Architects and of the Code of Ethics of Architects, of the decisions adopted by the governing bodies of the Order, as well as for any other offences committed in relation to the profession or outside it that harms its prestige or the Order. Thus, we can define the disciplinary offence of the architects as the offence committed with intent that harms the provisions of the special law no 184/2001, of the Rules governing the functioning and organization of the Romanian Order of Architects and of the Code of Ethics of Architects, of the decisions adopted by the governing bodies of the Order, as well as for any other offences committed in relation to the profession or outside it that harms its prestige or the Order.

For the disciplinary offence to exist there must be cumulated its constitutive elements, namely: the object, the objective side, the subject and the subjective side. It also must be determined the causality link between the disciplinary offence and its harmful result.

In the analyzed situation, the subject of the disciplinary offence is qualified, namely an architect, member of the Romanian Order of Architects. The object of the offence is a special one too, being represented by the social relations protected by the sources of law which give birth to architects' obligations, listed by the legislation applicable for this liberal profession.

The Rules governing the functioning and organization of the Romanian Order of Architects[10] state, without being limitative, action representing disciplinary offences. The legal exemplification resumes only to offences for which it shall be decided one of the disciplinary sanctions, especially the disciplinary sanction stated by Art 38, Para 2 Let c) of the Law No 184/2001, namely the suspension for a period between 6-12 months of the right to signature. These offences are:

a) Borrowing or alienation of the seal to other persons, regardless of their quality, with the purpose of applying it on projects subjected to analysis.
b) Non-delivery within the legal term of the professional seal if it has been ordered by a definitive sanction the suspension of the right to use it or the main architect/architect with the right to signature has requested the suspension, under the conditions of the Rules and according to other legal provisions in this area.
c) Counterfeiting duplicates of the seal
d) Non-declaring the loss of the seal at the local branch where the member is registered and publish the announcement in a national newspaper.

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[6] For its analysis see: E. Ciongaru, *Teoria generala a dreptului* (Craiova: Scrisul Românesc Publishing-House, 2011), 150; C. Șerban and R. Duminică, *Elemente de drept* (Craiova: Sitech Publishing-House, 2008), 217-235.

[7] For an analysis on the concept of disciplinary offence see C.C. Nenu, "Trăsăturile caracteristice ale contractului individual de muncă" (PhD thesis, unpublished, University of Bucharest, 2008), 119.

[8] For a definition of this form of legal liability see Al. Țiclea, *Tratat de dreptul muncii*, 8th Edition, reviewed and amended (Bucharest: Universul Juridic Publishing-house, 2013), 803-804.

[9] M. Volonciu in Al. Athanasiu et al, *Codul muncii. Comentariu pe articole*. *Volumul II, Articolele 108-298* (Bucharest: C.H. Beck Publishing-house, 2011), 362.

[10] Art 97 Para 1 of the Rules governing the functioning and organization of the Romanian Order of Architects.

e) Keeping the seal in other place than the professional headquarter, in the conditions in which the owner does not have it with him.
f) Using the signature of complacency
g) Failure to register the architectural projects drafted in order to issue the authorization for construction/demolition or organizing the construction site.

As it is shown by the legal provisions previously mentioned, the area of the actions representing disciplinary offences is not limited only to those enumerated, in the absence of a strict and limitative provision of the disciplinary offences committed by architects.

2. Disciplinary sanctions applicable to architects

The disciplinary sanctions applicable to architects, members of the Romanian Order of Architects, for the offences committed are expressly and limitative stated by Art 38 Para 2 of the Law No 184/2001[11]:

a) Warning
b) Vote of censure on an architect
c) Suspension for a period between 6 to 12 months of the right to sign
d) Suspension for a period between 6 to 12 months of the membership of the Order

The application of one of these sanctions shall be made depending on the consequences caused by the offence, by the circumstances of the offence, as well as by the personal circumstances of the offender. Though the legal provisions applicable for the disciplinary sanction of the architects do not refer to the principle of the unique disciplinary sanction, we consider that this principle is rightfully applicable. Thus, for the same disciplinary sanction committed more than once can be ordered one sanction.

It must be mentioned that for architects we have one of the simplest disciplinary sanctions applicable for liberal professions. The disciplinary sanctioning regime applicable for architects does not include the prohibition of exerting the profession or exclusion from the Romanian Order of Architects, sanctions found for other liberal professions. The prohibition to exert the profession is used as a complementary penalty, so it is applicable in the penal area.

a) Warning is the simplest disciplinary sanction which can be applied for architects. The warning has a dominant moral feature, which is ordered mainly for disciplinary offences without important consequences, for the persons who have committed their first offence. The warning is a signal for the offender that if he commits another offence he shall be sanctioned by another more serious penalty.
b) The vote of censure on an architect is a sanction also stated for other liberal professions[12] having a preponderant moral feature. It assumes the disapproval expressed by the Romanian Order of Architects for an action representing a disciplinary offence committed by an architect, member of this Order. This sanction shall be ordered for offences not having serious consequences.
c) The architects receive their right to signature[13] from the Romanian Order of Architects if they have a full exercise of their civil rights, if they fulfill the honorability and internship conditions or, where appropriate, if they have practical professional experience. Receiving the right to signature by architects mandatorily assumes their registration in the National Board of Architects. Receiving this right

[11] The sanctions are stated also by Art 96 of the Rules governing the functioning and organization of the Romanian Order of Architects.
[12] For instance, the disciplinary liability of doctors has been analyzed by Section 1 of this paper.
[13] According to Art 62 of the Rules governing the functioning and organization of the Romanian Order of Architects.

is essential for the profession, considering that the law states[14] that, for architectural projects for which the law states the authorization to build, it must be drafted by an architect with the right to sign or by a leading architect with the right to sign.

It is also stated by the same article that "the right to sign is exerted on all technical architectural documents or documentations, representing written and drawn documents, in all the stages of projection, namely: feasibility studies, documentations for receiving the special confirmations requested by the urbanity certificate, technical documentations for authorizing the construction, technical projects, details on the performance, projecting tasks for the specialized sub-projectors, building site orders, acceptance certificates of the construction, final acceptance certificates, other documents of this nature".

Suspending the right to sign requires that the architect cannot sign any of the documents above mentioned. This sanction affects him both materially and personally. Though, if the architect uses his right to sign in an associate office, this sanction may not affect him, since another architect may sign the documents prepared by the sanction architect.

The legal provisions state for this disciplinary sanction the period for which it may be disposed. Thus, are established both a minimum, as well as a maximum duration. The suspension of the right to sign cannot be disposed for less than 6 months, or for more than 12 months.

d) The most serious sanction applicable for architects is the suspension for a period between 6 to 12 months of the membership of the Romanian Order of Architects. From the analysis of the law[15] it does not result that for the performance of the profession as an architect is required the membership in the Romanian Order of Architects, considering that the registration in this national organism is made upon request, and the right to sign is not conditioned by the membership in the Order and mandatorily assumes only the registration in the National Board of Architects and not the membership in the Order.

Nevertheless, in practice, in order to be an architect with the right to signature is necessary the enrolment within the Romanian Order of Architects.

The suspension of the membership of the Order also assumes the suspension of all associated rights and obligations. The suspension may be ordered for a period between 6 to 12 months, without exceeding it. If the suspension of the right to signature does not involve the suspension of other rights, the suspension of the membership assumes the suspension of all associated rights and obligations, including the right to signature.

3. Competent authorities in the disciplinary procedure

The disciplinary authorities[16] are the territorial disciplinary commission which is organized in each branch of the Romanian Order of Architects and the national disciplinary commission[17] which is organized within the Romanian Order of Architects and is independent by the governing bodies of the Order. The law uses the name "disciplinary courts", considering that trialing the disciplinary offences of the architects is made according to the civil procedure norms.

The territorial disciplinary commission trials only as first instance the disciplinary offences committed by architects and conductor architects enlisted in that branch. From this

[14] Art 65 Para 1 of the Rules governing the functioning and organization of the Romanian Order of Architects.
[15] Art 48 Para 1 and Art 62 of the Rules governing the functioning and organization of the Romanian Order of Architects.
[16] As stated by Art 98 Para 1 of the Rules governing the functioning and organization of the Romanian Order of Architects.
[17] The rules governing the functioning and organization of this commission are stated by Art 112-122 of the Rules governing the functioning and organization of the Romanian Order of Architects.

rule are excepted the members of the governing bodies and the members of the commissions chosen, which are trialed by the national commission of discipline, as first instance. This commission may sanction, after trialing, only by warning or vote of censure. For the other two disciplinary sanctions, the territorial commission shall forward the case file together with the proposal for sanctioning to the national disciplinary commission. The proposal shall be motivated de jure and de facto and shall be forwarded to the national commission within maximum 15 days from its wording. Also, the proposal shall be communicated to all the parties.

The documents which can be issued by the territorial disciplinary commission are:

- Decisions, which are adopted in the disciplinary cases with the votes of the majority of the panel's members;
- Resolutions, which are adopted in cases regarding the organization, debated in the administrative meetings by the territorial disciplinary commission's plenum. These are adopted by the vote of the simple majority of the commission's members.

The national disciplinary commission has competence in trialing certain cases as first court, but also in trialing the contestations against the decisions ordering disciplinary sanctions. The commission judges as first instance the disciplinary cases in which the subjects of the offences are members of the governing bodies of the Romanian Order of Architects' branches and the members of the commissions elected within the branches and the Order.

Regarding the competence of the National Council for Solving Complaints, it solves both the complaints against the decisions issued by the territorial disciplinary commissions, as well as those against the decisions issued by its panel of 3 judges.

The documents issued by the national disciplinary commission are the same as in the case of the territorial disciplinary commissions (decisions and resolutions), being adopted in the same way and for the same areas of activity.

4. Procedural rules

The disciplinary procedural rules are stated by Art 123-134 of the Rules governing the functioning and organization of the Romanian Order of Architects and are the same both for the territorial disciplinary commissions, as well as for the national disciplinary commission. According to Art 134 of the Rules governing the functioning and organization, the provisions regarding the procedure are completed by the provisions of the Civil Procedure Code. Also, from the analysis of the provisions regarding the disciplinary liability stated by the Rules governing the functioning and organization, it results that these provisions are completed by the provisions of the Code of Procedure on the jurisdictional activity of the territorial disciplinary commissions and the commission of the Order[18].

According to Art 95 Para 5 of the Rules governing the functioning and organization, the procedure for trialing the disciplinary offences must be initiated in maximum 2 years from the moment when the offence was committed. Otherwise, the disciplinary offences are prescribed within this term.

As well as in the case of the common law, the disciplinary procedure begins with the notification of the competent authority regarding the commission of a disciplinary offence by the members of the Romanian Order of Architects.

The competent authority in order to receive the notification is the territorial disciplinary commission from the branch in which the architect who has committed the offence is registered as member. For the offences committed by the members of the governing

[18] Approved by the National Council's Decision No 551/24.02.2006.

bodies of the Order or of the branches, shall be notified the national disciplinary commission, according to its competence.

The governing bodies of the branches and of the Order may take notice regarding the disciplinary offences committed by their members. They shall notify[19] the competent disciplinary commission. The notification shall be registered in two copies. The verification of the conditions for the validity of the notification shall be made by the president of the notified commission. If the notification does not fulfil these conditions, it shall be returned for reformulation. If instead the notification is valid, the president of the notified commission shall appoint the panel which shall trial the case and the term for the summoning of the parties.

The summoning of the parties is made according to Art 125 of the Rules governing the functioning and organization, completed by Art 10 of the Code of procedure regarding the jurisdictional activity of the territorial disciplinary commissions and that of the Order. Shall be summoned both the investigated architect, who is the defendant in the trial, as well as the author of the notification, which is the plaintiff in the trial. The summoning shall be made in writing, by registered letter with confirmation of receipt, at the professional office of the parties or at their domicile address. The summoning[20] shall be sent with 30 days before the date of the hearing and shall have annexed a copy of the writings from the case file.

After the first summoning, for the other summons it is not mandatory the term of 30 days. Also, if the party was present at the hearing, it shall be presumed that he is aware of the term and shall not be summoned. The failure to appear at the hearing, although the party was legally summoned it shall not prevent the hearing. If instead the party was not legally summoned, the decision issued shall be annulled.

As an exception from the principle of public hearings in the civil law, the hearings of the panel trialing disciplinary cases are not public. As well as in the civil procedural law, at the first hearing, if the procedure was fulfilled, the parties may require a term for a new hearing for the lack of defense, request which may be registered only once. Also, the parties may inspect the documents in the case file at any stage of the trial.

Art 13 Para 4 of the Code of procedure regarding the jurisdictional activity of the territorial disciplinary commissions and that of the Order states the principle of the active role of the members of the trialing panel. They are obliged to insist by any legal means to discover the truth and to prevent any mistake in the knowledge of the facts and shall actively assist the parties in the protection of their rights and interests.

The hearings are conducted as well as in the civil trials. The president of the panel leads the debates, the panels being selected according to the provisions analyzed in the previous section. He shall take the parties' statements and shall listen to the proposed

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[19] For its validity, the notification must state the elements pointed by Art 123 Para 3-4 of the Rules governing the functioning and organization:
Name, surname and address of the person, namely the name of the governing body who issued the notification;
Name, surname and branch where is registered the architect/conductor architect against whom the notification is issued;
De jure and de facto description of the situation;
The evidences on which the notification is based on, annexed in a copy;
Signature;
A copy of the minute of the meeting which decided to notify the disciplinary commission, if the notification is made by a governing body of the branch or of the Order.

[20] For its validity, the summon shall state the elements listed by Art 10 of the Code of procedure regarding the jurisdictional activity of the territorial disciplinary commissions and that of the Order:
Number and date of issuance, as well as the number of the case file
Year, month and day of the hearing
The location of the hearing
Name, domicile and quality of the person summoned
Name and domicile/head office of the defendant
The seal of the commission, according to the annexed model and the signatures of the president and secretary of the commission

witnesses. If an independent legal adviser is consulted regarding legal issues, he must answer in written, his participation in the debates of the disciplinary commission being prohibited. At the end of the debates, the president shall listen to either the parties, or their defenders, arguing or combating the complaint.

The secretary of the disciplinary commission shall draft a minute at the end of every hearing, which must be signed by all the panel's members.

During the disciplinary procedure, the right to defense is guaranteed for the defendant. The Rules[21] establish that the parties must appear in person before the disciplinary commission. They can be assisted by an architect with right to signature and/or by a lawyer[22]. The members of the disciplinary commission cannot assist the parties, even if they are not part of that panel trialing the case.

After the deliberations, various solutions may be adopted, depending on the competence of each commission. Thus, the territorial disciplinary commission may only adopt two solutions: admits or rejects the complaint.

The national disciplinary commission may adopt four solutions, depending on the stage of the case:

- Admits the complaint for the cases assigned to the national disciplinary commission
- Rejects the complaint for the same causes
- Admits the contestation against the decision issued by the competent territorial disciplinary commission as first instance or against the decision issued by the national disciplinary commission.
- Rejects the contestation against the decision issued by the competent territorial disciplinary commission as first instance or against the decision issued by the national disciplinary commission.

The decisions[23] of the disciplinary commissions are adopted by the vote of the majority of the commission's members who have participated at the case trial and drafted within 15 working days by a member of the panel appointed by the president of the panel. If one of the panel's members has a different opinion he shall argue it in written and shall attach it to the decision.

The decisions of the disciplinary commissions are communicated by registered letter with confirmation of receipt. The communication shall be addressed to the parties, to the president of the territorial branch and to the president of the Order, within 15 calendar days beginning from the date when the decision is drafted.

The disciplinary commissions' decisions may be contested within 30 days since they are communicated. The competent court in solving the contestations is different depending on the competent first instance. Thus, the contestations against the territorial disciplinary

[21] Art 127.

[22] As it completes Art 11 Para 2 o the Code of procedure regarding the jurisdictional activity of the territorial disciplinary commissions and that of the Order.

[23] For validity, the decisions must state the elements listed by Art 130 of the Rules governing the functioning and organization, completed by Art 15 of the Code of procedure regarding the jurisdictional activity of the territorial disciplinary commissions and of the Order:
The name of the president of the hearing, of the members of the panel and of the secretary;
The name and surname of the parties;
The argumentations of the parties;
The presentation of the situation which grounded the decision of the commission, as well as those for which the demands of the parties were denied;
The de jure and de facto motivation of the decision
The content of the decision (the solution issued for the case);
The mean of attack and the term in which it must be submitted;
The date of the draft;
The signatures of the panel's members and of the secretary.

commissions' decisions are submitted to the national disciplinary commission. The contestations against the decisions issued by the national disciplinary commission as first instance are solved also by the national disciplinary commission in panel of 5 members.

The contestations against the decisions issued by the national disciplinary commission as court of appeal are solved by the competent administrative contentious court. If the decisions issued by the disciplinary commissions are not contested within the legal term, they become definitive. Definitive decisions have the res judicata authority for the parties and the governing bodies of the branches and of the Order and are executory from the notification of the decision to implement it. The decision to implement the suspension either of the right to signature or of the membership of the Order shall also state the date until the sanction is valid. The definitive decisions shall be applied either by the territorial ruling councils or by the national council of the Order, depending on the established disciplinary sanction. The decisions stating the warning or the vote of censure shall be applied by the territorial ruling councils. The decisions stating the other two disciplinary sanctions shall be applied by the national council of the Order.

Unlike the common law and the other professional statutes, the legislation states that the performance of the profession as an architect does not mention the possibility of erasing the disciplinary sanctions. We consider that, in order to align the provisions of the common law, as well as for rational reasons, the Law No 184/2001 should be amended on this area.

5. Conclusions

Though the norms regarding the disciplinary liability stated by the Labor Code represents the common law in the disciplinary area for all the persons performing their professional activity based on a specific labor relation, which is not born from an individual labor contract, their disciplinary liability acquired additional valences, by a detailed regulation, adequate for each category. Knowing and correctly applying these legal norms ensures the legitimacy of the document stating the disciplinary liability of these categories of persons.

Organized in associations or professional societies, the architects may unfold their profession both based on an individual labor contract, as well as based on other types of conventions. Even if they are not subjected to a subordination relation in this latter case[24], they are disciplinary liable in front of certain special bodies, created based on a special statute.

References:

- Athanasiu, Al. et al, *Codul muncii. Comentariu pe articole. Vol. II. Articolele 108-298*. Bucharest: C.H. Beck Publishing-house, 2011.
- Beligrădeanu, Ş., "Probleme şi efecte specifice ale răspunderii disciplinare şi ale jurisdicţiei acesteia în cazul salariaţilor care, în temeiul unor legi speciale, exercită anumite profesii organizate în corpuri profesionale". *Dreptul Review* No 9 (2005): 78-96.
- Ciongaru, E., *Teoria generala a dreptului*. Craiova: Scrisul Românesc Publishing-house, 2011.
- Nenu, C.C., "Trăsăturile caracteristice ale contractului individual de muncă". PhD thesis, unpublished, University of Bucharest, 2008.
- Nenu, C.C. and Drăghici, A., *Contractul individual de muncă – elemente definitorii*. Piteşti: Pământul Publishing-house, 2007.
- Şerban, C. and Duminică, R., *Elemente de drept*. Craiova: Sitech Publishing-House, 2008.
- Ţiclea, Al., *Tratat de dreptul muncii*, 8th Edition, reviewed and amended. Bucharest: Universul Juridic Publishing-house, 2013.

[24] For an analysis of the employer's right to establish and sanction misbehavior of the employee who works under his authority see C.C. Nenu, *Dreptul muncii*, University of Piteşti Publishing House, Piteşti, 2010, p. 34.

RESPECTING CHILDREN'S RIGHTS THROUGH THE INSTITUTION OF MINORS PROTECTION BY PARENTS

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MOTTO:
Our duty is to help the child live.
(Maria Montessori[1]**)**

Abstract

Every society hopes and expects that the younger generation, meaning children, grow and become capable and responsible citizens that contribute to the welfare of the community. However in the whole world, children are denied the most elementary rights of normal development, active participation and even the survival. Therefore, both at international level and national level have been taken measures to respect children's rights and thus to protect them.

Parental care is the care of the juvenile legal means consisting of all rights and duties relating to both person and property belonging of the child by both parents equally. The exercise of parental care is performed under control of the state, represented by the guardianship court. On how to exercise parental care usually is an accomplished both parents jointly and equally. But there are certain situations where it is not possible to apply this rule, given that one of the parents is impossible to exercise their rights and duties incumbent. In these cases exception is exercising parental care by one of the parents.

Keywords: *child, children's rights, minor, parents, guardianship court, parental care*

Introduction

The child, this pure being is still an unknown, both in school and in family. This is a big problem that rises in front of us! But maybe if we banish from our eyes and our mind the fog of prejudice and ignorance, the more dazzling, the further we consider more learned, we would see what and how much we need to do for our children. Why? Also because the children, at their turn, would make everything for us, the adults. They are so sensitive to everything we say and how much they would like to submit to us! Look at their eyes when they looked up at us and you will understand the meaning of these words. You can support their look?

Any society hopes and expects that its young offspring, the children grow and become capable and responsible citizens that contribute to the welfare of their community. However, throughout the world, are denied to children the most basic rights of normal development, active participation and even survival.

The question is: why children need rights? Moreover as these are mentioned in international documents and internal laws!

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[1] **Maria Tecla Artemesia Montessori** was an Italian physician and educator, best known for the philosophy of education that bears her name, and her writing on scientific pedagogy. Her educational method is in use today in public and private schools throughout the world (http://en.wikipedia.org/wiki/Maria_Montessori).

Children should be considered the most privileged age category, because of the importance of their proper training and education. However, in the world, mostly because of poverty, children are treated more often than we might imagine as a very cheap labor - in the best scenario, but also as mercantile commodities for illegal[2] organs transplant trade, as the object of child prostitution and flesh trade.

Such cases of abuse and exploitation can exist only because of the child's inability to defend himself, of his physical weakness and mental immaturity.

Both in developed and in developing countries, the children face too often with the street violence, the temptation to use drugs, with the abuse and sexual exploitation. They are often forced to work an excessive number of hours, practicing activities whose risk does not matter to anyone; the danger does not mean anything. All this affects their health - and so fragile, but it also impede them to enjoy the leisure and education to which they are entitled.[3]

Too many children die from diseases that could be prevented. Malnutrition is still a problem that must be rooted out, the access to drinking water or sanitary facilities still remains a luxury in areas like Africa.

In some parts of the world, the age at which they should go to school, children are enrolled in the armed forces, are tortured and subjected to some punishments absurdly harsh and improper the age.

All these children whose basic needs and fundamental rights are denied, cannot, they have no way to become responsible citizens, sensitive or productive. How can we ask someone that is not aware of the concept of right to respect the rights of others?

Therefore, the initiative taken in the United Nations Organization to adopt in 1989 the most approved international document (192 states in the world approved today the document) – The Convention on the Rights of the Child is more than commendable. Perhaps not coincidentally the Convention was adopted in the year of radical changes over the whole earth. Thus it was created a special place for children in the global agenda.[4]

Built on varied legal systems and cultural traditions, the Convention on the Rights of the Child is a set of standards and obligations universally accepted and negotiable. Children are born with fundamental freedoms and with innate rights of every human being. This is the basic condition of the United Nations Convention on the Rights of the Child.[5]

The Convention on the Rights of the Child is constitute in a real code of rights of children everywhere and sets the standards of a normal life at different stages of his evolution. With 54 articles preceded by a head note, the convention is represented as an ambitious text that has the aim to promote a genuine legal status of the child.

By the confirmation of the Convention, governments are obliged to fully implement the rights provided, rights that can be grouped into three major categories:

1. Protection: Children are entitled to protection against cruelty, abuses, neglect and exploitation;

2. Participation: Children are entitled to play an active role in society and to have a word to say in their own lives;

3. Care: Children are entitled that the most basic necessities of them be satisfied[6].

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[2] The day of Friday, March 20, 2009, represented for many of the Romanians a black day. This is because; all the televisions have shown a parent was willing to sell his own child-a girl- for organs. He had the courage to appeal to a gesture that many of us consider it criminal. Can this man have a soul? Or maybe it was fair to wonder if he has a mark of soul in him! And on top! The child looked at him with innocent eyes, but especially with confidence ...

[3] Mădălina Tomescu – *Les droits de l'enfant dans la société actuelle* – Transyvanian Review, Vol. XX, No.1, Spring 2011, p. 138-145.

[4] Ibidem.

[5] Ibidem.

[6] Ibidem.

The Convention is based on the philosophy that children are equal and have the same values as adults. But at the same time they are vulnerable because of their age and because of the way their lives are subject to the decisions and behavior of adults.[7]

Therefore, the New Civil Code provides parental care institution that includes all three elements: protection, participation, care. We will analyze how this Romanian institution contributes on respecting the children's rights, provided in an international document, confirmed and therefore assumed by Romania.

1. General considerations regarding parental care

Legal settlement must start from the creation of specific means of protecting and promoting the interests of minors. From a legal perspective, the basic function of parents and guardians is to exert protection of children. As Declaration of the Rights of the Child (1959) recognized, these rights are qualitatively different from those of adults, and this gives them a specific that turns them into a subject, support to study of a legal discipline.

Parental care, as usual legal means for minor protection finds its regulation in Title IV of the Civil Code devoted to parental authority, art. 483-512. According to art. 483 of the Civil Code *"(1) Parental authority is the ensemble of rights and duties relating to both person and assets belonging to the child and both parents equally. (2) The parents exercise the parental authority only in the best interests of the child, with due respect to his person, and they associate the child in all decisions that concerns him, taking into account the age and the maturity degree of the child. (3) Both parents are responsible for raising their minor children[8] "*

Based on these law, we can formulate a definition, in a way that we will say that by parental care is understood the legal means of protection the minor which consists of the ensemble of rights and duties relating to both person and assets of the minor and belong equally to both parents.

Under the legal aspect, the term "parents" includes both natural parents (blood) and adoptive parents.

As *judicial nature*, parental *care is a complex legal institution*, since belongs as both family law [9] and civil law [10] as belonging to other branches of law.[11]

2. Principles

Exercising the rights and fulfillment of the obligations of parents towards their children are subjected to certain principles committed categorical in the Civil Code.

Are considered as principles of parental care:

1. Exercising the parental care is performed exclusively in the superior interests of the minor[12]. In this sense, art. 104 Paragraph.1 of the Civil Code provides that "Any measure for the protection of the individual is determined only in its interests" and also, art. 263 Paragraph 1 of the Civil Code establishes that "Any measure relating to the child, regardless of its author, must be taken with the respect of the superior interest of the child". This principle is

[7] Stewart Asquith, Malcolm Hill**,** *Justice for children*, Martinus Nijhoff Publishers, 1994, p.13.
[8] Ungureanu, O. şi Munteanu, C *Civil Law. People*., Bucharest, Hamangiu, 2011, p 234.
[9] Especially concerning the minor person.
[10] Especially concerning the minor assets.
[11] For example, labor rights and social security.
[12] This principle is enshrined and by the Article 3. 1 of Law no. 18/1990 for ratifying the Convention on the Rights of the Child, republished, art. 48 Para. 1 of the Constitution, according to which "*parents have the right and duty to ensure growth, education of the children*."

set out in art. 483 Paragraph 2 and 3, according to which "(2) The parents exercise parental authority only in the superior interests of the child, with respect due to its person, and they associate the child in all the decisions that concern him, taking into account the age and the grade of maturity of the child . (3) Both parents are responsible for raising their minor children. "

2. The equality of both parents in exercising parental rights and duties, is another principle established in Art. 483 Paragraph 1 and 3, as well as art. 503 Paragraph 1, according to which "parent exercise together and on an equal basis the parental authority."

3. Both parents have equal rights and obligations to their children, without drawing a distinction as they are from marriage, outside of marriage, or adopted.

In this respect we recall the provisions of art. 260 of the Civil Code, which states that *"Children born outside the marriage are equal before the law with those born in marriage, as well as adopted children."* This legal provision enshrines the principle of equal opportunities and non-discrimination in the field of child rights.[13]

4. Economic independence principle, a principle enshrined in Art. 500 of the Civil Code: "The parent has no right over the child's assets and neither the child has no right over parent's assets, besides the right of inheritance and maintenance" and

5. Parental care is exercised under the control of society, especially of the state.

The exercise of parental care is performed under control of the state, represented by court guardianship, sense in which the art. 107 of the Civil Code establishes: "(1) The procedures provided in this Code concerning the protection of the individual are the competence of the court of guardianship and family established by law, hereinafter referred to as guardianship court. (2) In all cases, the court guardianship immediately resolves these claims."

Noted that the first two principles are enshrined in art. 18 section 1 of the Convention on the Rights of the Child: "*The States Parties* will strive to ensure the recognition of the principle that *both parents have a common responsibility* for child growth and development. The responsibility for raising the child and ensure its development rests primarily to the parents and, when applicable, *to his legal guardians*. They must guide, before anything, by the superior interest of the child "[14].

We retain that these principles must be exercised in observing the fundamental principles which govern the general legal framework regarding respecting, promoting and ensuring all children's rights provided by Law no. 272/2004, art. 6 (Official Gazette no 575/2004).

All these principles put in practice a significant amount of rights enshrined in the International Convention on the Rights of the Child. Among these are mentioned: the respect towards the child's dignity, the child's right to be consulted, depending on the age and the grad of maturity of the child, the right to participate in society, but especially the basic rights: the right of life and survival, the right of development, the right of nondiscrimination.

3. Ways to exercise

Regarding the manner of exercise the parental care, the rule is that both parents realizes it together and equally.

The rule is enshrined in the provisions of art. 503 Paragraph 1 of the Civil Code, as follows: *"Parents exercise together and equally the parental authority."*

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[13] In this regard see the provisions of art. 48 para. 3 of the Constitution, Art. 7 of Law no. 272/2004, art. 446, 448 and 471 para. 1 and 3 of the Civil Code.

[14] See also the provisions of art. 1372 of Civil Code.

But there are some situations where it is not possible to apply this rule, given that one of the parents is in the impossibility to exercise the rights and duties laid upon him. In these cases the exception consists in *exercising the parental care by one of the parents.*

The cases in which applies this method of exercising parental care are devoted to art. 507 of the Civil Code: "If one of the parents is deceased, declared dead by court order, put under the ban, decayed of the exercise of parental rights or if, for any reason, he is in the impossibility to express the will, the other parent exercises single parental authority".

As observed, the mere circumstance that, in fact, one of the parents is in the impossibility to exercise his parental rights and duties is sufficient to attract their exercising of the other parent.

Also as an exception, art. 490 Paragraph 1 recognizes the minor parent who has reached the age of 14 exercising the parental rights and duties, but only on the child's person (personal aspect) , the rights and duties of the child's assets being excluded , these returning to his guardian or, where appropriate, to other persons, under the law (art. 490 paragraph 2 Civil Code) .

The legislature has regulated this tiebreaker, as the minor over 14 years, with limited exercise capacity, has in turn the need of legal guardian consent to close certain legal acts.

There are also cases provided by law, in which the exercise of parental care has certain features (in the case of parents divorce, giving in foster home).

The ways to exercise parental rights according to art. 9 of the Convention on the Rights of the Child are:

"1. States Parties shall ensure that no child will not be separated from his parents against their will, except the situation when competent authorities decide, under the control of judicial review and respecting the laws and applicable procedures that such separation is in the best interests of the child. Such decision may become necessary in particular cases such as, for example where abuse or neglect children by parents or in the case of parents living separately and is imposing taking a regarding the place of residence of the child.

2. In all cases referred to in paragraph 1 of this article, all interested parties should be able to participate in debates and to make their views known.

3. States Parties shall respect the right of the child who is separated from both parents or one of them, to maintain personal relations and direct contact with both his parents, on a regular basis unless it violates the superior interests of the child.

4. When the separation results from any action taken by a State Party, such as detention, imprisonment, exile, deportation or death (including death from any cause occurring during detention) to both parents or one of them or the child, the State Party will provide, upon request of parents, the child or, if appropriate, another member of the family, basic information about the place where the absent member of the family can be found, except the case of disclosure these information would harm the child welfare. States Parties shall further ensure that showing such a request shall not conscript by itself adverse consequences for the person or persons concerned.

4. The content of parental care

The content of parental care is based on two components:

1. *the personal side* which concerns protecting the minor, and
2. *the asset side* which refers to:

- assets management and representation of the minor under 14 years in civil legal acts;
- Authorize civil legal acts of the minor 14 to 18 years.

The p*ersonal side*, which concerns the protection of minor, mainly belongs to family law, sense in which the New Civil Code has the art. 487: *" Parents have the right and duty to*

raise the child, taking care of health and the child's physical, mental and intellectual development, of his education, teaching and professional, according to their own beliefs, characteristics and needs of the child, they are obliged to give the child guidance and necessary advices for the proper exercise of the rights which the law recognizes for him."

Romanian law, as international regulation, mentions the right and *duty* of parents to raise the child. This means the **obligation** of parents to ensure the optimal conditions for harmonious physical and mental development of the child. Therefore, they must ensure both the climate necessary to biological and physical development of the child (*caring for the health and physical development*) and also family environment (moral, based on mutual affection) that can ensure the development in good conditions of the child 's personality and also to supervise and guide the child in such a manner that he is able to integrate into society, to cope with social demands , which once with the development of society, are becoming increasingly complex [15].

It seems that the idea of "duty" is very important, in condition I which in Romania there are parents willing to sell their child for modest amounts of money. In this respect, we mention the case of the two parents from Moreni, who in November 2013 were caught red-handed while trying to sell their last child, aged two months, for the amount of 2000 lei.[16]

The above situation is not unique to our country. A simple journalistic investigation revealed that throughout the country there are people willing to sell their children's souls. It is well known, for a man of sixty years from the village of Rodna, Bistrita-Năsăud who has nine children. But, he grew up but only three. He sold the rest of them. He recognizes with lightness, even showing pictures of his children which he does not know under what conditions they live. For him, these children meant 5000 lei each.[17]

Even if this practice is condemned by the criminal law, these people act without caring that they can go to jail, because of the very high levels of poverty.

On the other hand, an important place in this side is occupied by the educational aspects, sense in which can intervene the punishable civil liability of the parent for the illegal act of the minor[18].

Patrimonial side. The contents of this side of parental care is established by the provisions of article 501 of Civil Code, according to which: "(1) The parents have the right and duty to manage the assets of their minor child, and to represent him in legal civil acts or to approve for him these acts, as appropriate. (2) After the age of 14 years minor exercise his rights and performs his duties alone, under the law, but only with the consent of parents and, where applicable, the guardianship court. "[19]

Towards the thirds of good faith, any parents that fulfills single a current act for exercising parental rights and duties, is estimated to have the consent of the other parent (art. 503 par. 2 of the Civil Code).

Note that the rights and duties of parents to manage the child's assets are obeying to the rules established for the administration of minor's assets by the guardianship, excepting

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[15] Lişman Fănuța - *Discussions on the edge of parental responsibility essence for the injury event of the minor* - item available on the website http://www.juridice.ro/104244/discutii-pe-marginea-fundamentului-raspunderii-parintilor-pentru-fapta-prejudiciabila-a-minorului.html

[16] See http://www.mediafax.ro/social/doi-parinti-din-moreni-prinsi-in-flagant-dupa-ce-si-au-vandut-copilul-cu-2-000-de-lei-11631861

[17] www.antena3.ro/romania/copil-de-vanzare-5000-lei-bucata-cat-costa-o-via-a-in-romania-190886.html

[18] Article 1372 provides: "(1)The one *who under the law, of a contract or of a court* decision *is obliged to supervise a minor or a person under the interdiction responds for* the *injury caused* to another *by the last people. (*2) The responsibility *subsists even if when* the *offender being devoid of discernment, is not responsible for his own deed. (*3)The one obliged at t*he supervision is relieved of liability only* if he *proves that he could not prevent the injury act*. In the case o*f parents or, when applicable,* of *legal guardians,* the evidence *is deemed to be made only if they prove that the act of the child is the result of a cause other than how they have fulfilled the duties arising from the exercise of parental authority. "*

[19] Dumitriu, A.P, *New Civil Code, notes, correlations, explanations*, Bucharest: CH Beck, 2011, p 32.

inventory preparation. Also, the legal status of documents available is the same as the one regulated by art. 144 of the Civil Code in matters of guardianship, excepting the consent of the family council, because this is required to establish only in the case of juvenile guardianship.

The representation and consent of the minor civil documents are required because, as seen in the legal representation of individuals lacking of legal capacity, minors under 14 years is voided of exercise capacity, and the minor between 14 and 18 has the ability of restricted exercise. As it is known, the lack of exercise capacity requires the legal representation, and limited exercise capacity involves the prior consent of legal guardian for valid conclusion of certain civil acts by minors of 14 to 18 years.[20]

5. Settlement of disagreements between parents

Whenever there is a disagreement between the parents concerning the exercise of the rights or performance of parental duties, the guardianship court, after listening the parents and taking into account the conclusions of the report on the psychosocial investigation, decides the best interest of the child. Listening to the child is mandatory, the provisions of art. 264 [21] being applicable (Art. 486 Civil Code).

Guardianship court resolves disputes between parents and children which affect social relationships of the last ones, in the case in which the parents impede the correspondence or personal ties of the child under the age of 14 years (art. 494 of the Civil Code). Also disagreements between parents regarding child's housing or the change of it is settled also by the guardianship court. In both cases, the child's hearing is mandatory in conditions of the art. 264, 496 and 497 Civil Code. [22]

6. The liability for non-performance or improper performance of parental care

Failure to exercise or improper exercise of the rights and failure to fulfill or inappropriate fulfillment of parental duties, appeals parental liability according the law.

Depending on the negative consequences of parental behavior, the liability can take many forms:

1. criminal liability[23]
2. *contravention*[24] liability, and
3. *civil* liability

Analyzing the problem from the point of view of civil law, first of all, the parents may be deprived of the exercise of parental rights, this being the most severe sanction that can be imposed by the guardianship court, at the request of public authorities with responsibility in

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[20] Beleiu, G., *Civil Law. People, Bucharest* T.U.B., 1982, p 143.

[21] According to art. 264 of the Civil Code "(1) *In administrative or judicial proceedings which concerns him hearing the child who has reached the age of 10 is required. However, it can be heard and the child that has not reached the age of 10 years if the competent authority considers necessary to resolve the case. (*2) The right *to be heard requires children opportunity to request and receive any information*, according to his *age, to express their opinions and be informed* about *the consequences it can have it, if is respected,* as *and about the consequences of any decision concerning him*. *(*3) *Every child may ask to be heard, according to Para*. *(*1) and *(*2). The request r*efusal by the competent authority must be motivated*."

[22] Ungureanu, C. T., *Civil Law. General part. People*, Bucharest Hamangiu, 2012, p 370.

[23] It can interfere in the case of infractions: family abandonment (art. 228 of the Penal Code.) minor maltreatment(art. 229 of the Penal Code.) inobservance of measures concerning the child custody (art. 230 of the Penal Code.) unauthorized inventory (art. 258 of the Penal Code.) endangering a person being in the impossibility to take care of himself (art. 198 of the Penal Code.).

[24] This responsibility can be trained in the conditions of Law no. 61/1991 for the punishment of violations acts of some rules of public order social cohabitation, republished (Official Gazette. Nr. 387/2000).

child protection filed, if the parent endangers the life, health or development of the child through his maltreatment, trough alcohol or drugs consumption, through abusive behavior by severely negligence in fulfilling the parental obligations or by severely touching the interest of the child. The application is judged urgently, by summoning the parties and on the basis of psychosocial investigation report and with mandatory participation of the prosecutor (art. 508 of the Civil Code).

Typically, cancelling the exercise of parental rights is absolute and extends to all children born until the date of pronouncing the decision and only by exception, the guardianship court may order partial cancelling, either considering certain parental rights, or only regarding some of the children, but only if, in this way, are not endangered the growth, education, teaching and professional training of children (art. 509 of the Civil Code). Cancelling the exercise of parental rights does not discharge the parent of his obligation to give maintenance to the child (art. 510 of the Civil Code).

If, after the imposition of this measure, the child is in the position to be deprived of the care of both parents, will be institutionalized the guardianship (art. 511 of the Civil Code).

If the circumstances that led to the institution of this measure have ceased, it is possible that the guardianship court renders the exercise of parental rights if the parent does not endanger the life, health and child development (art. 512 par. 1 of the Civil Code). Pending resolution of the request, the guardianship court may allow the parent to have personal ties with the child if they are in the best interests of the child (art. 512 par. 2 Civil Code).

We want to point out that, although there are clear evidences of child abuse, in many cases, those responsible have not asked for cancelling the parental rights for the individuals who hardly can be called parents. We present below some situations that claim urgently cancelling from parental rights.

A shocking case is that of Grigore Marcu and his brothers from the village Pungeşti, Vaslui. On 6 February 2008, Grigore Marcu died in Reanimation of Vaslui Emergency Hospital, where he had been brought by ambulance, the day before . Valeriu Lupu, chief of pediatrics, stated then for a central newspaper that the boy "*was 7 years old, but looked like he was 5. He suffered from a rare condition, the Barter syndrome. The child was almost destroyed; the lack of nutrition or the very poor nutrition brought him in this condition "* However, DGASPC[25] Vaslui now claims that *"Grigore not died from starving "* even if, from the subsequent story , it appears that all the children from the family were very poorly fed, at medical assessment was discovered " *many problems due to food deficiencies* ."

Grigore was part of a family with five children. The mother had psychiatric disorders, the father was abusing alcohol and then the children and the wife. After Grigore's death, the family entered into a DGASPC's monitoring program, that had the aim to keep the children in the family. According to representatives of the institution, " in the same period , the family received from the Department for Employment and Social Solidarity of Vaslui material support in the amount of 1,000 lei , which consisted in food and non-food products(a stove with gas bottle , including clock and hose blankets , towels , shoes for them and for the children, detergents, etc.) . During subsequent visits, food products were not identified anymore, but even more, the children still were barefoot, the clothes they were wearing were dirty, and the stove with the gas bottle no longer existed. "Once started the grape harvest, the fights have intensified in Marcu's family and the misery deepened. "Considering the reasons which have led to the institution of protective measures for two of the family's children (the measures were instituted before the boy's death of 7 years) – incest attempt (but unproven) the affirmations of one of the children from which comes out that one of the little girls is

[25] General Direction Of Social Assistance And Child Protection.

«*dad's favorite, with her he plays the most and she is the one he caress the most* » - which raises doubt about the father and in this sense, the death of the two children of the family in suspicious circumstances (first child died in 1989) the children desires expressed verbally to leave the family environment as well as those presented previously, we conclude that the life and safety of children are jeopardized in the natural family, which is why we required for presidential ordinance issuance of placement of the four children in matter of urgency .”- ends the DGASPC Vaslui informing on this case. However though, not even for those parents was not turned on the action of cancelling from parental rights.[26]

Another case is that of Petronela, a girl of eight years from Bivolari, which in June 2008, came to the hospital after her father “disciplined” her with a chain. The girl had a thoracic and abdominal contusion and concussion on the left arm and forearm. But as the brutality father correction was not enough, the episode of child torture was accomplished by her mothers, who hold her under the father’s chain. At that time, the family of Petronela was living from the allowances of the four children. Once recovered, Petronela was entrusted again the family because "that was a singular event," explains Tiberius Bantaş (DGASPC). "*The child was advised and monitored by psychologists of DGASPC and the father is advised and monitored constantly by psychologist and social worker. The police from the village investigate for minor maltreatment*."[27]

With regarding to this case, in June 2008 DGASPC’s spokesman told the press that: "Following the investigation, it can reach up to cancelling from parental rights, but until then it is necessary a protective measure." DGASPC Iaşi has NEVER started in court an action of cancelling the rights of abusive parents. It was argued that police investigative maltreatment cases for minors. But the police action does not relieve DGASPC from the obligations which is incumbent. Consequently, these individuals, who can hardly be called "parents" would have been decayed from parental rights as soon as possible. Thus, it would have been relieved also from the obligations that they do not seem to remember...

Secondly, the parents, exercising parental authority respond with civil actions for illegal acts which cause injuries committed to their underage children, on the basis of punishable civil liability for his acts (art. 1357 Civil Code). Similarly, parents respond in punishable way also for illegal acts which cause injuries committed by their underage children, on the basis of punishable civil liability for the acts of another person (art. 1372 Civil Code)[28].

In this context it is worth mentioning the case of minor GLD from Paşcani[29] who, by legal representative GC (her mother), and along with her, have sued the PV and PD, for their minor daughter PIC , asking the court the jointly coercion of the last ones to pay the following amounts of money: 4.760 lei and 100 Euros, equivalent to the injury caused by PIC and the amount of 64.3 lei representing costs of enforcement, all amounts being updated to the payment date . In motivating the request is shown that since fall 2007 and until November 2008, the applicant GLD, aged 14 at the time, was the victim of blackmail from his colleague PIC, daughter of the defendants. The last one has repeatedly asked for different amounts of money to the claimant minor who, being a sensitive nature and to escape the insistence of the colleagues brought her from the family home and gave to various colleagues, including PIC’s.

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[26] http://jurnalul.ro/special-jurnalul/decaderea-din-iadul-copiilor-pe-pam-acirc-nt-tara-lui-eu-te-am-facut-eu-te-omor-139671.htm

[27] Ibidem.

[28] Article 1372 of the Civil Code provides: "(1) *The one who under the law of a contract or of a judicial decision is obliged to supervise a minor or a person laid under interdiction, responds for the injury caused to someone by the last ones. (*2) The responsibility *subsists even if when the offender being devoid of discernment, is not responsible for his own deed. (*3) *The* one obliged to *supervision* is *relieved of liability only by proving that he could not prevent the injury act*. In the case of the *parents and, when applicable, legal guardians*, the evidence *is considered to be made only if they prove that the act of the child is the result of a cause other than how they have fulfilled the duties arising from the exercise of parental authority*. "

[29] http://www.euroavocatura.ro/jurisprudenta/1641/Raspunderea_parintilor_pentru_fapta_copilului_minor

Thus, during 6th and 7th grade, the claimant gave and the daughter of defendants received various amounts of money. The mother of the minor applicant claimed that her daughter behaved in this way as a result of blackmail applied by three colleagues, the last ones denying this aspect and showing that GLD willingly gave them the money, they just had to ask.

To prove the factual situation described, in November 2008 was organized an act in which PIC was surprised to receive the sum of 3.000 lei. The complaint gave various amounts of money to AM and IM, not only to the daughter of defendants. To recover these amounts of money was formulated the criminal complaint, but considering the age of the girls, was found that they do not respond criminally.

The defendants have requested to dismiss the action since the injury alleged is false in conditions in which their daughter paid back during prosecution all the money she had received from the minor complaint. They also argued that it was not about blackmail between the two girls in no any moment, the GLD complaint voluntarily giving money to the simple request of her colleagues.

GC complaint's guilt was invoked as the parent of the minor who stole money from home, regarding the lack of oversight that showed for almost a year when her daughter dragged out from the parental home around 10,000 lei.

It is noted that obviously, the PIC minor parents were called to answer for the acts of their child. If the court had been established a fault of the child, then those who had been responded were the parents.

Regarding the two complaints: GC (mother) and GLD (daughter), it appears that the mother was not fully discharged from parental obligations because, negligently allowed the production of a real damage to her own family.

7. The cessation of parental care

As a rule, parental care ceases when the child acquires full exercise capacity, as applicable, at the end of age 18 years old, at the date of marriage of women less than 18 years or lifting the ban if the person has turned 18.

By exception, parental care may cease before this time, respectively in the expressly cases provided by law when is succeed to establish the guardianship.

8. Instead of conclusions...

The children are the future. Therefore, we believe it must be found the most appropriate ways to ensure a balance between parental authority and the realization of child rights. In this regard the local authorities and public services closest to the child and family should have the information and tools necessary to support parents and extended family to their turn and to assume responsibilities regarding the growth and development of children.[30]

The complex child protection must be simultaneously legal, economic and financial, medical, psycho-educational and social. This involves the simultaneous and coordinated action of professionals from the respective fields, assuming:

- A minimum of information of each actor about the other areas involved;
- Multidisciplinary team working skills and effective action in this formula;
- Harmonization of programs / projects starting from the complex requirements of the child and not from the field which initiate the action.

30 Tomescu, M. - Human Rights. Trends and contemporary orientations, Ed. Prouniversitaria, Bucharest, 2013, p. 127-128.

Complex intervention is a way of action which, in the context of coordination the immediate objectives with those on the medium and long term takes into account the following:

- Overall, creating some optimal conditions for development, evolution and manifestation of any child, so a default protection and on long term, although derived from general social conditions, is in the field of action of each person;

- In terms of prevention, medium and long-term orientation starting on the difficulty or risk factors;

- With repairing or therapeutic effect, post-factum action on short and medium term, to reduce, offset or removal of some negative items already manifested.

That is why the family, the community and organizations created by it is involving more actively in identifying social needs, of appointee service, means of approaching and solving problems, of action and funding plans, and in quality assessment in child protection services.[31]

Respecting the children's rights should be a priority in all communities. Otherwise, we will receive when we have reached the 3rd age, what now receives too many children: humiliation, pain, hunger.

References

- Beleiu, Gheorghe, *Civil Law. People*, 11th Edition, Universul Juridic Publishing House, 2011
- Dumitriu, AP, New Civil Code, notes, correlations, explanations, Bucharest: CH Beck, 2011
- Lişman Fănuţa - *Discussions on the edge of parental responsibility essence for the injury event of the minor* item available on the website http://www.juridice.ro/104244/discutii-pe-marginea-fundamentului-raspunderii-parintilor-pentru-fapta-prejudiciabila-a-minorului.html
- Tomescu, M. - *Human Rights. Trends and contemporary orientations*, Ed. Prouniversitaria, Bucharest, 2013
- Tomescu, M. – *Les droits de l'enfant dans la société actuelle* – Transyvanian Review, Vol. XX, No.1, Spring 2011, p. 138-145
- Ungureanu, C. T., *Civil Law. General part. People*, Bucharest, Hamangiu 2012
- Ungureanu, O. şi Munteanu, C *Civil Law. People.*, Bucharest, Hamangiu, 2011
- International Convention on the Rights of the Child
- Law no. 272/2004
- New Civil Code
- http://www.euroavocatura.ro/jurisprudenta/1641/Raspunderea_parintilor_pentru_fapta_copilului_minor
- http://jurnalul.ro/special-jurnalul/decaderea-din-iadul-copiilor-pe-pam-acirc-nt-tara-lui-eu-te-am-facut-eu-te-omor-139671.html
- http://www.mediafax.ro/social/doi-parinti-din-moreni-prinsi-in-flagant-dupa-ce-si-au-vandut-copilul-cu-2-000-de-lei-11631861
- www.antena3.ro/romania/copil-de-vanzare-5000-lei-bucata-cat-costa-o-via-a-in-romania-190886.html

31 Idem.

NEW REGULATION OF THE GRADUATES OF HIGHER EDUCATIONAL INSTITUTION'S PROBATION PERIOD

Aurelian Gabriel ULUITU*

Abstract

Romanian Labor Code – Law no. 53/2003[1] has stipulated from its modification in 2011 (operated by the Law no. 40/2011), in art. 31, that the persons who had graduated a higher educational institution shall be considered in probation period during the first months after their debut in profession. Those professions in which the probation is regulated by special laws shall be exempted. The Labor Code did not developed the regulation of this kind of probation period, but it mentions that the modality of performing the probation period for the graduates of higher educational institutions shall be regulated by a special law.

After almost three years after the Romanian Labor Code had been modified and begun to be applied the new normative content, the legislator enforced the regulation of the special law having object the probation period of the graduates of higher educational institutions (Law no. 335/2013 regarding the execution of the probation period by the graduates of higher educational institutions[2]).

The present paper represents a juridical analyze of the probation period for the graduates of higher educational institutions' normative framework.

Keywords: *probation period, probationer, mentor, probation period contract, employer, evaluation, evaluation commission*

Introduction

It is a specific of the labor market that the persons who entered in a specific profession have to go through a specific probation period. This probation period has specific main purposes consisting in the graduate's accommodation at the professional activities he is going to perform and the verification by the employer of the graduate's abilities.

The Romanian Labor Code – Law no. 53/2013, republished in 2011 – is regulating two form of probation period: (1) the principal form of probation period, which represents the first stage of the individual labor contract's execution, for every employee [art. 31 paragraphs (1) – (4), art. 32-33]; (2) the specific probation period for the graduates of higher educational institutions [art. 21 paragraphs (5) and (6), correlated with Law no. 335/2013 regarding the execution of the probation period by the graduates of higher educational institutions).

We are referring in the present paper only to the specific probation period of the higher educational institutions' graduates who go through this probation as employees. The Labor Code exempts the probation period for those professions which are regulated by special laws (as specific professional statutes).

The Romanian Labor Code's provisions having object the probation period of higher educational institutions' graduates are few and extremely generally. The Code mentions only the following aspects:

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1 Republished in the "Official Gazette of Romania", 1st part, no. 345 of 18 May 2011.

2 Published in the "Official Gazette of Romania", 1st part, no. 776 of 12 December 2013. The regulation will come into force after 90 days from its publication.

- the duration of the probation period is 6 months;
- the employer has the mandatory obligation to issue a certificate at the end of the probation;
- the attribute of the territorial labor inspectorate within the territorial jurisdiction of the employer's headquarter to endorse the certificate;
- the exemption from the Labor Code probation period's regulation of those professions in which the probation is regulated by special laws and
- the normative solution consisting in developing the graduates of higher educational institutions probation period's regulation through o special law.

This special law is Act no. 335/2013 regarding the execution of the probation period by the graduates of higher educational institutions. The law had been publishes in the Official Gazette in December 2013, but the regulation will come into force at the beginning of March 2014 (after 90 days after the law was published).

The Law no. 335/2013 regulates the following aspects:

- the general provisions having object the purpose of the probation period for the graduates of higher educational institutions and the significance of the specific terms and expressions used by the legislator;
- the probation period contract;
- the rights and the obligations of the probation period contract's parts;
- the organization of the probation period;
- the probationer's evaluation procedure at the end of the probation period;
- the ways of the probation period's funding;
- the juridical liability for the inobservance of the law provisions.

We assume that is important to correlate properly Labor Code's provision regarding the conclusion and the execution of the individual labor contract with the specific provisions of the probation period's regulation in order to determine in a correct manner the status – rights and obligations – of the parts and the specific relation between the individual labor contract and the probation period contract, which are concluded by the same parts.

1. Romanian Labor Code's provisions having object the general regulation of the probation period

a) In order to check the abilities of the employee, on the conclusion of the individual labor contract, a trial period of 90 calendar days at the most may be established for executive positions, and 120 calendar days at the most for management positions [art. 31, paragraph 1][3]. The check of professional abilities when employing disabled persons shall be based only on a trial period of 30 calendar days at the most[4].

Throughout the trial period or at the end of it, the individual labor contract may be terminated exclusively by a written notification, without notice, following the initiative of either party, without being necessary its motivation [art. 31, paragraph 3].

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[3] For the exhaustive analyze of the trial period, see I.T. Ştefănescu, *Theoretical and Practical Paper for Labor Law*, Second edition, Universul Juridic Editor, Bucharest, 2012, p. 275-285; Al. Ţiclea, *Paper for Labor Law*, Sixth Edition, Universul Juridic Editor, Bucharest, 2012, p. 421-425; Ş. Beligrădeanu, I.T. Ştefănescu, *The Labor Code's regulation of the trail period*, in "Dreptul" no. 8/2003, p. 24-32; C. Belu, *The new Labor Code's regulation of the trial period*, in Romanian Labor Law Magazine no. 2/2004, p. 27-31; Ş. Beligrădeanu, *Probation period – recantation clause and its consequences regarding the individual labor contract's cessation*, in "Dreptul" no. 9/2007, p. 67-69.

[4] We mention that the art. 83, paragraph 1, subparagraph d) from the Law no. 448/2006 regarding the protection and the promotion of the disabled persons (republished in the "Romanian Official Gazette", part I, no. 1 of 3rd January 2008) the duration of the trial period is 45 days. Taking into account that the Law no. 448/2006 is a special regulation in relation with the Labor Code, its provisions are first applicable. See I.T. Ştefănescu, *op. cit.*, p. 282. For the opposite interpretation, see Al. Ţiclea, *op. cit.*, p. 422.

During the trial period, the employee shall benefit from all the rights and have all the obligations stipulated in the labor legislation, the applicable collective labor contract, the internal regulations, as well as the individual labor contract.

b) For graduates of higher educational institutions, the first 6 months after their debut in profession shall be considered probation period. Those professions in which the probation is regulated by special laws shall be exempted. At the end of the probation, the employer shall mandatory issue a certificate, which shall be endorsed by the territorial labor inspectorate within the territorial jurisdiction of its headquarters.

The modality of performing the probation mentioned above shall be regulated by special law.

c) During the progression of an individual labor contract, there may only be one trial period [art. 32, paragraph 1].

As an exception, an employee may be subject to a new trial period if he starts up in a new position or profession with the same employer, or is to perform his activity in a work place under difficult, harmful, or dangerous conditions.

The trial period shall represent length of service.

The period when successive trial hiring of more persons for the same job may be made shall be of maximum 12 months [art. 33].

d) The contractual clause referring to the probation period (the one which is regulated by art. 31, paragraph 1 from Labor Code) represents also a mandatory element of the employer's obligation to inform [art. 17 from Labor Code]; the person selected for employment or, as applicable, the employee, shall be informed about the length of the trial period [art. 17, paragraph 3, subparagraph n)].

The trial period is an employer's right. So, it is possible that the employer to inform the person selected for employment or the employee (who shall perform another kind of work) that the length of the trial period is shorter that the one stipulated by art. 31, paragraph 1 from Labor Code, or even that the employer renounces to the trial period.

2. The trial period of the high educational institution's graduates. Purposes and specific terms

a) Art. 1 paragraph (2) from Law no. 335/2013 stipulates that the specific purposes of the probation period are:

- to assure the higher educational institutions' graduates transition from the educational system to the labor market;
- to consolidate the professional competences and skills in order to adapt the graduate to the workplace's practical demands and requirements;
- to assure a quicker integration in the labor process;
- to allow the probationers the conditions to acquire experience and length of service or of specialty.

b) The law mentions in art. 2 the main terms and expressions which are specific for this regulation:

- *the probationer* is the debutant in profession, hired on the individual labor contract, excepting the persons who prove that they had practice a professional activity in the same field, previous their graduation;
- *the probation period contract* is the contract signed by the employer and the probationer, annex to the individual labor contract concluded by the same persons;
- *employer* is the person who has this status based on the Labor Code's provisions;
- *mentor* is the person indicated by the employer who coordinates the probationer during the probation period and participates at the evaluation procedure (at the end of the probation period);

- *evaluation* is the procedure to finalize the probation period and which is accomplish by the evaluation commission;

- *the probation period* is the interval between the moment of probationer's employment and the moment of the probation period's finalizing, which ends with issue of a certificate signed by the employer;

- *evaluation commission* is the commission constitutes on members designates by the employer and which evaluates and issues to each probationer an evaluation report at the end

3. The probation period contract

a) The probationer is an employee. In order to obtain this status, he needed to conclude an individual labor contract. Based on the provisions of art.16 from the Law no. 335/2013, the probation period contract is concluded at the same time with the individual labor contract.

b) The length of the contract is 6 month. Are exempted those cases regulated by special laws in which there are stipulated other lengths for the duration period.

We assume that the probation period length stipulated by art. 31, paragraph 5 from Labor Code and art. 16, paragraph 1 from Law no. 335/2013 represents a maximum. The employer and the employee (which could be also probationer) have the right to diminish the length of the duration period and also to renounce at his right to verify the professional competences and skills of his new employee through probation period. As we mentioned above, the duration period is a right of the employer and the renounce to it is legally possible[5].

c) The form of the contract is the written one. The obligation to conclude the probation period contract in written form belongs to the employer.

The parts' rights and obligations regarding the performing of the probation period are stipulated in the probation period contract and, in addition, in the collective labor agreements and/or in the internal regulations.

The monthly base wage of the probationer is determined through the individual labor contract, based on regular work duration of 8 hours per day and 40 hours per week (full time work).

d) The probation period contract shall be suspended (art. 19, paragraph 1 from Law no. 335/2013):

- if the individual labor contract is suspended;

- if the probationer is on sick leave for more the 30 days.

The probation period contract can be terminated as follows (art. 22 from Law no. 335/2013):

- rightfully;

- based on the parties' consent, on the date agreed upon by them;

- as a result of one of the parties' unilateral will, in the cases and under the limitation terms stipulated by the law.

If the probation period contract is terminated for the reasons which are not imputable to the probationer, he can continue the probation period till the accomplish of the 6 month length if in a term of 60 days he concludes a new individual labor contract (and a new probation period contract) with another employer.

After the termination of the probation period contract, the employer can employ only once another probationer on the same workplace.

[5] Only for the employee Labor Code prohibits the renounce or diminishing of a right. Art. 38 stipulates: "Employees may not waive the rights acknowledged to them by the law. Any transaction the aim of which is to waive the rights recognized by the law to employees, or to limit such rights shall be null".

4. The rights and the obligations of the probation period contract's parts

a) The probationer has the following rights:

- to benefit of the mentor's coordination and support;
- to be set a program of activities suitable for his workplace, which difficulty level and complexity to gradually increase during the probation period;
- to benefit of an objective evaluation;
- to be assured the necessary time for individual training, the access to the sources of information necessary for his improvement and which allow him to consolidate his knowledge;
- to participate at the professional training organized by the employer for probationers;
- to receive the evaluation report or the certificate issued at the end of the probation period;
- to contest the evaluation reference issued by the evaluation commission, if appropriate.

b) The probationer has the following obligations:

- to prepare his professional skills and competences on the field he perform the probation;
- to organize and manage an own evidence for his professional activities;
- to observe the tasks provided by the mentor and by his superior;
- to consult the mentor in order to accomplish the tasks allocated by the compartment's leader;
- to respect the confidentiality regarding the entire aspects of his activity, observing the internal regulations issued by the employer;
- not to perform during the probation period activities which is competing with the one performed for his employer;
- to participate at the evaluation procedure.

c) The employer has the following rights:

- to set on the probationer, through his job description, the attributions in the field the probation period is performed;
- to harness the theoretical and practical probationer's knowledge in the work process;
- to exercise the control over the way in which the job duties are carried out;
- to find whether departures from discipline have taken place and to apply adequate sanctions, under the law.

d) The employer has the following obligations:

- to designate a mentor who will coordinate an support the probationer to achieve the specific objectives and the level of performance settled on the probation period's program;
- to set on a work program in the field of activity in which the probation is performed;
- to assure a proper endowment – logistic, technical and technological – necessary to harness the theoretical and practical knowledge received by the probationer during the probation period;
- to evaluate the probationer's level of knowledge at the termination of the probation period;
- to issue the probationer a certificate proving the period of probation, the competences and the skills acquired during the probation period.
- not to use the probationer in activities which are not stipulated in the probation period contract.

5. The organization of the probation period

a) The probation period is performing based on a *program of activities* approved by the employer, at the proposal of the department's leader where works the probationer.

The program of activities on the period of probation period has to include:

- the objectives and the quantifiable level of performance based on the evaluation shall be accomplish;
- the planning of the activities which the practitioner shall held, depending on the level of competences and skills needed to be achieved during the probation period.

b) The mentor is designated by the employer, based on the proposal of the department's leader where the probationer will work. In order to be mentor, the person has to fulfill the following demands:

- the mentor has to be an employee;
- the professional experience of the mentor, in the field of probation activity, is minimum 2 years;
- not to be disciplinary punished by the employer;
- the mentor can coordinate the activity of at most 3 probationers.

The mentor has the following obligations:

- to coordinate the probationer's activity on the entire probation period;
- to propose to the employer ways to accomplish the probationer's tasks;
- to supervise the manner of accomplish the specific demands of the probationer's workplace;
- to be member in the evaluation commission;
- to prepare a report regarding the probation period, if his individual labor contract ends before the termination of the probation period or the mentor is disciplinary punished by the employer (and its status ends because of that punishment);
- to prepare the probation period report, 10 days before the termination of the probation period.

6. The probationer's evaluation procedure at the end of the probation period

a) The evaluation commission has the obligation to prepare an evaluation report 5 days before the termination of the probation period. The evaluation report has to include the following elements:

- the description of the activity performed by the probationer;
- the degree of achievement by the probationer of the objectives and the level of performance set on by the activities program;
- the competences and the skills achieved by the probationer, the way of fulfillment of the specific attributes and the contractual clauses;
- the probationer's behavior and degree of implication during the probation period;
- conclusions regarding the probation period;
- other mentions.

The employer issues the certificate of probation period's termination based on the commission report in 15 days after the receiving of the report. The certificate has to be endorse by the territorial labor inspectorate within the territorial jurisdiction of the employer's headquarter.

b) The evaluation accomplished by the commission has to be based on the following elements:

- the analyze of the objectives and indicators' degree of fulfillment;
- the assessment of the competences' level of consolidation and practical skills needed for the exercise of the occupation in the specific field of the probation;
- the probation period's report.

If the result of the evaluation is negative, the employer shall issue an attestation recognizing the completion of the probation period. The probationer can contest the negative evaluation and if the result is also negative, he can address to the court.

Conclusion

The actual legal framework of the probation period allows distinction between the probation period of the employees who are at the beginning of the activity for their new employer and the probation period of the graduates of higher educational institutions.

The probation period in case of the graduates of higher educational institutions is regulated by Labor Code – art. 31, paragraph 5 – and Law no. 335/2013.

The Law no. 335/2013 is a necessary regulation because the act contains the development of the principal aspects of the probation period in case of the graduates: the general provisions having object the purpose of the probation period for the graduates of higher educational institutions and the significance of the specific terms and expressions used by the legislator; the probation period contract; the rights and the obligations of the probation period contract's parts; the organization of the probation period; the probationer's evaluation procedure at the end of the probation period; the ways of the probation period's funding; the juridical liability for the inobservance of the law provisions.

References

- I.T. Ştefănescu, *Theoretical and Practical Paper for Labor Law*, 2nd Edition, revised and completed, Universul Juridic Editor, Bucharest, 2012.
- A. Ţiclea, *Paper on Labor Law*, 6th edition, revised, Universul Juridic Editor, Bucharest, 2012.
- Ş. Beligrădeanu, I.T. Ştefănescu, *The Labor Code's regulation of the trail period*, in "Dreptul" no. 8/2003.
- C. Belu, *The new Labor Code's regulation of the trial period*, in Romanian Labor Law Magazine no. 2/2004.
- Ş. Beligrădeanu, Probation period – recantation clause and its consequences regarding the individual labor contract's cessation, in "Dreptul" no. 9/2007.

THE SUBSIDIARY NATURE OF THE UNJUST ENRICHMENT ACTION. CONTRACT-BASED ACTION VS. *ACTIO DE IN REM VERSO.* JURISPRUDENCE SEPARATION ONLY

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Abstract

For the purpose of recovering a paid amount within the insured sum, however, in addition to the owed amount, the insurer sues his client for claims. Does the insurer have, to this end, a cleared way towards unjust enrichment?

The provisions of the 1864 Civil Code do not contain definitions of ex contractu and actio de in rem verso.

The doctrine has established the acceptability requirements of actio de in rem verso, however, it did not do the same for ex contractu, and there is no notable change to this matter after the Civil Code became effective.

This situation is also maintained in the current Law No.287/2009 on the Civil Code.

Hence, the separation of the configuration and enforcement area of the two types of actions continues to be done in terms of jurisprudence by strictly relating to the case at hand.

The study starts from an actual case the settling of which highlights the issue of determining the subsidiary nature, hence the acceptability of the unjust enrichment. The purpose of this study is to re/focus on an old dichotomy, i.e. the contract-based action (ex contractu) and the action based on an licit deed, that of unjust enrichment (actio de in rem verso).

The primary goal of the study consists of highlighting the aspects that the provisions of the 1864 Civil Code and those of the new Civil Code have in common or not in terms of the two types of actions before the court, the doctrine-related solutions given as concerns the characteristics and legal status of the two actions and the fact that, in the nex Civil Code as well, the separation line between the two actions is determined on the basis of jurisprudence, being left at the judges' discretion and wisdom, with all related consequences thereof.

Keywords: *Insurance contract: amount paid without being owed: indemnity action before the court: actio de in rem verso: ex contractu action*

Introduction

This article is not writing practice. It is derived from a particular case, i.e. the insurance contract, and initially it was believed that the issue stayed within the specific matter of this type of contract.

A more in-depth analysis reveals however the general character of the matter as the conflict between the *ex contractu* action and *actio de in rem verso* may appear each time when, in almost any type of contract, either party's performance exceeds the sphere of its contractual obligation and raises the issue of the type of action to be resorted to in order to recover the incurred prejudice.

For instance, such an issue may appear in contractor agreements, service contracts, sale-purchase contracts, in brief, in any contracts; the likelihood that such a restitution claim will be subject to the judgment of a court of law is very high.

In the 1864 Civil Code, neither of the two actions has a legal definition.

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The unjust enrichment and action suitable for such illicit legal deed (*actio de in rem verso* or the restitution action respectively) were extensively dealt with in the specialized literature and consecrated in terms of jurisprudence.

Similarly, however without having a detailed treatment comparable to that of the above-mentioned concept, the *ex contractu* action (also known as contract-based action or contractual liability action) is constantly invoked in doctrine and jurisprudence, being attached to the issue concerning the contractual third-party liability and enforcement of judgment concerning contractual obligations.

Law No. 287/2009 on the Civil Code, republished and updated, includes four articles – art. 1345-1348 – on unjust enrichment and the restitution action which it generates, however, does not deal with the contract-based action.

Given that the provisions of art. 1348 of Law No. 287/2009 consecrate *in terminis* the subsidiary nature of the restitution action as compared to any "other action" which the creditor is entitled to, it is obvious that the *ex contractu* action, the most common type of action meant to cover contractual prejudice, should find a configuration both at a legislative, and doctrine level, as this procedural means can be a true exception of unacceptability in the case of *actio de in rem verso*.

The subject matter of this study

The de facto situation

The litigation consisted of the following *de facto* situation, which was given a definitive decision not objected to by the litigating parties:

S.C. A.R.A. S.A., in its capacity of insurer, and S.C. G.S. S.A., in its capacity of insured, entered into an insurance contract for a self-propelled barge. The insurance covered the risk of total loss, special and general average, third party collision liability and rescue expenses, up to the limit of Euro 205,000. The barge, loaded with plate rolls, got shipwrecked during a trip along the Danube River. It was established that major repairs were required, which repairs were done in a shipyard in Austria and shipyard in Romania.

Given that the insured event affected both the ship, and the merchandise on board the ship, this was considered a case of general average and it was decided to document the case. A specialized company[1] was supposed to draft the average adjustment document[2]. Until this document was drafted, at the insured's request, the insurer made payments to the insurance policy-related account either directly to the insured or to certain of his creditors. The amounts paid were Euro 91,701 Euro and Romanian Lei 132,927.

The general average adjustment document that was not objected to by either party after it was drafted determined that the Euro 68,562 owed amount was made up of Euro 54,781.12 – merchandise share and Euro 13,780.88 Euro – ship share.

In this context, the insurer estimated that it owed the insured only the amount determined by the average adjuster as being the ship share. For the already paid difference it submitted an action before a court of law for the restitution of the amount of Euro 52,257.57 that was allegedly paid without being owed, which action was indicated at one of the hearing as being based on unjust enrichment.

1 Average adjuster – expert who can estimate the damage and merchandise of a ship – www.dexonline.news.20.ro

2 Average adjustment – document drafted by the average adjuster according to the statutory legal standards and customs of the unloading ports for the liquidation of the general average – www.crispedia.ro

The decisions of the courts of law

In a first trial cycle, the action was rejected as expired. The decision was cancelled by the first judiciary control court by a decision maintained by the appeal court.

When re-judged, the court of first instance rejected the action as unacceptable, estimating that the claimant had the contract-based action, not the unjust enrichment-based restitution action, at his disposal. The decision was not upheld by the appeal court that, accepting the appeal submitted by the insurer, completely changed the decision made by the court of first instance, i.e. rejected the unacceptability exception, accepted the action submitted by the claimant and obliged the respondent to pay the amount of Euro 52,257.57 standing for indemnities.

The second appeal court accepted as a majority the appeal submitted by the insured, changed the decision made by appeal court, i.e. rejected the appeal submitted by the insurer against the first court decision that this second appeal court maintained. The judge expressing a separate opinion estimated that the second appeal should be rejected as ungrounded.

The conflicting issue concerned the acceptability of the restitution action in that the subsidiary nature of this action should be taken into account in relation to the contract-based action.

In brief, the following arguments were brought:

Majority opinion

The second appeal court noted as a majority that the court of first instance and the appeal court correctly accepted that the unjust enrichment was a legal deed by which a person's assets are increased based on another person's assets, with no legal basis for it and that this legal deed resulted in the restitution obligation of the person whose assets were thus increased.

The court notes that one of the legal conditions for submitting the restitution action is the absence of any other legal means of recovery. Doctrine and jurisprudence outline the subsidiary nature of this sanction in this respect.

The second appeal court notes as a majority that this case does not leave room for an *actio de in rem verso*, given the existence of the contractual insurance relations between the parties based on which the payments were made, which makes the increase of the insured's assets take place on a legal basis.

The court also notes that the insurer's allegation that only a request for the enforcement of a contractual duty or liability for non-performance or inappropriate performance would make the unjust enrichment become unacceptable.

In this respect, the second appeal court accepted that no legal provision adds to the *ex contractu* actions only those invoked by the insurer and that an action by which a contracting party requests the other party a restitution of payments made under the contract and later considered not owed is equally contractual.

To support the same opinion, the second appeal court notes that an *ex contractu* action is not exclusively a positive one, by which contract enforcement is requested, but is any contract-related action, and that a delineation between owed and not owed payments is done following an examination of contract-derived rights and obligations as well.

It is also highlighted that a distinction must be made between unjust enrichment, as a legal deed, that may, in the previously mentioned conditions, result in the right to initiate an *actio de in rem verso* and unjust enrichment as an effect of the failure to perform or appropriately perform any contract, that however does not clear the way in itself to initiating the homonymous action.

Separate opinion

It is noted that the judge expressing a separate opinion differentiates himself/herself from the majority opinion only in terms of the acceptability of the restitution action, and supports his/her decision with arguments leading to the conclusion that, in this case, the insurer did not have the *ex contractu* action at hand, hence the legal condition of the subsidiary nature of the restitution action was fulfilled, which action is thus considered acceptable.

In this respect, the judge expressing a separate opinion notes that in the 1864 Civil Code there are no legal definitions for *actio de in rem verso* and the *ex contractu* action, that doctrine and jurisprudence closely dealt with unjust enrichment and identified the material and legal conditions for the initiation of the restitution action based on this illicit legal deed, constantly indicating the subsidiary nature of this type of action that implies the lack of any other legal means to cover the incurred loss. He/she also notes that in the case of *ex contractu* he/she cannot state the same, as no definition was given by doctrine and jurisprudence.

However, the judge expressing a separate opinion notes that the legal means to recover the prejudice generated by the contractual tort may be configured starting from two legal texts: art. 1021 and art. 1073 of the 1864 Civil Code, which apply to the relevant case, bringing forth the following arguments:

The provisions of art. 1021 of the 1864 Civil Code gives the party that the contractual commitment has not been fulfilled for the right to choose between the action of enforcing the contract when this is possible and the action of terminating the contract and be paid indemnities.

The provisions of art. 1073 of the same Code gives the same contracting party the right to be granted the precise fulfillment of the obligation and, if not, the right to receive indemnities.

The two legal texts result it the conclusion that, whenever the creditor of an unfulfilled obligation chooses the action to enforce the contract (assumption I of art. 1021 of the Civil Code), he is entitled to the in-kind enforcement of this contract ("the precise fulfillment of the obligation" - assumption I of art. 1073 of the Civil Code); otherwise, he is entitled to request an equivalent enforcement ("right to compensation" - assumption II of art.1073 Civil Code).

The core meaning of both legal texts is that they give the right to a contract-based action that only the unfulfilled obligation creditor benefits from and that the object of this action is only the other party's failure to perform which may be obliged to do in kind or by equivalent.

In brief, these are the characteristics and conditions where the judge expressing a separate opinion notes that the contract-based action may be resorted to.

As concerns the aforementioned case, he/she notes that the only pecuniary obligation laid down in the parties' contract resting on the respondent, which enforcement or indemnities may be ask for, is the one concerning the payment of the insurance premium and that the parties did not include in their contract a clause under which, if the insurer paid within the insured amount limits, but not more than he owed for the actually materialized risk, the insurer undertakes to return this amount where only this clause may be a justification for an action for contract-based claims under the provisions of art. 969 of the Civil Code.

In this context, the judge expressing a separate opinion notes that the only action that the insurer may use to be able to recover the amount paid in excess of the prejudice actually incurred by the insured, even within the maximum limit of the insured amount, is the unjust enrichment action, which action was the first he submitted *ab initio* before the court of law.

Thus, the judge expressing a separate opinion deems unacceptable the thesis according to which the unjust enrichment action is excluded whenever the parties have a contractual relation, but the contract implementation exceeded the initial agreement as everything that is

performed and goes beyond the contract with no convention (even tacit) and leads to the increase in the assets of either party, in correlation with a reduction in the assets of the other party, cannot fall under the contract except in the cases expressly and limitatively laid down in art. 970 para. 2 of the 1864 Civil Code.

With reference to the same aspect, the judge expressing a separate opinion believes that the circumstance that, in order to determine the sum claim before the court, the court should examine the contractual clauses as this is exclusively intended to establish a delineation between "something owed" under the contract and "not owed" and determine where the insured risk-related indemnity payment obligations end for the insurer and where unjust enrichment (i.e. outside the contract) starts for the insured, which unjust enrichment leaves room for the *actio de in rem verso*. A relevant fact is that, according to doctrine and jurisprudence, what is owed under a convention or legal provision is based on a just cause, and what lacks such basis comes from the licit or illicit deed.

The judge expressing a separate opinion also notes that the lack of a legal regulation or doctrine examination of the legal status of the *ex contractu* action makes the extended use of this procedural means, seen as a possibility to reaching an agreement by the parties for all contract-related claims, seem justified as these claims are attached to a unique relation of facts.

However, he/she thinks this temptation should be limited whenever this generous approach harms the person who, precisely differentiating what was owed from what exceeds the contract, understands to rely on the illicit unjust enrichment, resorting to *actio de in rem verso* upon compliance with all material and legal conditions that are consecrated in doctrine and jurisprudence.

Hence, the judge expressing a separate opinion chooses the limited and restrictive interpretation of the *ex contractu* action, deriving from the aforementioned joint interpretation of the provisions of art. 1021 and art. 1073. A more extensive interpretation of the *ex contractu* action would lead to the rejection of the *actio de in rem verso* as unacceptable and would inappropriately set up, only based on the interpretation of art.969 – 970 of the 1864 Civil Code, an exception of unacceptability that, as a rule, derives and should derive from a legal norm exclusively and beyond any doubt.

All the above considerations have been the basis of the separate opinion judge's conviction that, in this case, the claimant, i.e. the insurer, could not rely on the *ex contractu* action, but only on unjust enrichment. The objection submitted by the claimant, i.e. insured, in this respect was considered ungrounded, being, hence, rejected.

Importance and current interest raised by the issue

As shown in the introduction of this study, the *ex contractu* and *actio de in rem verso* actions were not legally regulated by the 1986 Civil Code, which aspect is noted in both the majority opinion, and the separate opinion expressed in the decision of the ultimate court[3].

As concerns unjust enrichment and the restitution action which it entitles to, the Romanian and foreign specialized literature is abundant and constant, the two legal concepts being consecrated in jurisprudence as well[4].

3 Decision No. 3672 as of October 31, 2013 of the High Court of Cassation and Justice – II Civil Division.

4 The following works are worth mentioning:

-Constantin Stătescu and Corneliu Bîrsan, *Drept civil. Teoria generală a obligaţiilor,* Bucharest, All Publishing House, 1993, 107-111;

-Stătescu and Bîrsan, *Drept civil*, Bucharest, Hamangiu Publishing House, 2008, 117-123, where they quote the Commercial Decision No. 320/2005 of the Bucharest Court of Appeal – V Commercial Division and Civil Decision No. 3548/1999 of the Court of Appeal Bucharest – III Civil Division;

-Ion Dogaru "Some considerations regarding the place, the role and the mechanism of injust enrichement in the sections of civil obligations" in Ion Dogaru, Texte juridice, Bucharest, Universul juridic Publishing House, 2011, 160-166;

Contrarily, the *ex contractu* action is seldom mentioned in the specialized literature, in certain cases, being opposed to or, on the contrary, dealt with in conjunction with another type of action, with no precise description of its legal status, as was the case of *actio de in rem verso.*

Also, in a significant number of decisions, the courts of law refer to the contract-based action, particularly in commercial matters, given that the legal relations between traders are predominantly contractual in nature.

Our present analysis started from a legal relation governed by the 1864 Civil Code. The issue it raises is not, however, outdated, given that Law No. 287/2009 on the Civil Code, as updated, does not fundamentally change the particularities of the matter.

Similarly to the 1864 Civil Code, the new Civil Code includes no reference to the *ex contractu* action.

The specialized literature dealing with the provisions of the new Civil Code[5], though quite abundant, brings no novelty whatsoever in this respect. It is worth noting that one single paper mentions the *ex contractu* solution for the automatic serving of notice to the debtor, highlighting that this is done when the parties agree that "merely having reached the agreed deadline for contract performance equals serving a notice"[6]. It is obvious that the above-mentioned quote has no relation to the action before a court known as *ex contractu* action.

As far as unjust enrichment and the action driving from it are concerned, the makers of the new 2009 Civil Code focused on filling a legislative gap corrected in the former Civil Code by doctrine and jurisprudence.

These two concepts are dealt with in four articles:

Art. 1345 states as follows: "The person who got rich to the detriment of another person, but cannot be imputed this, shall restitute to the extent of the asset loss incurred by the other party, but with no liability beyond said enrichment."

Art. 1346 bring a most welcome novel element, i.e. presents the cases were enrichment should be considered justified.

Art. 1347 stipulates the conditions and extent of restitution, and its provisions are added those of art. 1639-1647 of the Code on restitution of performance.

Finally, art. 1348 concerns *in terminis* the secondary nature of the request for restitution and maintains the phrasing though it was a subject of objections and dispute in the specialized literature dealing with the former Civil Code, stipulating the following: "The request for restitution cannot be accepted if the harmed party is entitled to another action in order to get what is owed to him."

Actio de in rem verso and unjust enrichment are also discussed in the specialized literature related to the new Civil Code. Professor Paul Vasilescu's previously quoted paper may serve as an example[7].

The analysis of the two types of actions, at a legislative level – on the one hand, and at doctrine and jurisprudence level – on the other hand, makes us note the fact that the current

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-Dimitrie Gherasim, Îmbogăţirea fără cauză în dauna altuia, Bucharest, the Romanian Academy Publishing House, 1993;
-Muriel Fabre-Magnan, droit des obligations. Vol.2. Responsabilité civile et quasi-contrats, II-ième edition mise à jour, Paris, Presses Universitaires de France, 2010, 446-452;
-Philippe Malaurie, Laurent Aynès and Philippe Stoffel-Munck, Les Obligations, V-ième edition, Paris, Defrénois, Lextenso editions, 2011, 575-584.

5 Of which we mention, exempli gratia, the following works:
-Gabriel Boroi and Liviu Stănciulescu, Instituţii de drept civil, Bucharest, Hamangiu Publishing House, 2012;
-Liviu Pop, Ionuţ-Florin Popa and Selian Ioan Vidu, Tratat elementar de drept civil. Obligaţiile, Bucharest, Universul Juridic Publishing House, 2012;
-Ioan Adam, Drept civil. Obligaţiile . Contractul, Bucharest, C.H.Beck Publishing House, 2011
-Liviu Stănciulescu and Vasile Nemeş, Dreptul contractelor civile şi comerciale, Bucharest, Hamangiu Publishing House, 2013.

6 Paul Vasilescu, *Drept civil. Obligaţii,* Bucharest, Hamangiu Publishing House, 2012, 86.

7 Vasilescu, *Drept civil,* 216-223.

legal regulation of the contract-based obligations and those based on the licit legal fact of unjust enrichment shows no content-related differences from the previous one, as the conditions for the activation of the contractual third-party liability are the same just as the material and legal conditions to start an *actio de in rem verso* are the same.

In this context, it is of significance that the law-maker unequivocally states the secondary nature of the *actio de in rem verso* and completely ignores the *ex contractu*, not giving any clue whatsoever on *who, to what purpose* and *in what conditions* can initiate it.

The issue that is unquestionably and firmly raised in this context is related not to legal status of *actio de in rem verso,* as in this case there is now a legal provision, sustained by older and newer doctrine, which is constant, and previous unitary jurisprudence in line with the doctrine principles.

In reality, the issue is raised in relation to the *ex contractu* action, a concept that seems to be obvious, but legal status of which is the object of debate and dispute, the most compelling proof being the decision made by the ultimate court with the separate opinion that we previously referred to.

In the context of the current regulations, it can be estimated that, just as in the case of the 1864 Civil Code, a configuration of the *ex contractu* action can be outlined starting from the legal provisions that keep, *de lege lata*, the essence of the provisions of art. 969, 970, 1020-1021 and 1073 of the 1864 Civil Code.

Thus, art. 1270 para. 1 of Law No. 287/2009 on the Civil Code stipulates: "The contract that is validly entered into has the power of law between the contractual parties"; this article is the equivalent of art. 969 of the 1864 Civil Code and consecrates the *pacta sunt servanda* legal principles.

Art. 1272 of Law No. 287/2009 on the Civil Code takes over and adds to the provisions of art. 970 of the former Code and stipulates:

- para.1: "The contract that is validly entered into obliges not only to the fulfillment of what is expressly stipulated, but to all the consequences that the practices set between parties, common practices, law or equity attach to the contract depending on its nature.";
- para.2: "Common contractual clauses go without saying, though not expressly stipulated."

As a novelty to the former Civil Code, the provisions of art. 1350 of Law No. 287/2009 on the Civil Code concern contractual liability, stating that any person shall fulfill his/her contractual obligations and that, if failing to do so with no reason, he/she shall be responsible for the remedy of the harm done to the other party, being obliged to remedy said prejudice under the law.

Another aspect of novelty consists of the provisions of art.1170 of Law No. 287/2009 of the Civil Code stipulate the parties' obligations to act in good faith all along the performance of the contract.

Similarly to the provisions of art. 1073 of the 1864 Civil Code, but providing more details, the provisions of art. 1516 para.1 of the new Civil Code stipulate the creditor's right to acquire the full, precise and timely fulfillment of the obligations; the provisions of art. 1516 para. 2 point 1 stipulate, in the case of unjustified failure to perform, the creditor's right to request or initiate the attachment of the obligation; the provisions of art. 1527-1529 stipulate the in-kind attachment; and the provisions of art. 1530-1548 of the same law stipulate the equivalent attachment.

As a novelty compared to the provisions of art. 1021 of the 1864 Civil Code concerning the right of the creditor of the unfulfilled obligation to request the "cancellation" of the contract, the provisions of art. 1516 para. 2 point 2 of the new Civil Code concern the possibility given to the same creditor to request the rescission or termination of the contract, or, as the case may be, a reduction of his own obligation. The provisions of para. 2 point 3 of

the same article give the same party the right to use, when necessary, any other means under the law in order to enjoy his right.

Having examined these legal texts that govern the issue of contractual obligations, we can draw the conclusion that the basis of the *ex contractu* action is, to a great extent, that in the former civil law. An examination of the provisions of art. 1516 of the new Civil Code leads to the conclusion that, whenever a contractual obligation is not performed or is performed in a delayed or inappropriate manner, the debtor of the relevant obligation may be held responsible under third party contractual liability.

If, under art. 1516 para. 2 point 1 thesis II of the new Civil Code, the creditor does not resort to the attachment of said obligation, he may choose among the remedies laid down in art. 1516 para. 2 pint 1-3 of the same Code by way of a contract-based action before a court of law.

Hence, one may conclude that, in the system set up by Law No. 287/2009, the initiator of the *ex contractu* action is the creditor of the unfulfilled obligation, which seems to leave out the party having performed the agreed obligation from such action and is targeted against the other party for the restitution of the additional performance.

These arguments result in the conclusion that a debate on the proposed topic, even if starting from a legal relation governed by the former civil law, continues to be an up-to-date matter, given the solutions proposed by the law maker, *de lege lata*, as far as the contractual civil liability is concerned.

The debate still has great significance, given the absence of a legal, doctrine or jurisprudential definition of the *ex contractu* action and that the case subject to analysis revealed the fact that courts of law may, in theory, select an wider interpretation (such as that of the majority opinion in the decision commented on) or, on the contrary, a restrictive interpretation (such as that of the separate opinion in the same decision), with significant consequences on the decision concerning the restitution action.

Mention must be made that, as shown in the separate opinion, following a more general interpretation of the *ex contractu* action, based on a logical and legal rationale, not on one or several legal texts, an exception of unacceptability may be set up against the restitution action, limiting the party's access to a legal means laid down by law and via which the damage incurred may be covered.

It is also a significant fact that the option of giving a more general interpretation of the *ex contractu* action also had consequences in terms of the expiry of the right to bring a legal action before the court.

Thus, in the case of contractual obligations, the provisions of art. 2524 para. 1 of Law No. 287/2009 stipulate the rule of the expiry deadline lapsing from the date when the obligation becomes outstanding. An obligation to restitute such as the one that generated the above-mentioned dispute cannot be considered as having a due date agreed by the parties or defined by law; hence, it appears to be governed by art. 2523 of the same law, stipulating that the expiry occurs as of the date when the party entitled to that right became aware of or, on a case-by-case basis, should have become aware of the existence of such right.

As to the action in the area of insurance, the provisions of art. 2527 in Law No. 287/2009 on the Civil Code stipulate that the expiry starts lapsing as of the expiry of the dates laid down by law or established by the parties for the payment of the insurance premium, indemnity payment respectively or, as the case may be, the indemnities owed by the insurer.

An analysis of these legal provisions results in the conclusion that, in the case of an insurance contract, the *ex contractu* action could be initiated either by the insured – for the payment of the insurance premium or indemnities, as the case may be, in which case the expiry starts lapsing on the legally defined date or the date conventionally established for the payment of these sums, or the insurer – for the payment of the insurance premium, in which

case the expiry starts lapsing on the legally or conventionally established date for the payment of this premium.

Therefore, an examination of the provisions of art. 2527 of Law No. 287/2009 on the Civil Code leads to the conclusion based on the *per a contrario* argument that the only *ex contractu* action the insurer has against the insured is that concerning the payment of the insurance premium, not the action to restitute an indemnity or indemnity paid in excess.

If we were to start from the arguments suggested by the majority opinion, we would note that in this case it is impossible to determine the exact moment when the expiry deadline started in relation to the special law - art.2527 and when the enforcement of the general rule in art. 2523 should be done, which is utterly against the *specialia generalibus derogant* principle.

Conclusions

Divergent judicial practice and lack of doctrine-based study on the matter of the relation between the contract-based action and the restitution action, with unfavourable consequences on the latter, set in the context of a legislative framework that is almost identical to that set by the 1864 Civil Code make this debate topic be a significant topic of the moment after Law No. 287/2009 on the Civil Code became effective.

This study considers the law maker's intervention as being the ideal solution that should result in a legal definition of the *ex contractu* action or in setting the legal status of this action, at least the way it approached the restitution action based on unjust enrichment.

This primary goal of our study may seem absurd and far exaggerated, but it is completely justified and real, given, on the one hand, the aforementioned arguments, that may potentially generate divergent judicial practice, hence, far from being unitary.

On the other hand, a legislative intervention is not impossible given the fact that, in the new Civil Code, the law maker frequently dealt with other action types as well. Mention must be made of the following merely as a matter of example: filiation action, action of determination of paternity outside the marriage, action for the recovery of possession, action of denial of superficies, co-ownership action, actions of acceptance of superficies, usufruct or easement, action for real estate registration etc.

The purpose of this study is not however that of determining a legislative intervention on the legal status of *ex contractu* action, but –mainly – that of starting a debate on the topic, a debate by specialists and legal professionals and that, by legal arguments, may outline the profile of this legal concept that, at first sight, seems quite simple, but, if looked at more carefully, is open to plenty of approaches with most surprising consequences.

References

- Ioan Adam, *Drept civil. Obligaţiile. Contractul,* Bucharest, C. H. Beck Publishing House, 2011
- Gabriel Boroi and Liviu Stănciulescu, *Instituţii de drept civil,* Bucharest, Hamangiu Publishing House, 2012
- Dimitrie Gherasim, *Îmbogăţirea fără cauză în dauna altuia,* Bucharest, the Romanian Academy Publishing House, 1993
- Ion Dogaru, „Some considerations regarding the place, the role and the mechanism of unjust enrichment in the section of civil obligations" in Ioan Dogaru, *Texte juridice,* Bucharest, Universul Juridic Publishing House, 2011
- Muriel Fabre-Magnan, Droit des obligations. Vol.2. Responsabilité civile et quasi-contrats, II-ième édition mise à jour, Paris, Presses Universitaires de France, 2010
- Philippe Malaurie, Laurent Aynès and Philippe Stoffel-Munck, *Les Obligations,V-ième édition*, Paris, Defrénois, Lextenso Éditions, 2011
- Liviu Pop, Ionuţ-Florin Popa and Stelian Ioan Vidu, *Tratat elementar de drept civil. Obligaţiile,* Bucharest, Universul Juridic Publishing House, 2012
- Liviu Stănciulescu and Vasile Nemeş, *Dreptul contractelor civile şi comerciale,* Bucharest, Hamangiu Publishing House, 2013

- Constantin Stătescu şi Corneliu Bîrsan, *Drept civil. Teoria generală a obligaţiilor,* Bucharest, All Publishing House, 1993
- Constantin Stătescu şi Corneliu Bîrsan, *Drept civil. Teoria generală a obligaţiilor,* Bucharest, Hamangiu Publishing House, 2008
- Paul Vasilescu, *Drept civil. Obligaţii,* Bucharest, Hamangiu Publishing House, 2012

THEORETICAL AND JURISPRUDENTIAL ASPECTS CONCERNING THE CONSTITUTIONALITY OF THE COURT APPEAL ON POINTS OF LAW

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Abstract

The institution of the appeal on points of law has the role to ensure a unitary law interpretation and enforcing by the law courts. The legal nature of this procedure is determined not only by the civil and criminal normative dispositions that regulate it. In this study we bring arguments according to which this institution is of a constitutional nature, because according to the Constitution, the High Court of Cassation and Justice has the attribution to ensure the unitary interpretation of the law by the law courts. Thus are analyzed the constitutional nature consequences of this institution, the limits of compulsoriness of law interpretations given by the Supreme Court through the decisions ruled on this procedure, and also the relationship between the decisions of the Constitutional Court, respectively the decisions of the High Court of Cassation and Justice given for resolving the appeals on points of law. The recent jurisprudence of the Constitutional Court reveals new aspects regarding the possibility to verify the constitutionality of the decisions given in this matter.

Keywords: *Appeal on points of law/ the compulsoriness of the law interpretations for the law courts/ / The control of constitutionality of the decisions given for resolving the appeals on points of law/ Supremacy of Constitution*

1. Introduction

Such as its name is showing and such as results from the legal dispositions in the matter (Article 514-518 Civil Procedure Code and Article 471 - 474 of the new Criminal Procedure Code, respectively Article 414^2 -414^5 in the Criminal Procedure Code in force), the appeal on points of law is no remedy way with effects on the situation between the parties in the trial, but to ensure the unitary interpretation and application of the substantial and procedural laws throughout the entire country. Such a legal institution would not be required if all appeals shall be heard by the High Court of Cassation and Justice. In such a case the Supreme Court may achieve the unitary interpretation and application of the law. The normative regulations in force however establish the competence of the law courts and appeal courts in solving the appeal, which creates the possibility to have a different interpretation, even a wrong one of the laws. Therefore the legal institution of the appeal on points of law has the purpose to ensure in a unitary mode across the entire country, the observance of the will of legislator expressed within the law spirit and letter.

We consider that the legal nature of the appeal on points of law arises only from the civil and criminal procedural provisions which consecrate it.

In compliance with the provisions of Article 126 paragraph (3) of the Constitution "The High Court of Cassation and Justice ensures the unitary interpretation and application of the law by other law courts, according to its competencies". The decisions given in the proceeding of appeal on points of law represents the main means through which the Supreme Court fulfills the constitutional duty to ensure a unitary interpretation and application of the

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law. That's why, the appeal on points of law is not only a civil and criminal procedural institution, but at the same time, has its legal basis in the constitutional norm named above.

The constitutional nature of the appeal on points of law has two main consequences. The first refers to the obligation of the legislator to regulate in the civil and criminal proceeding, the juridical instrument through which the High Court of Cassation and Justice may accomplish its constitutional prerogative to ensure the unitary interpretation and application of the laws by all law courts. The legislator has at his disposition two possibilities: the first may be to regulate the exclusive competence of the Supreme Court in resolving all appeals and the second, the procedure this is currently regulated, of the appeal on points of law. The constitutional provision contained by Article 126 paragraph 3 of the Constitution represents a guarantee of the fundamental law. Given the principle of conformity of the whole law with the constitutional norms, the legislator cannot regulate the material competence of the Supreme Court without having instituted also the procedural instrument through which this will ensure the unitary interpretation and application of the laws by all law courts.

The second consequence refers to the necessity of compliance of the decisions ruled in this proceeding with the constitutional norms. The decisions of the High Court of Cassation and Justice shall be limited strictly to the interpretation of the law. The Supreme Court may complete, amend or repeal the regulations contained by the law. Otherwise it will be violated the principle of separation and balance of powers in the state, explicitly consecrated by the provisions of Article 1 paragraph 4 of the Constitution, because the law court exceeded the limits of judicial powers and would manifest itself as a legislative authority. We will refer to this consequence in chapter II of the present study.

2. Paper Content

One of the most important aspects of the legal regimes that is specific to the appeal on points of law is the compulsoriness of law interpretation by the courts.

The constitutionality of the regulations that consecrates in the civil and criminal matter the obligation of the decisions given in the proceeding for appeal on points of law was contested both in the doctrine[1] as throughout the exceptions of non-constitutionality solved by the Constitutional Court, in relation to the provisions of Article 124 paragraph (3) of the Constitution, which establishes the principle of judge submission only to the law. The Constitutional Court in its jurisprudence has constantly stated that the statutory provisions that foresee the courts' obligation of the "law interpretations" given by the Supreme Court through the decisions rendered points of law are constitutional[2]. Our Constitutional Court has held that: "The principle of submission to the law, according to Article 123 paragraph (2) of the Constitution (presently Article 124 paragraph (3) n.m.) has not and cannot have the significance of a different applying, or even in contradictory of the same legal provision based solely on the subjectivity of the interpretation belonging to different judges"[3]. However it has been noted that: "The ensuring of the unitary character of the practice of law is imposed also by the constitutional principle of equality of the citizens before the law and public authorities, therefore including before the legal authorities, because this principle would be otherwise severely affected, if in the application of one and the same law, the solution rendered by the

[1] Ion Deleanu , Tratat de Procedură Civilă, "Civil Procedure Treaty" C.H. Beck Publishing House, Bucharest, 2007,pg. 349; Ion Deleanu, Sergiu Deleanu, Jurisprudența și reverimentul jurisprudențial, "The Jurisprudence and jurisprudential Revival" the Publishing House " Universul Juridic", Bucharest, 2013, pg. 93-97.

[2] See also: the Decision no 1014 /2007 published in the Official Gazette, part I, no. 816 November 29th no. 2007, Decision no. 928/2008 published in the Official Gazette, part I, no. 706 on October 17th 2008, the Decision no. 528 /1997 published in the Official Gazette, part I, no 90 on February 26th 1998, the decision no. 221/2010 published in the Official Gazette, part I, no 270 on April 26th 2010.

[3] Quoted works Decision no 528/1997.

law courts would be different or even in contradictory[4]. A topic of interest for our research study and for the substantiation of the constitutional court according to which: "The establishing of the compulsoriness character of the interpretations of the law issues judged by means of appeal on points of law, is only giving efficiency to the High Court of Cassation and Justice, contributing thus to the lawful state's consolidation [5].

In the separate opinion formulated by the Decision no. 221/2010 it is claimed that the normative provisions establishing the compulsoriness for the courts of the decisions rendered on points of law, are contrary to the provisions of Article 124 paragraph (3) of the Constitution. The author of the separate opinion emphasizes: "In this meaning we believe that providing a unitary interpretation has the significance of taking the needed actions for the unitary understanding, interpretation of the norm by each judge, of its letter and spirit, and not of offering/ imposing a certain solution, to the interpretation in a certain sense. The judge cannot be brought in the situation of an obedient executor, in relation to the interpretations given in resolving the appeal on points of law".[6]

From the analysis of the jurisprudence of the Constitutional Court, of the doctrine in the matter, but also of the regulations in the fundamental law, one can conclude that no constitutional text foresees clearly the compulsoriness of the decisions rendered by the High Court of Cassation and Justice, on points of law. Therefore, the compulsory character of such decisions for the law courts is not of a constitutional nature. The compulsoriness is conferred exclusively by the special regulations, to which we referred to in the Civil Procedure Code and, respectively the Criminal Procedure Code. We appreciate that it is necessary to achieve the distinction between the constitutional nature of the appeal on points of law, and on the other side, the constitutional character of the compulsoriness of the decisions ruled for the law courts.

The binding character of the "interpretation of law" given by the High Court of Cassation and Justice cannot be considered as an equivalent with the compulsoriness of the law norm. Therefore, the judge, in the work of interpretation and application of law, will have into consideration, firstly, the regulations with normative character, including the constitutional ones and, in subsidiary, the interpretation and the "clarifications of law" conferred through the procedural decisions given in the procedure of appeal on points of law. We appreciate that the procedural provisions that establish the compulsoriness character of such decisions are constitutional related with the provisions of Article 124 paragraph (3) of the Constitution, only in so far as it is interpreted that such an obligation does not prejudice the constitutional principle according to which the judges must grant priority and give efficiency to the law norms applicable in solving the cause and only in subsidiary, to the decisions rendered in this procedure.

At this time a scientific approach of the issue mentioned above would appear useless, having into consideration that the legislator eliminated, at least for the judges, any possibility to reflect upon this topic, because through the Law no. 24/2012 were brought important amendments in the sphere of disciplinary judicial misbehaviors of the judges, so that Article 99 letter **s** of Law 301/2004, in the form acquired throughout the normative act named above, establishes as a disciplinary misconduct "the non complying with the decisions given by the High Court of Cassation and Justice in resolving the appeal on points of law". It is regrettable such a brutal intervention of the legislator which, in our opinion, affects not only the scientific approach upon such a delicate matter, but it limits unconstitutionally the independence of the judges. The above named law test raises a concrete practical problem for the judges, namely how will the law court proceed in situation there are contradictions between a decision of the

[4] Quoted works Decision no 907/2007.
[5] Quoted works Decision no. 221/2010.
[6] Tudorel Toader, dissenting opinion to Decision no 221/2010.

Constitutional Court and a decision of the High Court of Cassation and Justice given in resolving the appeal on points of law, both applicable in a case deduced to the judgment?

In the literature in specialty this problem was indicated previously to amending and completing of Law no. 303/2004 by Law no. 24/2011, having into consideration the concrete situation when the law courts faced such contradictions between the decisions of the Constitutional Courts and the decisions of the High Court of Cassation and Justice given in the procedure of appeal on points of law, both categories of decisions having as matter the same text of law applicable in a case deduced to the judgment[7]. The author of the study which we are referring to concludes in the sense that: "Therefore in the given situation, the law courts, ascertaining contradictions between the decision of the Constitutional Court and the one of the united sections of the High Court of Cassation and Justice, must comply to those stated by the Constitutional Court and remove those decisions decided by the United Sections of the High Court of Cassation and Justice"[8]. The solution we consider as logic and justified as a judicial reasoning but presently inapplicable, having into consideration the law text that sanctions as disciplinary misconduct both equally the non-abiding of the decisions of the High Court of Cassation and Justice regarding the compulsory interpretations given for resolving some law issues, as the decisions of the Constitutional Court. It is obvious that the judge is facing a insoluble dilemma and he is subjected to a constraint that is severely prejudicing his independence, because no matter what solution will be rendered, he will be liable for disciplinary responsibility for failure, as the case may be, either of the decision of the Constitutional Court or of the decision of the High Court of Cassation and Justice. It should be noted that no legal provision in the procedure for the judicial control is sanctioning the non-abiding of the compulsoriness of the decisions of the Supreme Court that were given in the appeal on points of law.

In the civil matter, there are no legal norms sanctioning the nonobservance of the decisions of the Supreme Court given on points of law. By way of interpretation it may be inferred that such a sanction in the regulations of Article 488 paragraph (1) point 8 Civil Procedure Code, establishing as cassation grounds of the appealing decision, the violation or wrong application of the substantive law norms. Nevertheless, such an interpretation of the above named law texts is debatable, as such as emphasized in the literature in specialty, the very interpretation itself of the Supreme Court will be implicitly brought into question, eventually it could be invoked only as argument in supporting the "legal" grounds of cassation. In any case, it by itself does not constitute such grounds[9].

In the Criminal Proceeding Code the cases to which cassation appeal can be done are regulated by the provisions of Article 438. In our opinion neither of these cases can be interpreted in the meaning that it is sanctioning the nonobservance of the compulsoriness of decisions given by the High Court of Cassation and Justice, through which was solved an appeal on points of law. In the actual criminal trial regulation, only by the interpretation way is possible to reach to the conclusion of sanctioning by the appeal court of non-abiding such a decision of the High Court of Cassation and Justice. Having into consideration the provisions of Article 385^9 paragraph (1) point 17^1 Criminal Procedure Code according to which the decisions are subject to cassation, if they are contrary to the law or when through the decision it was done a wrong application of the law. It worth mentioning that such dispositions were abrogated by Article 1 point 185 of the Law no. 356/2006, but by Decision no. 783 / 2009 the Constitutional Court declared such regulations as unconstitutional. For our research topic the

[7] For development see Cristina Ștefăniță, Manner to proceed of the law courts that face a contradiction between the decision of the Constitutional Courts and a judgment ruled by the High Court of Cassation and Justice, in the United sections, for the resolving of an appeal on points of law, in "the Law" no. 4/2010, pp. 119-135.
[8] Cristina Ștefăniță, quoted works p.125.
[9] Ion Deleanu, Sergiu Deleanu, , "The Jurisprudence and jurisprudential Revival" the Publishing House " Universul Juridic", Bucharest, 2013, pp. 92-94.

arguments of the Constitutional Court are of interest, according to which, Article 146 letter d of the Constitution does not exempt from the constitutionality control the abrogation legal provisions and, in case it is ascertained their unconstitutionality, they cease their legal effects within the conditions foreseen by Article 147 paragraph 1 of the Constitution, and the legal provisions that constituted the substance of abrogation, keep producing effects.

Another aspect we wish to emphasize is that the Supreme Court has no legitimacy in conferring the force of an authentic interpretation to the legal norms. Such an interpretation is of the exclusive competence of the legislator. In the procedure of appeal on points of law, the High Court of Cassation and Justice makes a synthesis of the decisions given in relation to a certain law issue, ruling on its correctitude, conferring at the same time, a compulsory interpretation" of the law aspects solved differently by the law courts.[10]

The question arises if the decisions handed down by the Supreme Court in this procedure are formal springs of law. Constantly, in the literature in specialty the notion of spring of law is defined as "the form of expressing the judicial norms that are determined by their enactment or sanctioning by the state" [11]. In our opinion, the decisions rendered by the High Court of Cassation and Justice cannot be springs of the law because they cannot contain law norms. Moreover, in our legal system the jurisprudence is not a formal spring of law. In this respect, the Constitutional Court stated: "The interpretative solutions given in the appeal on points of law named "interpretations of law" cannot be considered springs of law, in the usual meaning of this term[12]. Such interpretative solutions, constant and unitary, that do not concern certain parties and have no effect on the prior given solutions that entered the res judicata, are invoked by the doctrine as a judicial precedent, being considered by the legal literature "secondary springs of law" or "interpretative springs". In relation to the foregoing, we express our opinion that these decisions can be considered as sources of law, but not formal springs of law, opinion consistent with the Constitutional Court jurisprudence.

Another aspect we consider relates to the time at which the decisions given in the resolution of the appeals on points of law, start enforcing judicial effects. According to the procedural provisions "the decisions are published in Romania's Official Gazette – Part I, and on the internet page of the High Court of Cassation and Justice. These are brought to the knowledge of the courts also by the Ministry of Justice". From the interpretation of the legal dispositions results that such decisions cannot produce judicial effects with their ruling and their effects are only for the future. The decisions' publishing on the internet page of the High Court of Cassation and Justice and their communication to the courts by the Ministry of Justice cannot be considered as moments since when they start producing effects because the legislator did not foresee expressly this fact, and much more, neither of the above named procedures has presently in the Romanian Law the judicial value of the act of communication or publishing. We consider that the moment since when the decisions ruled in the procedure of appeal on points of law start producing judicial effects is the one of publishing in the Official Gazette. This solution is imposed by the general binding character of the decisions, and also by their quality as source of the law, which clearly distinguish them in terms of legal nature from other types of judgments.

The Civil Procedure Code, by Article 518, comes to clarify, at least in the civil matter, the issue of the effect of decisions on points of law. The normative regulations state that: "the decision on points of law ceases its applicability since the date of amending, abrogation or finding unconstitutional the statutory provision that made the object of the interpretation". The Criminal Procedure Code does

[10] For developments see Ion Deleanu, Sergiu Delenau, quoted works p.95.

[11] Ioan Muraru, Elena Simina Tănăsescu, Drept constituţional şi instituţii politice, "Constitutional Law and Political Institutions" C.H.Beck Publishing House, Bucharest, 2003, vol. I, p. 26. For developments see also Radu Motica, Mihai Gheorghe, Teoria generală a dreptului, "The "General Theory of Law" Alma Mater Publishing House, Timişoara, 1999; Nicolae Popa, Teoria generală a dreptului, "General Theory of Law" Actami Publishing House, Bucharest, 1999.

[12] Decision no . 93/200, published in the Official Gazette part I, no. 444 on September 8th 2000.

not contain such regulations and therefore, in the criminal matter, remains opened the problem of applicability of the decisions on points of law in the hypothesis of abrogation or finding unconstitutional the statutory provision that made the object of the interpretation. It is necessary that the legislator intervenes to regulate in a unitary manner this aspect in the sphere of criminal justice.

Before referring to the recent jurisprudence of our constitutional court in this matter, we consider appropriate to our research topic to emphasize briefly the nature of the relationships between the decisions of the Constitutional Court and the decisions of the High Court of Cassation and Justice ruled on points of law[13]. The first distinctive note is with regard to the effects of the two categories of decisions: the decisions of the Constitutional Court are compulsory in general, therefore not only for the law courts and including for the Supreme Court, but also for any other law topic. In contrast, the decisions of the High Court of Cassation and Justice ruled in the procedure of appeal on points of law are compulsory only for the law courts. Another aspect that distinguishes the two categories of legal acts is represented by the different nature of litigations that are resolved. The decisions of the Constitutional Court are rendered only to resolute a constitutional litigation and have as object the verification and analysis of the consistency or not of the legal norms examined with the Fundamental Law. The decisions of the Supreme Court are exclusively given with the purpose of a unitary interpretation and application of the law by the law courts and they concern the compliance or not of the law courts' practice in the authentic meaning of the legal provisions examined.

The Constitutional Court stated constantly in its jurisprudence that starting with 2000, in the exercising of the responsibilities provided by Article 126 paragraph (3) of the Constitution, the High Court of Cassation and Justice has the obligation to provide the unitary interpretation and application of the law by the law courts, with the observance of the fundamental principle of the separation of powers consecrated by Article 1 paragraph (4) of Romania Constitution. The Supreme Court does not have the constitutional competence to establish, amend or abrogate the judicial norms with law powers, or to do their control of constitutionality. The interpretations given by the Supreme Court to the law matters is mandatory for the other courts in as far as its objective is to promote a correct interpretation to the legal norms in force, and not to elaborate new norms. One cannot consider that the decision rendered by the High Court of cassation and Justice, in such appeals, would represent a task aiming at the law making prerogative, situation in which the named text would violate the provisions of Article 58 paragraph 1 of Constitution. [14]

Starting from a comprehensive jurisprudence analysis, the authors of a recent study[15] emphasize: "The decisions thus ruled have the role to give a correct interpretation to law matters over which they have appeal on points of law; however, proceeding to such an analysis, the High Court of Cassation and Justice is forbidden to violate the competence of the legislative power or executive power or that of the Constitutional Court. Therefore, this instrument is and remains a tool for the law interpretation and application, so like any other court decision, it cannot constitute a spring of law in the Romanian constitutional system"[16]. We share the view expressed.

It is necessary to notice the limits of the control of constitutionality related to the decisions ruled by the Supreme Court in the procedure of appeal on points of law.

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[13] For developments see Ion Deleanu, Sergiu Deleanu, quoted works, pp 97-98.

[14] See Decision no 93/2000, published in the Official Gazette part I, no. 444 on September 8th 2000 and Decision no 838/2009 , published in the Official Gazette part I, no 461 on July 3rd 2009.

[15] Mihaela Senia Costinescu, Karoly Benke, The effects of the general compulsory character of the decisions of the Constitutional Court regarding the decisions ruled by the High Court of Cassation and Justice in resolving the appeal on points of law, in the "Law" no. 4/2013, pp 134-162.

[16] Mihaela Senia Costinescu, Karoly Benke, quoted works. p. 135.

Constantly, until recently, the Constitutional Court refused to arrogate such a power, emphasizing the limits for constitutionality control in respect to the decisions ruled by the Supreme Court in the procedure for appeal on points of law. The Constitutional Court stated that a decision rendered on points of law cannot constitute an object of censorship of the constitutional litigation court[17]. Recently the Constitutional Court by Decision no. 854/2011[18] confirmed its previous case law. The Constitutional Court stated that " in regard to the censuring of the provisions of a decision given in an appeal on points of law, it cannot constitute an object of exception of unconstitutionality, being from this perspective, inadmissible , because the constitutional litigation court, in agreement with the provisions of Article 146 of the fundamental law, has not the competence of censoring the constitutionality of the statutory decisions, no matter if they are rule in the interpretation of some common law matters or in view of a unitary interpretation or application of the law". There are some nuance aspects in the constitutional court jurisprudence. Thus, quite recently the Constitutional Court emphasized: "The circumstance that throughout a decision given in an appeal on points of law, a certain interpretation is given to a legal text, is not to be converted in a non-receiving ending that obliges the Court, which despite its guarantor role of the Constitution supremacy, not to analyze the text in question, in the interpretation given by the Supreme Court"[19].

The recent doctrine expresses a similar point of view, in the meaning that the Constitutional Court has the competence to establish the non constitutionality of the statutory norm in the interpretation given by the High Court of Cassation and Justice:"Having into consideration those mentioned above, it comes out that the High Court of Cassation and Justice, being held by the decisions of the Constitutional Court on the track of a decision rendered in resolution of an appeal on points of law, cannot establish the application of an interpretation which *per se* would give a sense of unconstitutionality to the norm interpreted. Therefore the Court has the competence to establish the unconstitutionality of the norm in the interpretation given by the High Court of Cassation and Justice in the situation in which:

-The Supreme Court by interpreting the norm disobeyed an interpretative decision ruled by the Constitutional Court in regard to that statutory norm;

- The Supreme Court by interpreting the norm exceeded the jurisdiction of the law legislative power (judicial power n. m.);

- The Supreme Court interpreted that norm in a manner capable to breach the fundamental rights and freedoms". ☒

Nevertheless it is acknowledged the jurisdiction of the Constitutional Court to declare the unconstitutionality of the law norm in the interpretation conferred through the decision ruled by the High Court of Cassation and Justice, but not the unconstitutionality in itself of the decision through which was resolved the appeal on points of law.

The Decision no. 206 on 29th of April 2013 of the Constitutional Court[20] represents in our opinion, a legal revival in the matter of the jurisprudence of the Constitutional Court, because it clarifies the relationship between the decisions of this Court, and on the other side, the decisions of the High Court of Cassation and Justice ruled on points of law, and also a reconsidering of the competence of the Constitutional Court to censor under the aspect of this decision's constitutionality.

From considerations of the decision to which we made referral it comes out that the Constitutional Court was informed about the exception of non-constitutionality of the provisions of Article 414^5 paragraph 4 of the Criminal Procedure Code. The authors of the

[17] Decision no 409 on November 4th 2003, published in the Official Gazette part I no 848 on November 27th 2003.
[18] Published in the Official Gazette, part I, no 672 on September 21st 2011.
[19] Decision no. 8 on January 18th 2011, published in the Official Gazette part I, no. 186 on March 17th 2011.
[20] Published in the Official Gazette part I, no 350 /13th of June 2013.

non-constitutionality exception consider the text criticized as unconstitutional, because it establishes the binding compulsory nature of the interpretations given in the law matters, judged by the High Court of Cassation and Justice by means of appeal on points of law, and thus are violated the provisions of Constitutions regarding the separation and balance of the powers in the state, the equality before the law, the free access to the justice and last, the role of the Parliament as a sole legislative authority.

Concretely, the authors of the information towards the Constitutional Court have in consideration the decision no. 8/ 2010 given by the High Court of Cassation and Justice, in the procedure of appeal on points of law, by which it was admitted the appeal made by the General Attorney of the Prosecution besides the High Court of Cassation and Justice with regard to the consequences of the decisions of the Constitutional Court no. 62 / 2007 on the activity of the provisions of Articles 205, 206 and 207 of the Criminal Code. The Supreme Court established that: "The rules incriminating the insult and defamation contained by Article 205 and 206 of the Criminal Code, and also the provisions of Article 207 of the Criminal Code regarding the proof of truth, abrogated by the provisions of Article 1 point 56 of the Law no. 278/2006, provisions declared unconstitutional through the decision no. 62 on January 18th 2007 of the Constitutional Court, are not in force".

At the end of this comprehensive and pertinent argumentation, the Constitutional Court admits the exception of unconstitutionality having as objective the provisions of Article 414^5 paragraph 4 of the Criminal Procedure Code and finds that the "interpretation given to the the law matters, judged by the decision of the High Court of Cassation and Justice - United Sections no. 8 on October 18th 2010 … is unconstitutional, contravening to the provisions of Article 1 paragraphs 3, 4 and 5 and Article 126 paragraph (3), Article 142 paragraph (1) and Article 147 paragraph (1) and (4) of the Constitution and the decision of the Constitutional Court no. 62 on January 18th 2007". In support of this solution the Court notes that it is imposed the sanctioning of any interpretation of the statutory norms criticized for unconstitutionality that regulates the obligation of the clarifications given in the law matters by means of appeal on points of law, in the sense that it would offer to the Supreme Court the possibility that by this way, within the grounds of an infra-constitutional norm, to give compulsory interpretations that contravene to the Constitution and to the Constitutional Courts' decisions. From the contents of the decision clearly results that our Constitutional Court ruled on the constitutionality of the decision of the High Court of Cassation and Justice through which solved an appeal on points of law. It is a radical change of the previous jurisprudence through which constantly were rejected as inadmissible the complaints with constitutionality of such decisions.

The decision no. 206/2013 of the Constitutional Court presents a technical and practical importance for many aspects, of which we remember:

1. The Constitutional Court declared itself competent to rule on the constitutionality of the decisions delivered by the High Court of Cassation and Justice in the proceeding of appeal on points of law, which fact changes the previous jurisprudence of the Constitutional Court. We appreciate that the solution is correct even if neither the Basic Law nor the the special law for the Constitutional Court's organizing foresee expressly such a material prerogative. The legal basis is that any legal act of interpretation of such a judicial norm, mostly when it is about a compulsory judgment of a law court, cannot be dissociated by the judicial norm interpreted. In consequence, the Constitutional Court ruling on the constitutionality of the legal provisions that establish the compulsoriness of the decisions rendered in the appeal on points of law, has the competence to examine concretely any judgment of the High Court of Cassation and Justice, that confers an interpretation to a text of law and establishes a compulsory interpretation of law for the law courts. There is no „non-receiving ending" in the event that the author of an exception of unconstitutionality is

invoking the unconstitutionality of a decision rendered by the High Court of Cassation and Justice in the proceeding of appeal on points of law.

2. The Constitutional Court clarifies the relationships existing between the decisions of this law court, and on the other side, the decisions ruled by the High Court of Cassation and Justice. The interpretation conferred to the infra-constitutional law texts and the compulsory interpretations of law of the Supreme Court cannot contravene either to the Constitution or to the decisions of the Constitutional Court.

3. We appreciate that new possibility opens for the notification of the Constitutional Court in the procedure of exception of unconstitutionality. Thus the participants in the civil or criminal suits or court, ex officio, may appeal to the Constitutional Court, a plea of unconstitutionality, having as object the statutory regulations, but with specific reference to a decision of the High Court of Cassation and Justice in the proceeding of appeal on points of law, if appreciated that throughout of the compulsory interpretations of the law, the constitutional regulations or the decisions of the Constitutional Court are contravened. In such a circumstance, the Constitutional Court can ascertain the constitutionality of the the legal regulations mentioned in the exception of unconstitutionality, but may rule on the unconstitutionality of the decisions through which is solved the appeal on points of law, to the extent they conflict with the provisions of the Constitution or with the Constitutional Court decisions.

4. This decision, the ideas contained in the motivation constitute an argument for the legitimacy of the common law courts to examine the constitutionality of some legal acts, other than those that are subject to the exclusive jurisdiction of the Constitutional Court. Obviously the examination of constitutionality does not always equate with the right of the courts to rule on the constitutionality of such legal acts.

The recent jurisprudence of some Law Courts confirms such an interpretation regarding the possibility for the referral of the Constitutional Court with the verification of constitutionality of a law text in the interpretation conferred to it by the High Court of Cassation and Justice as a result of a settlement of an appeal on points of law.

The Court of Appeal Pitesti by the Criminal Concluding no. 876/R on December 2013 ordered the referral of the Constitutional Court with the exception of unconstitutionality raised by the Indicted, regarding the provisions of art 86/4 paragraph I in relation to item 83 paragraph I of the previous Criminal Code, in the interpretation conferred by the decision I/2011 of the High Court of Cassation and Justice, pronounced in solving an appeal on points of law.

Relevant for our research theme are the following aspects arising from the considerations of the court decision. The judicial court held admissible the request for referral to the Constitutional Court in relation to the provisions of art. 29 Law No. 47 / 1992, republished and with referring to decision No. 206/2013 of the Constitutional Court. It held that the referral of the Constitutional Court for the exception of unconstitutionality, having as object a decision of the High Court of Cassation and Justice pronounced in the procedure of appeal on points of law, is admissible, even if the provisions of art. 146 of the Constitution and respectively, those included in the Law no. 47/ 1992 republished, do not expressly regulate such a competence of the constitutional court. The decision of the Supreme Court is an act of interpretation of a judicial norm and therefore, makes one common body with the judicial norm which they interpret. Consequently, the examining of constitutionality of the legal text has as object, implicitly the examining of the interpretative act constitutionality.

The second argument to which the court refers to in justifying the admissibility of the request for the referral of the Constitutional Court refers to the jurisprudence of the constitutional controlling court. The decision No. 206/2013 of the Constitutional Court has the value of judicial precedent in relation to which it can be argued the admissibility of the

referral. It is mentioned in the decision of the Court of Appeal Piteşti: "therefore the Constitutional Court returned to its jurisprudence and ruled out that it has competence to adjudicate also over the decisions of the High Court of Cassation and Justice given in the procedure of appeal on points of law".

We appreciate as pertinent the arguments of the Court of Appeal Piteşti having into consideration the mandatory character of the decisions of Constitutional Court, in compliance with the provisions of art. 147 paragraph (4) of the Constitution. Certainly the compulsoriness of the decisions does not transform them into formal springs of law, but can be a juridical source to argue in favor of such a solution.

The case is in pending for solving by the Constitutional Court.

3. Conclusions

In relation to the foregoing, we appreciate that the judge has the possibility to notify to the Constitutional Court, for ascertaining the unconstitutionality of a decision ruled on points of law, certainly by invoking the statutory regulations interpreted throughout the respective decision, with referral to the constitutional norms violated by the High Court of Cassation and Justice through the compulsory interpretation given and, such as the case be, with referral to the decisions of the Constitutional Court whose general binding effect was not observed by the Supreme Court by the judgment ruled in resolving the appeal on points of law.

It is obvious that, under the conditions mentioned before, deduced from the contents of the decision no. 206/2013, the Constitutional Court may find unconstitutional such a decision. Worth mentioning that the decision of the Constitutional Court being binding has as a lawful consequence the cessation of the effects of the decision of the High Court of cassation and Justice for all law courts and not only for the specific case deducted concretely to the judgment. Therefore this is another termination situation of the effects of the decisions ruled for resolving the appeals on points of law.

In the concept of the Romanian constituent legislator the control of constitutionality done by the Constitutional Court has as objective only the law as a legal act of the Parliament, or the statutory regulations with a legal force equal with that of the law. In relation to this aspect in the doctrine is claimed that the issue of the control of constitutionality does not arise in the same terms for the legal acts with administrative character or the judicial acts of the law courts. The control of lawfulness and implicitly that of the constitutionality of the legal acts issued by the administration authorities or the law courts is performed within a judicial control, in compliance with the material competences of the law courts[21].

Such a legal reality, which is determined by the rules of Constitution, leaves outside the control of legality and implicitly of constitutionality, categories of important legal documents. We consider the decisions of the High Court of Cassation and Justice in solving appeals on points of law. As noted before the decisions ruled by the Supreme Court in this procedure, throughout the solutions adopted, may be unconstitutional at least by exceeding the limits of the judicial powers. The unconstitutionality of these legal acts may consist in the unjustified restraining of the exercising of some rights and fundamental liberties recognized and guaranteed by the Constitution or in violating some of the Constitutional Court decisions.

The lack of statutory regulations that establish the control of constitutionality by means of the Constitutional Court over the decisions ruled in the procedure of appeal on points of law, is likely to allow the excess of power in the Supreme Court's activity with serious consequences on the compliance of the lawful state requirements, citizens' fundamental human rights and freedom.

[21] Ioan Muraru, Elena Simina Tănăsescu, quoted works, vol I, p. 68.

There are other categories of legal acts that not only that they do not make the subject of the Constitutional reviewing but are also exempted from the judicial review. According to the provisions of Article 126 paragraph 6 of Constitution and Article 5 of the Administrative Litigation Law no. 554/2004, the acts that concern the relations with the Parliament and acts of military Command, cannot be subject to Constitutionality reviewing. This matter requires a separate analysis. In this context we emphasize only the fact the contemporary reality has shown the existence of legal acts of the executive in the relationship with the Parliament that are likely to violate seriously the letter and spirit of Constitution. The Parliamentary control of these acts is not sufficient to ensure the supremacy of Constitution and the requirements for democracy of the lawful state.

For our topic of research it is important to emphasize that there are Constitutions stipulating the competence of the Constitutional Courts to exercise the constitutionality review over other categories of individual and normative legal acts and not only on laws. Thus, the Belgian Constitutional Court is competent to exercise control, when being notified about a jurisdiction regarding the compliance with the rules for the division of powers between state authorities. The German Constitutional Court has the competence to exercise a subsequent specific control over some legal or administrative acts at the notification of the court or the direct notifying from the citizens, by constitutional appeal. Similarly, Spain Constitution on 1978 stipulated the competence of the Constitutional Court, by way of "de amparo" appeal proceeding, to verify the the constitutionality of some final judgments. An illustrative example is Hungary, where the Constitutional Court exercises a posteriori abstract or concrete on delegated acts and on ministerial acts.

All these arguments entitle us to support, along with other authors[22],, the proposal for ferenda law that in the light of revising the Constitution to be provided the competence of the Constitutional Court to exercise the constitutional control on the decisions ruled by the High Court of Cassation and Justice in the appeal on points of law procedure and on the legal acts exempted from the judicial reviewing. The subjects of law that may notify the Constitutional Court in such a procedure may be: the General Prosecutor of the Prosecution besides the High Court of Cassation and Justice, the People's Lawyer and courts.

References

- Ion Deleanu, Tratat de Procedură Civilă, "Civil Procedure Treaty" C.H. Beck Publishing House, Bucharest, 2007
- Ion Deleanu, Sergiu Deleanu, Jurisprudența și reverimentul jurisprudențial, "The Jurisprudence and jurisprudential Revival" the Publishing House " Universul Juridic", Bucharest, 2013
- Cristina Ștefăniță, Manner to proceed of the law courts that face a contradiction between the decision of the Constitutional Courts and a judgment ruled by the High Court of Cassation and Justice, in the United sections, for the resolving of an appeal on points of law, in "the Law" no. 4/2010
- Ioan Muraru, Elena Simina Tănăsescu, Drept constituțional și instituții politice, "Constitutional Law and Political Institutions" C.H.Beck Publishing House, Bucharest, 2003
- Nicolae Popa, Teoria generală a dreptului, "General Theory of Law" Actami Publishing House, Bucharest, 1999
- Mihaela Senia Costinescu, Karoly Benke, The effects of the general compulsory character of the decisions of the Constitutional Court regarding the decisions ruled by the High Court of Cassation and Justice in resolving the appeal on points of law, in the "Law" no. 4/2013

[22] See Mircea Criste, Considerations regarding the necessity to revise some texts of România Constitution concerning the Constitutional Court in the "Law" no. .6/2013, p. 152-172. The author emphasizes: "Having into consideration the effects of the decisions ruled by the High Court of Cassation and Justice in the matter of appeal on points of law and more recently of the decisions through which are given solutions in principle of some law matters, related to the experience of some European countries, we believe that should be conferred to the Constitutional Court also the competence of censoring the constitutionality of some of the High Court decisions" p 170.

THE CONTRADICTIONS OF THE JUSTICE. THE METAPHYSICAL PRINCIPLES OF LAW

Marius ANDREESCU[*]

Abstract

This essay represents an attempt to highlight, from a philosophical perspective, the most significant contradictions that can affect the justice throughout a period of social crisis. The object of our analysis consists of the contradictions between: the law and justice; the justice and society and the act to fulfill the justice and what we have just called "the fall in exteriority" of justice. Within this context we refer to some aspects that characterize the person and personality of the judge. This essay is a pleading to refer to the principles, in the work for the law's creation and applying. Starting with the difference between "given" and 'constructed" we propose the distinction between the "metaphysical principles" outside the law, which by their contents have philosophical significances, and the "constructed principles" elaborated inside the law. We emphasize the obligation of the law maker, but also of the expert to refer to the principles in the work of legislation, interpretation and applying of the law. Arguments are brought for the updating, in certain limits, the justice – naturalistic concepts in the law.

Keywords*: normative order, law and justice, the contradictions of the justice, the fall in exteriority, metaphysical principles and constructed principles*

1. Introduction

Justice should be a harmonious system in order to be in its truth and reality. "The truth is real only as a system"[1] said Hegel and by confirming this statement, justice is in its truth only if it satisfies this condition. The system means coherent order, functionality, suitability to the real and its purpose, but mainly unity in its diversion, a concrete universal in which each part to express the whole and this one to legitimize through the created order, the component parts. The system, including the justice one manifests itself dialectically, transforms itself, become a historical being, without losing the harmony and coherence. The thinker of Jena pointed out that "Truth is the whole. The whole is only the essence that fully accomplishes itself through its development"[2]. Like any other system, justice has its components or subsystems: ideal, value, normative, jurisprudential subsystem (the act of justice), institutional and perhaps the most important component, man as a producer, but also as a beneficiary of the act of justice. The truth of the judiciary system involves the making in its wholeness but also by each component of own existential purpose, which is at the same time its being, namely the *righteousness* as a values ideal but transposed into reality's concrete.

To the extent that the functions, we may say, the mission of justice, fulfill and express at the same time the functional harmony of a system, which at any time attempts the adequacy to its purpose as a value, the fulfilling of justice, justice finds itself in its truth, otherwise said, it gives its own legitimacy without waiting for it to be given, in forms sometimes inadequate, from outside.

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[1] Georg Wilhelm Friedrich Hegel, Fenomenologia spiritului, "Phenomenology of the Spirit", Bucharest: Academy Publishing House, 1965, p.18.

[2] Georg Wilhelm Friedrich Hegel, quoted works. p.18.

The contradictions and in general any malfunction in the coherence of the system or inadequacy to the purpose are maladies, deficiencies of the justice, that departs it from its role and truth. When the maladies of the justice become chronical but with manifestations which lead towards aggravation, one may speak about a crisis of the system of justice. Our justice is obviously in such a chronical crisis with tendencies towards aggravation. The main cause is the ailing contradictions of the system. In contrast to the beneficial contradictions that give the becoming, the unhealthy ones tend to depart more and more the justice from its reality and truth.

2. Paper Content

In the followings we try to emphasize the sickly contradictions of the justice system specific to the crisis in which this is located:

1. The fundamental contradiction of the justice, expression of the profound crisis in which this is between law and justice, and on the other side the constructive order of the norms and jurisprudence. The *law*, the justice do not represent the purposes and truth of justice, substituting these values, the law, norms and jurisprudence, that will find legitimacy in itself, in the abstract forms, the ephemeral realities, interests and precarious purposes but not in the ideal and reality of justice. Of course even when a judicial system is harmonious functional and does not have this malady, there isn't always a formal overlapping between law and justice. In the healthy justice system, between the justice and law there is a unilateral contradiction in the meaning that the law may contradict the justice, but this one does not contradict the law. The crisis of the judiciary system expresses sometimes in aggravated forms the inadequacy in absolute terms between the justice and law.

The above mentioned contradiction unleashed the "will of power" of the governors to impose their own order and legitimacy to justice by norming and legislating in the meaningless and illusory attempt to create an "order of the norms" that will replace the being and truth of justice: *the righteousness*. Reality shows that this false order proves itself inconsistent, contradictory and mostly inadequate to the realities it is destined for. The mere accumulation of rules, laws even codified, does not lead to the settlement into their being and purpose of the man, the "social" and justice if the norms do not express as a phenomenon the essence: the superior order of the values of justice, equity, truth, proportionality, tolerance. Jurisprudence is manifested the same in the exclusive concern to correspond to itself or to the norms, to be sufficient in itself and not be related to the higher order of the values named above. The act of justice accomplished by the magistrate obstinately seeks for exclusive legitimation only by the rules of law and not through the value order that should be its own.

This ailing contradiction is confirmed, but not made aware by the judicial technique and formalism. A judgement is not pronounced in the name of the justice but in the "name of the law". That is in the name of an order constructed by a temporary political will for the fulfilling of some temporary interests steeped into their particularity and often contrary to the common good and not, as it should naturally be done, in the name of the order *given* and not *constructed* of the values outside the justice but which represent its truth and purpose.

2. The doctrine asserts that the judge pronouncing a decision "is saying the law". It would be good to be so. In fact, most of times, the magistrate by the judgment pronounced "is saying the law" – when he is not doing it – trying to include his sentence in the order of law, which is not necessarily the order of justice, the judge if having the conscience of achieving an act of justice, respecting his moral and professional statute, does not contradict the law, yet there are situations when he should and could do so in the name of a superior order formed out of the values subsumed to the justice concept . For such an act, that is not only an act of justice but also an act of righteousness, courage is needed. The magistrate must assume the risk to exceed

the constructed imperfect order of the law in order to legitimate the act of justice achieved in the superior values reality of the metaphysical principles of law. Such an exiting from the normality of the inadequate forms of the concrete reality is risky for the judge, because the order constructed of the law can impose its coercive force. The contemporary justice is dominated by the order of normativity, of forms that are not abstracted from reality but ignores it.

The sickly rupture between the law and justice (the law as expression of the will of the legislator, of the temporary power, the only one seeking such a separation) should be reflected in the legal education plan. For a correct suitability to the crisis of justice emphasized by this contradiction, but also in order to reflect the order of law and not of righteousness, taught to the students, the faculties in speciality shouldn't be called "Law" Faculties but "Faculties of Laws", as it once was.

3. The contradiction between the justice and "world', throughout "world" we understand both the human in his individuality as the society as a whole. It seems it is increasingly present in the actuality of justice and placed in a place of honour the dictum *„ Fiat justiţia et pereat mundus*." It is not a simple dictum but a tragic reality, a disease of the justice consisting in the inauthentic legitimizing of the separation of justice from the world and man. Justice cannot live, triumph, *be* if the world dies. Bteween justice and the world there is a unilateral contradiction: justice can contradict the world, but the world cannot contradict the justice, because the world is the medium, the element that justifies the manifestations of justice. The righteousness through justice involves he man, both as a performer of the act of justice and as a beneficiary.

In its contemporary manifestations, the justice in crisis is increasingly making the dictum „Fiat justiţia et pereat mundus", tring to become a closed system, existing for itself and in some cases, even worse, directed against human, the only beneficiary of the act of justice, denying its own reason for being. The crisis of justice, by this disease, is also found in the meaningless rethoric of proclamation of the "abstract man" through rights equally abstract with the intention to give teleological form to its manifestations. But the true existential meaning of justice and its finality at the same time is the man considered in his human dignity. The rhetoric specific to the separation between the justice and world in favour of the abstract man, impersonal has obvious manifestations. Before the court, in a judgment, man is no longer in the concrete of his dignity as a person, but he becomes the "named" at most identified through a locus standing equally impersonal.

The existential rupture between the justice and world, further more the attempt of justice to deny its own medium that justifies its own reason to be, cannot confirm the natural dialectical order that should characterize a good placing of justice in its truth, but may have at the end of the road the nothingness, justice as an empty form, void of the fullness which only the "just" is offering when existing in relation to human's dignity.

4. The contradiction between the justice understood and even in the acception of the normative order of law, and on the other side, the act of justice and the magistrate performing it. In philosophy one speaks about an autonomous world of the values existing per se and for itself independent even to man. As stated, justice is undeniable a reality and a normative institutional system but also a system of values. Unlike other systems of moral, religious values and in general cultural ones, the essence of justice consists also in its achieving and fulfilling through the act of justice of the magistrate without which the justice system does not close. One can speak at most about the autonomy of the right understood as an order of values, but not about the autonomy of justice outside the act by which it gets concretized. Unlike other systems of values or by other nature, justice is a clear example of a universal concrete fulfilled through the act of justice whose expression is firstly the decision of the judge.

Therefore the act of justice may confirm or refute the normative order of justice and equally as much the right as a system of values. It is a situation similar with the relation between the experiment and the scientific theory "the first being able to confirm or refure the theory, according to the case. Only that in the sphere of scientific theories an experiment may invalidate a theory legitimizing a new, superior order, that will include the old one such as it once happened with Einstein's relativity theory. In contrast, the act of justice, if contrary to the normative order or the value order of law is only but a mere judiciary error, willfully, unintentionally or accidental of the magistrate which denies even the justice itself and implicitly the right abolishing thus the order of juridical and the lawful order having as finality not another order but the disorder, the chaos. How many judicial errors are now known or unknown.

One needs to emphasize the fact that the act of justice cannot dissociate the person of the one performing it from the magistrate. A judgment even anonymized is not anonymous: the act of justice contains in itself the person but also the personality of the magistrate. We can say that not only the magistrate is the author of the act of justice, but also the act of justice "makes" the magistrate. When the judiciary errors become obvious – the cause being the abandonment by the magistrate of the moral, social, professional statute, he being at peace with the disorder that is specific to the existential non-values – it is customary to say that these are isolated cases that do not characterize the justice system and lawful order. This is not true. Justice as a system of values needs to be confirmed in its own being, coming to truth by each act of justice, by each court judgment. A single judiciary error, a single corrupted or immoral magistrate "denies it by sending the judiciary and lawful order into nothingness, into non-existence. The contemporary reality still provides too many examples for such situations so that you wonder if there's anything left into the value being of justice. Here is an acute manifestation and not only a chronical one of crisis of justice.

Justice located into its being and truth imposes the magistrate, as a fact of conscience, the object of judgment: the deeds of the man and not the man, meaning the phenomenal that is specific to the humanity of man. Being aware at the principles of law and implicitly the justice as a value specific to an order higher than the normative one, the judge, by fulfilling the act of justice, must although to teleologically relate to the concrete man even if he will rule only over the deeds (actions and omissions) thereof. Unlike this, in case of a sickly justice, the judge imagines that he has the power to judge the man.

5. The falling in exteriority. Of course the justice made by man and for man is profane, to the "measures of man", but the sacred values are part of his being.

Being a component of the human temporary reality, the justice understood in its value dimension involves the relationship between transcendent and transcendental to which Kant and Heidegger referred to. As a reality of man and society, justice should not be transcendent, meaning "beyond" the man and the world and neither beyond his own reason for being. If this happens we are in the presence of a sickly manifestation specific to the crisis of justice, firstly by its separation from the "world" as mentioned above. Justice must be and remain in its *transcendental* being respectively "on this side" of the existential precariousnesses of this world and outside the conflicts and political interests of all kinds, without implications in the struggle for power or power games. The transcendental of justice is this one's being in its values dimension, is the right as justice manifested phenomenally through the act of justice.

The contemporary crisis of justice means falling from the immutability of the own existential and values transcendental into the social and political exteriority with the consequence of diminishing or even losing the very being of the "right as value". Unfortunately the examples are too numerous: conflicts and contradictions inside the institutional system of justice; transformation of justice into a tool for the political actors or of another kind; involving into the struggle for temporary power or into the power games both of

the whole justice system and of the magistrates; shifting from the publicizing of the acts of justice, to the media justice, done by the prime mass media; magistrates' abandonment of the moral and professional statute for the illusory gain conferred by the involvement into the precariousnesses, sometimes miseries of the world; arrogarnt and aggressive rhetoric without substance by random using, and mainly for the satisfaction of some selfish interests many times immoral, in the sacred name of justice and law: "in the name of law", "in the name of the right" which become simple formulas for legitimizing of what is lacking legitimacy. The falling into exteriority is a painfull manifestation of the crisis of justice which is sensed not so much by the judiciary system itself but mainly by the system's beneficiaries: the man, people and society.

We discussed about the crisis of justice. There is a justice of the crisis consisting in the illusion of the system to exist through the sickly contradictions presented above in a world which is not in the realization of the "progress in the conscience of liberty" such as Hegel believed, but mainly in a process of abolition, abandonment of the values cultural being and its replacing through civilization elements, excessive technicization, in a single word through the domination of the forms of civilization over the culture and not vice versa like normal. In social and political plan the world's *dissolution* process is manifested through *mass democracy* and the *democratic individualism* with the consequence of ignoring the man as person and personality, man becoming an individual in a political and economical normative, social order in which he does not confirm his *self* as he has become a mere number taken over by the rhetoric of forms and void ideals.

The crisis of justice cannot have a being as it is outside truth and its purpose like the society of crisis to which is trying to adapt itself. There can be no proper relation between the justice that is in serious sickly contradictions and a society that is in crisis with the purpose to legitimize the existence of a justice of crisis. The justice of crisis can however be a reality but devoid of truth, of being, because not all that exists it really *is*.

It is spoken, somhow with bewilderment about the lonliness and intransigence of the judge. The judge, the magistrate in general, cannot be lonely, he cannot isolate himself, cannot alienate himself. But he can be *a secluded one*. Living in community he must be in communion with the others and at the same time he can take in his being and mainly in his conscience as much of the feelings, values, aspirations of others, of course if all these bear the mark of the being, they are beneficial and not ailing. The common good, but only as a Christian value, must become the own good. The seclusion, the withdrawal in oneself does not imply abandoning the social environment on the contrary it implies its regaining and evaluation by one's own self: "is something deeper in us than ourselves" said Happy Augustin. Only by seclusion in own self, the judge may understand man, he can assimilate him, he may understand a few about the world's self. Seclusion but not loneliness: to be with you in deeper own self, but in communion with yours' another one.

The judge must relate to the concrete man, not to the abstract one, the latter as Goethe understood the sum of all people. He must bring closer to his being Eminescu's words" "in every man a world starts its existence", discovering and understanding this world in every man that comes before the judgment seat. In his solitude the joy of the judge must be that to which Kant is referring to:"two things fill the soul with ever newer and growing admiration and veneration: the starry sky above me and the moral law inside me".

Of course, the judge is looking down the ground or (at the earth), such as Aristotel's hand is pointing to in Rafael's painting. Only thus can he take the real, the concrete, the existing, so that together with Plato, to rise up to the idea. The judge is looking down the earth naturally in order to feel, to know not only the rational in the real, but also the real as a rational and to be aware of piety's meanings."Taller is the man kneeling than standing" – pointed out father Arsenie Boca.

Intransigence can not be in the nature of a judge's being, because it implies the impersonal authority, manifested in the name of the law and justice, but in fact without man and without justice. Intransigence means being placed in the exclusive plan of the formal logic with its categoric distinction between the true and false, between "yes' and "no". Yet, how many senses, how much richness of meanings life is offering between these extreme values to which judicial needs be identified.

Not the intransigence, but piety, mercy should characterize the judge because only thus can he see and understand something of every person's humanity. Noica said:"one needs to have mercy for the insignificant ones to see their meaningness"[3] . The piety of the judge is the piety of justice. How well the being and meaning of justice was described on 1919 by the great legal expert Matei Cantacuzino, and how far we depart today from the truth of justice to immerse ourselves into the unauthentic of the "other justice", of the crisis: "In a small church in Rome I saw the painting with a woman holding the black earth into her hands. She warmly embraced it; her expression showed she was a mother, with her eyes turned up to the sky she seemed she was trying to pull the light out of the sky's blue. I was expecting to have written underneath: Charity or Justice or Philanthropy. It was not. It was *Justice*! A justice unblindfolded and understaning all pains, and not the other justice, blind with the sword in one hand and holding a scale with the other hand, so little, that it couldn't contain any of our miseries.

3. Conclusions

An argument for which the philosophy of law needs to be a reality present not only in the theoretical sphere but also in the practical activity for normative acts drafting or justice accomplishing, is represented by the existence of the general principles and branches of law, some of them being consecrated also in the Constitution.

The principles of law, by their nature, generality and profoundness, are themes for reflection firstly for law's philosophy, only after their construction in the sphere of law methaphysics, these principles can be transposed to the general theory of law, can be consecrated normatively and applied to jurisprudence. In addition, there is a dialectical circle because the "understandings" of the principles of law, after the normative consecration and the jurisprudential drafting, are subject to be elucidated also in the sphere of the philosophy of law. Such a finding however imposes the distinction between what we may call: *constructed principles of law* and on the other side *the metaphysical principles of law.*The distinction which we propose has as philosophical grounds the above shown difference between 'constructed" and "given" in the law.

The constructed principles of law are, by their nature, juridical rules of maximum generality, elaborated by the juridical doctrine by the law maker, in all situations consecrated explicitly by the norms of law. These principles can establish the internal structure of a group of juridical relationships, of a branch or even of the unitary system of law. The following features can be identified: 1) are being elaborated inside law, being as a rule, the expression of the manifestation of will of the law maker, consecrated in the norms of law; 2) are always explicitly expressed by the juridical norms; 3) the work of interpretation and enacting of law is able to recognize the meanings and determinations of the law's constructed principles which, obviously, cannot exceed their conceptual limits established by the juridical norm. In this category we find principles such as: publicity of the court's hearing, the adversarial principle, law supremacy and Constitution, the principle of non-retroactivity of law, etc.

Consequenlty, the law's constructed principles have, by their nature, first a juridical connotation and only in subsidiary, a metaphysical one. Being the result of an elaboration inside the law, the eventual significances and metaphysical meanings are to be, after their

[3] Constantin Noica, *Devenirea întru fiinţă, [Becoming into Being]*, Bucharest: Humanitas Publishing House, 1998, p. 257.

later consecration, established by the metaphysic of law, at the same time, being norms of law, have a mandatory character and produce juridical effects like any other normative regulation. Is necessary to mention that the juridical norms which consecrate such principles are superior as a juridical force in relation to the usual regulations of law, because they aim, usually, the social relations considered to be essential first in the observance of the fundamental rights and of the legitimate interests recognized to the law subjects, but also for the stability and the equitable, predictable and transparent carry on of juridical procedures.

In case of a such category of principles, the above named dialectical circle has the following look: 1) the constructed principles are normatively drafted and consecrated by the law maker; 2) their interpretation is done in the work of law's enacting; 3) the significances of values of such principles are later being expressed in the sphere of metaphysics of law; 4) the metaphysical "meanings" can establish the theoretical base necessary to broaden the connotation and denotation of the principles or normative drafting of several such newer principles.

The number of the constructed principles of law can be determined to a certain moment of the juridical reality, but there is no preconstituted limit for them. For instance, we mention the "principle of subsidiarity", a construction in the European Union law, assumed in the legislation of several European states, included in Romania.

The metaphysical principles of law can be considered as a 'given" in relation to the juridical reality and by their nature, they are outside law. At their origin they have no juridical, normative, respectively jurisprudential elaboration. They are a transcendental 'given" and not a transcendent of the law, consequently, are not "beyond' the sphere of law, but are something else in the juridical system. In other words, they represent the law's essence of values, without which this constructed reality cannot have an ontological dimension.

Not being constructed, but representing a transcendental, metaphysical "given" of law, it is not necessary to be expressed explicitly by the juridical norms. The metaphysical principles may have also an implicit existence, discovered or valued throughout the work for law's interpretation. As implicit "given" and at the same time as transcendental substance of law these principles must eventually meet in the end in the contents of any juridical norm and in every document or manifestation that represents, as case is, the interpretation or enacting of the juridical norm. It should be emphasized that the existence of metaphysical principles substantiates also the teleological nature of law, because every manifestation in the sphere of juridical, in order to be legitimate, must be suited to such principles.

In the juridical literature, such principles, without being called metaphysical, are identified by their generality and that's why they were called "general principles of law". We prefer to emphasize their metaphysical, value and transcendental dimension, which we consider metaphysical principles of juridical reality. As a transcendental 'given" and not a constructed one of the law, the principles in question are permanent, limited, but with determinants and meanings that can be diversified within the dialectical circle that contains them.

In our view, the metaphysical principles of law are: *principle of fairness; principle of truth; principle of equity and justice; principle of proportionality; principle of liberty.* In a future study, we will explain extensively the considerents that entitle us to identify the above named principles for having a metaphysical and a transcendental value in respect to the juridical realities.

The metaphysical dimension of such principles is undeniable, yet still remains to argument the normative dimension. An elaborate analysis of this problem is outside the objective of this study, which is an extensive expose about the philosophical dimension of the pruinciples of law. The contemporary ontology does not consider the reality by referral to classical concept, in substance or matter. In his work *„Substamzbegriff und Funktionsbegriff"*

(1910) Ernest Cassirer opposes the modern concept of function to the ancient one of substance. Not what is the "thing" or actual reality, but their way of being, their inmost make, the structure concern the modern ones. Ahead of knowledge there are no real objects, but only "relations" and "functions". Somehow, for the scientifical knowledge, but not for the ontology, the things disappear and make space for the relations and functions. Such an approach is operational cognitive for the material reality, not for the ideal reality, that 'world of ideas" which Platon was talking about.[4]

The normative dimension of juridical reality seems to correspond very well to the observation made by Ernest Cassirer. What else is the juridical reality if not a set of social relations and functions that are transposed in the new ontological dimension of "juridical relations" by applying the law norms. The principles constructed applied to a sphere of social relations by means of juridical norms transforms them into juridical relations, so these principles correspond to a reality of judicial, understood as the relational and functional structure.

There is an order of reality more profound than the relations and functions. Constantin Noica said that we have to name an "element" in this order of reality, in which the things are accomplished, which make them *be*. Between the concept of substance and the one of function or relation a new concept is being imposed, that will maintain the substantiality without being dissolved in functioning, to manifest the functionality[5].

Assuming the great Romanian philosopher idea, one can assert that the metaphysical principles of law evoke not only the juridical relationships or functions, but the "valoric elements" of juridical reality, without which it would not exist.

The metaphysical principles of law have a normative value, even if not explicitly expressed by law norms. Furthermore, such as results from jurisprudence interpretations, they can even have a supernormative significance and thus, can legitimate the justnaturalist conceptions in law. These conceptions and the superjuridicality doctrine asserted by Francaise Geny, Leon Duguit and Maurice Duverger, consider that justice, the constitutional justice, in particular, must relate to rules and superconstitutional principles. In our view, such standards are expressed precisely by the metaphysical principles which we referred to. The juristprudential conceptions were applied by some constitutional courts. It is famous on this meaning, the decision on January 16th 1957 of the Federal Constitutional Court of Germany with regard to the liberty to leave the federal territory. The Court declares: "The laws are not constitutional unless they were not enacted with the observance of the norms foreseen Their substance must be in agreement with the supreme values established by the Consitution, but they need to be in conformity with the *unwritten elementary principles* (s.n.) and with the fundamental principles of the fundamental Law, mainly with the principles of lawfull state and the social state"[6].

One last thing we wish to emphasize refers to the role of the judge in applying the principles constructed especially the metaphysical principles of law. We consider that the fundamental rule is that of interpretation and implicitly of enacting any juridical regulation within the spirit and with the observance of the valoric contents of the constructed and metaphysical principles of law. Another rule refers to the situation in which there is an inconsistency between the common juridical regulations and on the other side the constructed principles and the metaphysical ones of the law. In such a situation we consider, in the light of the jurisprudence of the German constitutional court, that the metaphysical principles need to be applied with priority, even at the expense of a concrete norm. In this manner, the judge

[4] For more details see also, Constantin Noica, *Devenirea întru fiinţă, [Becoming into Being]*, Bucharest: Humanitas Publishing House, 1998, p. 332-334.
[5] Constantin Noica, *quoted works.* p. 327-367.
[6] For details see Andreescu Marius , *quoted works,* p. 34-38.

respects the character of being of the juridical system, not only the functions or juridical relations.

References

- Marius Andreescu, *Principiul proporţionalităţii în dreptul constituţional*, Bucharest: C.H. Beck Publishing House, 2007
- Georg Wilhelm Friedrich Hegel, *Fenomenologia spiritului, "Phenomenology of the Spirit"*, Bucharest: Academy Publishing House, 1965
- Immanuel Kant, *Critica raţiunii pure*, Bucharest: IRI Publishing House, 1994
- Constantin Noica, *Devenirea întru fiinţă. "Becoming into being",* Bucharest: Humanitas Publishing House, 1998
- Rudolf Stammler, *Theorie der Rechtswissenschaft*, University of Chicago, Press, 1989

THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE RIGHTS RELATED TO ARTICLE 6 UNDER THE ECHR JURISPRUDENCE: INDIPENDENT AND IMPARTIAL TRIBUNAL ESTABLISHED BY LAW

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Abstract

Access to justice is a core fundamental right and a central concept in the broader field of justice. The case-law of the European Court of Human Rights on Article 6 is a complex body of rules. Article 6 of the Convention was inspired by Article 10 and 11(1) of the Universal Declaration of Human rights of 1948. It has also its counterpart – with minor differences in Article 14 of the International Covenant on Civil and Political Rights on 1966. Article 6, which guarantees the right to fair trial, occupies a central place in the system of the Convention. it is a generally agreed that this provision is the most frequently cited one of the Convention, both at the national and international levels. This Article contains a variety of rights which are all related to the good administration of justice, not only criminal, but also in the civil and administrative matters. The 'independent and impartial tribunal established by law' is one of textual elements of the Fair Trial Right, as long as it has direct and explicit expression in the text of Convention. Even in simple logical way it can be considered as a suite of requirements referring to 1) the notion of tribunal 2) its attribute of being established by law 3) being independent and 4) being impartial.

Keywords: *access to justice, tribunal, independent, impartial, applicability.*

I. Introduction

If the jurisprudence of the Strasbourg Court was an ocean, the Article 6 jurisprudence would be an ocean in ocean.[1] On one hand, it has crucial role in developing and strengthening national judiciary, in increasing its reasonableness and predictability, in pushing the national investigating bodies to give up the archaically practice of oppressing the accused and, after all, in securing Human Rights. On the other hand, the fair trial cases have been periodically giving the European Court of Human Rights (ECHR) an opportunity to enhance its protective role, to develop its interpretative doctrines and to fortify its magnificence as the most effective supranational (and international) human rights protection instrument.[2]

In contrast to the guarantees provided by paragraph 2 and 3 of Article, which are applicable only in the context of criminal proceedings, paragraph 1 of the same provision has

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[1] Historically, Article 6 of the Convention was inspired by Article 10 and 11 (1) of the Universal Declaration of Human Rights of 1948. It has also its counterpart – with minor differences in Article 14 of the International Covenant on Civil and Political Rights of 1966.

[2] The Court has pointed out that 'Article 6 enunciates the rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term'. See *Golder* judgment of 21 February 1975, Series A, No. 18, p.13, pr.28. Moreover, the Court has sometimes described the right guaranteed by Article 6 as 'right to good administration of justice'. The expression 'the right to fair administration of justice' which sometimes is used for its conciseness and convenience . . . does not appear in the text of Article 6 , and can also be understood as referring only to the work and not to the organisation of justice. See *Delcourt* judgment of 17 January 1990, Series A, No.11, p.11, pr.25. The Court now generally refers to Article 6 of the Convention as guaranteeing 'the rights to a fair trial'. See *Golder* judgment, p.18.

wider scope of 'civil rights and obligations' beside 'the criminal charge'.[3] Furthermore, a broad construction of the 'civil rights and obligations' in Article 6(1) would then cover all the rights or obligations enforceable by law, regardless of whether the parties are individuals, corporations or public authorities or the State itself.

Active and protective jurisprudence of ECHR has been changing the very structure of Article 6 mosaic as whole. If we draw up the construction of Fair Trial Article following strictly the text in the Convention and then outline its state it result of Court's jurisprudence, we will have basically dissimilar pictures. The Court itself repeatedly emphasizes that the Article 6 protection "… has undergone a considerable evolution in the Court's case-law …"[4]

The 'independent and impartial tribunal established by law' is one of textual elements of the Fair Trial Right, as long as it has direct and explicit expression in the text of Convention. This provision deals, in principle, with the question whether a certain disciplinary or administrative body determining a dispute has the characteristics of a "tribunal" or "court" within the autonomous meaning of Article 6, even if it is not termed a "tribunal" or "court" in the domestic system.[5] This is the only provision of Article 6 which explicitly refers back to domestic law, warranting a certain degree of inquiry into "lawfulness" from the Court. At the same time, there is a strong presumption that domestic courts know the rules of jurisdiction better, and if the matter of jurisdiction is properly discussed at the domestic level the Court would tend to agree with the domestic courts in a decision on competence to hear the case.[6]

The body need not be part of the ordinary judicial machinery), and the fact that it has other functions besides a judicial one does not necessarily render it outside the notion of a "tribunal"[7]. The term established by law is intended to ensure that the judicial organization does not depend on the discretion of the executive, but that it is regulated by law emanating from parliament. Members of the body do not necessarily have to be lawyers or qualified judges[8]. The body must have the power to make binding decisions,[9] and not merely tender advice or opinions, even if that advice is usually followed in practice.[10]

One of the elements essential for the notion of "tribunal" for the purposes of Article 6 (1) is the existence of power to decide matters "on the basis of rules of law, following proceedings conducted in a prescribed manner".[11] This principle has been established by the Court, *mutatis mutandis*, in case of *Stromek v. Austria*.[12]

The Court's jurisprudence is much richer in interpreting and applying the 'independence' and 'impartiality' requirements than 'tribunal established by law'.

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[3] In this context, the Court points out that: 'Paragraph 3 of Article 6 contains an enumeration of specific applications of the general principle stated in paragraph 1 of the Article 6. The various rights of which a non-exhaustive list appears in paragraph 3, reflect certain aspects of the notion of a fair trial in criminal proceedings. When compliance with paragraph 3 is being reviewed, its basic purpose must not be forgotten nor must it be severed from its roots'. See *Artico* judgment of 13 May 1980, Series A. No. 37, p. 15, pr.32. Moreover, the Court has pointed out that ' The Contracting States enjoy a wide discretion as regards the choice of means calculated to ensure that their legal systems are in compliance with the requirements of Article 6 (1) in this filed. The Court's task is not to include those means to the states, but to determine whether the result called for the Convention has been achieved'. See *Colozza* judgment of 12 February 1985, Series A, No. 212-C, p. 26, para.26.

[4] *Borgers v. Belgium*, 30/10/1991, Appl. No. 12005/86, A214-B, para.24.

[5] *H. v. Belgium*, 30 November 1987, paras.50-55.

[6] *Khodorkovskiy* (No.2*) v. Russia*, 8 November 2011.

[7] See *H. v. Belgium*, Publication A 127 B.

[8] See *Ettl v. Austria*, paras. 36-41, Publication A117A.

[9] See *Sramek v. Austria*, paras 36-42, Publication A084.

[10] See judgment *Compbell and Fells*, paras. 32-33; and judgment *H v. Belgium*, para. 50.

[11] Case of *Sramek v. Austria*, judgment of 22 October, 1984, Application no. 8790/79, para. 36.

[12] Where the applicant complained the violation of Article 6(1) of the ECHR claiming that the Regional Real Property Transnational Authority that examined her case on the domestic level was not independent and impartial tribunal established by law. Despite the regional Authority was not classified as a court under the Austrian law, the Court concluded that "for the purposes of Article 6, however, it comes within the concept 'tribunal' in the substantive sense of this expression: its function is to determine matters within its competence on the basis of rules of law, following proceedings conducted in the prescribed manner. Ibid.

Nevertheless the latter is also attractive, since – though in fewer cases – it has given (and still gives) the Court opportunity to develop its jurisprudence in means of both textual and contextual interpretation.

As a final point, the right to a trial before an independent and impartial tribunal established by law engages three principles considerations: first, that the tribunal is one established by law; second, that the tribunal is competent to decide on matters brought before it; and, third, that the tribunal is both independent and impartial. It is the independence and impartiality of courts and tribunals that the Human Rights Committee and ECHR have focused most on. Claims brought before the Committee and the Court frequently mix issues of competence, establishment, independence and impartiality and, where this occurs, matters are often decided on the question of independence and impartiality.

II. Paper Content

1. Tribunal Established by Law

The survey of international and regional human rights instruments shows that they all provide for the guarantee to a competent, independent, and impartial tribunal established by law.[13] The common elements to all these texts appear to be *tribunal, independent, impartial,* and *established by law.* Additionally, the International Covenant on Civil and Political Rights (ICCPR) and the American Court on Human Rights require that the tribunal be "competent": a requirement which, under the European Court on Human Rights (ECHR), can be construed as being equivalent to the term *established by law*.[14]

The expression "established by law" is not defined in the ICCPR or the ECHR but includes two key requirements: first, that the judicial system is established and sufficiently regulated by law emanating from Parliament; and, second, that each tribunal is established, in the case of all hearings, in accordance with the legal requirements for its establishment.[15]

The concept 'tribunal' is interpreted by the Court in an autonomous manner. The classification in the domestic legal system is not decisive for the qualification of a certain authority as a 'tribunal' within the meaning of Article 6. In the case of *Ringeisen* the Court had to decide whether Article 6 was applicable in an Austrian dispute concerning the purchase of some property. The proceedings took place before an administrative authority (*Grundverkehrsbehörde*). The Court held that the character of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) is of little consequence, so it concluded that the body was a 'tribunal'.[16]

Furthermore, The Court has developed its own substantive requirements of a 'tribunal'. According to the jurisprudence of the Court, a 'tribunal' is

"[...] characterized in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after

[13] See e.g. Article 10 of the Universal Declaration of Human Rights; Article 14(1) of the International Covenant on Civil and Political Rights; Article 6(1) of the European Convention on Human Rights; Article 8(1) of the American Convention on Human Rights Law; and Article 7(a), (b) and (d) of the African Charter on Human and Peoples' Rights.

[14] For the purposes of Article 14 of the ICCPR and Article 6 of the ECHR, criminal and civil proceedings must be conducted by a "tribunal established by law". This requirement, according to the European Court of Human Rights, embodies the principle of the rule of law inherent in the system of the European Convention on Human Rights and its protocols. A body that has not been set up in accordance with the will of the people, i.e., as expressed through the law, would necessarily lack the legitimacy that is needed in a democratic society for such a body to hear the case of individuals. See *Lavents v Latvia* [2002] ECHR 786, para 114, available in French only.

[15] Consideration also needs to be had to the question of ad hoc or special tribunals and the fact there is no right to trial by jury.

[16] See *Ringeisen - Austria* judgment of 16 July 1971 (Series A-16), paaras.94 and 95.

proceedings conducted in a prescribed manner [...] It must also satisfy a series of further requirements - independence, in particular of the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure - several of which appear in the text of Article 6 para.1 itself."[17]

Consequently, the notion of 'tribunal' under Article 6 can be analyzed in the light of Court's case-law under the other relevant provisions of the Convention.

In *Neumeister* case the Strasbourg Court, under Article 5, points at the **independence** from "both of the executive and of the parties to the case" as *sine qua non* feature of 'judicial character' of the 'authority called upon to decide' the case[18].

In *De Wilde, Ooms and Versyp* judgment the Court acknowledged the '**guarantees of judicial procedure**' as another 'common fundamental feature' of the notion of *forum.*[19]

In *Ringeisen* (already Article 6 case) the Court was to decide whether an administrative body ('*Regional Commission*') can pretend to be a 'tribunal' under the Article 6. The Court recalled the tests for 'tribunal' in *Neumeister* and *De Wilde, Ooms and Versyp* and as an additional test pointed at the **term of office** of the body[20]. Also the term '**guarantees of judicial procedure**' was paraphrased into '**proceedings before ... [tribunal to] afford the necessary guarantees**'[21] in order to avoid the word 'judicial', evoking the traditional judiciary very in too direct manner.

Considering and applying those tests in *Ringeisen,* the Court held that '*Regional Commission'* is a 'tribunal' under the Article 6.

Thus, the term 'tribunal' in Article 6 was subjected to autonomous interpretation by Strasbourg Court, so akin to the 'criminal charge' clause, 'tribunal' (under Article 6) must not be defined exclusively referring to national law. Nonetheless, in *Belilos*, decided in 1988, Court held that the description of body in question in national law is also important, though not decisive[22].

Several elements are contained in these substantive requirements:

- Firstly, a 'power of decision'[23]. The Commission in the *Sramek* case formulated this requirement in a slightly clearer manner: "[...] a tribunal, being an authority with power to decide legal disputes with binding effects for the parties".[24] Soyer and De Salvia have argued that this implies the following: "Il faut donc que le tribunal soit en mesure d'apprécier, par lui même, l'ensemble des éléments – de fait ou de droit – conduisant à la solution du litige".[25]
- Secondly, the body needs to operate "on the basis of rules of law and after proceedings conducted in a prescribed manner".[26]

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[17] See *Demicoli – Malta* of 27 August 1991 (Series A-210), para.39. See also: ECHR, 29 April 1988, *Belilos - Switzerland* (Series A-132), para.64.

[18] See *De Wilde*, para.78.

[19] See *De Wilde*, para.78. Nevertheless, the requirement of 'guarantees of judicial procedure' remained vague in *De Wilde, Ooms and Versyp*.

[20] See *Ringesen v. Austria,* 16/07/1971, Appl. no. 2614/65, A13, para.95.

[21] Ibid.

[22] Ibid. para.95.

[23] Such a 'power of decision' is also required by the Court when it interprets similar concepts in Article 5 para.3 (see, for example, the case of *Assenov* described in *** Chapter 4 para.3.1 ***), Article 5 para.4 (see, for example, *Van Droogenbroeck – Belgium* of 24 June 1982 (Series A-50), para.50 and *Benjamin and Wilson – United Kingdom* of 26 September 2002 (appl. no. 28212/95), para.34) and in Article 13.

[24] EComHR, 8 December 1982, *Sramek - Austria* (to be found in Series A-84), para.71.

[25] *Terra Woningen – Netherlands* of 17 December 1996 (Reports 1996, 2105), para.52: "[…] it is required that the 'tribunal' in question have jurisdiction to examine all questions of fact and law relevant to the dispute before it".

[26] A similar criterion is used when interpreting the notion 'officer authorized by law to exercise judicial power' used in Article 5 para.3.In the *Schiesser* case the Court stated that the officer should decide "by reference to legal criteria".

- Thirdly, the body needs to determine "matters within its competence". This, both comprises material and territorial jurisdiction.[27]
- Lastly, a reference is made to other substantive requirements of Article 6 ECHR, such as judicial independence and impartiality. In the *Benthem* case the Court stated:

"[...] by the word 'tribunal', it denotes 'bodies which exhibit [...] common fundamental features', of which the most important are independence and impartiality."[28]

The prescription that the tribunal mast be 'established by law' implies the guarantee that the organization of the judiciary in democratic society is not left to the discretion of executive, but is regulated by law. In Commission's view this does not, however, rule out possibility that parts of this organization, *e.g.*, the institution of specific judicial bodies, may be left by law to the executive by virtue of delegation provided that sufficient guarantees are built in to counteract arbitrariness.[29] And in any case no right to be tried by the ordinary court can be inferred from the provision, provided that a legal basis is present for the special court as well.[30] In its Report in the *Piersack* Case the Commission evidently takes the view that not only the establishment, but also the organization and the functioning of the tribunal in question must have a legal basis, but for the question of whether this tribunal has applied these legal rules in the right way it apparently relies on the opinion of the (higher) national court.[31]

Finally, military and special courts are also covered by term "tribunal" for the purposes of Article 6(1) of the ECHR and Article 14(1) of the ICCPR. Usually, the aim of creation of military or special courts is that states try to create the bodies which are distinct from the ordinary court system and are subjected to special rules and procedures; especially interesting are instances where special or military tribunals which are entitled under domestic law to try civilians. Therefore the Court as well as the Committee subjects them to the requirements of the autonomous meaning of "tribunal" established in their case law.[32]

2. Independent and Impartial Tribunal

The requirement of an 'independent' and' impartial' tribunal is one of the key parameters of the right to a fair trial, and thus vital to the protection of constitutional and human rights, is not questionable. Originally, this requirement was conceived to address the inherent deficiencies posed by special jurisdictions, in particular tribunals set up *ex post*, for trying cases with political implications.[33]

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[27] *Mort – United Kingdom* of 6 September 2001 (appl. no. 44564/98).

[28] *Benthem - Netherlands* of 23 October 1985 (Series A-97), para. 43. See also: *Neumeister - Austria* of 27 June 1968 (Series A-8), para.24; *De Wilde, Ooms & Versyp - Belgium* of 18 June 1971 (Series A-12), para.78; *Ringeisen - Austria* of 16 July 1971 (Series A-13), para.95.

[29] Report of 12 October 1978, *Zand, D&R* 15 (1979), p. 70 (79-81); report of 14 December 1979, Le Compte, Van Louven.

[30] Appl. 8299/78, *X and Y v. Ireland*, D&R 22 (1981), p.51 (73).

[31] Report of 13 May 1981, B, 47 (1986), p. 23. In this case the Court did not deal with this point after it had held the complaint concerning the violation of the requirement of impartiality to be well-founded. See Judgment of 1 October 1982, A. 53, p. 16. Also, in the *Bulut* Case, however, the Court took the interpretation of domestic law by the national courts, like in the Commission in the *Piersack* Case, more or less for granted. See Judgment of 22 February 1996, Reports 1996-II, Vol. 5, para. 29.

[32] UN Human Rights Committee, CCPR General Comment 32 (2007), para 14.

[33] See also the findings of the UN Human Rights Committee, General Comment 13, Article 14, UN Doc. HRI/GEN/1/Rev. 1 at 14 (1994), para. 4; See e.g. the ECHR decision in *Rotaru v Romania*, (2000) 21/4-7 HRLJ 231, para. 62; *Pfeifer and Plankl v Austria*, (1992) 14 EHRR 692, p 25.

The words "independent and impartial tribunal" were used in the first draft of the Universal Declaration on Human Rights (UDHR).[34] Without doubt, the independence and impartiality of a tribunal is a central pillar of the right to a fair hearing.[35] Moreover, the principle that a court of law should be independent and impartial is firmly embedded in all legal systems and in all major international human rights instruments. Indisputably, this requirement constitutes a general principle of law and it gives rise to one of the most fundamental of human rights.[36]

The adjectives 'independent' and 'impartial' are the expression of two different concepts. The notion of 'independence' refers to the connection between the judge and the administration, whereas the 'impartiality' must exist in relation to the parties to the suit. However, the Court has not always drown a clear borderline between the two concepts.[37]

The distinction between *judicial independence* and *judicial impartiality* has been addressed by both domestic and international jurisprudence. In the *Valente* case, the Canadian Supreme Court held as follows:[38]

Although recognizing the 'close relationship' between the two, they are nevertheless separate and distinct requirements. Specifically, impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "independent", however, connotes not only the state of mind or attitude in the actual exercise of the judicial functions, but a status or relationship with others, particularly to the Executive Branch of government, that rests on the objective conditions or guarantees.

Also in Canada, in the *Lippe* case, the then Chief Justice Lamer stated that:[39]… judicial independence is critical to the public's perception of impartiality; judicial independence is the cornerstone, a necessary prerequisite, for judicial impartiality.

In this context, *impartiality* is viewed as wider than *independence,* in that a tribunal can be independent and yet be biased against one of the parties to the dispute.[40]Also, impartiality is a guarantee that is linked to the principle of equality before courts and tribunals and involves the idea that everyone should be treated the same. It requires that judicial officers exercise their function without personal bias or prejudice and in a manner that offers sufficient guarantees to exclude any legitimate doubt of their impartiality.[41]

In contrast with the above jurisprudence, it appears that the ECHR does not attach much importance to the distinction between *judicial independence* and *impartiality*. Thus, in *Findlay v United Kingdom***,** the ECHR held as follows:[42]

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[34] For more on this, see Stefan Trechsel, Human rights in criminal proceedings, Vol.XII/3 (Oxford University Press, 2005),` p 45; David Weissbrodt, The right to a fair trial: Article 8, 10, and 11 of the Universal Declaration of Human Rights (The Hague: Kluwern Law International, 2001), pp 13–15, 17, 33, 45–46, 51–52, 54.

[35] *Delcourt v Belgium* [1970] ECHR 1, para 25; and *De Cubber v Belgium* [1984] ECHR 14, para 30. Also, see Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow 1991, para 19.2, page 113. See also, UN Basic Principles on the Independence of the Judiciary, adopted in 1985 by the UN General Assembly Resolutions 40/32 and 40/146.

[36] Antonio Cassesse, *International Criminal Law (*Oxford University Press, 2003), pp 393–394.

[37] The principles established in the Court's case-law with regard to the notions of independence and impartiality apply as well to professional judges and lay judges as to jurors. See Judgment of 22 June 1989, *Langborger*, A. 155, pp. 15-16; judgment of 23 April 1996, *Remli*, Reports 1996-II, Vol. 8, paras 46-48; judgment of 10 June 1996, *Pullar*, Reports 1996-III, Vol. 11, paras 31-32.

[38] *Valente* [1985] SCR 673, 23 CCC 3d 193 (Can. 1985), pp. 201–202.

[39] *Lippe* [1991] 2 SCR 114, 64 CCC 3d 513, 530.

[40] The requirement of independence means, in general terms, that tribunals should be free from any form of direct or indirect influence, whether this comes from the government, from the parties in the proceedings or from third parties, such as the media. See UN Human Rights Committee, CCPR General Comment 32 (2007), para 25; *Ringeisen v Austria* [1971] ECHR 2, para 95; and *Le Compte, Van Leuven and De Meyere v Belgium* [1981] ECHR 3, para 55. See also, UN Basic Principles on the Independence of the Judiciary, adopted in 1985 by the UN General Assembly Resolutions 40/32 and 40/146, para 4: "There shall not be any inappropriate or unwarranted interference with the judicial process".

[41] See, for example, *Grieves v the United Kingdom* [2003] ECHR 688, para 69.

[42] *Findlay v United Kingdom*, Reports 1997 – I, 263, (1997) 24 EHRR 211, para. 73; also *Incal v Turkey*, Reports 1998 – IV, 1547, (2000) 29 EHRR 449, para. 65; *Sener v Turkey*,

The concepts of independence and objective impartiality are closely linked and the court will consider them together as they relate to the present case.

In the *Ringeisen* case the Court held that the Regional Commission could be regarded as a 'tribunal' as it was 'independent of the executive and also of the parties'. The latter element, however, refers in fact not to the independence but to the required impartiality of the court. The Court added that the members of the Regional Commission had been appointed for five years and the proceedings before it did offer the necessary guarantees.[43]The comparable line of reasoning was developed in the *Langborger* Case:

In order to establish whether a body can be considered 'independent' regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.[44]

These various characteristics of the notion of independence seems to fall into three categories. Firstly, the tribunal must function independently of the executive, base its decision on its own free opinion about facts and legal grounds. Secondly, there must be guarantees to enable the court to function independently. [45]Thirdly, even a semblance of dependence must be avoided.[46]

However, this aspect no longer refers to the independence, but to the impartiality of the court. Impartiality is also one of the fundamental characteristics of a tribunal. Deriving from the inherent power of judicial authorities to ensure the proper and orderly functioning of proceedings is the ability of judicial officers to hold persons in contempt of court.[47] Measures ordered by courts under contempt of court procedures have been described as akin to the exercise of disciplinary powers.[48] They must be exercised only for their legitimate purpose, i.e., ensuring the proper and orderly functioning of proceedings, and must not be used by judicial officers in a way that would undermine the actual or apparent impartiality of the judge (See also 3.3.2) or otherwise interfere with the practical enjoyment of fair trial rights.[49]

It is of fundamental importance in a democratic society that the courts inspire confidence in the public.[50] To that end, both the ICCPR and ECHR require a tribunal falling within the scope of Articles 14 and 6 respectively to be impartial. The requirement of impartiality has two features: first, that judges do not allow their judgment to be influenced by personal bias or prejudice, nor harbor preconceptions about the particular case before them – referred to as subjective impartiality; and, second, that the tribunal must also appear to the reasonable observer to be impartial – referred to as objective impartiality.[51] The Court has

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No. 26680/95, (2003) 37 EHRR 34, para. 56.

[43] Judgment of 16 July 1971, A. 13, p. 39.

[44] Judgment of 22 June 1989, A. 155, p. 16. See also the judgment of 29 April 1988, *Belilos*, A. 132, p. 29; judgment of 28 September 1995, *Procola*, A. 326, p. 16; and judgment of 29 November 1995, *Bryan*, A. 335-A, p. 15.

[45] As far as the latter requirement is concerned, it is not necessary that the judges have been appointed for life, provided that they cannot be discharged at will or on improper grounds by the authorities. Implicitly the judgment of 16 July 1971, *Ringeisen*, A.13. Explicitly the report of 12 October 1978, *Zand, D&R* 15 (1979), p. 70 (81-82), and the report of 14 December 19979, *Le Compte, Van Leunen and De Mayere*, B.38 (1984), p. 40.

[46] In the *Bryan* Case the Court held that the very existence of the power of the Secretary of State to revoke the power of an inspector to decide an appeal under the Town and Country Planning Act was enough to deprive the inspector from the appearance of independence. See Judgment of 22 November 1995, A.335-A, para. 38. Also, in the *Sramek* Case, where a member of the court was hierarchically subordinate to one of the parties to the suit, the Court held:' Litigants affects the confidence which the court must inspire in a democratic society'. Judgment of 22 October 1984, A.84, pp. 19-20.

[47] *Ravnsborg v Sweden* [1994] ECHR 11, para 34.

[48] Ibid.

[49] UN Human Rights Committee, CCPR General Comment 32 (2007), para 25.

[50] See *Padovani v Italy* [1993] ECHR 12, para 27; *Kyprianou v Cyprus* [2005] ECHR 873, para 118; *Farhi v France* [2007] ECHR 5562, para 23; *Jasinski v Poland* [2005] ECHR 883, para 53.

[51] UN Human Rights Committee, CCPR General Comment 32 (2007), para 21; *Karttunen v Finland*, HRC Communication 387/1989, UN Doc CCPR/C/46/D/387/1989 (1992), para 7.2; *Perterer v Austria*, HRC Communication 1015/2001, UN Doc CCPR/C/81/D/1015/2001 (2004), paras 10.2–10.4; *Castedo v Spain*, HRC Communication 1122/2002, UN Doc CCPR/C/94/1122/2002 (2008), para 9.5; *Piersack v Belgium* [1982] ECHR 6, para 30; *Incal v Turkey* [1998] ECHR 48, para

recognized the difficulty of establishing a breach of Article 6 of the ECHR on account of subjective partiality and, for this reason, has in the vast majority of cases focused on the objective aspects of impartiality.[52] However, there is no clear-cut division between the two notions since the conduct of a judge may not only prompt misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of her/his personal conviction (subjective test).[53]

Subjective impartiality is obviously difficult to assess.[54] The Court therefore cautiously likes to repeat that 'the personal impartiality of judge is to be presumed until there is proof to the contrary'.[55]

The objective approach refers to the question whether the way in which the tribunal is composed and organized, or whether a certain coincidence or succession of functions of one of its members, may give rise to doubt as to the impartiality of the tribunal or that member. If there is reason for such doubt, even if subjectively there is no concrete indication of partiality of person in question, this already amounts to an inadmissible jeopardy of the confidence which the court must inspire in a democratic society.[56] The fear that the tribunal or a particular judge lacks impartiality must 'be held to be objectively justified', so the standpoint of the accused on this matter, although important, is not decisive.[57] This objective-approach-test has been applied in several cases.[58]

There is no doubt that ensuring the independence and impartiality of the judges is not only the responsibility of States. It is also the responsibility of Judges themselves. An important milestone in this context is the development of the Bangalore Principles of Judicial Conduct,[59] developed by Judges, for Judges. They were tentatively developed in 2000 but are now increasingly seen as a reference document which all judiciaries and legal systems can accept. Its principles describe the professional and ethical code of conduct for Judges and also outline in a more practical way what exactly the concept of independence and impartiality mean for them. The six values described in the Bangalore Principles are independence, impartiality, integrity, propriety, equality, competence and diligence. Security of tenure, financial security and institutional interference are highlighted as important conditions for independence and it is also stressed that objective or subjective independence do not suffice. The judiciary should also be perceived as independent and impartial, and any test should include that perception. It is interesting to note that the document also stresses the fact that due consideration of a case should take precedence over „productivity". After all, judges have

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65; and *Wettstein v Switzerland* [2000] ECHR 695, para 42; *Kyprianou v Cyprus* [2005] ECHR 873, para 118; *Sara Lind Eggertsdottir v Iceland* [2007] ECHR 553, para 41.

[52] *Kyprianou v Cyprus* [2005] ECHR 873, para 119.

[53] Ibid.

[54] For an example, see the *Bockmans* case, which ended in a friendly settlement in front of the Commission in 1965.

[55] *De Cubber* judgment of 26 October 1984, Series A no. 86, p. 14, para. 25.

[56] See the judgment of 1 Ostober 1982, *Piersack*, A 53; judgment of 26 October 1984, *De Cubber*, A. 86; judgment of 25 June 1992, *Thorgeir Thorgeirson*, A. 239; judgment of 24 February 1993, Fey, A.255-A; judgment of 26 February 1993, *Padovani*, A.257-B.

[57] Judgment of 24 May 1989, *Hauschildt*, A.154, p.21; judgment of 25 June 1992, *Thorgeir Thorgeirson*, A.239, p. 23; judgment of 24 February 1993, Fay, A. 255, p. 12; judgment of 26 February 1993, Padovani, A.257-B, p.20.

[58] See Judgement of 24 August 1993, *Nortie*r, A.267,p.15; judgement of 22 April 1994, *Saravia de Carvalho*, A.286-B, p.38; judgment of 24 May 1989, *Hauschieldt*, A.154, p. 22; judgment of 16 December 1992, Sainte-Marie, A253-A, p. 16; judgment 24 May 1989, A.154, p. 23; judgment of 24 August 1993, *Nortier*, A.267, p. 16; judgment of 22 April 1994, *Saravia de Carvolho*, A.286-B, p. 39; judgment of 26 October 1984, *D Cubber*, A 86, pp. 15-16; report of 7 May 1985, *Yaacoub*, A.127, pp. 11-13; judgment of 29 April 1988, *Belilos*, A.132, p. 30. See also the judgment of 24 February 1993, Fey, A.255-A, pp. 13-14 and compare the *Thorgeir Thorgeirson* Case, judgment of 25 June 1992, A.239, pp. 23-24, where the applicant's claim that the court lacked impartiality because it had taken over the public prosecutor's functions in the legal absence of the latter, was not upheld by the Court, and the judgment of 22 February 1996, Bulut, Reports 1996-II, Vol. 5, para. 34, concerning a judge who had questioned witnesses in the pre-trial phase.

[59] See ECOSOC 2006/23

the privilege to put human rights into action. Their selection, resources, training and conduct are therefore of the utmost importance.

III. Conclusion

The main difference of the requirement of "fairness" from all the other elements of Article 6 is that it covers proceedings as a whole, and the question whether a person has had a "fair" trial is looked at by way of cumulative analysis of all the stages, not merely of a particular incident or procedural defect; as a result, defects at one level may be put right at a later stage.[60]

The assessment of the notion of a "tribunal established by law" involves a more general examination of the statutory structure upon which the whole class of the bodies in question is set up; it does not, as a rule, pertain to the examination of the competence of a particular body in the circumstances of each and every case – such as the reassessment of domestic lawfulness of the territorial or hierarchical jurisdiction of a certain court or the composition of the bench which dealt with the applicant's grievances.

Only in some very exceptional cases does the Court undertake to examine the notion of a "tribunal established by law" as including domestic lawfulness of the composition of the bench; the standard of proof in this respect is very stringent, and a total absence of domestic statutory basis – rather than a mere doubt or insufficiency of competence by a particular body or its member – must be shown by the applicant..

The requirement of an independent and impartial tribunal established by law is one of the key components of the right to a fair trial and, therefore, vital to the protection of individual rights, is not questionable. This is because the guarantee ensures that individual rights of parties to a dispute are decided by a neutral authority or body, be it judicial or quasi-judicial. On the other hand, the guarantee of an independent and impartial tribunal is considered as the foundation of the rule of law. Indeed, without an independent and impartial judiciary, one may wonder whether the law itself can have a real meaning.[61]

Notwithstanding to above, it is to be born in mind that there is no such thing as 'pure judicial independence and impartiality'. Naturally, in the exercise of their judicial functions, judges, as a human beings, will be influenced by the prevailing political, social and economic conditions in their respective jurisdictions.[62] In addition, judicial decision, make often than not, are influenced by a judge's personal history. Everyone has personal history that affects their judgment pervasively. Thus, through personal history can be a cause of judicial fallibility, it is perhaps absurd to hold that a judge should decide as s/he had not personal history.

References

- African Charter on Human and Peoples' Rights.
- American Convention on Human Rights Law.
- Antonio Cassesse, *International Criminal Law (O*xford University Press, 2003).
- Appl. 8299/78, *X and Y v. Ireland*, D&R 22 (1981).
- *Artico j*udgment of 13 May 1980, Series A. No. 37.
- Belilos - Switzerland (Series A-132).
- *Benjamin and Wilson – United Kingdom* of 26 September 2002 (appl. no. 28212/95).
- *Benthem - Netherlands* of 23 October 1985 (Series A-97).

[60] Monnell and Morris v. the United Kingdom, paras.55-70.

[61] For an excellent discussion on the relationship between judges and politics, see Carlo Guarnieri, *The power of judges: A comparative study of courts and democracy* (Oxford University Press, 2002), pp 4–13.

[62] Carlo Guarnieki, The powers of judges: A comparative study of courts and democracy (Oxford University Press, 2002), pp. 4-13.

- *Borgers v. Belgium*, 30/10/1991, Appl. No. 12005/86, A214-B.
- Carlo Guarnieki, The powers of judges: A comparative study of courts and democracy (Oxford University Press, 2002).
- *Castedo v Spain*, HRC Communication 1122/2002, UN Doc CCPR/C/94/1122/2002 (2008).
- *Colozza* judgment of 12 February 1985, Series A, No. 212-C.
- Compbell and Fells judgment.
- *De Cubber* judgment of 26 October 1984, Series A no. 86.
- De Cubber v Belgium (1984).
- De Wilde, Ooms & Versyp - Belgium of 18 June 1971 (Series A-12).
- *Delcourt* judgment of 17 January 1990, Series A, No.11.
- Delcourt v Belgium [1970].
- *Demicoli – Malta* of 27 August 1991 (Series A-210).
- Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow1991.
- EComHR, 8 December 1982, *Sramek - Austria* (Series A-84).
- ECOSOC 2006/23.
- *Ettl v. Austria*, paras. 36-41, Publication A117A.
- European Convention on Human Rights.
- Explicitly the report of 12 October 1978, Zand, D&R 15 (1979).
- *Farhi v France* [2007] ECHR 5562.
- *Findlay v United Kingdom*, Reports 1997 – I, 263, (1997) 24 EHRR 211.
- *Golder* judgment of 21 February 1975, Series A, No. 18.
- Grieves v the United Kingdom [2003] ECHR 688.
- H v. Belgium judgment.
- *H. v. Belgium*, 30 November 1987.
- *H. v. Belgium*, Publication A 127 B.
- *Incal v Turkey* [1998] ECHR 48.
- *Incal v Turkey*, Reports 1998 – IV, 1547, (2000) 29 EHRR 449, para. 65; *Sener v Turkey*, No. 26680/95, (2003) 37 EHRR 34.
- International Covenant on Civil and Political Rights of 1966.
- Jasinski v Poland [2005] ECHR 883.
- Jjudgment 24 May 1989, A.154.
- Jjudgment of 22 February 1996, Bulut, Reports 1996-II, Vol. 5.
- Jjudgment of 26 October 1984, *D Cubber*, A 86.
- Judgement of 22 April 1994, *Saravia de Carvalho*, A.286-B.
- Judgement of 24 August 1993, *Nortie*r, A.267.
- Judgment of 24 May 1989, *Hauschildt*, A.154.
- Judgment of 1 Ostober 1982, Piersack, A 53.
- Judgment of 10 June 1996, *Pullar*, Reports 1996-III, Vol. 11.
- Judgment of 16 December 1992, Sainte-Marie, A253-A.
- Judgment of 16 July 1971, A. 13.
- Judgment of 16 July 1971, *Ringeisen*, A.13.
- Judgment of 22 April 1994, *Saravia de Carvolho*, A.286-B.
- Judgment of 22 June 1989, A. 155.
- Judgment of 22 June 1989, *Langborger*, A. 155.
- Judgment of 22 November 1995, A.335-A.
- Judgment of 23 April 1996, *Remli*, Reports 1996-II, Vol. 8.
- Judgment of 24 August 1993, *Nortier*, A.267.
- Judgment of 24 February 1993, Fay, A. 255.
- Judgment of 24 February 1993, Fey, A.255-A.
- Judgment of 24 February 1993, Fey, A.255-A.
- Judgment of 24 May 1989, *Hauschieldt*, A.154.
- Judgment of 25 June 1992, Thorgeir Thorgeirson, A. 239.
- Judgment of 25 June 1992, Thorgeir Thorgeirson, A.239.
- Judgment of 26 February 1993, Padovani, A.257-B.
- Judgment of 26 February 1993, Padovani, A.257-B.
- Judgment of 26 October 1984, De Cubber, A. 86.
- Judgment of 28 September 1995, *Procola*, A. 326.
- Judgment of 29 April 1988, *Belilos*, A. 132.
- Judgment of 29 April 1988, *Belilos*, A.132.

- Judgment of 29 November 1995, *Bryan*, A. 335-A
- *Karttunen v Finland*, HRC Communication 387/1989, UN Doc CCPR/C/46/D/387/1989 (1992).
- *Khodorkovskiy* (No.2*) v. Russia*, 8 November 2011.
- Kyprianou v Cyprus [2005] ECHR 873.
- Kyprianou v Cyprus [2005] ECHR 873.
- Kyprianou v Cyprus [2005] ECHR 873.
- Lavents v Latvia [2002] ECHR 786.
- Le Compte, Van Leuven and De Meyere v Belgium [1981] ECHR 3.
- *Lippe* [1991] 2 SCR 114, 64 CCC 3d 513, 530.
- Monnell and Morris v. the United Kingdom.
- *Mort – United Kingdom* of 6 September 2001 (appl. no. 44564/98).
- *Neumeister - Austria* of 27 June 1968 (Series A-8).
- Padovani v Italy [1993] ECHR 12.
- *Perterer v Austria*, HRC Communication 1015/2001, UN Doc CCPR/C/81/D/1015/2001 (2004).
- Pfeifer and Plankl v Austria, (1992) 14 EHRR 692.
- *Piersack* Case, judgment of 22 February 1996, Reports 1996-II, Vol. 5.
- Piersack v Belgium [1982] ECHR 6.
- Ravnsborg v Sweden [1994] ECHR 11.
- Report of 12 October 1978, Zand, D&R 15 (1979).
- Report of 13 May 1981, B, 47 (1986).
- Report of 14 December 1979 Le Compte, Van Louven.
- Report of 14 December 19979, *Le Compte, Van Leunen and De Mayere*, B.38 (1984).
- Report of 7 May 1985, *Yaacoub*, A.127.
- Resolutions 40/32 and 40/146.
- *Ringeisen - Austria* judgment of 16 July 1971 (Series A-16).
- *Ringeisen - Austria* of 16 July 1971 (Series A-13).
- Ringeisen v Austria (1971).
- *Ringesen v. Austria*, 16/07/1971, Appl. no. 2614/65, A13.
- *Rotaru v Romania*, (2000) 21/4-7 HRLJ 231.
- Sara Lind Eggertsdottir v Iceland [2007] ECHR 553.
- *Sramek* Case judgment of 22 October 1984, A.84.
- *Sramek v. Austria*, judgment of 22 October, 1984, Application no. 8790/79.
- *Sramek v. Austria*, paras 36-42, Publication A084.
- *Terra Woningen – Netherlands* of 17 December 1996 (Reports 1996, 2105).
- *Thorgeir Thorgeirson* judgment of 25 June 1992, A.239.
- Trechsel, Stefan, *Human rights in criminal proceedings*, Vol. XII/3 (Oxford University Press, 2005).
- UN Basic Principles on the Independence of the Judiciary, adopted in 1985 by the UN General Assembly Resolutions 40/32 and 40/146.
- UN Basic Principles on the Independence of the Judiciary, adopted in 1985 by the UN General Assembly.
- UN Human Rights Committee, CCPR General Comment 32 (2007).
- UN Human Rights Committee, CCPR General Comment 32 (2007).
- UN Human Rights Committee, CCPR General Comment 32 (2007).
- UN Human Rights Committee, CCPR General Comment 32 (2007).
- UN Human Rights Committee, General Comment 13, Article 14, UN Doc. HRI/GEN/1/Rev. 1 at 14 (1994).
- Univers
- al Declaration of Human Rights of 1948.
- *Valente* [1985] SCR 673, 23 CCC 3d 193 (Can. 1985).
- *Van Droogenbroeck – Belgium* of 24 June 1982 (Series A-50).
- David Weissbrodt, The right to a fair trial: Article 8, 10, and 11 of the Universal Declaration of Human Rights (The Hague: Kluwer Law International, 2001).
- Wettstein v Switzerland [2000] ECHR. 695.

LIMITATIONS OF EU COMPETITION LAW AND THEIR INFLUENCE ON RECIDIVISM AND DETERRENCE: ANALYSIS OF THE CONVENIENCE OF A PENAL APPROACH TO CARTELS

Amaya ANGULO GARZARO*

Abstract

Competition law seeks to foster competition and innovation through the sanctioning of antitrust behavior, and it especially seeks to discourage the creation of hardcore cartels. To that effect, the European Union imposes administrative sanctions to cartels, whereas the United States use their penal system against them. This paper will analyze the advantages and limitations of each option, and will determine whether it would be more effective for the European Union to also use its penal system against cartels.

Keywords: *Antitrust law, European Union, United States, sanctions, deterrence*

1. Introduction

Effective competition benefits consumers as it fosters lower prices, higher quality products, a wider selection of goods and services, and innovation. In order to ensure a more effective competition, diverse enforcement systems have been implemented seeking to achieve three main objectives: punishment of antitrust behavior, prevention of recidivism, and general deterrence. There are various ways in which these three objectives can be achieved, and thus it is of particular importance to analyze the approach different jurisdictions choose when confronted with antitrust offences, and more specifically hardcore cartels, in order to establish the benefits and limitations of each approach.

The European Union (EU) and the United States (US) are two major jurisdictions in the sense of (i) having the nominal authority and enforcement capability to compel fidelity to their demands, and (ii) being the most fully developed. Therefore, this empirical study will compare the approach of the European Union to hardcore cartels, which is based on administrative sanctions, with the system used by the United States, which is based on criminal prosecution. This study will then analyze the differences and, based on the results of this analysis, it will endeavor to determine whether the EU antitrust sanctioning system could be improved by adopting approaches more similar to those of the US.

With this aim, first, a contextualization is needed in order to define where we are and expose in a comprehensive manner the most important features of each system. Next, the functioning of the EU system will be addressed through an explanation of the manner in which the European Commission calculates fines, followed by a short exposition on the criticism it has faced. In addition, the positive and negative aspects of the measures used by the US antitrust system will be described and analyzed, with a specific focus on criminal penalties. Finally, a decision will be made regarding the convenience for the EU of adopting a penal approach to antitrust behaviors, detailing whether it would be an improvement of the EU antitrust sanctioning system.

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2. Contextualization

Competition arises when firms fight for customers by offering them a better deal in terms of price, quality, range, reliability and associated services. In this spirit, in Europe, the European Commission (EC) stated that the objective of article 101 of the Treaty on the Functioning of the European Union (TFEU) is to protect competition in the market as a means to enhance consumer welfare[565].

There are three components of consumer welfare: money –reduction of prices or price maintenance whereas the quality is enhanced–, consumer choice, and innovation. All three elements should be protected since any of them could be endangered by collusive agreements or abuse of a dominant position[566]. Cartels are the main example of collusive agreements, and they generally involve price-fixing, market division, control of output, mitigation of technological improvement and limitation of production. Therefore, they are especially targeted by antitrust regulations.

These regulations establish that the punishment for antitrust behavior should deter future infringements of competition law through the creation of a credible threat of prosecution and punishment, without leading firms to choose an excessive (and therefore costly) level of compliance. There is a broad consent on what should be regarded as an optimal fine: first, it must exceed the social cost of the crime and, secondly, complete deterrence is not desirable[567]; thus, the expected fine will equal the harm of the violation so that the value of the illegal behavior is expected to be zero[568]; in other words, the minimal optimal fine is equal to the expected illicit gain derived from the collusion[569]. POSNER explains this situation by stating that "the penalty for an antitrust violation should be calculated to impose on the violator a cost, whether in pecuniary or non-pecuniary terms, equal to the cost that his violation imposed on society. This criterion is not derived from notions of symmetry or from the biblical notion of an eye for an eye. It is a criterion of efficiency."[570]

3. The European Union: an administrative system

The procedure followed by the Commission has to respect three important points: treaty's competition law provisions cannot be enforced criminally, private litigants cannot file cases before the Commission -the process is strictly civil and administrative- and, finally, the essential coercive power is to order fines. Europe's approach, different from other systems has long been administrative rather than judicial in nature[571].

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[565] It has to be acknowledged, however, that the European Treaty has not placed the maximization of welfare and efficiency at the top rank of its objectives. Far from this, the former Article 3.1.g EC, which has been transformed into Protocol No. 27 by the Treaty of Lisbon, puts the Community under an obligation to establish "a system ensuring that competition is not distorted". Thus, undistorted competition in the internal market is still to be considered as the ultimate goal of European competition law. Basedow, Jürgen and Wurmnest, Wolfgang, "Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct and State Aid" (2011): 343.

[566] Kokkoris, Ioannis and Olivares-Caminal, Rodrigo, "Antitrust Law Amidst Financial Crises" (2010): 397.

[567] There are anticompetitive behaviors that might deserve be exempted under article 101.3 TFEU due to the efficiencies they might produce. Emmanuel Combe and Constance Monnier, "Fines Againsts Hard Core Cartels in Europe: The Myth of Overenforcement," 56 - 2 (2011): 235-275.

[568] Ginsburg, Douglas H. and Wright, Joshua D., "Antitrust Sanctions," 6- 2 (2010): 3-39.

[569] Combe and Monnier explain us that the illicit gain is the additional profit made by a cartel member, which depends on four factors: (1) the increase in price due to collusion (2) the price elasticity of demand (3) the total affected market, and (4) the competitive markup. Combe and Monnier, *Fines Againsts Hard Core Cartels in Europe: The Myth of Overenforcement*, 235-275

[570] Nonthika, Wehmhörner, "Optimal Fining Policies," (2005). p. 8; see also Robert Kneuper and Langenfeld, James George, "The Potential Role of Civil Antitrust Damage," 18-4 (Summer 2011): 953-986.

[571] Crane, Daniel A., "The European Model" (2011):4.

The process of calculating the fines in the EU is set out in the 2006 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 ("2006 Guidelines"). As stated in *Archer Daniels Midland v* Commission, even if these guidelines "may not be regarded as rules of law which [the Commission] is always bound to observe, they nevertheless form rules of practice from which [the Commission] may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment"[572]. This process, as explained below, is divided into two basic steps, after which possible benefits –such as immunity from leniency programmes– will be applicable.

A. Process of calculating the fines

When establishing the amount of the fine, in order to ensure that the fines are set at a level sufficient to deter anticompetitive behaviors, the Commission "will have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in Article 23(3) of Regulation (EC) No 1/2003"[573]. Apart from that, the Commission will also take into account any aggravating or mitigating circumstances for each undertaking. Additionally, it will apply, where appropriate, the Leniency Notice[574]. Finally, the Commission will refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23.2.a of Regulation No 1/2003[575]. The importance of these Guidelines lies in that they contain a two-step methodology to set fines by the Commission.

a. First step

The 2006 Guidelines on fines and settle case law establish that "the basic amounts for each party result from the addition of a variable amount and an additional amount. The variable amount results from a percentage of up to 30% of the value of sales of goods or services to which the infringement relates in a given year (normally, the last full business year of the infringement) multiplied by the number of years of the undertaking's participation in the infringement. The additional amount ("entry fee") is calculated as a percentage between 15% and 25% of the value of sales. The resulting basic amount can then be increased or reduced for each company if either aggravating or mitigating circumstances are retained"[576]. In other words, the basic amount of the fine will be determined as a proportion of the value of the sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement[577].

Graphically, the first step could be shortened with the following formula: $BA = VA + EF = (VS \times P \times Y) + EF$

Where:

- BA = Basic Amount

[572] Judgment of the Court of First Instance (Third Chamber), 27 September 2006 II - 3642 "Archer Daniels Midland v Commission"; Wils, Wouter P. J., "Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement," 34-3 (September 2011): 21.
[573] Decision of the European Commission, COMP/39611 "Water management products ", 27 June 2012, par. 59
[574] Decision of the European Commission, COMP/F/38.645 "Methacrylates ", 31 May 2006, par. 317.
[575] Decision of the European Commission ,COMP/39611 "Water management products", 1 november 2012, par. 60
[576] Decision of the European Commission , COMP/39.611 "Water management products", 1 november 2012, par. 61
[577] Decision of the European Commission , COMP/38.432 "Professional Videotape", 20 November 2007, par. 204.

- VA = Variable amount before taxes, which at the same time is the sum of three components:
    - VS = Value of sales: direct and indirect in the EEA related to the infringement of the last full business year of participation in the infringement (unless the figure is not representative).
    - P = Percentage related to the gravity of the offence: it can range from 0-30% and is determined by: the nature of infringement, its geographic scope, implementation of the agreement, and the combined market share of the parties in the relevant market. For hard-core cartels the percentage will generally be set at the higher end of the scale
    - Y = Number of years the undertaking participated in the agreement.
- EF = Entry fee: it is a percentage of 15% to 25% of the value of shares, which is always imposed on hard-core cartel participants and might be imposed on other infringers, too. It will depend, among others, on the nature of the infringement, its geographic scope, the implementation, the parties' combined market shares in the relevant market…

Firstly, the economic importance of a specific business is translated in the value of sales[578]. According to the Commission "the relative strength of each undertaking concerned is determined as the percentage for which its sales of the goods or services to which the infringement relates in the geographic area covered by the cartel account in relation to the aggregate sales in that area of all of the undertakings concerned"[579].

Secondly, according to the Commission's practice, the percentage related to the gravity of the offence is generally established between 15% and 25% because in accordance with point 23 of the 2006 Guidelines, if we are referring to secret horizontal price-fixing and market-sharing agreements, the rate should be no lower than 15%[580].

Thirdly, in order to take fully into account the duration of the participation of each undertaking in the infringement individually, the amount determined on the basis of the value of sales will be multiplied by the number of years of participation in the infringement[581]. If a fine has to be imposed on several companies that belong to the same undertaking, "the duration of the infringement should be calculated on the basis of the economic power of that undertaking during the last full year of its participation in the infringement"[582], in order to ensure it has sufficient deterrent effect. Nevertheless, as the General Court has acknowledged "it is not necessary to establish in practical terms a direct relation between that duration and increased damage to the European Union objectives pursued by the competition rules"[583].

Finally, about the entry fee, point 25 of the 2006 Guidelines on fines and settle case law states that "irrespective of the duration of the undertaking's participation in the infringement, the basic amount will include a sum of between 15% and 25% of the value of sales"[584]. This percentage is totally independent of the aforementioned entry fee.

The aim of imposing this amount is to deter undertakings from even entering into such illegal practices, especially in the case of firms with a high turnover or when there are big

[578] Decision of the European Commission, COMP/39.396 "Calcium carbide", 22 July 2009, par. 296.
[579] Decision of the European Commission, COMP/39.180 "Aluminium fluoride", 25 June 2008, par. 232.
[580] Judgment of the General Court (Eighth Chamber) T-199/08 "Ziegler SA v European Commission." 16 June 2011, par. 141.; Judgment of the General Court T-208/08 (Eighth Chamber) "Gosselin Group v Commission" 11 July 2013, par. 131.
[581] Decision of the European Commission, COMP/39.611 "Water management products", 27 June 2012, par. 69
[582] Judgment of the General Court (Second Chamber), T-122/07 "Siemens and VA Tech Transmission & Distribution v Commission" 3 March 2011, par. 241.
[583] Judgment of the Court (Second Chamber), C-389/10 "KME Germany and Others v Commission", 8 December 2011, par. 74.
[584] Decision of the European Commission , COMP/39611 "Water management products", 27 June 2012, par.. 73

disparities between the size of the undertaking participating in the infringement because although other factors are also taken into account, "the link between, first, undertakings' size and global resources and, second, the need to ensure that a fine has deterrent effect cannot be denied"[585].

b. Second step

The Commission will use this second step to adjust the fine taking into account the particular circumstances of the case. This second step can also be shortened with a formula, which is the following: BA × AF = fine ≤ 0.1 × total turnover.

- BA = Basic Amount
- AF = Adjusting factors
- 0.1 = 10% ceiling cap

First of all, the 10% ceiling cap, according to article 23.2 of Regulation 1/2003, implies that the fine imposed on each undertaking must not exceed 10% of its total turnover in the preceding business year, independently of the cooperation of the undertaking[586]. This percentage is only applied to the final amount of the fine, and not to the intermediate amounts which can exceed this limit[587]. Therefore, the maximum amount of the fine that can be imposed on a given undertaking can be determined in advance[588]. The Commission has capped the fine in very few cases. Examples of such cases include *Refrigeration Compressors* to ACC; in *Animal Fee Phosphates* to Tessenderlo Chemie N.V., Yara Suomi Oy, Yara Phosphates Oy and Quimitécnica.com – Comércio e Indústria Química S.A, and to two of the undertakings participating in the *Bathroom fittings and fixtures* case[589]

Secondly, adjusting factors can be related or unrelated to the infringement. The former are aggravating or mitigating circumstances, which can be organized as shown in the following non-exhaustive table in Figure 1:

Figure 1: Non-exhaustive list of aggravating and mitigating factors on the imposition of EC fines

Aggravating factors	Mitigating factors
Ringleader or instigator.	Limited involvement and non-implementation of the infringement.

[585] Judgment of the Court (Second Chamber), C-413/08 P "Lafarge SA v European Commission", 17 June 2010, par. 102.; Judgment of the General Court (Second Chamber), T-112/07 "Hitachi Ltd, Hitachi Europe Ltd and Japan AE Power Systems Corp. v European Commission", 12 July 2011, pars. 349-350.

[586] Judgment of the Court of First Instance (Fifth Chamber), T-304/02 "Hoek Loos NV v Commission of the European Communities" 4 July 2006, par. 123.

[587] Judgment of the General Court (Eighth Chamber), T-377/06 "Comap SA v European Commission" 24 March 2011, par. 111; Judgment of the General Court (Third Chamber), T-11/06, "Romana Tabacchi Srl v European Commission", 5 October 2011, par. 259; Judgment of the Court of First Instance (First Chamber), Joined cases T-217/03 and T-245/03,. "Fédération nationale de la coopération bétail et viande (FNCBV) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others v Commission of the European Communities.", 13 December 2006, par. 255.

[588] Judgment of the Court (Second Chamber), C-413/08 "Lafarge SA v European Commission", 17 June 2010, par. 95.

[589] Decision of the European Commission, COMP/39600 "Refrigeration compressors", 7 December 2011, par. 88; Decision of the European Commission , COMP/38866 "Animal Feed Phosphates", 20 July 2010, par. 214; Decision of the European Commission, COMP/39.092 "Bathroom fittings and fixtures", 23 June 2010, par. 15 of the Summary Decision.

Refusal to cooperate (it can also lead to the imposition of separate fines for procedural infringements, but not to both a procedural fine and an aggravating circumstance).	Cooperation with the Commission (except for leniency applications requirements).
Coercion or retaliatory measures.	Pressure exercised by other companies.
Infringement continues after the Commission's investigation.	Immediate termination of the infringement, as soon as the Commission intervenes.
Awareness of the illegal nature of the conduct.	Negligence.
Recidivism (the fine can be increased by 100%, for each past infringement, also NCA condemning decisions count; no period of limitation).	Introduction of a compliance policy.
Institutionalized nature of the infringement.	--
Significance of the industry influenced.	--
--	Public authorization/ encouragement.
--	Slow reaction/ excessive length of procedures.

Source: Geradin, Damien, "The EU Competition Law Fining System: A Reassessment." 2011-052, p. 8

All of the factors mentioned in the Figure have been or could have been taken into consideration by the Commission to increase or decrease the basic amount[590]. For example, "the instigator" aggravating circumstance was used in *Bitumen* to increase the fine imposed to Shell by 50%[591]. On the other hand, as an example of a mitigating circumstance, in *Prestressing steel* the Commission considered that the role of Proderac and Trame was substantially more limited than that of the other cartel participants and granted them a reduction of 5% of the fine[592].

Adjusting factors unrelated to the infringement are: (1) the increase for deterrence, in order to ensure that it exceeds the amount of gains improperly made as a result of the infringement; (2) the 10% ceiling cap; and (3) the inability to pay defense, when there is "(i) a specific social and economic context" and "(ii) paying would irretrievably jeopardize the economic viability of the undertaking and cause its assets to lose all their value"[593].

c. Leniency programs

When firms decide to collude, it is highly likely that they will continue to collude indefinitely as long as the initial factors that allowed the expected gains to exceed the expected losses do not change. There are essentially three ways in which competition authorities can obtain information from the companies and individuals that have committed

[590] What is clear is that the word "other" that appears in point 28 of the 2006 Guidelines (when referring to aggravating or mitigating circumstances) highlights the discretion that the Commission has bestowed upon itself. Damien Geradin and David Henry, "The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts' Judgments," 02/05 (February 2005): 13.
[591] Decision of the European Commission, COMP / 38.456 "Bitumen", 3 october 2007, pars. 342, 349.
[592] Decision of the European Commission, COMP/38344 "Prestressing steel", 19 november 2011, par. 994, 1026.
[593] Geradin, Damien, "The EU Competition Law Fining System: A Reassessment," 2011-052 (October 2011): 8.

the antitrust violations: direct force (for example, inspections or "dawn-raids"), compulsion (for instance, threatened sanctions for refusal to cooperate) and leniency.

This third method deserves special focus because it presents clear advantages: firstly, it can be used to obtain all kind of information –not just existing documents or other existing physical evidence, as it happens in case of resorting to direct force–; secondly, it saves on search costs because it is done by the undertaking and its employees, and thirdly, there is no risk of applicants providing unreliable information, as is the case with compulsion, in which untruthful self-indicting statements are sometimes made in order to escape from the pressure[594].

According to this program, only one undertaking will benefit from a complete immunity of fines; namely, the first undertaking applying for leniency that submits information and evidence which, in the Commission's view, will enable it either to carry out a targeted inspection in connection with the alleged cartel or to find an infringement of Article 101 TFEU. Companies which, despite their willingness to cooperate, file their leniency application after another competitor has qualified for immunity, can only hope to obtain a reduction of up to 50% of any fine imposed on them, and this reduction declines for subsequent firms to a maximum of 20%[595]. The incentive of benefitting from immunity for being the first to self-report is supposed to induce undertakings to come forward, over all, when the probability of the rest of the team members being convicted with high fines had increased.

B. Main problems

The Commission's practice has some problems that should be addressed if we want to improve the deterrent effect of sanctions[596].. In this section we are going to deal with some of the most important ones.

a. Uncertainty and lack of transparency

The EU fining system involves a certain level of uncertainty because it is impossible to predict the amount of the fine that will be imposed.. This problem has not been solved even after the 2006 Guidelines[597]. In 2005, KILLICK stated that "even the best-informed lawyer would struggle to give any more than an approximate range, which could turn out to be half or double the fine ultimately imposed"[598]. GERADIN, to sustain this criticism, uses the example of the 2010 DG Competition Stakeholder Study where "the majority of lawyers and half the companies participating in the survey submitted that, with the possible range of fine levels now available in the 2006 Guidelines, fines became even more difficult to predict"[599].

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[594] Wils, Wouter P.J., "The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis," 30-2 (June 2007): 21.

[595] European Commission, "Compliance Matters. what Companies can do Better to Respect EU Competition Rules," (November 2011): 18.

[596] Wehmhörner, Nonthika. "Optimal fining policies" (2005): 8

[597] As Weber observes "Even some per se violations of the rule are beyond the reach of any meaningful punishment. It is not that antitrust damages are necessarily too high or too low, it is that they vary dramatically and that there is no a priori way to predict where punishment in a particular case or for a particular defendant will come out. This is the real but overlooked incoherence of antitrust punishment" Spencer Weber Waller, "The Incoherence of Punishment in Antitrust," 78 (2003): 208.

[598] Killick, James, "Is it Now Time for a Single Europe-Wide Fining Policy? an Analysis of the Fining Policies of the Commission and the Member States," 7 (December 2005): 1.

[599] Geradin, Damien, "The EU Competition Law Fining System: A Reassessment," 2011-052 (October 2011): 18.

Criticism was leveled, for example, at the wording of paragraph 37 of the 2006 Guidelines where it is stated that "in view of the particularities of a given case or in view of the need to achieve deterrence for a specific undertaking, the Commission might be justified to depart from these Guidelines". Due to the "lack of clarity" of what this exactly involve, or more precisely, what the legislator mean by "particularities of the case" and "deterrence"; it might be said that this uncertainty conflicts with the principle of legality and the protection of the undertakings' legitimate expectations, Article 7 ECHR, which reads that legislation should be "unequivocal and its application must be predictable for those subject to it."[600].

b. Absence of individual sanctions

EU competition law only foresees fines to undertakings. However, natural persons – which can be employees or employers– are the ones naturally engaged in the anticompetitive behaviors. This notwithstanding, it is true that an undertaking might have limited resources to discipline its employees and that they might have left the undertaking by the time the fine is imposed[601]. It is also true that once the offence has been committed, it may be difficult to impose sanctions because, for example, as the individuals are not identified in Commission decisions, proving employees' liability in front of labor courts will not be an easy task[602]. However, according to WILS "it is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing"[603].

Besides, in a study carried out by HOJ et al it is clearly stated that "applying sanctions to individuals would increase deterrence"[604] which is in line with the results from the survey carried out by Deloitte (2007) in the UK, which shows that sanctions which directly affect individuals (such as criminal penalties and director disqualification) are believed to have a greater impact on deterring infringements than sanctions which are imposed on businesses[605]. Furthermore, the moral force of antitrust laws is dramatically reduced by "not holding an individual responsible for his unlawful actions"[606].

c. Recidivism

In its 2006 Fining Guidelines, the European Commission defines recidivism as the situation "where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed [now Articles 101 or 102 TFEU]". And, according to the EU General Court, it implies "that a person has committed fresh infringements after having been penalized for similar infringements"[607].

However, although recidivism will produced an increase on the sanctions, as GINSBURG and WRIGHT suggest, "current sanctions have no more than a transitory impact upon market outcomes and little, if any, deterrent value"[608], or at least that is the only possible explanation to the high number of firms that are found to be recidivist. In fact, an study carry

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[600] Geradin, Damien, "The EU Competition Law Fining System: A Reassessment," 2011-052 (October 2011): 18-33.
[601] Geradin, Damien, "The EU Competition Law Fining System: A Reassessment" (October 2011): 15
[602] Geradin, Damien, "The EU Competition Law Fining System: A Reassessment" (October 2011): 20
[603] Wils, Wouter P. J., "Optimal Antitrust Fines: Theory and Practice," 29- 2 (June 2006): 20.
[604] Jens Hoj et al., "Product Market Competition in the OECD Countries: Taking Stock and Moving Forward," 575 (2007): 16.
[605] Gordon, Fiammetta and Squires, David, "The Deterrent Effect of UK Competition Enforcement," 156- 4 (December 2008): 411-432.
[606] Whelan, Peter, "A Principled Argument for Personal Criminal Sanctions as Punishment Under EC Cartel Law," 4-1 (November 2007): 7-40.
[607] Judgment of the General Court, T-141/94 11 "Thyssen Stahl v Commission" 11 March 1999, paragraph 617; Wils, Wouter P. J. "Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis," 35-1 (March 2012): 6.
[608] Ginsburg, Douglas H. and. Wright, Joshua D., "Antitrust Sanctions," (Autumn 2010): 3-39

out by GOLUB, DETRE, and CONNOR shows that harsher antitrust penalties for infringing individuals and firms have no effect on the rate of recidivism; or, if they have, it is unobservable due to the fact that it is compensated by the positive effect of antitrust compliance programs[609].

There is empirical evidence that shows that, for the last two decades, there has been a significant degree of continued cartel formation, as well as multiple convictions of scores of firms for price fixing. However, worldwide data shows that recidivism runs rampant among those convicted. (See Figure 2)[610]. Therefore, antitrust authorities must strive to improve existing regulations or to new ways of maximizing deterrence.

Figure 2: The World's leading recidivist (1990-2009)

Company	Number of judgments worldwide 1990-2009
BASF	26
Total S.A. (TotalFina, Elf, Atofina)	18
F. Hoffman-La Roche	17
Azko Nobel	14
Aventis	14
ENI	14
Shell	14
Degussa (Evonik)	13
Bayer	11
Mitsubishi	10
Mitsui	10

Source: Ginsburg, Douglas H. and. Wright, Joshua D., "Antitrust Sanctions." P. 15

4. The United States: a criminal system

Antitrust enforcement in the United States is a mixture of public and private efforts[611]. Regarding public enforcement, a violation of antitrust laws can result in a wide range of criminal sanctions, which vary from corporate fines and restitution payments to prison, including house arrest and fines for the corporate officials involved[612]. Injunctions or cease-and-desist orders are rarely used against naked cartels, as are measures for structural relief such as mandatory divestitures or restructuring of governance structures[613].

There is no doubt that the most common sanctions used by the US Government are corporate fines, individual fines and imprisonment of responsible managers. The analysis of the US antitrust sanctioning system is especially interesting, at least when it comes to criminal penalties, because, apart from Israel and Japan, it is the only jurisdiction that has served

[609] Golub, Alla; Detre, Joshua and Connor, John M., "The Profitability of Price Fixing: Have Stronger Antitrust Sanctions Deterred?" (April 2005): 11.
[610] Connor, John M., "Effectiveness of antitrust sanctions on modern international cartels" *Journal of Industry, Competition and Trade (*December 2006): 195-223
[611] Blair, Rober D. and Piette Durrance, Christine , "Antitrust Sanctions: Deterrence and (Possibly) Overdeterrence," 53-3 (Autumn 2008): 643 - 661.
[612] Lande, Robert H. and Connor, John M., "Optimal Cartel Deterrence: An Empirical Comparison of Sanctions to Overcharges," (September 2011): 21.
[613] Connor, John M., "Global Antitrust Prosecutions of Modern International Cartels," 4-3 (September 2004): 239-267.

prison sentences to a significative number of price-fixers with a well-established record of sending price-fixers to prison[614]. More precisely, the Section 1 of the Sherman Act states that "[…] on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court"[615].

The main difference between the US approach and that of the EU having been described, an analysis will be carried out, in order to detail the benefits and negative aspects of criminal sanctions, more specifically imprisonment, in maximizing deterrence of antitrust behavior. The goal is to determine whether European legislation would increase deterrence and solve some of the problems of its current regulatory system, and especially recidivism, were it to adopt some of the US approaches to the issue.

A. Main advantages in relation to the weaknesses of the EU system

Firstly, sanctions are correctly targeted: penalties directed against the individuals involved in the infringements might well a greater deterrence effect than penalties directed against the corporations. As previously established, the ability of a firm to discipline its employees is rather limited, as employees may have left the firm before the infraction is discovered. Furthermore, reliance on corporate sanctions alone may incentivize lower internal corporate enforcement efforts[616].

Secondly, individual sanctions, and especially imprisonment, provide with stronger incentives to apply for leniency if set appropriately[617]. Presently, it could be said that fines imposed by the European Commission are often perceived as a "license fee" paid to access larger (unlawful) cartel profits, whereas in the US individuals who are ultimately responsible for the active implementation of a cartel scheme are held accountable before the authorities for the offence receiving a punishment that fits their conduct[618].

Thirdly, hefty fines may cause the undertaking to go bankrupt because most firms would not have sufficient liquid assets to cover a fine capable of achieving the desired level of deterrence[619]. The long-term impact of a fine will vary greatly depending on the firm, reflecting differences in capital structure and other factors affecting the firm's ability to adjust to the payment of the fine, as it is likely that the profits would have been paid out in taxes, dividends, salaries and wages[620].

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[614] Connor, John M., "Cartels Portrayed: A 21-Year Perspective, 1990 to 2010," (June 23, 2011): 26. However, "in recent years, a wide range of other jurisdictions, at least formally, provide jail time for cartel offenses. Individuals now face potential imprisonment for cartel activity in Australia, Brazil, Canada, Iceland, Indonesia, Israel, Japan, Korea, Norway, Russia, Thailand, and Zambia, in addition to in the U.S. and a majority of E.U. member states" G. C. Shaffer and N. H. Nesbitt, "Criminalizing Cartels: A Global Trend?" 12 (2011): 8.

[615] The Sherman Antitrust Act (July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C. §§ 1–7) is the american antitrust law passed by Congress in 1890 that regulates monopolies and cartels.

[616] Whelan, Peter, "Contemplating the Future: Personal Criminal Sanctions for Infringements of EC Competition Law," 19-2 (2008), 364-376.

[617] Werden, Gregory J, Hammond, Scott D. and Barnett, Belinda A., "Deterrence and Detection of Cartels: Using all the Tools and Sanctions," 56-2 (Summer 2011), 207-234.; Calvani, Terry and Calvani, Torello H., "Cartel Sanctions and Deterrence," *The Antitrust Bulletin* 56- 2 (Summer 2011): 185-206.

[618] Whelan, Peter, "Contemplating the Future: Personal Criminal Sanctions for Infringements of EC Competition Law" (2008): 364-376

[619] Werden, Gregory J, "Sanctioning Cartel Activity: Let the Punishment Fit the Cartel," 5-1 (April 2009): 19-36.

[620] Wils, Wouter P.J., *Optimal Antitrust Fines: Theory and Practice* p. 19; Catherine Craycaft, Craycraft Joseph L. and Joseph C. Gallo, "Antitrust Sanctions and a Firms Ability to Pay," (1997): 171-183.

Finally, custodial sentences have a social and professional stigmatization effect that might act as a deterrent; however, custodial sentences incur a cost on society and it is said that every prison term has a corresponding fine equally deterring[621].

B. Main problems of criminal penalties

The first problem relates to jurisdiction because antitrust enforcement is essentially territorial in nature, so criminal sanctions might not deter international and global cartels. When sanctions rely basically on prison sentences, it is more difficult to persuade managers of cartels who reside abroad to submit to US jurisdiction[622]. This is important because even if the criminalization is perceived as a proportionate response it must lead to convictions. Otherwise, there would be a gap between general public's expectations and the deliveries from the courts which will affect to the normative commitment[623].

Secondly, as a consequence of criminal sanctions, cartelists will be more determined to try to avoid detection and more sophisticated in their methods. As a consequence, it will become more difficult to detect and prosecute them. At the same time, the criminalization of cartels raises the standard of proof required[624]. It is more complicated to discharge the burden of proof without the active help of cartel members; that is, without admissions and without the agreement of the companies. If criminal proceedings are implemented, there must be an increase in the rights of defense which would render criminal cases more difficult to win than civil or administrative proceedings. As a result, deterrence, rather than increasing, will be diminishing because of the additional hurdles for prosecutors[625].

Thirdly, judges might be reluctant to impose prison sentences. As one former Department of Justice official observed, "federal judges were reluctant to sentence price fixers to jail and tended to attempt to come up with alternative 'public service' type sentences" because "antitrust price fixers were often pillars of the community, supporters of charity, and posed no physical danger to other members of society."[626]

Lastly, we have to consider the existence of options less aggressive than imprisonment because there are other measures that might discourage the employee from committing antitrust violations, while at the same time emphasizing that cartelizing is a serious wrong that ought to have adverse consequences for the wrongdoers –and not just for the companies[627]. Examples of these options are:

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[621] Dunphy, Patrick Joachim , "Variable Geometry Europe - Patching Together what Works in the Fight Against Hard-Core Cartels: Carrots, Sticks, Custody and Leniency," (February 2007): 14.

[622] In the Vitamins cartel "Eleven executives—including six Europeans—went to prison in the United States. It was "the first time a foreign executive agreed to serve time in U.S. prison for his participation in an international cartel" SHAFFER and NESBITT, *Criminalizing Cartels: A Global Trend?*, 14.; "All victims of cartel activity would be allowed to sue in U.S. courts. In fact, foreign cartel participants likely would still face somewhat less liability than domestic cartel participants because foreign cartel members may have the capacity to ignore U.S. judgments, or may be protected by clawback statutes that reduce their liability" Klevorick, Alvin K. and Sykes, Alan O. "United States Courts and the Optimal Deterrence of International Cartels: A Welfarist Perspective on Empagran," 42 (July 1, 2007): 45.

[623] Norgren, Claes, "Criminal enforcement of antitrust laws" (2006): 2

[624] Morgan, Eleanor J. "Criminal Cartel Sanctions Under the UK Enterprise Act: An Assessment," 17-1 (February 2010), 67-86.

[625] Calvani, Terry, "Competition penalties and damages in a cartel context: criminalization and the case for custodial sentences" (2011): 15

[626] Stucke, Maurice E., "Morality and Antitrust," 2006 (2006), 443-544. p. 464.

[627] Baker, Donald I., "An enduring antitrust divide across the Atlantic over whether to incarcerate conspirators and when to restrain abusive monopolists." (2009):166

a. Disqualification[628]: this type of sanctions may dissuade executives from engaging in cartelistic behavior without any cost for society. It goes directly against the individual who has committed the infringement but is less aggressive than imprisonment. Therefore, it could be a solution for systems that do not want to resort to prison sentences. The deterrent effect of disqualification stems mainly from its tendency to deny the offender a substantial part of their income. It must be taken into account that the CEOs who are fined or imprisoned for global price fixing by the US DOJ are often at or near the top of their corporate management structures[629].
b. Internal audits and compliance programs: they rely on the education of employees with no background in competition law so that they learn what forms of contact with competitors are legal and which are prohibited.
c. Use of private enforcement: this would increase the final amount of the fine. However, the threat of civil damages could create an additional incentive to keep prices elevated once a cartel has been detected since price reductions could be used as evidence of the damages inflicted by the cartel.
d. Rewards for whistleblowing: these rewards may be an inexpensive means of improving the success of leniency programs because they could be financed cheaply from fines imposed on other cartel members. Nevertheless, it should be born in mind that a bounty could incentivize employees to over-report.
e. Reputational mechanisms: undertakings, to some extent, trade on their reputation. Therefore, if antitrust enforcement becomes a general value of the society, an illicit behavior may foreclose profitable opportunities in the future.

5. Conclusions

Refinement of antitrust laws requires experimentation and observation of the results. Indeed, banning cartel activity is merely symbolic if the ban is not reinforced with serious sanctions; for that reason, there is no doubt for competition authorities that, regarding offences like price fixing, substantial sanctions are crucial to deter, more so if we take into account the probability of detection..

Imprisonment might be regarded as the ideal option since it increases the value of the sanctions and it could be also regarded as an alternative to avoid problems caused by the imposition of high fines –i.e., bankruptcy–. However, we have to bear in mind that it shows several important drawbacks, the main one being the reluctance of judges to impose prison sentences.

Thus, the application of penal sanctions to antitrust offences would, in the current climate in the EU, create more issues than it would solve. Furthermore, criminal sanctions must always be used as *ultima ratio*. Therefore, the author propounds that the EU should strive to improve preexisting approaches before resorting to new ones, yet untested in the EU.

References

- Baker, Donald I. "An enduring antitrust divide across the atlantic over whether to incarcerate conspirators and when to restrain abusive monopolists." (2009)
- Basedow, Jürgen and Wolfgang Wurmnest. *Structure and Effects in EU Competition Law : Studies on Exclusionary Conduct and State Aid* . International Competition Law Series., edited by Jügen Basedow, Wolfgang Wurmnest. Alphen aan den Rijn: Kluwer Law International, 2011.
- Blair, Rober D. and Christine Piette Durrance. "Antitrust Sanctions: Deterrence and (Possibly) Overdeterrence." 53-3 (Otoño 2008, Autumn 2008): 643 - 661.

[628] This would imply an order of a Court banning the individual who has infringed the antitrust law for a stated period from becoming the director of a firm again.
[629] Connor, John M., "Global antitrust prosecutions of modern international cartels" (2004): 257

- Calvani, Terry. "Competition penalties and damages in a cartel context: criminalization and the case for custodial sentences" (2011): 15
- Calvani, Terry and Torello H. Calvani. "Cartel Sanctions and Deterrence." *The Antitrust Bulletin* 56-2 (Summer 2011): 185-206.
- Combe, Emmanuel and Constance Monnier. "Fines Againsts Hard Core Cartels in Europe: The Myth of Overenforcement." 56-2 (Summer 2011): 235-275.
- Connor, John M. "Cartels Portrayed: A 21-Year Perspective, 1990 to 2010." (June 23, 2011).
- --------- "Effectiveness of antitrust sanctions on modern international cartels" Journal of Industry, Competition and Trade (December 2006): 195-223
- ———. "Global Antitrust Prosecutions of Modern International Cartels." 4-3 (September 2004): 239-267.
- Craycaft, Catherine, Craycraft Joseph L., and Joseph C. Gallo. "Antitrust Sanctions and a Firms Ability to Pay." (1997): 171-183.
- Crane, Daniel A. "The European Model" (2011)
- Dunphy, Patrick Joachim. "Variable Geometry Europe - Patching Together what Works in the Fight Against Hard-Core Cartels: Carrots, Sticks, Custody and Leniency." (February 2007).
- European Commission. "Compliance Matters. what Companies can do Better to Respect EU Competition Rules " (November 2011).
- Geradin, Damien. "The EU Competition Law Fining System: A Reassessment." 2011-052 (October 2011).
- Geradin, Damien and David Henry. "The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts' Judgments." 02/05 (February 2005).
- Ginsburg, Douglas H. and Joshua D. Wright. "Antitrust Sanctions." 6-2 (Autumn 2010): 3-39.
- Golub, Alla, Joshua Detre, and John M. Connor. "The Profitability of Price Fixing: Have Stronger Antitrust Sanctions Deterred?" (April 2005).
- Gordon, Fiammetta and David Squires. "The Deterrent Effect of UK Competition Enforcement." 156-4 (December 2008): 411-432.
- Hoj, Jens, Miguel Jimenez, María Mather, Giusseppe Nicoletti, and Michael Wise. "Product Market Competition in the OECD Countries: Taking Stock and Moving Forward." 575 (2007).
- Killick, James. "Is it Now Time for a Single Europe-Wide Fining Policy? an Analysis of the Fining Policies of the Commission and the Member States." 7, (December 2005).
- Klevorick, Alvin K. and Sykes, Alan O. "United States Courts and the Optimal Deterrence of International Cartels: A Welfarist Perspective on Empagran." 42 (July 1, 2007).
- Kneuper, Robert and James George Langenfeld. "The Potential Role of Civil Antitrust Damage." 18-4 (Summer 2011): 953-986.
- Kokkoris, Ioannis and Rodrigo Olivares-Caminal. *Antitrust Law Amidst Financial Crises*. 1st ed. Cambridge etc.: Cambridge University Press, 2010.
- Lande, Robert H. and Connor. John M. "Optimal Cartel Deterrence: An Empirical Comparison of Sanctions to Overcharges." (September 2011).
- Morgan, Eleanor J. "Criminal Cartel Sanctions Under the UK Enterprise Act: An Assessment." 17-1 (February 2010): 67-86.
- Norgren, Claes. "Criminal enforcement of antitrust laws" (2006): 2
- Shaffer, G. C. and N. H. Nesbitt. "Criminalizing Cartels: A Global Trend?" 12, (2011).
- Stucke, Maurice E. "Morality and Antitrust." 2006, (2006): 443-544.
- Waller, Spencer Weber. "The Incoherence of Punishment in Antitrust." 78, (2003): 207.
- Wehmhörner, Nonthika. "Optimal Fining Policies." (2005).
- Werden, Gregory J. "Sanctioning Cartel Activity: Let the Punishment Fit the Cartel." 5-1 (April 2009): 19-36.
- Werden, Gregory J., Scott D. Hammond, and Belinda A. Barnett. "Deterrence and Detection of Cartels: Using all the Tools and Sanctions." 56-2 (Summer 2011): 207-234.
- Whelan, Peter. "Contemplating the Future: Personal Criminal Sanctions for Infringements of EC Competition Law." 19-2 (2008): 364-376.
- Whelan, Peter "A Principled Argument for Personal Criminal Sanctions as Punishment Under EC Cartel Law." 4-1 (November 2007): 7-40.
- Wils, Wouter P. J. "Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement." 34-3 (September 2011).

- ———. "The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis." 30- 2 (June 2007).
- ———. "Optimal Antitrust Fines: Theory and Practice." 29- 2 (June 2006).
- ———. "Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis." 35-1 (March 2012).

LEGAL LIABILITY CONDITIONS FOR THE ABUSE OF LAW

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Abstract

Knowing that in more and more cases, the only defence of the party whose law or interest has been injured is to invoke the abuse of law, the express interdiction of the abuse of law becomes a need as an answer to the social demand for legality and equality in all legal relationships. The issues of current legislation related to the abuse of law may be analysed in the light of the social role law has, especially from the viewpoint of its function of harmonization of the individual interests with the general ones. The concrete way to express the abuse of law is represented by the exercise of the subjective law beyond its legal limits as well as the pursuit of a goal in bad faith, but other goal than the one for which the law was consecrated. The role of legal liability for the abuse of law is represented by the legal relationship of constraint whose content consists in a plurality of rights and obligations of substantive or procedural law appearing as a result of commitment of some deeds non-compliant with the model prefigured by the legal norm by which the state is entitled to hold liable the one who exercised a subjective law in bad faith cumulated with the violation of the goal for which such law was consecrated and the guilty party is going to answer for their deed and to obey the sanctions provided under the law. This paper focuses on the conditions that must be met cumulatively, in the current legislation, so that the holder of a subjective law exercised abusively may become the subject of civil, contraventional, criminal, and administrative legal liability, etc.

Keywords: *abuse of law, legality, individual interests, equality, subjective law, procedural law.*

1. Introduction

Citizens' exercising of rights is guaranteed against any arbitrary restrictions imposed by the authorities and, as a result, the law acts not only as a limitation to the individual freedom, but also as an incentive for the free exercising of the rights and freedoms, protecting individuals against arbitrary actions from authorities and the other individuals, the reign of right of the strongest, of the self-will and arbitration, of the *abuse of law*, by eliminating the most important obstacles to the citizens' free exercising of their legitimate rights. As it is expressly provided by the Constitution of Romania, the constitutional rights and freedoms must be exercised in good faith, without any breach of others' rights and freedoms.

As appropriate and clear as the law may be, it is for nothing if the addresses thereof to no conform to it. As already and reasonably outlined in the specialised literature, once they are passed, "the legal rules shall be conformed to by all legal provision addressees, either individually or collectively subjected to the law".[1]

On the grounds of the civil law regulating patrimonial and non-patrimonial relationships established between natural persons and legal persons with equal legal rights and of such rights being sometimes exercised in breach of the limits determined according to the

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[1] Craiovan Ion, *General Theory of Law.* (Bucharest: Militară, 1997), 137; Duminică Ramona, *The crisis of contemporary law.* (Bucharest: C.H. Beck, 2014), 16.

economic and social purposes thereof, the theory of the *abuse of law* was developed firstly in terms of civil law, by way of several specialised papers published on this subject matter.[2]

In the 19th Century, as a mean of counteraction and reaction to the absolutistic trends in civil law, Louis Josserand[3] developed the *abuse of law* theory, making history on this matter in civil law. According to this theory, "the subjective law products of the society and awarded by the society, shall not be abstractly granted for us to exercise them at our discretion *ad nutum;* each of them has its basis and its mission to accomplish. When we exercise them, we have a duty to conform to this spirit and act accordingly. Otherwise, we will deter the right from its purpose and abuse it by making a mistake likely to make us accountable."[4]

In the Romanian legal system, the reference regulations governing *the abuse of law* are provided by Decree no. 31 of 1954, Art. 1-3, according to which, in Art. 1: "the civil rights of natural persons are recognised for the purposes of satisfying personal, material and cultural needs, in accordance with the general interests, under the law and the Socialist cohabitation rules", and Art. 3 (2) provides that the civil rights "may be exercised only for their economic and social purposes".

The concept of *abuse of law* may be defined as a deterrence of the rights from the intrinsic purpose thereof, expressed for the aim for which they were recognised and guaranteed[5]. In other words, the use of the rights for purposes, other than those considered by the legal rule underlying them, such purposes being considered as incompatible with the general interests and the requirements of the social cohabitation rules[6], represents not a use of the rights, but an abuse of law, therefore, the exercising of the rights passing from the normal into the abnormal domain, which removes them from legal protection and exposes the abusively exercised right to sanctioning.

The rights likely to be abusively exercised are the subjective law, namely, the rights representing both the legal means for limiting the behaviour of the other subjects of law by reference to the holders thereof, and for limiting the behaviour of the holders of subjective law by reference to the other. As a result, the subjective law are both the legally guaranteed grounds for requesting the other participants to the legal relationships a specific behaviour, but also, a limitation of the own behaviour, of the own conduct.

Considering that the rights cannot be abusive in themselves, the process referred to as an *abuse of law* does not consist in the abusive existence of the rights, but in the abusive exercising or non-exercising thereof, in the deterrence of the rights from the social and economic purpose for which they were awarded and guaranteed, thereby causing a material and/or moral prejudice or being likely to cause such a prejudice. [7]

The *abuse of law* exists regardless of the nature of a predetermined subjective law but, according to the nature of the subjective law, the nature of the legal grounds arises for requesting a specific type of conduct to the other participants to given legal relationships. Therefore, when the subjective law are civil in nature, the holder thereof have legal civil grounds for requesting to other parties a civil conduct and limit their own civil conduct and, to the extent the subjective law are of another nature, the holder of the concerned rights cannot

[2] Boroi Gabriel, *Civil Law. General. Persons.* (Bucharest: All Beck, 2002); Florescu Dumitru, *Sanctioning the Abuse of Law from the New Civil Code Perspective.* (Bucharest: Romanian Law Magazine, 1973), No. 2; Deleanu Ion, *Subjective Law and the Abuse of Law.* (Cluj: Dacia, 1988); Beligrădeanu Șerban, *Reflecting – in the Doctrine and Jurisprudence – the Notion of Abuse of Law in Labour Relationships.* (Bucharest: Romanian Law Magazine, 1989), No. 7; etc.
[3] Josserand Étienne Louis, (1868 - 1941), French journalist, Dean of the Law Faculty in Lyon.
[4] Josserand Étienne Louis, *French Positive Law Course.* (Paris: Librairie du Recueil Sirey, 1930), 206.
[5] Terre François at al., *Civil Law. Obligations*, (Paris: Dalloz, 10e édition, 2009), 748-749.
[6] Butculescu Claudiu Ramon, *Considerations regarding the influence of the legal culture on the codification in Romania during 1864-2009*, volume, Science and Coding in Romania, (Bucharest, Universul Juridic, 2012), 368.
[7] Mihai Gheorghe, *Fundamentals of Law. Legal Liability Theory*, (Bucharest: C.H.Beck, 2006), 200.

benefit from the grounds under which a specific civil conduct can be requested from others, but from a conduct appropriate to the nature of the concerned *subjective law*. [8]

The subjective law must be put forward according to the purpose[9] thereof from an economic and social perspective, fully balanced against the major meanings of social order, as expressed by the general interests, as a sum-up of individual interests, as a consequence of a systemic character of that [10]. To this effect, the subjective law are to be determined by social order, as an expression of freedom as a necessity, and as legal reasons for human freedom.

2. Contents

The definition of the *abuse of law* as a way of exercising subjective law in breach of the principles for the exercising thereof details two fundamental matters: *a subjective matter* – exercising in bad faith[11] of the rights specific to the field to which they apply and an *objective matter* – deterrence of specific subjective law from the purposes for which they were issued. *Legal liability,* as defined by Rene Savatier[12] is as follows: "… the obligation incumbent on a person to cure the damage caused to another one by way of their deed or by way of the deed of the persons or things depending on such person" shall be a legal constraint relationship, which consist in the following: the right of the State to hold accountable the party having breach the rule of law, by applying the sanction provided by the breached rule and; the guilty person's obligation to be liable for their deed and be subject to the sanction applied based on the legal rule.

Therefore, regardless of the form thereof, the legal liability always faces the State to the trespasser, and the application of the legal rule sanctions does not result only in the restoration of the rule of law breached by the illicit deed[13], but also, in the consolidation of lawfulness, the sanction acting in two manners - *educative and preventive,* and *repressive and intimidating*, these roles being exercised on the trespasser, and on the other participants to the social relationships. This double action of the sanction has different results, depending on the nature of the sanction, sometimes, the educative and preventive side being more important, and other times, the repressive and intimidating one.

According to an analysis of the two institutions of the legal liability, the legal liability in the case of an *abuse of law* can be defined[14] as the legal constraint relationship consisting in the right of the State[15] to hold accountable the person having exercised a subjective law in bad faith and in an unreasonable manner, but also by ignoring the economic and social purposes for which it was granted, the guilty party being liable for their deed and become subjected to the sanctions under the law.

The conditions to be cumulatively met for the holder of an abusively-exercised subjective law to become subjected to the legal liability are as follows:

1. there is to exist a subjective law;

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[8] Djuvara Mircea, General Law Theory; Rational Law – Sources and Positive Law. (Bucharest: All, 1995), 160.
[9] Flămînzeanu Ion. *Elaboration of law, on the formal legistics*, in the review, Romanian Law Studies, (Bucharest: Academia Română, 2009), 27-29.
[10] Butculescu Claudiu Ramon, *The role of international law in uniformity of the legal cultures*, in volume, Romanian law in context of European Union requirements, (Bucharest: Hamangiu, 2009), 445.
[11] Gherasim Dimitrie, *Good Faith in Civil Legal Relations.* (Bucharest: Academia Republicii Socialiste Romania, 1981), 105.
[12] Savatier René, *Treaty on Civil Liability in French Law*, Tome I. (Paris: Librairie générale de droit et de jurisprudence, 1939), 1-2.
[13] Vonica Romul Petru, *General Introduction to Law.* (Bucharest: Lumina Lex, 2000), 539.
[14] Avornic Gheorghe at al., *General Law Theory*, (Chişinău: Cartier, 2004), 494.
[15] Dascalu Betarice-Daiana and Tutunaru Mircea, *Constitutional Law and political institutions. Terms of seminar. Volume 2.* (Craiova, Scrisul Românesc, 2010), 8.

2. the exercising or non-exercising of the subjective law by the holder thereof is to result in an illicit deed;
3. a moral or patrimonial prejudice is to exist;
4. a causal relation is to exist between the illicit deed and the prejudice caused;
5. the subjective law's holder's is to exist.

As it can be seen, in the case of the abuse of law, additionally to the four conditions for the legal liability, as a supplement, there is a subjective law the exercising of which, when in bad faith and in an unreasonable manner, results in a prejudice cause to another person. As long as the condition for the existence of a subjective law is met, regardless of the nature thereof, the legal liability operates so that any of the specific types of legal liability[16] – civil, offensive, and criminal, etc. – may be analysed, subject to the existence of the abusively exercised subjective law and of an abuse of law.

In criminal law, the criminal liability is defined[17] as the criminal legal constraint relationship arising as a result of felony, between the State, on the one hand, and the felon, on the other hand, in the form of a complex relationship, the content of which outlines the right of the State, as a representative of the society, to hold the felon accountable, subject them to the sanction applicable for their crime and bound the execution thereof on them, as well as the felon's obligation to be held accountable for their deed and become subject to the sanction applied, with a view to restoring the rule of law and the authority of the law. In this case, the subjective law of the State to apply sanctions according to the law for specific felonies can be identified as a subjective law that may be exercised, indirectly, through a State representative, which is a judge who, in certain circumstances, may be likely to abuse such rights and, as a consequence, cause a significant prejudice to any person, as a subject to the criminal liability.

2.1 The Existence of a Subjective Law

The *abuse of law* does not exist unless a subjective law exists, which is exercised beyond the internal limitation thereof, by the deterrence thereof from the economic and social purposes for which it was granted. The requirements of this fundamental condition for the legal liability lead to the conclusion that the abuse of law is never contrary to the contents of the positive law or the provisions of the rule of law being, at least formally, in agreement with these. To the extent the exercising of the rights is not conforming to the conduct under the law there would not be about an abuse of law, but an illicit deed committed in the absence of the existence of any rights. Based on this conclusion, an opinion[18] was expressed according to which any abuse of law is apparently legal and may appear to be legitimate under the rule awarding it, a thorough analysis of the deeds being necessary with a view to identifying, punctually, the items defining it.

When the illicit deed is committed without any reference to the exercising of a subjective law, it may, eventually be in the form of a civil offence.

When reference is made to the abusive exercising of subjective law, both the material and substantial, and the procedural subjective law are taken into consideration. Therefore, the regulations in the field must be corroborated, however, ensuring the primacy of the substantial rule of law over the trial rule of law.

Nevertheless, not any *subjective law* is likely to be abused and so, there are *subjective law* cannot be abused, like the non-patrimonial personal rights (the right to have a name, the right to honour and reputation) or a few of the basic rights, enshrined by the Constitution of

[16] Flămînzeanu Ion, *Legal liability*, (Bucharest: ProUniversitaria, 2010), 89-90.
[17] Bulai Costică and Mitrache Constantin, *Criminal Law – General Part.* (Bucharest: Şansa, 1992), 176.
[18] Ştefănescu Traian, *Labour Law Treaty*, vol. II. (Bucharest: Lumina Lex, 2000), 39.

Romania: the right to equal rights, freedom of conscience, inviolability of residence, are subjective law not likely to be abused[19]. The right to life, which is also a fundamental right[20], may be abusively exercised to the extent the holder's will means waiving to such right.

According to other opinions[21], the subjective law, the exercising of which is likely to be abused, could be considered as discretionary but, in fact, the abusive exercising thereof is not possible from a material law perspective. For example, the fundamental constitutional law to have a civil status is not likely to be abused. In this case, it is difficult to agree on the manner in which the acquirer of a civil status by way of the natural act of birth would abuse it but, when subsequently a change in the civil status occurs as a will of the holder thereof, there may be a certain form of abuse whenever the right to change the civil status is exercised for a purpose, other than that enshrined by the law granting it. The same principle also operates for the right of a person to have a name, which may be abusively exercised when the concerned person wishes to change their name.

2.2 Committing an illicit deed by way of subjective law exercising or non-exercising

The second condition to be cumulatively met for an abuse of law to exist is either the existence of an illicit deed committed by way of the exercising or non-exercising of the subjective law, which may be in one of the following forms: by performance, by omission or by performance and omission; therefore, prejudicing a subjective law or a legitimate interest protected by law.

The illegality or illicitness firstly consist in the breach of the objective law, resulting in the prejudicing of subjective law of certain persons, thereby meaning the broad sense of the subjective law notion, which also includes the legitimate interests. Then, illegality also consists in the breach of the social cohabitation rules, to the extent they represent a continuance of the legal provisions outlining the content, limitations and manner of exercising the subjective law recognised by law.

With a view to classifying a deed as being illicit, several dimensions of the deed committed in general, may be identified, as follows: *the material dimension* – it consists in the conduct implied by the intent, which is likely to determine anti-normative changes in the rational reality beyond the trespasser; *the social dimension* – it consists in the damaging or prejudicing of one or several *sine qua non* values of an actual society, regardless whether or not such values are of legal nature and regardless whether they are in the private or public domain; *the legal dimension* – it consists in the fact that the illicit deed is a breach of a legal obligation; *the human dimension* – meaning that the trespasser, more than an entitled person, is a personality. In civil law, the prejudice curing does not involve sanctioning less the trespasser's personality, but sanctioning them in a different way. The illicit deed has the same dimensions even when it injures non-patrimonial subjective law and the courts of law take into consideration all these dimensions, regardless of the type thereof.

According to an opinion[22] expressly stated, depending on the positive law branch, a deed that is illicit is nature is referred to in different ways: *a felony*, in the criminal law; *a breach of contractual obligation or infraction*[23], in civil law; *an offense* in administrative law, *a disciplinary breach,* in labour law. Accordingly, each type of illicit deed relates to a

[19] Tutunaru Mircea, *Constitutional Law and political institutions.* (Craiova: Scrisul Românesc, 2011), 64-65.
[20] Constandache, G.George, Friedman-Nicolescu, Iosif et al., *Algorithm, Norma and Destin*, (Craiova: Alma, 2011), 196-197.
[21] Deleanu, Subjective Law and the Abuse of Law. 93.
[22] Mihai, Fundamentals of Law. Legal Liability Theory, 170.
[23] Filipescu P. Ion, *General Obligation Theory.* (Bucharest: Actami, 1998), 110.

complementary type of liability: the felony committed entails the criminal liability in the form of a punishment; the offense entails the administrative liability, in the form of a penalty; the infraction entails the civil liability in the form of a civil sanction; the disciplinary breach entails the liability specific to the labour law, in the form of an appropriate sanction.

The illicit deed cannot be classified as such when it is committed under circumstances covered by the clauses excluding the illicitness of the deed.

They are the following:

a. Self-defence (Art. 19 of the new Criminal Code), having an exonerating effect when the party in self-defence faces a material, actual, direct, unfair and imminent attack on them, another person or a general interest and which severely endangers the person, or rights of the party under attack, or the general interests – will not, under any circumstances, be considered an abusive deed.

b. The state of necessity (Art. 20 of the new Criminal Code), the execution of an activity imposed or allowed under the law or by an order from the supervisor, issued under the law, the victim's consent and the exercising of a subjective law according to the economic and social purposes thereof. [24]

c. The execution of an activity imposed or allowed under the law, when the requirements of the law have been met or the supervisor issued the order under the law[25] – cannot be clearly illegal and abusive, and the execution manner cannot be attributable to the agent. Such a kind of abuse, which is put forward the most, can be identified in the case of the legal executors' activity – who, even if acting without breaching the rule of law in any way, in many cases are considered, by the executed parties, real masters of abuse.

d. Legal non-liability case, grounded on the concept of risk undertaking, consists in a deed guiltily and easily committed, but only when the victim agreed, before it was committed, to the perpetrators acting in a specific manner, although there was a possibility for an injury to be caused by a prejudice of patrimonial or personal non-patrimonial rights. [26]

e. The exercising of subjective law according to the economic and social purposes thereof cannot be an abuse of law even when such an exercise prejudices the subjective law or the legitimate interests of persons such as particularly in neighbourhood relationships.

2.3. Moral Prejudice and Patrimonial Prejudice

The notion of *prejudice* appears as an essential element of the legal liability concept. Additionally to the meaning of *patrimonial prejudice,* which often, is considered to be the only one by strict reference to the damage caused to the *legal patrimony* of a specific person, the meaning *moral patrimony* of the persons has also been revealed, denoting the moral dimension of the negative effect of the illicit deed. [27]

The prejudice relating to the abuse of law involves certain nuances different from the one implied by the civil liability in tort.

Therefore, *the civil liability in tort* (Art. 1349 of the new Civil Code) implies the existence of a prejudice caused to a specific person as a result of an illicit deed committed by another person. For abuse of law, the liability may be engaged also when the perpetrator is self-prejudiced, if the public interest was injured thereby. As a result, the civil liability in tort is always tributary to a *direct*[28] prejudice, while the abuse of law is likely to also have an

[24] Stătescu Constantin and Bârsan Constantin, *Civil Law Treaty. General Obligation Theory.* (Bucharest: All Beck, 2002), 231.
[25] Antoniu George at al., *Criminal Law Explained to Everyone by Additional Explanations,* VI[th] ediction, (Bucharest: Societatea Tempus, 1996), 171.
[26] Anghel M. Ioan at al., *Civil Liability.* (Bucharest: Ştiinţifică, 1970), 80.
[27] Popescu Sofia, *General Law Theory.* (Bucharest: Lumina Lex, 2000), 302.
[28] Eliescu Mircea, *Civil Liability in Tort.* (Bucharest: Academiei, 1972), 83.

indirect negative consequence whereby society becomes a general passive subject, indirectly injured by such abuse.

The moral damage also includes the abuse in the form of a continuous baffling and pressuring of a person into a specific conduct. The negative result of such abuse can only be assessed by reference to the criteria underlying the determination of the moral prejudice.

The victim of an abusive deed is entitled to have the entire damage cured, regardless of the nature thereof. However, the curing function of the sanction applied in terms of civil liability in tort is not completely effective in the other fields of application of the abuse of law. In many cases – disciplinary liability in labour law, parental liability in family law – the preventive function of the specific sanction prevails, and the curing of the whole prejudice is virtually impossible. Without the *existence of the prejudice* there cannot be any question of an actual abuse of law nor will the mechanisms entailing the legal liability be started.

The prejudice must be certain both in terms of the existence thereof, and of the possibility to determine the coverage thereof currently and in the future, with a view to being able to quantify the legal liability of the trespasser. A potential prejudice, which might happen in the future, cannot be cured.

The prejudice must exist and be direct – to be a direct consequence of the illicit deed.

The prejudice must be personal – only the party whose subjective law was directly abused may claim both the discontinuance of the illicit deed, and the curing of the prejudice caused that way. The right to the curing thereof may be transferred on the prejudiced party's inheritors or may be exercised by one of the creditors thereof by a derivative action.

The prejudice must be a result of a breach of subjective law or of legitimate interests, of interests resulting from a standing state of facts, and the concerned interests must not be contrary to the social cohabitation rules. [29]

For the injured party's right to cure to become applicable, the prejudice must meet one last condition, namely, *not to have been cured by the trespasser or by a third party.*

2.4. Causal Relation

Since the abuse of law cannot be continuously conceived without the occurrence of a damaging, moral or patrimonial outcome by the deed thereof, it cannot be abused in the absence of a *causal relation* which is to exist between the abusive deed and the damaging outcome thereof. [30]

When a causal relation may be identified between the existence of an abusive deed committed by a subject of law and the existence of a damaging outcome may be determined, the abuser of law is to be held liable for the prejudice caused by his/her deed. As long as a cause-effect relation cannot be established between the abusive deed and the prejudice, the legal liability cannot be put forward.[31]

According to the definition of the system of the cause[32] category as the phenomenon which, prior to the effect thereof, is necessarily causes it to such system, the deeds not representing such cause, but only the conditions for the performance of the causing action are not in a causal relation to the prejudice, even if such conditions had great contribution to the outcome occurrence. The deficiency of this system consists in the failure to sanction the deeds acting as conditions even if the existence of the appropriate conditions create the possibility

[29] Mihai Gheorghe, *Unavoidable Law.* (Bucharest: Lumina Lex, 2002), 269.
[30] Deleanu, Subjective Law and the Abuse of Law, 107.
[31] Antoniu George, *Causal Relation in Criminal Law.* (Bucharest, Ştiinţifică, 1969), 235.
[32] Deak Francisc, Conditions and Fundamentals of Civil Liability for Prejudices Caused by Things. (Bucharest, Romanian Law Magazine, 1967), Nr. 1/1967, 18-22.

for a causal phenomenon to necessarily cause another *effect phenomenon*. With a view to overcoming the deadlock thus created, the developers of the *necessary cause* system consider that "under the law, it is possible to engage the civil liability of persons not having caused the prejudice, but acting as conditions for the causing thereof". [33]

The second system starts from the *cause indivisibility principle,* given that the system putting forward the idea that the causal relation determination is to take into consideration that the causal phenomenon does not act on its own, and the performance thereof is conditioned on certain factors, which, without causing the damaging or really dangerous effect in themselves, however, favour such effect occurrence. The theory[34] puts forward the notion of *causal complex,* or *full causal relation,* ready to explain both the consistent action of different kinds of causes and the consistent action of the causes and conditions with a view to causing a single effect.

2.5. Guilt

The legal liability for committing an abuse of law is grounded on the principle of guilt[35]. Guilt is a psychic, selective and externalised process, in the sense that the lawmaker uses not only the psychical elements intervening in actions breaching the law, being analysed only in the framework of external actions, the existence and assessment of the psychical processes being based on the analysis of an actual deed. Bad faith underlies intended behaviours and represents the externalised[36] will of the trespasser to damage the subjective law or the legitimate interests of a person.

Guilt takes three forms: *intent, fault* and *praeterintention* (oblique intention).

Intent[37] has different manners, depending on the attitude of the subject of law to the occurrence of the dangerous outcome, as *direct intent* – when the trespasser foresees and seeks the occurrence of the social dangerous outcome and *indirect intent* – when the trespasser foresees the outcome of his/her deed but does not seek it, however, accepts the possibility for such to ccur.

Fault[38] - the second form of fault – implies that the subject of law committing an illicit deed foresees the outcome of his/her deed but, while not seeking and not accepting the probability for the occurrence thereof, he/she hopes for the outcome not to occur or does not foresee the outcome, although he/she should have. Fault, also, has two forms: *prevision or imprudence or easy fault,* when the trespasser foresees the outcome of his/her deeds but does not accept it, unreasonably considering that it will not occur and *simple fault or negligence fault* when the trespasser does not foresee the outcome of his/her deed, although he/she should have. From direct intent through simple fault, the extent of the guilt gradually decreases, but, since the abuse of law is common to several branches of law and, as legal liability sometimes also applies for the smallest fault, when acting by fault, the abuser of law is to be legally liable in at least one form of this legal institution.

Another form of guilt, which is most often identified in criminal law (hitting or injury causing death) is the *praeterintent* which is a mix between intent and fault and, for this reason, it is also referred to as oblique intent, whereby the initial outcome is caused with intent, however, the more serious intent, which is significant and decisive occurs by fault, being much closer to fault, and not to intent.[39]

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[33] Stătescu and Bârsan, Civil Law Treaty, General Obligation Theory, 202.
[34] Eliescu, Civil Liability in Tort, 148.
[35] Antoniu, Causal Relation in Criminal Law, 21.
[36] Antoniu George, *Attempted Actions.* (Bucharest: Societatea Tempus, 1996), 32.
[37] Dobrinoiu Vasile et al., *Criminal Law, General Part.* (Bucharest: Europa Nova, 1997), 80.
[38] Antoniu George, *Criminal Guilt.* (Bucharest: Academia Română, 1996), 26 and flw.
[39] Dongoroz Vintilă, *Criminal Law.* (Bucharest: Institutul de Arte Grafice, 1939), 80 and flw.

3. Abuse of law in the New Civil Code

In the matter of the *abuse of law*, the new Civil Code is a breakthrough, in the sense that, while the prior civil law included express references to such, the abuse of law is enshrined under the provisions of Art. 15, according to which "no right shall be exercised with a view to excessively or unreasonably injuring or damaging another party contrary to good faith". According to these provisions, two assumptions on the abuse of law may be identified: on the one hand, *the exercising of a right with a view to injuring or damaging another party* and, on the other hand, *the excessive and unreasonable exercising of the right, contrary to good faith.*

Good faith, an essential condition for the exercising of each person's fundamental rights, for which, when breached, an abuse of law occurs, is regulated under Art. 14 (1) of the new Civil Code, according to which "the natural and legal persons part of civil legal relationships shall exercise their rights and comply with their obligations in good faith, in accordance with public order and good mores", and, under par. (2), "good faith is presumed until proved to the contrary". Then, complementary, Art. 26 states that "the civil rights and freedoms of natural persons and the civil rights and freedoms of legal persons shall be protected and guaranteed by law".

After establishing these principles for civil right exercising, the new Civil Code makes several references to good faith, thus, in Art. 1170, it is provided that "the parties shall act in good faith both when negotiating and when concluding contracts, and also, during the performance thereof" and in Art. 1183 (2) it reiterates the same provision according to which "the party engaging in a negotiation shall be bound by the requirements of good faith" and then, in Art. 3 and 4 of this latter text, good faith is successively referred to in case of negotiation without intent for contract conclusion and for when the party initiates, continues and interrupts negotiations. When one of the parties initiates a negotiation for a contract but does not have any intention to conclude the contract, the Unidroit Principles, in Art. Art. 2.1.15, point 3 provides that "a party acting particularly in bad faith shall be the party initiating or continuing negotiations when there is no intent to reach an amicable agreement with the other party". It is difficult to assess and decide on which party acts in bad faith when bad faith is presumed to exist, and the Court may have the deciding role when it is summoned to order on the matter. Another provision supplementing the regulations on abuse of law is the one in Art. 1353 of the new Civil Code according to which "the party causing a prejudice for the very exercising of the rights thereof shall not be bound to cure such, except when he/she committed the deed with the intent to injure another party".

4. Conclusions

To conclude, the liability for abuse of law survives in the new regulations, as a particular form of the civil liability in tort, so that it cannot be engaged in the absence of guilt and of the prejudice caused to another person. As a legal institution, the abuse of law is intended to answer the question whether and under which circumstances a right exercising may be considered as a prejudicing deed and to sanction, based on such answer(s), the legal documented concluded by abusing rights and all subsequent consequences thereof. By reference to the practice accrediting the idea of an abuse of law existence, however, corroborated with the reluctance of the courts of law to sanction such, which can also be explained by the lack of express legal rules, the regulation of such institution by the new legislation is beneficial, creating the premises for extending the solutions of the jurisprudence in the field. The existence of good faith will be an important assessment element in terms of abuse of law in the sense that, where there is good faith, there cannot be an abuse of law and,

to the extent it is exercised in bad faith, by deterring thereof from the economic and social purposes for which it was granted and by breaching other parties' rights, respectively, it can no longer be under legal protection, the court of law being the one assessing it and ordering accordingly.

References

- Anghel M. Ioan at al., *Civil Liability.* (Bucharest: Ştiinţifică, 1970).
- Antoniu George at al., *Criminal Law Explained to Everyone by Additional Explanations,* VIth ediction, (Bucharest: Societatea Tempus, 1996).
- Antoniu George, *Attempted Actions.* (Bucharest: Societatea Tempus, 1996).
- Antoniu George, *Causal Relation in Criminal Law.* (Bucharest, Ştiinţifică, 1969).
- Antoniu George, *Criminal Guilt.* (Bucharest: Academia Română, 1996).
- Avornic Gheorghe at al., *General Law Theory,* (Chişinău: Cartier, 2004).
- Beligrădeanu Şerban, Reflecting – in the Doctrine and Jurisprudence – the Notion of Abuse of Law in Labour Relationships. (Bucharest: Romanian Law Magazine, 1989), No. 7.
- Boroi Gabriel, *Civil Law. General. Persons.* (Bucharest: All Beck, 2002).
- Bulai Costică and Mitrache Constantin, *Criminal Law – General Part.* (Bucharest: Şansa, 1992).
- Butculescu Claudiu Ramon, *Considerations regarding the influence of the legal culture on the codification in Romania during 1864-2009,* in volume, Science and Coding in Romania, (Bucharest, Universul Juridic, 2012).
- Butculescu Claudiu Ramon, *The role of international law in uniformity of the legal cultures,* in volume, Romanian law in context of European Union requirements, (Bucharest, Hamangiu, 2009).
- Craiovan Ion, *General Theory of Law.* (Bucharest: Militară, 1997).
- Constandache, G.George, Friedman-Nicolescu, Iosif et al., *Algorithm, Norma and Destin,* (Craiova: Alma, 2011).
- Dascalu Betarice-Daiana and Tutunaru Mircea, *Constitutional Law and political institutions. Terms of seminar. Volume 2.* (Craiova, Scrisul Românesc, 2010).
- Deak Francisc, Conditions and Fundamentals of Civil Liability for Prejudices Caused by Things. (Bucharest, Romanian Law Magazine, 1967), Nr. 1/1967.
- Deleanu Ion, Subjective Law and the Abuse of Law. (Cluj: Dacia, 1988).
- Djuvara Mircea, General Law Theory; Rational Law – Sources and Positive Law. (Bucharest: All, 1995).
- Dobrinoiu Vasile et al., *Criminal Law, General Part.* (Bucharest: Europa Nova, 1997).
- Dongoroz Vintilă, *Criminal Law.* (Bucharest: Institutul de Arte Grafice, 1939).
- Duminică Ramona. *The crisis of contemporary law.* (Bucharest, C.H. Beck, 2014).
- Eliescu Mircea, *Civil Liability in Tort.* (Bucharest: Academiei, 1972).
- Filipescu P. Ion, *General Obligation Theory.* (Bucharest: Actami, 1998).
- Flămînzeanu Ion, *Elaboration of law, on the formal legistics*, in the review, Romanian Law Studies, (Bucharest, Academia Română, 2009).
- Flămînzeanu Ion, *Legal liability*, (Bucharest, ProUniversitaria, 2010).
- Florescu Dumitru, *Sanctioning the Abuse of Law from the New Civil Code Perspective*. (Bucharest: Romanian Law Magazine, 1973), No. 2.
- Gherasim Dimitrie, *Good Faith in Civil Legal Relations*. (Bucharest: Academia Republicii Socialiste Romania, 1981).
- Josserand Étienne Louis, *French Positive Law Course.* (Paris : Librairie du Recueil Sirey, 1930).
- Mihai Gheorghe, *Fundamentals of Law. Legal Liability Theory*, (Bucharest: C.H.Beck, 2006).
- Mihai Gheorghe, *Unavoidable Law.* (Bucharest: Lumina Lex, 2002).
- Popescu Sofia, *General Law Theory.* (Bucharest: Lumina Lex, 2000).
- Savatier René, *Treaty on Civil Liability in French Law*, Tome I. (Paris: Librairie générale de droit et de jurisprudence, 1939).
- Stătescu Constantin and Bârsan Constantin, *Civil Law Treaty. General Obligation Theory.* (Bucharest: All Beck, 2002).
- Ştefănescu Traian, *Labour Law Treaty*, vol. II. (Bucharest: Lumina Lex, 2000).
- Terre François at al., *Civil Law. Obligations,* (Paris: Dalloz, 10^{e} édition, 2009).
- Tutunaru Mircea, *Constitutional Law and political institutions.* (Craiova, Scrisul Românesc, 2011)
- Vonica Romul Petru, *General Introduction to Law.* (Bucharest: Lumina Lex, 2000).

ADMINISTRATIVE ACTS EXTEMPTED FROM JUDICIAL REVIEW BY ADMINISTRATIVE COURTS

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Abstract

The Romanian legislation, meaning by this Law no. 554/2004, creates in article no. 5 a special regime for some administrative acts which will be considered as exceptions from the „common administrative procedure". These acts are not subject to the review of the courts, the exception being a total one or a partial one as it will be described in this study.

The existence of the administrative procedure does not mean an absolute control on the administration. This is in fact the main reason why this article was included in Law no. 554/2004 and all implications will be described in this study.

Keywords: *Constitution, administrative acts, pleas of inadmissibility, Law no. 554/2004, contentious-administrative courts.*

1. Introduction

The administrative control is not and will never be an absolute one, without limits, so that once with the idea of such a control has also arisen the idea of some categories of acts that are to be removed from the scope of the control of the courts.

Traditionally, these acts have been called "pleas of inadmissibility", meaning administrative acts that are exempted from the full or partial review of the contentious-administrative courts.

Owing to the fact that the existence of such acts falls into the category of the exceptions, the importance of the concept and each category analysis involves a great importance for the theorists and practitioners of the administrative law.

II. The analysis of the administrative acts exempted from the judicial review by the courts – theoretical and practical implications

This analysis is based on the current wording of art. 4 of Law no. 554/2004[1] which provides the following:

(1) The following shall not be brought before the contentious-administrative court:

a) the administrative acts of the public authorities concerning their relations with the Parliament;

b) the acts of military command.

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[1] Law no. 554/2004 was amended and supplemented by the G.E.O. no. 190/2005 (Official Gazette no. 1179 of 28.12.2005), Law no. 262/2007 (Official Gazette no. 510 of 30.07.2007), Law no. 97/2008 (Official Gazette no. 294 of 15.04.2008), Law no. 100/2008 (Official Gazette no. 375 of 16.05.2008), Law no. 202/2010 (Official Gazette no. 714 of 26.10.2010) and Law no. 299/2011 (Official Gazette no. 916 of 22.12.2011), Law no. 76/2012 (Official Gazette no. 335/30.05.2012), Law no. 187/2012 (Official Gazette no. 757 of 12.11.2012), Law no. 2/2013 (Official Gazette no. 89 of 12.02.2013)

(2) The administrative acts for which amendment and dissolution is provided another judicial procedure by an organic law shall not be brought before the contentious-administrative.

(3) The administrative acts for the application of the state of war, of siege or of emergency, those relating to national defense and security, or those issued to restore the public order, as well as those to eliminate the consequences of the natural disasters, of epidemics and epizootic diseases, shall be appealed only by abuse of power.

The Constitution of 1923 states that: „The judicial power does not have the right to judge the government and military command acts."

The contentious-administrative law of 1925, enforced based on the wording of the Constitution has come up with a definition of the governments act, definition that has been criticized by the doctrine.

In general, in the current western doctrine the administrative acts issued in *"exceptional circumstances"* or the acts expressing *"the powers of the executive in case of danger"* are considered within the scope of the plea of inadmissibility.

The Constitution of 1991 contained only art. 4 par. 2, which stated: "The conditions and the limits of this right (the right to act within the contentious-administrative) shall be established by organic law", wording that has remained unchanged and has become art. 52 par. 2 by the review of the Constitution by Law no. 429/2003, passed by the national referendum of October 18th-19th, 2003.

The review law, as shown, introduces in art. 126, par. 6 thesis I, the principle of art. 107, final par. of the Constitution of 1967 with the wording: „*The judicial review of the public authorities administrative acts before the contentious-administrative is granted, except those regarding the relations with the Parliaments, as well as the acts of military command".*

Basically, the term "government acts" is replaced by the term "acts regarding the relations with the Parliament", but art. 48 par. 2 that has become art. 52 par. 2 remained in force, so that has arisen the problem of their "reconciling", especially since the Prof. Ioan Vida has brought in the current Romanian legal Doctrine the thesis of the "intra-constitutional antinomies".

Two interpretations are possible:

a) art. 126 par.6 is the only establishment of the matter concerning the scope of the plea of inadmissibility and art. 52 par. 2 concerns other matters and

b) art.126 par.6 governs the plea of inadmissibility of constitutional "status" and art. 52 par.2 governs the plea of inadmissibility of legal "status" within the limits permitted by art. 53 of the Constitution.

The scope of the plea of inadmissibility

Strictly speaking, the scope of the exempted administrative acts includes only the two categories of administrative acts provided by art. 126 par. 6 of the Constitution.

The traditional pleas of inadmissibility were grouped in two categories:[2]

- the pleas of inadmissibility deducted from the nature of the act;
- the pleas of inadmissibility determined by the existence of a parallel appeal.

Therefore, we can state that there are absolute exceptions, the two situations governed by par. 1 letter a and b and the relative exceptions, the situation of the "parallel appeal" governed by par. 2 of art. 5 of Law no. 554/2004.[3]

[2] For more, see E.E Stefan, *Administrative law manual, Part II, Seminar book,* Universul Juridic Publishing, Bucharest, 2012, p. 98.

[3] For more, see E.E Stefan, *Administrative law manual, Part II,* Universul Juridic Publishing, Bucharest, 2013, p. 69-70.

It was agreed that for the situations provided by par. 1 to be used the term "exceptions to the contentious-administrative" and for the parallel appeal the term "pleas of inadmissibility in the contentious-administrative courts".

The parallel appeal, since it covers the disputes on the administrative act, also represents an administrative dispute, but it is formally settled outside the contentious-administrative courts.

It should be noted that the legislator asked that the "parallel appeal" to be regulated by organic law and to represent a judicial procedure in terms of art. 126 of the Constitution.

The category of the ***acts of military command***, category of acts exempted from the contentious-administrative, provided for the first time in the Constitution of 1923 and then in the first special law of the contentious-administrative of 1925 was resumed in the identical wording in Law no. 29/1990 in order to get a constitutional consecration on the occasion of the review of the Constitution of 1991[4].

The justification for the introduction of such categories of acts exempted from the judicial review by the courts is observed in the situations arisen during the First World War, in parliamentarians' and public opinion memory being still actual, in 1923 some negative circumstances related to the command of the troops, the concerns particularly regarding the existing dangers for the technical leadership of the army if the judiciary would have the right to censor such acts[5].

The remove of such acts from the judicial review was based on the need to ensure the spirit of discipline of subordinates reported to the idea of prestige and authority of superiors, as well as to the conditions of the unit, the capacity and speed necessary for the military operations[6].

Therefore, emerged the main idea that in order to be within the scope of this category, there has to be about an act that comes from a military authority, being impossible for such acts to come from the civil or military authorities that "because of their nature or purpose are not commandments, hence the necessity of defining the concept of commandment[7].

The interwar doctrine usually distinguished between the acts of military command, the government acts of military command (those specific to the state of siege, requisitions, etc.) and the acts of military administration. This distinction aimed the authority acts because it was widely acknowledged that the military authorities, in their capacity of legal entities, may also perform management acts[8].

However, not any act of a military authority was a military command act. While the acts from the first category which included for example acts of appointment of officers, of military rank promotion, of sanction, retirement etc., could be brought before the contentious-administrative court, the acts included in the second category, no matter if they came from the Head of the State, the Govern, the Minister of Defense, could not be brought before the contentious-administrative[9].

For example, the interwar judicial practice ruled that the acts of withdrawal could be investigated and considered illegal by the courts, but could not be canceled; instead the

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[4] D. A. Tofan, Drept administrativ, (Administrative Law, 2nd volume), All Beck Publishing Bucharest 2004, p. 324.

[5]A. Iorgovan, Tratat de drept administrativ (Administrative Law Treaty), 2nd volume, 3rd edition, reorganized, revised and supplemented, Editura All Beck, collection of university course, Bucharest, 2002, p.560.

[6] R. N. Petrescu, Drept administrativ (Administrative Law), Accent, Cluj-Napoca Publishing, 2004, p. 414; L.Giurgiu, A. Segărceanu, C.G. Zaharie, Drept administrativ (Administrative Law), 3rd edition, reorganized, revised and supplemented, Sylvi Publishing, Bucharest, 2002, p.422; C. Ranicescu, Contenciosul administrative roman (Romanian contentious-administrative), 2nd edition, "Universală Alcalay" Co. Publishing, Bucharest 1937, p.311.

[7] D. A. Tofan, Drept administrativ, (Administrative Law) 2nd volume, All Beck Publishing, Bucharest 2004, p. 324.

[8]A. Iorgovan, Tratat de drept administrativ (Administrative Law Treaty), 2nd volume, 3rd edition, reorganized, revised and supplemented, Editura All Beck, collection of university course, Bucharest, 2002, p.561.

[9] D. A. Tofan, Drept administrativ, (Administrative Law, 2nd volume), All Beck Publishing Bucharest 2004, p. 325.

plaintiff had the right to obtain the rectification of pension, by assuming that the maximum years of service would be achieved, as well as the civil damages[10].

During the interwar period, the delimitation of the scope of the military command acts from the government acts was difficult to accomplish due to the vagueness of the contentious-administrative law of 1925.

Most of the authors dealing with this concept have made the distinction between the acts of military command that are involved in the relations between the military authority and the civilian population and the acts of military command that are involved in the military hierarchy. The former were subject to the judicial review by way of the contentious-administrative, except in cases were they were committed during war time[11].

By elimination, only the acts that met the duty of command, of ordering something in what concerned military issues, were maintained within the scope of the acts of military command.

Therefore, the following acts were considered acts of military command during war time: troops changing, their building-up on the attack or defense line, attack, advance or retreat, etc., and during peace time: the establishment, reorganization or dissolution of military units, delimitation of recruitment areas, troops building-up for exercise, maneuvers.

From this perspective maintained for decades, an order of the Minister of National Defense passed in 1990, that set out quite arbitrarily that all administrative acts implemented in the army were included in the category of acts of military commend, which is said of the exempted acts, undeniably represents an illegal order[12].

The including of an actual administrative act within the scope of the acts of military command remains a matter of the court judgment, but also an assessment made by the public law science[13].

In other words, the contentious-administrative courts shall exercise a maximum caution when including an administrative act in the scope of the acts of military command and therefore of those exempted from the judicial review[14].

In relation with all these doctrine elements, the consecration by the new contentious-administrative law of the concept of act of military command is welcome.

Thus, according to art. 2 par. (1) letter j) of the law, the act of military command is defined as the administrative act concerning the strictly military activities within the military organizations, specific to the military organization involving the right of the commanders to rule in matters relating to the troop control during war or peace time or as the case may be, during the serving of the military service[15].

In what concerns the old categories of acts exempted from the contentious-administrative review, under Law no. 29/1990, due to their nature, they were redesigned and entered in the category of those exempted under the new law of the contentious-administrative, in a particular way, based on the interpretation of art. 126 par. (6) of the republished Constitution, that regulates the pleas of inadmissibility of constitutional status in relation to art. 52 par. (2) of the republished Constitution (the conditions and limits of this rights are set by organic law), that aims the pleas of inadmissibility of legal status, within the

[10] R. N. Petrescu, Drept administrative (Administrative Law), Accent, Cluj-Napoca Publishing, 2004, p. 415.
[11] A. Iorgovan, Tratat de drept administrativ (Administrative Law Treaty), 2nd volume, 3rd edition, reorganized, revised and supplemented, Editura All Beck, collection of university course, Bucharest, 2002, p.562 and the following.
[12] D. A. Tofan, Drept administrativ (Administrative Law), 2nd volume, All Beck Publishing, Bucharest 2004, p. 325.
[13] A. Iorgovan, Tratat de drept administrativ (Administrative Law Treaty), 2nd volume, 3rd edition, reorganized, revised and supplemented, Editura All Beck, collection of university course, Bucharest, 2002, p.565.
[14] V.Vedinaş, Drept administrativ şi instituţii politico-administrative (Administrative Law and political-administrative institutions), Practical Manuals, Lumina Lex Publishing, Bucharest, 2002, p.205.
[15] D. A. Tofan, Drept administrativ (Administrative Law), 2nd volume, All Beck Publishing, Bucharest 2004, p. 326.

limits accepted by art. 53 of the republished Constitution dedicated to the limitation of some rights and freedoms[16].

There is also the expression used by the Law of the contentious-administrative of 1925, in relation to the content of art. 107 of the Constitution of 1923, reason for which the marginal title of the article was changed from the "pleas of inadmissibility", as referred in the project, in the "acts that are not brought to review and the limits of the review", the first category including the exempted acts of constitutional status and the second category including the exempted acts of legal status.

Thus according to art. 5 par. (3) of the new regulation, „the administrative acts issued for the implementation of the state of ware, siege or emergency regime, those relating to national defense and security, or those issued to restore the public order, as well as to remove the consequences of the natural disasters, epidemics and epizootic diseases shall be appealed only by abuse of power".

In disputes involving such acts the provisions on the suspension of the execution of the acts and on the trial of the appeal in particular situations, are not applicable.

It appears that the administrative acts listed above shall be brought before the contentious-administrative court only under certain conditions, and certain rules of the procedures set by the law are not applicable[17].

It is necessary for the respective acts to be appealed only by abuse of power, with the compliance of the conditions and limits provided by art. 53 of the republished Constitution.

In art. 2 of the law. dedicated to the meaning of certain terms and expressions, the abuse of power is defined as representing "the performance of the right of assessment, belonging to the public administration authorities, by violating the fundamental right of the citizens provided by the Constitution or by the law".

In relation to the content of art. 5 par. (3) of the new law aforementioned, the old exempted categories of acts – acts relating to national security; diplomatic acts concerning the Romania's foreign policy; acts issued under exceptional circumstances – are to be reconsidered.

Thus, in what concerns the category of the acts relating to national security, in the opinion of the legislator from the inter war period, they were considered as a type of government acts, together with the acts concerning the public order, being described as "acts aiming the internal and external state security", a wording with the same meaning.

In turn, the jurisprudence of that time held that all the government acts that are not specifically listed in the law, in addition to the fact that they shall relate to a general interest in relation to public order or internal and external state security, they shall be justified by the "existence of a serious and imminent danger that threatens the state".

In other words, as mentioned in the doctrine, the law should exempt them only in those serious moments when the state security was threatened and when the respective acts became governments and ceased to be simple authority acts, of organizing the law execution[18].

This is exactly what the current legislator considers by the express consecration of the abuse power criteria.[19]

The first category of exceptions belongs to the political acts, traditionally qualifies in the doctrine as "government acts'. Although the legislator has only defined the government acts in art. 2 par. (2) of the contentious-administrative law of 1925, later the doctrine and the

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[16] A. Iorgovan, Noua lege a contenciosului administrativ, Geneză şi explicaţii, (New law of the contentious-administrative, Genesis and explanations), Roata Publishing, Bucharest, 2004, p.305.

[17] A. Iorgovan, Noua lege a contenciosului administrativ, Geneză şi explicaţii, (New law of the contentious-administrative, Genesis and explanations), Roata Publishing, Bucharest, 2004, p.307.

[18] Al. Negoiţă, Drept administrativ (Administrative Law), Sylvi, Publishing, Bucharest 1996, p.245.

[19] D. A. Tofan, Drept administrativ (Administrative Law), 2nd volume, All Beck Publishing, Bucharest 2004, p. 327.

jurisdiction have tried to find definitions for the government acts. Currently, the public authorities acts in their relation with the Parliament benefit under the actual amended and supplemented of Law no. 554/2004 by Law no 262/2007, of a new legal definition in art. 2 par. (1) letter k) according to which public authorities acts are "the acts issued by a public authority in the performance of its duties, provided by the Constitution or by an organic law, in what concerns the political relations with the Parliament.

From this definition would result the fact that it is about the administrative acts of all public authorities in what concerns the political relations with the Parliament. The current doctrine states that, compared with the new constitutional provisions and with the constitutional structure as a whole, in this category of exempted acts are included the political acts issued in the performance of the constitutional duties between the supreme representative body (the Parliament) and the two heads of the executive (the President and the Government) and the acts involved in case of direct relationships, when complex acts arise involving two or more authorities of the executive, of which at least one is in a direct relations with the legislator forum, with special reference hereto to the presidential decrees to be entered by the Prime Minister, and also most decrees that do not require this procedure.

Concerning the acts on the relations between the Government and the Parliament, the acts of the Parliament in the relations with the Government shall not be administrative acts, but things are not that simple in what concerns the acts of the Government in its relations with the Parliament, in the board sense of the term. In the doctrine are identified two categories of acts of the Government as public authority of the executive power: government acts (political acts par excellence – motions, declarations etc.) and pure administrative acts (acts that settle technical organizational problems) of the public administration. It is also noted that not any act of the Government is a government act, because there may be decisions of the Government passed by the abuse of power and that violate rights and legitimate interests of persons. These decisions of the Government are normative or individual administrative acts, and when violate the law or supplement provisions of the law, they may be appealed before the contentious-administrative court under art. 52 of the Constitution republished and under the provisions of the special law in case, Law no. 554/20004, as further amended and supplemented. It was considered that, in case a Government decision violated the constitutional provisions, it might be appealed before the contentious-administrative court, the unconstitutionality being a serious form of illegality.

In order to analyze the acts concerning the relations of the Parliament with the President, the duties of the President in the relations with the Parliament shall be considered. In this category, the administrative doctrine includes: the addressing of messages to the Parliament (art. 88), the calling and dissolution of the Parliament (art. 89), the referendum (art. 90), the promulgation of the law (art. 77), the appointment of the candidate for the position of Prime Minister (art. 85 and art. 103) etc.

The professor Antonie Iorgovan states that when we traditionally distinguish between the decrees as legal acts and the exclusive political acts of the President of Romania, including its messages, we actually distinguish between the administrative law acts and the constitutional law acts that concern the exclusive political relations between the President and other political structures. It is also argued that most of the President's duties are performed by issuing decrees that shall be passed by the Prime Minister, and in this way is performed an indirect parliamentary control on the President by the Prime Minister, who is politically responsible before the Parliament.

Following extensive debates and arguments that took place in the doctrine and in the jurisprudence, it was held that the decrees of the President of Romania passed by the Prime Minister are complex legal acts that state a constitutional relationship between the two heads of the executive, on the one hand and the Parliament, on the other hand, being included in the

categories of the pleas of inadmissibility enshrined in art. 126 par. (6) of the Constitution, republished, meaning the acts concerning the relations with the Parliament.[20]

The administrative acts listed in par. (3) of art 5 may be appealed before the contentious-administrative court only under certain conditions, and certain rules of the procedure regulated by the law of the contentious-administrative are not applicable in these cases; thus it is firstly required that the respective acts to be appealed only for abuse of power, being understood that the concept of abuse of power in terms of art. 2 letter n of the law is taken into account.

Therefore, in the absence of express provisions in the organic law, the contentious-administrative courts, when settling the disputes concerning the abuse of power, shall apply directly the wordings of the Constitution and firstly art. 53.

Thus, the courts shall determine whether the administrative act which represented the object of the dispute was necessary for the implementation of the regimes, or as the case may be, for the removal of the situations provided in par. 3 of art. 5.

Then the courts shall determine if the act appears to be necessary in a democratic society and if the limitation by the administrative act of exercising the violated right is proportional to the situation that caused the issuance of the act, and if it is somehow discriminatory.

III. Conclusions

The specialized literature has widely discussed the issue of these types of acts, but has not excluded the fact that the establishment of some categories of exceptions from the legal review of the contentious-administrative courts would prevent the common law courts to take legal action to defend human rights and freedoms, such as the granting of indemnities, etc, however without having the jurisdiction to cancel or suspend the administrative acts that have caused the prejudice.

This is why it should be concluded that the citizens should not remain uncovered by the total lack of a legal control, but this control shall not bear the substance of the act.

References

- Iorgovan, New law of the contentious-administrative, Genesis and explanations, Roata Publishing, Bucharest, 2004
- Iorgovan, Administrative Law Treaty, 2nd volume, 3rd edition, reorganized, revised and supplemented, Editura All Beck, collection of university course, Bucharest, 2002.
- Al. Negoiţă, Administrative Law, Sylvi, Publishing, Bucharest 1996.
- Ranicescu, Romanian contentious-administrative, 2nd edition, "Universală Alcalay" Co. Publishing, Bucharest 1937.
- A. Tofan, Administrative Law, 2nd volume, All Beck Publishing Bucharest, 2004.
- Rîciu, Contentious-administrative procedure, Hamangiu Publishing, Bucharest, 2009.
- L.Giurgiu, A. Segărceanu, C.G. Zaharie, Administrative Law, 3rd edition, reorganized, revised and supplemented, Sylvi Publishing, Bucharest, 2002.
- R. N. Petrescu, Administrative Law, Accent, Cluj-Napoca Publishing, 2004.
- V.Vedinaş, Administrative Law and political-administrative institutions, Practical Manuals, Lumina Lex Publishing, Bucharest, 2002.
- E.E Stefan, Administrative law manual, Part II, Seminar book, Universul Juridic Publishing, Bucharest, 2012.
- E.E Stefan, Administrative law manual, Part II, Universul Juridic Publishing, Bucharest, 2013.
- Law no. 554/2004, amended and supplemented by the G.E.O. no. 190/2005 (Official Gazette no. 1179 of 28.12.2005), Law no. 262/2007 (Official Gazette no. 510 of 30.07.2007), Law no. 97/2008 (Official Gazette no. 294 of 15.04.2008), Law no. 100/2008 (Official Gazette no. 375 of 16.05.2008), Law no. 202/2010 (Official Gazette no. 714 of 26.10.2010) and Law no. 299/2011

[20] I. Rîciu, Procedura contenciosului administrativ (Contentious-administrative procedure), Hamangiu Publishing 2009, p. 178-181.

(Official Gazette no. 916 of 22.12.2011), Law no. 76/2012 (Official Gazette no. 335/30.05.2012), Law no. 187/2012 (Official Gazette no. 757 of 12.11.2012), Law no. 2/2013 (Official Gazette no. 89 of 12.02.2013)

THE LEGAL FRAMEWORK FOR THE OIL AND MINING CONCESSION IN DIFFERENT COUNTRIES

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Abstract

Concession is the oldest form of cooperation between the state and companies to exploit oil being found in the Middle East since the late nineteenth century. In colonized countries the right of exploitation belonged to the companies of the suzerain states. Invoking national interest, dispute over natural resources has increased in direct proportion to the increasing importance of these resources and inversely proportional to the decrease in quantity. A dull but intense battle at this point characterizes natural resources, especially of oil and mining of precious metals. Therefore, we can say that the power exerted on natural resources determines the ranking of countries of the world economic power and living standards of the population. Use of natural resources as an effective weapon in the economic consolidation became state policy and the expansion of exploration and exploitation in foreign lands required the development of complex regulations. Therefore, this study aims at presenting an analytic perspective of foreign law - specific states with relevant impact on the exploitation of natural resources - and the presentation of some features of international law.

Keywords: *concession, international, oil, mining, explotation.*

1. Introduction

Beyond the legal nature of concession, often disputed in doctrine, this type of contract gained the reputation of the most used method of operation of the public domain by the Administration, by sending private exclusive rights in this regard.

Given the complexity of the institution of concession, the fluctuations that the legal framework have been suffered, and a poor bending comparative literature on the area of concession contracts on natural resources, we believe that the relevance of a comprehensive approach is undeniable. Thus, making a presentation to the laws of states with experience in concessions, with relevant impact in the oil and mining concessions, and a comparative analysis is neccesary for a more objective determination of the essential features that should define this field. For a wide coverage as the features of this contract, the study is not limited to the European space and it shows also a derivative contract of concession - Production Sharing Agreement - which is more commonly used in Middle and Far East.

The study captures the involvement of general interest, as well as specific criteria of oil and mining concessions and emphasizes the need to fulfill this criterion. The theory of general interest had a role in strengthening the identity of the concession right in terms of necessity and its legal nature. Thus, concession is distinct from ownership and it was born from the need to simplify the operation of economic utilities and natural resources considered as a collective wealth. Stealing private ownership category of goods which are intended for the use of the entire population is a concern that has acquired a historical dimension, starting from Roman law until now. The study also select issues that have formed in certain states and in the approach to the exploitation through concession, successful recipes that become models for other states regarding implementation of natural resource concessions.

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The paper is divided into four main sections, namely : 1. "The legal nature of natural resources" 2. "The legal framework of the mining and peroliere in different countries of the world" 3. "Production Sharing Agreements" 4. Conclusion.

2. The legal regime of natural resources

Peoples' right to use and exploit their natural resources was recognized by resolution 626 (VII) of 21 December 1952 the United Nations (UN) General Assembly. Subsequently, XVII General Assembly Resolution 1803 of the UN on 14 December 1962 acknowledged that the right of people to permanent sovereignty over natural resources must be exercised in the national interest.

Recognising the right of countries, particularly those in developing countries, to secure and increase participation in the management of enterprises with foreign capital was mentioned by Resolution nr.2158 (XXI) of 1966 and the Charter of Economic Law and State requirements to was developed by Resolution no.3281 (XXIX) of 12 December 1974 issued by the same UN General Assembly.

Regarding oil and gas resources, article 1 par. (1) of the Act no.238/2004 provides that oil petroleum resources located in the basement of the country and the Romanian Black Sea continental shelf, defined under international law and international conventions which Romania is a party, shall be exclusively public property belonging to the Romanian state. According to the same article, the fuel oil is defined as those mineral substances consisting of mixtures of natural oil accumulated in the earth's crust which, in the frame of surface conditions, are present in the gaseous state, in the form of gas or liquid as crude oil and condensate.

The trends that have developed internationally were: ownership of natural resources belong to the landowner; property natural resources belong to the state or other public authorities where resources are located.

The United States are found in the first situation. The owner of the surface is also the owner of the oil that is located under the surface oil. In some jurisdictions, property of oil *in situ* is not recognized and it is claimed that the property appears only when the oil is produced and brought to possession, when it is extracted and becomes a movable property[1].

Moreover, in Texas it is recognized the ”catch rule” according to that the oil belongs to the owner when drilling oil field which is found under his land. So if oil moves from one place to another under the bark, it will belong to a person or the other depending on the hazard of oil movement. In California and Indiana there is a property theory according to that the land owner has no title of *in situ* oil because oil can be extracted and belongs to whom extract (of course, on his land). The exploration and exploitation rights are granted by lease / lease / concession (lease) mines[2].

Natural resources belonging to the state has origins in Roman law, becoming the property of the sovereign political authority. Under this system whereby the king granted licenses for exploration and exploitation, soil mastery (*dominium directum*) returned either Crown or feudal lords and was separated from the title of ownership (*dominium utile*) of which represent the right to use and obtain profit field. Consequently, states have mineral resources and land owners have only been entitled to compensation for loss of land ownership (expropriation).

[1] Aileen Mc.Harg, et.al., *Property and the Law in Energy and Natural Resources*, Oxford University Press, 2010, p. 124.
[2] Harg et.al., *Property*...., p. 119.

In Nigeria, the Supreme Court[3] ruled that only the state is the owner of natural resources, not local governments[4].

The Canadian Constitution explicitly assigns ownership of all land, mines, minerals and royalties to the provinces of Ontario, Quebec, Nova Scotia and New Brunswick. Section 92A of the Constitution (1867) completed in 1982, now gives the provinces exclusive jurisdiction to legislate with respect to exploration, development, conservation and management of non-renewable mineral resources such as oil.

In Papua New Guinea, although the communities have no such rights, they receive certain rights to the obtained benefits, rights that are entitled ”royalty” benefits.

The Law of capture[5] shapes the legal regime of natural resources in the United States, although its recognition nowadays is considered anachronistic. This right has been regulated by the laws of other countries including Romania, as shown in the 1865 Civil Code which does not strictly copied the provisions of Art.552 of the French Civil Code 1807. The same thing happened in Ukraine, Great Britain and Russia.

In Latin America and the Middle East, the situation has been different. Thus, under The Spanish Ores Order (1783) and according to the Islamic Law regulating ores, as the state had control of these riches, very large concession areas were allowed .

Gradually, with the exception of the United States, other countries have waived this right in legislation and allowed the public interest to justify taking over the basement of the state. Romania followed the same trend. Nationalization of natural resources led to Romania existence concession contract which replaced such private nature contracts[6].

3. The legal framework for the oil and mining concession in different countries

United States of America

It is proposed[7] that concession regulation in the United States of America (hereinafter, U.S.) to be similar to Directive 2004/17/EC given the development of the legal framework for Public Private Partnerships (hereinafter, PPP) in order to establish regulatory areas called ”monopoly” and principles[8]. The difficulty of taking over European specificity is that the U.S. does not recognize the state's right over natural resources, operating the ”catch rule” according to that the property owner is focused on the person of the soil and extract oil from both the basement and the basement has other neighboring owners.

According to point 71 from the United States Code (2011), any U.S. citizen over the age of 21 or any legal person created on American soil has the right to register the ownership of any tracts of land containing coal which are not appropriated by the state, no more than 160 acres / person or 320 acres / person in return for payment of not less than $ 10 / acre for an area of 15 miles or 20 dollars / acre for an area of to 15 miles[9].

Contrary to European law, in the U.S., PPP is regarded as a kind of concession agreement - so it is subsumed to concession, in which public project is carried out by private

[3] The Case The General Attorney of the Federation/The General Attorney of the State of Abia (2006).
[4] www.alaviandassociates.com/documents/petroleum.pdf.
[5] Terence Daintith, The Rule of Capture: The Least Worst Property Rule for Oil and Gas, Oxford University Press, 2010, p. 143.
[6] Daintith, The Rule of Capture, p. 53.
[7] Katherine Southland, U.S.Electric Utilities: The First Public-Private Partnerships?, *Public Contract Law Journal*, Chicago 39 (2010): 395.
[8] Although the oil and mining concession agreements are mentioned by the Directive 2004/17/EC, they are excepted from regulation.
[9] www.gpogov/fdsys/browse/collectionUScode.action?selectedYearFrom=2011&go=Go accessed in the 15th of February 2014.

funds. This view results from the history concession since the twentieth century when the first time the government granted monopoly in certain areas benefit in change of the private financing of public projects.

Transfer of acquired lands containing oil is not restricted if it is before oil exploration and discovery.

Portugal

Article 9 a) of the Code of Public Contracts, updated[10], states that are included as part of the activities of water services, energy and transport, exploration or continue extracting oil, gas, coal or other solid fuels - as part of the operation of a geographical area for this purpose, according to letter b) of the same article.

Despite of the fact that Portugal transposes European legislation, it has proceeded differently, by unifying the regulations dealing with the administrative contracts without exempting oil and mining contracts.

France

The new Code of Public Contracts Regulatory[11] mention the subject through Article 3, without excluding oil concessions. According to Article 135 b) item 3 the procurements assigned by adjudicating authority exercising any of the activities mentioned - including work on the exploitation of geographical areas for the purpose of exploring for or extracting oil or coal, are legally subject to the provisions. According to Article 144, the contract shall conclude in one of the conditions laid down: the negotiated procedure according to the principle of competition, open or restricted tender procedure, the dynamic purchasing system.

The new Mining Code of France includes both petroleum mining activities without distinction and regulates by art.L121 -2 that, within the boundaries of a license or a mining, prospecting concession have the right resources forming the object of concession and according art.L131 -1, mines can be exploited only by the state, through concession.

Nobody can achieve a license if it has not technical and financial capacity necessary to direct the operation. The concession is granted by decree of the State Council subject to commitment and just after a public inquiry conducted under the Environmental Code. Concessions apply competition law rules, since, according to art.L132 -4, the concession is granted by auction unless the holder of a valid permit research only within the boundaries of the ore mining license of the discovered exploitations.

According to art.L132 -13 of the New Mining Code of France, at the end of the concession established by decree, the deposit is returned, real dependencies can be free or may be sold to repay the state where remains exploitable mineral deposit, and in the case of the abolition of the holder, the concessionaire's rights and duties are transfered to the state.

Norway

According to Article 77 (1) of the Act Sea Convention, the coastal state exercises absolute rights on the mainland coast for exploration and exploitation of natural resources[12]. But these provisions do not relate directly to the property of natural resources. According to the Petroleum Law No. 72 of 29 November 1996, the Norwegian State claimed ownership of oil deposits in the sea.

[10] The Code of Public Contracts was adopted by the Decret-Law no.18 from the 29th of January 2008.
[11] The Code of Public Contracts was adopted by the Decret no.2006-975 from the 1st of November 2006.
[12] Ulf Hammer, Models for State Ownership on the Norvegian Continentat Shelf Property, Oxford University Press, 2010, p. 159.

The Norwegian State has established a licensing system in which private companies participate as licensed together with the state. The aim was to attract competent technology and oil companies to explore deep waters in harsh weather conditions. This system was introduced in 1965 and still exists, containing three licenses: exploration and production, installation and operation of installations.

But the state does not need a license to carry out activities under the Petroleum Law and its activities consist primarily of seismic monitoring potential exploitation of natural resources.

A Norwegian licensing system feature is the strong participation of the state in this system. This was achieved by the so-called Statoil - initially 100 % state company established in 1972 through which the state holds 50 % shares in all licensed groups.

From the 1st of January 1985, state ownership was reorganized. Following an arrangement established between Statoil and state, Statoil participation split in the state's economy and the Statoil's one. The first was entitled State Direct Financial Interest (SDFI)[13]. This means that the Norwegian State participates directly in the Norwegian petroleum sector as an investor. SDFI has a direct financial interest in 146 production licenses and 13 joint ventures for onshore facilities and oil pipelines.

With the implementation of Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons, the state lost its importance and became a commercial entity excluded of privileges.

In 2001 there is a reform that differentiates between the role of the owner and the resource manager. Thus, although there was a tendency on the privatization of the national oil companies including Statoil, the state remains the majority shareholder[14].

Subsequently reform Statoil retained responsibility for the marketing and sale of state-owned oil and gas through SDFI with Petora watching on establishing a fair price[15].

Statoil will remain under state control due to the importance of oil and to the fact that it is central to the economy[16].

Brazil

Initially the exploration and exploitation of oil in Brazil has been a state monopoly for 40 years until 1995 when Act No.9 of completion of the Federal Constitution of 1988 changed the legal structure of the state monopoly.

Thus, Law of Oil and Natural Gas no.9478/1997 allows private companies to pursue available through concession contracts and payment of taxes and government surcharges.

The discovery of new oil resources in deep waters of Brazil, rising oil prices and the global crisis have resumed discussions to return to the forefront of state involvement in the oil industry[17].

But lack of investment and rising inflation were reasons born for eliminating the monopoly of the state. Therefore, by Article 177 (1) of the Licensing Act nr.9/1995, private companies have been allowed to be licenced in the domaine.

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[13] Hammer, Models for State Ownership, p. 163.

[14] Despite these tendencies, a new company was created, Petora, which was totally owned by the Norwegian state.

[15] George Bermann, *A Restatement of European Administrative Law: Problems and Prospects*, Oxford University Press, 2010, 628; Adilson de Oliveira, *Brazil's Petrobas: Strategy and Performance*, Oxford University Press, 2010, p. 517.

[16] The more and more rare discovery of oil resources will lead to the decrease of production after 2020, as the Norwegian Oil Directorate anticipates. But both Petrobas and Statoil have confronted dificulties in the exploitation of natural resources and they have taken advantage of their privileged situation as champions of an adequate technology.

[17] Yanko Marcius de Alincar Xavier, Legal Models of Petroleum and Natural Gas Ownership in Brazilian Law, Oxford University Press, 2010, 222; de Oliveira, Brazil's Petrobas, 517; Leslie Lopez, Petronas – reconciliation tensions between company and state, Oxford University Press, 2010, p. 809.

There are three legal instruments to explore a public good in Brazil by a private entity: concession, permission or authorization. Authorization is a unilateral administrative, discretionary act, a temporary license that the licensee is allowed to use public property without prior auction. These are typical for oil transport and may be revoked at any time by the Government on the grounds of public interest.

Concession is another type of administrative license with the following characteristics: it is bilateral contractual, dependent on prior bidding. Concession cover activities of production and operation, and the risk belongs solely to the licensee.

The discovery of new oil deposits at 7,000 m deep in the ocean caused the need for large investments ($ 1 trillion) and adopt a new type of contract - PSA , and the concession was only preserved for onshore natural resources, Petrobras - the national oil company being entitled to have exclusive exploitation rights.

Regarding the administration of the petroleum field, the strategy was based upon the typology of the unilateral administrative acts which include: administrative power decisions legally binding, unilateral, administrative and information management contracts normative acts.

Like Petrobras, Statoil is frequently considered a state-controlled company, similar to more international oil companies. Statoil has expanded production to other countries such as Angola, Azerbaijan, Venezuela and became a model of efficiency.

Governmental strategy was to control the oil through two ways: by holding ownership of natural resources and the establishment of a national state oil companies .

Venezuela

With the arrival of Hugo Chavez to lead the country, nationalization was imposed as a result of the idea that some international oil companies have exploited Venezuela and weakened state. It was felt that a national oil company under state control would lead to greater confidence than in the private sector. The founded company was entitled Pétroleas de Venezuela SA (PDVSA)[18].

Through Hydrocarbon Law (2001), the fee was determined at 30 % , becoming the largest source of revenue - $ 20 billion for the year 2007 and for 2008. But PDVSA performance declined after the 2003 campaign Chavez administration[19].

United Kingdom

Act no.2814 of 2009[20] on the exploitation of oil and gas resources and supply (model clauses) describes the type clauses that are used for offshore exploration licenses as they are defined in the Petroleum Law (Petroleum Act 1998) and under section 4 of the Law on Energy (Energy Act 2008). These clauses are presumed to be incorporated into major licenses that allow certain types of oil exploration in production and delivery of gas . Regarding exploration licenses under section 4 of the Energy Law, the type clauses are regulated for the first time. Regarding exploration licenses under section 3 of the Petroleum Law, the type clauses have been previously specified in Annex 1 of the Law no.352/2004 of licensing of exploration and production of oil by sea and land (Petroleum Licensing - Exploration and Production - seaward and landward Areas Regulations) will be applied to licenses granted after the entry into force of the law.

The awarded licenses will allow the holder to obtain the entire area offshore exploration below the water to maritime limits of the continental shelf of Great Britain, but

[18] David Hults, *PDVSA from Independent to Subservience*, Oxford University Press, 2010, p. 418.
[19] Hults, *PDVSA*, 420. Despite all these, the author recognizes that, during that period of time, the biggest state income had been colected, and an important part of this income was invested in political policies addressed to the Venezuelan people.
[20] The Law no.2814 was enforced at 13 November 2009.

only by means that are relatively non-invasive methods such as seismic prospecting and drilling with depth. Participation criteria for licensing are based on competitiveness, costs, fees, royalties, and the government has the power of granting further exploitation contract in the North Sea, for example.

In order to obtain exploration rights to certain areas by invasive means (such as drilling deeper than 350 m), it will be necessary to obtain a separate license under section 3 of the Petroleum Law or section 4 of the Energy Act. Further, the licenses for both invasive and non-invasive exploration of the sea surface to obtain a CO2 bags can be guaranteed in accordance with Section 18 of the power law .

According to the Methodological Norms no.2814/2009 regarding offshore exploration - oil, gas storage and unloading gas, type clauses (The Offshore Exploration Regulations 2009)[21], exploration is made under license in search of oil in any area under the waterline or for establishing, maintaining plants in a controlled in order to explore. The rights granted by the license include prospecting and conducting geological studies by chemical and physical drilling to obtain geological information "area of operation", but does not include any right to drill a borehole at a depth greater than 350 m below the sea surface (article 3, paragraph 1). The rights granted license does not include the right to produce oil or drilling wells for oil production (article 3, paragraph 2). The license is granted for a period of three years and may be extended for another three years.

Performed exploration work is distinct from exploitation. Oil exploration works are not the subject of public works concession contract, but possibly represents a preliminary stage of exploration, without there being any specific elements matching the execution of public works[22].

Thus, petroleum operations means all activities on exploration, development and exploitation and abandonment of oil field, underground storage, transport and transit of oil in pipelines and operation of oil terminals. Through exploration and study means all operations are carried out for knowledge accumulation of petroleum geological conditions and the operating and assembly work on the surface for oil extraction.

On the other hand, in the PSA case, exploration is an intrinsic phase of the contract, it is exercising a minimum of three years which can be extended twice by two years, followed by a production of 25 years, with possibility of extending for another 25 years. However, PSA is not generally found among the contractual forms accepted in Europe.

Senegal

Article 3 section 4 c) of the Procurement Code[23] provides that contracting authorities may, without applying the procedures referred to in this code: purchase oil products intended solely for the use of government vehicles. *Per a contrario*, in other cases stipulated by the law, the principle of competition is respected and hence the award of contracts by tender.

4. Production - Sharing Agreements (hereinafter PSA)

PSA are some of the most common forms of contract on oil exploration and development in the field[24]. Through a PSA, the state, as owner of the mineral resources, instruct a foreign oil company usually from economically developed country (FOC) to provide technical and financial specific exploration and development operations. The state is

[21] The regulations entered into force in 13 November 2009, according to the Oil Law (1998) and Energy Law (2008).
[22] Antonie Iorgovan, *Tratat de drept administrativ*, Ed.C.H. Beck, Bucureşti, 2005, vol.2, p. 262-263.
[23] The Code of Public Procurements was adopted by the Decree no.2011-1048 from the 27th of July 2011.
[24] Kirsten Bildemann, *Production-Sharing Agreements-An Economic Analysis*, Oxford Institute for Energy Studies, 1999.

represented by the government or a national oil company (NOC)[25]. Contracting beneficiary company make a profit of some oil production in exchange for the risk taken for the services provided. The state, however, remains the owner of the oil produced and is entitled to participate in various aspects of exploration and development process.

The advantage of these contracts is that the state does not lose control of oil extracted, plus presenting all the features of an administrative contract. The big oil companies were initially opposed this type of contract, not wanting to invest in a business which were not allowed to control it and not wanted nor a precedent for concessions that were already in existence. Therefore, the first companies accepted the conclusion of such contracts were independent oil companies showing greater flexibility in obtaining a lower profit and compromise. PSA were first established in Indonesia and expanded globally in almost all oil exploration regions except Western Europe where only Malta offers this type of contract.

PSA has become such a formidable alternative to oil exploitation concession contract, borrowing some of its features, but coming to meet the requirements of the member's proprietary oil. The FOC has the full exploration risk, so if oil is not found, any compensation is excluded. Also, the foreign partner pays a fee (royalty) to the government for the benefit of exploration. If the country has a well developed mineral sector, stimulating exploration can be achieved by taking the risk of exploration - in part - by the government or the introduction of works or services in the contract , which is a new approach works and services contracts . So it was in the 70s in Peru and Bolivia for oil, in Indonesia for minerals respectively. PSA is used not only to carry out the works of oil, but the extraction of the ore. Foreign company shall bear the costs of exploration and feasibility risk in exchange for a portion of production if the association is successful.

With regard to mining rights, negotiating bilateral contracting is a method by which the government is addressed in order to obtain a concession for exploration, development and export of ore mining. The contract is made in exchange for a fee (royalty payment) from the company by the government. This type of contract favors the dealer, so it gaining control rights and mineral reserves, but also on production levels. Instead, he pays a fee but that is negotiable and may change according to predetermined contractual criteria (eg Abu Dhabi).

This type of contract - PSA originated in an attempt to regain control of state resources : the nationalization (Iran, Mexico), tax increases (Venezuela). Exceptions are the United States , as owner of the soil is the owner of the mineral resources of the subsoil.

Most African countries have taken the PSA system to the detriment of the concession (Nigeria, Angola, Gabon, Cameroon, Congo and Chad excluding). Nigeria recognizes the lease contract (Oil Mining Lease) granting exclusive rights to exploration, production, oil production and transportation for up to 1,295 km² for 20 years under a license for oil exploration. In PSA case, no license is required being included in the contract.

5. Conclusions

Invoking national interest, dispute over natural resources has increased in direct proportion to the increasing importance of these resources and inversely proportional to the decrease in quantity. A dull but intense battle at this point characterizes natural resources, especially of oil and mining of precious metals. Therefore, the power exerted on natural resources determines the ranking of countries of the world economic power and living standards of the population. Use of natural resources as an effective weapon in the economic consolidation became state policy and the expansion of exploration and exploitation in foreign lands required the development of complex regulations.

[25] For details reffering to the notion of "development", see.Iorgovan, *Tratat,* p. 262.

Within the framework of the complex natural resources field, the concession contract remains the main tool of obtaining benefits through their exploitation. On the other hand, exploiting implies also the protection of public interest.

These reasons provoked the need of a comparative analysis among the legislations of different countries regarding the oil and mining concession agreements. The purpose of the present research is to underline the importance of knowing how the institution of concession is regulated in different countries around the world and how the property of the natural resources – such oil and minerals – is understood within their legislation. This aim is achieved through presenting relevant aspects regarding the above mentioned issues, including a similar type of contract, which is used in some parts of the world: production sharing agreement.

We appreciate that the selection of the adequate tools in elaborating this legislation lead or not to the preservation of the natural resources in every state that owns them. And this preservation is the final and the most important aim that a state should follow, in the interest of its people and the future generations. This is the reason why the public interest should be a common criteria that must be taken into account in order for the Administration to decide upon the opportunity of operating the state's natural resources through concession agreements, in what terms and how to ensure the state control over the execution of contract. Therefore, the aim of the study is to shape an objective approach regarding the regulation of the institution of concession and its procedural aspects reffering to the protection of public interest and to the special status of the natural resources. Modern legislation and fair clauses within a concession contract would not be possible without the knowledge of what is happening around the world.

References

- Aileen Mc.Harg, Barry Barton, Adrian Bradbook, Lee Godden, *Property and the Law in Energy and Natural Resources*, Oxford University Press, 2010
- Terence Daintith, The Rule of Capture: The Least Worst Property Rule for Oil and Gas, Oxford University Press, 2010
- Katherine Southland, U.S.Electric Utilities: The First Public-Private Partnerships?, *Public Contract Law Journal*, Chicago 39 (2010)
- Ulf Hammer, Models for State Ownership on the Norvegian Continentat Shelf Property, Oxford University Press, 2010
- George Bermann, A Restatement of European Administrative Law: Problems and Prospects, Oxford University Press, 2010
- Adilson de Oliveira, *Brazil's Petrobas: Strategy and Performance*, Oxford University Press, 2010
- Yanko Marcius de Alincar Xavier, Legal Models of Petroleum and Natural Gas Ownership in Brazilian Law, Oxford University Press, 2010
- Leslie Lopez, Petronas – reconciliation tensions between company and state, Oxford University Press, 2010
- David Hults, *PDVSA from Independent to Subservience*, Oxford University Press, 2010
- Antonie Iorgovan, *Tratat de drept administrativ*, Ed.C.H. Beck, Bucureşti, vol.2
- Kirsten Bildemann, *Production-Sharing Agreements-An Economic Analysis*, Oxford Institute for Energy Studies, 1999

BRIEF CONSIDERATIONS ON THE PRINCIPLES SPECIFIC TO THE IMPLEMENTATION OF THE EUROPEAN UNION LAW

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Abstract

The principles specific to the implementation of EU law have as characteristic that they mark the specificity of EU law in relation to other legal orders, from national or international point of view. These principles include the principle of conferral, with multiple consequences on the entire EU system, but also the principle of subsidiarity, proportionality or of sincere cooperation.

Keywords: *principles of EU law; principle of subsidiarity; principle of loyal cooperation; principle of proportionality*

1. The principle of conferral[1]

Under the provisions of the Treaties, each institution shall act within the limits of prerogatives conferred on it by these Treaties.

The principle of conferral can be understood as a transfer into European Union law, of the specialty principle of international organizations. This stems from the fact that, like all international organizations, the European Union is an entity established by the Member States and does not share with them, the quality of original subject of international law.

Under Article 5 of the Treaty on European Union, "the demarcation of the Union's competences is governed by the principle of conferral". "Under the principle of conferral, the Union can only act within the limits of the competences conferred on it by the Member States in the Treaties to attain the objectives set out in those Treaties". Competences not conferred upon the Union in the Treaties remain with the Member States"[2].

Regarding the importance of the principle of conferral, it is determined by the types of competences covered in the EU treaties. In this respect, the nature and characteristics of competences will influence the process of their conferral. Thus, we can distinguish two situations. In the first case, EU competences do not replace state competences. They remain, but will be framed by rules of law originating in the EU. In this situation, the Union's institutions have the task to exercise a double action: on the one hand, to prescribe in accordance with Treaties, rules detailing and customizing the limitations set out by them and on the other hand, to ensure compliance with those limitations by Member States. In the second case, the Union's competences were intended to replace state competences. In this situation, the EU institutions have legislative powers greater than those of the Member States

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[1] Legal basis:

- Statement no. 24: The Union is not authorized „in any way to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties".

- Article 5 TEU paragraphs (1) and (2): „(1) The demarcation of the Union's competences is governed by the principle of conferral. The exercise of these competences is governed by the principles of subsidiarity and proportionality. (2) Under the principle of conferral, the Union can act only within the limits of the competences conferred on it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States".

[2] For details, see Augustin Fuerea, *„EU legal personality and areas of competence according to the Treaty of Lisbon"*, ESIJ no. 1/2010 („Lex ET Scientia International Journal").

due to the Union dimension of actions, accounting in this way, the task to enact common rules in the implementation and enforcement of which, the Member States acquire the quality of Community authorities (such a situation is encountered for example in joint policies).

Therefore, under this principle, the EU institutions carry out only those tasks that are specifically set out. At this level, the fulfillment of implicit, deducted responsibilities is not allowed.

The reason behind this principle is rooted precisely in matters pertaining to the rigor shown in the plan of action, but also to the liability[3] of institutions to whether or not fulfill the tasks / competences.

2. The principle of subsidiarity[4]

The principle of subsidiarity was introduced into the legal order of the European Union for the first time, by the Single European Act in 1986, and was firmly established in Article 3B of the Treaty of Maastricht. Until the emergence of these two conventional texts, the principle was, implicitly, present in the founding Treaties, even before ever being in the case law of the Court of Justice of the European Communities.

Under Article 5, paragraph (4) TEU, actions at EU level will not exceed what is necessary in order to achieve the objectives set out in the Treaties. This means in fact that whatever it can be done at national level by Member States, it should not be done jointly at EU level; however, if this is not possible, collective intervention is required. The competence of common law belongs, therefore, to states. More specifically, it is an acceptance from states to limit their competences in order to grant more competences to the Union. Therefore, the national competence is the rule, and the competence of the European Union is the exception. The doctrine states: "the principle of subsidiarity is a principle governing competences in the Union, and not a principle under which competences are granted"[5].

The principle of subsidiarity involves the following **two** aspects:

- the first aspect considers the situation in which the Union is competent to work in the areas and to the extent of objectives assigned to it expressly and obviously, being an exclusive competence. In fact, in this case, the implementation of the principle of subsidiarity (for example, in the areas of agricultural, transport, competition policies or common commercial policies) cannot even be brought into question;

- the second aspect relates to the case where we are in the presence of competing competences, i.e. in areas which do not belong to the Union's exclusive competences (for example, areas of social policy, health and consumer or environmental protection), and Member States cannot, because of the dimension and effects of that action, to attain their objectives. In this situation, the Union will only intervene in the cases where these objectives can be better attained at its level than at the level of Member States.

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[3] For details regarding „the liability", see Elena Emilia Ştefan, "*Răspunderea juridică. Privire specială asupra răspunderii în Dreptul administrativ*", "Pro Universitaria" Publishing House, Bucharest, 2013, pp. 40-49.

[4] Legal basis:

- Article 5 paragraph (3): „Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action can not be sufficiently achieved by the Member States at central level or at regional and local level, but the dimension and effects of the proposed action, can be better achieved at Union level.

Institutions of the Union shall apply the principle of subsidiarity in accordance with the Protocol on the application of subsidiarity and proportionality. The national Parliaments ensure the compliance with the principle of subsidiarity, in accordance with the procedure set out in that Protocol".

- Protocol (No. 2) on the application of the principles of subsidiarity and proportionality.

[5] Guy Isaac, Marc Blanquet, „*Droit général de l'Union Européenne*", 10e édition, Dalloz , 2012 , p. 91 .

Thus, considering the two aspects above mentioned, it is obvious that the principle of subsidiarity applies only in the case of shared, competing competences, and not in the case of exclusive competences of the European Union.

3. The principle of proportionality[6]

The principle of proportionality has been jurisprudentially established, being applicable, initially, in the matter of economic operators' protection against damage that could result from the application of Community law. Subsequently, it was codified by the Treaty of Maastricht, as it follows: "the Community action shall not exceed what is necessary to achieve the objectives of this Treaty"[7]. With the entry into force of the Treaty of Lisbon, the content of the principle becomes much more accurate, in the sense that "the Union's action, in content and form, shall not exceed what is necessary to achieve the objectives of the Treaties".

Unlike subsidiarity, which "aims at determining if a competence should be exercised"[8], proportionality occurs "once the decision to exercise a competence was taken, in order to determine the extent of the law"[9]. The principle of proportionality has been designed to avoid excessive regulatory activities of the Union and to find other solutions than legislative in order for the Union to achieve its objectives.

More precisely, proportionality means that, if in the application of a competence, the Union has to choose between several modes of action, it must retain that mode which leaves states, individuals and businesses, the greatest freedom. To this end, the Union must consider whether legislative intervention is urgently needed or other means could also be used, such as reciprocity, recommendation, financial support, encouraging cooperation between states or accession to an international convention. The principle of proportionality implies that, if it proves that it is more than necessary to adopt a rule in the European Union, its content should not be an excess of regulation, in the sense that it is preferable to resort to the adoption of a directive rather than to a regulation[10]. In this respect, there are also the provisions of Article 296 TFEU, namely: "if Treaties do not specify the type of act to be adopted, the institutions shall select it, from case to case, in compliance with applicable procedures and with the principle of proportionality".

In turn, the Court of Justice stated in its ruling[11], in *the Queen* case[12], that the "principle of proportionality requires that the acts of the [European Union's] institutions do not exceed the limits of what is appropriate and necessary in order to achieve the legitimate objectives pursued by the regulation in question, in the sense that when there is the possibility to choose between several appropriate measures, it must be resorted to the least onerous, and that the disadvantages caused must not be disproportionate to the aims pursued"[13]. In this respect, the academic literature[14] identifies three dimensions, specific to the principle of proportionality, namely: adequacy, necessity and non-disproportionality.

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[6] Legal basis:
- Article 5 para. (4) TEU: „Under the principle of proportionality, the Union's action, in content and form, shall not exceed what is necessary to attain the objectives of the Treaties. Institutions of the Union shall apply the principle of proportionality in accordance with the Protocol on the application of the principles of subsidiarity and proportionality".
- Protocol (no. 2) on the application of the principles of subsidiarity and proportionality.

[7] Article 5 para. (3).

[8] Jean Paul Jacqué, „*Droit institutionnel de l'Union européenne"*, 7e édition, Dalloz, 2012, p. 183

[9] Idem.

[10] Guy Isaac, Marc Blanquet, *op. cit*., p. 100.

[11] ECJ Ruling, 5 Mai 1998.

[12] C-157/96.

[13] Section 60 from the ruling.

[14] Guy Isaac, Marc Blanquet, *op. cit*., p. 100.

Therefore, according to the European Commission[15], "proportionality is a guiding principle for defining how the Union should exercise its competences, both exclusive and shared - *which should be the form and nature of EU action?* According to the TEU, the content and form of the Union's action shall not exceed what is necessary to achieve the objectives of the Treaties. Any decision should favour the least restrictive option in this regard"[16].

4. Common aspects of the principles of subsidiarity and proportionality[17]

Under Article 1 of Protocol no. (2) on the application of the principles of subsidiarity and proportionality, each EU institution shall, at all times, provide compliance with the principle of subsidiarity. In this regard, the Protocol establishes a control mechanism for compliance with this principle. Thus, before proposing legislative acts[18], the Commission, under Article 2 of the Protocol, must proceed to extensive consultations involving the regional and local dimension of actions envisaged. From the necessity of consultation, it can be derogated only in case of emergency, but in this case, the Commission must explain its decision in its proposal. Further, the Protocol provides that[19] both the European Parliament and the Commission are required to submit to national parliaments, their draft legislative acts, as well as their amended drafts, at the same time as to the Council. The Council, in turn, is required to submit to national parliaments, the draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, as well as the amended drafts.

In fact, the draft legislative acts must be grounded in terms of compliance with the principles of subsidiarity and proportionality. In this sense, Article 5 specifies that any draft legislative act must contain a detailed statement allowing the assessment of the compliance with the principle of subsidiarity. This statement includes "elements allowing the assessment of the financial impact of the draft in question and, in the case of a directive, of its implications on the rules to be implemented by Member States, including on the regional legislation, as appropriate. The reasons that lead to the conclusion that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. The draft legislative acts must consider the need to proceed so that any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimized and proportionate to the aim pursued"[20].

Within eight weeks from the transmission of the draft legislative act, the national parliaments can send to the President of the European Parliament, the Council and the Commission, a reasoned opinion stating why they consider that the draft in question does not comply with the principle of subsidiarity[21]. Once the opinion received, the President of the Council will transmit it further to the governments of states which initiated the draft

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15 European Commission Report on subsidiarity and proportionality (18th report "Better Regulation" for 2010), COM (2011) 344 final, Brussels, 10.06.2011 (http://eur-lex.europa.eu/LexUriServ / LexUriServ.do? uri = COM: 2011:0344: FIN: RO: PDF).

16 Ibid, p. 2.

17 For details, see Roxana-Mariana Popescu, *„Introducere în dreptul Uniunii Europene",* „Universul Juridic" Publishing House, Bucharest, 2011, pp. 84-95 and Mihaela-Augustina Dumitrașcu, *„Dreptul Uniunii Europene şi specificitatea acestuia"*, „Universul Juridic" Publishing House, Bucharest, 2012, pp. 66-72.

18 Under Art. 3, „In the meaning of this Protocol, "draft legislative act" mean proposals of the Commission, initiatives from a group of Member States, the European Parliament's initiatives, requests from the Court of Justice, the European Central Bank's recommendations and requests of the European Investment Bank on the adoption of a legislative act".

19 Article 4.

20 Article 5 of the Protocol.

21 Under Article 6 of the Protocol.

legislative act, respectively to the Court of Justice, the European Central Bank or the European Investment Bank, if one of these institutions is the originator of the draft legislative act.

In the case where the reasoned opinions on non-compliance of a draft with the principle of subsidiarity represent at least one third of all the votes allocated to national parliaments, or a quarter for a draft referring to the area of freedom, security and justice, the draft must be reviewed. Following this review, the Commission or, where appropriate, the group of Member States, the European Court of Justice , the European Central Bank or the European Investment Bank , if the draft legislative act is issued by them, can decide whether to maintain the draft, to amend it or to withdraw it. No matter what the solution is, it must, however, be reasoned.

Article 7 of the Protocol regulates, including the situation in which the opinion is offered in the ordinary legislative procedure. In this case, the opinions reasoned on the non-compliance of a draft legislative act with the principle of subsidiarity represent at least a simple majority of the votes allocated to national parliaments, the draft must be reviewed. Following such review, the Commission can decide to maintain the proposal, to amend it or withdraw it. If it chooses to maintain the proposal, the Commission must justify, in a reasoned opinion, why it considers that the proposal complies with the principle of subsidiarity. This reasoned opinion, as well as the reasoned opinions of national parliaments must be submitted to the Council and the European Parliament in order to be taken into consideration in the procedure[22]:

(a) before concluding the first reading, the European Parliament and the Council shall examine if the legislative proposal is compatible with the principle of subsidiarity, taking particularly into account the reasons expressed and shared by the majority of national parliaments, as well as the Commission's reasoned opinion;

(b) if, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the Council and Parliament (as legislative institutions) consider that the legislative proposal is not compatible with the principle of subsidiarity, it will not be further examined.

In the case where a Member State or a Member State on behalf of its national parliament notices that a legal act of the Union was adopted without complying with the principle of subsidiarity, it can attack that act, through an action for annulment, the Court of Justice of the European Union being the one that has the competence to rule on such actions. Such actions can be also formulated by the Committee of the Regions against legislative acts for the adoption of which the Treaty on the functioning of the European Union provides that it must be consulted23.

According to the European Commission[24], "the control and monitoring of subsidiarity issues have played an important role in the agenda of the European Parliament and the Committee of the Regions which adapted their internal procedures to more effectively analyze the impact and added value of the work performed"[25].

[22] Under Article 7, paragraph (3) of the Protocol.
[23] Article 8, paragraph (2) of the Protocol.
[24] The annual Report of the European Commission for 2012 , regarding subsidiarity and proportionality COM(2013) 566 final, 30.7.2013
(http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0566:FIN:RO:PDF).
[25] Ibid, p. 11.

5. The principle of sincere cooperation

Under the principle of sincere cooperation, "Member States are obliged to implement EU law, thereby contributing to the mission of the Union, and to refrain from any action that could jeopardize the achievement of the EU objectives"[26].

Under Article 4 TEU, "according to the principle of sincere cooperation, the Union and the Member States shall respect and assist each other in carrying out missions arising out of the Treaties. Member States shall take any general or particular action to ensure the fulfillment of obligations under the Treaties or resulting from the acts of EU institutions. Member States shall facilitate the achievement of the Union's mission and refrain from any measure detrimental to the achievement of its objectives". In this way, three obligations are established in the task of Member States[27]: two positive (the adoption of measures to implement EU law and facilitate the exercise of the Union's mission) and one negative - not to take any action that would jeopardize the objectives of the Union.

In the Union, under the principle of sincere cooperation, the Member States are invited to support the Union's actions and not to hinder its proper functioning, for instance[28] by punishing infringements of EU law, as strictly as infringements of national law or by cooperating with the Commission in procedures linked to the monitoring of compliance with EU law, e.g. by sending the documents required in accordance with the rules etc.

The sincere cooperation is a principle that the Treaty on European Union requires to be complied with by the EU institutions, too. Thus, according to Article 13 paragraph (2), the last sentence is "institutions shall cooperate with each other fairly".

The inter-institutional collaboration principle is found in Article 249 TFEU "that stipulates that the Council and the Commission must start mutual consultation and agree on the modalities of collaboration. Inter-institutional cooperation is organized in various ways, including: exchanges of letters between the Council and the Commission; inter-institutional agreements, joint declarations of the three institutions"[29] etc.

The principle has been often invoked by the Court of Justice in Luxembourg in various rulings over time. Thus, in 1983, the Court reminded in the ruling from the case *Luxembourg v./ the European Parliament*[30], that "when provisional decisions are taken, governments of the Member States must, under the rule which requires states and Community institutions, mutual obligations of sincere cooperation, rule inspired, especially from Article 5 TEC, consider that these decisions do not affect the proper functioning "[31]of the Union's institutions. In 1986, in the ruling in case *Greece v. / the Council*[32], the Court maintains its position, extending however, the sincere cooperation also to relations between the Union's institutions, saying that in the dialogue between the Union's institutions, "must prevail the same mutual obligations of sincere cooperation (...) that govern also the relations between Member States and Community institutions"[33]. The Court goes back to the principle of cooperation, in 1990

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[26] François-Xavier Priollaud, David Siritzky, „Le Traité de Lisbonne. Texte et commentaire article par article des nouveaux traités européens (TUE-TFUE)", La documentation Française, Paris, 2008, pp. 39-40.
[27] According to *Rapport* de Monsieur Etienne Goethals presented during „Réunion constitutive du comitésur l'environnement del'AHJUCAF. Ecole Régionale Supérieure de la Magistrature de l'OHADA Porto-Novo (Bénin) – Actes", http://www.ahjucaf.org/IMG/pdf/pdf_Actes_Porto-Novo.pdf.
[28] According to:
http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l10125_ro.htm
[29] http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l10125_ro.htm
[30] 10 February 1983, case 230/81
(http://curia.europa.eu/juris/celex.jsf?celex=61981CJ0230&lang1=ro&lang2=FR&type=NOT&ancre=).
[31] Section 37 from the ruling.
[32] 27 September 1988, case 204/86
(http://curia.europa.eu/juris/celex.jsf?celex=61986CJ0204&lang1=ro&lang2=FR&type=NOT&ancre=).
[33] Section 16 from the ruling.

when it specified, in the ordinance ruled in the case *Zwarveld*[34], that "in this community of law, relations between Member States and Community institutions are governed, under Article 5 TEC35, by the principle of sincere cooperation. The principle obliges not only Member States to take all measures necessary to ensure the strength and effectiveness of Community law, including, when needed, even of criminal nature, but requires equally to Community institutions, mutual obligations of sincere cooperation with Member States"36.

At a careful analysis of references made by the Court to the principle of sincere cooperation, we can see that, according to the Luxembourg Court, this principle has the following features37: it is a guiding principle of relations between Member States and EU institutions; it is a bilateral principle and it is a principle that applies not only to relations between Member States and EU institutions, but also to relations between EU institutions".

6. Conclusions

The principles of the European Union are stemming from specific principles of public international law, on the one hand, and from the principles contained in the legal systems of Member States, on the other hand. To become principles of EU law, these categories of principles are "communitarised"[38], as they are passed through the "filter of EU objectives, so sometimes, they may stand some limitations in order to comply with EU law"[39].

As we have seen, the European Union Treaties contain only general references to the principles specific to the implementation of EU law because the jurisprudence of the Court of Justice of the European Union was, in fact, the real developer of these principles.

References

- Dumitraşcu, Mihaela-Augustina, *„Dreptul Uniunii Europene şi specificitatea acestuia"*, „Universul Juridic" Publishing House, Bucharest, 2012
- Fuerea, Augustin, "EU legal personality and areas of competence according to the Treaty of Lisbon", ESIJ no. 1/2010
- Isaac, Guy; Blanquet, Marc, „*Droit général de l'Union Européenne*", 10e édition, Dalloz , 2012
- Jacqué, Jean Paul, „*Droit institutionnel de l'Union européenne"*, 7e édition, Dalloz, 2012
- Popescu, Roxana-Mariana, *„Introducere în dreptul Uniunii Europene",* „Universul Juridic" Publishing House, Bucharest, 2011
- Priollaud, François-Xavier; Siritzky, David, „Le Traité de Lisbonne. Texte et commentaire article par article des nouveaux traités européens (TUE-TFUE)", La documentation Française, Paris, 2008
- Ştefan, Elena Emilia, "Răspunderea juridică. Privire specială asupra răspunderii în Dreptul administrativ", "Pro Universitaria" Publishing House, Bucharest, 2013
- *Rapport* de Monsieur Etienne Goethals presented during „Réunion constitutive du comitésur l'environnement del'AHJUCAF. Ecole Régionale Supérieure de la Magistrature de l'OHADA Porto-Novo (Bénin) – Actes", http://www.ahjucaf.org/IMG/pdf/pdf_Actes_Porto-Novo.pdf.
- Statement no. 24: The Union is not authorized "in any way to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties"
- Protocol (no. 2) on the application of the principles of subsidiarity and proportionality
- European Commission Report on subsidiarity and proportionality (18th report "Better Regulation" for 2010), COM (2011) 344 final, Brussels, 10.06.2011 (http://eur-lex.europa.eu/LexUriServ / LexUriServ.do? uri = COM: 2011:0344: FIN: RO: PDF)

[34] Ordinance from 13 July 1990, C-2/88 (http://curia.europa.eu/juris/showPdf.jsf?text=&docid=95877&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=529108).
[35] Treaty establishing the Economic European Community.
[36] Section 17 of the Ordinance.
[37] According to Guy Isaac, Marc Blanquet, *op. cit*., pp. 101-102.
[38] Jean Paul Jacqué, „*Droit institutionnel de l'Union européenne"*, 7e édition, Dalloz, 2012, p. 530 and the next.
[39] Idem.

- The annual Report of the European Commission for 2012 , regarding subsidiarity and proportionality COM(2013) 566 final, 30.7.2013 (http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0566:FIN:RO:PDF)
- http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l10125_ro.htm
- http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l10125_ro.htm
- http://curia.europa.eu/juris/showPdf.jsf?text=&docid=95877&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=529108
- http://curia.europa.eu/juris/celex.jsf?celex=61981CJ0230&lang1=ro&lang2=FR&type=NOT&ancre=

TRANSBOUNDARY DAMAGE IN THE LIGHT OF INTERNATIONAL ENVIRONMENTAL LAW

Oana Maria HANCIU*

Abstract

Some activities that are useful for economic and social development of a State even if are not prohibited by national or international law can cause transboundary damages to other countries.

This kind of transboundary damages have given rise to theories of State responsibility and a worldwide demand for increased environmental protection.

"Under the principles of international law...no State has the right to use or permit the use of its territory in such a manner as to cause [environmental] injury ... in or to the territory of another or the properties of persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." (Stockholm Principle 21)

The paper analyses the impact of transboundary damage in the light of international environmental law and the increasing concern among States for environmental protection.

Keywords: *transboundary damage, environmental protection, State responsibility, injury, victim compensation.*

1. Introduction

Since the adoption of Stockholm Declaration[1] environmental concerning has increasingly developed and particularly after the adoption of the Rio Declaration[2]and Johannesburg Conference (2002) an impressive number of norms in environmental matters have been elaborated. The purposes of these Conferences were to debate and take action regarding global ecological problems and future development of environmental norms which also established the access to justice in environmental matters.

Some of these global ecological problems are characterized by activities that have a harmful impact on environment and that are causing an ecological damage. Article 2 of Lugano Convention[3] refers to ecological damage as "any loss or damage which can result from altered environment surroundings."

A consequence of the scientific progress in all fields - industrial, agriculture, technical field, although useful for mankind progress is also a source of possible destruction of this. In many situations, some activities conducted in one country can cause damage in another country or to areas of the global commons[4]. This kind of transboundary damage has given rise to theories of State responsibility and a worldwide demand for increased environmental protection.

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[1] UN Conference on the Human Enviroment, 1972 Stockholm Declaration (1972).

[2] Rio Declaration on Environment and Development (1992).

[3] Lugano Convention – 21 June 1993.

[4]Hanqin Xue – *Transboundary Damage in International Law,* Cambridge University Press, 2009 : " …global common, which are located beyond national jurisdiction and control. Damage to the polar areas, the high seas, or outer space during their exploration…".

Transboundary damage brings many questions regarding the responsibility of states and the obligation of *due diligence* of this states in controlling potentially harmful effects of some activities.

2. The Concept of Transboundary Damage

Expression of transboundary damage, as cross-border environmental pollution, refers to damage of environment, property or persons caused in the territory of another State. This damage can occur via land, water or air and it is not mandatory that the state affected to have common border with the State that is responsible for transboundary damage.

A definition of the concept of transboundary damage belongs to Hanqin Xue[5] who assesses that "transboundary damage embodies a certain category of environmental damage, including physical injury, loss of life and property, or impairment of the environment, caused by industrial, agricultural, and technical activities conducted by, or in the territory of, one country, but suffered in the territory of another country or in the commons areas beyond national jurisdiction and control".

The concept of environmental damage was first discussed in 1960, at the Convention on Third Party Liability in the Field of Nuclear Energy where the damage was defined as a prejudice caused to people and any prejudices caused to property. The concept was also approached in 1989 at the Conference on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, which besides damage to property speaks about "any loss or damage caused by dangerous goods through environmental contamination." Another definition was furnished at the Lugano Conference from 1993 which refers to damage as "any loss or damage that results from environmental alteration."

According to these definitions we can see that the concept of transboundary damage is fairly complex and that there is not a precise and unanimous definition. Therefore, we are going to try to identify some common and essential features regarding the concept of transboundary damage.

The first feature that is important is the relation between the activities conducted in one State and the ecological damage caused by its activities in the territory of another State.

The second feature is the existence of transboundary damage and the responsibility caused by it, responsibility that depends from the level of seriousness of damage.

The last point of view is the way that environmental damage is affecting not only the environment in general, but also people, property or goods. This environmental damage can affect in the same measure natural resources like water, atmosphere, land, biodiversity, terrestrial ecosystem, natural monuments, and also artificial environment created by man like cultural heritage.

In regard to these features, we can try to define the concept of transboundary damage as the activity conducted in one State that has a serious impact on environment, in general, on people, property and goods, in particular, from other States and that involves a certain international responsibility.

3. International environmental regulations regarding transboundary damage

The problem of international responsibility for environmental damage has raised many discussions by the doctrine. The violation of an international obligation concerning the

[5]Hanqin Xue – *Transboundary Damage in International Law*,Cambridge University Press, 2009.

environmental protection or a principle of international environmental law will determine in some cases the international responsibility of States.

Still, we need to stress the fact that in environmental field the States manifested some doubts for the enforcement of rules relating to environmental protection, even if there are many international treaties regarding international responsibility for environmental damage, some of them suggesting the solution of diplomatic path, International Court of Justice or Arbitration.

When speaking about regulation regarding transboundary damage it is crucial to note the importance role of Non-Governmental Organisations (NGOs) in these environmental matters. The importance of NGOs in the environment protection field is widely recognized, a good example of this is the fact that in 1992 during the Rio Conference more than 8000 NGOs attended the NGO forum[6]. NGOs play a major part in negotiations of protocols and treaties and also in bringing a large number of cases before International Court of Justice, International Tribunal on Law of the Sea and involving in the mechanism of access to justice in environmental field.

When trying to present the regulations regarding transboundary damage a main aspect is to determine from which State the pollution has emanated. If in some cases this is obvious (Trail Smelter dispute between Canada and United States over sulphur dioxide pollution from a Canadian smelter which damaged trees and crops on the American side of border) in other cases this problem is complicated. This is the case of acid rain which it forms from chemicals emitted from factories that rise in atmosphere and react with water and sunlight. It is also the case of ozone depletion and global warming which is the result of the consumption of fossil fuels and deforestation. Wishing to continue the issues discussed at Stockholm Conference there was established the UN Environment Program and also the UN General Assembly adopted a number of resolutions concerning the environment.

If sometimes it is complicated to determine which State the pollution has emanated, another important issue in determining the regulations regarding transboundary damage is the linkage between international human rights and international environmental law. A number of human rights norms have relevance to the environment. The first principle of Stockholm Declaration links the human rights to the environment: "Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth……Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself". Also the three principal human rights treaties – The European Convention on Human Rights (ECtHR), The American Convention on Human Rights and The African Charter on the Humans and Peoples Rights deal with the environmental protection on trying to protect the right to life, the right to health and so forth.

Another important Convention that links human rights and the environment is the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters from 1998 which states that "adequate protection of the environment is essential to human well-being." Despite being a regional treaty the Convention purpose is for global scale significance. Even former General Secretary of UN, Kofi Annan, said: "Although regional in scope, the significance of Aarhus is global. It is the most ambitious venture in the area of environmental democracy". In regard to access to justice in environmental protection, the Aartus seeks to implement Principle 1 of Stockholm Declaration and Principle 10 of Rio Declaration by trying to implement effectively remedy against environmental rights violation. It is worthy to mention here the Taskin case (2004): the applicants alleged that, as a result of the Ovacık gold mine's development and operations,

[6]See Birnie P. and Boyle A., *International Law and the Environment*, 2nd edn OUP, Oxford, 2002.

they had suffered and continued to suffer the effects of environmental damage; specifically, these included the movement of people and noise pollution caused by the use of machinery and explosives. In this case the ECtHR took both Principle 10 of Rio Declaration and the three pillars of Aarhus into consideration when it assessed the relevant law. Although Turkey had not signed Aarhus at that time the Court considered its provisions to be important and demonstrated once again the aim of Aartus Convention of global treaty.

Another important linkage in determining transboundary damage regulations is the relationship between the protection of environment and the economic development. This could be the most important challenge that the international community is facing. To find a correct balance between environment protection and economic development seems to be difficult.

According to what was analysed so far and trying to find some answers regarding State responsibility for transboundary damage and proper victim compensation we must classify the activities that generate transboundary damage in illegal activities (prohibited by international law) and not illegal activities that involve transboundary damage consequences.

The illegal character of an activity is an essential element for international liability of the State for environmental damage. In this concern, International Law Commission (ILC) work regarding the liability of States for illegal activities (2001) established that an activity is illegal from international point of view, if it is assigned to a State by international law and is a violation of an international obligation of that State (art2). There is a third element that is not mentioned in article 1 and article 2 of ILC work, and that is the "damage". This element "dominated the international liability of States doctrine until then, by considering the occurrence of damage as a *sine qua non* condition for the liability."[7]

Another important element is the proof of fault which can arise from breaches of treaty or customary international law. The proof of fault it is of paramount importance in starting the international liability of a State for transboundary damage as a consequence of lack of responsibility and *due diligence* obligation for environmental protection.

Illegal activities that involve transboundary damage can arise from air pollution, water damage and damage from land use. Very important in this regard it is the balancing interests between States on concerning sovereignty doctrine, which plays an important role in international relations between States and the concept of significant damage of the environment along with normal use of natural resources shared among States and the due diligence doctrine.

Concerning State responsibility article 8 of the ILC Articles provides that the conduct of a person or group of persons shall be considered as an act of State under international law. This article is strengthening the idea that the State is responsible for the unlawful acts of his people on consideration the fact that the State may be responsible for the failure to exercise the necessary control to prevent such act, in this case act that involve transboundary damage. The second part of the 21 Principle from Stockholm Declaration tries to underline the issue that a State is responsible for transboundary damage arising out of activities under its control, because of his duty to prevent such harmful effect from happening: "under the principles of international law...no State has the right to use or permit the use of its territory in such a manner as to cause [environmental] injury ...in or to the territory of another or the properties of persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." The same idea contains article 30 of United Nations General Assembly which says: "All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

[7]Besteliu-Miga Raluca, *Drept international public*, vol. II, Bucharest,C.H. Beck Publishing House, 2008, p.28.

The issue of State responsibility in environmental field is dominated by prevention principle and precautionary principle. The tendency nowadays is rather to prevent the occurrence of irreversible environmental damage even if the damage is unforeseeable. When it is not possible and breaches of treaties or customary international law appear the injured state may claim the harm by diplomatic actions or by recurring to international mechanism like International Court of Justice, International Tribunal on Law of the Sea and World Trade Organisations Dispute Settlement Understanding. In this regard important is "polluter pays" principle which triggers a liability mechanism for ecological damage, which can cover all the effects, in this case transboundary damage.

Another important issue is the problem of international liability of States for injurious consequences arising out of acts not prohibited by international law.

Some activities that are useful for economic and social development even if there are not prohibited by national or international law can cause transboundary damage to other countries.

As a consequence of the scientific progress in science and technology fields, some activities conducted on the territory of one country can cause damage on the territory of other countries, even if these activities are not prohibited by international law. The Chernobyl disaster and the Amoco Cadiz oil spill are only a few examples of environmental catastrophes that have crosses national borders and resulted in complex legal disputes in international law. This kind of disasters produced a worldwide demand for increased environmental protection and many discussions about more strictly international rules and compensation procedures that should be applied in transboundary environmental disputes.

Such transboundary damage can arise from ultra-hazardous activities like: nuclear activities, space activities, maritime pollution and activities involving other hazardous substances.

The nuclear activity brings in the same time risks and benefits, but the most important question is what if the risks overtake the benefits. Nuclear activities are likely to produce irreversible damage to the environment with catastrophic results to humankind - this is the case of the accident at the Chernobyl nuclear reactor in 1986. Following this catastrophe and the evident failure of URSS to inform immediate the affected States of the disaster, was adopted in 1986 the Vienna Convention on Early Notification of Nuclear Accident, which provides rules that in the event of a nuclear accident the relevant State shall inform directly or through International Atomic Energy Agency those States that may be affected by nuclear accident. In 1994 was adopted the Convention on Nuclear Safety in order to establish the responsibility for nuclear safety to the States with nuclear activity.

In addition to such nuclear accidents several conventions and protocols were adopted and they implement that fact that the operator of nuclear installation in case of a nuclear accident bear the loss and have to pay compensation to persons affected by the nuclear accident repercussions.

In contrast to nuclear damage, issues of State responsibility and international liability arising from outer space activities have drawn increasing attention in national legislature (especially for the recent development of commercial satellite services and activities) as well at international level. "In this regard, the 1972 Convention on International Liability for Damage Caused by Space Objects (the Space Liability Convention) is often considered the only example where States themselves undertake strict or absolute liability for damage caused by space objects"[8].

Marine pollution may arise from different sources like pollution from ships[9], which can be maritime oil pollution, activities on the seabed or effects of pollution originated from

[8] Hanqin Xue – *Transboundary Damage in International Law*, Cambridge University Press, 2009, p. 45.
[9] See International Convention for the Prevention of Pollution from Ships, 1973.

land but entering in the sea. As for establishing a responsibility for maritime pollution an example is the Convention on Civil Liability for Oil Pollution Damage from 1969, which provides that if there is oil pollution from a ship that causes damage to the territory or territorial sea of one State, the ship-owner is responsible for the damage.

The problem of hazardous substances is serious and difficult to control. Disposal of toxic and chemical substances are the subject of national regulation and it is a serious lack of international regulations in this field. Because of different national regulation there is a practice of seeking more permissive national regulations, especially in the Third World, and dumping these hazardous substances with severe impact on human health. In this concern were adopted the Convention on the Transboundary Effect of Industrial Accidents in 1992 and the Oslo Convention for the prevention of Marine Pollution by Dumping from Ships and Aircraft in 1972.

In 2001 ILC adopted the work "Prevention of transboundary damage from hazardous activities". "The whole concept of this work is based on the idea of pre-eminence of the duty of prevention, before the duty for repairing and compensation of damage"10.

As a completion of the project from 2001, ILC adopted in 2006 the work with the title "Draft principles on the allocation of loss in case of transboundary harm arising out of hazardous activities" and submitted it to the General Assembly. The scope of this work is presented in the first principle which says that "the present draft principles apply to transboundary damage caused by hazardous activities not prohibited by international law". The second principle deals with the notion of "damage", which was omitted from the work regarding the liability of States for illegal activities (2001). In this regard, ILC in principle 2 established that "damage" means significant damage caused to persons, property or the environment. It also explains the terms of environment, state of origin, transboundary damage, victim, operator and hazardous activities, considering it useful to insert these mentions in order to better define the notion of damage, that was previously considered by part of the doctrine and international jurisprudence as a sine qua non condition of responsibility, even if in the ILC work (2001), in order to determine State responsibilities, illicit conduit and imputability were considered necessary and sufficient.

The purpose of this draft as it is presented in principle 1 is to „ensure prompt and adequate compensation to victims of transboundary damage and to preserve and protect the environment in the event of transboundary damage... ". In the end, principle 8, states that „each State should adopt the necessary legislative, regulatory and administrative measures to implement the present draft principles".

The projects for codification of international responsibility of the States from 2001 and 2006 even if there are useful from the doctrinal point of view, due to the fact that they have been elaborated in quite a long time period, they have lost part of the interest they presented some time ago, in special due to the present international trend to institute juridical norms that are specific in the matter of States international responsibility (i.e. Sea Law, Air Law, Regime of International Commerce etc.).

It is unlikely that the articles from ILC work (2001) and principles from ILC work (2006) will form the basis for an international treaty or to be adopted in another form.

Even so, the works of ILC are likely to influence the development of customary international law on transboundary damage.

It is worthy to mention also about the "injurious consequences of human activities in the areas beyond the limits of national jurisdiction or control, usually referred to as *the global commons*, or simply *the commons*"[11]. In this regard the first signal for the need of development legal rules of State responsibility and liability for damage caused to the areas

[10]Besteliu-Miga Raluca, *Drept international public*, vol. II, Bucharest, C.H. Beck Publishing House, 2008, p.46.
[11]Hanqin Xue – *Transboundary Damage in International Law*, Cambridge University Press, 2009, p. 191.

beyond the limits of national jurisdiction was in 1972 at the Stockholm Declaration on the Human Environment in its Principles 21 and 22. One decade later, in Montego Bay, the Convention on the Law of the Sea in article 235 stresses the importance of State responsibility and liability for damage to the marine environment.

Issues as marine environmental protection12, the depletion of the ozone layer13, biological diversity14, climate change15 and land degradation16 are more and more in the attention of international environmental law which recognises the urgency of developing a comprehensive international response to this environmental changes, and drafting rules of international liability for damage caused in the commons areas.

These issues raised profound questions about environmental protection and the human rights impact if this protection is not sustained by stricter rules of international liability for damage caused in this areas. There is obvious a need for action from international actors in this concern, knowing although the fact that the political will is of paramount importance in settling international rules for environmental protection and transboundary damage.

In order to prepare for the challenges of this century, especially the development of scientific and technical filed, and to avoid humanitarian and environmental catastrophes, the international community must act now and deal with these issues.

4. Conclusions and future perspectives

Despite the developments in environmental field, despite the great number of treaties, protocols and NGOs implication, the international response to concrete transboundary damage remain week and most of the time at theoretical level.

The problem to identify from which States the pollution is emanated, especially acid rain, ozone depletion and global warming, is difficult and it is the result of uncontrollable industrial developments, from ecological point of view, and irrational exploitation of natural resources.

The environment protection cannot be separated by the concept of human rights. It was demonstrated that environmental damage has great impact to humankind, especially to the right to life and right to health.

The most important challenge that international community is facing is the need for economic developments which comes with a demand for environmental protection. It is important to find the right balance between the two, because as we have seen in nuclear accidents, for instance, even if the nuclear activity has its benefits, the risk is greater and many times the environmental damage is irreversible.

Unfortunately, time demonstrated that only after serious ecologic damage international community tried to take measures and adopt rules in environmental field. States should prevent or minimise an environmental harm, particularly in the case of transboundary damage which most of times have serious human rights consequences.

On the same time there it is a need for international harmonization of environmental norms and a good cooperation at international level so that the environmental protection to be efficient.

Access to justice, access that many times is difficult to obtain, because most of the treaties do not offer a simple and easy mechanism of access to justice and compensation remains a problem. In this regard a step was made with Aarhus Convention which suggested

[12]See the International Convention on Liability and Compensation for Damage in Connection with the Carrige of Hazardous and Noxious Substances by Sea.
[13]See the Convention for the Protection of the Ozone Layer (Vienna, March 22, 1985).
[14]See the Convention on Biological Diversity (Rio de Janeiro, June 5 , 1992).
[15]See UN Framework Convention on Climate Change (New York, May 9, 1992).
[16]See UN Convention to Combat Desertification in Thouse Countries Experiencing Serious Drought and /or Desertification, Particulary Africa (Paris, June 17, 1994).

that the access to justice to be more effective and gives remedies against environmental harm, but it is not enough.

Considering this facts, it is obvious that there is the need for international cooperation and enforcement of rules in environmental field and even a fusion of environmental norms with the purpose to simplify the procedures and give real effectiveness to this norms, because the normative background in this field is over-dimensioned and sometimes it is difficult to distinguish between the juridical norms and soft law.

References

- Boyle Alan - Globalising Enviromental Liability: The Interplay of National and International , Journal of Environmental Law (2005) Vol 17 No 1, 3–26
- Hanqin Xue – *Transboundary Damage in International Law*, Cambridge University Press, 2009
- Besteliu-Miga Raluca, *Drept international public, vol. II*, Bucharest, C.H. Beck Publishing House, 2008
- Anghel Doina – *Raspunderea juridical privitoare la protectia mediului*, Bucharest, Universul Juridic Publishing House, 2010
- Dutu Mircea – *Dreptul International al Mediului*, Bucharest, Economica Publishing House, 2004
- Shaw Malcom – *International Law*, Fifth Edition, Cambridge University Press, 2004
- Constantin Valentin – *Drept International*, Bucharest, Universul Juridic Publishing House, 2010
- http://www.ciel.org/Publications

NATIONAL COUNCIL FOR COMBATING DISCRIMINATION – COURT OF JUSTICE OF EUROPEAN UNION – BUCHAREST COURT OF APPEAL. CAUSE C-81/12

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Abstract

The scope of this investigation consists in closing the jurisdictional circle initiated in 2010 and analysing the national and European procedural, jurisdictional-administrative issues, in case of notifying some institutions related to certain discriminatory assertions. The investigation relies on assertions made during a radio show.

On 12 October 2011 the Bucharest Court of Appeal ruled the notification of the Court of Justice of European Union related to preliminary questions formulated and ordered the suspension of the case until the settlement of the procedure.

In 2013, the Bucharest Court of Appeal, although initially accepting the preliminary application of ACCEPT, submitting the case to the Court of Justice of European Union in order to determine the manner of interpretation of communitarian legislation related to the claims of plaintiff, eventually all arguments of CNCD have been accepted that is the warning is an effective, reasonable, dissuasive and (contextual) proportional sanction, and such declaration cannot be understood as a discrimination in the labour field.

De facto, the assertions of CNCD were in full agreement with the resolution of the Court of Justice of European Union, that is the ***communitarian legislation does not exclude the application of some sanctions without pecuniary character****, such as the sanction with warning, since this kind of sanction does not have only a symbolic character, being a contraventional legal sanction, mainly when associated a relevant degree of advertising (such in the case), and the addressee is addressed, with arguments, directly and expressly the recommendation of meeting the non-discrimination principle, under the implicit effect of a more drastic sanction in case of relapse (discrimination in the same field).*

Keywords: *discrimination related to sexual orientation, burden of evidence, National Council for Combating Discrimination, Bucharest Court of Appeal, and Court of Justice of European Union*

I. Introduction

The scope of this investigation consists in closing the jurisdictional circle initiated in 2010 and analysing the national and European procedural, jurisdictional-administrative issues, in case of notifying some institutions related to certain discriminatory assertions. The investigation relies on assertions made during a radio show. During the investigation, the following are analysed: notification of the National Council for Combating Discrimination (CNCD), CNCD resolution, appeal of CNCD judgement at Bucharest Court of Appeal, notification of the Court of Justice of European Union by Bucharest Court of Appeal and starting the procedures at the Court of Justice of European Union.

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The scientific demarche has as objectives a better understanding of the mechanisms of operation of every institution involved in this process as well as the chronology of the terms necessary to solve this case.

By Judgement 276/13 October 2010 CNCD[1] decided that the assertions of Mr. B. refusing to employ at the team the football player I. I. for the suppositions of being homosexual, affect the dignity right of homosexual persons. On the other hand, CNCD rejected the demands of A. Association to sanction S. Club for labour discrimination. CNCD motivated the decision by the fact that, although he was shareholder of S. Club on the date of making the assertions, Mr. G. B. was not representative of the club.

The non-governmental association A. appealed, by an application of interpretation, the Judgement 276/13 October 2010 CNCD at the Bucharest Court of Appeal and asked for the annulment of the administrative deed, in species the Judgement 276/13 October 2010 passed by CNCD. The demands of non-governmental association ACCEPT was registered on 21 December 2010 at Bucharest Court of Appeal.

On 12 October 2011 the Bucharest Court of Appeal ruled the notification of the Court of Justice of European Union related to the preliminary questions formulated and ordered the suspension of the case until the settlement of the procedure.

In 2013, the Bucharest Court of Appeal, although initially accepting the preliminary application of A., submitting the case to the Court of Justice of European Union in order to determine the interpretation of communitarian legislation related to the claims of plaintiff, eventually, it accepted all arguments of CNCD that is the argument is an effective, reasonable, dissuasive and (contextual) proportionally sanction, and such declaration cannot be understood as a discrimination in the labour field.

The assertions of CNCD were in full agreement with the judgement of CJUE, that is the communitarian legislation does not exclude the application of some pecuniary sanctions, as in the case of sanction with warning, since this kind of sanction does not have only a symbolic nature, being a contraventional legal sanction, mainly if attached a relevant degree of advertising (as in the case), and the addressee is submitted, with arguments, directly and expressly the recommendation of meeting the principle of non-discrimination, under the implicit effect of a more drastic sanction in case of relapse (discrimination in the same field).

This as much as the victim of discrimination holds the legal means of applying tort liability of *damni culpa, dati reparation nature*, in conformity to art. 27 of O.G. no. 137/2000[2]. We declare as well that it is decisive for the settlement of the case the issue that, in species, not on the prescription of applying the contraventional sanction with fine (and, thus, the impossibility of applying another sanction than warning) relied the sanction with warning, but on the conviction of the official examiner, correlatively to its own competences in determining the form of contraventional legal liability , on the satisfying nature of the sanction with warning, and the proportionality of legal constraint, circumscribed to the degree of (low) social risk, not generic, but actual differentiated from the antisocial-reprehensible deed.

On the other hand, in terms of legal liability in the labour field, in the case, the court considered the assertions, as in the answer of CJUE, that is S.C. Fotbal Club S. Bucureşti S.A., to the extent of considering the dissociation of the declarations of „legal third party ” – B. (based on the assertion that he did not refuse to contract such sportsman due to sexual orientation / contracting which he never targeted in fact, not initiating any demarche in this respect, all being reduced to the assertion of the “third party”), third party with no legal relation, or legal representation, is not liable of legal liability related to a fact of discrimination in the labour field .

[1] See Resolution 276/October 13th 2010 of the National Council for Combating Discrimination.
[2] See O.G. no. 137/2000 on the prevention and punishment of all forms of discrimination, republished.

Also, the Bucharest Court of Appeal considered as well the assertions related to the ungrounded nature and, simultaneously, inadmissible, of the claim of plaintiff considering the application of a sanction agreed by it, since the plaintiff does not hold the legitimacy to claim a breach of rights under the protection of art. 1 of Law no. 554/2004 in the context of managing the remedy at law against the resolution of Council, to the extent that its petition was „accepted" being determined the incidence of the disposals of O.G. no. 137/2000R[3], as claimed in the report administratively-jurisdictionally addressed.

II. From the National Council for Combating Discrimination to the Court of Justice of European Union – Case C-81/12

By application registered on the docket of Bucharest Court of Appeal, the plaintiff A. Association in opposition to the defendant the National Council for Combating Discrimination, asked the court to cause: partly annulment of the Resolution no. 276/13.10.2010 passed by CNCD in the file no. 84/2010, related to point 1 in the enacting terms, by which the defendant decides that the issues notified are beyond the incidence of a potential work relation, based on art. 2 par. 1 corroborated to art. 5 and 7 of O.G. no. 137/2000, republished and related to point 3 of the enacting terms, when the defendant decides to sanction the plaintiff G. B. by warning; to determine that the issues notified by the plaintiff are part of labour field, subject to Chapter II, Section I – Equality in economic activity and in the field of employment and profession, mainly art. 2 par. 1 corroborated to art. 5 and 7 of O.G. no. 137/2000, republished and to compel the defendant to consequently remake the investigation; to determine that in front of CNCD the plaintiff has accomplished the obligation of proving the existence of some deeds that allow to be implied the existence of a direct or indirect discrimination (presumption of discrimination), which involves the fact that the plaintiffs G. B. and S.C. Football Club S. Bucharest S.A. have the obligation to prove that the facts do not represent a discrimination, based on art. 20 par. 6 of O.G. no. 137/2000, republished and to compel CNCD to consequently remake the investigation; 4. to determine that, considering the circumstances of the case, the breaches of O.G. no. 137/2000, republished, are meant to entail the sanctioning by contraventional fine instead of the warning ruled by CNCD on point 3 of the enacting terms[4].

In fact, the plaintiff declared that on 09.03.2010 it registered at CNCD a notice claiming the discriminatory nature based on the criterion of sexual orientation of the assertions of Mr. G. B. made in mass media on 13.02.2010. The complaint was grounded on the disposals of art. 2(1) corroborated to art. 5 and 7, art. 15, art. 20, art. 26 and art. 28(1) of O.G. no. 137/2000, republished. On the first hearing, the plaintiff asked to be introduced in the case S.C. Fotbal Club S. Bucharest S.A., demand accepted by defendant.

By Resolution no. 276/13.10.2010[5], the defendant decided that the issues notified to be placed beyond the incidence of a potential labour report in terms of art. 2 par. 1 corroborated to art. 5 and art. 7 of O.G. no. 137/2000 republished, subject to the disposals of art. 2 par. 5 and art. 15 of O.G. no. 137/2000, republished. By the same resolution, the defendant determined the sanctioning of the plaintiff G. B. by warning, based on art. 2 par. 11 and art. 26 par. 1 of O.G. no. 137/2000, republished.

The resolution no. 276/13.10.2010 is no legal related to the points 1 and 3 of the enacting terms, due to the following reasons:

1. Discrimination in labour field[6];

[3] See O.G. no. 137/2000 on the prevention and punishment of all forms of discrimination, republished.
[4] See Civil Judgement No. 4180/ 23.12.2013, Bucharest Court of Appeal.
[5] See Resolution 276/October 13th 2010 of the National Council for Combating Discrimination.
[6] See Civil Judgement No. 4180/ 23.12.2013, Bucharest Court of Appeal.

The defendant did not apply correctly O.G. no. 137/2000, republished, since it rejected the classification of facts in the labour field. Such an interpretation is non-conform as well to art. 2 of Directive 2000/78/CE of Council dated 27 November 2000 related to the creation of a general frame in favour of equal treatment in employment and occupation of work force.

Although it claims in the recitals C-54/07, (Feryin Case), CNCD does not observe the standards imposed by the European Court of Justice in such case.

In Feryin Case, the European Court of Justice decided that it is direct discrimination the public declaration of the administrator of a company of refusing to recruit individuals of certain race or ethnic origin, declaration with a clear potential of discouraging certain possible candidates, generating the prevention of their access on labour market (C-54/07, paragf. 25, 28).

Before CNCD, one did not contest: public declarations made by Mr. G. B., as shareholder of S.C. Football Club S. Bucharest S.A. on the date of declarations and the lack of reaction of S.C. Football Club S. Bucharest S.A. on such declarations. On the contrary, the representative of S.C. Football Club S. Bucharest S.A. acknowledged that they are not interested in employing a gay football player „since the team is like a family", the presence in the team of a gay „would generate tensions in the team and among the spectators".

In Feryin Case, the European Court of Justice does not distinguish between different representatives of the employer, what is important is that the declaration is made in public and perceived as coming from the employer (C-54/07, paragf. 25, 28). Or it is notorious the fact that Mr. G. B. is the manager, financing the S. Club and establishes the policies of the club. Upon completing such issues related to notoriety, Mr. G. B. was shareholder on the date when he made such declarations, he was self-introducing himself and he was perceived as the manager of S. Club.

Also, the Feryin Case does not distinguish between different kinds of recruiting the staff – based on a public offer or direct negotiation – what is important is that such declaration has clear potential of discouraging certain potential candidates to accede to certain work relations with S.C. Football Club S. Bucharest S.A., since the gay football players are rejected (C-54/07, paragraph 25, 28). In addition, in the jurisprudence of the European Court of Justice (Bossman Case, C-415, 15 December 1995) it isn't made any difference between the labour field in general and the labour field of football players, since it has been acknowledged that communitarian law for protection against discrimination based on the known criteria includes in the category of labour relations "practicing sports, in particular, the professional football players who exercise a waged activity or render remunerated services, /.../ as long as it is an economic activity" (paragraph. 6,1.5).

Although CNCD claims this case in this species, decides contrary to the standards expressed in the Bossman Case. In addition, it cannot be accepted the assertion of CNCD that the professional football player has nothing to declare related to being employed by a tea.

The European Court of Justice stated expressly that sanctioning direct discrimination in the labour field in case of a public declaration that involves a discriminatory criterion on employment must be enforced regardless the existence or inexistence of an identifiable individual filing a complaint for suffering the consequences of imposing the discriminatory condition on recruitment. The assertions of S.C. Football Club S. Bucharest S.A., stating that no negotiation process was initiated for recruitment, thus employment was not considered on any moment related to the player I. I, are not relevant in the case

2. Presumption of discrimination and rebutting the evidence duty[7];

The defendant CNCD did not apply correctly O.G. no. 137/2000, republished related to considering the presumption of discrimination and rebutting the evidence duty by plaintiffs.

[7] See Civil Judgement No. 4180/ 23.12.2013, Bucharest Court of Appeal.

According to art. 20 par. 6 of O.G. no. 137/2000, republished, before CNCD, the plaintiff accomplished the obligation to prove the existence of some facts that allow to be supposed the existence of a direct or indirect discrimination (presumption of discrimination), which involves that the plaintiffs G. B. and S.C. Football Club S. Bucharest S.A. have the obligation to prove that the facts do not represent a discrimination (rebutting the evidence duty). The enforcement by CNCD in the case is not conform to art. 10 of Directive 2000/78/CE of Council dated 27 November 2000 to create a general frame in favour of equal treatment related to employment and occupation of labour force.

The plaintiff proved in front of CNCD facts suggesting that, on behalf of the employer S.C. Football Club S. Bucharest SA, Mr. G. B. made public declarations related to imposing some direct discriminatory conditions based on criteria of sexual orientation in recruiting football players for S. football team. Based on such facts demonstrated, in conformity to art.20 par.6 of OG no. 137/2000 republished and the jurisprudence of European Court of Justice mentioned, CNCD should consider a discriminatory presumption in the labour field related to S.C. Football Club S. Bucharest S.A. and to rebut the evidence duty towards the latter. In particular, it should ask S.C. Football Club S. Bucharest S.A. to prove that in practice the recruitment is not possible as stated in such public declaration. CNCD did not adopt such legal procedural attitude.

In the case, simple means of demonstrating a recruitment practice are possible in conformity to the principle of equal treatment and non-discrimination including based on the criteria of sexual orientation – express disposals in the recruiting policy, a reaction of S.C. Football Club S. Bucharest S.A. contradicting publicly the declaration given in the case, an audit in the field of equality and non-discrimination, supporting some relevant initiatives in the field of equal chances and non-discrimination, etc.

3. Sanction of contraventional fine[8];

In the case, this sanction is not effective, proportional and dissuasive, according to art. 17 of Directive 2000/78/CE, both opposite to the classification assigned by CNCD to the case, and if it were considered upon the completion and breach of art.2 par. 1 corroborated to art. 5 and art.7 of O.G. no. 137/2000, republished.

In the case, it is necessary the application of the sanction of contraventional fine since the fact was qualified as harassment (art. 2 par. 5) and prejudicing the dignity (art. 15), it was committed in public, the declarations were given in several mass-media means, the public declarations do not target a sole individual, but prejudice the dignity and free access on labour market of a group or community of individuals. In addition, the personal circumstances of Mr. G. B. are meant to justify the enforcement of the sanction of contraventional fine instead of warning. Thus, Mr. G. B. is Euro parliamentarian of Romania, public person and proves a repeated discriminatory conduct – being the third case in the last four years when CNCD observes discrimination facts committed by him (CNCD resolution no. 397/04.10.2007 and CNCD resolution no. 602/26.11.2009).

In law, the plaintiff bases the action on the disposals of law no. 554/2004, on the disposals of O.G. no. 137/2000 and of Directive 2000/78/CE of Council dated 27 November 2000 to create a general frame in favour of equal treatment related to employment and occupation of labour force.

By the statement of defence drafted in the case, the defendant CNCD asked to be rejected the action as insubstantial.

By resolution passed in the open session dated 12.10.2011, the Bucharest Court of Appeal admitted the petition drafted by the plaintiff and ruled the notification of the European Court of Justice with the following preliminary questions:

[8] See Civil Judgement No. 4180/ 23.12.2013, Bucharest Court of Appeal.

1. One may apply the disposals of art. 2 par. (2) lett. (a) of Directive 2000/78/EC of Council dated 27 November 2000 to create a general frame in favour of equal treatment related to employment and occupation of work force if a shareholder of a football club self-represented and is perceived in mass media and in the society as the main manager („chief") of such football club declares in mass media the following:

„I won't accept a gay at S. not if team is dissolved. The rumours are rumours, but to write something like this if it's not true and to publish on the first page maybe it is a lie that he is gay (n.r. the Bulgarian football player I. I.), but what if it's true? I told an uncle of mine, who did not believe in devil and in Christ. I told him: «Let's suppose that God does not exist. But what if He does? What do you loose if you receive the communion? Would you dislike going in Heaven?» And he told me I was right. One month before he died, he went to receive the communion. God rest his soul. There is no place in my family for a gay and S. is my family. I prefer playing with a junior than with a gay, there is no discrimination in my opinion. I cannot be forced to work with someone. I have the right to work with whom I like as they have rights as well."

„ I won't accept a gay at S. not if team is dissolved! Maybe it is a lie that he is gay, but what if it's true? There is no place in my family for a gay and S. is my family. I prefer playing with a junior than with a gay. There is no discrimination in my opinion. I cannot be forced to work with someone. I have the right to work with whom I like as they have rights as well. Even if God tells me tonight that 100% I. is not gay, I still refuse to take him! The papers wrote too much that he is gay. I won't accept him not even ŢSKA gives him to me for free! He may be the greatest hooligan or drunker /.../ but if he is gay, I never want to hear of him."

2. To what extent may the above declarations be qualified as „facts that may presume the existence of a direct or indirect discrimination" in conformity to art.10 par. (1) of Directive 2000/78/CE of Council dated 27 November 2000 to create a general frame in favour of equal treatment related employment and occupation of work force, concerning the plaintiff S.C. Football Club S. Bucharest SA?

3. To what extent we deal with a *probatio diabolica* if it appears in the case the rebutting of evidence duty according to art. 10 par. (1) of Directive 2000/78/CE of Council dated 27 November 2000 to create a general frame in favour of equal treatment related employment and occupation of work force and the plaintiff S.C. Football Club S. Bucharest S.A. is required to demonstrate that the principle of equal treatment has not been breached, in particular to prove that employment does not interfere with sexual orientation?

4. Whether the impossibility of applying the contraventional sanction with fine in the cases of discrimination pursuant to the expiration of the prescription term of 6 months as of the date of committing the fact, according to art. 13 par. (1) of Government Ordinance no. 2/2001 related to legal regime of contraventions, is contrary to art. 17 of Directive 2000/78/EC of Council dated 27 November 2000 to create a general frame in favour of equal treatment related employment and occupation of work force considering that the sanctions in the cases of discrimination must be effective, proportional and dissuasive?

Bucharest Court of Appeal ruled the suspension of the case until the settlement of the procedure. On the date of 08.05.2013, it has been forwarded to the court the CJUE resolution passed in the case C-81/12, having as object the preliminary petition of decision formulated in terms of article 267 TFUE by Bucharest Court of Appeal.

Court of Justice of European Union declared:

1. Article 2 paragraph (2) and article 10 paragraph (1) of Directive 2000/78/EC of Council dated 27 November 2000 to create a general frame in favour of equal treatment concerning employment and occupation of work force must be construed in the sense that the facts similar to those on the origin of the main dispute may be qualified as „facts which do not allow the presumption of existence of a discrimination" related to a professional football club

if the targeted declarations are made by an individual who introduces himself and is perceived in media and in the society as the man manager of a club, without being necessary to have however the legal capacity to hire a club or to represent it in the recruitment field.

2. Article 10 paragraph (1) of Directive 2000/78 must be construed in the sense that, based on the hypothesis that the facts similar to those on the origin of the main dispute would be classified as „facts that allow the presumption of the existence of a discrimination" based on reasons of sexual orientation committed upon the recruitment of players by a professional football club, the burden of proof, as conceived in article 10 paragraph (1) of Directive 2000/78, does not entail the acceptance of an evidence impossible to be presented without affecting the right to observe private life.

3. Article 17 of Directive 2000/78 must be construed in the sense that it opposes a national regulation based on which, if a discrimination is determined by reason of sexual orientation, according to this directive, it is not possible to apply but a warning, as the one debated in the main dispute, when such a finding appears pursuant to the expiration of a term of prescription of six months as of the date of committing the fact if, based on the same ruling, such a discrimination is not sanctioned based on substantive and procedural issues which provides the sanction an effective, proportional and dissuasive nature. The submitting court has the obligation to consider if this is the situation of such ruling in the main dispute and, if the case, to construe the national law, to the largest extent possible, in the light of the text and finality of the directive mentioned in order to achieve the result followed by it.

Analysing the documents and works of the file, considering the object of the summons and legal grounds incident in the case, the Bucharest Court of Appeal considered the following:

By Resolution no. 276/13.10.2010, the National Council for Combating Discrimination determined that the issues notified by the petitioner A. Association related to the plaintiffs G. B. and S.C. Football Club S. are beyond the incidence of a potential work report, in terms of art. 2 par. 1 corroborated to art. 5 and art. 7 of O.G. no. 137/2000 concerning the prevention and sanctioning of all discriminatory forms, republished, entering under the incidence of the disposals of art. 2 par. 5 and art. 15 of O.G. no. 137/2000.

Consequently, National Council for Combating Discrimination ordered to be sanctioned the plaintiff G. B. by warning, according to art. 2 par. 11 and art. 26 par. 1 of O.G. no. 137/2000.

The resolution stipulated that, by petition registered with the National Council for Combating Discrimination under no. 1811/09.03.2010, the petitioner A. Association declared that G. B. made discriminatory declarations related to the sexual orientation of a Bulgarian football player and he breached thus the principle of equality in the field of employing individuals with homosexual orientation. Thus, in an interview related to a possible transfer of the Bulgarian football player I. I. and his potential sexual orientation, G. B. declared that he prefers using a junior player than buying a player with other sexual orientation.

In the procedure carried out in front of CNCD, the plaintiffs G. B. and S.C. Football Club S. stated that such declarations represent an exercising of the right to free expression not being meant to demonstrate the existence of constant rules or practices in the field of employing football players at S.C. Football Club S., based on a discriminatory criterion starting with the sexual orientation of players. It has been declared as well that, as long as, in fact, one never approached the issue of hiring the player I. I. at S. Bucharest S.A., it cannot be considered that such declarations are meant to breach the principle of non-discrimination, these being subscribed to the right to freedom of opinion secured by CEDO.

The Board of Directors of CNCD considered that the issues claimed shall be analysed beyond the sphere of application of a potential labour report, since the declaration of the plaintiff couldn’t be assimilated as coming from an employer/legal representative of the

employer or a person in charge with employment, although he was holding on the date of such declarations the capacity of shareholder at the Football Club S. Bucharest S.A. in what concerns the consequences caused by such declaration, unlike Feryin case, this does not have the same reverberation over potential candidates, since the recruitment process is not performed based on a public offer, or direct negotiation. On the other hand, S.C. Football Club S. did not initiate any process of negotiation for recruitment, thus employment was out of question on any moment related to the player I. I., which excludes the existence of some potential conditions or discriminatory refusal.

The Board of NCCD considered however that the assertions of the plaintiff represent a conduct in close connection to sexual orientation and by their nature create a hostile, intimidating and offensive frame particularly affecting a community of individuals, in species, the individuals with sexual orientation. From this point of view, the assertions of the plaintiff, under the effect created, were meant to affect the right to dignity of homosexual individuals in terms of the disposals of art. 2 par. 5 of O.G. no. 137/2000.

The assertions of plaintiff related to including the issues notified in the sphere of labour reports, according to art. 2 par. 1 corroborated to art. 5 and art. 7 of O.G. no. 137/2000, are insubstantial.

The Bucharest Court of Appeal considered that, according to art. 2 par. 1 of O.G. no. 137/2000, „In terms of this ordinance, discrimination means any difference, exclusion, restriction or preference, based on race, nationality, ethnie, language, religion, social category, convictions, sex, sexual orientation, age, handicap, non-contagious chronic disease, HIV infection, member of a disfavouring category, as well as any other criterion that has as scope or effect the restriction, removal of acknowledgement, use or exercise, under equality conditions, of human rights and fundamental liberties or rights acknowledged by law, in the political, economic, social and cultural field or in any other fields of public life."

According to art. 5 of the said ordinance, „It is a contravention, based on this ordinance, the conditioning to participate to an economic activity of an individual or the selection or free exercising of a profession of belonging to a certain race, nationality, ethnie, religion, social category, respectively convictions, sex or sexual orientation, age or member of a disfavouring category."

Art. 7 par. 1 and 2 of the same normative act stipulates: „(1) It represents a contravention, according to this ordinance, the refusal of a physical or legal person to hire an individual based on the reason that he/she belongs to a certain race, nationality, ethnie, religion, social category or disfavoured category or due to his/her convictions, age, sex or sexual orientation, except for the cases stipulated by law. (2) It represents a contravention, according to this ordinance, the conditioning for occupying a position by announcement or competition, launched by employer or by its representative, belonging to a certain race, nationality, ethnie, religion, social category or disfavoured category, of age, sex or sexual orientation, respectively the convictions of candidates, except for the situation stipulated by art. 2 par. (9)."

The principle of equal treatment opposite to all the other employees and employers, forbidding any form of discrimination, ruled by labour code, is ruled in the contents of O.G. no. 137/2000, which on art. 1 par. 2 lett. i sets forth: „The principle of equality between citizens, of exclusion of privileges and discrimination are mainly secure in exercising the following rights: i) right to work, to freely choose the profession, to fair and satisfying work conditions, to protection against unemployment, to an equal wage for equal work, to fair and satisfying remuneration /.../".

According to art. 3 lett. a of O.G. no. 137/2000, „The disposals of this ordinance are applied to all natural or legal, public or private persons, as well as to the public institutions with attributions related to: a) employment conditions, criteria and conditions of recruitment,

selection and promotion, access to all forms and levels of orientation, education and professional training;".

The legal disposals mentioned assure transposing in the national law the disposals of Directive 2000/78 and of Directive 2000/43.

According to art. 1, the scope of the Directive 2000/78 is to rule the general frame for combating discrimination based on the criterion of religion or convictions, disability, age or sexual orientation in what concerns the field of labour and occupation, with a view to implement the principle of equal treatment in the member states of European Union.

According to art. 2 of Directive 2000/78, the equality principle represents the absence of any direct or indirect discrimination, based on one of the reasons stipulated in art. 1.

III. Conclusion

In the recitals of CJUE resolution pronounced in the case C-81/12, it is considered that the appreciation of the facts that allow the presumption of existence of discrimination belongs strictly to the national court or to other competent national authority, without performing any analysis related to the nature of the fact submitted to judgement, the competence of judicial examination being exclusively incumbent upon the national court[9].

As for the mechanism of the burden of proof in the field of non-discrimination, stipulated by art. 10 par. 1 of Directive 2000/78 and transposed in the national legislation by art. 20 par. 6 of O.G. no. 137/2000, by the same resolution, CJUE declares that, only if the facts that allow the presumption of existence of a discrimination are demonstrated (by the plaintiff), the defendant has the obligation to prove that, despite such discrimination appearance, the principle of equal treatment was not breached.

In the case, the plaintiff did not demonstrate the existence of an effective refusal of the football club to contract the sport services of the player I. I., refusal presumed to have as object a criterion of discrimination, so as, according to the CJUE argumentation, the individual accused of discrimination in the labour field is in the position of proving that this is not the reason of employment refusal.

Thus, the Football Club S. Bucharest S.A. declared that it never intended to transfer the sportsman I. I. and he did not initiate an actual demarche of negotiation with the club holding the federative rights of the player. In this respect, CNCD correctly considered that in the case of professional football players, the recruitment process is atypical, meaning that it does not involve a public offer, or direct negotiation (except for the situation when the sportsman has no contractual obligation, which is not the case), but a specific process of negotiation between the contracting sport clubs.

The plaintiff did not demonstrate either that the Football Club S. Bucharest S.A. was identified on any moment with the declarations of the defendant G. B. or that, as employer, practiced a discrimination policy based on the criterion of sexual orientation.

Such declarations have been given in the context of a journalistic demarche, when it was the author of the interview who approached the issue of sexual orientation of such player, not the defendant G. B.. Such declarations expressed a personal position of defendant, being included in a context associated to his religious faith and they were not appropriated by the football club.

As for the notoriety provided by the capacity of „manager" of the defendant G. B., based on the writs attached to the file of the case, it does not result that he was holding, on the date of such declarations, the capacity of legal representative of the football club. According to the writ issued by the trade register (pages 59-60 in the file), G. B. assigns the shares held in number of 858, to the named G. C., who appears with a number of 1848 shares.

[9] See Civil Judgement No. 4180/ 23.12.2013, Bucharest Court of Appeal.

Consequently, the defendant G. B. was no holding a position or a quality which could provide him the legal authority to take decisions in the Football Club S. Bucharest S.A. or to involve the sport club in relations with third parties, including related to the recruitment/employment policy.

With respect to CJUE jurisprudence claimed by the plaintiff, despite this case, it is noticed that in Feryin case C-54/07, the active subject of declarations holds not only the capacity of representative but also the position of manager of the company, which would question the existence of an exercise of authority in terms of the role accomplished by subject as employer[10].

Also, in Bossman case C-414/93, the issue submitted to analysis is an express rule passed on the level of football associations, by which it is imposed a clause formulated sine qua non based on a nationality criterion.

On those grounds, CNCD correctly included the claimed issues beyond the incidence of a potential labour report, circumscribed to the hypotheses of legal norms instituted by art. 5 and art. 7 of O.G. no. 137/2000.

As for the action having as object the annulment of pct. 3 of resolution no. 276/13.10.2010, by which CNCD ordered the sanctioning of the defendant G. B. with warning, the court considers it unsubstantiated.

By CJUE resolution passed in the case C-81/12, it is confirmed the legal value of the warning sanction in terms of accomplishing the exigency of effectiveness, proportionality and dissuasive nature, the national court being competent to check if this sanction is proper in the dispute subject to the case submitted to judgement.

In the case, considering the circumstances in fact considered in the challenged resolution, the court considers that CNCD performed a correct individualisation of a contraventional sanction.

Thus, the contraventional sanction of warning was applied distinctly of the issue of prescription of application of fine sanction (Law no. 189/2013 amended O.G. no. 137/2000, by introducing art. 26 a par. $2^{A}1$), the defendant authority considering upon the application of sanction the circumstance of committing the fact, respectively, in the context of a purely journalistic demarche, the declaration being challenged by a journalist with the obvious scope of obtaining the particular position of the individual interviewed, correlatively to exercising the right to free expression, opposite to a subject in abstract relation to the labour field, as well as the absence of subsequent effects, by non-materialisation of an effective refusal on employment, based on discriminatory criteria.

The public character of declarations cannot be regarded as an aggravating circumstance in determining the sanction and it was considered by CNCD in individualising the sanction, with the other circumstances above mentioned leading to the conclusion that contraventional sanction of warning corresponds to the requirements of effectiveness, proportionality and dissuasive nature of juridical coercion in the field.

For the recitals presented, considering the disposals of art. 1 and art. 18 of Law no. 554/2004, the Bucharest Court of Appeal rejected the action as unsubstantiated.

References

- Consolidated Treaties, Charter of Fundamental Rights, Published by Publications Office of the European Union, Luxembourg, 2012
- Corneliu Bârsan European Convention of Human Rights, Vol. 1 & 2, Rights and obligations, C.H. Beck Publishing House, Bucharest 2005

[10] See Civil Judgement No. 4180/ 23.12.2013, Bucharest Court of Appeal.

- I.Chopin and J.Niessen, A comparison between the EU Racial Equality Directive and the Starting Line in The Starting line and the Incorporation of the Racial Equality Directive into National Laws of the EU Member States and Accession States, 2001
- C. Jura, Combating discrimination in Romania, CH Beck Publishing House, Bucharest, 2004
- C. Jura, Jurisprudence of National Council for Combating Discrimination, CH Beck Publishing House,
- Bucharest, 2003
- C. Jura, National legislation on combating discrimination, CH Beck Publishing House, Bucharest, 2003
- http://curia.europa.eu
- http://eur-lex.europa.eu

POLITICAL PLURALISM AND MULTIPARTY

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Abstract

Political parties have made themselves noticed in history by competing for power and over time they have emerged as undeniable and indispensable realities in a political system regardless of its form. The Constitution of Romania recognised the role and historical importance of pluralism and political parties and dedicated them a place of honour in the general principles that establish our state as a democratic and social state of law.

This article analyses the constitutional provisions on political parties, depicting the evolution of statutory regulations thereon over more than 100 years, during various political regimes.

Last but not least, it also analyses concepts and points of view of the doctrine with respect to the subject matter, while also making references to the relevant constitutional jurisprudence. Finally, as a result of the analysis conducted, we will reveal any weaknesses of the legislation and we will make our conclusions.

Keywords: *pluralism, political party, Constitution, law, multiparty*

1. Introduction

Long considered the "engine of the political life" of a society, political parties are characterised by a fervent activity, in the forefront of political life. The state has an acknowledged relationship with the civil society, relationship that is lost in the mists of time. Thus, it is public knowledge now that civil society works on the state in many ways, while parties, together with the media or trade unions stand out as a major player in rendering the power relations more dynamic. Many times we, ordinary citizens, have witnessed the adoption of various legal acts by the legislative or executive body with the support of the political parties in power.

The French legal doctrine estimates that the state performs three basic functions:

a) Enactment of general rules – legislative function;
b) Application or enforcement of these rules – executive function;
c) Settlement of litigations arising in society – judicial function.[1]

In recognition of the role played by the parties, they have been expressly regulated in the Constitutions of the states of the world. But, since the society has evolved in a dramatic rhythm, some Constitutions are required to be revised and adapted to times.

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[1] M. Chantebout, Droit constitutionnel et science politique (Constitutional Law and Political Science), Dalloz Publishing House, Paris, 1982, p.156.

2. Paper content

2.1 Political parties and their constitutional regulation

On the national political scene, in addition to traditional political parties, such as for instance the Peasant Party or the Liberal Party, a series of alliances operated, such as the Alliance for Justice and Truth (J & T Alliance) or the Social Liberal Union (SLU). Also a political force of the national minorities was noticed – Democratic Union of Hungarians in Romania (DUHR). What does this mean from the point of view of the subject proposed in this study? There is nothing simpler! If we refer to the classification of the system of parties in general, we notice that the best known classification refers to three classes, namely: single party, two-party and pluri-party or multi-party.

We present below, in constitutional terms, how the concept of political party was regulated in the Romanian Constitutions, as a historical analysis of successive Constitutions, starting from 2013, with more than 100 years of statutory regulation.

The *Constitution of 1866*[2] did not regulate anything with respect to the political parties, but stipulated among others the equality before the law or the right of association, which was set out in article 27 and read as follows: "*Romanians have the right to associate, complying with the laws that regulate the exercise of this right*".

The Constitution of 1923, considered a modern Constitution for the time, was superior to the previous one by its much broader vision, but it also failed to include any provision on political parties.

Thus, we find provisions on the freedom of association in article 5, which states that: "*Romanians, regardless of ethnic origin, language or religion, enjoy the freedom of conscience, the freedom of education, the freedom of press, the freedom of assembly, the freedom of association and all the freedoms and rights established by laws*", while article 29 [3](1) shows that: *Romanians, regardless of ethnic origin, language or religion, have the right to associate, complying with the laws that regulate the exercise of this right.* It is also stipulated that *the right to free association does not imply in itself the right to create legal persons and the conditions under which legal personality is granted shall be established by special law.*

The *Constitution of 1938* replaced the Constitution of 1923 and granted greater powers to the king. King Carol II imposed an authoritarian regime that did not last. The Constitution of 1938 has provisions only on the right of association, such as article 8(3): *no political association on religious grounds or pretexts, or during religious manifestations is allowed to anyone*, while article 25 reads as follows: Romanian citizens have the right to associate, complying with the laws, and the right of association does not imply the right to create legal persons.[4]

On 31 March 1938 the Decree-law for the abolishment of political parties was issued and published in the Official Gazette of 31 March 1938. Article I. stated that: *"all associations, groups or parties currently in existence and established in order to spread or achieve the political ideas are and remain dissolved.* At the time the National Liberal Party was in operation and its roots apparently dated from around 1875, when several liberal groups

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[2] Ioan Muraru, Gheorghe Iancu, Mona-Lisa Pucheanu, Corneliu-Liviu Popescu, *Constituțiile Române. Texte.Note. Prezentare comparativă (Constitutions of Romania. Texts. Notes. Comparative Presentation)*, "Official Gazette" Government Business Enterprise, Bucharest, 1993, pp. 35-40.

[3] Ioan Muraru, Gheorghe Iancu, Mona-Lisa Pucheanu, Corneliu-Liviu Popescu, Constituțiile Rormâne. Texte.Note Prezentare comparativă (Constitutions of Romania. Texts. Notes. Comparative Presentation), op.cit.,1993, pp.71-76

[4] Ioan Muraru, Gheorghe Iancu, Mona-Lisa Pucheanu, Corneliu-Liviu Popescu, Constituțiile Rormâne. Texte.Note Prezentare comparativă (Constitutions of Romania. Texts. Notes. Comparative Presentation), op.cit.,1993, pp.98-101

unified, but the abovementioned Decree-law [5] dissolved that party. The second largest party that operated in the interwar period, but that worked approximately from 1880 to 1918 was the Conservative Party. Therefore, one could say that in that historical period there were two parties that dominated the Romanian politics. Later the *single party*, the National Renaissance Front, was established and its originator was Armand Călinescu, intimate of King Carol II[6].

The *Constitution of 1948* was no exception to the previous regulations and failed to stipulate anything on political parties, as it only included provisions on the right of association. Article 32[7] stipulates that citizens have the right to associate and organise if the purpose is not against the democratic order established by the Constitution. Any association with fascist or antidemocratic character was prohibited and punished by law. It was also expressly stipulated for the first time that the legislative body of the Republic was the Grand National Assembly.

The *Constitution of 1952* was characterised by a different style, as it was a socialist statutory regulation and this time it included expressions such as: "working people" instead of Romanians, or the "victory over fascism" or "socialist system" etc. What was different in the Constitution of 1952 was the very fact that for the first time it made reference to the notion of party as *single party*, namely the Romanian Workers' Party. The right of association was the object of article 86, whose content was extremely well-defined and consistent with the socialist thinking of the authors of that Constitution.

According to article 86(1) "*in accordance with the interests of those who work and in order to develop the political and public activity of the masses, the citizens of the People's Republic of Romania are guaranteed the right of association in public organisations, in professional trade unions, cooperative unions, women's organisations, youth organisations, sports organisations, cultural, technical and scientific associations.* The prohibition of fascist or antidemocratic associations was maintained and the participation in such association was punished by law.[8]

The Constitution of 1965 continued the previous conception on the right of association and referred to this in article 27 making use of a new expression, namely: "mass and public organisations". The regulation of 1965 showed that: *The citizens of the Socialist Republic of Romania have the right to associate in trade unions, cooperative, youth, women's, social-cultural organisations, creative unions, scientific, technical and sports associations and other public organisations.*[9] Article 27(3) expressly stipulates that: *mass and public organisations ensure the broad participation of masses in the political, economic, social and cultural life of*

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[5] The National Liberal Party was restored after December 1989, with known personalities from various fields acting as leaders.

[6] The text may be seen at the address http://www.monitoruljuridic.ro/act/lege-nr-4-321-din-15-decembrie-1938-pentru-infiintarea-organizatiei-politice-a-frontului-renasterii-nationale-emitent-parlamentul-publicat-n-30588.html, accessed on 9 April 2014

Law no. 4321 of 15 December 1938 establishing the "National Renaissance Fund" political organisation, published in the Official Gazette no. 293/16 December 1938

[7] Ioan Muraru, Gheorghe Iancu, Mona-Lisa Pucheanu, Corneliu-Liviu Popescu, Constituțiile Rormâne. Texte.Note Prezentare comparativă (Constitutions of Romania. Texts. Notes. Comparative Presentation), op.cit.,1993, p.125

[8] Article 86 (3) stipulates that: "The most active and most aware citizens of the working class and the other categories of working people unite as the Romanian Workers' Party, the vanguard detachment of the working people in the struggle to strengthen and develop the people's democracy and to build the socialist society", while paragraph 4 states that: "The Romanian Workers' Party is the driving force of both the organisations of those who work and of state bodies and institutions. All the organisations of those who work in the People's Republic of Romania gather around it."

Ioan Muraru, Gheorghe Iancu, Mona-Lisa Pucheanu, Corneliu-Liviu Popescu, Constituțiile Române. Texte. Note Prezentare comparativă (Constitutions of Romania. Texts. Notes. Comparative Presentation), op.cit., 1993, p.156.

[9] Ioan Muraru, Gheorghe Iancu, Mona-Lisa Pucheanu, Corneliu-Liviu Popescu, Constituțiile Române. Texte.Note Prezentare comparativă (Constitutions of Romania. Texts. Notes. Comparative Presentation), op.cit.,1993, p.170.

Article 27(2) stipulates that: "the state supports the activity of the mass and public organisations, creates conditions for the development of the material base of these organisations and protects their property".

the Socialist Republic of Romania and in the exercise of the public control – expression of the democracy of the socialist system. Through the mass and public organisations, the Romanian Communist Party establishes an organised connection with the working class, the peasants, the intellectuals and the other categories of working people and mobilises them in the struggle for the completion of the construction of socialism. Also, article 29(2) prohibits fascist or antidemocratic associations. Participation in such associations and fascist or antidemocratic propaganda are prohibited by law.

The Constitution of 1991 ended the long line of socialist Constitutions and it stood out as a liberal Constitution that established in article 1 that: *"Romania is a democratic and social state of law, in which the freedom of people, the rights and freedoms of citizens, the free development of human personality, the justice and* ***political pluralism*** *are absolute values and are guaranteed".* Therefore, the Constitution of Romania of 1991 expressly regulated the political pluralism. Also, the political pluralism and parties were enshrined in article 8, which has two paragraphs in its structure and is contained in Title I, entitled *"General principles"*, but references to political parties may be found in other constitutional provisions as well.

According to article 8(1) "pluralism in the Romanian society is a prerequisite and a guarantee of constitutional democracy". Under article 8(2), "political parties are established and conduct their activity under the conditions of the law and they contribute to defining and expressing the political will of the citizens, respecting the national sovereignty, the territorial integrity, the rule of law and the principles of democracy". It should be mentioned that article 8 kept its form as a result of the revision of the Constitution of 2003.

Also, the Constitution of 1991 regulated the right of association in article 37 and this time one could talk about the fundamental rights, freedoms and duties, stipulated in Title II. As a result of the revision of 2003, this article became article 40, following the renumbering of articles, but its content was not changed.

In essence, this article provides that citizens may freely associate into political parties, trade unions and others forms of association, while secret associations are prohibited. Its second paragraph expressly stipulates that parties or organisations that, by their purposes or activity, militate against the political pluralism, the principles of the state of law or the sovereignty, integrity or independence of Romania, are unconstitutional. The analysed text refers to the prohibition according to which judges of the Constitutional Court, ombudsmen, active members of the army, policemen or other categories of public servants established by organic law may not be members of political parties.

Last but not least, regarding the political parties, letter h of the Constitution of 1991, when referring to the powers of the Constitutional Court, points out that it settles the disputes that cover the constitutionality of a political party.

Thus, this is a picture of the Romanian Constitutions during 1866-2013 that shows how the notions of political pluralism or political party were stipulated, whereas the majority of said legal acts failed to provide these two values. The only act that truly dealt with the recognition of the importance of the role played by the political parties in a society was the Constitution of 1991, revised in 2003 by Law no. 429/2003[10].

2.2. Reflections on the Constitutional Court of Romania and its role in the constitutionality of a political party

The Constitutional Court has stood out in the recent years of activity by its undeniable involvement in the protection of fundamental rights of citizens. Its jurisprudence is extremely

[10] Law no. 429/2003 revising the Constitution of Romania, published in the Official Gazette, Part I, no. 758/2003.
Under paragraph 79 of the single article of this law, the Legislative Council caused the publication of the Constitution as amended and completed, with updated names and renumbered texts, in the Official Gazette of Romania, Part I, no. 767/31 October 2003

rich on this matter and the grounds of its decisions directly follow the arguments of the European Court of Human Rights. Thus, in Germany, considering that the fundamental rights are intended to protect the individual against the state, the fundamental law enshrines an objective order of the fundamental rights, establishing a system of values centred on the free development of human personality and the principle of protection of human dignity, a system directly applicable by all branches of the power: legislative, administrative, judicial authorities.[11]

In the realisation of the fundamental rules, law no. 14/2003 stipulates in article 1 that political parties are political associations of Romanian citizens with voting rights who participate freely in the formation and exercise of their political will, fulfilling a public mission, guaranteed by the Constitution. They are legal persons of public law."[12]

As previously shown, according to article 144(1) (i): The Constitutional Court of Romania settles the disputes that deal with a political party. This provision will be put in conjunction with the organic law of the political parties[13], as follows: "The Constitutional Court settles the disputes that cover the constitutionality of a political party, according to the provisions of article 30(7), article 37(2) and (4) and article 144(i) of the Constitution, with the procedure laid down in Law no. 47/1992 on the organisation and operation of the Constitutional Court."[14]

According to doctrine, although it resembles the control of the constitutionality of the law because they belong to the scope of the constitutionality control, there are still aspects that differentiates them: the control of the constitutionality of the law does not settle a conflict of particular interests; the control of the constitutionality of a political party concerns the group interests of the party in question, not in the sense that it does not interest the national community as well, but in the sense that it directly concerns the party in question whose legal existence is denied by the dispute filed against it.[15] The authors of the relevant notice may be the presidents of one of the Chambers of the Parliament or the Government, while the Constitutional Court reviews the substantive fulfilment of the conditions concerning the activity of the political party included in article 40(2) of the Constitution.

The legal effects of the decision of the Constitutional Court on the unconstitutionality of a political party consist in removing the political party from the records of the legally established parties.[16]

3. Conclusions

Throughout the constitutional history of Romania, political parties have had a winding route, marked by two types of situations, despite the fact that in terms of state structure the country was a monarchy and then a republic, more precisely, there was either a democratic

[11] H.G. Rupp, Objet et portee de la protection des droits fundamentaux.Tribunal constitutionnel federal alemand, in Cours constitutionnelles et droits fundamentaux (Purpose and Scope of Protection of Fundamental Rights. German Federal Constitutional Court, in Constitutional Courts and Fundamental Rights), Provence, Economica, PUAM, Paris, 1982, p. 245, apud. Bianca Selejan Guțan, Excepția de neconstituționalitate și constituționalizarea dreptului, in Ioan Muraru-Liber Amicorum (Exception of Unconstitutionality and Constitutionalisation of Law, in Ioan Muraru-Liber Amicorum), Hamangiu Publishing House, Bucharest, 2006, p. 201

[12] Decision of the Constitutional Court of Romania no. 530/2013 on the admission of the exception of unconstitutionality of the provisions of article 16(3) of the law on political parties, published in the Official Gazette no. 23/2014

[13] Law no. 14/2003 on political parties, published in the Official Gazette no. 25/2003

[14] Law no. 47/1992 on the organisation and operation of the Constitutional Court, republished in the Official Gazette no. 807 /2010

[15] I.Muraru, N.Vlădoiu, A.Muraru, S.G.Barbu, *Contencios constituțional (Contentious Constitutional Matters),* Hamangiu Publishing House, Bucharest, 2009, p. 169.

[16] I.Muraru, E.S. Tănăsescu, *Drept constituțional și instituții politice (Constitutional Law and Political Institutions)*, volume II, XII edition, C.H.Beck Publishing House, Bucharest, 2005, p.265.

regime in which several political parties operated, or a royal dictatorship, referring mainly to the time of Carol II, or a socialist authoritarian regime characterised by the existence of the single party. Today, we can speak of a constitutional democracy and of the existence of several parties.

The Romanian Constitutions, heavily inspired by the European Constitutions, promoted values such as the right to free association, equality before the law, etc., and we refer to the Constitutions of 1866 and 1923, and in 1938 an authoritarian regime was established, which suppressed the liberal democratic regime. It was only in 1991 that there was a traditional resumption of values promoted at first by the authors of the modern Constitutions. Multiparty is the most common form in modern societies.

The existence of diverse and competing interests is the basis for a democratic equilibrium, and is crucial for the obtaining of goals by individuals. A polyarchy – a situation of open competition for electoral support within a significant part of the adult population − ensures competition of group interests and relative equality. Pluralists stress civil rights, such as freedom of expression and organization, and an electoral system with at least two parties. On the other hand, since the participants in this process constitute only a tiny fraction of the populace, the public acts mainly as bystanders. This is not necessarily undesirable for two reasons: (1) it may be representative of a population content with the political happenings, or (2) political issues require continuous and expert attention, which the average citizen may not have.

Pluralism is, in the general sense, the acknowledgment of diversity. In democratic politics pluralism is a guiding principle which permits the peaceful coexistence of different interests, convictions and lifestyles. One of the earliest arguments for pluralism came from James Madison in "The Federalist Papers". He posits that to avoid factionalism, it is best to allow many competing factions to prevent any one dominating the political system. Pluralism in this sense is connected with the hope that this process of conflict and dialogue will lead to a definition and subsequent realization of the common good that is best for all members of society. This implies that in a pluralistic framework, the common good is not given *a priori*. Instead, the scope and content of the common good can only be found out in and after the process of negotiation, i.e., *a posteriori*.

References

- M.Chantebout, Droit constitutionnel et science politique (Constitutional Law and Political Science), Dalloz Publishing House, Paris, 1982.
- Ioan Muraru, Gheorghe Iancu, Mona-Lisa Pucheanu, Corneliu-Liviu Popescu, *Constituțiile Române. Texte. Note. Prezentare comparativă (Constitutions of Romania. Texts. Notes. Comparative Presentations)*, "Official Gazette" Government Business, Bucharest, 1993.
- I.Muraru, E.S Tănăsescu, *Drept constituțional și instituții politice (Constitutional Law and Political Institutions)*, volume II, XII edition, C.H.Beck Publishing House, Bucharest, 2005.
- I.Muraru, N.Vlădoiu, A.Muraru, S.G.Barbu, *Contencios constituțional (Contentious Constitutional Matters)*, Hamangiu Publishing House, Bucharest, 2009.
- H.G. Rupp, *Objet et portee de la protection des droits fundamentaux.Tribunal constitutionnel federal alemand*, in Cours constitutionnelles et droits fundamentaux (Purpose and Scope of Protection of Fundamental Rights. German Federal Constitutional Court, in Constitutional Courts and Fundamental Rights), Provence, Economica, PUAM, Paris, 1982.
- Bianca Selejan Guțan, *Excepția de neconstituționalitate și constituționalizarea dreptului*, in Ioan Muraru-Liber Amicorum (Exception of unconstitutionality and Constitutionalisation of Law, in Ioan Muraru-Liber Amicorum), Hamangiu Publishing House, Bucharest, 2006.
- Law no. 429/2003 revising the Constitution of Romania, published in the Official Gazette, Part I, no. 758/2003
- Law no. 4321 of 15 December 1938 establishing the "National Renaissance Front" political organisation, published in the Official Gazette no. 293/16 December 1938
- Law no. 14/2003 on political parties, published in the Official Gazette no. 25/2003

- Law no. 47/1992 on the organisation and operation of the Constitutional Court, republished in the Official Gazette no. 807/2010
- Decision of the Constitutional Court of Romania no. 530/2013 on the admission of the exception of unconstitutionality of the provisions of article 16(3) of the law on political parties, published in the Official Gazette no. 23/2014
- www.monitoruljuridic.ro/act/lege-nr-4-321-din-15-decembrie-1938-pentru-infiintarea-organizatiei-politice-a-frontului-renasterii-nationale-emitent-parlamentul-publicat-n-30588.html, accessed on 9 April 2014

FRAMEWORKING THE PRESS FREEDOM, AT THE BORDER BETWEEN LEGAL AND SELF-REGULATION

Cristina Anca PĂIUȘESCU*

Abstract

Freedom of the press is essential to democracy and to a pluralistic culture. Most journalists are against any form of legal regulation considering the creation of a press law as an interference with freedom of the press, while state authorities considered necessary minimum set of rules to sanction those who exceed the "normality" of free speech. If in the audiovisual field the legislation tends toward European standards, for print media all draft laws proposed so far by different political parties or the government have failed. Representatives of the major newspapers saw each time in these legislative proposals an attempt to "choke" the freedom of the press. In this context, self-regulation is seen as a way in which journalists can establish their own rules in order to protect themselves from the state attempt to regulate this area, a method of protecting against political manipulation and preventing the erosion of public trust, and it is also seen as a method of education within the profession.

Keywords: *press freedom, legal-regulation, self-regulation*

1. Introduction

This study is performed in a time when public debate on self-regulation in the media is very lively and already showing tangible results in Romania. I have started from the assumption that there is a serious need for to self-regulation rules in the media sector in order to build a greater confidence in the ability of the press to express the freedom of speech, and that is best that both systems coexist, in order to regulate the press area, legal regulations – made by the state - and self - regulations - as set own rules, created by journalists.

For the media and press are there is a legal framework consisting of rules created exclusively by the state bodies, which is one imposed by the state, even a democratic state. But, a complet freedom of expression in the media must, however, include a set of rules for journalists of their own creation, based on their professional ethics and created by their own bodies, in order to sanction those who violate the rules of the profession of journalism. The main purpose of this paper is to provide an analysis of what it means for media freedom of expression in its legal framework, within the limits of the law, followed by generating discussion, exchanging information and experiences about the advantages, applicability and implementation of self-regulation of the press in Romania. Most journalists are against any form of legal regulation considering that the creation of a press law is an interference with freedom of the press, while state authorities deemed necessary minimum set of rules in order to sanction those who exceed the "normality" of free speech.

The research is considered to be helpful especially in the context of the public debate on self-regulation in the media, debate that has been running in states with democratic experience and which is already showing tangible results, also within ex-communist states, with lack of experience about self-regulation. In Romania, progress has been quite high in

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terms of legislative reform in the press: the abolition of laws restricting media content, adoption of legislation on freedom of information, the development of a legal framework regulating the audio-visual and the transformation of private radio and television State Public Broadcasting Service. The result of the study aims to be an overview of the concept of self-regulation of the press in Romania and the forms in which it was implemented as an alternative to the set of legal rules that tends to suppress the absolute value of "freedom of expression". There are some benefits of self-regulation, and we are going demonstrated by this case study, benefits although not universally accepted, especially in countries like Romania, which have a relatively recent democratic experience. Here, the state has traditionally played an aggressive role and where topics such as privacy are regulated by law, is unlikely to be the desire to have a system of self-regulation. At least not from the state.

It is a fact that freedom of the press is essential to a democracy and pluralistic culture. A free press requires a variety of publications which would provide a variety of information and views. Out of these, people should be able to collect what themselves find useful in order to process information according to their own convictions. Thus, people can knowingly participate in social life, for the defense of democratic values. Media must be free so that the information brought to the public to be real and honest. The role of media is to play as real and accurate information on the one hand, but the media's role is also to problematize, discuss and debate political decisions, on the other hand. Most journalists are against any form of legal regulation, considering the creation of a press law as an interference with freedom of the press, while state authorities considers necessary the creation of a minimum set of rules to sanction those who exceed the "normality" of free speech. In any profession or sector, self-regulation involves establishing and implementing rules even by those whose conduct is to be regulated, with the ultimate goal of improving the services offered to consumers, beneficiaries or – in case of media - the services provided to general public[1]. Self-concept is well understood by journalists, NGO activists, lawyers. Self-regulation is seen as a way in which journalists establish their own rules to protect themselves against the state attempt to regulate the media, as a method of protecting against political manipulation and preventing the erosion of public trust, and as a method of education within the profession[2].

2. Content

Written press legislation in Romania. Even if in the audiovisual field the legislation tends toward European standards, for all written press, the bills proposed so far by different political parties or the government have failed. Representatives of the major newspapers saw each time in these legislative proposals, as an attempt to "choke" the freedom of the press. In recent years, journalists in Romania showed an increasingly strong opposition to state's attempts to adopt a media law. This opposition is based on concerns that, due to remnants of the old totalitarian mentality, any project seeking to ensure freedom of the press is proclaimed that, once inside the mixer of the Parliament, will come out as a law limiting the freedom of the press[3]. Unlike broadcasting, where appropriate regulations were adopted[4], the written press, newspapers and other printed media still remained unregulated. Once, there was Law No. 3 of 1974, the Socialist Republic of Romania Press Law, a law that has been repealed by article 5 of the Ordinance nr.53/2000 except art. 42 to Article 75 governing the right of reply.

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[1] Cristian Florin Popescu, *Journalistic ethics and media law*, (Bucharest: ANI Publishing House, 2006), 9-10;
[2] Miroiu Mihaela Gabriela Blebea Nicholas, *Introduction to professional ethics*, (Bucharest: Three Publishing, 2001), 23.
[3]Cristian Tudor Popescu, *De ce ziaristul?* Accessed February 22, 2014.
http: //bloguleditorialelor.blogspot.com/2007/06/.html http:
[4]Law no.504/2002 Broadcasting Act, with subsequent amendments and completions, Accessed February,12, 2014, http://legislatie.resurse-pentru-democratie.org/504_2002.php

Later, in 2012, the law was fully repealed, including articles on the right of reply, by the Law nr.95/2012, and the right of reply was taken over by the New Civil Code, which entered into force in 2011[5]. The regulation of written press are is based on the applying the rules and principles of the Constitution relating to the rights and freedoms in general and freedom of expression, and the right to access to information, in particular, namely by art. 29, art. 30, art. 31. Of course, a meaningful interpretation of these items should be made by considering the entire constitutional text, both in letter and in spirit, by the systemic analysis of rules arising from the whole philosophy of the fundamental law. The provisions of the constitutional text will corroborate therefore to those of the Civil Code and with those of the Law No.544/2001 regarding free access to public information. This last law not only regulates the print media, but given the fact that the journalist has as main purpose the transmission of information to the public that can be "public interest", the reference at this act seems mandatory.

The broadcasting legislation in Romania. Broadcasting channels are the most popular means of mass information and education, for which broadcasters must enjoy effective regulation, adapted to cultural, social and economic realities, in order to ensure freedom of communication, accurate information and public education[6]. Legal regulation of the audiovisual field media in Romania is based on two pillars that provides the legislative framework governing the audiovisual: the Law no.504/2002, known as the Broadcasting Act, adopted by the Romanian Parliament and The Audiovisual Content Regulation Code adopted by the National Broadcasting Council (CNA) in 2006. This institution is a state body set up to monitor and control of communication through the audiovisual. Under the provisions of art. 10 para. (1) of the Broadcasting Act no. 504/2002, as amended and supplemented[7] " The *National Audiovisual Council ... is an autonomous public authority under parliamentary control and safeguard the public interest in the field of broadcasting*."

Regulatory Code details the obligations of television stations licensed in Romania about the audiovisual content, in terms of editorial, as well as the obligations regarding correct information, the protection of human dignity, the right to reply, protection of minors and legal compliance of advertising and publicity.

Self-regulation into Media in Romania. In order to act as the "watchdog of democracy" journalists must maintain credibility with the public[8]. This requires the highest ethical standards. Creating effective systems of self-regulation to implement these standards increase the trust between the press and the public. Journalists that individual undertakes to comply with a code of ethics and strive to practice ethical journalism are accountable to their own conscience and can be held accountable to colleagues, according to accepted standards of professional association or union to which they belong[9].

Media Organizations Convention and Code of Ethics. Convention of Media Organizations (COM) was created in 2001 as an informal coalition of 35 professional associations. Two NGOs, the Centre for Independent Journalism (CIJ) and Media Monitoring Agency (MMA) provides secretariat and, to some extent, the management of COM, although they are not members of the Convention. COM has created Journalist's Statute and the Code of Conduct, which were adopted at a meeting in Sinaia, July 2004.

The Statute's aims are:

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[5]http://www.ziuanews.ro/dezvaluiri-investigatii/lasati-presa-libera; Accessed February 22, 2014, http://www.romanialibera.ro/opinii/editorial/presa-un-maidanez-la-portile-parlamentului-201122.html. Accessed February, 12, 2014.

[6] Ștefan Deaconu - "*Freedom of expression in the public radio and television*", *The Law 1* (2001) :11, quoted by Emil - John Moțiu in the "Autonomous administrative *authorities of national security and coverage information*" (Bucharest: CH Beck, 2010), 179.

[7] Published in Official Monitor of Romania, Part I,. No.. 534 of 22 July 2002.

[8] Ș. Deaconu, "*Freedom of expression in the public radio and television*", 180.

[9] Ibidem, p.179.

- Defining journalist relationship with society;
- Declaring the profession of journalist as independent and free and offers a free definition of the journalist as a person exercising the right to free speech and whose main source of income comes from journalistic activities either as an employee or as a freelance, in any environment (online, print, audiovisual, etc.)[10].

Journalists' Code of Ethics. Journalist Code of Ethics is considered an integral part of Journalist's Statute in Romania and it stipulates the role, the professional conduct, the rights and duties of journalists. The Code includes a definition of the public interest as - among others - any issue that affects the community, the way that the government, authorities and state institutions are working, facts about the management of power and information about violations of human rights[11]. The Section cover story about professional behavior refers to the press - offenses (presumption of innocence), the respect for privacy, the respect for the interests of minors, victims of accidents, and, also speaks about the journalist's obligation to avoid discrimination of any kind, to separate the facts from opinions, to make efforts to present the views of everyone involved, and to maintain the confidentiality of sources[12].
The Code refers to corruption and conflict of interest and puts the responsibility of the right of reply on the journalist's shoulders, recommending an immediate error correction and publication of excuses, when necessary[13]. Journalists' rights includes the right to invoke the conscience clause, which means the right to refuse any journalistic activity which it considers against ethical principles or against its own principles, and to refuse to require advertising contracts for the institution they work in. This refers to the common practice of asking journalists to provide the norm for advertising contracts to ensure theirs salary[14].

Romanian journalists' point of view. Although most journalists believe that the media in Romania is facing serious problems regarding compliance with ethics, media experts and the the specialized public rejected the idea of legal regulation of the media (press law). The rejection is being motivated by the fear that a bill could restrict freedom of expression of journalists[15]. In democratic states, as well as in Romania, the law regulating the freedom of the press is rejected by the public and journalists, is considered a threat to freedom of expression in general. The solution of self-regulation is not denied, but is considered unfeasible in these cases, due to[16]:

- employers' reluctance to enter into such an agreement would affect their own interests;
- the lack of credibility of those who have initiatives of self-regulation;
- the impossibility of creating a system which would ensure and enforce sanctions because there is enough credible people to manage it;
- the experience of unsuccessful attempts to create a regulatory body and a single code of ethics[17].

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[10] Carmen Monica Cercelescu, *Legal Regime of the press*, the rights *and obligations of journalists*, Teora Publishing House, Bucharest, 2002 : "*According to those who wrote the status*, it *is not intended to impose or to regulate this definition, but only to clarify how COM sees the profession of journalist*", 102.

[11] Journalist Code of Ethics, Accessed February 14, 2014www.paginademedia.ro/.../codul-deontologic-al-jurnal...; http://clubulromandepresa.ro/?page_id=322.

[12] Official website of the Convention of Media Organizations , Accessed February 11, 2014, www.organizatiimedia.ro/docs/codul_deontologic.doc *; www.ngo.ro/site_item_full.shtml?x=1284*

[13] Păiușescu, Cristina Anca, Duță, Oana, *The right of communication. Theoretical considerations and relevant legislation*, (Bucharest: University Publishing House, 2011), 167-168.

[14] Idem.

[15] Active Watch Report on freedom of expression, Accessed February 10, 2014, http://www.activewatch.ro/stiri/FreeEx/Raportul-FreeEx-2010-Libertatea-Presei-in-Romania-307.html, Accessed February14, 2014.
http://www.activewatch.ro/uploads/FreeEx%20Publicatii%20/Press%20Freedom%20in%20Romania%20Report%20May%202011.pdf, 31.

[16] Idem.

[17] Ibidem, p.14.

3. Conclusion.

Arguments for and against of self-regulation of the press field. Self-censorship is a sign of responsibility from the media. Through self-censorship, media can demonstrate it's good faith to state regulations and it may impose alone to it's self some of the information content criteria. By establishing a set of rules for transmitting additional information, newspapers and radio and TV can protect themselves against unpleasant consequences such as lawsuits for libel and slander, or the for violating the right of privacy. Self-censorship can be seen in this sense as something not automatically with negative connotation, but rather as a tool that can be used in a positive sense. Thus, when a media publishes an article / report only to the extent that it is considered to be of public interest, that trust performed an act of censorship. It does allow the emergence of potentially damaging information, or simply unnecessary. In this way is being protected the credibility of newspaper or radio/TV and the trust the media institution. Protecting the sensitivities of certain individuals cannot be complied without affecting freedom of expression. It can operate at the level of modification of information form to submit social and international usage on names of people or minorities, as long as an act of self-censorship in the press, does not harm the content of information. Thoughtless remarks in the media, such as those of racist or sexist, can affect both minorities and the media institution in question[18].

To conclude, in the absence of a regulatory structure in the written press, self-regulation is preferable, so that the achievement of a mix of self-regulation for editorial and a single forum where all the media can join, seems ideal for the freedom of expression of the media in order for it be able to really manifest in a democracy. Media self-regulation can be effective only within a legal framework that provides strong guarantees for ensuring the fundamental right to freedom of expression and access to information.

In Romania, the state has traditionally played an aggressive role and where topics such as privacy are regulated by law, is unlikely to be the desire to have a system of self-regulation. This lack of enthusiasm can turn into suspicion to the suggestion that self-regulation should include actors outside the journalistic profession. In any state society in transition, politicians, big business and lobbyists believe that the media is a powerful tool in the struggle for power and influence. At the same time, many NGOs that have emerged after the fall of communism and who often calls as representatives of the public, are not always independent of any kind of influence, political or other. In this situation, it is perhaps not surprising that journalists are reluctant to participating in the self-regulation coming from strangers, non-journalists.

References:

- Cercelescu, Carmen Monica, *Legal Regime of the press, the rights and obligations of journalists*, Teora Publishing House, Bucharest, 2002
- Deaconu, Ştefan - "Freedom of expression in the public radio and television" Legal no. 1/2001
- Emil – Moţiu, Ion, Autonomous administrative authorities of national security and coverage informatio, Bucharest: CH Beck Publishing House, 2010
- Miroiu Mihaela Gabriela Blebea Nicolaie, *Introduction to professional ethics*, Three Publishing, Bucharest, 2001
- Păiuşescu, Cristina Anca, Duță, Oana, *The right of communication. Theoretical considerations and relevant legislation*, University Publishing House, Bucharest, 2011
- Popescu, Cristian Florin, *Journalistic ethics and media law*, ANI Publishing, Bucharest, 2006
- Active Watch Report on freedom of expression, 2012, http://www.activewatch.ro/stiri/FreeEx/Raportul-FreeEx-2010-Libertatea-Presei-in-Romania-307.html;http://www.activewatch.ro/uploads/FreeEx%20Publicatii%20/Press%20Freedom%20in%20Romania%20Report%20May%202011.pdf, p.31

[18] Cristian Tudor Popescu – accessed on February 22, 2014: http://www.ziuanews.ro/dezvaluiri-investigatii/lasati-presa-libera and http://www.romanialibera.ro/opinii/editorial/presa-un-maidanez-la-portile-parlamentului-201122.html - accessed on February, 12, 2014.

- Law no.504/2002 Broadcasting Act, with subsequent amendments and completions.
- Cristian Tudor Popescu, *De ce ziaristul?* - accessed February 22, 2014,http://bloguleditorialelor.blogspot.com/2007/06/.html
- http://bloguleditorialelor.blogspot.com/2007/06/ l
- http://www.ziuanews.ro/dezvaluiri-investigatii/lasati-presa-libera;
- http://www.romanialibera.ro/opinii/editorial/presa-un-maidanez-la-portile-parlamentului-201122.html – accessed on 12th 12 February 2014
- www.organizatiimedia.ro/docs/codul_deontologic.doc

GENERAL ASPECTS ON THE IMPLEMENTATION OF THE EU LEGAL ORDER, UNDER PUBLIC INTERNATIONAL LAW

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Abstract

We believe that achieving a uniform legal order, as the European Union order, is nothing new at international level, as long as at the basis of what today is forming the European Union law, we find several international treaties concluded under the existing regulations of international law. In this respect, we are considering, first of all, the three founding Treaties of the European Communities, which, from the point of view of international law, have at least three fundamental features, namely: firstly, they express the legal bond between member states of the Communities; secondly, they constitute an organized assembly of legal rules; thirdly, documents developed under these treaties, by bodies empowered in this regard, have legal effects in the states parties.

Keywords: *Treaties establishing the European Communities; European Union; international law; Member States.*

1. The Founding Treaties, authentic international treaties

The conclusion of international treaties requires a set of procedures that must be fulfilled for the treaty to be constituted, to become binding on the parties and to enter into force. According to Professor Nguyen Quoc Dinh[1], concluding an international treaty, *"is a process involving multiple aspects:*

1) the adoption of the treaty text and its authentication;

2) the consent of the state to be bound through the treaty;

3) the international notification of the consent;

4) the entry into force of the treaty, according to its provisions, in states which have expressed their consent".

The international notification of the state consent to become party to the Treaty and the entry into force of the Treaty shall be subject exclusively to international law, while the consent of the state to be bound by the treaty shall be governed solely by the law of that state. Given this aspect, it is undeniable that the Treaties establishing the European Communities and the European Union have been concluded by sovereign states, by expressing their agreement will. Thus, states have become *"contracting parties"*[2] to three multilateral treaties, before becoming *"member states"* of some organizations, the main objective of which is the economic integration.

Although, the Community Treaties have entered into force over 60 years ago (one of those treaties ceasing even to have legal effects by exceeding the period for which it was concluded), the above mentioned goal has not yet been achieved, and the process of economic integration is still continuing; that is why, we believe that the EU member countries, despite the fact that *"have limited, only in some areas, their sovereign rights and have, thus, created,*

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[1] Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet, „*Droit international public",* ediția a VII-a, L.G.D.J, 2002, p 125.

[2] According to the Preambles of the three founding Treaties.[3] Decision of the ECJ, July 15, 1964, *Costa v. / ENEL,* 6/64.

a system of law applicable to nationals and states themselves"[3], are still contracting parties, preserving of course, their sovereignty, aspect highlighted whenever the conclusion of new treaties at EU level comes in question, with the purpose of changing the founding Treaties, by negotiating the mutual rights and obligations.

The founding Treaties contain both obligations and rights for the states parties. As far as obligations are concerned, we observe at a careful analysis of these international legal instruments, that they contain general, but also special obligations.

1.1. Rights of the states parties

The founding Treaties confer upon states, as contracting parties, a number of rights and these rights are, moreover, essential for the functioning of the Union. Thus, we mention: the participation of states to the establishment of common institutions and bodies; the right to bring an action, before the Court of Justice of the European Union, in order to ensure compliance with treaties; the enforcement immunity; the right to decide on the accession of new member states; the right to revise treaties.

A. Under the founding Treaties, states parties have the right to take part, according to certain criteria, to the establishment of the main institutions of the European Communities[4] and later, of the European Union. In this regard, each state has one representative at ministerial level, in the decision-making institution. The governments of member states appoint members of the Commission - the EU's authentic executive. As for the Court of Justice, its members are appointed by the common agreement of governments of the member states.

B. States parties to founding treaties have the right to bring to the Court of Justice in Luxembourg, an action against any contracting party. This action aims at ensuring the compliance with Community law and, more recently, with the European Union law.

C. Another right conferred upon states parties, in the founding treaties, is the immunity from enforcement, resulting from the fact that the Treaties do not contain provisions for the enforcement of states in the case where they do not fulfill their obligations[5]. In this situation, we consider that the enforcement immunity applies under the state sovereignty. It is clear that if the Court of Justice of the European Union gives a sentence against a state which did not fulfill an obligation, that sentence represents, in fact, a principle, because it is not enforceable. This situation has been considered in the literature as "capital for understanding the Community institutional system. Unlike what happens in a federal state where the federal power has the means to reduce the potential resistance of the federal state against the federal order, in the Community, there is no Community enforcement"[6]. States keep their sovereignty within the Union, and if they refuse to voluntarily enforce their assumed obligations, the exception of non-enforcement is applicable *("non adimpleti contractus")*. By invoking this exception, a suspension of enforcement of the Union's obligations towards the member state is obtained, until that state fulfills its incumbent

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[3] Decision of the ECJ, July 15, 1964, *Costa v. / ENEL*, 6/64.

[4] Under TCEC: the Special Council of Ministers, the High Authority, the Common Assembly, the Court of Justice. Each Treaty founding EEC and Euratom establishes the following institutions: the Council, the Commission, the Assembly, the Court of Justice.

[5] The situation was different in the case of the Treaty of Paris which initially provided at art. 88, paragraph (3), two penalties for the State failing to perform its obligations, namely the payment suspension by the CECA, to the State concerned and the authorization given by the High Authority of Member States to take, notwithstanding the common market principles, defense or retaliation measures on the State concerned
(see http://eurlex.europa.eu/fr/treaties/dat/11951K/tif/TRAITES_1951_CECA_1_FR_0001.pdf).

[6] Pierre Pescatore, L'ordre juridique des Communautés Européennes. Etude des sources du droit communautaire, Presses Universitaires de Liège, A.S.B.L., p. 54.[7] For modifying Treaties, the Vienna Convention on the Law of Treaties of 1969 has a lot of relevance, stating in art. 26 that: "Every treaty in force is binding upon the parties and must be enforced by them, in good faith".

obligations.

And still, there is one way to penalize the member state which becomes guilty of failing its assumed obligations. Thus, in the case of failure to comply with an obligation, that State breaches the individual rights and interests and the persons prejudiced can address national jurisdictions and obtain, under certain conditions, the repair of the prejudice caused, under the form of a sentence against the state, for example the obligation of that state to refund the illegally collected taxes.

D. The accession of a state to the European Union requires, among other things, the agreement of all already member states. In other words, any member of the Union has the right to express its agreement or, conversely, to make use of its right of veto on the accession of new member states.

E. The founding treaties contain a clause under which any revision thereof can be made only with the unanimous agreement of all member states. The treaty is revised through a diplomatic treaty subject to ratification. Thus, no commitment can be changed without formal consent.

1.2 . Obligations of member states

Naturally, states parties to the founding treaties acquire besides rights, also a number of obligations, which we shall divide into general and special.

- General obligations

Although these obligations are not numerous, they are, however, fundamental and specific to international law.

A. A first general obligation consists in **loyalty to the Union**. Founding treaties contain a clause of loyalty to the Union, according to which states parties must apply treaties in good faith and act in order to ensure the achievement of objectives pursued. This clause is nothing more than a way of expressing the principle of pacta sunt servanda[7] from international law. The idea, which results in an obligation to enforce and act in good faith, is found in art. 5[8] of the Treaty establishing the EEC[9], article that states: "Member states shall take all appropriate measures, whether general or particular in order to ensure the fulfillment of obligations resulting from this Treaty or from acts of Community institutions. At the same time, it facilitates the achievement of its mission". Under that same article, member states must refrain from any action "likely to jeopardize the achievement of objectives of this Treaty".

Moreover, the Court of Justice, even in its early decisions, has resorted in its motivations, to this general obligation of cooperation and loyalty to the member states, either by citing articles that enshrines it, or by referring to a more general form, the obligation of solidarity between member states. In this regard, we find several rulings, among which we mention the first ones ruled by the Court, in this area:

- the decision from 1969[10] where the ECJ stated that "solidarity grounds the whole Community system, under the commitment set out in art. 5 of the Treaty";

- in the Case *Scheer*[11], from 1970, the Court stated the following: at the beginning of implementation of the common agricultural policy, when the Commission could not fully assume its role, the member states were entitled and were required to take national legislative measures to facilitate the proper application of EU law;

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[7] For modifying Treaties, the Vienna Convention on the Law of Treaties of 1969 has a lot of relevance, stating in art. 26 that: "Every treaty in force is binding upon the parties and must be enforced by them, in good faith".

[8] The current art. 4, TEU.

[9] We find similar clauses in art. 192 of the Euratom Treaty, and also in the Treaty of Paris in art. 86, paragraphs 1 and 2.

[10] Decision of the ECJ, December 10, 1969, Commission v. / France, 6/69.

[11] Decision of the ECJ, December 17, 1970, Scheer v. / Einfuhr -und Vorratsstelle für Getreide und Futtermittel, 30/70 .

- the decisions from 1971 *: the Commission v. / France*[12] and *the Commission v. / Italy*[13]. In the first ruling, the court in Luxembourg talked about a general obligation of cooperation laid down in art. 192 of the EAEC Treaty, under which the parties had to resort to means offered by the Treaty to resolve any legal uncertainty that states were obliged to overcome in order to cover the failure of obligations;

- in the decision from 13 July 1972[14], the Court stated: "the effect of Community law, considered as having *res judicata* authority, by the Republic of Italy, compelled the competent national authorities to refrain from applying a national provision, recognized as being incompatible with the Treaty, as well as to take all necessary measures to facilitate the effect of Community law".

B. Another general obligation is **the coordination of national policy in order to ensure the common interest**, initially enshrined in art. 6 of the Treaty. According to the Treaty, member states commit themselves to coordinate their economic policies in order to achieve the objectives of the Treaty. Unlike the good faith principle existing in all three founding Treaties, this obligation is not provided, in similar terms, in the ECSC and Euratom Treaties. However, in the last two treaties, we find a general clause which gives to the Council of Ministers, the task of coordinating national policies with the action of Communities[15].

C. The financial contribution is another obligation of states parties, provided in the founding Treaties. This obligation is found in the Treaties of Rome, but it is missing from the Treaty of Paris. This is not really a gap, but has a reasonable explanation, in the sense that this Community had its own resources in the form of levies on coal and steel[16]. The obligation of financial contribution no longer exists today because, since 1970, the contributions of member states have been gradually replaced by their own resources[17].

D. The obligation of **responsibility[18] for actions of the Communities / Union towards third countries.** Although not covered by any of the three treaties, we believe that this obligation must be taken into consideration, resulting from the general rules of international law.

- Special obligations

By joining the founding Treaties, member states have undertaken a number of obligations arising from the economic character and the main objective of the European Communities, that of achieving the common Market. It concerns the obligations to do, characteristic especially for the transition period, otherwise told, commitments that states parties have undertaken. We mention the fact that it does not involve rules directly applicable to subjects in the member states. Given the large number of special obligations, further on, we shall only make a list of those that we consider to be illustrative for the achievement of the major objective of the Communities, namely the economic integration. Thus, we mention:

- the obligation to gradually remove, national tariffs and to replace them with a common external tariff;

- the obligation to abolish quantitative restrictions within the Common Market;

- the obligation to establish the free movement of workers;

- the obligation to set out the freedom of establishment and the freedom to provide services;

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[12] Decision of the ECJ, March 31, 1971, *the Commission v. / Conseil*, 22/70.
[13] Decision of the ECJ, December 14, 1971, *Commission v. / France*, 7/71.
[14] Decision of the ECJ, July 13, 1972, *Commission v. / Italy*, 48/71.
[15] Article 26 TEAEC and article 115 TCEC.
[16] Art. 49 TEAEC.
[17] Under the Treaty of 22 April 1970.[18] For more details regarding „responsibility" see Elena Emilia Ştefan, "*Răspunderea juridică. Privire specială asupra răspunderii în Dreptul administrativ*", "Pro Universitaria" Publishing House, Bucharest, 2013, p. 25-39.
[18] For more details regarding „responsibility" see Elena Emilia Ştefan, "*Răspunderea juridică. Privire specială asupra răspunderii în Dreptul administrativ*", "Pro Universitaria" Publishing House, Bucharest, 2013, p. 25-39.

- the obligation to liberalize the financial services;
- the obligation to renounce at the state aid;
- the obligation to eliminate tax differences etc.

2. Institutional systems set out in the founding Treaties

As known, under international law, one of the constituent elements of international intergovernmental organizations is the existence of a self-institutional system. Treaties founding the European Communities, and later the European Union are not limited only to make mutual legal bonds between the contracting parties, but they also create, inclusively, for each organization that they set up, a self- institutional system. In other words, the founding treaties provide the establishment of a "social assembly organized with a common purpose, which is anything but the result of national interests in attendance. This assembly is provided with bodies invested, to some extent, with autonomy and who are able to work towards achieving a common interest"[19].

A significant part of the content of founding treaties is reserved to the institutions of the European Union.

3. The classic review of constitutive treaties, under international law[20]

Each constitutive Treaty contains a review clause. Thus, in the Treaty of Paris it was stipulated that "after the transition period, the government of each Member State and the High Authority may propose amendments to this Treaty. The proposal will be submitted to the Council. The Council issues, by two-thirds majority, a favourable opinion in a conference with representatives of the governments that will be immediately convened by the President of the Council in order to reach a common agreement on the amendments to the Treaty. Amendments shall enter into force for all Member States after being ratified by all Member States in accordance with their respective constitutional requirements"[21]. Similar provisions are also found in the Treaties of Rome, as follows: The Government of any Member State or the Commission may submit to the Council, proposals on the review of this Treaty (CEEC, respectively TEAEC note[22]). If the Council, after consulting the Assembly and in the cases received from the Commission issues a favourable opinion at the reunion of a conference with representatives of Member States governments, convened by the President of the Council in order to reach a common agreement on the amendments to this Treaty, amendments shall enter into force after being ratified by all the Member States, under the internal constitutional procedures of each Member State[23].

Currently, provisions relating to the revision of Treaties of the European Union are found in art. 48 of the Treaty on European Union. The doctrine states that this article is one of the most important of the Treaty[24]. The text of the new art. 48 TEU, as amended by the Lisbon Treaty replaces the single revision procedure of the Treaties, provided prior to 2009[25]. Thus, under the mentioned article, Treaties may be amended in accordance with an ordinary

[19] Pierre Pescatore, *op. cit.* , p 56.
[20] This point of the article was published in Knowledge Horizons-Economics, Volume 5, Special Issue 1, „Pro Universitaria" Publishing House, Bucharest, p. 108-110.
[21] Art. 96, TEAEC (the variant from 1951).
[22] Our note.
[23] Art. 236 EECT and art. 204 TEAEC (variant from 1957).
[24] François-Xavier Priollaud, David Siritzky, „Le traité de Lisbonne. Texte et commentaire article par article des nouveaux traités européenne (TUE-TFUE)", La documentation Française, Paris, 2008, pag. 137.
25 The year when the Treaty of Lisbon has entered into force.

revision procedure. Also, they may be amended in accordance with some simplified revision procedures: a simplified procedure aimed at internal Union policies and activities and a simplified procedure named "bridging clause".

Regarding the ordinary procedure[26], we briefly mention the following: The Government of any Member State, the European Parliament or the Commission may submit to the Council, proposals for the amendment of Treaties. These proposals may, among other things, either increase or reduce the competences conferred upon the Union, in the Treaties. These proposals shall be submitted to the European Council, by the Council and the national Parliaments shall be notified. If the European Council, after consulting the European Parliament and the Commission, adopts by simple majority, a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, the European Parliament and the Commission. The European Central Bank is also consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt, by consensus, a recommendation addressed to the Conference of representatives of Member States Governments. The European Council may decide by a simple majority, with the approval of the European Parliament, not to convene a Convention if this is not justified by the proportion of changes. In the latter case, the European Council shall define the terms for the Conference of Member States. In order to adopt by common agreement, the amendments to be made to the Treaties, the Council President shall convene a conference of representatives of the Governments of Member States. Amendments shall enter into force after being ratified by all Member States in accordance with their constitutional requirements.

Regarding the simplified review procedures[27], as already mentioned, the first procedure envisages certain treaty provisions, and the second is known as the "bridging clause".

According to the first simplified procedure provided in art. 48 TEU, this applies only if the total or partial review of the provisions of Part Three of the Treaty on the functioning of the European Union is wanted, i.e. that concerning the internal policies and actions of the Union. The initiative belongs to the government of any Member State, the European Parliament or the Commission. The project of total or partial review is presented to the European Council. The European Council may adopt a decision for total or partial amendment. The European Council shall decide unanimously after consulting the European Parliament and the Commission, as well as the European Central Bank in the case of institutional changes in the monetary area. This Decision shall enter into force only after the approval of Member States in accordance with their respective constitutional requirements.

The second simplified procedure "allows adopting an act by means other than those provided by the founding treaties, without resulting however in a formal amendment of the Treaties. The general "bridging clause" applies in two situations:

• in the case where the Treaties provide that an act must be unanimously adopted by the Council, the European Council may decide to allow the Council to adopt the decision by qualified majority;

• in the case where the Treaties provide that the acts should be adopted under a special legislative procedure, the European Council may decide to authorize the adoption of those acts under the ordinary legislative procedure[28].

In both cases, the European Council shall decide unanimously and must obtain the consent of the European Parliament. Each national Parliament shall have, in addition, a right

26 Par. (1) – (6) of art. 48, TEU.
27 Par. (7) – (8) of art. 48 TEU.
28 According to http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0013_ro.htm

to object and prevent the activation of the general bridging clause. The bridging clause applies to all European policies, except to the defence policy and to decisions with military implications.

At a careful analysis of the texts presented above, we note that the review procedure envisages a preparatory stage with community character and a diplomatic stage. So, we shall remember that the preparatory phase, which develops at the Union level, is that where the initiative of treaties review may belong to the government of a Member State, the Commission or the European Parliament. The project is then submitted to the European Council that must consult, in its turn, the European Parliament, and where the initiative belongs to one of the governments of Member States, to the Commission. Subsequently, the European Council shall convene a Convention for the review of this Treaty. After making the decision to convene a diplomatic convention, the diplomatic stage follows. The Convention's mission is to reach a common agreement on the total or partial review of an EU Treaty. We believe that under the Convention, nothing happens other than the completion of negotiations on amending the Treaty, the signing by representatives of Member States, because negotiations are held in the preliminary stage. In other words, the amendments are negotiated and agreed by the European Council, and the Convention's purpose is the formalities required by signature. Amendments will not take effect until all Member States have expressed their consent, according to their national constitutional rules.

In conclusion, the EU Treaties may be amended totally or partially, in accordance with rules of the classic international law, under which the amendment of Treaties in force is following the procedure for their conclusion, namely: negotiation, signature and ratification by all States parties to the original Treaty.

4. Conclusions

In conclusion, we note that the Treaties which formed the foundation of the European Communities, and later of the European Union are international legal instruments governed by rules of public international law. The negotiation, conclusion, expression of consent, amendment of Community Treaties, respectively of European Union Treaties are specific stages of entry into force of any international treaties, governed by the same rules of international law.

References

- Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet, „*Droit international public*", ediţia a VII-a, L.G.D.J, Bruxelles, 2002
- Pierre Pescatore, „L'ordre juridique des Communautés Européennes. Etude des sources du droit communautaire", Presses Universitaires de Liège, A.S.B.L.François-Xavier Priollaud, David Siritzky, „Le traité de Lisbonne. Texte et commentaire article par article des nouveaux traités européenne (TUE-TFUE)", La documentation Française, Paris, 2008
- Elena Emilia Ştefan, "Răspunderea juridică. Privire specială asupra răspunderii în Dreptul administrativ", "Pro Universitaria" Publishing House, Bucharest, 2013
- Decision of the ECJ, December 10, 1969, *Commission v. / France*, 6/69
- Decision of the ECJ, December 17, 1970, Scheer v. / Einfuhr -und Vorratsstelle für Getreide und Futtermittel, 30/70
- Decision of the ECJ, March 31, 1971, *the Commission v. / Conseil*, 22/70
- Decision of the ECJ, December 14, 1971, *Commission v. / France*, 7/71
- Decision of the ECJ, July 13, 1972, *Commission v. / Italy*, 48/71
- The Vienna Convention on the Law of Treaties of 1969

BRIEF CONSIDERATIONS ON THE TRADE RELATIONS BETWEEN ROMANIA AND THE EUROPEAN UNION AFTER 1989

Roxana-Mariana POPESCU*

Abstract

In 1980, a Trade Agreement was concluded between the European Community and Romania. This Agreement was then suspended by the Community because of human rights violations during the communist regime. After a failed debut in 1990, Romania's relations with the EU found gradual improvement. In 1991, the Commerce and Cooperation Agreement came into force; it was replaced by the Interim Agreement, which was, in turn, replaced, on 1 February 1995, with the Europe Agreement. These are the three great moments that have marked the evolution of the relations between Romania and the EU, moments which we characterize briefly below.

Keywords: *Trade Agreement; European Union; trade relations; Romania.*

1. Introduction

After the fall of the Berlin Wall, the collapse of the USSR and the breakup of Yugoslavia, the CMEA ceased to exist. The consequences of the disappearance of that organization resulted in the fact that in Eastern Europe, the trade was no longer subject to administrative measures and no longer took place within an integrated market, turning into international trade, conditioned by market forces, practices, and legal rules of world trade. Given that reality, Romania had to turn to a market economy and to European integration, along with other countries in Central and Eastern Europe. Given the fact that Romania's economic system based until 1989, on centralized planning, was about to radically change, it was necessary to renegotiate the Protocol from 15 October 1971 on the accession of Romania to the General Agreement on Tariffs and Trade (GATT)[1] because "it was based on quantitative commitment, and by eliminating the centralized planning in the Romanian economy (...), compliance with the obligation assumed by Romania (...) became practically impossible"[2]. It is interesting that, from legal point of view, "GATT was a simplified agreement "run by an interim commission"[3]. Therefore, states that acceded to the Agreement were not becoming GATT members, but "contracting parties".

The renegotiation process was developed in parallel with the implementation of the Uruguay Round[4], at the end of which the World Trade Organization (WTO) was formed. In that situation, Romania, as part of the GATT, became a founding member of the WTO.

We consider that our membership in the WTO has naturally influenced the trade policy of our country after 1989. In this regard, we take into consideration the possibility of concluding a series of economic agreements, of which the most important, in our opinion, is the European Agreement of Romania's Association to the European Communities.

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[1] Published in the Official Gazette no. 9 of January 27, 1972.

[2] Adriana Giurgiu, "Comerţul intraeuropean. O nouă perspectivă asupra comerţului exterior al României", Economic Publishing House, Bucharest, 2008, p. 181.

[3] De Grégoire Bakandeja wa Mpungu, Le droit du commerce international: Les peurs justifiées de l' Afrique face à la mondialisation des marchés, Afrique Éditions, Kinshasa , 2001, p 15.

[4] For details on the rounds of multilateral trade negotiations (1947-1993).

2. Romania and the European Communities

Diplomatic relations between Romania and the European Communities were resumed in 1990, and resulted in the signing of the Agreement between Romania, on the one hand and the European Economic Community and the European Atomic Energy Community, on the other hand, on trade, and commercial and economic cooperation[5].

In 1993, the Interim Agreement on trade and trade -related matters between Romania, on the one hand, and the European Economic Community and the European Coal and Steel Community, on the other hand[6], was signed in Brussels. That Agreement replaced the one signed in 1990.

It is easy to notice that the most important Agreement signed by Romania with the European Community after 1989 is, in our opinion , the European Agreement establishing an Association between Romania, on the one hand and the European Communities and their Member States, on the other hand[7], signed in Brussels, on February 1st, 1993.

Under Article 1 of the Agreement, the objectives of that association between Romania and the Community were the following:

- ensuring an appropriate framework for political dialogue between the parties ;
- promoting the development of trade and harmonious economic relations between the parties, supporting, thus, the economic development of Romania;
- ensuring the prerequisites for economic, social and cultural cooperation;
- supporting Romania's efforts to develop the economy;
-completing the transition to a market economy and strengthening the democracy and
-creating the necessary institutions to concretely achieve that association;
-providing a framework for the gradual integration of Romania in the Community. The Agreement was concluded on an indefinite period and can be terminated unilaterally by either party; when reaching the six months from the notification to the other party, the Agreement will cease to have legal effect.

With the entry into force of the European Association Agreement, on February 1st, 1995, conditions for the following aspects were created:

- Romania's participation to the structured dialogue EU - associated countries at all levels;
- improving the access of Romanian products on the Community market by aligning, from January 1st, 1995, our country to the liberalization timetable applied to Poland, Hungary, Czech Republic and Slovakia;
- including our country in projects aimed at expanding and developing trans-European infrastructure networks (transport, communications, energy) and
- Romania's participation to various Community programs (culture, research, education, training, youth, energy, environment and small and medium enterprises).

Regarding the **movement of goods**, the Agreement "contained detailed provisions on trade policy measures, namely: customs duties and direct quantitative restrictions"[8]. In that sense, the Agreement established several measures regarding the normal functioning of mutual trade flows. Among them, we can mention the following:

- internal taxation, regulated in article 27. The article stipulates for the parties' commitment not to adopt and enforce national legal rules in the taxation area which, would directly or indirectly, favor its own products over those originating from the other party;

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[5] Ratified by Law no.23/1991, published in the Official Gazette of Romania, Part I, no. 51 of 15 March 1991.
[6] Ratified by Law no.16/1993, published in the Official Gazette of Romania, Part I, no. 66 of 30 March 1993.
[7] Ratified by Law no.20 /1993, published in the Official Gazette of Romania, Part I, no. 73 of 12 April 1993.
[8] Mirela Diaconescu, "Asocierea României la Uniunea Europeană. Implicaţii economice şi comerciale", Economic Publishing House, Bucharest, 2003, p. 200.

- procedures for conducting public procurement. Under article 68, companies in Romania have access to public procurement carried out according to Community rules, under the same conditions as those applicable to companies, situation that occurs within the Communities. In turn, Romania had to offer the same treatment to companies in the Communities, the latest, at the end of the transitional period provided in the Agreement (31 December 2002);

- the setting up and enforcement of standards and technical, sanitary and phyto-sanitary, veterinary, packaging and labeling regulations etc. Although this aspect is not expressly covered in the Agreement, it results from its economy that both Romania and the European Community and its Member States are contracting parties to the agreements concluded in the Uruguay Round, on the application of sanitary and phyto-sanitary measures and technical barriers to trade[9]. In this regard, we remind the fact that the Agreement provided the progressive and asymmetric creation of a free trade area, within a period of nine years divided into two successive stages of 5, respectively 4 years each. It is important to note that that provision was in full compliance with Article XXIV of GATT on the achieving of a free trade area;

- customs formalities. This aspect too is not expressly covered in the Agreement; however, it should not be overlooked that both parties to the Agreement, are also parties to the agreements of the Uruguay Round on customs evaluation and inspection before delivery.

Since January 1st, 1996, under the principle of asymmetry of the European Agreement, the EU has proceeded unilaterally to bringing forward the liberalization of trade in Romania, by eliminating tariff and non-tariff barriers to imports from Romania. Romania had to eliminate, in turn, those obstacles in the second stage. We mention that "in the period 1997-2001, an increase in the value volume of export of Romania in EU member states is recorded, i.e. from 4768 million in 1997 to 7720 million in 2001. In 1997, Romania's exports to the EU countries represented 56.6 % of its total exports, while in 1998, they were of 64.5 %, in 1999 of 65.5%, in 2000, of 63.8%, and in 2001 of 67.8 %[10].

As mentioned, the main objective of the Agreement referring to trade was to achieve a free trade area between the contracting parties, by eliminating all tariff and non-tariff barriers to trade. During more than 10 years, the parties of the European Association Agreement had to mutually enhance, different types of concessions, such as: "the reduction or abolition of customs duties or charges having equivalent effect, the reduction of various levies and moveable element for some agricultural products; the gradual abolition of quantitative restrictions or of measures having equivalent effect to them"[11]. In order to establish those concessions and furthermore, to implement them, the Agreement divided products into two categories, namely: industrial and agricultural products. The industrial products, in turn, were also divided into two categories: textile and steel products, on the one hand and industrial products, other than textiles and metals, on the other hand. Regarding the concessions granted by the European Community for textile products, they were included in Protocol no. 1 of the Agreement. To a careful analysis of the Protocol, we notice the following: all textile products of Romanian origin, imported into the Community, 6 years after the entry into force of the Agreement, were fully exempted from customs duties; economic operators benefited from the gradual reduction of customs duties; from the date of entry into force of the Agreement, Romanian products were imported into the European Community with customs duties reduced by 2/7, and after three years, they have been annually reduced by 1/7.

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[9] According to Mirela Diaconescu , *op. cit*., p. 200.
[10] Octavian Gh. Botez, Madalina Militaru, *"Comerţul internaţional şi comerţul exterior al României"*, 3rd edition, Publishing House of *Romania de Maine* Foundation, Bucharest, 2006, p. 103.
[11] *Ibid*, p 204.

In the steel sector, Romanian steel products were imported into the Community with a 20% reduction of customs duties, since the entry into force of the Agreement. Subsequently, after a period of six years, the customs duties were, finally abolished.

For industrial products other than textiles and steel products, the concessions granted to Romania, by the Community, under the Agreement were the total abolition, for more than 90 % of those products, of customs duties existing at the entry into force of the Agreement and the suspension of customs duties for about 5% of the products included in the combined Nomenclature, originating from Romania, within some quantitative limits.

Regarding Romania and the regime offered for the import of industrial products from the European Community, there are 3 types of concessions, as follows: for a number of products that our country did not manufacture, Romania had to eliminate customs duties since the entry into force of the Agreement; for another group of complementary products, Romania would gradually eliminate the customs duty in the first five years, according to a schedule established by the Agreement[12]; for a group of products that needed protection from the entry into force of the Agreement, the customs duties were reduced, in several phases[13].

The European Association Agreement provided the legal and institutional framework for the Romanian - Community relations aiming fundamentally at preparing Romania's accession to the European Union.

According to the Agreement, the following joint bodies were created, at governmental and parliamentary level: the Association Council[14], the Association Committee[15] and the Parliamentary Committee of Association[16].

In accordance with the Agreement provisions, at the annual meetings of the EU - Romania Association Council, the Association Committee and Sectoral Association Subcommittees, issues such as the implementation of the Agreement provisions and developments in the preparation of the accession were analyzed.

According to the provisions of the Agreement, the Association Council supervised the implementation of the Agreement. The Association Council was meeting, at ministerial level, once a year and also whenever needed. Its main task was to examine any major issues which arose in the Agreement and in other bilateral or international issues of mutual interest. The Council was made up of members appointed by the Government on the one hand, and members of the Council of the European Union and the European Commission, on the other hand. Members of the Association Council could decide to be represented, in accordance with terms of the rules of procedure. The Council established its own rules of procedure. The Presidency of the Council was provided, in turn, by a member of the Romanian Government and a member of the European Union, in accordance with provisions of the rules of procedure. The European Investment Bank (EIB) could also participate to the work of the Association, as an observer. In order to achieve the objectives of the Agreement, the Council was entitled to take decisions on matters specifically provided in the Agreement. The decisions taken were binding only on the parties. They were obliged to take all necessary measures in order to concretize the decisions taken. In carrying out its duties, the Board, in addition to taking decisions, could also make recommendations. The Council's responsibilities included also the dispute settlement. Thus, any of the two parties could submit to the Council, any dispute concerning the application or interpretation of the Agreement. The dispute was settled by a decision of the Council. Parties were obliged to take the necessary measures to

[12] To 80 % at the entry into force of the Agreement, to 40% after 3 years and 0% after 5 years.
[13] At the end of the third year, after the entry into force of the Agreement, the application of a fee equaling 80% of the tax base, reducing it gradually to 60 % at the end of the fifth year, to 50 % at the end of the sixth year, until the abolition of the tax at the end of the ninth year of transition (Source: Mirela Diaconescu, *op. cit.* , pp. 205-206).
[14] Article 106 of the Agreement.
[15] Article 110 of the Agreement.
[16] Article 112 of the Agreement.

comply with the decision. Where it was not possible to solve a dispute in accordance with the foregoing, each party could notify the other of the appointment of an arbitrator. The other side had at its disposal two months, during which it had to appoint a second arbitrator. For that procedure to be applied, it was considered that the EU and Member States constituted a single part. In its turn, the Association Council called a third arbitrator. The arbitrators' decisions were taken by majority of votes. Each party involved in the dispute had to take the necessary measures to comply with the decision of the arbitrators.

In carrying out its duties, the Association Council was assisted by an Association Committee. Thus, under the Agreement, the Committee was composed of representatives of the Government of Romania, on the one hand, and representatives of the Council of the European Union and members of the European Commission, on the other hand, and they usually were senior officials. By its rules of procedure, the Association Council established the responsibilities of the Association Committee. Among these, we mention the preparation of meetings of the Association Council and the functioning of the Committee which had an important place. The Association Council had the capacity to delegate to the Association Committee, any of its prerogatives. In that case, the Association Committee took its decisions in accordance with the conditions specified in the Agreement.

Also, under the Agreement, a Parliamentary Committee of Association was set up. The Committee was a forum in which members of the Romanian Parliament and the European Parliament could meet and exchange ideas. The Committee used to meet at intervals self-established (usually quarterly). The Parliamentary Committee of Association comprised members of the Romanian Parliament, on the one hand, and members of the European Parliament, on the other hand. The Committee established its own rules of procedure. The presidency of the Committee was provided, in turn, by the Romanian Parliament and the European Parliament in accordance with provisions established by its rules of procedure. The Parliamentary Committee of Association could request information regarding the application of the Agreement by the Council of Association, information which in that case was delivered. Committee meetings ended with the adoption and signing of a final document, as recommendation and that document had political value.

In February 2000, on the initiative of both parties, a Joint Romania-EU economic and social Committee was formed with an advisory role for the EU- Romania Council of Association.

Creating joint bodies had as purpose, facilitating the communication and political dialogue at parliamentary and governmental level, between Romania and the European Communities.

In parallel with the European Agreement of Association, Romania began negotiations with countries of the European Free Trade Association (EFTA)[17] to become part of the Free Trade Agreement. To a careful analysis of the two agreements, we observe that they contained similar provisions, and tariff concessions were the same. The main differences aimed at including concessions concerning industrial products, on different lists. Regarding the agricultural products, it should be emphasized that, "while transformed agricultural products were negotiated in the EFTA, concessions for basic agricultural products were the object of bilateral agreements concluded with each EFTA state"[18].

In 1995, on June 22, our country applied for EU membership. Two years later, in accordance with provisions of Art. O of the Treaty of Maastricht and, at the request of the Council, the Commission prepared an opinion on Romania's application for membership and

[17] Law no.19/1993 ratifying the Agreement between Romania and the European Free Trade Association (EFTA) and bilateral agricultural arrangements referred to in the Agreement, signed in Geneva on 10 December 1992, published in the Official Gazette of Romania, Part I, no. 75 of 16 April 1993.
[18] Adriana Giurgiu, *op. cit*., p. 191.

the opinion was published on 16 June 1997, in the Agenda for 2000[19]. In preparing that document, the Commission applied the criteria set in the meeting of the European Council in Copenhagen, in June 1993, namely:

- the political criterion which aims at the stability of institutions guaranteeing democracy, the rule of law, human rights, minority rights and their protection;
- the economic criterion which refers to the existence of a functioning market economy and to the capacity to cope with competitive pressure and market forces in the Union and
- the criterion of the Community/ European Union acquis and of the administrative capacity; this criterion refers to the ability to assume the obligations of EU member, among which the accession to the purpose proposed by the political, economic and monetary Union.

Romania's capacity to assume the acquis was evaluated based on several indicators, namely:

- the obligations set out in the European Agreement of Association, particularly those relating to the establishment of companies, national treatment, free movement of goods, intellectual property and government procurement;
- the implementation of measures envisaged in the White Paper[20], essential for the Single Market and
- the progressive transposition of other parts of the acquis.

A decision on these three groups of criteria depends also on the potential of administrative and legal systems of a country to implement the principles of democracy and those of the market economy, and also to apply and implement the acquis.

According to the considerations contained in the Opinion of the Commission, the executive in Brussels believed that: "negotiations for Romania's accession to the European Union will be open as soon as there will be significant progress in the fulfillment, by Romania, of EU membership conditions so as defined by the European Council in Copenhagen".

According to the same Opinion of the Commission, "the enhanced pre-accession strategy will help Romania to be better prepared to fulfill the obligations arising out of the membership and to act in order to do away with deficiencies identified in the Opinion".

On August 1st, 1996 came into force the Additional Protocol to the European Agreement establishing an Association between Romania, on one hand, and the European Communities and their Member States, on the other hand[21], signed on 30 June 1995. Under Article 1 of the Protocol, "Romania may participate in the FPs, specific programs, projects or other Community actions in the fields of research and technological development, information services, environment, education, training and youth, social policy and health, consumer protection, small and medium enterprises, tourism, culture, audiovisual sector, civil protection, trade facilitation, energy, transport and the fight against drugs and drug addiction.

On July 25, 1996, Romania's response to the European Commission's questionnaire on the preparation of the opinion on the application for EU membership was filed in Brussels.

The conclusion and entry into force of the European Agreement of Association made possible the accession of our country to the Central European Free Trade Agreement (CEFTA), in 1997. The Czech Republic, Poland, Slovakia and Hungary were the founders of CEFTA which was signed on 21 December 1992 and entered into force on 1 January 1993. The objective of the Agreement was to facilitate intraregional trade and economic cooperation and thus, to support the economic development of the participating countries. By setting, as objective, a free trade area, the Agreement was considered as a legal tool that contributed to

[19] COM (97) 2000.
[20] Cited above.
[21] Ratified by Law no. 41/1996, published in the Official Gazette of Romania, Part I, no. 112 of 31 May 1996.

preparing the participating countries for their accession to the European Union. The appropriate argument to support this idea is that according to which the Central European Free Trade Agreement was accessible only to those states that had already concluded an Agreement with the EU, from which it resulted their quality of associated state of the Union. Subsequently, CEFTA was extended by the inclusion of Slovenia, Romania[22], Bulgaria and Croatia[23].

Further, we note that in 1998, the European Commission prepared and submitted the Report on the progress of our country concerning our candidacy to the European Union. In the second Report, published in October 1999, the European Commission recommended the opening of accession negotiations with Romania, conditioned, however, by two issues: improving the situation of children in institutions and developing a medium-term strategy for solving this problem.

The European Council from December 1999, reunited in Helsinki, decided to start, *de jure*, the accession negotiations with our country. However, *de facto*, they started, on 15 February 2000. The negotiations were long and complex, involving a series of serious institutional, economic and social reforms. Referring to negotiations with the European Union in areas of interest for our approach, we make the following clarifications:

- according to the position Paper[24], Romania accepted the Community acquis on Chapter 1 - Free movement of goods, in force on 31 December 2000 and did not request transition periods or derogations, stating that it would fully adopt the Community acquis, at the date of accession. Romanian legislation in the field was, mostly, compatible, with components of the Community acquis and the full alignment with EU regulations would occur no later than at the date of accession. The alignment with the Community acquis concerned, mainly, the statistical licensing system and certain measures restricting the export of logs and the import of second-hand goods;

- regarding the common commercial policy, Romania had to make its goals and positions compatible with the ones of the European Union within the World Trade Organization. At the same time, the bilateral trade agreements concluded with third countries should not contain provisions diverging from those of the European Union;

- concerning the customs union, Romania fully accepted the Community acquis in force on 31 December 1999 and did not request any transition period or derogation, stating that it would be able to fully implement the acquis, at the date of accession[25]. From the point of view of Romania's position as a candidate, customs union negotiations included not only the adoption of the acquis, but also demonstrated the operational capacity of the customs administration in areas such as: the full implementation of computer applications for customs services to ensure the proper implementation of the acquis, the implementation of measures to reduce waiting times at the border, measures for the protection of copyrights and industrial property rights, measures to combat economic crime, to improve internal coordination within the customs administration, as well as between the administration and other institutions responsible with law enforcement (police and judicial authorities) and the adoption of legal and institutional measures necessary to ensure the collection and control of EU revenue and to efficiently manage the common agricultural policy[26].

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[22] Law no. 90/1997 ratifying the Agreement deciding Romania's accession to the Central European Free Trade Agreement (CEFTA), Krakow, December 21, 1992, signed in Bucharest on 12 April 1997, published in the Official Gazette of Romania, Part I, no . 108 of 30 May 1997.

[23] Grigore Silasi, Philippe Rollet, Nicu Trandafir, Ioana Vădăsan, *"Economia Uniunii Europene: o poveste de succes?"* Universitatea de Vest Publishing House, Timisoara, 2007, p 342.

[24] http://www.clr.ro/menu1/Capitole % 20negociere/CAP01-DP.pdf .

[25] According to the position paper for Chapter 25 - Customs Union (http://www.clr.ro/menu1/Capitole % 20negociere/CAP25-DP.pdf).

[26] For details, see ***, *"Politica privind comerţul şi dezvoltarea"*, the European Institute from Romania, Bucharest, 2005 (http://www.ier.ro/documente/formare/Comert_si_dezvoltare.pdf).

The formal conclusion of the accession negotiations in December 2004 marked a new stage in the evolution of the accession process. Thus, since December 2004, Romania started formalities for drawing up the Accession Treaty. On 22 February 2005, the European Commission gave a positive opinion to signing the Accession Treaty with Romania, followed by the assent of the European Parliament, on 13 April 2005. The Accession Treaty was signed on 25April 2005.

With the accession of Romania to the European Union, on January 1st, 2007, the European Association Agreement ceased to have effect. Also at that time, our country renounced at the quality of state party to CEFTA, and the Free Trade Agreement with EFTA countries was renegotiated.

3. Conclusions

In conclusion, the legal instrument that marked the trade between Romania and the European Union was the European Association Agreement, which aimed at achieving a free trade area for industrial products by the end of 2001, and at adopting strict competition rules, to eliminate trade distortions through unfair and anti-competitive practices.

Through its content, the Agreement was preferential and its application led to the gradual liberalization of trade between the parties, under a schedule. In that context, any other international legal instrument that Romania would have wanted to be part of, had to be reported, including to the objective of our country, namely the accession to the European Union, and that because, once the European Association Agreement entered into force, Romania acquired the EU membership. As shown, the acquisition of this membership has helped also to becoming member state of CEFTA and EFTA partner.

References

- De Grégoire Bakandeja wa Mpungu, „Le droit du commerce international: Les peurs justifiées de l' Afrique face à la mondialisation des marchés" Afrique Éditions, Kinshasa, 2001;
- Octavian Gh. Botez, Madalina Militaru, *"Comerţul internaţional şi comerţul exterior al României"*, 3rd edition, Publishing House of Romania de Maine Foundation, Bucharest, 2006
- Mirela Diaconescu, "Asocierea României la Uniunea Europeană. Implicaţii economice şi comerciale", Economic Publishing House, Bucharest, 2008
- Adriana Giurgiu, "Comerţul intraeuropean. O nouă perspectivă asupra comerţului exterior al României", Economic Publishing House, Bucharest, 2003
- Grigore Silasi, Philippe Rollet, Nicu Trandafir, Ioana Vădăsan, *"Economia Uniunii Europene: o poveste de succes?"* Universitatea de Vest Publishing House, Timisoara, 2007, p 342
- Law no.19/1993 ratifying the Agreement between Romania and the European Free Trade Association (EFTA) and bilateral agricultural arrangements referred to in the Agreement, signed in Geneva on 10 December 1992, published in the Official Gazette of Romania, Part I, no. 75 of 16 April 1993
- Law no. 41/1996, published in the Official Gazette of Romania, Part I, no. 112 of 31 May 1996
- Law no. 90/1997 ratifying the Agreement deciding Romania's accession to the Central European Free Trade Agreement (CEFTA), Krakow, December 21, 1992, signed in Bucharest on 12 April 1997, published in the Official Gazette of Romania, Part I, no . 108 of 30 May 1997
- http://www.clr.ro/menu1/Capitole % 20negociere/CAP01-DP.pdf
- ***, "*Politica privind comerţul şi dezvoltarea*", the European Institute from Romania, Bucharest, 2005 (http://www.ier.ro/documente/formare/Comert_si_dezvoltare.pdf)

THE FISCAL ANTI-FRAUD CONTROL. LEGAL REGIME

Rada POSTOLACHE[*]

Abstract

The fiscal anti-fraud control has been regulated quite recently, by the Government Emergency Ordinance No. 74/2013, adopted in the context of the implementation of the "Project for the modernization of the fiscal administration" and the intensification of the fight against tax evasion. On the basis of the legal norms applying to it, of specialized doctrine and legal literature, the present work aims to approach fiscal control from various perspectives – organization, enforcement and definition of legal accountability – so as to point at the same time its specific forms, in relation to other similar control forms. Moreover, the present work will also analyse the novelty elements which the law brings, so as to create a specific technical support for the authorities, regarding those case laws having as object the economic-financial frauds. The current study aims to delineate the legal regime of this control form, which we consider a specialized activity, organized within the National Agency of Fiscal Administration and performed with the specific target of control, so as to prevent, acknowledge and fight tax evasion. At the same time, the present study is useful under the present circumstances, in which fiscal fraud has become more intense, becoming a phenomenon, but also because fiscal fraud has incidence upon other field of economic and financial interest.

Keywords: *operative and unexpected control, tax evasion, anti-fraud inspector, control act*

1. Introductive points of reference

The present work will analyse the fiscal anti-fraud control – one of the main components of the financial and fiscal control, together with fiscal audit, economic-financial audit and the control of budget execution[1], as it is approached by specialized literature[2].

Instituted in 1991, together with the reformation of public finances, the control against fiscal fraud has benefitted from a regulation constantly modified, which reconfirmed the mobility typical to the field. *At present*, the control against fiscal fraud has as special legal ground the provisions of G.E.O. No. 74/2013 on certain measures for improving and reorganising the activity of the National Agency of Fiscal Administration[3], but also the provisions of Government Decision No. 520/2013 on the enforcement of the G.E.O. No. 74/2013. These regulations have been adopted in the context of the demand *to modernise fiscal administration* and *to make the fiscal anti-fraud control more efficient*; at the same time, the fight against tax evasion constitutes, together with the actions for preventing the lack of observance by taxpayers of their fiscal obligations, the top priority of A.NA.F also for the

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[1] Regarding the forms of financial control, see: Rada Postolache, *Drept financiar*, (Bucharest: C.H. Beck Publ. House, 2014), 278.

[2] See for that matter: Rada Postolache, "*Controlul financiar"*, in *quoted works* 276-319; Nadia-Cerasela Aniței, "*Controlul financiar*", in *Drept financiar*, (Bucharest: Universul Juridic Publ. House, 2011), 117-233 ; Viorel Roș, "*Controlul financiar*", in *Drept financiar*, (Bucharest: C.H. Beck Publ. House, 2005), 377-416; Marian Tudor, Daniela Iancu, Andreea Drăghici, „*Controlul financiar-fiscal*" in *Drept financiar*, (Pitești: University of Pitești Publ. House, 2009), 284-330.

[3] Which will be called also A.N.A.F. in the present work.

following years, according to the Strategy of Fiscal Administration on a medium term, period 2012-2016[4].

The performance of the fiscal anti-fraud control triggers also the incidence of other regulations; in many cases, the transgression of fiscal norms takes the form of the fiscal evasion crime, subject to Law No. 241/2005 on the prevention and fight against tax evasion[5]; frequently, tax evasion itself is associated to some "connected" crimes[6], which are subject to some special distinct regulations.

In this context, we aim to delineate the legal regime of the control against fiscal fraud, from the institutional and operational perspective, by pointing out its specific elements, but also its connections with the other forms of the fiscal control, particularly the fiscal inspection.

We would like to point out the usefulness of our study, given the deepening of fiscal fraud, which has become a phenomenon, but also its connection with other domains of economic and financial interest, its approaching within legal doctrine being sequential.

2. The definition of fiscal anti-fraud control

From a *terminological* point of view, the control analysed within the present work is acknowledged by the special law with the name of "fiscal anti-fraud control". Law also contains the expression: "fiscal and customs anti-fraud control", which has the same meaning.

The special law does not define the anti-fraud control *in expressis verbis.* The prerogatives attributed to A.N.A.F, briefly regulated by article 14 of the G.E.O. No. 74/2013, point out a control exerted with the aim to prevent, discover and fight against the deeds and acts related to tax evasion and fiscal and customs fraud. It can be deduced from here that the Special law makes a difference between tax evasion and fiscal fraud, but without defining them. Yet, specialized literature constantly uses the unitary definition of "tax evasion", attributing two forms to it: *licit tax evasion* (generated by a favourable interpretation of law); *illicit tax evasion* or *fiscal fraud* (generated by the transgression of the imperative norms of the fiscal law), this being also the meaning considered by the lawmaker within the Law of tax evasion.

For this purpose, *de lege lata*, the name attributed to control does not correspond to its purpose pointed out by law, being limitative; moreover, according to the G.E.O. No. 74/2013, fraud is different from tax evasion, while fraud constitutes a form of tax evasion.

3. The organisation of the fiscal anti-fraud control within A.N.A.F.

In the autumn of 2013, the Financial Guard[7], a special institution of fiscal control having legal personality was abolished according to the G.E.O. No. 74/2013 mentioned above. Its activity has been taken over by the National Agency of Fiscal Administration, under the name of "anti-fraud control", being organized on the principle of regionalizing financial activity.

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[4] *http://static.A.N.A.F..ro/static/10/A.N.A.F./Informatii_R/Strategia_A.N.A.F._2012_2016.pdf* (accessed on 10.02.2014). See this document for: measures of tax evasion prevention and fight (p. 10); tax evasion fight (p. 12).

[5] Official Gazette No. 672 from July 27th 2005.

[6] For an analysis of these, see Nadia-Cerasela Aniţei, Elena-Roxana Lazăr, *Evaziunea fiscală, între legalitate şi infracţiune*, (Iaşi: Lumen Publ. House, 2013), 109-117.

[7] Organized as it follows: the general Commission – at a central level; regional commissions (areal units), having in their componence districtual sections – at a territorial level. For details see Marian Tudor, Daniela Iancu, Andreea Drăghici, *quoted works*, 305-306.

The General Directorate for Fiscal Anti-fraud. In this context, within A.N.A.F. was organized at a central level the General Directorate for Fiscal Anti-fraud. Just like its predecessor (the Financial Guard), the General Directorate for Fiscal Anti-fraud consists in a *body specialized in fiscal and customs control*, having direct attributions of preventing, acknowledging and fighting the acts and deeds related to tax evasion and fiscal and customs fraud, according to the new regulation, which *does not have legal personality.*

The absence of legal personality strengthens here the wish of the lawmaker to have only one control structure: A.N.A.F. The control which the latter exerts is nonetheless distinctly regulated: fiscal inspection, customs control, *fiscal and customs anti-fraud control*.

*Direction for Fraud Fight.*Within the central structure of the General Directorate for Fiscal Anti-fraud functions, apart from the structures of prevention and control, *the Direction for Fraud Fight*, set up for performing the activity of *fast* and *steady tracking* and *pursuing* of the economic-financial crimes, for *shedding light* upon some *technical aspects* within the activity of criminal investigation. For this purpose, this structure offers *specialized technical support* to the *prosecutor* in carrying out the criminal investigation, for case laws regarding economic-financial crimes, by means of the anti-fraud inspectors on loan[8] to the Prosecution services, on the position of experts, for a period of three years, which can be expanded, by observing the requirements of the G.E.O. 74/2013.

Regional Directorates for Fiscal Anti-fraud. At a territorial level, within the General Directorate for Fiscal Anti-fraud function also the *Regional Directorates for Fiscal Anti-fraud*; they are as well structures lacking legal personality, organized on the basis of the same principle of regionalization, but having headquarters which are different from those of the General regional directorates of public finances, a fact which also underlines the specific features, but also the autonomy of the anti-fraud control within A.N.A.F.

4. The objective and scope of the anti-fraud control

The objective of the anti-fraud control. According to article 14 of the G.E.O. No. 74/2013, in order to carry out its activities of preventing the deeds and acts of tax evasion and fiscal fraud, A.N.A.F., through its specialized structures, carries out the *operative and unexpected control* for checking: a) the observance of the normative acts, for preventing, discovering and fighting against any acts of tax evasion and fiscal or customs fraud; b) the observance of the commerce norms, with the aim to prevent, track and remove tax evasion and fiscal or customs fraud; c) the way that assets are produced, stored, transported and valued, in all the places and spaces where the activity of economic operators takes place; d) the participation, in collaboration with the specialized bodies of other ministries and specialized institutions, to activities of tracking and fighting against illicit activities generating phenomena such as tax evasion and fiscal and customs fraud.

The scope. In accordance with the objective mentioned above, the lawmaker has configured the attributions of A.N.A.F. regarding the anti-fraud control, grouping them into 2 categories:

a) attributions in the field of *preventing* and *discovering* tax evasion and fiscal and customs fraud;

b) attributions in the field of *fighting against* acts related to tax evasion and fiscal and customs fraud;

Concretely speaking, the provisions of article 14 of the G.E.O. No. 74/2013, expanded at article 7 letter D of the Government Decision No. 520/2013 point out the following fields

[8] Regarding the way these inspectors are nominated and transferred, see the provisions of article 4 paragraphs (11)-(14) of the G.E.O. No. 74/2013.

for exerting the anti-fraud control: the production, storage and transport of assets (on public roads, rail and inland water roads, in ports, train and bus stations, airports, inside free areas, near customs facilities, in storehouses, but also in other places where economic activities take place), the commercialization and good use of such assets.

Moreover, given the area of the anti-fraud control and the diversity of the operations which are subject to it, this control is allowed in regard to all entities performing the activities mentioned above, irrespective of their tax residence, size and organization form, in all the spaces in which the operations subject to verification are carried out, but also, according to law, "in other places where economic activities are performed", which fall under the incidence of national normative acts, including those transposed in the legislation of the European Union; briefly, according to specialized literature[9], the control is carried out "according to the place where the taxable source is found" – the headquarters of the economic agent, in any of his working points, using communication ways, in any transport place, including the headquarters of the control entity.

The anti-fraud control is a form of control allowing for the operative and free access to all the information necessary for being accomplished - that is to the data bases of other institutions or legal persons, according to the conditions established through the protocols concluded with the entities involved, respecting the legal regime of personal data; this anti-fraud control also constitutes gradually its own data basis.

Essentially, when the anti-fraud control is carried out, it is verified the lawful character of the activities performed, the existence and authenticity of the justifying documents of the latter, but also the application of seals, for insuring the assets integrity. Briefly speaking, the check-up activity can regard *any* legal fact or act generating legal financial, fiscal and customs effects, the role of anti-fraud inspectors being that of making a judgment upon their legal character.

Interactions with other forms of control. The fiscal anti-fraud control is a distinct control form, interacting nonetheless with the other forms of control. It intercrosses particularly with *fiscal inspection*[10], but without overlapping with it, both forms influencing directly the organization of budgetary incomes; in this context, are relevant the activities subject to anti-fraud control which generate fiscal/customs debt titles for the local state budget/budgets, the management of the due and acknowledged amounts of money constituting nonetheless the prerogative of the authorized fiscal entity which is, by hypothesis, different from the anti-fraud control structure.

The fiscal anti-fraud control also intercrosses with the *activity of criminal prosecution* of the economic-financial crimes, performed within Prosecutor's offices, by means of the Directorate for fraud fight.

Moreover, the anti-fraud control regulated by the G.E.O. No. 74/2013 is integrated in the European and international context of the anti-fraud fiscal and customs fight. We are taking into account the internal inter-institutional collaboration, for common actions of control and a thematic control, with the institutions performing their activity in fields of common interests (the Ministry of Labor, Family, Social Protection and Elderly, the Ministry of Administration and Internal Affairs). Moreover, at the internal level, A.N.A.F. collaborates with the specialized bodies of other specialized ministries and institutions, particularly with the Anti-Fraud Fight Department (DLAF), for actions of tracking and preventing illicit

[9] For that matter, see Viorel Roș, *quoted works*, 401.

[10] With a few exceptions, taxes have, in their essence, a statement character – established on the basis of the statements made by taxpayers. In this context, the control of taxes, called "fiscal inspection" according to the Romanian legal system, is aimed to check the statements made by taxpayers, from the perspective of their legal character and the accuracy of the data contained, on the basis of the procedure regulated by the special law – the Fiscal Procedure Code (briefly expressed as "verification of the accurate statements and payments). For more details on the tax control, see Jacques Grosclaude, Philippe Marchessou, *Procedures fiscales*, 3 edition, (Paris : Dalloz Publ. House, 2004), 109-117.

activities generating phenomena such as tax evasion and fraud[11]; the institution mentioned above is also the contact institution of the European Anti-Fraud Office (OLAF), which is an European body integrated to the European Commission, but has independence in investigating frauds[12].

At the same time, A.N.A.F. collaborates also with the other member states, by means of measures typical to the activity of administrative cooperation for preventing and fighting tax evasion and inter-community fiscal fraud: initiates multilateral controls and continues the participation to the control initiated by the other states; participates to the network Eurofisc of inter-community exchange of information, dedicated to the operative exchange of data regarding suspect inter-community transactions; increases the efficiency in the good use of the data received within Eurofisc, by intensifying the actions of verification performed by the territorial structures.

A.N.A.F. cooperates with the organizations having similar attributions from *other states*, on the basis of the international treaties of which Romania is a party, or on the basis of mutuality.

At the same time, it collaborates with European fiscal administrations for preventing crossborder fraud, for improving and perfecting the techniques, methods and control abilities.

5. Exercising the anti-fraud control and the prerogatives of fiscal anti-fraud inspectors

Exercising the anti-fraud control. It is taken into account here the control performed by the General Directorate of Fiscal Anti-fraud, by means of anti-fraud inspectors, and not also the special activity carried out by the anti-fraud inspectors on loan to the prosecutor's offices. The functions which this structure uses in performing the functions established by law are: *the public functions* of anti-fraud inspector[13] (specialized function); general public functions. Just like in the case of the former regulations, specialized instructors (ant-fraud inspectors) are public servants[14], with an economic/legal specialization, invested with the public authority of the state for performing their professional attributions and duties, being all the time available for the service performed and protected.

The filling up of the functions mentioned above is done by competition or exam, the access being conditioned by meeting the *minimum conditions* provided for by law for: specialized education, pass of some complex psychological tests, pass of integrity evaluations[15].

At the same time, law imposes a *special conduct*. While exercising their professional attributions, anti-fraud inspectors must wear a uniform and some distinct symbols (badge and, according to the case, weapons and other technical means used as an individual means of

[11] DLAF is organized and functions according to Law No. 61/2011 (Official Gazette No. 331 from 12th May 2011) as a structure with legal personality, within the working system of the Romanian Government, under the coordination of the prime minister. It is the *contact institution* of OLAF. Its objective regards *protecting the financial interests of the European Union in Romania*, so that it has the attribute of an *acknowledging body*, according to the Criminal Procedure Code. When exercising its control, DLAF performs administrative investigations, controls on the place, analyses and verification of documents, its control acts being used as evidence, according to law. For more details, see Nadia-Cerasela Aniţei, Elena-Roxana Lazăr, *quoted works*, 170-172.

[12] For more details regarding the set up and the prerogatives of these structures, see Nadia-Cerasela Aniţei, Elena-Roxana Lazăr, *quoted works*, 163-172.

[13] Previously called "commissioner" of the Financial Guard.

[14] The appointment of the anti-fraud personnel is done according to Law No. 188/1999 on the Statute of public servants, republished, with the subsequent modifications and amendments [article 4 paragraph (6) G.E.O. No. 74/2013, quoted above].

[15] According to specialized literature, "the perfect investigator of tax evasion acts must be a good combination between: a police officer, a detective, an accountat, a sociologist, a computer scientist and a lawyer. For that matter, see: Financial Investigations: a financial approach to detecting and resolving crimes, U.S. Government Printing Office, 2003, p. 3, apud, Nadia-Cerasela Aniţei, Elena-Roxana Lazăr, *quoted works*, 175.

defense, protection and communication, which are freely given). In certain circumstances, when performing their professional duties, anti-fraud inspectors can wear *civilian clothes*.

According to article 18 paragraph (1) of the Government Decision No. 520/2013, anti-fraud inspectors (excepting those of the Directorate for Fraud Fight), when performing their duties, carry out the following:

a) operations of current control, performed operatively and in an unexpected manner, on the basis of the control identity card, badge and permanent service order;

b) operations of thematic control, on the basis of the control identity card, badge and *thematic control order*, by means of which are established the objectives to be checked, the entities subject to control, the period subject to verification, the length and the moment when the control starts.

Law rules that any control operation must be performed by at least two anti-fraud inspectors, while the control can be exercised anywhere in Romania, and not only within the territory where the Regional Directorate for Anti-fraud is located. The control actions with a high degree of danger can be performed by control teams accompanied by the *members of the sub-units specialized in rapid intervention*, under the subordination of the Ministry of Internal Affairs, in the conditions established by the protocol concluded between the latter and A.N.A.F.

Moreover, according to article 9 of the G.E.O. No. 74/2013, when strong *clues* show that there have been committed deeds provided for by the criminal law, A.N.A.F. can demand to the Ministry of Internal Affairs to ensure the necessary staff for the protection and safety of the operations performed by the public servants in completing their control activities, the necessary personnel being also provided by the *sub-units specialized in rapid intervention.*

The prerogatives of anti-fraud inspectors. They are inseparable from the objective and prerogatives of A.N.A.F., being regulated with the same content and purpose: preventing, acknowledging and fighting against fraud and tax evasion. Without reiterating them, we will point out the relevant features of these prerogatives, on the basis of their content:

a) the prerogatives for preventing and acknowledging tax evasion and fiscal and customs fraud

a1) Investigations, supervisions, verifications, fiscal and customs acknowledgements. The prerogatives attributed by law point out a complex control activity, which is not limited to a typically administrative activity. Either that is performed in an operative and unexpected manner, or in a thematic one, the anti-fraud control presupposes factual check-ups, including factual and written stocks, followed and upheld by a control of the witten documents attesting the legitimacy of the operations subject to verifications, which are extremely diverse, and which can take including the form of cross check-ups. For that matter, in order to find out the truth, anti-fraud inspectors can demand, in the conditions of the Fiscal Procedure Code, the copies of the original documents, can also take proofs, samples and other similar items, but also to demand the performance of the technical expertise necessary for the control act (for instance the evolution of financial flows of the person subject to verification). The analysis and examination of proofs and samples, but also the technical expertise, are performed in agreed specialized laboratories, the expenses for their performance, including those related to the storage and handling of the confiscated goods being supported from the funds specially granted for the budget of incomes and expenses.

Moreover, law, in its actual forms, expands the field of control, by providing for the possibility for data to be demanded or, according to the case, documents, from any private and/or public entity, with the aim of handling and motivating the acknowledgements on

committing deeds which are not according to the legislation in force, in the fiscal and customs field[16].

Moreover, during a control, the identity of the managers of the entities checked can be demanded and established, without taking the role played by the structures authorized by that matter.

According to current legislation, inspectors no longer have the right to demand, according to the conditions of the Criminal Procedure Code, the performance of perquisitions in public or particular place, there being considered[17] that "the lawmaker avoids like this the transgression of the separation of state powers, naturally acknowledging the right of the criminal investigation bodies to order the necessary measures for criminal investigations, without getting indications for that purpose".

When carrying out the control, the anti-fraud inspectors can acknowledge certain circumstances in which some acts provided for by criminal law have been committed in the fiscal field.

a2) Coercion. In strong connection to the control activity and for restoring the affected legal order, the anti-fraud inspectors can:

- order for measures of *confiscating* the assets/incomes having an illicit way of fabrication, storage, transport or presentation, but also the incomes obtained from illegal commercial activities or services delivery; confiscation has the special legal regime instituted by the Government Ordinance No. 14/2007, regarding the regulation of the way and conditions in which the assets entered according to law in the private property of the state are used[18];

- take *insurance measures* for the situation in which there is the danger for the debtor to escape the prosecution or to hide, alienate or spread his patrimony;

- acknowledge the *crimes* and apply the appropriate sanctions, according to law, to take the financial-accounting documents or documents of another type which can help to prove the contraventions or, according to the case, the crimes;

a3) Complaint/communication. According to the circumstance, the anti-fraud inspectors shall make complaints to: fiscal bodies; criminal prosecution bodies; entities authorized to implement the confiscation and insurance measures; the same inspectors must notify to the entities mentioned above the acts concluded and the documents on which they are based, with the aim to use the acknowledgements and to apply to measures ordered by the control acts. The inspectors cannot replace the specialized structures in the field.

b) Prerogatives for fighting against fraud. Separately, the special law regulates the prerogatives for fighting against fraud, attributed to the *Directorate for Fraud Fight*, which is directly connected to the criminal prosecution activity performed by the Prosecutor's offices, and thus, reformed. The prerogatives are carried out by the inspectors on loan to Prosecutor's offices and concern:

- offering specialized *technical support* to the prosecutor in carrying out the criminal prosecution related to the criminal files having economic-financial crimes as object;

- performing the following, by means of the Directorate for Fraud Fight, out of the prosecutor's order: technical-scientific acknowledgements constituting evidence, according to law; financial investigations, with the aim of rendering certain assets unavailable; any other check-up in the fiscal field, ordered by the prosecutor.

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[16] This prerogative regarded before the financial-bank, insurances and re-insurances institutions.

[17] See Nadia-Cerasela Aniţei, Elena-Roxana Lazăr, *quoted works*, 178-179.

[18] Republished in the Official Gazette No. 195 from March 27th March 2009. According to article 7 letter B, point 8 of the Government Decision No. 520/2013, the activity of using the assets conifiscated or entered in the private property of the state, according to law, but also of the assets seized during the compulsory foreclosure, according to law, is organized by A.N.A.F.

Practically speaking, when they are on loan[19], the anti-fraud inspectors have to carry out the criminal prosecution, being involved, as ”experts” in all the range of operations required by the performance of the economic-financial crimes investigation, which overcome the fiscal fraud stricto sensu. The activity of the inspectors mentioned above is performed *under the exclusive authority of the chief of the prosecutor's office* within which they function, by carrying out the activities ordered by him, in order to insure the impartiality but also the promptness and efficiency of the criminal investigation activity performed by the Prosecutor's offices; the same inspectors cannot, in any situation, replace the prosecutor's activity[20].

6. The legal regime of the control acts concluded

According to article 15 of the G.E.O. No. 74/2013, ”When performing its own attributions, as a consequence of the controls concluded, A.N.A.F. concludes minutes of control/acts of control, for establishing the fiscal situation de facto, for acknowledging and sanctioning contraventions, but also for acknowledging the circumstances regarding some deeds provide for by the criminal law, ”opposable to the entities checked”[21].

The procedure on the drafting, form and content of the minutes concluded by the anti-fraud structure are established by means of the order of the president of A.N.A.F.

The minutes on the fiscal situation de facto. Establishing this situation constitutes the main objective in the exertion of the anti-fraud control, being included in the final act of anti-fraud control.

In no circumstance can a control act produce legal effects directly upon taxes and contributions due to the general consolidated budget. If the legal fiscal/customs order is affected, the anti-fraud inspector is bound to *notify the competent bodies*, which will receive one copy of the minutes of anti-fraud control, accompanied by the documents proving its authenticity, with an aim to *use the acknowledgements* within the control act.

The control act has an *administrative-fiscal* character, being subject to the legal regime instituted by the Fiscal Procedure Code. On its basis, according to the case, the fiscal body where it is or should be the controlled entity (the taxpayer) shall issue the taxation decision, having the legal regime of the fiscal debts title, or on the basis of the same act, will be started the criminal investigation.

Naturally, the confiscation and insurance measures shall be used, according to special law.

The contravention minutes. Will be sanctioned as contraventions only the deeds referred to by law. As a legal act, the contravention minutes are subject to the requirements instituted by the G.E.O. No. 2/2001 on the legal regime of contraventions. Their enforcement is nonetheless subject to the Fiscal Procedure Code, the same minutes also having the quality of fiscal debt title, there being necessary for them to be communicated to the entity having the ability to execute the fiscal debts.

The act for notifying the criminal investigation body. When acknowledging certain circumstances in which some deeds provided for by the criminal law for the fiscal field have been committed, the inspectors for fiscal anti-fraud have the duty to notify the criminal investigation bodies abut it, establishing at the same time their fiscal implications and ruling,

[19] Regarding the appointment and the way inspectors are “loaned”, see the provisions of article art. 4 paragraphs (11)-(14) of the G.E.O. No. 74/2013.

[20] The current work will not focus on ”The way anti-fraud inspectors exert their attributions while they are *on loan* to Prosecutor's offices”, this being established by the law on the statut of this category of public servants, as provided for by the provisions of article 5 paragraph (15) of the G.E.O. No. 74/2013.

[21] For that matter, see Emil Bălan, *quoted works*, 322.

according to the conditions of the Fiscal Procedure Code, on taking the insurance measures, any time there is the danger for the debtor to escape from the investigation or to hide, alienate or spread his patrimony.

7. Conclusions

The study of two normative acts has brought us to the following conclusions:

a) Terminological inconsistency. *De lege ferenda*, it is necessary to think again the terminology within the two normative acts under discussion: on the one hand, for making compatible the name of the control analyzed, while on the other hand for making compatible the meaning of tax evasion as presented in the two regulations: the G.E.O. No. 74/2013 and Law No. 241/2005, given that tax evasion also includes fiscal fraud.

b) Organisation. By assigning it to A.N.A.F., the new law confers a unitary character to the activity of fiscal and customs control. Yet, albeit integrated to A.N.A.F. and organized on the principle of regionalization, the fiscal anti-fraud control keeps its specific elements unaltered, a fact which justifies the way it has been performed as self-standing so far, by means of specialized anti-fraud inspectors.

A novelty element is the Directorate for Fraud Control, which consolidates the activity of criminal investigation, its set up being at the same time according to article 120/1 of Law No. 304/2004 on judicial organization[22], according to which: "The experts in the economic, financial, banking, customs and informatics field can perform their activity *within Prosecutor's offices*, but also in other fields, for shedding light upon some technical aspects related to the criminal investigation activity".

c) Procedures. The procedure according to which the anti-fraud control is performed is not essentially different from that presented by the former regulations, the law currently in force confirming again the character of "specialized body" of this control structure.

The new elements brought expand the area of control also to bus and train stations, the inspectors having the right to demand information and documents from any entity, public or private, as the new law no longer limits their field.

d) Performance/check-up of control. Essentially, the G.E.O. No. 74/2013 only insures the organizational and operational framework of the anti-fraud control, by conferring legitimacy to it, for acknowledging the fiscal and customs situation de facto.

Most of the times, ending the anti-fraud control constitutes the premise of some new activities, for using acknowledgements, which are under the competence of some specialized structures and the incidence of other legal regulations, frequently represented by: the Fiscal Procedure Code, the Criminal Code, Law No. 241/2005 on tax evasion.

All the aspects mentioned above point out a *specific control*, with an identity legally acknowledged, which is delimited from the other species of the financial and fiscal control, particularly in terms of its objective and way of being exercised, declared by law: prevention, acknowledgement and fight against tax evasion and fiscal fraud[23].

References

- Aniţei, Nadia-Cerasela and Lazăr, Elena-Roxana. *Evaziunea fiscală între lege şi infracţiune*. Iaşi: Lumen Publ. House, 2013
- Aniţei, Nadia-Cerasela. *Drept financiar*. Bucharest: Universul Juridic Publ. House, 2011
- Grosclaude, Jacques and Marchessou, Philippe. *Procedures fiscales*, 3rd edition. Paris: Dalloz Publ. House, 2004
- Lamarque, Jean and Negrin, Olivier and Ayrault, Ludovic. *Droit fiscal general*. Paris: Litec Publ. House, 2009

[22] Official Gazette No. 827 from September 13th 2005.

[23] Legal literature analyses this control as a "financial control of the state". See for that matter: Viorel Ros, *quoted works*, 400-402; Emil Bălan, *quoted works*, 320-321.

- Postolache, Rada. *Drept financiar*. Bucureşti: C.H. Beck Publ. House, 2014
- Roş, Viorel. *Drept financiar*. Bucharest: C.H. Beck Publ. House, 2005
- Tudor, Marian and Iancu, Daniela and Drăghici, Andreea. *Drept financiar*. Piteşti: University of Piteşti Publ. House, 2009

OLD AND NEW LEGAL TYPOLOGIES

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Abstract

The existence of legal constants does not preclude the process of legal change, of its permanent evolution. Thus, the legal doctrine emphasizes that there is no legislation valid for all times, the legal progress mentioned by Turgot being ubiquitous. Multiple forces drive to diversification or to approach the national legal systems. Analysing the history of law, we distinguish the existence of overlapping legal systems, fact that raises the question of legal typologies. Different criteria and different names have been proposed by the legal comparatists. In the present study, we shall address some of the most important and famous criteria, with emphasis on a new legal typology that has arisen - the European Union law.

The present study is part of a more complex research on this theme and it is meant to approach certain important points of my Ph.D. thesis.

Keywords: *comparative law, diversification, European Union, legal systems, typology*.

I. Introduction

Conceived as a multidisciplinary study combining elements of general theory of law, with elements of comparative law and European Union law, this paper aims to answer the questions: what are the legal typologies and is the EU law a new type of law, with specific qualitative determinations?

We are currently witnessing exciting challenges concerning the European Union – there are discussions about the integration in a legal order above the Member States legal order, about connecting supranational interests, about the reconfiguration of sovereignty, about the intertwining of national values with the European Union and about the harmonization of legislation.

Thus, we ask ourselves if the European Union law, characterized by *multilingualism* and *multijuridism*, can be considered a new type of law, emerged in the panorama of the world's legal systems? We believe that, just as far as the EU is based on an autonomous legal will and on principles and values that are within the eternal law, "unity in diversity" is possible and so the existence of a new legal family.

In law, because the legislator cannot exhaust all legal situations that may arise in society and that have to be regulated, he selects certain current *types* out of the diversity of possible relationships, excluding the others. Using simplification methods, the legislator chooses sometimes typification, and other times classification.

The typological or typological-classificatory method is used from ancient times by legal sciences (*e.g.* from Roman law we find out about the type of *pater familias*). In general, legal typologies are used in law by considering the real elements and relationships in legal life in order to know more precisely what mechanisms or structural relationships have been established in a range of legal issues[1].

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We consider that typologies involve the analysis of typical features between different types of objects, phenomena, processes and people. However, any typology face a particular problem – the *selection of the criteria* underlying the classification of the phenomena studied. Because the typology represents a *partial synthesis*, the social sciences use very often the typological method, providing valuable results.

II. Paper Content

Humans are social beings, but they are also juridical beings - *homo juridicus*, who, wishing to regulate and develop the human society, understood that it is necessary to create the law. Equipped with consciousness and will, humans act in order to meet their needs and interests, whether by respecting their values protected by law, whether by breaking them.

Law is conditioned by time and space, and its history is lost in the mist of time. Thus, using the historical method of legal phenomenon research, we find out that law appeared in the Ancient East. We note here the *cosmogenetic conception* that encompasses several philosophical ideas crystallized in China and Ancient Greece, ideas which constitute the basis of law.

An impressive feature of the entire universe is *diversity*. Like there are not two snowflakes alike, two leaves alike, two trees alike, two people alike, two souls alike, there are not two legal systems alike. But having no unity around us, can we dream of knowing the law of other societies?

Law is connected to the social environment, being influenced by various legal and extra-legal factors. Because of this connection, the law evolves with the society, and as Ihering said, law is not always and everywhere the same. But people do not live isolated. Since ancient times, they felt the need to gather in communities. Today more than ever, in this globalized world, people come in contact with each other. This requires an understanding of the rules governing legal systems. It requires a common understanding of people's rights and obligations. This thirst for knowledge is *watered* by the science of comparative law, which explains the institutions and legal concepts in the context in which it occurs, in their dynamics, analysing the concrete social conditions in which they arise.

The existence of legal constants changes law, its permanent evolution. Thus, there can be no legislation which would be valid for all times, because in the natural process of becoming law the legal progress, that Turgot was mentioning about, intervenes.

Multiple forces drive diversification or the closeness of the national rights. Some of these forces are not legal (*e.g.* geography of the respective states, religion, politics, economics, language). Others are legal because even the law can be "an accelerator of its own diversity". The comparatists do not just try to establish the existence of these forces, but they try to group them into systems.

Analysing the history of law, we distinguish the existence of overlapping legal systems, fact that raises the question of legal typologies. As I have underlined above, the typological method is widely used in the social sciences (especially in law), and it supposes "not considering individual differences insignificant for the given goal, since any typology is subject to some research purposes, especially in terms of establishing uniformity and explanatory value"[2].

In order to group the national legal systems, task of the comparative law, different criteria were used and different names were proposed.

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[1] Nicolae Popa, *Teoria generală a dreptului*, 4th edition, C.H. Beck Publishing House, Bucharest, 2012, p. 58.
[2] Nicolae Popa, *op. cit.*, p. 57.

The first legal classifications were based on the genetic criteria: natural-ethnological, cultural, legislative, legal-genetic. These genetic criteria fell into two streams: genetic-racial and genetic-historical.

From the *genetic-racial stream*, we mention the legal orders typologies by Adhémar Esmein and James Bryce. At the beginning of the last century, Adhémar Esmein proposed, with great accuracy, the need to classify the laws of different nations "by reducing them to a small number of families and groups, each of them representing an original legal system"[3]: the Latin group (France, Belgium, Italy, Spain, Portugal, Romania and the Latin Republics of Central and Southern America), the German group (the Scandinavian nations, Austria, Cisleithania[4], Hungary), the Anglo-Saxon group (England, the United States of America and the English-speaking colonies), the Slavic group, the Muslim law group.

As regards the typology of legal orders proposed by James Bryce, we emphasize that he was discussing about the Teutonic, Roman, Hindu, Mohammedan legal orders.

For a long time, the racial-genetic stream has been vexed because this criterion was doomed to failure, the concept of race being uncertain and imperceptible.

As regards the *genetic-historical stream*, we note that some comparatists noticed the importance of history in determining the legal orders. Before 1880, Ernest Glasson classified the legal systems from this point of view, revealing three types of legislation: one in which the Roman law prevails (Romania, Portugal, Italy, Spain, Greece), one in which the customary law prevails (England, Russia, Scandinavia) and one in which the Roman element merged with the barbaric element (France, Switzerland, Germany).

This classification has been criticized for incompleteness and inaccuracy, its author only making a micro-comparative study at Europe's level. The classifications of Nobushige Hozumi, Bevilaqua and Martinez-Paz come also under this category. Enrique Martinez-Paz's classification is interesting because it improves Glasson's classification, distinguishing: the customary-barbaric group (English law, Swedish law, Norwegian law), the barbaric-Roman group (German law, French law, Austrian law), the barbaric-Roman-canonical group (Portuguese law, Spanish law) and the Roman-canonical-democratic group (Latin American countries law, Switzerland, Russia). This work is also criticized for the same reasons as Glasson's theory especially that classifying the Russian law as democratic in 1934 is unbelievable.

At the end of the genetic stream, classifications designed by Lévy-Ullmann and Sarfatti appear, which focus on the encoded, religious or customary character of legal systems. Although superficial, these classifications *predict* the typological method.

There were also modern attempts to classify, as Leontin-Jean Constantinesco called them, among which: the *Arminjon-Nolde-Wolfe* classification (distinguishing seven families of legal systems: French, German, Scandinavian, English, Islamic, Hindu, Soviet), Grisolia's classification contesting Arminjon-Nolde-Wolfe classification (distinguishing five legal systems: the codified, the Anglo-American, the religious, the socialist), the Spanish doctrine

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[3] Leontin-Jean Constantinesco, *Tratat de drept comparat*, vol. III – *Ştiinţa dreptului comparat*, All Publishing House, Bucharest, 2001, p. 83 (*op. cit.)*.

[4] According to wikipedia.org, *Cisleithania* was a common yet unofficial denotation of the northern and western part of Austria-Hungary, the Dual Monarchy created in the Compromise of 1867 - as distinguished from Transleithania, *i.e.* the Hungarian Lands of the Crown of Saint Stephen east of ("beyond") the Leitha River.
The Cisleithanian capital was Vienna, the residence of the Austrian emperor. The territory had a population of 28,571,900 in 1910, it reached from Vorarlberg in the west to the Kingdom of Galicia and Lodomeria and the Duchy of Bukovina (today part of Poland, Ukraine and Romania) in the east, as well as from the Kingdom of Bohemia in the north to the Kingdom of Dalmatia (today part of Croatia) in the south. It comprised the current States of Austria (except for Burgenland), as well as most of the territories of the Czech Republic and Slovenia (except for Prekmurje), and parts of Italy (Trieste, Gorizia and Trentino-Alto Adige/Südtirol), Croatia (Istria, Dalmatia) and Montenegro (Kotor Bay). Information [on line] available at http://en.wikipedia.org/wiki/Cisleithania

classifications (Sola Canizares's classification, Eichler's classification, and José Maria Castan Vazquez's classification).

After the Second World War, the comparatists abandoned the historical criteria and search criteria among the *typological elements*. It is interesting what Leontin-Jean Constantinesco underlines as being characteristic at the beginnings of the typological classification: "the classification proposed by an author is rejected by the objections of another author"[5], without any scientific dialogue. "The merit of the comparatists who were part of this new stream is to have grouped legal orders in systems, not because they were genetically, genealogically or historically related, but because they presented common typological structures"[6].

The best known comparatist falling under this stream is René David, who noted that, like religions, legal systems can be reduced to a few fundamental types. He used two criteria in order to determine the affinity or the typological mismatch: the ideological point of view and the technical point of view.

As regards the ideological point of view, David said that "legal systems oppose each other because they express different conceptions about justice, which relate, of course, with all factors organizing the respective society; legal systems distinguish between them because the communities to which they apply maintain different religious or philosophical beliefs or because they have different political, economic or social structures (...) the legal systems oppose each other, even when they reflect the same conception of what is just, by the technique developed by their lawyers and that they use to make this conception triumph"[7]. It is evident that even this typology can be criticized.

The panoramic analysis of legal systems did not stop at René David, existing other classifications according to the style theory (Konrad Zweigert) based on cultural and ideological element (Silva Pereira's classification, Castan Tobenas's classification), according to the Marxist doctrine (although a general reluctance of Soviet lawyers towards the comparison can be observed).

Thus, in time, lawyers have attempted to classify these types of law, taking into account the law content and the specific features of the means of expression of this content, but also some criteria such as the dependency of social organization systems typology (criterion proposed by Poirier) or the affiliation to a legal civilization pool (criterion proposed by David). It is interesting that the terminology used to represent the group result of national legal systems is: *great legal systems, legal families, legal types*.

All the classifications mentioned above show that the legal systems typology is not entirely solved. Why? As Leontin-Jean Constantinesco pointed out, "[t]he first thing that hits you when you deal with this problem is the dilettantism, superficial analysis or even the absence of any scientific examination of the matter. Comparatists who addressed this matter seem rather keen to demonstrate the flaws criteria proposed by other authors, being eager to propose their own classification, which does not really worth more"[8].

There are several reasons we mention here: the lack of a serious examination of the issue regarding the legal systems classification, the fields examined in order to make groups were not determining, any partial and unfounded classification is necessarily false, the spread of civil codes in the world cannot represent a classification criterion, the heterogeneity of the proposed criteria. One of the most important reasons is the inability to provide the criteria necessary to the micro-comparison classification (eventually only micro-results could be obtained!), the macro-comparison being necessary.

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[5] Leontin-Jean Constantinesco, *op. cit.*, p. 105.
[6] Leontin-Jean Constantinesco, *op. cit.*, p. 105.
[7] René David, Traité élémentaire de droit civil comparé, Paris, 1950, p. 223.
[8] Leontin-Jean Constantinesco, *op. cit.*, p. 141.

Over time, there have been various attempts to define and classify legal systems, with existing various criteria, out of which the most important: the dependence on systems of social organization, the affiliation to a legal civilization pool, the role of law as means of social organization. We shall further length these three criteria.

The colourful words of Leontin-Jean Constantinesco come back to our mind: "[t]o develop legal systems means to know and to have conscience of the exact position of the legal systems in the legal universe. This means, simultaneously, to exit the legal national *ghetto* and to understand that national legal systems, linked by their determined elements derived of other legal systems, form larger assemblies"[9].

A. The legal typology based on the dependence of social organization systems (Poirier)

Using the typological method and this criterion, the famous analyst Jean Poirier ascertains the historically overlapping legal systems (historical legal types): slave law, feudal law, bourgeois law, socialist law.

It is interesting to note that although these types of law present specific features in the content of fundamental institutions, legal constructions or in share of sources, "such typology does not cancel the specific differences of the various individual systems coexisting in the same historic space"[10].

The *slave law* had as major objectives "to defend the property of the slave owners and the exclusion of slaves from the category of the persons and their location in the one of things"[11]. Roman law is part of this category. But there were also differences, such as the province of Dacia which received the Roman law, and where there were observed features of the acquisition of property, marriage and kinship.

The *feudal law* defended the land ownership, its legal rules being designed to prevent the division of large estates, the primogeniture rule playing an important role.

The *bourgeois law* proclaimed human rights (*e.g.* freedom of the individual, equality of citizens).

The *socialist law* arose through reception of the Soviet law in states with a political system like the Union of Soviet Socialist Republics (USSR). Based on dialectical and historical materialism, such legal system considered the entire legal order as public law. In the countries that had adopted this legal system, the economy was centralized, the commercial law being virtually non-existent, and the purpose of law being distorted, because politics could ever taint the law application by calling frequently "to the law and regulation, especially in critical situations of social system functionality, forcing the law to be what it cannot be - a panacea"[12].

However, "[t]he events occurred in 1989 in the countries of Eastern Europe, which left the Soviet model of development, the collapse of the totalitarian system, drove to the atomization of the «great socialist legal system» to powder, the reminded states turning back to their traditional principles, attached to the great Romano-Germanic legal system" [13].

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[9] Leontin-Jean Constantinesco, *Tratat de drept comparat*, vol. I – *Introducere în dreptul comparat*, All Publishing House, Bucharest, 1997, p. 43.
[10] Nicolae Popa, *op. cit.*, p. 58.
[11] Luminiţa Gheorghiu, Evoluţia sistemelor juridice contemporane. Privire specială asupra tipologiei dreptului comunitar, Universul juridic Publishing House, Bucharest, 2004, p. 23.
[12] Ion Craiovan, *Tratat de teoria generală a dreptului*, Universul Juridic Publishing House, Bucharest, 2007, p. 73.
[13] Ion Craiovan, *op. cit.*, p. 73.

B. The legal typology based on the affiliation to a legal civilization pool (David)

In the legal doctrine, René David is considered as being "certainly the comparatist who has devoted the greater part of his work to the description of the legal systems and, thus to the classification of legal systems"[14], his analysis being the most comprehensive.

The criterion of law affiliation to a legal civilisation pool determined the comparatists to acknowledge the existence of *legal families*, which differentiate through legal language, legal concepts, legal institutions and philosophical features; therefore, René David retains the following legal families (which represent the major contemporary legal systems): Roman-Germanic, Anglo-Saxon, socialist, Muslim, Hindu, Chinese, Japanese (the Far East) and black Africa and Madagascar.

The development of legal systems in Europe and in the British Isles took place in parallel for several centuries, creating two different legal environments.

The Roman-Germanic family or legal system (the civil law) is the result of reception of Roman law in the XIV-XV centuries; it integrates the Italian legal system, the French legal system and the related national systems (Romanian, Spanish, Portuguese, Belgian, Latin America), as well as the German legal system. This system is opposed to the *common law* system.

Although some authors believe that in this legal system there are two distinct groups [(a) the Latin group represented by Romania, Spain, Italy, Portugal, and (b) the Germanic group represented by Germany, Austria, Scandinavia, Switzerland), we agree with those who argue that, in fact, the systems "left from the same background, and they evolved differently depending on their previous customs, religion, culture"[15], namely the common legal background sprang from the reception of the Roman law.

The name is conventional, "because a large number of national legal systems included in this area, can not find its origin in any of these two systems (*i.e.* Roman law and German law), but it represents the result of the legislation export practiced by states that once held colonial empires, like France, Spain, Portugal and, to a lesser extent, Italy"[16].

This legal family is characterized by the following features: it is a written law, based on a hierarchical system of sources of law, is codified and, knows a great division into public and private law, which determines the structure of its branches and institutions.

By origin and characteristics, it is clear that Romanian law is part of the Roman-Germanic law.

This system has been criticized in the *Doing Business* reports published by the World Bank on the grounds that it would be less economically efficient than common law. In the 2004, 2005, 2006 reports, the economists concluded that French law, and generally the countries that are part of the civil law system are economically counterproductive, unlike common law. Of course that there were many reactions and counterreactions from the civil law lawyers.

The *common law* family, the second largest legal system of our times, is originally from England and is opposed to the civil law system. While "Europe was separated from the British Isles by a slap of water, the legal communication was almost non-existent"[17], two legal systems developing in parallel and creating two different legal pools. Currently, this system is found in England, Ireland, USA (except Louisiana), Canada (except Quebec), Australia, New Zealand.

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[14] Leontin-Jean Constantinesco, *op. cit.*, p. 105.

[15] For more details, please see Philippe Malinvaud, *Introduction à l'étude du droit,* 13th edition, LexisNexis Publishing House, Paris, 2011, p. 13.

[16] Victor Dan Zlătescu, *Panorama marilor sisteme contemporane de drept*, Continent XXI Publishing House, Bucharest, 1994, p. 28-138.

[17] Mihail Albici, *Despre drept şi ştiinţa dreptului*, All Beck Publishing House, Bucharest, 2005, p. 54.

This system consists of three components: *common law* (judicial precedents), *equity* (rules of law given before the unification of the English courts by special courts, to mitigate the asperities of the common law rules) and *statutary law* (rules of law created by statutes). Equity represents a "corrective background brought to the common law, in so far as this law based on precedents loses ground, becoming unreceptive to social impulses. Given that *equity* became a parallel legal system concurrently with the *common law* and not infrequently in conflict with it, in 1873, it was established by a special statute that if a conflict between *equity* and *common law* arises, the former will prevail"[18].

Among its features, we underline the following: written law has more *lex specialis* character, special structure, legal sources system, legal conceptualization and legal language are different from those of other families, legal branches are not structured due to the lack of division in public law and private law, law creation is not necessarily the result of the work of the legislator based on the legislative technique principles. In the "jurisprudence's thicket"[19], the statute is a secondary source of law and its provisions are incorporated in the legal system of judicial precedents.

The differences between these two legal families are well established in the legal doctrine. Even the concepts are different (*e.g.* the concept of fraud).

It is interesting that English law does not recognize the implied repeal and the desuetude, therefore many statutes which have been abolished, last for centuries. Thus, in order to facilitate knowledge of the statutes, over time, collections of statutes have been compiled.

Nowadays, we discover that many common law contractual techniques (*e.g.* know-how contracts, factoring, leasing, franchising) penetrated the entire international law, which leads us to support the idea that in the near future "elements of interference between the two major legal systems will increase"[20].

The "socialist" great system was born as a result of receiving more or less massive Soviet law in states with a political system like the Soviet Union[21]. This system should be investigated especially because there are countries that have not abandoned the socialist political and economical system, although there is a trend towards the market economy. The ideology of the dialectical and historical materialism is the foundation of the "socialist" law. This historic law inspired by the Marxist ideology, has disappeared with the end of communism and it was found especially in the eastern countries (*e.g.* the USSR and its satellites). Opposed to the capitalist law, the socialist law meant socialization of all means of production, their owner being the State or the political party , except for goods of personal use. Since the fall of communism and the USSR breakup, the socialist states adopted the Roman-Germanic legal system, with all the legal implications arising from this fact.

The "*religious and traditional legal systems*, although the product of past eras, adjusting sometimes with great difficulty to the modern social relations, govern hundreds of millions in the contemporary era" [22]. The religious origin of certain systems (Hindu, Islamic or Jewish) must not lead us to the conclusion that all legal norms are religious. Moreover, there is a tendency to modernize the traditional legal systems, although in the beginning, it was organically integrated in the religious doctrine of Islam, such as China, Japan and Turkey which have adopted fully modern legislation[23].

In the category of religious and traditional legal systems, the *Muslim law* has wide application in all Arab countries (*e.g.* Pakistan, Bangladesh, Iran, Afghanistan, Indonesia). In

[18] Victor Dan Zlătescu, *op. cit.*, p. 153.
[19] Ion Craiovan, *op. cit.*, p. 153.
[20] Mihail Albici, *op. cit.*, p. 58.
[21] René David, *Grands systémes de droit contemporains*, Dalloz Publishing House, Paris, 1978, pp. 155-313 (*op. cit.*).
[22] René David, *op. cit.*, p. 163.
[23] Ion Craiovan, *op. cit.*, p. 164.

the concept of Islam, the Muslim law is the fruit of the divine revelation, as a result of its rules revelation by God to the Prophet Muhammad, through the archangel Gabriel" [24].

Muslim law has several sources. The *Qur'an* is the holy book of Islam, comprising 6,342 verses, 500 referring to law. *Sunna* is all that is attributed by tradition to the Prophet Muhammad. *Idjima* records the consensus of legal counsels on legal matters, *idjitihad* representing the jurisprudence. *Sharia of Islam* are fundamental principles of Muslim law enshrining the right solutions for law branches.

Specialists in Islamic law emphasize that today, it is subject to reforms, being modernized; this change is "a natural step, dictated by a rapidly changing world"[25], some countries resorting to codification, procedure or judicial organization.

Hence the problem of adapting people moving from a Muslim country or in a Muslim country because that person may feel subject to inconsistent rights, *Sharia* and the civil law of the other country.

Hindu law is a preservative law, not representing the Indian law, but the law of the community that adheres to Hinduism. It is based on the caste system, based on the four castes: Brahmins, Satria, Vaisala and Sudra. Therefore, in theory, India is also called "melting pot of legal systems"[26].

Traditional Japanese law still has importance, because some principles and rules have been kept by the Japanese legislator in modern legislation adopted (*e.g.* the matter of persons and family relations) or provided to other countries. This legal system was inspired by Chinese Confucianism, one of the sources of *Shinto*. Although for many centuries, Japanese regulations regarded the division of rice fields by the number of each family members (*ritsu-ryo* regulations) and the formation of Japanese feud proved as inviolable areas (*shó* regulations), we notice that with the blossoming of the samurai military caste (the twelfth century – to its members being applicable the customary law), the ritsu-ryo and sho rules have been abandonned. Like in China, "[i]nstea of the legal rules, in the society *giri* was acting, behaviour rules similar to the Chinese rites"[27], because ideas about law and justice were considered to disturb the social peace. Subsequently, Japan went through the *Meiji era* (roughly 1868-1912), when European legislation was received and the first legal codes were drafted, thus entering into the Roman-Germanic legal system.

The African customary law has been described as a peasant law by the colonial powers who colonized Africa[28]. We can not speak only about one system of law, because each ethnic community had its own customs. The African law was dominated by the tribal religion, with many agrarian rites, according to which the earth is divine property entrusted to their ancestors, humans being only simple holders. This system of law was based on orality. It is interesting that orality was also applicable to the community head edicts, age castes or of the various associations that could legislate under an empowerment from the king or chief[29]. This system of law was enriched by the colonial metropolis rules, therefore we find now in Africa, the common law or the civil law system.

[24] Ion Craiovan, *op. cit.*, p. 164.
[25] Mihail Albici, *op. cit.*, p. 61.
[26] Mario Losano, Marile sisteme juridice. Introducere în dreptul european şi extraeuropean, All Beck Publishing House, Bucharest, 2005, p. 421.
[27] Victor Dan Zlătescu, *op. cit.*, p. 233.
[28] Ion Craiovan, *op. cit.*, p. 166.
[29] Ion Craiovan, *op. cit.*, p. 167.

C. The legal typology based on the law role as a social organization mean (Mattei)

An interesting analysis in comparative law was made recently by the Italian researcher Ugo Mattei. Although Mattei entitled his study *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, we believe it is a new conception of legal typology. Motivating his study on the need of transferring knowledge between different legal systems, he argues that a global taxonomy that would "allow legal systems to learn from each other"[30]. In a world where right is exported and imported, this kind of typologies is needed.

The author stresses out that René David's legal typology should be revised because the world map is different nowadays. The first major difference is the fall of communism in Central and Eastern Europe, which questions the socialist legal family. The second difference is the "success" of the same political system in China and thus "the increased importance of legal sinology among comparative disciplines"[31]. The third difference is the increased importance and progress of Japanese law in the last decades. The fourth difference is related to the increasing consciousness in the Islamic world about cultural and legal particularities. The fifth difference is related to the independence of the states from the African continent.

Thus Mattei proposes a new legal typology based on the role of law as a means of social organization in the Weberian sense, using the assumption that the most primitive social structure is a legal structure so that the existence of a legal order is independent of the presence of the legislator, magistrates and lawyers. The basic idea is that "in all societies there are three main sources of social norms or social incentives which affect an individual's behavior: politics, law and philosophical or religious tradition"[32]. According to these sources, Mattei provides a tripartite scheme. He points out that every legal system assumes a plurality of legal patterns. Moreover, he stresses out that the legal systems are "the result of a layered complexity that stems from the accidents of legal history and from legal transplants"[33] - an interesting example being the Latin American countries where public law is based on common law, while private law on the continental law. These ideas lead to the idea, according to Mattei, that "the legal systems never *are*. They always *become*. And what determines the becoming is the variable role of different patterns within legal systems. Hence the difference between a patern and a system of law" [34].

The truth is that all three legal patterns are found in all legal systems of the world, the only difference being their share. This leads to the "hegemony" of one of the two remaining - of course they do not disappear, but they have a more blurred role. It is very interesting the example of Italy[35] offered by Mattei, which is a legal system classified by him as a professional one.

On August 1st, 1996, Italy was rocked by the acquittal of a Nazi criminal, Eric Priebke, by a court of Rome, and later acquittal, the Minister of Justice (an eminent professor of criminal law, professor Flick) ordered the police to arrest Priebke in order to stop people's revolt. Clearly illegal under the umbrella of the theory of rule of law, that decision was justified on the grounds of the extradition request made by Germany, being proved later that the request was filled after the Minister's order. Even arguing that he was aware of the intentions of the German authorities, his order was illegal because Article 716 of the Italian Code of Criminal Procedure only attributed this right to prosecutors, who, in Italy, are

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[30] Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, The American Journal of Comparative Law, no. 1/1997, vol. 45, p. 6, available at http://works.bepress.com/ugo_mattei/19/ (15.03.2014).
[31] Ugo Mattei, *op.cit.*, p. 10.
[32] Ugo Mattei, *op.cit.*, p. 12.
[33] Ugo Mattei, *op.cit.*, p. 14.
[34] Ugo Mattei, op.cit., p. 14.
[35] Ugo Mattei, *op.cit.*, p. 14-15.

independent of the Ministry of Justice. In this case, it is an obvious example that politics had an advantage over the law, even if the political decision was contrary to the Italian court verdict.

According to Mattei's typology, national systems may belong to professional rule of law, political rule of law and traditional rule of law.

Of course that this division is dynamic because legal transplants can change the direction of a national system, because of the influence of a predominantly legal pattern. The author does not deny the possibility that a legal system be part of two categories at once (*e.g.* family law related to traditional, while commercial law to professional and criminal law to politics). He stresses out that this division "in three major families of law allows considerable flexibility and recognizes clearly that classifying legal families is a means to better understand and not an end in itself"[36].

Legal systems that fall within the *rule of professional law* entrusts major decisions (*i.e.* political decisions) to the political world (which must, however, comply with the law) and the decisions less important to the legal world. Legal systems that fall into this category are: United Kingdom of Great Britain, United States of America, Oceania, Western Europe, Scandinavia national systems, some "mixed" systems (Louisiana, Quebec, Scotland, South Africa). The author doubts whether Israel and India should be placed here. Basically, there are states where the legal process is not very influenced by alternative social structures. Currently, this category is legitimized by democracy.

The *rule of political law* requires that all political systems in this class cannot separate the legal process of the political process, since they are not autonomous. Political relations are crucial in these systems, being very important "who's who" in the political world. From the need to preserve stability and power, governments in these countries do not respect the law. It is interesting to note that "when men rather than law govern, people usually find it more prudent to seek a powerful human protector than to stand on legal rights against the State"[37]. In this category, the important and less important decisions are taken by the political power. This includes the vast majority of socialist law states except certain states ("maybe" Poland, Hungary and the Czech Republic), the least developed countries in Africa and Latin America, with the exception of the Islamic states in northern Africa, as well as Cuba. The author excludes from the list of socialist states China, Mongolia, Vietnam, Laos and North Korea, the former Soviet republics in Asia.

The *rule of traditional law* is found in systems where law and religious or philosophical tradition are not clearly delineated. In this category would fall the Islamic states, states that are governed by the Indian or Hindu law, other countries in Asia governed by Confucianism conceptions of law (*e.g.* China, Japan).

D. The appearance of a new legal typology – the European Union law

The analysis of the European Union law leads to the conclusion that we are in the presence of a p*articular type of law*, different from the national law of the Member States and from the international legal system.

Due to the sovereignty of the Member States, each State is entitled to determine the applicable law, with the feeling that this law must be designed at national level, as well as the national and social policy of the country.

[36] Ugo Mattei, *op.cit.*, p. 17.
[37] Ugo Mattei, *op.cit.*, p. 29.

EU law is a law under construction, evolving, not being "the incarnation of an eternal and metaphysical idea"[38]. Certainly, the European Union is a progressive realization of a political project without precedent.

The recognition of its own legal order means that EU legal norms form a complex structure of legal norms which have a well-defined set of legal sources, while the EU institutions have well-established procedures to apprehend and punish violations and deviations.

Moreover, the existence of the institutional law, substantive law and procedural law of the European Union confirms the existence of a new legal typology – the type of EU law.

We also stress out that the procedural law of the European Union is not suspended, because the substantive law of the European Union exists, and although it is somewhat disparate, it is not (yet) codified.

Codification is a topic increasingly discussed, existing a growing concern regarding the contractual side. The realities of the past century have led to a desire to unify private law, like this being born the European contract law. The efforts of the doctrine "codification" were supported by the EU institutions (*e.g.* the rules of harmonization from the directives on consumer protection, the uniform rules on cross-border contracts under Regulations Brussels I and Rome I, the resolutions of the European Parliament on European contract law, the Common Frame of Reference.

But we must not be tempted to believe that the desire to "codify" would only occur in private law, because we find first steps in criminal law (*e.g.* such as the European arrest warrant, the convention on drugs, the convention on trafficking in persons, the fight against money laundering, aspects regarding the use of European funds.

Moreover, EU's legal order is inherent, being independent of the international legal order and relatively independent of the national legal order of the Member States.

Moreover, the EU legal order is integrated to the legal system of the Member States and it is imposed to their courts due to the direct, immediate and priority applicability of EU law.

But which are the features that should meet European Union law in order to be considered a new legal typology?

According to the legal doctrine, in order to discuss about a new typology in terms of legal theory, we should establish the existence of:

1. autonomous will to control the legal decision making;
2. fundamental principles steering the essential directions of erecting and developing the respective legal order.

1. Autonomous will of the European Union

EU's legal will represents the very essence of the EU law. This autonomous will, which controls the legal decision making, should not be seen as the simple arithmetic sum of the individual wills of the Member States, but as a separate legal will. Precisely because of this, Nicolae Popa points out that the "European Union combines, in a specific dialectic, the supranational with national in an order with new qualitative determinations"[39], stressing that it is less important "the reference to classical types of social-state organization". Therefore, the European Union is not just a sum representing the number of the Member States, but a whole having a stable structure and presenting distinct features in relation to the characteristics of its parts. This is normal, because we are talking about an Union, so the problem is the typical features, even if there are peculiarities.

[38] Mario Losano, *op. cit.*, p. 25.
[39] Nicolae Popa, *op. cit.*, p. 63.

According to the legal doctrine, the EU law is composed mainly of two types of legal sources: *primary law* and *secondary law*. The primary law includes the legal rules comprised in the founding treaties of the European Communities, as well as the conventions and protocols attached to the founding treaties, the amending treaties. The secondary law comprises the rules contained in the acts adopted by the EU institutions. However, there are also other specific sources of law, such as the unwritten legal rules applicable in the EU legal order: the general principles of law common to the legal systems of the Member States, the case law of the Court of Justice of the European Union, the rules resulting from the EU's external commitments or the complementary rules arising from conventional acts concluded by Member States in implementing the treaties.

To this list of legal sources, Ion Craiovan adds another one - the national law, which sometimes, can be a source of the EU law by reference either express or implied.

The European Union has a functioning legal status which allows it to fulfil its mission and to achieve its goals. In this sense, it is endowed with legal personality, enjoys privileges and immunities, and its decision making is very complex and well developed.

Regarding the legal personality of the European Union, it is well known that before the entry into force of the Lisbon Treaty, only the European Communities had legal personality (Article 281 TEC, Article 184 of the Euratom Treaty). Since then, the Union replaced and remained the successor of the European Communities [Article 1(3) TEU], the full legal personality being recognized (Article 47 TEU). It is a limited functional legal personality, which exists only to help to achieve the objectives of the Union. This aspect is confirmed by Declaration no. 24/2007 on the legal personality of the European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Lisbon Treaty.

The Conference confirms the fact that if the European Union has legal personality will not in any way authorize the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties.

The legal personality of the European Union is *domestic* and *international*.

Based on the text of Article 47 of TEU which explicitly recognises the legal personality of the European Union and of Article 335 TFEU ("[i]n each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission"), we notice that the European Union is thus treated as a legal person of public law, having its own legal personality, distinct from that of the Member States. We find interesting the recognition of the internal legal personality of the Union, and not only of its institutions (even if the Commission is authorized by the above mentioned Article), because this recognition allows it to perform all acts necessary for its operation in each Member State (*e.g.* acquisition or alienation of assets, conclusion of contracts, court appearances). Other institutions and bodies of the Union still enjoy a legal personality distinct from that of the Union (*e.g.* European Investment Bank or the European Central Bank - Articles 308 and 282 TFEU).

However, like the European Community, the European Union has an international legal personality, even in the absence of any express mentioning in the treaties. The Court of Justice upheld in the A.E.T.R. judgment that independent of the powers expressly provided in the TFEU, the European Community (therefore, nowadays the Union!) is competent, even in the absence of express provision, to conclude external agreements in all areas in which the Community is competent to meet a specific objective according to the Treaty and in which the adoption of an international commitment appears to be necessary for achieving that objective.

Thus, we can conclude that the EU is a subject of international law, having the right of representation in third countries or around the international organizations, with an active and

passive right of legation, being able to stand alone in court, with the possibility of entailing the international liability and concluding international agreements, as well as adopting economic sanctions or becoming member in international organizations.

Just because it has a special legal status, the European Union shall enjoy in the territory of the Member States such privileges and immunities necessary for performing its mission.

Union shall enjoy in the territories of the Member States such privileges and immunities necessary for the performance of its duties, according to the conditions laid down in the Protocol concluded on April 8th, 1965 on the privileges and immunities of the European Union. The same regime applies in the case of the European Central Bank and the European Investment Bank.

These privileges and immunities profits the members of the Union institutions and their staff, being fixed by the Protocol no. 7 on the privileges and immunities of the European Union, annexed to the Treaties. Among the privileges and immunities enjoyed by the Union we mention: inviolability of premises, buildings, archives and official communications, immunity execution, tax exemptions, customs exemptions.

Unfortunately, not all consequences were drawn from the recognition of the legal personality of the European Union by the Treaty of Lisbon.

2. Principles of the EU law

The legal principles represent those guiding ideas, fundamental precepts that orientate the development and implementation of legal rules, either at the level of the whole legal system, or at the level of a law branch. The doctrine emphasizes that they are a factor of stability, adaptation and integration in the legal order, filling the legislative gaps, correcting excesses and anomalies in the moment of accomplishing the law.

In legal theory, the principles of law are not addressed in terms of each state, such as the principles of the Romanian law, the principles of the Indonesian law, the principles of the Polynesian law, but about the principles of law, of any kind of law, regardless of space or time.

In the complex process of development and enforcement of the EU law, the general principles of law occupy a very important place. The plurality of general principles of law is not enshrined in the EU law, but in some cases we find references in the treaties. The reference to these principles can only be made when the EU law is incomplete, because, if there are provisions in this regard, their application is mandatory.

If in the settlement of any case, the Court of Justice must send or apply general principles of law derived from the national legal order of the Member States or from the international legal order, the reference or the application may be made only if those principles "are compatible with the principles of the Community and with the specific of the legal order arisen from the Community texts".

As the general principles of the EU can make the object of a future extended research, we will not insist on their analysis in the present study.

We shall only mention that the number of these principles is not agreed in the doctrine, since the European construction is in a continuous process of evolution, and that they can be divided into four main groups:

- ✓ the public international law and its general principles inherent in any organized legal system (*e.g.* principle of legal certainty, general principles derived from procedural rights);
- ✓ the domestic law of the Member States by identifying the general principles common to the Member States (*e.g.* principle of equality before the economic regulations,

principle of access to legal procedures, principle of confidentiality between lawyer and its client);

- ✓ the EU law by deducting the general principles derived from the EU nature (*e.g.* principle of direct effect, principle of priority of EU law, principle of representative democracy);
- ✓ the fundamental human rights (*e.g.* property right, freedom of speech and religion, principle of fair trial).

III. Conclusions

We have started our research from defining the term "typology". We have also tried to emphasize the difference between "typology" and "classification", with which is often confused. Summarizing the above said in this regard, the classification is used when the distinction between elements can be achieved by a *single criterion*, while the typology occurs when using multiple criteria, typologies being a *particular form of systematization*. Furthermore, the classification is complementary to division.

Regarding the typologies, it is interesting that they have in common the fact that they fail to comprise all the variety of types. We cannot find the "pure type" in any typological system, especially that the idea of type is abstract, it is a mental construction that meets our logical desire to "order" natural phenomena which, by their nature, are not "ordered". Thus, we will never find the perfect typologies. In order to achieve a real typology, it takes *a lot of work synthesis*.

Moreover, Twining noted that today, "in a globalized, cosmopolitan world, even the general studies on law science and those of comparative law should become cosmopolitan, as a pre-condition for a revival of the general theory of law and a reconsideration *in extenso* of comparative law"[40].

By using the typological method, we notice that a legal family or a legal system "represent the grouping of national legal systems, in relation to certain common features of them" [41]. Thus, each legal system knows the combination of typical general features with intrinsic ones. Of course that these have been marked by the social, economic and cultural conditions from each historical period.

As previously mentioned, analysing the history of law, we distinguish the existence of overlapping systems of law, which raises the question of their typology.

Unfortunately, all the classifications mentioned in this study show that the legal systems typology is not entirely solved. As pointed out Leontin-Jean Constantinesco, "[t]he first thing that hits you when you deal with this problem is the dilettantism, superficial analysis or even the absence of any scientific examination of the matter. Comparatists who addressed this matter seem rather keen to demonstrate the flaws criteria proposed by other authors[42], being eager to propose their own classification, which does not really worth more".

There are several reasons we mention here: the lack of a serious examination of the issue regarding the legal systems classification, the fields examined in order to make groups were not determining, any partial and unfounded classification is necessarily false, the spread of civil codes in the world cannot represent a classification criterion, the heterogeneity of the proposed criteria. One of the most important reasons is the inability to provide the criteria necessary to the micro-comparison classification (being able eventually to obtain only micro-results), macro-comparison being necessary.

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[40] Nicolae Popa, op. cit., p. 11 apud W. Twining, Globalization and Comparative Law, apud M.-F. Popa, Sistemul juridic englez. Tendinţe actuale de evoluţie, PhD thesis, 2008, p. 60.
[41] Luminiţa Gheorghiu, *op. cit.*, p. 30.
[42] Leontin-Jean Constantinesco, *op. cit.*, p. 105.

Currently, we are witnessing a mutual forthcoming and influence of legal systems from all over the world, this fact being obvious right from the existence of the European Union, which gave rise to a new type of law - *European Union law*.

Compared by Jacques Delors to an "unidentified political object", the European Union is largely a *sui generis* construction, borrowing from different models of institutions.

No matter how we perceive typologies, we note that, currently, they are widely used and appreciated together with classifications, regardless of the science. Moreover, some authors consider that typologies are a simplification. As a shaping or a theory, it is false by definition, modelling or theorizing, it is false by definition, using the contradiction.

As A.-E. Bottoms stated, in the conclusion of a report presented to the Council of Europe, "we must recognize that a classification, whatever it may be, shall not necessarily entail all the richness of human individuality and there might be a risk very easily to create a distorted image of human overall and of his life in the community. Our classification work required to improve our knowledge will result in a failure if, in our effort to understand, we lose sight of these truths" [43].

References

- Albici Mihail, *Despre drept şi ştiinţa dreptului*, All Beck Publishing House, Bucharest, 2005
- Leontin-Jean Constantinesco, *Tratat de drept comparat*, vol. I – *Introducere în dreptul comparat*, All Publishing House, Bucharest, 1997
- Constantinesco Leontin-Jean, *Tratat de drept comparat*, vol. III – *Ştiinţa dreptului comparat*, All Publishing House, Bucharest, 2001
- Craiovan Ion, *Tratat de teoria generală a dreptului*, Universul Juridic Publishing House, Bucharest, 2007
- David René, *Grands systémes de droit contemporains*, Dalloz Publishing House, Paris, 1978
- David René, Traité élémentaire de droit civil comparé, Paris, 1950
- Gheorghiu Luminiţa, Evoluţia sistemelor juridice contemporane. Privire specială asupra tipologiei dreptului comunitar, Universul juridic Publishing House, Bucharest, 2004
- Lopez Gérard, *Dictionnaire des sciences criminelles*, Dalloz Publishing House, Paris, 2004
- Losano Mario, Marile sisteme juridice. Introducere în dreptul european şi extraeuropean, All Beck Publishing House, Bucharest, 2005
- Malinvaud Philippe, *Introduction à l'étude du droit,* 13th edition, LexisNexis Publishing House, Paris, 2011
- Mattei Ugo, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, The American Journal of Comparative Law, no. 1/1997, vol. 45, p. 6, available at http://works.bepress.com/ugo_mattei/19/
- Popa Nicolae, *Teoria generală a dreptului*, 4th edition, C.H. Beck Publishing House, Bucharest, 2012
- Zlătescu Victor Dan, *Panorama marilor sisteme contemporane de drept*, Continent XXI Publishing House, Bucharest, 1994
- www.wikipedia.org

[43] Gérard Lopez, *Dictionnaire des sciences criminelles*, Dalloz Publishing House, Paris, 2004, p. 943.

SOME ASPECTS REGARDING TRANSLATION DIVERGENCES BETWEEN THE AUTHENTIC TEXTS OF THE EUROPEAN UNION

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Toi, qui me lis, es-tu sûr de comprendre ma langue ?[1]

Abstract

When multiple legal orders and languages co-exist within a single legal regime, there is potential for divergences between the legal texts. The European Union represents on the international legal stage, the most ambitious linguistic project, integrating 28 Member States and 24 official languages.

What we undertook with this study was to discover how the multilingual and multicultural environment of the European Union affects its legislative and judicial processes. We tried to argue the problem of translation divergences between the authentic texts of the European Union.

Many questions arise. Is 'controlled multilingualism' the key to our problem? Is weak multilingualism the solution - especially that it is not new for the European construction? Should one language be chosen as the original?

Of course that we have to see that multilingualism is an advantage, a blessing of the European Union and not an obstacle, a curse. We consider that, despite the various problems with the European multilingualism described in this study, it is unlikely that something would change in the foreseeable future. However, we consider that lawyers should research more in languages and legal interpretation. Interdisciplinary efforts could solve the multilingualism problems of the European Union.

The present study is part of a more complex research on this theme and it is meant to approach certain important points of the master thesis prepared in Switzerland for a LL.M. program.

Keywords: *European Union, translation, divergences, conflicts, authentic texts.*

1. Introduction

Language is the highest cultural form and the most important factor distinguishing between humans and animals. Being an important part of our identity, it supposes diversity and cultural heritage. Because of the fact that we can communicate between ourselves and with others, the languages represent a bridge between people and cultures. Language represents the mean through which communication takes place in the legal, political, commercial or academic environment, in the mass media, on the internet, occupying a leading role in our lives and in this globalised world.

When multiple legal orders and languages co-exist within a single legal regime, such as the European Union, there is potential for divergences between the legal texts. The European Union represents on the international legal stage, the most ambitious linguistic project, integrating 28 Member States and 24 official languages[2].

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[1] Glanert, S., *De la traductabilité du droit*, Dalloz, Paris, 2011, p. 3.

[2] We have to borne in mind that there are also in the EU more than 90 linguistic minority groups. Please see, Duparc Portier P., Masson A., *La question des langues en Europe: entre paradoxes et divergences juridiques* [on line], in Revue trimestrielle des droits de l'homme, no. 72/2007, p. 1071, http://www.rtdh.eu/pdf/20071051.pdf (13.03.2014).

In this study, we shall explore how the multilingual and multicultural environment of the EU affects its legislative and judicial processes, and the challenges raised by the multilingual drafting of legal texts. This objective goes hand in hand with the importance of the adequate drafting of legislative texts and the proper linguistic expression of EU concepts.

The ambition of this study is to prove that the meaning of EU law cannot be derived from one version of the official languages, therefore the languages are interdependent and "[h]ence EU citizens cannot purely rely on their own languages when they want to know what EU law says on a particular issue. In principle, EU citizens must know the law in each and every official language because the meaning of the law is anchored not in one single language version, but in all the language versions taken together"[3].

2. Content

2.1. Multilingualism and Multijuralism[4] in the European Union

Multilingualism can be seen as "a democratic value to be protected, a fundamental right of minority groups, an obstacle to deliberative democracy and a hindrance to legal certainty and the possibility of uniform law, a cultural asset of Europe to be promoted and protected, a competitive advantage of businesses on the market and a prerequisite for the free movement of EU citizens"[5].

Why EU does not agree on a common language? Would this be the solution? The linguistic diversity is a *specific value* of the EU which should be protected. As the former European Commissioner for Multilingualism, Mr. Leonard Orban, once said at a conference on multilingualism that took place in Romania on 15 May 2009:

> *Today we live in a globalized world and Europe is building an ever closer Union. While, on a global level, some "big" languages tend to dominate the scene, Europe is not a melting pot where differences are blotted out. Europe is a common home where diversity is celebrated, and where our many mother tongues are or should be a source of wealth and a bridge to greater solidarity and mutual understanding*[6].

What Mr Orban *did not* say was that although the many mother tongues are a symbol of EU democracy, *a source of greater cultural wealth*, they still impede mutual understanding between EU citizens. Moreover, "[i]n a market where goods, capital, services and persons are encouraged and expected to move freely, the diversity of languages is, in fact, a hindrance to such movement" [7].

Contrary to the provisions of the Treaty establishing the European Coal and Steel Community (authentic in French only) the European Union (and the European Community first) has always been based on the principle that at least one official language of each Member State[8] should become an official language of the Union. As for the provision of Article 314 of the Treaty establishing the European Community, the treaty was drawn up in a

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[3] Kjaer A.L., Adamo S., "Linguistic Diversity and European Democracy: Introduction and Overview" in Kjaer A.L., Adamo S. (eds.), *Linguistic Diversity and European Democracy: Introduction and Overview*, Ashgate, 2011, p. 7.

[4] By *multijuralism*, we mean the simple fact that within the EU each Member State has at least one legal system which is entirely its own and whose validity, as opposed to its history, is independent of all other Member State legal systems. From this fact it follows that EU legislators and adjudicators, and their staff, coming as they are from different countries, have many different legal backgrounds, and must legislate for widely differing legal systems.

[5] Kjaer, A.L., Adamo S., "Linguistic Diversity and European Democracy: Introduction and Overview" in Kjaer A.L., Adamo S. (eds.), *op. cit.*, p. 2.

[6] Speech [on line] http://ec.europa.eu/archives/commission_2004-2009/orban/news/news_en.htm (13.03.2014).

[7] Kjaer A.L., Adamo S., "Linguistic Diversity and European Democracy: Introduction and Overview" in Kjaer A.L., Adamo S. (eds.), *op. cit.*, p. 5.

[8] There are multilingual legislative systems in the EU: *Belgium* (French, Dutch and German) and *Malta* (Maltese and English). Other multilingual legislative systems in the world: Canada and Switzerland.

single original in four texts equally authentic (*i.e.* Dutch, French, German and Italian languages). This Article has been amended by the Accession Treaties upon each entry into the Community/Union of new Member States[9].

As from July 1st, 2013, the European Union has 28 Member States, the last Member State entering into the European family being Croatia. Each Member State has its own legal system, which can be classified under the criteria of René David in civil law countries or common law countries. Almost every Member State has its own official language, in the EU being recognized 24 languages per total[10]. Moreover, "depending on how languages are defined and what inclusion criteria are used, more than 100 regional and minority languages are spoken in Europe"[11]. However, despite *the struggle* of Europeans to keep their linguistic diversity, we notice that the number of languages spoken in Europe has certainly dropped: "[m]any languages have disappeared, and some European states gave even managed to impose an almost perfect linguistic unity on their territory: English in the UK, German in Germany, French in France or Italian in Italy. Some states even share the same official language"[12].

For those reasons, we consider that we can discuss about multilingualism and multijuralism in the EU. If the notion of "multilingualism" does not rise any questions, by "multijuralism", we understand the simple fact that within the EU, each Member State has at least one legal system which is entirely its own and whose validity, as opposed to its history, is independent of all other Member State legal systems[13]. That means that the EU legal specialists, coming from the Member States, have different legal backgrounds and must legislate for different legal systems.

2.2. The EU Multilingualism. Unity in Diversity

Law is not created in a vacuum, because it has to be applied to practical situations. As mentioned above, if we want a legal act *to be applied uniformly throughout the EU*, it has to be communicated in such a way that the same legal effect be reached in all circumstances. In a multilingual construction such the EU, it means that language has a much more important and complicated role than in national legal systems characterised by one single language.

The multilingualism is one key characteristic of the EU law – "if not *the* key manifestation – of cultural diversity in Europe today"[14]. It is an "indispensable component of the effective operation of the rule of law in the Community legal order"[15].

Why recognizing equal official status to all languages? We consider that this was the solution found by the European legal architects to "immunizing the European institutions

[9] In 1973, English, Irish and Danish, in 1981 Greek, in 1986 Spanish and Portuguese, in 1995 Finnish and Swedish, in 2004 Czech, Estonian, Hungarian, Lithuanian, Latvian, Maltese, Polish, Slovenian and Slovak, in 2007 Romanian and Bulgarian, in 2013 Croatian became official languages in the EU.

[10] However, it must be emphasized that until 2007 Irish was an authentic language of the Treaties but was not included among the official and working languages of the EU. Irish became, with the accession of Ireland, an authentic language of the Treaties but it did not acquire the status of an official language under Regulation No. 1 until 2007 when the regime was extended to Irish with some limitations.

[11] Kjaer A.L., Adamo S., "Linguistic Diversity and European Democracy: Introduction and Overview" in Kjaer A.L., Adamo S. (eds.), *op. cit.*, p. 4 (footnote omitted).

[12] Gravier M., Lundquist L., "Getting Ready for a New Tower of Babel" in Kjaer A.L., Adamo S. (eds.), *op. cit.*, p. 75.

[13] Schilling, T., Multilingualism and Multijuralism: Assets of EU Legislation and Adjudication?, German Law Journal, Vol. 12, No. 07/2011, p. 1462.

[14] Kraus P., "Neither United nor Diverse? The Language Issue and Political Legitimation in the European Union" in Kjaer A.L., Adamo S., *op. cit.*, p. 27.

[15] Bengoetxea J., "Multilingual and Multicultural Legal Reasoning: The European Court of Justice" in Kjaer A.L., Adamo S. (eds.), *op. cit.*, p. 100.

against the nationalist setbacks they anticipated in case some Member States felt symbolically discriminated against because of the preferential treatment given to the languages of others"[16].

The concept of "multilingualism" can be *strong*, meaning that all official language versions are equally authentic, or *week*, meaning that one language version is authentic, while the others are official translations. In the history of the European construction, we can find both strong and weak multilingualism. For example, the EU adopted the strong multingualism, because all language versions of an act are authentic, while the European Coal and Steel Treaty adopted the weak multilingualism, because the French version was considered to be authentic. An example of today's weak multilingualism would be the case law of the ECJ, because the authentic version is the language-of-the-case version.

From the doctrine and from the ECJ case law, we have noticed that by adopting the strong multilingualism, the EU faces many problems, leading to contradictions or variations between the language versions of EU acts.

Some authors point out that "embracing weak multilingualism instead of the strong variety would solve some of the EU's multilingualism problems without creating new ones (purely political problems apart), and without squandering any of the opportunities multilingualism may offer in the EU context"[17]. The solution for such problems would consist in looking to the single authentic version.

There are however *benefits* of the multilingualism. For instance, translation could lead to a better and clearer version of the original[18], because by translation, the implied assumptions made in the original version may be identified.

Strong multilingualism has the advantage to offer the same rights of a Member State to another Member State, because all European citizens have the right to discover the EU law in their own language.

The paradox expressed in the EU motto "united in diversity" affects also the EU legal regime, the legislation being translated into 24 official languages. All the official languages have equal authenticity. We consider that "in stressing the equal value of the different linguistic versions of the Community acts, the Court [the European Court of Justice] discounted legal argument brought by some States, aimed at supporting the greater value of the different linguistic versions, based, for example, on the corresponding percentage of population in the Community; the Court will not allow the interpretative value of an official version to vary in proportion to the number of individuals of member States where certain languages are spoken"[19]. As stated by the Court in the *EMU Tabac* case[20], "all the language versions must, in principle, be recognised as having the same weight and this cannot vary according to the size of the population of the Member States using the language in question".

In many ECJ cases, it was underlined that multilingualism is essential to the EU legal order. For instance, in the case *Kik v. OHIM*, it was underlined that:

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[16] Kraus P., "Neither United nor Diverse? The Language Issue and Political Legitimation in the European Union" in Kjaer A.L., Adamo S., *op. cit.*, p. 23 (footnote ommited).

[17] Schilling T., *op. cit.*, p. 1463.

[18] Caussignac G., "Empirische Aspekte der zweiprachigen Redaktion vom Rechtserlassen" in Muller, F., Burr, I. (eds.), *Rechtssprache Europas. Reflexion der Praxis von Sprache und Mehrsprachigkeit im Supranationalen Recht*, 2004; Robinson W., *How the European Commission Drafts Legislation in 20 Languages*, 53 Clarity, 2005.

[19] Vismara F., "The Role of the Court of Justice of the European Communities in the Interpretation of Multilingual Texts" in Pozzo B., Jacometti V., *Multilingualism and the Harmonisation of European Law*, Kluwer Law International, 2006, p. 66. See also judgment in Case C-296/95 *The Queen v Commissioners of Customs and Excise, ex parte EMU Tabac SARL, The Man in Black Ltd, John Cunningham* [1998] ECR 1605, and Case 9/79 *Marianne Wörsdorfer, née Koschniske, v Raad van Arbeid* [1979], ECR 2717. In these cases, the Court held that in case of doubt, the text of the legal norms should not be considered in isolation, but it should be interpreted and applied in the light of other texts drawn up in the other official languages.

[20] Case C-296/95 The Queen v Commissioners of Customs and Excise, ex parte EMU Tabac SARL, The Man in Black Ltd, John Cunningham [1998] ECR 1605, par. 36.

Multilingualism is an indispensable component of the effective operation of the rule of law in the Community legal order, since many rules of primary and secondary law have direct application in the national legal systems of the Member States[21].

Another example can be discovered in the *CILFIT* case, where the Court stated:

It must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions[22].

Thus, the meaning of EU law cannot be derived from one version of the official languages, therefore the languages are interdependent and "[h]ence EU citizens cannot purely rely on their own languages when they want to know what EU law says on a particular issue. In principle, EU citizens must know the law in each and every official language because the meaning of the law is anchored not in one single language version, but in all the language versions taken together"[23].

The differences between the languages are inevitable because *they are not absolute copies one of each other*. In this case, the EU multilingualism leads to "legal miscommunication, misinterpretation, incoherent and divergent texts and, ultimately, an obstacle to achieving what lies at the very core of the rule of law, namely legal certainty"[24].

But to what extent must language be regarded as *a barrier* to the development of a uniform EU law?

2.3. The EU Multijuralism and the EU law making

As mentioned before, the term "multijuralism" is not very clear and we use it in the sense of the fact that within the EU each Member State has at least one legal system which is entirely its own and whose validity, as opposed to its history, is independent of all other Member States' legal systems. That means that the EU legal specialists, coming from the Member States, have different legal backgrounds and must legislate for different legal systems.

Some authors[25] claim that the different legal background and the obligation to legislate for different legal systems "may cause problems for devising general concepts which will be understood in the same way throughout the EU"[26].

It seems that there is no evidence in this concern, but still, "those problems are accompanied by the unique opportunity offered to the producers of EU legal texts to have at their disposal a toolbox of 27 possible solutions for many situations"[27]. This toolbox should be very useful, a source of inspiration for the best available solution, and the EU should "pay attention to the lessons of national experience"[28].

Although the detailed analysis of the EU law making process would be very interesting for the present study, we emphasize that is not our aim. We resume some of the

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[21] Judgment of the Court in Case C-361/01 P Christina Kik v. Office for Harmonisation in the Internal Market [2003] ECR I-8283.

[22] Judgment of the Court in Case C-283/81, Srl CILFIT and Lanifacio di Gavardo SpA v. Ministry of Health [1982] ECR 3415, par. 18.

[23] Kjaer A.L., Adamo S., "Linguistic Diversity and European Democracy: Introduction and Overview" in Kjaer A.L., Adamo S. (eds.), op. cit., p. 7.

[24] Kjaer A.L., Adamo S., "Linguistic Diversity and European Democracy: Introduction and Overview" in Kjaer A.L., Adamo S. (eds.), op. cit., p. 7.

[25] Pozzo B., "Multilingualism as a "value" in the European Union" in Ajani G., Tiscornia D., Sartor G. (eds.), The Multilanguage Complexity of European Law: Methodologies in Comparison, 2007, p. 133-134.

[26] Schilling T., op. cit., p. 1462.

[27] Schilling T., op. cit., p. 1462.

[28] Mummery J., "Links with National Courts" in Moser P., Sawyer K., Making Community Law. The Legacy of Advocate General Jacobs at the European Court of Justice, 2008, p. 109.

main problems of the EU law making process regarding the divergences between the authentic texts.

There are, according to the Treaty on the Functioning of the European Union, two categories of legal acts in the EU legal order: "legislative" and "non-legislative" acts. The legislative acts have to be adopted under the ordinary or special legislative procedure, while the non-legislative acts have to be adopted by the Commission (two sub-groups: delegated acts and implementing acts).

The EU law making process is construed on a unique multilingual system in which 24 official languages have an equal status - this principle has been established by the founding Treaties of the EU. Moreover, this principle was the subject matter of the very first Regulation of the Council of the European Economic Community, adopted in 1958. By this principle, the EU has to publish its legislation and major policy documents in all the official languages in order that everybody in the EU (citizens, government entities and private organisations) is able to understand the rights and obligations that EU membership confers upon them and to act accordingly. Another right deriving from this principle is the right of the EU citizens to communicate with the EU in any of the official languages.

According to Articles 293-299 of the Treaty on the Functioning of the European Union, the majority legislative acts of the EU are to be adopted under the ordinary legislative procedure, jointly by the Council and the European Parliament (the former co-decision procedure). Summarizing the procedure, the text of a legislative act is the joint product of the following institutions: the *Commission* submits the proposal, while the *European Parliament* and the *Council* adopt the act.

The drafting of legal texts usually starts at the Commission, the most used languages being English[29] and French (however, nowadays, there is a decreasing percentage for French). But is the increasing use of English in the EU institutions compatible with the EU's commitment towards maintaining linguistic diversity? Some authors consider that "EU institutions can be considered as in effect practising linguistic apartheid"[30], since minority languages have no place.

However, each unit of the Commission drafts the legal texts in its working language. In order to be adopted by Commission's decision, the texts have to be translated into the authentic languages, so if the texts are of general application, they have to be adopted in all the EU's official languages.

According to Article 294 of the Treaty on the Functioning of the European Union, which is the most important procedure based on Commission proposals, the European Parliament will deal with the legal texts, once they have been translated into all the EU's official languages. The documents presented by the Member States in their official language, are translated by the Council in the other 23 official languages. After the acts have been sent for publication to EU's Publication Office, the language versions remain unmodified, except for formatting and linguistic corrections. In the end, all legislative acts of the EU are published in the Official Journal of the European Union in all 24 official languages.

One of the most interesting situations related to the conflict of language versions is the *inadequate drafting of EU legal acts*. We consider that the quality of drafting the EU legislation is extremely important in order to exclude undesirable consequences at the national level, and to prevent private litigants from appearing before the EU courts with actions that undermine the EU legal instruments.

Under Article 268 of the Treaty on the Functioning of the European Union, the ECJ has jurisdiction in disputes relating to compensation for damage under non-contractual

[29] This is not a result of a decision by the Council of Ministers, but because of the market forces. The role of English is reinforced also by key decisions, such as using it in all negotiations with applicant Member States.
[30] Philipson R., "The EU and Languages: Diversity in What Unity?" in Kjaer A.L., Adamo S. (eds.), *op. cit.*, p. 62.

liability. The ECJ case law dealing with the non-contractual liability of the European Union provides indications on the possibility for individuals to claim compensation for damages due to translation errors or even differences in the language versions of a given legal act. However, we did not find any such cases, whereas a body of case law relating to the damages caused by illegal acts of the institutions can be identified.

In case *Brasserie du Pêcheur and Factortame*[31], the ECJ found that, in legislative acts not involving an element of discretion on behalf of the legislator, the mere infringement of EU law may suffice for liability. Evidently, it had to establish the causal link between the Union's action and the loss, as well as the damage itself.

Possible scenarios of non-contractual liability for inadequate multilingual drafting and publication of legal acts can be identified, but we did not find case law on this specific problem.

From the *Skoma-Lux* case[32] we understand that the incorrect publication of the EU legislation may not only entail the lack of enforceability of that legal act against individuals, but may be a ground for compensation in the event of losses caused by the application of such legislation (financial losses or damage). The reference was submitted by the Czech court in Ostrava in the course of the national proceedings concerning a fine imposed in respect of customs infringements. One of the company's defences for the annulment of the fine was that the national authorities could not enforce against it the EU legislation not yet published in Czech in the Official Journal.

Realizing the considerable impact of this decision, the Court limited its temporal application, underlying that it should not be applicable to national decisions prior to this judgment, except for the decisions which had been the subject of administrative or judicial proceedings at the date of this judgment.

Moreover, drafting legal texts and translating them are done by natural persons and may sometimes lead to error, especially when there are 24 official languages in the EU legal order. Some errors may be easily recognizable to the readers, others not. There is a powerful need that the EU institutions adopting legal acts have levers to correct those errors. Adopting corrigenda[33] is a common tool to be used when the error may create serious legal consequences. "It derives its authority from the text it rectifies, including its legitimacy, legal force and the provisions on its temporal application"[34]. A corrigendum needs to be published in the same series of the Official Journal as the initial document, and it enjoys retroactive effect (*i.e.* the corrected legal text is official from the date of the initial act). Its size varies – from one or two correction points to hundreds.

The EU law is very special, because it is an autonomous legal order, characterized by multilingualism (24 equally authentic official languages) and multijuralism (28 national legal systems). The increase of the official languages in the EU (from 4 in 1958 to 24 in 2013), determines the multilingualism in EU institutions to be even more complex. We have to keep in mind that with the 24 official languages, the European institutions have to manage 552 linguistic combinations both for translation and for interpretation: each of the 24 languages

[31] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* 258 [1996] ECR I-1029.

[32] Case C-161/06 *Skoma-Lux* [2007] ECR I-10841. The ECJ was interrogated on the enforceability against individuals by the authorities of a Member State of EU legislation not published in the official language of that Member State. The ECJ held that obligations contained in such legislation may not be imposed on individuals in that Member State, even though those persons could have learned about that legislation by other means (the principle of legal certainty, that required that EU legislation allow those concerned to acquaint themselves with the precise extent of the obligations it imposes on them, which may only be granted by the proper publication of that legislation in the official language of those to whom it applies).

[33] For more information, please see European Commission, Directorate-General for Translation, *Studies on translation and multilingualism. Lawmaking in the EU multilingual environment*, 1/2010, p. 142.

[34] Bobek M., "The Multilingualism of the European Union Law in the National Courts: Beyond the Textbooks" in Kjaer A.L., Adamo S. (eds.), *op. cit.*, p. 127.

must be transposed in the 23 other official languages. This fact requires the recruitment of an important number of translators and interpreters.

Some *other special features of the EU* are: the growing technicality (the majority of legislative areas, resulted from the continuous extension of the legislative competences; technical terminology), product of (political) compromises[35] (different interests at stake reflect in wording of the acts[36]), and special legal terminology.

We consider that in order to be able to do proper legal translations, the translators have to have also legal education and to be experienced in comparative law. This is required because the legal language is a specific domain and term equivalences between different languages are not sufficient. It is not a problem of terminological equivalence of proximity, therefore the legal background in comparative law should be compulsory. Needless to say that "[w]hile rudimentary or superficial comprehension [of the legal text] is common to the layman, precision or thorough comprehension is the forte of the specialist. Between these two levels of comprehension, a whole range of interpretations is theoretically possible"[37]. Language has a good quality when the jurists' ideas are clear.

The goal "of legal translation is to produce texts that are at least equivalent, if not identical (utopia?) […] The problem of achieving equivalent legal effects in the translated text is not the same for the translator and the jurist. Ideally, the translator is also a lawyer; however, the translator generally strives for *linguistic* equivalence, the lawyer for *legal* equivalence. In both cases, it is the meeting and the harmonious fusion of the two constitutive ingredients of the text – form and content – that produce a desired equivalence"[38].

Albeit there is no special provision to try and avoid the translation conflicts between the 24 official language versions (although this problem is well known at the EU level[39]), the translators have to avoid these divergences.[40] We consider that a final control of the consistency of the 24 language versions "at the very end of the legislative process is imperative to minimize the incidence of contradictions between language versions"[41]. Some authors underline that "[a] possible solution for this dilemma is to have the legislative bodies vote twice on a bill – once before and once after finalization by the experts – or at least to

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[35] The political compromises leave sometimes the EU translators without answer why several words are used to denote one and the same concept in the original version and therefore do not know if these words should be translated in a different way or not. One example is the context of emission trading under the Kyoto Protocol and under the EU European Trading System, respectively, where the same concept is called *deletion* [of assigned amount units] in the Kyoto system and *cancellation* [of allowances] in the European Trading System, or retirement in the Kyoto system and surrender in the European Trading System. European Commission, Directorate-General for Translation, *Studies on translation and multilingualism*. *Lawmaking in the EU multilingual environment*, 1/2010, p. 72.

[36] There are typical vague expressions without a concrete meaning sometimes, like *promote, foster, encourage, support, strengthen, facilitate, manage, take place, proceed to*, which result in artificial constructions, and syntax and grammar problems in certain languages.

[37] Gemar J.-C., "What Legal Translation is and is not – Within or Outside the EU" in Pozzo B., Jacometti V., *op. cit.*, p. 73.

[38] Gemar J.-C., "What Legal Translation is and is not – Within or Outside the EU" in Pozzo B., Jacometti V., *op. cit.*, p. 75-76.

[39] The Rule 146 of the Rules of Procedure of the European Parliament states that: "Where it has been established after the result of a vote has been announced that there are discrepancies between different language versions, the President shall decide whether the result announced is valid... If he declares the result valid, he shall decide which version is to be regarded as having been adopted. However, the original version cannot be taken as the official text as a general rule, since a situation may arise in which all the other languages differ from the original text". [on line] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20130701+RULE-146+DOC+XML+V0//EN&language=EN&navigationBar=YES (13.03.2014).

[40] We remember a funny story about divergences, found in our research in ROBINSON W., *How the European Commission drafts legislation in 20 languages*, in Clarity – Journal of the international association promoting plain legal language, no. 53/2005, p. 6: "It may happen that a term used in one language leads to a misunderstanding in another. In Regulation (EC) No 141/2000, the term «orphan drug» is used in a technical sense (known to the trade circles) of a drug which is used to treat a rare disease and for which the manufacturer receives special tax credits and marketing rights as an incentive to develop the drug. However, a German expert has assured me that she has seen it translated as «medicine for children without parents»!".

[41] Schilling T., *op. cit.*, p. 1482.

have them take cognizance, with the possibility of another vote, of the finalized language version"[42].

According to Rule 180 (2) of the Rules of Procedure of the European Parliament[43], before the legislative text is finalized and published in the Official Journal, that text has to be verified by legal and linguistic experts. Therefore, the experts intervene *after* the political agreement on the text.

Of course that all the EU major institutions have their own translation services. As one study pointed out in 2010, "[t]he largest one is the Directorate-General for Translation of the European Commission with c. 1750 translators located in Brussels and Luxembourg. The European Parliament has 1200 translators in Luxembourg. The Council Secretariat employs 700 translators in Brussels. The Court of Justice, the Committee of the Regions and the European Economic and Social Committee (these two latter jointly), the Court of Auditors, the European Central Bank and the European Investment Bank […] have their own translation services and the decentralised bodies and agencies of the EU which have no own translation services can resort to a joint Translation Centre. Most EU translation services have freelance contractors, too, in order to lessen their workload (according to Commission statistics, 28% of the Commission's translation workload was outsourced to freelance contractors in 2008)".[44]

Not every document produced or received by an EU institution is translated into all official languages, but, as a general rule, all legislative and legally binding documents are translated into all official languages (*e.g.* regulations, decisions, directives).

At this level, we consider it is wonderful that there is an online official database where all EU legislation is available in the official languages.

However, with the impressive number of translators and interpreters, there is a strong need to keep in control the costs for the translation and interpretation services. In 2011, the total cost for these services was around 1.1 billion Euros, representing less than 1% of the EU budget, or 2.50 Euros per citizen yearly. This was possible due to the use of "«relay languages», so-called «bipolar» or «tripolar» translations, the use of specialized software, interfaces and data bases (Poetry, DGTVista, Eur-Lex, IATE, Euramis and others) and relying on an increased number of external translators"[45]. The relay language translation is a translation for which a first translator translates from one language to another language (usually, English or French), and a second translator translates this translation into the intended target language. A *bipolar* translation is when a translator translates in another language that his mother tongue, while a *tripolar* translation is when a translator translates one language in another, none of which are his mother tongues.

2.4. Multilingualism and Multijuralism at the European Court of Justice

The European Court of Justice (formed by the Court of Justice, the General Court and the Civil Service Tribunal) is the judicial authority of the multilingual EU, ensuring the uniform interpretation of the EU law in 24 official languages. It ensures the observance of law "in the interpretation and application" of the treaties. It has to ensure that the Member States comply with their obligations, reviews the legality of the EU institutions' acts and interprets the EU law at the request of the national courts.

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[42] Schilling T., *op. cit.*, p. 1462 (footnote omitted).

[43] The rule states that "[t]exts adopted by Parliament shall be subject to legal-linguistic finalisation under the responsibility of the President. Where such texts are adopted on the basis of an agreement reached between Parliament and the Council, such finalisation shall be carried out by the two institutions acting in close cooperation and by mutual agreement".

[44] European Commission, Directorate-General for Translation, Studies on translation and multilingualism. Lawmaking in the EU multilingual environment, 1/2010, p. 17.

[45] Gravier M., Lundquist L., "Getting Ready for a New Tower of Babel" in Kjaer A.L., Adamo S. (eds.), *op. cit.*, p. 81 (footnote omitted).

As for the Court's multilingualism, a distinction must be drawn between the language of the case, which is governed by Article 29 et seq. of the Rules of Procedure[46], and the working language used within the Court. The *working language* of the Court is the language used by the Members of the Court and its staff for day to day internal communication and work produced jointly, which, at present, is French. Therefore, the Members of the Court, 28 judges and 9 Advocates General, do not have to be multilingual – they have to know French. Moreover, "[b]y opting for a common working language, the Court preserves multilingualism as an institution but becomes a monolingual decision-maker"[47]. One author underlines that this system is "inflexible to such an extent that if a judgment were to be drafted in a language other than French (for example, in English, as it has exceptionally been the case), the Court would literally be totally *lost in translation*"[48].

As for the *language-of-the-case*, all the 24 official languages of the Member States can be the language-of-the-case. Only one language may be chosen as the language-of-the-case in front of the ECJ. There is however one exception: where cases are joined and the language of the case is different for each, each language used is a language-of-the-case.

It is interesting that, before the final deliberation, the draft judgement is submitted to a "judgement reader", who has "to burnish the French version"[49]. After the judgement reader and the final deliberation, the judgements are translated into the language of the case and, of course, in all the other official languages.

Moreover, it is interesting that a feature of the Court's translation is that "translators do not start afresh. […] Concerning EU legislative texts quoted by the Court, the translation of the judgment into the language of the case generally will follow the language-of-the-case version of such a text even if that text is adopted as a *dictum proprium* by the Court and even if its language-of-the-case version is not, or only with difficulties, reconcilable with the French version on which the judges have based their judgment"[50].

As for the multijuralism, we underline that this is a special feature of the ECJ due to its composition, judges and AGs educated and trained in different legal systems and areas of law, therefore "the Court is a potential laboratory for comparative law and comparative legal cultures"[51].

We have really enjoyed the colourful comparison of a judge with a rock climber. "Although a keen rock climber or mountaineer might select the most difficult or challenging route to get to the top of a particular rock face simply for the sake of responding to the challenge, a judge faced with a problem of interpretation will be more like the hill walker who merely wants to enjoy the view from the top and, if an easier path exists around the back, will for preference take that. Of course if no such path exists, the judge will have to take the rock climber's approach using the available equipment"[52].

In its activity, the ECJ deals with the interpretation and application of the EU law. The Court has to consider the EU legal texts as equally authentic expressions of the law maker's intention. In order to discover the real intentions of the law maker, the Court has to interpret

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[46] Rules of Procedure of the Court of Justice [on line] http://www.google.ro/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&sqi=2&ved=0CDEQFjAA&url=http%3A%2F%2Fcuria.europa.eu%2Fjcms%2Fupload%2Fdocs%2Fapplication%2Fpdf%2F2008-09%2Ftxt5_2008-09-25_17-33-27_904.pdf&ei=mcARUtDuHqeg4gSOhoDIAQ&usg=AFQjCNGDiJSN6UT7xZmzuwlFNlGPn8dwWQ (13.03.2014).

[47] Bengoetxea J., "Multilingual and Multicultural Legal Reasoning: The European Court of Justice", in Kjaer A.L., Adamo S. (eds.), *op. cit.*, p. 106.

[48] Bengoetxea J., "Multilingual and Multicultural Legal Reasoning: The European Court of Justice", in Kjaer A.L., Adamo S. (eds.), *op. cit.*, Ashgate, 2011, p. 107.

[49] Schilling T., *op. cit.*, p. 1475.

[50] Schilling T., *op. cit.*, p. 1475.

[51] Bengoetxea J., "Multilingual and Multicultural Legal Reasoning: The European Court of Justice" in Kjaer A.L., Adamo S. (eds.), *op. cit.*, Ashgate, 2011, p. 107.

[52] Kennedy T., Learning European Law. A Primer and Vade-mecum, Sweet&Maxwell, 1998, p. 253.

the legal text. Judicial interpretation is the way in which the judges establish the meaning of legal norms. As stated in the doctrine, "interpretation of law is in no way an exact science but rather a judicial art. In the end, it is a matter of judicial instinct, and because the judge proceeds instinctively, the process cannot be reduced to a series of mechanical rules"[53]. We shall deal with this matter in the following sub-section.

Additionally, the ECJ develops the general principles of law, which can be considered to be judge-made law – almost quasi-legislative.

Although the matters of judicial interpretation and of developing the general principles of law are very interesting, we shall not refer to them in this study, because they will make the object of a future study.

However, it is highly essential to discuss some of the *ECJ's case law* on translation conflicts between the authentic texts of the European Union and the legal consequences of such judge-made definitions.

The ECJ has pointed out in the *CILFIT* case[54] that, since the Community law is drawn up in different languages equally authentic, "even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States".

Therefore, every provision of EU law "must be placed in its proper context and interpreted in the light of the whole series of provisions which are part of the same law and of its purpose, including its state of evolution at the time that the provisions it contains are applied"[55].

Michal Bobek drafted the *CILFIT* guidelines which indicate the multilingual and multicultural judicial reasoning[56]:

- ✓ do not read one version in isolation; all language versions are equally authentic and correct legal interpretation of any one piece of EU legislation involves the parallel reading of all versions;
- ✓ do not majoritize from a number of confluent language versions (*i.e.* do not allow the majority of language versions to prevail over the minority);
- ✓ take into account other methods (system and *telos*).

Some authors add to these guidelines not to choose a meaning that is incompatible with some language versions (go for a minimum common denominator). It is interesting that Bobek considers that "if the national judges were genuinely to adhere to these guidelines, the entire Community judicial system would collapse within months"[57].

The *CILFIT* judgement was described in a picturesque manner described: it "can be seen either as a punishment to proud courts similar to that of Babel – if you dare contest my authority and contradict clear precedents by resorting on your clear understanding of the law (*acte clair*) I shall have you read all language versions and confuse you! – or as a strategy to defend its own record of interpretation, as when squids squirt ink and blur the waters around

[53] Socanac L., Goddard C., Kremer L. (eds.), *Curriculum, Multilingualism and the Law*, Nakladni zavod Globus, Zagreb, 2009, p. 10 apud Brown L.N., Kennedy T., *Brown, Jacobs: The Court of Justice of the European Communities*, Sweet&Maxwell, London, 2000, p. 323.

[54] Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health [1982] ECR 03415.

[55] Vismara F., "The Role of the Court of Justice of the European Communitities in the Interpretation of Multilingual Texts" in Pozzo B., Jacometti V., *op. cit.*, p. 67.

[56] Please see Bengoetxea J., "Multilingual and Multicultural Legal Reasoning: The European Court of Justice" in Kjaer A.L., Adamo S. (eds.), *op. cit.*, p. 115.

[57] Bengoetxea J., "Multilingual and Multicultural Legal Reasoning: The European Court of Justice", in Kjaer A.L., Adamo S. (eds.), *op. cit.*, p. 115.

them in order to hide from predators – by following the *CILFIT* guidelines you realize the difficult predicament of the Court"[58].

As we can imagine, the language of the procedure before the ECJ has important implications on the procedure and establishes the authentic language version of the judgment given. However, the language of the procedure does not mean that the EU legal acts applied in the case by the ECJ shall be considered only in the language version corresponding to the language of the procedure, since the ECJ has been asked to resolve questions relating to conflicting language versions of EU law provisions. Using different interpretation techniques, the Court uses in this matter the principle of the equal authenticity of the language versions of the EU legal acts, completed by the application of a teleological rather than a grammatical interpretation. The case law is not always consistent and a considerable margin of uncertainty is left for national authorities and private parties applying EU legal acts.

This question appeared from 1967, when in case *Van der Vecht*[59], the ECJ resolved the problem relating to the Dutch version of a regulation which differed from three other language versions: "*the need for a uniform interpretation of Community regulations necessitates that this passage should not be considered in isolation, but that in cases of doubt, it should be interpreted and applied in the light of the versions existing in the other three languages*". The Court reasoning was that in cases free from doubt, a language version could be interpreted in isolation.

In 1969, in case *Stauder*[60], the ECJ dealt with the difference in the wording of a EU decision relating to the sale of butter at reduced prices to beneficiaries under certain social welfare schemes. The decision authorised Member States to make butter available at a lower price than normal to some special beneficiaries (certain consumers who are in receipt of a certain social benefit). Two language versions mentioned the purchase based on the 'coupon indicating their names', whilst the other versions mentioned a 'coupon referring to the person concerned'. The ECJ stated that "*when a single decision is addressed to all the Member States the necessity for uniform application and accordingly for uniform interpretation makes it impossible to consider one version of the text in isolation but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light in particular of the versions in all four languages*". Considering the objectives of the decision and the intent of the EU legislator, the ECJ held that the provision had to be interpreted, in all Member States, in a way that it would not require the identification of the beneficiaries by their names.

Also, in 1977, in case *North Kerry Milk Products*[61], the ECJ was asked to interpret the provisions of a regulation regarding the conversion rate to be applied between the currency in which the Community aid for the production of casein was fixed and the Irish pound in which the aid was to be paid to the applicant. According to the regulation, sums owed in national currency by a Member State for transactions under the Common Agricultural Policy were to be paid on the basis of the relationship between the unit of account and the national currency prevailing at the time when the transaction was carried out (*i.e.* the date on which the event by which 'the amount involved in the transaction becomes due and payable' occurs.) Stating that *"the elimination of linguistic discrepancies by way of interpretation may in certain circumstances run counter to the concern for legal certainty, inasmuch as one or more of the texts involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words. Consequently, it is preferable to explore the possibilities of solving the*

[58] Bengoetxea J., "Multilingual and Multicultural Legal Reasoning: The European Court of Justice" in Kjaer A.L., Adamo S. (eds.), *op. cit.*, p. 116.
[59] Case 19/67 *van der Vecht* [1967] ECR 345.
[60] Case 29/69 *Stauder* [1969-1970] ECR 157.
[61] Case 80/76, *North Kerry Milk Products* [1977] ECR 149.

points at issue without giving preference to any one of the texts involved", the ECJ recognized an apparent discrepancy between the English wording of the provision and the wording of other official languages. The phrase in English "*the event… in which the amount… becomes due and payable*" was rendered in French with the phrase "*le fait générateur de la créance*" and with the equivalent expressions in the other languages. Although the Commission argued that the English version of the provision was to be interpreted in the light of the other language versions, the ECJ stated that it was preferable to explore the possibilities of solving the point raised by such discrepancies without giving preference to any text involved. Reading the relevant texts determined that the event by which the manufacturer became entitled to aid was marketing, and that marketing was "*le fait générateur de la créance*" within the meaning of the French text and the other corresponding texts and also "*the event by which the amount became due and payable*" within the meaning of the English text of the regulation, therefore the ECJ stated that any discrepancy between the versions in different languages of the regulation was irrelevant in the present context. The ECJ reached the above conclusion by taking into consideration the general context of the provision at issue and by discerning a meaning of the relevant provision that could be reconciled with all language versions and that corresponded to the legislator's intent regarding the provision in question.

Another case where the Court tried to reconcile diverging language versions is the case *Road Air*[62], when the ECJ decided that the provisions of the then Article 133 (1) of the Treaty permitted three different ways of interpretation. The Court underlined that the interpretation of the provision should be assigned to the one favoured by most language versions, and that the German version, "*even if it were ambiguous […] must be interpreted in a manner conforming with the other language versions*".

In *Kraaijeveld BV*[63], the Court restated that in translation conflicts between the authentic texts of the European Union, there is a need for a uniform interpretation of the rule concerned and that provision has to "be interpreted by reference to the purpose and general scheme of the rules of which it forms part"[64].

Another important case is the case *Ferriere Nord*[65] where the ECJ was asked whether conditions need to be fulfilled alternatively or cumulatively, question that showed the fact that the ECJ was not always able to reconcile diverging language versions. The Court stated that:

> *[the Italian] version cannot prevail on its own over all the other language versions which, through the use of the word 'or', show that the condition in question is alternative and not cumulative in nature. The uniform interpretation of Community provisions requires that they be interpreted and applied in the light of the versions established in the other Community languages*".

Even after this case, the situation was not clear. Although the Court continued to use the expression "in cases of doubt", the *Ferriere* case underlines that no reliance can be placed on a single language version.

In judgment *Vorarlberger Gebietskrankenkasse*[66], the ECJ had to analyse a conflict between the different language versions of the provisions at issue:

> *The French version uses the term 'victime', which, on a semantic interpretation, refers to the person who directly suffered the damage. On the other hand, the version in*

[62] Case C-310/95, *Road Air* [1997] ECR I-2229.
[63] Case C-72/95 Aannemersbedriif P/K. Kraaijeveld BV & Others v. Gedeputeerde Staten van Zuid-Holland [1996] ECR I-5403.
[64] See also Case 30/77 *Régina v. Pierre Bouchereau* [1977] ECR 1999, para. 14; Case C 437/97 *EKW and Wein & Co.* [2000] ECR I 1157, para. 42; Case C 457/05 *Schutzverband der Spirituosen-Industrie* [2007] ECR I 8075, para. 18; Case C 239/07 *Sabatauskas and Others* [2008] ECR I 7523, para. 39; Case C-347/08 *Vorarlberger Gebietskrankenkasse v WGV-Schwäbische Allgemeine Versicherungs AG* [2009] ECR I-08661, para. 26; and Case C-511/08 *Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen eV* [2010] ECR I-03047, para. 51.
[65] Case C-219/95 *Ferriere Nord* [1997] ECR I-4411.
[66] Case C-347/08, *Vorarlberger Gebietskrankenkasse* [2009] ECR I-08661.

German, which is the language of the case, uses the term 'der Geschädigte', which means the 'injured party'. Accordingly, that term may refer not only to persons who directly suffered the damage, but also to persons who suffered it indirectly.

The ECJ considered that other language versions of the relevant provision used terms similar to the German version (which is the language of the case), and that the ECJ had already given an interpretation in a previous judgment that determined the scope of the concept. These two elements led to the conclusion that, regardless of the French term that suggested a narrower scope of the concept (term 'victime', which refers to the person who directly suffered the damage), the provision in question had to be interpreted in accordance with the scope suggested by the German and many other language versions.

In another judgement dated September 10th, 2009,[67] the Court stated that:

First, it is settled case-law that the need for a uniform interpretation of Community directives makes it impossible for the text of a provision to be considered, in case of doubt, in isolation; on the contrary, it requires that it be interpreted and applied in the light of the versions existing in the other official languages (see, to that effect, Case C-296/95 EMU Tabac and Others [1998] ECR I-1605, paragraph 36; Case C-321/96 Mecklenburg [1998] ECR I-3809, paragraph 29; and Case C-498/03 Kingscrest Associates and Montecello [2005] ECR I-4427, paragraph 26).

The wording of the Court may be sometimes different[68]:

It is settled case-law that the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement for uniform application of EU law. Where there is divergence between the various language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.

In a more recent judgment, dated May 30th, 2013,[69] the Court used the same reasoning, but making a reference to the real intentions of the author and the aim to achieve:

It is settled case law that the need for uniform application and, accordingly, for uniform interpretation of a European Union measure makes it impossible to consider one version of the text in isolation, but requires that that measure be interpreted on the basis of both the real intention of its author and the aim that the latter seeks to achieve, in the light, in particular, of the versions in all other official languages (see, inter alia, Case C 569/08 Internetportal und Marketing [2010] ECR I 4871, paragraph 35, and Case C 52/10 Eleftheri tileorasi and Giannikos [2011] ECR I 4973, paragraph 23).

From all the above mentioned ECJ cases, it appears that the Court is compelled to apply *different interpretation techniques* that correspond to the nature of the actual discrepancy between the language versions of the EU legal acts that it is called upon to interpret. In order to avoid such discrepancies, a continuous effort of strengthening the quality of the drafting and the translation of the multilingual EU law is compulsory. Although the principle of equal authenticity of all language versions is incompatible with cases that result in an interpretation that gives precedence to one version over the other, the ECJ realized that solutions are needed. We have to borne in mind that these solutions do not have to overlook the principle of effectiveness, which ensures maximum adhesion to the EU objectives. Thus, in a judgment of 2000, the ECJ stated that "whenever a provision of Community law was capable of diverse interpretation, preference must be given to the one which is best adapted to

[67] Case C-199/08 *Erhard Eschig v UNIQA Sachversicherung AG* [2009] ECR I-08295, par. 54.
[68] Case C-41/09 European Commission v Kingdom of the Netherlands [2011] ECR I-00831, para. 44.
[69] Case C-488/11 Dirk Frederik Asbeek Brusse, Katarina de Man Garabito v Jahani BV [2013], not yet published, par. 26.

safeguarding its effectiveness, while preserving the principle that, in the case of disparity between the various language versions of a Community text, the provision must be interpreted as a function of the system and purpose of the legislation of which it forms part"[70]. In another case[71], the Court reiterated that, when an EU provision is capable of different interpretations, preference shall be accorded to the best suited to preserve the effectiveness of that provision.

An examination of the ECJ case-law[72] highlights "how solutions to problems of interpretation of multilingual texts reflect specific characteristics"[73] of the EU's legal system. This analysis shows that the Court does not yet have a clear policy on how to solve the practical problem of authenticity of texts of all language versions of the Community legislation. Although AG Stix-Hackl suggested that the language version of the draft legislation should be such "reference" version, the Court has not confirmed this solution.

As mentioned before, we have to borne in mind that in the future, the ECJ may answer to the question of conflicts of language versions from inadequate drafting.

A final issue regarding that we shall refer in this study analyses the reconciliation of the texts in case of divergences between language versions. It is obvious that there are diverging meanings between all 24 official languages versions, but the problem is how do we reconcile the diverging meanings? European institutions are familiar with this question. During the years, several methods of reconciliation have been discussed and observed in the ECJ's case law: preference for the majority meaning, preference for the clear meaning, preference for the liberal meaning. Unfortunately, the Court did not prefer and adopt just one method.

Sometimes, in reconciling the divergent language versions, the Court uses the context and the purpose. For example, in case *Givane v. Secretary of State*[74], the Court presupposed that a literal interpretation can solve the problem of diverging meanings, but underlined that it has not enough:

> *Since a literal interpretation of the words 'for at least two years' […] does not provide an unequivocal answer to the question referred, it is necessary to place that expression in its context and to interpret it in relation to the spirit and purpose of the provision in question.*

Thus, we should interpret this passage as saying that literal interpretation can be used to reconcile diverging meanings, BUT that was not possible in the respective case.

We notice that the Court regularly uses a standard phrase when explaining the need for multilingual interpretation, which is:

> *It must be borne in mind in this regard that, according to settled case-law, the necessity for uniform application and accordingly for uniform interpretation of a Community measure makes it impossible to consider one version of the text in isolation, but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light, in particular, of the versions in all languages*[75].

However, there are situations when a comparison of the different official versions will not solve the interpretative problem, but it will still have an important role because it can demonstrate that a particular wording is *misleading*. When using the purpose to solve the interpretative problem, the Court often uses the wording of various articles of the act of its

[70] Case C-437/97 Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wein & Co. HandelsgesmbH v Oberösterreichische Landesregierung [2000] ECR 1157.
[71] Case C-434/97 Commission of the European Communities v. the French Republic [2002] ECR 1129.
[72] Case 19/67 *van der Vecht* [1967] ECR 345, Case 49/71 *Getreide*, Case 6/74 *Moulijn*, Case C-103/01 *Firefighters*.
[73] Vismara F., "The Role of the Court of Justice of the European Communities in the Interpretation of Multilingual Texts", in Pozzo B., Jacometti V., *op. cit.*, p. 68.
[74] Case C-257/00 Nani Givane and Others v. Secretary of State for the Home Department [2003] ECR I-345.
[75] Case C-188/03 *Irmtraud Junk v. Wolfgang Kühnel* [2005] ECR I-885, para. 33.

preamble. For example, in the case *Commission v. Germany*[76], the Court used in order to establish the purpose of the act the wording of Article 13 and the preamble of the directive. Of course, that it is important how the ECJ finds and construes the purpose of a legal act. Apart from looking to the preamble or various articles of the act, the ECJ could also consult the *travaux préparatoires*, because the choice of the proper word could have been part of the discussions in the legislative bodies.

We consider that the teleological method is the most used method in establishing legal meaning of the EU law by the ECJ.

But when multilingual interpretation is going to be engaged and which languages should be considered as mandatory consultation languages? First of all, we consider that English and French should be the consultation languages, because these are "*de facto* originals in the legislation process of the Union, in the sense that a crushing majority of all documents are drafted first in one of these languages. As *de facto* originals they are potentially better prepared than other language versions and better reflect the intention of the legislator"[77]. Another reason would be that they represent the most important legal cultures: civil law and common law. The need for uniformity[78] throughout the European Union could be another reason to choose these languages as consultation languages. "[T]he search for their meaning [varying linguistic expression of laws] does not start out with the aim of reconciling the various language versions, but originated in the need to represent the precepts and values of the Community legal system in a uniform way"[79]. The uniformity is needed because "a Union whose rules are interpreted and applied differently in each Member State is a Union on paper only"[80]. We consider that if the national courts will use their own language version, interpreted with the help of the two mandatory consultation languages (English and French), the uniformity could be achieved, because the same languages would be used in all the Member States. Although there might be critics regarding the privileged position given to French and English by this recommendation, we consider that they already enjoy a special position, being considered *de facto* originals in the legislative process of the European Union. Of course, that in the event of difficult cases, the national courts retain the possibility to refer them to the ECJ.

As regards the moment when national courts should consult other language versions, we underline that these mandatory consultation languages should be employed automatically in the interpretation process. As for the multilingual interpretation by the ECJ, this does not happen regularly. The ECJ either trusts its AGs with the performance of language comparison[81], or it conducts its own comparison, sometimes including more languages[82] and arriving at different conclusions[83].

The multilingual interpretation can have two outcomes: either all the official language versions have the same meaning, or they do not. Sometimes, the ECJ understands the

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[76] Case 107/84 Commission of the European Communities v. Federal Republic of Germany [1985] ECR 2655.

[77] Derlen M., "In Defence of (Limited) Multilingualism: Problems and Possibilities of the Multilingual Interpretation of European Union Law in National Courts" in Kjaer A.L., Adamo S. (eds.), *op. cit.*, p. 162.

[78] Case 30/77 Régina v. Pierre Bouchereau [1977] ECR 1999, para. 14; Case C-372/88 *Milk Marketing Board of England and Wales v. Cricket St. Thomas Estate* [1990] ECR I-1345, paras. 18-19; Case C-187/07 *Criminal proceedings against Dirk Endendijk* [2008] ECR I-2115, para. 25.

[79] Vismara F., "The Role of the Court of Justice of the European Communitities in the Interpretation of Multilingual Texts" in Pozzo B., Jacometti V., *op. cit.*, p. 68.

[80] Derlen M., "In Defence of (Limited) Multilingualism: Problems and Possibilities of the Multilingual Interpretation of European Union Law in National Courts", in Kjaer A.L., Adamo S. (eds.), *op. cit.*, p. 163.

[81] See Case C-173/07 *Emirate Airline* [2008] ECR I-05237, par. 25. But sometimes, important language differences discovered by the AGs are ignored by the Court – *e.g.* Case C-265/03 *Igor Simutenkov v Ministerio de Educacion y Cultura, Real Federacion Espanola de Futbol* [2005] ECR I-2579.

[82] See Case C-420/98 *W.N. v. Staatssecretaris van Financiën* [2000] ECR I-2867.

[83] See Case C-72/95 Aannemersbedriif P/K. Kraaijeveld BV & Others v. Gedeputeerde Staten van Zuid-Holland [1996] ECR I-5403.

language comparison as looking for the literal meaning or the usual meaning of words, at least[84].

3. Conclusions

What we undertook with this study was to discover how the multilingual and multicultural environment of the EU affects its legislative processes and the challenges raised by the multilingual drafting of legal texts. It has tried to argue the problem of translation divergences between the authentic texts of the European Union.

We saw that multilingualism and multijuralism are specific to the EU. If at the beginning of this complex structure, there were just six countries (Belgium, France, Italy, Luxembourg, the Netherlands, West Germany) and four languages (German, French, Italian, Dutch), nowadays it is even more challenging because there are 28 countries and 24 languages. Definitively, the EU is a multilingual environment, integrating 28 Member States and 24 official languages[85].

When multiple legal orders and languages co-exist within a single legal regime, such as the EU, there is potential for differences between the legal texts. The European Union represents, for sure, on the international legal stage, the most ambitious linguistic project.

Multilingualism can be seen as "a democratic value to be protected, a fundamental right of minority groups, an obstacle to deliberative democracy and a hindrance to legal certainty and the possibility of uniform law, a cultural asset of Europe to be promoted and protected, a competitive advantage of businesses on the market and a prerequisite for the free movement of EU citizens"[86].

As some authors point out "there is an important difference in the way multilingualism and multijuralism play out: while it is entirely possible and, indeed, necessary for individual participants in the legislative and adjudicative processes of the EU to act sometimes or even regularly in a language that is not their mother tongue", it is rather difficult and generally not required to forget one's legal background and to adopt a foreign one"[87].

The ambition of this study was to prove that the meaning of the EU law cannot be derived from one version of the official languages, therefore the languages are interdependent and "[h]ence EU citizens cannot purely rely on their own languages when they want to know what EU law says on a particular issue. In principle, EU citizens must know the law in each and every official language because the meaning of the law is anchored not in one single language version, but in all the language versions taken together"[88].

The differences between the languages are inevitable because they are not absolute copies one of each other; therefore, the EU multilingualism leads to "legal miscommunication, misinterpretation, incoherent and divergent texts and, ultimately, an obstacle to achieving what lies at the very core of the rule of law, namely legal certainty"[89].

This study tried to touch upon both theoretical aspects (*i.e.* what the multilingualism and multijuralism of EU law implies) and practical issues (*i.e.* how this multilingual legislative system actually works in the EU; the interaction between legal languages at

[84] Case C-298/07 Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV v deutsche internet versicherung AG [2008] ECR I-07841. In this case, AG Colomer used the dictionary meanings of the words in question.

[85] We have to borne in mind that there are also in the EU more than 90 linguistic minority groups. Please see, Duparc Portier P., Masson A., *La question des langues en Europe: entre paradoxes et divergences juridiques* [on line], in Revue trimestrielle des droits de l'homme, no. 72/2007, p. 1071, http://www.rtdh.eu/pdf/20071051.pdf (13.03.2014).

[86] Kjaer A.L., Adamo S., "Linguistic Diversity and European Democracy: Introduction and Overview" in Kjaer A.L., Adamo S. (eds.), *op. cit.*, p. 2.

[87] Schilling T., *op. cit.*, p. 1461 (footnote omitted).

[88] Kjaer A.L., Adamo S., "Linguistic Diversity and European Democracy: Introduction and Overview" in Kjaer A.L., Adamo S. (eds.), *op. cit.*, p. 7.

[89] Kjaer A.L., Adamo S., "Linguistic Diversity and European Democracy: Introduction and Overview" in Kjaer A.L., Adamo S. (eds.), *op. cit.*, p. 7.

national and at EU level, problems emerging from multilingualism, illustrated by the relevant case law of the European Court of Justice).

Of course that the meaning of the EU law cannot be derived from one version of the official languages, therefore the languages are interdependent and "[h]ence EU citizens cannot purely rely on their own languages when they want to know what EU law says on a particular issue. In principle, EU citizens must know the law in each and every official language because the meaning of the law is anchored not in one single language version, but in all the language versions taken together"[90].

From all the ECJ cases mentioned in this study, it appears that the Court is compelled to apply different interpretation techniques that correspond to the nature of the actual discrepancy between the language versions of the EU legal acts that it is called upon to interpret. In order to avoid such discrepancies, a continuous effort of strengthening the quality of the drafting and the translation of the multilingual EU law is compulsory. Although the principle of equal authenticity of all language versions is incompatible with cases that result in an interpretation that gives precedence to one version over the other, the ECJ realized that solutions are needed. We have to borne in mind that these solutions do not have to overlook the principle of effectiveness, which ensures maximum adhesion to the EU objectives.

This study shows that the Court does not yet have a clear policy on how to solve the practical problem of authenticity of texts of all language versions of Community legislation. Although advocate general Stix-Hackl seemed to suggest that the language version of the draft legislation should be such "reference" version, the Court has not yet given a clear opinion on this suggestion.

As mentioned before, we have to borne in mind that in the future, the ECJ may also answer to the question of conflicts of language versions from inadequate drafting.

What about the solution? Is weak multilingualism the solution (replacing the 24 equally authentic official language versions of EU law by one version and 23 official translations), especially that is not new for the European construction? Should one[91] language be chosen as the original? We consider that *unilingualism* would vitiate the European Union, violating the principle of European identity. If the "real unity of Europe is the multilingualism" [92], therefore *unilingualism* would be the end of Europe. However, there are authors supporting the choice of a "single reference language". But, "[s]ince it is unlikely (due to political reasons) to expect that a single reference language, or a reference language for specific Community instruments will be introduced in the near future, it is most important that at least lawyers are trained to understand the most widely used drafting languages of Community legal instruments (in accordance with the opinion of AG Stix Hackl) and compare national harmonised legislation or directly applicable language versions against the original language version in order to minimise the risk of misinterpretation of Community law"[93].

Of course that we have to see that multilingualism is an advantage, a blessing of the EU and not an obstacle, a curse. We consider that, despite the various problems with the EU multilingualism described in this study, it is "quite unlikely that anything would change in legal terms in the foreseeable future"[94]. However, we consider that lawyers should research

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[90] Kjaer A.L., Adamo S., "Linguistic Diversity and European Democracy: Introduction and Overview" in Kjaer A.L., Adamo S. (eds.), *op. cit.*, p. 7.

[91] For the rejection of *unilingualism*, please see Fenet A., *Diversité linguistique et construction européenne,* in Revue trimestrielle de droit européen, Dalloz, Paris, 2001, p. 262 and following.

[92] Eco U., *Un entretien avec Umberto Eco*, Le Monde, 29 September 1992.

[93] Glézl A., *Lost in Translation; EU Law and the Official Languages – Problem of the Authentic Text* [on line], p. 11, http://www.cels.law.cam.ac.uk/events/Glezl.pdf (13.03.2014).

[94] Bobek M., "The Multilingualism of the European Union Law in the National Courts: Beyond the Textbooks" in Kjaer A.L., Adamo S. (eds.), *op. cit.*, p. 141.

more in languages and legal interpretation. Interdisciplinary efforts could solve the multilingualism problems of the EU.

References

- Duparc Portier P., Masson A., *La question des langues en Europe: entre paradoxes et divergences juridiques* [on line], in Revue trimestrielle des droits de l'homme, no. 72/2007
- European Commission, Directorate-General for Translation, Studies on translation and multilingualism. Lawmaking in the EU multilingual environment, 1/2010
- Glanert, S., *De la traductabilité du droit*, Dalloz, Paris, 2011
- Glézl A., Lost in Translation; EU Law and the Official Languages – Problem of the Authentic Text [on line]
- Kennedy T., Learning European Law. A Primer and Vade-mecum, Sweet&Maxwell, 1998
- Kjaer A.L., Adamo S. (eds.), Linguistic Diversity and European Democracy: Introduction and Overview, Ashgate, 2011
- Moser P., Sawyer K., Making Community Law. The Legacy of Advocate General Jacobs at the European Court of Justice, 2008
- Muller, F., Burr, I. (eds.), Rechtssprache Europas. Reflexion der Praxis von Sprache und Mehrsprachigkeit im Supranationalen Recht, 2004
- Pozzo B., Jacometti V., *Multilingualism and the Harmonisation of European Law*, Kluwer Law International, 2006
- Robinson W., How the European Commission Drafts Legislation in 20 Languages, 53 Clarity, 2005
- Socanac L., Goddard C., Kremer L. (eds.), *Curriculum, Multilingualism and the Law*, Nakladni zavod Globus, Zagreb, 2009
- Schilling, T., Multilingualism and Multijuralism: Assets of EU Legislation and Adjudication?, German Law Journal, Vol. 12, No. 07, 2011
- Cases 2 and 3/62 Commission v. Luxembourg and Belgium [1962] ECR 425
- Cases 90 and 91/63 Commission v. Luxembourg and Belgium [1964] ECR 625
- Case 19/67 *van der Vecht* [1967] ECR 345
- Case 29/69 *Stauder* [1969-1970] ECR 157
- Case 49/71 *Getreide*
- Case 6/74 *Moulijn*
- Case 23/75 Rey Soda v. Cassa Conguaglia Zucchero [1975] ECR 1279
- Case 80/76, North Kerry Milk Products [1977] ECR 149
- Case 30/77 Régina v. Pierre Bouchereau [1977] ECR 1999
- Case 76/77, Auditeur du travail v Bernard Dufour, SA Creyf's Interim and SA Creyf's Industrial [1977] ECR
- Case 9/79 Marianne Wörsdorfer, née Koschniske, v Raad van Arbeid [1979], ECR 2717
- Case 150/80 Elefanten Schuh v. Jacqmain [1981] ECR 1671
- Case 53/81 Levin v. Staatssecretaris van Justitie [1982] ECR 1035
- Case C-283/81, Srl CILFIT and Lanifacio di Gavardo SpA v. Ministry of Health [1982] ECR 3415
- Case 45/83 Ludwig-Maximilians-Universität München v Hauptzollamt München West [1984] ECR-267
- Case 100/84 Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland [1985] ECR 1169
- Case 107/84 Commission of the European Communities v. Federal Republic of Germany [1985] ECR 2655
- Case C-372/88 Milk Marketing Board of England and Wales v. Cricket St. Thomas Estate [1990] ECR I-1345
- Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame 258 [1996] ECR I-1029
- Case C-449/93 *Rockfon* [1995] ECR I-4291
- Case C-64/95 Konservenfabrik Lubella v. Hauptzollamt Cottbus [1996] ECR I-5105
- Case C-72/95 Aannemersbedriif P/K. Kraaijeveld BV & Others v. Gedeputeerde Staten van Zuid-Holland [1996] ECR I-5403
- Case C-219/95 *Ferriere Nord* [1997] ECR I-4411
- Case C-296/95 The Queen v Commissioners of Customs and Excise, ex parte EMU Tabac SARL, The Man in Black Ltd, John Cunningham [1998] ECR 1605
- Case C-310/95, *Road Air* [1997] ECR I-2229

- Case C-321/96 *Mecklenburg* [1998] ECR I‑3809
- Case C-434/97 Commission of the European Communities v. the French Republic [2002] ECR 1129
- Case C 437/97 Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wein & Co. HandelsgesmbH v Oberösterreichische Landesregierung [2000] ECR 1157
- Case C-420/98 W.N. v. Staatssecretaris van Financiën [2000] ECR I-2867
- Case C-257/00 Nani Givane and Others v. Secretary of State for the Home Department [2003] ECR I-345
- Case C-103/01 *Firefighters*
- Case C-361/01 P, Christina Kik v. Office for Harmonisation in the Internal Market [2003] ECR I-8283
- Case C-188/03 Irmtraud Junk v. Wolfgang Kühnel [2005] ECR I-885
- Case C-265/03 Igor Simutenkov v Ministerio de Educacion y Cultura, Real Federacion Espanola de Futbol [2005] ECR I-2579
- Case C 457/05 Schutzverband der Spirituosen-Industrie [2007] ECR I 8075
- Case C-63/06 UAB Profisa [2007] ECR I-3239
- Case C-161/06 *Skoma-Lux* [2007] ECR I-10841
- Case C-311/06 Consiglio Nazionale degli Ingegneri v Ministero della Giustizia and Marco Cavallera [2009] ECR I‑00415
- Case 47/07 Masdar (UK) Ltd. V. Commission of the European Communities [2008] ECR I-9761
- Case C-173/07 *Emirate Airline* [2008] ECR I-05237
- Case C-187/07 Criminal proceedings against Dirk Endendijk [2008] ECR I-2115
- Case C 239/07 *Sabatauskas and Others* [2008] ECR I 7523
- Case C-298/07 Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV v deutsche internet versicherung AG [2008] ECR I-07841
- Case C-199/08 Erhard Eschig v UNIQA Sachversicherung AG [2009] ECR I-08295
- Case C-347/08 Vorarlberger Gebietskrankenkasse v WGV-Schwäbische Allgemeine Versicherungs AG [2009] ECR I-08661
- Case C-511/08 Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen eV [2010] ECR I-03047
- Case C-41/09 European Commission v Kingdom of the Netherlands [2011] ECR I-00831
- Case C-488/11 Dirk Frederik Asbeek Brusse, Katarina de Man Garabito v Jahani BV [2013], not yet published
- www.connection.ebscohost.com
- www.curia.europa.eu
- www.ec.europa.eu
- www.eur-lex.europa.eu
- www.google.com
- www.unifr.ch

THE TOPICALITY AND THE IMPORTANCE OF THE ADMINISTRATIVE AGREEMENT WITHIN THE ROMANIAN LAW

Elena Emilia ŞTEFAN[*]

Abstract

The administrative agreement as a legal institution challenged a series of controversies within the legal literature. Nowadays, we observe that the activity of the public administration authorities also includes this legal category, so that we can assert that it has an increasingly share in areas such as delegation of public utilities services, public acquisitions, transport and others.

Romanian legislation in the field of administrative law stands out through the lack of codification, which complicates such a scientific approach having as scope the analysis of the administrative agreements, similar to the civil law, for example. As we shall prove in this analysis, administrative agreements are distinguished by the rule of the priority of the public interest as against the contractual freedom.

Keywords: *public interest, administrative agreement, public service, legal fiction, Constitution.*

I. Introduction

The theory of the administrative agreements was founded starting from the idea that the administration, having a double character, concludes two types of agreements: administrative agreements and private law agreements[1]. Being an agreement by which the administration conducts part of its duties, the legal regime applicable to the administrative agreement is an exorbitant one, in particular of public law, also having negotiated clauses that confer it a mixed regime of public and private law[2].

Nowadays, under the national law, the agreements concluded by the administration with individuals are: the concession of public services, the concession of public domain, public works agreements and public acquisition agreements. It should be noted that by special law there may be provided other categories of administrative agreements, in various fields of activity. The applicable legislation includes among others: Law no. 554/2004[3] of the contentious-administrative but also the Government Emergency Ordinance no. 34/2006 on the assignment of public acquisition agreements, of the agreements of public works concession and of the agreements of services concession[4] or the law no. 51/2006[5] of the community services of public utilities.

As shown in the doctrine, the conclusion of the administrative agreements is performed by public authorities or institutions by virtue of the prerogatives of public powers

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[1] V.Vedinaş, *Drept administrativ* (Administrative Law), 4th edition, Ed.Universul Juridic, Bucharest,2009, p.125.

[2] I.Corbeanu, *Drept administrativ (Administrative Law),* Ed.Lumina Lex, Bucharest, 2010, p.123.

[3] Law no. 554/2004 of the contentious published in the Official Gazette no. 1154/2004.

[4] Government Emergency Ordinance no. 34/2006 on the assignment of public aquisition agreements, of the agreements of public works concession and of the agreements of services concession, published in the Official Gazette no.418/2006.

[5] Law no. 51/2006 of the community services of public facilities, published in the Official Gazette no. 254/2006.

at their disposal, to the extent of legal competence[6]. The capacity of administrative law is the possibility of participating as an independent subject within administrative law relationships to achieve their competence[7]. The philosophy of the administrative agreements requires that the consent of the parties to be subordinated to the public interest[8].

II. The administrative agreements reflected in the Romanian legislation

According to Ioan Santai, *the administrative agreement* represents the legal act concluded between an administrative entity and another natural or legal person seeking the achievement of a general (public) interest for an amount of money paid by the provider or incurred by the beneficiary, as the case may be[9].

After passing the law no. 554/2004 of the contentious-administrative, as further amended and supplemented, for the first time the legislator, by a legal fiction, has assimilated the administrative agreement to the unilateral administrative act, the contracting parties being on the legal position of inequality, unlike the civil agreement where the parties are on the legal position of equality[10]. Therefore, according to art. 2 paragraph 1 item c of the second study of the contentious-administrative law, the agreements concluded by the public authorities seeking to enhance the public property are also assimilated to the administrative acts, under this law.

It is beyond any doubt that the concept of administrative agreements, that finally receives a legal consecration, concerns the individualized agreements in art. 2, paragraph 1, item c, second study, namely the agreements concluded with the public authorities seeking to enhance the public property, in order to provide public services to perform public works or those that aim public acquisitions[11]. As shown in the recent jurisprudence, in other words the concession agreements that represent a legal instrument for the enhancement of the property owned by the state or of the territorial administrative units, shall be assimilated to the administrative act for the purpose of the aforementioned legal norm and shall be subject by way of consequence to a legal regime of administrative law only to the extent that its scope aims exclusively the enhancement of the public property[12].

An issue that has challenged discussions in practice refers to the situation where the prefect under its right of administrative trustee may attack the administrative agreements concluded by the local public administration authorities by way of the contentious-administrative. There may be noted in one opinion the fact that only unilateral administrative acts issued by the local prefect may be challenged by the prefect, which results from the grammatical analysis of the legal provisions as well as from the fact that the text excepting the actions brought by the prefect from the formulation of the prior complaint is placed immediately after the paragraphs dealing with the regime of this complaint for the unilateral administrative acts, thus excluding the administrative agreements.[13]

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[6] C.S. Săraru, *Capacitatea autorităţilor sau instituţiilor publice de a încheia contracte administrative* (The ability of public authorities or institutions to conclude administrative agreements), Law no. 1/2010, p.117.

[8] A. Iorgovan, L. Vişan, A. S. Ciobanu, D. I. Pasăre, *Legea contenciosului administrativ.Comentariu şi jurisprudenţă* (Contentious law. Comment and jurisprudence), Ed. Universul juridic, Bucharest,2008, p.189.

[9] I.Santai, *Drept administrativ şi ştiinţa administraţiei* (Administrative Law and science administration), vol.II, Ed. Alma Mater,Sibiu,2009, p.221.

[10] O. Puie, Aspecte privind soluționarea unor litigii derivând din contractele administrative și alte tipuri de contracte încheiate de autoritățile publice (Issues concerning the settlement of disputes arising from the administrative agreements and other type of agreements concluded by the public authorities) Romanian Pandects no.7/2008, pp.32-33.

[11] A. Iorgovan, L.Vişan, A. S. Ciobanu, A. I. Pasăre, *op.cit.*, 2008, p.188.

[12] High Court of Cassation and Justice, the Department of administrative and fiscal contentious, decision no. 6/2001, in Ionescu Maria, *Contencios administrativ.Practică judiciară 2010-2011*, (Contentious-administrative, Judicial Practice, 2010-2011), Ed.Moroşan, Bucharest, 2012, p.79.

[13] A.Iorgovan, L.Vişan, A.S Ciobanu, A.I Pasăre, *op cit*., p.116.

Following the logic of the doctrine[14] expressed during the enforcement period of the former law no. 69/1991, repealed by law no. 215/2001[15], according to which the reference to the administrative acts of art. 110 paragraph 1 represent an unconstitutional restriction owing to the fact that it eliminates the category of administrative agreements from the legal control of the prefect, it can be argued nowadays that given the current provisions of art. 3 paragraph 1 of law no.554/2004 and of art.123 paragraph 5 of the Constitution that refer to the acts issued and to the administrative acts, in the category of which also fall the administrative agreements as assimilated acts of the administrative acts, all the more the administrative agreements may be included in the domain of the administrative guardianship performed by the prefect. In our opinion, as far as the administrative agreement is considered assimilated administrative act, there is nothing to prevent the prefect to attack by way of contentious-administrative this type of act of the local authorities, exercising the right of administrative guardianship, as representative of the government in the territory.

In the Romanian legal doctrine, in the paper entitled "Ficțiunile juridice", (The legal fictions), the author Ion Deleanu[16] stated that, "the new law of the contentious-administrative offers us another legal fiction, namely that the agreements are assimilated to the administrative acts (...)". In this paper the author identifies several legal fictions in the field of the administrative law, such as the tacit approval, in fact the office and the officer, the unjustified refusal of an administrative authority, the administrative silent and asks a rhetorical question: "are the fictions essential for the law?" In what concerns the agreements, we are interested in what the authors says, namely that by assimilating the administrative agreement with the administrative act, the assimilation amounts to a legal fiction not only owing to the fact that distorts the legal concept of the agreement, but rather owing to the fact that it ignores it in fully.

In what concerns the object of the activity within the contentious-administrative, according to art. 8 paragraph 3 of Law no. 554/2004 the court of the contentious-administrative has the jurisdiction in case of the disputes related to the conclusion of the administrative agreements, including those concerning the stages prior to their conclusion, as well as any other disputes related to the amendment, execution, interpretation and termination of the administrative agreement. Any legal system or scientific construction should relate to principles that guarantee or establish[17]. The principle that the contentious-administrative judge has to comply with when solving a dispute having as scope an administrative agreement is the priority of the public interest. Also the Government Emergency Ordinance consecrated the principle of transparency in the process of assignment of the public acquisition agreements, of public works concession and of the agreements of service concession.[18]

However, we should mention that the provisions of art. 8 paragraph 3 of law no. 554/2004 were subject to an unconstitutional exception that was rejected. Therefore, the Constitutional Court appreciated that:"these provisions are constitutional in relation to art. 52 paragraph 1 of the Constitution, as the rule established in the text of the law refers only to the disputes related to the application and execution of the administrative agreement and does not mean the placing of the public authority on a preferential trial position, because not the

[14] Iuliana Râciu, *Procedura contenciosului administrativ (*The procedure of the contentious-administrative) Ed.Hamangiu, Bucharest,2009, pp.140-141,apud. C.L.Popescu, *Autonomia locală și integrarea europeană* (Local autonomy and European , Ed.All Beck, Bucharest,1999, pp.244-245.

[15] Law no .215/2001 of the local public administration, published in the Official Gazette no. 204/2001.

[16] Ion Deleanu, *Ficțiunile juridice (Legal fictions)* Ed. All Beck, Bucharest, 2005, p.207.

[17] I. Boghirnea, *Teoria Generală a Dreptului* (General Theory of Law), 3rd edition, reviewed and updated, Ed.Sitech, Craiova, 2013, p.101.

[18] C.S.Săraru,*Contractele administrative* (Administrative Agreements), Ed.C.H,Bucharest, 2009, p.146.

quality of the party shall be the one considered by the court that settles the dispute, but the principle of the priority of the public interest[19]".

Another issue that caused discussions both in the Romanian law and in the French law refers to the possibility of incorporating the arbitration clause within the administrative agreements. The arbitration clause is usually used within the commercial agreements. One opinion shows that the possibility of inserting the arbitration clause within the matter of the administrative agreements is expressly provided by article 55 of the Government Decision no. 71/2007 by which the Methodological Norms of applying the Government Emergency Ordinance no. 34/2006 were approved, but the possibility of settlement of a possible dispute related to these agreements, by way of arbitration procedure, is only limited to negotiable clauses in these agreements[20]. Moreover, neither in the French doctrine the administration may introduce within its agreements a compromise clauses to entrust the settlement of the disputes to an arbitrator on the grounds of the legal prohibition to compromise, namely the use of the arbitration affecting the public person, except for certain categories of industrial and commercial public establishments which list has to be set by decree[21].

The community services of public facilities as defined by the provisions of art. 1 of Law no. 51/2006 represents the total activities of utility and general public interest conducted in communes, cities, municipalities or counties, under the coordination and responsibility of the authorities of the public local authority in order to meet the requirements of the local communities providing the following facilities: water supply, sewage and wastewater treatment; production, transmission and distribution of heat; local public transport; public lighting etc.

III. The administrative agreements in the French doctrine

The theory of the administrative agreements was created in the French law owing to the jurisprudence of the State Council, which was systematized by the doctrine.[22] Therefore, the contentious-administrative courts in France, first of all the State Council, qualified through their jurisprudence as administrative agreements only those agreements that apart from the mere participation of a public administration, another purpose is also observed – to ensure the functioning of a public service, namely a certain legal regime of public law[23]. As shown in the French doctrine, in order to prior situate all the agreements within the administrative action we have to remember that all public actions are settled by two types of acts: normative acts and administrative and intellectual operations.[24]

French literature is very rich in what concerns this matter, the theory of the administrative agreements being taken over in many foreign countries[25]. Major infrastructure of France from that time and until now is closely related to the theory of the administrative agreements, in case of railways, roads, electricity, gas and water supply etc., but the administrative agreements were also present in the scope of the social area, for example the convention between the National Health Insurance Company and the national organizations of

[19] The Decision of the Romanian Constitutional Court no.464/2006, published in the Official Gazette no. 604/2006, apud. I.Râciu, *Procedura contenciosului administrativ. Aspecte teoretice şi repere jurisprudenţiale* (The procedure of the contentious-administrative. Theoretical aspects and jurisprudential marks), E.Hamangiu, Bucharest, 2012, pp.240-241.
[20] O. Puie, *op.cit.*, Romanian Pandects no. 7/2008, p.47.
[21] J. Rivero, J. Waline, *Droit administratif*, Dalloz,Paris,1996, p.107, apud. O.Puie, *op.cit.*, p.47.
[22] R. N.Petrescu, *Drept administrativ* (Administrative Law), Ed.Hamangiu, Bucharest,2009, p.358.
[23] A. Iorgovan, *Drept administrativ* (Administrative Law), 2nd volume, Ed.Atlas Lex, Bucharest,1994, p.104 apud. Jean Rouviere, *Les contracts administratifs*, Paris,Dalloz,1930, pp.5-10
[24] George Dupuis, M-J Guedon, P. Chretien, Droit administratif, 10 edition, Ed.Dalloz, Paris, 2007, p. 420.
[25] M. Orlov, *Curs de contencios administrative* (Contentious-administrative course), Kishinev, 2009, p.29.

physicians being considered an administrative agreement, for which purpose the State Council passed the law of 1974.[26]

During the inter-war French doctrine, Gaston Jeze was the one devoted to identify the elements bounding the administrative agreements that could not be considered private law agreements, by its paper called: *Les principes generaux de droit administratif* (...) printed in six volumes between 1925-1936, of which the last three are dedicated to the administrative agreements.[27]

Both complex and controversial legal nature of the administrative agreement succeeded in being claimed by the specialists both of the public and of the private law, from this point of view being part of the legal institutions category which are between the two branches of the law, at the border between the unilateral act and the agreement, as a French author entitles his paper dedicated to this institution.[28] In conclusion, Gaston Jeze considers that the existence of an administrative agreement requires the following conditions[29]:

- ✓ An agreement of wills between the administration and individuals;
- ✓ The agreement of will has to aim to create a legal obligation to provide material works or personal services for remuneration;
- ✓ The performance has to be designed to ensure the functioning of a public service;
- ✓ The parties are required to obey the public law regime by an express provision, by the form of the agreement, by the type of collaboration required to the agreement or by any other manifestation of will;
- ✓ Inequality of the contracting parties;
- ✓ Extensive interpretation of the agreement. In what concerns the administrative agreements, the individual has to sacrifice its private interest in favor of the public interest of the contracting administration, having the right to compensation;
- ✓ The right to take unilateral enforceable measures. In what concerns the administrative agreements, the public administration seeking the achievement of a public interest and having beside the capacity of contracting party the one of public authority, is entitled to take some enforceable measures during the performance of the agreement or on the occasion of termination the agreement, without apply to justice;

Under the conditions of joining the E.U, member states undertaken to integrate their own legal order of the E.U. regulations[30]. National legal order of each country is influenced by the supranational legal systems, showing a trend of globalization of the world, without being denied the influence and the interdependence of the states law, while the state, in its capacity of signatory of international conventions has certain obligations to meet, including in what concerns the plan of enforcing internal legal regulations.[31]

IV. Conclusions

As the title of this study suggests, the administrative agreements are not only topical, but also in our opinion, at this moment there can not be conceived that the activity of the public administration authorities in general to be performed without them.

Therefore, the administrative agreement does not represent itself a purpose, as the civil or the commercial agreement: the administrative agreement as well as the unilateral

[26] A. Iorgovan, *Tratat de drept administrativ* (Administrative Law Treaty), vol II, Ed.All Beck, Bucharest, 2002, pp.99-100.
[27] C.S. Săraru, *Contractele administrative. Reglementare,doctrină,jurisprudenţă* (Administrative Agreements. Regulation, doctrine, jurisprudence), Ed.C.H. Beck, Bucharest,2009, p.33
[28] V. Vedinaş, op.cit.,2009, apud Y. Madiot, Aux frontieres du contract et de l´acte unilateral: recherches sur la notion d´acte mixte en droit public francais, L.G.D.J, Paris, 1971, 390p.
[29] G. Jeze, Les contracts administratifs de l`Etat, des departaments, des communes et des etablissementes public, Ed. Girard, Paris, 1927, vol. I, p.16, apud. C.S Săraru, op.cit., p.34.
[30] R. M. Popescu, *lntroducere în dreptul Uniunii Europene*, Ed.Universul Juridic, Bucureşti, 2011, p.197.
[31] L. Vişan, Necesitatea codificării normelor de procedură administrativă, Revista de Drept Public nr. 2/2005, p.48

administrative act represents a legal mean by which the public administration is performed, either in the form of law enforcement in specific cases or by the provisions of public services, in the board sense of the term and to the extent of the law.[32]

During the researching of this study, we noticed that the main weakness of the Romanian legislation is the lack of administrative coding[33], which entitles us to assert that the enforcement of the Administrative Procedure Code is a necessity.

References

- The Constitution of Romania
- I. Boghirnea, *Teoria Generală a Dreptului, (*General Theory of Law), 3rd edition, reviewed and updated, Ed.Sitech, Craiova, 2013, p.101
- I.Corbeanu, *Drept administrativ (Administrative Law)* Ed.Lumina Lex, Bucharest 2010
- I. Deleanu, *Ficțiunile juridice (Legal Fictions)* Ed. All Beck, Bucharest, 2005
- A.Iorgovan, Tratat de drept administrativ (Administrative Law Treaty) vol II, Ed.All Beck, Bucharest, 2002
- A.Iorgovan, *Drept administrativ (Administrative Law),* vol II, Ed.Atlas Lex, Bucharest, 1994
- A.Iorgovan, L. Vișan, A. S. Ciobanu, D. I. Pasăre, Legea contenciosului administrativ.Comentariu și jurisprudență. (Contentious law. Comment and jurisprudence), Ed. Universul juridic, Bucharest, 2008, p.189.
- M. Orlov, Curs de contencios administrativ *(Contentious-administrative course),* Kishinev, 2009
- R. N.Petrescu, *Drept administrativ (Administrative Law),* Ed.Hamangiu, Bucharest, 2009
- R. M. Popescu, lntroducere în dreptul Uniunii Europene (Introduction in the European Union law), Ed.Universul Juridic, București, 2011
- C.L.Popescu, Autonomia locală și integrarea europeană (Local autonomy and European integration) Ed.All Beck, Bucharest, 1999,
- O. Puie, Aspecte privind soluționarea unor litigii derivând din contractele administrative și alte tipuri de contracte încheiate de autoritățile publice (Issues concerning the settlement of disputes arising from the administrative agreements and other type of agreements concluded by the public authorities), Romanian Pandects no.7/2008
- I. Râciu, Procedura contenciosului administrativ.Aspecte teoretice și repere jurisprudențiale (The procedure of the contentious-administrative. Theorical aspects and jurisprudential marks), Ed.Hamangiu, Bucharest,2012
- I. Râciu, Procedura contenciosului administrativ (The procedure of the contentious-administrative) Ed.Hamangiu, Bucharest, 2009
- I.Santai, Drept administrativ și știința administrației (Administrative law in the administrative science), vol II, Ed. Alma Mater, Sibiu, 2009
- C.S. Săraru, Contractele administrative. Reglementare, doctrină, jurisprudență (Administrative agreements. Regulation, doctrine, jurisprudence), Ed.C.H. Beck, Bucharest, 2009
- C.S. Săraru, Capacitatea autorităților sau instituțiilor publice de a încheia contracte administrative (The capacity of the public authorities and institutions to conclude administrative agreements) Law no. 1/2010
- V.Vedinaș, *Drept administrativ (Adminidtrative Law),* 4th edition, Ed.Universul Juridic, Bucharest, 2009
- L. Vișan, Necesitatea codificării normelor de procedură administrativă (The need of coding the administrative procedure norms), The Journal of Public Law no. 2/2005
- Y. Madiot, Aux frontieres du contract et de l´acte unilateral: recherches sur la notion d´acte mixte en droit public francais, L.G.D.J, Paris,1971
- G. Jeze, Les contracts administratifs de l`Etat, des departaments, des communes et des etablissementes public, Ed. Girard, Paris, 1927, vol. I
- J. Rivero, J. Waline, *Droit administratif*, Dalloz, Paris,1996.
- G. Dupuis, M-J Guedon, P. Chretien, *Droit administratif*, 10 edition, Ed.Dalloz, Paris, 2007.
- Jean Rouviere, *Les contracts administratifs,* Paris, Dalloz,1930.
- Law no. 554/2004 of the contentious published in the Official Gazette no. 1154/2004

[32]A.Iorgovan, L.Vișan, A.S Ciobanu, A.I Pasăre, *op cit.,* p.189.

[33] For details about the integration of the E.U. regulations within the internal law and the state liability for the failure to comply with the obligations, see R. M. Popescu, *op.cit.,* p.198 and the following.

- Government Emergency Ordinance no. 34/2006 on the assignment of public aquisition agreements, of the agreements of public works concession and of the agreements of services concession, published in the Official Gazette no.418/2006.
- no. 51/2006 of the community services of public facilities, published in the Official Gazette no. 254/2006
- Law no. 69/1991 of the public local administration, published in the Official Gazette no. 238/1991
- Law no. 215/2001, of the public local administration, published in the Official Gazette no. 204/2001.

THE EXCEPTION OF ILLEGALITY IN CONTENTIOUS-ADMINISTRATIVE

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Abstract

By way of exception of illegality the party of a dispute is entitled to invoke the irregularity of an administrative act. Therefore, this study shall present the regulation of the exception of illegality, respectively the provisions of the Law no. 554/2004 of the contentious-administrative, showing through the doctrine and the jurisprudence the possible weaknesses of the current normative regulations.

There will also be discussed case studies from the recent practice of the High Court of Cassation and Justice concerning the exception of illegality. Last but not least, our conclusions will focus on the highlighting of several critical observations on the current state of the subject proposed, our approach considering in this purpose the warnings that come from the practice of the courts.

Keywords: *Law no 554/2004, exception of illegality, liability, individual unilateral administrative act, contentious-administrative.*

1. Preliminaries

The exception of illegality has also been called in the doctrine 'the plea of illegality" and has been known in our legal system prior to the Law no.554/2004[1], of the contentious-administrative, respectively to the Law no. 1/1967 on the courts judgment on the claims of those whose rights have been prejudiced by illegal administrative acts[2].

The doctrine defined the exception of illegality as being: "*a mean of defense by which during a process for other grounds beside the illegality of the administrative law act*[3]*, one of the parties threatened to be applied such an illegal act, defends itself by pleading this defect and requires the act not to be taken into account in solving the case"*[4].

Although it was not expressly regulated in the legislation prior to the Law no. 554/2004, the exception of illegality of the normative administrative acts was accepted as a procedural mean of defense that could be submitted before any court, in a traditional way in the Romanian contentious, both by the parties and by the ex officio court and is settled by the competent court to hear the case in question[5]. Nowadays the exception of illegality is expressly regulated in art. 4 of law no.554/2004.

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[1] Law no.554/2004 of the contentious-administrative, published in the Official Gazette no. 1154/2004.

[2] Law 1/1967 on the judgment performed by the court of the complaints of those whose rights were prejudiced by illegal administrative acts, published in the Official Journal no.67/1967.

[3] It can be noticed that the author refers to the administrative acts, being well known in the doctrine the theoretical disputes of the two schools of administrative law in our countries on the concepts, namely the School of Bucharest used the concept of administrative act and the School of Cluj which exponent was the professor Tudor Draganu, the concept of administrative law. But essentially the disputes were only theoretical, the concepts being similar.

[4] Tudor Drăganu, *Actele de drept administrativ* (Administrative Law Acts), Ed.Ştiinţifică, Bucharest, 1959, p.260.
For the same purpose, see şi Antonie Iorgovan, *Tratat de drept administrativ* (Administrative Law Treaty), vol.II, 4th edition, Ed.All Beck, Bucharest, 2005, p.677, Verginia Vedinaş, *Drept administrativ (Administrative Law)*, 3rd edition reviewed and updated, Ed. Universul Juridic, Bucharest, 2009, p.187.

[5] Gabriela Bogasiu, *Justiţia actului administrativ* (Administrative act justice), Ed. Universul Juridic, Bucharest, 2013, p. 264.

2. Normative regulation of the exception of illegality

The legislation in the field of the administrative law is distinguished by the lack of administrative coding, which means that from the point of view of the legal procedure, the scope of the legislative acts is restricted to the contentious-administrative and to the Civil Procedure Code.

We shall briefly present below the way the exception of illegality was reflected over several time periods.

a) Prior to the law no. 554/2004 of the contentious-administrative.

This exception was not regulated prior to the law no. 554/2004 of the contentious-administrative, neither in Law 1/1967 on the judgment of the courts on the claims of those whose rights were prejudiced by illegal administrative acts and neither in law no. 29/1990[6]. After the enforcement of law no. 1/1967 and especially after the enforcement of law no. 29/1990 when the persons whose rights recognized by law through an authority administrative acts are prejudiced may appeal to the competent court for the repeal of the authority administrative act and the remedy of the case, the exception of illegality can only be submitted for defense, either by statement of defense submitted by the defendant or by response to the statement of defense submitted by the plaintiff[7].

b) Law no. 554/2004 of the contentious-administrative

It is well known that the exception of illegality was regulated for the first time by law no. 554/2004 of the contentious-administrative, consisting of 4 articles and four paragraphs. The law editors are liable for the express insertion of the exception of illegality in the content of the contentious-administrative law.

Therefore, in accordance to art. 4 of the law: par. (1) *The legality of an unilateral administrative act may be at any time investigated during a law suit, by way of exception, ex officio or upon the request of the interested party. In this case, the ascertainment that the administrative acts depend on the settlement of the disputes, the court notifies the contentious-administrative court by explanatory statement, in this way suspending the case. (2) The contentious-administrative court rules in public session after the emergency procedure by summoning the parties. (3) The decision of the contentious-administrative is subject to appeal, which is stated within 48 hours from the decision and is judged within 3 days from the registration, by summoning the parties. (4) If the contentious-administrative court observes the illegality of the act, the court before which the exception was submitted settles the case without considering the act which illegality was observed.*

However the Constitutional Court held the provisions of par. (3) as unconstitutional due to the imprecision and ambiguity resulting from the running of the appeal term from the decision or from the notifying of the set short terms, as well as in terms of the mean of summoning that is contrary to art. 21 and 24 of the Constitution and to art. 6 of the Convention for the protection of human rights and fundamental freedoms[8].

c) Law no. 262/2007

Law no. 554/2004 of the contentious-administrative was amended and supplemented by Law no. 262/2007[9]. Art. 4 has basically undergone several amendments: on the one hand the exception of illegality may be submitted only on individual unilateral administrative acts and not on normative acts, on the other hand the suspension of the case is not disposed any

[6] Law no.29/1990, published in the Official Gazette no.122/1990 that represented the law of the contentious-administrative until its repeal by law no.554/2004.

[7] Valentin Prisăcaru, *Tratat de drept administrativ român.Partea generală* (Romanian administrative law treaty. General Part) 3rd edition reviewed and supplemented, Ed.Lumina lex, Bucharest, 2002, p. 624 and the following.

[8] The Decision no. 647/2006 of the Constitutional Court of Romania on the exception of illegality of the provisions of par. (3), art.4 of law no. 554/2004, published in the Official Gazette no.921/2006.

[9] Law no. 262/2007 on the amending and supplementing of Law no. 554/2004 of the contentious-administrative, published in the Oficial Gazette no.510/2007.

more, the exception of illegality being submitted before the competent contentious-administrative court to settle it. Another amendment refers to the fact that the submitting of the exception may not be reported on the date of issue of the individual act. These amendments represented the scope of an exception of unconstitutionality that was rejected[10].

On the other hand, the High Court of Cassation and Justice also held that the provisions of law no. 554/2004 of the contentious-administrative, as further amended and supplemented by law no. 262/2007 violate the principle of the legal security and the right to a fair law suit provided for by art. 6 of the ECHR and 47 of the Charter of Fundamental Rights of the European Union to the extent that they allow the censoring of the legality of the individual administrative acts issued prior to the enforcement of the law[11].

Therefore, by the enforcement of the provisions of art. 20 par. (2) and of art. 148 par. (2) of the Constitution in relation with the ECHR and the Court of Justice from Luxembourg, the enforcement of the provisions of art. 4 of law no. 554/2004 as further amended and supplemented by law no. 262/2007, on the individual administrative act issued prior to the enforcement of this law and which illegality was called by way of exception, was properly removed.

d) Actual state-Law no. 76/2012 for the enforcement of Law no. 134/2010 on the Civil Procedure Code, as well as the amendment and the supplementing of other normative acts.

For reasons mainly related to the necessary shortening of the law suits terms, Law no. 76/2012 radically modified the regime of the exception of illegality restoring its settlement by the court vested with the substance of the dispute, before which it was submitted.[12]

Nowadays the exception of illegality provided for by art. 4 of Law no. 554/2004 par. (1) has a different wording compared to the original one, respectively: *„the legality of an individual administrative act, regardless the date of its issuing, may be at any time investigated during a law suit term,* by way of exception, ex officio or at the request of the interested party". If in the past the setting of the jurisdiction to settle the exception of illegality in favor of the contentious-administrative court represented the main novelty element of art. 4 entered by Law no. 262/2007, unlike the previous situation when the court notified by the dispute also settled the exception[13], in 2013 the novelty element is represented by the fact that any court has the jurisdiction to settle the exception.[14]

Par. (4) also expressly stipulates that the normative administrative act may not be the scope of the exception of illegality, its control being exercised only by the action for annulment, which is indefeasible.[15]

3. Jurisprudence

The High Court of Cassation and Justice ruled in its jurisprudence on whether the Regulations of the Romanian Football Federation are administrative acts in terms of art. 2 par. (1) letter c) of the law no. 554/2004 of the contentious-administrative.

Therefore, in one of the cases the High Court of Cassation and Justice held that the provisions of art. 4 par. (1) and (2) of law no. 554/2004 of the contentious-administrative, on

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[10] The Decision no. 404/2008 of the Constitutional Court of Romania on the exception of illegality of the provisions of art.4 of law no. 554/2004, published in the Official Gazette no.347/2008.

[11] The High Court of Cassation and Justice, contentious-administrative and fiscal Department, Decision no. 4785/2008, http://www.iccj.ro/cautare.php?id=46601, accessed on 15.04.2014.

[12] G.Bogasiu, *op.cit.,* p. 265.

[13] D. Apostol Tofan, *Unele consideraţii privind excepţia de nelegalitate* (Some considerations on the exception of illegality), in RDP no. 4/2007, p. 28.

[14] Elena Emilia Ştefan, *op.cit.,* pp. 85-86.

[15] G.Bogasiu, *op.cit.,* p. 267.

the date in force of the calling of the exception of illegality, do not expressly provide that the normative administrative acts, respectively the regulations of the Romanian Football Federation, are excluded from the legality control based on the special procedure of the exception of illegality[16]. As an undeniable fact, the court determines that the Romanian Football Federation is a public authority assimilated in terms of the provisions of art. 2 par. (1) letter b) of law no. 554/2004 of the contentious-administrative, being a legal entity of private law declared public by the special law of the physical education and sport, justified by particularity of the activity performed.

In the same context it is stated that the disputed acts under art. 4 of law no. 554/2004 of the contentious-administrative issued by the Romanian Football Federation assimilated to a public authority share the nature of normative administrative acts, being issued under the actual performance of the provisions of the general law no. 69/2000[17]. The fact that they were issued under and in compliance with the international regulations of FIFA and UEFA for the regulation of a sport activity shall not remove the regulations nature of normative administrative acts. Therefore, the court considers that the regulations rule the sport activity in a similar way to the regulations of the cults, namely in a general and abstract way.

In another case, the High Court of Cassation and Justice had to settle the legal issue on whether the Decision of the General Director of the Prison Administration is a normative act. The exception of illegality in this case was submitted within a pending dispute before the Court of Appeal from Craiova. The court observed that: the normative administrative act may be subject to the legality control in the exception procedure of illegality, by virtue of the principle of law according to which the law is construed in terms of producing legal effects, with no doubt that if the legislator has created a mean of defense on the way of the exception of illegality for the individual authority act, all the more such a mean of defense has to be provided to the subjects of law in connection with the normative acts.

Indeed the legislator in art. 4 par. (1) refers to the analysis of the legality on individual administrative acts which may lead to the conclusion that the possibility of calling the exception of illegality on the individual administrative act might be limited, but in par. (2) of art. 4 the term unilateral administrative act is used without the distinction between the normative and the individual, being obvious that the legislator's omission on the exception of illegality on the normative acts do not represent the plea of inadmissibility of the exception for these acts. Thus, the court concludes that the normative administrative acts may be subject to the legal control, provided for by art. 4, as further amended, the amendment having the role to include the individual acts in the area of the general acts, and not to exclude the normative acts. Furthermore, the principle of the legislative consistency requires the solution of the admissibility of the exception of illegality both for the individual and for the normative acts, with the purpose of keeping the function for which this mean of defense was created. If the legislator intended to provide for the individuals a mean of defense by way of exception for the individual acts, based on the judgment of *a fortiori* legal reason, such a mean of defense should also be provided to the parties on the normative acts which target audience is general and which effects may occur or may be observed not only immediately after the issuing, but also prior to it.

The High Court of Cassation and Justice also ruled on the acts exempted from the legal control[18]. According to art. 5 par. (2) of law no. 554/2004 the administrative acts for which amendment or dissolution is provided another judicial procedure may not be challenged by way of the contentious-administrative, which leads to the conclusion that the

[16] High Court of Cassation and Justice, contentious-administrative and fiscal, decision no. 5465/28 May 2010, unpublished, p.13.
[17] Law no. 69/2000 of physical education and sport, published in the Official Gazette no. 200/2000.
[18] High Court of Cassation and Justice, decision no.5925/2013, http://www.iccj.ro/cautare.php?id=94557

exception of illegality was not regulated by the legislator in order to create a way of avoiding special judicial procedures. In this case the object of the exception is the notice of assessment that represented the basis of a notification and of an enforceable title; therefore the taxation decision may be appealed in accordance with art. 205 and the fiscal procedure by way of a fiscal complaint submitted before the fiscal competent body and only the settlement decision of the complaint may be appealed before the contentious-administrative court, according to art. 218 par. (2) of the fiscal procedure code.

In the specialized doctrine, as well as in the jurisdiction of the contentious-administrative and fiscal department of the High Court of Cassation and Justice was observed that from the corroboration of the art. 4 and 5 of law no. 554/2004 results that the administrative acts exempted from the legal control by way of the direct action are also exempted from the legal control by way of the exception of illegality. In other words the jurisdiction of the contentious-administrative of verifying by way of exception the legality of an administrative act can not be drawn by calling the art. 4 of law no. 554/2004 when it comes to an administrative act for which the amending or dissolution requires a special judicial procedure.

4. Conclusions

This study was focused on the description of the exception of illegality in the Romanian legal system and took into account a threefold approach: the normative state, the doctrine point of view and the jurisprudence phase. The exception of illegality has received regulation at the normative acts level within the content of law no.554/2004 of the contentious-administrative. Compared to the actual wording of the exception, we consider that problems generated by the fact that at this moment the exception may not be submitted within any law suit shall not arise in practice, making extremely difficult to solve such a procedural incident due to the particularity of the administrative acts, which are essentially acts of power. Therefore we consider that only the contentious-administrative judge has the power to knowingly consider the analysis of the illegality of an administrative act. From this point of view we consider that the actual wording of the provisions of art. 4 of law no. 554/2004 of the contentious-administrative is unsuccessful.

References

- Tudor Drăganu, Actele de drept administrativ (Administrative Law Acts), Ed.Ştiinţifică, Bucharest, 1959, p.260
- Gabriela Bogasiu, *Justiţia actului administrative* (Administrative Act Justice), Editura Universul Juridic, Bucharest, 2013
- Antonie Iorgovan, *Tratat de drept administrativ* (Administrative Law Treaty), vol.II, 4th edition, Ed.All Beck, Bucharest, 2005
- Verginia Vedinaş, *Drept administrativ (Administrative Law)*, 3rd edition reviewed and updated, Ed. Universul Juridic, Bucharest, 2009
- Valentin Prisăcaru, Tratat de drept administrativ român. Partea generală (Romanian administrative law treaty. General Part) 3rd edition reviewed and supplemented, Ed.Lumina lex, Bucharest, 2002
- Elena Emilia Ştefan, *Drept administrativ, partea a II-a* (Administrative Law, 2nd part), Ed.Universul Juridic, Bucharest, 2013
- Law no.554/2004 of the contentious-administrative, published in the Official Gazette no. 1154/2004
- Law no. 262/2007 on the amending and supplementing of Law no. 554/2004 of the contentious-administrative, published in the Official Gazette no.510/2007
- Law no. 76/2012 for the enforcement of Law no. 134/2010 on the Civil procedure Code, and for the amendment and supplementing of other normative acts, published in the Official Gazette no. 365/2012
- Law 1/1967 on the judgment performed by the court of the complaints of those whose rights were prejudiced by illegal administrative acts, published in the Official Journal no.67/1967

- Law no.29/1990, published in the Official Gazette no.122/1990 that represented the law of the contentious-administrative until its repeal by law no.554/2004.
- High Court of Cassation and Justice, contentious-administrative and fiscal department, decision no.5465/ 2010, unpublished.
- The Decision no. 404/2008 of the Constitutional Court of Romania on the exception of illegality of the provisions of art.4 of law no. 554/2004, published in the Official Gazette no.347/2008
- The Decision no. 647/2006 of the Constitutional Court of Romania on the exception of illegality of the provisions of par. (3), art.4 of law no. 554/2004, published in the Official Gazette no.921/2006
- The High Court of Cassation and Justice, contentious-administrative and fiscal Department, Decision no. 4785/2008
- The High Court of Cassation and Justice, contentious-administrative and fiscal Department, Decision no.5465/ 2010, unpublished
- The High Court of Cassation and Justice, contentious-administrative and fiscal Department, Decision no. 7/ 2013 unpublished
- http://www.iccj.ro/cautare.php?id=94557, accessed on 15.04.2014
- http://www.iccj.ro/cautare.php?id=46601, accessed on 15.04.2014.

STUDY ON REAL AND FORMAL SOURCES OF LAW

Mircea TUTUNARU[*]

Abstract

The right switch first factual existence of the form, a fact that gives him the opportunity to be known and, consequently, to be respected and applied to the specific case. These specific ways of expressing the content of the law in legal theory and legal sciences branch of law called the source or sources of law. The concept of source of law is the ideological source and meaning in the sense of legal civilization pool connects to a national legal system.

Keywords: *formal sources, streams real-time legal, legal system, doctrine, law*

1. Introduction

By understanding sources of law elements forming substrate law rules and the different ways in which these rules are set and we are known. The phrase "sources of law" is employed to designate documents we can find to a particular era.[1]

Analysis of the sources of law highlighted the two meanings, namely: a source of law in the material sense (real) and a source of law in the formal sense.

Material sources of law (referred to as real sources) are designed as external realities right, true "s given" thereof, which determines the action of the legislature or give rise to rules arising from practical needs (whether it is usual).[2]

The contents of these springs are introduced elements belonging to different spheres of social reality.[3]

Scientific analysis of law can not ignore the role of material sources (social, economic, cultural, ideological, etc.). These are factors that give concrete substance as positive as Djuvara Mircea said: "positive law, is (...) essence legal awareness of your company."[4]

Of course, the study of these sources are important both in the theoretical investigation of the phenomenon of the complex legal and practical work of creating the right.

There are many the idea that the right spirit merges with the law or, rather, the only source of law as law. We must mention, however, two things:

a) first, that laws are not all right;

b) the law, like other formal sources, is only one of "law enforcement expression"[5]

Other acceptable source of law notion called formal sources or forms of expression of the rule of law. Along with the law find that organ of expression of legal custom and case law. We must point out that the right value is manifested in diverse eras and opinions Juris consults entries, which form doctrine sometimes requires the same power as other sources.

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[1] Alexandru Vălimărescu, *Tratat de enciclopedia dreptului* // *Treaty of Law Encyclopedia*, Bucureşti: Lumina Lex, 1999, p.159.

[2] Nicolae Popa, *Teoria generală a dreptului* // *General Theory of Law*, Bucureşti: Actami, 1999, p.191

[3] Idem.

[4] Mircea Djuvara, Teoria generală a dreptului (enciclopedie juridică) // General Theory of Law (legal encyclopedia), Bucureşti: All, 1995, vol. 2, p.406.

[5] Alexandru Vălimărescu, op.cit., p.160.

Law, like other sources, not form than clothes that dress right formula expressing the legal reality. Behind these forms - law, custom, doctrine and jurisprudence - is real substrate, the material forming the substance of the law.

2. Content

The theory of term source of law is widely debated. Distinction between the legal sense of the term source of law and its historical significance. History and archeology spring term legal means a document evidencing a superimposed form as (s - relics or vestiges of legal civilization).

The concept of source of law has meaning in the sense of ideological source pool Legal civilization connects to a national legal system.[6] In this regard, the basin of legal civilization Roman-Germanic type was the source of many national legal systems, including the Romanian legal system. Legislator, judge, legal advisor, popular consciousness in the development of legal rules expressed in first, and not exclusively as claimed Historical School and positivists, the external imperatives of the social environment.[7]

Thus, we come to the essential difference between actual and formal sources of law. Real sources are the substrate material or moral law, social phenomena, economic, moral dictates legal needs. Formal sources are fatal forms determined to be inevitably put external behavior rules for society to impose coercive power under the shield of law.[8]

Legal sense of the term spring formal law covers a multitude of issues, the ways that perceptual content of the rule of law becomes a rule of conduct, it is necessary as a role model in human relationships. The variety of forms expressing legal rules have led some authors to speak of heterogeneous forms of law.[9]

While dominant interpretive concept that sees only one source of law, namely the law, which he considered as the inspiration philosophical rationalism of the eighteenth century as a work of reason and the will of the legislature, nor raised the issue of external which determines the right training.[10]

As stated Hans Kelsen, when using the concept of source of law must consider the correct sense of the problem, understanding the source of law no technical form which will manifest will of the state, since such expression is not only anthropological metaphor, but the reason for that is a valid time.[11] Validity is the very condition of existence of the legal norm. The normativist conception validity of any rules lies in the so-called fundamental rule.[12]

The effectiveness of the legal norm is given by the fact that she is a carrier of rationality. Classical legal theory distinguishes law sources written sources of unwritten sources, official sources unofficial sources, direct sources of indirect sources. To illustrate this effect, a spring unwritten custom is legal, unlike the document that is always present in writing. Custom and doctrine are considered unofficial sources, unlike the statute or case law that official sources. Also, legislative enactment or contract are considered direct sources, while practice or standards developed by non-governmental organizations are indirect sources (media), they must be validated by a state authority to become sources of law.[13] We note also

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[6] Nicolae Popa, op.cit., p.193.
[7] Georges Cornil, Le droit privée: essai de sociologie juridique simplifiée, Paris: Marcel Giard, 1924 p.2.
[8] J. Bonecase, *Introduction à l'étude du droit*, (1939), apud Alexandru Vălimărescu, op.cit., p.161.
[9] Jean-Louis Bergel, *Théorie générale du droit*, Paris: Dalloz, 1985, p.56.
[10] Henri Capitant, *Introduction à l'étude du droit civil: notions générales*, Paris: A. Pedone, 1912, p.5; Bonecase, op.cit., p.72 şi urm.
[11] Hans Kelsen, *General theory of law and state*, Harvard University Press, 1949, p.367.
[12] Nicolae Popa, op.cit., p.193.
[13] Nicolae Popa, op.cit., p.194.

other categories of sources: sources of creative and interpretative sources.[14] In this regard, we stated that the law and custom are creative springs as it creates new rules on the case law and doctrine, but they not create new rules interpreting existing ones, not only interpretive innovativeness.

As the professor Nicolae Popa, classification sources of law must be made by accepting real data and consider its implications logical order, thus avoiding contradictions that may occur by interpreting notions of content and form. It should also be noted that, as stated prof. C. Stegăroiu, necessary to prevent the danger of confusing the right form of expression with one of its sources. In accordance with these requirements, the author suggests classification law sources into two categories: potential sources and current sources.[15] Potential sources express opportunity to develop, amend or repeal rules of law. Will social unit designed and made exclusive opportunities and externalized through the state, is the potential factor. Current sources are efficient sources determined, operating on concrete social relations and consist of normative acts. We note that in such a classification are included only normative acts, omitting the existence of the plan formal sources of law and other sources, custom, case law, etc.

Concerns latest classification of sources of law have emphasized other aspects of expression to refer to forms of legal norms. Discussed the formal sources of law and the legal or historical sources its materials.[16] Some authors have considered this unnecessary division and has been criticized by those who disagree with dividing the two areas - material and formal.

Hans Kelsen believes that its meaning source material and historical concept of the simple case law history that led to the existence of legal rules. Among the historical causes and reasons of validity and effectiveness of legal norms, Kelsen made a clear distinction.[17] What is really interested in this. Theory of law must deal with the reasons of validity and efficiency of law. These issues can not be learned but only on the basis of analysis dogmatic right is a closed logical system.[18]

Regarding knowledge of historical sources, Kelsen theory of law raised before a true exception "incompetence"[19] Historical School had merit but to show that law is the product of social, historical and moral, that the legislature may not arbitrarily create simply by will. The theory also revealed the role that schools Legal habit exegetical school rationalism suppress it altogether. However, the historical school also fell in excess of ignoring the role of human intelligence, initiative in the development and evolution of the law solicitor.[20]

Scientific School, represented by Francois Geny, transactional formula found between school exegetical and historical school, seeing Sources of external factors, material and moral, and rational factor, human intelligence work.[21]

In interpreting the sources of law, legal literature ruled a double conceivable springs right - a genetic conception and a gnoseological conception. The genetic conception aims to highlight genetic factors underlying the emergence and existence of legal rules and the gnoseological conception seeks enhancement cues after recognizing the legal nature of the rules of conduct.

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[14] I. Rosetti-Bălănescu, O. Sachelarie, N.G. Nedelcu, *Principiile dreptului civil român // Romanian civil law principles*, Bucureşti: Editura de Stat, 1947, p.10.
[15] C. Stegăroiu apud N. Popa, op.cit., p.194.
[16] H. Kelsen, op.cit., p.131-132.
[17] Idem.
[18] N. Popa, op.cit., p.195.
[19] Jean Dabin, *Théorie générale du droit,* Paris: Dalloz, 1969, p.24.
[20] Alexandru Vălimărescu, op.cit., p.162.
[21] François Gény, Science et technique en droit privé positif: nouvelle contribution à la critique de la méthode juridique, Paris: Société du Recueil Sirey, 1913, p.442.

Together with known sources of law, some authors include the so-called informal sources preferable to judge as they may better guide the delivery of fair solutions.[22] This view has been criticized that it introduces subjective elements in the application of law, with serious consequences for the principle of legality. It corresponds , however, specific guidelines socio - legal school American (especially school in Chicago) who reckons that since the law embodies the history of a nation's development over time , it can not be treated like a math book containing only the axioms and corollaries , laws may deteriorate over time due to the continued need for modeling based on community interests . The American experience in this area has shown the image of a hectic fluctuations, the corresponding rules logically and legally become ineffective or contradictory effects, disturbing instead to organize social relations.

The prevailing concept today, sources of law is presented dual aspect: look real (material) and a formal look , the actual layout representing the changing field of law (except a few principles) and formal aspect renders fixed form of dress that matter. The law transposes Aristotle's famous distinction between form and matter. This duality springs merely reflect the needs of the human mind. Once the right is born of the necessities of life filtered by human intelligence must know the formal sources, because the law is clear and precise rules need to be able to achieve order and safety, social harmony.

If it is true that the right arises spontaneously as soon as the society, this right must be translated into specific rules, certain and uniform society to make him known . Or just can fulfill this role than formal sources, the real sources of law , by their very nature. Through formal sources is known right people, people (Romans said ex quibus fontes juris notitia hauritur).

Imposed by the evolution to date of the law, its formal sources are: legal custom, doctrine, case law, regulatory and contract enactment.[23] Romanian legal system is a Roman-Germanic the main source of law is the enactment writing. In the hierarchy of sources of law in our country, the Constitution occupies a prominent position, all other sources are subordinate to it.

Today in Romania applies rules previously adopted Constitution in force, but does not contradict its provisions - it is about some decrees of the Council of State, but most of the normative acts shall be adopted after 8 December 1991.

Hierarchy of sources of law issue is closely linked to that of their legal force. According to this criterion, the sources of law are ordered from the one that takes precedence over any other source of law and to the one to produce legal effects must be consistent with all others. In Romania the main source of law is the law. The term of law, however, can be understood in two ways. Broadly speaking, the law is synonymous with law (or, more rarely, the rule of law) this is the term used in art law 15 para. (2) of the Constitution , for example, or some of the provisions of Law 24/2000 regarding the legislative technique . Narrow, technical, legal, law is the enactment came from parliament adopted after a predetermined procedure which enjoys supremacy over all other sources of law, as the Constitution uses the term in art. 73. for the definition of the law in this narrow criterion adoption procedure is as important as that of the body from which it comes. I concur with Professor Tudor Drăganu opinion considers that the infringements procedure for adopting the law is non-existent.[24]

Regarding the second criterion of body adopter must emphasize that in our country, as in most states, Parliament has primary regulatory law, a concept that expresses the

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[22] Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of Law*, Harvard University Press, 1974, apud Sofia Popescu, *Introducere în studiul dreptului* // *Introduction to the study of law*, Bucureşti: UNEX-AZ – University Complex, 1991, p.87.

[23] Emilian Ciongaru, *Teoria generală a dreptului* // *General Theory of Law*, Craiova: Scrisul Românesc, 2011, p.53.

[24] Tudor Drăganu, Drept constituţional şi instituţii politice. Tratat elementar // Constitutional Law and Political Institutions. Basic Treaty. Vol. II, Bucureşti: Lumina Lex, 2000, p.118 şi urm.

competence of Parliament to enact laws in any field without restrictions. According to art. 73 of the Constitution, the laws are constitutional, organic and ordinary.

The concept of constitutional law concerns in a broad sense, both constitutive laws Silas revision. Regarding the fundamental value provisions of national law system, is also used the term "constitutional block", meaning a constitution . This is the case of the French constitution, formed by the 1958 Constitution, the French Declaration of the Rights of Man and Citizen of 1897 and the Preamble to the Constitution of 1976. Austrian constitutional system block consists of international treaties constitutional law Constitutional Court's organization, etc.

To detach the Constitution of the other laws, we can use several criteria. Thus, a criterion regarding the subject matter of regulation, we note that, unlike the ordinary laws governing each a segment of social life , the Constitution contains rules which govern society as a whole, rules on both the main and the state authorities human and civil rights. Constitution is considered "law of laws", the "supreme law" etc.

After a formal criterion, referring to the procedure for adopting the Constitution, we must note that it is governed by principles apart from the ordinary legislative procedure. There are special rules for adoption and entry into force of the Constitution, and on the review we mention that it is quite difficult procedure, aiming at turning the Constitution into law perennial as possible. The Constitution is adopted by a special assembly called "Constituent Assembly", "Convention" etc., is passed by a qualified majority open vote in solemnity, is subjected to a referendum - as the Constitution itself and the laws amending the Constitution so. In the text of the Constitution stipulates whether and how they can be changed.

For example, the U.S. Constitution is considered from this point of view, a rigid constitution, and one semi-rigid Constitution. Although in most states the Constitution is detached from other laws by adopting the procedure, there are countries which do not have such a distinction. This is the case of Great Britain, Switzerland, where the constitution is revised by the ordinary legislative procedure.

Regarding legal force, the constitution is superior to all other sources of law, and its upper position finds its legitimation in social contract theory. For overseeing compliance with the constitution even by ordinary legislator, was created as a constitutional review conducted either ordinary courts or special court created for that purpose (the Constitutional Court, the Constitutional Tribunal, the Constitutional Council, etc.). [25]

Organic Law is, in the Romanian legal system, a infraconstitutional and supralegal law; in that scale hierarchy of norms follows immediately after the constitution and above ordinary laws. For its definition there is a material criterion, meaning that organic laws shall be adopted in areas expressly and exhaustively listed in the Constitution, and formal procedural criteria. Organic laws shall be adopted by an absolute majority can not adopt organic law mandates extension during meetings and can not be authorized the government to issue ordinances in reserved areas of organic laws. Organic laws governing the most important areas of social life and the state, having a position distinct from the legislative hierarchy. Ordinary laws are normative documents drawn up by Parliament after a procedure predetermined areas by their importance justifies laws. They are legally superior to other sources of law. We can see that if the definition of constitutional laws or organic material I could use a criterion for the definition of ordinary leaves us only formal criterion because parliament having primary regulatory law, adopt laws in any areas where they judge it necessary. Legislative procedure is common both organic laws and the ordinary, except that the final voting ordinary laws is reached by a simple majority. We must emphasize that the initiative for the adoption of laws often comes from the government, but it can also come

[25] Emilian Ciongaru, op.cit., p.55-56.

from lawmakers or citizens.[26] The project, once sent to the secretariat of the Chamber, is discussed in the Special Committee then discussed in plenary voted and sent for promulgation to the President of Romania. Law shall enter into force after 3 days from its publication in the Official Gazette or a later date specified in its text.

Evident also that according to their content material laws differ in laws regulating the conduct of subjects of law and procedural law, which regulates the conduct of a public or private activities, as the ones who should be punished have disregarded the laws of materials.

International treaties occupy a special place in the hierarchy of sources of law in Romania. Their position in this hierarchy emerges from a systematic interpretation of art. 11 and 20 of the Constitution of the Special Law no. 4/1991 on the conclusion and ratification of treaties and of Law 24/2000 regarding the legislative technique. The problem of consistency between treaties and domestic law, especially the Constitution, in areas other than human rights, previously put their ratification. If necessary, revise the Constitution first, with the consent of the electorate, and then ratify the treaty, thus saving principle of supremacy of the Constitution over any other source of law.

Although it is the only legislative authority (art. 61 of the Constitution) some sources of law are the fruit of the government headed by administrative authorities. We emphasize, however, that these sources of law as legally inferior laws.

Ordinances have a special position among value- normative acts in the country. From the interpretation of art. 61, 108 and 115 of the Constitution , it follows that the formal point of view , organic, are acts of an administrative nature , but are materially legislation, although adopted by an administrative authority - government , being comparable with the law . Orders are the result of Parliament's legislative delegation, which mandates the government to adopt provisions the force of law, in certain situations and areas. They come into force after their submission to Parliament for approval.[27]

Decisions are acts that the Government shall, by its own power, but point out that not all decisions are sources of law. Some are individual acts, others acts. Only the latter are sources of law. Decisions are subject to review by the courts through administrative proceedings.

Presidential Decrees are for the most part, individual acts. As if government decisions only normative decrees are sources of law.

Regarding **the Constitutional Court decisions**, they are sources of law, the Constitutional Court acting as a "negative legislator" when removed from the unconstitutional provision or application you reveal consistent interpretation of the constitution, and her creative interpretation of the legal rules.

Decisions of the European Court of Human Rights in Strasbourg have also normative value.

Rules of the European Union are also a source of law since the entry into the European Union.

Creating law based on the needs that life is a great action depicts social resonance and deep implications in the normal course of essential relations between people. A fundamental role in modern societies has scientific knowledge, legal theory.

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[26] Ioan Muraru, Elena Simina Tănăsescu, *Drept constituţional şi instituţii politice*; Ediţia a IX-a, revăzută şi completată // *Constitutional Law and Political Institutions*, Ninth Edition, revised and supplemented. Bucureşti: Lumina Lex, 2001, p.515-518.

[27] Tudor Drăganu, op.cit., p.125 şi urm.

3. Conclusions

The need for a variety of forms of expression that they are right and it is caused by multiple social relationships that require legal regulation. The society is more advanced, more organized, the formal sources and especially the law take greater development.

Study law sources the conclusion that there a variety of sources.

All right so far experienced a plurality of springs: acts of state authorities, customs, literature, legal precedents, etc.

Share one or another formal sources report changes in the legal system , the degree of its development , the complexity of social relations they express . In this respect, the laws in general but especially the Constitution must be the mirror of a nation reflects its degree of development and understanding.

References

- Bergel, Jean-Louis. *Théorie générale du droit*. Paris: Dalloz, 1985
- Bodenheimer, Edgar. *Jurisprudence: The Philosophy and Method of Law*. Harvard University Press, 1974
- Capitant, Henri. Introduction à l'étude du droit civil: notions générales. Paris: A. Pedone, 1912
- Ciongaru, Emilian. *Teoria generală a dreptului* // *General Theory of Law*. Craiova: Scrisul Românesc, 2011
- Cornil, Georges. Le droit privée: essai de sociologie juridique simplifiée. Paris: Marcel Giard, 1924
- Dabin, Jean. *Théorie générale du droit*. Paris: Dalloz, 1969
- Djuvara, Mircea. Teoria generală a dreptului (enciclopedie juridică). Bucureşti: All, 1995, vol. 2
- Drăganu, Tudor. Drept constituţional şi instituţii politice. Tratat elementar // Constitutional Law and Political Institutions. Basic Treaty. Vol. II, Bucureşti: Lumina Lex, 2000
- Gény, François. Science et technique en droit privé positif: nouvelle contribution à la critique de la méthode juridique. Paris: Société du Recueil Sirey, 1913
- Kelsen, Hans. *General theory of law and state*. Harvard University Press, 1949
- Muraru, Ioan; Tănăsescu, Elena Simina. *Drept constituţional şi instituţii politice*. Ediţia a IX-a, revăzută şi completată // *Constitutional Law and Political Institutions*, Ninth Edition, revised and supplemented. Bucureşti: Lumina Lex, 2001
- Popa, Nicolae. Teoria generală a dreptului // General Theory of Law. Bucureşti: Actami, 1999
- Popescu, Sofia. *Introducere în studiul dreptului* // *Introduction to the study of law*. Bucureşti: UNEX-AZ – University Complex, 1991
- Rosetti-Bălănescu I., Sachelarie O., Nedelcu N.G. *Principiile dreptului civil român* // *Romanian civil law principles*. Bucureşti: Editura de Stat, 1947
- Vălimărescu, Alexandru. *Tratat de enciclopedia dreptului* // *Treaty of Law Encyclopedia*. Bucureşti: Lumina Lex, 1999

THE EUROPEAN PARLIAMENT BEFORE THE 2014-2019 PARLIAMENTARY TERM IN THE LIGHT OF INNOVATIONS AND CHANGES INTRODUCED BY THE LISBON TREATY

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Abstract

Viewed through the prism of its historical evolution, the European Parliament has seen an original evolutionary process during which underwent a series of successive modifications of its competences and composition, at the same time with increasing of democratic legitimacy. Legitimated by direct universal suffrage, the European Parliament has gradually strengthened its position within the Community institutional system through a series of treaties, evolving from a purely advisory body, in an institution that plays an active role in drafting legislation, having, also budgetary powers and exercising democratic control over all institutions. Given the international context marked by the consequences of the monetary, financial, economic and social crisis, many Europeans have become more interested in European affairs and want the European Parliament to play a more important role in the future life of the European Union. For this reason, the European elections of 22-25 May 2014 are very important, a vote in the European elections is every citizen's chance to influence the shape of the Parliament and the future political course of the European Union. Therefore, this study seeks to highlight the importance of the 2014 European elections, especially these elections will be different due to the major new developments introduced by the Lisbon Treaty which granted the European Parliament a number of important new powers.

Keywords: *European elections, European Parliament powers, Innovations introduced by the Lisbon Treaty, rights of European citizens, voters.*

1. Introduction

Over time the transfer of responsibilities from national level to European level has largely been to the Council, and the European Parliament has not acquired all the powers that would have enabled it to play a full parliamentary role in European affairs. For this reason, although the European Parliament is the only supranational institution whose members are democratically elected by direct universal suffrage, the rate of participation of European citizens in European Parliament elections has declined steadily in the period 1979-2009, the downward trend reflecting turnout slight erosion of 'trust capital' of the European Parliament and of the other European Union institutions. It is noted as a deficit of trust and participation by citizens which translates to a 'democratic deficit' of the European Union, the situation requiring a new source of legitimacy to renew connection between the European Union and the citizens of the Member State.

Taking into account that 2014 is an electoral year and the European elections give voters the chance to influence the future political course of the European Union, through this study we will try to highlight the importance of the 2014 European elections, especially these elections will be different due to the major new developments introduced by the Lisbon

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Treaty which granted the European Parliament a number of important new powers. This approach is necessary because in the specialized literature are only few studies on this issue, therefore it is necessary to continue efforts to inform and highlight voting rights of EU citizens and encourage people to vote.

Thus, starting from the idea that well-informed citizens understand that they have a stake in the European project and they therefore want to engage in the democratic life at all levels, our goal is to raising awareness and knowledge of the rights and responsibilities attached to Union citizenship, including their electoral rights. This is because European elections matter, they will not only provide an opportunity for EU citizens to express their opinions over the publicly important issues, but will also give them the chance to influence the shape of the European Parliament and the future political course of the European Union.

2. General considerations on the evolution of the European Parliament

The origins of the European Parliament can be found in the Common Assembly, a purely consultative assembly set up in 1951 by the Treaty establishing the European Coal and Steel Community (ECSC). The Common Assembly of the European Coal and Steel Community (ECSC) was made up of 78 deputies, who were representatives of the national Parliaments[1].

After the establishment of the European Economic Community (EEC) and the European Atomic Energy Community (EAEC) in 1957, it was agreed that a single assembly would have the powers and responsibilities that the EEC and the EAEC Treaties assigned to it. The single Assembly would also replace the Common Assembly of the ECSC and enjoy the same powers and responsibilities[2].

The newly-established institution was initially known as the European Parliamentary Assembly[3] and was organized as a deliberative assembly with advisory function. Its powers extended to new areas, and its membership increased to 142. The Assembly was made up of 'delegates whom the Parliaments shall be called upon to appoint from among their members in accordance with the procedure laid down by each Member State'.[4]

After the accession of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Communities (1973), the European Parliament amounted to 198 members, this number increases substantially as a result of repeated enlargements of the European Union.

The accession of Greece in 1981, and of Spain and Portugal in 1986, increased the number of seats, bringing the total number of representatives to 434 and then to 518. The accession of Austria, Finland and Sweden in 1995 increased the total number of MEPs to 626. Thus, in 1999-2004 parliamentary term the European Parliament's mandate included the 626 MPs, and since 2004 (following the accession of ten new EU Member States) for the first three years of parliamentary term 2004-2009 the number increased to 732 MEPs. With the accession of Bulgaria and Romania to the European Union (January 1, 2007), in mid-legislature, the number was temporarily increased to 785, to include MEPs from these two countries (18 for Bulgaria and 35 for Romania).

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[1] Article 21 of the ECSC Treaty explains that it was to be 'composed of delegates whom the parliaments of each of the member States shall be called upon to designate once a year from among their own membership, or who shall be elected by direct universal suffrage, according to the procedure determined by each respective High Contracting Party'.

[2] Articles 1 and 2 of the Convention of 25 March 1957 on Certain Institutions Common to the European Communities

[3] A few years later, on 30 March 1962, it became known as the *European Parliament*. This name was officially laid down in the Single European Act in 1986.

[4] Article 138 of the Treaty establishing the European Economic Community and Article 108 of the Treaty establishing the European Atomic Energy Community.

Given the dissatisfaction of some Member States concerning the distribution of the number of seats in European Parliament, at their June 2007 summit, EU heads of state and government asked the European Parliament to table a proposal for the redistribution of its seats. This redistribution is needed because the summit decided to raise the number of seats, as laid down in the amended Nice Treaty, from 736 to 750.

Following the request of the European Council, the European Parliament adopted a resolution[5] in October 2007 which included a draft decision of the European Council establishing the composition of the European Parliament.

The draft decision provided numbers of representatives in the European Parliament in view of Article 14(2) of the Treaty on European Union (TEU) as amended by the Treaty of Lisbon. The European Council gave its political agreement to the draft decision at the time of the Intergovernmental Conference 2007, including one additional amendment to the numbers put forward (namely, one additional seat for a member from Italy)[6].

Considering the fact that the ratification process of the Lisbon Treaty could not be completed (which has happened) to the 2009 European elections, at its meeting on 11 and 12 December 2008, the European Council declared that in the event of the Treaty of Lisbon only entering into force after the European elections in June 2009, transitional measures would be adopted as soon as possible in order to increase the number of Members of the European Parliament (MEPs) until the end of the 2009-2014 legislative period, in conformity with the numbers agreed at the time of the Intergovernmental Conference 2007 which adopted the Treaty of Lisbon, the number of MEPs of the twelve Member States for which the number of MEPs was set to increase[7].

As a result, these countries were forced to make all the national legal provisions necessary to allow the pre-election in June of the 18 supplementary MEPs, so that they can sit in Parliament as observers from the date when the Lisbon Treaty eventually enters into force.

Since the Lisbon Treaty had not entered into force before the 2009 European elections, the latter were held in accordance with the provisions of the Nice Treaty, and the number of MEPs was reduced to 736.

Given that the Lisbon Treaty finally entered into force on 1 December 2009, the 18 additional MEPs from the 12 Member States bring the total number of MEPs to 754, although the Lisbon Treaty had established that their number "shall not exceed seven hundred and fifty in number, plus the President". Moreover, the Treaty held that the" representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State and no Member State shall be allocated more than ninety-six seats"[8].

With the accession of Croatia on 1 July 2013, the maximum number of seats has been temporarily raised to 766, in accordance with Article 19 of the Act concerning the conditions of accession of the Republic of Croatia[9]. Thus, until the end of the 2009-2014 term of the European Parliament MEPs mandates are distributed as follows: Germany - 99; France, Italy and the United Kingdom of Great Britain and Northern Ireland - 72 seats each; Spain, Poland - 50 seats each; Romania – 33; Netherlands - 25; Belgium, Greece, Hungary, Portugal and Czech Republic - 22 seats each; Sweden - 18; Austria, Bulgaria - 17 seats each; Denmark,

[5] European Parliament resolution of 11 October 2007 on the composition of the European Parliament (2007/2169(INI))
[6] Declarations No. 4 and No. 5 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon - Official Journal of the European Union C 115, 09/05/2008.
[7] The declaration explicitly states that the total number of MEPs will therefore rise from 736 to 754 until the end of the 2009-2014 legislative period. It also states that the modification should enter into force, if possible, in 2010 – Presidency Conclusions of the Brussels European Council (11 and 12 December 2008) - http://www.european-council.europa.eu/council-meetings/conclusions, accessed on December 23, 2013.
[8] Article 14(2) of the Treaty on European Union (TEU)
[9] Official Journal of the European Union L 112/26, 24.4.2012

Finland and Slovakia - 13 seats each; Ireland Lithuania and Croatia - 12 seats each; Latvia - 8; Slovenia - 7; Cyprus, Luxembourg and Estonia – 6 seats each; Malta - 5 seats[10].

3. The importance of the European Parliament in the EU's institutional system after reform made by the Lisbon Treaty

Over the years, the European Parliament has gradually strengthened its position within the Community institutional system through a series of treaties, evolving from a purely advisory body, in an institution that plays an active role in drafting legislation, having, also budgetary powers and exercising democratic control over all institutions. Following the reform made by the Lisbon Treaty, the European Parliament shall, jointly with the Council, exercise legislative and budgetary functions, it shall exercise functions of political control and consultation as laid down in the Treaties[11].

With regard to legislative competence of the European Parliament, it is shared with the Council of the European Union for the adoption of general legal instruments of a binding nature (regulations and directives). The decision-making procedures comprise the consultation procedure, the cooperation procedure, the co-decision procedure (ordinary legislative procedure)[12] and the assent procedure.

The vast majority of European laws are adopted jointly by the European Parliament and the Council, the ordinary legislative procedure gives the same weight to the European Parliament and the Council of the European Union on a wide range of areas, for example: economic governance, immigration, energy, transport, and the environment and consumer protection.

In certain legislative areas, the European Parliament is requested to give its consent, as a special legislative procedure under Article 289(2) of the Treaty on the Functioning of the European Union (TFEU). The consent procedure gives Parliament the right of veto. Parliament's role is thus to approve or reject the legislative proposal without further amendments and the Council cannot overrule Parliament's opinion. Consent is also required as a non-legislative procedure when the Council is adopting certain international agreements.[13]

On the basis of its legislative powers, the European Parliament also provides the impetus for new legislation by examining the Commission’s annual work programme, considering what new laws would be appropriate, and asking the Commission to put forward proposals[14].

Following the entry into force of the Lisbon Treaty, the European Parliament has a fundamental role in adopting the EU budget and exercises democratic oversight to make sure that the Commission and the other institutions deal properly with European funds.

In addition, the Parliament, on a recommendation from the Council of the European Union, decides whether to grant the discharge, i.e. final approval of how the budget for a specific year has been implemented.

European Parliament's budgetary power is established in Article 314 of the Treaty on the Functioning of the European Union (TFEU), which states that the European Parliament

[10] www.europarl.europa.eu – accessed on December 23, 2013.
[11] Article 14(1) of the Treaty on European Union (TEU)
[12] With the Treaty of Lisbon 'co-decision' it is officially called the 'ordinary legislative procedure'. According to Article 289 of the Treaty on the Functioning of the European Union (TFEU), the ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission.
[13] www.europarl.europa.eu – accessed on December 27, 2013.
[14] Dan Vătăman, *Institutional law of the European Union*, 2nd Edition, Bucharest, 'Universul Juridic' Publishing House, 2011, p. 88.

and the Council, acting in accordance with a special legislative procedure, shall establish the Union's annual budget.

In the exercise of this function, according to Article 322 of the Treaty on the Functioning of the European Union (TFEU), the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, shall adopt by means of regulations the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts, and rules providing for checks on the responsibility of financial actors, in particular authorising officers and accounting officers. [15]

Regarding European Parliament's control over implementation of the budget, according to Rules of Procedure of the European Parliament, this task is entrusted to the committees responsible for the budget and budgetary control and to the other committees concerned. Each year it shall consider, before the first reading of the draft budget for the following financial year, the problems involved in the implementation of the current budget, where appropriate on the basis of a motion for a resolution tabled by its committee responsible[16].

In the case of granting a discharge to the European Commission for the implementation of the EU budget, according to Article 318 of the Treaty on the Functioning of the European Union (TFEU), the Commission shall submit annually to the European Parliament and to the Council the accounts of the preceding financial year relating to the implementation of the budget. The Commission shall also submit to the European Parliament and to the Council an evaluation report on the Union's finances based on the results achieved. The European Parliament, acting on a recommendation from the Council, shall give a discharge to the Commission in respect of the implementation of the budget[17].

The European Parliament has a range of supervisory and control powers, these powers allow it to exercise a democratic supervision over the other European Union institutions and to ensure the correct implementation of European Union law. [18]

In this regard, the European Parliament has an important role in election of the President of the European Commission, the candidate shall be elected by the European Parliament by a majority of its component members. Moreover, the President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. The Commission, as a body, shall be responsible to the European Parliament, which in accordance with Article 234 of the Treaty on the Functioning of the European Union, may vote on a motion of censure of the Commission. If such a motion is carried, the members of the Commission shall resign as a body and the High Representative of the Union for Foreign Affairs and Security Policy shall resign from the duties that he carries out in the Commission. [19]

In the course of its duties, the European Parliament may set up a temporary Committee of Inquiry to investigate alleged contraventions or maladministration in the implementation of Union law by the Member States. Also, the European Parliament can ask the Court of Justice to take action against the other institutions of Union if they have acted in a way that is contrary to the spirit of European Union law[20].

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[15] Dan Vătăman, *Law of the European Union*, Bucharest, 'Universul Juridic' Publishing House, 2010, p. 75.
[16] Article 78 of the Rules of Procedure of the European Parliament
[17] Article 319 of the Treaty on the Functioning of the European Union (TFEU)
[18] www.europarl.europa.eu – accessed on December 28, 2013.
[19] Article 17(8) of the Treaty on European Union (TEU)
[20] According to Article 263 of the Treaty on the Functioning of the European Union (TFEU), the Court of Justice of the European Union shall have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the

4. European elections – a growth factor of legitimacy and the authority of the European Parliament

Before direct election MEPs were appointed by each of the Member States' national parliaments, all Members thus had a dual mandate. At the Paris summit of December 1974, the Heads of Government of the nine Member States of the European Communities agreed that the election of the European Assembly by universal suffrage, one of the objectives laid down in the Treaty, should be achieved 'as soon as possible' and, therefore, invited the European Assembly to submit proposals in this regard. [21]

In January 1975, the European Parliament adopts the Patijn Report[22] and approved a Resolution on the adoption of a draft convention introducing elections to the European Parliament by direct universal suffrage.

On the basis of this draft, the European Council met in Rome in December 1975 agreed that elections to the European Parliament shall take place on a single date in May or June 1978 and also instructed the Council of Ministers to continue examination of the problems encountered and to submit a report which will enable the text of the Convention on elections to the European Parliament to be finalized as soon as possible[23].

After a series of negotiations and settling a number of differences about number and distribution of seats in the future European Parliament, the European Council met on 12-13 July 1976 asked the Council to take an overall decision on the election of the members of the European Parliament by direct universal suffrage before the end of July 1976.

The Decision and Act on European elections by direct universal suffrage were signed in Brussels on 20 September 1976[24]. After ratification by all the Member States, the text came into force on 1 July 1978 and in the summer of 1979 the citizens of the then nine Member States of the European Community elected for the first time in direct elections their representatives in the European Parliament.

Although the possibility of standardisation of electoral procedures for electing the European Parliament is set in Article 138 ECC Treaty, European elections are still largely governed by national legislation. For this reason, during the time the European Parliament tried to create a uniform electoral system and promoted resolutions, public reports, inquiries and proposals in this regard.

Thus, on 10 March 1982, the European Parliament adopted the Seitlinger Report[25] and approved a Resolution on a draft uniform electoral procedure for the election of members of the European Parliament.[26] These proposals of the European Parliament met with obstruction of the Council of Ministers which failed to reach agreement in time for the 1984 European election.

Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

[21] Final communiqué of the Meeting of the Heads of Government of the Community, Paris 9-10 December 1974 - Bulletin of the European Communities, No. 12/1974

[22] On 24 May 1973, the Bureau of the European Parliament instructs the Political Affairs Committee to draw up a report on the election of the Members of the Assembly by direct universal suffrage. On 13 January 1975, the Dutch rapporteur, Schelto Patijn, submits the report (Doc 368/74) which will be adopted by the Assembly the following day.

[23] Conclusions of the meeting of the European Council held in Rome on 1 and 2 December 1975 - http://www.european-council.europa.eu, accessed on December 28, 2013.

[24] Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to the Council decision of 20 September 1976 - Council Decision 76/787/ECSC, EEC, Euratom (OJ L 278, 8.10.1976, p. 1)

[25] The drafting of the Seitlinger Report focussed on the issue of extending proportional representation. It proposed multi-member constituencies of between three and fifteen MEPs, with seats allocated by the D'Hondt system, and allowed for the possibility of preferential voting for individual candidates within lists. It noted that there could be deviation from the norm on the grounds of 'special geographical or ethnic factors'. Seitlinger also sought to insist that nationals of one Member State resident in another for more than five years should be given the right to vote in their country of residence - www.europarl.europa.eu, accessed on December 29, 2013.

[26] OJ C 87, 5.4.1982, p. 64

The European Parliament has resumed the problem in 1985 when the German MEP Reinhold Bocklet in his report of 22 March 1985 has made new recommendations about a uniform electoral procedure in all member states for the election of the members of the European Parliament by universal suffrage. The Bocklet Report have met opposition from British, so that the proposals did not induce a consensus within Council of Ministers.

Despite strenuous efforts to develop a uniform electoral procedure, European leaders were unable to find a procedure that all the member states could agree on.

Following the adoption and entry into force of the Treaty on European Union (Maastricht Treaty) was established a citizenship of the Union which applies to every person holding the nationality of a Member State. 'Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements to be adopted before 31 December 1993 by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State'[27]. The treaty provided also that 'the European Parliament shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States'. The Council shall, acting unanimously after obtaining the assent of the European Parliament which shall act by a majority of its component members, lay down the appropriate provisions, which it shall recommend to Member States for adoption in accordance with their respective constitutional requirements. [28]

However, since the Council was unable to agree on any of the proposals, the Treaty of Amsterdam introduced the possibility of adopting 'common principles' instead. Council Decision 2002/772/EC, EURATOM modified the 1976 Act accordingly, introducing the principles of proportional representation and incompatibility between national and European mandates[29].

With the Treaty of Lisbon, the right to vote and to stand as a candidate acquired the status of a fundamental right[30]. In addition, according to Treaty on the Functioning of the European Union (TFEU), 'every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State'[31]. Also the treaty provide that 'The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its Members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States'[32].

The implications of these provisions are clear: following the reform implemented by the Treaty of Lisbon the Parliament is today the only European institution whose members are elected by direct universal suffrage and one of the largest democratic assemblies in the world. For the first time, the concept of European citizenship has become a practical reality in that the citizens of the Union have acquired the opportunity to determining the course of European policy.

[27] Article 8b of the EC Treaty
[28] Article 138(3) of the EC Treaty.
[29] Council Decision (2002/772/EC, Euratom) of 25 June and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom - Official Journal L 283, 21/10/2002, pp. 1-4.
[30] Article 39 of the Charter of Fundamental Rights of the European Union.
[31] Article 22(2) of the TFEU.
[32] Article 223(1) of the TFEU.

5. The importance of the 2014 European elections for the future of the European Union

Overview of the European Parliament before the 2014 European elections

According to the statistics we see that the European Parliament remains the institution in which the citizens of Member States of the European Union have the greatest confidence.

Thus, in 2012 the majority of European citizens believe that the European Parliament is the institution that 'best represents the European Union' and also 'plays an important role in the functioning of the European Union'. Although they considered that Parliament's role has been strengthened during the last ten years and it plays an important role today, an absolute majority of them would like to see Parliament play a larger role in the future. As appears from a Eurobarometer published in December 2013, the European Parliament's overall image have improved in a large majority of Member States, even in most of the countries worst hit by the crisis, the role currently played by the European Parliament is seen as 'important' by three-quarters of respondents, and almost half of Europeans want the European Parliament to play a more important role in the future[33].

As noted, in the European context marked by the consequences of the monetary, financial, economic and social crisis, many Europeans have become more interested in European affairs and want the European Parliament to have a more important role in the future. This development highlights a change in priorities of Europeans, who are aware of the importance of the European elections as a means to participate in the democratic life of the Union, a vote in the European elections is the best way to make their voices heard by actors involved in EU decision-making process.

Preparing for the 2014 European elections

The 2014 European elections will be the first since the Lisbon Treaty entered into force, a document that established a legal basis for the adoption of a uniform procedure for elections of the European Parliament[34].

In order to facilitate citizens' participation in the 2014 European elections, The European Commission is committed to fully exploiting existing Lisbon provisions to further enhance transparency and the European dimension of the European elections, thereby reinforcing the democratic legitimacy of the EU decision-making process and bringing the system closer to Union citizens. In this regard, on 12 March 2013, the European Commission presented a Communication[35] in which outlines the Commission's initiatives to facilitate citizens' participation in the 2014 European elections and to safeguard the respect of the democratic principles of these elections. This Communication is accompanied by a Recommendation[36] intended to enhance the democratic and efficient conduct of the European elections. In opinion of the Commission, its recommendations, evolutionary but not revolutionary, can contribute to sparking a European debate and to forging a European public space, and also will help to put Europe at the heart of national debates across the EU. This will provide a platform for the next steps of European integration.

In the same context, on 4 July 2013, the European Parliament adopted a resolution[37] regarding practical arrangements for the holding of the European elections in 2014. In this document the European Parliament recommended that the Member States take all necessary steps to give effective implementation to the measures agreed on to assist citizens who wish

[33] European Parliament Eurobarometers EB/EP 77.4, EB/EP 78.2 and EB/EP 79.5 - www.europarl.europa.eu, accessed on December 30, 2013.
[34] Article 223 TFEU.
[35] COM(2013) 126 final.
[36] C (2013)1303 final.
[37] European Parliament resolution of 4 July 2013 on improving the practical arrangements for the holding of the European elections in 2014 (2013/2102(INI)).

to vote or stand as candidates in states other than their own, and to organize a public campaign to encourage citizens to turn out to vote, with the aim of halting falling participation rates. Also urged the European political parties to nominate their candidates for the Commission presidency sufficiently well in advance of the election for them to be able to mount a significant, European-wide campaign that concentrates on European issues that are based on the party platform and on the programme of their candidate for the Commission presidency. In addition, the Parliament insisted that political parties at all levels adopt democratic and transparent procedures for the selection of candidates for election to the European Parliament and for the Presidency of the Commission.

Regarding fixing the period for the 2014 European elections, following discussion by the Working Party on General Affairs, the Council decided on 15 March 2013 to consult the European Parliament on a draft Council decision fixing the period for the eighth election of representatives to the European Parliament by direct universal suffrage from 22 to 25 May 2014.[38]

After the European Parliament has given its opinion[39] on 21 May 2013, having regard to the Act of 20 September 1976 concerning the election of the representatives of the European Parliament by direct universal suffrage[40], the Council adopted a decision[41] which determined that the upcoming European elections shall be from 22 to 25 May 2014.

Why the 2014 European Parliament elections will be different from all elections?

The 2014 European elections will be different than other elections organized before, especially since the Treaty of Lisbon has introduced a number of novelty elements regarding to composition and powers of the European Parliament.

Treaty on European Union (TEU) provides, inter alia, that the functioning of the Union shall be founded on representative democracy, citizens being directly represented at Union level in the European Parliament and Member States being represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens[42].

With regard to the future composition of the European Parliament, the Treaty on European Union (TEU) provides that the number of representatives of the Union's citizens in European Parliament are not to exceed seven hundred and fifty in number, plus the President, that representation of citizens is to be degressively proportional, with a minimum threshold of six members per Member State, and that no Member State is to be allocated more than ninety-six seats[43].

Having regard these provisions, in March 2013, the European Parliament, which has the power of initiative on the matter, approved a resolution[44] that was annexed a proposal for a decision of the European Council establishing the composition of the European Parliament. Under the solution adopted by Parliament, to comply with the 751-seat limit set by the Lisbon Treaty, Germany would lose 3 seats (as already planned), and Belgium, Bulgaria, the Czech

[38] Doc. 7279/13.
[39] European Parliament legislative resolution of 21 May 2013 on the draft Council decision fixing the period for the eighth election of representatives to the European Parliament by direct universal suffrage (2013/0802(CNS)) - www.europarl.europa.eu, accessed on January 3, 2014.
[40] Annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 (OJ L 278, 8.10.1976, p. 1), as amended by Council Decision 93/81/Euratom, ECSC, EEC (OJ L 33, 9.2.1993, p. 15), and Council Decision 2002/772/EC, Euratom (OJ L 283, 21.10.2002, p. 1).
[41] Council Decision (2013/299/EU, Euratom) of 14 June 2013 fixing the period for the eighth election of representatives to the European Parliament by direct universal suffrage - OJ L 169, 21.6.2013, p. 69–69.
[42] Article 10 TEU.
[43] Article 14(2) TEU.
[44] European Parliament resolution of 13 March 2013 on the composition of the European Parliament with a view to the 2014 elections (2012/2309(INI)) - www.europarl.europa.eu, accessed on January 5, 2014.

Republic, Ireland, Greece, Croatia, Latvia, Lithuania, Hungary, Austria, Portugal and Romania would all lose one seat each. Resolution of the European Parliament also stated that in the application of the principle of degressive proportionality provided in the Treaty, the allocation of seats in the European Parliament shall fully utilise the minimum and maximum numbers set by the Treaty on European Union in order to reflect as closely as possible the sizes of the respective populations of Member States. The ratio between the population and the number of seats of each Member State before rounding to whole numbers shall vary in relation to their respective populations in such a way that each Member of the European Parliament from a more populous Member State represents more citizens than each Member from a less populous Member State and, conversely, that the larger the population of a Member State, the greater its entitlement to a large number of seats.

Considering the provisions of Treaty on European Union (TEU), having regard the Protocol (No 36) on transitional provisions (annexed to the Treaty[45]) and taking into account the initiative of 13 March 2013 and the consent of 12 June 2013 of the European Parliament[46], the European Council adopted a decision[47] for establishing the composition of the European Parliament in order to enable Member States to enact in good time the necessary domestic measures for organising the elections to the European Parliament for the 2014-2019 parliamentary term.

Thus, by the decision of the European Council the number of representatives in the European Parliament elected in each Member State is hereby set as follows for the 2014-2019 parliamentary term: Belgium – 21, Bulgaria – 17, Czech Republic – 21, Denmark – 13, Germany – 96, Estonia – 6, Ireland – 11, Greece – 21, Spain – 54, France – 74, Croatia – 11, Italy – 73, Cyprus – 6, Latvia – 8, Lithuania – 11, Luxembourg – 6, Hungary – 21, Malta – 6, Netherlands – 26, Austria – 18, Poland – 51, Portugal – 21, Romania – 32, Slovenia – 8, Slovakia – 13, Finland – 13, Sweden – 20, United Kingdom – 73.[48]

One other major new development introduced by the Lisbon Treaty is that, for the first time, the President of the Commission is elected by the European Parliament, in accordance with the procedure laid down in Article 17(7) of the Treaty on European Union (TEU), and taking into account the arrangements foreseen in Declaration No. 11 annexed to the Final Act of the Intergovernmental Conference which adopted the Lisbon Treaty. These procedures require that the elections to the European Parliament must be taken into account and that appropriate consultations between the European Council and the European Parliament must be carried out in electing the President of the Commission. These provisions thus reflect the increased role of the European Parliament in the designation of the President of the Commission and the relevance in this process of the outcome of the elections to the European Parliament.

Given the new system of electing the President of the European Commission and then of the whole Commission as collegial body, the 2014 European elections have a very important stake, the voters having now a clear say in who will lead the European Commission and, through it, the chance to influence the future political course of the European Union.

[45] Article 2(3) of the Protocol (No 36) on transitional provisions states that: 'In accordance with the second subparagraph of Article 14(2) of the Treaty on European Union, the European Council shall adopt a decision determining the composition of the European Parliament in good time before the 2014 European Parliament elections' – Official Journal of the European Union C 326/323, 26.10.2012.

[46] European Parliament legislative resolution of 12 June 2013 on the draft European Council decision establishing the composition of the European Parliament (2013/0900(NLE)) - www.europarl.europa.eu, accessed on January 10, 2014.

[47] European Council Decision (2013/312/EU) of 28 June 2013 establishing the composition of the European Parliament - Official Journal of the European Union L 181/57, 29.6.2013.

[48] Article 3 of the European Council Decision 2013/312/EU.

6. Conclusions

Since the establishment of European Coal and Steel Community (ECSC) a questions have arisen about an element of democratic legitimacy within the Community and therefore, the founding members have created a parliamentary assembly that have invested it with an advisory role.

With the advent of the other European Communities and the establishment of a single Parliamentary Assembly, the new entity has progressively consolidated its position in the Community institutional system, evolving from a purely advisory body, to an institution that plays an active role in drafting legislation, having also budgetary powers and exercising democratic control over all European institutions.

Despite the fact that in the last three decades the European Parliament's powers have grown consistently thereby increasing the role of this forum in the European Union institutional system, the rate of participation of European citizens in the European elections has declined steadily over the period 1979-2009, the downward trend of the presence at elections showing a slight erosion of 'trust capital' of both the European Parliament and the other European Union institutions.

According to Eurobarometer (EB71.3) related to the 2009 European elections, European citizens who said they did not trust the European Parliament cited reasons related to its legitimacy and the European Union and politics in general, many of those surveyed believing that Parliament is too distant from citizens.

The Lisbon Treaty has strengthened the democratic foundations of the Union and enhances the role of the European citizens as actors in political life of the European Union by establishing a solid link between citizens, the exercise of their political rights and the democratic life of the European Union. According to these rights conferred to European citizens, policy-makers in the European Union have stepped up their efforts to inform citizens about the importance of their involvement and active participation in civic fora on policies and issues related to the European Union.

Starting from the idea that well-informed citizens understand that they plays an active role in the European Union and thus will want to engage in the democratic life of the Union at all levels, the year 2013 has been designated as the 'European Year of Citizens'[49], the general objective shall be to enhance awareness and knowledge of the rights and responsibilities attached to Union citizenship, in order to enable citizens to make full use of their rights, including the right to vote and to stand as a candidate in elections to the European Parliament and in municipal elections in his or her Member State of residence under the same conditions as nationals of that Member State;

Thus, the 'European Year of Citizens' provides a timely opportunity for citizens of the Union to make their voices heard representing an opportunity for a major debate on the future of Europe, thus contributing to the preparations for the European elections in 2014.

Given the data submitted earlier, we can consider that the 2014 European elections as an opportunity to restore confidence in the European Union also offered Europeans a real chance to influence the future political direction of the European Union.

References

- Dan Vătăman, *Institutional law of the European Union, Second edition*, Bucharest, „Universul Juridic" Publishing House, 2011
- Dan Vătăman, *European Union Law*, Bucharest, "Universul Juridic" Publishing House, 2010
- Dan Vătăman, *History of the European Union*, Bucharest, "Pro Universitaria" Publishing House, 2011
- Internet sites

[49] Decision No 1093/2012/EU of the European Parliament and of the Council of 21 November 2012 on the European Year of Citizens (2013) - Official Journal of the European Union L 325/1, 23.11.2012.

- www.consilium.europa.eu – Council of the European Union
- http://ec.europa.eu/ - European Commission
- www.eur-lex.europa.eu – Access to European Union law
- www.europarl.europa.eu - European Parliament

TARGETED SANCTIONS, JUDICIAL ANTAGONISM OR LEGAL DIALOGUE

Ioan-Luca VLAD*

Abstract

This piece begins by illustrating the current status of United Nations targeted sanctions regimes, from the formal point of view. It then proceeds to explain the mechanisms of listing and de-listing at the UN level, as well as the means by which UN Member States, and the European Union, implement these sanctions in their national (regional) legal orders, and why the chosen means of implementation create potential situations where the states (the EU) might find themselves in breach of differing international obligations. In the final part, the article shows how the major international European courts (the Court of Justice of the European Union and the European Court of Human Rights) have dealt with this potential conflict, and posits that their approaches are very different and will have different consequences: i.e. whereas the CJEU has taken a militant approach, which threatens to damage the unity of international law, the ECtHR has taken an unitary approach, which strengthens the international system, while also promoting human rights over sanctions.

Keywords: *UN, targeted sanctions, CJEU, ECtHR, Article 103, international obligations, human rights, 1267 Committee*

Introduction

1 The international practice of targeted sanctions is a fairly recent development of the United Nations Security Council (UNSC) practice. The thinking behind such an approach is that comprehensive economic sanctions have an indiscriminate impact on a country and can entail severe negative humanitarian consequences for the civilian population and third countries. A particular black spot on the record of general, traditional, sanctions regime, was the Iraq case, where the same persons who were supposed to suffer from the effects of sanctions (i.e. the Baath regime) were in fact profiting from the Oil for Food Program.

2 In order to minimize the general negative impact of country-directed sanctions, the UNSC developed "targeted sanctions" aimed directly at the elite and at specific individuals in problematic countries. The hope is that, by limiting these individuals' access to economic resources, travel and generally impeding their activities, they will be pressured into changing their negative behavior, or otherwise lose their power and influence in their respective countries. As a corollary, sanctions against legal persons and associations of persons were also imposed, as these are often useful vehicles for the transfer and concealment of economic resources.

3 Targeted sanctions can be imposed at the UNSC level, or, in the case of the European Union (EU), also at the European level. EU targeted sanctions include all the UNSC ones, but sometimes go beyond those, both in terms of targets and the restrictions that they impose. Generally, UNSC sanctions involve 1) asset freezes; 2) travel restrictions; 3) restrictions on trade in certain goods; 4) restrictions in economic contacts with the targeted individuals and organizations.

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4 The list of targets, as it stands today, can be broadly classified in A) individuals and organizations making up the governing elite in "problematic" countries (dictatorial regimes, regimes which promote international instability, regimes which flaunt international norms) (10 regimes) and B) terrorists, their supporters and financiers (3 regimes). The current sanctions regimes in place are enumerated in Table 1[1].

Table 1. Situation of current sanctions regimes instituted by the UNSC

No.	UNSC Resolution(s)	Scope of application
1	751 (1992) 1907 (2009)	Eritrea and Somalia
2	1267 (1999) 1989 (2011)	Any individual or entity associated with Al-Qaida
3	1518 (2003)	Senior officials of the former Iraqi regime and immediate family members, including entities owned or controlled by them or by persons acting on their behalf
4	1521 (2003)	Liberia
5	1533 (2004)	Democratic Republic of the Congo
6	1572 (2004)	Côte d'Ivoire
7	1591 (2005)	The Sudan
8	1636 (2005)	Individuals designated by the international independent investigation Commission or the Government of Lebanon as suspected of involvement in the 14 February 2005 terrorist bombing in Beirut, Lebanon that killed former Lebanese Prime Minister Rafiq Hariri and 22 others[2]
9	1718 (2006)	Democratic People's Republic of Korea (DPRK)
10	1737 (2006)	Islamic Republic of Iran (in particular its nuclear program)
11	1970 (2011)	Libya (in particular the leaders of the Qaddafi regime)
12	1988 (2011)	Any individual, group, undertaking and entity designated as or associated with the Taliban in constituting a threat to the peace, stability and security of Afghanistan
13	2048 (2012)	Guinea-Bissau

5 Each of these UNSC Resolutions provides that a specialized Committee, which is a subsidiary organ of the UNSC, designates individuals and entities to be included on lists of targeted sanctions. Some of the Resolutions provide exceptions (humanitarian or otherwise) from the general restrictions imposed on these individuals, others do not. The decision to list an individual or entity is a political one, taken according to the normal voting process of the

[1] For a „bridge" between the situation at the end of WWI when individuals were indicated in peace treaties as being indicted for war crimes trials, see the new and informative work by Kevin Jon Heller, Gerry Simpson (Eds.), *The Hidden Histories of War Crimes Trials*, OUP, Oxford, 2013, in particular Chapters 1 and 3.
[2] At present, no such persons have been designated.

UNSC. There is no previous communication with the potential "targets" and there is no direct means of judicial review of a listing, once it has been decided.

6 At their introduction, targeted sanctions were hailed for their important advantages, such as 1) reduction of hardship and distress towards the general population of a country; 2) ability to be tailored to specific individuals, places, types of resources and types of travel; 3) immediacy of the UNSC's decisions, which sidesteps normal judicial procedures, and can list a person or entity based on any kind of available information; 4) their "temporary and preventive" character, which leaves place for legal proceedings to take place in the normal criminal justice forums.

7 Over time, a number of counter-arguments have been advanced, chief among which are 1) the lack of any judicial oversight of the listing and de-listing procedures; 2) the closed nature of the listing and de-listing debates, and the occasional use of confidential intelligence, leaving the targets with no means to make prove their innocence; 3) negative effects towards innocent third parties (such as co-owners of frozen assets); 4) the lack of humanitarian and other exceptions to the strict sanctions regimes.

8 As the UNSC is immune from the jurisdiction of the International Court of Justice, as well as that of regional or national courts, and there are no judicial mechanisms to review the legality of the sanctions regimes, there have been few options for the targeted persons and entities to challenge their listing in a meaningful and legally binding way. However, due to the fact that the sanctions regimes are to be implemented by the UN Members States, the targeted persons and individuals have been able to challenge the implementing measures in national and regional courts.

9 Europe, and the EU, have arguably the most advanced regional system of human rights protection, which is guaranteed mainly by the European Court of Human Rights (ECtHR) and, secondarily, by the European Court of Justice (ECJ). It is only natural that the most resounding legal sagas concerning the legality of sanctions and their implementing measures have been played before these two international, regional, courts. As expected, the judicial solutions have not been able to please everyone, and have generally given priority to the protection of human rights over the UNSC Resolutions. However, it is arguable that these Courts have at the same time attempted to preserve the unity and harmony of the international normative system, by trying to find a "third way" which would reconcile the obligations of UN Member States under UNSC Resolutions with their obligations under human rights treaties.

10 This article attempts to provide an overview of (I) the functioning of UNSC sanctions regimes and their national implementation, including (IA) the procedure for listing and actual restrictions being imposed on the targeted individuals and entities and (IB) the procedure for de-listing and other possible challenges to listing; following which it will discuss the legal basis of the UNSC sanctions regimes (II), including the relationship between key UN Charter articles and general international law (IIA), finishing with the competing approaches that the regional courts have taken when assessing the legality of sanctions and their implementing measures (IIB).

I Organization of UNSC Sanctions Regimes

IA Listing and Restrictions

11 Each of the 13 sanctions regimes provides for a separate listing procedure. However, they are organized on broadly similar lines. Thus, there is a Security Council Committee pursuant to each of the relevant Resolutions, which has among its attributions the

designation of individuals and entities as targets of the several sanctions[3]. The Committees are invariably composed of representatives of the same Member States as those present in the UNSC itself, and change accordingly. These Committees are subsidiary organs of the UNSC and have individual Secretaries coordinated by an Officer-in-Charge. The voting procedure in the Committees is the same as in the UNSC, including the power of veto of the five Permanent Members[4].

12 The types of sanctions taken against individuals and entities are summarized in Table 2.

Table 2. Types of sanctions taken against individuals and entities

No.	Type of Sanctions	Description
1	Arms Embargo	Targeted ban on arms transfers to individuals and entities (not to be confused with the territorial arms embargo usually imposed concurrently on the affected country). This usually includes arms-related materiel of all types, spare parts, technical advice, assistance or training related to military activities
2	Travel Ban	Prevention of entry into or transit through the territories of Member States of the designated individuals
3	Assets Freeze	Immediate freezing of funds, other financial assets and economic resources owned or controlled, directly or indirectly, by the designated individuals and entities
4	Ban on the export of luxury goods	A territorial ban on the DPRK which, due to the particular situation in the country, acts as a targeted ban – only the regime has access to luxury goods
5	Ban on the provision of financial services or the transfer of financial or other assets	A ban imposed against the financial institutions of the DPRK which are presumed to contribute to prohibited programs or activities, or to the evasion of sanctions

Additionally, there are country-specific measures such as a Charcoal Ban for Somalia, a nuclear-related spare parts ban for Iran, or a Diamonds Ban for the Democratic Republic of Congo (DRC), which aim to prevent the value of these resources from accruing, through export or import, to the perpetrators of violence or elites of the local regimes. Out of these, the most immediately damaging and problematic bans are 1) Travel Bans and 2) Assets Freezes. It is these types of sanctions which concern the present article, since they directly concern individuals and private entities and can potentially create situations of human rights violations.

13 The voting procedure takes place individually, for each person or entity designated, as well as for every type of sanction. Thus, there can be individuals subjected only to travel bans, while others are subjected both to travel bans and asset freezes within the same sanctions regime. Some of the UNSC Resolutions have instituted criteria for listing. A more

[3] The only exception is Resolution 1636 (2005) concerning Lebanon, where the Committee is supposed to „register" the persons indicated by the international investigation Commission appointed in the death of Rafiq Hariri. No such person has been „registered" yet.

[4] See for the mechanics of listing and de-listing under Resolution 1267 (1999) Dire Tladi, Gillian Taylor, *On the Al Qaida / Taliban Sanctions Regime: Due Process and Sunsetting*, 10 Chinese JIL 771 et seq. (2011).

developed example is that concerning the DRC, which provides that there shall be designated by the Sanctions Committee

"1) persons and entities acting in violation of the arms embargo;
2) political and military leaders of foreign armed groups operating in the DRC, or Congolese militias receiving support from abroad, who impede the process of disarmament, demobilization, repatriation, resettlement, and reintegration;
3) political and military leaders recruiting or using child-soldiers, and individuals violating international law involving the targeting of children;
4) individuals operating in the DRC and committing serious violations of international law involving the targeting of children or women in situations of armed conflict, including killing and maiming, sexual violence, abduction and forced displacement;
5) individuals obstructing the access to or the distribution of humanitarian assistance in the eastern part of the DRC;
6) individuals or entities supporting the illegal armed Groups in the eastern part of the DRC through the illicit trade of natural resources, including as a consequence of not having exercised due diligence consistent with the steps set out in Resolution 1952 (2010)."

However, it should be noted that the majority of UNSC Sactions Resolutions do not provide for such criteria, nor have the relevant Committees produced such criteria themselves.

14 Quite apart from the general criteria for listing an individual or an entity are the actual reasons given for the listing. Here, one must take into account the UNSC's view that targeted sanctions are a temporary and preventive measure, and therefore, they are not to be subjected to the same high standards of proof as normal criminal judicial proceedings. Therefore, the UNSC has in practice provided very little information on why a particular person or entity has been listed. The sources of such information vary widely: from BBC reports to confidential intelligence, everything is included and summed up in a few phrases. Sometimes, the reasons being given are very general to the point of being no reasons at all. A few examples are illustrated in Table 3.

Table 3. Different examples of reasons for listing

Extensive, reasoned listing	„Hassan Dahir Aweys has acted and continues to act as a senior political and ideological leader of a variety of armed opposition groups responsible for repeated violations of the general and complete arms embargo and / or acts that threaten the Djibouti peace agreement, the Transitional Federal Government (TFG) and the African Union Mission in Somalia (AMISOM) forces. Between June 2006 and September 2007, AWEYSs served as chairman of the central committee of the Islamic Courts Union; in July 2008 he declared himself chairman of the Alliance for the Re-Liberation of Somalia-Asmara wing; and in May 2009 he was named chairman of the Hisbul Islam, an alliance of groups opposed to the TFG. In each of these positions, AWEYS's statements and actions have demonstrated an unequivocal and sustained intention to dismantle the TFG and expel AMISOM by force from Somalia[5]."

[5] List of individuals and entities subject to the measures imposed by paragraphs 1, 3 and 7 of SC Resolution 1844 (2008), p. 5. Available at http://www.un.org/sc/committees/751/pdf/1844_cons_list.pdf

Short, reasoned listing	"Ibrahim. Hassan, Tali, Al-Asiri; Operative and principal bomb maker of Al-Qaida in the Arabian Peninsula (AQAP). Believed to be hiding in Yemen as at Mar. 2011. Wanted by Saudi Arabia. INTERPOL Orange Notice has been issued for him. Also associated with Nasir 'abd-al-Karim 'Abdullah Al-Wahishi, Said Ali al-Shihri, Qasim Yahya Mahdi al-Rimi, and Anwar Nasser Abdulla Al-Aulaqi[6]."
Short, basic reasoning	"Said Jan, 'Abd Al-Salam; In approximately 2005, he ran a "basic training" camp for Al-Qaida in Pakistan[7]."

15 Usually, only one or a few of the UNSC Member States have the particular details regarding a specific individual, and they only share them (if at all) within the closed confines of the specialized Committee. These details do not make it onto the public lists. Member States invoke the potential negative effects that more details would have on their sources and operatives on the ground. What is clear, however, is that the standard of reasoning for listing is very much lower than that for a judicial criminal action. Furthermore, the allegations contained in the lists do not have to be materially proven before the Committees, since the listing procedure is political, rather than judicial.

16 The UNSC Resolutions are addressed to Member States. The typical language for a Travel Ban reads as follows:

"1. *Decides* that all Member States shall take the necessary measures to prevent the entry into or transit through their territories of individuals designated by the Committee pursuant to paragraph 8 below, provided that nothing in this paragraph shall oblige a State to refuse its own nationals entry into its territory[8]."

The typical language for an Asset Freeze reads as follows:

"3. *Decides* that all Member States shall freeze without delay the funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the individuals or entities designated by the Committee pursuant to paragraph 8 below, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, as designated by the Committee, and decides further that all Member States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of such individuals or entities[9];"

While the Travel Ban obligations are naturally implemented by the Member States through their organs, border protection and regulation being a traditional attribution of state institutions, the Asset Freeze obligations cannot be directly acted upon by the Member States, in the context of a market economy where private property is the main form of economic ownership of assets. In other words, the State needs the private sector to actually freeze assets and prevent their use by the designated individuals and entities. To this end, the State has two options: 1) make the UNSC Resolutions directly applicable within its legal system, thus obliging the relevant private actors to apply them directly; or 2) implement the UNSC Resolutions through national legal rules. In the context of the EU, where Member States have pooled the decision-making process concerning targeted sanctions at the European level

[6] The List established and maintained by the 1267 Committee with respect to individuals, groups, undertakings and other entities associated with Al-Qaida. Available at: http://www.un.org/sc/committees/1267/AQList.htm
[7] Idem.
[8] UNSC Resolution 1844 (2008) concerning Somalia, para. 1. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1844(2008)
[9] Ibidem, para. 3.

(specifically, within the Council of the EU), without, however, renouncing their sovereign rights on the matter, the relevant implementation measures are those taken at EU level. The private sector, being deemed to know national law, is responsible for its application. The second option is taken by most states. Furthermore, several states, including Romania, have established specialized institutions to deal with the imposition of Asset Freezes and its practicalities.

17 Some UNSC Resolutions provide for exemptions from the restrictions. Regarding the restrictions against individuals, the exemptions generally have a humanitarian nature. The typical language for a Travel Ban exemption reads as follows:

"2. *Decides* that the measures imposed by paragraph 1 above shall not apply:

(a) where the Committee determines on a case-by-case basis that such travel is justified on the grounds of humanitarian need, including religious obligation; or

(b) where the Committee determines on a case-by-case basis that an exemption would otherwise further the objectives of peace and national reconciliation in Somalia and stability in the region[10];"

Typical language for an Asset Freeze exemption reads as follows:

"4. *Decides* that the measures imposed by paragraph 3 above do not apply to funds, other financial assets or economic resources that have been determined by relevant Member States:

(a) to be necessary for basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges, in accordance with national laws, for routine holding or maintenance of frozen funds, other financial assets and economic resources, after notification by the relevant State to the Committee of the intention to authorize, where appropriate, access to such funds, other financial assets or economic resources, and in the absence of a negative decision by the Committee within three working days of such notification;

(b) to be necessary for extraordinary expenses, provided that such determination has been notified by the relevant State or Member States to the Committee and has been approved by the Committee; or

(c) to be the subject of a judicial, administrative or arbitral lien or judgement, in which case the funds, other financial assets and economic resources may be used to satisfy that lien or judgement provided that the lien or judgement was entered into prior to the date of the present resolution, is not for the benefit of a person or entity designated pursuant to paragraph 3 above, and has been notified by the relevant State or Member States to the Committee;

5.*Decides* that Member States may permit the addition to the accounts frozen pursuant to the provisions of paragraph 3 above of interests or other earnings due on those accounts or payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the provisions of this resolution, provided that any such interest, other earnings and payments continue to be subject to these provisions and are frozen[11];"

18 A few important circumstances may be identified from the texts above. Firstly, the UNSC, through the Committees, has monopolized the decision-making process regarding the Asset Freeze and Travel Bans. In practice, with the exception of basic expenses and legal services, any other expense of a targeted individual or entity must be approved in advance by the Committee. In other words, each individual must apply, through the relevant State, to an obscure international body who decides, politically and without recourse, on whether he or

[10] Ibidem, para. 2.
[11] Ibidem, para. 4-5.

she may incur a certain expense or make a certain trip. Secondly, regarding travel, practically the targeted individuals are "frozen" on the spot they found themselves on the date of their listing, since no country is allowed to let them "enter into or transit through" its territory, and this presumably includes transit through international airports. Even if the country where they are found is not their country of citizenship, unless the two are contiguous, it is hard to see how such a person would be able to return to their country of citizenship. Thirdly, these sanctions have no automatic time limitation, even though several commentators have proposed "sunset clauses", i.e. the automatic lapse of sanctions after a period of time if they are not renewed. All these circumstances transform the sanctions into a harsh form of punishment taken without a judicial process.

IB De-listing and Challenges to Listing

19 In principle, a listing should be a temporary and preventive measure, designed to impede the escalation of conflict, or the actions of a particularly important person, and thus determine this person to stop perpetrating acts against international peace and security. Therefore, the UNSC sanctions Resolutions provide for means of de-listing individuals designated by the specialized Committees. The typical language for such a provision is:

"9. *Decides* that the measures outlined in paragraphs 1, 3 and 7 above cease to apply in respect of such individuals or entities if, and at such time as the Committee removes them from the list of designated individuals and entities[12];"

Until 2006, there was no direct means for an individual or entity to apply for de-listing to the relevant Specialized Committee. They had to apply to the individual state where they were found, or to their state of citizenship, and, after a review process, that state would forward the request to the Committee for consideration. This procedure was obviously not expedient, and it was also finally subject to the same constraints as any other decision of the UNSC – its peculiar rules of voting, which meant that even one negative vote by a Permanent Member would impede any de-listing.

20 In 2006, the UNSC established through Resolution 1730 (2006) a Focal Point for De-listing, "as part of its commitment to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions[13]." Currently, a targeted person may ask for de-listing through either their State of Citizenship or State of Residence, or through the Focal Point[14]. The Focal Point consults with the two relevant states, as well as with the Requesting State (the one which requested the listing in the first place), and, if these states oppose the de-listing or give no reply, with the other members of the relevant Committee. If even one member of the Committee proposes de-listing, providing the reasons thereof, the Chairman circulates this proposal under the No Opposition rule, meaning that the individual or entity is de-listed unless the Committee opposes the request. Thus, the procedure is reversed, leading to a high number of de-listing in the past seven years (13 individuals out of 54 requests).

21 The Focal Point does not have competence to deal with de-listing requests from the Al-Qaida Sanctions List. The reasons are that 1) the Al-Qaida Sanctions list is in a class of its own, concerning a non-state entity with a global presence; 2) it is by far the longest list in the targeted sanctions system; and 3) it affects quite a lot of persons indirectly, including family members, co-owners of assets under the control or ownership of listed persons; and 4) it sometimes affects persons with no link to Al-Qaida, due to some wrong listings. For this particular list, the UNSC through Resolution 1904 (2009) has established the Office of the

[12] Ibidem, para. 9.
[13] Focal Point description, available here: http://www.un.org/sc/committees/dfp.shtml
[14] The exceptions are France and Hungary which have made declarations pursuant to which their citizens or residents should address their de-listing requests directly to Focal Point.

Ombudsperson. This "independent and impartial" Ombudsperson, appointed by the Secretary-General, "is mandated to gather information and to interact with the petitioner, relevant states and organizations with regard to the request. Within an established time frame, the Ombudsperson will then present a comprehensive report to the Sanctions Committee. Based on an analysis of all available information and the Ombudsperson's observations, the report will set out for the Committee the principal arguments concerning the specific delisting request. The report will also contain a recommendation from the Ombudsperson on the delisting request. Where the Ombudsperson recommends that the Committee consider delisting, the individual or entity will be delisted unless, within 60 days, the Committee decides by consensus to maintain the listing. However, if there is no such consensus, during that 60 day period a Committee member may request the matter be referred to the Security Council for a decision on the question of whether to delist[15]."

22 The Office of the Ombudsperson has made some significant steps towards transforming the de-listing process into a more open and impartial activity. For example, it has adopted a Standard for Analysis, Observations, Principal Arguments, and Recommendation, as well as an Approach to Assessment of Information alleged to have been obtained by Torture, and procedures for access to confidential or classified information. Currently, there are 49 Cases on the roster of the Ombudsperson. Out of these, 27 have been solved through de-listing, 3 were denied de-listing, one each have been amended or retracted by the petitioner and the rest are still under consideration. The Cases concern one or more individuals each, and one or more entities.

23 Even though the Ombudsperson has taken significant measures to ensure that individuals have an easy access to its procedures, the final decision regarding de-listing remains with the 1267 Committee, and the UNSC. Therefore, in essence, it remains a political process. While the Ombudsperson is a public attorney of a sort (in the absence of any procedure for the Committee to listen to the listed persons directly), the Committee is certainly not a court of law.

24 The options available to listed individuals and entities are indeed limited. The Committees, and the UNSC, are immune from legal suits according to public international law at large. The International Court of Justice may not hear individual petitioners. The Human Rights Committee established under the International Covenant on Civil and Political Rights does not have direct jurisdiction since the United Nations is not a party to the Covenant. The United Nations Administrative Tribunal does not have jurisdiction *ratione materiae.* And, of course, the United Nations has legal immunity from suits in regional or national courts. Therefore, as far as direct actions by the listed individuals are concerned, they have no options.

25 Supposing that a certain state would like to exercise diplomatic protection and take up their case, it would be similarly limited in its options. Thus, the International Court of Justice would not have direct and compulsory jurisdiction, since the UN is not a state. Only through a concerted action, such as a request for an Advisory Opinion from the ICJ, presumably addressed through the General Assembly, would the question of the legality of targeted sanctions be put to the "judicial organ of the United Nations." Such a request is not forthcoming.

26 The only opening available to individual petitioners, for a judicial review of their sanctions regime, is therefore to be found at the national and regional level. At this point, two potential "targets" of review present themselves, namely 1) the UNSC Resolution instituting sanctions itself; and 2) the implementing measures taken by the Member State. The interplay

[15] Ombudsperson introduction page, available here: http://www.un.org/en/sc/ombudsperson/

between these two, and the court's approach to such judicial actions is presented in the second part of this article.

II UNSC Sanctions Regime and International Law

IIA Conflicting Obligations of Member States

27 According to Article 24(1) of the United Nations Charter (UNC), the Security Council has primary responsibility for the maintenance of international peace and security. After a determination under Article 39 that a situation constitutes a threat to, or breach of the peace, the UNSC can order states to undertake provisional measures under Article 40, non-forcible measures under Article 41 – normally referred to as sanctions – and finally, military action under Article 42, against the entity responsible for the threat or breach. The UNSC seldom states explicitly on which article it is basing its resolution, but confines itself to saying that it is "acting under Chapter VII of the Charter[16]." Once a Resolution is adopted, the measures contained in it must be implemented by the Member States *exactly* as stated in it – there is no margin of appreciation unless the Resolution says so. There *might* be a margin of appreciation or at least the possibility of influencing the listing of a person, i.e. *before* the Resolution takes effect against the listed individual, but this issue will be dealt with later. In any case, once a person is listed, the Member State has only three things to do: 1) implement the Resolution exactly; 2) receive and recommend action on any de-listing request; and 3) possibly act within the margin of appreciation left by the wording of the Resolution.

28 Under article 103 UNC, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." The text is very clear that anything contained in the UNC prevails over any other obligation of a Member State. It has been generally interpreted to apply also to any obligation arising out of a decision taken *according to* the Charter, such as a Chapter VII Resolution of the UNSC[17]. A problem appears in the case of Member States which have assumed international obligations with respect to human rights, especially ones which impose *procedural* rights, such as the right to a fair hearing. Because, in this case, even though the underlying *material* right may be derogated from (e.g. the right to travel), the derogatory measure would still be a violation of human rights if it was taken without appropriate procedural safeguards.

29 Exactly such a situation arises regarding the State Parties to the European Convention of Human Rights (ECHR)[18], and even more so regarding the Member States of the EU. Article 6 of the ECHR provides for the "Right to a fair trial" while Article 8 protects private and family life, and Article 13 guarantees the "Right to an effective remedy." Concurrently, in the EU, human rights are protected by the Charter of Fundamental Rights of the European Union, which has the same legal value as the Treaties[19], in respect of the validity, interpretation and application of EU legal measures. At the same time, "fundamental rights, as they are guaranteed through the ECHR and as they result from the constitutional traditions common to Member States, are general principles of the Union law[20]." Suffice it to

[16] Iain Cameron, *Targeted Sanctions and Legal Safeguards*, Uppsala University Working Paper, available here: http://pcr.uu.se/digitalAssets/96/96817_sanctions.pdf at p. 5.
[17] Jean-Pierre Cot, Alain Pellet, *La Charte des Nations Unies, Commentaire article par article*, 3rd Edition, Economica, Paris, p. 2133 et seq.
[18] Convention for the Protection of Human Rights and Fundamental Freedoms and its additional Protocols, available here: http://www.echr.coe.int/Documents/Convention_ENG.pdf
[19] Treaty on the European Union, Article 6(1).
[20] Treaty on the European Union, Article 6(3).

say that the Charter has grown on the ECtHR developments and fully provides for the same and other human rights.

30 Finally, every UN Member State is also bound by customary law, including the norms of *jus cogens*. Inasmuch as such norms protect human rights, it is argued that they would supersede even Article 103 UNC, since their effect voids even preexisting law which runs contrary to their tenets. It is, however, fairly hard to find rules of *jus cogens* which would apply in our situation.

31 The direct effect of UNC provisions within the national legal systems are debatable, as are those of UNSC Resolutions[21], even though their binding and superior legal power is not. Therefore, Member States have chosen to repeat the provisions of the targeted sanctions Resolutions in national law, through corresponding legal instruments (Laws, Orders, Government Decisions etc.), which have unquestionable direct effect in national law and are also practically more accessible to their intended recipients (mainly the financial and legal services sectors). However, this opens a wedge between the international legal obligations of the Member States and the obligations imposed on national natural and legal persons by the same States. It is a wedge in which the State can find itself squeezed.

32 In the EU, the decision-making power with regard to targeted sanctions has been taken to the European level, in a consensus procedure, which means that every Member State has a power of veto over the proposed measures. However, it is important to note that, at the same time, every state has an obligation under Article 48 UNC, to apply the UNSC decisions both directly, as well as through their actions in the relevant international organizations where they are members. This obligation is not imposed on international organizations or organs *per se*, but it imposes on Member States a positive duty of action which should be taken into account in order to engage their own responsibility, if the organization adopts measures incompatible with the UNSC decisions, provided that these measures would not have been possible without the active or passive contribution of the relevant Member State[22]. Therefore, the Member States reunited in the EU Council only have a measure of discretion if either 1) the UNSC Resolution allows one; or 2) for the targeted sanctions imposed by the EU outside of the UNSC framework.

33 From the formal point of view, EU decisions concerning targeted sanctions are Council Regulations or Council Decisions. These instruments have clear direct effect according to the Treaties, and therefore do not require further transposition by the EU Member States. In this situation, therefore, it is the EU which creates a wedge between the international obligation of Member States according to UNSC Resolutions and the obligations imposed on their nationals, and chooses to place itself in this wedge by taking the decision-making process off states' hands, at least formally.

33 Every Party to the ECHR, and by implication every EU Member State has a system whereby legal rules, as well as individual decisions, issued by state organs, may be challenged in a court of law. The challenge must be effective, so as to guarantee a remedy that makes the person good on any damage suffered as a result of an unlawful rule or decision. The ECtHR guarantees this right, as well as the procedural right of due process and fair hearing, and there is a direct action against the state available to anyone being “under its jurisdiction,” under the condition that national legal remedies have been exhausted. At the EU level, the ECJ is empowered to verify the validity and legality of EU measures, including Council Regulations and Decisions, in the area of targeted sanctions.

34 As indicated above, the international organizations themselves are not directly obliged to follow UNSC Resolutions. On the contrary, they must also follow their own fundamental instruments, namely the ECHR in the case of the ECtHR, and the EU Treaties in

[21] Cot, Pellet, op. Cit., p. 73-74.
[22] Cot, Pellet, op. Cit., p. 1300.

the case of the ECJ. Both these courts have a respectable record of judicial reasoning and judicial activism, whereby they have consolidated the respective power of their fundamental instruments in the legal orders of the Member States. From the formal point of view, these fundamental instruments are treaties, thus instruments instituting international obligations. Read through the perspective of Article 103 UNC, they would all have secondary status as opposed to Charter obligations. The conclusion is not the same if read through the prism of the European treaties themselves.

35 This point has not been lost on individual applicants seeking to challenge their UNSC listing. Left without any direct challenge against the Resolutions themselves, they have challenged the national or EU norms which "translated" with direct effect the relevant UNSC sanctions lists, both on substantive grounds (i.e. for negating their freedom of movement or their right to property), as well as on procedural grounds (i.e. the lack of a judicial process and effective guarantees when the measures were imposed). Faced with these challenges, for which the ECJ and ECtHR have, respectively, a clear jurisdiction *ratione materiae*, the courts could have taken one of the following courses of action:

A Affirm that the challenge has actually been made against the UNSC Resolutions, and therefore that they have no jurisdiction to annul a norm not issued by the EU or Member States;

B Affirm that, when adopting the implementing rules, the Member States have no margin of appreciation, and therefore that these rules cannot be annulled because that would go against a superior international obligation of the state;

C Affirm that, when adopting the implementing rules, the Member States do have some margin of appreciation, and therefore they should have implemented the UNSC Resolutions in a manner consistent with the rights guaranteed to individual applicants under the ECHR and EU Treaties. Further make an inquiry whether these rights have been respected at either the UN, or EU, or national level, and if the answer is in the negative, annul the implementing measure;

D Affirm that UNC obligations are inferior to *jus cogens* norms, and check whether the obligations imposed by the UNSC Resolutions are contrary to these norms, thus "discovering" and indirect basis of jurisdiction over UNSC Resolutions, and if the answer is in the positive, annul the implementing measure.

As seen above, in two of the four approaches, the Member States and the EU run the risk that their implementing measures are annulled, while leaving their international obligation under UNC standing. In other words, because of the compulsory nature of ECtHR and ECJ decisions, the states would have no power to execute their UNSC obligations internally, while not being able to use this as a valid excuse towards the UN.

36 This is exactly what has happened in the several cases analyzed below, in the final part of this article.

IIB Judicial Antagonism or Legal Dialogue

37 For the present article, I have chosen the main judgments issued by the ECtHR and the ECJ in the matter of targeted sanctions, which have created valid precedents and have illustrated the approaches taken by these courts to analyzing the validity of implementing measures and, some would say, of the UNSC Resolutions themselves. These are *Kadi I*[23] *and II*[24] for the ECJ, and *Nada*[25] and *Al-Dulimi*[26] for the ECtHR.

[23] Case of Kadi & Barakaat Int'l Found. v. Council of the E.U. & Comm'n of the E.C., Joined Cases C-402/05 P and C-415/05 P.
[24] Case of European Commission and Others v Yassin Abdullah Kadi, Joined cases C-584/10 P, C-593/10 P and C-595/10 P.
[25] Case of Nada v Switzerland (Application no. 10593/08), Judgment of 12 September 2012.

38 *Kadi I* concerned a listing made against Mr. Yasin Abdullah Ezzedine al-Qadi (Kadi) by the Committee established pursuant to UNSC Resolution 1267 (1999), regarding the Taliban and Al-Qaida. This listing was "transplanted" into EU law by Council Regulation 881/2002[27]. As a result, a travel ban and asset freeze were imposed on Mr Kadi, who challenged the Regulation before the Court of First Instance (CFI). The CFI rejected his application, reasoning that "that obligation of the Member States to respect the principle of the primacy of obligations undertaken by virtue of the [UNC] is not affected by the EC Treaty, for it is an obligation arising from an agreement concluded before the Treaty, and so falling within the scope of Article 307 EC[28]." The CFI further considered that "in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the [UNC], the provisions of that Charter have the effect of binding the Community[29]." The CFI also found that, while in normal circumstances, every act of the Member States or of the Community itself must be subject to judicial review, there may be "structural limitations" to this review, which limit its scope. In the case, given that "the Community acted, […], under the circumscribed powers leaving it no autonomous discretion in their exercise, so that it could, in particular, neither directly alter the content of the resolutions at issue nor set up any mechanism capable of giving rise to such alteration[30]," Mr Kadi's challenge was actually targeted at the UNSC Resolution. Such a Resolution could not be challenged except as with regard to the norms of *jus cogens*, which were found not to have been disregarded by the UNSC, as "measured by the standard of universal protection of the fundamental rights of the human person covered by *jus cogens*[31]." On the other hand, the CFI found that it is not competent "to review indirectly whether the [UNSC]'s resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order[32]," nor "to verify that there has been no error of assessment of the facts and evidence relied on by the [UNSC] in support of the measures it has taken or, […] to check indirectly the appropriateness and proportionality of those measures. It would be impossible to carry out such a check without trespassing on the Security Council's prerogatives under Chapter VII of the [UNC][33]." Compared with the approaches presented at para. 35 above, the CFI adopted both B and D, in an interesting way. On the one hand, it rejected the application, finding that the Community legal order is not superior to the UNC obligations, and that the UNSC is independent in its application of the UNC. On the other hand, however, it established a right for the ECJ to review UNSC Resolutions, where they would conflict with *jus cogens* norms. Finally, it also affirmed that *jus cogens* norms, at that point in time, did not cover any obligation of access to a fair hearing before being targeted by an asset freeze or travel ban, which is an important situation of *opinio juris* being expressed on the matter.

39 Mr Kadi appealed the decision to the General Court, and asked for the CFI decision to be overturned, along with the annulment of the contested Regulation. The General Court (GC) proceeded to affirm the supremacy of human rights as a condition of legality for any act of the Community, and in particular the special role played by the ECHR in that assessment. Then, it denied the right of any EU institution to review the legality of UNSC Resolutions, even with the norms of *jus cogens*[34]. Any such review must be directed only at the Community measure which gives effect to the Resolution. It then goes on to affirm that "any

[26] Case of Al-Dulimi and Montana Management Inc. V Switzerland (Application no. 5809/08), Judgment of 26 November 2013.
[27] Adopted on the basis of Articles 60, 301 and 308 EC, currently Articles 75, 215 and 352 TFEU.
[28] *Kadi I*, para. 75. Article 307 EC is now Article 351 TFEU.
[29] *Kadi I*, para. 79.
[30] *Kadi I*, para. 84.
[31] *Kadi I*, para. 90.
[32] *Kadi I*, para. 104, at 283.
[33] Idem, at 284.
[34] *Kadi I*, para. 287.

judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would **not** entail any challenge to the primacy of that resolution in international law[35]." I would posit that, while the GC statement is valid in that the resolution's validity and supremacy in international law is not affected, it is, at the same time, left without any means of application at the Community and national level, thus placing the Member States in a situation where they cannot fulfill one of their international obligations. In other words, with this statement, the GC opens the way to a type C approach, where it is ready to throw the state in the wedge between international obligations and the impossibility to implement them nationally.

The GC goes on to strike another blow to the supremacy of UNSC Resolutions, affirming that "by virtue of that provision [i.e. Article 300(7) EC], supposing it to be applicable to the [UNC], the latter would have primacy over acts of secondary Community law. That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part[36]." This is a very important statement. Although apparently the GC conserves the Article 103 UNC obligations, it does so on different lines than the CFI. Thus, if the CFI adopted an direct approach, saying that, in and of itself, the UNC imposes on the Community its obligations, because the attributions of the Member States in relation to implementing UNC cannot be taken at the Community level without their corresponding obligations, the GC states that, within the EU legal order, the hierarchy of norms is stated by the Treaties, and thus it is the Treaties which confer, in a limited and circumvented way, a legal power to UNSC Resolutions.

Going further, the GC analyzes summarily whether the contested Regulation would be attributable to the UNSC itself, and finds that it cannot be so. This is in quite some contrast with a *prima facie* reading of the Draft Articles on the Responsibility of International Organisations (DARIO), and in particular Article 15 which provides that an international organization which directs and controls another international organization in the commission of an internationally wrongful act by the latter organization is internationally responsible for that act if (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization. On the other hand, it is an explainable approach, because, in order to give effect to the judicial guarantees provided for by the EU Treaties, the GC must insulate them from the UNC, so as not to be seen as attacking in any way the UNSC.

At this point in the *Kadi I* decision, the GC takes an opportunity for a sort of "judicial dialogue" with the Member States and the UNSC. It creates a "test" to see whether the UNSC procedure offers the required procedural guarantees which would be similar or equivalent to the judicial guarantees offered by the EU[37]. Of course, given the political nature of the UNSC decision process, it finds that such a system does not exist. On the other hand, by proposing such a test it sends the message that, if and when the UNSC will adopt a listing and de-listing procedure which would offer equivalent guarantees, such a procedure would be recognized and given effect at the European level. It is, thus, a form of judicial encouragement towards the reform of the UNSC.

40 In the final part of the *Kadi I* decision[38], the GC looks at ways in which the procedural guarantees under EU law must be respected. In this regard, it says that, in order for Mr Kadi to refute the accusations made against him, he should have been communicated the

[35] *Kadi I*, para. 288.
[36] *Kadi I*, paras. 307-308.
[37] *Kadi I*, para. 326.
[38] See for an analysis of the margin of appreciation issue here the piece by Antonios Tzanakopoulos, *Kadi Showdown: Substantive Review of (UN) Sanctions by the ECJ sec. IV*, Jul. 26 2013, available at www.ejiltalk.org/kadi-showdown/#more-8613

grounds on which the name of a person or entity is listed. On the other hand, this communication does not need to be done immediately, since the "surprise effect" of the listing would be jeopardized, but at least once the claimant wishes to refute the allegations. Such a communication is also necessary for the GC, because otherwise it cannot "do other than find that it is not able to undertake the review of the lawfulness of the contested regulation in so far as it concerns the appellants, with the result that it must be held that, for that reason too, the fundamental right to an effective legal remedy which they enjoy has not, in the circumstances, been observed[39]." For the same reasons the GC finds that Mr Kadi's right to respect for property has been infringed, since, even though the asset freeze measures might in principle be justified (here the GC summarizes the ECtHR jurisprudence in the matter) and proportional, the lack of any reasoning or imposing it makes it intrinsically infringing[40]. Thus, the GC annuls the contested Regulation in respect of Mr Kadi.

41 *Kadi II* was rendered on the 18th of July 2013, and its contents and effects have not yet been fully analyzed by the doctrine. It is the second part of the Kadi legal saga, and starts off where *Kadi I* left it. Thus, after the *Kadi I* decision, on 21 October 2008, the Chairman of the 1267 Sanctions Committee communicated the narrative summary of reasons for Mr Kadi's listin on that committee's Consolidated List to France's Permanent Representative to the UN, and authorized its transmission to Mr Kadi[41], while also publishing it on the website of the Sanctions Committee. France sent it to the European Commission, which sent it to Mr Kadi, informing him that for the reasons set out there, it envisaged maintaining his listing according to Regulation no. 881/2002, also providing him with a period for comment, which Mr Kadi used to mount a defense, based on the lack of criminal charges brought against him in several countries, and drawing attention to the vagueness and generality of a number of allegations contained in the summary of reasons[42]. The Commission still adopted the Regulation.

Mr Kadi made an appeal to the GC for annulment of the Regulation. The GC took up the arguments presented in *Kadi I* while also analyzing the effect of the communication of reasons on their application. The GC observed that "those rights had been respected only in a purely formal and superficial sense, since the Commission considered itself strictly bound by the findings of the Sanctions Committee and at no time envisaged calling them into question in the light of Mr Kadi's comments or making any real effort to refute the exculpatory evidence adduced by Mr Kadi; and […] the few pieces of information and the vague allegations in the summary of reasons […] were clearly insufficient to enable Mr Kadi to mount an effective challenge to the allegations against him[43]." After applying the same test as shown above at para. 39, the GC found that the judicial standards guaranteed by the EU have not been met, and therefore annulled the Regulation. One extra point made by the GC was that the asset freeze was, given its general application and duration (almost a decade at the time), a significant restriction on his right of property which was not proportional to its purpose. The Commission and the Council appealed this ruling.

42 The Grand Chamber of the ECJ (the Chamber) reaffirmed the reasoning of the GC in *Kadi I*, saying that "without the primacy of a Security Council resolution at the international level thereby being called into question, the requirement that the European Union institutions should pay due regard to the institutions of the United Nations must not result in there being no review of the lawfulness of such European Union measures, in the light of the fundamental rights which are an integral part of the general principles of European Union law[44]." Thus, the wedge posited above was thoroughly consolidated.

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[39] *Kadi I*, para. 351.
[40] *Kadi I*, para. 371.
[41] *Kadi II*, para. 27.
[42] *Kadi II*, para. 29-31.
[43] *Kadi II*, para. 43.
[44] *Kadi II*, para. 67.

Here, the Chamber engages in another round of "judicial dialogue," this time with regard to the apparent impossibility of Member States and the Council to respect their EU law obligation to provide adequate reasons for listing. After repeating the unchallenged facts regarding the listing procedure (explained, in summary, in part I of this article), the Chamber imposes a new obligation on the Member States, thusly: "In that context, it is for that authority to assess, having regard, *inter alia*, to the content of any such comments [i.e. comments made by the listed person], whether it is necessary to seek the assistance of the Sanctions Committee and, through that committee, the Member of the UN which proposed the listing of the individual concerned on that committee's Consolidated List, in order to obtain, in that spirit of effective cooperation which, under Article 220(1) TFEU, must govern relations between the Union and the organs of the United Nations in the fight against international terrorism, the disclosure of information or evidence, confidential or not, to enable it to discharge its duty of careful and impartial examination[45]." And further, "it is for the Courts of the European Union, in order to carry out that examination [i.e. on the merits of the listing], to request the competent European Union authority, when necessary, to produce information or evidence, confidential or not, relevant to such an examination[46]." This is based on the burden of proof being on the accuser, i.e. the UNSC Resolution cannot reverse the burden of proof to the accused, in order to impose on him an obligation to adduce negative evidence.

What happens if the European Union is unsuccessful in its attempts to obtain more information? The Chamber says that the Union itself might provide similar information, in order to establish the well-founded nature of the listing. If neither of these happens, then the listing must be annulled[47]. If, also, the information is confidential or sensitive, the Courts of the European Union are prepared to consider alternative disclosure methods, such as summaries, or *in camera* proceedings. Finally, the Chamber imposes a *de minimis* condition on the validity of the listing – i.e. out of all the reasons invoked for it, if even only one is valid, then the listing must stand, given its preventive nature[48]. After making several determinations of factual errors on the part of the GC, the Chamber dismisses the appeals and maintains the obligation to de-list Mr Kadi from the contested Regulation.

43 The ECJ placed the European Union and, more importantly, its Member States in a legal bind. On the one hand, at the international level, they had an obligation to ensure the application of UNSC Resolution 1267, against the persons enumerated by the 1267 Committee, an obligation which is paramount, according to Article 103 UNC, and leaves no margin of appreciation to the State, as per the text of the Resolution. On the other hand, the Member States had pooled this responsibility at the European level, through the Council, and discharged it through a Council Regulation. This Regulation was found to be unlawful under EU law, while at the same time, the Member States were not able to make national rules on the matter. Thus, they were prevented from discharging their international, UN-mandated obligation by an international, EU-mandated obligation!

I would posit that this result is a blatant manifestation of judicial antagonism to a system of sanctions seen as partial, political, and dismissive of human rights and procedural guarantees. It is a judicial reaction towards the monopolization of sanction power against individuals at the level of the UNSC, where it is immune from any kind of judicial review. It is, thus, a revolt of the European legal spirit against a type of world governance which does not share its human rights and procedural values. Below, I will expose the alternative approach taken by the ECtHR to the same issues.

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[45] *Kadi II*, para. 115.
[46] *Kadi II*, para. 120.
[47] *Kadi II*, para. 123.
[48] *Kadi II*, para. 130.

44 The *Nada* case concerns not an asset freeze, but a travel ban. Mr Nada is a businessman living in the town of Campione d'Italia, which is an enclave of Italy in the South-East of Switzerland, fully surrounded by this country. In 2000, the 1267 Committee decided to list Mr Nada on its Consolidated List. After joining the United Nations on 10 September 2002, Switzerland implemented the travel ban against Mr Nada, who was thus prevented from leaving the town of Campione d'Italia even in order to enter Italy. Since there were no alternate means of transport, apart from car, between the town and the rest of Italy, Mr Nada was in effect barred from seeking medical treatment in his own country[49]. It is worthy to note that the implementation of the sanctions was undertaken by Switzerland through a Federal Ordnance, with an Annex which fully reproduced the Consolidated List of the 1267 Committee. Mr Nada also applied for de-listing through the focal point procedure, but his application was denied due to the opposition of an undisclosed country. After initiating a number of internal administrative appeals in Switzerland against his travel ban, the Swiss Federal Court rejected his final appeal. "It first pointed out that, under Article 25 of the [UNC], the UN member States had undertaken to accept and carry out the decisions of the Security Council in accordance with the Charter. It then observed that under Article 103 of the Charter the obligations arising from that instrument did not only prevail over the domestic law of the member States but also over obligations under other international agreements, regardless of their nature, whether bilateral or multilateral. It further stated that this primacy did not relate only to the Charter but extended to all obligations which arose from a binding resolution of the Security Council. The Federal Court observed, however, that the Security Council was itself bound by the Charter and was required to act in accordance with its purposes and principles, which included respecting human rights and fundamental freedoms. At the same time, it took the view that the member States were not permitted to avoid an obligation on the grounds that a decision (or resolution) by the Security Council was substantively inconsistent with the Charter, in particular decisions (resolutions) based on Chapter VII thereof (action with the respect to threats to the peace, breaches of the peace, and acts of aggression)[50]." Article 190 of the Federal Constitution of Switzerland is a provision similar to that instituting the primacy of international law over internal law in Romania. In searching for a rule to solve a situation of conflict between the different international obligations of States, the "Federal Court was of the opinion that the uniform application of UN sanctions would be endangered if the courts of States Parties to the European Convention or the International Covenant on Civil and Political Rights were able to disregard those sanctions in order to protect the fundamental rights of certain individuals or organisations. The court nevertheless accepted that the obligation to implement the Security Council's decisions was limited by norms of *jus cogens*. Accordingly, it considered itself bound to ascertain whether the sanctions regime set up by the Security Council was capable of breaching the peremptory norms of international law[51]." However, it found that the enjoyment of possessions, economic freedom, the guarantees of a fair trial or the right to an effective remedy did not fall within *jus cogens*, and also found that Switzerland did not have any margin of appreciation in its application of the UNSC Resolution. By a procedure unknown to Mr Nada, his name was however deleted from the sanctions lists after the Federal Court case concluded.

It is striking how similar the judgment of the Tribunal in *Kadi I* is with the judgment of the Federal Court. Both courts approached the problem according to approaches B and D illustrated at the beginning of the case presentations. Both courts found that the only way they could have checked the validity of the UNSC Sanctions Resolutions was by reference to *jus*

[49] *Nada*, paras. 15-21.
[50] *Nada*, paras. 42-43.
[51] *Nada*, paras. 45-46.

cogens, and that the lack of a margin of appreciation for the concerned state (the EU, respectively) meant that they could not verify the legality of the implementing measures independently of that of the UNSC Resolutions, thus rejecting the claims. We will see, however, the different approach taken by the ECtHR as opposed to the EU GC.

45 In its assessment, the ECtHR first illustrated the applicable law, with reference to the UNC, the UNSC Sanctions Resolutions, as well as the *Kadi I* case. It also made a note of the case of *Sayadi and Vinck v. Belgium*, which was dealt with by the United Nations Human Rights Committee. A relevant finding of the Committee was that, although Belgium was not competent to remove the names from the sanctions list, it had the duty to do all it could to obtain that deletion as soon as possible, to provide the complainants with compensation, to make public the requests for de-listing, and to ensure that similar violations did not occur in the future[52]. The ECtHR also mentioned relevant cases at the national level, such as that of *Ahmed and others v. HM Treasury* (United Kingdom Supreme Court) and that of *Abdelrazik v. Canada (Minister of Foreign Affairs)* (Canadian Federal Court).

46 On the merits, the Court found that it had jurisdiction, even against Switzerland, as, due to the factual circumstances of the case, it was Switzerland, and not Italy, which was impeding the movement of Mr Nada. Mr Nada did have the status of "victim" in the sense of the ECHR and that he had exhausted all national remedies. Thus, it found the request admissible. It found that the travel ban constituted a significant restriction on Mr Nada's freedom, especially due to the geographical location of Campione d'Italia[53]. The ECtHR found that the limitation did have a legal basis and a legitimate aim. It approached the question of whether it was "necessary in a democratic society" by first asking whether Switzerland had any margin of appreciation in implementing the Sanctions Resolutions.

Here, the different points of view of the EU Courts and those of the ECtHR come into play. The ECtHR posited a principle that "the United Nations Charter does not impose on States a particular model for the implementation of the resolutions adopted by the Security Council under Chapter VII. Without prejudice to the binding nature of such resolutions, the Charter in principle leaves to UN member States a free choice among the various possible models for transposition of those resolutions into their domestic legal order. The Charter thus imposes on States an obligation of result, leaving them to choose the means by which they give effect to the resolutions[54]." Basing itself on paragraph 2(b) of the relevant Sanctions Resolution, which said that the travel ban did not apply where entry or transit was "necessary" for the fulfilment of a judicial process, the Court took the view that the term "necessary" was to be construed on a case-by-case basis. It also found that the words "where appropriate" in the same Resolution, in the context of urging States to take immediate steps to enforce the sanctions meant that there was a certain flexibility given to the national authorities in the mode of implementation of the Resolution. Thus, the ECtHR found that "Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the UNSC[55]."

In my view, this is a completely different approach from that of the EU Courts. Instead of fragmenting international law into a "grand sphere" (the general international law) and a smaller and independent sphere (EU law) with its own hierarchy of norms, thus putting states in a wedge, the ECtHR maintains the unity of international law and the supremacy of UNC obligations, but uses a literal interpretation of the UNC, and of the Sanctions Resolutions, to "discover" some leeway of the States when implementing them. It is a wise and

[52] *Nada*, para. 91.
[53] *Nada*, para. 165.
[54] *Nada*, para. 176.
[55] *Nada*, para. 179-180.

compassionate way of interpreting apparently conflicting norms, and one which does not stand squarely against the very supremacy of UNC obligations.

In approaching the question of proportionality, the ECtHR found that the Swiss authorities, although cognizant of Mr Nada's situation, and having discovered themselves, through criminal investigations, that there was no case to build against him, did not take into account his specific situation, and that "the possibility of deciding how the relevant Security Council resolutions were to be implemented in the domestic legal order should have allowed some alleviation of the sanctions regime applicable to the applicant, having regard to those realities, in order to avoid interference with his private and family life, without however circumventing the binding nature of the relevant resolutions or compliance with the sanctions provided for therein[56]." In other words, and here the ECtHR is admirably square in its appreciation, regardless of the hierarchy of norms between the ECHR and UNC obligations, "the important point is that the respondent Government have failed to show that they attempted, as far as possible, to harmonise the obligations that they regarded as divergent[57]." Therefore, the measures were not proportionate and therefore not necessary in a democratic society, and therefore there was a violation of Article 8 of the ECHR.

The ECtHR also found a violation of Article 13 of the ECHR on the basis that, even if Mr Nada was able to appeal administratively up to the Federal Court, the fact that this latter Court considered itself unable to order the de-listing of his name, there was no remedy in respect of the Convention violations[58]. On the other hand, the ECtHR found that Mr Nada was not deprived of his liberty, even in light of the quite small area of Campione d'Italia.

47 The *Al-Dulimi* ruling, which was only very recently published, and for now only in the French language, was also addressed against Switzerland and concerns the "1518 Sanctions Committee" which was empowered to establish a list of persons whose assets were to be frozen, and given to the Development Fund of Iraq, as a sanction for being members of the former Iraqi regime. Switzerland implemented these sanctions through administrative decisions, which were contested within the Swiss court system by the applicants. After several appeals, the Federal Court did reject their application, basing its decision on a similar reasoning as that in the *Nada* case[59].

48 After reviewing the international and national law and jurisprudence, as it developed in the past few years, including the decisions presented in this article, the ECtHR proceeded to find the case admissible. It is on the merits that the ECtHR develops is specific approach started in the *Nada* case. Under the specific header of "Preliminary Question: the coexistence of guarantees under the Convention [ECHR] and of obligations imposed on States by the resolutions of the Security Council" the ECtHR deals for the first time by an international judicial forum, squarely, with the relationship between the two sources of obligations.

The ECtHR reminds that the ECHR must be interpreted in a manner which can be reconciled with the general principles of international law. It bases this interpretation on Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties, but giving a specific weight to human rights treaties[60]. The ECtHR also establishes a principle that there is a presumption that the UNSC does not mean to impose on Member States any obligation which would be contrary to the fundamental principles of human rights protection, unless there was a very clear language to this effect in the Resolution itself[61].

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[56] *Nada*, para. 195.
[57] *Nada*, para. 197.
[58] *Nada*, para. 213.
[59] *Al-Dulimi*, para. 38.
[60] *Al-Dulimi*, para. 112.
[61] *Al-Dulimi*, para. 113.

The ECtHR distinguishes the *Al-Dulimi* case from *Nada* on the basis that, as opposed to *Nada*, the relevant Resolution did not leave any margin of appreciation to Switzerland[62]. It finds that the focal-point system does not offer a protection of human rights equivalent to the one required by the ECHR, a fact recognized by the UN Special Rapporteur on the matter. Therefore, the Court affirms that the national tribunals should have made a full examination of the facts alleged by the applicants, in order to give them a fair hearing on the merits of their listing[63]. The ECtHR finds a violation of Article 6(1) of the ECHR, and that the rest of the allegations were not receivable for the rest.

It is quite a remarkable ruling, in my opinion, in light of the enumerated principles, but also of the proposed solution. Thus, the main principle established by the ECtHR is that apparently conflicting international obligations must be interpreted in a way which makes them compatible with one another. In light of the fact that there was no margin of appreciation left for Switzerland by the UNSC Resolution, and also that there was no adequate mechanism of listing review at the UN level, the ECtHR offered the solution that Switzerland itself should have provided the required review.

In light of this affair, we are left with one question: what would happen if, after a full review on the merits by Swiss courts, finding that the listing was not justified, followed by specific requests of Switzerland for de-listing to the UNSC, the de-listing would be unsuccessful? Would Switzerland still be found guilty of the violation of ECHR or not? In light of the Court's approach, I believe not, because, under that situation, the ECtHR would accept the general hierarchy of international law norms.

Going back to the title of this article, it is also interesting to note that the ECtHR ruling is also a form of judicial dialogue with the UNSC, and specifically with the relevant Sanctions Committees, but also with the State Parties to the ECHR, inviting them to further develop the system of human rights protections within the targeted sanctions regimes. The Court puts forward not only a stick (the threat of finding further violations of the ECHR), but also a carrot (the possibility that the UNSC system would be recognized as meeting the guarantees of the Convention, and thus escaping review by the ECtHR).

49 In Table 4 a summary of the different approaches taken by the European courts is made, by way of **conclusion**. "Both sets of reasoning are bound to be very influential, as they involved two of Europe's most powerful and prestigious courts. Whereas the ECtHR informs the jurisprudence of 47 states that constitute the membership of the Council of Europe, the CJEU impacts the legal developments in 27 states which make up the EU. Moreover, all 27 EU member states (two of which are permanent members of the UNSC) are also members of the Council of Europe and therefore need to take into consideration the jurisprudence of both the ECtHR and the CJEU[64]." It will be interesting to see if, via other similar cases, these approaches will be taken further on their separate pathways, or will be somehow reconciled with one another.

Table 4. Summary of European judicial approaches to targeted sanctions

European Court of Justice	European Court of Human Rights
At international law, UNC obligations are prevalent over any others, except for *jus cogens* obligations	
The Court does not have any jurisdiction to review the UNSC Resolutions, but only the implementing measures	

[62] Al-Dulimi, para. 117.
[63] Al-Dulimi, para. 144.
[64] Erika de Wet, From Kadi to Nada: Judicial Techniques Favoring Human Rights over United Nations Security Council Sanctions, 12 Chinese JIL 5 (2013)

Within the EU normative system, UNC obligations are superior to secondary law, but not to the fundamental EU Treaties	Although the UNC obligations are superior to the ECHR, they must be interpreted in such a way in which they are made compatible as far as possible
Therefore, if a secondary rule of EU law implements UNC obligations in a way which is incompatible with Treaty principles, the secondary rule should be anulled	Therefore, if the Member State did not take absolutely every measure to ensure the furthest compatibility of the two sets of obligations, then the state is in breach of the ECHR obligations
The effect is that the act through which the states implement their UNC obligations is annuled, leaving them without the legal means to execute their international obligations	The effect is that the state is given the means to rectify its breach of ECHR obligations, without putting it in a situation where it would violate its UNC obligations
Further, there is a clear fragmentation of the system of international law	The EctHR promotes the fundamental unity of the system of international law[65]

[65] See for the same opinion Erika de Wet, Jure Vidmar, Conclusions, in *Hierarchy in International Law. The Place of Human Rights*, 305 et seq. (E. De Wet, J. Vidmar, eds., 2012).

CONSIDERATIONS REGARDING PROVISIONAL MEASURES FOR THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN ROMANIA

Paul-George BUTA*

Abstract

The article takes a look at provisions in the Code of Civil Procedure dealing with the provisional measures that can be requested by the intellectual property right-holder in case of apparent infringements of his rights. Starting from the goals of such regulation, as provided by Directive 48/2004, the article examines what could be the hurdles imposed by the Romanian legislator (mostly by not providing sufficiently tailored means in respect of intellectual property rights) on the right-holder and proposes that, in light of the problems as reflected in the courts' practice, a legislative intervention be undertaken in order to better adapt the means to the purpose envisaged.

Keywords: *provisional measures, interim measures, intellectual property rights, injunction, procedure*

1. Introduction

The Civil Procedure Code having entered into force on 1 February 2013 provides, in articles 977 and 977, for provisional measures for the protection of intellectual property rights. These were formerly dealt with by a triad of legal instruments comprising provisions in special legislation concerning the measures for the protection of the specific intellectual property right concerned, the provisions of Emergency Government Ordinance 100 of 20 July 2005 ("GEO 100/2005")[1] and the provisions regarding the presidential ordinance of the Old Civil Procedure Code.

In their turn, both the special legislation concerning the measures for the protection of the specific intellectual property rights and GEO 100/2005 were amended or drafted so as to implement the provisions of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights[2].

This short article aims to analyze whether the changes brought by the Civil Procedure Code bring any improvements to the situation where the provisional measures were sought without there being a specific regulatory provision for such in the Civil Procedure Code.

2. Content

The objective of Directive 24/2008 was "to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the Internal Market" as provided by preamble 10 of the Directive. Therefore one of the goals of Directive 24/2008

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[1] Published in the Official Journal nr. 643/20.07.2005.

[2] OJ L 157, 30.04.2004, pp. 45-86.

was the provision of measures that were effective, proportionate and dissuasive while homogenous at Community level for the protection of intellectual property rights[3].

The Romanian legislator has decided (in 2005) to implement the Directive by amending Law nr. 8/1996 concerning copyright and related rights ("Copyright Law"), on the one hand, and by enacting GEO 100/2005 in order to provide for the enforcement of industrial property rights, on the other[4].

Leaving aside the fact that this artificial division makes little sense and contravenes the objectives of the Directive, as indicated in preamble 13 ("It is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and/or by the national law of the Member State concerned. Nevertheless, that requirement does not affect the possibility, on the part of those Member States which so wish, to extend, for internal purposes, the provisions of this Directive to include acts involving unfair competition, including parasitic copies, or similar activities"), the division has caused problems also in respect of the changes brought about by the enactment of the New Civil Code and New Civil Procedure Code.

Thus the Law implementing the New Civil Procedure Code, Law nr. 76/2012[5], has amended both the Copyright Law and GEO 100/2005 in order to harmonize the level of protection granted to industrial property rights and copyright and related rights to the level provided for by Directive 48/2004.

Article 977 of the Code of Civil Procedure provides that the interim measures regulated by it and concerning interim measures for the protection of intellectual property rights apply in respect of both patrimonial and non-patrimonial rights (if concerning intellectual property) and that article 255 of the Civil Code provides interim measures for "other non-patrimonial rights".

This provision raises some issues in respect of its apparent excluding from the scope of interim measures provided by the Civil Code of the ones dealing with non-patrimonial intellectual property rights. This would not be of particular concern were the Civil Code not to expressly provide for substantive relief in respect of the infringement of such rights. This would in turn entail that while relief available for the infringement of non-patrimonial rights of authors of intellectual property would be available under article 253 of the Civil Code, interim relief in respect of such would only be available under the provisions of the Code of Civil Procedure. This would be awkward since the provisions of article 255 of the Civil Code and those of article 978 of the Code of Civil Procedure are identical, which means that the dissociation would, without any corresponding practical effect, merely require that the owner of a non-patrimonial right related to intellectual property claim for relief under the Civil Code and for interim relief under the Code of Civil Procedure while the owner of a non-patrimonial right not related to intellectual property would claim for both substantive and interim relief under the Civil Code[6].

The interim measures especially available

The interim measures that can be requested are provided for by article 978 of the Code of Civil Procedure and generally relate to a claim that the court provisionally order the forbidding or the provisional cessation of the alleged breach of an intellectual property right

[3] William Cornish, David Llewelyn, Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 7th ed., (Sweet & Maxwell – London: 2010), 57.
[4] Sonia Florea, Proceduri civile în materia drepturilor de proprietate intelectuală, (Universul Juridic: Bucureşti, 2013), 136.
[5] Published in the Official Journal nr. 365/30.05.2012.
[6] Buta Paul-George, "Considerations Regarding the Scope of Provisional Measures for the Defense of Non-patrimonial Rights as Provided for in the Civil Code" in Mircea Duțu, Mihaela Tomiță (eds.), *The New Romanian Civil Code, two years after its entry into force*, (Medimond International Proceedings: Pianoro, 2013), 38.

(article 978, letter a)) and/or the securing of evidence (article 978, letter b)). We detail each, in turn, below.

The forbidding of the breach of the intellectual property right [paragraph (2) letter a) 1st thesis]

Although not expressly provided, as in the case of the 2nd thesis of letter a), the forbidding of an infringing act can be ordered only provisionally, for a period of time precisely determined, this being of the essence of the provisional measures and the procedure of the presidential ordinance by which such measures are to be ordered.

The possibility of provisionally forbidding the perpetration of the future act could not be requested, upon a strict interpretation of the text of law, not even in the case of the industrial property rights, when relying on GEO 100/2005, as art. 9 paragraph (1) letter a) provides the possibility of requesting the forbidding „under provisional title, that the alleged breach continues". Subsequent to the modification of GEO 100/2005 by the Law nr. 76/2012 for the implementation of the new Code of Civil Procedure, the procedure for taking the interim measures was harmonized at the level of those specified by art. 978 of the Civil Procedure Code[7].

This measure aims at provisionally forbidding the perpetration of the illicit action, if such action is imminent, while the forbidding for the future of the illicit action, which has already started and continues, makes the object of the measure provided by the 2nd thesis.

This raises the interesting question concerning the possibility of obtaining an order that the respondent make a declaration that he does not intend to breach the intellectual property rights of the plaintiff. Such order could be extremely useful especially in the case of generic entry where the generic company seeks regulatory approval before patent expiry (without intending to launch the product before patent expiry) but, due to the principle of parallel regulation (the pharmaceuticals regulatory bodies are not competent to assess possible infringements of intellectual property rights when assessing applications for regulatory approval) the modifications arising out of mere regulatory approval (even if not followed by actual launch of the generic) would cause damage to be incurred by the originator especially by means of the changes in the level of compensation by the public health insurance schemes.

In such cases the only remedy that the originator could have would be either an order that such changes not be operated before patent expiry (in which case the originator would have to seek injunctive relief against the authorities operating the public insurance program, which, in light of the fact that the generic normally applies for regulatory approval only a few months before patent expiry, could cause such claim to be heard only after patent expiry thereby leaving such claim without object) or, by means of the generic demanding that its regulatory approval become effective only after patent expiry (in which case the possibility of obtaining an order that the generic issue such request would be the only form of relief).

In both cases outlined above there is uncertainty as to the admissibility of a claim for interim relief to the effect sought. In the first case the issues that could be raised would pertain to the fact that the public authority is not a direct infringer itself, the fact that the authority would merely follow provisions of law in operating the changes and the fact that, in most likelihood, such interim injunction would, in fact, be a final injunction. In respect of the second case, the relief sought would not fall expressly within the scope of the provisions and the originator could be determined as lacking standing to bring such a claim since the generic would be willing to declare that it does not intend to launch before patent expiry and he would be under a legal obligation not to infringe beforehand. Moreover, in the second case the relief would be akin to a final relief rather than interim relief.

[7] See Mihaela Tăbârcă, *Drept procesual civil*, vol. II, (Universul Juridic: 2013), 713-718.

The provisional cessation of the breach of intellectual property right [paragraph (2) letter a), 2nd thesis]

This time, the legislator provided expressly for the provisional character of this measure. The measure aims at the cessation for the future of the illicit act, if such is still ongoing.

The taking of the necessary measures to ensure the securing of evidence [paragraph (2) letter b)]

The "securing of evidence" can be realized, in the case of breach of intellectual property rights, even in the absence of this provision from the Civil Procedure Code, through the procedure of securing of evidence provided by the Civil Procedure Code by arts. 359-365. It is true that the analyzed text uses the expression "securing of evidence", while the preservation of evidence, according to art. 235 Civil Procedure Code in force and art. 359 of the New Civil Procedure Code is made through the "collecting" of those evidence facing peril of disappearance or that would be difficult to be produced in the future, but the most used and useful manner of preserving evidence – if not the only one – is to produce such evidence prior to its alteration, destruction or disappearance.

The measures the court might consider necessary for the preservation of evidence, and which it might take, envisage for the most part, in our opinion, those measures considered by art. 359 of the Civil Procedure Code: acknowledging the confession of a party, the opinion of an expert, the status of goods, movable or immovable, the recognition of a writ, fact or right.

Although the text refers to the "preservation of evidence", we believe that a teleological interpretation allows us to state that the court will be also able to order measures for the acknowledging of a certain situation of fact that might cease or change until the producing of evidence. But, even if the court will consider that the text of paragraph (2) letter b) of art. 255 of the new Civil Code does not allow it to do so, it would still be able to order such measure, if considered necessary, on the ground of art. 359 of the Civil Procedure Code.

The provisional measures provided by paragraph (2) letters a) and b) are those the legislator considered as being the most frequent and useful for the provisional protection of the intellectual property rights and that is why it stipulated that the courts may order them "especially", therefore not exclusively. Consequently, the claimant may request to the court, and the judge may order, the taking of provisional measures other than those expressly provided.

The conditions necessary for taking the provisional measures

A first condition provided by paragraph (1), in order for the court to be able to take a provisional measure, is that the person considering himself harmed must make the credible proof of the fact that his intellectual property rights are the object of an illicit action. This means that the claimant has to prove both the action of breach of its intellectual property right and its illicit character[8].

A second condition provided by the text of law is that the illicit action invoked by claimant should be actual or imminent, only in this case the urgency for the taking of the provisional measures being justified. The mere evidencing of the actual or imminent character of the act is of a nature to grant legitimacy to claimant's enterprise, from the point of view of the urgency, because, in cases where there is an express provision concerning the taking of measures by way of presidential ordinance – as in this case – the court must no longer verify such condition, for it is presumed by the legislator.

[8] See Mihaela Tăbârcă, *Drept procesual civil*, vol. II, (Universul Juridic: 2013), 713-718.

The third condition imposed by the text of paragraph (1), in order to be able to take the provisional measures – and which also falls under the general conditions of the presidential ordinance – is the existence of the risk that the illicit action causes a prejudice difficult to recover. It is about an imminent prejudice which has not occurred yet but will certainly occur, if the circumstances presented by the claimant do not change, so it is not about a possible prejudice. On the other hand, the request is admissible not only if the prejudice that may occur could not be repaired at all, but also if its subsequent repairing would be possible, but only with difficulty.

Paragraph (3) provides some supplementary conditions for the taking of provisional measures, in case of prejudices brought through the means of the written or audio-visual press. Thus, the court will not be able to order the cessation, under provisional title, of the prejudicial action unless: a) the prejudices caused to the claimant are severe; b) the action is not evidently justified, according to art. 75 of the Civil Code; and c) the measure which the court is to take, upon claimant's request, does not appear as disproportionate relatively to the caused prejudices.

The three supplementary conditions provided by paragraph (3) for the taking of the provisional measures in case of prejudices brought through the means of written or audio-visual media impose on the claimant a supplementary evidencing effort, while on the judge impose a deeper and more restrictive analysis in the taking of such measures, inclusively from the perspective of the international treaties and conventions Romania is a party to and to which art. 75 of the Civil Code refers, indicated by the very text of paragraph (3). From this perspective the judge is to analyze the seriousness of the prejudices, the obvious non-justified character of the action and the proportionate or disproportionate character of the provisional measure to be taken, relatively to the caused prejudice.

In the final part of paragraph (3) it is specified that the provisions of art. 253 paragraph (2) of the Civil Code remain applicable, which means that the court will be not able to order, by way of presidential ordinance, under the title of provisional measure, the forbidding of an imminent illicit deed, in case of breach of non-patrimonial rights by the exercising of the right to free speech.

If GEO 100/2005 imposed, in the matter of industrial property rights, with a view to the taking of provisional measures other than the preservation of evidence, only the first two conditions specified above (respectively the existence of an actual allegedly illicit action or with imminent effect), in case of the measure of preserving the evidence, the legislator not only imposed the satisfaction of all three conditions specified above, but in regard of the prejudice, the latter had to be „irreparable" and not only "difficult to be repaired". Subsequent to the modification of GEO 100/2005 by Law nr. 76/2012 for the implementation of the new Code of Civil Procedure, the measures for the preservation of evidence shall be ordered according to the provisions of art. 978 of the respective Code.

The procedure for taking the provisional measures

The procedure for taking the provisional measures for the protection of intellectual property rights is provided by article 978 of the Code of Civil Procedure[9].

Paragraph (4) provides that "*The court settles the request in line with the provisions concerning the presidential ordinance, which apply accordingly*". Consequently, when taking the above mentioned provisional measures, the court will apply the ordinary law provisions of the special procedure concerning the presidential ordinance, respectively those of art. 996 – 1001 of the Code of Civil Procedure, although some of them have a "corresponding" application by reference to the specificity of the matter.

[9] See Mihaela Tăbârcă, *Drept procesual civil*, vol. II, (Universul Juridic: 2013), 745-761.

Mention must be made of the fact that art. 998 of the Civil Procedure Code provides that the claim for interim relief is to be judged with the summoning of the respondent and with the providing for the respondent of the possibility to file a statement of defense. However, paragraph 2 of art. 998 provides that, upon receipt of the claim for interim relief the court may, in situations deemed as special emergencies by the court, order that the claim be ruled on without summoning the either of the parties and that the court may rule on the claim the very day the claim is filed.

Special mentions need to be made here in respect of the claims seeking interim relief for the alleged breach of intellectual property rights. A first such mention regards the claim for the securing of evidence. It is evident that on a literal reading of the provisions in art. 998 of the Civil Procedure Code the court should normally communicate the claim to the alleged infringer, allow him to file a statement of defense and only afterwards rule on the claim for the securing of evidence. Only where the court would find that there is a "special emergency" would it be allowed to rule on the claim without informing the respondent of the claim filed.

Since the claim for the securing of evidence is most obviously a claim that requires that the respondent not be aware of the intentions of the plaintiff, given that the very purpose of the provisions governing the admissibility of the claim refer expressly to the need for securing evidence that would otherwise be destroyed or lost, it appears as the provisions governing the presidential ordinance generally, need to be adapted in order to allow the fulfilling of the special role envisaged by the legislator for the provisions governing the interim relief for alleged infringements of intellectual property rights. Thus, if the plaintiff were to prove that the evidence would be destroyed or lost if not secured at that particular time, the onus of proof on the plaintiff would be quite high given that the factor that would trigger the risk of the evidence being destroyed would be precisely the informing of the respondent of the intentions of the plaintiff to file for infringement. Therefore the court should interpret "otherwise" widely so as to include situations where the evidence would be destroyed or lost only as a result of the actions (albeit legitimate) of the right-holder.

Moreover, in practice, even where the court would allow for such a claim to be ruled on without summoning the parties, in order to assign the docket to a judge in the manner provided by the provisions of the Civil Procedure Code, the court clerk would need to first register the docket in the electronic docket management system (ECRIS)[10], the information contained therein being accessible to the public (i.e. also to the respondent). Therefore the respondent could in fact know of any claims filed against him by merely searching his name with the ECRIS system. Afterwards the respondent may request that he access the file and check for himself the exact relief sought (including type of evidence to be collected, the locations to be searched). Finally, using the same ECRIS system, the respondent could in fact know when the order is granted and prepare accordingly. The respondent could also file a motion of defense (even if not summoned) and file an appeal (which however would not, of its own, suspend execution of the order granted by the first-instance court).

This obvious disadvantage to the right-holder most certainly goes against the purpose of Directive 48/2004 in allowing the right-holder effective means to secure evidence of possible infringements.

Such disadvantage could be avoided if the order for the securing of evidence were to be always granted without summoning the respondent. However the avoiding of the claim being registered with ECRIS and published on-line could not be so avoided. The only way to make this information not harm the plaintiff would be to always rule on the claim the same day as filed and provide the reasons for such without delay.

[10] See art. 93 of the Internal Regulation of the Courts published in the Official Journal no. 958/28.10.2005.

In practice[11] however the courts appear to favor the normal route for claims for provisional relief, which means that upon their being registered with the court clerk they are registered with ECRIS, assigned to a judge who includes them on the list of cases previously assigned and then sets a date for ruling upon such within approximately one month. This allows the respondent to study the file and even file a statement of defense. Moreover the fact that the terms set for issuing the grounded decision (provided by the Code of Civil Procedure not to exceed 48 hours after the ruling) are regarded by the courts as indicative and not imperative results in the grounded decision (which alone can be enforced) to be issued only after a relatively long time since the ruling thus giving the respondent plenty of time to prepare for the eventual enforcement of the order.

One can observe that this practice of the courts, in the absence of express provision to the contrary in the law, voids the claim for the securing of evidence of most of their purpose and thus explain the overall scarcity of jurisprudential activity in this domain.

This is even more of a problem when considering the above mentioned cases concerning generic entry where the declaration to be sought from the generic (in order to prevent the changes to the level of compensation to be paid to the originator by the national public insurance scheme) can only be obtained by means of an adapted form of the order for the securing of evidence and needs to be obtained very quickly in order to prevent the changes being operated by the public authority.

3. Conclusions

1. The current framework for the protection of intellectual property rights, by being dependent on procedural issues on the generic regulation concerning the presidential ordinances, fails to fulfill the purpose envisaged by the European legislator in the enactment of Directive 48/2004. Moreover such failure to provide for actual means to protect intellectual property rights is not only a potential infringement of the European law but also a potential failure by the Romanian state to fulfill its duties in respect of obligations assumed under international treaties, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[12].

2. In view of the particular objectives and the specificity of intellectual property rights enforcement a better adapted protection framework is needed in respect of these rights and therefore, in the absence of a jurisprudential practice doing so, the Romanian legislator should provide for specific, tailored means of obtaining provisional relief for infringements of intellectual property rights. Such a tailored regulatory framework should follow the objectives of Directive 48/2004 and the implementation of this Directive in other Member States.

References

- Cornish, William Llewelyn, David Aplin, Tanya, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 7th ed., (Sweet & Maxwell: London, 2010)
- Duțu, Mircea Tomiță, Mihaela (eds.), *The New Romanian Civil Code, two years after its entry into force*, (Medimond International Proceedings: Pianoro, 2013)
- Florea, Sonia, Proceduri civile în materia drepturilor de proprietate intelectuală, (Universul Juridic: București, 2013)
- MacQueen, Hector Waelde, Charlotte Laurie, Graeme Brown, Abbe, *Contemporary Intellectual Property Law and Policy*, 2nd ed., (Oxford University Press: Oxford, 2010)
- Tăbârcă, Mihaela, *Drept procesual civil*, vol. II, (Universul Juridic: București, 2013)

[11] See, for example, Decision 394/31.03.2014 of the Bucharest Tribunal, 4th chamber (http://portal.just.ro/3/SitePages/Dosar.aspx?id_dosar=300000000572496&id_inst=3, accessed on 11 April 2014).

[12] Hector MacQueen, Charlotte Waelde, Graeme Laurie, Abbe Brown, *Contemporary Intellectual Property Law and Policy*, 2nd ed., (Oxford University Press: Oxford, 2010), 955-956.

- Decision 394/31.03.2014 of the Bucharest Tribunal, 4th chamber (http://portal.just.ro/3/SitePages/Dosar.aspx?id_dosar=300000000572496&id_inst=3, accessed on 11 April 2014)

PROTECTION OF DRAWINGS AND PATTERNS BY ADMINISTRATIVE LAW MEANS IN INTELLECTUAL PROPERTY LAW

Ovidia Janina IONESCU[*]

Abstract

According to the relevant Romanian legislation, i.e. Law no. 129/1992 on the protection of drawings and patterns and Government Decision no. 211/2008 for the approval of the Regulation enforcing Law no. 129/1992, rights over drawings or patterns may also be protected via administrative law.

Administrative law means ensure the recognition of the right during the procedure of registering the drawings and patterns and of issuing the drawing or pattern registration certificate, which, as mentioned above, represents the protection title granted by OSIM for registered drawings and patterns.

This category of means includes the opposition and challenge, which may be filed with the administrative authority ensuring the protection of drawings and patterns, i.e. the State Office for Inventions and Trademarks.

Keywords: *drawings or patterns, administrative law, opposition, challenge, opposition examination commission, drawings and patterns examination commission*

1. Introduction

The scope covered by the topic of the proposed study is how drawings and patters can be protected by administrative law means also, which is relevant in the national law. Thus, through a short but concise study the author tries to identify the main drawings and patters protection methods in terms of administrative law (opposition and challenge), i.e. those means of protection that account for the protection title granted by OSIM for drawings and patterns registered. The importance of this study is to identify these means of protection and to detail them, and the goal is to identify as clearly as possible these means and to show their importance. The author responds to objectives set by explaining and substantially detailing research topic and discussion about it. Romanian legislation regulates this protection, i.e. Law no. 129/1992 on the protection of drawings and patterns and Government Decision no. 211/2008 for the approval of the Regulation enforcing Law no. 129/1992.

2. Content

2.1. Preliminary matters

According to the relevant Romanian legislation, i.e. Law no. 129/1992 on the protection of drawings and patterns and Government Decision no. 211/2008 for the approval

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of the Regulation enforcing Law no. 129/1992, rights over drawings or patterns may also be protected via administrative law[1].

Administrative law means ensure the recognition of the right during the procedure of registering the drawings and patterns and of issuing the drawing or pattern registration certificate, which, as mentioned above, represents the protection title granted by OSIM for registered drawings and patterns.

This category of means includes the *opposition* and *challenge*, which may be filed with the administrative authority ensuring the protection of drawings and patterns, i.e. the State Office for Inventions and Trademarks.

2. Opposition

Art. 21 of the Special Law on the protection of drawings and patterns in the version adopted in 1992, provided that any interested person could make written *objections* to OSIM on industrial drawing or patterns registration within 3 months from the date of its publication in the Official Industrial Property Bulletin – Drawings or Patterns Section.

Though not specifically mentioned in the law, the interested third parties who could object in writing, included: the holder of a prior drawing or pattern, the applicant of a request for industrial drawing or pattern having precedence over the published application, the holder of another industrial property right, the holder of a copyright or any other interested person[2].

In the analysis of the law in its version adopted in 1992, we see that the opposition was not provided as an administrative or jurisdictional administrative mean in the procedure for registering the industrial drawing or pattern.

Concurrently, we find that the resolution of written objections (remarks) was not made in a specific procedure, and finally a decision be adopted, instead the objections were taken into account when considering the merits of the application for registration of the industrial drawing or pattern. Also, the authors of written objections did not have parties to the proceedings, nor a fee for submission was levied.

Objections were not genuine means of appeal, but if reasoned, the result obtained was similar to that obtained by exercising the means of appeal. The review of objections was made by the commission examining the application for drawing or pattern registration[3].

With the adoption of Law no. 585/2002 amending and supplementing Law no. 129/1992 on the protection of industrial drawings and patterns, written objections procedure was abandoned and *the opposition proceedings were adopted*, whose settlement lies within the powers of opposition reviewing Commission.

Opposition is a petition that actuates a research, namely an administrative control the outcome of which the two persons with competing interests are concerned with, namely, the person who formulated the opposition and the person who filed the application for registration of a drawing or pattern. Thus, we consider, among other authors[4], that *"the opposition rather takes the form of a gracious intimation, which (atypically) is directed to a body of the consultative public administration."*

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[1] See A. Postavaru, *Means of defending the rights over industrial drawings and patterns*, material presented at the Symposium "Counterfeiting and protection of trademarks, industrial drawings and patterns", Eforie Nord, May 19-20, 2006, C. Feraru, *Defending the rights on drawings and patterns*, paper presented at the Symposium "Community design protection", Tulcea, July 28-29, 2008.

[2] C. Solzaru, P. Ohan, On objection and challenge in the procedure for registering IDP in the context of Law no. 129/1992, in RRPI (Romanian Journal of Intellectual Property) no. 5-6/2000, p. 51.

[3] V. Ros, *Intellectual property law*, Global Lex Publishing House, Bucharest, 2002, p. 516.

[4] Cr. Clipa, Jurisdictional and administrative bodies and procedures. Introduction to the study of public jurisdictionalised administration, Hamangiu Publishing House, Bucharest, 2012, p. 26.

2.1. Filing the opposition

Pursuant to art. 21 par. (1) the relevant specific law, interested persons may submit written objections to the State Office for Inventions and Trademarks on application for registration of the drawing or pattern, within two months of its publication, for the reasons set out in art. 22 par. (3) in the examination procedure.

The term "interested person" means "any person who has a legitimate interest related to the drawing or pattern in question and whose interests may be affected by its registration[5]." "Interested person" may also be any natural or legal entity that owns an earlier right over a drawing or pattern[6].

Regulation of opposition proceedings in drawings or patterns aims at preventing the occurrence of a potential conflict of rights between the ownership claimed and other rights that were previously recognized to another person.

The interest in opposition formulation coincides with interest justifying the exercise of the civil action[7] and must meet the requirements on the *legitimate, vested and present, personal and direct*[8] nature, and the conditions provided by art. 33 1st sentence of the New Code of Civil Procedure[9] according to which the interest must be *determined, legitimate, personal, vested and present*[10].

In connection with those interest conditions identified by law, we observe that the new legislator of the New Code of Civil Procedure preferred the attribute "determined" instead of the traditional phrase "*positive and tangible interest*" which, as Professor Ion Deleanu assessed, "*considered it ambiguous, vague and useless*." The new wording "*clearly and more rigorously calls for interest concreteness precisely to be expected judicial review*[11]."

2.2. Grounds of the opposition

According to art. 22 par. (3) of Law no. 129/1992 on the protection of drawings and patterns, application for registration of a drawing or pattern shall be rejected or the registration will be cancelled for the following reasons:

– failure to meet the provisions relating to conditions which a drawing or pattern must meet to be registered, i.e. to constitute a drawing or pattern, as defined, is new and individual and also upon its disclosure;

– the object of the application falls within the provisions of art. 8 (the drawing or pattern is determined solely by a technical function) and art. 9 which stipulates that the drawings or patterns which conflict with public order or morality are excluded from protection;

– incorporates, without the proprietor's consent, a work protected by Law. 8/1996 on copyright and related rights, as amended and supplemented, or any other intellectual property right protected;

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[5] Art. 2 letter p) of the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns.

[6] L. Badea *Third party opposition*, paper presented at the Symposium "Community design protection", Tulcea, July 28-29, 2008.

[7] V.M. Ciobanu, G. Boroi, T.C. Briciu, *Civil procedural law. Selective course. Multiple choice tests*, 5th edition, C.H. Beck Publishing House, Bucharest, 2011, p.4.

[8] See High Court of Cassation and Justice, civil and intellectual property department, civil decision no. 3315 of April 24, 2007 in RRDPI (Romanian Journal of Intellectual Property Law) no. 3/2007, page 178, in the selection and processing of M. Tabarca, High Court of Cassation and Justice, civil and intellectual property department, decision no. 2776 of March 10, 2009, in O. Spineanu Matei, *Intellectual Property (4). Court Practice 2010*, Hamangiu Publishing House, Bucharest, 2010, p 289.

[9] Republished in the OG. no. 545 of August 3, 2012.

[10] For details, see M. Tabarca, Civil procedural law, General Theory, Vol. I, Universul Juridic Publishing House, Bucharest, 2013, pp. 236-239, as well as comments from the case.

[11] I. Deleanu, *New code of civil procedure. Comments by articles*, Volume I, Universul Juridic Publishing House, Bucharest, 2013, p 82.

– constitutes an improper use of any of the items mentioned in the list contained in art. 6 ter of Paris Convention for the Protection of Industrial Property, as revised at Stockholm on July 14, 1967, to which Romania adhered by the Decree. no. 1.177/1968 or misuse of emblems and blazons other than those mentioned in art. 6 ter of the Convention;

– applicant has not demonstrated that it is entitled to the registration of the drawing or pattern for the purposes of art. 3, which refers to drawings or patterns created independently or as a result of creative mission contracts or by employees in their duties;

– the drawing or pattern conflicts with a prior drawing or pattern which has been subject to public disclosure after the date of filing the application for registration or after the priority date if priority is claimed, and which is protected from a date prior to the registration of a community drawing or pattern or by an application of registration of a community drawing or pattern, or by registering a drawing or pattern in Romania or by an application for obtaining protection in Romania;

– drawing or pattern uses a hallmark that provides the holder of that mark with the right to prohibit such use.

Opposition procedure is not regulated in any specific laws of the Member States of the European Union. Thus, given that Regulation no. 6/2002 on community drawings or patterns does not provide the opposition procedure either, the relevant legislation in France, Italy and the UK does not provide this procedure. The application for registration of the drawing or pattern is examined only by reference to the formal conditions.

2.3. Opposition content

The opposition shall be filed in writing and, according to art. 23 of the Regulations for the implementation of the Law no. 129/1992 on the protection of drawings and patterns should contain:

– directions on the drawing or pattern against which such application is made, and the file number, the name of the applicant and Official Industrial Property Bulletin – Drawing or Pattern Section in which that publication was made;

– directions of prior drawing or pattern or earlier right, which the opposition is based on, for each drawing or pattern;

– documents indicated in the notice of opposition must have legal date and be published before legal filing;

– the notice of opposition should also state precisely the opposing drawing or pattern (page and position in the opposable matter); every notice of opposition and acts in support thereof shall be submitted in two copies, one for the Opposition Examining Commission and one for the applicant;

– mentions on the quality and interest of the person formulating the opposition;

– the grounds underlying the opposition;

– name and address or registered office of the authorized representative, if appropriate.

Matters submitted in support of the opposition should be publicly accessible, taking into account the date when they were deposited in places where the public could take notice of, to be submitted in original or certified copy[12].

If OSIM finds that the opposition does not satisfy the requirements of paragraph (3) above, it requires the person who filed the opposition that within 15 days it remedy the deficiencies. If they are not remedied within the time limit, OSIM shall settle the opposition only under existing documents.

[12] Art. 23 par. (3) of the Regulations for the implementation of Law no. 129/1992 on the protection of drawings and patterns.

2.4. Addressing the opposition

The opposition shall not be considered if the above provisions are not all met and the legal fee is not paid[13].

Opposition shall be settled within 3 months of its submission by the Opposition Examining Commission consisting of a chairman and 2 members appointed by the chairman, and a legally qualified examiner in the Drawing and Pattern Division and the application examiner.

The examiner of the application, who is OSIM expert with basic responsibility of examining the applications for registration of drawings and patterns[14], communicates the objection to the applicant in order to submit its opinion within 30 days, according to art. 23 par. (8) of the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns.

If the applicant does not express its opinion, OSIM shall decide on the opposition, relying upon the records in the file.

Chairman of the Opposition Examining Commission, if deemed necessary, may invite the parties to the hearing set for the settlement of the opposition.

Opposition Examining Commission may accept or reject the opposition, drawing up, in this regard, a report in connection thereto. The report shall be submitted to the Commission examining the drawings and patterns for further examination in terms of fulfilling the conditions on the matter and shall be forwarded to the applicant and the opponent.

In conclusion, we find that for the settlement of an objection, the Opposition Examining Commission of OSIM allows conflicting parties to express their views on objection filed and propose evidence in support of their positions. Thus, solving an opposition to an application for registration of a drawing or pattern supposes passing a procedure pertaining to "*advisory-type public administration, but marked by numerous elements of apparent jurisdictionality*[15]."

As shown, the Opposition Examining Commission of OSIM completes its activities not issuing an administrative act, but with a report that "*in terms of formality, does not act as an administrative document, but as a technical-material operation*"[16].

Also, in terms of substantiality, the report groups the conclusions of the administrative body "on issues under consideration by specifying various matters of fact or law, the clarification of which will depend on the issue of an administrative act by another public administration body"[17].

In 2012, the Opposition Examining Commission of OSIM had to solve a number of 19 oppositions, of which 18 objections were introduced during the year. Of the 19 objections, the Commission resolved 15 objections, 4 oppositions whose term expires in the first part of 2013 pending settlement[18].

2.5. Suspension of opposition settlement

In some cases expressly provided by law, the resolution of opposition may be suspended. Thus, the settlement of the opposition may be suspended when relying on an application for registration of a drawing or pattern, until a decision is made in connection

[13] According to paragraph 12 of Annex no. 5 of GD no. 41/1998 on fees for the protection of industrial property and rules for their use, the fee for the examination of an opposition to the registration of a drawing or pattern is 30 euros, equivalent in lei at the date of payment.
[14] Art. 2 letter l) of the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns.
[15] Cr. Clipa, works cited, p. 25.
[16] Idem.
[17] T. Draganu, Acts of administrative law, Ed. Stiintifica Publishing House, Bucharest, 1959, p. 130, quoted by Cr. Clipa, works cited, p. 25.
[18] OSIM Activity Report for 2012, available at www.osim.ro

thereto, where, opposing drawing or pattern is the subject of an action for annulment by final resolution of the case[19].

However, both the legislation in force and the practice show that there are no regulations regarding the establishment of a deadline by which the opposition suspension procedure is settled, nor sanctions against the parties that do not apply that the opposition settlement procedure be resumed. For these reasons, we propose *de lege ferenda*, that provisions establishing deadlines by which the settlement of opposition may be suspended, be adopted and the possible sanctions if the parties do not apply for the procedure be resumed in order to complete the opposition.

From reading the art. 21 par. (3) of Law no. 129/1992 on the protection of drawings and patterns, we observe that the term in which the applicant may submit its views with regard to the opposition filed is two months[20], and in art. 23 par. (8) of the Regulation for the implementation of Law no. 129/1992 states that "the examiner of the application shall communicate the objection to the applicant for it to submit its views within 30 days."

Thus, we find that the two laws, namely Law no. 129/1992 on the protection of drawings and patterns and the Regulations for implementation thereof, provide for different times in which the applicant for the registration of a drawing or pattern can present its point of view with reference to the opposition filed.

Given these inconsistencies, and taking into account the provisions of art. 1 par. (5) of the Constitution of Romania, according to which "in Romania, observing Constitution, its supremacy and the laws is mandatory" and that the purpose of a regulation implementing a law is to allow the law be executed, to clarify concepts and legal situation arising from the law, and also to detail specific issues and/or procedures arising from the law in question, we believe that, as already shown in literature,[21] time in which the applicant for the registration of a drawing or pattern must present its point of view with reference to the opposition filed is that provided in art. 21 par. (3) of Law no. 129/1992 on the protection of drawings and patterns, i.e. *two months*.

To avoid misunderstanding, we consider *de lege ferenda* that in art. 23 par. (8) of the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns, the period during which the applicant may submit its views with regard to the opposition filed be two months.

3. Challenge

3.1. Introductory matters

The challenge, in the analysis of the matter, is a mean of appeal available to the applicant for the registration of the drawing or pattern, to challenge the decision of the Examining Commission of OSIM on application for the registration of a drawing or pattern.

The procedure for settling the challenge is provided both in art. 24 and art. 25 of Law no. 129/1992 on the protection of drawings and patterns and in art. 45-50 of Government Decision no. 211/2008 approving the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns. We must also mention that the provisions of art.

[19] Art. 21 [par. (5) letter a)-b)] of Law no. 129/1992 on the protection of drawings and patterns.
[20] According to art. 21 par. (3) of Law no. 129/1992 on the protection of drawings and patterns "*Within two months of the notification of opposition, the applicant may present its point of view*."
[21] C.Duvac, C.R. Romitan, *Penal and legal protection of drawings and patterns*, Universul Juridic Publishing House, Bucharest, 2009, p 137.

45-50 on the procedure for solving challenges is properly supplemented by the provisions of Code of Civil Procedure[22].

From the analysis of the legal provisions laid down in the special law and the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns[23], we find that people that have the right to file challenge against decisions on applications for registration of a drawing or pattern are persons who by law were communicated these decisions, namely:

– applicants whose application for registration of a drawing or pattern was rejected;

– applicants whose application for registration of a drawing or pattern was partly accepted to the record.

Therefore, from the above it results that the challenge procedure is not *inter partes*.

Concurrently, the legislation in force reveals that the report of Opposition Examining Commission prepared under art. 21 par. (4), last sentence, of the Law no. 129/1992 on the protection of drawings and patterns cannot be attacked by formulating a challenge by a third party - opponent.

Under the provisions of art. 21 par. (4), last sentence of Law no. 129/1992 on the protection of drawings and patterns and art. 23 par. (12) and art. 26 par. (6) of the Regulation for the implementation of Law no. 129/1992, the Opposition Examining Commission issues the report referred and submits it to the Examining Commission for further examination in terms of the fulfilment of conditions on the matter and is forwarded to the applicant and to the opponent. The decision of the Commission examining the drawings and patterns shall be based on the report prepared by Opposition Examining Commission.

The third party - opponent which is dissatisfied with how the opposition was settled, may, under art. 42 of Law no. 129/1992 on the protection of drawings and patterns[24], apply for the cancellation of the certificate of registration of the drawing or pattern in question at the Bucharest High Court.

Likewise, the legal literature following the adoption of the special relevant law[25], stated that the defence the law makes available to the third party – after the opposition settlement is the action for annulment of the certificate of registration of the drawing or pattern.

As far as we are concerned, we agree with this solution and appreciate that in this way the remedies are fair and equal to those of the applicant, i.e. the other party involved. In this way the provisions of Part III (Means of enforcing intellectual property rights), Section II, entitled "Civil and administrative procedures and remedies" are also observed.

3.2. The procedure for filing a challenge

Challenges shall be made in writing and filed with the General Registry of OSIM within 30 days of the communication of decisions on applications for drawing or pattern registration, made by the OSIM Commission examining the drawings and patterns. As shown, following amendments to the special relevant law in the Law no. 280/2007 amending and supplementing Law no. 129/1992 on the protection of drawings and patterns, the time to file a challenge has been reduced from 3 months to 30 days, which should be appreciated because it

[22] Art. 51 of the Regulations for the implementation of Law no. 129/1992 on the protection of drawings and patterns.

[23] Art. 46 par. (10) of the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns.

[24] According to art. 42 par. (1) of Law no. 129/1992 on the protection of drawing and patterns, "drawing or pattern registration may be cancelled, in whole or in part, at the request of an interested person, for the reasons set out in art. 22 par. (3). Cancellation may be required throughout the duration of the certificate of registration and is judged by the Bucharest High Court"[par. (2)].

[25] Y. Eminescu, *Protection of industrial drawings and patterns*, Lumina Lex Publishing House, Bucharest, 1994, p. 131, V. Ros, *Intellectual property law*, *works cited*, pp. 516-517.

is assumed that this will speed up the processing of applications for registration of the drawing or pattern.

Challenges shall be in Romanian language and, according to art. 46 par. (4) of the Regulations for the implementation of Law no. 129/1992 on the protection of drawings and patterns shall include: name, surname and domicile, residence of the individual or, if applicable, name and address of the legal entity filing the challenge; OSIM deposit and contested judgment number; object of the challenge; the factual and legal grounds underlying the challenge; power of attorney, if any; attaching proof of payment of the prescribed fee for the examination of a challenge[26]; signature of the applicant or of the authorized representative, as appropriate. If documents are written in a foreign language, certified translation thereof into Romanian shall be submitted.

The challenge may be made in person, by representative, attorney or legal counsel. Foreign natural or legal entities may file challenges and may bring conclusions before the Commission only by representative, according to art. 13 of Law no. 129/1992 on the protection of drawings or patterns[27].

3.2.1. Registering challenges

Challenges are recorded in chronological order in the Register of challenges. Record of challenges is kept on annual basis, starting each year from the serial number 1 (one). Challenges will be reviewed within 3 months from the filing of the challenge by the Commission of Challenge of OSIM Department of Appeals.

The Commission of Challenge of the State Office for Inventions and Trademarks *exercises special administrative jurisdiction and can be regarded as a court*[28] within the meaning of art. 6 par. (1)[29] with marginal name "The right to a fair trial ," of the Convention for the Protection of Human Rights and Fundamental Freedoms[30].

As mentioned above, special administrative jurisdiction is defined as "activity carried out by an administrative authority which has, according to special relevant organic law, the jurisdiction to hear a dispute concerning an administrative act by a procedure based on adversarial principles, ensuring the right to defence and independence of jurisdictional administrative activity.[31]"

The registry of challenges that records the challenges must contain, according to art. 50 par. (2) of the Regulations for the implementation of Law no. 129/1992 on the protection of drawings and patterns, the following items: the date the challenge was filed and the number under which the challenge was registered, surname, first name or the name of the appellant, subject of the challenge, the time limit for resolution of the challenge, the judgment of the Commission on challenge filed, number of receipt or payment order proving the payment of

[26] The challenge examination fee is 150 euros, equivalent, according to point 11 of Annex no. 5 of GD no. 41/1998 on charges of industrial property protection and rule for their use.

[27] According to art. 21 par. (1) of Law no. 129/1992 on the protection of drawings and patterns, "In proceedings before OSIM the applicant of the registration or its successor in title may be represented by an authorized industrial property counsel. For persons who are not resident or located in Romania, representation under par. (1) is mandatory, except for application filing" [par. (2)].

[28] C. Birsan, *European Convention on Human Rights*. *Comments by articles*, Volume I, 2nd edition, C.H. Beck Publishing House, Bucharest, 2010, pp. 487-503.

[29] According to art. 6, par. 1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, "Any person has the right to a fair trial of the case, publicly and within a reasonable time by an independent and impartial law court judging whether on his/her civil rights and obligations infringement or on the merits of any criminal charge against him/her."(...).

[30] The Convention was adopted in Rome on November 4, 1950 and entered into force on September 3, 1953. Romania ratified the Convention by Law no. 30/1994, published in the Official Gazette No. 135 of May 31, 1994.

[31] Art. 2 par. (1) letter e) of Law no. 554/2004 - Administrative Litigation Law, as amended and supplemented, republished in the OG no. 751 of November 6, 2007.

the fee for the examination of the challenge, the Commission decision number, the number and the date the judgement was communicated.

3.3. Procedure for challenge settlement

Settlement of challenge is made by the Commission of Challenge on drawings and patterns that is organized and operates under art. 24 of Law no. 129/1992 on the protection of drawings and patterns.

Commission of Challenge on drawings and patterns consists of the chairman and two members. The chairman is the CEO of OSIM or, by delegation of responsibility, Head of Department of Appeals. The two members of the Commission of Challenge are in the Department of Appeals, one of which is a legal counsel. The members of the Commission shall be approved by the CEO of OSIM. Commission secretariat is provided by an adviser in the Department of Appeals.

By analysing the special legislation specific for invention patents, we note that Government Decision no. 547/2008 approving the Regulation for the implementation of Law no. 64./1991 regarding invention patents[32] stipulates that „The members of the re-examination commissions cannot take part in resolving any challenge or requests for revocation if they have a personal interest in the challenge at issue or if they have participated, as examiners or members of an examination commission, in the invention patent examination application subject in the challenge"[33].

Although the special relevant legislation on drawings or patterns does not include a regulation regarding a state of incompatibility, the literature [34] states that, in order to ensure decisional autonomy, the specialists within the challenge commission should not have been involved in the examination proceedings.

Therefore, we hereby propose *de lege ferenda* adopting provisions by which an application to recuse be filed in the procedure of challenge against decisions regarding the application for registering a drawing or pattern, against a member of the examining commission who exerted a personal interest in the challenge at issue or if he/she participated, as examiner or member of an examining commission in the examination of application for drawing or pattern the challenge refers to.

Pursuant to art. 47 par. (1) of the Regulation for the implementation of Law no. 129/1992, the chairman of the challenge commission shall set the appeal session time and decide on summoning the parties. In this regard, the secretary of the challenge commission shall summon the parties at least 14 days prior to the date set for the settlement of the challenge, by mail, with acknowledgement of receipt. If the summoned party fails to appear at the date and time set, the procedure before the commission may be carried out by default.

The presence of parties at the challenge resolution term covers the irregularities regarding the summons procedure. The parties may appear before the challenge commission in person or represented by an authorized patent counsel or attorney. Legal entities may appear before the commission through a legal representative or legal counsel with a delegation.

The opinion of the commission examining the drawing and pattern, drawn up by an examiner within the Drawing and Pattern Service, authorized by the chairman of the commission examining the drawings and patterns, shall be attached to the case file at least 5

[32] Published in the Official Gazette no. 456 of June 18, 2008.
[33] Art 55 par. (4) of Government Decision no. 547/2008 approving the Regulation for the implementation of Law no. 64/1991 on patents.
[34] E. Stoica, Settlement of challenges on drawings and patterns in RRPI no. 4/2008, p 37.

days prior to the term set for resolving the challenge. The opinion shall include the response to the pleas de facto and de jure provided by the appellant in support of his challenge[35].

Compliant to art. 47 par. (8) of the Regulation for the implementation of Law no. 129/1992, the files for drawings and patterns registration applications, shall be provided in original copy, upon request, to the challenge commission by the drawings and patterns service, upon request.

The session is public. The challenge commission may decide on a secret session if a public dispute affects one of the parties or public order. The session opening, suspension or closure is called by the commission chairman.

The secretary of the commission shall verify if the procedure is complete and if the challenge examination fee was paid and informs the chairman of the aforementioned. Upon the term set, if the parties are present or if the summons procedure was duly effected, the chairman initiates the dispute and gives the floor to the party who brought the challenge.

The law entitles the chairman to question the parties[36], in order to clear the aspects shown in the appeal. The chairman is entitled to dispute any situation de facto or de jure in order to resolve the case even if such are not included in the challenge.

Moreover, under art. 48 par. (6) of the Regulation for the implementation of Law no. 129/1992, members of the challenge commission can also question the parties, but only through the chairman. The latter may allow members of the challenge commission to directly address questions.

Subject to the duly justified request of the parties or to the necessity of providing new evidence implied by the disputes, the challenge commission may grant a new due date, the parties being informed of the latter.

Upon dispute closure, the challenge commission shall deliberate in the absence of the parties and pronounce a decision on the same day during the session or, in special cases, may postpone the pronouncement for up to 3 weeks. The chairman listens to the commission members' opinions and finally pronounce a decision.

The session disputes and the commission decision are recorded by the secretary in the session registry.

Upon making a decision, the commission shall draft the operative part of the judgment, recorded in the session registry for each case, and the rapporteur shall draft the decision. Divergent opinions of the commission members are recorded in the operative part of the judgment under signature and are motivated separately.

We may conclude that the examination request subject in the appeal, „is a graceful request that only in exceptional cases and when confronted with opposition may be resolved as a result of a procedure riddled with jurisdictional elements"[37]. Therefore, the examination commission within OSIM (State Office for Inventions and Trademarks), invested with an application for registering a drawing or pattern, becomes a jurisdictional administrative body as the dispute resolution is rendered according to a procedure based on the adversarial principle, ensuring the right to defend and independence of administrative-jurisdictional activity[38].

3.4. Decisions of challenge commission

The commission decisions are made with majority of votes and shall be drafted in a single original copy, submitted with the commission decision folder and kept within the secretariat thereof. The decisions are signed by the chairman and members. If one of the

[35] Art. 47. (6) and (7) of the Regulation for the implementation of Law. 129/1992 on the protection of drawing and patterns.
[36] Art. 48 par. (5) of the Regulation for the implementation of Law. 129/1992 on the protection of drawing and patterns.
[37] Cr. Clipa, *works cited*, pp. 26-27.
[38] *Ibidem*, p. 498.

members is unable to sign a decision, the Commission chairman shall record such situation within the decision.

The commission decision shall be recorded within the Decision Registry of Challenge Commission and must include the following information: decision number; last name and first name or names of the appellant, of the authorized proxy or of the attorney, as the case may be; decision content; number of commission file, number from the commission session lists[39].

According to the provisions of art. 49 par. (6) of the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns, the Drawing and Pattern Challenge Commission may decide, in the settlement of the challenge on the matter on trial:

– to admit the challenge and forwarding the case to the Drawing and Pattern Service in order to implement the decision;

– to dismiss the challenge and uphold the decision against which the challenge was filed.

3.4.1. Withdrawal of challenge

If necessary, the Drawing and Pattern Challenge Commission may take note of the challenge withdrawal, through session closure, according to the provisions of art. 523 of the New Code of Civil Procedure, according to which "The appeal may be withdrawn at any time until its resolution. Once withdrawn, the appeal cannot be reiterated[40]". The possibility to withdraw an appeal is the expression of the principle of availability in the civil trial [41].

3.5. Ways of appeal against the decisions of a challenge commission

According to art. 25 par. (1) of Law no. 129/1992 on the protection of drawings and patterns, the decision of the challenge commission shall be communicated to the parties, in original certified copy, within 30 days from decision delivery.

Within 30 days from communication, the decisions of the Challenge Commission *may be contested* with the Bucharest High Court. The decision is only subject to an appeal with the Bucharest Court of Appeal[42].

The final decisions of the Drawings and Patterns Challenge Commission shall be published in BOPI – Drawings or Patterns Section, within 60 days from decision delivery [43].

Considering the aforementioned:

– against a decision pronounced by the Challenge Commission within the Directorate of Judicial, Contestation, International Cooperation and European Affairs of OSIM[44], the Romanian legislator *established distinguished means of appeal*, namely *the challenge*;

– the challenge must be promoted with the Bucharest High Court, a court with an exclusive material jurisdiction;

– against the first court decision of the Bucharest High Court, the interested party may only submit *an appeal within the competence of the Bucharest Court of Appeal*;

– The Bucharest Court of Appeal shall resolve the appeal and deliver a final decision.

Since the enactment of Law no. 129/1992 on the protection of drawings and patterns to the present day, provisions regarding the judicial control of decisions pronounced by the

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[39] Art. 50. par. (4) of the Regulations for the implementation of Law no. 129/1992 on the protection of drawings and patterns.

[40] Ban on reiterating an appeal is appreciated by Professor I. Deleanu "*that it does not correspond to the nature of the specific ways of appeal*." For details, see I. Deleanu *New Code of Civil Procedure, Comments by articles*, Vol. I, Universul Juridic Publishing House, Bucharest, 2013, p. 714.

[41] Idem.

[42] According to art. 25 par. (1) of Law no. 129/1992 on the protection of drawings and patterns, as in force on February 1, 2013. To date, the text of art. 25 par. (1) reads as follows: " *The decision of the Challenge Commission shall be notified to the parties within 30 days from delivery and may be appealed to the Bucharest High Court, within 30 days of notification*."

[43] Art. 25 par. (2) of the Law no. 129/1992 on the protection of drawings and patterns.

[44] Structure of OSIM management, according to GD no. 573/1998, was updated on July 30, 2013.

challenge commission have changed, the legislator noting, that the establishment of a jurisdiction of the Bucharest High Court to resolve appeals against the decisions of the Drawings and Patterns Challenge Commission of OSIM *was incorrect*.

Moreover, the establishment of this jurisdiction for the Bucharest High Court was repeatedly criticized in the literature. Thus, one highlighted that the appeal resolution was incorrect „*because the appeal is a devolutive remedy which may be exercised against judicial decision. Its extension to decisions pronounced by authorities with jurisdictional activities distorts the nature of the remedy of appeal, as well as the function exercised by the court of appeal*"[45].

Another author [46], shows that the notion of „appeal", although „suggestive in terms of full control, de facto and de jure, exercised by the court with regards to the decision of the jurisdiction authority within OSIM, was used inadequately, as, in this case, no judicial control was exercised so that a court was informed for the first time on verifying the legality and soundness of a decision pronounced by a jurisdictional activity authority, outside the court system".

On the same lines[47], one mentioned that „the decisions issued by the re-examination commission cannot be contested by appeal before a court of law, only as an action representing the main issue of the matter on trial, compliant to the law. The appeal is a devolutive remedy of appeal specific to civil procedure by which a decision by a court of law, and not by an administrative authority, is censored, whether the latter is granted following a remedy procedure similar to the one carried out before a court of law".

In conclusion, considering the aforementioned, we appreciate the changes made by the legislator to art. 25 of Law no. 129/1992 on the protection of drawings and patterns through Law no. 76/2012 for implementing Law no. 134/2010 regarding the Code of Civil Procedure, since the establishment of a jurisdiction for the Bucharest High Court to resolve appeals against the decision of Drawings and Patterns Challenge Commission within OSIM *was incorrect*.

3. Conclusions

The main directions discussed in the article aim at drawings and patterns protection in terms of national administrative law and through this proposed paper the author desired to identify the administrative law means aiming at and ensuring the recognition of the right during the procedure of drawings and patterns registration and the procedure for releasing the registration certificate for drawings and patterns. Without this procedure the desired result would not be achieve, namely the recognition of legitimate ownership of the invention (intellectual products) made. The expected impact is to understand the importance of this segment, better saying this element in the whole ensemble the intellectual property represents. For future research, my suggestion is to find common elements between domestic and international administrative law, namely those which are applicable to international regulations and conventions and which apply in the field.

References

- Postavaru, Means of defending the rights over industrial drawings and patterns, material presented at the Symposium "Counterfeiting and protection of trademarks, industrial drawings and patterns", Eforie Nord, May 19-20, 2006;

[45] V. Ros, Intellectual property law, works cited, p. 369.
[46] Gh. L. Zidaru, Considerations on the rules of jurisdiction contained in the New Code of Civil Procedure. Material jurisdiction (I), in RDP no. 3/2011, p. 187.
[47] A.L. Vrabie, Defence of industrial property rights by way of challenge before the Re-examination Commission of OSIM. Prior administrative procedure or special administrative jurisdiction, in RRDPI no. 3/2008, p. 129.

- Feraru, Defending the rights on drawings and patterns, paper presented at the Symposium "Community design protection", Tulcea, July 28-29, 2008. C. Solzaru, P. Ohan, On objection and challenge in the procedure for registering IDP in the context of Law no. 129/1992, in RRPI (Romanian Journal of Intellectual Property) no. 5-6/2000, p. 51.
- V. Ros, Intellectual property law, Global Lex Publishing House, Bucharest, 2002, pp. 516.
- Cr. Clipa, Jurisdictional and administrative bodies and procedures. Introduction to the study of public jurisdictionalised administration, Hamangiu Publishing House, Bucharest, 2012, p. 26.
- Art. 2 letter p) of the Regulation for the implementation of Law. 129/1992 on the protection of drawings and patterns.
- L. Badea, Third party opposition, paper presented at the Symposium "Community design protection", Tulcea, July 28-29, 2008.
- V.M. Ciobanu, G. Boroi, T.C. Briciu, Civil procedure law. Selective Course. Multiple choice tests, 5th edition, C.H. Beck Publishing House, Bucharest, 2011, pp. 4.
- High Court of Cassation and Justice, civil decision no. 3315 of April 24, 2007 in RRDPI (Romanian Journal of Intellectual Property Law) no. 3/2007, page 178, in the selection and processing of M. Tabarca, High Court of Cassation and Justice, decision no. 2776 of March 10, 2009, in O. Spineanu Matei, Intellectual Property (4). Court Practice 2010, Hamangiu Publishing House, Bucharest, 2010, p 289.
- M. Tabarca, Civil procedural law, General Theory, Vol. I, Universul Juridic Publishing House, Bucharest, 2013, pp. 236-239, as well as comments from the case.
- Deleanu, New code of civil procedure. Comments by articles, Volume I, Universul Juridic Publishing House, Bucharest, 2013, p 82.
- Art. 23 par. (3) of the Regulation for the implementation of Law. 129/1992 on the protection of drawings and patterns.
- Art. 2 letter l) of the Regulation for the implementation of Law. 129/1992 on the protection of drawings and patterns.
- T. Draganu, Acts of administrative law, Ed. Stiintifica Publishing House, Bucharest, 1959, p 130, quoted by Cr. Clipa, works cited, p. 25.
- OSIM Activity Report for 2012, available at www.osim.ro
- Art. 21 [par. (5) letter a) -b)] of Law no. 129/1992 on the protection of drawings and patterns.
- Article 21 par. (3) of Law no. 129/1992 on the protection of drawings and patterns "Within two months of the notification of opposition , the applicant may present his/her point of view."
- Duvac, C.R. Romitan, Legal and penal protection of drawings or patterns, Universul Juridic Publishing House, Bucharest, 2009, p 137.
- Y. Eminescu, Protection of industrial drawings and patterns, Lumina Lex Publishing House, Bucharest, 1994, p 131, V. Ros, Intellectual property law, works cited pp. 516-517.
- Birsan, European Convention on Human Rights. Comments by articles, Volume I, 2nd edition, C.H. Beck Publishing House, Bucharest, 2010, pp. 487-503.
- Art. 55 par. (4) of Government Decision no. 547/2008 approving the Regulation for the implementation of Law no. 64/1991 on patents.
- Stoica, Settlement of challenges on drawings and patterns in RRPI no. 4/2008, p 37.
- V. Ros, Intellectual property law, works cited, p 369.
- Gh L. Zidaru Considerations on the rules of jurisdiction contained in the New Code of Civil Procedure. Material jurisdiction (I), in RDP no. 3/2011, p. 187.
- L. Vrabie, Defence of industrial property rights by way of challenge before the Re-examination Commission of OSIM. Prior administrative procedure or special administrative jurisdiction, in RRDPI no. 3/2008, p. 129.

ORIGINALITY - CONDITION FOR PROTECTION OF SCIENTIFIC WORKS

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Andreea LIVĂDARIU**

Abstract

The Doctrine defines originality as a combination of fancy, audacity, individuality and novelty. This ensemble of ideas meant to define originality appeals to the patents/ certificates Law for which novelty/ innovation is not enough. It shall be accompanied by inventive activity.

The aim of the paper below is to clarify the question of the scientific works originality, by referring to the two appearantly contradictory norms and to their consequences over counterfeit/ imitation.

Keywords: *protection conditions, scientific work, originality, counterfeit, standard vocabulary*

1. Introduction

Originality is the essential and - according to some authors - the unique solution meant to protect the works (scientific works included) by copyright. Before being enforced by law, the originality of the works was consecrated by jurisprudence and doctrine. Yet - whatever originality means, whatever its mesurement unit is and whatever its limits are - they, all together, stand for matters which will probably never meet a unanimous opinion.

According to Petre Ţuţea, "***it is God alone who is really true and original***." According to "**The Ecclesiast**", "***then***, ***when there might have appeared something about which one could say***, **<<** ***look***, ***here is finally something new!*****>>**, ***that thing might have appeared and existed long before our centuries***" and, according to Terentius[1] Afer - the ancient poet and playwright - who deeply rooted his inspiration in his forerunners' works, and whose own works were - in their turn - a source of inspiration for the famous French playwrights, among whom Molière, "***nothing was ever said that had not been said before***." According to those authors, there is no originality or, this originality is not accessible to mortals.

Other authors - quite many in number - are confident with the original aspect of the works yet they also say that originality is aleatory and is to be found exclusively at the level of the wording.

Who is right and who is wrong?

The first category shall be rendered justice, unconditionally because the Bible can be neither denied nor contradicted! But who else, except Petre Ţuţea, defends the rightfulness of the Ecclesiast?

The other category is right because, according to the copyright Law, ideas are excluded from protection, and a non-original work is not simply called a work and is not

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[1] Who had even taken the name of his master - Terentius Lucanus - the one who had been training him - as being deeply impressed by his intelligence - and he who, ultimately, freed him from slavery.

suitable (if admitting that one's own creation can or shall be suitable) and protectable. In the standard vocabulary, the word "work" means an original work of art, a scientific work[2], etc. In the mind/mentality of the people the idea that there cannot be called a work without being the result of an original creative activity is deeply rooted and it appeared very long ago. In other words, a lacking originality work, is not considered to be a work at all. However, the copyright Law protects and supports both the writers and their works, but in no way those works lacking a minimal personal creative participation, neither those who cannot be original at all.

The last category is right because, according to the Law on good conduct applied to scintific research, technological development and innovation, ideas are protected. Yet, starting from this solution offered by the Law, certain authors extend the area from "objects"[3] to ideas.

The Law on copyright and on other related rights excludes ideas from protection, so that the two laws and their possible interpretations generate conflicts of ideas and among ideas: are ideas protected or not? How can ideas be protected by one Law and excluded from protection by another law? How can this conflict be settled?

The above mentioned opinions are, as one can easily notice, hard to be settled.

Ever since writers and art-consumers have appeared, the creators have been required to be original in order that both themselves and their works be protected. The lack of originality can find an explanation in the common, banal phrasing resulted from the creator's incapacity to be original (a benign form of lack of originality) or, from plagiarism/ literary theft, which is practically a malign, culapable form expressing lack of originality.

If speaking about scientific works, the ethics concerned with scientific research imposes the research-authors a loyal and correct behaviour with regard to their fellow writers whom they are supposed to recognize the paternity of their works and/ or the priority of their ideas, theories, data, hypotheses, scientific methods - briefly, the paternity of what Law no 8/1996 on copyrights and of the related rights excludes from protection. Whether, from the point of view of Law no. 8/1996, a counterfeit can be applied only to phrasing, to formal elements of creation bearing the mark of the creator's originality, from the point of Law no. 26/2004 on the good conduct in the scientific research, couterfeit, in the form of literary theft, can be applied not only to phrasing but also to ideas extracted from the works belonging to other authors whose names and works have not been mentioned.

2. On the originality of intellectual creations in general

In a very extensive sense, to be original means to be always yourself, irrespective of circumstances. In the domain under discussion - that is in a restricted meaning - to be original means to imitate no one, to copy no one then when you create and invoke the protection of your authorship by copyright! This means to have personality, style, individuality, personal way of speaking, of writing and of clothing the ideas into proper and adequate words. It means not to be common and trivial. The question is whether we can all be original or not. Can we be original in everything?

Each of us has his/her bit of originality arising for the uniqueness of his/her nature. This is, in fact, called personality, which is more or less shaped, more or less visible or identifiable! We resemble, to a certain extent, with one another, yet we are, in a way, different from one another - a perfect identification with one another is excluded. On the other hand we

[2] See DEX according to which work/ creation = original literary or artistic production.

[3] Intellectual creations are - as well-known - immaterial. That is why to speak about the intellectual creation as about an "object" seems somehow vulgar or inadequate as reported to the immaterial nature of the intellecual creation.

have a common and very large vocabulary (fund of words), knowledge, needs, pleasures but we also have rules that standardize our behaviour and reactions.

When stepping over the patterns we can be driven to isolation (either voluntary or forced!). Originality for originality sake or excessive originality is synonymous with bizarrerie, with extravagance or weirdness and they can make us fall into the ridicule. If - willingly or unwillingly - we try to conform ourselves to patters, we can also be turned into beings lacking - as we like to say - style or personality. The lack of any trace of originality is synonymous with no personality, with the commonplace. There shall be a golden mean in everything, in absolutely everything! A way of expressing oneself should characterize anybody, a way in which every person's personality should fully manifest itself without jeopardizing the others.

Still, what is the meaning of intellectual creation and what does it mean to create a work? From a lay point of view "***to create***" means to do something that did not exist before; the word "***creation***" defines the act (of creation) and its result, that is the result of creative activity in its various ways of expression (literary, artistical scientific works, inventions, drawings, models, etc.); the meaning is somehow closer to the Biblical term as, by "creation" it is understood the act God created the world alongside with space and time **out of nothing/*creatio ex nihilo*.**

For man, creativity manifested itself according to various stages of evolution, since ever: for the man who was to assure his living as a hunter or a reaper - in an economy based on agriculture, in the industrial revolution (which he practically unleashed), in the era of the intellectual property of our times - which is even more revolutionary than the preceding one - if we take into account the speed with changes are taking place.[4]

Real creators - in the sense given by the Law of intellectual property - are very few because men - equal before the law - are no more equal from birth/by nature: some are strong, some a feeble, some are endowed with an intelligence that was refused by mother nature to others, some are suspicious, some other indifferent or mere meditative, some are rulers and some submit to their rulers, some are inventive, some others indulge in reproducing the others' inventions, some are endowed with an imagination they use to write literature, music or to invent things, others are happy with only looking, listening, reading or making use of what the others have done and invented, some have the calling for a creative activity, others for the pleasure of consuming, etc. Yet, none of them can live alone separated from the others, because the creative activity makes sense and value only in the presence of consumers.

In their turn, the consumers feel the many benefits of the creative activity! Life might also go on in a world without creators/ makers of creative activities. We can certainly imagine a world with no weapons and wars but, just try to imagine a world with no writings, wheels, computers, telephones, cars and planes, with no radios and TVs and with no medicine. Just try to imagine that you should live in such a world!

The works - that are the product of man's spiritual activity - are the result of a conscious effort which is considered to be a common denominator concerned with any act of creation. The conscious act of creation is specific to any man endowed with the sense of proportions, with harmonious sounds pleasing the ear, to any man who is responsive to beauty, to a man who has the ability to investigate and invent, to deal with theoretical concepts, to understand the phenomena around, to a man whose capacity and strength can make nature serve him, briefly, to a man endowed with intelligence.

One of the meanings generally met with in the ordinary vocabulary and used to characterize ideas, theories or works is the word *original* that means - according to the DEX

[4]25-30 years ago it was believed that the amount of medical knowledge doubled every 10 years, while today, a period of 5 years seems to be too long. There are authors who say that the amounts double even sooner than 2-3 years. For more see Horia Cristian, on http.//horia-cristian.blogspot.ro.

(Explanatory Dictionary of the Romanian Language) - "*something that is particular and characteristic to a person or to an author; something that can be imitated by no one; something that is personal, new, and original*;" yet, when the same word is used to characterize an artist, a writer or a man of science it means "*the one who creates something new and personal without appealing to someone else's pattern*." But, to be original, does also mean "*that which is egregious, remarkable, weird, eccentric, extravagant*."[5]

In as far as the copyright is concerned, to be original in a work means to lay down one's own personality, to transpose one's own imagination into letters, to design the ego in the manner one chooses to express his/ her own ideas - and, all these for the final conclusion: to simply enjoy the Law of copyright for the sake of creation proper even if the work has not been made known to public. Consequently, originality can be regarded as an extension of each and every creator's uniqueness and personality, because whatever the copyright protects is the very personality of the creator manifested in his/ her work by means of his/ her own originality. Two writers describing the same place, two poets writing verses on the same theme, two sculptors carving the same bird will produce different original works, for it is the expression itself that marks their personal style and ego transposed in the work.

Originality shall be mirrored according to every man's uniqueness - an art creator in fact - and a definition of originality liable to exceed any explanation given in a dictionary or any legal significance of a norm will be - in my opinion - doomed to failure if pretending to be exhaustive and have a generally available character. That is why originality shall be regarded by reporting it to whatever we - people - are: a sum of infinite and different experiences and feelings.

The copyright protects creation in conformity with its originality which, depending on the law system, is considered to be objective or subjective. **From an objective point of view**, a work is considered to be original if, when compared with other previous works, the results prove that it is not copied (but that it brings in a certain novelty) and that it demonstrates a minimum intellectual effort. The objective criterion in appreciating originality is specific to the American, Anglo-Saxon and German copyright systems. **From a subjective point of view,** a work is considered to be original then when it bears the mark of its author's personality; this manner of interpreting originality is particularly specific to the Continental Law - French and Belgian - which has the longest tradition when considering originality in such a way.

The Romanian Jurisprudence and Doctrine have consented to define originality from a subjective point of view even before the Law no, 8/1996 on copyright and other related rights was approved.

The legislator himself approved the efficiency of the jurisprudence and doctrinarian solutions with respect to originality, attaching a special importance to the author's moral rights and emphasizing on the relationship between the author and his work: art 10, letter d) of Law no. 8/ 1996 protects the author's personality expressed in his own creation, and acknowledges him the moral right in respecting the integrity of his work, a right in whose basis **the creator/author has the right to object against any modification/alteration/change or to cause any damage to it as to be detrimental to his honor or reputation.** The Law defends this sound connection between creator and his work - a conclusive proof concerning the respect granted to integrity, for the fact that the work will outlive the author and that it will be transmitted to his legal successors - for an unlimited period of time - in agreement with the civil legislation (art. 11).

Originality shall not be discussed only by reporting it to the personality of the creator but it has to be appreciated from the point of view of the type of work (literary, scientific,

[5] *Explanatory Dictionary of the Romanian Language*, (Bucharest: Universul enciclopedic Printing House, 1998), 728;

dramatic, cinematographic, etc.) which lends originality its own characteristics. Written works shall be analyzed within the triptych idea-composition-external form - for these are the steps of any process of creation -, while with the fine arts works the idea is replaced by image (as the artist renders his ideas into images)[6] and with the musical works the idea takes the form of sounds.

Although, originality is an extension of the creator's personality into his own creation - a fact that leads to the conclusion that originality is the creator's monopoly - there are situations in which the author's own creation limits his capacity of being original. Such is the case of the scientific works when, "compelled" by the standardized vocabulary, the author can be less original when presenting the results of his research activity.

Under these circumstances, originality is not only a condition meant to protect the author's copyright but, at the same time, a situation permitting counterfeit. A work lacking originality will never be accused of being counterfeited. The border between counterfeit and lack of originality is liable to arise confusions; so, when the scales incline in one sense or another, it is necessary to take into account the fact that the scientific works are characterized by a standardized vocabulary, by a quite rigid way of expressing ideas and, the more technical the idea is the more reduced the granted juridical protection is.

3. Originality - a unique condition for protecting works by copyright

The Bern Convention on the Protection of Literary and Artistic Works, whose dispositions are applied in the countries of the European Union - as a recommendation but impossible to be directly imposed in the internal law - does not deliberately stipulate originality as a protecting condition by copyright. It should not be astonishing, because as it was stipulated in the French doctrine, the settlement of the protective conditions of works by copyright differ from one legislation to another: some mention originality without any further definition, some others do not mention it but, like in France, it is **implicit and indisputable**.[7]

Thus, the Convention makes reference to originality in order to establish the fact that the *derivated works are protected as being considered original works* (art. 2(2), or that *the cinematographic work is protected the same as the original work* without causing damages to the copyright of whatever work that could have been adapted or reproduced (art.14 bis, paragraph 1), or to establish that in case of *the original works and manuscripts of writers and composers, their authors profit by the inalienable right of being involved in the selling activities of his work*, after the first concluded assignment (art. 14 third, paragraph 1), speaking about the original work as if the the criterion of protecting originality were implied. Yet, art 2 paragraph 2 establishes that signatory countries of the Bern Convention can decide over their own legislation so that the literary or artistic works, or one/several shall not be protected, in as far as they have not been soundly justified.

Similarly, the French Code of Intellectual Property, does not explicitely stipulate that originality should be a necessary condition for the protection of the intellectrual works by copyright. The only reference to originality is the one about the title of the works which, "*as far as they have an original character, they are protected as the works themselves*"[8].

The French doctrine explained why they did not stipulate in the Law the protection conditions of the works by copyright, the problem of originality implicitely, by the fact that notions

[6] Yolanda Eminescu, *The Copyright*, (Buharest: Lumina Lex Printing House, 1994), 43.
[7] Fréderic Pollaud-Dulian, *Le Droit d'auteur* (Paris: Economica Printing House, 2005), 99.
[8] Art. L112-4 Code de la Propriété Intelectuelle (of 1992) available at http://www.legifrance.gouv.fr/affichCode?cidTexte=LEGITEXT000006069414)

specific to copyright - as for instance "works of spirit" and "originality" appeared - in the course of time - in a clear and systematized way by help of jurisprudence and doctrine.[9]

The silence of the French legislator in 1957 - when the first codification of the copyright took place in France - is justified by the fact that the Law of Intellectual Property intended to codify only certain framework-notions, and not to reinstate and transpose in a juridical norm, the principles settled by jurisprudence and doctrine.[10]

Neither the Romanian Law on Press of 1862 nor Law no 126 of June 28, 1923, on the literary and artistic property do not enumerate or explain the conditions for the protection of the works by copyright. Nevertheless, in the old doctrine, the question "*Is it legitimate the protection granted by the legislator to the literary and artisctic works*?" the following answer was given: "*Undeniably yes, because the author has to have the propriety over his work, **a work that bears the seal of his personality** because this right of property is based on the intellectual creation **whose origin is his inetelligence, talent and inspiration** because a literary and artistic work is, ultimately, **the product of the personal efforts of the author, without which the work would not have existed.*** So, what other manner is it to experss "the seal of peresonality**", "inteligence", "talent", "inspiration" or "personal efforts"!**[11]

Decree no. 321/18.06.1956 on copyright, follows the tradition of the previous norms, stipulating nothing with regard to originality that should be a condition for protecting works by copyright, but settled, in art 2, that "*the copyright comes into being the moment the work takes the form of a manuscript, sketch/ short story, theme, painting or any other concrete form*." Even so, the specialized doctrine enumerated three conditions for the protection of the copyright: to be the result of the author's creative activity, to appear into a concrete form, to be perceived by human senses and to be liable to be shared with the public; it was recognized that although the norm makes no reference to originality, the condition resides from the fact that "*the creative activity is a process in which a work is conceived and in which talent, fancy and the author's knowledge play a main role*"[12] and that "*the essential element of the intellectual creation is the very originality of the work itself*".[13]

Although Law no. 8/ 1996 establishes originality to be an express condition for the author's right to be protected by copyright (art. 7: *only the **original** works can make the object of copyright*), many authors keep saying that alongside with originality - in order for a work to be protected - it has to fulfill two more conditions: to have a concrete from of expression and to be able to share it with the public.[14] Yet, is it really the concret form of expression and the sensitiveness of a work to be shared with the public enough to protect the literary, scientific and artistic works?

The question is legitimate and the answer is negative - in our opinion. The concrete form of expression and the sensitiveness of a work to be shared with the public are, in fact, "melted" in the condition of originality: one cannot speak about a "work" and about the calling of the work before it has been really finished. Whatever has not taken a concrete form, does not exist and, consequently, it cannot be protected; but, for a work to exist, it is

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[9] Frédéric Pollaud-Dulian, *quoted works.*, p. 81. In the decision *Haddad c. Monnier*, The French Court of Cassation/ Appeal issued a statement of principle that "the dispositions of this Code shall protect the copyrights of all the works of spirit, irrespective of their genre, value or destination, with the sole condition that these works must be original", *ibidem* p. *82.* This jursprudencial decsion settles that originality is the fundamental criterion meant to be protected by copyright, the sole effficeint and necessary means by which a work can be protected.

[10] *Ibidem*, 81.

[11] Constantin Gr. C. Zotta, *The Literary and Artistic Copytight,* (Bucharest: Curentul Românesc Printing House, 1939), 38.

[12] Stanciu D. Cărpenaru, *Civil Right. Rights of the Intellectual Creation.Successions* (Bucharest: Didactic and Pedagogic Printing House, 1971), 38.

[13] Ibidem.

[14] Yolanda Eminescu, *quoted works*, 41-44; Ioan Macovei, *Treaty on the Right of Intellectual Property*, (Bucharest: C.H. Beck Printing House, 2010), 43; Ciprian Raul Romiţan "Originality - A Main Condition for the Protection of the Intellectual Creations in the Literary, Artistic and Scientific Domains" in *"The Law"* no. 7 (2008), 73.

necessary that the idea should take shape outside the conscience of the author, so that to be able to be brought to the knowledge of the public.[15]

Consequently, we believe that **the condition of originality "absorbs" the other two conditions, because it stands to reason that no appreciation can be made about something that has no form of expression, that is about something that is not perceived by human senses.** It is true that there are works that shall be indispensably[16] fixed on a support (without being necessarily understood that the support is a protection condition by copyright); among these works are: audiovisual, photography, fine arts. A work that exists in the author's imagination only, cannot be protected. To be able to say that a work is original or not, the work has to have a perceivable form of expression and the sensitiveness to be shared with the publlic. This the reason why the condition of originality is sufficient to make a work benefit by the protection of the law.

4. Why are ideas excluded from the copyright protection?

The term "idea" is used in a general manner**, for various forms of logical knowledge, but its meanings are many.** Such senses are of interest for the theme under discussion: general principles, abstract rules, concepts, theses (comprehensive, basic), theories, scientific discoveries and concepts; methods (accounting, education, etc.) or algorithms (on which computer applications are made), thinking, way of interpreting, opinions, suggestions, solutions, plans, projects, etc.

Ideas belong, by definition, to the domain of knowledge/cognition and are asimilated - by the law of copyright and other related rights - to theories and discoveries. They slip from any attempt of approach, as they have the privilge of being eternally free, of permanently being on "no one's land" but of everybody's, at the same time. Their are part of a common fund, made up of whatever created and transmitted humanity in time (knowledge in the domain of science, morals, religion, etc.) a sound enough reason to exclude them - in their rough aspect - from any kind of protection. Such assertions as "the more you insist on your idea, the more you are persuades that it belongs to another", or "all our ideas belong, practically, to others" are almost accepted as laws of the creative work.

A general principle stipulated in the Copyright Law excludes the idea from protection; the copyright does not protect ideas, but the manner they are expressed.

Ideas, theories, concepts and discoveries contained by a work - no matter of the way of their being taken over, written, explained or experssed - cannot benefit by the legal protection of the copyright and are not protected by the copyright proper, when **taking into consideration the dramatic consequences such a protection might have for the evolution of science and culture.** As reported to the work, **the idea is the raw material**, the source of inspiration. There is no personal idea to be protected by the copyright, but only personal treatment of ideas, themes, subjects/ topics. It is only the power to give ideas a concrete, personal form, to spread them in an original manner, then the act of creation becomes protective. This means that - once an idea expressed by somebody - can be taken over; the one who uttered it first has no monopoly/ exclusiveness on it. Yet, a justified/ explicit idea is its very expression, and it is this expression that makes the object of the copytight.

The exclusion of ideas from protection, by copyright, is based on the fact that they are susceptible to be approached and on the fact that the recognition of a privative right of ideas would hinder any activity of creation. For André Gide "spirit does not advance but on the

[15] Viorel Roş. Octavian Spineanu-Matei, Dragoş Bogdan, *The Copyright and the Related Rights*, (Bucharest: All Beck Printing House, 2005), 99.
[16] *Ibidem,* 95.

corpse of ideas". As a rule, any idea can be expressed in different ways, but to protect the idea which was at the foundation of a work would create a monopoly to be used by the author over an entire genre of works, not only over one specific work. The problem is even harder to be solved when the idea and the form in which it appears are difficult to be separated from one another, as it always happens with arrangements or interviews.

In France, not having a legal consecration, the principle was concluded by the doctrine according to which: "***Thinking, in itself, slips from any form of approach; it remains in the sacred domain of ideas, whose privilege is to eternally be free***." Unlike the French Law, the Romanian Law deliberately consecrates this principle, by stipulating in art 9 that: "There will not benefit by the legal protection of the copyright (...) ideas, theories, scientific discoveries, proceedings, means of functioning or mathematic concepts as such and inventions contained by a work, no matter of the way of their being taken over, written, explained or expressed." Even if the ideas are not protected by copyright, this does not mean they do not benifit by any protection at all. Under certain circumstances, the appraoch/ the nearness of an idea belonging to another person can be sanctioned within an action of unloyal competition or for the violation of certain pre-contractual obligations. The researchers are quite peremptory when saying that "men and ideas are expensive."

Besides, not even the opinion according to which ideas are not protectable is not unanimous. **There are authors who, in the name of equity, consider that ideas should be protected -** especially in those cases when the artitic idea is transmitted to a third in order to be accomplished. Concretely, it is about advertizing ideas or creations; the domain of computer applications or the TV programs are confronted with similar problems. Publicity is the object of activity for certain private persons or trading companies who do not restrict their activity to only publicity, posters, press, radio and TV programs, etc. With this aim in view there are created original works (literary, artistic, musical) able to vouchsafe the creators' copyrights. The idea - according to the adepts who protect it - cannot be taken over, given a form and used by other people, unless the person whose idea was first pretended a compensation, which will be inequitable. As for the TV programs they say that "everybody copies eveybody" and that "the great Americam television companies copy each other shamelessly", so the ideas-theft accusations are very frequent.

As for the Romanian Law, this opinion cannot find any support in it, **because it excludes from protection ideas, both implicitely - when it grants protection to those works having a concrete from of expression and explicitely - when it stipulates the fact that ideas cannot be a matter concerning the copyright.**

On the other hand, if it is correct to say that ideas are not given protection by copyright, it is not correct to maintain that they are not given any protection at all; protection can be obtained in other ways. More particularly, ideas can be protected in action, against an unloyal competition (such a case may appear only when the usage of the idea derives from a competitor who makes this contrary to any loyal and honest customs).

In practice it is often difficult to settle a frontier between the unprotected idea and its protective expression. The difficulty is even greater then when it is accepted the fact that protection by copyright extends over the composition of the work, that is over the concatenation of ideas that leads to the scenario and the texture of the work - the intrinsic form - without limiting itself to the exterior form, only - that is the expression/ manifestation. The French jurisprudence and doctrine considered that: 1) the history of the breaking up of the relationship in a couple is a free usage; 2) the simple idea of a TV broadcast on film stars is not protected by copytight; 3) in publicity, the idea to compare the ordinary bleaching by help of a detergent is not approachable; 4) but, the producer who transmits a thrid person the idea from where a melody was composed, committed a punishable offence.

In practice, in Romania, there is a tendency to also include in the sphere of plagiarism/ literary theft the appropriation of ideas and arguments belonging to another author. Consequently, the definition given by the Editorial Committee of the Europolis Magazine of the Faculty of Political and Administrative Sciences within the Babeş-Bolyai, Cluj Napoca, is: "Plagiarism is the presentation - as if one's own work - of the words, ideas and arguments belonging to another person, without a correct recognition of the sources, by quotations, references or notes. Consequently, one can speak about plagiarism then when the words of a certain person are reproduced as such, with no mention of the source, but also then when another person's ideas or arguments are paraphrased in such a way that the reader may believe that they belong to the author of the text." The men of letters do not embrace such an extremely severe vision about plagiarism that oversteps even the limits of the legal protection.

The copyright does not protect ideas. This general principle has two meanings, according to the significance given to the word (idea). If 'idea' means the content, the essence of a work - that is whatever it is attempted to be transmitted by the respective work - than the principle decides that the object of protection should be the form, the materialization of the idea and not the idea itself; in such a case the form becomes the object of protection. If, by idea, it is understood 'pure thinking' non-exteriorized (mental activity), than the above mentioned principle demands that the work should take a form perceivable by senses; in such a case the form appears to be a protective condition.

Acccording to art. 9 letter a) of Law no 8/1996, the ideas contained in a work cannot benefit by the copyright legal protection. This article illustrates the first meaning of the above stated principle. But, if the ideas already materialized, rendered and used within the content of a work cannot be legally protected, much more than this is this aspect of protection excluded when it is about non-exteriorized ideas. Consequently, an indispensable condition of protection refers to the fact that ideas should be exteriorized in the form of an intellectual creative work, in order to benefit by protection.

It is not always easy to make a distinction between idea and expression. Once an idea expressed it bears the mark of the personality of he who had formulated it, yet it does not make it protectable. The exclusion of ideas from protection is based on the fact that they are not approachable, because the recognition of a privative law on ideas will hinder any creative activity. The use of ideas from a pre-existent work is licit, because the ideas are not protected, but if the taking-over extends to the form that clothes the idea, this is a counterfeit already. Ultimately, it is a problem of appreciating the barrier - which once crossed over - places us on the ground of illicitely use of a pre-existent work or of the counterfeit.

5. Originality of the scientific works and the apparent law/legal conflict over the protection of ideas

If originality is manifested differently in conformity with the capacity of the creator to express - in a more or less elevated or more or less sensitive way- his own ego and his own feelings, the manifestation of originality can be, at the same time, censored by the category of works his creation belongs to. The scientific works protected by copyright belong to a category of creation which deserves a careful analysis within the bounds an author can be original, from this point of view.

A literary work appeals to **feelings and senses,** while the scientific work appeals to **intellect.** The role of the scientific work is not meant to produce and impress through aesthetic values, but to transmit information, knowledge and ideas in a most intelligible way. That is why the language of the scientific works is - to a certain extent -standardized and, in some cases (see the scientific works belonging to exact sciences) one can hardly speak about originality - in the common meaning of the word - within the framework of copyright. The

scientific works can be written or oral; the law, in art 7 letter b) enumerates among them: **communications/ dissertations, studies, university courses, manuals, scientific projects and documentations.**

This category of works made the object of long doctrinary disputes, because it was considered that a clear delimitation should be made between those **scientific works** that give rise to copyrights and the **scientific results emphasized by such a work** for which it would necessarily obtain a special protection. Those who objected against a scientific protection of the scientific discoveries appealed to two arguments in the defence of their position. The first refers to the insurmountable difficulties of organizing such a protection and, the second, to the fact that such a protection is alien to copyright. No wonder that the International Convention concluded in Geneva and having on its agenda the protection of the scientific discoveries, did not come into force, because it was not ratified by the necessary number of states, so, the problem on the protection of the scintific discoveries seemed to be forgotten until nowadays.[17]

In the disputes on the object of how to protect the scientific works, there are two **dominant opinions**; they can only confirm the particularities presented by the criterion of originality, with reference to this kind of works. The first considers that the object of protection could be the **scientific originality** not the oral or figurative way of expression. The second considers that originality of a scientific work is given by the extent in which the author - who is a man of science - succeeds to give his ideas a precise and exact phrasing.[18]

In the Romanian Copyright Law art 9 letter a) there are definitely excluded from protection ideas, theories, discoveries and inventions contained by a work. As all these are the very scientific originality of the work, we can but embrace the second opinion, according to which, whatever makes the object of protection in case of a scientific work is the form in which the author explained the results of his research activity. By a decision of the American Supreme Court (1978) the copyright protection was refused because of an accounting method. In the decision pronounced by the Court it was mentioned: "*the copyright for a work in mathematical sciences cannot give the author an exclusive right over the suggested method and solution*."[19]

Nevertheless, the analysis sould be continued in order to see which is the degree of protection granted to such a creation characterized by an abstract, arid, technical, difficult and rigid language. How does the degree of protection by copyright of such a work can appreciate the existance or the non-existance of a counterfeit? Is the condition of originality replaced by the condition of novelty as regarding the scientific works? Are the two opinions excluding each other or do they co-exist?

A deeper analysis is required if considering the fact that the scientific works benefit by the "privilege" of a more complex regulation; in their situation the following Laws are influencial: Law no 206/2004 on the good conduct in scientific research, technological development and innovation, Law no 319/2003 on the Statute of the research- development personnel and Law no 1/ 2011 on the national education that defends both the scientific work and the creator who makes an innovation and who makes efforts to research there where nobody did that before, and which sets up a protection for ideas.

Law no 8/1996 explains what does it mean the object of the copyright for the original intellectual creations in literature, arts and science, irrespective of the kind of creation, its manner of expression and of their value and destination (art 7). **From the point of view of the copyright Law, a scientific work benefits by protection if it is original;** in such a case,

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[17] In such countries as USSR, Bulgaria and Czechoslovakaia, the previous regulations definitely protected the scientific discoveries; the new Czech law stipulates that discoveries that achieved protection under the influence of the previous law are still protected.

[18] See Yolanda Eminescu, *quoted work*, 88-89.

[19] Jules Marc Boudel, *législation des Etats-Unis sur le droit d'auteur*, (Bruxelles: Ed. Bruylant, 1990), 51.

originality is appreciated in conformity with the specificity of the language, ideas and arguments contained by the work. But, because ideas must circulate freely, without becoming the object of a singular approach - as it is in the interst of the social, cultural and economic development that the humaneness fund should be made up of knowledge achieved and discovered along centuries and meant to be at the hand of whoever wants to build more on them - Law no. 8/1996 excludes from protection, among other things, "ideas, theories, concepts, scientific discoveries, procedures, means of working or mathematical concepts as such, as well as inventions containd by works, irrespective of the way they were taken-over, written, explained or expressed."(art 9 letter a).

If Law no. 8/1996, with no exception, deprives ideas of protection by copyright, another norm - that is **Law no 206/2004 on the good conduct in scientific research, technological development and innovation, stipulates - in art 4 paragraph 1 letter d) - *that the use - in a written work or in an oral communication* (*even if in electronic form*) - *of certain texts, expressions, ideas, demonstrations, data, hypotheses, results/ solutions or scientific methods extracted from the works of other authors, without mentioning the original sources*, is plagiarism.**

Under these conditions a natural question arises: whether these two legal provisions are in conflict with one another and should or might be reconciled.

Before finding an answer to it, mention shall be made that in the Romanian Law plagiarism is a manner of counterfeit specific to all written works and that Law no. 206/2004, that defines plagiarisn in art 4 paragraph , letter d) puts a sign of equality between counterfeit and plagiarism - plagiarism being, in essence, an un-authorized reproduction of someone else's creation.

As for the possible conflict between Law no. 8/1996 and Law no. 206/2004 on the exclusion of ideas from protection by copyright, it must be first noticed that the provisions of **Law no. 296/2004 address to categories of personnel belonging to social or private environment who benefit by public funds for research and development and who shall respect the aim of having a good, correct and loyal conduct in their research and development activity** (art 1 paragraph 4). Plagiarism, the way it was defined in art 4 paragraph 1 letter d, is considered a disregard for the norms of good conduct in the activity of communication, publication, dissemination and scientific populatization (art 2^{1} paragraph 2 reportedto art 2 letter b), the theft of the results or publications issued by other authors being considered serious violations[20] from the good conduct in the scientific research and the universitary activity (art 310 of the Law of National Education no 1/201).

If the doctrinary and jurisprudential interpretations of Law no. 8/1996 on the copyright and other related rights defined originality as a subjective criterion for the protection of creation, stressing on the importance given to the author's own mark on the expression he clothes his ideas in and whose monopoly is not hold by any other person, Law no. 206/2004 seems to be tributary to the *copyright* system according to whichh originality exists then when a minumum intellectual effort is made; this can be understood as the absence of a copy.

From the economy of the provisions of Law no. 206/2004 it resides that **the persons who work in researh and development activities are required to come up with novelties in their domain of activity, and the taking-over of ideas, expressions, texts, theory demonstrations should be recognized by their paternity and authorship.** This is a normal fact to be admited. Research means improvement of knowledge, investigation of new and not

[20] Law no. 206/2004 provides that all violations from the norms of goof conduct in the activity of research and development (plagisrism included) will be discussed and analysed within the institution where the violation was committed and, as a result of the report the discussions will extend to the National Council on Aethics (which can have their own motion) and they will write a report containing: an argued decision about the existence of one or more violations, the culpable person and the suggested sanctions. In other words, one cannot speak about plagiarism if it was not recognized as such by a decision of the National Council on Ethics.

totally known horizonts, searcing and finding answers to new, unknown, unapproached problems or enriching the older ones, it means competition but, at the same time, the recognition of the priority of those who, through their own efforts, research and investigations could reach new conclusions and answers, formulate hypotheses and solve problems that had no solutions. It was them who came with new ideas in their own domain of knowledge and research.

Consequently, scientific research presumes looking for the new, for innovation; but innovation shall be based on loyal values as: responsibility, correctness, honesty. These are the very values protected by Law no. 206/2004, Law no, 1/ 2911 on national education, Law no. 319/2003 on the status of the research and development personnel, which enumerate and punish unloyal conducts: plagiarism; self-plagiarism; inclusion in the aurthors' list one scientific publication belonging to one or several co-authors who have not significantly contributed to the publication; or exclusion of some co-authors who have significantly contributed to the publication; inclusion, in the list of authors, a scientific publication belonging to a person without his/ her consent; the authors' unauthorized publishing or dissemination of certain results, hypotheses, theories or unpublished scientific methods; introduction of false information in case of applications for grants and financing; in the candidature dossiers for the empowerment certificates; for university didactic positions or for positions in research and development (art. 2^1 of Law no. 206/2004).

The Law considers all these aspects violations of the norms of conduct and can be punished by one of the measures stipulated in art 14 of Law no. 206/2004: wtitten warning, withdrawal and / or correction of all the works published by violating the norms of good conduct, withdrawal of the title of a doctor, etc.

In the acception of Law no. 8/1996, which excludes idea from legal protection, its author cannot use - for the defence of his/ her own idea - the moral and patrimonial prerogatives conferred by copyright, not even to pretend the recognition of his/ her quality of an author (paternity of idea). While, according to Law no. 206/2004, the taking-over of an idea without indicating the source - name and work of the writer - is considered "plagiarism"; this means that by plagiarism it is violated loyalty against the creators who became a source of inspiration.

If the aim of the first norm is to protect, by copyright, the author's original creations, by establishing a specific juridical regime for this right, the second norm is meant to regulate the necessary framework for the development of a scientific research governed by academic probity, able to stimulate good personal results (that is why one of the basic rules is to indicate the sources).

Taking into account the various aims for which the two norms were edicted - according to the already drawn considerations - we believe that the two norms have not come into a conflict with each other[21], because the "idea" spoken about in Law no. 206/2004 has a different acception than the"idea" of Law no. 8/1996: **the idea forbidden to plagiarism** has the meaning of **opinion, solution or vison of a subject, expressed in the scientific reasearch activity, an activity which is encouraged to be innovatory.** The idea forbidden to plagiarism - and which, when is submitted to plagiarism, is protected by one of the sanctions stipulared in art 14 of Law no. 206/2004 - is that idea that has a character of novelty and which is visibly identified with the author's paternity, and so, it shall be protected as such.

[21] It was said, in the specialized literature that we find ourselves in face of two norms (Law no. 8/1996 and Law no. 206/2004) presenting apprantley contradictory dispositions which do not allow to make a distinction for which of the two plays the role of a special law. See Ligia Dănilă Cătuna "Works and Ideas, Plagiarism. Exception of Exceptions" in *Romanian Magazine on Law of Intellectual Property* 1 (2009), 57.

The idea excluded from protection is understood as an abstract concept, generally known, an undisputed and accepted as a universally available thesis, a theme of a work, sketch or of an yet unfinished project. **And because whatever the Law no. 206/2004 protects is the new idea, theory, the scientific method discovered by an author, the demonstration and conclusion to a question to which no answer has been found yet or to which another answer was expected, obtained by work, creativity, imagination and sacrifice - after having filtered through reason and soul and given the personal mark and novelty, but also because the protection insured to ideas and theories in such a way takes place in the context of the scienific research, development and innovation, between the two - Law no. 8/1996 and Law no. 206/2004 - the latter is the special norm in as far as the protection of ideas is concerned.**

Whatever Law no. 206/2004 tries to do when interdicting plagiarism, is to defend and protect the moral right of the author of a text, work, thesis, idea, demonstration, bringing in novelty obtained during the activity of scientific research.

Within the same context, art 141 of Law no. 8/1996 considers it a violation **punishable with prison from 3 months to 5 years or a fine from 2,500 lei to 50,000 lei the deed of a person who appropriates, without reason, the quality of being the author of a work.** The act of "committing plagiarism" (counterfeit) translated into the copyright Law means to appropriate, without reason, the quality of an author over his own creation; yet for appealing to penal responsibility, this deed must demonstrate the degree of social danger stipulated by Law (art 18-18[1] C. pen.), that it had been made deliberately, and that the creation itself should benefit by the protection of the Law; in other words, to be original, otherwise they become incidents to the disposition of Law no. 206/2004.

Some confusion is hanging over plagiarism - which, ultimately is a form of counterfeit, specific to the written works, as very often plagiarism is also understood as the creation of a work lacking originality or as a quotation which is not conform with the academic norms (although the sourse of the take-over is indicated, the context does not clarify who is the real author). That is why we consider it necessary to give some explanations meant to clarify the diffrenece between the non-observance of the academic norms of quoting and counterfeit on one hand, and lack of originality and counterfeit, on the other.

6. The opinion of Professor Nae Ionescu on ideas and the position of his critics

In the period between the two World Wars, Nae Ionescu, professor at the Bucharest University, used to make full amphitheatres and always impress the audience. He did not have a wtitten course but notes, only, like Istrate Micescu.

Deliberately or accidentally, he insisted upon the problem of originality and of the limitations of this condition, saying that "***in philosophy originality cannot have another meaning than that of one's own effort of reasoning, of the genuineness of philosophizing. One lacks originality not because one says whatever had been said before, but because one accepts to take for free the others' sayings/ words (...) That is, without thinking" (...) do not tell me that these or those ideas are not mine; I can answer you that the father of an idea who did nothing more than to conceive it and than forgot about is not much more imporatnt than the one who adopted it, cleaned it, taught it and placed in the right place."***

Nowadays, the originality of his works was raised for discussion, the pros and cons opinions being impregnated with political arguments, as well, totally alien to the problem under discussion. The discussions were an occasion for the expression of extreme points of view. So, while Mr. Baconsky said that "***We do not write only because we have learned to read our predecessors***", Mr. Nicolae Manolescu considered that "***a confusion is made between filiation (which refers to ideas) and plagiarism (which refers to the text). Nobody***

contests that ideas circulate freely and that an absolute originality is impossible. But the theory of Mr Baconski, who started his speech by saying <<We do not write only because we have learned to read our predecessors >>, although true in content shifts the problem from the textual to the ideational field. Any man of science who writes has at his disposal two means to demonstrate that he had been reading his predecessors: the quotation marks and the mention of the source. If neither one nor the other appears in Nae Ionescu's course of metaphysics indubitably throws him in the sphere of plagiarism."[22]

7. Conclusions

- Originality is the only one condition meant to protect a work by copyright: **the condition of originality absorbs the other two conditions, standing to reason that no appreciation can be made about something that has no form of expression, that is, about something that is not perceptible by human senses.**
- In the acception of Law no. 8/1996 that excludes idea from legal protection, its author cannot use, in the defence of his own idea, the moral and patrimonial prerogatives conferred by the copyright, not even to ask for the recognition of his quality of the author of the idea (paternity of the idea). While, according to Law no. 206/2004, the take-over of the idea without indicating the source - name and work of the author - is considered to be "plagiarism". (as the moral right of the quality of an author was violated). Thus, we can say that **the idea is both excluded from protection and, at the same time, protected!** In the analysis of the so-called conflict between the two norms (Law no. 8/1996 - that excludes ideas from the copyright protection and Law no. 206/2004 - that defends the paternity of ideas) we have to take into account the different aims of the two mentioned norms: if the first protects the original creation , by copyright, by creating a juridical regime to this right, the aim of the second regulates the framework necessary for the development of the scientific research activity governed by academic probity, meant to stimulate the obtaing of personal results (one of the basic rules being that of mentioning the sources of research). Taking into account these different aims for which there have been edicted the two norms, they do not contradict each other; the more so as the "idea" mentioned in Law no.296/2004 has a different acception than the "idea" mentioned in Law no. 8/1996: the idea forbidden from plagiarism is considered opinion, solution, vision on a certain subject, while idea excluded from protection is considered to be an abstract concept, generally-known, undisputable and accepted thesis, universally available, subject of a work, sketch, unachieved project
- The restrictions of the copyright, the way they are regulated and stipulated by art 33 of Law no. 8/1996 have as corollary the right of a third person to reproduce, use, distribute, transform or make a private copy, without the consent and with no payment to the titular of the patrimonial rights, a right which, practically, is a breaking of the exclusive character of these prerogatives, legally recognized to be in favour of the titular of the copyright.
- The conditions to be fulfilled for a quotation to be licit are: the work the quotation is taken from to be brought to the public knowledge; the use of quotations to justify their length; their use shall be in conformity with the good manners; their usages should not be abusive; thier usages should not bring prejudices to neither the author nor to the titulars of the right to use.
- Before proceeding to the examination of a possible counterfeit, it has to be setteld if the text/ work submitted to analysis is original, as **originality represents a criterion that shall be taken into consideration when establishing the character of a protectable written work and when analysing the licit character of the copy, as well**
- Under the condition in which the originality of the scientific works appears more in the form in which the author chooses to present the results of his research - and less

[22] Literary Romania 6 (1995).

or not at all in the very content of the ideas that cannot be expressed otherwise, but in the form used by predecessors, because of the technical, specialized and uniformed language - the examination of a possible illicit copy is made by taking into account the form of the text, the succession of arguments, their distribution into sub-chapters and afferent sub-titles, as well as other elements connected with the expression of the text.

- One cannot speak about an illicit copy of a scientific work then when the one suspected to have committed a counterfeit act took insusceptible protective elements - as they belong to the public domain - neither then when there are inherent similitudes due to the form of the specific expression of the scientific work.

References

Specialized Works

- CĂRPENARU, Stanciu D., *Civil Law. Rights of Intellectual Creation. Successions.*, Didactic and Pedagogic Printing House, Bucharest, 1971.
- EMINESCU, Yolanda, *The Copyright*, Lumina Lex Printing House, Bucharest, 1994
- MACOVEI, Ioan, *Treaty on the Law of Intellectual Property*, CHBECK Printing House, Bucharest, 2010.
- POLLAUD-DULIAN, Frédéric, *Le droit d'auteur*, Economica Printing House, Paris, 2005.
- ROȘ, Viorel, SPINEANU-MATEI, Octavia, BOGDAN, Dragoș, *The Copyright and the Related Rights*, All Beck Printing House, Bucharest, 2005.
- SPINEANU-MATEI, Octavia, *Intellectual Property. Judiciary Practice 2006-2007*, Hamangiu Printing House, Bucharest, 2007, pp. 245-251.
- VIVANT, Michel, BRUGUIERE, Jean-Michel, *Droit d'auteur*, Editura Dalloz House, Paris, 2009.
- ZECA, Dorin, Moral Prejudices in Civil, Penal and Intellectual Property Litigations, Judiciary Practice, Hamangiu Printing House, Bucharest, 2010.
- ZOTTA, Constantin Gr. C., *Literary and Artistic Cioyright*, Curentul Românesc printing House, Bucharest, 1939.

Articles

- BUTA, Paul George, MUȘAT, Anca, "Limitations in Exercising Copyright. The Condition They Happen", in *Romanian Magazine on the Law of Intellectual Property*, no. 2/2007, pp. 117-119.
- CĂTUNA DĂNILĂ, Ligia, "Student's Code and the Copyright Law", in Romanian Magazine on the Law of Intellectual Property, nO. 2/2012, pp. 33-38.
- CĂTUNA DĂNILĂ, Ligia, "Works and Ideas. Plagiarism. Exception of Exception", în in Romanian Magazine on the Law of Intellectual Property, nr. 1/2009, pp. 52-57.
- ROMIȚAN, Ciprian Raul, "Originality – an essential condition to protect intellectual creations in the Literary, Artistic and Scientific Domains" in The Law no. 7/2008, pp. 72-80.
- ROȘ, Viorel, "The Law of Quotation", în in *Romanian Magazine on the Law of Intellectual Property*, no. 3/2009, pp. 15-34.

Jurisprudence

- Civil Decision no 175 A of November 2009, pronounced in the Bucharest Court of Appeal, in Dorin Zeca, *Moral Prejudices in Civil, Penal and Intellectual Property Litigations. Judiciary Practice*, Hamangiu Printing House, Bucharest, 2010, pp. 73-78.
- Decision no 6428/30.06.2006 pronounced by the High Court of Cassation and Justice, Civil Section and of Intellectual Property, in Octavia Spineanu-Matei, *Ontellectual Property. Judiciary Practice 2006-2007*, Hamangiu Printing House, Bucharest, 2007, pp. 245-251.
- Decision no. 1978/2008, pronounced by the High Court of Cassation and Justice, Civil Section and of Intellectual Property

NORMS

- Code Code de la propriété intelectuelle (din 1992), available on http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069414
- Bern Convention

- Legea nr. 8/1996 privind dreptul de autor și drepturile conexe
- Law no. 206/2004 on Good Conduct in Scientific Research, Technological Development and Innovation
- Law of national Education no. 1/2011
- *** *Exlanatory Romanian Dictionary*, Universul enciclopedic Printing House, Bucharest, 1998.
- *** Nikolaeva, Ianna, Zasavițchi, Lidia, *Bibliographical References: norms and styles of quotations*, Chișinău, 2010.

REMUNERATION PAYABLE TO PERFORMERS FOR THE BROADCASTING OF PHONOGRAMS. TYPES OF PHONOGRAMS

Mariana SAVU[*]

Abstract

The institution of copyright and related rights, as regulated in our system by Law nr.8/1996, deals with the protection of literary, artistic and scientific works and their creators. By a definition that has a tradition in our doctrine, the legal institution of copyright (generally speaking) means all the legal rules governing social relations that arise from the creation, publication and use of literary, artistic or scientific works. The moral and patrimonial rights of the author and neighboring rights stakeholders are protected both by the special law, mentioned above, and also by the common law provisions. Among them is included the Decree no.31/1954 concerning individuals and legal entities but also the Civil Code. One argued problem during the arbitrations, which take place at ORDA headquarters, institution that provides the Secretariat, also in the courts of law, when setting claims was promoted by Collecting Societies against bad payers users, was to analyze the two phrases commercial phonograms and phonograms published for commercial purposes.

Keywords: *commercial phonograms, phonograms published for commercial purposes, Collecting Societies moral and patrimonial rights moral and patrimonial rights protection*

1. Introduction

The institution of copyright and related rights, as regulated in our system by Law nr.8/1996, deals with the protection of literary, artistic and scientific works and their creators.

By a definition that has a tradition in our doctrine, the legal institution of copyright (generally speaking) means all the legal rules governing social relations that arise from the creation, publication and use of literary, artistic or scientific works.

The special Law (Law no.8/1996[1], hereinafter referred to as the Law) aimed not only to harmonize the national legislation with the one in the European Community Member States but also to create a reliable protection system for the copyright and related rights by creating the necessary tools in order to prevent and punish the rights violation.

The international legal frame for copyrights and related rights protection is particularly important as it also has an impact on the Romanian legal regulations in this field. However, given *the international vocation of the intellectual creation*, it is necessary to ensure an effective protection of the rights of authors and their creations, not only in their home country but equally in other countries where they are used and capitalized. For these reasons, *we consider the need for further harmonization and implementation of legislation* on copyright

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[1] Published in the „Official Gazette of Romania", Part I, no. 60 dated March 26th, 1996, as supplemented and amended by the Law no. 285/2004, published in the „ Official Gazette of Romania", Part I, no. 587 dated June 30th, 2004, as amended and supplemented by Government's Emergency Ordinance no. 123/2005, published in the „ Official Gazette of Romania", Part I, no. 843 dated September 19th, 2005, as amended and supplemented by the Law no. 329/2006 regarding the approval of Government's Emergency Ordinance no. 123/2005 for the amendment and supplementation of Law no. 8/1996 on copyright and related rights, published in the „ Official Gazette of Romania", Part I, no. 657 dated July 31st, 2006. (All further specifications regarding the Law no. 8/1996 refer to the form as supplemented and amended by Law no. 329/2006).

and related rights both in the Member States of the EU and in the acceding countries and beyond.

The moral and ancestral rights of authors and of related rights holders are protected both by the provisions of the special law, referred to above, and by the provisions of the common law. These include the Decree no. 31/1954 concerning the natural and legal persons, as well as the Civil Code[2] .

In the "Copyright and Related Rights" treaty by the Professor Viorel Ros and his collaborators, Dragos Bogdan and Octavia Spineanu – Matei, they show that the object of study "The Intellectual property law" studies "the protection of the authors of the works of mind and the result of their creative activities, namely the form creations (protected by copyright and related rights, and more recently by sui-generis rights) and the background creations (protected by industrial property rights), as well as the protection of the most important distinctive marks of trade activity ".[3]

The rights related to copyright, or the "neighboring rights", as they were referred to in doctrines and jurisprudence, were regulated in the Romanian law for the first time by the Law no. 8/1996 on copyright and related rights. In the regulation of related rights protection by law no. 8/1996, the Romanian legislator was inspired by the provisions of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, concluded at Rome on October 26th, 1961 and the Convention for the Protection of Phonograms Producers against unauthorized reproduction of their phonograms, concluded at Geneva on October 29th, 1971[4].

For the purposes of the Law no. 8/1996, by performers we understand: actors, singers, musicians, dancers, and other persons who sing, dance, recite, declaim, play, perform, direct, conduct or execute in any other manner a literary or artistic work, a show of any kind, including folk, variety, circus or puppet shows (Article 95).

The rights related to copyright are the intellectual property rights, other than copyright, enjoyed by performers for their own performances or executions, by producers of sound recordings and by manufacturers of audiovisual recordings for their own recordings and by broadcasting and television organizations for their own programs and program services.

An issue debated in arbitrations[5] that take place at the ORDA[6] headquarters, institution also ensuring their Secretariat, as well as to the courts when settling the claims promoted by the collecting societies against non-paying users, is to analyze two phrases, namely the "trade phonograms" and the "phonograms published for commercial purposes."

2. Paper Content

I. Users[7] claim, without bringing the proof, that the phrases “trade phonograms" and "phonograms published for commercial purposes" used in Articles 123^1 letter f) and 123^2 letter f) of the Law no. 8/1996 as amended and supplemented, “have a distinct meaning and different legal rules."

In relation to what they claim, it would mean that the nature of the phonogram is given by the way of using it. *For instance: a phonogram communicated to the public (in bars,*

[2]See, for instance, Gh. Beleiu, op. Cit. 1999 and Fr. Deak , Treaty on succession law.
[3]Viorel Roş, Dragoş Bogdan, Octavia Spineanu – Matei, *Copyright and related rights, Treaty,* All Beck Printing House, Bucharest, 2005, page 1.
[4]Romania acceded to the Geneva Convention for the Protection of Phonogram Producers against piracy of phonograms by the Law no. 78 dated April 8th, 1998, published in the „Official Gazette of Romania”, Part I, no. 156 dated April 17th, 1998.
[5]See Order no. 2357/July 8th, 2010 al Minister of Culture and National Heritage, unpublished, for the assignment of the ORDA Referees Body.
[6]Romanian Office for Copyright.
[7]Broadcasting Organizations.

shops, etc.) and broadcasted by a television station (generic name, according to the statement of the holder - "by cut") is collectively managed, and the same phonogram, if it is broadcasted by a radio station, should be optionally collectively managed.

The Romanian Radio Broadcasting Company – SRR, argues that there may be "trade phonograms" and "phonograms published for commercial purposes" that can be "non phonograms"[8] or "phonograms that are not intended for sale" [8]. *For instance, audio post signals, jingles, TV advertisements, music curtains, social campaigns approved by CNA*[9] *etc. are non phonograms and consequently they were never reported on play lists to collective management organizations, nor was paid any remuneration for these phonograms. This was one of the reasons why CREDIDAM, the collective management organization, addressed the Court. The payment difference to CREDIDAM is represented by this lack of play-lists.*

From discussions with right holders who created phonograms to order and performed them (no matter how they were generically called - promos, jingles etc.), I underline that: the only difference between a promo or jingle and a song fixed on a support that is sold in stores is their duration, the latter having a longer average of 2-3 minutes. In a broadcasted show, music draws attention. There are circumstances where a jingle can bring greater benefits to a radio station than a piece fixed on a support which is sold in stores. Such phonograms are created by order with the aim to be easily recognized and remembered by the listeners. A jingle is easily associated with the sound material, with the name of the show or with the spot. A jingle is also called a musical signature. It is obvious that, when those musical notes are played, we are not required anymore to mention the name of the show or of the station (eg. the EUROPA FM promo - if the musical notes should be played without text, surely that listeners could easily identify the radio station), as the listener just by hearing those sounds he/she knows that a certain show will follow.

As for the advertising and social campaigns that have background music (a pre-existing phonogram or a phonogram created by order), the right holder claims that on the same music two or three commercials totally different can be performed but all of them representing the same product. For instance: the "Real" advertisement has about sixty spots using the same background music (the same phonogram). The rights granted by law were never transferred by their right holders. Therefore, no user has the right to fail reporting these artistic performances on the play-lists sent to the collective management organizations, because radio stations have only the quality of advertisements broadcasters, for an amount of money (calculated to the value of the advertising second), received for broadcasting such advertisements. Ads that do not have background music are exceptions. Only three commercials per year are created this way.

II. Under the establishment of an optional collective management in case of broadcasting the phonograms published for commercial purpose, the **referees panel** which has determined the final form of the methodology[10] showed that the two concepts, "trade phonograms" and "phonograms published for commercial purposes", are two distinct terms for which the legislature has established different legal regimes. In order to clear up, the referees panel has defined the two notions, that law itself has failed to define, as follows "by the phrase **trade phonogram** we understand that phonogram which is communicated to the public or broadcasted *by that category of users in front of whom it is impossible to individually exercise* the right to an equitable remuneration for the holders of rights related to

[8]See unpublished SRR written notes (file no. 10.141/2/2010, CAB (Bucharest Court of Appeal) Xth Civil and IP Section).
[9]National Audiovisual Council.
[10]Methodology regarding the remuneration payable to performers and phonogram producers for broadcasting the phonograms published for commercial purpose or reproductions thereof by the broadcasting organizations, published in the Official Gazette no. 668/2010, by the ORDA Decision no. 284/2010, amended by the Civil Judgment no. 153 A/2011 of the BAC, published in the Official Gazette no. 470/July 5th, 2011, by the ORDA Decision no. 216/2011.

copyright; by the phrase **phonogram published for commercial purposes** we understand the phonogram which is communicated to the public or broadcasted by *that category of users in relation to whom it is possible to individually exercise* the right to an equitable remuneration for the holders of rights related to copyright.

In this case, we understand that we speak of the right to equitable remuneration for the use of phonograms published for commercial purposes by broadcasting organizations, so that the collective management of such right is optional ..."

These two definitions are taken verbatim from the reasoning of the Civil Judgment no. 23A/February 5th, 2007 [11] pronounced by the IXth Civil Section of the Bucharest Court of Appeal and for the intellectual property cases, a decision strongly criticized, both nationally and internationally, because of the confusion it brought regarding the management on the Romanian territory of the right of broadcasting the phonograms published for commercial purposes.

Although the law does not separately regulate the two phrases, we find that for phonograms published for commercial purposes the decision of the referees' panel was to consider the optional collective management solution.

Moreover, although the referees' panel held that "mandatory collective management is justified by the existence of those circumstances in which the using method of works or performances makes it impossible to individually follow the right regarding the equitable remuneration, hypothesis corresponding to the phrase trade phonogram", **does not specify how these circumstances can be determined.**

III. The types of phonograms indicated by the Court in conclusions of the session dated March 15th, 2011[12] are created **independently and without regard** to the so-called "categories" provided by the Law no. 8/1996 on copyright and related rights, as subsequently amended and supplemented. The criterion used to distinguish three types of phonograms is a technical criterion consisting of phonograms content and of the purpose for which they were created. Thus, the Court speaks of three types of phonograms, contained in the current methodology[13], namely:

"1. phonograms including performances, or other sound or digital representations thereof, which fixing was mainly done for the purpose of making them available to the public through selling the media on which are fixed such performances;

2. phonograms including performances, executions or other sounds created in order to identify and self-promote a broadcasting station or a program thereof, phonograms which producer is either that radio station or another phonogram producer, which created the phonogram at the order of this broadcasting station;

3. phonograms including performances, executions or other sounds created in order to broadcast them for promoting a product or service belonging to a third party in relation to the broadcasting station, as advertising for that product or service."

Judicial distinctions remove the objective impossibility to include these types of phonograms within the categories established by the Law no. 8/1996, namely in the categories of "trade phonograms" and "phonograms published for commercial purposes ."

ARCA[14] thesis is correct, according to which *"first we must note that we can not define the contents of both concepts, but only of one of them, namely of the* - phonograms *published for commercial purposes - concept, for which definitions are included in the Rome*

[11]Published in the Official Gazette no. 572/August 21st, 2007.

[12]Unpublished, file no. 10.141/2/2010 settled by BCA, IXth Civil Section and for causes on IP.

[13]Civil Judgment no. 153 A/2011 of BCA, published in the Official Gazette no. 470/05.07.2011, Desizen ORDA no. 216/2011.

[14]Romanian Association for Audiovizual Communications , an association which has as members companies owning radio and television stations.

Convention or in the WIPO Treaty on phonograms, but not of the - trade phonograms – concept, phrase which is currently present only within the Romanian law of copyright, but without being defined here" (see paragraph 1 , page 1 of the written notes[15] submitted by ARCA). In our opinion, the thesis promoted by ARCA defenders is developed by practitioners in this field, who are aware that, technically speaking, the use by the Law no. 8/1996 of various phrases for the same concept (the concept of "trade phonograms" and of "phonograms published for commercial purposes") is incorrect. The European Community law does not know the technical-legal concept of - "trade phonograms" and "phonograms published for commercial purposes." Therefore, we consider that the classification of these types of phonograms judiciary identified – in the so-called two categories of phonograms as provided by Law no. 8/1996 – in order to determine the legal regulations applicable to the management of each type of phonogram, is impossible and unnecessary.

In reality, phonograms broadcasting determines a **mandatory collective management (an extended legal mandate).**

IV. In relation to domestic legislation as well as to directives and treaties to which Romania acceded, we consider that the two phrases "trade phonogram" and "phonogram published for commercial purposes" are synonyms for the following reasons:

1. According to **art. 103 paragraph 1** of Law no. 8/1996 on copyright and related rights, with subsequent amendments and supplements, a "**sound recording or phonogram shall be considered**, for the purposes of this law, the fixation of sounds coming from a performance or an execution, or of other sounds or digital representation of these sounds, other than in the form of a fixation incorporated in a cinematographic work or in another audiovisual work."

According to the definition, any sound coming from a performance / execution and fixed on an analog or digital support, as appropriate, is a phonogram. There is only one exception defined by law, namely that sound coming from a performance / execution fixed and embedded in a cinematographic work or in another audiovisual work that cannot be defined as a phonogram (that does not mean that its use does not generate remuneration). This exception exceeds users who own radio stations, because they cannot ever use the audiovisual part when they broadcast a phonogram.

Phonogramme (fr) [16] *= recording of sound vibrations on photographic paper tape, tape recorder, disc, film etc. by electrical, mechanical means etc.*

2. The Law no. 8/1996, with subsequent amendments and supplements, regulates as **a single right to equitable remuneration for both communication to the public and broadcasting**, **namely only in the case of phonograms published for commercial purposes** (see the provisions of **art. 98 letters g and g[1]** and **art. 105 letter f**, both related to the provisions of **art. 106[5]**), and this right is exercised only through the beneficiary management organizations (**art. 106[5] paragraphs 2-4**).

According to art. 106[5] of the law, for direct or indirect use of phonograms published for commercial purposes, or of a reproduction thereof, by broadcasting or by any methods of communication to the public, performers and phonogram producers have the right to a single equitable remuneration.

Moreover, the provisions of **art. 112[1]** clearly show the consequence of protecting by right to remuneration: ***"If right holders shall, by law, benefit of a mandatory remuneration***

[15]See ARCA unpublished written notes (file no. 10.141/2/2010, BCA X[th] Civil and IP Section).
[16]Definition by the Explanatory Dictionary of the Romanian Language.

***[if of the remuneration referred to in art. 106[5]], they cannot argue the uses generating it." Per a contrario,* since artists can not prohibit the broadcasting of their records/performances, they were compulsory acknowledged the right to remuneration.**

Even if we were to assume, theoretically, that by 'phonogram published for commercial purposes' means the phonogram which is communicated to the public or broadcasted by that users' category in relation to which the right to equitable remuneration can be individually exercised, from a practical point of view, it is impossible to individually authorize and manage such phonograms.

3. Coexistence of the provisions of **art. 123[1] paragraph 1 letter f** (which refers to ***"trade phonograms"***) with those of **art. 123[2] paragraph 1 letter f** (which refers to ***"phonograms published for commercial purposes"***) of the law, which users rely on, leads to a **completely erroneous conclusion**, claiming that performers and phonogram producers would be beneficiaries of two rights to equitable remuneration, one for public communication and broadcasting of **trade phonograms**, which is exercised through mandatory collective management (art. 123[1] paragraph 1 letter f), and another for public communication and broadcasting of **phonograms published for commercial purposes**, for which the collective management is optional (art. 123[2] paragraph 1 letter f).

We do not understand what would be the reason why the legislature would admit the existence of two rights to equitable remuneration, since in the whole body of Law no. 8/1996, with subsequent amendments and supplements, **is only mentioned the phrase of phonogram published for commercial purposes and a single right to equitable remuneration is regulated**. If the legislature had intended to make a distinction in order to avoid any confusion, it ought to define the two phrases.

ORDA[17] point of view, as sole regulator, is *"By the G.E.O. no. 123/2005, because of a material error, the remuneration has been included both in the category of rights optionally collectively managed* (art. 123[2] paragraph 1 letter f), *and in that of the rights mandatory collectively managed* (art. 123[1] paragraph 1 letter f). *In conclusion, the equitable remuneration payable to performers and producers of phonograms for broadcasting the phonograms published for commercial purposes or of reproductions thereof* ***is mandatory collectively managed****, which means that collective management organizations will also represent right holders who have not granted a mandate and it is regulated in* ***art. 123[1] paragraph 1 letter f and paragraph 2 of Law no. 8/1996, as amended and supplemented****. Therefore, this* ***single equitable remuneration*** *can not be individually managed by a performer or producer of phonograms ".*

ORDA[18] also stated: *"given that for the proper resolution of the case it is necessary to apply* **art. 123[1] letter f),** *we specify that, because of a material error, the content of this text is also included in the text of* **art . 123[2] letter f)**. For the correct interpretation of the law we must point out that the text of art. 123[1] is the accurate one, as it is in accordance with art. 12 of the Rome Convention and with art. 15 paragraph 1 of the WIPO Treaty".

In the technical-legal dispute related to *"trade phonograms"* and *"phonograms published for commercial purposes,"* our point of view is and remains still the same, i.e. the law makes no distinction between the two phrases and the legal regime applicable to phonograms is unique.

Legislation in Romania has transposed the provisions of international regulations, which aimed to the uniformization of standards for the protection of intellectual property at international level.

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[17]See ORDA unpublished letter no. 2187/2006, submitted upon the request of the Referees Body, during the arbitration with the television organizations.

[18]See ORDA unpublished letter no. 1442/2007, submitted upon the request of the Court, to the file no. 5313/2006.

Phonograms have a single definition in each of these international instruments:
a) Art. 3 paragraph 1 letter b) of the Rome Convention[19] defines phonogram as: "any fixation of a sound reproduction of sounds, either of a representation of a sound or of other sounds."
b) art. 2 paragraph 1 letter b) of the WIPO Treaty[20] on phonograms and public reproduction (WPPT) defines phonogram as fixation of the sound of a representation or of other sounds or of sounds production, other than in the form fixed and embedded in a cinematographic or audiovisual work.

Moreover, art. 12 of the Rome Convention establishes: "when *a phonogram published for commercial purposes*, or a reproduction of such phonogram, is directly used for broadcasting or for any kind of communication to the public, the one who uses it will pay the performers, or producers of phonograms, or to both of them, an equitable single remuneration".

Art. 15 of the WIPO Treaty[21] establishes that the performers and producers of phonograms shall enjoy the right to a equitable single remuneration for the direct or indirect use of phonograms published for commercial purposes, for broadcasting and for any communication to the public.

We notice that internationally there is no distinction between the concept of "trade phonograms" and of "phonograms published for commercial purposes."

The difference made in the Romanian law is artificial and contradictory, as long as subsequent changes in the law nr. 8/1996 only pursue to implement international regulations where no difference is made in this respect.

According to the provisions of art. 20 of the Constitution where the provisions of international treaties to which Romania is a party prevail, if there are inconsistencies or contradictions between them and the regulations of the national legislation, the Court will hold that the arrangements applicable to phonograms is unique and no distinction is necessary in this field[22].

Courts' opinion is unitary. In this respect we invoke the ICCJ Decision no. 9699/November 27th, 2009[23], the Civil Judgment of the Constanta Court of Appeal no. 287/C/December 4th, 2008[24], the Civil Judgment no. 1195/2010[25] of the Bucharest Court IIIrd section, judgment which is also maintained under this aspect by the Bucharest Court of Appeal, XIth Civil Section fot the IP cases, by the Civil Judgment no. 57A/February 15th, 2011[26].

We quote: "The Court holds that a distinction between the phonograms published for commercial purposes and the trade phonograms cannot be sustained, resulting from the combination of the provisions of art.123^1 paragraph 1, letter f and of art. 123^2, paragraph 1 letter f of the Law nr. 8/1996 in the direction shown by the defendant, based on the criteria considered while pronouncing the civil judgment no. 23A/2007 issued by the Bucharest Court of Appeal IXth Civil Section, namely after the effective opportunity of the holder of related right to individually exercise his/her rights.

This interpretation leads to the conclusion that the same phonogram can be described as phonogram published for commercial purposes when it is subject to use as background

[19]Law no. 76/1998 for Romania accession to Convention on the protection of performers, phonogram producers and broadcasting organizations, concluded in Rome on October 26th, 1961, published in the Official Gazette no. 148/1998.
[20]World Intellectual Property Organization .
[21]WIPO Treaty on performances, executions and phonograms ratified by Romania by the Law no. 206/2000.
[22]See the unpublished Civil Judgment no. 57A/2011 of the BCA IXth Civil Section and for the IP cases.
[23]Unpublished.
[24]Unpublished.
[25]Unpublished.
[26]Unpublished. See also the conclusions dated February 10th, 2011 and March 17th, 2011 in the file no. 28.956/3/2010 in trial at the Bucharest Court of Justice, Vth Civil Section (unpublished).

music, subject to satellite retransmission etc. or trade phonogram when it is subject to radio broadcasting or broadcasting through the TV stations.

This conclusion cannot be accepted as such a distinction of the legal regulation cannot be made only for the reason of an actual possibility of the holder of related rights to individually exercise the rights, as it would remove the existence of a clear, accurate rule known with many particular, exceptional circumstances, which would lead to the violation of the principle of equality and non-discrimination consisting of applying the same legal rules in identical circumstances."

In the report entitled "International review of license charges in management companies for music broadcasting' prepared by CAPACENT[27] in April 2006 for the Ministry of Culture in Denmark, at page 6, there are defined the following terms, we quote:
"Dividing transmitters in commercial and non-commercial categories was made at the same time with the definitions applied by the so-called AUVIS[28] publications of Eurostat, as the application of these categories seems to be quite widespread in the 18 countries."

Definitions:
"The non-commercial radio transmitters (users in the Romanian legislation) are those broadcasters which have a public obligation and which can be fully or partially funded by license fees or by government subsidies."
"The commercial radio transmitters (users in the Romanian legislation) are those broadcasters which are usually funded by advertising or sponsorship."
As it can be seen, the users are divided into commercial and non-commercial ones and not the phonograms. In Romania, the only radio station that can be considered non-commercial, as defined above, is SRR (and all its owned stations)m while commercial radio stations are all the other licensed broadcasters in the Romanian territory.

4. According to **art. 123¹ paragraph 1, letter "f"** of the Law no. 8/1996 on copyright and related rights, with subsequent amendments and supplements, ***"The collective management is mandatory in order to exercise the following rights: ... the right to equitable remuneration acknowledged for the performers and producers of phonograms for …broadcasting trade phonograms or reproductions thereof". The paragraph 2 reads: "for the categories of rights provided in paragraph 1, the collective management organizations also represent the right holders who have not granted a mandate."***

In France, the doctrine is divided between believing that these organisms have the capacity of assignees of copyright holders (such as SPEDIDAM[29]), or they are only the Agents of the latter. [30]

Consequently, the right to equitable remuneration acknowledged for the performers and producers of phonograms for the public communication and broadcasting of trade phonograms / phonograms published for commercial purposes or of reproduction thereof is **compulsory** collectively managed and not necessarily regards only the repertoire of that collective management organization, but the **extended repertoire**.

This is the meaning of the provisions of art. 12 of the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, concluded at Rome on October 26th, 1961 and of art. 15 paragraph 1 of the WIPO Treaty on Performances and Phonograms ratified by the Law no. 206/2000.* For phonograms, the

[27]CAPACENT is the institution which drew up the, International analysis of license fees in management companies for music broadcasting", upon the request of the Ministry of Culture in Denmark.
[28]Statistics regarding the Audiovisual Services.
[29]The Collective Management Organization for Performers in France.
[30]See Viorel Roş, Dragoş Bogdan, Octavia Spineanu- Matei, Copyright and related rights, All Beak Publishing House, page 495 and the French doctrine quoted therein. Also see the unpublished Civil Judgment no.57A/2011 of BCA IXth Civil Section and for the IP Cases.

mandate of the collective management organization as the only collector in Romania for the performers, is an extended legal mandate, with the right to collect remuneration for both members and non-members, Romanian and foreign artists. For non-members, the collective management organization has the obligation to publicly notify the right holders in order to receive the remuneration collected for the use of the phonograms published for commercial purposes or of the reproductions thereof. Thus, **art. 129¹** of the Law no. 8/1996, with subsequent amendments and supplements, states: ***"In case of the compulsory collective management, if a right holder is not attached to any organization, the jurisdiction lies with the organization in the area having the largest number of members. Claiming by the unrepresented right holders of the payable amounts can be made within three years from the date of notification."***

3. Conclusions

Lex ferenda, by the draft Law amending and supplementing Law no. 8/1996 on copyright and related rights, with subsequent amendments and supplemental, as prepared by the Government in order to be submitted to the Romanian Parliament for adoption, which is currently under debate, it seeks to eliminate material errors which appear in the text of the Law no. 8/1996, including the deletion of the phrase of "trade phonogram" in art. 123¹ paragraph 1 letter f of the Law no. 8/1996, by replacing it with the phrase "phonogram published for commercial purposes" (phrase used throughout the law). At the same time, the letter f of the art. 123² of Law no. 8/1996 is deleted in order to remove any doubt regarding compulsory management rules for the broadcasting of phonograms.

References

- Law no. 8/1996 published in the „Official Gazette of Romania", Part I, no. 60 dated March 26th, 1996, as amended and supplemented by Law no. 285/2004, as published in the „Official Gazette of Romania" , Part I, no. 587 dated June 30th, 2004, as amended and supplemented by Government's Emergency Ordinance no. 123/2005, as published in the „Official Gazette of Romania", Part I, no. 843 dated September 19th, 2005, as amended and supplemented by Law no. 329/2006 regarding the approval of Government's Emergency Ordinance no. 123/2005 for the amendment and supplementation of Law no. 8/1996 regarding copyright and neighboring rights, as published in the „Official Gazette of Romania", Part I ,no. 657 dated July 31st, 2006. (Moreover all specifications regarding Law no. 8/1996 refer to the form amended and supplemented by Law no.329/2006).
- Mihaly Ficsor, Collective management of copyright and related rights, WIPO, 2002.
- Tarja Koskinen-Olsson, the *Collective Management of Reproduction.* This study was developed under the cooperation agreement between WIPO and IFFRO in 2003.
- WIPO Treaty on performances, executions and phonograms, ratified by Romania by Law no. 206/2000.
- See Civil Resolution no.57A/2011 of BCA Civil Section IX and for IP causes, unpublished.
- Romania acceded to the Rome Convention regarding the protection of performers, producers of phonograms and broadcasting organizations by Law no. 76 dated April 8th, 1998 published in the „Official Gazette of Romania", Part I, no. 148 dated April 14th, 1998.
- Romania acceded to the Geneva Convention for the protection of producers of phonograms against unauthorized duplication of their phonograms by Law no. 78 dated April 8th, 1998, published in the „Official Gazette of Romania", Part I, no. 156 dated April 17th, 1998.
- „À l'exclusion de l'artiste de complément". For details, please see *Code de la propriété intellectuelle*, Édition 2002, Litec, Paris.
- Romanian Academy, „Iorgu Iordan" Institute of Linguistics, The *Explanatory Dictionary of Romanian Language, DEX*, Universul Enciclopedic Printing House, Bucharest.
- Paula Schepens, *Guide sur la gestion collective des droits d'auteur* (La Societe de Gestion au Service de l'Auteur et de l'Usager), UNESCO, 2000.
- http://europa.eu.int/comm/internal_market/copyright/management/management_fr.htm.
- Rodica Pârvu, Ciprian Raul Romiţan, *Copyright and Related Rights*, All Beck Publishing House, Bucharest, 2005.

- Bucharest Court of Appeal, Civil Section IX and intellectual property cases, Decision no. 134 A dated May 24th, 2007, published in the Off. Gazette no. 610 on September 4th, 2007.
- Law no. 76/1998 for Romania's accession to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, concluded at Rome on October 26th, 1961, published in the Off. Gazette no. 148/1998.
- For details see Arbitration Resolution dated July 25th, 2007, published in the Off. Gazette no. 586 dated August 27th, 2007, according to the ORDA General Manager's Decision no. 262 dated July 31st, 2007. The Arbitration Panel was composed of the following arbitrators: Ana Diculescu-Şova; Cristian Iordănescu; Alexandru Ţiclea; Mihai Tănăsescu; Gheorghe Gheorghiu.
- Bucharest Court of Appeal, Civil Section IX and intellectual property cases, Resolutions no.115A and no.116A dated May 2nd, 2007, published in the Off. Gazette no. 562 dated August 16th, 2007;
- Resolutions no. 29A dated March 7th, 2006 and 116A dated June 15th, 2006, published in the Off. Gazette no. 841 dated October 12th, 2006.
- See location: www.urbandictionary.com/define.php?term?=figurant
- Katherine M. Sand, Study on Agreements and Remuneration Practices regarding Performers of Audiovisual Works in the United States of America, Mexico and the United Kingdom, presented within „**Informal Ad-hoc Meeting on Audiovisual Interpretations and Performances**", Geneva, November 6th-7th, 2003.
- Viorel Roş, Dragoş Bogdan, Octavia Spineanu – Matei, *Author rights and Neighboring Rights,* Treaty, All Beck Publishing House, Bucharest, 2005.
- Ligia Dănilă, *Figurants – subject for neighboring rights or just ornaments?,* in „Romanian Magazine of Intellectual Property Right", no.4/2007.
- Ligia Dănilă, *Intellectual Property Right*, C.H. Beck Printing House, Bucharest, 2008.

ACCOUNTING PARADIGMS WHICH FAVOR HISTORICAL COST

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Abstract

Henning Kirkegaard shows that the evolution of accounting is to shift from one paradigm to another . Business continuity perspective should guide the company into the future , without confine it exclusively in the past. Accounting in its classical form , however, can not be dissociated from the historical cost evaluation .

Keywords: *paradigm, historical cost, prudence principle, postulate, business continuity.*

1. Introduction

This paper is part of accounting, aiming to show that the evolution of accounting means changing the paradigm to another . Interest in the topic is closely linked to traditional accountings in force in Europe that are based on well established principles (prudence , historical cost) whith help to provide assessment results and own funds. Axiomatization financial accounting is done by developing accounting postulates and principles. We propose to analyze postulates that favor historical cost.The reseach will be achieved through deductive analysis . About this theme was written very little, the attention on the topic is channeled on the paradigms that favor historical cost . " Accounting history enables a new approach to how we understand this , and to control and predict the future ," said Haskins since 1904[1].

Accounting axiomatization products produce change because are based on the arrangement of users of financial information and on their information evolutionary needs.

Sombart[2] considered double-entry bookkeeping as " force that transformed the feudal society in the capitalist one" . Incited by its boldness , now several authors affirm to reverse this situation: economic development has prompted the accounting . By establishing a relationship of dependency , accounting achievements still remain from this period: the generalization of double-entry accounting and emergence costing techniques . Financial capitalism was the period characterized by conservatism and tendency to present profits by "interest", usually understated values. The accounts have noted various techniques underestimate or overestimate the amount of profit. In the literature of that time appeared a "cure" prudence principle (English Conservatism principle), which currently operates in accounting plan.

Between corporate capitalism (after 20-30 years of the twentieth century) is marked primarily by: - existing global concerns to create a chart of accounts (in Continental countries, especially in Germany) - concerns about improve financial communication , given that the crisis of 1929 revealed the lack of accounting information.

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[1] Quoted by Carnegie, G. & Napier, C., *Critical and interpretive histories: insights into accounting's present and future thought his past*, Critical Perspectives on Business and Management, vol. I, 2000.

[2] Sombart, W., *Der moderne Kapitalismus*, Duncker and Humblot, 1902.

2. General accounting paradigms and postulates

Henning Kirkegaard[3] shows that the evolution of accounting is to shift from one paradigm to another . He identifies three paradigms in accounting actually show the progress of accounting model . The first paradigm is the treasurer paradigm . This model of accounting (cash accounting) corresponds economy where payments are made exclusively in cash. The introduction of credit and sharing tools at the end of the Middle Ages led to insufficient treasury accounting model, the capitalist monetary economy generating adaptation model without changing the paradigm . The second paradigm , the accountant paradigm appeared when accounting language evolved comprising logic in that the transfer of benefit and corresponding transfer payment to be made at two different times . The third paradigm is the manager paradigm. In an uncertain environment , privilege management accounting information in making decisions , at which signifies the transition from quasi - certainty of uncertainty previzionalului achievement . This third paradigm is based methodological fusion of traditional accounting and accrual accounting (cash) double entry.

R. Schroll[4] summarizes the characteristic elements for three accounting systems as follows:

- Anglo -Saxon accounting system is built around a true image.
- German accounting system is based on performance , first of all , the legal requirements and , in particular , tax compliance (particularly those relating to income tax).
- French accounting system can be considered a " compromise" between the Anglo-Saxon and German accounting systems.

A new element is the presentation of the consolidated financial statements , in the case of groups. It were introduced four fundamental accounting concepts - continuity exploitation accrual presentation consistency (Consistency) , prudence and intensifying concerns about inflation accounting under .

In the 70s, Accounting Standards Steering Committee - ASSC was established accounting standards , an organization that aimed to replace accounting recommendations with accounting standards.

Truth accounting postulates and principles is made by their general acceptance, the result of a consensus or compromise . Some postulates or principles may create great controversy or are passed from one category to another or vice versa, due to the dynamic reality and diverging interests . Therefore , the postulates and principles of accounting may not get unanimity .

A more prominent place occupies the postulates and principles in the Anglo-Saxon accounting and their role is growing in countries in continental Europe .

Accounting postulates are known as hypothesis, fundamental concepts , assumptions, doctrines , axioms obvious general fundamental and irreducible , that , as in mathematics , it has not to be demonstrated.

Classification of the postulates as hypothesis through observation and measurement :

1. Delimitation : entity postulate . The company is regarded as an autonomous entity from an accounting perspective , with legal personality , possessing a distinct heritage from that of its owners.

2. Delimitation time:

a. going concern assumption;

b. periodicity postulate;

c. specialization or independence exercises postulate;

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[3] Quoted by Matei, M., De la primordialitatea aparenței juridice, la reflectarea realității economice sau calea de evoluție a contabilității, teză de doctorat, 2004.

[4] Hilal Yousif Al-Saleh, Rudolf Schroll, *Evaluation of Direct Costing for Management of Industrial Enterprises*, 1990.

d. permanent methods postulate.

3. Quantification of observed facts : the postulate of the currency .

3. Accounting principles , important part of the accounting device

To receive accounting reports and to be interpreted uniformly, unitary and fair, it was developed a set of general rules that form the conceptual framework of financial accounting generally called accounting principles. These can be defined as "conventions, rules and procedures necessary to define accepted accounting practice at a time"[5].

Accounting principles and may be defined as conceptual elements, sentences, basic rules that ensure, on the one hand, development of accounting rules, and on the other hand, representation fair, clear, honest and complete enterprise evolution through financial statements.

In terms of measuring performance, resulting concept is different, and about the financial situation reflected by the balance sheet, namely funds in communism and capital in capitalism that lead to obtaining different information.

Dominant player in every economic system, shareholders in capitalism and state in communism require different fundamental concepts in accounting.

Each actor can exercise power in different ways , depending on the existing political system (see the capitalism liberal system, social-democratic or authoritarian) and modes of governance (entrepreneurial ownership, co-management , and so on).

The other stakeholders may be a factor and balances and can have an influence in building accounting information according to modes of governance.

In terms of accounting, the dominant factor and the factors and balances within a particular economic and political system requires choosing a particular accounting system, a particular type of accounting, certain accounting principles require recognition and certain bases and assessment methods. IASB in or conceptual accounting generally requires neutrality as a characteristic quality of the financial statements as "to be credible, the information contained in financial statements must be neutral . Financial statements are not neutral if, by the selection or presentation of information, influence decision making and judgment, so as to obtain a predetermined result or objective"[6].

Although the IASB requires compliance neutrality as a criterion for quality of accounting information, it can not be validated only if we refer to a particular accounting system to a certain type of accounting. Otherwise, the existence and definition of fundamental concepts in accounting differently make us appreciate that the accounting information accounting system is subjective and can not be neutral objective, but subjective. Recognition (implicit or explicit) of a dominant privileged user of accounting information, is an argument in favor of subjectivity. By allowing for multiple users of accounting information and their information needs differ, but producing a single set of financial statements, neutrality must be called into question. How about the possibility of options, choices between different methods or accounting treatments permitted within the same accounting system, we believe this is the main way that ' producer ' of information accounting exercise ' subjectivity ' for a reason, namely to promote and satisfy their interests.

The accounting , using the example of the International Accounting Standards Board regulations (IASB), consists of :

1. Accounting framework (conceptual) general;

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[5] Needles Jr., Belverd E.; Anderson, Henry R.; Caldwell, James, C.: *Principiile de bază ale contabilităţii* (traducere din limba engleză), ediţia a V-a, Editura ARC, Chişinău – Republica Moldova, 2001 p. 9.

[6] IASB (www.iasb.org) and FASB (www.fasb.org.).

2 . International accounting standards (IAS / IFRS);

3 . Interpretations of international accounting standards (IAS / IFRIC).

By their importance , accounting principles are found , directly or indirectly, explicitly or implicitly, in all areas of accounting device .

The IASB accounting is, doctrinally, eclectic because he felt his influences are many theories[7].

Also, the production of a uniform accounting information as a result of global standardization of accounting practices is supported by major international consulting companies accounting (The Big Four)[8], all derived from the Anglo -Saxon , as they own 95 % of the market world in the field. One effect of unification production accounting rules and reporting accounting information would substantially reduce the costs of these offices with training activities and specialized staff for several accounting systems to "translation" and interpretation of accounting data structures of an account system (referential) to another.

In terms of doctrine, issued by the IASB accounting referential presents a framework that explains a number of accounting concepts and techniques used to obtain an accounting information enabling good financial communication in the interest of all parties (investors, employees , creditors, financial suppliers, customers, public authorities, etc.).

Current IASB conceptual framework is perfectly representative of Anglo-Saxon conception of accounting, which can be summarized by three main features :

- An orientation to become global financial markets, the market value of the company and the value of its shares ;

- An obvious approach economic value to investor utility and rationality in decision-making regarding the ratio benefit / cost of obtaining;

- A totally independent of accounting in relation to taxation.

4. Accounting paradigms that favor historical cost

Historical cost accounting is one backward, which describes the flow - stock distinction. Profit and loss is the main transport vehicle value information to shareholders and not balance sheet and statement of gains and losses on the company's performance report arbitrage market prices market suppliers and customers. Perspective of business continuity should guide the company into the future without confine it exclusively in the past.

Accounting in its classical form, however, can not be dissociated from the historical cost evaluation. It is based on a certain vision of time, which is consistent with a stable environment in which the future is considered predictable.

IASB Framework formulates for the Preparation and Presentation of Financial Statements, the accounting model based on evaluation historical cost concept and the nominal financial capital maintenance as a general model. This means using in search of models and concepts for achieving the primary objective: to provide useful information in decision making. The traditional accounting in force in Europe are based on well established principles (prudence , historical cost). Through which provides evaluation and own funds.

Historical cost is the cost of the home assessed, measured and recorded at the entrance of assets and debt creation. For assets, historical cost is the amount of cash paid or payable on the purchase or acquisition of production which enables economic good. If the debt represents the historical cost equivalents obtained in exchange for the obligation or, in certain

[7] IASB (www.iasb.org) and FASB (www.fasb.org.).

[8] Study Texts on the websites of (”The Big Four”) – Ernst & Young, PriceWaterhouseCoopers, KPMG and Deloitte & Touche Tohmatsu.

circumstances (such as income tax), the amount expected to be paid in cash or cash equivalents to extinguish liabilities in the normal course of business .

Characteristic features of historical cost are verifiability and objectivity arising from contable documents.These characteristics of historical cost result from the application of accounting principles widely used in Western practice, namely monetary nominalism and prudence. Once established , historical cost remains fixed as long as the property remains in the possession of the company . To be based on information provided by manufacturers, internal and external users must ensure that the information is accurate and based on facts and just use historical cost as the basis of measurement allows manufacturers to provide the financial statements , objective and verifiable information.

Historical cost can be defined as the " sacrifice that was agreed to bring in good company at the date of its entry ." Thus we can consider that any cost or sacrifice is accepted , an untapped opportunity for other alternative uses , shall be deducted : historical cost represents the costs incurred plus the cost associated untapped opportunities (lost revenue) .

As the play information about the value of buying on their balance sheet structures , historical cost accounting oriented enterprise toward the past . Accounting professionals agree that accounting objective should not be limited to play financial position and past performance of the enterprise . For investors, the prospects of particular importance .

There are a number of advantages and disadvantages associated with this method.

Among the advantages of the method underpinning the historical cost include: is the oldest and best known method , it is easy to understand , is an objective , can be easily verified by comparing the documents underlying records and there is a perfect correlation between the amounts balance sheet and the amounts of the cash flow statement .

5. Conclusions

IASB Framework formulates for the Preparation and Presentation of Financial Statements, the accounting model based evaluation reference recoverable historical cost concept and the nominal financial capital maintenance as a general model. The traditional accounting in force in Europe are based on well established principles (prudence , historical cost). Through which provides evaluation and own funds.

Historical cost is the cost of the home assessed, measured and recorded at the entrance of assets and debt creation. For assets , historical cost is the amount of cash paid or payable on the purchase or acquisition of production which enables economic good. Historical cost can be defined as the "sacrifice that was agreed to bring in good company at the date of its entry." Through the advantages of the method underpinning the the historical cost include: is the oldest and best known method, it is easy to understand, is an objective, can be easily verified by comparing the documents underlying records and there is a perfect correlation between the amounts balance sheet and the amounts of the cash flow statement. It is better to understand and to study the rapport between historical cost and fair value.

We consider that the method based on the historical cost is very solid over the time.

References

- Bannock, G., Manser, W., *Dicţionar internaţional de finanţe englez – român,* Editura Universal Dalsi, Bucureşti, 2000;
- Bojian, O., Contabilitate generală (Bazele contabilităţii, Contabilitatea financiară a întreprinderii), Editura Universitară, Bucureşti, 2003;
- Călin, O., Ristea, M., Văduva, I., Neamţu, H., *Bazele contabilităţii*, Editura Didactică şi Pedagogică, Bucureşti, 1995;
- Collin, P.H.; Jollife, A., *Dicţionar de contabilitate englez – român,* Editura Universal Dalsi, Bucureşti, 2000;
- Diaconu, P., *Contabilitate managerială,* Editura Economică, Bucureşti, 2002;

- Epstein, B. J.; Mirza, Abbas Ali: IFRS 2005 – Interpretarea şi aplicarea Standardelor Internaţionale de Contabilitate şi Raportare Financiară (traducere din limba engleză), BMT Publishing House, Bucureşti, 2005;
- Feleagă, N., (coordonator) *Contabilitate aprofundată,* Editura Economică, Bucureşti, 1996;
- Feleagă, N., Ionaşcu, I., *Tratat de contabilitate financiară* (vol. I şi II), Editura Economică, Bucureşti, 1998;
- Feleagă, N., *Sisteme contabile comparate* (ediţia a II-a), vol. I – 1999, Vol. II, III – 2000, Editura Economică, Bucureşti;
- Feleagă, N., Malciu, L., Politici şi opţiuni contabile. Fair Accounting versus Bad Accounting, Editura Economică, Bucureşti, 2002;
- Feleagă, N., Malciu, L., Provocările contabilităţii internaţionale la cumpăna dintre milenii, Editura Economică, Bucureşti, 2004;
- Grigore, M. Z., Ștefan-Duicu, V. M., "Agency theory and optimal capital structure" in *Proceeding of the International Conference CKS 2013* ed. "Nicolae Titulescu" University of Bucharest, 2013;
- Grigorescu, Ş., *Bazele contabilităţii în administraţia publică*, Editura InfoMega, Bucureşti, 2004;
- Ionaşcu, I., *Epistemologia contabilităţii,* Editura Economică, Bucureşti, 1997;
- Ionaşcu, I., *Dinamica doctrinelor contabilităţii contemporane,* Editura Economică, Bucureşti, 2003 p. 57;
- Macve, R.H., „Fair value vs conservatism? Aspects of the history of accounting, auditing, business and finance from ancient Mesopotamia to modern China, The British Accounting Review, (in press), January 2014;
- Malciu, L.; Feleagă, N., Reformă după reformă: Contabilitatea din România în faţa unei noi provocări (vol. I), Editura Economică, Bucureşti, 2005;
- Needles Jr., Belverd E.; Anderson, Henry R.; Caldwell, James, C.: *Principiile de bază ale contabilităţii* (traducere din limba engleză), ediţia a V-a, Editura ARC, Chişinău – Republica Moldova, 2001 p. 9;
- Ristea, M., (coordonator): *Contabilitatea financiară a întreprinderii,* Editura Universitară, Bucureşti, 2004;
- Săcărin, M., *Contabilitatea grupurilor multinaţionale*, Editura Economică, Bucureşti, 2001;
- Stoian, Ana: *Contabilitate şi gestiune fiscală,* Editura Mărgăritar, Bucureşti, 2001;
- Vâlceanu, Gh.; Robu, V.; Georgescu, N., *Analiză economico – financiară,* Editura Economică, Bucureşti, 2004;
- x x x ACCA – Study Texts for Professional Scheme Programme, BPP Editions, London, 2005;
- x x x Study Texts on the websites of ("The Big Four") – Ernst & Young, PriceWaterhouseCoopers, KPMG and Deloitte & Touche Tohmatsu;
- x x x IASB (www.iasb.org) and FASB (www.fasb.org.);
- x x x *ACCA Student Accountant* www.accaglobal.com;
- x x x Accounting Law. 82/1991, amended and republished in the Official Gazette no. 48 / January 14, 2005.

INNOVATION IN THE EUROPEAN UNION

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Abstract

In the contemporary knowledge-based society, innovation, as a vector used for the application and promotion of inventions and innovations, is one of the main sources used for obtaining a sustainable competitive advantage.

The present paper points out the main directions which the European Commission aims to develop in the sphere of innovation, within the context of the Initiative: "A Union of Innovation", which is part of the Europe 2020 Strategy. The paper analyses the performances accomplished by the EU states in the area of innovation while developing an international perspective that may represent the starting point in identifying solutions whereby the EU could reduce the gaps that exist in relation to the main international competitors, i.e. South Korea, USA and Japan.

Keywords: *innovation, research-development, European Union, Europa 2020 Strategy, economic performance.*

1. Introduction

Innovation activities imply the creation, adaptation and adoption of new products, services and technological processes, as well as the improvement thereof. Innovation policy may be defined as a set of coordinated actions whose main objective is to enhance the efficiency of the innovation activities[1].

The "Dictionary of Modern Economic Sciences" approaches innovation as an instrument that is frequently used both with reference to technological advance made in production processes, and with reference to introducing attributes and combinations of attributes for the traded products. As to products, innovation is a source of differentiation used by manufacturing companies for generating demand and, similarly, for enhancing their market share.

The innovative potential of an organization is a function with more variables, of which we mention the creative capacity of human resources, the competence of the managerial team, as well as the existence of financial-motivational mechanisms that support the creation, experimentation and transformation thereof into competitive market products and services.

In the contemporary knowledge-based society, innovation – as a vector of application and promotion of inventions and innovations – is one of the main sources which generate a sustainable competitive advantage.

The knowledge-based society relies on innovation and the on-going training of its members, which, in its turn, relies on a large community of researchers, academics, engineers, all of whom being included in a university network, in research centres and

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[1] Iancu, A., *Cunoaştere şi Inovare. O abordare economică*, Bucharest: the Romanian Academy Publishing House, 2006.

innovation-oriented companies that offer high-technology products and services and that use and process information[2].

Innovation was one of the main topics approached at the 6th edition of the World Science Forum[3] held at Rio de Janeiro on 24th-27th November 2013. Thus, the "Declaration of the World Science Forum" presents five recommendations, of which two refer to innovation activities:

- training for reducing inequality and promoting sustainable science and innovation worldwide;
- ethical and responsible attitude in research and innovation.

In the epoch of worldwide science, scientific authority must continuously implement self-analysis and self-assessment in relation to the responsibilities, duties and behaviour rules that are specific to the field of research and innovation.

When selecting and implementing research-development and innovation projects (RD&I) that are supported by governments (administrations) or private companies, science promoters and scientists, as well, are primarily responsible for maintaining a constant long-term interest in morality and society and secondly they are responsible for maintaining a constant interest in the short-term economic and political interests. Social inclusion, as a key-part of sustainable development, is an absolute necessity for scientific research, technology and innovation[4].

2. Innovation, an essential coordinate for Europe 2020 Strategy

In 2010, the European Commission adopted Europe 2020 Strategy, which is structured on 3 major coordinates[5]:

- intelligent growth – development of a knowledge & innovation-based economy;
- sustainable growth – promotion of a more efficient, more competitive and more environmentally-friendly economy as regards the use of resources;
- growth which facilitates inclusion – promotion of an economy with a high employability rate, which may ensure economic, social and territorial cohesion.

These three important axes of development support each other and represent a general perspective over the 21st century European social market economy.

Intelligent growth implies the consolidation of knowledge and innovation, as essential vectors for society and the knowledge-based economy. In order to achieve this objective, it is necessary to implement the following measures:

- enhancement of quality in the educational systems;
- enhancement of performances in research activity;
- promotion of innovation and transfer of knowledge within the EU space through IT and communication technology;
- developing the entrepreneurial spirit, which is opportunity-oriented and which adapts to the users' needs on the market.

One of the seven initiatives set forth in the Europe 2020 Strategy is the initiative: "A Union of Innovation". The objective of this initiative is represented by the orientation of

[2] World Science Forum, **Knowledge and Future*, Budapest: 5th-7th November 2009.***

[3] The World Science Forum (WSF) is an event organized every other year under the aegis of the President of Hungary, the Managing Director of UNESCO, the President of the European Commission and the President of the International Scientific Council. In its first edition, WSF was organized in a different country, i.e. not in Hungary, as part of a strategy which was meant to reflect the modifications incurred in the landscape of science and in order to help the forum benefit from the contribution and the accomplishments of the scientific powers set up at scientific initiatives and, finally, in order to promote the forum in other regions.

[4] World Science Forum, *Science for Global Sustainable Development*, Rio de Janeiro, 24-27 November 2013.

[5] European Commission, *Europe 2020*, Brussels, 2010.

research-development and innovation policy towards the challenges of the contemporary society, i.e. climate changes, energy and the efficient use of resources, health and demographic changes. Each link in the innovation chain should be reinforced for all activities ranging from fundamental research to trading. The European Commission is going to take measures like:

- completing the creation of a European Space for Research, creating a strategic agenda for research that is centred on a set of priorities, of which we mention energetic security, transports, climate changes, the efficient use of resources, health and aging, ecological means of production and land management;
- improving the innovation conditions-framework for the business environment, the setting up of a European Unique Patent, a Court of law with jurisdiction in the matters of patents, modernization of the copyright and trademark protection framework, improving access of SMEs to copyright, speeding up the implementation of inter-operation standards, facilitating access to capital and the full usage of policies for secondary demand, e.g. through public acquisitions and intelligent regulations;
- launching European partnerships in the area of innovation between EU and national levels in order to speed up development and the use of technologies that are necessary for coping with challenges;
- reinforcement and further development of the role played by EU instruments in supporting innovation (e.g., structural funds, rural development funds, the Framework Programme - Research - Development, the Framework Programme – Competitiveness and Innovation, Plan SET), including through a closer collaboration with the European Bank for Investments through the simplification of administrative procedures in order to facilitate access to finance, especially for SMEs;
- promoting partnerships for knowledge and consolidation of the connections existing between education, enterprises, research and innovation, including through the European Institute for Innovation and Technology (EIT), as well as promoting the entrepreneurial spirit by supporting young innovating companies.

3. Performances of EU states within the area of innovation

The program of the Innovation Union, 2014 edition, designed by the General Directorate "Enterprises and Industry" within the European Commission, groups EU states into four categories as to the performances they obtained in the innovation activities[6]:

- Denmark (DK), Finland (FI), Germany (DE) and Sweden (SE) are "leaders in the area of innovation"; their innovation performances are much higher than the average level recorded within the EU;
- Austria (AT), Belgium (BE), Cyprus (CY), Estonia (EE), France (FR), Ireland (IE), Luxembourg (LU), the Netherlands (NL), Slovenia (SI) and the United Kingdom (UK) are "supporters of innovation", who obtained performances in the area of innovation that are above the average level or close the average level reached by the EU countries;
- Croatia (HR), the Czech Republic (CZ), Greece (EL), Hungary (HU), Italy (IT), Lithuania (LT), Malta (MT), Poland (PL), Portugal (PT), Slovakia (SK) and Spain (ES) are "moderate innovators"; they recorded performances in the area of innovation that are below the average level reached by EU states;

[6] European Commission, Directorate-General for Enterprise and Industry, *Innovation Union Scoreboard 2014*, Brussels, 2014.

- Bulgaria (BG), Latvia (LV) and Romania (RO) fall into the category of "modest innovators", whose results in the area of innovation are significantly much lower than the average reached by EU states.

This classification of EU states from the perspective of the innovation performances that they reached relies on 25 indices, which belong to three basic groups:

- ✓enablers (human resources; open, excellent and attractive research systems; finance and support);
- ✓firm activities (firm investments; linkages & entrepreneurship; intellectual assets);
- ✓outputs (innovators; economic effects).

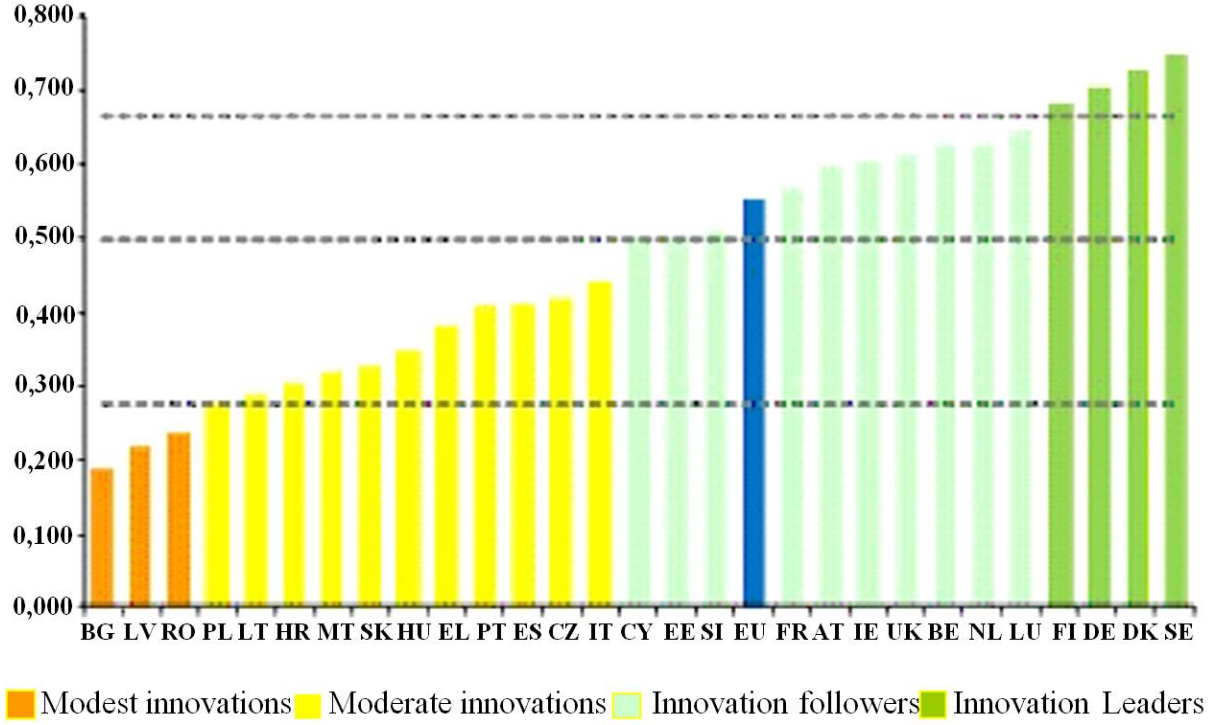

Figure 1. EU Member States' innovation performance7

The states belonging to the first group have excellent results that clearly rank them above the EU average in the innovation key-domains, from higher education and research systems, which imply innovating and active intellectual trading activities, to innovation accomplished within SMEs and the economic effects thereof, a fact which illustrates balanced national research and innovation systems.

The classification made within the European Union is relatively stable for Sweden, which appears as a leader, and which is followed by Denmark, Germany and Finland; these four countries grant the biggest financial resources for research and innovation. Portugal, Estonia and Latvia have recently recorded the most significant progress in the area of research and innovation, while Poland is the only country that evolved from the category of "modest innovators" to the one of "moderate innovators".

As to the countries which do not belong to the EU space, it is interesting to notice the fact that Switzerland remains a leader in the area of innovation, recording the best results in 9 of the 25 indices used for classifying states from the point of view of performances obtained in innovation. Island is also above the EU average, having the status of "innovation follower", while Norway and Serbia are "moderate innovators"; Macedonia, a country belonging to the former Republic of Yugoslavia, and Turkey belong to the category of "modest innovators".

[7] Idem.

At regional level, one can notice that the most innovative regions of the EU are, basically, identical with the most innovating states. However, 14 countries have performance groups and 4 member-states (France, Portugal, Slovakia and Spain) have regions in 3 regional performance groups, a fact which indicates differences in the area of performance and innovation, which are more visible within those states. It is only Austria, Belgium, Bulgaria, the Czech Republic and Greece (which belong to the EU), as well as Switzerland (which does not belong to the EU), that have a relatively homogenous performance in innovation because all the regions in those countries belong to the same performance group[8].

4. An international perspective

At international level, the EU is exceeded by South Korea, USA and Japan, which currently are undoubtedly leaders in the area of innovation. The performances recorded by the first two countries, South Korea and the USA are 17% higher than the results recorded by the EU, while Japan has recorded performances that are 13% higher than the ones recorded with the EU area.

The main innovation leaders, USA, Japan and South Korea are ahead the EU especially as to the indices that measure enterprise activity, expenditures made for research and development, publications edited in collaboration by the public-private sectors and the patent applications for PCT, including as regards the results obtained in education that are measured through "the percentage of the population that has graduated a university"[9].

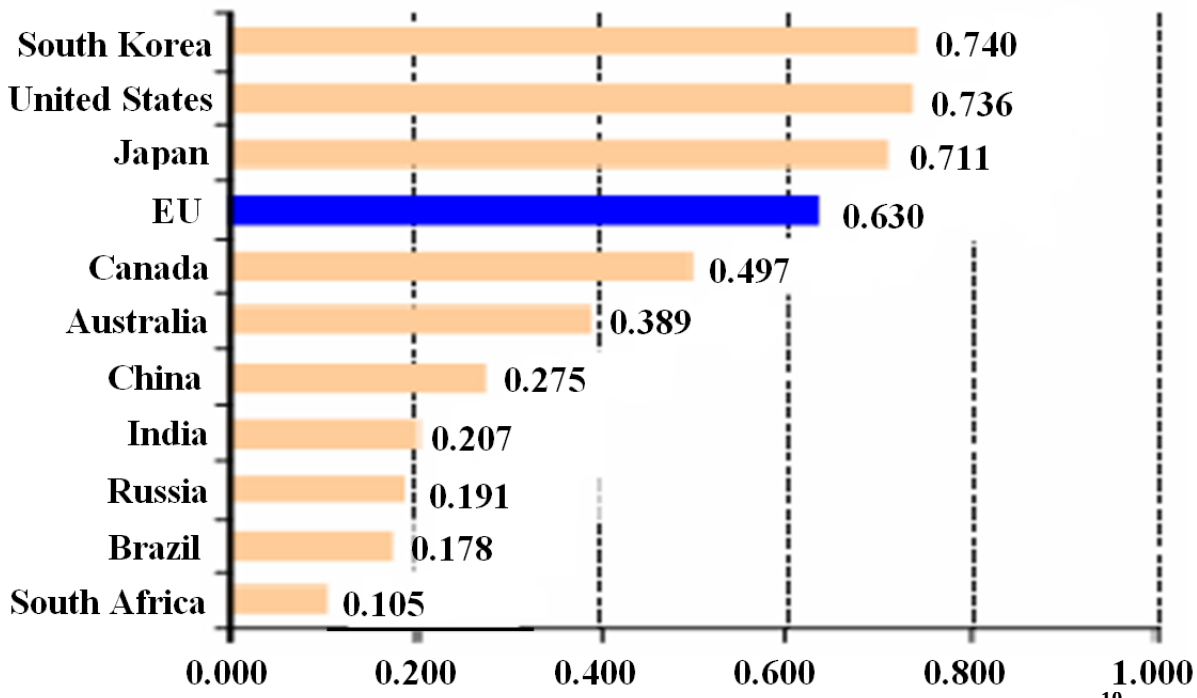

Figure 2. EU Innovation performance compared to main global competitors[10]

The performances of the EU in the area of innovation are superior to Australia and Canada, whose results represent 62%, respectively, 79% of the EU performances in the domain.

[8] European Commission, Directorate-General for Enterprise and Industry, *Regional Innovation Scoreboard 2014*, Brussels, 2014.
[9] European Commission, Innovation performance: EU Member States, International Competitors and European Regions compared, Brussels, 2014.
[10] Idem.

Similarly, the EU is one step ahead in comparison with the BRICS countries group, made up of Brazil, Russia, India, China and South Africa. The gap between the EU and the BRICS countries is increasing with only one exception, i.e. China, the second economic power of the world, whose performance in the area of innovation amounts to 44% of the level reached by the EU; however, this gap tends to diminish because the results obtained in the area of innovation advance with a higher speed in comparison with the EU area.

Consequently, the EU must continue to make efforts as regards the cooperation of EU member states in the domains of education, culture, enterprises and employability, developing the young people's entrepreneurial spirit, and developing innovative behaviour within public and private organizations.

In this context, Antonio Tajani, the Commissioner for industry and entrepreneurship and Deputy President of the European Commission, declared: "The general spread of innovation in the entire European space remains a priority if we wish to achieve our industrial policy objective according to which, until 2020, at least 20% of the EU GDP could be generated by the manufacturing industry. A large number of enterprise investments, a higher demand of European innovating solutions and less numerous obstacles in the commercial exploitation of innovations are essential for ensuring growth. We need more innovating enterprises and a framework that supports growth and facilitates the successful transfer of innovations to the market"[11].

Similarly, Máire Geoghegan-Quinn, the Commissioner for research, innovation and science, declared: "The dashboard confirms once more that investments in research and development enhance economic performance. With a budget of about 80 billion EURO for the next 7 years, the new research and innovation Program, Horizon 2020, is going to help us maintain this dynamic. It is necessary for us to increase the innovation investments in the entire European Union so that, by 2020, innovations will have amounted to a 3% level of the GDP[12]."

5. Conclusions

Innovation was one of the most debated topics at the 6th edition of the World Science Forum, held at Rio de Janeiro from 24th -27th November 2013. The "Declaration of the World Science Forum" contains five recommendations, of which two refer to the innovation activities: training for reducing inequality and promoting sustainable world science and innovation; ethical and responsible behaviour in research and innovation.

One of the seven initiatives comprised by the Europe 2020 Strategy is the Initiative: "A Union of Innovation". The objective of this initiative is political orientation in the sphere of research - development and innovation towards the challenges of the contemporary society, such as climate changes, energy and the efficient use of resources, health and demographic changes.

In the area of innovation, the hierarchy of the EU states is relatively stable, with Sweden as a leader, followed by Denmark, Germany and Finland, these four countries allotting the highest funds for research and innovation. Portugal, Estonia and Latvia have

[11] European Commission, *Press conference on the 2014 Innovation Union Scoreboard and the Regional Innovation Scoreboard reports*, Brussels, 2014 (my translation); original text: „Generalizarea inovării la întreaga Europă rămâne o prioritate, dacă se dorește atingerea obiectivului nostru de politică industrială ca, până în 2020, cel puțin 20% din PIB-ul UE să fie generat de industria producătoare. Mai multe investiții ale întreprinderilor, o cerere mai puternică de soluții inovatoare europene și mai puține obstacole în calea exploatării comerciale a inovațiilor sunt esențiale pentru creștere. Avem nevoie de mai multe întreprinderi inovatoare și de un cadru favorabil creșterii pentru a asigura tranziția cu succes a inovațiilor înspre piață."

[12] Idem; original text: „Tabloul de bord confirmă, încă o dată, că investițiile în cercetare și dezvoltare aduc beneficii în ceea ce privește performanța economică. Cu un buget de aproape 80 de miliarde de euro pentru următorii șapte ani, noul program de cercetare și inovare Orizont 2020 ne va ajuta să menținem această dinamică. Este nevoie să creștem acum investițiile în inovare în întreaga Uniune Europeană, pentru ca, până în anul 2020, să ne atingem obiectivul de 3% din PIB."

recently recorded the most significant progresses in the area of research and innovation, while Poland is the only country that has turned from a "modest innovator" into a "moderate innovator". Romania belongs to the group of "modest innovators", occupying the 26th of the 28 positions, represented by the total number of EU states.

At global level, the EU is surpassed by South Korea, USA and Japan, but it has superior performances in the area of innovation in comparison with Australia and Canada. Similarly, the EU has made an important step ahead the countries from the BRICS group, which includes: Brazil, Russia, India, China and South Africa. China is an exception for it makes fast progress in the area of innovation and it catches up with the gap it currently has in comparison with the EU.

In order to reach a performance level in the area of innovation that is close to the level reached by the world leaders in this area, the EU must further make efforts as regards: cooperation between member states in the domains of education, culture, enterprises and employability, developing the entrepreneurial spirit of the young people, encouraging the innovating behaviour within public and private organizations.

References

- European Commission, Directorate-General for Enterprise and Industry, *Innovation Union Scoreboard 2014*, Brussels: 2014.
- European Commission, Directorate-General for Enterprise and Industry, *Regional Innovation Scoreboard 2014*, Brussels: 2014.
- European Commission, *Europe 2020*, Brussels: 2010.
- European Commission, Innovation performance: EU Member States, International Competitors and European Regions compared, Brussels: 2014.
- European Commission, Press conference on the 2014 Innovation Union Scoreboard and the Regional Innovation Scoreboard reports, Brussels: 2014.
- Iancu, A., *Cunoaştere şi Inovare. O abordare economică*, Bucharest: the Romanian Academy Publishing House, 2006.
- World Science Forum, *Knowledge and Future*, Budapest: 5-7 November 2009.
- World Science Forum, *Science for Global Sustainable Development*, Rio de Janeiro: 24-27 November 2013.
- www.europeancommission.com
- www.infoeuropa.ro

RECENT EVOLUTIONS OF SMEs IN ROMANIA

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Abstract

In relation to the social middle class, SMEs play a key role in contemporary economy, while accomplishing several economic, social and technical functions. The present paper analyses the sector represented by SMEs in Romania in relation to relevant indicators like: the density of SMEs in our country and territorially, the regional distribution of SMEs employees, the number of companies that are economically active etc. In its final part, the paper makes a short and comparative analysis with the situation existing within the European Union, while focusing on the ten principles comprised in "Small Business Act" for Europe, with special reference to the "entrepreneurship" principle.

Keywords: *SMEs, density of SMEs, development region, "Small Business Act" for Europe, entrepreneurship.*

1. Introduction

At present it is generally acknowledged that SMEs are a key-sector for sustainable economic development, an important factor for absorbing workforce that is available or that is laid off and, similarly, a flexible vector that facilitates the adaptation of goods and services production to the volume and structure of the market demand.

The development of SMEs has led to an increase in competition, to a mitigation of the monopolist role played by large companies, as well as to the enhancement of exports, while also generating economic and social alternatives. The existence of SMEs has generated an improvement in the economic behaviour of the population and the surpassing of obstacles for certain socially disadvantaged groups, as well as the recovery of some communities which were affected by industrial slump. Similarly, the active presence of these companies in the private developing sector of economy had a favourable impact on the production structures' capacity to adapt to the dynamic of the economic environment nationally and regionally.

The importance of SMEs in contemporary economy is obvious if we consider the multiple economic, technical and social functions which they accomplish. Of these, we would like to mention[1] [2]:

- SMEs bring a substantial contribution to the GDP: between 55% and 95%, in general;
- SMEs produce a large variety of goods and services, while substantially satisfying the demand on the market;
- SMEs support the activity performed by large and very large companies through outsourcing (parts, subsets and/or specialized services);
- SMEs create workplaces for most of the population;
- SMEs offer products and services at lower costs in comparison with large companies;

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[1] The National Council of Private SMEs in Romania, *Strategy 2012-2016*, Bucharest, 2012.
[2] Cornescu, V., Ionescu, V., *Economia şi managementul afacerilor mici şi mijlocii*, Bucharest: University of Bucharest Publishing House, 2011.

- SMEs represent the most dynamic sector of economy;
- SMEs contribute to the reduction of unemployment, while absorbing the laid off personnel through the reorganization of large companies;
- SMEs offer to many persons the possibility to achieve professional and social fulfilment, particularly to the most active and innovative segment of the population;
- SMEs manifest a high receptivity for the innovating phenomenon both as regards production, and also as regards the incorporation of inventions and innovations;
- SMEs are an important revenue source for the state budget (taxes, VAT, etc.);
- SMEs are the main vectors of knowledge-based economic development;
- SMEs are the basis of the future large companies, especially in new areas of economy, such as the most important domains of activity that rely on state-of-the-art technology.

The relationship between the development of SMEs and the business environment is bi-univocal. On the one hand, a stable and predictable business environment facilitates the manifestation of private initiative, the setting up of enterprises and, in consequence, the development of the SMEs sector. On the other hand, a strong SMEs sector is an important factor for economic and social balance, which intensifies market competition, increases the quality of products and services to satisfy demand and diversifies the offer. Thus, the premises of creating and reinforcing a stimulating and dynamic business environment - which is attractive to the local investors and the foreign ones - are ensured.

2. A brief examination of the SMEs sector in Romania

In the last few years, Romania has made several important steps as regards the creation of a stable and predictable business environment; however, there is still more to do: the configuration of a legislative and institutional framework that offers premises for a favourable manifestation of the entrepreneurial spirit. The efforts that have been made so far must be continued because the existence of a stimulating and dynamic business environment, which is attractive to investors, and the development of SMEs, are fundamental premises that ensure a sustainable development for Romania, which must comply with the Europe 2020 Strategy.

Thus, according to the data comprised in the "White Charter of Romanian SMEs", 2013 edition, 43.38% of the Romanian enterprisers appreciate that the present economic environment is unfavourable to the business development, while 41.28% of them perceive it as neutral and only 15.34% of the interviewed respondents appreciate that the economic environment is favourable to the development of businesses (see Figure 1)[3].

[3] The National Council of Private SMEs in Romania, The Ministry of Economy (Department for SMEs, Business and Tourism Environment), *White Charter of Romanian SMEs*, Bucharest: Sigma Publishing House, 2013.

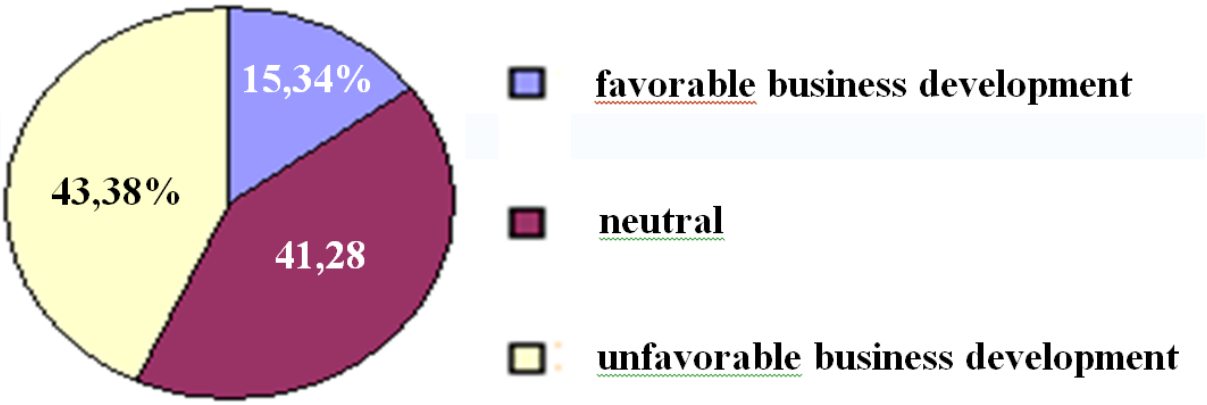

Figure 1. Perception of Romanian entrepreneurs as to the present economic environment[4]

In 2012, the economic environment was perceived as unfavourable by 54.45% of entrepreneurs, while 33.75% of them considered that it was neutral and 11.8% of the entrepreneurs perceived the economic environment as favourable to the development of businesses (see Figure 2). The main conclusion that can be drawn after a comparative analysis between 2012 and 2013 is that of a slight improvement in the Romanian entrepreneurs' perception as to the situation of the business environment. However, we point out the high percentage (43.38%) of entrepreneurs who consider that the economic environment in Romania is not favourable to the development of businesses.

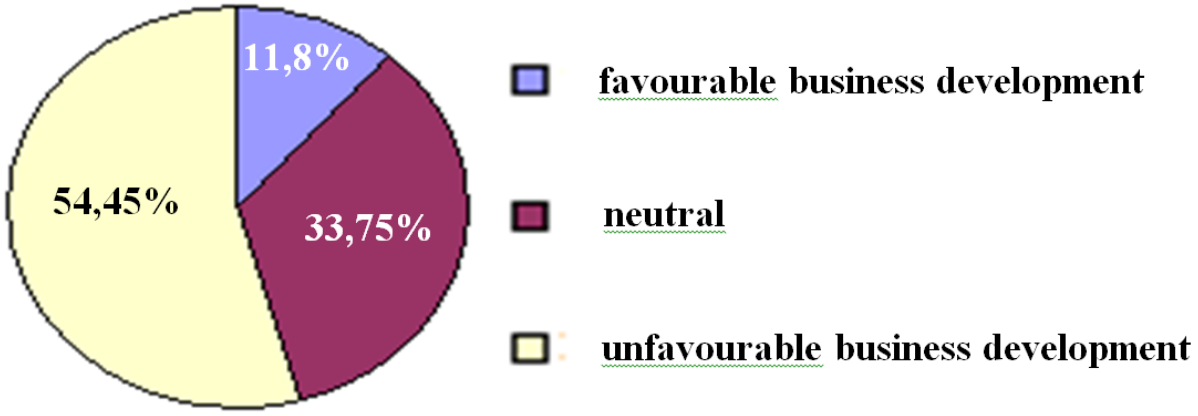

Figure 2. Perception of Romanian entrepreneurs as to the economic environment in 2012[5]

As to the share of the SMEs within the microeconomic sector of Romania, one can identify a sort of stability in the last few years (see Table 1). This share maintains itself at 99.6%, because in 2011, in comparison with 2010, a slight improvement was recorded both with SMEs (437,042 companies in 2011, in comparison with 436,508 companies in 2010), and with large companies (1,588 companies in 2011, in comparison with 1,527 companies in 2010). If we consider that in 2008, before the onset of the economic crisis, there were 498,200 economically active firms, we can state that a short-term objective could be to re-reach the level of 2008 as regards the number of companies.

[4] Adapted after The National Council of Private SMEs in Romania, The Ministry of Economy (Department for SMEs, Business and Tourism Environment), *White Charter of Romanian SMEs*, Bucharest: Sigma Publishing House, 2013.
[5] Adapted after the National Council of Private SMEs in Romania, The Ministry of Economy (Department for SMEs, Business and Tourism Environment), *White Charter of Romanian SMEs*, Bucharest: Sigma Publishing House, 2013.

The number of economically active SMEs in 2010-2011[6]

Table 1

Year	SMEs	Large enterprises	Total number of enterprises	Share of SMEs
2010	436,508	1527	438,035	99.6%
2011	437,042	1588	438,630	99.6%

The demographic evolution of SMEs is, on the one hand, illustrated by the total number of incorporated companies, and, respectively, by the number of companies that were subjected to suspension, dissolution and deregistration, on the other hand[7].

In 2008, 144,239 companies were incorporated, while the total number of companies that were subjected to dissolution, suspension and deregistration amounted at 33,457 firms. In other words, for 4 companies that were incorporated in 2008, only one ceased its activity. In 2009 and 2010, the number of dissolutions, suspensions and deregistration cases was double in comparison with the number of the incorporated companies due to the economic crisis. The situation improved in 2011 and 2012, when the relation between the number of incorporated companies and the number of companies that ceased to perform their activity was around 1 (in 2012 a number of 125,603 companies were incorporated and a number of 118,324 companies ceased to pursue their activity).

The total number of companies which were subjected to incorporation, suspension, dissolution and deregistration for 2008-2012[8]

Table 2

Year	2008	2009	2010	2011	2012
Incorporations	144,239	111,832	119,048	132,069	125,603
Suspensions	12,019	134,441	66,428	21,086	24,078
Dissolutions	3,762	30,105	8,191	11,660	22,500
Deregistration cases	17,676	43,713	171,146	73,244	71,746
I / SDR	4.31	0.54	0.48	1.25	1.06

The strategic indicator that points out the development stage for SMEs in an economy is their density, respectively the number of active SMEs calculated in proportion to 1,000 inhabitants. This indicator provides essential information as to the efficiency of the governing policies which are meant to encourage and assist SMEs and, at the same time, it reflects the sectorial and regional trends[9]. At present, in Romania, SMEs density amounts at 23 firms/1,000 inhabitants, representing 56% of the EU average, i.e. 41 firms/1,000 inhabitants.

[6] Post – Privatization Foundation, Raportul privind sectorul IMM din România. Ediția 2013, Bucharest, 2013.
[7] Idem.
[8] Post – Privatization Foundation, Raportul privind sectorul IMM din România. Ediția 2013, Bucharest, 2013.
[9] Dinu, M., Economia României. Întreprinderile mici şi mijlocii. Cu ce ne integrăm?, Bucharest: Economică Publishing House, 2002.

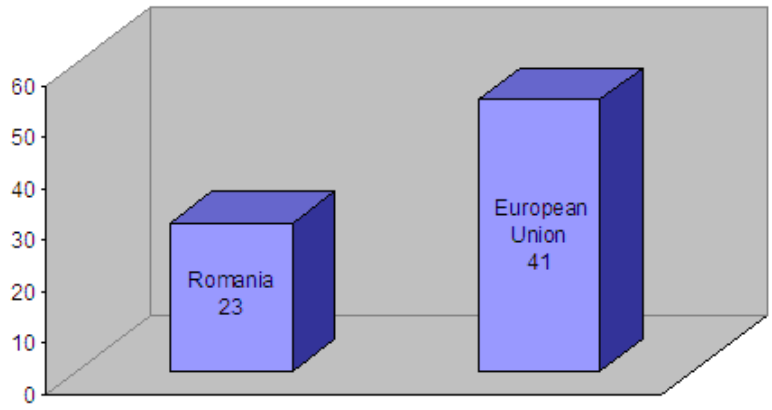

Figure 3. Density of SMEs in Romania in relation to the EU average

Analysing the density of SMEs territorially (see Table 3), one can notice that the region of Bucharest-Ilfov occupies the first position in the hierarchy, with a density of 50.23 firms/1,000 inhabitant, followed by the North-West region with a density of 24.35 firms/1,000 inhabitants and by the Central region whose density is of 23.54 firms/1,000 inhabitants. The last positions are occupied by the regions of South-Muntenia and North-East, in which the density of SMEs is of 16.10 firms/1,000 inhabitants and, respectively, 15.12 firms/1,000 inhabitants. One can notice that the hierarchy of the 8 development regions, as regards the density of SMEs, remains stable in time; however, one can also identify a significant gap between the first region, Bucharest-Ilfov, and the regions of North-West, Centre and West, which occupy the next three positions. Similarly, one can spot a critical situation in the regions of South- Muntenia and North-East, where 32.27% of the total population of Romania lives, and which record the lowest density level for SMEs. The data comprised in Table no. 3 illustrate the major gaps existing between the eight development regions of Romania as to the entrepreneurial phenomenon.

Number and density of SMEs in the 8 development regions, 2011[10]

Table 3

Region	**Number of SMEs**	**Regional share of SMEs**	**Number of inhabitants**	**Density (no. of SMEs / 1,000 inhabitants)**
BUCHAREST-ILFOV	102,577	22.69%	2,042,226	50,23
NORTH-WEST	60,758	13.95%	2,495,247	24,35
CENTRE	53,002	12.31%	2,251,302	23,54
WEST	40,594	9.41%	1,730,146	23,46
SOUTH-EAST	51,694	11.94%	2,399,604	21,54
SOUTH-WEST OLTENIA	32,532	7.48%	1,977,986	16,45
SOUTH-MUNTENIA	48,273	11.17%	2,998,679	16,10
NORTH-EAST	47,612	11.05%	3,148,577	15,12
ROMANIA	437,042	100%	19,043,767	22,95

[10] Post – Privatization Foundation, Raportul privind sectorul IMM din România. Ediţia 2013, Bucharest, 2013.

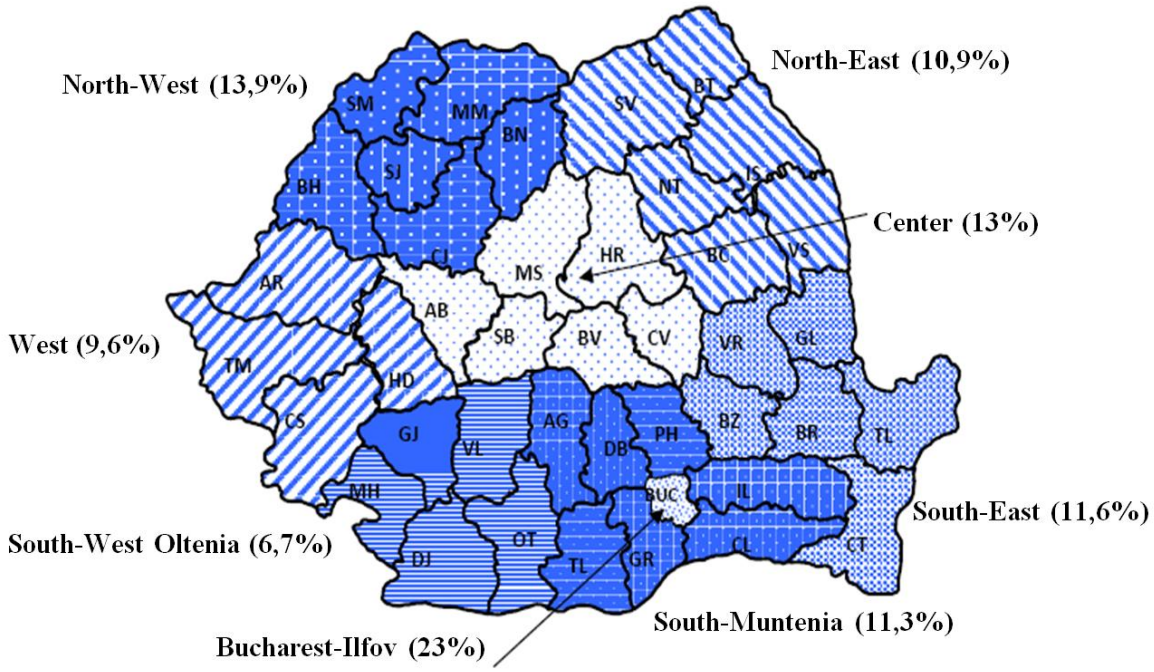

Figure 4. Regional distribution of the employees in SMEs[11]

As to the distribution of employees who perform their activity in SMEs, illustrated per regions of development (see Figure 4), one can spot the first position in the hierarchy for the region of Bucharest-Ilfov with 23%. In fact, almost a quarter of the total number of employees in SMEs in Romania work in companies that are located in this region, which also occupied the first position also as to the SMEs density. Actually, there is a natural correspondence between the two indicators, the regions of North-West and Centre, which occupy the second and, respectively, the third positions as to the SMEs density, and as to the share of employees. The West Region, which occupies the fourth position as to the SMEs density, is the first before last in the hierarchy as to the share of employees, a situation which is not accidental if we consider that this region has the lowest number of inhabitants of all the 8 regions of development. A critical situation exists in the North-East region, which occupies the last position as regards the SMEs density and which records only 10.9% of the total number of employees working for SMEs, though this region has the largest number of inhabitants of all the existing ones.

3. Relevant comparisons with the European Union

The European Commission adopted in 2008 a document entitled "Small Business Act" for Europe, the first ample frame of policies for SMEs within the EU and the EU member states[12]. The main goal of the "Small Business Act" for Europe is the adaptation of the general strategic approach to the entrepreneurial spirit in order to irreversibly impose the principle: "Think small first".

In order to successfully implement "Small Business Act" for Europe, the Commission suggested concluding a political partnership between the European Union and member states, which must observe the principles of subsidiarity and proportionality. "Small Business Act" for Europe promotes a set of 10 principles which are meant to guide the conception and

[11] Idem.
[12] Commission of the European Communities, *"A Small Business Act" for Europe*, Brussels, 2008.

application of public policies within the area of SMEs both at European Union level and at the member states level. The 10 principles are as follows[13] [14]:

- Entrepreneurship;
- Second chance;
- Think small first;
- Responsive administration;
- State aid & public procurement;
- Access to finance;
- Single market;
- Skills and Innovation;
- Environment;
- Internationalization.

As one can notice in Figure no. 5, the first principle, "entrepreneurship", is the only of the 10 principles where Romania exceeds the European Union average. The result is surprising if we consider that in Romania, the SMEs sector does not benefit from the support and assistance offered to the other member states. Moreover, as we have pointed out at the beginning of the second section of the present paper, only 15.34% of the Romanian entrepreneurs consider that the economic environment is favourable to the development of businesses. Consequently, one can state that in Romania there is a culture of the entrepreneurial spirit, a favourable attitude and a tendency towards the setting up of businesses and, at the same time, a tendency towards developing the existing companies, a fact which is an important premise for the consolidation of the SMEs sector for the next period.

[13] Idem.
[14] European Commission, Directorate-General for Enterprise and Industry, *2013 SBA Fact Sheet Romania*, Brussels, 2013.

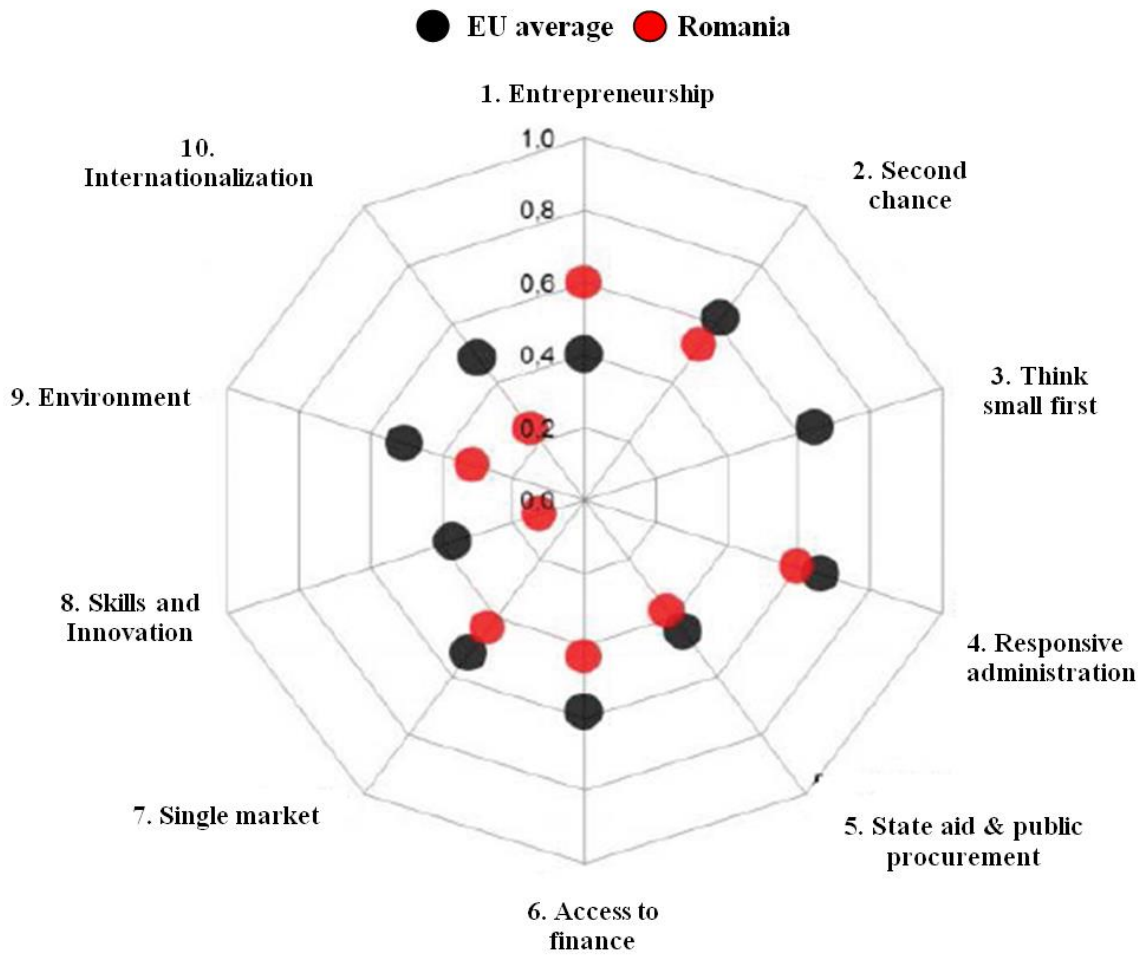

Figure 5. Principles of the "Small Business Act" for Europe. Comparison between Romania and the European Union[15]

The "entrepreneurship" principle takes into consideration 9 indicators, which are synthetically presented in Table 4.

Analysing the data comprised by Table 4, one can notice that Romania occupies a position which is higher than the EU average for 8 out of the 9 indicators that define the "entrepreneurship" principle, except for the "opportunity-driven entrepreneurship" criterion. Similarly, as regards the "Entrepreneurial intention" and "Preference for self-employed" indicators and "Share of adults who agree that school education helped them develop an entrepreneurial attitude" indicator, Romania occupies a significantly superior position in comparison with the average calculated for the entire European Union.

One should also emphasise the fact that mass-media is seriously involved in Romania in promoting the entrepreneurial spirit. In our opinion, this is an essential aspect because, in the contemporary knowledge-based society, mass-media plays a key-role in promoting notions, concepts, values and principles and, also, in shaping the behaviours and attitudes of the population.

[15] European Commission, Directorate-General for Enterprise and Industry, *2013 SBA Fact Sheet Romania*, Brussels, 2013.

Indicators of the "entrepreneurship" principle. Comparison between Romania and the European Union[16]

Table 4

Indicators	Romania	EU average
Self-employment rate (% of total employment)	20	15
Entrepreneurship rate (% of adults who have started a business or are taking the steps to start one)	26	23
Entrepreneurial intention (% of adults who intend to start a business within 3 years)	27	13
Opportunity-driven entrepreneurship (% of entrepreneurs)	43	49
Preference for self-employed (% of adults who would prefer to be self- employed)	48	37
Feasibility of becoming self-employment (% of adults who think it is feasible to become self-employed)	31	30
Share of adults who agree that school education helped them develop an entrepreneurial attitude (%)	73	50
Share of adults who think that successful entrepreneurs receive a high status in the society (%)	74	69
Media attention for entrepreneurship (%)	55	50

We also remark the high percentage of adults who consider that the education obtained in school helped them develop an entrepreneurial spirit. The values recorded for this indicator (73 in Romania, in comparison with 50, which is the average within the European Union) should be an impulse and, at the same time, a supplementary motivational factor for the development of new curricula in schools, colleges and universities, with a view to stimulating the entrepreneurial spirit, principles and values in general.

4. Conclusions

The relationship between the development of SMEs and the business environment is bi-univocal. A stable and predictable business environment favours private initiative, the setting up of enterprises and, consequently, the development of the SMEs sector. At the same time, a strong sector for SMEs is an important factor which ensures a balance both economically and socially, while intensifying market competition, the enhancement of the quality of the offered products and services, as well as the diversification of the offer. Thus, the premises that are necessary for the creation and reinforcement of a stimulating and dynamic business environment, which is attractive both to the investors in our country and for the foreign ones, are ensured.

The strategic indicator which points out the level of development for SMEs in an economy is the density thereof, respectively the number of active SMEs in relation to 1,000 inhabitants. At present, in Romania, the SMEs density is of 23 companies/1,000 inhabitants, representing 56% of the average recorder at EU level, which is of 41 companies/1,000 inhabitants. In the regional analysis of the SMEs density, we have spotted the major gaps existing between the eight regions of development in Romania as regards the entrepreneurial phenomenon.

There is a correlation between the SMEs density from a territorial perspective and the distribution of SMEs employees per regions of development; thus, the regions of Bucharest-Ilfov, North-West and Centre occupy the first three positions in the hierarchy. The Region of

[16] European Commission, Directorate-General for Enterprise and Industry, *2013 SBA Fact Sheet Romania*, Brussels, 2013.

West, situated on the fourth position as to the SMEs density, occupies the first before last position as to the share of employees, a fact which is not surprising if we consider that this region has the lowest number of inhabitants of all the 8 regions of development. A critical aspect refers to the North-East region, which is located on the last position as to the SMEs density, and which records 10.9% of the total number of SMEs employees even though this region has the largest number of inhabitants.

Romania occupies a higher position in relation to the other EU member states as to the "entrepreneurship" principle, which is one of the 10 principles promoted by "Small Business Act" for Europe, a framework-document adopted by the European Commission in 2008. Thus, in Romanian, there is a culture of the entrepreneurial spirit, a favourable attitude and a tendency towards setting up businesses and, at the same time, a tendency towards developing the existing ones, a fact which is an important premise for the reinforcement of the SMEs sector for the next period.

As regards the indicators of "Entrepreneurial intention", "Preference for self-employed" and "Share of adults who agree that school education helped them develop an entrepreneurial attitude", Romania is one step before the average recorded at the level of the European Union. We appreciate the implication of mass-media in promoting the entrepreneurial spirit, which is an essential aspect for our contemporary knowledge-based society because mass media plays a key-role in promoting notions, concepts, principles and values, as well as in shaping behaviours and attitudes for the population.

In the last few years, Romania has made important steps in creating a stable and predictable business environment, which favours the development of the SMEs sector. The efforts that Romania has made up so far must be continued because the existence of a stimulating and dynamic business environment, which is attractive to investors, together with the development of SMEs, are fundamental premises for ensuring that Romania is on the right path in reaching a sustainable development level that complies with the provisions stipulated by Europe 2020 Strategy.

References

- Commission of the European Communities, *"A Small Business Act" for Europe*, Brussels, 2008.
- The National Council of Private SMEs in Romania, The Ministry of Economy (Department for SMEs, Business and Tourism Environment), *White Charter of Romanian SMEs*, Bucharest: Sigma Publishing House, 2013.
- The National Council of Private SMEs in Romania, *Strategy 2012-2016*, Bucharest, 2012.
- Cornescu, V., Ionescu, V., *Economia şi managementul afacerilor mici şi mijlocii*, Bucharest: University of Bucharest Publishing House, 2011.
- Dinu, M., Economia României. Întreprinderile mici şi mijlocii. Cu ce ne integrăm?, Bucharest: Economică Publishing House, 2002.
- European Commission, Directorate-General for Enterprise and Industry, *2013 SBA Fact Sheet Romania*, Brussels, 2013.
- Post – Privatization Foundation, Raportul privind sectorul IMM din România. Ediţia 2013, Bucharest, 2013.
- European Commission, *Europe 2020*, Brussels, 2010.
- www.europeancommission.com
- www.infoeuropa.ro

RESHORING IN MANUFACTURING AND SERVICES

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Abstract

The extent of offshoring and outsourcing recorded in manufacturing and services in the last two decades has gradually eroded the advantage of the global arbitrage of labor costs. Along with other factors, this process began to change the options of international relocation of some companies that initially had adopted such a strategy, generating a reverse trend for returning in the country of origin of manufacturing and other activities. This process, called "reshoring," has recently started to gain some consistency. The trend is most notable in the sphere of production. In terms of business and IT services we cannot yet speak of a tangible start of the reshoring phenomenon, as it does in the sphere of production. Nevertheless we can see a slowdown in the offshoring of services and the emergence of new strategies in the field.

Keywords: *offshoring, outsourcing, reshoring, on-shore, TNCs.*

Introduction

The phenomenon of offshoring and external outsourcing in the sphere of production and business services emerged in the '80s and quickly became, in the next two decades, a widespread phenomenon, and in fact a new component of what we call economic globalization.

Both external outsourcing and offshoring took place almost exclusively in the direction of developed countries - the least developed countries (mainly emerging), with important benefits for Western companies that have opted for this strategy as a result of a significant gap in labor cost (most noticeable factor of a wider set of factors that weighted in the geographic relocation decision), and also as a result of the indisputable advantages of the outsourcing of manufacturing and of other components of the value chain of a product in the context of the international functional specialization.

For the offshoring boom period remained emblematic the assertion of the Executive Director of the American giant General Electric, Jack Welch , who said that "the ideal strategy for a global company would be to put every factory it owned on a barge and float it around the world , taking advantage of short-term changes in economies and exchange rates".

The two manifestations of globalization, offshoring and external outsourcing, also produced advantages and disadvantages for the countries involved, namely multiple economic and social benefits to the countries to which production and services have been relocated, while for the Western countries most visible were the lower prices for a wide range of goods and the loss of jobs, initially more evident to those with lower skills, but increasing thereafter for the middle class also. This issue was raised in a survey conducted in 2010 by NBC News and the Wall Street Journal showing that 86 % of Americans indicated as the cause of economic difficulties the offshoring of jobs to low-wage countries.

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The scale of offshoring gradually eroded the advantage of the overall labor costs arbitration. Wages in China and India have grown by 10-20 % annually in the last decade, while payment per hour of work in industry, both in America and Europe, almost stalled. Along with other factors, this process began to change the options of international relocation of some companies that had adopted the offshoring strategy, generating a reverse trend of returning to the country of origin of manufacturing and other activities. This process, called "reshoring", has recently started to gain some consistency, which requires the analysis of the present and future favoring factors.
The trend is to be seen both in the production and in the business services areas.

Reshoring in manufacturing

It must be emphasized first that reshoring is predominantly an American phenomenon. This follows from the following facts:

- European companies were much less involved in the offshoring strategy compared to the transnational American companies, so they have, from the start, less to relocate.
- Labor markets in European countries are still inflexible and expensive, so that a considerable advantage in labor cost arbitrage persists, even if wages in China and other countries increased meanwhile.
- Compared to the U.S., in Europe the share of family firms is high and they are prone to conduct business in their own country.
- European companies were to a greater extent relying on "near- shoring", meaning offshoring to East European countries, thus minimizing from the start the cultural and linguistic differences, but also transportation costs.
- However a differentiated approach to offshoring within the European countries can be also observed, most active being the companies of north European countries which, unlike companies in France, Italy and Spain, have not suffered the same social and political pressure to keep the jobs in the country.

Secondly the tendency to manufacturing reshoring results from the expressed intentions of the companies, as well as from the actual relocation of production capacities.

In this respect, from the two surveys conducted in collaboration by AlixPartners, McKinsey and Hackett on a global scale regarding the intentions of companies to relocate manufacturing, it resulted, for the period 2012-2014 compared with the period 2009-2011, on one hand a reduction of the offshoring volume (from 26 % to 23 % of production capacity) and on the other hand an increasing determination to relocate from the initial offshoring destinations (from 25 % to 43 % , including an increase in relocation to other low-cost countries from 16% to 24% of the capacity and an increase of reshoring intentions from 9 % to 19 % of capacity) .

Among companies that have already started reshoring operations worth mentioning are General Electric, Caterpillar, Ford Motor Company, Google, Apple and smaller firms such as IKEA, Emerson (electrical equipment), Desa (power tools), ET Water Systems. A year ago, the number of U.S. firms that have brought home the whole or a part of the manufacturing capacity already reached 100. The comparative figures the phenomenon is not yet of magnitude, but it is significant.

Transnational companies will become less overall as a result of this trend, but the geographic distribution of their activities will be more selective.

Among the factors that determine today and will influence in the following years the reshoring decisions of companies we should mention:

1. The narrowing wage gap between developed countries and "low-cost" countries. International Labor Organization has calculated that in Asian countries real wages increased

between 2000 and 2008 by 7.1-7.8 % per year, while in the developed economies, according to McKinsey Global Institute, wages rose in the same period only by 0.5-0.9 % per year. The gap appears even more striking compared to China where the aggregate of the salaries and benefits of an average worker increased between 2000 and 2005 by 10% per year and have accelerated between 2005 and 2010 to 19% a year, and the Chinese government has set the target to increase the minimum wage by 13% per year until 2015. Regarding the top management remuneration, according to a study conducted by the consulting company Hay Group, in some countries such as China, Turkey and Brazil it equaled or exceeded the levels recorded in America and Europe.

Other countries including Vietnam, Indonesia, Philippines, Cambodia, Myanmar offer lower wages than China, but still do not offer the same opportunities in respect of the long series of production, efficiency and supply chains. Not to mention other setbacks such as labor availability, productivity and skills.

In the context of the narrowing wage gap, already the well-known American company Manpower recommends to those Western companies that have in the overall cost structure of the product up to 15 % labor costs, to avoid the option for offshoring. This strategy will produce them losses due to the narrowing wage gap and its cancellation by transport costs.

It is expected however that in industries intensive in labor to observe a reverse in the current situation to the detriment of offshoring due to an impending revolution in robotics.

2. The impairment, by the interposing of a considerable distance between the functions of manufacturing and design, of innovation and quality. A solution would be the offshoring of research and development to the host countries of production offshoring. An example is the company Caterpillar which has recently decided to expand its R & D activities in China. However, because the protection of intellectual property rights in many developing countries cannot be fully guaranteed, most high technology companies prefer to conduct these activities in their home countries.

Impaired quality as a reason for reshoring is not new. A study by Deloitte Consulting in 2005 revealed that from 25 major companies who outsourced certain activities, a quarter insourced them back to achieve better quality and even lower costs.

3. Slower reaction to market demands when between this and the location of manufacturing is interposed a considerable distance. This factor increases in importance due to the fact that the proximity to customers and the quick respond to their demands became a major competitive advantage.

Increasingly the TNC's production relocation strategy is not so largely motivated by the arbitrage of production factors, as by the need to be close to customers. Some authors consider that in such cases we do not speak about offshoring in the sense that this term was used in the last three decades, but about "on-shore" in other countries. It is true that the term offshoring is often associated with the transfer of manufacturing to countries with low wages, but we must not forget that the transfer of manufacturing to other countries has been and still is the basic strategy of TNCs to conquer new markets. This aspect is to be found in TNC's strategy to go in various forms to China and other countries for their potential to grow as large markets. The carmakers case is relevant. But there are companies who initially moved manufacturing to China to take advantage of low cost of labor, but now remain and expand in China for the market itself (Bombardier, Siemens, etc.).

Closeness to the customer is a strategy that large companies from emerging countries have also started to implement through the offshoring of manufacturing to developed countries. For example, the Chinese giant Lenovo who bought a decade ago the manufacturing of PCs from IBM, decided in 2013 to transfer some production in the U.S. in order to meet customer demands and quickly customize the product without waiting six weeks until it would arrive by ship from China. Taiwanese giant Foxconn also announced

recently that it will increase activity in the U.S., motivated by the partial reshoring of Mac computers by Apple.

4. The appearance and decrease in the cost of implementation of new manufacturing technologies that will cut down the use of labor will gradually diminish the importance of a major reason for manufacturing offshoring. Perspectives closer than we can imagine will offer 3D printers and industrial robots. Already the average price of robots relative to labor cost decreased by 40-50% over the last 15 years with the increasing complexity of their operations and programming versatility.

5. Avoiding the problems of the supply chain management. Although logistics has improved, there are still plenty of factors that can jeopardize a complex chain of suppliers with high spatial dispersion. A recent resounding example was the less inspired product strategy of Boeing to manufacture a new and very sophisticated type of plane, the 787 Dreamliner, outsourcing 70 % of the development and manufacturing activities to about 50 suppliers who in turn have subcontracted to hundreds of other companies. As a result not only the deadlines have been exceeded, but some serious quality and reliability issues appeared. An example of a consistent strategy that relied on short chains and flexible suppliers is the Spanish company Inditex (with Zara as its main brand) that develops successfully by resisting the temptation to contract with suppliers from China and using the manufacturing capabilities of Spain, Portugal and Morocco.

Reshoring in services

In terms of business and IT services we cannot yet speak of a tangible start of the reshoring phenomenon as it happens in the sphere of production. Transport costs do not play any role here. What we find is a slowdown in services offshoring and the emergence of new strategies in the field.

Regarding the first aspect, the slowdown in services offshoring, the main causes are:

a) The fact that most services readily transferable abroad have been already moved there, especially in the BRIC countries, with India as the main destination. In 2008 India was credited with 65% as a destination for IT services offshoring and 43% for business services. Thus, recent estimates show that European and American banks and financial services institutions have already transferred about 80 % of what can be transferred to India and other foreign locations.

b) The fact that many of the activities that could be outsourced are subject to further efficiency gains in developed countries and requiring a higher level of qualification, making them less outsourceable.

Hackett, an American outsourcing consultancy company estimates that during 2002-2016 offshoring will be responsible for the transfer of about 2.1 million jobs in the business and IT services, but this process will slow after 2014 and even stop complete to 2022.

The emergence of new strategies in the sphere of services offshoring and outsourcing can be observed and it is also expected that gradually more and more companies will reconsider their options in the near future. Some considerations can be the following:

1. Although during the crisis years of 2008-2009 the overseas transfer of jobs in the service sector accelerated, including also more complex and highly skilled activities, today, according to some specialists, more companies find that there are hidden costs of this strategy, first of all the loss of connection with some important functions of the company. Thus, if some activities were, until recently, regarded as not being important for the overall profitability of the company, such as information management, now they are reconsidered as essential and undesirable to be transferred to independent firms also located at considerable distances.

2. It is important to note that a strong signal about IT services reshoring was recently given by two American giants that were at the forefront of offshoring and outsourcing processes, namely General Electric and General Motors. The main motivation, but also favored by the reducing wage gap, is that returning at least a portion of IT services in the U.S. allows more flexibility, speed and innovation in relation to the local market, aspects suffering when they were performed by suppliers from India.

3. Decreased relative wage advantage is to be observed also in the sphere of services. In the case of IBM, for example, the cost of labor in India was in the beginning with 80 % less than in the U.S., but now the gap reduced to 30-40 % and decreases further.

From a survey conducted by Hfs Research from Boston in 2012 resulted that the most promising market for outsourcing IT and business services for at least the next two years was considered America, for the first outpacing India. One explanation comes from a study of McKinsey, a consultancy company, regarding the perspectives of jobs in U.S., showing that IT specialists in areas with lower wages in the U.S. can be hired cheaper than in Brazil or Eastern Europe, and being just 24% more expensive than those in India. In many developed countries there are wage regional differences, ranging up to 30 %, such as between Paris and northern France, or between western and eastern Germany.

4. Greater labor fluctuation in "low-cost" countries creates services quality issues. We can observe also that third companies cannot perform monotonous back-office tasks better, but on the contrary.

5. Cultural affinity also plays an increasingly important role in customers' mind, customers that are even willing to pay more for this convenience. This is more strongly observed in the case of financial services, and the result is the transfer of call center services from India to the Philippines, America or Europe.

6. A complementary to reshoring phenomenon is the transfer of services offered by big Indian companies from India to U.S.. For example, Infosys has opened in recent years a number of 18 new offices in the U.S., employing primarily Americans and being close to various U.S. companies.

Conclusions

Can we say that the narrowing wage gap between developed countries and "low-cost" countries, along with other factors to which reference was made above, will increase in the near future the reshoring phenomenon, especially in the sphere of manufacturing and to a smaller scale in the business and IT services. As results from surveys conducted in the Western business enviranment, a number of factors such as the qualification of the workforce, labor legislation, the existence of appropriate infrastructure and industrial clusters, the stability and benefits of the tax system, get a growing importance in the companies decisions on international relocation. These issues have to be tackled with more consideration within government policies. Reshoring or quitting offshoring or outsourcing may be promising for Western economies, but they have to be stimulated by a greater flexibility of the labor market, by providing an increased number of specialists coming out the educational system, etc..

References

- Baldwin R. (2006): " Managing the Noodle Bowl :: The Fragility of East Asian Regionalism " .
- Suzanne Berger and the MIT Industrial Performance Center, How We Compete: "What Companies Around the World Does Doing to Make It in Today's Global Economy" Currency Book, 2006.
- The Economist, January 19th, 2013.
- Dunning H.John , Masataka Fujita , Nevena Yakov : "Some macro -data on the Regionalization / Globalization Debate : A Comment on the Rugman / Verbeke Analysis" , Journal of International Business Studies 38, no.1 (January 2007) .
- " Globalization Study " (2005), Industrial Performance Center at MIT

- Krugman P. & Venables A. (1995) : " Globalization and the Inequality of Nations " .
- A. Inkpen , K. Ramaswamy , " Global Strategy" , Oxford University Press, 2006 .
- Margulescu Sergei Margulescu Elena , "Switching from the globalization of markets to the globalization of production and services in the world semi-globalized " in The 33- rd Annual Congress of the American Romanian Academy of Arts and Sciences (ARA) Proceedings, Volume I, Polytechnic International Press, Montreal, Quebec, in 2009 .
- Sam Palmisano , "The Globally Integrated Enterprise ," Foreign Affairs, USA (2006) .
- Pankaj Ghemawat , " Redefining Global Strategy" , Harvard Business School Press, Boston , Massachusetts (2007)
- Alan Rugman , Alain Verbeke: ' A Perspective of Regional and Global Strategies of Multinational Enterprises " , Journal of International Business Studies 35 , no. 1 (January 2004).
- Van Agtmael Antoine - "The Emerging Markets Century", Free Press, New York , 2007.
- Margulescu Sergei, Margulescu Elena, "Factors and Aspects of the relocation strategies of companies ", Global Economic Observer, 2013.

ASSESSMENTS OF THE DEGREE OF ADOPTION OF THE EURO IN ROMANIA

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Abstract

The changeover to euro is an older objective of Romania, but whose implementation has suffered numerous delays depending on the degree of economic integration with the euro area and the fulfilment of nominal convergence criteria. Romania has started preparations for euro adoption since 2010, but the completion of the process is uncertain. In this study we will analyse the stage of adopting the euro, the steps taken and what criteria must be met in this regard. Research is completed with an analysis of the European Union member states that have not yet adopted the euro or adopted recently.

Thus, we will highlight the measures taken by governments and central banks of these countries, the results obtained the reaction of public opinion and the ways in which they managed to overcome the economic crisis opinion and the ways in which they managed to overcome the economic crisis.

Keywords: *Euro, convergence criteria, economic crisis, economic competitiveness, monetary union.*

1. Introduction

The adoption of Euro was an objective assumed by Romania when it adhered to the EU. Economic and financial progress gives us the necessary grounds to hope for the fulfilment of this obligation. The initial target deadline for this objective was the year 2015. Taking into account the international context, the study herein analyses the sustainability of this deadline and Romania's degree of preparation to cope with this new challenge.

The subject brought up for debate is not new, but a topical issue, which has initially led to the crystallization in the specialized literature of two tides of opinion: the sceptics and the enthusiasts; but later on, the ideas of prudence and expectancy were outlined.

At international level, the European Economic Community is preoccupied with and worried about the political stability and evolution of some of the EU Member States. The direct connection between the political and economic factors is unquestionable. Any instability of either of them can lead to economic and financial crisis with direct or indirect impact over the whole EU zone.

It is not the first time the European Union faces such a phenomenon, but, considering the situation in Ukraine, never before had it reach such widths.

The European Union has started to face a first acute economic crisis when Greece signalled the financial difficulties it encountered. Confronted with such a situation, the leaders of Eurozone decided, in agreement with the IMF, to offer Greece financial support in case this country asks for it[1]. Leaders' concerns led to the idea of consolidation and supplementation of the existing legislative framework so that fiscal sustainability in the Eurozone is thus ensured. Such preoccupations emerged even since 2009, when the Ministers of Finance of the European Union set an objective to create new European Authorities for the control of

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[1] See the Declaration of the Eurozone leaders given on March 25th, 2010.

banking sector, insurances and securities market, i.e.: European Banking Authority; European Insurance and Occupational Pensions Authority; European Securities and Markets Authority.

Shortly after, only one month later, on April 23rd, 2010 Greece requested financial support. After this event, which can be considered the first phase of the Eurozone Member States depression, new economic and financial crises, which have strongly shook the European Union, started to develop.

In this context, we will hereinafter make an analysis of Romania's situation, by taking into account the specialized literature, the position of the National Bank of Romania, the position of the European Central Bank, of the other States and of the economic analysts and jurists in order to express a documented point of view regarding Romania's position.

2. Euro adoption process

At worldwide level, the creation of a State union is not unique. We take for example the Andean Pact[2] -which unites states from the Central America - the Association of Southeast Asian Nations (ASEAN), The Economic Community of West African States (ECOWAS), The Commonwealth of Independent States (CSI) - which regroups ex-soviet republics, all having the purpose of creating economic union.

The European Union has managed to create besides the economic unity, a monetary unity too. The creation and adoption of the single European Currency, i.e. Euro, which enables free trade and economic development of the Member States is unprecedented.

As of January 1st, 1999, Euro was adopted by 11 Member States which have agreed to replace the national currency with the new European currency. This transition was not at all a smooth one, due to the fact that it was contested by some people and supported by others. Even now, when the advantages of the Euro adoption are well-known, there are some voices which criticise it and find arguments against it. In order to ease the integration of the new currency on the market, a two-phase plan was agreed for the replacement. For starters, it was a virtual currency used for payment operations which did not involve banknotes and coins and for accounting purposes. In 2002 Euro was released in the form of banknotes and coins. In order for the population to accommodate with the European currency, cash payments were allowed in the old currencies, considered Euro subunits.

Progressively, new Member States of the EU adopted the single currency. For others the process is still in progress. Until now, 18 of the 28 Member States of the European Union can brag about this achievement. Latvia is the country which has most recently joined the "Euro Club", starting with January 1st, 2014.

Romania is part of the 8 States[3]which are not part of the Eurosystem. These States make considerable efforts and have undertaken to adopt Euro later on, after they will have complied with the convergence criteria settled in the Maastricht Treaty.

Denmark and the United Kingdom have a peculiar situation, due to the fact that they have chosen to use the "exception clause" from the adoption of the single currency.

State	Year of the Member State / EU Founder	Year Euro was adopted
Belgium	1957	1999/circulation since 2002
France	1957	1999/circulation since 2002
Germany	1957	1999/circulation since 2002

[2] Regional Government organization, with its registered office in Lima, created by the Cartagena Agreement in 1969, for the purpose of creating an economic, commercial and political union of the member states.

[3] Bulgaria, Czech Republic, Croatia, Lithuania, Poland, Romania, Hungary, Sweden, United Kingdom and Denmark which have adopted the exception clause.

Italy	1957	1999/circulation since 2002
Luxembourg	1957	1999/circulation since 2002
Netherlands	1957	1999/circulation since 2002
Ireland	1973	1999/circulation since 2002
Greece	1981	1999/circulation since 2002
Spain	1986	1999/circulation since 2002
Portugal	1986	1999/circulation since 2002
Austria	1995	1999/circulation since 2002
Finland	1995	1999/circulation since 2002
Slovenia	2004	2007
Cyprus	2004	2008
Malta	2004	2008
Slovakia	2004	2009
Estonia	2004	2011
Latvia	2004	2014

Source: European Central Bank[4]

3. Evolution of the Eurozone in the context of depression

As shown above, Greece was the first state which has triggered the alarm signal regarding the stability of the Eurozone. It was followed by Ireland, which, in the same year 2010, requested financial help from the Member States.

Faced with these new challenges, EU is forced to take measures in order to prevent and consolidate the Eurozone. Thus, the "Euro-Plus Pact" is created. This pact stipulates a better coordination of the existing economic policies, but also plays the role of a political commitment undertaken by the European Heads of Government. The purpose of the Pact is to increase economic competitiveness and convergence.

The main measures proposed refer to[5]the improvement of the sustainability of public finances, the consolidation of the economic stability, the promotion of employment and of competitiveness. Thus, the target is set for the fields which depend on the national competence, which are essential for the medium and long term economic growth and can lead to the avoidance of market unbalances. Taking into account the fact that not all the Member States have adopted Euro, but target to comply with the convergence criteria, and due to the fact that this Pact sets measures which impact every Member State, they were all invited to participate in the meeting of the Eurozone leaders. Thus, the final act of the Pact was also agreed to and accepted by Bulgaria, Denmark, Latvia, Lithuania, Poland and Romania.

In the following year (2011), Portugal requested financial assistance.

In this context, the European leaders signed the Treaty on Stability, Coordination and Governance, also named the Fiscal Pact through which they settled a better surveillance of the Eurozone by creating a new banking surveillance agent subordinated to the European Central Bank.[6]

The year 2012 is shook by two other requests for financial assistance from Cyprus and Spain, accepted by the Ministers of Finance of the Eurogroup.

[4] http://www.ecb.europa.eu/euro/html/index.ro.html

[5]http://ec.europa.eu/europe2020/pdf/euro_plus_pact_presentation_december_2011_ro.pdf, Situation of the Euro- Plus Pact, Presentation of Mr..J.M. Barroso, President of the European Commission and of the European Council of December 9th, 2011.

[6] See the Declaration of the Eurozone summit of June 29th, 2012.

The European Commission, the European Central Bank and the International Monetary Fund permanently carry on missions for the assessment of the States that have requested financial support, in order to verify the degree to which the conditions imposed and obligations undertaken are observed. They also assess the measures which need to be taken in the future, both with respect to these States and with respect to the whole monetary policy.

3.1 The position of Germany and of the United Kingdom

Germany is the State that knew best how to manage the financial difficulties it faced. As founder of the EU, its concern regarding the future of this entity is permanent, even if on many occasions, its firm position was not seen in agreement by a part of the States which face the economic crisis.

The depression did not by-passed Germany. Considering its economic force and due to the fact that it is a strong and developed State, the political forces of Germany knew how to manage the moments of depression which could have destabilize this State. Other developed European countries have faced the depression, but they did not managed to overcome this obstacle yet. It wasn't an easy thing to do for Germany, which imposed severe austerity measures, but the depression did not reach the dimension and widths known by the other states. Germany has gone through fluctuating periods of decline, followed by a slight recovery and then by economic decrease, but in the end it found the solutions necessary to make a strong recovery from the depression. It is like it went through the storm by ambitiously keeping its sails up. The measures taken for the labour market, which led to a low unemployment rate, were appreciated. It also managed to become one of the largest worldwide exporters, concurrently obtaining a decrease of the budgetary deficit, which led to economic growth.

The German model is very often discussed in the specialized literature. Economic analysts consider Germany the treasury of Europe and the most stable country from an economic point of view.

Given this status, Germany's representative, the Chancellor Angela Merkel plays a central role in the anti-crisis politics set up at European level, by having a firm position within the EU. She is a supporter of these though austerity measures which lead to profound reforms within the economies of the States which find themselves in crises situations. The position adopted is not an easy one, given the fact that she has to convince European leaders. She had sometimes attracted an anti-German feeling from the citizens of the States affected by depression. Angela Merkel has shown several times that the Euro currency is not allowed to collapse, due to the fact that this will also lead to the collapse of Europe.

In 1990 the two Germanies, The Federal Republic of Germany and the German Democratic Republic were reunited. But there was a development gap between the two countries. By their joint effort, they managed to overcome that gap and to support each other to form a strongly developed country. Thus, Germany's attitude towards the EU is not arbitrary. On one hand, the German Chancellor is a strong supporter of the EU, Germany being one of its founders, but on the other hand, she also protects the interests of the German state.

The year 2013 was marked by the position of the United Kingdom[7], which stated its potential intent to exist from the European Union if the austerity conditions adopted were preserved. A current was formed among British political leaders, who requested a national referendum at population level in order to show what British people want. The reaction of the European officials came with no delay, reminding the British Premier the benefits of such extreme solutions.

[7] The United Kingdom is made up of Great Britain, Whales, Scotland (making up Great Britain) and Northern Ireland.

The position of the United Kingdom is a peculiar one within the EU, due to the fact that it has chosen to invoke the "exception clause" from the adoption of the single currency. And this is not due to the fact that it was not able to comply with the convergence criteria, considering the fact that it is a developed country, but due to the fact that it prefers to have a reserved attitude towards the future of the European Union, in the context of the enlargement through the adhesion of new states.

Next to Germany, the economy of the United Kingdom is one of the most "envied" economies. Its engine is based on services and on a strong industrial capacity, especially in the sector of high-end technologies. London is also one of the international centres for financial services.

4. The role of the European Central Bank

Together with the decision to create a single currency at EU level, the decision to set-up a body which will be responsible for the monetary policy was also taken. This role was given to the European Central Bank (ECB) and to the national banks of the Member States which have adopted Euro. Together, they form the Eurosystem.

The European System of Central Banks (ESCB) is composed of the European Central Bank (ECB) and of the National Central Banks (NCB) of all EU Member States, no matter if they have adopted Euro or not. The Eurosystem and the European System of Central Banks coexist as long as there are States which did not adopt Euro.

On the international market, in terms of importance, Euro is considered the second international currency after the dollar. Thus, the role of the Central Bank is not an easy one, especially taking into account the fact that the single currency is a basic segment, a pillar of the single market. Any weakness, unbalance, depression of Euro directly affects the single market and even the existence of the Union. As long as the European single market is not strongly influenced by external influences generated by the increase of oil price or by the offsets of the exchange market, we can state and acknowledge the force and widths of the Euro currency and of the Eurozone in general.

The European Central Bank supervises the purchasing power of Euro and the insurance of prices stability in the Eurozone. Thus, its main assignments are: to define the policies of the Eurosystem; to make decisions regarding the monetary policy operations, their coordination and monitoring; to adopt legal acts to a certain extent - mandatory legal force within the Eurosystem; to authorize the issuance of banknotes; to interfere with the exchange market; to operate payment systems and supervise the payment infrastructure and other infrastructures of the financial market[8].

The European parliament supports ECB's effort, by approving the set-up of a single control mechanism, through which as of September 2014, approximately 150 of the biggest banks within the EU will make the object of direct control. This control system will function by observing two fundamental criteria: transparency and responsibility.

The Members of the European Parliament have agreed that knowledge transfer regarding banking control from national level to EU level is necessary. Based on the above-mentioned principles, the European Parliament has wide access to the information held by the Control Council, either through the control of the Minutes of meetings registers, or by inviting its representative to hearings in order to clarify certain issues, or by starting some investigations when suspicions regarding control errors exist or by formulating written requests.

[8] http://www.ecb.europa.eu/ecb/html/index.ro.html

These measures are aimed to consolidate the relationship between the European Banking Authority and the European Central Bank and to increase authority's capacity to make stress tests and to gather information. Another aim is to create a uniform culture for banking control, considering the diversity of the EU banking sector[9].

5. Romania and the Eurozone

In order to become part of the Eurozone, Romania must comply with the convergence criteria, condition which was also fulfilled by the States which currently use Euro. The convergence criteria refer to the pre-adhesion legal and economic conditions that the candidate countries must comply with in order to successfully participate in the Monetary Economic Union.

From an institutional and organizational point of view, as of 2010, the Committee for the preparation of the transition to Euro was created within the National Bank of Romania[10] (NBR). As of 2011 the Inter-ministerial committee for the transition to Euro started to function. This Committee is led by the Prime Minister and is also composed of the NBR Governor, the Minister of Public Finance, ministers and heads of other Governmental institutions and representatives of employers' and associations syndicates.

The Maastricht Treaty stipulates the achievement of a "high degree of durable convergence", convergence achieved when the following criteria are met[11]:

- Prices stability: inflation must not exceed with more than 1,5% the medium rate of inflation calculated for the three Member States of the EU which have registered the best results in the prices stability field;
- Sustainability of fiscal position: budgetary deficit of maximum 3% of GDP and maximum public debt of 60% of GDP;
- Stability of the exchange rate: compliance with the normal limits of fluctuation stipulated by ERM II for at least two years, without depreciation of the national currency;
- Convergence of long term interest rate: its average must not exceed with more than 2% the medium rate of the interest calculated for the three Member States which have registered the best results in the prices stability field.

The NBR Governor Mugur Isărescu considers that[12] there are still two of the nominal convergence indicators which need to be met: the inflation rate and the long term interest rate, indicators which can be achieved during 2014.

Looking at the statistic data and at the economic analyses, we can reach the conclusion that we are only one step away from Euro adoption. We still need to see how big this step really is, especially considering the fact that several deadlines were prefigured for the compliance with this objective. Furthermore, we need to take into account the fact that, subsequent to the Maastricht Treaty, the concept of durable convergence has gained new meanings, evolving into the concept of sustainable convergence.

The National Bank of Romania considers that the above-mentioned criteria are not enough to report ourselves to. Any of the States which has not yet introduced Euro and which intends to do so, must achieve the compliance with these criteria on long term, i.e. political, economic and financial stability must be permanent and not only for a certain time period

[9] According to the Press release of the European Parliament of September 12th, 2013.
[10] http://www.bnro.ro/Trecerea-la-euro-1251.aspx
[11] acad. Mugur Isărescu, Romania and the Eurozone, ESPERA 2013 International Conference, Bucharest, December 11th, 2013 .
[12] Idem, p.29, indicating source: Eurostat, National Institute for Statistics, National Bank of Romania, Ministry of Public Finance.

from the request to its granting. We all have to aim at the achievement of these criteria based on real convergence, considering the GDP on inhabitant, the degree of economy openness, the structure of the economy, the financing of the current account deficit, the cost of the work force, the degree of financial intermediation etc.

NBR position is not unique within the group made up of the 8states which have not yet introduced the single European currency. Bulgaria, Czech Republic, Hungary and Poland are reserved in forecasting a reference year for Euro adoption.

For Romania, the year 2015 was once the target, but at this point, it is no longer actual. Even if at declarative level the year 2018 was brought up, the National Bank of Romania, by its Governor, prefers to adopt a prudent position regarding the target date considering the real and legal[13] achievement of the convergence criteria and the evolution of the depression and of the monetary policy of the EU.

This uncertainty concerning the deadline does not affect the obligation undertaken by Romania in the moment of its adhesion to the European Union, i.e. to adopt Euro, due to the fact that there is no deadline settled for meeting this objective. Besides, the European Union is not interested in time limitation. It aims for stability, economic development, development of international trade and a strong single currency. This would not be possible if Euro is adopted by States which are not sustainably prepared, especially in the context of the European depression.

The European Commission and the European Central Bank are responsible for the analysis of the progresses made by the Member States in the creation of the Economic and Monetary Union. They draw up convergence reports which are submitted to the Council, which contain the previously mentioned progresses.

6. Conclusions

The adhesion to the European Union is an incontestable success for Romania. The adoption of Euro, as a distinct phase, is a very delicate issue. The EU currently faces great economic and, more recently, political issues, being marked by the instability in Ukraine. For the countries which did not adopt Euro, the example of the countries which did introduce Euro as single currency and which currently face a severe economic and financial crises, represented an alarm signal which determined them to analyse their own states.

The Economic and Monetary Union has many advantages, but in the same time many costs which the States must be able to undertake and support at the level of their economy and population.

I consider that the position taken by NBR, that of expectancy, is currently the best option for Romania, even if the results obtained at financial and economic level are hopeful. We must prove the persistence of these results, marked over time by economic growth. Romania has had over time small progresses obtained with considerable efforts. Even if we meet the criteria in 2014, our economy does not have the ability to cope with the new status and thus we have to consolidate, to observe the evolution of the other states, the mistakes they have made, in order to avoid them, and only then to be able to decide whether or not we are prepared.

References

- Declaration of the Eurozone leaders of March 25th, 2010.
- http://www.ecb.europa.eu/euro/html/index.ro.html

[13] By legal convergence we understand the continuation of the process of transferring community regulations in the national legislation.

- http://ec.europa.eu/europe2020/pdf/euro_plus_pact_presentation_december_2011_ro.pdf, Situation of the Euro- Plus Pact, Presentation of Mr. .J.M. Barroso, President of the European Commission and of the European Council of December 9th, 2011.
- Declaration of the Eurozone summit of June 29th, 2012.
- http://www.ecb.europa.eu/ecb/html/index.ro.html
- Press release of the European Parliament of September 12th, 2013.
- http://www.bnro.ro/Trecerea-la-euro-1251.aspx
- acad. Mugur Isărescu, Romania and the Eurozone, ESPERA 2013 International Conference, Bucharest, December 11th, 2013.
- http://ec.europa.eu/europe2020/pdf/nd/cp2013_romania_ro.pdf, Programul de convergenta al Romaniei 2013-2016.

AN OVERVIEW AT MACROECONOMIC LEVEL THROUGH ACCOUNTING FIGURES PROVIDED BY THE ECB ASSESSMENT ON EUROZONE BANKING SYSTEM

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Abstract

Along with the main macroeconomic indicators, the credit risk indicators became an important leverage in monitoring and evaluating the standard of living at a national level and the country's economic evolution. These two types of indicators show a strong interconnection, and the correct assessment of the credit risk indicators becomes a must.

As a consequence, the central banks and the main regulators in the Europe aria provided for a strict monitoring of such indicators and further on, for constant update of the banking supervisory regulations.

In October 2013, the European Central bank (ECB) issued the Note of Comprehensive Assessment that will be carried out during 2014, on the Euro-zone[1] banking system.

The outcome of the assessment will impact not only the accounting figures of the banking system, but also might change the macroeconomic overview of Euro-zone and the IASB's Conceptual Framework for Financial Reporting.

Keywords: *macroeconomic indicators, credit risk indicators, asset quality, non-performing exposure, provisions.*

1. Introduction

Traditionally, the economic overview of a country is offered by the main macroeconomic indicators: gross domestic product[2], final consumption[3], gross fixed capital formation[4], external balance sheet of goods and services[5].

At the same time, there are specific indicators that show the fair image of the country's banking system, offering not only a realistic picture of the financial system, but also on the

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[1] Officially called the euro area, is an economic and monetary union (EMU) of 18 European Union (EU) member states that have adopted the euro as their common currency and sole legal tender.

[2] The monetary value of all the finished goods and services produced within a country's borders in a specific time period. It includes all of private and public consumption, government outlays, investments and exports less imports that occur within a defined territory.

[3] Final consumption consists of goods and services used up by individual households or the community to satisfy their individual or collective needs or wants.

[4] Statistically it measures the value of acquisitions of new or existing fixed assets by the business sector, governments and "pure" households less disposals of fixed assets.

[5] Is the difference between the monetary value of exports and imports of output in an economy over a certain period, measured in the currency of that economy. It is the relationship between a nation's imports and exports.

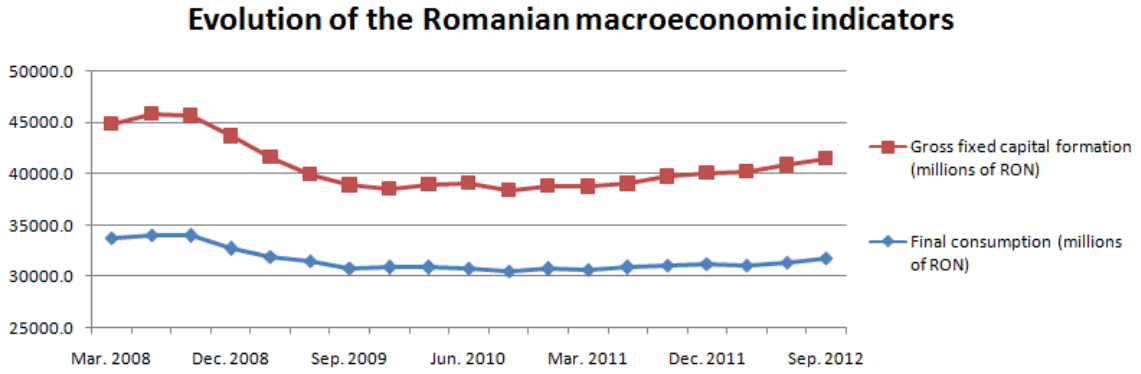
financial burden of the population and the legal entities acting in the territory of the said country: solvency ratio, impaired loans ratio, credit risk ratio[6], liquidity ratio.

These two types of indicators show a strong correlation, making the banking system indicators relevant for the real economy of a country. This being said, the assessment that ECB will conduct on the Euro-zone banking system might change the macroeconomic overview by affecting the accounting figures of the banking system.

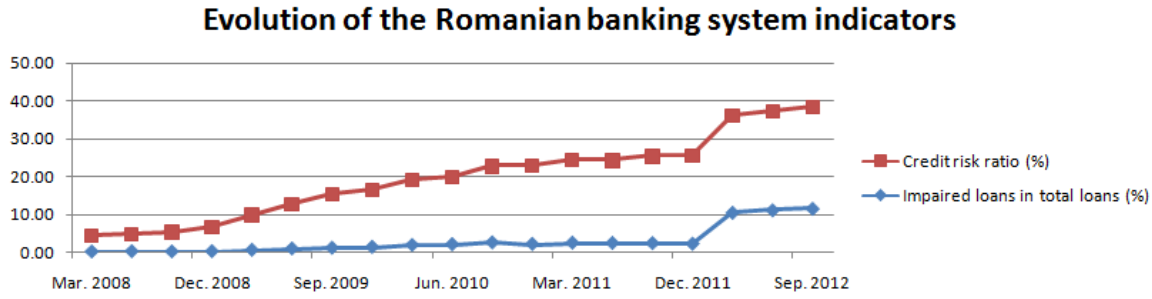
2. Content

For this specific analysis, it was considered that the most representative variables of the macroeconomic and banking system are:

- final consumption and the gross fixed capital formation for the real macroeconomic overview as they provide a fair image of the standard of living and production. The below picture shows a decreased evolution of the final consumption and gross fixed capital formation at Romanian macroeconomic level.



- impaired loans ratio and the credit risk ratio for the credit risk and banking overview, that show an increasing risk in the Romanian banking system, and also an increase of the impaired loans of the country.



Note: The sudden increase of the indicators starting 2012 is due to the methodological changes in the definition of the impaired loans, linked to the application of the IFRS

The interconnection between the two sets of indicators, the macroeconomic one and the credit risk one, specific to the banking system, can be easily demonstrated using statistical leverages, such as covariance and correlation.

Using covariance[7], one can determine whether units were increasing or decreasing, but it is impossible to measure the degree to which the variables moved together because covariance does not use one standard unit of measurement. To measure the degree to which

[6] Gross exposure relative to loans and interest under "doubtful" and "loss"/Total loans and interest, less off-balance sheet items.

[7] The sign of the covariance shows the tendency in the linear relationship between the variables.

variables move together, one must use also correlation. Correlation[8] shows the simultaneous change in value of two numerically valued random variables. In addition to telling you whether variables are positively or inversely related, correlation also tells you the degree to which the variables tend to move together.

Both covariance and correlation identified that the analyzed variables mentioned above are negatively related, as shown in the below tables. The statistical analysis was conducted on a time series between March 2008 until September 2012.

CORRELATION	Final consumption	Gross fixed capital formation
Impaired loans ratio / total loans	-0.860	-0.825
Credit risk ratio	-0.760	-0.638

COVARIANCE	Final consumption	Gross fixed capital formation
Impaired loans ratio / total loans	-955.131	-1064.768
Credit risk ratio	-6332.591	-6166.056

The results of the analysis show that there is a strong negative correlation between the macroeconomic indicators, final consumption and gross fixed capital formation, and the credit risk ones, impaired loans ratio and credit risk ratio.

In this view, the credit risk indicators of the banking system offer a fair image of the macroeconomics of a country. As a consequence the accounting and risk figures disclosed by the banks become of crucial importance.

By the end of year 2014 the banking system figures might change as a consequence of the ECB assessment, offering an even more realistic overview of the financial and economic stage of the EU countries.

The European Central Bank, which assumes a new role as single supervisor of euro-zone banks at the end of next year, said the asset review will include on-balance sheet and off-balance sheet exposures such as credit derivatives. The ECB will examine the banking and trading books of financial institutions of the euro bloc consisting of 17 countries, rising to 18 in January when Latvia adopts the euro.

The exercise has three main goals: *transparency* – to enhance the quality of information available on the condition of banks; *repair* – to identify and implement necessary corrective actions, if and where needed; and *confidence building* – to assure all stakeholders that banks are fundamentally sound and trustworthy.

The ECB estimates that it will scrutinize around 130 financial institutions, which together are responsible for almost 85% of bank assets in the Euro-zone. It released a provisional list of these institutions, although the "full and final list of significant banks" will only be compiled when "up-to-date statistics have become available". A bank will be considered "significant" if its assets are worth in excess of €30 billion, or more than 20% of its country's GDP[9]. Banks that are within the three largest credit institutions in any given member state will also be included.

[8] Correlation standardizes the measure of interdependence between two variables and, consequently, tells you how closely the two variables move. The correlation measurement, called a correlation coefficient, will always take on a value between 1 and – 1:

If the correlation coefficient is one, the variables have a perfect positive correlation. A positive correlation coefficient less than one indicates a less than perfect positive correlation, with the strength of the correlation growing as the number approaches one.

If correlation coefficient is zero, no relationship exists between the variables.

If correlation coefficient is –1, the variables are perfectly negatively correlated (or inversely correlated) and move in opposition to each other. A negative correlation coefficient greater than –1 indicates a less than perfect negative correlation, with the strength of the correlation growing as the number approaches –1.

[9] Gross Domestic Product.

Of the 18 member states, Germany has the most banks earmarked for assessment with 24, while Malta has the least with two – the third of its systemic banks being a subsidiary of another group, Deutsche Bank, which is already being assessed.

The assessment will cover three pillars: supervisory risk assessment on key risk factors, asset quality review with focus on the classification of non-performing exposures, and stress test as a forward looking view of the banks' capacity to face a potential crisis. When these have been completed, the ECB could then impose a range of remedial actions on banks, including forcing them to hold additional capital.

Supervisory risk management will be performed a supervisory judgment on key risk factors such as liquidity, leverage and funding. The assessment will imply a qualitative and quantitative analysis.

The *asset quality review* will focus on the assessment of data quality of the banks' balance sheet and financial statement, asset valuation, classification of non-performing exposures, collateral valuation and last, but not least, provisions amount. The review will cover credit and market exposures, following a risk based, targeted approach.

The purpose of the *stress test* is to provide a forward looking view of banks' shock-absorption capacity under stress conditions. The test will be conducted in collaboration with European Banking Authority (EBA) based on specific banking risk approach. The ultimate impact of this stress test is to challenge the capitalization of the banks, challenge that will be transferred directly to the investors in case of additional capital need.

The *stress test* will be conducted in collaboration with EBA, which will also cover other countries that the ECB assessment is not covering. Full details of how the stress test will be conducted

When the ECB and European Banking Authority (EBA) conduct their stress test, at a later stage in 2014, they will also examine banks' leverage ratios to glean "supplementary information" on their capital adequacies.

If the ECB finds any holes in a bank's capital, it will issue instructions on how and when it should be patched up. It stressed that if the exercise is to be a success, backstops must be established before they are needed. In the view of ECB it is essential to ensure that any banks that have viable business models, but are required to build additional capital for prudential reasons, will be able to obtain such additional resources within an appropriate time frame.

First and foremost, the ECB wants banks to make up any shortfalls with privately sourced capital, but it accepts that public backstops "might need to be drawn upon".

The ECB is yet to gain any powers for the direct recapitalization of banks, and the Single Resolution Mechanism (SRM) remains a work in progress. Therefore, the central bank stressed, member states taking part in the SSM must have established their own national backstops ahead of the completion of the exercise.

There are close inter-linkages between the three elements and together they provide a wide ranging, yet in-depth view of banks' balance sheets, bringing together both quantitative and qualitative aspects of banks' risks, and in addition, both point-in-time and forward-looking elements. The comprehensive assessment will conclude with a single disclosure of the outcomes, which will be published prior to the ECB assuming its supervisory role in November 2014.

In case of any gaps between the ECB results and the banks' ones, adjustments will be imposed. The ECB will demand that all banks meet, after the assessment, a minimum Common Equity Tier I ratio of 8% of their risk-weighted assets when they are assessed. This

8% comprises the minimum 4.5% specified in Basel III[10], an additional 2.5% capital conversation buffer, and another 1% on top to account for the banks' "systemic relevance".

EBA has also asked national supervisors in other countries in the EEA to carry out asset quality reviews that will feed into stress tests on other major banks outside the Euro--zone. The national supervisors embraced the initiative and have started to perform dedicated assessments at national level. Only by knowing the regulatory environment can one really know what a bank is or what a bank does in deferent countries[11].

The National Bank of Romania, at its turn, has started to assess the forborne portfolio of the local banks, considered the less transparent one. The action was started on October 2013 and will continue on 2014, in order to cover the entire Romanian banking system.

This local review has a direct consequence in the accounting and risk figures of the banks every time an asset or a portfolio is challenged in terms of evaluation, classification and provisions. At their turn, the provisions will impact the profit and loss account of the banks, which was already under pressure in the last years.

It is known that higher reporting quality improves the effectiveness of regulatory intervention and a 'weaker reporting quality reduces the effectiveness of monitoring and leads to lower quality loan portfolios, which results in more non-performing loans and lower profitability'.[12]

From the three mentioned pillars of the ECB assessment, the asset quality review will have the strongest impact on the accounting figures and therefore on the financial statements of the assessed banks.

The asset quality review has formally begin on December 31, 2013, and concentrate on the elements of banks' balance sheets that the ECB believes are most risky or non-transparent. The specific objective of the asset quality review will be:

- assessment of adequate provisions for credit exposures
- determination of the appropriate valuations of collateral for credit exposure
- assessment of the valuations of the complex instruments and high-risk assets.

The rules governing banks' credit provisioning and reserves require a trade-off between the goals of bank regulators, who emphasize safety and soundness, and the goals of accounting standard setters, who emphasize the transparency of financial statements[13]. According to IASB, a bank should increase their loan loss reserves when it becomes highly probable that a loss is imminent, and if the amount of that loss can be reasonably estimated. According to the prudential considerations of the regulators, higher reserves should be created, in order to enable the bank to absorb greater unexpected losses without failing.

Still, the asset quality review is a different exercise from a pure review of auditors.

The methodology will be intrusive with risk-based individual file reviews and harmonized procedures across the different jurisdictions. A yearly audit may verify the accuracy of records, the accounting standards compliance and the soundness of internal controls. This assessment is more invasive by taking into account:

- accounting prudential requirements (e.g. risk considerations for individual banks, definitions according to prudential Union law);
- harmonized definitions for variables (e.g. non-performing loans, forbearance, loans classifications etc.);

[10]Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/201.

[11] James R. Barth, Gerard Caprio Jr., Ross Levine, Banking Systems around the Globe Do Regulation and Ownership Affect Performance and Stability?, 2001.

[12] Jeffrey Ng Tjomme, O. Rusticus, Banks' Survival during the Financial Crisis: The Role of Regulatory Reporting Quality.

[13] By Eliana Balla, Morgan J. Rose, Jessie Romero , *Loan Loss Reserve Accounting and Bank Behavior,* 2012.

- individual re-evaluations of files and data integrity validation (bottom-up detailed analysis of loan and securities data, review of credit risk monitoring and IT systems, full balance sheet reconciliations).

The third parties (i.e. auditors, specialized appraisal companies) involved in such reviews would be different from the ones employed by the banks on a regular basis in order to avoid conflicts of interest. The comprehensive assessment will have both a quantitative and a qualitative output. Apart from the capital shortfall, the exercise will also lead to specific recommendations in areas such as improvement of risk management or governance for specific banks. Nonetheless, qualitative shortcoming can also feed in the capital gap if certain process or controls of banks are found as insufficient.

The note of the ECB assessment states that all types of financial instruments will be subject to revision, according to a "conservative" interpretation of current IFRS, where necessary taking national GAAP into account and that the review will be conducted with reference to harmonized definitions, including those of "forbearance" and "non-performing" exposures proposed recently by EBA.

First of all, the phrase "revision, according to a "conservative" interpretation of current IFRS" was not dully explained.

The IASB's[14]*Conceptual Framework for Financial Reporting* states that the fundamental qualitative characteristics of useful financial information include faithful representation, meaning clearly that financial information should be neutral and free from bias. From this point of view, conservative is not defined in the IASB's framework.

However the judgments exercised by banks' management in respect asset classification, impairment and valuation will probably be subject to additional scrutiny or challenge for regulatory purposes.

Also, the IFRS does not define the terms "forbearance" and "non-performing" exposures. However banks increasingly use such terminology for the purpose of disclosures, encouraged by regulators and users.

EBA, instead, has proposed definitions for regulatory purposes, which include forbearance (forborne exposures) and non- performing exposures. In October 2013 EBA has published the final implementing technical standards (ITS) on the definitions of "forbearance" and "non-performing exposures" under the Capital Requirements Regulation (CRR). Together with the corresponding supervisory reporting templates, these definitions will make it possible to capture and compare asset quality across EU financial institutions. These definitions rely on, and do not supersede, those on impairment and default, so they will have no direct impact on reporting institutions' profitability or capital ratios. In particular, the definition of non performing exposures focuses on a 90-day past due threshold, while the definition of forbearance focuses on concessions extended to debtors who face, or may face, difficulties in meeting payments. Forborne exposures can be identified in both the non-performing and the performing portfolios. These definitions apply to all loans and debt securities that are on balance sheets, except for those held for trading, as well as to some off-balance sheet exposures.

The IASB has, at its turn, published for public comment a Discussion Paper exploring possible changes to the IASB's Conceptual Framework for Financial Reporting. The Discussion Paper is the first step towards issuing a revised Conceptual Framework.

The Conceptual Framework sets out the concepts that underlie the preparation and presentation of financial statements. It identifies principles for the IASB to use when it develops and revises its IFRS. The existing Conceptual Framework has enabled the IASB to

[14]International Accounting Standards Board.

develop high quality IFRS that have improved financial reporting. However, it does not cover some important areas and some guidance needs updating.

The Discussion Paper is designed to obtain initial views and comments on important issues that the IASB will consider as it develops an Exposure Draft of a revised Conceptual Framework. The issues include:

- definitions of assets and liabilities;
- recognition and de-recognition;
- the distinction between equity and liabilities;
- measurement of the assets and liabilities;
- presentation and disclosure; and other comprehensive income.

3. Conclusions

By the autumn of 2014, the comprehensive assessment will conclude with an aggregate disclosure of the outcomes, at country and bank level, together with any recommendations for supervisory measures. This comprehensive outcome will be published prior to the ECB assuming its supervisory role in November 2014, and will include the findings of the three pillars of the comprehensive assessment.

Should the ECB find capital shortfalls, banks will be required to undertake corrective measures, such as recapitalization and other means, and the time lines for implementing the measures will come as part of the review's outcome.

The euro zone emerged from a lengthy recession during the spring 2013. But the pick-up has been weak and uneven, with growth, in annualized terms, of only around 1% and unemployment still near record highs. For the region to rebound on a sustained basis, its banks need to extend additional loans to households and businesses in order to finance new spending, investment and hiring.

Despite record-low ECB interest rates and abundant cash in the banking system, lending to the private sector continues to shrink in the euro zone. Small businesses in recession-ravaged southern Europe pay far higher interest rates on loans than their German counterparts.

This assessment will strengthen private sector confidence in the soundness of euro area banks and in the quality of their balance sheets, and, it might change the macroeconomic overview of Euro-zone.

Also, the outcome of the assessment will impact not only the accounting figures of the banking system, but, it could influence the IASB's Conceptual Framework for Financial Reporting.

References

- Jeffrey Ng Tjomme, O. Rusticus, Banks' Survival during the Financial Crisis: The Role of Regulatory Reporting Quality
- James R. Barth, Gerard Caprio Jr., Ross Levine, Banking Systems around the Globe Do Regulation and Ownership Affect Performance and Stability?, 2001
- Eliana Balla, Morgan J. Rose, Jessie Romero, *Loan Loss Reserve Accounting and Bank Behavior*, 2012
- Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms
- Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/201
- EBA FINAL draft Implementing Technical Standards On Supervisory reporting on forbearance and non-performing exposures under article 99(4) of Regulation (EU) No 575/2013.
- Discussion Paper DP/2013/1, A Review of the Conceptual Framework for Financial Reporting.

- www.bnro.ro, Dataset on Romanian banking system.
- www.insse.ro, Dataset on Romanian macroeconomic indicators.
- www.ecb.europa.eu, Note on comprehensive assessment.

MACROECONOMIC OUTLOOK THROUGH THE EYES OF INVESTORS: FINANCIAL INSTRUMENTS AND FAIR VALUE MEASUREMENT

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Abstract

A country's economy growth is depending on the investments, either direct or indirect, made in it. Also, the level of the foreign direct investments is a relevant indicator for other potential investors.

While lenders are looking at the financial statement to understand the company's ability to repay debt, the investors are looking at the financial statements to understand the company's ability to grow.

The IASB's Conceptual framework for financial reporting offers a standardized model of financial statement that is about to change.

Keywords: *economic decision, investor, financial statement, fair value, financial instrument.*

1. Introduction

Based on the IASB's *Conceptual Framework for Financial Reporting,* the companies are using one standardized model in preparing the balance sheet, the income statement, and the notes to the financial statements. Investors, at their turn have learned one common way to read this information.

"The objective of financial statements is to provide information about the financial position, performance and changes in financial position of an enterprise that is useful to a wide range of users in making economic decisions."[1] Financial statements should be understandable, relevant, reliable and comparable. Reported assets, liabilities, equity, income and expenses are directly related to an organization's financial position. Financial statements are intended to be understandable by readers who have "a reasonable knowledge of business and economic activities and accounting and who are willing to study the information diligently."

Also, mandatory IFRS adoption is improving comparability and thus leading to capital market benefits by reducing insiders' ability to exploit private information[2].

Reading the annual report – which must be independently audited – is a chance for investors to examine the company's financial strength and performance over the past year and to consider what opportunities there are for future growth.

A major potential benefit from the global move towards IFRS is an increase in accounting comparability. However, many commentators question the potential for IFRS to increase comparability because the same accounting standards can be implemented differently and in the absence of suitable enforcement mechanisms real convergence and harmonization

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[1] "The Framework for the Preparation and Presentation of Financial Statements" International Accounting Standards Board.

[2] Francois Brochet, Alan D. Jagolinzer, Edward J. Riedl, working paper *Mandatory IFRS Adoption and Financial Statement Comparability, 2012.*

is unlikely IFRS adoption is likely to generate both information and comparability effects and improve the quality of information intermediation in capital markets; a key market institution that facilitates efficient allocation of resources towards its most productive uses[3].

2. Content

Currently, IAS 39 *Financial Instruments: Recognition and Measurement* recognizes impairment of financial assets using an incurred loss model. The model assumes that all loans will be repaid until evidence to the contrary (known as a loss or trigger event) is identified. Only at that point is the impaired loan (or portfolio of loans) written down to a lower value.

IFRS 9 *Financial Instruments* includes requirements for recognition and measurement, de-recognition and hedge accounting. The IASB is adding to the standard as it completes the various phases of its comprehensive project on financial instruments, and so it will eventually form a complete replacement for IAS 39 *Financial Instruments: Recognition and Measurement*.

This project, to be included in IFRS 9, is considering various forms of the 'expected loss' approach, whereby expected losses are recognized throughout the life of a loan or other financial asset measured at amortized cost, not just after a loss event has been identified. Under the expected loss approach, losses are recognized earlier than the incurred loss model. Proponents of the expected loss model believe it better reflects the lending decision.

The IASB continued to discuss the *impairment model* and many requirements under ED /2013/3 Financial Instruments: Expected Credit Losses (the impairment ED) were reconfirmed. The key areas in which the IASB made tentative decisions to amend or refine proposal in the impairment ED are mainly the following:

- timing of recognition of lifetime expected credit losses. The assessment of significant increases in credit risk could be more simply by establishing the initial maximum credit risk for a particular portfolio or financial instruments with similar credit risk on initial recognition (by product type and/or region) and then comparing the credit risk of financial instruments in that portfolio at reporting date with the origination credit risk.

- the proposed description of law credit risk will be modified

- the expected credit losses (ECL) would be discounted at the effective interest rate or an approximation thereof.

- for revolving credit facilities, the expected credit losses would be estimated for the period over which an entity is exposed to credit risk and over which future draw-downs cannot be avoided, while the ECL on the undrawn and drawn portions of a facility would be discounted using the same EIR. The provision for the ECL on the undrawn facility would be presented together with the loss allowance on the drawn facility if an entity cannot separately identify those two components.

- In October 2008, the International Accounting Standards Board amended IAS 39 to allow banks to retroactively reclassify financial assets that previously were measured at fair value to amortized cost. By reclassifying financial assets, a bank can potentially avoid recognizing the unrealized fair value losses and thereby increase its income and regulatory capital during a market downturn[4]

In terms of transition, an entity could approximate the credit risk on initial recognition by considering the best estimation that is available without undue cost or effort. If an entity is not able to determine or approximate the credit risk on initial recognition, then it would

[3] Joanne Horton, George Serafeim, Ioanna Serafeim, research paper Does Mandatory IFRS Adoption Improve The Information Environment? .

[4] Chee Yeow, Lim Chu, Yeong Lim, Gerald J. Lobo, research paper IAS 39 Reclassification Choice and Analyst Earnings Forecast Properties.

measure the loss allowances based on the credit quality at each reporting date until that financial instrument is de-recognized.

In terms of *classification*, IFRS 9 divides all financial assets that are currently in the scope of IAS 39 into two classifications - those measured at amortized cost and those measured at fair value. Classification is made at the time the financial asset is initially recognized, namely when the entity becomes a party to the contractual provisions of the instrument[5]. For this purpose, a business model should be used.

The term business model should refer to the way in which financial assets are managed. The business model assessment should result in financial asset being measured in a way that would provide the most relevant and useful information. Of course, the business model should be assessed at a level that reflects groups of financial assets that are managed together to achieve a particular objective.

The final standard would make the following clarifications:

- The business model is often observable through particular activities that are undertaken to achieve the objectives of that business model
- These business activities usually reflect the way in which the performance of the business is evaluated and reported, as well as the risks that typically affect the performance of the business model; and how those risks are managed.
- An entity should consider all relevant and objective information, but not every „what if" or worst case scenario
- A change in business model would occur only when an entity has either stopped or started doing something on a level that is significant to its operations. This would generally be the case only when the entity has acquired or disposed of a business line.
- Held-to-collect business model:

    - The current held-to-collect "cash flows (value) realization" concept would be reinforced by providing examples and guidance
    - Insignificant and/or infrequent sales may be consistent with the held-to-collect business model, regardless of the reasons for those sales.
    - Historical sales information and patterns could provide useful information, but this sales information would not be determinative
    - Sales to minimize potential credit risk due to credit deterioration are integral to the held-to-collect objective
    - Sales made in managing concentrations of credit risk would be assessed in the same way as any other sales made in the business model.

- The application guidance in the final standard would include the following clarifications:

    - Sales to not drive the business model assessment
    - Historical sales information would help an entity support and verify its business model assessment
    - Fluctuations in sales in a particular do not necessarily mean that the entity's business model has changed
    - If cash flows are realized in a way that is different from the entity's expectations, then this would neither result in a restatement of prior period financial statements, nor change the classification of the existing financial assets in the business model as long as the entity considered all relevant and objective information that was available at the time that it made its decision.

[5] IFRS 9, paragraph 4.1.1.

FVTPL[6] *measurement category*. The FVTPL measurement category would be retained as the residual category and the final standard would clarify the following:

- When financial assets are either held for trading or managed and evaluated on a fair value basis, the entity makes decisions about whether to hold or sell the assets based on changes in, and with the objective of realizing the assets' fair value.
- The activities that the entity undertakes are primarily focused on fair value information, and key management personnel use that information to assess the assets' performance and to make decisions accordingly.
- Another indicator is that the users of the financial statements are primarily interested in fair value information on these assets to assess the entity's performance

FVOCI[7] *category*. The final standard would clarify the following in respect to the fair value through other comprehensive income:

- Managing financial assets both to collect contractual cash flows and for sale would reflect the way in which financial assets are managed to achieve a particular objective, rather than the objective in itself.
- The application guidance would more clearly articulate that FVOCI provides relevant and useful information when both the collection of contractual cash flows and the realization of cash flows through selling are integral to the performance of the business model
- The application guidance would describe activities that are typically associated with such a business model
- There would be no threshold for the frequency or amounts of sales.

It was reconfirmed that entities would be permitted to apply the fair value option to a financial asset that would otherwise be mandatorily measured at FVOCI if such a designation eliminates or significantly reduces an accounting mismatch.

A finalized additional chapter of IFRS 9 *Financial Instruments* is expected in the second quarter of 2014, but considering the changes implied, the IASB tentatively decided at its February 2014 meeting to select an effective date of 1 January 2018 as the effective date for mandatory application of IFRS 9.

If IFRS 9 *Financial Instruments* applies starting 2018, IFRS 13 *Fair Value Measurement* is already in force. IFRS 13 was originally issued in May 2011 and applies to annual periods beginning on or after 1 January 2013.

Therefore the financial statements for year 2013, currently under elaboration, are based on the provisions of this standard. Bothe companies and investors must quickly adapt to new financial statement model.

It is worth saying that during time, also some negative effects were envisaged regarding the potential wider application of fair values, that could unduly increase the volatility of banks' balance sheets, possibly reducing their ability to react to adverse shocks[8]. In the ECB Occasional paper series no.13/April 2004 „Fair Value Accounting and Financial Stability", it was said that „given the proliferation of different internal valuation models, the comparability of balance-sheet data across financial institutions could be severely jeopardized".

[6] Fair Value through profit and loss.
[7] Fair Value through other comprehensive income.
[8] Andrea Enria, Lorenzo Cappiello, Frank Dierick,Sergio Grittini, Andrew Haralambous, Angela Maddaloni, Philippe Molitor, Fatima Pires and Paolo Poloni, *ECB Occasional Paper Series No. 13 Fair Value Accounting And Financial Stability*, 2004.

IFRS 13 *Fair Value Measurement*[9] applies to IFRSs that require or permit fair value measurements or disclosures and provides a single IFRS framework for measuring fair value and requires disclosures about fair value measurement. The Standard defines fair value on the basis of an 'exit price' notion and uses a 'fair value hierarchy', which results in a market-based, rather than entity-specific, measurement. Any changes from adjusting valuation techniques at the date of adoption are recognized in the period of adoption, either in profit or loss, or in other comprehensive income, depending on the requirements of the underlying standard. The standard applies to all companies, with no exceptions for nonpublic entities.

The key term that drives this process is *fair value*: the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date. Being an exit price, it embodies expectations about the future cash flows (inflows and outflows) associated with the asset or liability from the perspective of a market participant (based on buyers and sellers who have certain characteristics, such as being independent and knowledgeable about the asset or liability)

Fair value is a market based measurement, rather than an entity specific measurement, and is measured using assumptions that market participants would use in pricing the asset or liability, including risk. As a result, an entity's intention to hold an asset or to settle or otherwise fulfill a liability is not relevant in measuring the fair value.

Relative to historical cost, MTM incorporates more timely information in financial statements. The primary effect of more timely disclosure most likely is to reduce information asymmetry[10].

Fair value is measured assuming the transaction in a principal market (the market with the highest volume and level of activity). In the absence of a principal market, it is assumed that the transaction would occur in the most advantageous market. This is the market that would maximize the amount that would be received to sell an asset or minimized the amount that would be paid to transfer a liability, taking into account transaction and transportation costs. In either case, the entity needs to have access to the market, although it does not necessarily have to be able to transact in the market at the measurement date.

The fair value measurement is made up of one or more inputs, which are the assumptions that market participants would make in valuing the asset or liability. The most reliable evidence of fair value is a quoted price in an active market. When this is not available, entities use a valuation technique to measure fair value, maximizing the use of relevant observable inputs and minimizing the use of unobservable inputs.

These inputs also form the basis of the fair value hierarchy, which is used to categorize a fair value measurement into one of three levels. This categorization is relevant for disclosure purposes. The disclosure about fair value is extensive, with more disclosures being required for the measurement in the lowest category (level 3) in the hierarchy.

A summary of the steps to be undertaken in order to correctly measure the fair value, is presented in the below table:

Establish the parameters	Identify the unit of account and unit of valuation
	Identify the market
Establish valuation approach	Market approach: quoted prices
	Income approach: discounted cash flows
	Cost approach: depreciation replacement cost
Establish the input of the measurement	Level 1: quoted prices for identical asset in the market
	Level 2: quoted prices for similar asset in the market
	Level 3: discounted cash flows

[9] IFRS 13 is effective for annual reporting periods beginning on or after 1 January 2013. This means that companies with a calendar year-end will be applying the Standard for the first time in 2013.

[10] Ray Ball, Sudarshan Jayaraman, Lakshmanan Shivakumar, working paper, *Mark-to-Market Accounting and Information Asymmetry in Banks*, 2012.

Measure the fair value	Fair value at initial recognition
	Highest and best use approach[11]
	Portfolio measurement exception
	Inactive markets

Unit of account. The unit of account is the level at which an asset or liability is aggregated or disaggregated for recognition purposes. It is also the level at which an asset or liability is generally aggregated or disaggregated for the purpose of measuring the fair value. When these two units differ, the term unit of valuation is used to describe the unit used for measurement.

The unit of account (unit of valuation) for financial instruments generally is the individual financial instrument. However, an entity is permitted to measure the fair value of a group of financial assets and financial liabilities on the basis of the net risk position. - section L exceptions

Portfolio measurement exceptions. An entity that holds a group of financial assets and financial liabilities is exposed to market risks (i.e., interest rate risk, currency risk, price risk) and to the credit risk of each counterparties. If certain conditions are met, an entity is permitted to measure the fair value of a group of financial assets and liabilities with offsetting risk position on the basis of its net exposure.

Under the exception, the fair value of the group is measured on the basis of the price that would be received to sell a net long position, or paid to transfer a net short position, for a particular risk exposure in an orderly transaction between market participants. Therefore, application of portfolio measurement exception is considered to be consistent with the way in which the market participants would price the net risk position at that measurement date.

In my view, application of the portfolio measurement exception changes the unit of valuation from the individual financial asset or liability to the net position for a particular risk exposure.

In order to allow an offsetting, the market risks being offset have to be substantially the same with regard to both their nature (interest rate risk, currency risk, price risk) and duration. For example, an entity could not combine the interest rate risk associated with a specific financial asset with the commodity price risk associated with a derivative liability. Any basis risk resulting from market risk parameters that are not identical is reflected in the fair value of the net position (e.g. difference in the interest rate bases: LIBOR and U.S. treasury, duration differences, etc.).

The net portfolio measurement exceptions do not relate to financial statement presentation, it does not change the requirements for presentation in the balance sheet. As a consequence, application of the exception may result in a measurement basis that is different from the basis of presentation of the financial instrument in the balance sheet. The allocation on individual financial asset or liability, for presentation and disclosures purposes, must be done on a reasonable and consistent basis using an appropriate methodology and the appropriate allocation method is affected by the fair value hierarchy of the financial instruments in the portfolio.

Valuation approaches and techniques. An entity selects those valuation approaches and techniques that are appropriate and for which sufficient data is available to measure fair value. The techniques chosen should maximize the use of relevant observable inputs and minimize the use of unobservable inputs. Valuation techniques used to measure fair value fall under three approaches:

- Market approach (quoted prices in an exchange market for equity securities, futures;

[11] Highest and best use is a valuation concept that represents the use of a nonfinancial asset by market participants that would maximize the value of the asset.

quoted prices in dealer markets; market multiples derived from a set of comparable assets)
- Income approach: present value techniques for unlisted products, Black-Scholes-Merton model for OTC[12] options, relief-from-royalty method for intangible assets expected to be used actively
- Cost approach: depreciated replacement cost (DRC) for factory plant and equipment. It estimates the replacement cost of the required capacity rather than the actual asset.

Inputs to valuation technique. These are the assumptions that market participants would use in pricing the asset or liability. Inputs are categorized in 3 levels:

- Level 1 inputs: unadjusted quoted prices in active markets for identical assets or liabilities that the entity can access at the measurement date
- Level 2 inputs: other observable inputs for the asset or liability, either directly (as prices), or indirectly (derived from prices)
- Level 3 inputs: unobservable inputs for assets and liabilities.

The fair value measurement objective remains the same regardless of the level of the inputs to the fair value measurement. Unobservable inputs also reflect the assumptions that market participants would use when pricing the asset or liability, including assumptions about risk. An entity should select inputs that are consistent with the characteristics of the unit of valuation for the asset or liability that market participants would take into account.

The fair value hierarchy is made up of the same three levels, with level 1 being the highest.

A particular situation can be detected when measuring the *fair value at initial recognition.* If an asset is acquired or a liability assumed, the transaction price normally reflects an entry price. Although conceptually different, in many cases the exit and entry price are equal and therefore fair value at initial recognition generally equals the transaction price. If there is a difference, it is necessary to consider whether a day one gain or loss should be recognized. The transaction price might not represent the fair value at initial recognition if:

- The transaction was entered into in a market other than the principal and most advantageous one
- The transaction price is not the price within the bid-offer spread that is most representative for fair value. (when an entity uses the bid process for assets and ask prices for liabilities)
- The transaction is between related parties
- The transaction takes place under duress or the seller is force to accept the price
- The unit of account represented by the transaction price is different from the unit of account for the asset or liability measured at fair value.

3. Conclusions

In order to align to the new view of the financial statements, efforts must be made both by the companies and the investors.

From a company point of view, the changes imply costs and time in order to align and enhance the IT systems in order to support the new methodologies of computations required in order to obtain the fair value of their portfolios. Apart for the IT updates, a special attention must be paid to the market information, and companies must find the relevant markets and relevant data. All the data must be correctly retrieved from outside the company and stored in order to be used in the fair value calculations.

[12] Over the counter.

Investors expected net benefits to IFRS adoption in Europe associated with increases in information quality, decreases in information asymmetry, more rigorous enforcement of the standards, and convergence[13]

Investors must learn the meaning of this new data provided in the notes to the financial statements. Since it is a completely new and different concept, I envisage a 'transition period'. It may be that 'transition' here is not used in its first meaning, but, for sure, at the beginning, at least for a year, the majority of the investors will keep looking at the other information in the financial statement, more 'familiar' to them, and tend to avoid or ignore in their analysis, the information provided by the fair value.

Also, it is unclear how investors would react to these changes in financial reporting, and both positive and negative reactions are likely.

References

- Francois Brochet, Alan D. Jagolinzer, Edward J. Riedl, working paper *Mandatory IFRS Adoption and Financial Statement Comparability*, 2012
- Joanne Horton, George Serafeim, Ioanna Serafeim, research paper Does Mandatory Ifrs Adoption Improve The Information Environment?
- Christopher S. Armstrong, Mary E. Barth, Alan D. Jagolinzer, Edward J. Riedl, research paper *Market Reaction to the Adoption of IFRS in Europe*
- Andrea Enria, Lorenzo Cappiello, Frank Dierick, Sergio Grittini, Andrew Haralambous, Angela Maddaloni, Philippe Molitor, Fatima Pires and Paolo Poloni, *ECB Occasional Paper Series No. 13 Fair Value Accounting And Financial Stability*, 2004
- Chee Yeow, Lim Chu, Yeong Lim, Gerald J. Lobo, research paper IAS 39 Reclassification Choice and Analyst Earnings Forecast Properties
- Ray Ball, Sudarshan Jayaraman, Lakshmanan Shivakumar, working paper, *Mark-to-Market Accounting and Information Asymmetry in Banks*, 2012
- IFRS 9 Financial instrument
- IAS 39 Financial Instruments: Recognition and Measurement
- IFRS 13 Fair Value measurement
- Exposure Draft /2013/3 Financial Instruments: Expected Credit Losses
- http://www.iasplus.com/en/standards/ifrs/ifrs9
- http://www.iasplus.com/en/standards/ifrs/ifrs13

[13] Christopher S. Armstrong, Mary E. Barth, Alan D. Jagolinzer, Edward J. Riedl, research paper *Market Reaction to the Adoption of IFRS in Europe*.

HARNESSING INNOVATION POTENTIAL OF CROWDSOURCING

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Abstract

The new innovation paradigm is based upon articulation of external and internal sources of innovation. Nowadays, crowdsourcing is coming up as significant external source in innovation processes of the companies. Crowdsourcing enables harnessing of initiatives, ideas, solutions and knowledge of the crowd so as to enhance innovation performance and induce a value creation. Given that existing innovation literature does not cover sufficiently the issues related to crowdsourcing this paper is to offer an additional views about innovation potentials of crowdsourcing thus contributing for future research on this relatively unexplored concept.

Therefore, this paper aims at considering key insights about crowdsourcing contribution on developing companies' innovation capacity. More specifically it is focused on identification of benefits, weaknesses and risks arising from crowdsourcing to the innovation process comprising conceptual and empirical aspects.

Keywords: *Crowdsourcing, innovation, crowd, knowledge, innovation potential*

1. Introduction

Nowadays, innovation is a driving force of the companies' success and competitiveness in the global market. Consequently, companies are faced with the challenge to redesign traditional concept of innovation and develop new innovation methods in order to achieve a competitive advantage. The emergence of crowdsourcing enables integration of external resources into the concrete innovation projects of the companies. In fact, it uses the potential of collective intelligence in order to achieve a certain goal.[1] Crowdsourcing is mainly a consequence of intensive and dynamic ICT development. It "harnesses the power of today's communication technologies to liberate the potential which exists in large pools of people"[2].

Many companies that usually conducted their own R&D activities for solving specific problems or developing new products are increasingly distributing these activities through online crowdsourcing platforms such as InnoCentive, CrowdSpring, TopCoder, uTest. At the same time, some companies (Procter & Gamble, Starbucks, Dell, Best Buy, Nike) create their

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[1] Levy, P. 1997. Collective Intelligence: Mankind's Emerging World in Cyberspace Cambridge: Perseus Books
[2] Howe Jeff, 2009, Crowdsourcing, Why the Power of the Crowd is Driving the Future of Business, www.crownpublishing.com.

own digital platforms that allow customers to generate new ideas and products. Thus, solutions and proposals of the crowd are being progressively used in innovation process of the company. The emergence of crowdsourcing has significantly changed the traditional approach to innovation based primarily on in-house research or outsourcing tasks to contractors. At present, internal R&D efforts are being supplemented or even supplanted, by leveraging a variety of sources for knowledge 'inflows' including suppliers, partners, customers, competitors, academic researchers, etc.[3] Therefore, it implies redefining of innovation methods, expanding innovation possibilities and providing more efficient ways for improving companies' innovation performance by exploiting creative potential of the crowd.

2. Crowdsourcing: a conceptual framework

Although the concept of crowdsourcing has emerged less than a decade ago, in a very short period it has drawn attention of scientific community generating many discussions, comments and analyses in the context *of its conceptual clarification. Jeff Howe has introduced crowdsourcing concept in recent literature giving the initial impetus for further research. According to Howe, crowdsourcing is the act of company or institution taking a function once performed by employees and outsourcing it to an undefined (and general large) network of people in the form of an open call. This can take the form of peer-production (when the job is performed collaborative), but is also often undertaken by sole individual.*[4] Consequently, a key feature of crowdsourcing is an open call for taking a certain activity that can't be implemented with the internal resources of the company. The open call allows participation of a broad network of individuals, companies and institutions. The participation in the crowdsourcing is voluntary and the contribution of a wide network of people is required for the initiative to reach a substantial scale. Therefore, sufficient crowd participation is imperative for the success of a crowdsourcing initiative.[5]

However, it should be stressed that the open call is announced to the crowd with different scale of experience, skills and knowledge. This means that companies which use a crowdsourcing approach, do not use a predefined group of experts or individuals with professional knowledge and skills, but they outsource functions to an undefined network of people. Therefore, it comes out that its basic features are: a large number of participants, heterogeneity of participants and voluntary participation.[6] It is worth noticing that very often the open call is looking for proposals, ideas and solutions for which a specific knowledge and competence is required. Thus, even though the call is directed to an undefined group of people it inherently have selective nature. Therefore, some authors differentiate selective approach and integrative approach to crowdsourcing. In the integrative approach, the strategy is to pool broad numbers of information and data from a large, undefined network of people. In the selective crowdsourcing, the strategy is to tackle a specific issue that needs a defined group of people with specific skills. This might happen usually in the form of an idea contest or other types of open innovation.[7]

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[3] Chesbrough, H., 2006, Open Innovation: A New Paradigm for Understanding Industrial Innovation. *In Open Innovation: Researching a New Paradigm*, Oxford University Press & Cahalane, M.,Feller, J.,Finnegan, P.,2013, Peer Produced Innovation, An Exploration of 'the Wisdom of Crowds' in Virtual Worlds, *Proceedings of the 21st European Conference on Information Systems.*

[4] Howe, J. 2006. The Rise of Crowdsourcing. *Wired magazine* 14 (6).

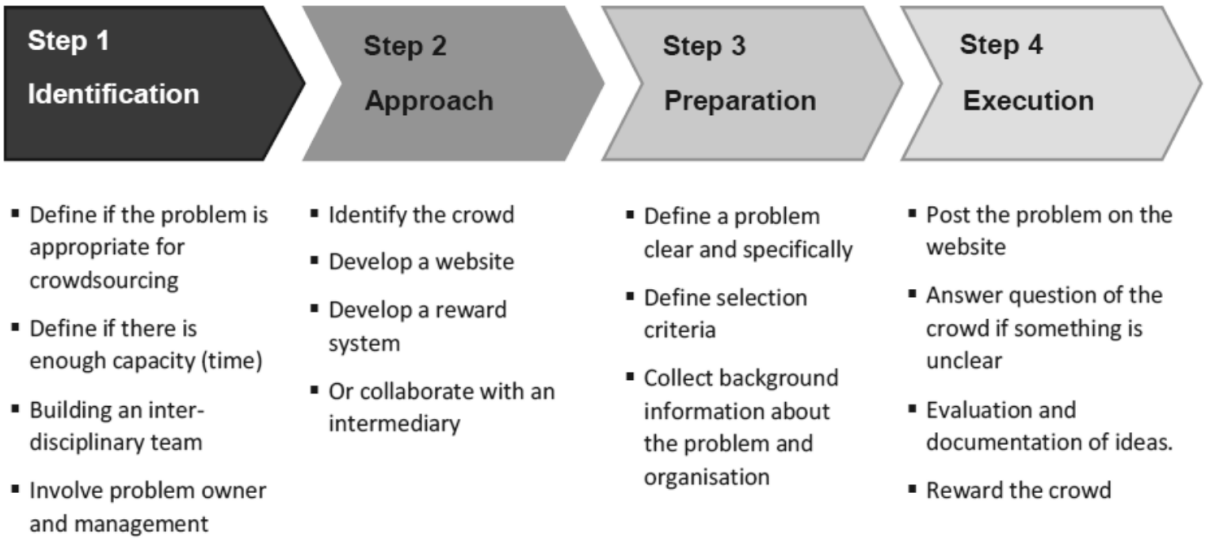
[5] Ankit Sharma, 2010, Crowdsourcing Critical Success Factor Model, *Strategies to harness the collective intelligence of the crowd*, Working Paper 1.

[6] Tanja Aitamurto, Aija Leiponen, Richard Tee, 2011, The Promise of Idea Crowdsourcing – Benefits, Contexts, Limitations, www.ideasproject.com.

[7] Pia Erkinheimo, Paul Dombowsky (2013), Crowdsourcing and Open Innovation for Enterprises, Ideavibes.

More recent definitions involve multiple aspects and highlight more features of the crowdsourcing attempting to explain its complexity. In this context, it is noted that crowdsourcing represents a type of participative online activity in which an individual, an institution, a non-profit organization, or company proposes to a group of individuals of varying knowledge, heterogeneity, and number, via a flexible open call. The undertaking of the task, of variable complexity and modularity, and in which the crowd should participate bringing their work, money, knowledge and / or experience, always entails mutual benefit.[8]

Figure 1. Phases of crowdsourcing



Source: Hay Group

According to the methodological framework created by Hay Group, crowdsourcing in practice is implemented in four subsequent steps: identification, approach, preparation and execution. Each of these steps incorporates a set of activities with purpose to ensure successful realization of the projected goal. (Figure 1)

3. Innovation oriented crowdsourcing: potentials and weaknesses

In practice crowdsourcing is being implemented through various methods focused on achieving different goals. However, only certain methods affect innovation process and innovation performance of the companies. Recent research makes difference between crowdsourcing of inventive activities, crowdsourcing of routine activities and crowdsourcing of content. It has to be emphasized that only inventive activities produce innovation impact by allowing the crowd to solve problems that the firm would not or could not solve internally. However, the crowd only brings the solution and not the practical way to implement the solution (commercialization or industrialization phase). It remains for the firm to industrialize the solution proposed by the crowd, to make it operational.[9] Similar typology is being offered by Schenk and Guittard comprising three types of crowdsourcing: crowdsourcing of complex tasks, crowdsourcing of creative tasks and crowdsourcing of routine tasks. Fulfilling the complex and creative tasks by the crowd include innovation input to the companies by providing solutions for problems and harnessing creativity of the crowd for obtaining novel ideas. According to Howe crowdsourcing includes four models: collective intelligence, crowd

[8] Estellés-Arolas, Enrique; González-Ladrón-de-Guevara, Fernando (2012),"Towards an Integrated Crowdsourcing Definition", *Journal of Information Science.*

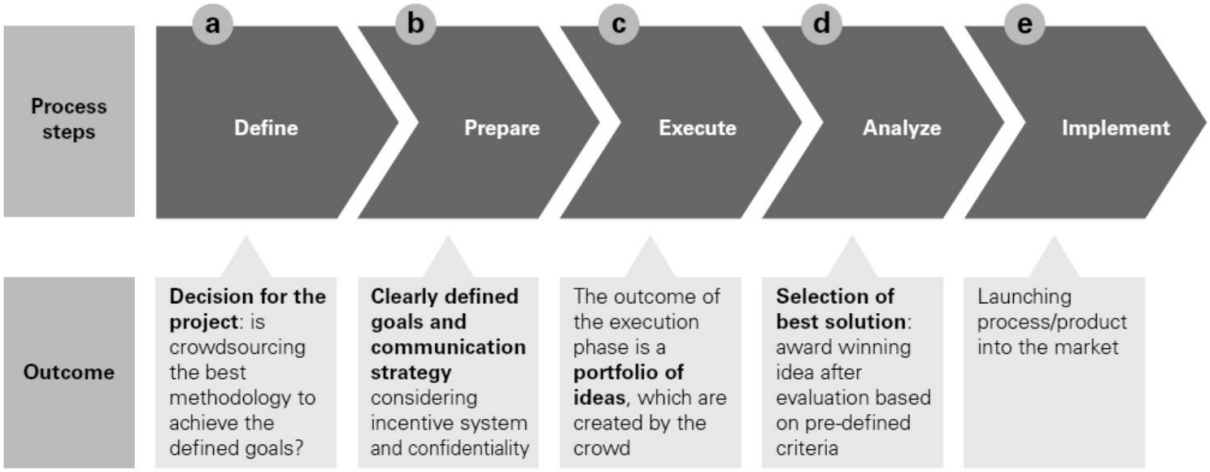
[9] Thierry Burger-Helmchen, Julien Pénin, 2010, The limits of crowdsourcing inventive activities: What do transaction cost theory and the evolutionary theories of the firm teach us?.

creation, crowd voting and crowd funding, where collective intelligence and crowd creation are models that support crowdsourcing innovation.

It is evident that recent literature perceives 'Crowdsourcing Innovation' as a particular way to open up the innovation process, using large networks of individuals to access, capture and explore external knowledge, technologies and competencies. In other words, this concept is based onbringing the "wisdom of crowds" into the company to help it innovate.[10] Crowdsourcing is based upon research collaboration that radically enlarges the pool of potential scientific collaborators.[11]

Pointing to the innovation aspects of crowdsourcing certain authors use the notion crowd innovation.[12] Following the Erl, et al.[13] the implementation of crowd innovation initiatives is completing in five steps: define, prepare, execute, analyse and implement (Figure 2). The defining phase determines if the crowd innovation is the best option for creating ideas and solutions to a given problem of the company. The preparation phase outlines the goals, the communication strategy and the challenge to solve, while the execution phase comprises communication with the crowd and ideas generation. The ideas are then analyzed according to the criteria that have been defined during the preparation phase and the winner of competition is selected. Finally, during the implementation phase the innovation is launched to the market or the new solution is incorporated in the organization.[14]

Figure 2. Crowd innovation process overview



Source: Arthur D. Little analysis

Boudreg and Lakhani[15] identified four distinct forms through which innovation impact of crowdsourcing is provided: contest, collaborative community, complement and labor market. The contest is considered to be most effective method when the problem is complex or novel or has no established best-practice approaches. It allows generation of high value solutions through large scale and diverse independent experimentation. Collaborative

[10] Oliveira F., Ramos I., Santos L., 2010, Definition of a crowdsourcing Innovation Service for the European SMEs, Current Trends in Web Engineering, Vol.6385.
[11] Thierry Buecheler, Jan Henrik Sieg, Rudolf M. Füchslin and Rolf Pfeifer, (2010) Crowdsourcing, Open Innovation and Collective Intelligence in the Scientific Method: A Research Agenda and Operational Framework, Proc. of the Alife XII Conference, Odense, Denmark, 2010.
[12] Hans-Peter Erl, Michaël Kolk, Andreas Deptolla, Fabian Sempf, 2012, Crowd innovation fosters new business opportunities, How business can profit from group-oriented innovation approaches, Prism / 2 / 2012.
[13] Ibid.
[14] Ibid.
[15] Kevin J. Boudreg, Karim R.Lakhani, 2013. Using the Crowd as an Innovation Partner, April 2013 Harvard Business Review.

communities include aggregating a large number of diverse contributions into a value-creating. They are most effective when tackle projects whose orchestration is relatively simple. Complementor is the third type of crowd-powered innovation where the core product or technology is effectively transformed into a platform that generates complementary innovations. Finally, Crowd Labor Markets contribute to efficiently and flexibly matching talents to discrete tasks.

In addition, innovation oriented crowdsourcing can be observed as competitive or collaborative. According to the competitive approach, community members offer multiple solutions for a specific problem from which further winning solutions will be selected. On the other hand, the collaborative approach enables solutions to be offered and amended openly by the community and participants to learn among each other achieving a synergy effect.[16]

Crowdsourcing innovation benefits can be evaluated from different aspects and include various forms. According to Reichwald and Piller mobilization of consumers in the value creation process involve four benefits for firms. These are the reduction of the time it takes to develop new products ("time-to-market"), the reduction of the costs of innovation ("cost-to-market"), the increase of market acceptance of new products and consumers' willingness to buy them ("fit-to-market"), and the increase of consumers' subjective perception of the actual newness of a new product ("new-to-market").

Having in mind the above considerations it comes out that crowdsourcing offers many innovation benefits for companies, such as:

- it allows a broader range of solutions, ideas and initiatives than can be obtained from internal sources of the company;
- companies can easier identify user needs and adjust the offer according to user tastes and preferences;
- crowdsourcing very often can provide a cost-effective innovation solutions;
- in certain cases it can offer a faster solution than in-house research;
- it enables a multiplier effect. A new idea, product or service introduced and discussed within the organization will often lead to generation of additional new ideas[17]
- it enables the outsourcing of the risk of failure since the firm only pays the crowd for successful performance[18].

However, despite the above mentioned advantages innovation-oriented crowdsourcing incorporates multiple weaknesses and risks. Recent studies point out that crowdsourcing is not a method that can be effective for radical innovation, i.e. it is primarily suitable for incremental product innovation. The crowd contribution in generating new product ideas to a large extent depends on the nature and complexity of the industry or product category and the needed amount of knowledge to innovate. If required knowledge is more specific and complex there is possibility for lower crowd involvement in innovation. Most recent studies indicate if knowledge-based entry barriers are low and/or the knowledge needed to come up with successful ideas is closely linked to aspects of user experience users might be more successful in the innovation process[19]. Actually, users might generally be better at solving needs-based problems (e.g., novel functionality) and worse at technology-based problems (i.e., dimensions of merit).[20]

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[16] Ye Weiwei, Crowdsourcing for Collaboration-Oriented Innovations, Social Science Letters, ISSN: 2163-4130, Volume 1, Number 1, December, 2012 & Le, Q., Panchal, Jitesh H., Modeling the effect of product architecture on mass-collaborative processes, *Journal of Computing and Information Science in Engineering*, vol.11, issue (2011).

[17] Hans-Peter Erl, Michaël Kolk, Andreas Deptolla, Fabian Sempf, 2012, Crowd innovation fosters new business opportunities, How business can profit from group-oriented innovation approaches, Prism / 2 / 2012.

[18] Thierry Burger-Helmchen, Julien Pénin, 2010, The limits of crowdsourcing inventive activities: What do transaction cost theory and the evolutionary theories of the firm teach us?.

[19] Lettl, C., C. Herstatt, and H. G. Gemünden, 2006; & Marion K. Poetz, Martin Schreier, 2012.

[20] Ibid.

In addition, innovation management shortcomings are emerging as restraining factor for harnessing crowdsourcing innovation potential. In this context, the main reason companies resist crowds is that managers don't clearly understand what kinds of problems the crowd really can handle better and how to manage the process.[21] In fact, for crowdsourcing to be effective tasks need to be focused and clearly explained and the firm needs to have procedures in place for effectively filtering and considering ideas that come in.[22] Besides this, crowdsourcing is mainly enabled through the technology of the web. Hence, certain infrastructural barriers such as: access to computers, access to the web and access to high-speed connections, may limit harnessing of crowdsourcing potentials.[23]

Furthermore, the critics point to the possibility that crowdsourcing can increase the chances of failure in innovation efforts, due to factors such as: diminished and distributed ownership of a problem; difficulties in monitoring the quality of work and in managing a project; challenges in maintaining a working relationship with crowdsourced workers throughout the duration of a project; as well as vulnerability to faulty results caused by malevolent work efforts- for example by a competitor.[24]

Erkinheimo and Dombowsky (2013) identify a number of risks related to implementation of crowdsourcing, such as: a) Confusion by the crowd caused by lack of clarity the task given to it; b) Low participation due to lack of awareness of the audience/ resource that a company wish to reach and their behaving patterns; c) Gamification by special interest groups or individuals; d) Controversy over IP ownership after idea is submitted, originality of idea (relates to the ownership mentioned above); e) The crowd stops participating due to the perception the organisation is non-responsive to their input; f) Reduced internal capacity for innovation caused by a misdirected sense on the part of management that the 'crowd can do it all'.

4. Conclusions

Crowdsourcing is still a relatively new concept that is not sufficiently explored in existing literature. In this paper we have analyzed crowdsourcing potentials for supporting innovation processes in the companies. We found that crowdsourcing significantly expands the innovation potential and opens new opportunities for augmentation of companies' innovation. The analysis of contemporary empirical and theoretical considerations indicates that crowdsourcing enables faster and broader access to innovative ideas and solutions that can be implemented with relatively low costs. At the same time, a number of weaknesses have been identified diminishing or limiting the crowdsourcing innovation impact. In this context, it is emphasized the relevance of knowledge-based barriers, the shortcomings in innovation management of the companies infrastructural barriers, etc. Therefore, the prospective challenge to the companies is to develop methods that will enable effectively to deal with constrains so as to harness the potential benefits of crowdsourcing. Finally, it is noteworthy to be mentioned that complex interactions coming up from a range of participants leave significant room for further research.

[21] Kevin J. Boudreg, Karim R.Lakhani, 2013.Using the Crowd as an Innovation Partner, April 2013 Harvard Business Review.

[22] Hempel, J. (2007). Tapping the wisdom of the crowd. Business week. Retrieved October 2, from http://www.businessweek.com/innovate/content/jan2007/id20070118_768179.htm.

[23] Brabham, C. Daren 2008, Convergence: Crowdsourcing as a Model for Problem Solving, An Introduction and Cases, *The International Journal of Research into New Media Technologies*, Vol 14(1), 2008 Sage Publications

[24] Cove, 2007; McNichol, 2007; McDonald, 2007; Stranieri, 2006; Marjanovic et al., 2012.

References

- Brabham, C. Daren 2008, Convergence:Crowdsourcing as a Model forProblem Solving, An Introduction and Cases, *The International Journal of Research into New Media Technologies*, Vol 14(1), 2008 Sage Publications
- Brabham, D. C. (2009). Crowdsourcing the public participation process for planning projects. *Planning Theory* , 242-262.
- Michael Gebert, 2012, How Crowdsourced Innovation Models Evolutionize Idea Creation, University of Glamorgan, Munich University of Applied Sciences
- Levy, P. 1997. Collective Intelligence: Mankind's Emerging World in Cyberspace Cambridge: Perseus Books
- Chesbrough, H. (2006) Open Innovation: A New Paradigm for Understanding Industrial Innovation. *In Open Innovation: Researching a New Paradigm*, Oxford University Press.
- Howe, J. 2006. The Rise of Crowdsourcing. *Wired magazine* 14 (6).
- Howe Jeff, 2009, Crowdsourcing, Why the Power of the Crowd isDriving the Future of Business, www.crownpublishing.com
- Cahalane, M., Feller, J., Finnegan, P., 2013, Peer Produced Innovation, An Exploration of 'the Wisdom of Crowds' in Virtual Worlds, *Proceedings of the 21st European Conference on Information Systems*
- Le, Q., Panchal, Jitesh H., Modeling the effect of product architecture on mass-collaborative processes, *Journal of Computing and Information Science in Engineering*, vol.11, issue (2011)
- Thierry Burger-Helmchen, Julien Pénin, 2010, The limits of crowdsourcing inventive activities: What do transaction cost theory and the evolutionary theories of the firm teach us?
- http://cournot.u-strasbg.fr/users/osi/program/TBH_JP_crowdsouring%202010%20ENG.pdf.
- Ye Weiwei, Crowdsourcing for Collaboration-Oriented Innovations, Social Science Letters, ISSN: 2163-4130Volume 1, Number 1, December, 2012
- Ankit Sharma, 2010, Crowdsourcing Critical Success Factor Model, *Strategies to harness the collective intelligence of the crowd*, lse Working Paper 1 – 2010
- Hempel, J. (2007). Tapping the wisdom of the crowd. Business week. Retrieved October 2, from
- http://www.businessweek.com/innovate/content/jan2007/id20070118_768179.htm
- Estellés-Arolas, Enrique; González-Ladrón-de-Guevara, Fernando (2012),"Towards an Integrated Crowdsourcing Definition", *Journal of InformationScience*
- Greengard, S. (2011). Following the crowd. *Communications of the ACM*, Vol. 54, No. 2, p. 20-22.
- Oliveira F., Ramos I., Santos L., 2010, Definition of a crowdsourcing Innovation Service for the European SMEs, Current Trends in Web Engineering, Vol.6385
- Hans-Peter Erl, Michaël Kolk, Andreas Deptolla, Fabian Sempf, 2012, Crowd innovation fosters new business opportunities, How business can profit from group-oriented innovation approaches, Prism / 2 / 2012
- Scottish Enterprise, 2012, New approaches to R&D, A Guide to developing new products and services, http://www.scottish-enterprise.com/
- Erkinheimo, Pia, and Karoliina Harjanne. 2011. "Idea Crowdsourcing at Nokia–12 months wiser." *ideasproject.com*. http://www.ideasproject.com/servlet/JiveServlet/previewBody/8922-102-1-2562/Service Innovation Year Book 2012 Nokia Idea Crowdsourcing – 12 months wiser.pdf.
- Anneke Westhoff, 2009, Using the crowd:An exploration of conditions for crowdsourcing in the idea generation process, 2009 Hay Group, www.haygroup.com
- Thierry Buecheler, Jan Henrik Sieg, Rudolf M. Füchslin and Rolf Pfeifer,(2010) Crowdsourcing, Open Innovation and Collective Intelligence in the Scientific Method: A Research Agenda and Operational Framework, Proc. of the Alife XII Conference, Odense, Denmark, 2010
- Pia Erkinheimo, Paul Dombowsky (2013), Crowdsourcing and Open Innovation for Enterprises, Ideavibes
- Schenk, E., & Guittard, C. (2009, December). *Working Paper - Crowdsourcing: What can be Outsourced to the Crowd, and Why?* Retrieved from Ideas: http://ideas.repec.org/p/hal/wpaper/halshs-00439256_v1.html#download
- Sonja Marjanovic, Caroline Fry and Joanna Chataway, Crowdsourcing based business models: In search of evidence for innovation 2.0, Science and Public Policy 39 (2012) pp. 318–332
- Kevin J. Boudreg, Karim R.Lakhani, 2013.Using the Crowd as an Innovation Partner, April 2013 Harvard Business Review

- Marion K. Poetz, Martin Schreier, (2012) The Value of Crowdsourcing: Can Users Really Compete with Professionals in Generating New Product Ideas? Journal of Product Innovation Management Volume 29, Issue 2, pages 245–256, March 2012
- Lettl, C., C. Herstatt, and H. G. Gemünden. 2006. Learning from users for radical innovation. *International Journal of Technology Management* **33** (1): 25–45.
- Tanja Aitamurto, Aija Leiponen, Richard Tee, 2011, The Promise of Idea Crowdsourcing – Benefits, Contexts, Limitations, www.ideasproject.com

ASSESSMENT OF ENTREPRENEURSHIP DEVELOPMENT IN LATVIA IN THE CONTEXT OF SMART SPECIALISATION

Ilva RUDUSA[*]
Evija KOPEIKA[**]

Abstract

To stimulate the development of smart specialisation in Latvia, a smart specialisation strategy was elaborated. The objective of the smart specialisation strategy is to set and regularly review priorities and to channel investments, including to choose appropriate policy instruments in accordance with the strategy and to establish a system of monitoring, which is oriented towards raising the competiveness of Latvia's economy at the regional, European and global levels.

The research aim of the paper is to analyse the development of the entrepreneurial environment in Latvia in the context of smart specialisation. Three indexes (the Global Competitiveness Index, the World Bank's index of the ease of doing business and the Index of Economic Freedom) were used to assess the development of the entrepreneurial environment, and an analysis of business demography as well as an assessment of the development of high and medium high technology industries and knowledge-intensive service industries in Latvia was performed.

To assess the development of an industry, one can use such indicators as number of economically active enterprises, number of employees, net turnover and exports.

Keywords: *entrepreneurship, entrepreneurial environment, smart specialisation, competitiveness, innovations.*

1. Introduction

An increase in productivity in the entire national economy is the basis of wellbeing and the determinant factor for future economic growth in Latvia. Economics admits that productivity level and competitiveness of products (besides, not only in terms of price but also in terms of innovation and value added) are the factors that determine a country's capability to achieve a higher level of economic development (national industrial development priorities).

According to a classification by the World Economic Situation and Prospects 2013, Latvia is ranked in the group of developed countries, however, a sufficient potential has not yet emerged in the country to fully exploit the comparative advantages that developed countries have and to be able to use these advantages in competition.

Efforts made by management at all levels to form, develop and control their local economy, its capability to successfully compete with other similar organisations, have become a significant factor in decision-making. At all levels of management (at the enterprise, local government and national levels), these factors cause stress and the need to find ways to stimulate and implement successful business growth.[1]

In the modern world, economic, political and social realities require a new approach to process development both in the national and in the global aspect. Nowadays, competitiveness

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[1] (Kuzmišin 2013, 22-36).

exists not only between individuals and enterprises but also among institutions, governments, between cities and regions, as well as among national economies.[2]

The development of a competitive economy is based on creating an entrepreneurial environment and favourable conditions for the expansion of enterprises, which, to a great extent, stimulates economic activity and the competitiveness of enterprises.

As economic globalisation increases, the development of innovative products and products of high value-added play an important role in creating a competitive entrepreneurial environment. For this reason, over the recent period, smart specialisation is a topical issue in the context of creating an entrepreneurial environment. This type of specialisation allows regions to take advantage of scale, scope and spillovers in knowledge production and use. Smart specialisation is about combining knowledge and innovation with specific strengths of the national or regional economy. [3]

To stimulate the development of smart specialisation in Latvia, a smart specialisation strategy was elaborated. The objective of the smart specialisation strategy is to set and regularly review priorities and to channel investments, including to choose appropriate policy instruments in accordance with the strategy and to establish a system of monitoring, which is oriented towards raising the competiveness of Latvia's economy at the regional, European and global levels.

Although the basic factors facilitating entrepreneurship are globally the same in all areas, depending on the wellbeing level of a country (enterprises), the geographical position, the population etc., a case study or a forecast of potential developments has to be made individually, given the development strategy of any country. Within every country (enterprise), such research has to be conducted without ignoring the specifics of one's own country; however, the findings of researchers of other countries have to be considered, according to Roslyn K. Chavda.

In Latvia, given its individual characteristics in the post-crisis period, an overall situation analysis has to be performed.

So, the situation has to be examined and data have to be summarised and analysed, which is reflected in the present research.

The research aim of the paper is to analyse the development of the entrepreneurial environment in Latvia in the context of smart specialisation. Three indexes (the Global Competitiveness Index, the World Bank's index of the ease of doing business and the Index of Economic Freedom) were used to assess the development of the entrepreneurial environment, and an analysis of business demography as well as an assessment of the development of high and medium high technology industries and knowledge-intensive service industries in Latvia was performed.

The industries were selected in line with the Smart Specialisation Strategy of Latvia and the Research, Technological Development and Innovation Framework 2014 – 2020. [4]

To assess the development of an industry, one can use such indicators as number of economically active enterprises, number of employees, net turnover and exports.

[2](Zaharieva 2008, 154-155).
[3] (Jucevicius 2013, 333-340).
[4](http://polsis.mk.gov.lv/view.do?id=4608).

2. Theoretical Solutions

2.1. Analysis of the entrepreneurial environment in Latvia

An entrepreneurial environment is defined as a factor which is critical in the development of entrepreneurship in certain regions 5

There are many definitions of entrepreneurial environment in economic literature according to which an entrepreneurial environment is the factor by which the economy enters into competition for investors or customers, and where they decide and choose an environment providing them the best conditions for doing business.6

A quality entrepreneurial environment is one of the key elements for raising a country's competitiveness – the better conditions are created by the country for its entrepreneurs, the greater investments can be expected in the national economy, which, in its turn, leads to the creation of new jobs and to high wellbeing for the population.

A quality entrepreneurial environment adequately motivating the country's population to perform business is generally one of the determining resources of government machinery to ensure the long-term competitiveness of the national economy. The entrepreneurial environment does not influence only the activity of local business entities, but is also an important part of deciding of foreign investors on the allocation of their capital.7

To assess the entrepreneurial environment, several indexes are used; the most popular ones are the Index of Economic Freedom and the Global Competitiveness Index, as well as the World Bank's index of the ease of doing business (Table 1).

Table 1

Quality characteristics of the entrepreneurial environment in Latvia in the period 2010-2013

Indicator	2010 - 2011		2011 -2012		2012 - 2013	
	Rank	Score	Rank	Score	Rank	Score
Index of Economic Freedom	56	65.8	56	65.2	55	66.5
Global Competitiveness Index	70	4.14	64	4.24	55	4.35
World Bank's index of the ease of doing business	24	No data	21	76.5	25	76.1

Authors' construction

Global Competitiveness Index

Data of the Global Competitiveness Index allows identifying a country's competitive advantages and disadvantages broken down by individual factors determining competitiveness. The Global Competitiveness Index involves a specific methodology combining micro- and macro-indicators for the purpose of quantifying a wide range of indicators, starting with institutions, infrastructures and macroeconomic environment and ending with labour market efficiency, market size, technological readiness and innovation.

[5] (Gnyawali 1994, 43-62).
[6] (Kuzmišin 2013, 22-36).
[7] (Kuzmišin 2013, 22-36).

In the Global Competitiveness Index 2012-2013, Latvia was ranked 55th among 144 countries. Compared with the previous period ranking (2011-2012), Latvia's position improved 9 places.

Table 2

Latvia's scores and ranks in the Global Competitiveness Index and Subindexes in the period 2011-2013

	2010 - 2011		2011 - 2012		2012 - 2013	
GCI	70	4.14	64	4.24	55	4.35
Innovation	77	3.37	59	3.53	68	3.57
Higher education and adult training	35	4.81	34	4.84	42	4.78
Technological development	51	3.96	46	4.26	38	4.73
Business development	80	3.73	71	3.84	71	3.89

Authors' construction based on the Global Competitiveness Index 2010-2011; 2011-2012; 2012-2013

An analysis of individual indicators of the Global Competitiveness Index shows that Latvia's rank for technological readiness climbed from 46th to 38th position, whereas its rank for higher education and adult training decreased from 34th to 42nd position and the rank for innovation fell from 59th to 64th place (Table 2).

Despite the fact that Latvia's rank improved compared with its neighbouring countries, the country is still in the lowest position.

Table 3

GCI 2012-2013 scores and rankings of Latvia and other countries

Country	GCI score (1-7)	Rank
Finland	5.55	3
Sweden	5.53	4
Germany	5.48	6
Denmark	5.29	12
Estonia	4.64	34
Poland	4.46	41
Lithuania	4.41	45
Latvia	4.35	55

Authors' construction based on the Global competitiveness index 2012 - 2013

Index of Economic Freedom

The Index of Economic Freedom is an annual study by the institute Heritage Foundation that has been published since 1995, and it aims to show the degree of economic freedom in the world's countries, presuming that the higher the economic freedom, the higher the wellbeing level and income per capita.

Latvia's economic freedom score in 2013 was 66.5, taking 55th position among the world's countries and 25th position among 43 countries of the European region.

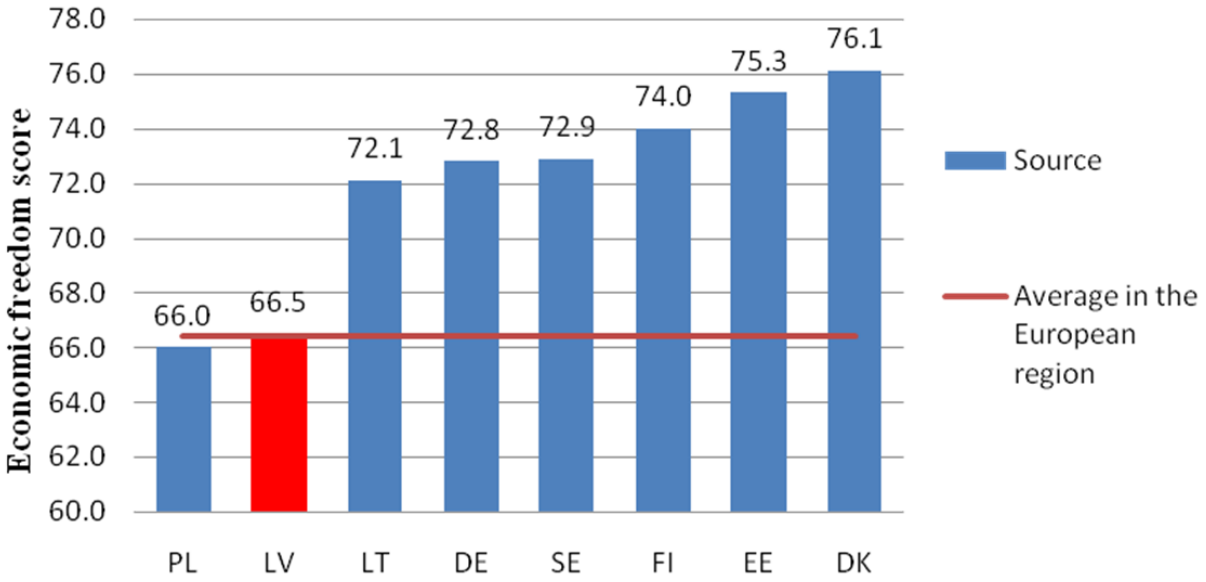

Fig.1. Economic freedom scores for Latvia and other countries in 2013. Authors' construction based on www.heritage.org

An analysis of Latvia's rank in the Index of Economic Freedom in the period 2010-2013 shows that it has not considerably changed. Compared with two previous periods, Latvia's rank rose one place, but in year 2014 rank climbed from 55th to 42th place. (Table4).

Table 4

Index of Economic Freedom for Latvia in the period 2010-2014

	2011	2012	2013	2014
IEF score	65.8	65.2	66.5	68.7
Rank	56	56	55	42

Authors' construction based on www.heritage.org

Compared with 2012, Latvia's score improved by 1.3 points.

World Bank's index of the ease of doing business

In Latvia, the most popular instrument for assessing the entrepreneurial environment is the World Bank's study Doing Business.

The World Bank's study Doing Business (www.doingbusiness.org) is an international comparative entrepreneurial environment rating that has been prepared for eight years (since 2004); it annually measures the administrative procedures for entrepreneurship and their application in various countries of the world. Doing Business quantitatively measures and compares the regulatory conditions and procedures of countries – both those facilitating entrepreneurial activity and those hindering it.

In the World Bank's study Doing Business 2013, among 185 countries, Latvia takes the high 25th place, whereas among the European Union Member States it is ranked 8th.

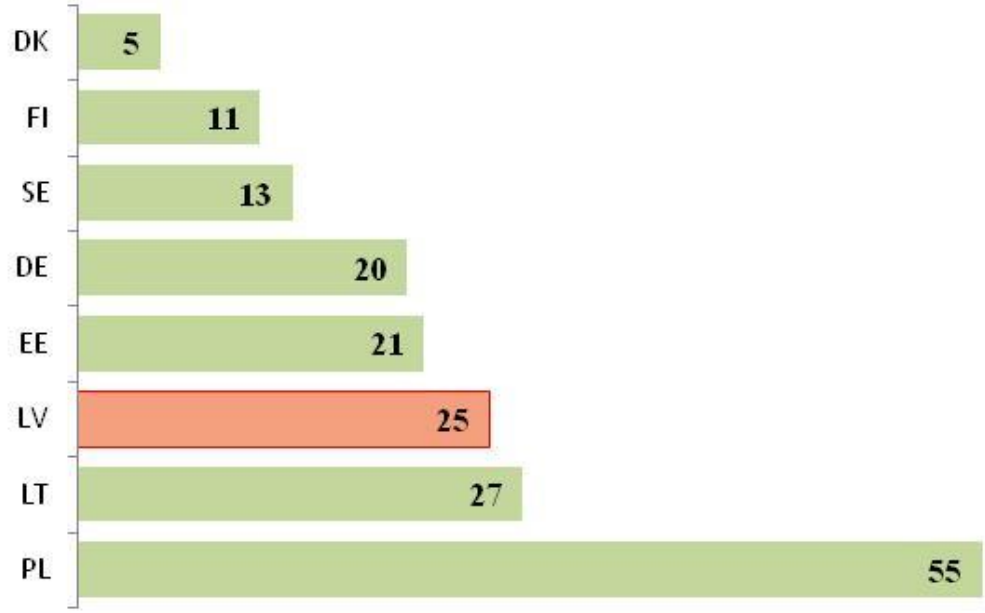

Fig.2. Rankings of Latvia and other countries in Doing Business 2013 Authors' construction based on www.doingbusiness.org

It has to be noted that Latvia's rank fell compared with the previous report; in Doing Business 2012, Latvia was ranked 21st among 183 countries and 7th among the European Union Member States.

The entrepreneurial environment is a totality of all the factors that affect the performance of an enterprise. Business demography, trends in an industry, government activities, innovation and technological development may be mentioned as the key factors shaping the entrepreneurial environment.

2.2. Business demography

In the context of development of the entrepreneurial environment, it is important to analyse changes in the number of enterprises or business demography indicators, as the establishment of new enterprises is considered a significant factor for the country's sustainable development and competitiveness. The emergence of new enterprises indicates a quality entrepreneurial environment as well as economic development in general.

The most significant business demography indicators are the rates of establishment and liquidation of enterprises in the country.

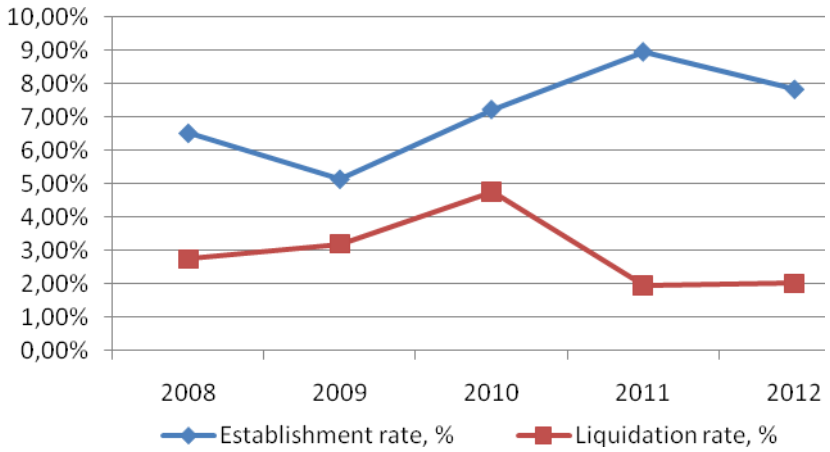

Fig.3. Enterprise establishment and liquidation rates in Latvia in the period 2008-2012, %. Authors' construction based on data of the Latvia Register of Enterprises and www.lursoft.lv

According to the data, the rate of establishment of enterprises started rising in 2009, reaching 8.94% in 2011. However, in 2011 it slightly decreased. Over the past two years, a positive trend may be observed for the rate of liquidation of enterprises, which decreased from 4.75% in 2010 to 2% in 2012.

An analysis of both indicators shows that over the entire period, the rate of establishment of enterprises exceeded the liquidation rate, which is one of the preconditions for sustainable economic development.

It is important to analyse the rate of survival of enterprises for the purpose of assessing sustainable economic development. The rate of survival of enterprises shows the share of registered enterprises that have been able to continue their economic activity.

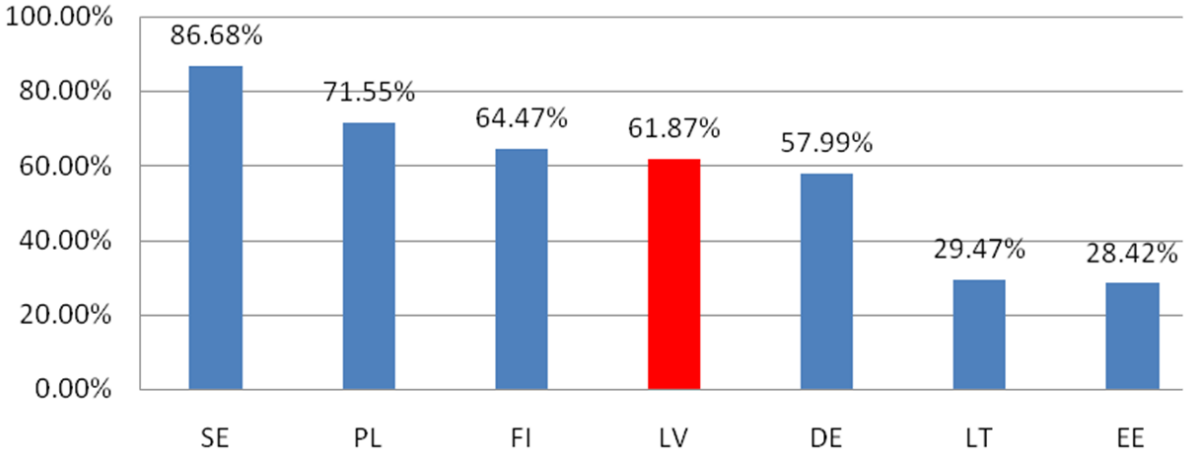

Fig.4. Enterprise survival rate in Latvia and in selected countries in 2010 Authors' construction based on www.eurostat.com

In Latvia in 2010, the rate of survival of enterprises was equal to 61.87%, which indicated that slightly more than half of the newly established enterprises were able continue their operation two years after their establishment.

2.3. Assessment of the development of high and medium high technology industries and knowledge-intensive service industries in Latvia

As economic globalisation increases, the development of innovative products and products of high value-added play an important role in creating a competitive entrepreneurial environment. Therefore, it is important to analyse the development of high and medium high technology industries and knowledge-intensive service industries in the context of entrepreneurial environment.

The significance of high value-added businesses has been stressed in contributions by other researchers, for instance, "the development of high value-added industries and the use of information and communication technologies are among the key drivers in the "knowledge economy", as these industries provide main support for the expansion of the economy through high value-added economic activities and exports of electronics".[8]

For successful development of Latvia as a small economy, it was and is necessary to identify the industries whose development is desirable and feasible and to purposefully adapt the training of professionals, science, technological development and innovation to these industries, as well as to ensure the availability of finances. Despite its low overall innovation capacity, Latvia has made achievements in several industry-related technologies: surface and coating technology, materials, engines, pumps and turbines and nanoscience. Several its advantages also relate to IT techniques and control, audiovisual technologies, health, pharmacy, chemistry and wood chemistry.

To date, research in Latvia mainly specialised in such fields as biotechnology, ICT, energy and transport technology.[9]

Latvia's Smart Specialisation Strategy envisages five key priorities in smart specialisation:

1. Knowledge-intensive bioeconomy;
2. Biomedicine, medical technology, biopharmacy and biotechnology;
3. Smart materials, technologies and engineering systems;
4. Smart energy;
5. Information and communication technologies.

To assess the development of an industry, one can use such indicators as number of economically active enterprises, number of employees, net turnover and exports.

An analysis of the development of high and medium high technology industries in Latvia reveals that 619 economically active enterprises operated in 2011, which accounted for 0.41% of the total number of economically active enterprises in the country.

Compared with 2008, the number of enterprises engaged in high and medium high technology industries rose by 124 (Fig. 5).

[8] (Toh, Thangavelu 2013, 233-244).
[9] (http://polsis.mk.gov.lv/view.do?id=4608)

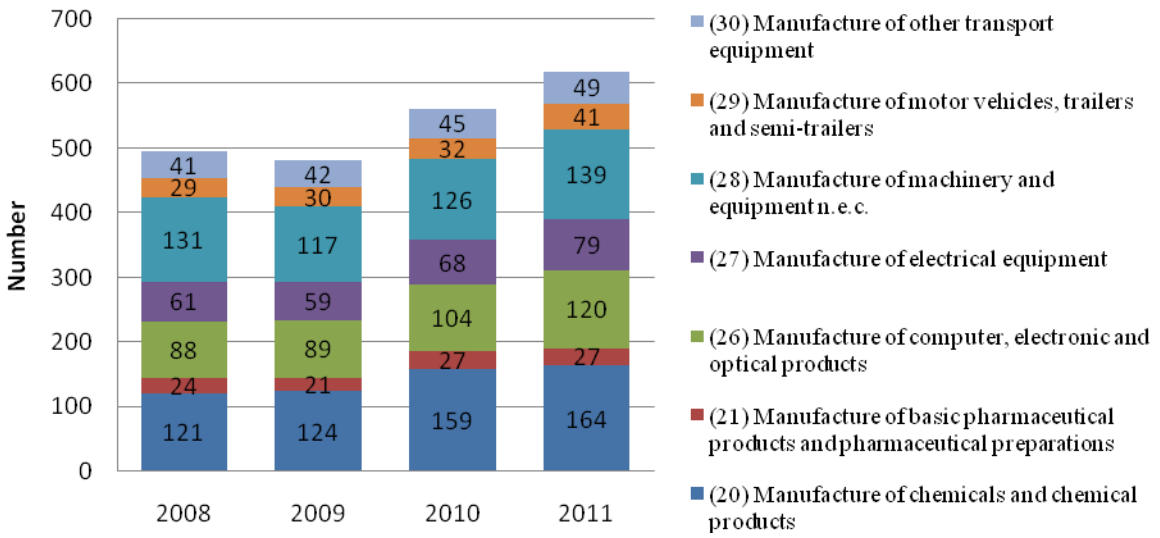

Fig. 5. Number of economically active enterprises in high and medium high technology industries in the period 2008-2011. Authors' construction based on www.csb.lv

In 2011, the highest proportion of economically active enterprises was in the manufacture of chemicals and chemical products, 26.49%; it was 19.39% in the manufacture of computer, electronic and optical products and 22.46% in the manufacture of machinery and equipment not elsewhere classified.

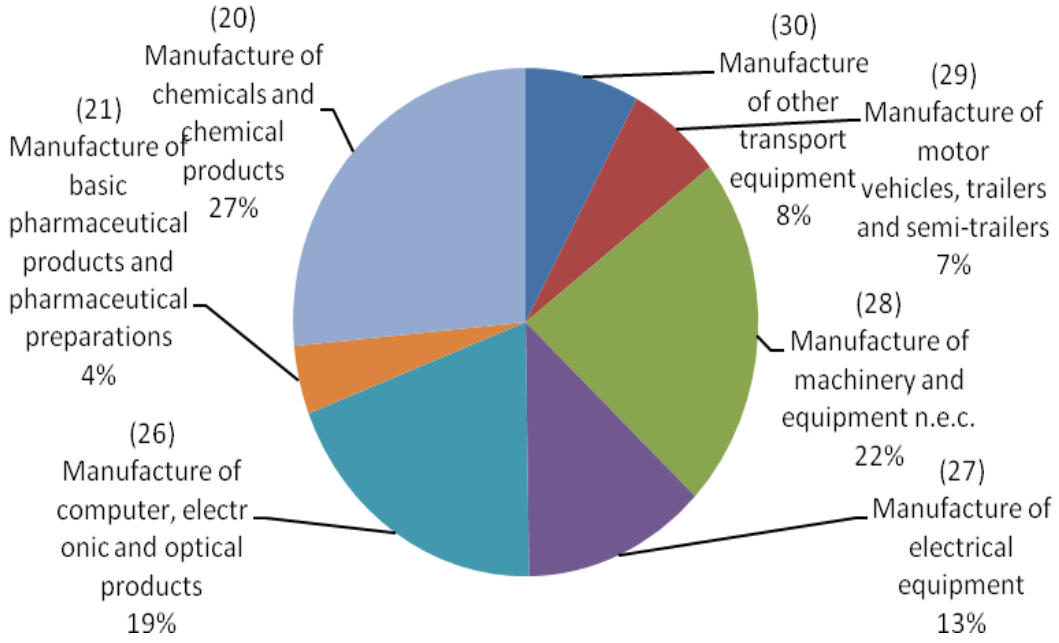

Fig. 6. Percentage distribution of economically active enterprises by high and medium high technology industry in 2011. Authors' construction based on www.csb.lv.

In the knowledge-intensive service industries in 2011, 8901 enterprises operated, which comprised 5.86% of the total number of economically active enterprises. Compared with 2008, the proportion of enterprises engaged in the knowledge-intensive service industries rose by 0.56 percentage points.

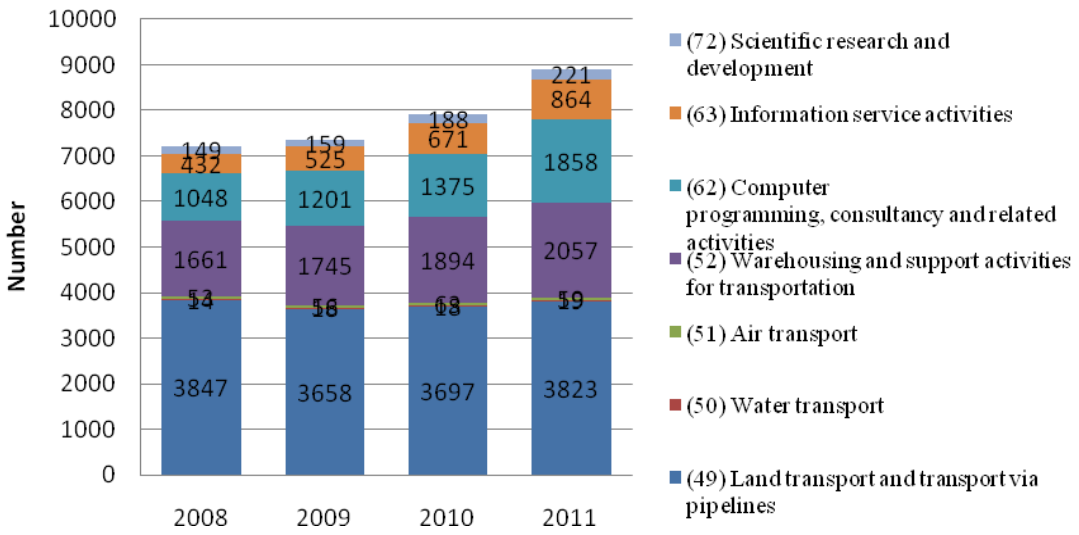

Fig.7. Number of economically active enterprises in knowledge-intensive service industries in the period 2008-2011. Authors' construction based on www.csb.lv.

An analysis of the percentage distribution of enterprises by industry in 2011 shows that the highest proportion of economically active enterprises was registered in the industry of land transport and transport via pipelines, 42.95%, followed by the industry of warehousing and support activities for transportation with 23.11% and the industry of computer programming, consultancy and related activities with 20.87%.

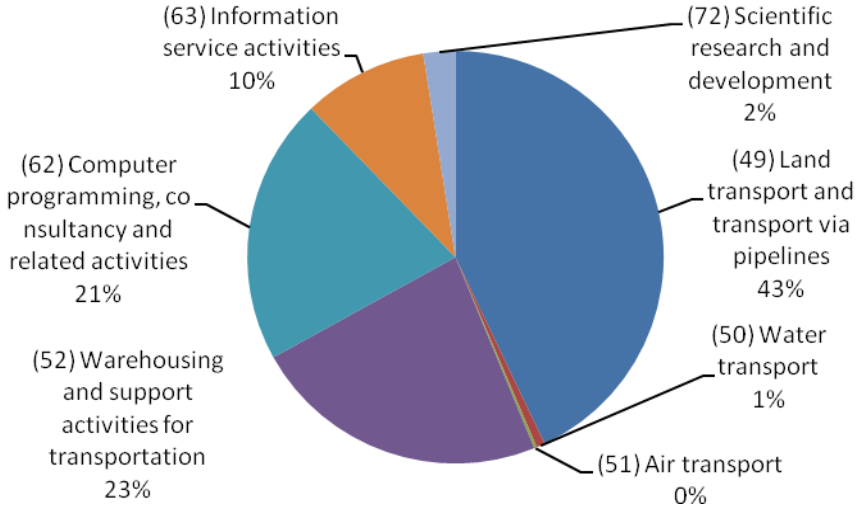

Fig.8. Percentage distribution of economically active enterprises by knowledge-intensive service industry in 2011. Authors' construction based on www.csb.lv.

In analyses of the development of an industry, an important indicator is net turnover of enterprises operating in an industry, which shows the quantity of goods and services produced in the industry in terms of money, as well as number of occupied jobs in the industry.

The net turnover of enterprises operating in the high and medium high technology industries totalled LVL 842.03 million in 2012. In the period 2008-2012, the proportion of the net turnover of high and medium high technology industries in the total net turnover rose from 1.87% in 2008 to 2.54% in 2012. However, a decrease of 0.07 percentage points was observed in 2009 (Fig.9).

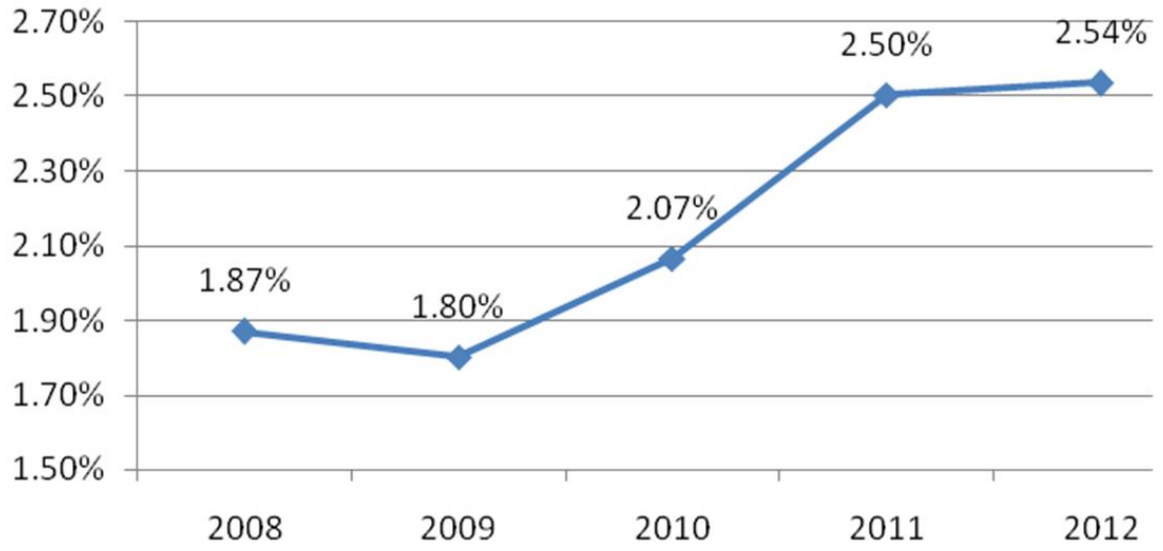

Fig.9. Proportion of the net turnover of high and medium high technology industries in the total net turnover in the period 2008-2012. Authors' construction based on www.csb.lv

An analysis of the percentage distribution of net turnover by high and medium high technology industry showed that in 2012 the manufacture of chemicals and chemical products had the highest proportion of net turnover, 23.51%, followed by the manufacture of basic pharmaceutical products and pharmaceutical preparations with 15.10% and the manufacture of electrical equipment with 14.94%.

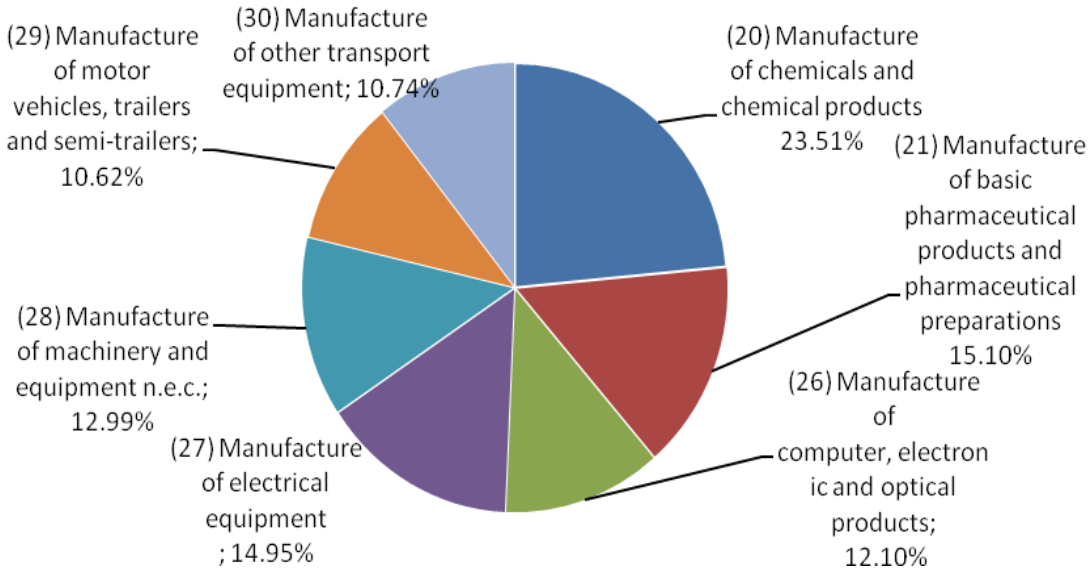

Fig. 10.Percentage distribution of net turnover by high and medium high technology industry in 2012. Authors' construction based on www.csb.lv

In 2012, the average number of occupied jobs in the high and medium high technology industries was 15370, accounting for 1.83% of the total number of occupied jobs.

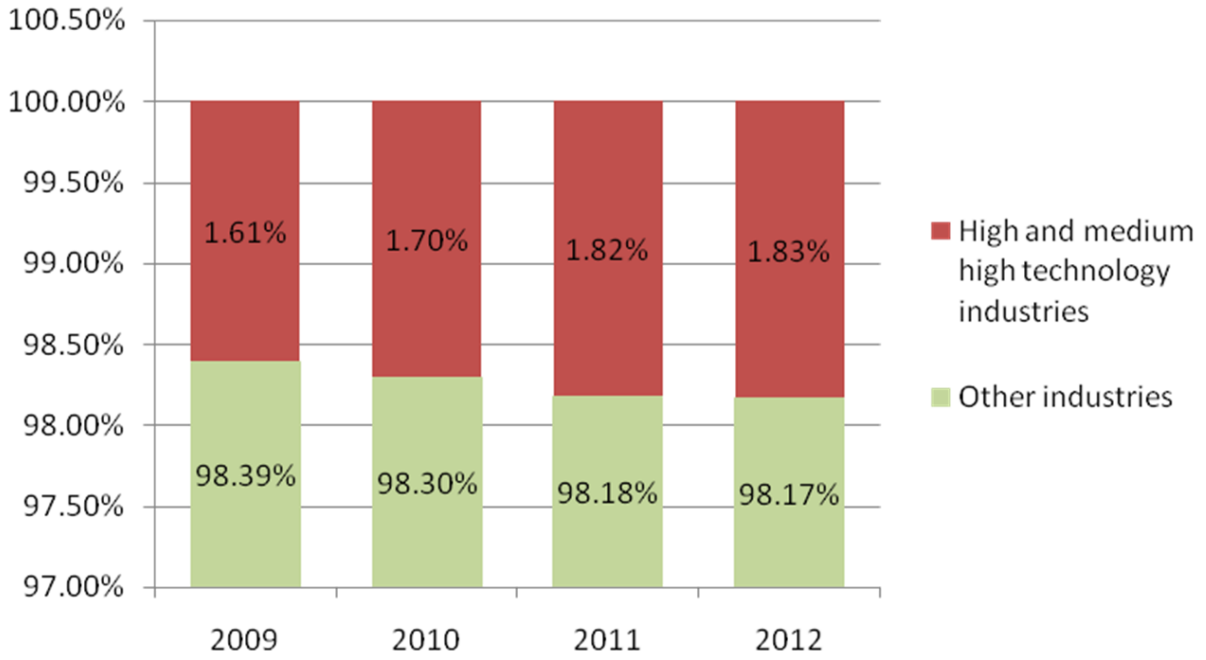

Fig. 11.Percentage distribution of occupied jobs by group of industries in the period 2009-2012. Authors' construction based on www.csb.lv

As shown in Fig. 11, over the period of analysis the number of occupied jobs in the high and medium high technology industries rose by 0.22 percentage points.

In the period of analysis, the greatest number of occupied jobs was reported in the manufacture of machinery and equipment not elsewhere classified, in the manufacture of electrical equipment and in the manufacture of chemicals and chemical products. Fig.12 shows that the number of occupied jobs rose in all the industries except the industry of chemicals and chemical products, in which a decrease was recorded in 2012.

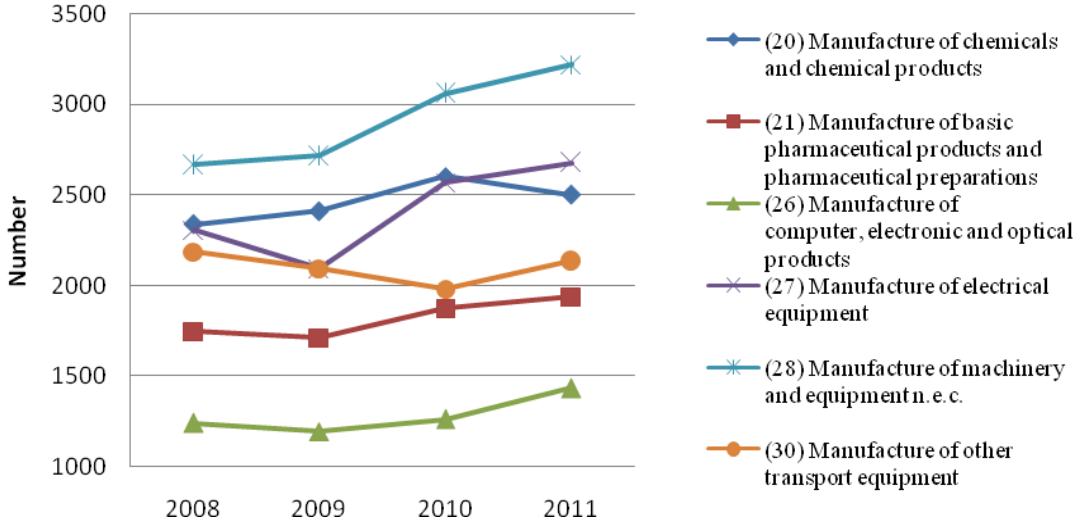

Fig. 12. Changes in the number of occupied jobs in high and medium high technology industries in the period 2009-2012. Authors' construction based on www.csb.lv

After analysing the net turnover of knowledge-intensive service industries, one can conclude that it was equal to LVL 1921.5 million in 2011; compared with 2008, it rose by LVL 192.2 million.

In the period 2008-2012, the proportion of the net turnover of knowledge-intensive service industries in the total net turnover rose from 9.56% in 2008 to 11.94% in 2012.

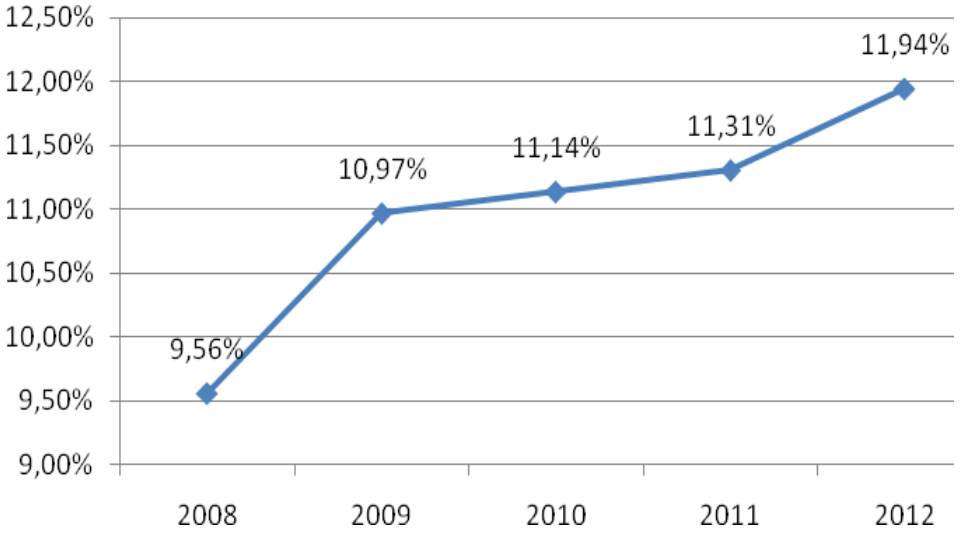

Fig.13. Proportion of the net turnover of knowledge-intensive service industries in the total net turnover in the period 2008-2012. Authors' construction based on www.csb.lv

An analysis of the percentage distribution of net turnover knowledge-intensive service industry shows that warehousing and support activities for transportation had the highest proportion, 49.41%, followed by the industry of land transport and transport via pipelines with 35.02%.

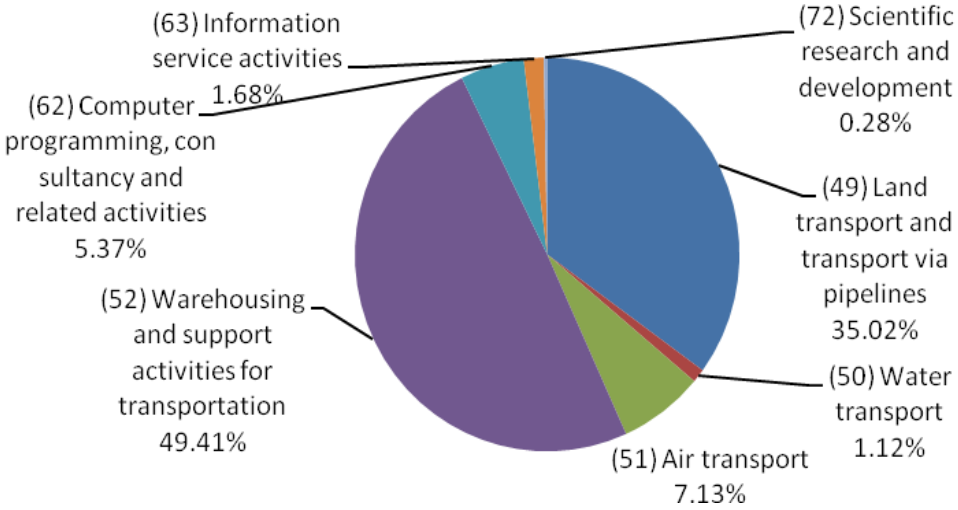

Fig. 14. Percentage distribution of net turnover by knowledge-intensive service industry in 2012. Authors' construction based on www.csb.lv

The average number of occupied jobs in the knowledge-intensive service industries in 2012 was equal to 757099, which accounted for 9.77% of the total number of occupied jobs.

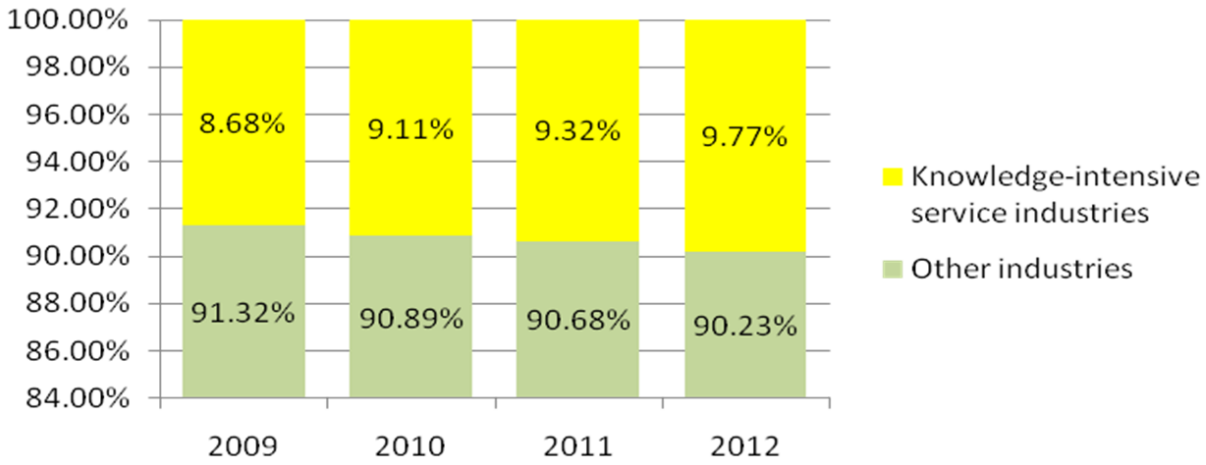

Fig. 15. Percentage distribution of occupied jobs by group of industries in the period 2009-2012. Authors' construction based on www.csb.lv

As shown in Fig.15, in the period of analysis, the number of occupied jobs in the knowledge-intensive service industries rose, and the increase was 1.09 percentage points, compared with 2009.

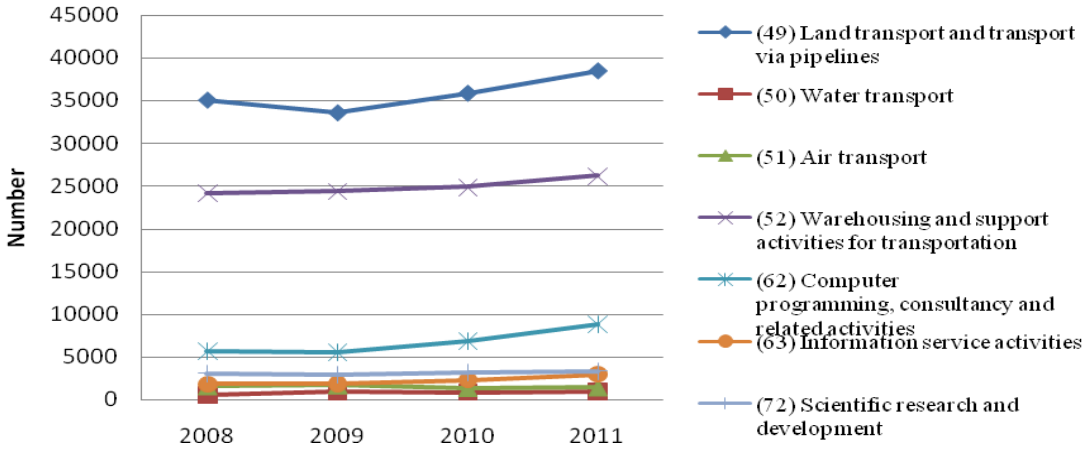

Fig. 16. Changes in the number of occupied jobs in knowledge-intensive service industries in the period 2009-2012. Authors' construction based on www.csb.lv

An analysis of the average number of occupied jobs in knowledge-intensive service industries shows that it increased in all the industries. In the entire period of analysis, the greatest increase was observed in the industry of land transport and transport via pipelines, and 46.97% of all the employees working in the knowledge-intensive service industries were employed in this industry in 2012. The industry of warehousing and support activities for transportation employed 31.94%, while the industry of computer programming employed 10.72% of all the employees.

A significant indicator of an industry is exports in this industry.

The total exports of high and medium high technology industries amounted to LVL 621897 thousand in 2012. Compared with 2009, the exports rose by LVL 290275 thousand.

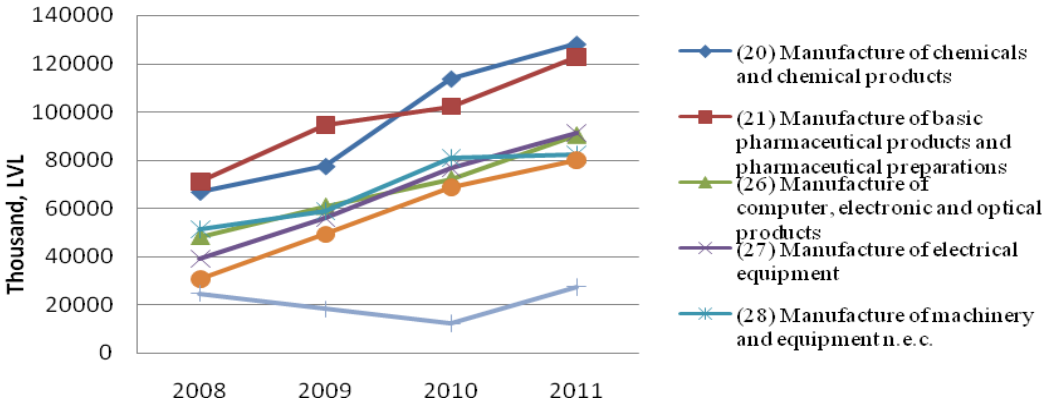

Fig. 17. Exports of high and medium high technology industries in the period 2009-2012, thousand LVL. Authors' construction based on www.csb.lv

After analysing the changes in exports in the period 2009-2012, one can conclude that the exports rose in all the industries except (30) the manufacture of other transport equipment, in which a decrease in exports was reported in 2010 and 2011.

In 2012, the total exports of knowledge-intensive service industries reached LVL 334692 thousand, accounting for 4.85% of the total exports from Latvia. Compared with 2009, the exports of knowledge-intensive service industries increased by LVL 252835 thousand.

Table 5

Exports of knowledge-intensive service industries in the period 2009-2012, thousand LVL

Industry	**2010**	**2011**	**2012**
49- Land transport and transport via pipelines	13269	43674	56295
50- Water transport	463	4554	1083
51- Air transport	9452	18579	12803
52- Warehousing and support activities for transportation	121622	193864	259334
62- Computer programming, consultancy and related activities	2007	4222	4611
63- Information service activities	181	679	400
72- Scientific research and development	246	123	166
Knowledge-intensive service industries in total	*147240*	*265695*	*334692*

Authors' construction based on www.csb.lv

However, an analysis of the changes in exports by industry show that compared with 2011, in a few industries – water transport, air transport and information technologies – exports decreased. In the knowledge-intensive service industries, the greatest increase in exports was observed for warehousing and support activities for transportation, which comprised 82.6% of the total exports of knowledge-intensive service industries in 2012.

On the whole, one can conclude that Latvia's high and medium high technology industries as well as knowledge-intensive service industries develop, and all the indicators indicated economic growth.

3. Conclusions

According to all the indexes selected, Latvia's entrepreneurial environment's rank rose in the period of analysis (2010-2013). Latvia's rank in the Global Competitiveness Index has to be especially noted, as it rose from 64th to 55th place.

The improvement of Latvia's rank in such categories as innovation and technological development was also considerable.

A positive trend is that the growth of high value-added and knowledge-intensive industries and their exports has been stable, for instance, in the period 2010-2012, the exports of land transport and transport via pipelines rose by 324%, water transport – by 134% and the exports of computer programming, consultancy and related activities increased by 130%. Such increases are important and significant for any country, especially it is important for a small country in the post-crisis period; given the geographical position of Latvia, these trends have to be fostered, and presently negotiations with several countries, for instance, China, on expanding the offers of this kind from Latvia take place at the government level.

The present research examined the current situation in entrepreneurship in Latvia in the context of smart specialisation, its development trends and, in some areas, the disadvantages.

The research results provide a wide range of options – to forecast the potential trends in a short- and long-term, taking into consideration various aspects, both global and individual, and as well as the national specifics affected by the geographical position and political factors. In fostering entrepreneurship in the country, a very important role is played by foreign investments; therefore, to make further decisions on economic development, it is necessary to extensively examine the effects of domestic and foreign investments, the opportunities for their attraction and the effects of all these indicators on the country's exports and economic growth.

References

- Fogel G.. "An analysis of entrepreneurial environment and enterprise development in Hungary." Journal of Small Business Management, 39(1) (2001); 103-109.
- Gnyawali D. Fogel D. "Environments for entrepreneurship development: Key dimensions and research implications." Entrepreneurship: Theory & Practice, 18 (4) (1994); 43-62.
- Jucevicius R. Galbuogiene A. "The Dimension of Smart Specialisation in the Business System." Proceedings of the European Conference on Knowledge Management. Vol. 1 (2013). 333-340.
- Kisiel R., Lizińska W. "Tiesioginių užsienio investicijų poveikis lenkijos ūkio plėtros stabilumo pasirinktiems aspektams." Management Theory & Studies for Rural Business & Infrastructure Development. Vol. 26, Issue 2, (2011), 105-111.
- Leonardo Iacovone and Gustavo A. Crespi. "Catching up with the technological frontier: Micro-level evidence on growth and convergence." Industrial and Corporate Change. 19, 6, (2010); 2073–2096; accessed February 4, 2014 doi:10.1093/icc/dtq057.
- Min-Ren Yan and Kuo Ming Chien. "Evaluating the Economic Performance of High-Technology Industry end energy Efficiencya Case study of Science Parks in Taivan." Energies 2013,6, 973-987; accessed February 4, 2014, doi:10.3390/en6020973.
- Peter Kuzmišin and Alžberta Šiškova. "The Quality of entrepreneurial environment as a factor of foreign direct investments inflows." Quality Innovation Prosperity XVII/2-2013, 22-36; accessed November 26, 2013, doi: 10.12776/QIP.V1712.199.
- Roslyn K. Chavda, "An analysis of the salient factors in business location decision making." Academy of Management Proceedings, (2004); 1-7.
- Toh M. H. Thangavelu S. M. „An input–output study of the singapore information sector. " Economic Systems Research. Vol. 25, Issue 2, (2013), 233-244.
- Zaharieva G. Čiburienė J. "The national competitiveness: the gain and cost of european integration (bulgarian and lithuanian case)." Economics & Management. (2008); 154-155.
- „Zinātnes, tehnoloģijas attīstības un inovācijas pamatnostādnes 2014. – 2020.gadam.", accessed January 17, 2014, http://polsis.mk.gov.lv /view.do?id=4608.
- „Nacionālās industriālās pamatnostādnes 2014. – 2020. gadam." accessed December 10, 2013, http://polsis.mk.gov.lv/view.do?id=4391.

- „Index of Economic Freedom", accessed February 6, 2014, http://www.heritage.org/index/ranking.
- „Eurostat" accessed July 20, 2013, http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home/.
- „The Global Competitiveness Report", accessed July 15, 2013, http://www.weforum.org/reports/global-competitiveness-report-2013-2014.
- „Latvijas statistika", accessed July 15, 2013, http://www.csb.gov.lv/.

THE CONSTRUCTIVE RELATIONSHIP BETWEEN ACCOUNTING AND PERFORMANCE IN THE CONTEXT OF CORPORATE GOVERNANCE AND ACCOUNTING NORMALIZATION

Mihai SAVIN*

Abstract

Since the emergence of the concept of corporate governance, there was a close connection between this concept and accounting, which is enforced by the fact that the latter must reflect, in a conventional manner, all the economic facts that affect the economic entity, meaning the facts related to the production, distribution and consumption of wealth, but also to the creation of value for shareholders and other stakeholders, in this sense being the most reliable, efficient and effective method of economic observation.

The explanations provided by the economic science according to which an economic entity is considered an individual agent who seeks to maximize profits no longer constitute a support for explaining the continental, renan or Anglo-Saxon accounting model, and as such the scientific basis of accounting must be seeked in the scientific approach of the concept of corporate governance, which has as overall objective the study of the manner to lead, to steer, to structure, to develop, to control an entity (company, public institution etc.), to create value for shareholders and other interest groups.

Corporate governance and also the normalization of the accounting have managed for the first time to provide a complete and consistent representation of the economic entity, meaning they defined the essential tools to manage and control the economic activity, to measure its overall performance.

Keywords: *financial performance, corporate governance, normalization of accounting, accounting method, interest groups.*

Introduction

Specific elements of the new global economy (economic liberalization, globalization, increasingly strong competition, the transition from an industrial economy to a knowledge-information-based economy, ecological and social challenges brought by the needs of sustainable development, the financial crisis felt worldwide) have resulted in changing the requirements directed to the various economic entities, and also the diversification of their responsibilities to shareholders and interest groups, to the community as a whole. Therefore, we cannot speak of the viability of an economic entity in a competitive, unstable and turbulent environment without considering the concept of corporate governance, normalization of accounting and without economic and financial performance.

This study aims to be a theoretical study on the constructive relationship issues between accounting and performance, in the context of corporate governance and normalization of accounting.

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1. The objectives of accounting in the era of corporate governance

The process of normalization of Romanian accounting with the International Accounting Standards and with the Fourth European Directive represents a challenge that falls within the scope of the reform process the science and accounting practice are facing in the last decade. The presence of the European component within the Romanian accounting represents a comittment assumed by our country after signing the European Accounting Directives.

In the literature the accounting normalization is defined as follows:

– *the accounting normalization is a social activity subjected to the pressure of groups interested in redistributing wealth*[1]*;*
– *the accounting normalization shall consist in the definition of rules and their application*[2]*;*
– *the process harmonizing the presentation of documents of synthesis, accounting methods and terminology*[3].

The steps taken by the Romanian accounting in these 23 years were influenced unequivocally by the profound changes in the Romanian economy since 1990, by increasingly high demand of relevant and credible information coming from investors and other donors, on the basis of their objectives needs of investment risk assessment and of course performances generated by them.

Corporate governance defines all principles, rules and norms ensuring the administration and management by managers of the entities in the interest of current and potential investors. This is classic and the most common. In its context, managers are studied in relation to shareholders. Being a political report, where there are other stakeholders, corporate governance gains also an expanded interest. Governance and accounting are mutually conditional, although corporate governance influences dominantly the accounting. The connection between accounting and corporate governance is one of interdependence. They behave towards each other in form and content.

The emergence of capital firms and mandating business administration have imposed that shareholders to be major users of accounting information, in order to control managers and measurement of the return on invested capital and the creation of value for them, *at the origin of which stand three levers of strategic nature: strategic levers in the strict sense, financial leverage and governance leverage of the firm*[4].

The answer to the question "What are the objectives of accounting in the era of corporate governance?" must be sought from an evolutionary perspective after 1989, the objectives of accounting changing within 1990-2013. Once with the development of capital firm, the primary objective of accounting is to provide information to owners (shareholders or associates). Normalization and harmonization efforts internationally, as well as the increase of the number of users seeking diversified information printed a public function of accounting. In this context, the accounting has a triple role, at the same time representing a management tool, a control instrument and a means of social adjustment.

In the era of corporate governance, shareholders and other stakeholders, demand the accounting to ensure useful information in the management of the economic entity, to represent a tool in assisting decision, evaluate performance and accurately predict the activity of the company. In this case it is necessary to use the criteria of evaluation of economic

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[1] I. Ionașcu, Epistemologia contabilității [*Accounting epistemology*], Economic Pub. House, Bucharest, 1997, p. 79.
[2] N. Feleagă, I. Ionașcu, Tratat de contabilitate financiară [*Financial accounting Treaty*], vol. I, Economic Pub. House, Bucharest, 1998, p. 261.
[3] J. F. Casta, La comptabilité et ses utilisateurs [*Accounting and its users*], in Feleagă, N., Ionașcu, I., Tratat de contabilitate financiară [*Financial accounting Treaty*], vol. I, Economic Pub. House, Bucharest, 1998, p. 263.
[4] Caby, J., Hirigoyen, G., 2005, Création de Valeur et Gouvernance de l'Entreprise [*Value creation and Corporate Governance*], Economic, Paris, p. 39.

nature, which implies that the economic entity is continuing its activity, not pessimistic assessment criteria, thus complying with the rules of prudence, but moving away from reality.

Like other countries in transition, Romania has started a process of formation of the accounting system, with the assistance of EU member countries (France, Belgium and United Kingdom). The beginning of the road chosen by Romania in harmonizing the accounting system was marked by the Accounting Law no. 82/1991, and subsequent amendments and additions as well as the rules governing its application reflected the tortuous road towards EU adhesion and accumulations achieved by the development of the accounting profession. From the point of view of the accounting regulatory level, we can affirm, without fail, that at this moment our country is perfectly consistent with the European requirements in the field of financial reporting, as a member country of the EU. Thus, the Accounting Regulations compliant with European Directives (approved by OMPF 1752/2005, amended and supplemented by OMPF 2001/2006, then amended by OMPF 3055/2009) provides the general framework for reporting in strict correlation with the requirements of European Directives in this field.

Accounting plays an important role within the culture of corporate governance having responsibilities towards the public interest but also towards sustainable and balanced economic development of economic entities, in promoting good practice in service to corporate governance. In the accounting profession as well as the academic environment we talk more and more about corporate governance in the sense of searching for management rules of economic entities to prevent and uncover fraudulent management practices of the company and granting of unfair privileges. The importance of accounting in the corporate governance of companies is highlighted by studies conducted internationally. All these demonstrate the role of the accounting professional, its responsibility in corporate governance and also the increasing role of financial information prepared by it. Between accounting and the concept of effective corporate governance there is a constructive, convergent, positive relationship, the accounting representing *"the recording, classifying and compiling the economic events of logical manner, in order to provide financial information for decision-making"*[5].

In order to provide relevant information, which is always quantitative, the accounting professional must be very familiar with the principles and rules on which their processing is based on and to devise a system for ensuring the accuracy, timeliness and economic efficiency of the facts and events recording. Thus, the accounting must be regarded as the basic instrument governing the system of corporate governance of an economic entity, which follows the internal processes in all their phases, beginning with the phase of conception.

The accounting field is the shaping of the value expression of resources related to the objectives pursued of the economic entity. There are two guidelines. First, on long-term, being familiar with the costs of customers, suppliers, competitors and strategic accounting. Accounting must incorporate into its database physical, monetary and commercial information about its competition, as well as the practices of a company using similar processes and activities, with the condition of preserving the specificity by clear identification of the objective: economic performance. Another guideline considers the needs of financing the operational activity. In this context, accounting assumes a mission of evaluation of corporate governance models that correlate activities and resources, informing management and serving the internal control procedures. In the company accounting is a permanent activity, providing information at regular periods of time about the performance of the entity, its purpose being the balance sheet and the profit and loss account.

[5] Arens A., Audit. O abordare integrată [*Audit. An integrated approach*], Arc Pub. House, Bucharest, 2003, p. 14.

The development of accounting, in particular the financial performance assessment, increases the capacity of response towards shareholders, employees, customers, Government and business community.

2. Effective corporate governance and normalized accounting, supportive pillars of the economic entity's performance

Corporate governance has a number of implications over the accounting; accordingly, there are made decisions leading to maximize the value created for shareholders, which is in fact the purpose pursued by them.

Effective corporate governance and normalized accounting are supportive pillars of economic entity's performance. *The accounting normalization takes place on the ground of the need for universal in accounting, its complement being international accounting harmonization*[6]. It aims two main purposes: obtaining by public power of homogeneous information relating to economic entities and using accounting information by stakeholders, in particular with regard to comparisons over time and space.

The advantages of normalization are relevant[7]: *improving accountin; a better understanding of accounting; ease of control over accounting; comparing financial information; strengthening accounting within larger groups, sectors of activity, regions or the nation; developing statistical data*.

Standardized accounting allows:

- the entity to record systematically all events, operations and situations that take place over time and to formalize them in the financial statements;
- obtaining information comparable over time and space, based on which are assessed the trends and evolution of an entity from one period to another, also in relation to other companies;
- getting some forward looking information that provide users to make predictions and estimates about the evolution of the enterprise;
- investors and other stakeholders to have regularly different information formalized in various forms and media and communication, in particular annual financial situations, in order to help them in substantiation decisions;
- fixing some accounting information qualitative characteristics and assessing the usefulness of information according to these criteria.

Economic entities' efforts to promote the reform in the field of accounting in the corporate sector provide clear and direct benefits to entities and business environment in Romania. High-quality financial information is significant for the proper functioning of corporate governance principles. Moreover, they provide to current and potential investors an assurance concerning the reliability of the information that is or will be the basis for investments decisions. In addition, the reform in the field of financial reporting is particularly important for commercial relations between Romania and the European Union. Improving the quality of financial reporting of domestic entities will contribute to increase the reliability and comparability of the information in the financial statements and the creation of a favourable business environment.

Theoretically, effective corporate governance leads to a lower cost of capital and reduces the economic entity's risk. A low cost of capital is equivalent to the application of

[6] Ristea M., Dumitru G., Contabilitate aprofundată [*Advanced accounting*], Mărgăritar Pub. House, Bucharest, 2005, p. 9.
[7] Claveranne J, Darney J., Comptabilité et enterprise, Comptabilité générale, Applications et réflexions [*Accounting and company, General accounting, Applications and reflexions*], Economica Pub. House, Paris, 1991, p.37.

lower rates of future cashflows, resulting in a higher market value of the action, and hence a higher value of the company.

Companies with effective corporate governance have managed to avoid a drastic reduction of the shares listed on the Bucharest Stock Exchange during the financial crisis, 2009-2011.

Economic entities must especially strengthen corporate governance mechanisms to reduce the cost of capital and debt, and thus the growth of economic and financial performance. We can state that the performance of a company can be achieved using the trinomial: effective corporate governance – reducing the cost of capital – reducing the company's risk.

The effect of improving the corporate governance mechanisms has a positive influence on the efficiency of actions, pointing out that economic entities listed on the Bucharest Stock Exchange with an effective corporate governance record a higher profitability of shares when the economy is expanding (economic boom), but a small profitability during economic contraction (economic crisis).

In the broadest sense, corporate governance refers to the method of assessing the balance of interests regarding the fact that the economic entity lies between employees, investors, stakeholders and other economic entities. It denotes the system whereby the company's objectives are defined and achieved, risks are assessed, and the strategies are chosen for the proper achievement of the performance through the standardization of the various processes. Considering the fact that effective corporate governance is based on the principles of responsibility, transparency and control of decision makers, the reporting on the situation of the company, corporate governance must highlight: clear organisational structure of the company with precisely defined rights and responsibilities of members, managing body and other employees of the entity; effective procedures for the identification, measurement, monitoring and control of the risks to which the company is exposed to; transparency in the activity of the entity related to all stakeholders, in accordance with the rules and business policies of the company; supervisory and control systems set up at least at the following levels (e.g.: supervision by the supervisory and control bodies set up by the company, as well as the monitoring of the operations of the executive body of the entity; internal control systems; integrated risk management system; setting the control function in accordance with the regulations; independent internal audit).

At the level of the company, corporate governance in accordance with the normalized accounting researches the organization of power and the increase of responsibilities between shareholders, administrators and managers. At this moment, this binomial, governance – normalized accounting, is used to designate the action to govern the manner of administer, manage both at the State level, world bodies and companies.

Contemporary economic activities are dominated by the internationalization of markets. This has as direct effect a severe competition, forcing entities to permanent innovation and restructuration. The pace of change and adaptation at this rhythm became the performance key and survival of these entities. The stake is the increase of the capacity of response and reactivity of entities to essential features, time, quality and costs, which implies: leveraging the experience, understanding, shareholders, managers and employees experience; fostering innovation; funding resources; work processes etc.

For such transformation projects to be realized, it is essential that the company should be equipped with appropriate corporate governance mechanisms in order to achieve success in many projects in parallel, especially in the field of information systems with very important role in change management.

To deal with the uncertainty and complexity of the modern world, a new means of governance has emerged, which considers not only the need to inform shareholders and their

satisfaction, but also the ability of the entity to respond positively to the new restrictions set out in the market through external bodies, representatives of the company and its staff, public opinion etc. An entity will not be assessed only on the basis of economic criteria or profitability, but also by resilience and reactivity, by creating value for shareholders and other stakeholders of the results of the company.

The development of corporate governance requires the establishment of the basic principles that: lead relations between different participants; clearly define responsibilities; guarantee the correct functioning of the decision-making process.

3. The future of accounting in developing viable corporate governance

Which will be the future of accounting in developing healthy corporate governance? In my opinion, this scenario takes into account two pillars, namely, the accounting will be reduced to a strictly legal and fiscal role in the case of small economic entities, with an emphasis on legal function of the accounting, or the role of accounting will broaden to the coordination of various systems of information that will multiply in large economic entities, emphasizing the managing function, considering accounting as a database, which will ensure transparency and comparability of information to investors and any other third parties. Using databases is consistent with the accounting computerization and the impact that IT has on the evolution of accounting and corporate governance system at the macroeconomic and microeconomic level. The use of databases enables accounting to meet specific requirements of various users by taking into account very different criteria of evaluation and classification of accounting information. Precisely the information classification criterion distinguishes between the different types of databases. Accounting can exploit this variety by diversificating the offer, abandoning the principle of oneness of balance sheet, but pursuant the accounting and corporate governance principles and as well as international guidelines for preparation and reporting of economic and financial situations.

The role of accounting in developing viable corporate governance will be determined by being aware of the fact that financial and accounting information represent a business card of a company, and their production is the finality of the accounting business. Officials from the economic entities should be aware of the role they have in the process of implementation of corporate governance and accounting as social game and social good must support this approach. The concept of corporate governance sends us directly to the influence of strategic decisions relating to the creation of value at both the macroeconomic and the microeconomic level. A viable system of corporate governance in accordance with a normalized accounting should lead us, with the help of surveillance mechanisms, to a high degree of responsibility of the main stakeholders of economic entities (supervisory boards, shareholders, executive board, etc.)

The constructive relationship between the accounting and corporate governance systems is based on information underlying the financial situation – company performance binomial, which are first mentioned in the OECD recommendations, according to which, the corporate governance framework should ensure the disclosure of accurate and timely in all aspects of information on the company, including financial accounting, performance, ownership and governance. This information is needed in order to reduce costs to the agency and information asymmetries between managers and stakeholders, which include not only shareholders, but also a wide variety of other interested parties, all of these being disadvantaged in terms of access to information in comparison with managers, who control the decision-making process. This is why a comprehensive information system, which would include both non-economic information and also reporting data would help interested groups, including shareholders in order to obtain adequate and reliable information. It can be said that

the financial situation and corporate performance should work as a whole, they actually representing the fair image of effective corporate governance. And the reverse is also true, that effective corporate governance has a positive, advantageous, beneficial effect on the financial situation of the company. Corporate governance with a serious risk level has a negative, unfavourable impact on the financial situation of the economic entity. Also, accounting information presented in the financial statements are perceived as a control mechanism that promotes an effective corporate governance in an economic entity.

There is no doubt that at the microeconomic level is a constant concern for understanding and implementing key elements of corporate governance and standardization of accounting. Fairness, credibility and transparency in relations with stakeholders, taking responsibilities, optimal risk management is essential to ensure full consistency between corporate governance and accounting normalization able to support and promote the performance at the entire national economy level.

Conclusions

The objective of this study was to determine the constructive connection between the elements of the corporate governance – normalization of accounting –performance trinomial, for the economic entity to achieve its main objective, namely the creation of "wealth" for shareholders. Optimal operation of this trinomial involves the convergence of relations between corporate governance, managers, investors and any other stakeholders.

It is important to recall that the achievement of the objectives of effectiveness and operational efficiency allows on medium and long term, saving economic assets; in this respect, the trinomul normalization of accounting – corporate governance – performance, well managed and controlled, will ensure that the internal structure of a company to be organized in such a way as to achieve the strategic objectives set by the economic entity's top management, through compliance with the requirements of efficiency and optimization of risk reduction activity and the creation of value for the company's investors.

Corporate governance in close connection with the accounting normalization have managed for the first time to provide a complete and consistent representation of the economic entity, meaning they defined the essential tools to manage and control the economic activity, to measure its overall performance.

References

- Arens A., Audit. O abordare integrată, 2003, Ed.Arc, Bucureşti.
- Caby, J., Hirigoyen, G., 2005, Création de Valeur et Gouvernance de l'Entreprise, Economic, Paris.
- Claveranne J, Darney J., Comptabilité et enterprise, Comptabilité générale, Applications et réflexions, 1991, Ed.Economica, Paris.
- Feleagă, N., I.Ionaşcu, Tratat de contabilitate financiară, vol.I, 1998, Ed.Economică, Bucureşti,
- G.Lavalette, M., Niculescu, Stragies de croissance, 1999, Ed. d'Organisation, Paris.
- I.Ionaşscu, Epistemologia contabilității, 1997, Ed.Economică, Bucureşti,
- J.F.Casta, La comptabilité et ses utilisateurs, în Feleagă, N., Ionaşcu, I., Tratat de contabilitate financiară, vol.I, 1998, Ed.Economică, Bucureşti.
- M., Niculescu, Diagnostic financiar. Vol.2, 2003, Ed.Economică, Bucureşti.
- Ristea M., Dumitru G., Contabilitate aprofundată, 2005, Ed.Mărgăritar, Bucureşti.

ECONOMIC AND ACCOUNTING INFORMATION AND STOCK MARKET EFFICIENCY

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Abstract

The purpose of this paper is to explore and to analyse the relations between financial accounting information and stock market efficiency. As we know, accounting contributes to the efficiency of the stock market by producing primordial information for the investors. On the other side, an efficient market facilitates the role of accounting by providing a reliable estimate of the value of many assets that needs to be evaluated. This article examines the importance of the financial accounting information for the efficiency of stock market, and also analyses whether and how the structure, the characteristics and publication of the information, impacts the prices and transactions volumes.

Keywords: *accounting information, economic information, stock market, information quality, market efficiency.*

1. Introduction

In many economic studies efficiency is the central motive of concerning. Gravelle and Rees said in 1992, in their paper called "Microeconomics", that the fundamental economic problem of society concerns the allocation of scarce resources among alternative uses. So, the society needs to find such a pattern of allocation that eliminate waste, namely to find efficient allocation.

Efficiency is a concept both major and highly controversial in Economics. After the appearance of stock markets, the theorists continued to prove that the stock prices follow a totally random pace. For their part, stakeholders argue that these markets are alternating phases of expansion and depression. After several attempts to explain the behaviour of prices, it was concluded that prices follow a stochastic process called "random walk".

The notion of efficiency of financial markets has its origins in the famous thesis of Bachelier from 1900 "Thèse de la speculation", where he has studied the link between changes in share price and the random walk. Bachelier was ahead of his time because other studies on the behaviour of stock prices do not appear until the early 60's with authors like Paul A. Samuelson and Eugene F. Fama. In a remarkable way, they both developed the same basic notion of market efficiency from two rather different research bases.

Samuelson says in his article called "Proof that Properly Anticipated Prices Fluctuate Randomly" that "In an informationally efficient market, price changes must be unforecastable if they are properly anticipated, that is, if they fully incorporate the information and expectations of all market participants".

Fama described in his article[1] the efficient market as a market in which prices fully reflect all the available information. He postulated that "a financial market is called efficient if

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[1] Eugene E. Fama, „*The Bevahior of Stock Market Prices*", Journal of Business, 38, Janvier.

only all available information on each financial asset traded on this market, is immediately incorporated in the price of the asset".[2]

Since the original definition of Eugene E. Fama, the definition of efficiency has evolved and today allows certain forms of predictability and it is less strict. According to M. Jensen (1978) "efficient markets are those markets where prices listed assets include information about them so that an investor may not, by buying or selling the asset, draw profit higher transaction costs generated by this action".[3]

Referring to the capital markets, efficiency is defined in terms of the amount of the information absorbed in share prices.[4]

C.M.C. Lee tries to highlight in his paper "Market efficiency and accounting research: a discussion of 'capital market research in accounting' by S.P. Kothari" published in Journal of Accounting and Economics 31 (2001) p: 233–253, the importance of investigating the various aspects of stock market efficiency and suggests that "Rather than assuming market efficiency, we should study how, when, and why price becomes efficient (and why at other times it fails to do so)." Since accounting information is one of the most important factors in price determining, I consider that it is a reliable candidate that needs to be analysed".

2. Content

According to economic theory, the value of an asset for its owner is the discounted value of all future cash flows which the owners expects to receive as a consequence of the possession and decisions regarding the assets use. The value of a company is assumed to ultimately depend on the monetary success of the business. In our days companies have many owners and their shares are traded on a stock exchange. The stock prices are determined by the interaction of many investors with different transaction motives, expectations of the future and analytical methods. The results of the aggregated actions of those investors generate market prices. Observed stock prices can be viewed as an aggregated measure of the market's valuation of the claim on the firm's future value creation.

Accounting can be viewed as a language through which an attempt is made to measure and describe the financial consequences of the actions that are taken within a financial entity.[5]

So, we can say that financial accounting and the stock markets are closely related, on the one hand, because accounting has become an essential source of information for investors, on the other hand, because the accounting is based more on market values to evaluate the assets from the balance sheet.[6] Accounting contributes to the efficiency of the markets by providing to the investors the information they need for taking the decisions.

Fama, said in his article called "The efficient capital markets: A review of theory and empirical work" that "the ideal is a market in which prices provide accurate signals for resource allocation: that is, a market in which firms can make production-investment decisions, and investors can choose among the securities that represent ownership of firms' activities under the assumption that security prices at any time "fully reflect" all available information". He defines efficient market as a market in which prices always "fully reflect" available information. That means that all the information must be instantly and completely integrated in the stock price.

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[2] Philippe Gillet, „*Efficience des marches financiers",* (Paris: Ed. Economica, 1999), p: 11.
[3] Philippe Gillet, „*Efficience des marches financiers",* (Paris: Ed. Economica, 1999), p: 11.
[4] Jiri Novak, „On the Importance of Accounting Information for Stock Market Efficiency", (PhD diss., Uppsala University, 2008).
[5] Mikael Runsten, " *The association between accounting information and stock prices",* (PhD diss., Stockholm School of Economics, 1998).
[6] Bernard Colasse, Encycolpédie de Comptabilité, Controle de Gestion et Audit (Paris: Ed. Economica, 2009), p: 1035.

One of the problems that accounting confronts with is the delayed production of the information. If the observers may anticipate the evolution of the enterprise and to environment, the accounting information will be incorporated to the securities price although they are not published yet. In this case its informative content can't influence the price quotations, regardless of the efficiency of the market. Therefore, if there is no significant reaction of the quotations when valid accounting data are published, the lack of response can mean either that the data does not provide any new information, either that the market is not efficient. So, to judge the efficiency of the financial market using accounting information, we must first ensure the reality of its informational content.[7]

C.M.C. Lee sustains that "If a particular piece of information is not incorporated in prices, there is a powerful economic incentive to uncover it, and to trade on it".[8]

In some studies, authors tried to explain the significance of the accounting information for the corporate value of firms, and to investigate the market value relevance of these dates. Francis and Schipper say that the market value relevance means that there "is a statistical association between financial information and prices or returns, and that the accounting based measures explain market prices in a good way, under the efficient market assumption that pricing reflects available information".[9] This definition of value relevance conforms to the statement of the importance of value relevance of accounting information in the Framework for the Preparation and Presentation of Financial Statement (IASC, 1989). Relevant information is such that "…influences the economic decisions of users by helping them evaluate past, present and future events".[10]

The use of the accounting information by the financial analysts demonstrates the utility of the information in matter of evaluating the enterprise. In the conditions of an efficient market, the publication of the accounting information must determine investors to change the structure of their asset portfolios and to revise their anticipations. Indirectly, the evolution of the market prices will suffer changes and the number of transactions with financial titles will grow up.

The studies of Ball and Brown (1968) and Beaver (1968) have revealed for the first time how important is the announcing of the annual results in the decision making of the investors. After them, several other studies have been conducted to identify the investor reaction to the disclosure of various accounting data. In these studies the researchers have tried to analyze the informational content of preliminary and final annual results, and of intermediate ones.

Pincus (1983), Bamber (1986) and Utama and Cready (1997) have concluded that when the annual profits are announced, the stock transactions volume has significant increases. If the accounting data can determine the investors to the change their position on the market, we can also expect to an increase of the volatility of rate of return on shares in publication moment. These results tend to confirm, on one side, the efficiency of financial markets, and, on the other side, the utility of the accounting data in matter of enterprise evaluation.

In the last period, it has been made more studies regarding the importance of the informational content of intermediate financial results for the investors. For appreciate the nature and the amplitude of the informational content of accounting data, the researchers analyzed the link between the unknown part of the announced profit and the market

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[7] Bernard Colasse, Encycolpédie de Comptabilité, Controle de Gestion et Audit (Paris: Ed. Economica, 2009), p: 1036.

[8] C. M. C. Lee, „Market efficiency and accounting research: a discussion of 'capital market research in accounting' by S.P. Kothari", Journal of Accounting & Economics, Vol. 31, No. 1-3, p: 233-53.

[9] Francis, J. and K. Schipper "*Have Financial Statements Lost their Relevance?*" Journal of Accounting Research 37 (No 2 Autumn), 1999, p: 326.

[10] Babalola Yisau Abiodun, „*Significane of accounting information on corporate values of firms in Nigeria",* Research Journal in Organizational Psychology & Educational Studies, 2012, p: 105-113.

profitability of the enterprise. Others have pushed the analysis further by comparing the market reaction at the announcement of interim results with that associated with publication of annual results. Gajewski and Quéré have observed in their study published in 1991[11] that favorable annual publications are accompanied by an increase of the stock return greater than that associated with the semiannual publications, which suggests that the annual results have a higher informative content than the interim results. They have also studied the markets price evolution after the publication of financial statements by the enterprises in France. As a conclusion they affirmed that the value of stocks is adjusted in the day of results announcement.

E. Grant (1980) affirms that the information content of annual profits should be inversely related to the amount of intermediate information disclosed. He validated his hypothesis by comparing the reaction of the firm listed on the New York Stock Exchange with that of firms whose shares are traded on the OTC market. The first ones are large sized and publish frequently quarterly, while the last ones are rather small and with a low degree of disclosure. Grant demonstrates that the reaction of market prices at the moment of disclosure of the annual results, is much higher for the firms that are activating on OTC market, than that of firms listed on the New York Stock Exchange, which tends to confirm the assumption that the intermediate disclosure of the results reduces the informational content of annual financial statements.

The researchers D. Craig Nichols and James M. Wahlen, after studying the evolution of stock prices, adjusted for market movements, over a period of 18 months, (beginning with the accounting exercise and completed it six months after the closing of accounts), have concluded that the enterprises performances are widely anticipated long before the publication of accounting data. Companies that have increased their earnings caeteris paribus saw the price of their shares grow steadily during the financial year, relating to earnings that have been reported. Instead the enterprises which reduced their earnings have seen their fall during the same period. The have shown that their "sample firms' stock returns during years in which earnings increase beat similar-size firms' returns by an average of 19.2 percent, whereas our sample firms' returns underperform similar-size firms by an average of 16.4 percent during years in which earnings decrease"[12]. This suggests that the information conveyed by the accounting results are largely redundant and that they are already partially processed by the observers of events that are affecting the enterprise, when it announcing its financial results. Also, they concluded that "changes in annual earnings contain substantially more value-relevant information than changes in annual cash flows from operations, highlighting the importance of the information contained in accounting accruals."[13]

In Britain, Rippington and Tâffler (1995) measured the effects of four events considered individually: the announcement of preliminary annual result, the publication of annual reports, the meeting of the General Meeting of Shareholders and the interim results announcement. They wanted to find out if one of these events provides any additional information comparing to another rapports. Their study showed that the reaction of stock market is higher when the preliminary results are announced and that the publication of interim results is the second most important event. However, the publication of annual reports and General Meeting of Shareholders have a very low effect on stock returns. "This indicates that investors incorporate the information from the preliminary announcement of annual results, despite its low reliability, without waiting for confirmation of the information by the

[11] J.F. Gajeweski and B. Quere, „*The information content of earnings and turnover announcements in France",* European Accounting Review, Vol. 19, 2001, p: 679 – 704.
[12] D. Craig Nichols and James M. Wahlen, „How Do Earnings Numbers Relate to Stock Returns? A Review of Classic Accounting Research with Updated Evidence", Accounting Horizons' Vol. 18, No. 4, December 2004, p: 264.
[13] D. Craig Nichols and James M. Wahlen, „How Do Earnings Numbers Relate to Stock Returns? A Review of Classic Accounting Research with Updated Evidence", Accounting Horizons' Vol. 18, No. 4, December 2004, p: 265.

publication of annual reports. On the contrary, the fact that he has low reaction when publishing annual reports suggests that they reported no new information compared to that contained in the preliminary announcement. This publication has rather a confirmatory role."[14]

In the paper called "On the Importance of Accounting Information for Stock Market Efficiency", Jiri Novak talks about the fact that the structure of accounting information can change the valuation of enterprises. He says that "the way in which accounting figures are constructed is unlikely to have any effect on either the expected cash flows or the discount rate. Hence the choice of accounting regime should be irrelevant to company value. In addition, analysts can easily capitalize the investments in intangible assets and apply any impairment rate that they find appropriate; hence they can easily reverse the accounting treatment when estimating company value. In consequence, there is a reason to believe that the change in accounting principles should not affect the company valuations". [15]

3. Conclusions

Concluding, we can say that the studies regarding the impact of accounting information on security prices confirms both the information content of accounting data and financial market efficiency. Rapid evolution of exchange rates and increase the volume of transactions at the time of disclose of interim accounting information or annual financial statements show that the information conveyed by the accounting data are instantly incorporated into prices. For a complete validation of efficiency hypothesis, we must ensure that the investors make good use of accounting information, particular because they interpret it in a pertinent way.

So, the earnings announcements do appear to contain information that is relevant to the stock market, and for the most part it appears that the stock market reacts efficiently to this accounting information. Finally, I can say that this paper tries to contribute to the debates regarding the links between the economic and accounting information and the efficiency of stock markets.

References

- Bernard Colasse, "Encycolpédie de Comptabilité, Controle de Gestion et Audit" , Paris, Ed. Economica, 2009
- Babalola Yisau Abiodun, *„Significane of accounting information on corporate values of firms in Nigeria",* Research Journal in Organizational Psychology & Educational Studies, 2012, p: 105-113
- Charles M.C. Lee, "Market efficiency and accounting research: a discussion of 'capital market research in accounting' by S.P. Kothari", Journal of Accounting and Economics 31, 2001, pp: 233–253
- D. Craig Nichols and James M. Wahlen, „How Do Earnings Numbers Relate to Stock Returns? A Review of Classic Accounting Research with Updated Evidence", Accounting Horizons' Vol. 18, No. 4, December 2004, pp. 263–286
- Eugene E. Fama, *„The Bevahior of Stock Market Prices",* Journal of Business, 38, Janvier
- Eugene E. Fama, *"Efficient capital markets: A review of theory and empirical work"*, The Journal of Finance, Vol. 25, No. 2, May 1970, pp: 383-417
- Gérard Charreaux, *"Gouvernement d'entreprise et comptabilité ",* published in B. Colasse, "Encyclopédie de comptabilité, contrôle de gestion et audit", Ed. Economica, Janvier 2000, p.743-756
- Francis, J. and K. Schipper *"Have Financial Statements Lost their Relevance?"* Journal of Accounting Research 37 (No 2 Autumn), 1999, p: 326

[14] Sarra Elleuch, „L'impact des information comptables sur les rendements boursieres: Étude de trois événements sur le marché français.", Association Francophone de Comptabilité, 2003/,2 Vol. 9, p : 137-150

[15] Jiri Novak, „On the Importance of Accounting Information for Stock Market Efficiency", (PhD diss., Uppsala University, 2008).

- J.F. Gajeweski and B. Quere, *„The information content of earnings and turnover announcements in France"*, European Accounting Review, Vol. 19, 2001, pp: 679 – 704.
- Jammel Edine Henchiri, "L'impact de l'information financière ; divulguée à travers Internet, sur le comportement des investisseurs: Analyse empirique sur le marché boursiere tounisiene.". Revue Africaine de Gestion, No. 1, Avril 2003
- Jiri Novak, „On the Importance of Accounting Information for Stock Market Efficiency", (PhD diss., Uppsala University, 2008).
- Oliver Kim and Robert E. Verrecchia, *"Trading volume and price reactions to public announcements"*, Journal of Accounting Research, Vol. 29 No. 2 Autumn 1991, pp. 302-321
- Michalis Glezakos, *"The Impact of Accounting Information on Stock Prices: Evidence from the Athens Stock Exchange"*, International Journal of Economics and Finance, Vol. 4, No. 2; February 2012, pp. 56-68
- Mikael Runsten, *"The association between accounting information and stock prices"*, (PhD diss., Stockholm School of Economics, 1998)
- Philippe Gillet, *„Efficience des marches financiers"*, (Paris: Ed. Economica, 1999), p: 11
- Pu Liu, Stanley D. Smith, and Azmat A. Syed, *"Stock Price Reactions to The Wall Streer Journal's Securities Reccommandations"*., Journal of Financial and Quantitative Analysis, Vol. 25, No. 3, September 1990, p: 399-410.
- Richard G. Sloan, "Do Stock Prices Fully Reflect Information in Accruals and Cash Flows about Future Earnings?", The Accounting Review, Vol. 71, No. 3. (Jul., 1996), pp. 289-315.
- Sarra Elleuch, „L'impact des information comptables sur les rendements boursieres: Étude de trois événements sur le marché français.", Association Francophone de Comptabilité, 2003/,2 Vol. 9, pp : 137-150.

INTERDISCIPLINARY PERSPECTIVES ON INDIVIDUAL CONSUMPTION DECISION

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Abstract

In a world were consumer is attacked by information and the decisional process is hampered by the multitudine of choices, the consumption can be explained through a multidisciplinary approach that can integrate also the economic and psychological variables. People are faced with having to choose one option out of many desirable choices, thus their options are evaluated in terms of missed opportunities instead of the opportunity's potential. In this playground appears the regret aversion that can paralyze the action of the consumer and recreate the frame in which this acts. That is why, this area has been approached through a multidiciplinary perspective that can explain better the decisional process of the buyer that can act also in a subjective and non-linear way ante and post-factum decision making.

Keywords: *consumer, decision, regret aversion, interdisciplinarity, economic crises.*

1. Introduction

Consumer's behavior, as a part of human behavior, although it is influenced also by objective factors, has a high subjective load, determined by cognitive and affective factors.

Consequently, market research companies have understood that only an interdisciplinary approach can provide a general overview on consumer's behavior.

It's because knowing and understanding well the mechanisms that influence the decision-making process and manifestation of individual's preference, enable the manufacturers to draw up strategies for sustainable growth and for fluid supply in relation to the new market trends.

2. Economic and psychosocial approaches on consumer's behavior- retrospective analysis

The economic theory, the first area that dealt with the analysis of consumer's behavior, claims that the consumer's purpose is to maximize ones satisfaction by choosing those economic goods, which provide the most utility. Representative of this view is Alfred Marshall's theory, acknowledged as the first consumer's behavior model.

He claims that the purchase decisions "are the consequence of some conscious economic and rational calculations, the nominal income and the price of the economic goods having a final role.[1]

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[1] Morariu D., Pizmaş D., 2001, Consumer's Behavior - dilemmas, realities and perspectives, Bibliofor Publishing house, Deva, p. 10-11.

However, all economic activities, implicitly consumption, are filtered by the human mind. Thus, as the analysis on consumer's behavior went deeper, has become increasingly obvious that the physiologic needs and the purchasing power are not the only determinant factors.

Therefore, in the early 70s of the twentieth century was introduced in economic theory the idea of subjective nature of value. The founders of this new type of analysis (S. Jevons, Walras L., C. Manger), known as marginal theory, although did not know each other they have found at about the same time this principle, the basic concept being the marginal utility.

Another approach that has had a powerful impact on the economic theory belongs to JM Keynes, which highlights the psychological behavior of the individual, in terms of consumption activity.

According to his point of view, the income plays an important role in the evolution of consumer spending, being an objective factor of influence, but he also identified a number of subjective factors that relate to the individual's psychological characteristics, customs, traditions, social institutions etc.

Although they have brought an important contribution to "decoding" consumer's behavior, these theoretical approaches have proven insufficient in practice, in the context of the progress made by the socio-economic environment, particularly in business field.

Consequently, this field has extended its area of research outside the economic theory and psychology, addressing the consumer and his decisional process from a broad perspective.

Thus, at the beginning of the last century, the first research on consumer behavior has emerged in marketing, the American psychologist, Daniel Starch, considered one of the pioneers in this field.

That is because in 1914, he was the first who spoke about the three functions of advertising (to attract attention to stimulate interest, to strengthen a response) in his paper "Advertising: Its Principles, Practice, and Technique" and in 1923 he founded the first company which provided market research services - Daniel Starch and Staff.[2]

Currently, the theory of consumer behavior has become a distinct field of marketing, addressed multidisciplinary.

It has even come to transposing the consumer's behavior into cybernetic language.

The American Professor Philip Kotler, the founder of modern "Marketing Management" has described the consumer's decision-making process as a sequence of steps presented in a cyber language: input, output and the black box.

Thus, the exogenous that influence our consumer behavior are received through information channels as inputs, are then evaluated and processed through individual psychological mechanisms within the "black box" to be externalized through the assembly of acts, deeds, decisions that form the consumer behavior.

In this context, the consumer's behavior represents an output that could be anticipated and influenced if the psychical processes carried out in the "black box" would be precisely identified and understood.

From this perspective, areas such as cognitive psychology, neurology, biology, contribute substantially to complementing this knowledge scientifically grounded within this disciplinary field.

Business professionals have acknowledged the limits of traditional market research, which led to the development of a new field of study --Neuro-marketing. It uses specific techniques of neuroscience and cognitive psychology (brain scanners, EEGs devices eye - tracking, galvanic

[2] Chelcea Septimius, 2014 Advertising psychology. About the visual ads, Polirom Publishing House, Bucharest, pg.79-84.

skin response sensors) to obtain information about consumer's reaction various products and commercial messages.

Neuro-marketing has shown a major development in the last 10 years, currently working in this field over 60 companies. Leading companies have used specialist's services to increase their sales (Microsoft, Mc Donald's, Facebook, Google, Procter & Gamble, etc.).

However, the benefits of progress in the field of consumer's behavior shouldn't be seen only from the manufacturer's perspective. The advantages arise also for consumers who can benefit, thus, from economic goods adapted to their own expectations, needs.

If we consider the statistics, according to which 80% of new products launched on the market are not successful[3], precisely due to inconsistencies demand - offer, we can state that benefits arise for the entire society by reducing inefficient use of limited resources.

3. Current trends in consumer's behavior

New levers shape the way companies build their strategy to reach faster and more efficiently the consumer. If some, as we have seen, are already outlined, other lie ahead as challenges to traditional approaches.

That is because the economic- financial crisis, which began in 2008, has put a strong imprint on people's attitudes towards consumption.[4]

For example Romanians, according to GFK research- one of the largest market research company in the world- have gradually reduced their spending for durable goods (houses, cars), then they cut also the ordinary expenses (clothes, holidays).[5]

This can be also noted from the comparative analysis of the household consumption expenditure in Romania between 2008 and 2013, which reflected a growing on the "housing, utilities, fuel" segment and a significant reduction in consumption on the "education", "clothing", "shoes" and "transport" segments.[6]

Thus, we find that more than half of household budget is allocated to food expenditures (40.9%) and maintenance of the dwelling (15.5% compared to 13.6% in 2008). However, we also must keep in mind that this increase registered under the reduction of the living standard was determined by the rising prices within this period and by the inelastic character of the demand on this segment.

At the opposite pole are education expenses, whose share in the total consumption expenditure dropped from 0.6% to 0.3%.[7]

In conclusion the consumers are now more temperate and more aware of the products they buy, they inquire more, make price comparisons, turning towards the best alternative price-quality.[8]

An important aspect highlighted in GfK's research is that, these changes in consumer's behavior actually represent "a final metamorphosis, due to changes in people's lives, and not a temporary phase," which means that, in the future it is possible even to extend and refine the

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[3] Pradeep A. K., 2010, The buing brain.Secrets for sellingto the subconscious mind, published by Jon Wiley & Sons, Inc., Hoboken, New Jersey, chap.1.

[4] Flatters P., Willmott M.,2009, Understanding the Postrecession Consumer, Harvard Business Review, July/ August 2009, p.106 -109.

[5] Alexandrescu P., 2014, "Consumer's Behavior Romanian: dualistic, with the extreme manifestations," *Wall Street*, 9 Jun 2010.

[6] Orgonas C., 2014, Evolution of household consumption between 2008 and 2013", *BusinessDay.ro*, 8.01.2014

[7] idem.

[8] Butaru C., 2013, "How has the consumer's behavior evolved during the five years of the crisis, *Ziarul Financiar*, 20.September. 2013.

intelligent purchase behavior, the information search skills and diversifying the information sources used in the process.[9]

This is why, the modern theories apply an interdisciplinary approach meant to introduce, also, in the study of consumer behavior, the psychological elements which are relevant especially in explaining the deviations from a "normal consumption behavior" which are more evident during the situations of crisis.

Where utility theory views the consumer as a „rational economic man" , contemporary research on consumer behaviour considers a wide range of factors influencing the consumer, and acknowledges a broad range of consumption activities beyond purchasing. These activities commonly include: need recognition, information search, evaluation of alternatives, the building of purchase intention, the act of purchasing, consumption and finally disposal.

Rational models of consumer behaviour see consumer especially as at a rationally considering being, acting on the basis of economic advantage. Consumer behaviour is interpreted as a result of consumer rational consideration. Nevertheless some preconditions must be kept: consumer is wholly informed about all options parameters and is able to make decision-making algorithm that he deliberately complies. Bindings among income, prices, facilities, budget limit, marginal behoof, cross-elasticity, indifferent curves and others are controlled.

On the other side sociologic approaches to consumer behaviour study how consumer behaviour is influenced by social aspects and social groups. Concrete form of purchase decision-making process is conditioned by every consumer individuality, his consumer predisposition. The binding of predisposition and decision making takes place inside every human, it is about internal processes and in a manner it expresses consumer blackbox.

Consumer blackbox is more or less some kind of consumer behaviour predisposition and purchase decision-making interaction. After the purchase being made, the consumer may confront with a state of cognitive dissonance that leads to the appearance of regret. Many of us buy something on the spor of the moment only to realize afterwards that their acquisition was not so inspired. That is why a good decision can lead to hapiness or to regret that ist o say that people anticipate regret if they make a wrong choice, and take this anticipation into consideration when making decisions. Fear of regret can play a large role in dissuading or motivating someone to do something.

Bell (1982) and Loomes and Sugden (1982) derived an economic theory of regret

They propose a normative theory of choices under uncertainty that explains many observed violations of the axioms used to build the traditional expected utility (EU) approach.

Regret theory (RT) assumes that agents are rational but base their decisions not only on expected payoffs ("value") but also on expected regret. Investors reach their investment decision by maximizing the expected value of this modified utility. So investors try to anticipate regret and take it into account in their investment decisions in a consistent manner.

Risk takes two dimensions: traditional risk (volatility of final wealth) and regret risk. RT offers a parsimonious specification with strong cognitive and axiomatic foundations. It predicts Allais' paradox and many other axiom violations reported in experiments by Kahneman and Tversky (1979) and others. There is an extensive literature in experimental psychology and a recent literature on neurobiology that shows that regret influences decision-making under uncertainty beyond disappointment and traditional uncertainty measures. Other theories have proposed normative models of consumer behaviour based on some preference based characteristics that differ from the standard economic model.In first place, it can be mentioned the models relied on Prospect Theory[10] a descriptive theory that has beedn

[9] Mirila O., 2013, „Romanian consumer's purchasing behavior in 2013 ', *Journal The market*, 06 November 2013.
[10] Kahneman, Daniel, and Amos Tversky, (1979), Prospect theory: An analysis of decision making under risk, Econometrica, 47(2), 263-291.

extensively used in behavioral finance. A second class of preference-based models also introduce the notion of loss aversion, but derive these preferences from Disappoinment Aversion theory (Gul, 1991), an axiomatic and normative decision theory using class of risk preferences. Customer satisfaction can be regarded as a summary of the activities of the consumer who is affected by both negative and positive emotional experiences that can make one feel sad or happy. For example, it was shown that individuals tend to overestimate the usefulness of what they earn in the future (Easterlin, 2001), although there were positive correlations between happiness and high levels of income.

Whenever the consumer makes a decision and does not have the expected results or find an alternative that would have a more favorable outcome is a candidate to regret. We consider post-decision regret that appears after one consumer anticipates the outcome of the decision and regret that is felt before it made its decision. Post-decision regret is defined as customer remorse. So regret does nothing to affect the psychological state of the consumer and as there are several alternatives, the more likely to experience regret, either in anticipation of the decision or after.

Once with the growth of opportunity costs increases also the regret. The more options there are, the more scenarios can be generated and thus increasing regret and decreasing the satisfaction felt after the election made by consumer. For example, Mr. David owns shares in insurance company X. In the last year considered the alternative of buying shares in the company Z, but decided not to invest. Then find that this change would have brought a gain of 2,000 euro. Mr. Paul owns shares in company Z. During the last year has become a shareholder in the company X. But this change has lost 2,000 euro. Who feels the biggest regret? Since both shareholders hold shares in company X and since both would be richer if they had 2,000 shares in the company Z should be in the same situation. However, 92% believe that Mr. Paul will regret it more than Mr. David. The key is that Mr. Paul regrets what he did when Mr. David regrets something you ought to do and failed. Most consumers regret more the actions that did not turn out as desired than the unsuccessful attempts. This is called a "propensity to failure", a tendency to frustrate attempts failed when assessing the consequences of our decisions. (adaptation from “The paradox of choice”, Barry Schwartz, 2004).

A difference must be made between regret and disappointment. Regret aversion is the fear of experiencing the pain of regret, regret is an emotional reaction, a pain felt when facing the negative effects or a non positive response of our action. In another words regret appears when the consumer considers the failure as due to its error of judgment. In which concerns disappointment a similar pain but less acute, can also strike when the damage comes from the general uncertainty that any decider faces when taking any decision. The margin between regret and disappointment is thin because people have the tendency to attribute failure to other people even if this are related to our neglects or illusions of knowledge or competence.

On the other hand we might feel emotionally guilty for damaging events that really depends of us.

Regret aversion faces the fact that people keep the status quo because they know from experience that options that seem to be favorable given the apparently correct information at the time the decision is to be made, may later turn out to be less favorable than previously assumed (Samuelson and Zeckhauser,1988). Regret aversion refers to the theory of omission bias, which sustains that people perceive harmful commissions as worse than corresponding omissions and, therefore, prefer omission to commission (Ritov and Baron, 1992).This is to say that consumer can create false reference points when making a decision having into mind the omission of regret or cognitive dissonance in the near future.

Regret aversion arises due to the desire to avoid feeling the pain of regret resulting from a poor decision. It embodies more than just the pain of financial loss, and includes the regret of feeling responsible for the decision, which gave rise to the loss. Regret aversion could encourage 'herd behavior' in economy, for example, to invest in 'respected' or reliable companies as these investments carry implicit 'insurance' against regret (if you lose money, so will a lot of other people, and therefore you won't feel as bad about it.).

In particular, the biases can be applied also in the area of ordinary purchases having into consideration the facts that people try to extrapolate the past trends into future when they buy a product, to have over or under reaction to price changes or news. Regret aversion has the particularity than can paralyze consumer decision to consume a certain good, tangling the decisional process and creating anxiety for the future purchases, but this is the topic of another future debate upon the subject.

Conclusions

Consumer Decision was treated in terms of opportunity cost and regret that it involves. It was noticed that many times, freedom of choice that involves consumer's multitude of alternatives does not mean necessarily a good thing. Even if the consumer makes the right decision once with the multitude of alternatives increases the attractiveness of the features of the other options which ultimately diminishes felt satisfaction and increases the opportunity costs despite the fact that the election was correct. Thus, the context in which the decision is made, continue to have influences after the decision.

It is important to understand the basic motivation behind the behavior of economic agents in order to improve existing theories and to obtain more accurate predictions. That is why "limited rationality" describes the cognitive limitations faced by decision makers in terms of obtaining and processing information.

The key presumption of regret model expected utility theory is that individuals avoid the adverse consequences of an outcome that would prove worse than the best result given the size of loss would have been known from the start.

So the regret theory does not assume that the decision maker experiments only regret but that the anticipation of regret experimentation is a decisive factor in the decision process of the buyer.

Thus, consumer behavior has become a complex study field, well-founded from a scientific and interdisciplinary point of view, studies in the field of economics, psychology, sociology, neuroscience, genetics, evolutionism, anthropology, statistics, bringing thus its contribution to a better understanding of the motivations, preferences and consumer's habits, both at individual and organizational levels.

Addressed individually, these prospects have a reduced utility, being necessary but insufficient whereas they address limitedly the consumption behavior, with reference to the influence factors specific to the disciplinary field of the specialist. However, the scientific information provided do not contradict each other but they complement each other, contributing thus to the formation of an overall view on the motivations, preferences and consumers' habits, considering the internal and external factors (personal, economic, social, demographic, psychological, cultural) that leave a mark on consumer's behavior, ante and post-factum decision making.

References

- Alexandrescu P., 2014, "Consumer's Behavior Romanian: dualistic, with the extreme manifestations," *Wall Street*, 9 Jun 2010, accessed March 1, 2014
- http://www.wall-street.ro/slideshow/economie/87230/comportamentul-consumatorului-roman-dualist-cu-manifestari-la-extreme.html

- Butaru C., 2013, "How has the consumer's behavior evolved during the five years of the crisis, *Ziarul Financiar*, 20.September. 2013, accessed February 12, 2014,
- http://www.zf.ro/zf-live/video-zf-live-cum-a-evoluat-comportamentul-consumatorilor-in-cei-cinci-ani-de-criza-urmariti-inregistrarea-emisiunii-de-vineri-20-septembrie-cu-gabriela-luca-gfk-11365422
- Chelcea Septimius, 2014 Advertising psychology. About the visual ads, *Polirom Publishing House*, Bucharest, pg.79-84
- Kahneman, Daniel, and Amos Tversky, (1979), Prospect theory: An analysis of decision making under risk, Econometrica, 47(2), 263-291.
- Kahneman, D. & A. Tversky, (1984), Choices, Values and Frames, American Psychologist, Vol.39, 341-350.
- Miller, Edward M., (1977), Risk, Uncertainty and Divergence of Opinion, Journal of Finance, 32(4), 1151-1168. Investor Irrationality and Self-Defeating Behavior: Insights from Behavioral Finance, Sudhir Singh, The Journal of Global Business Management Volume 8, February 2012
- Flatters P., Willmott M.,2009, Understanding the Postrecession Consumer, *Harvard Business Review*, July/ August 2009, p.106 -109
- Mirila O., 2013, „Romanian consumer's purchasing behavior in 2013 ', *Journal The market*, 06 November 2013 accessed 12 February, 2014, http://www.revista-piata.ro/Consumatorul_roman_si_comportamentul_lui_de_achizitie_in_2013-id9656.html
- Morariu D., Pizmaş D., 2001, *Consumer's Behavior - dilemmas, realities and perspectives*, Bibliofor Publishing house, Deva, p. 10-11
- Pradeep A. K., 2010, *The buing brain.Secrets for sellingto the subconscious mind*, published by Jon Wiley & Sons, Inc., Hoboken, New Jersey, chap.1
- Preotesi Mihnea, 2007, "Freedom, necessity and rationality of population consumption behavior", *Calitatea Vieţii Magazine*, XVIII, no. 1–2, p. 91–108
- Orgonas C., 2014, Evolution of household consumption between 2008 and 2013", *BusinessDay.ro*, 8.01.2014, accessed 10 February, 2014, http://businessday.ro/01/2014/evolutia-consumului-populatiei-intre-2008-si-2013-dam-cu-45-mai-multi-bani-pe-tutun-si-alcool-si-cu-40-mai-putini-bani-pentru-educatie/
- * * Romanians, becoming more confident in overcoming the difficult economic situation in 2014, GfK Romania, Press Release, January 23, 2014,accessed 1martie, 2014, http://www.gfk.com/ro/news-and-events/press-room/press-releases/pagini/românii-din-ce-în-ce-mai-încrezători.aspx
- * * *Press release no. 243/2013*, National Institute of Statistics, , accessed 10 February, 2014 *http://www.insse.ro/cms/files/statistici/comunicate/abf/ABF_II_r13.pdf*

STATISTICAL METHODS FOR ASSESSMENT OF DEVELOPMENTS IN THE ROMANIAN INSURANCE MARKET

Sandra TEODORESCU[*]

Abstract

As expected, the Romanian insurance sector faced stagnation in 2013. Current economic conditions raise questions about future development in the field. What will 2014 bring for the further insurance sector?

The present paper has 3 parts. The first section presents an analysis of developments on the Romanian insurance market over the last few of years. The second chapter contains essential statistical techniques used for short-term gross written premium (GWP) forecasts on the market. Finally, the third section is dedicated to conclusions.

Keywords: *insurance market, gross written premiums (GWP), GDP, self-regression, correlation, mathematical statistics.*

1. Introduction

The first insurance market report was published in1997 by the relevant oversight body, which was the Insurance and Reinsurance Supervisory Authority (OSAAR). Seven years after the removal of state monopoly on insurance by dismantling ADAS, three new insurance companies, THE ROMANIAN INSURANCE – ASIROM, ASTRA, and CAROM – took over its active and passive assets, and the first privately-owned insurance company, UNITA, was established. OSAAR's annual report contained financial data on Romanian insurance companies.

Analyzing the respective data, one can see that the eleven years that passed until 2008 brought a 70% increase in GWP, which was a positive development on the insurance market, at least from the quantitative point of view. Between 1997 and 2008, the respective sector experienced an upward trend in value and volume, and a special dynamics. Although quantitative improvement was extremely visible, it wasn't the most important development in the field. This remarkable increase and change reflected the qualitative evolution of the insurance market, which was reaching maturity. A constant characteristic of this period was the transformation and dynamics of the insurance market, which was the most exposed to changes.

Five years after the financial crisis, its effects are still being felt across Romania and the whole world. But how did it exactly affect the insurance market? As expected, the Romanian insurance sector faced stagnation in 2013. Current economic conditions raise questions about future development in the field. What will 2014 bring for the further insurance sector? The present paper contains some answers to these questions, based on the statistical techniques used for short-term gross written premium forecasts on the market.

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2. CONTENT

2.1 Statistical Data on The Insurance Market

After an impressive growth of over 35% in general insurance industry, unparalleled in Europe, and a 25% increase in life insurance – the third in Europe, in 2008[1], the Romanian insurance market experienced a sharp decline in the following years. For example, in 2009, it faced a 48% decline in life insurance – the sharpest in Europe -, followed by a slight recovery.

In 2012, GWP for both life and general insurance amounted to 8,256,914,950 lei, increasing by 434,604,998 lei, as compared to the previous year, namely by 5.56% in nominal terms or by 0.58% in real terms. The data reflected the dependence of the Romanian insurance market on car insurance industry, which accounted for 62.81% of the total amount of GWP for general insurance, in 2012[2].

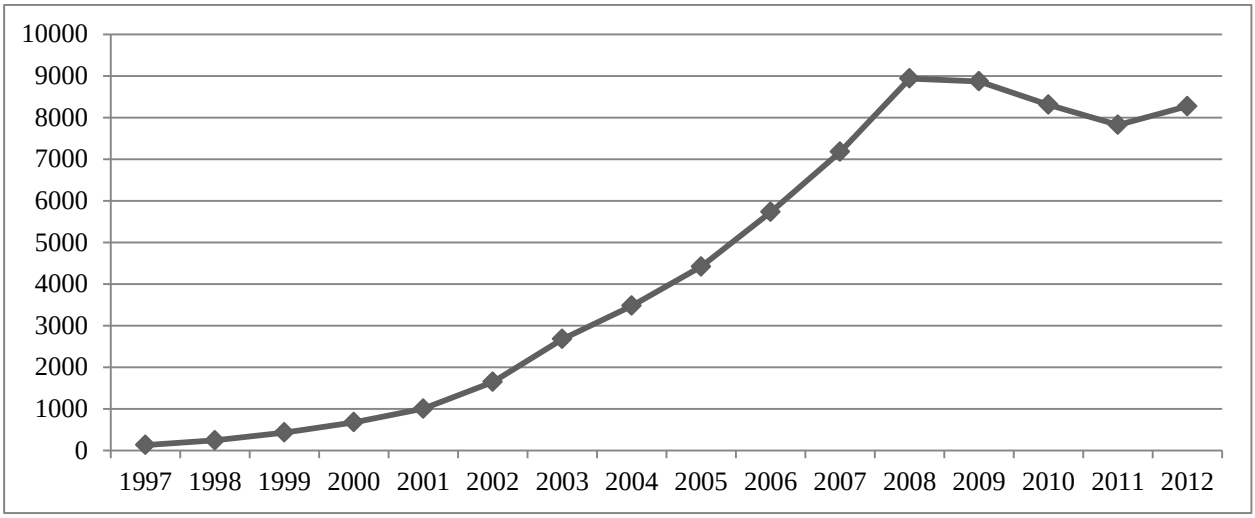
Table 1. *GWP dynamics for both life and general insurance, during 1997 - 2012*[3]

Year	GWP (milion lei)	Increase in nominal terms on an annual basis (%)	Inflation rate (%)	Increase in real terms, on an annual (%)
1997	130.4	Not available	Not available	Not available
1998	241.4	85.18	40.6	31.71
1999	427.3	76.99	54.8	14.33
2000	673.8	57.67	40.7	12.06
2001	1001.2	48.58	30.3	14.03
2002	1645.9	64.39	17.8	39.55
2003	2673.8	39.6	14.1	22.4
2004	3476.5	30.02	9.3	18.96
2005	4417.2	27.07	8.6	17.01
2006	5729.3	29.7	4.87	23.68
2007	7175.8	25.25	6.57	17.53
2008	8936.3	24.53	6.3	17.15
2009	8869.7	-0.74	4.74	-5.24
2010	8305.4	-6.36	7.96	-13.27
2011	7822.3	-5.81	5.8	-10.98
2012	8272.7	5.56	4.95	0.58

Based on the statistical data for the first eleven months of 2013, released early this year by the financial oversight body, GWP for both life and general insurance amounted to 7.45 billion lei, decreasing by 1% on an annual basis. GWP for general insurance totaled 5.93 billion lei, accounting for 79.56% of the total amount of GWP, and increasing by 0.97% on an annual basis. GWP for life insurance amounted to 1.52 billion lei, decreasing by 7.99% as compared to the first eleven months of 2012. 96.04% of the GWP for life insurance came from life insurance products, annuities, additional insurance products, life insurance policies and annuities – strongly linked to investment funds, both of them decreasing by 6.07% and, respectively, by 11.52% as compared to 2012.

[1] According to the European Insurance Figures 2009 report, recently published by the European Federation of Insurance and Reinsurance Companies.
[2] According to the 2012 report of the Insurance Control Authority, the current ASF.
[3] According to the annual reports released by the Insurance Control Authority between 1997 and 2012.

Figure 1. GWP dynamics (million lei) during 1997-2012



According to Figure 1, which shows the GWP dynamics on the insurance market, GWP constantly increased during 1997-2008, when a real growth of over 20-30% per year was reported. However, between 2009 and 2011, the decline in GWP is visible. The global economic and financial crisis was not immediately felt on the insurance market, and the first decrease occurred in 2009. Between 2009 and 2011, the Romanian insurance industry experienced an 11.08% decrease. General insurance fell by almost 16%, while life insurance grew by 6.77%. This negative trend was triggered by several factors, such as the industrial and business decline, the uncertainty related to consumers income, and their growing mistrust in financial markets.

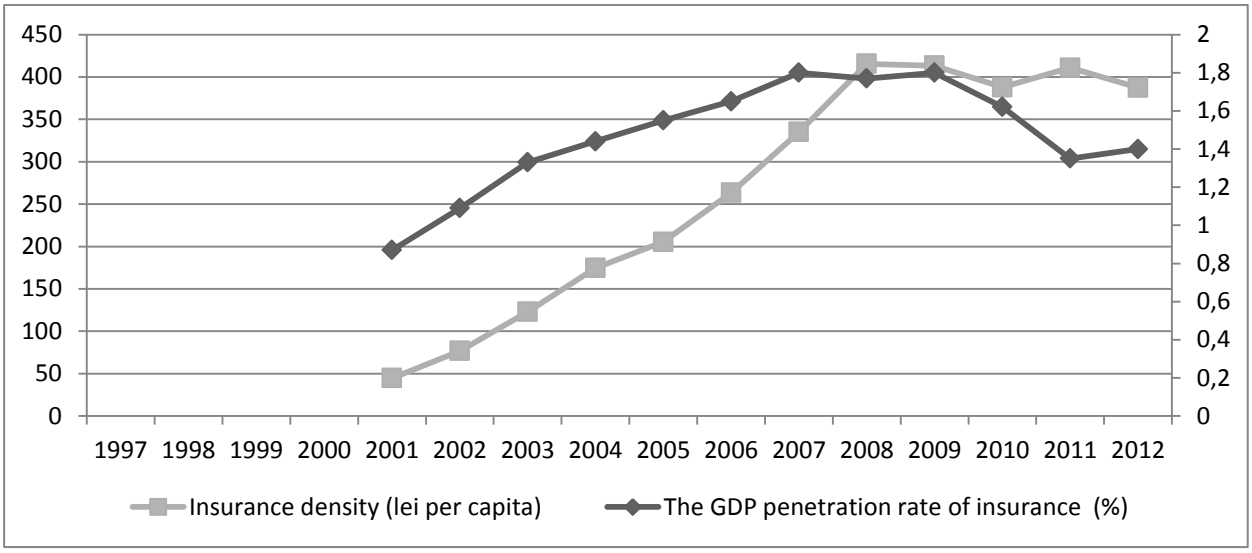
For the first time after 2011, as the previous figure shows, the insurance market experienced a slight increase in 2012, following the general economic trend.

As a share of the economy, the insurance industry has its total contribution to the country's Gross Domestic Product (GDP). The GDP ***penetration rate*** of *insurance*, namely the general and life insurance premium per GDP, was 1.40% in 2012, increasing by 0.05 percentage points on an annual basis. The GDP penetration rate of *general insurance* was 1.10%, increasing by 0.05 percentage points on an annual basis, while that of *life insurance* remained unchanged – 0.30%, as compared to 2011[4]. In the past couple of years, during 2009 – 2011, its contribution to GDP decreased (see Figure 2) as a result of the decline on the insurance market. After experiencing a downward trend three years in a row, in late 2012, the insurance industry reported a slight increase both in GWP and their contribution to GDP.

Another indicator that measures average insurance spending per capita is presented below. ***Insurance density*** is calculated as the ratio of total insurance premiums to total population. In 2012, it stood at 387.35 lei per capita, decreasing by 23.42 lei per capita, as compared to the previous year (410.77 lei per capita). Between 2009 and 2012, it declined sharply. The decrease experienced in 2012 – in comparison with 2011 – was triggered by the population growth, according to the 2012 census – 21,316,420 inhabitants. Previously, National Statistical Office released its 2011 report -19,042,936 inhabitants[5].

[4] According to the 2012 annual report of the Insurance Control Authority, the current ASF.
[5] According to the 2012 annual report of the Insurance Supervisory Commission, the current ASF.

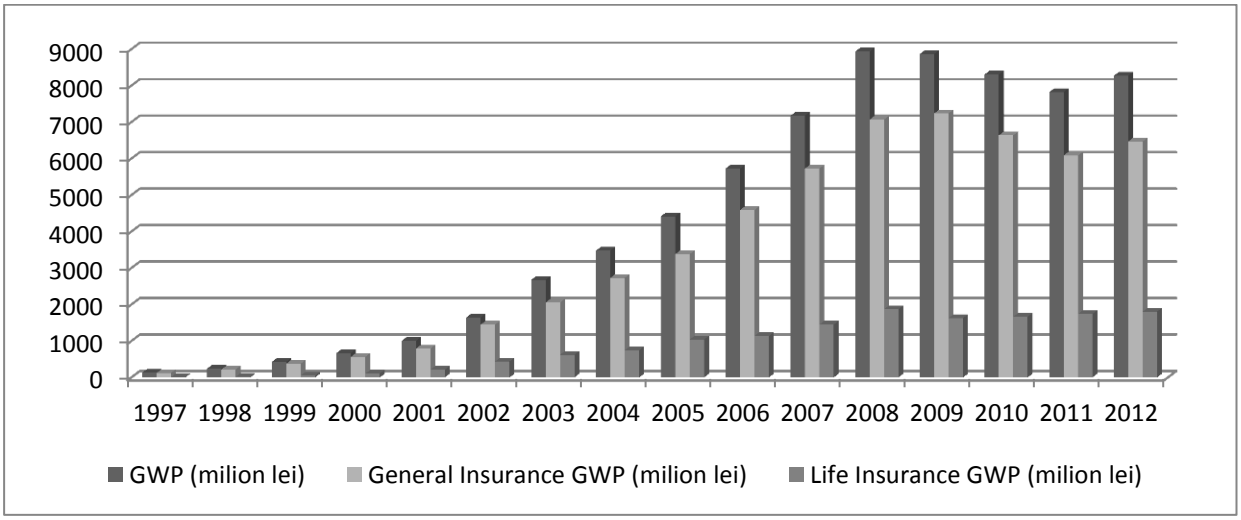
Figure 2. Insurance penetration rate versus insurance density, between 1997 and 2013.



Despite the large number of news reports and analyses of the insurance market potential, in the past 16 years this "obstinate" industry remained at low levels of only a few percentage points, from the point of view of the insurance penetration rate, namely the contribution of GWP to the country's GDP.

However, the Romanian insurance market attracted major European and international players in the field, such as the famous companies ING, AVIVA, AXA, Allianz, Generali or Metlife, which opened branches in our country. Local companies had also emerged, some of them gaining top positions, such as ASTRA or being absorbed by international giants, such as OMNIASIG, ARDAF, ASIROM or BCR Insurance and BCR Life Insurance.

Figure 3. GWP dynamics – total amount and share premium amount (million lei), during 1997 – 2012.



Before talking about the maturity of the Romanian insurance market, one should analyze the maturity of the consumers' financial behavior, which lacked sophistication even before the global financial and economic crisis. For e.g., the Romanian consumers reluctance towards life insurance products is probably cause by their unfortunate experience with general insurance companies. Moreover, the lack of adequate reinsurance programs to incorporate the risks assumed casts serious doubt on the Romanian insurance companies' ability to pay for the losses suffered by their clients.

As for local insurance industry predictions, estimates show a growth of a few percentage points in 2013, mainly due to compulsory insurance policies, followed, most likely, by stagnation in 2014.

The main causes of this decline in GWP are considered to be the low income of population, freezing of loans, decreasing consumption, and the gradual fall of the life insurance market.

On the other hand, the health insurance segment is expected to show robust growth, due to the announced implementation of the long-delayed reforms on the respective market. Other positive developments that could encourage growth could be the potential increase in demand for facultative home insurance and a tighter tax policy to cover the significant loss of earnings.

Since economic recovery is quite unlikely, 2014 will probably be a difficult year for the insurance industry. Moreover, the expected tax increase will have an indirect negative impact on this market, since it will affect all consumers.

The growth of insurance industry depends on the improvement of living standards, wage increases, and, of course, efficient campaigns to inform consumers about the benefits of insurance to society. Therefore, the insurance companies could intervene only by improving the quality of their services, in order to gain consumers trust and excite their interest in facultative insurance.

2.2. Statistical Methods for Romanian Insurance Market Surveys

Since any decrease or increase in economy affects the insurance industry as well, we took into consideration several factors that could influence the total amount of GWP. Theoretically speaking, these factors could be: *wage levels* (WL), the country's *GDP*, and the number of *economically active people* (EAP). The *GWP* variable is a dependent variable. The independent variables are the above-mentioned factors.

The statistical analysis of the relationship between these variable employs two tools: regression and correlation. The first model enables us to describe the average variance of the dependent variable, while the latter measures the strength of their relationship[6].

To find the independent variables, we resorted to scientific tools, such as the correlation matrix. The chart for the four variables is also presented below. We employed STATISTICA v.8.0. The correlation coefficient is the most important tool in measuring the strength of the linear relationships.

The correlation coefficient (see Table 2) for GWP and WL is 0.983, and for GWP and GDP – 0.989, revealing a very strong relationship, as compared to the GDP per EAP relation, whose correlation coefficient is 0.51.

Table 2. Correlations (GWP). Marked correlations are significant at p < ,05000 N=16 (Case wise deletion of missing data)

	Means	Std.Dev.	GWP	WL	GDP	EAP
GWP	908,17	714,538	1,000000	0,983520	0,989057	-0,517417
WL	960,35	672,688	0,983520	1,000000	0,997096	-0,575233
GDP	13577,32	9722,175	0,989057	0,997096	1,000000	-0,559054
EAP	4623,26	384,723	-0,517417	-0,575233	-0,559054	1,000000

[6] See reference [2.]

Figure 4. GWP and WL evolution during 1997 – 2012.

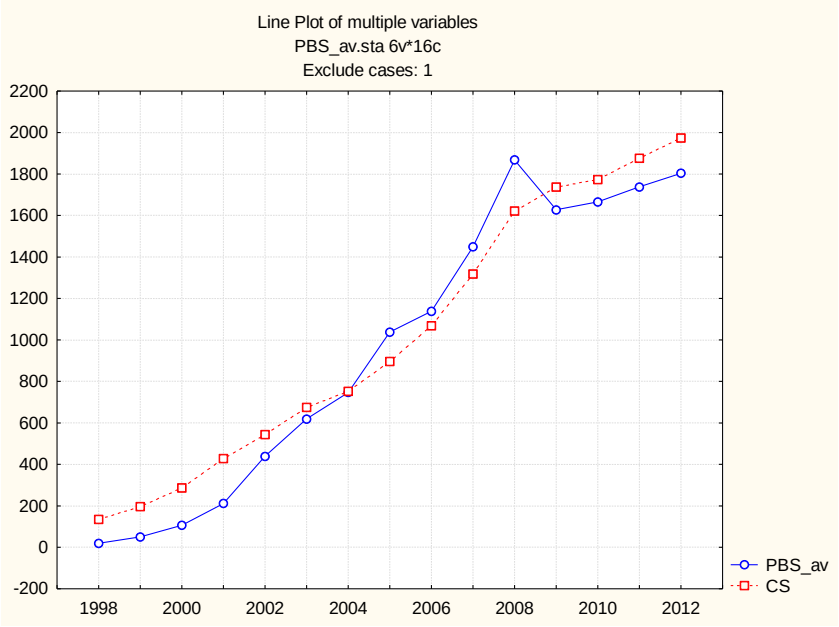
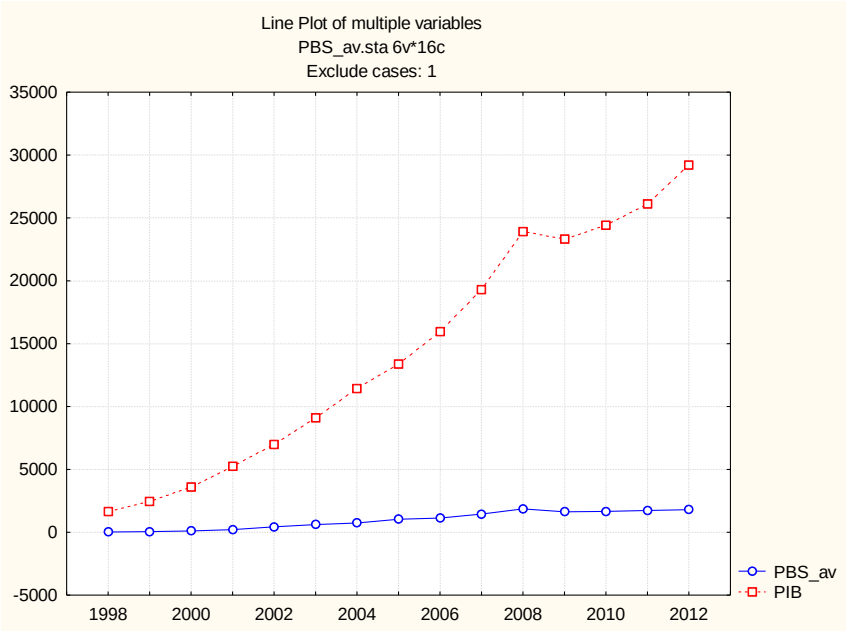


Figure 5. GWP and GDP evolution during 1997 – 2012.



Although the GWP – WL variables appear to be strongly related, the GWP – GDP variables are more strongly related than the GWP – WL ones. Therefore, GDP is the independent variable in the regression.

To provide short-term GWP values, we choose the following model:

$$GWP_{(t)} = b_0 + b_1 * GWP_{(t-1)} + b_2 * GDP(t) + \varepsilon(t)$$

which represents a fist-order correlation plus a simple linear regression model – ARIMA (1.0) without seasonal effects. To provide medium-term GWP values, one can use ARIMA models (autoregressive integrated moving average) to forecast non-stationary processes, which enable estimation of trends.

The multivariate regression performed with STATISTICA v.8.0 provided the following results:

Summary Statistics; DV: GWP (GWP.sta) Exclude cases: 1	
	Value
Multiple R	0,9879
Multiple R2	0,9759
Adjusted R2	0,9719
F(2,12)	242,7827
p	0,0000
Std.Err. of Estimate	116,8548

	B	**Std.Err. - of B**	**t(12)**	**p-level**
Intercept	-57,6374	74,56772	-0,772954	0,454506
GDP	0,0645	0,01837	3,513379	0,004275
GWP_t-1	0,1130	0,24929	0,453285	0,658431

The correlation ratio or the Pearson's correlation coefficient, also known as R, is a measure of the strength and direction of the linear relationship between two or more variables, regardless of their form. The square of the correlation ratio, typically denoted R^2, and called the coefficient of determination, estimates the proportion of the variation in a variable that is accounted for by the best-fit line[7]. R^2 is a statistic that will give some information about the goodness of fit of a model. In regression, the R^2 coefficient of determination is a statistical measure of how well the regression line approximates the real data points. An R^2 of 1 indicates that the regression line perfectly fits the data.

According to STATISTICA results, the value of the correlation ratio is 0.9879, which shows that the two variables – GWP and GDP – are strongly related. The coefficient of determination R2 is 0.9759, which shows the variation of the resulting variable (GWP) is determined by the variation of GDP influence, in this case 97%.

Comparing the model's results with the observations (the predicted values, based on regression, versus empirical values), we find that the regression coefficient is 0.97588, and the correlation coefficient is 0.98787, which means that the two variables are strongly related (see Figure 6). The two-dimensional scatter plots visualize a relation (correlation) between the two variables GWP and GDP_pred. Individual data points are represented in two-dimensional space, where axes represent the variables. The two coordinates that determine the location of each point correspond to its specific values on the two variables.

[7] See reference [2].

Figure 6. Predicted values versus independent variable and regression

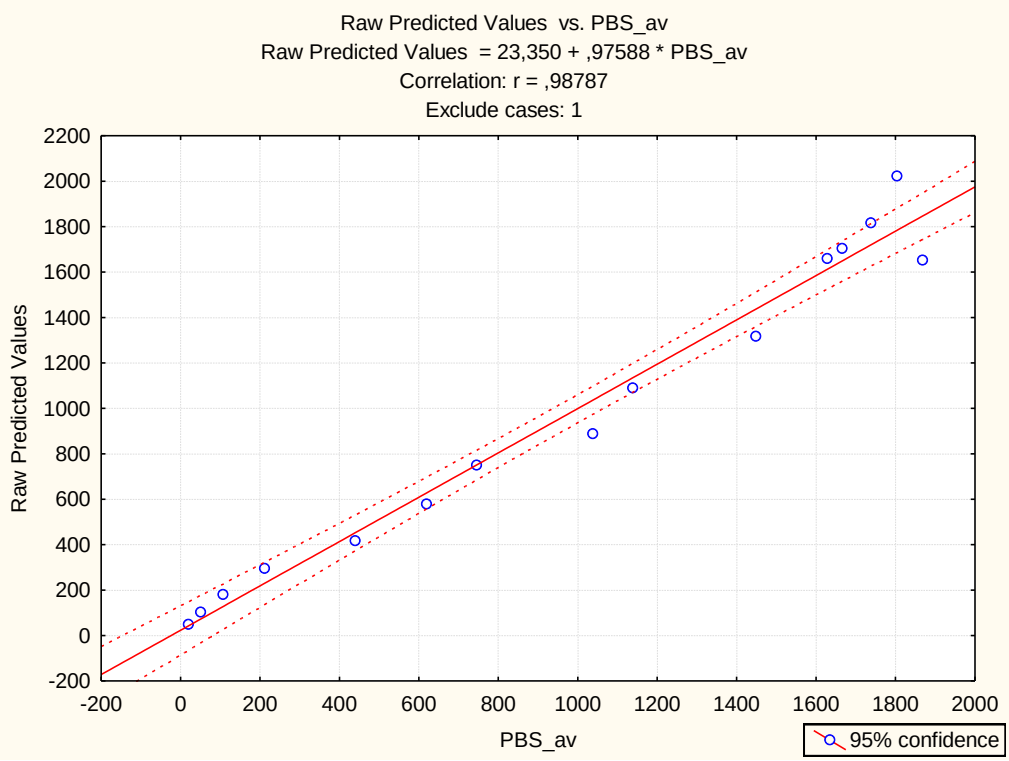
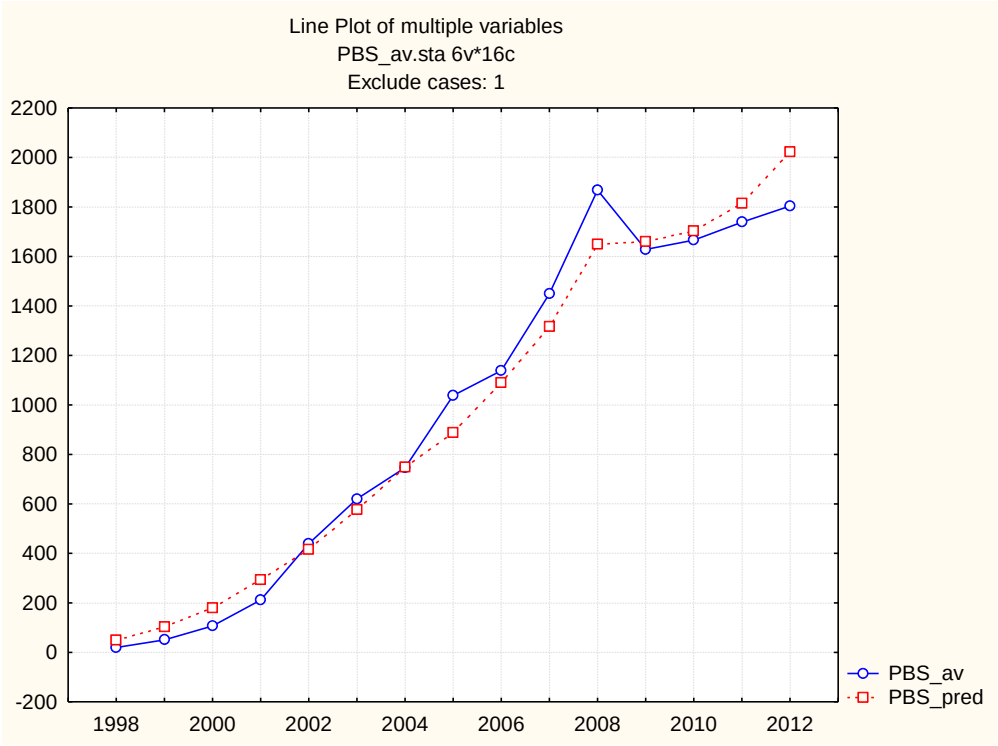


Figure 7. GWP values versus predicted GWP values.



The regression line expresses the best prediction of the dependent variable, given the independent variables. However, nature is rarely (if ever) perfectly predictable, and usually there is a substantial variation of the observed points around the fitted regression line. The deviation of a particular point from the regresison line (its predicted value) is called the residual value.

We also used STATISTICA to display a normal probability plot of the residuals. If the residuals (plotted on the x-axis) are normally distributed, then all points should fall into a straight line in the plolt. If the residuals are nor normally distributed, they will deviate from the line. Outliers may also become evident in this plot[8]. Residual value is the observed value minus the predicted value.

One can see the normal distribution of residuals after examining the residuals of the model (see Figure 8).

Figure 8. Residual analysis. Distribution of residuals.

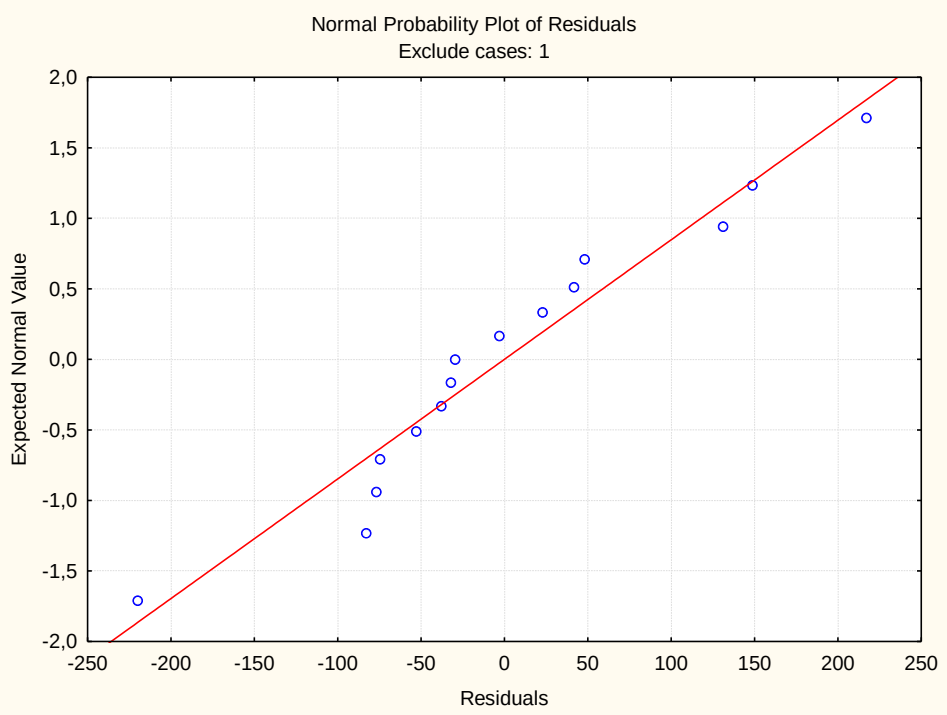
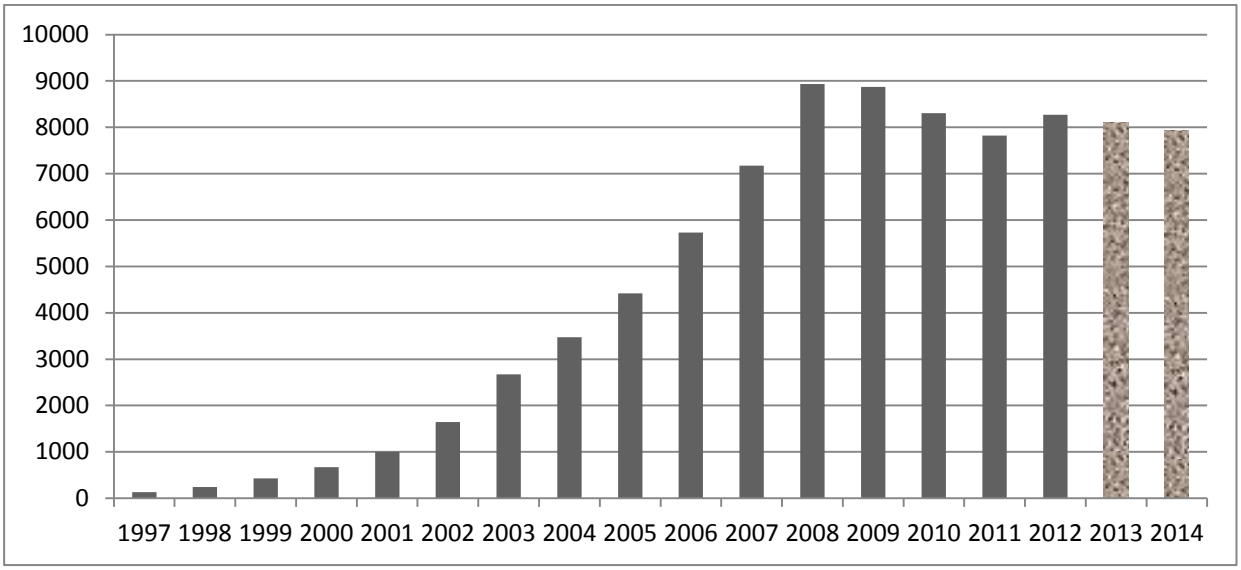


Figure 8 shows that the program does not detect outliers (compared to the model) in observations. Outliers are atypical (by definition), infrequent observations; data points which do not appear to follow the characteristic distribution of the rest of the data. Because of the way in which the regression line is determined (especially the fact that it is based on minimizing not the sum of simple distances but the sum of squares of distances of data point from the line), outliers have a profound influence on the slope of the regression line and consequently on the value of the correlation coefficient.

For the years 2013 and 2014, the value of GWP is consistent with the regresison results and has a downward trend (See Figure 9).

[8] See reference [12].

Figure 9. GWP evolution in 2013 and 2014.



The model of regression and self-regression used is not suitable for prediction, and a simple self-regression model with time-integrated relationships (based on nonstationary time series, according to Figure 1), namely ARIMA (1,1,0) could be obtained, meaning that:

$$GWP(t) = b_1 GWP(t-1) + \varepsilon(t)$$

The choise of this model respects Ochkam's razor (based on the following principle: „do not use more parameters there are needed") and the ARIMA method, based on the shape of the autocorrelogram (ACF) and partial autocorrelogram (PACF), according to which „one autoregressive parameter (p): ACF – exponential decay, PACF – spike at lag.1, no correlation for other lags". This test will be the subject for future research.

3. Conclusions

Analyzing the correlation matrix of several determinant factors that influence the total value of GWP and calculating the correlation ratio, one can see that GWP is strongly influenced by GDP. For these variables, we applied a model representing a first-order correlation plus a simple linear regression model – ARIMA (1, 0) without seasonal effects. For the years 2013 and 2014, the value of GWP is consistent with the regression results and has a downward trend.

According to forecasts, we should witness a slight increase by a few percentage points in 2013, mainly due to compulsory insurance policies, this trend being expected to continue into 2014. As for the determinant factors, we already mentioned that the insurance industry, as a share of the economy, follows the general economic trend, therefore it depends on future developments. To conclude, if no major events with a negative impact on the insurance market occur this year, there will be no dramatic changes in 2014, as compared to the previous year.

References

- George E. P. Box, Gwilym M. Jenkins, *Time series analysis forecasting and control*, Revised Edition, Printed in the United States of America, ISBN 0-8162-1104-3
- Maria Molnar, *Statistică,* editura BREN Bucureşti, ISBN 978-973-648-892-4, 2007;
- Sandra Teodorescu**,** *Metode statistice pentru estimarea repartiţiei daunelor din asigurări*, Editura Universităţii din Bucureşti, ISBN 978-973-737-626-8, 2009;
- Sandra Teodorescu., *Matematici aplicate în economie*, Editura PRO Universitaria, Bucureşti, ISBN 978-973-129-620-3, 2010;

- Sandra Teodorescu, *Fundamentele asigurărilor*, Editura BREN, Bucureşti, ISBN 978-973-648-892-4, 2010;
- Sandra Teodorescu, *The business of insurance along time. Romanian outlook on historical aspects*, Romanian Journal of Insurance, Insurance Management Institute, *vol 1/2009* Editura Mustang, ISSN 2066-4168, pp.115-127; http://www.ima-imi.ro/ro/publicatii/index.html;
- Annual reports released by the Insurance Supervisory Commission (CSA), posted on the institution's website www.csa-isc.ro;
- Statistical data posted on the Insurance Control Authority website , www.asfromania.ro;
- National Statistics Institute website www.insse.ro;
- Labor Ministry website www.mmumncii.ro;
- Databases on European Commission website , www.epp.eurostat.ec.europa.eu;
- StatSoft STATISTICA, V. 8.0.

THE NONPROFIT ORGANIZATIONS' CHARACTERISTICS AND THEIR INFLUENCE ON THE DEPARTMENTS WITHIN THEM

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Delia Corina MIHĂLŢAN[**]

Abstract

The present paper deals with the characteristics of nonprofit organizations. It has been written in the literature about how they are defined by various typical aspects. But this paper aims to test the following hypothesis: the characteristics of the nonprofits have a significant impact on their departments and influence the entity to the microeconomic level and its relationships with the social and economic environment.

Keywords: *nonprofit organizations, characteristics, similarities and differences, departments, organizing system.*

1. Introduction

The present paperwork focuses on the nonprofit organizations field. As many authors reckon, these are forming the third economical sector, by being themselves distinctive society bodies.

The research importance is sustained by the current economic conditions, which favorite founding and developing the nonprofit organizations. Political leaders have started to look for alternative ways to combine the market facilities with the social protection advantages. This process is obvious by the attention given from Mr. Tony Blair on "the third way" in Great Britain or from Mr. Gerhard Schröder on "the new middle way" in Germany. It can also be seen throughout the concise declaration of the French prime-minister Lionel Jospin: "YES to the market economy, NO to the market society!" [1]It cannot be involved just one player on the issues management, because the today world is in full process of globalization, with countries which have insufficient national budgets, but great expectations and demands from the citizens' part. Therefore many of these issues find their resolution through founding nonprofit organizations. The good function of this process requests first of all, an improving knowledge of their working properties and principles.

As objectives, we intend to approach two connected subjects. The first one is represented by the defining characteristics of nonprofit organizations. The second one has to deal with the way that these typical aspects affect the entity organization (at a microeconomic level) and their relationships with the society and the environment (at a macroeconomic level).

In order to reach the purpose in accordance with the pointed objectives, we will perform a literature review compared with the empirical practice of the field. The empirical study is based on observing and analyzing the nonprofit entities organization and functioning at an internal level, as well as external.

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[1] M., L., Salamon, H., K, Anheier, and associates, *Globalizarea sectorului nonprofit: o teorie revizuită.* (Baltimore, 1998) 6, accessed January, 2014. http://www.fdsc.ro/documente/19.pdf.

For a long time, the nonprofit sector has not been uniformly defined due to the various opinion regarding their characteristics, roles and functions. Many authors have done plenty of efforts to support the particularity of the sector by presenting these entities as distinctive bodies compared to the ones from the public or private sector. The most relevant authors of the field are M. L. Salamon; H. K. Anheier; P. Hall. There are also some important researches and publications performed by Romanian authors like M. Vlăsceanu; D. Săulean; C. Epure; M. Lambru; A. Vameşu. The last ones present the Romanian civil society properties and dimensions as well as its legality.

2. Civil society – defining aspects

From the perspective of The World Bank[2] the civil society is build up from a large number of nonprofit and nongovernmental organizations, which are present in public life. These express the interests and the values of their members and other groups as well, based on some ethical, political, cultural, scientific, and religious, philanthropic considerate. Thus, The World Bank sees the nongovernmental organizations as being those entities which aim to activate in order to reduce the hardship, to promote the interests of the poors, to protect the environment and to provide basic social services. Therefore these entities are a real support to the community development.[3]

The concept of "nonprofit organizations" originates from English and reflects those organizations which are using their gained surplus to reach the settled goals. They cannot use the surplus as profit or dividends for the persons involved in the governance of the entity, namely: founders, members, directors and managers. All these entities are led by their mission and not by the will of being profitable.

The "United Nations" defines the nonprofit organizations as being the entities which operate outside the public sector or the governmental mechanism. They do not distribute the profit to their leaders or owners and significantly use the volunteers' activity (e.g. involving the volunteers as members of the administration boards). This definition refers to both informal and formal organizations as well as the volunteers' activity which is the same with the formal paid employees' activity. [4]

By a juridical point of view, in Romania the nonprofit organizations are the legal persons which represent the interest of the society in general or the interest of a specific group. They do not have a patrimonial purpose and take the form of associations and foundations defined by the Law no. 246/2005 to approve the G.O. no. 26/2000 regarding the associations and foundations, as seen below, in the Table no. 1.

Table no. 1

Definitions of types of nonprofit organizations in Romania

The nonprofit organization types:		
ASSOCIATION	FOUNDATION	FEDERATION
is the legal entity formed by three or more	is the legal entity established by	is the body

[2] "World Bank", accessed January, 2014, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20101499~menuPK:244752~pagePK:220503~piPK:220476~theSitePK:228717,00.html.

[3] M., Lekorwe, D., Mpabanga, "Managing Non-Guvernamental Organization in Botswana", *The Innovation Journal: The Public Sector Innovation Journal* 12 (2007): Article 10.

[4] M., L., Salamon, H., K, Anheier and associates, *Globalizarea sectorului nonprofit: o teorie revizuită* (Baltimore, 1998), accessed January, 2014. http://www.fdsc.ro/documente/19.pdf

persons who, according to an agreement, are pooling and are not subject to refund material contribution, knowledge or contribution in labor with the purpose of carrying out activities in the general interest of some communities or, where appropriate, in their private prerogatives.	one or more persons on the basis of a legal act between the living or upon death and constitutes a patrimony permanently and irrevocably affected to achieve a goal of general interest or, as the case of some communities.	established by the association of two or more associations / foundations for specific purposes

Source: author's construction based on law[5]

The noted definitions are between the most important ones, being stated repeatedly in the specific literature, even though some of them were issued by various bodies. If we could analyze the defining characteristics of the nonprofit organizations throughout all the definitions we could conclude that no matter their form and name, the nonprofit entities are universally defined by a couple of common features, such as:

- Their purpose is not to obtain profit, but is of a general interest, non-patrimonial;
- The gained benefits are not distributed as profit or dividends, but are used in order to achieve the entity objectives;
- These entities are not founded by the state or any other public organism, but they are private legal persons with a private capital;
- They are following the citizens interest in general, but also the interest of a particular group of individuals;
- Each of them is part of the civil society.

In Romania, the nonprofit organizations can develop three types of activities, namely: no patrimonial activity (nonprofit activity), economic activity (developed in order to reach the financial resources necessary for the nonprofit activity) and special activity.

Due to what they represent, the nonprofit organizations allow the citizens to express their support for certain causes or certain social projects, to be solidary, to get organized regarding their common interests and concerns. Also the citizens can found such entities in order to interaction with other structures of society, for instance the government or the business sector.

3. The impact of nonprofit organizations features at microeconomic level

The civil society bodies have borrowed from the other two sectors features. The nonprofit organizations are public due to their purpose, but are private as property, as seen from the definitions above.

The profit oriented entities are working upon just one organizing system which is to produce goods and services and to distribute their profit gained from sales to their shareholders and to reinvest it in the production (e.g. acquisitions of fixed assets and raw materials, salary payment so on). On the other side, the nonprofit organizations are using two different organizing systems in order to achieve their purpose:

1. Resources development system: requests –> donors –> contributions and
2. Goods and services distribution system: goods/services –> the target beneficiary group –> gratitude.

We will present you, in the table below, other similarities and differences between nonprofit organizations and the other two sectors.

[5] Law no. 246 approving *Government Ordinance no. 26/2000 on associations and foundations*, published in (2005) Official Monitor of Romania no. 656, Art. 4 and 15.

Table no 2

Similarities and differences between the three sectors bodies

Subject	Public institutions	Nonprofit organizations	Profit maker entities
Philosophy	Equity	Clarity	Profit
Representation	Majority	Groups	Owners and managers
Legal base for their activity	Social rights	Gratuity	Paying the price
Main source of funds	Tax	Donations, subventions /grants, contributions,	Sale revenues
Defining the mission	Prescribed by law	Selected by founders	Chosen by owners
Decisional authority	Government	Articles of organizations and Corporate charter	Owners or administrative board
Accountability to	The citizens voters through government	The public, through the decisional board	The owners through the management
Field of interest	Large	Limited to groups	Limited to customers

Source: I. Străinescu, B. Ardelean, Managementul ONG, p.17

The table above emphasizes the differences between those three sectors. The similarities appear regarding their philosophy: both the public institutions and nonprofit organizations pursuing the public good; regarding their mission, which is defined by the founders for companies, but also for nonprofit organizations; and regarding the field of interest which refers to the groups of beneficiaries of services and goods offered both for-profit organizations and for companies.

Other characteristics of this civil society as against the other two sectors relates to:

- Performance cannot be precisely measured as in the case of profit maker entities;
- Effectiveness is determined according to the value and quality of services;
- The main tool for staff motivation is volunteering;
- The existence of a dual organizing system regarding the own resources and the supply of goods and services;
- The satisfaction of the internal user is a priority due to the fact that they are also donors;
- The nonprofit activity (which is the main activity) is not taxed;
- The contact with beneficiaries reveals new needs that are arising within the society.

We will highlight further on the concrete specificities of nonprofit organizations that exist within their departments.

The management of nonprofit organizations is legally regulated in Romania by the Government Ordinance no 26/2000. Associations are led by the general meeting of associates and board of directors (its members are some of the associates) which ensure the enforcement of decisions of the general meeting. Regarding the foundations, we cannot speak about a general meeting of associates, but they are led by the board of directors which has the task also to manage and run the entity. The associates and the board members must know and take into account all of the nonprofit organizations features, for a better understanding of their mechanism of operation.

The control within the nonprofit organizations in Romania is different from one organization to another according to the specific features of the organization within is

exercised. Censorial control is practiced in those entities which have not acquired the status of "public utility" and / or which manage public funds at less than 50% of their total financial resources. Censorial control exercised by a censor or, in the case of organizations with over 100 members by a committee made up of an odd number of censors. The censor must be certified public accountant, and in the case of the committee, at least one person within it must be of a certified public accountant. The nonprofit organizations which have a legal "public utility" status and / or which manage public funds in a proportion bigger than 50% of their total financial resources are required to audit their financial statements. Censorial control and financial audit should take into consideration the characteristics of each department controlled or audited.

Within the financial-accounting department must be at least one person in charge with the activity of fund-raising, finding sponsors and donors to fund the nonprofit organizations activities. Working based on a budget requires the existence of staff who deals with drawing up the budget, budget amendment and verification of budget execution. Regarding the accounting, this is strongly influenced by the specific features of nonprofit organizations. The accounting is organized distinctly for those three types of activities that the nonprofits can develop, namely: non-profit activity, economic activity and specific activity. Within a nonprofit, there are specific patrimonial elements, such as income from donations, contributions and sponsorships, special funds. The outcome tax regime is different from the one of the companies. The financial statements have a form adapted to the specific features of the nonprofit organizations, so that they can illustrate a true and fair view of the entities activity.

In the human resources department could be two different staff categories: employees and volunteers, due to the legal possibility of the nonprofit to work with volunteers. As a consequence, many nonprofit organizations have an employee who has the position of coordinator or trainer of the volunteers involved. Employees and volunteers should be motivated primarily by the mission of the organization, given that the resources are limited, so there is no possibility to reward the employees, and remunerate the volunteers.

Legal department must consider the specific legal framework governing the nonprofit organizations existence and activity. It is also concern by the specific laws to the field in which the organizations are conducting their activity, especially when these are carrying out a certain activity or managing public funds.

IT department handles local computer system. Through this system the data within each department are collected and processed in order to generate various information needed to the management for the decision process. Among the most important data and information included are: financial accounting data, data related to the projects undertaken, databases with statistics about donors, beneficiaries, employees, volunteers and other data and information's specific to each entity. This information acts as elements of adjustment of the organizational system that ensures the optimization of the decision-making process within the entity.[6] The computer system must be designed according to information flows which are in the organization. The flows can be: permanent, periodic, occasional, upward, downward and horizontal. Out of these types, should be identified those that exist within the entity.

The activity of a nonprofit organization is based, in most of the cases, on projects. Due to this fact, within these nonprofits is organized a special department which deals with developing and implementing the projects. To the level of this department is working especially with project beneficiaries, but also with the other departments.

Depending on their mission, the nonprofit organizations can establish specific departments within them in order to support the well running of their activity. Some examples

[6] Ioan, Străinescu, Ben-Oni, Ardelean, *Managementul ONG* (Bucureşti: Didactică şi pedagogică, 2007), 195.

of such departments can be: public relations department, social department, health department, partnerships department, environmental department and so on.

4. Relationships between society and nonprofit organizations

These relationships have been established by the moment when the organizations have been founded. The European state crises, from the last two decades, put under question its effects over the people, and so it generated doubt in citizens' minds. Mainly they started to wonder about such issues like:

- The traditional politics of social protection from many developed Northern countries;
- The poor development process run by the government in the Southern developing countries;
- The crash of socialism trial from Central and Eastern Europe;
- The ongoing issues regarding the environmental damage continues as a widely threat for the people health and security.

The organizations of civic society have the duty to offer an answer for the individuals' necessity to get associated as self-employers and under their own autonomy, and not under public authority. In this way there is a chance for the citizens and groups to be noticed by/stand up for the society and to take part on the public decisions. More precisely the nonprofit organizations offer opportunities to achieve proper purposes of the territorial and professional communities, and they multiply the chances of a better and flexible distribution of main public services, which are not provided by the governmental agencies. Therefore, they are public organisms/entities due to the programs and the services they provide for the public and not for other reasons.

Being compared with the public institutions, which provide same type of services, it is accepted that civic society organisms differently answer to the same set of values, rules, or „organizational imperatives", mainly because all these entities engaged in public services, need to follow such objectives like: equity, sensibility, responsibility, efficiency, and fiscal integrity.

Thus, social services provided by the nongovernmental organizations have the following features[7]:

- High service quality: due to their nonprofit character, nongovernmental organizations can assure more time and persons to solve any possible issues; their flexibility allow them to react faster and different regarding the needs; also they can offer complementary and support services for their beneficiary (i.e. social-medical services);
- Equity: voluntarily and philanthropic support and the lack of bureaucracy, make possible for these organizations to help every person in need;
- Reduced costs: being voluntarily and philanthropic institutions, the nongovernmental entities can assure services at a lower cost compared to other providers;
- Innovation: flexible and receptive, the nonprofit organizations are pioneers in some new fields, identifying new needs, working on new approaches, more complex and other alternative solutions.

Taking into consideration the Kaldor-Hicks efficiency, at a macroeconomic level, the development could be seen as making better-off some groups by making worse-off others. Thus, the level of making better-off exceeds the level of making worse-off. If we add to this equation the founding activities of nonprofit organizations, we could say that these bring up a

[7] Oana, Ţigănescu, "Organizaţiile nonguvernamentale – furnizori de servicii sociale: sursă iniţială sau soluţie?" *Revista de Asistenţa Socială* 1 (2004): 44.

balance in which regards the surplus distribution from those who are making better-off toward those social categories assisted by the nonprofit entities, those who are making worse-off.

At their bases, the nonprofit organizations have the purpose to contribute to the development and well state of the society, role that is achieved throughout some particular functions of these entities. On the related field literature, are mentioned different sets of functions of the nonprofit organizations, which can directly affect: the social groups, the authorities, the economy's sector and their present values system. Among these, we'll mention below the most important functions and their affected areas - view Table No. 3:

Table No. 3

The functions of the civil society and their affected areas

NO.	FUNCTION	SOCIAL GROUPS	AUTHORITIES	ECONOMY	VALUES
1.	Develops the social classes where it activates;	YES			
2.	Provides goods and services toward targeted community;	YES			
3.	Intermediates citizens and authorities relationships;		YES		
4.	Represents the interests of some particular groups from the society itself and activates for these;	YES			YES
5.	Prevents and corrects certain negative phenomena which are currently happening or which can rise in the society	YES			YES
6.	Offers support to the economic system of the society (i.e. providing continuum training services for adults;			YES	
7.	Assures the recreational and stress less condition of the individuals;	YES			
8.	Facilitates the social and political inclusion of the citizens (i.e. these entities represents a frame of civic participation);	YES			
9.	Constitutes an essential latent source to achieve some purposes of public interest;	YES			
10.	Offers to society a great variety of social innovations, partially tested, out of which the government, the business organizations and other institutions can choose the brightest ones and put them in practice;		YES		
11.	Offers a forum to put in balance the reality and morality conceptions - ideologies, perspectives and world perceptions (i.e. mainly playing the role of questioning the dominant suppositions related to what is there; what is it right and what should be done in the society);	YES	YES		YES
12.	Activates with the goal to maintain and/or represent the various traditional ideas, and the sense of sacred mystery;	YES			YES
13.	Frees the individuals and allow them to express their personal capacities and potential within a social ground, which is usually constraining;	YES		YES	
14.	Takes over the negative feedback between community and government.	YES	YES		

Source: personal projection based on the field literature review

As we can notice, a great majority of the presented functions affect not only the individual groups but also the governmental authorities, the set of values and moreover the national economy. There is of course an indirect effect over other sectors as well, but this presentation has the purpose to underline the primary role and effect of nonprofit organizations, and more precisely the role of pursuing the interests of a group of persons in their relationships with society, and so improving the existent society.

5. Conclusions

As shown by large number of studies in the field literature, the nonprofit organizations all together represent the "civil society", a distinct sector that is different by the public and the economic ones, through its own characteristics. The latter affects nonprofit entities both at micro and macroeconomic level.

Nonprofit sector has at its disposal the context and opportunity of a long expansion, mainly because it responds to a distinct set of various functions and social needs. By their particular role and importance, the nonprofit organizations demand not only to identify some manners to improve their own activities but also to engage in a new distinctive management. At the bottom line, these entities are looking to use a particular way to generate the financial-accounting information, so that this could be effective both for its own development and for user' needs satisfaction.

The characteristics of nonprofit sector require a suitably qualified staff especially in management and financial-accounting. Due to the complex functions of nonprofit organizations in the society, the need for specialists in this area becomes urgent. Once manifested their functions, the nonprofit organizations bear a responsibility proportionate to the functions they perform. In practice, managers and economists from the nonprofit entities have problems in their work if they are not familiar with the features of this sector. These problems can affect the function that the entity should perform. Thus, nonprofit organizations must be treated as a separate sector of the economy, not just the same as the companies or the public institutions, although, as we have seen, these three sectors have a number of common features. We can state, therefore, that the success of a nonprofit organization depends on the understanding of its mission by all those involved in their activity, whereas is rooted even the motivation of human resources. Also the proper functioning of the nonprofit organization depends on the adaptation of the staff to the specific features of each department.

As future research directions we can approach the specific aspects of each department for an in-depth study in order to create the context of an appropriate qualified to nonprofit field, for the persons interested to engage in a civil society organization.

References

- Hall, P. *Inventing the Nonprofit Sector*. Baltimore: The Johns Hopkins University Press, 1992.
- Stănescu, Vasile. *Societatea civilă*. Bucureşti: Expert, 2001.
- Străinescu, Ioan, Ardelean, Ben-Oni. *Managementul ONG*. Bucureşti: Didactică şi pedagogică, 2007.
- Tiron-Tudor, Adriana. Asociaţii şi fundaţii: aspecte juridice, fiscale şi contabile. Cluj Napoca: Dacia, 2000.
- Vlăsceanu, Mihaela. Economia socială şi antreprenoriat. O analiză a sectorului nonprofit. Iaşi: Polirom, 2010.
- Opportunity Associates Romania. *Ghid de bune practici pentru organizaţii neguvernamentale*. accessed January, 2014.
- http://www.coddeconduitaong.ro/resurse/Ghid_de_Bune_Practici_ONG.pdf
- Lambru, M., Vameşu, A.. *România 2010. Sectorul neguvernamental – profil, tendinţe, provocări.* Bucureşti: „Fundaţia pentru dezvoltarea societăţii civile, 2010. accessed January, 2014.
- http://www.fdsc.ro/library/conferinta%20vio%207%20oct/Romania%202010_Sectorul%20neguvernamental1.pdf

- Salamon, M., L., Anheier, H., K. and asociates. *Globalizarea sectorului nonprofit: o teorie revizuită.* Baltimore, 1998. accessed January, 2014. http://www.fdsc.ro/documente/19.pdf
- Săulean, D., Epure, C. *Defining the nonprofit sector: Romania*. Bucureşti: Johns Hopkins Comparative Nonprofit Sector Project, 1998. accessed January, 2014. http://www.fdsc.ro/documente/20.pdf
- Ţigănescu, Oana. "Organizaţiile nonguvernamentale – furnizori de servicii sociale: sursă iniţială sau soluţie?", *Revista de Asistenţa Socială* 1 (2004): 40-47.
- Lekorwe, M., Mpabanga, D. "Managing Non-Guvernamental Organization in Botswana", *The Innovation Journal: The Public Sector Innovation Journal* 12 (2007): Article 10
- *** Law no. 246 approving Government Ordinance no. 26/2000 on associations and foundations, published in (2005) Official Monitor of Romania no. 656.
- *** Law no. 125 regarding volunteering republished in (2007) Official Monitor of Romania no. 276.
- *** Law no. 571 of 22 December 2003 regarding the Fiscal Code, as amended and completed, republished.
- United Nation, "World Bank", accessed January, 2014. http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20101499~menuPK:244752~pagePK:220503~piPK:220476~theSitePK:228717,00.html

MARKETING TECHNIQUES: RHETORICAL STRATEGIES IN CEOs' LETTERS INTRODUCING CORPORATE SOCIAL RESPONSIBILITY REPORTS OF THE COMPANIES

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Abstract

This paper provides limited but new details on the rhetoric of Chief Executive Officers' letters to stakeholders. We analyze CEOs' letters to which introduce Corporate Social Responsibility reports for 2012 of several US large companies. The analysis is rooted in discourse analysis, rhetoric, and the theory of argumentation. It yields significant results to be later valued in the field of Business Ethics.

Keywords: *Corporate Social Responsibility (CSR) reports, Chief Executive Officer (CEO) letter, discourse analysis, marketing, rhetorical strategy.*

> Date: Weds, 30 June 2010 From: Matt Rutledge (CEO – Woot.com)
> Subject: Woot and Amazon To: All Woot Employees
> […] From a practical point of view, *it will be as if we are simply adding one person to the organizational hierarchy*, except that one person will just happen to be a billion-dollar company that could buy and sell each and every one of you *like you were office furniture*.
> […] After spending a lot of time falling asleep at the library while facing the philosophy books, I determined that the concept of destiny is a construct that allows man a gentle release from facing the terror of his existence, and that *a Hyundai full of twenties would pretty much offer the same benefits*. And so, I ultimately said YES!
> This is definitely an emotional day for me. The feelings I'm experiencing are *similar to what I felt in college on graduation day*: excitement about getting a check from my folks combined with nausea from a hellacious bender the night before. I remember fondly that time when an RA turned on the lights and yelled "WHO OWNS THESE PANTS?" Except *this time, the pants are a company*, and *the RA is you*, and *the sixty five hours of community service is a deal that will ensure the Woot.com experience can continue to grow* for years and years and years, *like a black mold behind the Gold Box*. Join us, because together, *we can rule the galaxy as father and son*. Also, there will be six muffins waiting in the company break room, courtesy of the nice folks at Amazon.com. Welcome to the family!
> [our italics] **Matt Rutledge CEO, Woot**
> (http://www.woot.com/blog/post/amazon-woot-and-you-but-mostly-woot)

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1. Introduction

The excerpts above are from the letter the Woot CEO wrote to the company's employees on the occasion of the acquisition of Woot by Amazon in 2010. The three excerpts rely on a widely known and used argumentative scheme, argumentation by analogy. This means that in attempting to convince someone of the acceptability of an explicit or implicit standpoint (*The acquisition of Woot by Amazon is beneficial to the former's employees*), the speaker advances arguments based on analogy. Out of the 253 words contained in these excerpts, a bit more than 100 words are used for various types of analogies and their expansions. This represents almost 50% of the total of words in the above excerpts and about 10% of the text of the whole letter. These figures may serve as a departing point for the hypothesis that argumentation by analogy is a widely used, perhaps effective rhetorical device in CEOs' letters. However, we are not intending to test this hypothesis here, nor to put another hypothesis to tests.

Our goal is to explore several CEO letters serving as an introduction to various company reports in order to identify the main discursive techniques or rhetorical strategies used to enhance promotion of the company and its products. The topic of this 2014 conference, *Challenges of the Knowledge Society*, and our research interests in organizational discourse issues make us examine more closely how leadership focuses towards "the control of discourse and interaction between business and society" and "the use of relevant business information and knowledge in verifying social responsibility" (Burchell & Cook 2006: 122). We consider that rhetoric and discourse analysis, as well as linguistics, more comprehensively, may shed a new light on the way in which knowledge about doing business is shaped and molded into a social matter.

Starting with the very first initiatives of company reporting, CEOs' letters have been regarded by some researchers as attempts to influence stakeholders and present "a positive personal and corporate image." (Hyland 1998) The significance of the CSR discourse and the interest for its analysis is due to several of its characteristics. According to studies already deployed in this field, CSR may be seen as a method for large companies: 1) to gain "competitive advantage and social capital"; 2) "to develop strong links with the local communities in which they operate"; 3) to alleviate "risk and the threat of damaging publicity"; 4) to identify and manage "relationships with stakeholders beyond the traditional confines of shareholders and employees. (Burchell & Cook 2006: 121-122, also quoting other authors)

The discourse of annual or CSR reports and of CEOs' letters opening them has become an object of study for multidisciplinary approaches to business and organizational communication: "Many authors […] have pointed to the value of analyzing CEO discourse such as disclosures in CEO letters to shareholders." (Brennan & Conroy, 2013: 56). The CEO's letter "is widely seen as a promotional genre", since it advances a (very) positive image about

We are of the opinion that discourse analysis of CEOs' letters to stakeholders from a rhetorical and argumentative perspective reveals a series of rhetorical devices and argumentative techniques which may contribute to a normative perspective. Rhetorical strategies in this context "are the choices a writer makes to achieve particular social purposes." (Hyland 1998, 229) At the same time, they may disclose less 'ethical' discourse maneuvers which are meant to manipulate the reader. Our study contributes to the scientific literature dealing with the rhetoric of these types of texts, and more generally of organizational discourse.

2. CSR Reports and CEOs' Letters

Companies are supposed to publish, during the second term of each year, detailed reports on their activities of the previous year. In the US, annual reports are mandatory, and companies may also issue financial reports, corporate responsibility reports, corporate citizenship reports, etc. (see Table next page). Each company has a different goal in mind when publishing a specific type of report, and the design follows certain regulations (most generally, according to the Global Reporting Initiative, GRI). There is a tendency towards producing CSR or sustainability reports, meant to show companies' commitment to business and society, as well as to global sustainability.

Our interest goes here to CSR reports, no matter the way in which they are called (see Legend of Table 1 for a set of various denominations of CSR or sustainability reports). Among the first 10 top US companies listed in Fortune 500, the only company which does not issue a CSR report is Berkshire-Hathaway. The company issues only an annual report in which Warren E. Buffet (the CEO) addresses the shareholders – not the stakeholders – in a letter about 20 pages long.

The British Petroleum disaster in the Gulf of Mexico in 2010 turned the attention of the public, of governments, and of the media to the damage which can be caused by the oil industry (Breeze 2012, 7). Corporate discourse will consequently become more and more aware of the necessity to influence public opinion by discourses produced on the occasion of press releases, corporate reports, etc. Organizational rhetoric finds in CSR reports a fully fledged object of study which can give way to interesting research in the field and produce valuable insights into normative and practical issues concerned with design of this type of discourse

A CEO letter has been used in the last decade as an introduction to the company Annual Report, the CSR (Corporate Social Responsibility) report or other types of reports that companies publish regularly addressing its stakeholders. This is a practice which has evolved in the US and developed lately as a result of the companies' tendency to comply with the regulations of the Global Reporting Initiative. A CEO letter should convey to the stakeholders a positive confident message, the image of a strong company enhanced by a competent CEO. The picture of the CEO most often accompanies the text of the message. We suggest that the analysis of such a picture from a semiotic perspective may add to the interpretation of the message from a rhetorical perspective.

First 10 companies listed in Fortune 100 top (US)

No	Company	Status of the report	Date of publication* (2013)	Position	CEO Name	App. no of words of CEO's letter
[1]	ExxonMobil	CCR**	May	Chairman & CEO	Rex W. Tillerson	800
[2]	Wal-Mart Stores Inc.	GRR	April	President & CEO	Mike Duke	1500
[3]	Chevron	CRR	May	Chairman of the Board & CEO	John S. Watson	750
[4]	ConocoPhillips	SDR	August	Chairman & CEO	Ryan M. Lance	770
[5]	General Motors	SR***	July	Chairman & CEO	Daniel F. Akerson	800
[6]	General Electric	SGR		Chairman of the Board & CEO	Jeffrey R. Immelt	800
[7]	Berkshire Hathaway	AR		Chairman of the Board	Warren E. Buffet	
[8]	Fannie Mae	PR		President & CEO	Timothy J. Mayopoulos	800
[9]	Ford Motor		June 2012			390
[10]	Hewlett Packard	GCR	April	CEO	Meg Whitman	450

AR = Annual Report; CCR = Corporate Citizenship Report; CRR = Corporate Responsibility Report; GCR = Global Citizenship Report; GRR = Global Responsibility Report; PR = Progress Report; SDR = Sustainable Development Report; SGR = Sustainable Growth Report; SR = Sustainability Report.
* These data are available at: www.corporateregister.com
** Title of the report: *Taking on the world's toughest energy challenges*. This is more like the slogan of the company. It is published on the cover page of the report.
*** Title of the report: *Charging Ahead. When Customers Drive Sustainability*. Idem**.

We identify the CEO's letter as part of a promotion strategy in which an authoritative figure, the head of the company, stands through one's ethos in front of the stakeholders to support, to improve, and to enhance the image of the company and to thus contributes to product mix promotion. We do not assume the CEO is the author of the final text of the 'CEO letter' in a company report. Yet, we strongly believe that the CEO is the main 'moral' author. A 'rhetor', or speechwriter – like Ted Sorensen for J. F. Kennedy –, or communication officer, builds the CEO's attitude and perspective into a most persuasive 'letter to the stakeholders' by using linguistic tools, rhetorical devices, and argumentative techniques converted subsequently into marketing strategies. Thus, the CEO letter represents a promotional tool of the company. This study starts from the idea that *selling a product depends, in some respect, on the discourse evolving around it* and, consequently, studying the discourse of CEO letters might shed some light upon the possible rhetorical strategies adopted.

Over the last years, CEOs' letters have expanded their dimensions to almost a chapter of the company annual or CSR report. This may be also due to the expanding dimension of the report itself – some of them reach 300 pages. This makes it difficult for any stakeholder to read it in full. Thus, the CEO letter has got a new role today, that of synthesizing the most important information in the report, sometimes putting it into a completely new form. Researchers have highlighted the persuasive function of these letters which have "enormous rhetorical importance in building credibility and imparting confidence, convincing investors that the company is pursuing sound and effective strategies." (Hyland 1998, 224)

Among hundreds of CEOs' letters, we have selected only five. They serve as an introduction to the CSR reports of the top five companies in the 2012 Fortune 100. The table below presents information on the subtype of CSR report the CEO letter is part of, as presented by its title, the full position and the name of the CEO, and the number of words the CEO's letter contains. The CEO may also be the chairman or the president of the company, as the data in the above table shows. The companies in the table are listed according to their ranking, with ExxonMobil being on the first place.

3. Organizational discourse and discourse analysis

The object of this study is represented by excerpts of the CEOs' letters referred to above as [1] to [5]. A *rhetorical perspective*, and *discourse analysis* as a method are used. Discourse analysis is used in social sciences to reveal particular functions of words, lexical constructions, intonation, figures of speech, etc. in building the message and its meaning. Discourse analysis always takes into account all data coming from the co-text and the situation in which a message is produced, its goal, the social and historical setting. We are using here only some of the elements proposed by discourse analysis.

When applying discourse analysis to the study of organizational discourse, the discourse analyst should have in mind one important thing: in business many voices would make one voice. The author of a piece of organizational discourse (such as the annual report and the CEO's letter) is a 'corporate' author, represented by a group of communication officers of the company and/or the professionals of a specialized agency outside the company.

Such an author's attitude and perspective depend upon both the company's general policy and strategy, and particular, departmental, local strategies. At the same time, it is obvious that some CEOs would like to project in the text of the opening letter their own personality and would make their 'hubris' (see Brennan & Conroy, 2013) transparent to readers / stakeholders. These are significant aspects in examining the issuing text.

4. Analysis and Discussion

4.1. Creating Presence

We are following in the analysis one of the most important principles of rhetoric: *Creating Presence* (see *The New Rhetoric. A Treatise on Argumentation*, Chaïm Perelman & Lucie Olbrechts-Tyteca, 1958 [1969]). This means that the simple fact of mentioning a notion, making reference to an event or to an entity in discourse directs the attention of the audience to that notion, event or entity. In this way, the other entities become less important and fade out from attention. *Creation of presence* is achieved by carefully selecting the elements presented to the audience. Creation of presence is an important device in argumentation and in persuasive discourse. For instance, advancing commitment in discourse means (for the audience) that the action is almost achieved since there is some intention to do it and since the necessity of its achievement is present – obvious – to the speaker and to the audience as well. When one is saying *I'll be back in half an hour* the hearer accepts the commitment as sincere and well meant, but also accepts, as true, the fact that the speaker will be back in half an hour. Yet, such an utterance has no truth value and it is a mistake to take it as such. However, this is why in election campaigns candidates easily declare themselves committed to a number of actions, and the voters take those engagements for granted.

Thus, mentioning particular notions becomes of crucial importance in persuading the public that the activity of the company is responsible, safe, etc. This may seem common sense and such a simple and handy maneuver that one (the audience) should not even take it into account, in the sense that if someone is saying *This is only the truth* the simple fact of mentioning the notion of *truth* is almost enough to make an addressee believe the utterance and, which is more, also a judge.

This rhetorical technique is used when a CEO declares the company to be committed to "core goals for sustainability: 1) to be supplied 100 percent by renewable energy; 2) to create zero waste; 3) to sell products that sustain people and the environment." [2] What the CEO qualifies as "*core* goals for sustainability" is not part of some theoretical representation in which these core goals are listed. Presenting them as such creates for the audience the belief that these are indeed the core goals for sustainability. The three goals which follow all create presence, and allow the audience to represent the company as being very near to reaching these goals only because they have been mentioned. The figures (*100%* and *zero*) are meant to strengthen this presence. Although the goals are only listed, the company image is not widely affected.

We thus consider that terms referring to notions (concepts, properties, etc.) in a CEO letter have the role of creating presence of those notions in the discourse. Other roles of such terms may be even more important, but they cannot be activated if the term corresponding to a particular notion is not present in the text.

4.2. The auctorial voice in the CEO letter

While the report itself is meant to reflect upon the year's activity, the CEO has got a special place in it. The CEO is an individual, sometimes the only individual, to be introduced

to stakeholders by means of a CSR report. The CEO may thus address the stakeholders dialogically. This means that the rhetoric of the CEO's letter may be rather different from that of the CSR report. It should also be consistent with the rhetoric and the contents of the same CEO's letter opening the annual report, if this is the case.

In most CEO letters, the CEO would be only a kind of spokesman of the company, saying *we* to refer to the company, the board, the staff, the employees, and to oneself. The use of *we* creates at the same time the feeling of power, solidarity, and consistency. This may stand as the usual, neutral rhetorical device by which the CEO points to the company as a whole and as an actor animated by clear, transparent goals. This is quite the rule in most CEO letters: "*We* look forward to continually improving our performance and contributing to innovation and growth in the decades to come." [1]; "*We* work hard every day at Walmart to be more responsible…" [2]; "Fundamental to everything *we* do is a constant focus on…" [3].

Addressing the stakeholders dialogically means that the CEO may refer to oneself by saying *I* and address directly the stakeholders by saying *you.* This is the case of CEO Daniel F. Akerson (General Motors): "I am very pleased to report that…"; "As you will read in this report…"; "You can see sustainability in action…"; "we hope you'll let us know what you think by leaving us feedback" [5]. It is perhaps important that CEO Daniel F. Akerson has a long and very fruitful experience in leadership positions in many other companies and businesses. He may thus give up temporarily the more common *we* to highlight his own personality. At the same time, this technique slightly detaches the image of the individual from the image of the company as a whole, but the merits of the latter are nevertheless the more stressed upon. In fact, by saying *I* in *I am very pleased* the CEO does not play upon his authority, but upon his inner feelings. He can also more easily address the stakeholders by *you*, placing himself in an equality relationship with them and identifying them as individuals: *you* means "all of you", each singular *you*. We are of the opinion that the use of *I* presents the CEO not only as an individual, but also as the leader of the company. In a large measure, being part of the company's leadership, the CEO will also refer to the company even when speaking in his personal name and pointing to oneself as *I*. This is the case with Mike Duke: "*I* pledged that we would broaden and accelerate our commitment […], *I* pledge that we'll continue…" [2]. Wal-Mart Store's CEO stands here for himself and for the company at the same time – he is committed as a CEO and also guarantees from his position the commitment of the company to sustainable growth.

We consider as acceptable the idea that delivering the image of a CEO with a powerful ethos to the stakeholders is meant to enhance the image of the company and the sales of the products. There still remains to explain in a more detailed way what a CEO's "powerful ethos" consists in.

The author's voice diminishes when the name of the company is used instead of *we* or *I*: "*ExxonMobil* is focused on the long term" [1]; "*Walmart U.S.* crossed a significant threshold" [2]; "*Chevron*'s 58,000 employees around the world" [3]; "For *ConocoPhillips*, sustainable development is…" [4]; "…*GM* has a role to play" [5]. This practice is less visible in CEOs' letters, as it is in the CSR report itself. It is probably not favored because repetition of the name of the company burdens the text, while use of *we* is more economical and rhetorically effective. Further investigation should indicate at which points in discourse the name of the company is mentioned, when a CEO or the author of the CSR report find it adequate to replace *we* by the company name. A 'combined device' is also used to refer to the company, its form being *we at {CompanyName}*. This is also a type of designation worth studying in subsequent research.

The CEO may also use at the same time all the possibilities identified above to refer to the company, as in the following excerpt introducing the letter: "*I* am very pleased to report that in 2012 *General Motors* created significant long-term value for *our* customers and

stockholders through the award-winning products *we* build, *our* strong business results, leadership on environmental issues and meaningful interaction with the communities in which *we* operate." [5] The three manners of pointing to the company result in an enhancement of the rhetorical effect of the whole.

4.3. Rhetorical Devices

4.3.1. Types of Public Referred to in the CEO's letter

The CSR report and the CEO's letter opening it address the very large group of stakeholders, but only some of them are mentioned explicitly by the CEO letter. Again, mentioning these categories of stakeholders creates presence. When such information is released to the press, there are chances that members of each category get in touch with this information: indirectly, the mention of each category here plays the role of an emotional appeal. This is how persuasion plays: *The CEO mentioned in his letter the category I belong to, so this company treats me well*, or rather, *The company are fully aware of me as an individual since they mentioned the category I belong to*. In some cases only the place some categories live in is mentioned (in what follows, all italics are ours): the employees [1], the shareholders [1], the communities [1], the local communities [1], *growing populations and economies* [1], *countries where we work* [1].

4.3.2. Characterization of the company, of its actions and activities

The CEOs explicitly refer in their letters to the way in which the activity of the company is being deployed. They carefully select notions or concepts which better characterize this activity, as well as keywords and expressions that characterizes the whole company. This is a most useful and widely used technique of creating presence and this also makes up a canvas serving as a background for the company's image: operate *safely* and *responsibly* [1], culture of *safety* [1], *citizenship* [1], operational *performance* [1], in a *safe, secure* and *environmentally responsible* manner [1], becoming a more *sustainable, responsible* company [2], building *meaningful, long-term change* [2], to set *ambitious goals* [2].

4.3.3. Reference to compartments of the company's activity or systems underlying it

A CEO may mention the most performing or 'delicate' sectors of activity of the company: planning [1], management [1], accountability [1], Operational Excellence Management System [3]. Speaking about them to the stakeholders is of great importance for the leadership of companies dealing with production of energy (ExxonMobil, Chevron).

4.3.4. Pointing to qualities of the staff and other categories of collaborators

The CEO legitimizes the activity of the company by pointing to the professionalism of the staff: expertise [1], diligence [1], integrity [1], attention to detail [1], concern for the local communities [1], efforts [1], commitment to continuous improvement [1]. The categories of 'experts' CEOs point to in their letters are: (thousands of) employees around the world [1], (thousands of) contractors around the world [1].

The significant number of individuals (*thousands*) thus associated to the activity of the company also serves as an element for enhancing presence and providing a consistent image of the company to the stakeholders.

4.3.5. Pointing to the role of the company in the development of society

The CEO appeals to the argumentative scheme based on a cause-effect relationship. In the case of ExxonMobil, the need for energy is seen as a consequence of the social necessity of development and progress. On the other hand, the "complex challenges related to a growing world population, economic growth, climate change, food security and public health" [1] lead inevitably to a permanent use of energy. This cause-to-consequence connection is nevertheless not directly pointed to. The CEO shifts the public's attention from the company to the other great stakeholders in the solution of world energy issues: "Most of these issues can only be tackled through effective dialogue and cooperative action between governments, business and civil society." [1] In other words, the CEO is not saying *you will always need us*, but something like: we are willing to negotiate solutions, to be involved in the important decisions of the day. There follows a rather 'unethical' truth: "We must recognize that none of the challenges we face can be addressed without reliable and affordable access to energy". The CEO announces the power position the company has, but introduces this truth gradually by the following rhetorical devices, all meant to avoid a brutal affirmation of the reality *Modern society cannot do without energy*:

- a phrase which does not communicate any particular meaning and serves only as an attention shifter and an attenuator, *we must recognize that ...* ;
- a pseudo-metonymy, by pointing to the way to get something, *(without…) access to energy*, instead of naming it directly, *without energy*;
- endowing a neuter term, *access*, with positive force, by adjoining to it positive determiners, *reliable and affordable access*, while *reliable* and *affordable* are to be read as properties depending on the company;
- omission of any explicit reference to the company, except by the term *energy*, placed on the least visible place in the sentence and modified by all the linguistic elements mentioned above. [1]

Moreover, in association with the previous sentence, there may be one more implicit meaning in the excerpt: *reliable and affordable access to energy* depends on the "…effective dialogue and cooperative action between governments, business and civil society" [1], that is government should support such an access by social programs, and so does civil society by paying particular taxes and fees.

4.3.6. Enhancing the position of the company by pointing to social actors

The CEO's message refers to other actors on the social stage "(effective dialogue and cooperative action between) governments, business and civil society" [1], and although there is no direct reference to the company itself, the company is referred to implicitly since it is part of the business sector. This association of terms allows the CEO to point to the equality in status, on the one of the government, the actors of civil society, and the company itself, thus placed in a favorable position.

4.3.7. Use of emotionally endowed terms

The appeal to the audience through *pathos* is achieved by the use of various terms endowed with emotional meaning. This creates presence of a feeling of safety and tranquility owing to the company involvement, although no explicit reference is made to it:
"Energy powers our *offices* and *schools*. It runs *life-saving medical equipment* and *operating rooms*. It manufactures *vaccines* and transports *medical personnel*." [1];
"he*althier, affordable food* and *women's global economic empowerment*." [2]

Thus, public health, children [1], women [2], everyday life [1; 2] are indirectly referred to and their presence, in combination with promises, engagements of the company, public announcements of commitment, contribute to creating a positive image of the company.

4.3.8. Argument from authority or appeal to authority

Referring to one individual's words (by quoting or evoking them) or to one's facts may function as a good justification for the company's activities and actions if that individual has some positive notoriety. This is the case when, for instance, the founder of the company's words are recalled: "as *Sam Walton* often told us, 'swim upstream.'" [2] or when a prominent public figure is associated to the actions of the company, thus legitimizing the action: "we stood with U.S. first lady Michelle Obama and launched a major initiative…" [2]

4.3.9. Metadiscourse in CEO letters

Metadiscourse is discourse about discourse, whose role is to direct the reader (Crismore 1983, 2) or to provide the addressee with information about discourse. There are various types of metadiscourse. Hyland (1998) looks at the role of metadiscourse in CEOs' letters and shows that it "helps CEOs to engage their audience, signal propositional relationships, apprise readers of varying certainty, and guide their understanding of the information presented" thus accomplishing "persuasive objectives by contributing to […] rational, credible, and affective appeals… (Hyland 1998, 230).

The CEO may synthesize the content of the CSR report to allow the stakeholders to direct their attention to particular aspects which represent the nucleus for the company. By placing a metadiscourse section at the very beginning of the message, the CEO creates the audience's expectation with respect to the report instead of simply attempting to comply with it: "It details our progress against specific goals, the wide range of issues we're engaged on and strengthens our commitment to transparency." [2] It may also play the role of a *captatio benevolentiae* by announcing some interesting or less predictable issue: "You will also learn about two new initiatives we launched in 2011: healthier, affordable food and women's global economic empowerment." [2]

4.3.10. Shifting from the past / present to the future

Company reports are usually drawn up in the first three to five months of the following year. CEOs' letters may be thought to be devised and composed at any moment before the report goes to press. This allows some CEOs to speak about the previous year in connection with the activity the company has undertaken during the first months of the year following the reported year of activity.

The CEO's message goes sometimes beyond the limits of the time interval referred to by the report itself. The CEO may stress upon any profitable development of the company and dwell less on unfavorable events which affected the company image after the year elapsed. This is the case of the ExxonMobil CEO letter, which mentions an unhappy event in the life of the company: "a crude oil spill in Mayflower, Arkansas", which took place in early 2013, and not in 2012, for which the report is being written. The reference to this / a regrettable event which is not in the 'official' span of time is achieving several persuasive objectives by the following rhetorical strategies: appeal to *pathos*, by showing regret – "a regrettable event", "we are deeply sorry"; appeal to *ethos*, by admitting that the company has made some mistake, openly acknowledged it, and assumed responsibility for it – "We responded immediately with a focus on community safety"; appeal to *logos*, by detailing upon the safety measures and systems operated by the company – "…our goal is to manage risk to avoid incidents such as these. (…) we have the competency and the capability to respond and a process to integrate lessons learned into future operations…" [1] This kind of appeal to logos is also meant to reinforce the appeals to pathos (positive emotional reactions resulting from

assurance of the community owing to adequate risk management) and ethos (an ethical attitude)

The CEO lays stress on the evolution of the company with respect to CSR / sustainability by pointing to the fact that the company is changing: "*becoming* a more sustainable, responsible company and *building* meaningful, long-term change" [2]. Even when speaking about *efforts* and *commitment to continuous improvement* [1], the temporal reference is to an interval open to the future.

5. Conclusions, Limitations, Implications

The analysis presented in this article is part of a much more extended study about business reporting. The attention is mainly directed towards CSR reports and CEOs' letters or messages to the stakeholders. These are not designed to live only between the pages of a report, but also to be released to the press on particular occasions. These two types of discourse reveal a particular rhetoric for the unveiling of which many studies have been published so far. Our research is empirical at this time. It has been concerned with a very small amount of textual material since the main purpose has been so far to look very closely at each linguistic element in CEO discourse so as to identify moves instrumental in building persuasion with various types of audiences. Our research is at this moment empirical. The observations and remarks we could make trace an itinerary for future enquiry and selection of CEOs' letters. In this study we pointed to the necessity to identify small discourse elements which do not always come under the form of a word, term or phrase, yet are part of the constructed complex meaning of each piece of discourse. The analysis we have practiced so far validates the need to study metadiscourse (Hyland 1998) in organizational discourse for the force metadiscourse has to put pressure on the audience. The relationship between use of the solidarity pronoun *we* and the other elements pointing to the company, its people, its leadership is complex and requires a lot more discourse excerpts to be analyzed; the analysis should reveal which combination is more adequate in various circumstances, and especially to enhance ethos of the leader and even of the company. The elements we have identified serve as examples in a much broader and longer journey termed by Conrad (2011) *Creating Topoi for Organizational Rhetoric*. Such *topoi* are meant to legitimize the company and the leader. Among them are the following, to be studied in other pieces of discourse: reference to various categories of public, to the qualities of the company and its staff, to particular events in the remote or very near past, to well-known personalities (and their words). To these add many more, to be unfolded in further research.

References

- Berg, Marhaba von. 2013. *CEO letters in CSR reports: oil companies in focus*. Master's thesis. Department of Communication, School of Business, Aalto University.
- Bhatia VK (2008) Genre analysis, ESP and professional practice. English for Specific Purposes 27(2): 161–174.
- Breeze, Ruth. 2012. "Legitimation in corporate discourse: Oil corporations after Deepwater Horizon." In *Discourse & Society* 23(1): 3-18.
- Brennan, Niamh & John Conroy. 2013. "Bank CEOs, Executive Hubris and the Financial Crisis." *Accountancy Ireland*, June, vol. 45, no 3: 56-58.
- Brown, Gillian, George Yule. 1983. *Discourse Analysis*. Cambridge: Cambridge University Press.
- Burchell, Jon & Joanne Cook. 2006. "Confronting the 'corporate citizen'. Shaping the discourse of corporate social responsibility." *International Journal of Sociology and Social Policy*, Vol. 26 No. 3/4: 121-137.
- Conrad, Charles. 2011. *Organizational Rhetoric*. Cambridge: Polity Press.
- Crismore, Avon. 1983. *Metadiscourse: What It Is And How It Is Used in School and Non-School Social Science Texts*. Technical Report No. 273. Cambridge, MA: Bolt Beranek & Newman Inc., The National Institute of Education / University of Illinois at Urbana-Champaign.

- Gâţă, Anca, Michael Stoica. 2013. "Rhetorical Strategies in Corporate Social Responsibility Reports." Paper presented at the Macrotheme BSS Conference, Paris, December 20-21.
- Gâţă, Anca, Michael Stoica, Michaela Praisler. 2013. "A Discourse Analysis Approach of Corporate Social Responsibility Reports". Paper presented at the International Organization of Social Sciences and Behavioral Research Fall Conference, Las Vegas, NV, October 7-8.
- Goodwin, Eugenie, ed. 2013. *Proceedings of the Association for Small Business and Entrepreneurship 39th Annual Conference*, New Orleans, LA, October 2-4, 2013. New Orleans: University of Louisiana at Monroe.
- Hyland, Ken. 1998. "Exploring corporate rhetoric: metadiscourse in the CEO's letter." *Journal of Business Communication*, 35 (2): 224-245.
- Lydenberg, Steve & David Wood. 2010. *How to Read a Corporate Social Responsibility Report. A user's guide*. Boston: Boston College Carroll School of Management, Center for Corporate Citizenship.

A NEW MANAGERIAL TOOL FOR SCENARIOS IN SCHEDULING

**George Cristian GRUIA*
Michal KAVAN****

Abstract

The purpose of this paper is to introduce a newly developed managerial tool, Quality Scheduling Index (QSI), which can be used at the improvement of quality and time consumption within not only manufacturing companies. The authors present this tool as a result of the actual market conditions of finding a way for managing and controlling the usage of time, quality of work and the costs associated with these two factors. The paper is focused on the area of Management of Production and Operations with the main goal of developing the area of scheduling research and main purpose of increasing the productivity of a manufacturing enterprise by using at maximum the available resources, without any additional costs or investments. A survey is realized regarding the market requirements and partial empirical results of the authors' researches are presented, with conclusions being drawn for future studies. A scenario mainframe is also developed and a relation between QSI and scenarios is presented. The paper represents partial results of the grant projects GAČR P403/12/1950 and SGS13/191/OHK2/3T/12.

Keywords: *quality, scenarios, scheduling, index, process*

1. Introduction

Scenarios can be used in management in order for the company to learn and be prepared to answer the possible questions regarding the development of the business environment and the corresponding strategies. Managers should come together and decide about the next step in the company's future on the market. Scenarios are part of the selecting process of the right strategy for the required segment of the market and in nowadays market time usage and quality improvement can be considered strategic for the survival of the company.

Innovation is part of the company's business model and each company should decide which innovation portfolio to adopt according to the competitive environment. As Davila considers in his book[1], we too consider that the right amount of innovation at the right time, can differentiate winners from losers of the market and of the customers. He considers that there are two types of strategies (Play To Win Strategy and Play Not To Lose Strategy), which companies must consider on a long term to achieve their goals. In the same sense Gruia[2], considers that the innovation and development of the public sector are also important in the good development of the state, and thus the area of applicability of our research can be broaden in the private as well as in the public sector. We consider that the productivity of

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[1] Davila, T., Epstein, M., Shelton, R.: *Making Innovation Work: How to Manage It, Measure It, and Profit from It*, Updated Edition, FT Press, 2012, New Jersey, ISBN: 978-0-13-309258-5.
[2] Gruia, George, *Politici publice*, Ed. Sitech, Craiova, 2014, p.186, ISBN 978-606-11-3764-0.

work can be increased by combining the quality of work, time consumption and appropriate sequencing rules.

Gruia[3] shows that the Just-In-Time delivering of the jobs from one working area to another, within a manufacturing company are in direct relation with the resources' utilization, but also with the Greedy approach of designing the production lines in order to minimize the total cost of the work load, according to the costs of the possible locations of the workplaces[4].

The present paper aims to present a way for solving two main problems, i.e. quality control and time management within the companies, with only one managerial tool and to show how this new developed tool, can affect the decisions and strategies taken by the top management within the public, as well as private sector. The research for our paper is focused on the field of quality management and operational management (specifically the scheduling of manufacturing operations on the production lines).

In order to find the latest studies regarding Scheduling operations in a manufacturing company, a research was made with the help of online scientific databases. Based on the initial research of scientific papers, books as well as by developing a new questionnaire, the market was tested and it was discovered that one of the main problems which affects the productivity of work in manufacturing processes, is the *quality of time consumption in scheduling manufacturing process*. The survey was taken by scheduling professionals, online with the help of the website SurveyMonkey and Linkedin, where the link to the survey was posted online on scheduling groups, which are visited and read every day by professionals and quality and scheduler practitioners. The questions were designed in such a way so that it was obtained as much information as possible from apparently simple questions (the bias of the questions were minimised). Based on this survey, it was discovered that there is a need in the market of a *way of managing the time usage and quality of workforce together*, as well as the important role the customers' perception plays in the establishment of the management of the utility value and accordingly of the quality of the products.

By analysing the results of this survey, we have found that a number of more than 88% of the managers are willing to manage the quality of the work and the time used on the production line, *with the help of only one tool*, which we have developed as part of one authors' doctorate thesis and which we will further present.

Thus the present paper presents a new solution, i.e. *Quality Scheduling Index*, to the market requirements regarding quality and scheduling management and ways of improvement which can be further used in the scenarios done by the managers and implemented in their long-term strategies.

2. Quality Scheduling Index and its role in scenarios development

Managers in manufacturing companies are facing every day with questions like:

1. "How can we deliver the goods requested by the market at the desired level of quality?" AND
2. "How can we deliver our products at the right moment (Just-In-Time)?"

These questions are part of our Research Questions and are the basis for the newly developed Quality Scheduling Index, which can be implemented in different scenarios to help them decide which strategy to adopt on the desired market.

[3] Gruia, C. George and Kavan, Michal: „An off-line Dual Maximum Resource Bin Packing Model for solving the maintenance problem in the aviation industry", Paper presented at the conference The 7th International Conference "Challenges of the Knowledge Society" Bucharest, 17.-18. May 2013, Romania, CKS – ebook, ISSN 2068-7796.

[4] Gruia, C. George and Kavan, Michal: „A Greedy Czech Manufacturing Case", Paper presented at the conference ICMSEM 2013: International Conference on Manufacturing Systems Engineering and Management, Toronto, 20.-21 June 2013, Canada, [online], World Academy of Science Engineering and Technology, vol.78:2000-2007, e-ISSN 2010-3778.

Based one of the author's research as part of his Ph.D. thesis, we can consider different scenarios based on different values of the QSI. The main goal of the index is, based on the input data, to find the best value for obtaining maximum value for the requested quality level by the customers, with minimum production costs and time usage.

The level of quality is settled according to the utility level, different customers consider for the desired products. In collaboration with the marketing and CRM/CI departments, companies should find the needs and the problems of the customers and develop strategies based on different scenarios, which in turn are based on the computational values of the Quality Scheduling Index, for different levels of quality desired by different customer segments from different markets.

Van der Heijden, states in his book[5], that the language of the scenarios is about the future of the company, but it should differentiate how a company should act in the present. And with the help of the Quality Scheduling Index, different scenarios can be stated and some strategic decisions can be taken accordingly. The usage of the index is for the area in time when the level of uncertainty is bigger and the level of predictability is lower than in the area of planning based on forecasting, i.e. the area of planning based on scenarios for the development of new business strategies. This can be better seen from the figure below.

Companies should use time and quality of time consumption in planning and deciding next steps for maintaining the same or better level on the market. With the help of the Quality Scheduling Index, one can improve the productivity of work within company and thus can produce better and faster outputs with the same inputs (resources, financial and non-financial).

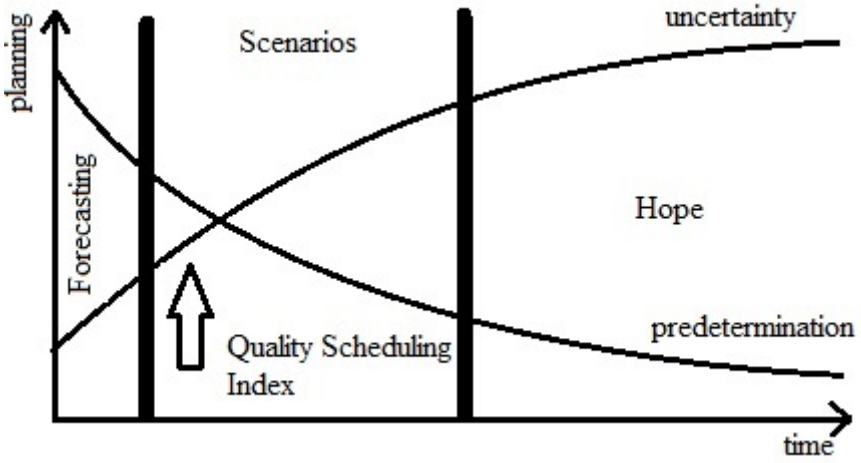

Fig. 1 – Position of QSI in planning using scenarios

Source: Own contribution, based on figure "Balance between uncertainty and predetermination" adapted from Van der Heijden[6]

We all know that productivity is the ratio between output and input,

$$productivity = \frac{output}{input}$$

and if we know that the input is according to the standards (for e.g. the raw material is delivered in time, at the required quality standard imposed by us, the company, the people are trained and chosen by the HR department to work within our company according to our needs

[5] Van der Heijden, Kees: *Scenarios: The Art of Strategic Conversation*, John Wiley & Sons, New York, 2005, ISBN 0-470-0236943.
[6] Ibidem 5.

and financial resources and our equipment is advanced enough to perform well our manufacturing operations), the only way to improve the productivity of the company and our work is to increase our output to the market. By output, we understand either a bigger number of products (but which must comply with quality standards) or the same amount of products, but with better quality. In the second case, the quality of the products is improved, thus the company reduces its time (and accordingly its costs) dealing with service, rework or maintenance of our products, when they broke. Also customers will recommend our qualitative products to their acquaintances and relatives and our market share will raise, qualitative products being one of our competitive advantages and thus part of the company's strategy.

If we consider either two cases, we can increase the output of the company by organizing the resources on the production line to produce faster and better products, without any additional costs. That is why here we present the newly developed Quality Scheduling Index which can improve the output of the company and in this way the management can use it as managerial tool to improve the productivity within the company and plan on larger time interval, than the one, where forecasting is used, in order to expand on other markets, destroy the actual competition and faster innovate the products in a radical way, rather than semi-radical one.

A manufacturing company can thus better implement a radical innovation in either the technology or in the business model, or in both actually, by reducing the risk involved with this kind of innovation, because, now, after implementing the QSI on the production line, the time usage of the workers is without any "dead" time, the company doesn't lose money from this, nor uses additional resources than the ones which are absolutely needed for the production process and can relocate these resources in the R&D department for the next generation of products.

However, without strong leadership and vision from the top management, the innovation is not likely to be achieved and implemented in the company's culture. The difference between the two possible types of strategy is given by internal as well as external factors of the company. Between the internal factors, we can recall:

- Technical possibilities
- Organizational abilities
- Success of the actual business model
- Finances
- Vision of the company

And we can add to the internal factors, which drive innovation through the company, also:

- Innovation culture and willingness to improve the process without any financial drive incentives---and this factor can be easily solved with the help of the QSI.

Every manager wants to develop its products with the minimum production costs, at the highest quality and in the fastest way possible, so that he can take the lead in the market with the innovation of the product. That is why we have developed the following mathematical index:

$$\text{QSI} = \frac{\sum_{i=1}^{h}\sum_{k=1}^{f}(ew_{ki}E_{ki}y_{ik} + tw_{ki}T_{ki}z_{ik} + w_{ki}C_i)}{\sum_{i=1}^{h}\sum_{k=1}^{f}\frac{q_i}{tc_i * (E_{ki} + T_{ki} + C_i)}} = min$$

which can be useful for minimum values.

We can state that this index has the following important roles in a manufacturing company:

1. Considers especially the processes which have delays and those which are made in advance than their planned schedule, making the management to consider these delays and advances from a financial point of view;
2. Considers quality not only from the ISO norms' point of view, but also from their customer's segment point of view which they want to target with their products, by trying to develop an equation for the level of quality based on the utility values and which processes add this value on specific working places on the production line;
3. It evaluates the time consumption with regard to the quality level and production costs and helps improving the production processes, by increasing the work productivity;
4. Has a positive influence on long term planning within the company based on different scenarios, where can act as a good managerial tool and can answer to questions like:
   Are we well prepared and do we manage our actual processes good enough to make the next step and implement a radical innovation in our business model and/or technology?

   What will happen if we increase the quality of the products?

   How can we increase the quality of products and faster deliver our products on the market?

   How will influence our manufacturing costs the increase in quality? and

   Where should we act on the production line to increase quality, reduce production time and costs related to time consumption?

5. Can be used as a motivational tool for employees, for managing processes in such a way so that the needed quality level to be obtained, together with the corresponding costs and time, so that together to reach the previously computed Quality Scheduling Index, by the management. In this consideration QSI can be used as a Key Performance Index for the quality of the work of each worker and can have impact on the salary if the worker has reached his previously settled target or not.
6. Can reduce the risk of failure, of the company which can rise from the possible scheduling scenarios related to the semi-radical innovations in business model or technology. By analyzing the processes where the quality can be increased and by taking necessary steps in increasing it, the risk of failure at the operational level is reduced, because as part of the implementation, the management should redesign the production process according to the greedy algorithm and increase of the resource utilization. The index can considered as an effective tool for evaluation of the effects of scheduled changes to the design and operational procedures, as function of quality, time and total costs.

The index can be also used as part of the top management's vision of innovation the business model, by adding value to the produced final products, by increasing the quality and reducing the time spent with their production. Here by "reducing time", I consider reducing of the unnecessary time spent of the product on the production lines, reducing or even elimination of the waiting / dead time of the products from their technological processes and manipulation.

Whatever part of the innovation process we want to improve (business model or the technology), we should also increase productivity of the processes, by reducing the time spent with them and correspondingly the costs, and increasing the quality of the processes and of the products.

The success of the actual business model, as one of the internal factors which influence the choosing of the right innovation strategy, can be analysed from the productivity point of view. Managers must look at the processes and based on different scenarios, made from the data from the customers and suppliers, i.e. data from CRM and CI, should improve the time spent in the factory with the production of their goods, but without reconsidering the quality level required by the standards on one hand (ISO 9001, 14 000, 18 000, etc.) and also by the customers, on the other hand.

We consider that a manufacturing small or middle size company can develop its innovation strategy based on scheduling the internal processes in a productive way.

In other words the following main *scenario mainframe* should be maintained when dealing with a new scenario, as part of the future strategy:

1. Arrange the working areas with the corresponding tools in a "greedy" manner so that each worker can be accounted responsible for his work, if any fault will appear.
2. Prioritize the work according to the available resources and the main skills of the workers so that the time and quality can be maintained within standards.
3. Consider and arrange the machines in a parallel way in order to increase productivity and schedule the manufacturing operations with a focus on quality, time and their corresponding costs.
4. Deliver goods to the market and receive feedback from both the customers and workers in order to improve the process.
5. Adjust the short term and long term strategy of the company, based on the feedback and obtain approval from the stakeholders, with regard to the fulfilment of their needs.

If we look at the first three points of the above mentioned mainframe, we see that we should analyse three different problems in terms of improving the productivity of the company. However in order to create a scenario, all these different views are needed. One view cannot be good enough to create a scenario as part of a long term strategy. That is why scenarios are very difficult to create and implement in a company, i.e. because when we talk about scenarios we should consider different points of view of the same problem in order for managers to come to a single generally accepted idea.

The scenario should take in consideration the companies outside environment as well as the internal one, which is responsible for production and shipment of the goods.

This tool, QSI, can be used for adjusting scenarios made after the external environment has been known. We focus on improving the strategy, by managing the internal processes of the company in a productive time manner.

With the help of Design Of Experiments, based on the input data from the company and feedback from the customers, according to the quality level of the products, we can simulate different scenarios with outputs, which can be used to answer the market conditions and which can be further implemented in the long term strategy of the company. Thus using data from the manufacturing process, in connection with the customers' utility value for our products, we can run different experiments, from which we can draw different conclusions, take specific actions and learn how and where to improve the production processes, in order for the production to be in the Just-In-Time manner.

3. Design of Experiments for QSI

We are interested in the effect of different scheduling scenarios, from the implementation of the Quality Scheduling Index, on the utilization of the available resources. In this manner we want to test the robustness of the newly developed index.

As Gruia has proven[7], by using a 2^4 factorial design he has showed that the quality function which he considered was viable and applicable in a simple logistical problem as well as into a more complex scheduling problem, as is the case of this research.

We want to see if the model is robust enough to sustain manufacturing of products so that the manufacturing process and its quality will not be affected by the variability transmitted by the components of the system, like priority of the job (A), capacity utilization of the available resources (B), processing time (C) and preparation time for the next operation (D).

Based on the 2^4 factorial design, from the previous studies, we assume that the processing time of the job, denoted by C, is difficult to control in a real situation where jobs are formed of more than one operation and the technological process should be smooth without any delays or works in advance of the schedule, but it can be controlled in the pilot scale experiment, which we have performed. The other factors A, B, D are on the other hand easy to control in a real situation based on the technological requirements.

Thus the noise factor (or the uncontrollable variable which cause variability in the quality of the job formed of more than one operation) is factor C, the processing time, which we denote by p_1, while the controllable variables we denote with $c_1, c_2\ and\ c_3$ for priority of the job (A), utilization of the available resources (B) and respectively preparation time for the next operation (D).

According to Montgomery[8] a general representation of the regression model of Gruia's 16-factorial experiment can be written as:

$$y = \beta_0 + \beta_1 x_1 + \beta_2 x_2 + \beta_3 x_3 + \beta_4 x_4 + \beta_{12} x_1 x_2 + \beta_{13} x_1 x_3 + \beta_{14} x_1 x_4 + \beta_{23} x_2 x_3 + \beta_{24} x_2 x_4 + \beta_{34} x_3 x_4$$

According to table 1, the both the controllable factors and noise factors are in the same 2^4 factorial design and we can apply the combined array design in order to investigate the effect of these factors on the quality of the work from the production process.

The general response model of control and noise variable has the following general form:

$$\widehat{y(c,n)} = f(c) + g(c,n) + e$$

where function $f(c)$ is function of the controllable variables c and the function $g(c,n)$ considers the interactions of the noise variables n and the interactions between the noise and controllable variables.

If we assume that the noise variables have the mean zero, variances $\sigma_{n_i}^2$ and zero covariance and if the errors e have zero covariance, then the mean model for the response of the factors affecting the product is[9]:

$$E_n[y(c,n)] = f(c) \quad (1)$$

And the variance model for the response will be accordingly:

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[7] Gruia, C. George: „Experiments for identical parallel machine scheduling with bee algorithm", Paper presented at the Conference STČ 2013, Prague: CTU, Faculty of Mechanical Engineering, 2013, vol. 1, ISBN 978-80-01-04796-5.

[8] Montgomery, C.D.: *Design and Analysis of Experiments*, 6th edition, John Wiley & Sons Inc., New Jersey, 2005, ISBN 0-471-48735-X.

[9] Ibidem 8.

$$V_n[y(c,n)] = \sum_{i=1}^{j} (\frac{\partial y(c,n)}{\partial n_i})^2 \sigma_{n_i}^2 + \sigma^2 \quad (2)$$

Using the results from table 2, the response model will be considered for noise factor processing time of the job (C) and controllable variables c_2 *and* c_3, the utilization of the available resources (B) and respectively preparation time for the next operation (D):

Run Number	Factor				Run label	Quality qi
	A	B	C	D		
1	-	-	-	-	(1)	1,030507545
2	+	-	-	-	a	1,007462277
3	-	+	-	-	b	12,74211248
4	+	+	-	-	ab	2,289437586
5	-	-	+	-	c	1,000001207
6	+	-	+	-	ac	1,000000302
7	-	+	+	-	bc	1,000120665
8	+	+	+	-	abc	1,000030163
9	-	-	-	+	d	1,000003981
10	+	-	-	+	ad	1,000000995
11	-	+	-	+	bd	1,000398264
12	+	+	-	+	abd	1,000099536
13	-	-	+	+	cd	1,000000926
14	+	-	+	+	acd	1,000000231
15	-	+	+	+	bcd	1,000092601
16	+	+	+	+	abcd	1,000023149

Tab. 1 – The quality of i-th bee experiment

Source: own contribution

$$\widehat{y(c,p_1)} = 1{,}81689 - \left(\frac{0{,}46762}{2}\right)p_1 + \left(\frac{0{,}458428}{2}\right)c_2 - \left(\frac{0{,}46753}{2}\right)c_3 - \left(\frac{0{,}45836}{2}\right)c_2p_1 + \left(\frac{0{,}467525}{2}\right)c_3p_1$$

$$\widehat{y(c,p_1)} = 1{,}81689 - 0{,}23381p_1 + 0{,}229214c_2 - 0{,}233765c_3 - 0{,}22918c_2p_1 + 0{,}23376c_3p_1$$

Using equations (1) and (2) we can compute the mean and variance of the model as:

$$E_n[y(c,p_1)] = 1{,}81689 + 0{,}229214c_2 - 0{,}233765c_3$$

$$V_n[y(c,p_1)] = \sigma_{p_1}^2(-0{,}23381 - 0{,}22918c_2 + 0{,}23376c_3)^2 + \sigma^2 \quad (3)$$

We will further assume for the simplification of the computation, that the noise variable, which in our case is the processing time of the job formed of more than one operation (C), has the highest and lowest values deviated with one standard either sides of the average value so that we can use in our computations:

$$\sigma_{p_1}^2 = 1 \quad (4)$$

Model term	Effect estimate	Sum of squares	Percent contribution
A	-0,28061	0,314976	3,726%
B	0,458428	0,840625	9,944%
C	-0,46762	0,87468	10,347%
D	-0,46753	0,874353	10,343%
AB	-0,27506	0,302625	3,580%
AC	0,280573	0,314885	3,725%
AD	0,280521	0,314767	3,723%
BC	-0,45836	0,840383	9,941%
BD	-0,45828	0,840068	9,937%
CD	0,467525	0,87432	10,342%
ABC	0,275017	0,302538	3,579%
ABD	0,274966	0,302424	3,577%
ACD	-0,28052	0,314755	3,723%
BCD	0,458267	0,840036	9,937%
ABCD	-0,27496	0,302413	3,577%

Tab. 2 – Factor effect estimates and sums of squares for our 2^4 design

Source: own contribution

And the residual mean square obtained from the response model, i.e. the model which incorporates the controllable as well as the noise variables, as seen from the table below, will be:

$$\widehat{\sigma^2} = 0{,}414948675 \quad (5)$$

Source of variation	**Sum of Squares**	**Degrees of freedom**	**Mean square**	F_0	**P-value**
C	0,87468	1	0,874680465	2,107924466	0,094384595
B	0,840625	1	0,840624562	2,025851901	0,100053566
D	0,874353	1	0,874352892	2,107135036	0,09443713
BC	0,840383	1	0,840382633	2,025268865	0,100095385
CD	0,87432	1	0,87431977	2,107055214	0,094442444
Error	4,149487	10	0,414948675		
Total	8,453847	15			

Tab.3 – Analysis of Variance for the pilot experiment with factors C, B and D

Source: own contribution

If we analyse the values of the F_0, F-statistic, which is calculated by taking the mean square for the variable divided by the mean square of the error, it represents a ratio of the variability between groups compared to the variability within the groups. If this ratio is large enough, then the p-value is small producing a statistically significant result (i.e. rejection of the null hypothesis). The acceptation of the null hypothesis means that all the group population means are equal versus the alternative, i.e. rejection of the null hypothesis, that at least one is not equal.

The p-value is the probability of being greater than the F-statistic or simply the area to the right of the F-statistic, with the corresponding degrees of freedom for the group (which is equal to 1) and error (total sample size minus the number of group levels, or here 15 – 5 = 10). The F-distribution is skewed to the right (i.e. positively skewed) so there is no symmetrical relationship such as those found with the Z or t distributions. This p-value is used to test the null hypothesis that all the group population means are equal versus the alternative that at least one is not equal. The F-statistic will always be at least 0, meaning the F-statistic is always nonnegative.

In our case for values of "p-value" less than 0,0500, it indicates that the model terms are significant. But if we analyse the results there are no significant model terms and values greater than 0.1000 indicate the model terms are not significant.

For example F_0 of 2,107924466 implies that the model is not significant relative to the noise and there is a 9,43% probability that a value of F_0 this large could appear due to the noise factor.

Thus Gruia's model[10] can be successfully applied in jobs with more than one operation and the processing time of the operations will not influence the utility function of the final product.

By substituting equations (4) and (5) in (3), the variance model becomes:

$$V_n[y(c, p_1)] = 0{,}469615 + 0{,}107169c_2 - 0{,}107146c_2c_3 - 0{,}10931c_3 + 0{,}05252c_2^2 + 0{,}05464c_3^2$$

With the help of Design Expert 8 software, we can draw the contour of the utility function (see figure 4) used in the model of jobs with more than one operation, which is influenced by the noise variable (processing time of the operations) and controllable variables (the utilization of the available resources and respectively preparation time for the next operation).

Also with the help of the same software we can draw a surface response model (see figure 5), where one can see the variance in the utility function given by the capacity and processing time of the operations.

[10] Ibidem 7.

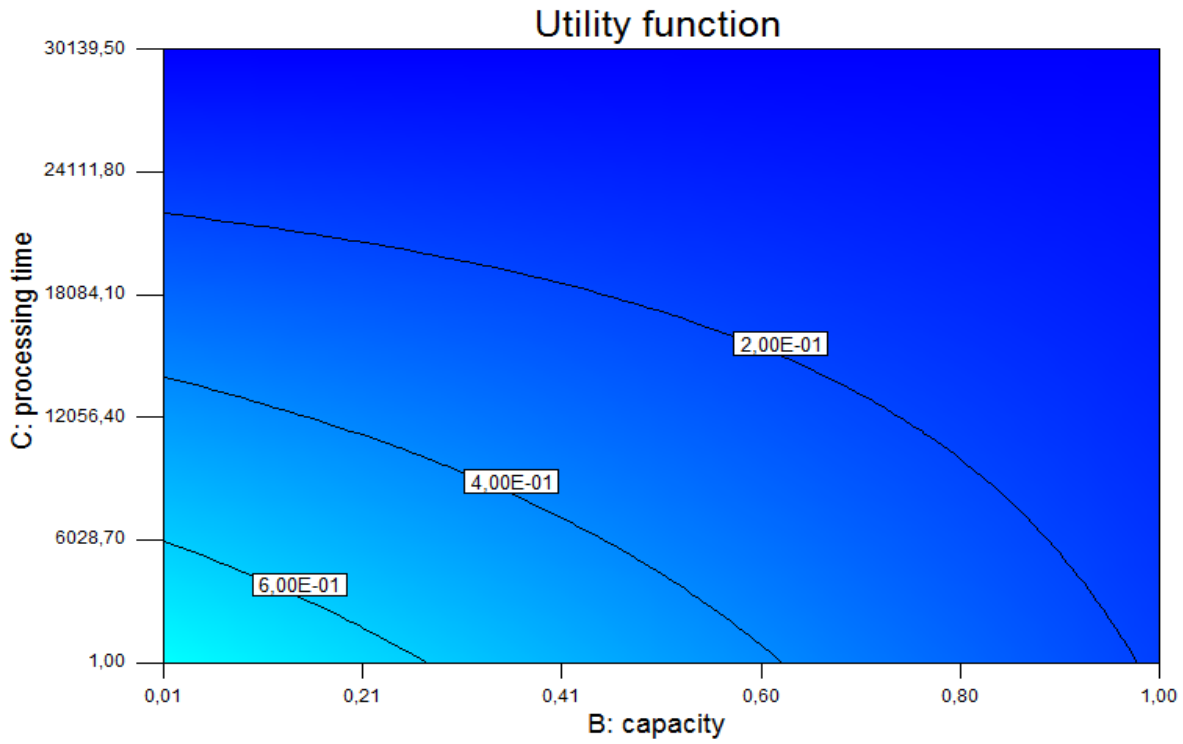

Fig. 4 – Contour plot of the utility function from the Quality Scheduling Index model

Source: own contribution

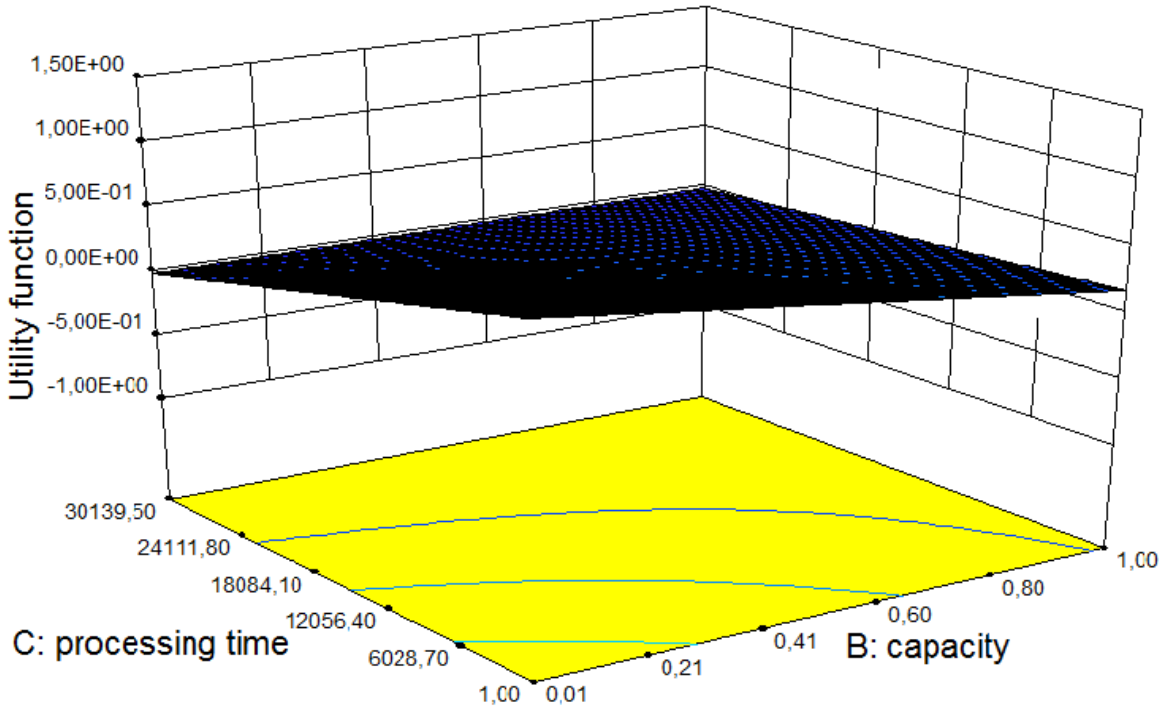

Fig. 5 – Response surface plot of the Quality Scheduling Index model

Source: own contribution

The variation is smooth in 3D and we can conclude that the model of the Quality Scheduling Index, which was developed for jobs with one operation can be successfully applied for jobs with more than one operation, because the processing time of each operation

in part will not affect the sequence and schedule of the others, nor the available capacity utilization of the available resources.

The model is viable and can be successfully applied for jobs with one operation. The case when the jobs are composed of more than one operation can also be considered, but the manufacturing processing times should be known in advance for each operation. The Quality Scheduling Index was developed in such a way, so that it can be applied to both cases of jobs with one as well as with more operations. The only difference is in the implementation methodology which I will further present.

When dealing with jobs with more operations with the same goal of increasing the productivity, specifically to increase the quality of the workforce and decrease the time and costs associated with the manufacturing processes, we should decompose each job according to the resources which are used, time consumption and required level of quality.

By applying this index, the managers can compute the best values according to their specific customers' and standard's limits and the company can take these values and use them to evaluate their our manufacturing process. Doing so, they have a way of improving their processes using their actual data, computed from their customers' utility value. The values of the QSI can then be implemented back into the individual manufacturing operations, according the optimal values of the quality, time and costs which have to be maintained at all considered working areas, so that the process to be Just-In-Time.

4. Conclusions

The paper presented a new managerial tool, i.e. Quality Scheduling Index, which was developed in compliance with the present market conditions. A connection between the index and scenarios was also presented and a scenario mainframe was developed accordingly. The roles and importance of the index for the management are presented. An initial study was done by the authors as part of their research grants and accordingly actions were taken in order to solve the problem of increasing the productivity, which is still a major problem in, but not limited to, manufacturing companies worldwide.

The model was developed with the main goal of increasing the work productivity within the company. The robustness of the model is tested and we find out that a less than 10% probability exists that our model, which is in direct relation with the utility function of the customers and productivity of our company, to be affected by processing time of each operation. Thus the duration of each operation can affect the satisfaction of our customers in a small percent, but on the other hand we have showed that there exists a probability higher than 90% to increase the productivity using our QSI index which is focused on scheduling the operations and quality of the work done by the employees.

This paper presented partial results of the research done by the authors within their research grants. Also it represents part of the Ph.D. thesis of one of the authors.

To sum up, the index QSI can be successfully applied for jobs with one and more than one operation in order to measure, control and improve the time consumption on the production lines and quality of work, which affect the productivity of the company in a direct way.

Acknowledgement

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References

- Davila, T., Epstein, M., Shelton, R.: *Making Innovation Work: How to Manage It, Measure It, and Profit from It*, Updated Edition, FT Press, 2012, New Jersey, ISBN: 978-0-13-309258-5.
- Gruia, George, *Politici publice*, Ed. Sitech, Craiova, 2014, p.186, ISBN 978-606-11-3764-0.

- Gruia, C. George and Kavan, Michal: "An off-line Dual Maximum Resource Bin Packing Model for solving the maintenance problem in the aviation industry", paper presented at the 7th International Conference "Challenges of the Knowledge Society" Bucharest, 17.-18. May 2013, Romania, CKS – ebook, ISSN 2068-7796.
- Gruia, C. George and Kavan, Michal: "A Greedy Czech Manufacturing Case", paper presented at ICMSEM 2013: International Conference on Manufacturing Systems Engineering and Management, Toronto, 20.-21 June 2013, Canada, [online], World Academy of Science Engineering and Technology, vol.78:2000-2007, e-ISSN 2010-3778
- Gruia, C. George: "Experiments for identical parallel machine scheduling with bee algorithm", paper presented at Conference STČ 2013, [online], Prague: CTU, Faculty of Mechanical Engineering, 2013, vol. 1, ISBN 978-80-01-04796-5.
- Montgomery, C.D.: *Design and Analysis of Experiments*, 6th edition, John Wiley & Sons Inc., New Jersey, 2005, ISBN 0-471-48735-X.
- Van der Heijden, Kees: *Scenarios: The Art of Strategic Conversation*, John Wiley & Sons, New York, 2005, ISBN 0-470-0236943.

EXPORT STRATEGY BASED ON MARKET RESEARCH

Octavian-Liviu OLARU[*]

Abstract

A strategy is a general plan aimed to develop a business. Even export firm that wants to develop and prosper needs some form of strategy. A company's strategic fit with the trading environment has to be continuously reconsidered because it is likely to erode. Managers should be well informed in order to develop their judgment and understanding of the driving forces that shape the business environment. The greatest mistakes are made by exporters who think they know a foreign market as well as they know their local one, only to find after an ill-fated export launch, that they do not.

Keywords: *strategy, business environment, export, foreign market*

1. Introduction

Business firms operate in an increasingly global world. The world economy is no longer monopolized by the developed countries. Without Africa, Asia, Latin America or Eastern Europe there can be no globalization. Since economic growth in developing and emerging economies remains higher than growth in advanced countries, it is probable that within the next two decades the global economic map will change more than it has done over the last 20years. This will mean a fundamental change in the global corporate landscape.

An important aspect of the globalization process is the rapid change in regulations affecting the international marketing environment. The world trading system is constantly spinning out new opportunities and creating new threats. Certain tariffs and quotas are removed but new technical norms, phytosanitary measures and anti-dumping actions are rendering the export trade more difficult for companies all over the world. While numerous subsidies are being eliminated and the bureaucracy of customs procedures curtailed, new rules on intellectual property rights, certification requirements or complex domestic regulations require export managers to respond to new regulatory challenges.

In the above mentioned conditions, managers of small and medium-sized enterprises (SMEs) are particularly affected by this complexity of the regulatory context. The complications of customs procedures, documentation requirements, technical standards, sanitary norms, administrative practices and unofficial dealings surrounding the application of various regulations are high on the list of managerial export concerns. Combining these facts of life with the frequent requests for just-in-time delivery, enlarged product responsibility, more services around exported products results in too great a competitive effort for many exporters in developing and transition economies.

The aim of this paper is to identify the critical issues facing managers in this system, consider their operational and strategic implications for business firms and suggest techniques and approaches for dealing with the regulatory challenge in global markets.

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2. Need of information search and marketing analysis

The greatest mistakes are made by exporters who think they know a foreign market as well as they know their local one, only to find after an ill-fated export launch, that they do not.

Preliminary market research is needed when choosing a new market. A systematic, detailed and constantly updated intelligence network is required to support ongoing export operations. In most cases the company's client (importer) is the best source of market information. Market research is also required when the exporting firm wishes to take a more active role in its export development.

Any marketing study has to begin with an internal diagnosis of the export company itself. Only when managers are clear in their minds about their firms' relative strengths and weaknesses in production, financing, human resources, technology and export experience, may they study prospective export markets with respect to regulation, the competition, possible customers and other characteristics.

Most countries maintain statutory or semi-public institutions, Trade Promotion Organizations (TPO), providing marketing information and assistance to exporters and offering a wide range of export incentives. Managers interested in initiating an export trade with new markets should begin their research by exploring the documentation and the assistance opportunities provided by such government bodies.

Typically, the information on regulation is an integral part of more extensive foreign market study which deals with market access; domestic regulations and sales practices; supply, demand and end-use analysis; pricing; distribution; communication; sales promotion. That study involves the use of both secondary data (official documentation, mass media reports and online sources) and primary sources such as official documentation, interviews with the authorities or experts, and field research in the foreign market.

The conditions of a company's market access may differ from those of its foreign competitors because of preferential trading agreements, discriminatory sanitary measures or other factors. The study has to evaluate the total cost of distance and the regulatory environment in the export market, taking into account such factors as transportation and insurance costs, customs tariffs and other import charges, quotas, special rules and prohibitions.

The domestic costs of market entry such as the costs of product testing and certification, the cost of maintaining a local presence if required by law, the cost of obtaining permits or registration of trademarks should all be considered.

Potential exporters will have to search for data defining their status within a given market, i.e. data on national treatment, harmonization and mutual recognition of standards, and the like. Many aspects will be covered by bilateral arrangements between the exporting and importing countries.

Market research should be conducted to answer mainly the following questions:

- How does the general price level in the export country compare with that of the exporter's domestic market?
- How has the average product price evolved in recent years?
- What are the distribution costs and customs duties, taxes and other charges paid on imported and local products?
- What are the cost advantages (disadvantages) of local producers with respect to regulation?
- What is the nature of the competition in the export market? For instance, how does the price leader behave, what are the rules against cartelization, what is acceptable pricing behaviour in the opinion of local competitors?
- What are the normal margins charged by distributors of like products and the

legal provisions applying to them?

- What are the highest and the lowest price that can be charged for the export product? (The answer to this should be based on field research.)
- How do the export market's rules on pricing differ from those in the firm's home market?

The regulatory network may require a diversified pricing strategy for the exporter to arrive at the same retail price in a number of countries. An initial market study will usually rely on secondary data but a solid pricing analysis based on modern price-testing techniques may be needed before larger-scale direct exports are initiated.

Those engaging in direct marketing should also consider following communication and promotion issues:

- What marketing and trade promotion approaches have proven most effective in the past for the products concerned?
- What are the most important trade fairs in which the export firm might consider participating?
- Is there any public support available in the exporting country for that purpose?
- What communication channels should the exporter use and what are the legal restrictions that should be taken into consideration?
- What is the cost of alternative communication and promotion strategies? The target audience should be evaluated and the message to be delivered should be formulated coherently.
- What are the basic rules on communication and promotion and how do those rules differ from those in the exporter's domestic market?

3. Trade information services provided to the business community by a TPO

The quality of business decisions taken by a company depends on pertinent, reliable and timely information. Exporters need to stay current in their awareness and understanding of market developments and trade opportunities in order to maintain their positions or establish edges over their competition. A TPO should pay close attention to the trade information needs of exporters and have appropriate mechanisms for acquiring such information systematically and disseminating it in a timely way. Moreover, a TPO provides basic and useful support to the export community by offering methodologies and procedures for the product export potential identification and if facilitating the match maker between the export offer and import demand.

There are three steps in the methodology for product identification:

- Prepare the product-market framework.
- Determine export potential of local industries.
- Make a pre-selection.
- Make a survey of the export supply.

A useful and practical approach is to adopt the product-market framework for an export promotion program. As the term suggests, each program concentrates on a specific product or group of products. Activities are directed mainly at helping the specific sector or a selected group of companies to gain entry into certain markets.

The advantage of this approach is that it makes a relatively low demand on the workforce and on financial resources, which may be limited in some developing countries. The product-market framework means allocating resources to focused activities for maximum impact designed to achieve export targets. Three features of this approach are:

- Products are identified for the purpose of designing a marketing strategy for a

specific sector, including all necessary action and support activities that help generate or increase exports.

- A program based on the product-market framework can address specific concerns of the sector, putting into evidence particularly obstacles to export growth, and providing the basis for coordinated or co-operative actions, including joint export promotion and marketing activities.
- The program can help individual companies to develop their own marketing strategies and program and to identify specific areas where support or assistance is required.

Planning and implementing a program with a product market framework could be done by a central export coordinating body, although institutions and organizations from both the public and private sectors might also participate.

The significant role of the TPO is to lay the groundwork in preparing the program and to do the necessary studies to identify the products to be promoted in target markets.

In many cases, companies looking forward to export do not have a clear idea of what products to promote in international markets. This leads to haphazard trade promotion efforts, often as a reaction to inquiries made by foreign buyers, with uncoordinated, ineffective export assistance. Identifying priority export products is necessary to maximize the impact of all activities and efforts aimed at achieving national export targets.

In carrying out the activities in the field, a TPO should not work in isolation from the business community. A TPO must be ready to adjust the scope and nature of its services according to the requirements of the export sector.

In most cases, however, additional measures are needed, and the following recommendations can be considered:

- TPO staff concerned with manufacturers and exporters should maintain frequent contacts with them, and information obtained should be recorded systematically on standard forms. TPO staff should respond to all requests, in order to improve confidence in TPO-business relations.
- Working groups should be established to study, design and implement specific promotional programs, and activities. Working groups should include key representatives from relevant sectors in ways that take their points of view into consideration.
- Industry advisory groups/committees should be established under the sponsorship of the TPO and act as a feedback mechanism to provide the TPO with inputs for implementing industry-specific promotional program and activities. These committees should include key representatives from relevant sectors, and their points of view should be taken into consideration.
- The staff of the TPO should keep in close contact with export associations, sectoral groups and organizations and chambers of commerce and industry. Such contacts are the most effective channels of communication with the business sectors in many countries.
- The TPO should organize market and industry seminars to disseminate information as frequently as possible, in order to motivate the business sector towards greater involvement in the export trade.
- The TPO should have consultations, dialogues, and workshops with the business community to discuss external trade impediments affecting their exports to overseas markets. These views could be incorporated in lobbying representations and market access negotiations, either on a bilateral or multilateral basis.
- The TPO should also have periodic dialogues with the transportation and

logistic sectors about ways to enhance the effectiveness of the trade administration system.

In summary, the TPO should act in response to the needs of the private sector when developing its interface with the world market.

4. Market research activities developed within a TPO

Since many novice exporters are not qualified or experienced to interpret and make use of this information, the TPO can provide a useful service by offering light analysis in the form of suggestions, pointing out specific opportunities, and identifying potential liaisons. Support and information for this can come from published market data, private trade and market studies, other trade promotion organizations, trade associations, chambers of commerce, diplomatic trade missions, foreign governments, and development and aid organizations.

After identifying the target markets that demonstrate the most potential, a general set of profiles ought to be developed. These help to stimulate ideas and possibilities among producers and potential exporters and can serve to educate and inform them about the characteristics and conditions of those target markets that have the highest potential for their export products. These profiles can inform and influence the TPO's foreign promotional efforts and should, like all trade information, be updated periodically.

Market profiles typically include:

- the general background of the target market (culture, outlook, income levels, marketing conditions);
- the types of imports favored;
- importing patterns, taking into account main trading partners, ten-year trends, and annual seasonality;
- available distribution channels;
- historical price data;
- customs requirements and other import regulations;
- import tariffs;
- relevant trade agreements;
- useful contacts (diplomatic missions, trade bodies, chambers of commerce, etc.).

TPOs can conduct market studies that are considerably more detailed than market profiles. These provide in-depth information about a particular sector or subsector and its characteristics. While such studies cover the macro information available in market profiles their focus tends to be on identifying and defining the characteristics of a select market channel. This includes:

- identifying market participants;
- determining constraints or barriers to entry such as import and legal requirements;
- providing specific tariffs schedules;
- determining the distribution system to be used;
- offering details of typical shipping and payment methods;
- detailing costs and options for shipping;
- identifying the characteristics of the products and their packaging;
- discovering current import statistics for a product including countries of origin, pricing and trends;
- determining potential market volumes and predicted saturation points;

- providing a sales forecast;
- suggesting a pricing strategy;
- suggesting the kind of promotion to be done;
- explaining cultural or seasonal factors;
- providing catalogs and copies of advertisements from competing or related producers, wholesalers, distributors, and retailers;
- listing specific contact information for potential trade partners (importers, distributors, wholesalers, etc.);
- identifying trade newsletters and journals;
- providing a compilation of similar or related market studies;
- obtaining product and packaging samples.

Given the costs involved, these ought to be conducted in response to specific export opportunities and ideally supported by (financially or in terms of study assistance) interested exporters or trade associations. Such studies, especially for less open countries, can be coordinated with diplomatic trade missions but ought to be conducted by experienced, market-oriented professionals familiar with the target market.

Assessments can help to concentrate promotional efforts on a particular product or service when driven by clear market opportunities or the request of an exporter. The specificity of such studies requires that they be designed in close cooperation with the exporter or trade association. Such assessments use market studies as a point of departure and are not only more specifically focused, they also tend to develop interactions with specific market actors. From such interactions, importers and exporters can take over from the TPO to develop their own relationships or partnerships. Through these working links they can then continue to develop appropriate products or services designed to fit market needs. This can include sourcing of other or different raw materials, developing new packaging sizes and designs, and improving or altering product characteristics.

The nature of market studies and assessments i.e. techniques and in-depth on-site research, usually means that they are best conducted by professional marketing firms especially given that many TPOs lack the depth of staff and specific country or sector experience of a dedicated market researcher/analyst.

Both market studies and specific product assessments should include a follow-up or evaluation component to determine their effectiveness. Such evaluation should, at a minimum include interviews with relevant exporters to determine what impact such studies or assessments have had on their plans for export or export quantities.

Taking in view their marketing focus TPOs can be particularly well-suited to assist individual enterprises in designing, developing, and implementing their international marketing plans. For many TPOs this service can be linked to the more general publicity and promotion that they develop and conduct for a country or sector as a whole. Indeed, sometimes enterprise participation can help to defray the TPO's marketing expenses or enable marketing efforts to have a broader scope and reach. Caution should be exercised when selecting marketing or promotional partners to ensure that the TPO's reputation is not compromised and that the opportunity is also transparently available to other qualified enterprises.

5. Business strategy based on market studies

The information contained in a market survey is one of the most important elements to be taken into consideration in drawing up an export strategy.

Most companies have to adapt to the regulatory environment while at the same time attempting to influence that environment whenever feasible. Such companies may thus be seen as biological systems following both reactive strategies (changing themselves) and proactive strategies (influencing the environment) simultaneously.

Reactive strategies

There are several patterns of business response to a regulatory change in an export market. The firm may either avoid or circumvent a new regulation or it can adapt to it. In certain cases, such as contingency protection, the firm may make concessions to its competitors, or it may build good relations with the people who administer the rules and procedures. The various strategies are not necessarily exclusive and firms usually opt for a mix of approaches.

- *Avoidance.* A firm decides not to export to a given market because of regulatory trade resistance. It prefers to abstain from doing business in an environment that it considers distant, given the firm's corporate culture, business style or expected returns on the cost of market entry. If exports take place they are sporadic or generated by intermediaries acting without the producer's support. Companies sometimes prefer to abandon entry into a certain market because they consider the regulations or the administrative burden imposed unacceptable, or because they prefer to do business elsewhere.
- *Circumvention.* A producer prefers not to get directly involved but favours exporting its products through trading firms. Intermediaries are favoured in order to save the exporter the trouble of dealing with regulatory measures in the import market or to circumvent prohibitions. When domestic regulations (e.g. certification requirements or technical standards) are strict or arbitrary, it may be advantageous to have importers in the export market assuming responsibility for arranging the necessary permits and certificates.
- *Adapting.* This is the most common option. A company analyses the regulatory environment for its export activities, then commits itself to a set of actions that conform to that environment. The mindset is on accepting the regulatory environment as it is, and on seizing new opportunities and responding to new threats. The approach is well illustrated by adjustments in the marketing mix variables such as product concept, transfer pricing, and the like.
- *Appeasement.* In certain situations the level of regulatory barriers may be dependent on the exporter's response strategy and the ability to negotiate business reciprocity arrangements. This is often the case when exporters are confronted with the risk of contingency protection (e.g. anti-dumping and countervailing procedures). Export firms (typically important exporters and challengers to domestic firms) may moderate the reactions of their competitors and of governments through public relations. They are also advised to conduct their business in ways that do not risk thi imposition of contingency measures by the authorities in their markets.

Proactive strategies

A firm's proactive response to the regulatory environment in its trade area may take the form of public relations. This strategy involves dealing with legislators and government officials to promote or defeat trade regulation. PR is most popular with industrial associations or large firms which can justify the substantial expenses of such strategies. Surprisingly enough, even the large organizations tend to underestimate the importance of lobbying and other forms of PR, and use them only as an afterthought. Yet a well-planned PR program constitutes an effective tool for improving the firm's access to foreign markets and may be cheaper than an offsetting marketing action.

6. Conclusions

The application of marketing concepts and techniques is often described as a combination of art and science. Decision-making in export marketing is a skill that is developed over time, through practice based on market information and strategy.

A strategy is a general plan for the conduct of business. Every export company that wants to develop and prosper needs some form of strategy. A company's strategic fit with the trading environment has to be continuously reconsidered because it a likely to erode.

Companies face numerous constraints to initiating, developing and sustaining export operations. These constraints may be associated with the characteristics of the managers and the company (internal barriers) or with the environment within which the company operates (external barriers).

In view to surpass the above mentioned external barriers, a company has to benefit:

- At microeconomic level, from a lot of information provided mainly by a national TPO, in view to draw up its own marketing strategy.
- At macroeconomic level, from a national foreign trade promotion strategy.

Creating a national export strategy is by definition an issue involving all relevant players, having to be treated as a national, interdisciplinary and multi-sectoral imperative. A solid national export strategy has to include the effective participation of the ministries of economy, finance and industry, chambers of commerce, as well as experienced members of the national business community.

References

- Hofstede, G. - Culture 's Consequences, Beverly Hills, Sage, 1984
- International Trade Centre UNCTAD/WTO – International Marketing and the Trading System, Geneva, 2009.
- International Trade Centre UNCTAD/WTO - Priorities on Export Trade Promotion and Competitive Advantage, Geneva, 2005
- Olaru, Octavian Liviu - Promovarea exportului, componentă esenţială a strategiei naţionale de comerţ exterior, Editura Cavallioti, Bucureşt, 2002.
- Paliwoda, Stanley – International Marketing, Oxford, Butterworth-Heinemann Ltd., 1993.
- World Bank - National Trade Promotion Organizations: their Role and Functions, NY, 2013.

BEHAVIOR OF THE ROMANIAN GREEN GOODS CONSUMERS

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Abstract

Marketing has put forward for a long time the fact that any activity conducted in an organization should consider an intimate knowledge of the client, and a close look at the green marketing practices used over time shows that eco-friendly products should be positioned in relation to those attributes looked for by the involved consumers. In this context, the following paper reveals some important aspects regarding the Romanian green market and the characteristics of the green consumer behavior together with solutions that marketers can apply to stimulate the consumption of green goods.

Keywords: *green marketing, consumer behavior, green goods, sustainable marketing, eco marketing, marketing strategies*

1. Introduction

In trying to meet the needs, wishes and preferences of consumers, through marketing activities, green marketing often resembles traditional marketing. Many of the essential differences existing between the two refer to the values and philosophies supporting the marketing strategy and the way in which marketing elements are conceptualized. Thus, strategies applied for green marketing are largely influenced by the specific behavior of green goods consumers. In this context, we hereby present the current condition of the Romanian market of eco-friendly products and the ways to access this market in terms of consumer behavior.

2. The Romanian market of green goods

Despite the fact that Romanians exhibit healthier habits and the consumption of eco-friendly products grows year by year by 20% -30%, they are not even 1% of cumulated sales within Romanian retail, compared to Western Europe, where the share exceeds 5%[1] (in Germany consumption is 5%, in England and Austria 3% and in Hungary consumption has reached 2%). Romanians buy eco-friendly products of approximately 80 million euro each year, representing a value of almost 40 times higher compared to 2007. In 2009, for example, the growth registered for the sales of bio products was 80% compared to 2008, and for some categories it has increased four times. During the first half of 2012, sales were higher by almost 30% compared to the same period of 2011 and experts predict that the sales of green goods covering a wide range of categories will double by 2015 to 114 billion euro.

As for the offer provided for this market, large retailers have already introduced green goods on their retail shelves. Thus, Carrefour Romania has had organic products on its shelves since 2003, and Mega Image has gone even further, being the only supermarket that provides its own brand of organic products (Delhaize Bio). Cora, on the other hand, has

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[1] Ilie, I., 2012, *Green goods: few, expensive, but in increasing demand in Romania*, Capital.ro, Friday 13 July 2012, http://www.capital.ro/detalii-articole/stiri/verde-de-romania-169127.html

introduced at the beginning of 2012, in addition to the variety of organic products for food products as well as for cosmetics and detergents, the first textiles manufactured of organic cotton. Moreover, all retailers, from real,- Hypermarket, Cora, Auchan, Mega Image, Billa, Profi to discounters such as Lidl, are considering green goods in the future.

On the other hand, as for the diversity of green goods, such products are observed to be also present on the Romanian car market - Dacia has developed a hybrid engine for Dacia Hamster Hybrid Electricway, the first Romanian hybrid car – in tourism – hotels such as Saturn (the first hotel in Romania receiving the eco-label for tourist accommodation services), Vega (the first hotel in Romania certified Eco-Hotel Management System, the only beach in Romania certified Blue Flag eco-label for sustainable beaches in the world), Meitner (is based upon the ecologic concept of environmental protection and is characterized by the use of ecological and non-allergenic materials) - but also in real estate. The company Ozone Homes, part of the group South Pacific Construction, already sells green houses with utility bills reduced by up to 35%. The cosmetics industry also reflects changes of the green culture in Romania, moisturizers containing parabens being now replaced by moisturizers containing benefic natural alternatives.

Marketing has put forward for a long time the fact that any activity conducted in an organization should consider an intimate knowledge of the client, and a close look at the green marketing practices used over time shows that eco-friendly products should be positioned in relation to those attributes looked for by the involved consumers.

3. Green consumer behavior

We can observe that green marketing tends to deal with a very limited number of customers' requests or needs at a specific time.

However, people's needs and requests are many, diverse and often potentially incompatible. Consumers may wish to live in an unpolluted area, far away from traffic congestion and the danger of vehicles, however not willing to give up the benefits of personal mobility provided by a vehicle. When a product is analyzed as a „package of benefits", a client should be analyzed as a „package of desires and needs".

Consumers' behavior towards eco-friendly products tends to presently manifest in a way expressing their conviction that, with the acquisition of these products, they will require some sacrifices, in the form of inconvenience, with high costs and low performance, and all these without significant environmental benefits. However, contrary to what consumers may think about this, a series of green goods available on the market are actually desirable, as they provide comfort, reduced operating costs and/or a better performance. These incorrect convictions often arise from the fact that the above advantages are not promoted with their „green" benefits, thus consumers do not immediately recognize them as convenient goods and form prejudices regarding the benefits they provide. When they become convinced of the „non-green" benefits of these types of goods[2], consumers will become more and more willing to apply them. On the other hand, many eco products have presently become so common and widely distributed, that many consumers may not recognize them anymore as „green", because these goods are purchased for different reasons compared to other characteristics giving them this title.

In the past, customer satisfaction was analyzed in terms of product performance at the moment of (or during) consumption. However, presently, „green" consumers may reject a product when they become aware of the damages that the product may cause to the

[2]Makover, J., 2011, *Green Marketing Is Over. Let's Move On*, GreenBiz.com, 16 May 2011, http://www.greenbiz.com/blog/2011/05/16/green-marketing-over-lets-move?page=0%2C0

environment during production process or its removal from consumption. Also, consumers may avoid a product, in response to the disapproval towards the activities conducted by the manufacturer of those goods, its suppliers or its investors.

4. To do's in green marketing regarding consumer behavior

Customer satisfaction relies more and more on the production process and all activities conducted by the manufacturer, so we are approaching the condition when the company itself becomes the consumed product. Drucker's famous concept (1973) according to which „marketing is the only business seen from the point of view of the final result, which is the consumer's point of view" seems to become a reality for many companies, just as the green movement means that potential customers (or those influencing them) actively observe all aspects related to the company.

Taking into account the specific behavior of eco product consumers, as well as the successful marketing strategies, it can be observed that the eco products that have been successful on the market followed three main principles[3]:

- ***The marketing of successful eco products is characterized by the fact that it focuses on non-eco consumption values and frequently links this type of consumption to at least five benefits desired by consumers: efficiency and cost-effectiveness, health and safety, performance, symbolism and status, as well as comfort.***

Arguments supporting the above statement are numerous. Given the energy price explosion, tax incentives for vehicles that are efficient in terms of fuel consumption, improvements and rehabilitation of houses and home appliances leading to long term savings have convinced consumers who are sensitive to costs to buy green products. Also, as for the safety of the promoted eco products, a study performed by Alliance for Environmental Innovation in cooperation with the manufacturer of household products SC Johnson, set up, among its conclusions, the fact that consumers act most likely as the result of „green" messages that are strongly connected to their personal environment. Specifically, the results suggest that most consumers prefer those household products with benefits promoted in messages such as: „for use under maximum safety conditions around children", „no toxic ingredients", „no chemical residues" much to the detriment of promoting benefits through messages such as „recyclable package" or „the product was not tested on animals"[4]. Moreover, in terms of performance, many green products are currently designed to function better than the conventional ones, so establishing a high price is justified.

Successful programs developed and implemented by „green" marketing aimed at increasing consumers' attractiveness to eco products, by convincing them of the non-eco consumption values that such products include. The directions to be followed in setting up successful strategies in the field of green marketing summarizes for marketers the identification of consumers' opinion regarding the value of the main features of the eco product or incorporating within these products the desired consumption values as well as drawing attention of the target group on these values.

- ***Many of these successful eco products promote convincing and educational messages and slogans linking the green features of products with their desired consumption value.*** In other words, green marketing programs have successfully calibrated the consumers'

[3] Ottman, J.A., Stafford, E.R., Hartman, C.L., 2006, *Avoiding Green Marketing Myopia. Ways to Improve Consumer Appeal for Enviromentally Preferable Products*, *Environment*, Volume 48, No. 5, pages 22-36, http://www.greenmarketing.com/files/Stafford-MyopiaJune06.pdf

[4] Alston, K., Prince Roberts, J., 1999, *Partners in New Product Development: SC Johnson and the Alliance for Environmental Innovation*, Corporate Environmental Strategy, Vol 6, No 2, pages 110-128, http://cleartheair.edf.org/documents/536_ces.pdf

knowledge so that they should recognize the consumption benefits of eco products. This led to the condition when, in many cases, the environmental benefit was placed on secondary level or was not specified at all. Certain communication activities having a convincing nature also educate consumers so that they should recognize eco-friendly products as „solutions" for their personal needs and for the environment. Practically, advertisement drawing attention to the way in which the benefit of the green product can provide a personal value desired by consumers can extend their acceptance degree of green goods.

➢ ***Credibility is the main element of an efficient green marketing.*** Successful eco products must meet or exceed customers' expectations by providing their promised consumption values and by assuring substantial benefits for the environment. Often, consumers do not have the expertise or ability to check the environmental benefits and/or the consumption value of eco products, leading to preconceptions and skepticism[5]. To be convincing, statements on the „green" features of products must be specific and significant, humble and should not promise too much. Also, the features of eco products should be honestly communicated and certified in order to increase credibility (in other words, the benefits for consumers and the environmental efficiency should be compared to comparable alternates or likely use scenarios). Experts, as third parties, having observed standards for environmental testing (such as independent labs, government agencies, private consultants or representatives of non-profit organizations) can provide approval notes for eco products and/or „seals of approval" to help clarify and strengthen the credibility of statements related to green products. In our country, before being named and labeled as organic/eco, a product must be certified by European certification organizations, ECO CERT, BDIH, DEMETER or BCS OKO GARANTIE, the only ones accredited in Europe.

Bio VerLinea, an online shop distributing bio cosmetics and bio products, understood that, when consumers want to purchase a product, it is very important that they should be aware of its origin, its certificates and list of ingredients. The credibility of the shop increases in proportion to the long list of certifications of the organic products distributed through this shop – Ecocert (www.ecocert.com), Cosmebio (www.cosmebio.org), BDIH (www.bdih.de), The Soil Association (www.soilassociation.org), Natrue (www.natrue.org), Leaping Bunny (www.leapingbunny.org), Fair Trade Association (www.fairtrade.net), Bio-Siegel (www.bio-siegel.de), Bioagricert (www.bioagriocert.org), Agriculture Biologique (www.agencebio.org), Demeter (www.demeter.net), EU Organic Farming[*] (http://ec.europa.eu), USDA ORGANIC (www.ams.usda.gov/nop), Japan Agricultural Standards (www.maff.go.jp), The Vegan Society (www.vegansociety.com), The Vegetarian Society (www.vegsoc.org), Asthma Allergy Association din Danemarca (www.astma-allergi.dk), Qualité-France SAS (www.qualite-france.com)[6]. Consumers' lack of confidence melts as they look through the list and descriptions provided by these certificates.

However, even if green certifications help differentiate products and make decisions related to consumption, they are not without controversy. Therefore, when they request approvals and eco-certifications, marketers should take into account the compromises related to environment and the complexity of their products, as well as the experts and organizations behind the requested approvals and/or eco-certifications. Marketers should educate customers about the meaning behind an approval or criteria behind „eco seals" (see the example Bio Verlinea). Also, another way in which a company may increase its credibility among

[5] Cronin, J.J., Smith, J.S., Gleim, M.R., Ramirez, E., Martinez, J.D., 2011, *Green marketing strategies: an examination of stakeholders and the opportunities they present*, Journal of the Academy of Marketing Science, Vol 39 (2011), pages 158–174, http://www.uceresource.org/articles/Admin/2011/JAMS-11-vol-39-1-11.pdf

[*] All organic products produced in the European Union are printed with organic logo "Euro-leaf"

[6] Official website of the Bio VerLinea online shop, http://www.bioverlinea.ro/i/certificari/104/

consumers is concluding a partnership with a third party that is credible and professional in the environmental field, such as non-profit organizations.

Consumers have become increasingly skeptical to commercial messages, so that, nowadays, they turn their attention to the collective wisdom and experience of friends and colleagues related to green products. Word-of-mouth or „buzz marketing" is perceived as having high credibility, especially when consumers take into account and try to understand the complex product innovations. The internet, through e-mail, and its wide information repository, websites, search engines, blogs, product rating sites, podcasts and other digital platforms, have opened significant opportunities to make social and communication networks spread a credible „word-of-mouse" (buzz facilitated by Internet) related to eco-friendly products. In order to facilitate the „buzz marketing", the marketers have to create for their products credible messages, stories and websites, that should be both convincing, interesting and/or entertaining, so that consumers should be driven to seek information and pass it on to friends and family.

5. Conclusions

In the context in which Romanian market for green products is not even 1% of Romanian retail accumulated sales, unlike the average proportion in Western Europe (amounting to 5%), it is necessary that we should analyze closely the behavior of green goods consumers and find solutions to the trends observed at this level, in order to stimulate consumption for this category of products.

Trends observed in the behavior of consumers of eco-friendly products manifest in different forms. Firstly, we should remember that the needs and desires of consumers of eco products are numerous, varied and often potentially incompatible, as they often seek satisfaction by not buying, so that, when a product is analyzed as a „package of benefits", a client should be considered as a „package of desires and needs."

Consumers' attitude towards eco products presently manifests in a way expressing their conviction that, with their acquisition, these products will prove to be inconvenient, with high costs, low performance and all these, without significant environmental benefits, wrong convictions deriving mostly from the fact that the above advantages are not promoted with their „green" benefits, therefore, usually, consumers do not immediately recognize them as convenient goods and form preconceptions about the benefits they provide. Also, "green" consumers reject products when they become aware of the damages these products cause to the environment during production process or removal from consumption or as a reaction of disapproval towards the activities conducted by the manufacturer of these goods, its suppliers or investors.

Taking into account the specific behavior of consumers of green products and the successful marketing strategies, we may set up several action guidelines that can be applied by organizations operating or intending to operate on the eco products market. One of the action guidelines to follow in the green marketing activity is represented by the fact that it needs to focus on non-eco consumption values, with at least five desired benefits, frequently associated with this type of products: efficiency and cost-effectiveness, health and safety, performance, symbolism and status, as well as comfort. In this context, in the promotion activity, we should take into account the fact that consumers most likely act based upon the „green" messages strongly connected to their personal environment. In developing successful strategies in the green marketing field, the marketers should identify consumers' opinion on the value of the main eco features of the eco product or incorporate in this type of product the desired consumption values and draw attention of the target group on these values.

Also, the green marketing programs should calibrate consumers' knowledge so that they should recognize the consumption benefits of eco products.

And last but not least, within the marketing activities in the field of green products, we should never forget that credibility is the essential element of an effective green marketing. In this sense, certifications have a major role in clarifying and strengthening the credibility of the statements related to eco products, with the specification that marketers should take into account environmental compromises and the complexity of their products, as well as the experts and organizations behind the requested approvals and/or certifications. Another source contributing to the increase of the credibility level towards green products is represented by the collective wisdom and experience of friends and colleagues related to eco products, promoted through word-of-mouth or „buzz marketing" perceived as highly credible.

References

- Alston, K., Prince Roberts, J., 1999, *Partners in New Product Development: SC Johnson and the Alliance for Environmental Innovation*, Corporate Environmental Strategy, Vol 6, No 2, pages 110-128, http://cleartheair.edf.org/documents/536_ces.pdf
- Belsey Priebe, M., 2010, *What is Green Marketing?*, Green Marketing Tv, 27 June 2010, http://www.greenmarketing.tv/2010/06/27/what-is-green-marketing/
- Cronin, J.J., Smith, J.S., Gleim, M.R., Ramirez, E., Martinez, J.D., 2011, *Green marketing strategies: an examination of stakeholders and the opportunities they present*, Journal of the Academy of Marketing Science, Vol 39 (2011), pages 158–174, http://www.uceresource.org/articles/Admin/2011/JAMS-11-vol-39-1-11.pdf
- Ilie, I., 2012, *Eco-friendly products: few, expensive, but in increasing demand in Romania*, Capital.ro, Friday 13 July 2012, http://www.capital.ro/detalii-articole/stiri/verde-de-romania-169127.html
- Makover, J., 2011, *Green Marketing Is Over. Let's Move On*, GreenBiz.com, 16 May 2011, http://www.greenbiz.com/blog/2011/05/16/green-marketing-over-lets-move?page=0%2C0
- Ottman, J.A., Stafford, E.R., Hartman, C.L., 2006, *Avoiding Green Marketing Myopia. Ways to Improve Consumer Appeal for Enviromentally Preferable Products*, *Environment*, Volume 48, No. 5, pages 22-36, http://www.greenmarketing.com/files/Stafford-MyopiaJune06.pdf
- * * * - Official website of the Bio VerLinea online shop, http://www.bioverlinea.ro/i/certificari/104/

MANAGEMENT ACCOUNTING AT THE BOUNDARY BETWEEN CLASSICAL AND MODERN

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Abstract

Deep changes in actual society have transformed management accounting information system in a "black box", the most important source of information on socio-economic context.

Management accounting is a tool of counselor guidance providing management "database" necessary management decision making.

In these conditions, it is imperative abandon classical costing systems in favour of modern costing tailored to the requirements of modern management. But now, we live in a world of limited resources which require a rogorous analysis of the social, economic, cultural, historical entity that implements a specific systems costing.

In this context, we believe it is useful to analyze the current trend of adopting modern costing systems at te expense of classical and adaptability of this reform in Romanian practice.

Keywords: *management accounting, classical, modern, changing, decisions.*

1. Introduction

Technical progress, environmental instability and complexity of information flow have made the concept of instilling a need for flexibility in the context of a genuine change managers phenomenon.

Management of economic entitities tasked to „ensure the vitality of the organization's robustness to change, due to the constant coordination of activities, te efforts of its resources"[1], comes in support of the guide imperative in „find your own way in confusing circumstances, you strive to make sense of ambiguous messages, read signals to look around and listen all the time to cope with conflicts and strive to achieve your tasks by establishing and maintaining a network of relationship"[2].

In order to „manage future and constantly report at this managers"[3] must have at their disposal a powerful costing system, a truly reliable tool, allowing knowledge at any time of the firm, its objectives, and competitive situation.

Through management accounting is trying to identify a part of the solution and removal of part of a problem. This is the basis, the foundation of any operating in the economic environment, so any imbalance caused by various external or internal distrubance may be amended only by a rearrangement in a different perspective of management accounting.

Continuing globalization of markets and rapid technological changes in production have created fierce competition throughout the world. To achieve any competitive advantage

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[1] Tabara N. – *Management control in the new competitive environment,* Review Accounting, Expertise and Business Audit, No.2, 2004, p.5.

[2] Watson T.J. – *In search of management,* New York, International Thompson Business Press, 1998, p.8.

[3] Budugan D. et al. – *Management Accounting,* Publishing House CECCAR, Bucharest, 2007, p.383.

a company functional entities must adopt strategies that integrate environmental opportunities, market and technology advantages in the most efficient way.

In this context, the question of modernization, transformation management accounting to adapt them to the realities of the present, changing instruments processes and making methods to meet current scientific and technical progress.

This raises the following problem: traditional costing systems have become inefficient leaving only a theoretical part in the evolution of management accounting history, leaving the place of modern costyng sistems designed to meet current demands properly ?

Many world argue unequivocally that the current trend, but it is always good to be aware that te theory is the ideal state, pure while eliciting real state practice, actually. Thus, we need to know very well the past to step into the future with certainty.

Each tape of costyng sistem both traditional and modern ones have their right full place.

But management accounting currently lies at the boundary between classical and modern, being a mixture toughtful and tailored to the entities representing „international cusine" where the chef always manages to surprise by adding a new spice in a traditional dishes.

2. Management accounting – a fundamental tool of management activity

„Accounting is the impartial judge the past, guide and counselor of this essential need of every enterprise future"[4].

In the current conditions of market economy, the management accounting approach is topical and of real interest for both specialists and especially for lose responsible entities.

In the present context, managers are forced to assimilate basic knowledge related to management accounting, consisting not only in the specific terminology but in some essential techniques in this field regarding the use and efficient management of information available to decision-making, especially understanding the limitations of information.

Entities, „once inside the game market, it is necessary to create their management information system designed to ensure their protection and the possibility of competition in response to shocks"[5].

Deepening turmoil manifested in the external environment makes assimilation of essential knowledge required heady own management accounting by managers to be able to base decisions on a real basis to ensure the survival of the entity whose management are responsible and not least, to ensure performance desired.

Currently, the need to manage a complex set of issues facing any organization, make one management accounting tools most readily that it can wear out to assess opportunities, targeting pathways and strategy development company.

Managers use accounting information to draw general path followed by the entity by implementing a predefined optimal in order to „manage each of the activities or functional areas they are responsible and to coordinate these activities and functions within the organization taken as a whole"[6].

To cope with technological process, fierce competition in the market and especially to succeed fundamental objective of any organization, is to strengthen its position, in the market, policy makers will have to organize, implement, monitor and improve internal information system.

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[4] Hindle T. *Management*, Publishing House Nemira, 2008, p.18.
[5] Aslau T. – *Management control beyond appearances*, Economic Publishing House, Bucharest, 2000, p. 93.
[6] Horngren C.T. – *Cost accounting. A managerial approach, 9th Edition*, Publishing House ARC Chisinau, 2008, p.2.

It takes the form of management accounting and is the foundation of leadership.

In recent years, the role of management accounting in an organization has gone from „worked the numbers and financial history, the business partner and trusted advisor"[7].

It is necessary that both managerial accounting and management of an organization to develop a true „business partnership". Management accounting needs to target both cost and modeling the behaviour of decision makers.

Of course, in a complex, turbulent and uncertain information needs of managers grow and diversify and management accounting privileged information source management system can meet the needs of management providing tools to adapt permanently and practices requests makers.

3. The limits of traditional costing systems

Aspects of traditionalism and conservatorism found in the cost calculation become increasingly apparent during the evolution of technical progress. By this was an urgent need for improving the processes and calculation techniques by formulating appropriate computer systems of the production techonlogy.

Thus, the literature strongly advocates the abandonmnent of classical or traditional information processing cost, considered inappropriate to current and introduction of modern or advanced whose effectiveness would be superior.

Traditional costing systems in order, job-order costing, process costing and standard costing still widely used, were adopted in the early part of last century to calculate production costs in the types of companies that were characterized by predominant share of total costs direct costs, product promotion uniform and standardized trend conservation products, and the methods of calculation. According to the classical, all indirect costs are affected cost, sized according to the volume of activity.

In the economic entities in our country, costing preserves in most cases a conservative character, because the methods used are the same as three decades agos, despite the fact that the new production character of an upward trend.

The cost calculation is based only on command method or method steps, sometimes combined with different specific procedures specific conditions of each entity. Predefined and practiced at the station or workshop filled with a prost-calculation made in the accounting department.

Traditional costing systems have the disadvantage that provides information capacity reduced, not having the potential to provide information for decision-operative enterprise management in timely and optimal decisions. Post-calculation of the traditional methods to obtain information leading to late, lack of efficiency and coverage of certain aspects of the production of wich no longer intervem. Because of these drawbacks called actual cost of literature historical cost.

Continual evolution of technical progress, changes in the conditions of competition in the domestic and foreign markets have influenced traditional costing systems, characterizing them in some degree as inefficient.

In the current average, new entity is one automated and computerizing the products have a short life cyrcle services evolve, constantly adapting to consumer demands.

In the field of competition is seen an evolution of the criteria that characterize the expression of it, the only quantitative criteria (price) to the qualitative criteria (product, quality, security services, etc). But it is obvious management accounting information system integrates a little quality issues, limiting generally quantitative.

[7] Siegel G. – *The Image of Corporate Accountants,* Strategic Finance, no.2, 2000, p.8.

Another highlights the changing structure of production costs, raising the share of indirect costs to the detriment of direct production costs, varying according to the varieties and complexity of products.

In conclusion, we can say that the rigidity of the current system of management accounting information make a difficult tracking costs, setting standards, analisys of deviations regarding products and services, changes occurred in the current economy[8].

This is done felt the acute need of a real management costs by building an information system relevant and adapted to current requirements.

4. Evolutionary trends in costing systems

Unprecedented development of production technologies, changes manifested especially in the new competitive environment, have proliferated in the literature a number of new theories and concepts that reflect besides the appearance of novelty and a great finaliate the light efficiency recorded in the entities in th which have found practical application.

Studies and concerns of specialists in accounting converging with those in order related fields such as marketing, management, generated a revolution in systems costing methodology.

So, the way to achieve drastic change known products based on the use of advanced production technology, especially in the case of „world-class manufactures".

The concept of advanced manufacturing technology includes automated production technology, computer-aided design and manufacturing, robotics, flexible manufacturing systems, total quality control, total quality management, et.al.

The retrieval of these methods, techniques and programs the entity is dependent its success or failure, its existence in the market or bankruptcy.

According to experts in the field of accounting, costing systems is traditional and practical measurement results are incompatible with the use of advanced manufacturing technologies. Johnson and Kaplan says that „almost all management accounting tools appeared until 1925"[9] and Peter Drucker points out in the 60s, the risk of using traditional cost systems, that loosing relevance in an environment that does not have anything in common with that of the period in which these systems were designed and developed.

Proffessor Kaplan said that traditional managerial accounting produces „simply the wrong size. She directs the company in the wrong direction, reward managers for endangering the business and provides no solution improvement. The best thing you can do is to disable right to stop!"[10]

Given the radical plea for the exlusion of traditional practice, wants refining system cost through a better appreciation of the uneven use of resources. Thus emerged two types of costs that primarly targets overall resource management and responsible behaviour involved. It's about the cost of activities (the process) and target costs.

The calculation of activities (Activity Based Costing) highlights the causal link between resources, activities and subject to calculation, according to the „activities consume resources and products consume activities". Such an approach requires abandonment of entreprise vertical pilotage to cut the functions and adopt a transversal approach, along the value chain concept developed by Michael Porter.

Costs of activities (the process) not only respond watched last goal in classification costs, they can serve equally stock assessment, and decision making.

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[8] Budugan D. et al. – *idem, p.382.*

[9] Johnson H.T. & Kaplan R.S. – *Relevance Lost. The Rise and Fall of Management Accounting*, Boston: Harvard Business School Press, 1991, p.25.

[10] Lucey L. – *Management Accounting*, 3rd Edition, London, 1992, p.320.

ABC system is more complex, „promising" cost more „clean" and useful to managers. It envisions such questions: Is ABC solution ?

Costs target (Target Costing) are part of a boarder project that aims at analyzing the wearer's cost throughout its life, but especially in the design phase. The target cost is a market-oriented approach and is applied since the design phase (design) of the product. Product design requires a long time because it follows from this very stage remove any subsequent changes, the implementation of which is more expensive.

Target cost is determined by deducting from the sale price of the product the service has a profit margin that now wants to achieve. Target costing is not only a method of cost control, but also an approach to planning profit (outcomes) and cost management.

From extensive theoretical plea result superior advantages of modern costing systems, by promoting the idea of transforming the traditional systems in a page of history in literature.

The spirit of the classic drop is universally supported but must always keep the note of a sound advantage to be ephemeral and any bet on the future extremely risky"[11].

Thus, according to Herbert Simon, owner of the Nobel Prize for Economics, is born haunting question: Which is the various solutions is the best ?

5. Clasic or modern in Romanian accounting: a case study to SC FOREST SRL

The mission of any company reflect management's opinion on what organization is trying to achieve or become long-term.

The mission it self is a form that states who is making and direction of the organization. Mission requires a strategy by managers in order to achieve these objectives, inserting the desired finality.

Management accounting is the manager that supports when designing a strategy, providing information on sources of competitive advantage (eg productivity or efficiency advantage in that it has now from the competition, et al).

The role of management accounting is decisive because it helps considerably of a build the foundation of an entity, which, like the foundation of a building, if not solid, craks and collapses immediately appear shortly.

Wanting to reflect the major role of management accounting, the accountant proposals in adapting a system of costing linked to management decisions, we developed a case study suggestively at SC FOREST SRL.

In the initial phase entity has as main activity the marketing of forestry and wood. The expansion of markets profile and attracting a loyal client (customer orientation), SC FOREST SRL has decided to diversify its object of activity, thus opting for wood processing, wood products, except furniture.

In consequence was done designing adequately able to provide managers with information it needs to efficiently and effectively manage the entity. Here comes the natural question: where is found the design of an ideal system costing ? Interference between theory and practice, the boundary between classical and modern ?

The achieved proved extremely laborious and difficult. Initial approach resulted in launching and economic study which requires knowledge of relevant legislation, followed by a thorough documentation regarding peculiarities which shows the sector within which the entity operates. Then, knowing the environment in which enterprises operate, the competitors faced, the existing and potential market outlets for the products/services is useful information when designing and implementing a costing sistem.

[11] Tabara N. – *idem,* p.6.

Once completed the study of the economic environment, the next phase of the study focused entity, based on two fundamental elements-structure and strategy. Strategy guide is any account in the desing of costing systems. Fundamental desire of the management entity was considered that the implementation of the consting system to come to his support by providing relevant information to guide him in determining a sale price in the long-term decision making and represent an optimal adjuvant for financial reporting. Also took into account the size of the entity (for small, six employees, turnover of 1 444 765 lei) and desire as the cost of the new management system to fit into a budget investment.

The accountant has the difficult task to design and implement a costing system effectively, but with limited resources.

The accountant is forced to consider the following fundamental goals in designing a costing system:

- the cost-advantage;
- systems of accounting and costing are those that have to adapt to operating activities and not vice versa;
- systems various cost calculation records in order to facilitate decision making.

Besides theoretical basis, a significant contribution in the design and

implementation of an appropriate calculation is the practical experience of the accountant in the activity analyzed.

The wood industry is one as complex as it is vast. Success lies in their ability to connect with the accounting technical knowledge.

Manager communicated to accountant the success of European funds in order to purchase the necessary production machinery and equipment (saw, chainsaw, circular pendulum, circular multiple machine calibred central thermal), chich contributed to lower acquisition costs by 50%) the rest being subsidized from EU funds.

Analysis is performed market research concluded that there are many customers in the country and outside border whose demand is rising. He then designing to lead to obtaining a relevant production cost such that, based on full cost manager to set a competitive price in order to ensure long-term profitability.

Comes fundamental question: ***where do we go now ? to classical or to modernism time ?*** The answer is as complex as it is hard to argue.

Globalization, emerging phenomenon has led to the innovation of existing costing systems in each country, sometimes by their own creation, but often by imitation. Japanese culture, because of innovative well known world wide success experts a great influence in the implementation of costing system. Of course, implementing an Activity Based Costing calculation (the activity) or Target Costing (target cost) going up the steps to the essence of Japanese management Just in Time (production in real time) or Total Quality Management would be ideal. But it would have to become more pragmatic, let's not forget the real state of their own culture, opportunities and characteristics of each country in general, the individual features of each entity analyzed in particular.

Words on the agenda are organizational restructuring, remodeling processes reengineering in order to remove the classical accounts that produce „just the wrong" according to Proffessor Kaplan.

Does so much we have disfavored traditional costing systems that we want to turn a page of history evolutionary scale ?

We support the effectiveness and efficiency of the new costing system, but unanim ously sould not commit the common mistake to deny our past. Will history be written in a collective momentum madness or small steps and forethought, so handy to have a noteworthy legacy account ?

Of course we cannot remain rooted in the past, but much more effective would be to find an old method and system adaptability to the current environment, a mixture of old an new, a blend between traditional and modern accounting. Permanent care management accountant has resulted in a sound mind to propose a cost calculation to be based on a stable foundation, not just an imitation failed, because change is one of substance and not just one forme, as failure would be immiment future.

Refering to the case study, belived to be pertinent proposal management accountant who decided to implement costing systems on controls and designing a folded accounting program with a specific activity of IT companies.

In the initial stage, management accountant has used expertize of a forestry, who later occupy the responsible production technology in the design process for the four categories of manufactured products: timber, flooring and panels.

Then have provided production accountant recipes that just highlights the amount of finished product and of waste, loss of technology, consumption norms for supplies, each products custom made. IT firm contracted specialists have designed and implemented the software necessary entity and folded on specific activity. By analyzing information flows and circuits were designed and implemented entrances computer system resulting in final statements and reports to management review.

In the final stage, given the new organizational structure, management accountant proposes 13 people (10 workers skilled in woodworking, one charge of production with specialization in forestry and wood processing experience, one mechanical and 1 fireman for heating) for the development of the productive process under optimum conditions according to established manufacturing recipes accurately.

In the analysis performed (Table 1) entity SC FOREST SRL justifed proposal management accountant, proving to be folded on the realities of the economic environment and local real support in the decision making process.

It justified the choice of costing the orders (classic costing system) as the share of direct costs is superior share of indirect costs (see Tabel 1).

Thus, because of the type of wood production-processing component of direct costs (raw material direct, direct manufacturing labour, energy technology, materials supplies-gasoline, diesel, glue, incidental expenses – electric motor winding, sharp knives, machine, abrasive belt replacement, et. al) is the upper value of indirect costs (staff salaries service and management of the productive sector, depreciation expense, energy consumption in the overall interest of the productive sector.

Although indirect production costs are related to the execution of a specific command, they cannot be directly atributed to it. Therefore we chose as the basis for allocating the number of direct labor hours to make the connection between indirect costs and orders executed. Why ? Because it is considered that there is a strong relationship between the number of cause-effect direct labor hours to order the part (cause) and indirect manufacturing resources consumed by that command (the effect).

Of course there are many other key distribution (hours-machine production units, direct materials costs, et.al.). Used in practice and supported in theory. Each has advantages and disadvantages. Should be moved effeciently support a specific base distribution over another, because each entity according to its specific and cause-effect relationship grounded implements its own distribution keys.

Then calculate the full cost (production cost + cost period) is an adjuvant in the negotiation of the sale price, directing long-term decision making.

I highlighted and gross margin calculation unit to compare the profitability of different production orders to determine why some commands have lower profitability. They wasted direct materials ?

Too much direct manufacturing labor ? Is there any way to improve efficiency of these commands ? Or simply, the price fixed for such orders production was too low ? Besides being established initially in a special recipe of production some consumption norms, and so on, it is absolutely necessary to analyze the cost of production orders because it provides the information necessary for evaluating performance and for making future improvements. Today it is considered reasonable gross margins for each command executed, yielding a benefit/order considerably entity.

Table 1. Analysis of efficiency of production for the month of August 2013

Explanations/Order	**Currencies**	**Beech timber**	**Oak elements**	**Beech parquet**	**Oak panel**	**Cherry timber**
Quantity produced and sold/order	cubic meters	50	80	51,852	43,636	30
Cost of production	Lei/cubic meters	481,672	1 363,464	662,9	2 481,033	2 255,788
- direct costs		451,055	1 329,048	636,17	2 397,754	2 126,52
- indirect costs		30,617	34,416	26,73	83,279	129,268
Complete unit cost	Lei/cubic meters	582,256	1 514,216	778,91	2 756,612	2 661,584
Negotiated price/order	Lei/cubic meters	750	2 500	2 300	7 560	2 800
Benefit unit	Lei/cubic meters	167,744	985,784	1 521,09	4 803,388	138,416
Benefit/order	Lei/cubic meters	8 307,2	78 862,72	78 871,58	209600,638	4 152,48
Turnover	lei	37 500	200 000	119	329 888,16	84 000
- cost of production sold		-24083,6	-109077,2	259,6	-108262,35	-67673,64
= Gross margin on sales		=13416,4	=90922,88	-34372,69	=22162580	=16326,3
- cost period		-5 029,2	-12 060,16	=84886,9	-12 025,16	-12 173,8
* cost distribution		1 315,52	3 157,28		3 129,792	3 192,24
*general administration costs		3 713,67	8 902,88	-6 015,35	8 895,373	8 981,64
				1 574,294		
				441,056		
The result of Operating	lei	8 387,2	78 862,72	78 871,55	209 600,63	4 152,48

According to our opinion, the solution presented for the entity studied is the optimum moment, but it is obvious that the future will bring notable changes necessary and pertinent always correlated with local environmental variation imposed by the effect of massive globalization.

6. Conclusions

Choosing optimal system cost calculation represents great dilemma entities. ***What is the ideal path in a turbulent and uncertain ? For what you are going: classic or modern ?***

The literature has long campaigned for the abandonment of classical, projecting mainly disadvantages. The optimal solution is looming in the adoption of modern calculation systems, the benefits of which are outlined in a frenezy.

Nothing really should say followers of this idea, ready to argue revolutionary system costing the activities clear disadvantage of a system command or phases.

In our opinion, the approach is beneficial and right but up to a certain point. It wants access to modernism in the context of the traditional obsolete, but it seems that you no longer realize the true significance of the impact of cultural, economic or social.

In this context, the ABC method is not illusion solution ?

In literature, there is recognition that „ABC knows dissemination slow below expectations in several countries (UK, Canada, Sweden, Finland, Norway)"[12] because of the time difference between user expectation of ABC eventual promotion speeches by hand, press conferences: „success stories". ***Does reality match the company ?***

Study have shown that the ABC has a good reputation, as business take their ideas even partially, even if they are few organizations that apply completely.

„Home reluctance seems to be the date of presentation of the method as a panacea, because businessmen have learned that management no recipes".It's time to stop overselling ABC – said Johnson in 1992, as Brimson in 1998 noted that this method exposes man show to obsolescence[13].

Apparently not in the distribution of indirect costs by finding the correct base allocation for each activity excel ABC, but by ABM (Activity Based Management), a kind of corollary much less formalized. And then it all grounded opinion that a cause of onsolescence of traditional calculation systems of the type inductor chosen for allocation of indirect cost ?

In Romania most companies apply traditional costing systems, particularly calculation systems or costing order phases.

It would lend implement modern calculation based on this fund ?

The answer can be a definite as interval an external factors influence is particularly striking.

Opt for small steps policy because succes is more certain mod uncertain as if not adopting extreme solutions.

First, referring mainly to the shere of production, entities should focus their attention towards technological progress, namely to renew old machines, physically and morally worn with other topical designed to streamline the production process in a concrete manner. Then the computer system of the organization is another key success factor that helps in better management, processing and storing flows, and not least efficient manufacturing of products traded recipes and a recording system and the calculation of specific activity costs folded help decisively to ensure and maintain success in an increasingly aggresive and turbulent. Of course no solution is not free, but the desire to succed and maintenance in the field of activity, each entity will use its professional judgment to find adequate solutions to cost as diminished.

Obtaining accurate cost should not be an end in itself for any calculation system. To try to determine the exact costs involved, on the one hand, a long time processing an rendering of information and, on the other hand, a risk in terms of loss of substance, at the expense of form.

Johnson and Kaplan referred to this situation wondering: „in fact, when the product cost is played with five or six decimal places, who will suspect the first digit is incorrect ?"[14]

To address a problem of choice that cost management is necessary and will allow for the best solution, so that cost of appropriately analyzed context. Ideally, the information given is both relevant and accurate, except that, in reality, the cost of such information often exceeds the benefits they generate information itself. Thus it is preferable that the information is relevant and with a degree of "accuracy" reasonable.

The role of managerial accounting and calculation systems has been pointed out by Kaplan and Johnson again after twenty years: "Poor managerial accounting systems, by themselves, cannot lead to the failure of an organization. Besides, no excellent managerial accounting systems does not ensure success. But surely, they can contribute to the decline or survival of the organization".

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[12] Diaconu P. et.al. – *Managerial Accounting Depth,* Economic Publishing Bucharest, 2003, p.89.
[13] Ibid, p.90.
[14] Johnson H.T. & Kaplan R.S, idem, p.187

A calculation system cannot exist, he has designed universally and implemented taking into account the realities of the environment in which the organization operates and especially internal conditions and requirements management system.

Best calculation system is achieved by balancing the "cost of errors resulting from incorrect cost estimates more accurate measurements"[15].

Where are we heading ? to classical and/or modern ? The answer is somewhere on the boundary between plates of scales at the limit of what we think, justify, and apply the result…deserve.

References

- Aslau T., (2000), *Management control beyond appearances*, Economic Publishing House, Bucharest, p. 93.
- Budugan D. et al., (2007), *Management Accounting*, Publishing House CECCAR, Bucharest, p.383.
- Diaconu P. et.al., (2003), *Managerial Accounting Depth*, Economic Publishing Bucharest, p.89.
- Hindle T., (2008), *Management*, Publishing House Nemira, p.18.
- Horngren C.T., (2008), *Cost accounting. A managerial approach, 9th Edition*, Publishing House ARC Chisinau, p.2.
- Johnson H.T. & Kaplan R.S., (1991), *Relevance Lost. The Rise and Fall of Management Accounting*, Boston: Harvard Business School Press, p.25.
- Lucey L., (1992), *Management Accounting*, 3rd Edition, London, p.320.
- Siegel G., (2000), *The Image of Corporate Accountants*, Strategic Finance, no.2, p.8.
- Tabara N., (2004), *Management control in the new competitive environment*, Review Accounting, Expertise and Business Audit, No.2, p.5.
- Watson T.J., (1998), *In search of management*, New York, International Thompson Business Press, p.8.
- Minister of Finance Order nr.3055/2009 for approval of Accounting Regulations in accordance with European directives, published in the Official Gazette, nr.766/10.11.2009.

[15] Diaconu P. et.al , idem, p.90

IMPACT OF VAT ON THE PROFITABILITY AND THE CASH FLOW OF ROMANIAN SMALL AND MEDIUM ENTREPRISES

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Abstract

The options available to taxpayers make tax systems attractive and give them an opportunity to choose one system or another after a careful analysis of the fiscal advantages and disadvantages of each choice.

A small or medium company has to explore the options available, whether that is VAT registration or de-registration or choosing the best VAT special scheme.

VAT optimisation is particularly interesting because of the high cash flow involved and because of the cash flow benefits that can be obtained.

This paper presents an analysis of VAT costs and their impact on profitability and cash flow of small and medium enterprises. We also analysed specific mechanisms to improve profitability and cash flow through VAT optimisation.

Keywords: *VAT optimization, special VAT schemes, the compliance costs, profitability, cash flow.*

1. Introduction

Modern taxation systems impose a heavy burden on taxpayers, particularly on small business taxpayers. That burden consists of three elements:[1]

- In the first place there are taxes themselves;
- Secondly, there are the efficiency costs, involving tax-induced market distortions;
- Finally, there are the operating costs of the tax system: the costs to the government (ultimately borne by taxpayers) of administering and collecting the taxes and the costs expended by taxpayers in complying with their tax obligations.

Companies must optimize the relationship to taxation from a financial and economic point of view. This behaviour is possible when taxation offers business the opportunity to increase its profitability and liquidity when they exercise their tax options.

The enterprise' tax management objectives shall ensure tax security and effectiveness.

Tax security is obtained by complying tax obligations. In this way the companies avoid any penalty taxes and proceed to a better allocation of its financial resources.

Tax effectiveness involves minimizing taxes in observance of the tax law. This can be obtained either directly or indirectly. Direct effectiveness can be achieved through tax law which includes measures of incitement for tax purposes. An example of this is the company option to be liable for VAT even if its turnover allow it to qualify for a small businesses scheme (which means exemption from VAT).

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[1] L. Babone, R. M. Bird, J. Vazquez-Caro, *The Costs of VAT: A Review of the Literature*, International Center for Public Policy, Working Paper 12-22, April 2012.

The aim of this work is to analyse the impact of company management options of VAT on profitability and cash flow.

Obtaining tax advantages requires a good knowledge of tax legislation. This is why in the first chapter of this work we will identify the main characteristics of Romanian VAT system and we will go into detail on two special schemes of VAT: the small companies' scheme and the cash accounting scheme, which have a significant impact on the cost related to VAT.

The costs of complying with VAT regulations are separated into administrative costs, direct costs and costs related to the cash flow management. We will examine these costs in the second chapter.

At the end of our work we will try to identify for the managers of small companies some tools designed to improve cash flow, simplify accounting requirements and thus, reduce administrative burdens of VAT.

2. Key features of Romanian VAT system

2.1. Transactions within the scope of VAT

Supplies of goods or services, which have the place of supply in Romania, are subject to Romanian VAT, where made by a taxable person in the course of a business carried on by said person.

The transactions which fulfil the following conditions are subject to Romanian VAT:

- They represent a supply of goods/services in return for consideration or an operation treated as such.
- The deemed place of supply is in Romania.
- They are performed by taxable entities.
- They result from economic activities.

From the VAT point of view, persons may be classified as follows:

<table>
<tr><td rowspan="4">Taxable persons</td><td colspan="2">Normal taxable persons – Romanian entities carrying out economic activities in excess of the small undertaking threshold of EUR 65,000 (RON 220,000).</td><td>Persons liable to pay VAT
These persons are required to register and account for Romanian VAT.</td></tr>
<tr><td rowspan="2">Exempted persons</td><td>Taxable persons covered by the exemption for small companies</td><td rowspan="3">Group of the 3 entities which do not pay VAT
These persons are not required to register for VAT purposes at the beginning of activity, but are required to register if their intra-Community acquisitions exceed EUR 10,000 /year.</td></tr>
<tr><td>Romanian entities who carries out exclusively VAT exempt without deduction right</td></tr>
<tr><td rowspan="2">Non-taxable persons</td><td>Non-taxable legal persons</td><td>Public institutions, Non-governmental organizations</td></tr>
<tr><td>Non-taxable natural persons</td><td>Natural persons who do not carry out economic activities independently</td><td>Persons which do not pay VAT
These persons are not required to register for VAT purposes.</td></tr>
</table>

Within the scope of the VAT enters various categories of transactions, which can be classified according to several criteria, such as:[2]

Classification criterion	**Categories of transactions falling within the scope of VAT**	
Regime of taxation	1) Taxable transactions	the supply of goods for consideration within the territory of a Member State by a taxable person acting as such; the supply of services for consideration within the territory of a Member State by a taxable person acting as such; the intra-Community acquisition of goods for consideration within the territory of a Member State by a taxable person acting as such; the acquisition of general business to business services taxable in Romania, from EU and non-EU suppliers; the importation of goods into Romania.
	2) Transactions exempt from tax	Supplies of goods or of services exempt from tax, with the right to deduct the input VAT, sometimes called ”zero-rating”: - Export of goods, transport and related services - Intra-community supply of goods - International transport of passengers - Goods placed in free trade zones and free warehouses b) Supplies of goods or of services exempt from tax, without the right to deduct the input VAT: - activities including banking, finance and insurance - medical, welfare and educational activities, if performed by licensed entities - rental and lease operations involving immovable goods, as well as the supply of old buildings and non-constructible plots of land (however, the option to tax these operations is available) c) Exemptions on intra-Community acquisition and importation (imported goods that would have been VAT exempt if supplied locally in Romania)
Special VAT schemes	The cash accounting scheme Special scheme for small companies (taxable persons whose annual turnover is no higher than the equivalent in RON of 65.000 euro). These persons may opt either for the normal system of VAT. Special scheme for travel agents Special scheme for second-hand goods, works of art, collectors’ items and antiques Special scheme for investment gold Special scheme for non-established taxable persons supplying electronic services to non-taxable persons	

[2] M. Z. Grigore, M. Gurău, *Fiscalitate. Noţiuni teoretice şi lucrări aplicative*, Editura Cartea Studenţească, Bucureşti, 2009.

2.2. The cash accounting scheme

The introduction of cash accounting scheme is part of the wider EU measures aimed at combating intercompany indebtedness. VAT-registered suppliers of goods and services often provide credit to the state by paying the VAT due on their supplies before they have received the cash from their customers. In the meantime, their clients benefit from an ”advance” deduction of input VAT without effectively paying anything (including tax) to their suppliers. This effect is known as”pre-financing” and it is considered to be one of the flaws of the current VAT system.

Therefore, with the aim of reducing intercompany indebtedness, the EU has amended its legislation (Directive 2011/7/EU). One measure is to introduce an optional VAT cash accounting scheme, which Member States can opt to implement in their national legislation from 1 January 2013[3].

In Romania, this system was introduced on 1 January 2013 and taxable persons generating annual taxable turnover of up to EUR 500,000 (RON 2,250,000) were obliged to apply. These persons were supposed to record the output VAT only after the client had paid it but no later than 90 days from the date on which such VAT had been generated. Nevertheless, the taxable entity could not deduct the VAT related to acquisitions until the relevant invoices were paid.

The taxable entities registered for VAT purposes that did not apply the system but acquired goods or services from entities being obligated to apply it could not deduct the related VAT until the invoices for such acquisitions were paid. These entities had no obligation to collect VAT upon receiving the invoice value as they should comply with the general rules.

Because of the noticeable number of companies that were in this situation, more than 400,000, the Government expected a significant impact on unlocking money in the economy. Unfortunately, the effects were not as expected. The main problem, even observed by the European Commission, has been imposing deadline for payment of 90 days of VAT to the budget, even if the invoice was not received. At the same time, it was not specified a time limit for the deduction of value added tax, and the companies could credit the state budget, sometimes even for months.

The cash accounting system has been modified on 1 January 2014, due to European Commission pressure and the discontent of the business environment.

The system has undergone two essential changes:

- The system is not mandatory. Companies with annual taxable turnover of up to EUR 500,000 may choose to apply or not, depending on the cash flow and the activity type.
- More important, the second change has been eliminating the 90-day period in which output VAT had to be paid to the state budget, even if the amount was not received from their clients.

A positive side effect from the VAT cash accounting scheme is that it provides a means of combating VAT fraud. Most often, VAT is drained through fraudsters reclaiming input VAT on invoices documenting fictitious supplies. The application of the VAT cash accounting scheme should limit the number of such cases.

Currently, some large customers of small and medium enterprises have stronger negotiation powers and are dictating certain contractual conditions, such as long payment terms. These companies can benefit from VAT reclaim on their purchases before they actually pay the price (including the tax) to their suppliers. However, this will no longer be possible if the cash accounting scheme is applied. The need to recover input VAT may prove an incentive for larger companies to pay their SME suppliers more quickly.

[3] http://tmagazine.ey.com/insights/cash-accountings-impact-business-bulgaria/.

Nevertheless, applying the cash accounting scheme may not be attractive to an SME compared with the threat of losing a big client who might dislike this inconvenience. It is currently difficult to predict whether this is a legitimate issue. To a large extent, the effectiveness and attractiveness of the scheme depends much more on the practical complexity of the registration procedure and the requirements for its application.

2.3. VAT Chargeability

In the standard system, VAT chargeability occurs on the date of the supply of goods/services. However, chargeability appears from the date of the invoice, when the invoice is issued before the delivery of the goods.

If the cash accounting scheme (CAS) is applied, the deduction and collecting of VAT shall take place as follows:

The deduction of VAT, in the cash accounting scheme

Buyer	Supplier	VAT Chargeability
The buyer applies CAS	The supplier applies CAS	Input tax is deductible to the extent payments are made to suppliers
	The supplier doesn't apply CAS	
The buyer doesn't apply CAS	The supplier applies CAS	
	The supplier doesn't apply CAS	Input tax is deductible from the date of the purchase of goods/services.

The collecting of VAT, in the cash accounting scheme

Supplier	Buyer	VAT Chargeability
The supplier applies CAS	The buyer applies CAS	Output tax is chargeable upon receipt of payment.
	The buyer doesn't apply CAS	
The supplier doesn't apply CAS	The buyer applies CAS	Output tax is chargeable from the date of the supply of goods/services.
	The buyer doesn't apply CAS	

2.4. Regime of deductions

A taxable person is allowed to deduct the VAT he paid on his purchases insofar as the goods or services are used for his business activities.

If a taxable person registered for VAT purposes performs both taxable and exempted transactions without deduction right, input VAT (for purchases) may be recovered according to the following criteria:

- VAT directly attributable to taxable transactions – direct deduction in full
- VAT directly attributable to exempt transactions – non-deductible in full
- VAT related to both taxable and exempted transactions – subject to pro-rata allocation.

The pro-rata allocation shall be made up of a fraction comprising the following amounts:

- as numerator, the total amount, exclusive of VAT, of turnover per year attributable to transactions in respect of which VAT is deductible;
- as denominator, the total amount, exclusive of VAT, of turnover per year attributable to transactions included in the numerator and to transactions in respect of which VAT is not deductible.

Net VAT to be paid or to be recovered shall be determined as follows:

- If the output VAT is higher than the deductible VAT, the difference between them is the VAT payment.
- If the deductible VAT is higher than the output VAT, the difference between them is the VAT to be recovered (a negative amount of tax).

2.5. VAT Compliance

As a general rule, the fiscal period is the calendar month. For taxable entities whose previous year-end turnover did not exceed EUR 100,000 and not performing intra-community delivery/acquisition of goods, the fiscal period is the calendar quarter.

VAT returns should be submitted to tax authorities by the 25th day of the month following the end of the fiscal period.

In addition to the VAT returns, tax payers must submit to tax authorities three other summative statements (390, 392A and 394).

The VAT payment shall be paid up to the date of submission of VAT returns.

The negative amount of tax shall be compensated with VAT payment in respect to the following period or shall be refunded. A request for VAT refund is made through a tick box that should be marked on the VAT return. The VAT refund is made after a tax audit is performed, either in advance of the refund or after the refund (subsequent procedure). The VAT refund with a subsequent procedure is only available for taxpayers having a low risk profile as determined by the fiscal authorities.

Refund claims must be processed by the tax office within 45 days from the submission date. In practice, this period may be longer.

3. The impact of VAT on the companies'profitability and the cash flow

VAT involves the following costs for the enterprise: the compliance costs, direct costs and costs related to the cash flow management.

3.1. The compliance costs (administrative costs)

The compliance costs are the costs expended by taxpayers in complying with their tax obligations. These costs are generated by:

- The complexity of legislation: frequency and nature of changes, costs involved in understanding legislation (exclusions, exemptions, deductions, rgood/services distinctions etc.)

- Procedural requirements. Companies registered for the purposes of VAT must draw up the supporting evidence and VAT registers. It also must be organized rigorous, detailed and complex enough accounting records to have the information necessary for drawing up the VAT return. This will involve additional work and therefore, the increase in expenditure on wages and salaries.

The Communication from the European Commision on the future of VAT[4] mentions that compliance costs for business represent 2% to 8% of VAT receipts. The compliance costs are disproportionately higher for small business. Furthermore the compliance costs are significantly higher when businesses are involved in cross border trade. SMEs have fewer

[4] Communication from the European Commision to the European Parliament, the Council and the European Economic and Social Committee on the future of VAT, COM(2011) 851 final, Brussels, 6.12.2011 http://ec.europa.eu/taxation_customs/taxation/vat/future_vat/index_en.htm#comm.

resources for copying with the difficulties resulting from the differences in rules and obligations of each Member State. The cost is proportionally higher for them.

The administrative costs in the case in which the company applies the cash accounting scheme (CAS) are higher, for the following reasons:

- This system requires more accounting records, as well as completing several forms, statements and logs.
- If suppliers/service providers who are applying this system does not mention in the invoices "CAS", the beneficiaries shall be obliged, in order not to have problems with the right of deduction, to check the status in the register suppliers taxable persons who apply to the CAS available on the ANAF[5] web site, resulting in additional bureaucratic work.

3.2. Direct costs. VAT implications on the companies'profitability

Considering the impact of VAT on costs and default on the companies'profitability, there are two possible situations:

(A) value added tax is neutral for the enterprise only if two conditions are fulfilled simultaneously:

- The company falls within the scope of the payment of VAT or is a small company which has opted for VAT purposes
- The deductibility is 100%.

This neutrality is due to the fact that the company registers purchases and sales in the net value, exclusive of VAT. In this situation it is estimated that between accounting and taxation creates report neutral, accounting information being used as support for calculation of VAT.

(B) value added tax adversely affects companies' profitability as follows:

- If the company is not subject to VAT, the inputs VAT enter into the acquisition cost.
- If the company is subject to VAT, but supplies goods exempted from VAT without the right to deduction (pro rata allocation is less than 100 %), the non-deductible difference is included in the acquisition cost, thereby affecting the account of results by an increase in operating costs.

The increase in the operating costs involves reducing the management intermediate balances.

Thus, commercial margin will diminish with non-deductible VAT. This will result in reduction in the value added, the gross operating surplus, the operating result, the current result and the outcome of financial year.

Decrease of result will lead to the reduction of return rates, in view of the fact that these rates shall be determined as the ratio between the results and invested capital.

In order to optimize the cost tax, the company needs to analyse very well its object.

If the company is exempt from VAT and obtains its supplies of goods or services which have a relatively high value, it charges the cost of acquisition with the value added tax, risking to be excluded from the market. If the costs of acquisition, which determines the value added tax, are large, then the company's manager's decision must be to choose to be subject to VAT.

For a company whose object of activity is supply of services, through the analysis, consultations, assessment, design and exploitation of intelligence, in general, external consumption is small. In such situations, the company will not opt for VAT purposes, as this will be borne by the customer. Even if the quality level of the services provided is high, customers will choose non-taxable companies, because the cost will be lower.

[5] The National Agency for Fiscal Administration (ANAF) – subordinated to the Ministry of Public Finances – has the mission to provide the resources for the public expenditures of the society by collecting and managing efficiently the taxes, charges, contributions and other amounts due to the general consolidated budget.

3.3. Costs related to the cash flow management

Understanding and implementing cash flow management strategies is a vital piece in building a sustainable business. Managing capital in a responsible manner means making financial decisions related to short term financing as well as maintaining a balanced relationship between short term assets and short term liabilities. The ultimate goal of a company will be to be able to continue its day-to-day operations with enough cash flow to cover short term debts in a timely manner and to also handle operational expenses.

Costs related to the cash flow management are determined by the delay between receipt of claims and the payment of debts in the short term.

According to the financial equilibrium theory, net cash flow (NCF) is influenced by the difference between the delay revenue (inventories, claims, prepaid expenses, VAT refund etc.) and delayed payments (amounts owed to suppliers, to employees, to the state for tax obligations and social consisting of: VAT payment, profit tax, excise duties, contributions to social security etc.). These delays are compiled by an indicator called working capital needs (WCN), which has direct influence on net cash (NCF), as a result of the relationship:

$$\mathbf{NCF = WC – WCN}$$

in which: WC = working capital = Current assets – Current liabilities

The relationship that highlights the impact of the value added tax on WCN look as follows:

WCN = (inventories + claims + VAT refund) - (accounts payable+ VAT payment + other short-term obligations)

VAT refund and VAT payment affect treasury monthly or quarterly. Thus, if the company records VAT payment, this amount shall be paid in the 25th day of the following month. Until that date the company will be able to use availabilities created and give up on loans. This will result in increasing financial autonomy and the decrease in the debts rate. The company benefits from this surplus cash-flow for 25 days, provided that the amount of sales to be paid by customers before the date of the first of the following month. Otherwise the surplus cash-flow shall be reduced in proportion to the number of days of delay in payment.

If the company has to recover VAT, then it will be faced with the need of cash. Even if refund claims must be processed by the tax office within 45 days from the submission date, in practice it may take months.

Financial implications of VAT may be highlighted also by the determination of three indicators: average collection period (ACP), average payment period (APP) and days of working capital needs (DWCN).

The average collection period (ACP) shows the average number of days it takes a business to collect payment for sales to customers on credit.

The formula used to calculate the average collection period is:

$$\text{ACP} = \frac{\text{Average of accounts receivable}}{\text{Average of sales}} \text{ x } 365$$

When the average collection period increases, the company is faced with a deficit of liquidity.

The average payment period (APP) is defined as the number of days a company takes to pay off credit purchases. It is calculated as follows:

$$APP = \frac{\text{Average of accounts payable}}{\text{Average of supplies}} \text{ x } 365$$

As the average payment period increases, cash should increase as well, but working capital remains the same.

If we take into account only those elements strictly generated by financial flows on VAT, the difference between ACP and APP will represent days of working capital needs (DWCN):

DWCN = ACP - APP

If the company's goal is to minimize the use of working capital, then it has to do everything it can to keep accounts receivable low (for example, by offering discounts for quick payment) and accounts payable high.

The companies' cash flow can be also seriously affected by applying the cash accounting scheme. In 2013 this scheme had a positive impact on the cash-flow for some of the Romanian companies and a negative one for most businesses.

A negative impact on the cash-flow was felt by some small and medium companies obliged to implement the system in the year 2013, as well as at large companies that have been working with SMEs which applied the cash accounting scheme, in the sense that they have been able to deduct the input VAT only after payment of the invoice.

Although the cash accounting scheme should have led to an increase in the companies' cash flow and should have help them in a time when banks were not yet open for financing, the reality was different. This scheme was not even a payment of VAT at collection time, but rather a deferment of payment until the 90th day at the date of the invoice, which did not bring taxpayers significant benefits.

What's more, the new scheme of VAT has led, in some cases, to elimination of small companies from the market, since some large companies, which were not eligible for the the cash accounting scheme, had selected the providers of goods and services who don't apply the new VAT scheme. Suppliers which applied the cash accounting scheme were excluded because large companies wanted to avoid administrative costs and improve their cash flow.

Since 2014, the cash accounting scheme became advantageous as a result of the elimination of two obligatory conditions in 2013: the obligation of firms with an annual turnover less than EUR 500,000 to apply the system and the obligation of them to pay the VAT in up to 90 days, even if the amount has not been received from the customer.

The main advantage of using this scheme is the positive impact on the supplier's cash flow, if a customer is a late payer. Under this regime, the supplier should not bear the burden of paying VAT on the supply before receiving the payment from customers.

For purchasers, VAT recovery is delayed until payment for invoices subject to cash accounting. Therefore, the regime will indirectly help to improve the liquidity of the entities that opt to apply the cash accounting scheme by eliminating the situations when a customer benefits from input VAT reclaim before paying the supplier. In such cases, the customer would likely prefer to pay all invoices for which the cash accounting scheme is applied instead of keeping the invoices unpaid.

4. Conclusions

Small companies' managers must plan carefully, choose wisely and in accordance with the type of their business and reduce the risk of failing to achieve tax compliance. In the area of VAT stand out two options for small businesses with major impact on the profitability and cash-flow:

- ***The option of applying the system of VAT exemption for small business***

This scheme provides a competitive advantage by prices free of the VAT.

The option of applying the system of VAT exemption for small business is justified under the following conditions:

- The company doesn't carry out or estimates a turnover of less than EUR 65,000;
- The company doesn't carry out a significant investment process;
- The company is not carrying out operations exempted from VAT with the right to deduction (e.g. exports, intra-Community supplies of goods etc.);
- The company has mainly B2C (business-to-Consumer) transactions.

If the company has mainly B2B (business-to-Business) transactions then is better to register for VAT, as this will allow it to reclaim the VAT paid on goods and services purchased.

- ***The option of applying the cash accounting scheme***

This option is justified under the following conditions:

- The firm carries out or estimates a turnover of less than RON 2,250,000;
- The firm collects invoices issued to customers after substantial periods of time;
- The firm has no significant acquisitions that should generate VAT to be refunded.

Such a situation can be found, for example, in the services sector, where input VAT is insignificant, in comparison with output VAT.

If the company collects invoices in a short period of time or is planning an investment process which will generate VAT refunds, it is better not to opt for the application of the cash accounting scheme. The main advantage will be that input VAT will be deducted immediately, no matter the time of the payment of the bills to suppliers, therefore, by default, the possibility to apply for a VAT refund more quickly.

References

- L. Babone, R. M. Bird, J. Vazquez-Caro, *The Costs of VAT: A Review of the Literature*, International Center for Public Policy, Working Paper 12-22, April 2012.
- M. Z. Grigore, M. Gurău, *Fiscalitate. Noţiuni teoretice şi lucrări aplicative*, Editura Cartea Studenţească, Bucureşti, 2009.
- http://ec.europa.eu/taxation_customs/taxation/vat/future_vat/index_en.htm#comm.
- http://tmagazine.ey.com/insights/cash-accountings-impact-business-bulgaria/.

FINANCIAL REPORTING AND THE DASHBOARD

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Abstract

The domain of accounting and management control at the level of multinational corporations operating in a global economic environment is an interesting blend of two disciplines: the international component of management and, on the other hand, the more technically challenging side of recording and handling financial-accounting information, which is seen as an "optimal information package". The need for accounting and management control derives from the company's strategy, serving as a source of information for the management and as an instrument for validating the convergence of the company's interests and those of its employees.

Keywords: *dashboard, financial performance, financial reporting system.*

1. Introduction

Strategic management seeks to develop dashboards that allow validating the long term direction of a company in the interest of its shareholders, its employees, its clients and other partners. Traditional dashboards are focused primarily on financial performance, concentrating on the definition of performance and monitoring indicators.

Management in Anglo-Saxon countries, given their financial scandals, imposed the growth of communication in the financial sector, based on value creation. Different networks and department groups, which see themselves as interdisciplinary, offer companies services that go beyond the sphere of accounting and auditing: legal, fiscal, informational and organizational counselling. Conflicts often arise between economists and professionals in other fields.

The listed failures stem from insufficient control over the process of management in high risk conditions. Such an approach generates long term value, because it focuses on controlling risks that may threaten the continuity of a company's activity.

The prospective dashboard extends the traditional dimensions of financial reporting by means of two new complementary dimensions (the process and the training/learning axes) in a strategic risk control approach. The new generation of dashboards is considering sources of value creation through dynamic and multidimensional analysis

2. The dashboard: A monitoring or reporting system?

The dashboard is a tool that encodes and structures communication. It is the factor which allows achieving parameters which are essential for a company. The suggested system distinguishes itself from other management information systems, in the sense that, ultimately, it is a financial report of the operational system where one can find global operations affecting the past, including large amounts of data which favour detailed analysis. There are two kinds of limitations to these systems. The first concerns the level of detailed in the available data: the juxtaposition of significant information and information that highlights details does not

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lend itself to a fast appreciation. The second limitation comes from the focus on past data. Precedence is given to budgetary and accounting systems over historical information. The focus is on controlling past actions. However, the interest for this type of information decreases with the passing of time.. The dashboard is thus used to track and anticipate action, allowing for flexible adaptation. Its focus on monitoring is what distinguishes it from a reporting system.

Another difference can be found at the level of the observation position. In the case of the dashboard, an observation takes place at the same time for difference services as well as for the company's hierarchy. In the case of a reporting system, such observations are only made for the hierarchy.

The dashboard can use data from the budgetary system and the general accounting, without being confused with these ones, but sharing some common points. It can be constructed, the same as the budgets, based on the existing responsibilities structure in the enterprise, and applying the same principles of analysis of the differences, being anyway, much more sleek, much more synthetic, sometimes with approximate data. While accounting favors the accuracy and the completeness of data, the dashboard is designed to provide faster partial and approximate data. We can conclude that the high frequency dashboards will prevail extra-data, while in the annual panels most indicators are calculated based on accounting information. This ensures the coherence of different sources supplying the dashboard by cross game information that enhances their mutual relevance.

As synthesis instrument, the dashboard uses multiple data sources based on several tools: budgets, quality management, commercial management, social management, technical management, financial accounting, cost calculation system, etc.

There is a special relationship between the dashboard and the reporting system. The reporting system is present in groups, and it consists of hierarchical information on the results obtained, it represents the tribute of the branch because it bears its name. This tool implements the Anglo-Saxon meaning of the term "report", with information role, hierarchical communication in case of decentralization. The dashboard is however a tool of enterprise management, aiming at the action. Starting from this general distinction, there can be identified several differences between the two instruments:

• The reporting is essentially based on financial indicators while in order to facilitate the knowledge of the business the dashboard contains non-financial indicators;

• The reporting is based on the structure of sharing of responsibilities appealing to the controllability principle; the dashboard can correspond to other decompositions of the enterprise;

• The reporting is an instrument that provides centralization, data standardization, its purpose being "the information ascent", while the dashboard must primarily ensure the management of decentralized units;

• The reporting is done in a required format, the dashboard has a more flexible structure in space and time.

Thus, reporting is present within groups of companies, while the dashboard can be used in all types of businesses. The confusion or the relationship, dashboard – reporting, appears only in groups. Although we have noticed clear differences between the two instruments, they can overlap in groups' management, the main reason being the higher cost of their separation.

Some construction principles, outlined in specialized literature, have the role to ensure the fulfillment of the purpose of the dashboard:

The coherence - the dashboards shall be drawn up in each responsibility center or at the level of any other cutting units of the company and they are subsequently centralized to be useful to several hierarchical levels. In this respect, they must be coherent with the enterprise

cropping and the compilation must comply with the chain of command. The same coherence is also necessary at transversal level. So, in order to allow the aggregation at a higher level, the dashboards, for the same functions and at the same hierarchical level, must contain the same performance indicators, the same definition of indicators and a common source.

The relevance - in order to fulfill its purpose, the dashboard should contain few indicators, but essential to the respective mission.

The urgency - the scoreboard frequency is determined according to the nature of the activity and the need of information in order to follow the fulfillment of the objective. We should note that the rapidity in preparing and delivering the dashboard is more important than the accuracy of the calculations.

The efficiency - this is the result of taking attitude in front of the figures on the dashboard. The purpose of the instrument is alerting officials, generating an action and organizing the action. The natural consequence of the dashboard is represented by the plans of action. This is an instrument that translates the desire to implement corrective actions and that allows sharing of analysis. Applying a dashboard that does not result in action involves a waste of time and money.

In order to interpret correctly the indicators and to make good decisions, in addition to the actual values of the period there must be provided one or more references:

• the historical basis - the level reached in the past. In this selection there will be taken into account the characteristics of the indicator: if it is the sales' level, the comparison will be made against the same period of last year. Instead, for the collection level of debts, the comparison basis is represented by the previous period of study. The historical references are useful, because they show the evolution of the activity, but at the same time they are closed, disregarding the environment's development and not encouraging progress;

• a provisional basis - represents the budgeted level, expected, of the indicators. The use of this base shows the degree of compliance of the commitments, but focusing on it exclusively, leads to losing sight of the ultimate goal – the customer satisfaction;

• a technical basis - the level of optimal performance from a technical point of view;

• a basis of customer expectations - very useful especially in quality-oriented approaches;

• a basis of performance of another unit - consists in using the benchmarking to determine the database. This reference is favorable to progress, internal dialogue, creativity and self-improvement;

The dashboard stands as a relatively autonomous instrument of management control, having its own presentation procedure and use of data in decision-making activities. The place of the dashboard in the management control system can be determined only in conjunction with the company's structure and the persons authorized to take corrective actions in their area of responsibility.

As the person in charge, he is entitled to receive information on the action to be taken. And as the degree of delegation of the authority, according to the structure and the organizational chart of the enterprise, determines the organization of those lower echelons known as responsibility centers, it would be inappropriate to talk about a single dashboard. Every person in charge will have to use its own instrument, which will be part of a network dashboard, constructed and arranged in a suitable organizational structure.

If a reporting system shows the results without looking at the way they were obtained, a dashboard includes indicators that describe the ongoing process. It allows going beyond the mere observation of the mismatches between objectives and results. The tool's originality lies in the broader approach which results in a new provision for the management: knowledge of the system they they are administering.

The nature of the data provided by the two systems reveals yet another distinction. The dashboard contains data gathered before the accounting step, which occurs after and not

before or during an action. The reporting system calls on accounting and financial elements determined after the action.

One can appreciate that the dashboard offers both an interface and an intermediary structure for accessing, filtering, reorganizing and presenting relevant information for management. It does not focus on detailed and regular reports by means of the management system.

The dashboard is an auxiliary tool used for decision making and monitoring, to the extent that it consists of process indicators that permit rapid adaptation in case of a drift from the agreed target. Even so, it must not contain only financial indicators taken after the fact. The dashboard offers a global image on the activities and state of a company, a crystallization of research in the field of innovation and expansion, maintaining secure conditions. In this sense, management accounting brings important information which the IT expert can use to organize information systems and subsystems.

The dashboard can be seen as a response to the insufficiencies of general accounting in justifying the decisions taken by management. In this regard, management accounting provides a quantified information, processed and transmitted especially for internal use by management. The dashboard in question is composed from a set of indicators, less numerous, that give management significant information that concerns monitoring the effects of their own activity.

The information system is organised by level, function and autonomous unit. One can imagine a multitude of information, considering:

✓ the initial situation - information regarding the organisational environment and resources;

✓ the real situation - predictions and objectives regarding the environment, resources and value created at the end of the control period;

✓ simulation - a model of the organisation allows for the testing of the alternatives in order to define the real situation and to describe the methods used to get there;

✓ surveillance - information regarding the implementing methods.

The strategic dashboard has the role of reuniting a number of information micro-systems, which exist within the organisation, build in order to crystallize the strategic decisions:

- the information system regarding risk management;
- the reporting system regarding management based on creating value;
- reporting system regarding activity-based management;
- financial reporting system;
- prospective dashboard system.

Risk management information system – this system needs to correlate the Value Based Management reporting by simulating the impact of a major risk in the system of value creation, both at the level of the balance and at the level of the economical result account. We can consider natural calamities, apparition of conflagrations etc. It refers to the evaluation of the controlling of risks which might affect the strategic objectives of the group. The system integrates the balance, the result account, risk management, risk management dashboard, risk control dashboard. The main performance indicators regarding risk management are based upon the identification of risk indicators, of generating facts, found at the origin of various types of losses.

The reporting system regarding management based on value creation – the prospective dashboard expresses the dimension of the financial vision of the Activity Based Management reporting system and of the risk management informing system. The estimation of material, exploitation and human loss, according to risk centres, allows for the evaluation of the diminishing in group wealth. The system focuses on creating value on business unit,

geographical area and profit centre. Value indicators are often times similar to activity indicators used in accounting systems based on activities.

The reporting system regarding activity management – it allows for the performance monitoring of various processes in the organisation. By means of this reporting system one can determine costs, as well as cost objects pertaining to the various strategies of the enterprise. The system also verifies indicators referring to strategic operations involved by means of the Activity Based Management method, as well as the restructuring of the commercial and marketing systems, including the optimization of resource usage.

The financial reporting system - is connected to the Value Based Management reporting system by means of components of the result account and of the balance. It is correlated with the prospective dashboard according to the financial orientation which measures financial performance for the shareholder, by decomposing the growth and diversification perspectives for the turnover as well as that of cost reduction and productivity improvement. The above mentioned system helps communicating regarding the process of long-term value creation

The system of the prospective dashboard – this is a control instrument that is widely used for reaching the objectives of various levels of an organisation. The premise of its invention consists in the observation that the organisations that are developing strategies which are later implemented in a coherent and controlled environment have a strong competitive advantage.

The above mentioned dashboard has the following characteristics:

- it re-establishes the cause-effect relationships from the four viewpoints: clients, finances, processes, organisational experience;
- constitute a strategy communicating vector;
- uses linear causality and retro-action.

The concept does not take intro account the dimension of the said environment risk, placing it under strict control, which generates a potential financial loss for the entity. The prospective dashboard system has as common denominator with the Activity Based Management reporting system the process axis, with the marketing information system the client axis, and with the financial reporting and Value Based Management system– the financial axis.

Applying the executive dashboard implies a rational organisation accomplished by means of correlating the activity of a monitoring committee with a significant number of projects which strive to implement the system. This is how to guarantee the interface with the old monitoring system, as well as the choice of an adequate informational configuration.

The finality of the executive dashboard is not that of completely substituting the old management control system architecture. It is meant mainly for the organisational leaders, for those in charge of operations, who continue to use traditional management control systems. The executive dashboard's objective is to provide the leaders with a modelling tool as well as with a tool for effectively monitoring the general policy of the organisation.

The Financial Accounting and Management Committee within IFAC made recommendations referring to:

- defining the concept of management accounting;
- investing decision;
- project control;
- quality improvement management;
- strategic planning of the information system management.

The automation of the executive dashboard development requires the existence of a prior acquisition in terms of reporting system architecture. The executive dashboard situates itself at the third level of the decisional information system architecture.

Implementing this type of dashboard requires preventive verification of the key failure factors, such as:

- lack of formalisation for a medium-term plan;
- lack of the financial report system;
- lack of the traditional dashboard indicators, according to performance, monitoring and clarifying indicators;
- lack of formalization for the value system and for organisational culture;
- insufficient structure for the activity based costing system and for the activity based budgeting system;
- lack of quality assessment tools on a marketing, human resource and management control level;
- lack of a formalized risk management strategy and lack of a employee assessment culture within the organisation.

3. Conclusions

The decisional strategy of any company is essentially founded on financial reporting. In this context, the main role is that of annual financial situations. The dashboard is a modern tool for achieving performing management, which includes risk management. The new generation of dashboards may be seen as feedback to insufficient financial accounting in founding decisions made by managers. In such a context, management accounting provides adequate information to the activities which use up resources and produce results.

Such a dashboard is an ensemble of indicators and essential data which allow for a panoramic view of the organisation, for an analysis of the disturbances and for making decisions regarding the direction that the management needs to follow in order to achieve the objectives set within the strategy. Moreover, it provides a common language to the various partners of the organisation.

References

- Drury C., *Management and Cost Accounting* (London: Chapman & Hall, 2005),145-160.
- Ionașcu I., Filip A.T., Mihai S., *Control de gestiune*, (Bucuresti: ASE, 2009), 171-174.
- Ristea M., *Contabilitatea financiară a întreprinderii*, (Bucuresti: Universitară, 2008), 219-221.
- Tabără N., Horomnea E., Mircea M.C., (2009), *Contabilitate internațională*, (Iași: Tipo Moldova, 2009), 224-229.

LOAN BROKERS

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Abstract

A loan is probably the most important financial decision we make in life. In a time when lack of time affects us in every way, including financially, we can only appeal to specialists if we want fast, reliable and quality long-term services. „The notion of "creditor" includes all legal entities, branches of credit institution and nonbankingfinancial institutions that operate in Romania and grant or undertake to grant loans in itscommercial of professional activity"[1].

In the case of loans, the "specialist" has been called loan broker. Loan broker is a person trained in intermediating bank loans who offers advice on choosing the best financial solutions for each client. Through partnerships with banks in Romania, the broker has access to their credit products and assist customers in choosing the loan that best suits their financial needs and possibilities. Moreover, the broker will help in preparing loan application to be submitted to the bank and pursue it to its completion.

Loan broker can be defined as the person authorized by the bank or non-bank financial institutions to promote their products through direct contact with natural or legal persons wishing to contract a loan, without any of the parties to have exclusivity. There can be defined as an independent bank or non-bank financial institution, as an intermediary between customers and banks. Through its financial advisors , the company helps customers overcome the difficulty of understanding the credit products, difficulties arising from the multitude of factors that compose such a product, especially in the case of a housing loan or mortgage.

Each financial institution is doing everything possible through such partnerships to attract the largest possible portfolio of clients, therefore is developing a real network of brokers to be partners for local or national level (depending on the sites coverage of the branches of each institution) on one or more types of credit products.

The loan broker advises individuals and businesses in choosing and contracting the most appropriate credit and handles the relationship with the bank (collection and submission of documents, monitoring of file analysis, informing the customer). He is not allowed to approve or reject a case, this decision lies with the bank that takes the file for analysis.

Keywords: *credit broker, portal Financial brokerage market, loan consultants, customized financing.*

1. Introduction

For researchers, the study of banks and banking was one of the most fascinating areas of operation. Numerous fundamental or applied memoires have been dedicated to this sector.

Within the dynamic and diversified notion of economic mechanisms of the market, the issue concerning the specific risk is a complex one, the concept of risk being defined as a conscious and calculated assuming of a reality. It is true that nothing venture nothing have, but equally true is that superficial or partial risk taking does not always guarantee the expected gain.

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[1] Stefan-Duicu, Adrian, Viorica Mirela, Stefan-Duicu, *The Influence of Lending Activity over Consumer's Behavior*.Lex ET Scientia International Journal (LESIJ) XVIII-1 (2011): 261-268.

Compared to other sectors, the role of banking system in a country's economy has continuously increased due to the rising complexity of banking.

Implementation of an efficient bank management is needed to increase efficiency and optimize banking profit-risk correlation. In this respect, the bankers should pay attention to the principle of profit center in the operation of the bank. However banks that want to have a profitable activity in conditions of a competitive banking scramble and to cope with risks need to identify market needs and choose that strategic position on the market which compatible with its own management.

Bank performance is a very important analysis tool for bank managers, shareholders and all participants in the money markets. Measurement of bank performance involve analysis of both quantitative and especially qualitative indicators, primarily aimed to determine the soundness of the bank, the extent of its exposure to the various risk categories and especially its level of efficiency.

Along with the transition to market economy and socio-economic development of Romania it was felt the need to modernize and adapt to the demands of the banking sector financing/lending both individuals and especially, companies, regarding realization of development projects and implementation of investment strategies.

In this context also enroll the loan brokers whose activity is aimed at better informing customers about the possibilities for financing and collecting offers from specialized financial institutions.

Generally speaking, are meant as loan brokers the mortgage brokers and brokers for other needs loans. The commission normally comes from the individual or the institution that provides a credit loan, but there are cases in which the loan broker charges as well the client who needs a loan without the bank's knowledge of such a practice .

In order to better internationally coordinate an alliance was created, the ICBA - International Credit Brokers Alliance, which is the world's largest team of specialists in intermediation of lending financing for trade and business, and credit insurance . Founded in 1999 in Paris , ICBA currently has offices in 24 countries on five continents, ICBA partners combine local service with global coordination and expertise to provide solutions on brokering activities for multinational companies[2]. Serving more than 7,000 customers, ICBA brokers form a global network of entrepreneurs.

In Romania over 500 loan brokers mediates approximately 5 % of total amount of bank loans, the local industry of bank brokerage being at a great distance from the European market, where up to 70 % of loans come from intermediaries.

Considering this figures, one can say that Romania's banking brokerage is a start-up runner in the local market. Currently, between 3% to 5% only of Romanian banks loans are intermediated by loan brokers, according to specialists.

2. Content

Young industry with over 100 companies which have as object the banking brokerage , bank credit intermediation is particularly preferred by individual clients rather than companies and corporate.

Legal entities prefer to borrow directly from the banks which they are working with for current operations. Business clients only calls are related to brokerage services: business plans, feasibility studies and grant projects . Peak periods for loan brokers are those before and after holidays. However, increasing the number of customers remains directly

[2] http://www.icba-online.com/about-icba/.

proportional to the expansion of the network in the territory.For the next five years, bank brokerage industry is estimated to 30 % of the total number of loans granted by banks.

The main **benefits** from using loan brokers are:

• Time saved

One advantage from such a relationship between a client and a loan broker is to give those interested in a loan an opportunity to choose from various types of lending without having to go to several banks. Thus, one can avoid the loss of time spent in many banks looking for the best deals. Specifically, a loan consultant is working on average with 5 to 7 banks and supposedly knows the specific conditions of each offer.

• The opportunity of choosing the right loan

Besides the advantage that all banks credit offer for choosing a loan are being available in one place and at the same time, the customers calling to a broker can make a more relevant image on credit conditions so they can choose the best offer . A loan broker , in addition to providing information about the loans from various banks , help the client understand the information . This is a great advantage because the financial tongue for interests or fees is quite ingenious and can be well hidden.

After a thorough discussion with the client about the financial situation and the goals they want to meet, loan broker will offer a personalized recommendation for financing and thus the client will have a better chance to obtain the credit he needs.

In addition, the consultant will provide a complete list of documents required for the preparation of loan application and show the customer where to get them from and how to fill it in.

Once he draws your credit file and ensure that it contains all the necessary documents, the consultant shall forward it to the bank for analysis and keeps the client updated with the file state, which is analyzed in terms of financial and legal accordance.

• No extra cost

A loan obtained through a loan broker has the same cost as the one granted by the bank. The broker does not take any commission from credit beneficiaries but from the bank only because the bank's broker brings new customers who otherwise it would not have had. Moreover, the broker can provide the bank with better customers than ones the bank itself draw, ie cheaper.

Thus, the bank receives the customer "ready-made" and did not have to spend money by opening branches where the customer should come and by hiring banking advisors to discuss with the client and advise him. For this reason, banks pay brokers a fee for new customers .

Moreover, the bank gains by the fact that it is receiving loan files with a higher degree of approval, as they have already passed through the broker's filter .

In his work , loan brokers can meet different **biases** such as :

• "They get extra money from me"

• "For sure they send me where they prefer, where they get a higher commission"

" But how do they know better? "

These uncertainties relating to loan brokers work are leading, in the minds of customers, to the hypothesis that they may have an agreement with a bank or another to sell soft loans in return for higher commissions. The answer to these concerns lies in the legal regulations which stipulate that "all consultants receive the same fee , regardless of the bank which customer chooses ..[3]. "

Loan brokers are individuals with training and education in this field and guide the client who needs help, due to the dynamics of change products and difficulty in understanding

[3] Coman, Vasile, *Why Resort to a Loan Broker?*, 11.03.2008, http://www.ghiseulbancar.ro/articole/66/9519/De ce sa apelam la un broker de credite?.htm, accessed on 10 Dec 2009.

all market offerings. CreditLand.eu , for example, operates each client's analysis based upon FinZoom.ro software for product comparisons - therefore relate to all offers available in Romania and select the best deal according to a very precise system.

In addition, some credit brokers may also offer customers free assistance on legal, notary or other matters, especially in the case of real estate loans or those secured by a mortgage.

According to representatives of BCR, working with loan brokers help increase the bank's sales force and therefore the volume and number of loans granted. Disadvantages in such collaborations consist in granting a part of the bank's income on loans to the intermediary partner, additional efforts from the bank in training and marketing.

The number of banks which have loans brokers as sales partners rose to 11 at present. BRD does not cooperate with loans brokers while CitiFinancial, division of individuals funding in Citibank, is working with one broker, preferring expansion of the distribution network through internal means.

Banca Transilvania has expanded through alternative channels of distribution in the estate agencies and car dealers sectors. "The reasons behind this expansion was that most customers requiring loans for cars and/or mortgage first addressed these companies. Moreover, their advantage is that they have already made up clientage and commercial venue needed to run such activities.

Average commissions received by brokers from banks for mortgage loans is approximately 1 % and consumer loans is approximately 2 % - 3% of the loan amount to the client.

Although bank loans have become fashionable among Romanians, they avoid a loan through a loan broker. Maybe that's why the number of companies providing such services is only 30-40.

Romanians trend is to require all information from the credit broker regarding bank offers for loans, then prefer to go by themselves to the bank. The explanation for this behavior is the fear of not paying fees to the credit broker.

To be sure of the professionalism of a loan broker, the client can search the internet to check which are the companies that offer these kind of services, then it is better to seek advice about each company.

Such brokerage companies attract their customers through various methods:

• Online:

- through their sites that all serious companies have developed;

- through online applications implemented on relevant sites (eg. real estate or financial news sites) ;

- promotion campaigns (banners, textlinks).

• Offline:

- presence at fairs and different events in the domain (loan , real estate etc.) where they directly meet potential clients;

- presence in the media (articles, interviews, advertising models etc.);

- distribution campaign of promotional materials (flyers , brochures , banners).

• Client portfolio

- recommendations received from customers who have already worked with that company.

Currently, loan brokers are increasingly using Internet applications for attracting customers, building financial portals . Thus , customers can find information about both aggregate loan products but also savings , payments, credit cards , private pensions etc. Also they contain sections for educational and information for potential customers: news, guides ,

financial and banking press review, work tools etc . In Romania there are also a number of portals, including[4]:

Table 1 - Addresses of loan brokers sites in Romania

FinZoom Financial Services SRL	www.finzoom.ro
Procredite	www.procredite.ro
CREDIT EXPERT SRL	www.creditepentrulocuinte.ro www.depozite-bancare.ro www.credite-auto.ro www.creditenevoipersonale.ro www.pensiaprivata.ro
Creditlink SRL	www.creditimobiliar.ro

3. Romanian Association of Credit Brokers

Romanian Association of Credit Brokers , the first professional association of credit brokerage companies in Romania , was established in June 2008 at the initiative of the leader of credit brokerage market in Romania - Kiwi Finance. Since its establishment, some other 11 credit brokerage companies have joined the association, which is currently represented in 22 counties in Romania.

Romanian Association of Credit Brokers (ARBC) officially began operations on July 1st, 2008 and its goal is to regulate credit brokerage industry and promote the professional interests of its members[5].

Along with Kiwi Finance, the initiator of establishing this association, other seven credit brokerage companies are founding members - DBSOL Consulting , Perfect Finance (Credit Zone) , Finzoom Financial Services, Rapid Finance Consult, International Brokers , Easy Credit Invest and Creditlink.

ARBC members are working with 19 banks, 9 leasing companies and five new IFNs and have a commission range of 0.8 to 3% from banks to credit the customer having additional costs.

Any interested customer can visit the official website of the Romanian Association of Credit Brokers , aimed precisely to regulate this sector.

The establishment of this association was required to legitimate the loan broker activity, both to customers and to potential partners. The Romanian bank brokerage field is growing and establishing this association meets the requirements of increasingly mature domestic financial market.

The objectives of the Association are to promote the professional interests of its members in order to regulate the credit brokerage industry in Romania and credit broker profession, establishing a code of ethics for the industry, the organization and ensuring dialogue with third parties - the state authorities, public institutions, non-governmental organizations, individuals and legal entities in Romania -, professional ethics and fair competition, supporting members' personnel in training and education, in addition to the study of different matters of concern to credit brokers and informing members on these issues.

To become a member of ARBC , any applicant must be registered as a trade company, to cater for the credit brokerage market, have a good reputation, to have a minimum capital of £ei 25,000, have at least three months of activity and least five cooperation agreements concluded with banks or non-banking financial institutions .

[4] Căpraru, Bogdan, *Retail banking*, Editura C.H.Beck, Bucureşti, 2009, p. 145.
[5] http://www.arbc.ro/pages/despre-a.r.b.c.php.

According to ARBC estimates, only five percent of total loans to households are intermediated by loan brokers, but this share will rise to 15 % in four years, according to officials of the institution[6].

4. Conclusions

Although there are peculiarities in the loans brokers work, which differ from country to country depending on it's development degree, on the appurtenance in a particular area, it can be concluded that everyone win when falling back on a loan broker: saves the customer time and can choose the best offer and can receive expert advice , the bank also saves money and get cheap and pretty more customers and the brokerage company get nice gains from this activity.

Most times choosing a company that is in charge of bank credit intermediation is the effortless option for getting a loan, primarily because there is no more necessary to make trips to the bank.

Also, due to the dynamics of products change at this time and the difficulty in understanding all the offers on the market, it becomes increasingly difficult to contract a loan directly from the bank, which makes customers turn increasingly more to a loan broker.

Given the commitment of the client, he needs a "summary" to guide him to those details that make the difference between a product that favors him or not.

References

- Andrei, Ruxandra, *Ce sunt până la urmă brokerii de credit - What are eventually loan brokers*, 09.02.2009, http://www.finzoom.ro/Info/art/Advices/.
- Căpraru, Bogdan, *Retail banking*, CH Beck Publishing House, Bucharest, 2009.
- Căpraru, Bogdan (FEEA Iasi), Particularităţi ale activităţii brokerilor de credite în lume- Characteristics of business loan broker in the world.
- Coman, Vasile, *De ce să apelăm la un broker de credite- Why Resort to a Loan Broker*, 11.03.2008, http://www.ghiseulbancar.ro/articole/66/9519/De ce sa apelam la un broker de credite?.htm.
- Stefan-Duicu, Adrian, Viorica Mirela, Stefan-Duicu, *The Influence of Lending Activity over Consumer's Behavior*. Lex ET Scientia International Journal (LESIJ) XVIII-1 (2011): 261-268.
- ***U.S. Fed News Service, Including U.S. State News, Washington DC, 7.12.2009, http://proquest.umi.com/pqdweb?did=1916388581&sid=1&Fmt=3&clientId=65092&RQT=309 &VName=PQD.
- http://www.arbc.ro.
- http://www.creditultau.ro/despre-vision-consult.php.
- http://www.finzoom.ro.
- http://www.icba-online.com.
- http://stiri.portal.ro/home/citeste_stire//asociatia-romana-a-brokerilor-de-credite-isi-va-incepe-oficial-activitatea-la-1-iulie.htm.
- http://www.zf.ro/banking - and - insurance/brokers.

[6]http://stiri.portal.ro/home/citeste_stire/53551/asociatia-romana-a-brokerilor-de-credite-isi-va-incepe-oficial-activitatea-la-1-iulie.htm.

THE INTRODUCTION OF THE UNIQUE MECHANISM OF SURVEILLANCE AND THE REDUCTION OF NON-PERFORMING LOANS

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Abstract

The introduction of a harmonized framework for financial supervision allows the minimizing of tax consequences and possible systemic bank failures. Banking union project will have impact on both the micro-prudential supervisory practices and the prudential supervision framework in the euro area and in the state members that will decide to participate in this project.

The non-performing loans (NPL) trend in the countries of Southeastern Europe further shows that nonperforming loans will increase in some of the states of Eastern Europe affecting credit flows and profits made by the banks.

The activities conducted by the banks cannot be estimated, quantified and especially eliminate all risk, lending generates NPL even lending procedures were followed in accordance with the laws and regulations in force.

Romania has the highest rate of non-performing loans in the region and the fact is generated because of difficulties in removing non performing loans from banks' balance sheets. In order to increase the volume of loans it is necessary to decrease of nonperforming loans from banks' balance sheets. To identify the optimal strategy for managing non-performing loans is necessary to continually monitor the performance and providing rapid adaptation to the dynamic environmental factors and changes in the characteristics of the loan portfolio.

European Central Bank will consistently enforce a set of unique rules apply to the group of euro area credit institutions will directly supervise credit large institutions and will monitor supervisory practices of credit institutions less significant conducted by competent national authorities.

Keywords: *financial regulations, non-performing loans, interbank market reform, banking system, banking union.*

1. Introduction

The European Commission estimates that the new European financial supervisory framework must fully respond against the political authorities in the EU and it is necessary to create a common culture in the surveillance procedures. National banking problems can be more easily managed by a central European authority, mainly the European Central Bank.

European Central Bank (ECB) will take sole responsibility for supervising banks in Europe. Switching the bank supervision at EU level will be complemented by other measures such as: harmonization and simplification of deposit-protection systems and integrated management crises in the European banking system. Under this unique mechanism of supervision proposed by the European Commission, the ECB will oversee all banks in the EU, which will apply to specific common rules of the single market[1].

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[1]Bruni, L.. (2011). The Europe and World Economy Governance: The Monetary and Financial Perspective, A. Global Governance and the Role of EU, Assessing the Future Balance of Power. USA, Edward Egar Publishing Limited.

Interests of all Member States are conditioned by the existence of balanced, strengthened relations and strengthen trust between domestic and host country. The purpose is to promote a system based on high standards of supervision, equivalent, correctly and consistently applied to all market actors, while respecting the independence of supervisors in fulfilling their respective debts.

To achieve this goal the key tool is the development, implementation and enforcement of legislation on banking and financial conglomerates in the EU, which covers prudential regulatory requirements for credit institutions, financial conglomerates and investment firms. This includes correct and timely transposition of legislation in the Member States and facilitating of different procedures for the situation breaches of Community law. Bank financial sector is concentrated mainly on:

- strict control of financial and banking system
- promoting integrated financial institutions and financial markets more stable
- ensuring good corporate governance in the banking sector
- protect the interests of bank customers by guaranteeing deposits and providing compensation
- correct information of customers about the risks of financial products
- promote a banking system aimed at supporting the real economy
- ensuring sustainable economic growth.

2. The role of the European Central Bank (ECB) in the unique supervisory mechanism

The decision of EU Commission regarding banking union accompanies two legislative proposals, one for the establishment of a single supervisory mechanism by conferring specific ECB policy on prudential supervision of credit institutions and second on improving the Regulation establishing a European Banking Authority (EBA).

According to these regulations, the European Central Bank is given the key and specific supervisory tasks that are essential to ensure the detection of risks to the sustainability of banks.

European Central Bank will be, among other things, the competent authority for authorization of credit institutions, evaluating qualifying holdings, ensuring compliance with minimum capital requirements, ensuring internal capital adequacy in relation to the risk profile of the credit institution, conducting supervision on a consolidated basis and supervision of financial conglomerates.

European Central Bank will ensure compliance with the provisions on the relationship between funds raised and borrowed (leverage) and liquidity and capital reserves application will perform in coordination with the relevant authorities early intervention measures when a bank violates the provisions relating to requirements capital.

The European Central Bank will be invested with the necessary powers of investigation and surveillance in order to perform its tasks. It includes the active involvement of national supervisors in the single supervisory mechanism to achieve effective training without problems and implement surveillance decisions and the necessary coordination and flow of information on both local and European issues, with to ensure financial stability throughout the EU and its Member States.

All tasks that are not explicitly assigned to the European Central Bank shall be cover by the national supervisory authorities. For example, national supervisory authorities will remain responsible for consumer protection and combating money laundering and supervision of credit institutions from third countries establish branches or provide cross-border services

within a Member State. European Central Bank must be able to fulfill their supervisory functions in full independence, being completely responsible for his actions.

The creation of "banking union" by a single supervisory mechanism will exert a direct control on banks to ensure compliance with prudential and conduct effective monitoring of cross-border interbank markets. But in terms of "good governance" burdens monetary policy will be strictly separated from supervisory tasks, in order to eliminate potential conflicts of interest between monetary policy and prudential supervision.

Experience shows that the failure of Banks, even relatively small, can cause systemic cross border damages.

In addition, banks that acting across national borders may critically weaken domestic banking systems. Enhanced surveillance in the banking union will improve the robustness of banks. However, if crises attack occurs, it is necessary to ensure that institutions can be protected in a methodical manner and that their savings depositors are safe. A banking union should include a more centralized management of banking crises with the involving of main European institutions.

3. NPL analysis in the context of single supervisory mechanism

The financial crisis has shown that irresponsible behavior by market participants can undermine the foundations of the financial system, leading to a lack of trust between all parties, especially consumers with potentially serious social and economic consequences. Many consumers have lost confidence in the financial sector, considering their loans increasingly unaffordable.

Credit quality across the European region has been affected due to the economic crisis. Since 2008-2009, the volume of non-performing loans grew rapidly in the countries of Central and Eastern Europe (from a regional average of 3.5% before the crisis to 11% in late 2011).

In a number of countries are continually deteriorating bank assets, particularly in the South East, where the period of recovery remains slow and delayed. In South East Europe non-performing indicators are growing (7.3% on average in 2012, 2.5% more than in 2009).

NPL growth, defined by the European Central Bank (ECB) as loans that were delayed for over 90 days, was especially influenced by southern European countries such as Italy, Spain and Greece, plus Ireland. At the end of 2012, European banks had bad loans worth 1.190 billion Euros from 1.090 billion Euros at the end of 2011.

Greek banking system will face a massive increase of 40% and non-performing loans in 2014. Central Bank of Greece (CBG) announced that loans with delays of over 90 days in June amounted to 29.3% of total loans, at the end of the year reached 35 percent.

The peak of the proportion of bad loans is projected to be reached during 2015, after which their level will decrease.

The objective of the Greek banking system is to stabilize non-performing loans level, so their growth to slow this year as for the resumption of lending and return to normal economic levels.

Italian Banking Association (ABI) said in a statement that the non-performing loans held by financial institutions registered in Italy in November 2013, the largest amount in 14 years.

Total gross non-performing loans in the portfolio of Italian banks in November 2013 had a volume of 149.6 billion Euros (202.3 billion dollars), up 22.8%. Gross non-performing loans represented 7.8% of total loans in November from 7.7% in October.

The number of consumers and businesses who have failed to pay loans reached 1.2 million. For the 20th consecutive month in December banks reduced lending in Italy by 3.4%

following a decline of 4.5% in November, given that the last two years performing loans increased by 45%, Italian banking Association announced.

Non-performing loans of Spanish banks reached a new record level in November 2013 under the country's unemployment rate exceeds 26%, according to the central bank in Madrid.

According to official data, the percentage of non-performing loans in the portfolio of Spanish banks reached 13.08% in November 2013 from 12.99% in October. Central Bank of Spain show that these non-performing loans amounted to EUR 192.5 billion in November 1.5 billion more than in the previous month.

In Romania, in 2012 recorded the most unfavorable values in the region: 20.1%, from 15.6% in 2011 and 7.2% in 2009[2].

The statistical data shows that at the end of 2013 in Romania NPL ratio reached 21.87%, the indicator could be actually higher. Romania was at the end of last year the third position among the European countries affected by the non refunding of loans to the banks, non-performing loans tripled as a share of total portfolios in the last three and half years. Some banks have resorted to repeated restructuring of loans, in some cases 20 times, just in order to avoid performing their employment and hence provisioning[3]. It is well known that after a certain threshold, the effect of bad loans affect credit, and of course growth.

Implementing a unique supervisory mechanism could also facilitate the operation of a new system to support ailing banks, with the possibility of speaking European Stability Mechanism, the Euro zone emergency fund.

4. Solutions in terms of managing non-performing loans

Regarding recovery solutions at European level, the banks are mainly oriented towards adjusting payment terms - generally avoiding interest capitalization or refinancing - or to sell portfolios of non-performing loans or the intensification of collection that are still relatively rare.

In times of economic stagnation, an effective credit portfolio management becomes a key factor to ensure profitability.

Effective management of non-performing loans represent a mechanism capable to take into account a variety of parameters, each designed to meet a specific need, and determining a portfolio segmentation in line with internal strategies related to customer management and risk management.

Good portfolio segmentation is a key factor for managing the complexity of managing non-performing loans.

NPL management should start with the analysis of the external environment, followed by the analysis of the cost / revenue collection and team effectiveness.

A good coordinated gathering process could significantly improve performance, organizing physical and virtual channels and defining activities accurately. Key activities used to strengthen the management of non-performing loans refers to a review of operational, technological and quantitative gathering process in general, while specific monitoring actions are usually implemented to improve standardization and automation system.

As macro prudential factor acting on both the demand and supply side should be mentioned the limitation of currency loans to borrowers exposed to currency risk, through this regulatory measures adopted by the central bank coordinated at European level as a result of implementation of the recommendations of the European Committee for Risk systemic Risk Board (ESRB).

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[2]National Bank of Romania (NBR), Financial Stability Report, 2013.
[3]National Institute of Statistics (NIS), "Statistical Yearbook ", 2012.

In addition, many organizations have opportunities to improve performance related to a variety of factors, such as multiple systems and / or sub integrate, processes and procedures inefficient or under-utilization metrics for performance analysis, effective preventive measures granting NPL or the technology for collection and recovery.

An integrated view of all stakeholders helps to achieve excellence in the management of non-performing loans.

The monitoring of performance is fundamental to identify the optimal strategy for managing non-performing loans, providing rapid adaptation to dynamic environmental factors and changes in the characteristics of the loans portfolio.

5. Conclusions

The European Commission estimates that the recent international financial crisis has highlighted the need for crisis prevention must starts at the internal level of the domestic banks, and the shareholders and managers must participate actively and responsibly in the prevention and all the procedures regarding must be based on internal control systems more robust.

Therefore, by introducing the new Basel III regulation is intended that the European banking system has become more secure by repairing many of the errors that have become visible in crisis.

Improving the quality and size of capital and the renewal of management liquidity are designed to stimulate banks to improve their capacity to manage systemic risks.

The implementation of this new agreement is gradual, starting in 2011, until fully implementation at the end of 2018.

The goal for the banks to is eventually to restructuring banks risk - what we can call a new paradigm of risk - which should be good for business, consumers, investors and governments. In response to new regulations Basel III, banks will have to act in the following directions: efficient management of capital and liquidity, balance sheet restructuring, adjusting the business model and financial services offered.

In European countries that already have experience of market economies we found that banks should be prepared for the changes permanent forms that can manifest risk.

Thus, in addition to traditional risk exposures add operational, financial and strategic caused by a number of factors such as: changes in legislation, certain European standards and norms, needs on refurbishment, cost effectiveness, economic events spontaneous (unexpected, unplanned).

Eastern European countries are involved in the bank industrialization from a different perspective since they are targeted for outsourcing of the big banks from the West. This is mainly due to low cost of labor, still considerably lower than in Western Europe, and generally greater flexibility in the allocation of a number of full-time employees in the process, which helps to optimize operations.

Non-performing loans will continue to grow in some of the states of Eastern Europe, affecting credit flows and profits made by Western banks operating here. Although conditions may vary from country to country, the IMF believes that authorities should remove legal obstacles and other banks to help solve the problem of bad loans, which in some cases reached 20% of the portfolio.

Solving the problem of bad loans, which many banks in Central Eastern and South Eastern Europe are reluctant to grant new loans could be an important incentive for credit growth, the development of local capital markets could create a stable and long-term source of funding for domestic banks.

In Romania slow economic growth, inflation and depreciation of the national currency have helped people and companies to improve their financial position to meet the requirements imposed by banks easier.

The volume of credits decreased, while the NPL is growing. In an economy dependent on financial intermediation, increased production can only come from credit recovery, which by all signs will not happen in 2014. The only thing the state could do to compensate for the blockage lending and to ease the financial constraints of the business environment as lower taxation and deregulation, but this will be difficult.

Given that local capital markets are underdeveloped, increased domestic might prove insufficient to support a significant revival in lending. Reducing cross-border financing by Western banks in CESE countries continues at a moderate pace, but with major differences from country to country and move to a model based more on domestic financing grow more and more.

To foster the development of viable markets debt recovery, possible discrepancies between the Tax Code and IFRS accounting standards on the treatment of non-performing loans sold local debt management companies will be resolved in accordance with the settlement with the European Commission infringement procedure.

References

- Mihai Laurentiu – Treapat, *Bank risk management and insurance in Romania*, Economica Publishing House , 2011, ISBN : 9789737095336.
- Sorin Gabriel Anton, *International banking and financial institutions*, CH Beck, 2013, ISBN : 978-606-18-0277-7.
- EU Banking Structures. Frankfurt am Main, European Central Bank, 2010,
- http://www.ecb.int/pub/pdf/other/eubankingstructures201009en.pdf .
- European Commission. (2012). Communication from the Commission to the European
- Parliament and the Council: A Roadmap towards a Banking Union. (COM(2012) 510 final). Brussels, http://ec.europa.eu/internal_market/finances/docs/committees/reform/20120912-com2012-510_en.pdf.
- European Commission, 2012, *Restoring the health and stability of the EU financial sector*, Brussels. http://ec.europa.eu/internal_market/smact/docs/20120206_restoring_health_en.pdf .
- Basel III and the European banking: its impact, how banks might respond and the challenges of implementation Harle, P., & Luders, E., 2010, USA, Mc Kinsey & Company.
- Global Financial Stability Report, International Monetary Fund, 2012, Washington
- DC, http://www.imf.org/external/pubs/ft/gfsr/2012/02/pdf/text.pdf .
- Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), Official Journal of the European Union, 2010 European Parliament and Council, http://eurlex.europa.eu .
- Lagarde , C., *Global Risks Are Rising, But There Is a Path to Recovery*, 2011, USA, Remarks at Jackson Hole, http://www.imf.org/external/np/speeches/2011/082711.htm.
- National Bank of Romania (NBR), " Financial Stability Report ", 2013.
- National Institute of Statistics (NIS), " Statistical Yearbook ", 2012.
- *** www.ebrd.com.
- *** www.europa.eu.int.

THE IMPACT OF ENTERPRISE RESOURCE PLANNING SYSTEMS ON MANAGEMENT ACCOUNTING

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Abstract

The added value on the ongoing improvement process of forecasts for financial and non-financial information systems is the main object of this study during nowadays context. Our results reveal the findings of an empirical research on the communication with various software vendors, such as SAP or Oracle, confirming the hypothesis that enterprise resource planning systems are not so well connected with the field of financial reporting analysis, but strongly linked with the management accounting field. Our study is and will be further opened for future research, passing over the limits of resource planning.

Keywords: *management, budget, resource, information system, financial reporting.*

1. Introduction

1.1 Research background

Organizations have become more complex in terms of their corporate structure and geographical presence due to the globalization process, and they are facing an increasing amount of data to be handled in daily operations. The more and more changes of the business environment and the increased complexity of the companies' activities need to permanently adapt, in an alert rhythm, which sometimes exceeds the effort and analysis capacity of the human factor. In order to overcome the problems incurred by different information systems within the organization, companies have integrated all their operational systems into one single system (Shang and Seddon, 2002). This could refer to enterprise system software (ESS) which consists of, for example, enterprise resource planning (ERP), supply chain management (SCM) and customer relationship management (CRM). These systems are already considered 'classic' imperatives within the big companies, a very important condition for maintaining the competitive advantage. ERP systems enable organizations to integrate business processes and functions and they can supply managers with real time information. Consequently, ERP systems are considered to provide management means to respond more efficiently to changes in the business environment (Spathis and Constantinides, 2003).

While ERP originated from manufacturing and production planning systems used in the manufacturing industry, ERP expanded its scope in the 1990's to other 'back-office'

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functions such as human resources, finance and production planning (Nieuwenhuyse, Boeck, Lambrecht, & Vandaele, 2011).

An ERP system, by linking all systems through a data warehouse, allows a company to manage its operations holistically. A second impact of ERP systems has been a general shift to manage at the activity level rather than at the more abstract level of financial transactions.

This paper presents, based on the background of the studies conducted by various researchers and economists, the relation between management accounting and ERP systems, as well as the influence of a good ERP implementation on the management accounting and on the company, as a whole.

2. Literature Review

The interaction between the ERP systems and management accounting is quite a new research topic and is continually developing. The emergence of ERP systems has signified the beginning of a new era in the business environment, where companies can integrate business processes/applications and respond to real-time information (Stefanou, 2002; Nicolaou, 2003; Spathis, 2006).

Nevertheless, the focus of the relevant literature has been on ERP systems in general and there is limited published scientific evidence on the ERP implementation processes and their effects on accounting in particular (Granlund and Malmi, 2002; Sutton, 2006).

According to quite recent studies, the implementation of ERP systems affects the accounting processes and the accountants' role (Granlund and Malmi, 2002; Scapens and Jazayeri, 2003).

Spathis and Constantinides (2003) identified in their study the benefits of ERP systems which include: increased flexibility in information generation, as well as improved quality of reports and financial statements. Also, in 2004, they examined the impact and the changes occurred by replacing the traditional information systems with ERP systems, in terms of accounting application. One relevant finding of the study was the fact that ERP implementation produced important benefits for accounting.

Further, researchers have investigated the impact of ERP systems on management accounting. Both, Matolcsy and Wieder (2000) studied the effects of ERP systems on management accounting. Although they did not observe significant differences between ERP adopters and non-adopters regarding the use of advanced management accounting techniques, they concluded that ERP systems function as a driver behind the adoption of modern management accounting techniques. According to the researchers, implementation of the new ERP system did not change the management accounting practices. Nonetheless, the study provides evidence that ERP systems reduce the time needed for execution of routine tasks and, thus, leaves accountants additional time to conduct more useful information analysis.

Expectations for ERP systems to change management accounting were introduced by Kaplan and Cooper (1998), especially through the fourth of their four-stage model for cost and performance measurement systems. When speaking about first stage systems of a company, these systems are basically inadequate for all purposes, even for financial reporting. When improvements are made, the first stage companies tend to add financial systems to meet regulatory requirements. As a result, they evolve into second stage systems where financial reporting systems dominate; these companies being driven by financial reporting. The companies with third stage systems have customized, relevant cost management, financial reporting, and performance measurement systems; however, these systems are independent. ERP systems are only used with the fourth stage systems where ERP systems integrate cost management, financial reporting, and performance measurement (Kaplan and Cooper, 1998).

Kaplan and Cooper (1998) also state that the integration with ERP systems allow all managerial processes, including budgeting, what-if analysis, and transfer pricing to be also

based on activities rather than only on dollars. Furthermore, the activity-level focus of budgeting leads to more accuracy in forecasting the demands for all direct and, especially indirect activities.

Cook et al.'s (2000) field study suggests that ERP systems can increase the effectiveness of capital budgeting by anchoring financial numbers to activities rather than stopping at monetary measures with pre-ERP practices. Their arguments were convincing, yet not able to be verified.

Scapens and Jazayeri (2003) reviewed the literature to find that 'ERP systems are having relatively limited impacts on management accounting and management accountants'. According to the literature, the purpose of Scapens and Jazayeri (2003) was 'to explore the processes of change and to examine in more depth the nature of the changes in management accounting which have accompanied the implementation of an ERP system … within a specific organization.' The latter lead to more information sharing and teamwork on one hand and greater centralization of information processing activities (pp. 216- 218) on the other. Although the authors considered three years to be long enough to study the change process, this would not appear long enough given the existence of institutional forces (Burns and Scapens, 2000).

Booth et al. (2000) analyzed the extent to which the application, by an enterprise, of an ERP system can result in the adoption of new accounting practices. It was concluded that ERP systems represent data sources for new accounting practices, being designed to support that practices. More exactly, Rom and Rohde (2006) found that ERP proved to be very useful in terms of data collection, as well as management accounting. This was further confirmed by Javernpaa (2007), who noted that such systems lead to more efficient development of the routine activities, adoption of new management accounting practices, use large databases more quickly and reporting in a more flexible and faster way.

According to Colmenares (2009), the implementation of the ERP systems generated benefits for the enterprise, consisting of the improvement of the decision-making processes, as well as enterprise integration.

On contrary, Kelton et al. (2010) noted that the effects of the information presentation, through ERP implementation are pervasive and affect the decision making processes in various contexts.

There are some reasons for which the days of the ERP systems are considered numbered, due to the shift regarding the way in which people consume products and services. It is considered that ERP systems were specifically designed for the 20thcentury manufacturing era rather than the 21st century services-based world, according to Tien Tzuo, the CEO of Zuora (2012).

In the literature there are also additional studies which indicate that ERP systems improve the decision making process within an organization (Spathis, 2006; Spathis and Kanellou, 2007), other benefits derived from ERP implementation being: more accurate reports - statements of accounts and improved service of accounts in accounting tasks (Velcu, 2007; Colmenares, 2009). Furthermore, Brazel and Dang (2008) pointed out that ERP implementation appears to reduce reporting lags.

To sum up, in the literature exists confusion regarding the potential for ERP systems to change management accounting, as well as confusion regarding the changes that have actually occurred. Perhaps management accounting will take longer to reflect changes because of the institutional forces (Burns and Scapens, 2000).

3. Management accounting and budgeting in organizations

In what concerns the accounting history, Gomes et al. (2011) encourage accounting historians to function as 'change agents' in shaping public opinion and public policy decisions, in order to enrich the new area of management accounting.

Additionally, Jacobs (2012) finds a need for exploring new areas of accounting due to social change in which accounting plays an increasing role. This requires new types of accounting theory and research in order to understand the social context in which accounting operates.

Gomes et al. (2011) emphasize the importance of accounting history studies since they often reveal how accounting emerges, its impacts on society and its social setting. These are important elements in the further development of management accounting techniques and especially the nuances of accounting techniques which need further attention.

Management accounting is often defined as a system that provides useful information for managers in terms of decision making, planning, control and performance evaluation (Drury, 2004). A definition by Atkinson et al. (2001) describes management accounting as:

'A value adding continuous improvement process of planning, designing, measuring and operating nonfinancial and financial information systems that guides management action, motivates behavior, and supports and creates the cultural values necessary to achieve an organization's strategic, tactical and operating objectives' (Atkinson et al., 2001).

As pointed out by Atkinson et al. (2001), the functions of management accounting include operational control, product and customer costing, management control as well as strategic control.

Likewise, the role of management accounting is increasingly expanded and diversified (Baldvinsdottir et al. 2010).

Management accounting information refers to the accounting information used inside the organization. By tradition, accounting information has been considered financial in its nature.

However, management accounting information has begun to encompass also non-financial information such as quality, as well as subjective measurements for example, customer satisfaction (Atkinson et al., 2001).

The role of management accountants have changed significantly in the past 15 years. The paper by M. Newman, C. Smart and I. Vertinsky (1989) suggest that major tasks of management accountants are score-keeping and maintenance of financial records for internal and external users. However, in 1995 R. Kaplan identified new tasks and roles for management accountants. He proposed for the future management accountants to be involved in formulating and implementing corporate strategy and designing organization's management information systems. Similarly, Cooper (1996a, 1996b) argues that management accountants need to develop skills in system design and implementation, change and strategy management as well as in cost management.

Relatively recent research in the area also suggests that the role of management accountants is changing. Pierce and O'Dea (2003) have questioned managers' opinion concerning the future role of management accountants and found that the major elements include: partnership, physical location, teamwork and understanding of the business. Pierce and O'Dea (2003) suggest that future management accountants need not only knowledge of accounting and finance but also knowledge of the company's business, especially understanding of production and sales activities.

So, management accounting is about providing users in organizations with useful information to make decisions. Unlike financial accounting whose objective is to provide information to external parties, management accounting information is meant for internal use.

Budgeting is a widely known management accounting tool, as well as the most commonly used one. It approaches a company's financial situation in an operational way, giving information in a manner that supports managers in planning and control procedures. Budgeting, which is considered the cornerstone of management accounting, still plays an important role in organizations despite the criticism directed towards budgets. Organizations prepare budgets for different reasons; the four most important reasons identified by Hansen and Van der Stede (2004) include: operational planning, performance planning, communication of goals and strategy formation.

Budget planning is the process of preparing the budgets that are implemented by an organization. Private and public organizations can prepare the budget planning, and then set up actual budget planning processes to meet their organization's policies, procedures, and requirements for budget preparation.

Budget planning is integrated with other modules, so that you can bring in information from previous budgets, actual expenditures, fixed assets, and human resources (Microsoft, 2014).

4. ERP systems in organizations

Enterprise resource planning (ERP) systems have enabled organizations to exploit better their business information. Since introduction in the mid-1990s, adopters of ERP systems have increased rapidly (Drury, 2004). The most significant factor that distinguishes ERP systems from previous generations of information systems is that ERP permits organizations to integrate business processes and optimize the available resources. According to Zeng et al. (2003), an EPR system should be: flexible, modular and open, comprehensive and beyond the company.

ERP vendors market their ERP products by promising advantages such as: 'Gain new market insights and adapt quickly to market changes. Sense and respond to customer requirements in real time. Extend processes beyond the organization to include customers, suppliers, and partners' (SAP, 2005). However, implementation of ERP does not automatically provide any benefits for the organization. Poston and Grabski (2001) have listed benefits that companies expect ERP to entail – these include for example, reduced administration costs, improved decision making, more accurate and timely information, increased customer satisfaction and flexibility to react to changes in the environment.

Shang and Seddon (2002) have created a framework to summarize the benefits from enterprise systems (including ERP systems). According to the researchers, the benefits of an ERP system can be classified into five different dimensions: operational, managerial, strategic, IT infrastructure and organizational benefits.

There have also been several studies investigating the economic benefits of the ERP systems. Researchers from all over the world examined weather the implementation of the ERP systems have a positive impact on the performance of a company. Consequently, the study concluded with mixed results. However, the researchers found significant differences when adopters and non-adopters were compared – while the financial ratios of adopters remained somewhat unchanged, the financial performance of non-adopters weakened during the same time period.

5. ERP systems and management accounting

According to Atkinson et al. (1997), management accounting should help organizations to adapt to changes in the business environment. Management accounting

should facilitate organizations to identify the need to undertake change by suggesting appropriate measures. Equally important, management accounting should not hinder change by emphasizing performance measures that maintain the status quo.

On the other hand, ERP is serving as a means to facilitate organizations to change. Based on the relevant literature, this paper tries to analyze whether the implementation of the ERP systems provide better ways to conduct management accounting or is only maintaining the status quo.

At the micro level, management accounting techniques have traditionally concentrated on supporting middle-level managers to supervise shop floor workers. At the macro level, management accounting is used to coordinate the centralized decision-making as well as to provide information for decision-making in the decentralized organization (Atkinson et al, 1997).

Atkinson et al. (1997) also suggest that management accounting can lead to development of routines based on past experience. Although these routines will help organizations to respond to similar type of circumstances as encountered in the past, they reduce organizations' ability to respond to new events.

5.1. The influence of ERP implementation on management accounting

The influence of ERP systems on management accounting was studied by Booth et al. (2000). Later cited by Granlund and Malmi (2002), Scapens and Jazayeri (2003), Spathis and Constantinides (2003) and Spathis and Ananiadis (2005), the study of Booth et al. (2000) is one of the first papers analyzing the relationship between ERP and management accounting. The survey found that ERP systems are best at transaction processing, whereas they have only limited effects in reporting and decision support. In addition, Booth et al. (2002, like Granlund and Malmi, 2002; and Hyvönen, 2003) did not find evidence that implementing an ERP system would lead to adoption of advanced accounting practices.

The study of Maccarrone (2000) investigated the benefits of ERP implementation towards accounting information and management processes. The researcher identified two categories of benefits related to ERP systems: time related benefits, like reduced need of time to perform some activities, which lead to other benefits and quality-related benefits.

Further, Granlund and Malmi (2002) investigated the effects of ERP systems on adoption of modern management accounting principles in ten companies. The results indicated that half of the companies have integrated their cost accounting practices into ERP environment while the other half exploited stand-alone software (e.g., spreadsheets). Although the respondents did not consider that the ERP implementation has changed the logic of management accounting, ERP was considered to have improved management accounting process through better access to data.

Scapens and Jazayeri (2003) wanted to investigate in more detail the changes in management accounting by studying an SAP implementation in a European company. SAP was seen to have facilitated the work of middle-level and lower-level managers by providing them real-time information. On the other hand, senior managers still need to devote significant time to prepare complex reports. The implementation of SAP program did change some of the management accounting principles in the analyzed company. However, one cannot be sure whether these changes have emerged as a result from the implementation.

The benefits of ERP systems on accounting information and management process have also been researched by Spathis and Constantinides (2003), who identified increased flexibility in information generation, improved quality of reports and financial statements and increased integration of applications as the highest perceived benefits. Another study by Spathis and Ananiadis (2005) recognized three dimensions of benefits: managerial, operational and IT infrastructure.

The paper by Hyvönen (2003) studied whether there exist differences between ERP and BoB adopters regarding current management accounting practices and adoption of more advanced management accounting techniques. Thus, Hyvönen (2003) noticed that ERP adopters had more problems in budgeting process compared to BoB adopters. Furthermore, ERP adopters derived fewer benefits from the new system.

New research on the impact of ERP implementations reveals mixed results. Although respondents proved to be satisfied with their software choice and ERP implementation, the survey showed that most of the ERP projects run over budget and the users do not exactly receive expected benefits (Krigsman, 2013).

In another recent study (2012), conducted by the Manufacturing Performance Institute, on behalf of Plex Systems Inc., the participants affirmed that, most likely, the accounting management has been improved through the implementation of the ERP systems.

The results of all these studies are quite contrasting, depending on the different perceptions and understandings of ERP. The common feature of these studies is that all of them concluded that there exists only weak or moderate impact of ERP on management accounting.

5.2. Changing role of management accountants

Besides the effects of ERP systems on management accounting, several studies have examined the implications of ERPs implementation and discussed the changing role of management accountants. Lodh and Gaffikin (2003) reached the conclusion that accountants are becoming business process analysts, work at all levels in the improvement process and also that accountants have to change their attitude in order to be able to manage real-time cost management systems.

According to Granlund and Malmi (2002), ERP systems have given management accountants new work tasks. On the other hand, ERP systems have eliminated routine works previously done by management accountants (Scapens and Jazayeri, 2003). In addition, Granlund and Malmi (2002), Scapens and Jazayeri (2003), as well as Spathis and Constantinides (2003) suggest that ERP systems pose new requirements for management accountants - to have a good understanding of organization and its different activities and processes.

Spathis and Constantinides (2003) also suggest that management accountants need to have good IT skills to keep up with the constantly changing IT environment. Furthermore, Caglio (2003) agrees that the role of accountants is changing. She uses the term ‘hybridization’ of accountants meaning that accounting knowledge get dispersed in organizations when IT and line people start using accounting information due to the new ERP system.

Doran and Walsh (2004), in their research of analyzing the effects of ERP implementation on accounting techniques and practices have reached the conclusion that the implementation of the ERP systems had an effect on the role of management accountants, consisting of new tasks and responsibilities, the accountants becoming agents of change within the organization.

As the specific literature presents, there are conflicting views related to the adoption of an ERP system, which can bring a redefinition of the management accountants’ tasks and responsibilities (Brazil and Li, 2005; Carruth, 2004; Gabriels, 2002). It is clear that ERP is influencing the management accountant and is a valuable tool which assists the management accountants in fulfilling their core activities. However the core responsibilities remain the same, providing the financials on a monthly basis still remaining a high priority in any company.

6. Conclusions

Based on the literature review, there could be clearly stated that ERP systems have only a limited impact on management accounting. Booth et al. (2000) find that ERP systems are powerful tools with regard to transaction processing, whereas reporting and decision-making are not well supported by the systems.

The findings of their study confirmed the previous researches, as they demonstrate the fact that ERP systems have no significant relationship with reporting and analysis, budgeting, non-financial, external and ad hoc management accounting, as well as allocation of costs. However, a significant and positive relationship is found between ERP systems and data collection and organizational breadth of management accounting. It is confirmed that ERP systems are powerful tools with regard to transaction processing and integration of the organization, as data collection can be considered a proxy for transaction processing, and organizational breadth of management accounting a proxy for integration.

ERP systems also have the capability to help in the current management accounting activities. This conclusion supports the claim that having an ERP system is still better than having no ERP system with regard to the existing management accounting tasks.

Also, ERP systems are changing the practices of capital budgeting and management accounting. ERP systems lead to highly standardized and highly computerized information. Without significant changes, ERP systems are allowing capital budgeting, budgeting, operating statements, forecasting, performance measurement, and costing to be more detailed, more accurate, and reported more quickly.

It is proved, through the conducted studies over the past decades that there has been a shift in the role of the management accountant and accounting, as a whole. ERP implementation is one of the major contributors to this change. Accountants consider that ERP allows them to expand their roles and instead of producing figures, they dispose of more time for further analysis and value adding activities in areas such as cost control.

Although there are negative aspects of the ERP implementation in management accounting, the truth is that, overall, there also exist positive aspects, which certainly outweigh the negative ones.

References

- Baxendale, S. J. and Jama, F., *What ERP can Offer ABC*, Strategic Finance, 2003, Issue 2, pp. 54-57.
- Burns, J. and Baldvinsdottir, G., *Hybrids 'The Changing Roles of Accountants in Stam plc',* Working paper, University of Manchester, 1999. Cited in Scapens and Jazayeri (2003).
- Colmenares, L., *Assessing critical success factors of ERP implementation*, Encyclopedia of Information Science and Technology, Second Edition, USA, 2009.
- Constantinides, C. S., *Enterprise resource planning system's impact on accounting processes*, Business Process Management, no. 2.
- Cooper, R. and Kaplan, R.S., *Measure Costs Right: Make the Right Decisions*, Harvard Business Review, September-October, 1988.
- De Boeck, L, Lambrecht M., Vandale N., Van Niuwenhauyse, I., *Advanced Resource Planning as Decision Support Module to ERP*, Catholic University of Lueven, Faculty of Business and Economics, Lueven, 2013.
- Doran, J. and O' Mahony, A., The Changing Role of Management Accountants; Evidence from the Implementation of ERP Systems in Large Organizations, International Journal of Business and Management, August, 2008.
- Ferguson, C. B., Enterprise Resource Planning systems: A study of the usage and challenges of implementing ERP software, 2007.
- Gartner Dataquest, *Oracle is the #1 Database*, accessed online: www.Oracle.com, on February, 2nd, 2014.
- Ho, T. Y., *Impact of ERP and OLAP systems on management accounting*, Swedish School of Economics and Business Administration, 2006.

- Hope, J. and Fraser, R., *Beyond Budgeting*, White Paper, CAM-I Beyond Budgeting Round Table, May, 2001.
- Kanellou A., Caralambos S., *Accounting Benefits and Satisfaction in an ERP Environment*, 8th International Conference on Enterprise Systems, Accounting and Logistics (8th ICESAL 2011).
- Kaplan, R.S. and Cooper, R., Cost & Effect Using Integrated Cost Systems to Drive Profitability and Performance, Harvard Business School Press, Boston, 1998.
- Kelton, A. S., Pennington, R. R., Tuttle, Brad M., *The Effects of Information Presentation Format on Judgment and Decision Making*, A Review of the Information Systems Research, in: Journal of Information Systems, Vol. 24, No. 2, 2010.
- Krigsman, M., *2013 ERP research: Compelling advice for the CFO*, Beyond IT Failure Journal, February 2013.
- Kyle, C., *Budget Planning Overview*, Microsoft Dynamics, January 2014, available at: http://technet.microsoft.com/en-us/library/jj677328.aspx, accessed on March, 7th, 2014.
- Malmose, M., The role of management accounting in new public management reforms: implications in a socio-political Health care context, PhD Thesis, Aarhus University, Department of Economics and Business, Denmark, 2013, available online:
- http://pure.au.dk//portal/files/51069575/Margit_Malmmose_PhD_Thesis.pdf, accessed on March, 7th, 2014.
- MPI Group, 2012 ERP Study: Implementation and usage trends for SaaS Cloud vs. Traditional Systems, Plex Systems Inc., 2012.
- Rohde, A. R., Enterprise resource planning systems, strategic enterprise management systems and management accounting - A Danish study, Journal of Enterprise Information Management, 2006.
- SAP, BW305: Business Information Warehouse – Reporting & Analysis, Participant Handbook, SAP, Walldorf, 2004.
- Spraakman, G., The impact of enterprise resource planning systems on management accounting, School of Administrative Studies, December, 2005.
- Tzuo, T., *The end of ERP*, Forbes, February 2012, available online: http://www.forbes.com/sites/ciocentral/2012/02/09/the-end-of-erp/ accessed on March, 5th, 2014.

THE QUANTIFICATION OF THE EUROPEAN INTEGRATION DEGREE OF ROMANIA'S BANKING SYSTEM

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Abstract

There are many methodologies described in the literature for approaching the integration process of financial markets in a given area (a comprehensive study of this subject can be found in Adam K, Jappelli T, Menichini A, Padula M, Pagano M (2002). Financists Emiris (1), Stulz (2), Ferson and Harvey (3) focus their work on the integration of capital markets. Other works look at financial integration from the angle of benefit and cost (4), from a legislative perspective (5, 6), or studying various segments of financial markets (7). In this paper, the subject of convergence is approached first of all by analysing interest rates in the Romanian interbank market, which are on a converging trend to similar values in the EU. In the second part, we propose a model for testing both the mobility of Romanian banking capitals and the European integration process of Romania's banking sector. The model is based on the idea of maximising the Sharpe index in the portfolio theory. Furthermore, knowing that the Romanian economy and its macroeconomic variables have been a function of the American currency more than the European one, we deemed it useful to study whether and to which extent the Romanian banking sector has any converging trend to the American currency market.

Keywords: *financial market integration, interbank interest rate convergence, portfolio yield covariance, Sharpe index, European integration of capital.*

1. Introduction

The post-war European construction illustrates the option for regionalisation as opposed to creating a universal state, labelled as globalisation (neo-collectivism, unilateralism). In this evolution we find long-standing disputes between the concept of a "Confederate Europe", the "Europe of Motherlands", of nation states, and a federative European state with a single sovereignty, the "Super-national Federal Europe".

Although it is obsolete in principle, the effects of this controversy are still felt in the institutional discourse of the European construction, with the exception of the Monetary Union, which has its own autonomous institutional balance system.

Unification in banking and finances is based on three complementary elements, according to the European Act (adopted in 1987), namely;

- Freedom of movement of capitals;
- Free cross-border provision of financial and banking services;
- A minimum harmonisation of regulations applied to banking and financial activities.

Taking into account the trends generated by the financial revolution, the reduction in the cyclical nature of financial and currency crises, the upward trends of the weight of capital markets in company funding and the creation of financial conglomerates and supermarkets, as

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well as the prevailing opinion in most European states, there is an opportunity to reconsider the financial and banking regulatory and supervisory structures according to EU practices and regulations.

Economic and monetary integration (an essential goal of Romanian policies, especially European monetary structures), is the subject of this paper.

We deemed it useful to study whether and to what extent the Romanian banking sector still has any convergence trend to the American currency market, given the current financial crisis and the serious problems that the US are facing with sovereign debt, reaching the highest level in the history of America (14,300 trillion dollars).

Discussion

2. Convergence of Interbank Interest Rates

Studying the evolution of interest rates is frequently employed method in showing whether a financial market is following a trend for integration in a certain area, and if the answer is affirmative, at what rate that convergence process is happening. For this analysis, we took into account interbank interest rates for several considerations:

1. Capital operations (as defined by the Currency Regulations, with its subsequent amendments and supplements) carried out by the banks have been free since the second half of 2005;
2. Interbank operations are significant and guiding for the currency market;
3. In Romania, long-term yields (e.g. those related to mortgages loans) are not yet established;
4. The EU zone itself has no full convergence for interest rates on mortgage loans or retail banking (8, 9, 10).

In order to study whether interbank interest rates in Romania are converging to those in the EU zone, we employed the methodology used by Goldberg and Verboven (11). This has the advantage of answering two questions: is the integration process ongoing and, if the answer is yes, at what rate is this process happening? The two authors use an equation of the form:

$$\Delta i_t = \alpha + \beta i_{t-1} + \sum \gamma_k \Delta i_{t-k} + \varepsilon_t \quad (1)$$

Where

I is the interest rate spread (i.e. between BUBOR and EUROIBOR or LIBOR)

Δi_{t-k} measures possible series correlations of the error terms

ε_t represents exogenous shocks

Negative values of β reflect the existence of a convergence process[1] (12), while a β that is equal to zero reflects a lack of convergence. At the same time, the absolute value of β shows the convergence rate. The higher β is (in absolute value), the higher the convergence rate.

Taking into account the large difference between interest rates in RON and those in EUR and USD, the spread was calculated with the following formulae:

- for the BUBOR-EUROIBOR spread

$$\text{spread\_eur} = \frac{1+\text{EUROIBOR}}{1+\text{BUBOR}} - 1 \quad (2)$$

[1] The concept of convergence used in such analyses was "borrowed" from the theory of economic growth (P indicator - convergence). See Durlauf, Steven, Quah (1999)

- for the BUBOR-LIBOR spread

$$\text{spread\_usd} = \frac{1+\text{LIBOR}}{1+\text{BUBOR}} - 1 \quad (3)$$

The regressions of equations (2) and (3) corresponding to the spread between the interbank interest rate for the national currency and the European one, on the one hand, and between the national currency and the American one, on the other hand, lead to the following result:

$\Delta\ \text{spread\_eur}_t = -0.01 - 0.09\Delta\text{spread\_eur}_{t-1} - 0.18\Delta\text{spread\_eur}_{t-1} - 0.17\Delta\text{spread\_eur}_{t-2} - 0.07\Delta\text{spread\_eur}_{t-3}$

$\Delta\text{spread\_usd}_t = -0.02 - 0.10\Delta\text{spread\_usd}_{t-1} - 0.22\Delta\text{spread\_usd}_{t-2} - 0.17\Delta\text{spread\_usd}_{t-2} - 0.07\Delta\text{spread\_usd}_{t-3}$

Therefore there is a process of convergence (β= -0.09) between the interest rate for the Romanian interbank market (BUBOR) and the European one (EUROIBOR), approximately of the same magnitude as between BUBOR and LIBOR (β= -0.10). This result shows that the Romanian interbank market has no "preference" for the European space, and the integration process that has been accelerating since 2000 does not seem to be determined by a particular affinity for the single currency market at the expense of the American dollar.

A possible explanation could be the rather short history of the single currency and the inertia of businesses and the population in changing the structure of their portfolio, as well as negative developments in the Euro area during this period. As regards the rate of convergence, this is approximately at the same value that Adam and co. (8) found in their study in countries of the Euro zone. We should mention that there are some differences between the work of Adam and co. and this paper in the methodology for determining the convergence rate. These differences regard how the spread is calculated and the interbank interest rates chosen (3 months versus one month for this study). What can be worrying is the convergence rate decrease rate shown in table 1.

Evolution of the convergence rate

Time horizon	β EUR	B USD
January 2005 - January 2006	-0.38	-0.37
January 2006 - January 2007	-0.18	-0.19
January 2007 - January 2008	-0.15	-0.17
January 2008 - January 2009	-0.09	-0.10

Furthermore, taking into account the fact that it is becoming increasingly difficult for the inflation rate to decrease when it has fallen under 10%, it is expected that the descending trend given to interest rates by their similar levels in the EU will be increasingly difficult to attain. This result also applies for the convergence process of the interest rates.

3. Mobility and European Integration of Romanian Banking Capitals

After studying the convergence between Romanian interbank interest rates and the values of EUROIBOR or LIBOR, we must study the international mobility and European integration in a certain space without having capital mobility, while the reciprocal can be true.

For this, we propose a method that quantifies the level of international mobility and European integration in a certain area of the banking capitals of a country. This method is based on notions of the portfolio theory. Let us consider that at the aggregate banking sector

level, decisions to choose the optimum weight of placements in national currency and foreign currency are made based on maximising the Sharpe index. The resulting value is considered the optimum decision and can show both capital mobility and integration process on a certain area. For this purpose, we will compare the optimum weight of national currency portfolio with the actual value at bank aggregate level. If the two values converge, we can conclude that there is capital mobility, as bank managers place their resources taking into account the criteria of profitability versus risk, with no impediments regarding the geographic location of such placement.

Furthermore, if the optimum value converges to 0.5, we can conclude that there is an integration process (this statement will be proven later). We can also measure the rate of the integration process using the methodology of point 1.

Thus, let:

x= actual weight of national assets in the total banking assets (at aggregate banking system level);

$x^{optimum}$ = optimum weight of national assets in the total banking assets (at aggregate banking system level).

In order to determine xoptimum, let us consider the bank assets as a portfolio consisting of 2 assets: placement in national currency (P1) and placement in foreign currency (P2). Each placement is characterised by average profitability (E1 and E2, respectively) and dispersion (δ1 and δ2, respectively).

let:
P1 (E1, δ1)
P2 (E2, δ2)

The banking asset (P) is a portfolio consisting P1 and P2:

$$P = P1 + P2 \quad (4)$$

but P = P(E,δ)

where:
E = XE1 + (1-X)E2

$$\delta = X^2\delta1^2 + (1-x)^2\delta2^2 + 2x(1-x)\delta12 \quad (5)$$

where δ12 is the covariance between the yields of portfolios 1 and 2

Let us maximise:

$$F = \frac{E}{\delta} = \frac{xE1+(1-x)E2}{\sqrt{x}} \quad (6)$$

After a few computations, we obtain:

$$X^{optimum} = E1(\delta2)^2 - E2\delta12/E2(\delta1)^2 + E1(\delta2)^2 - E1 + E2\delta12 \quad (7)$$

If we have integration over a certain area (assuming that E2 and δ2 are the profitability and risk coordinates for that area), then, according to the law of one price, we have:

$E1 = E2$
$\delta 1 = \delta 2$
$\delta 12 = 1$

Replacing these conditions into formula (7) we obtain, if we have integration:

$X^{optimum} = 0.5$

We notice that finding the optimum solution involves first quantifying the profitability of the external placement, taking into account that in this case the exchange rate has a significant impact on the result.

We started from the formula:

$$E2_t = (1 + r_t^f)CS_{t+1}/CS_t \quad (8)$$

where:

R_t^f – the interest rate for the considered currency;
CS – the exchange rate between national currency and that currency.

Taking into account that the relation of "uncovered interest parity" does not apply (including Romania's case), we started from the assumption that adaptive anticipation characterise Romania's currency market. Therefore:

$$CS_t = CS_{t-1} + \delta(CS_{t-1} - CS_{t-2}) \quad (9)$$

From the relationships (8) and (9) we obtain:

$$E2_t = (1 + r_t^f)CS_t + \delta(CS_t - CS_{t-1})/CS_t \quad (10)$$

Regressing the equation (9), for the two reference currencies (USD and EUR), we obtain the following estimates:

- For EUR[2](13):

$CS_t = 329.13 + 1.00CS_{t-1} + 0.10(CS_{t-1} - CS_{t-2})$

- For USD:

$CS_t = 140.38 + 1.00CS_{t-1} + 0.52(CS_{t-1} - CS_{t-2})$

Therefore, $\delta = 0.10$ for EUR and $\delta = 0.52$ for USD

The values of δ thus determined are replaced successively in formula (10) and then in formula (7) in order to find E2, and then xoptimum (because optimum weight was studied

[2] Estimates were made using a statistical series between January 1999 and April 2005

separately for EUR and USD, we will optain xoptimum_eur and xoptimum_usd, respectively).

Then, using the methodology of point 1, we obtain the following spreads:

$$Spread\_x\_eur = 0.00 - 0.25\ spread\_x\_eur_{t-1} - 0.18\ spread\_x\_eur_{t-1} - 0.34\ spread\_x\_eur_{t-2} + 0.02\ spread\_x\_eur_{t-3}$$

$$Spread\_x\_usd = 0.02 - 0.08\ spread\_x\_usd_{t-1} - 0.03\ spread\_x\_usd_{t-1} - 0.17\ spread\_x\_usd_{t-2} - 0.05\ spread\_x\_usd_{t-3}$$

Where:

$$spread\_x\_eur = 1+x/1+x^{optimum\_eur} -1\} \quad (11)$$

$$spread\_x\_usd = 1+x/1+x^{optimum\_usd} -1\} \quad (11)$$

In conclusion, Romanian banking capitals are characterised by mobility, stronger towards the European single currency than to the American currency (formula 11 gives β-x-EUR = -0.25 β-x-USD = -0.08). As for the integration process, the model currently shows a low degree of integration of the Romanian banking sector, but with high potential to the European space (xoptimum_eur fluctuates around 0.5). These results however should be interpreted as a trend and not ad valorem, because placement decisions of bank managers are not risk-neutral and also take into account banking prudence requirements (e.g: the percentage of placements in foreign currency is not independent of the weight of resources obtained in that foreign currency).

4. Conclusions

Starting from the assumption that European integration is a process that is supported not only by Romania's geographic position or its foreign trade (currently over 70% of the exports and over 60% of the imports are with EU partners), but also by the orientation of its political and economic decisions, we can conclude that Romania's banking sector can follow no other path.

European integration of Romania's banking sector must be seen first of all in close connection with the evolution of performance in the real economy. When Romania started its EU accession negotiations in 2000, this meant an improvement of the macroeconomic framework, a resumption of economic growth and a sanitisation of the banking sector. From a legislative viewpoint, due to the existence and implementation of the harmonisation calendar with European regulations, we can conclude that the Romanian banking system is undergoing an integration process. The pace of aligning the system to the European standards is very rapid, which can create difficulties in the implementation of the new regulations, not only for the credit institutions, but also for the central bank itself. However, the benefits of implementing a modern banking legislation, compatible with European standards, clearly exceed the costs of this process.

Aligning the Romanian banking sector to European practices is under way, but the greatest effort is not in accepting the acquis, but in its implementation. In fact, the acquis implementation level is a much more significant indicator of the integration degree and is closely related to the progress of structural reforms.

These reforms have caused (and are still causing) substantial changes in the Romanian banking sector, so that it becomes compatible with the EU requirements. The value of profitability and risk indicators, although it has a higher volatility, shows the potential for continuing structural changes. Direct involvement of banks in the capital market, increasing the presence of other banks with European passport or credit institutions (other than banks) in

the banking market, continuing the concentration process and appearance of a European level player, harsher competition etc., are some of the features that may arise in the following years from the integration efforts. At the same time, an important role in the alignment to European requirements is held by the significant percentage of European capital in the Romanian banking sector and the management that is "imported" this way.

The level and rate of the integration process were tested using either a model that was adapted for this subject or by constructing one based on the portfolio theory. Furthermore, since the affinity towards the American dollar has dominated the Romanian banking world (and to some extent it still persists), in parallel we have studied the integration process to the American currency zone.

The first test shows that there is a convergence process between BUBOR and EUROIBOR, but it has slowed down lately. However, this is normal because a reduction in the inflation rate (and implicitly in the interbank interest rates) becomes increasingly difficult as Romania's inflation goes into single digits. Another observation is that the test does not show whether the convergence is a consequence of the de-inflation efforts of the last few years or a direct effect of a stronger correlation of the interbank currency market with the EU space. It is possible that the first possibility is much more plausible.

The second test starts from a model that is proposed in this analysis, based on maximising the Sharpe index in the portfolio theory. We determined the optimum weight of the aggregate portfolio at the level of the entire banking system that needs to be invested in national assets and it was compared with what actually exists. If the two values converge towards each other, banking capitals are considered to have international mobility, as bank managers place their resources taking into account profitability versus risk criteria, with no impediments regarding the geographic location of such placement. Furthermore, if the optimum value converges to 0.5, it is proven that there is an integration process. The results of the model applied for Romanian banking capitals proved that we can speak of mobility, stronger towards the European single currency space than to that of the American currency. As for the integration process, the proposed model shows a low degree of integration for the Romanian banking sector, but with high potential towards the European space.

In conclusion, the Romanian banking sector has a trend of European integration. However, in order to have a more correct image of the phenomenon, we need to compare the progress and rate of the Romanian integration process with that of the other candidate countries. This way we can have comparative conclusions about the capacity of the Romanian banking system to catch up with the other candidates. At the same time, another subject of discussion in this context is the fact that, while boundaries between the various sectors of the financial market (banking sector, capital market and insurance) tend to be reduced, one must take into account how such interactions can support an evolution of the financial system towards European values.

The current period (since 2009) of economic and financial crisis affecting Romania in an international context that is aggravated by the financial crisis in the US but also in the EU (euro zone) makes Romania not achieve its EU convergence criteria, which extends the timeframe for accession beyond 2015.

References

- Emiris M., Measuring capital market integration, BIS Papers, 12, 2002.
- Stulz R., Globalization of equity markets and the cost of capital, NBER Working Paper, 7021, 1999.
- Ferson W., Harvey C., Economic, financial and fundamental global risk in and out of the EMU, NBER Working Paper, 6967, 1999.
- Agenor P., Benefits and costs of international financial integration: theory and facts, The World Bank, 2001.

- Zimmerman G., Implementing the single banking market in Europe, Federal Reserve Bank of San Francisco, Economic Review, 3:35-51, 1995.
- Bianco M., Jappelli T., Pagano M., Courts and banks. Effects of judicial enforcement on credit markets, CSEF Working Paper, 58, 2001.
- Cabral I., Dierick F., Vesala J., Banking integration in the Euro area, ECB Ocassional Paper Series, 6, 2002.
- Adam K., Jappelli T., Menichini A., Padula M., Pagano M., Study to analyse, compare and apply alternative indicators and monitoring methodologies to measure the evolution of capital market integration in the European Union, Centre for Studies in Economics and Finance, 2002.
- Kleimeier S., Sander H., European financial market integration: evidence on the emergence of a single Eurozone retail banking market, European Credit Research Institute, Research Paper, 2, 2002.
- Padoa-Schioppa T., Is a euroland banking system already emerging?, Lecture at the Societe Universitaire Europeene de Recherches Financieres, European Central Bank, 2000.
- Goldberg K., Verboven F., Market integration and convergence to the law of one price: evidence from European car market, NBER Working Paper, 8402, 2001.
- Durlauf, Steven N., Quah D., The new empirics of economic growth, Center for Economic Performance, Discussion Paper, 384, 1998.
- European Central Bank, EU Banking sector stability, 2003.
- National Bank of Romania, Annual reports, Monthly Bulletin, 12, 1991-1995; 1996-2004; 2002.

AN ANALYSIS OF THE METHODS USED FOR DEVISING EARLY WARNING SYSTEMS FOR CURRENCY CRISES

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Abstract

Currency crises may appear and propagate under many forms, a fact which led to their analysis through various methods. The need to predict systemic crises has led to the creation of a monitoring instrument known as the early warning system - EWS.

The early warning system used for currency crises makes it possible to predict the appearance of a crisis within a well-defined period of time. Such a method may be applied both for currency crises, as well as for banking or fiscal ones. This method consists in the analysis of economic and financial indicators that facilitate the collection of information related to the potential vulnerability of the payment balance or to the non-sustainability of the exchange rate.

Keywords: *early warning system (EWS); signal-based approach; methods of a logit/probit type; methods used for analysing the impact of a currency crisis; currency market pressure indicators, currency crisis indicators etc.*

1. Introduction

The present paper deals with currency crisis warning methods, as well as with preventing currency crisis methods.

In devising the EWS, several methods are used; the most important ones are as follows:

a) methods based on a signal-based approach, consisting in monitoring a set of indicators: if these methods surpass a certain threshold, which was previously calculated, this is considered to be a warning signal. Indicators can be: calculated indicators – composite indicators of vulnerability (currency market pressure indicators, banking system stability indicators (sentiment indicators): GDP increase, budgetary deficit, capital market indices, securities spread (Kaminsky, Lizado and Reinhart) [1];

b) logit/probit type methods (limited dependent variable - LDV): they estimate an econometric model of a logit/probit type wherein the depending variable indicating the appearance of a crisis is calculated on the basis of the currency market pressure indicator, whereas explaining variables are economic and financial indicators. The model has the advantage that it allows to measure the effect of each explaining variable over the crisis probability (Frankel and Rose, 1997 or Bussiere and Fratzscher, 2002)[2],

c) model for analysing the impact of a currency crisis (severity of crises indicators): this model determines which countries will be most seriously affected if a financial external crisis bursts out in a country from a certain region. The method is used to

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define a crisis indicator over a period and during a stress period for international financial markets – the differences incurred by the index for every country are explained by the variables that describe economic conditions of the analysed crisis (Sachs, Tornell and Velasco, 1996)[3].

The first two of the methods enumerated above are going to be presented in the next lines.

2. Literature Review

1. Methods relying on a signal-based approach

Signal-based approach methods have been considerably developed in a set of works by Kaminsky, Lizondo and Reinhart (1996, 1998)[4], whose methodology will be used in the next lines. We should point out that, in calculating some indicators, depending on the existing data, a larger sample of countries has been used in comparison with the second model (Argentina, Brazil, Bulgaria, the Czech Republic, Chile, Columbia, South Korea, Croatia, Estonia, Philippines, Indonesia, Latonia, Lithuania, Malaysia, Mexico, Poland, Romania, Russia, Slovakia, Slovenia, Thailand, Turkey, Hungary, Venezuela):

In this context, the crisis is defined as the period in which the currency pressure indicator surpasses the average value and it surpasses two times and a half the standard difference. The currency pressure indicator is a moderate sum of three factors: the increase rate of the real exchange course and the increase rate of the international reserves.

An indicator issues a signal when it surpasses a certain percentile in the distribution of the values of that indicator[1] (here we have chosen 15 %, and 85 %, depending on the indicator). One should mention that these limits are specific to each country, in the sense that, even if the percentiles are identical for all countries, the value of the signal-based indicator varies depending on the country.

The analysis may be synthetized as in the matrix comprised in Table 1.

The signalling period was chosen *a priori* as lasting 12 month. Thus, if the chosen indicator issues a signal followed by a crisis 12 months before the crisis starts, this is a good signal; if the signal is not followed by a crisis then the signal is a false one.

Analysis of the signal issued depending on the identified crisis period

Table 1

	Crisis in the next 12 months	No crisis in the next 12 months
Signalling a crisis	A	B
Non-signalling a crisis	C	D

The results of the analysis relying on this method are presented in Table 2

[1] E,g, for the increase of the non-governmental credit we used the superior perception of the distribution (85 %), while for the current account / GDP we used the inferior percentile (15 %).

Performance of indicators when using the signal-based model

Table 2

No.	Indicators	Issued signals	Correct signals Total number of potentially correct signals A(A+C)	False signals Total number of potentially false signals B(B+D)	Noise to signal ratio [NS/ (B/(B+D)] / [A/(A+C)]	Conditioned probability (crisis/signal) A/(A+B)	Unconditional crisis probability (A+C) /'(A+B+C+D)	Persistence degree of a signal (crisis VS normal period) 1/NS
0	1	2	3	4	5	6	7	8
1	M2/Reserves	527	0.44	0.12	0.28	0.20	0.07	3.55
2	Overestimation of the real currency exchange rate	440	0.45	0.14	0.31	0.17	0.06	3.25
3	Short-term debt / total debt	487	0.38	0.14	0.36	0.16	0.06	2.75
4	Private debt/GDP	455	0.22	0.10	0.47	0.11	0.06	2.14
5	Total debt/GDP	456	0.22	0.11	0.48	0.11	0.06	2.07
6	Current account/GDP	548	0.35	0.18	0.53	0.10	0.06	1.90
7	Portfolio investments/GDP	406	0.24	0.15	0.62	0.09	0.06	1.61
8	Short-term debt/ Exports	481	0.22	0.14	0.62	0.10	0.06	1.61
9	Export increase	489	0.19	0.14	0.71	0.09	0.06	1.40
10	Budgetary deficit	434	0.25	0.18	0.73	0.09	0.07	1.37
11	Non-governmental credit /GDP	473	0.17	0.14	0.84	0.07	0.06	1.19
12	ISD/GDP	2153	0,.7	0.85	1.10	0.05	0.05	0.91
13	Public debt/GDP	445	0.12	0.13	1.12	0.05	0.06	0.89
14	ISD/Total debt	2318	0.76	0.86	1.14	0.05	0.06	0.88
15	Exports/GDP	2457	0.60	0.80	1.32	0.05	0.06	0.76
16	Increase in the real GDP	455	0.10	0.17	1.66	0.04	0.06	0.6
17	Degree of opening	722	0.04	0.24	5.60	0.01	0.06	0.18

Column 3 indicates the share of correctly signalled crises in relation to the total number of crisis signals that could have been sent correctly. According to Kaminsky (1998), 100 % indicates that there is a crisis signal for each of the 12 months preceding the crisis. One can notice that the share of direct foreign investments expressed in relation to the GDP (ISD/GDP), followed by the share of direct foreign investments expressed in relation to the total debt (ISD/total debt) and the share of exports expressed in relation to the GDP (exports/GDP) poses the highest percentage of good signals. However, one has to be very cautious when interpreting these signals. Column 4 indicates the number of false signals expressed as a percentage of the total potential of false signals that could have been sent. One can notice that the previously mentioned variables (ISD/GDP, ISD/total debt, exports/GDP) have recorded a high degree of false signals. The first three of them, for which there is a low percentage of false signals expressed in relation to all the sent signals, are: private debt/GDP, total debt/GDP and M2/reserves.

In order to simultaneously measure the ability of an indicator to send good and false signals, Kaminsky et. al. (1998) suggest using what they call noise to signal ratio defined as a fraction illustrating the relationship between signalling an unfulfilled crisis and the periods without crisis B/(B+D) and the relationship between signalling a real crisis and the periods of crisis A/(A+C). This is illustrated in column 5 of Table 2. For an indicator which sends signals at random and for a sufficiently large sample, the law of large numbers implies a noise to signal ratio that is equal to 1. Thus, those indicators that point noise to a signal ratio higher

than 1 have an extremely low power to signal crises. In the present context, they are: ISD/GDP, public debt/GDP, exports/GDP, real GDP growth, opening degree (calculated as a relation between the sum of exports and imports and the GDP) and inflation. The high value of the indicators recorded for variables like the growth of the real GDP and inflation, as pointed out by Kaminsky et.al. (1998), predicts crisis relatively well.

The indicators that have a sub-unitary degree of correctly signalling crises and of avoiding false signals are: M2/reserves, overestimation of the real rate, short term debt/total debt, short-term debt/exports, exports growth, governing deficit, non-governmental credit/GDP.

Another aspect pointed out by Kaminsky et.al. (1998) refers to the difference between the probability conditioned by the appearance of the crisis (column 6) and the unconditioned probability (column 7). If that indicator has a high degree of predictability, conditioned probability should be at a relatively higher level than the unconditioned one, a fact which is true for the first 6 indicators. One should notice that, for the used sample, the probabilities record relatively low values, which are, e.g., comparable with the ones estimated by Kaminsky et.al. (1998); the last aspect may be determined by the inclusion in the sample of some countries which, during the investigated period, did not experience major crises, a fact which leads to the mitigation of the conditioned and unconditioned probability.

The last column in the table indicates the degree of persistence for the indicators for the 12 months interval before the crisis and in relation to the other periods. Thus, M2/reserves and the overestimation of the real exchange rate are three times more persisting during the pre-crisis periods in comparison with the ones in which no crises are incurred. A coefficient higher than 2 is also obtained for the 3 indicators that involve different forms of debt in relation to the GDP.

The relatively good performance of the total and private debt expressed in relation to the GDP, and in comparison with the poor result recorded by the total public debt/GDP, may be due to a higher share of the private debt in relation to the total debt for the countries that underwent a currency crisis period and/or a poor quality of the data for these indicators; these facts are reconfirmed by econometric analyses in which these indicators are not relevant when estimating the crisis probability.

Berg et. al. (1998)[5] were some of the first who tested the accuracy of the models (both the ones developed by Kaminsky et.al. in 1998, and the logit/probit ones) during the in-sample and the out-of-sample periods. To achieve this goal they assess the models using observations made until 1995 and make predictions for the next 2 years. The authors use a threshold of probability of 25 % and 50 % to indicate the appearance of the crisis. The authors compare the results obtained with the real values.

The model of Kaminsky, Reinhart and Lizondo (1998)[6] predicts the observations in a correct manner for 70 % of the cases. However, the prediction of crisis is of interest considering the previous result, which may be due to the prolonged periods in which crises did not occur. Thus, the mentioned model correctly predicts only 34 % of the pre-crisis period, when the threshold is 25 %. At the same time, more than half of the signals are false. Moreover, the crises occurred in 24 % of the cases without being signalled.

In contrast, the logit/probit models have a high degree of predictability. When the threshold is 25 %, the model correctly anticipates 79 % of the observations. 73 % of the pre-crisis periods were correctly predicted and the proportion of false alarms is a little below 50 %. In order to surpass a series of shortcoming specific to the above mentioned models, a LDV model was used, which was based on a logit multinomial procedure.

2. Limited dependent variable - logit multinomial methods

This model belongs to the category which is based on variables of a qualitative nature, but, in this case, the explained variable is not binary. The used econometric instrument is a logit multinomial model. In comparison with a binary model, the crisis period is split into two parts: the pre-crisis period and the crisis period and post-crisis period. This separation allows avoiding the post-crises bias effect, which records different evolutions for the macroeconomic indicators during the two periods (Bussiere and Fratzscher, 2002)[7].

The creation of a warning model based on a logit multinomial model involves the following stages:

a) calculating a pressure indicator for the currency market: this allows defining the crisis period, including not only the successful attacks on a currency (forcing the central bank to give up a fixed regime), but also the external vulnerability moments in which the measures taken by the monetary authority or the favourable external situation of the country made it possible to avoid a currency crisis;
b) calculating the indicator of currency crisis;
c) calculating the crisis indicator (the multinomial indicator);
d) estimating the model by the econometric logit multinomial method;
e) determining the optimum threshold for signalling a currency crisis.

On the basis of the crisis indicator the logit multinomial model is created. Explanatory variables are the ones which may depict the external financial and economic situation of a country.

The main variables used in the model were (a selection criterion that we used was the signal-based analysis, as described before) [8]:

(i) external competitiveness indicators: overestimation of the exchange rate, current account, commercial balance, imports/exports – at an absolute level and as a growth rhythm. The use of the real effective rate instead of the real rate is motivated by the necessity of identifying external competitiveness issues and it allows for fixed-rate savings to be evaluated;
(ii) external exposure: short-term debt/reserves, total debt/reserves, growth rhythm of debt on a short-term;
(iii) internal economic indicators: the growth of the real GDP, budgetary deficit, inflation rate;
(iv) financial indicators: non-governmental credit, governmental credit, currency multiplicator, M2/GDP, volume of banking deposits;
(v) contagion indicators: contagion and the banking system.

Calculating the contagion indicator of the banking system was used through the method proposed by Fratzscher (2000)[9]:

$$CB_{ij} = \sum \left(\frac{F_{dj} \cdot F_{di}}{F_d \cdot F_i}\right) \quad (1)$$

where F_{dj} represents credits which were granted by country "d", and F_d stands for the total number of credits which were granted by country "d".

In the present analysis, countries marked with "d" are developed economies, whereas countries marked with i,j(iF) are emerging economies. The interpretation of this indicator relies on the effect of the common lender (common lender effect): if country "j" faces a currency crisis and the degree to which the "d" country is indebted to the former one is a high one, the probability for country "d" to refuse prolonging the debt or the probability for this country to withdraw the capitals placed in country "i" is also higher.

In order to signal a crisis for the chosen countries and periods we chose an optimal threshold (if a probability surpasses this threshold, the signal indicates a crisis). Thus, the

result obtained on the basis of this model corresponds to the situations depicted by using the signal-based method.

Choosing the optimum threshold and period must rely on the number of crises that were not signalled and the number of false alarms, which is regarded as optimum for establishing the currency policy. Let us consider the following cost[10] function:

$$\alpha(T) = \theta \cdot P_{CN}(T) + (1-\theta) \cdot P_{CS}(T) \quad (2)$$

where T is the probability threshold; P_{CN} is the probability of not signalling a crisis; P_{cs} is the probability of signalling a crisis; Θ the cost of non-signalling a crisis or the degree of aversion to risk.

The increase of the temporal horizon and the probability threshold determine the increase of the number of non-signalled crises but it reduces the number of false alarms.

3. The pressure indicator for the currency market

The pressure indicator for the currency market is calculated as an average sum of three factors: the increase rate of the real exchange rate, the increase of the real interest rate and the increase rate of the international reserves; this is calculated as follows:

$$EMP_{i,t} = (\frac{1}{\sigma_e^2}) \cdot (\frac{\Delta e_{i,t}}{e_{i,t-i}} + \frac{1}{\sigma_r^2}) \cdot (\frac{\Delta e_{i,t}}{\gamma_{i,t-i}} - \frac{1}{\sigma_{res}^2}) \cdot \frac{\Delta res_{i,t}}{res_{i,t-i}} \quad (3)$$

where σ_e^2 represents the volatility of the exchange rate, σ_r^2 the volatility of the interest rate, σ_{res}^2 the volatility of international reserves.

The motivation for defining the pressure indicator in this manner is that, in the event of a currency attack, the currency authority has two options: either it attempts to maintain the rate (this is the situation of fixed currency regimes) by mitigating reserves and/or the increase of the interest rate or it gives up supporting the rate and then the currency is strongly devalued.

The use of the inverse variation as a weight factor is due to the fact that the factors with a lower volatility are considered to be more important (the most important factor used to determine the crisis is the modification of international reserves). Similarly, the use of a constant weight for all the countries makes the pressure indicator, including the crisis indicator, comparable for all the countries; this is true especially for the economies that use fixed exchange regimes (the volatility of the exchange rate is lower in this case, a fact which granted more weight to the exchange rate).

Some studies (Edison, 2000[11] or Mills and Omarova, 2004[12]) do not include the interest rate when they calculate the pressure indicator; this omission is most of the time motivated by lack of data in emerging countries. Other studies (Berg, Borensztein and Pattilo, 2004[13]) explain the lack of the interest rate data by referring to the fact that the devaluation of the exchange rate and the increase of the interest rate are different events; thus, the use of the interest rate when calculating the pressure indicator would lead to an accrued prediction of the two events.

4. Currency crises indicator

The currency crises indicator defines the crisis period as the moment when the pressure indicator exceeds the average value and it twice exceeds the standard deviation[2].

[2] Value 2 is determined by the choice of a trustful period (one sided) of 95 %. Edison (2000) uses 2.5 while Milles and Omarova (2004), Kaminsky et.al. (1998) use the value of 3. The use of value 2 was studied by Bussiere and Fratzsiher (2002).

$$CC_{i,t} = \begin{cases} 1, if \ \ldots \overline{EMP_{i,t}} \succ EMP_i + 2\delta EMP_{(i)} \\ 0, \ for...the...rest \end{cases} \quad (4)$$

Once the currency crisis periods are defined, one can identify the crises indicator which will be used in the logit multinomial analysis.

The main problem in defining this indicator is the period in which the currency crisis probability is observed. The separation of the two pre-crisis and post-crisis periods may be made in relation to this period. However, the economies that experienced currency crises underwent different periods of recession and recovery. Thus, defining the pre- and post-crisis periods must be a compromise between the analysis horizon (which the authority in charge with maintaining financial stability set) and the period comprised between the first signs of external vulnerability and the currency crisis incurred by the chosen countries and during the analysed period.

The most used periods of time in economic literature comprise 12, 18 and 24 months. In this analysis, the best results were obtained for the 12 month period.

The crisis indicator is calculated as follows:

$$y_{i,t} = \begin{cases} 1, if \ \exists k = \overline{1,12} \ldots CC_{i,t+k} = 1 \ldots and \ldots CC_{i,t+1-k} \neq 1 \\ 2, if \ \exists k = \overline{1,12} \ldots CC_{1,t+1-k} = 1 \\ 0, \ for \ldots the...other...situations \end{cases} \quad (5)$$

the values of 0.1 and 2 have the following significance:

- y=0, a quiet (normal) period: no currency crisis occurred 12 months before and there is no probability for a new crisis to occur in the next 12 months;
- y=l, the pre-crisis period: a crisis is anticipated for the next 12 months but no crisis occurred before;
- y=2, the post-crisis period: a crisis occurred 12 months before.

5. The results obtained with the econometric model

The logit multinomial analysis was accomplished for 21 emerging economies. Only two emerging countries were used because in these countries domestic and external financial problems are a key factor in the outset of a currency crisis – a fact which does not refer to developed countries. This result was also obtained with the study accomplished by Kaminsky (2003)[3].

The analysed period covers the maximum temporal interval of 1994-2004[4]. The main crises incurred during this period for the chosen countries occurred in: Mexico (1994), the Czech Republic (1997), Bulgaria (1996), Asia (1997)', Russia (1998), Brazil (1999) and Turkey (2000).

The results of this econometric model are presented in Table 3.

We used the following indicators:

- overestimation of the national currency (calculated as a real and effective departure from a linear trend);
- the rhythm with which the non-governmental credit grew as a percentage from the GDP;
- the share of the current account deficit of the GDP;
- the relationship between the monetary M2 aggregate and the reserves;
- the rhythm with which exports grew.

[3] For the signal-based model the data referring to the following countries were used: Brazil, Bulgaria, The Czech Republic, Chile, Columbia, South Korea, Croatia, Estonia, Philippines, Latonia, Lithuania, Malaysia, Mexico, Poland, Romania, Russia, Slovakia, Slovenia, Turkey, Hungary, Venezuela.

[4] The period of time established for each country was determined in accordance with the existing data.

The choice of the indicators was also made in relation to the noise-to-signal values, which were calculated previously according to the criterion that indicators whose value is lower than the relation may better explain crises.

The results of the econometric estimation were calculated with the logit multinomial model for the period comprised between: 1994-2004.

Table 3

Multinomial logistic regression					Number of obs.= 2349 LR Chi2(10)= 653.33		
Log likelihood =-973.47669					Prob>Chi2= 0.0000 Pseudo R2= 0.2513		
	Y	coef.	Std.Err.	Z	p»|z|	[95% Coef.	Interval]
y=i	Overestimation	0.1087522	0.00922105	11.81	0.000	0.0907	0.1268043
	NGC/GDP	0.136496	0.0069529	1.96	0.050	0.0000223	0.027277
	CA/GDP	-0.0444268	0.0201994	-2.20	0.028	-0.084017	-0.0048367
	M2/Reserves	0.6886401	0.0707071	9.74	0.000	0.5500568	0.8272235
	Export growth	-0.0082245	0.0048127	-1.71	0.087	-0.0176571	0.0012082
	Constant	-5.675106	0.3016928	-18.81	0.000	-6.266413	-5.083799
y=2	Overestimation	-0.0659354	0.0088901	-7.42	0.000	-0.0833598	-0.0485111
	NGC/GDP	-0.0124348	0.004345	-2.85	0.004	-0.209891	-0.0038805
	CA/GDP	0.0306049	0.0116045	2.64	0.008	0.0078605	0.0533494
	M2/Reserves	0.9095183	0.0647752	14.04	0.000	0.7825613	1.036475
	Export growth	-0.0270937	0.0036976	-7.33	0.000	-0.0343409	-0.0198465
	Constant	-4.59022	0.2282077	-20.11	0.000	-5.037498	-4.142941

(y=0 is the main group)

The first part of Table 3 illustrates the coefficients for the five used variables, while indicating a pre-crisis probability in relation to the probability of experiencing a normal period. The variables are included in the equation with the expected signal. The overestimation of the national currency and the M2/reserves ratio have a significance of 1 %; the increase of the internal credit is related to the GDP increase, the current account deficit related to the GDP amounts at 5 %; the export increase amounts at 10 %.

An increase of the real effective rate in relation to the trend, a lending boom (the increase of the non-governmental credit/GDP), an increase of M2 in relation to reserves all lead to an increase in the crisis probability. Similarly, a high current account deficit and a decrease of the rhythm of export growth indicate an increased crisis probability.

One can notice the difference between the pre- and post- crisis period especially as to the overestimation of the rate and the increase of the non-governmental credit. Moreover, the current account deficit is significantly improved after the crisis.

The general capacity of the model is relatively good if we consider the values obtained with the panel data (pseudo R2 amounts at 0.2513). However, this is not the only evaluation criterion. Table 4 offers a more detailed analysis of the performance degree for the model calculated and in relation to the probability threshold chosen for signalling the crises.

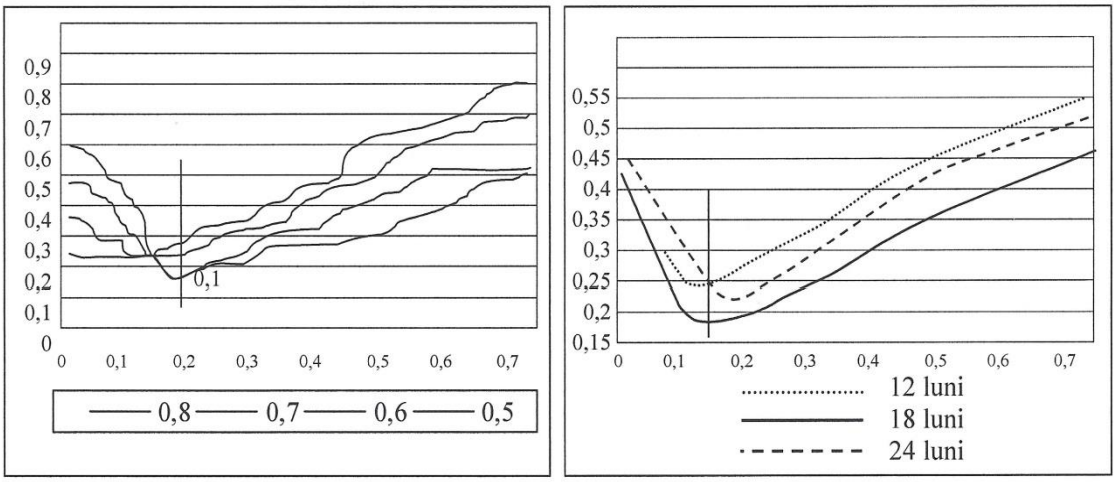
Model performance degree (with crisis threshold of 10%):

Table 4

	Signal		
Crisis	S=0	S=1	TOTAL
y=0	1825	148	1973
y=1	58	89	147
TOTAL	1883	237	2389

% correctly estimated observations:	90,28%
% correctly estimated crises:	60,54%
% false alarms in relation to the total number of alarms:	62,45%
% signal crisis probability:	37,55%
% non-signalled crisis probability:	6,15%

The choice of this threshold was made by minimizing a function of cost which was presented for the limited dependent variable-logit multinomial method and which, in the event of an authority that is neutral to risk (0=0.5), amounts at 10 %, as one can see in Graphic 1. By increasing the risk degree, one has to consider the compromise (trade-off) between the costs of non-signalling a crisis and the one of signalling a crisis (i.e. implementing a measure) for the situations in which there are no real chances for a crisis to occur.



Graphic1. The policy function in the event of risk neutrality for different crisis period and different degrees of risk aversion (%)

The performance degree of the model is estimated for the pre-crisis period (i.e. for PCY=1). In this case, 90% of the observations and 60.5 % of the crises are correctly estimated, while the crisis probability indicated by the signal amounts at only 37.55 %. In comparison with the models estimated by the International Monetary Fund (IMF-Developing Country Studies Division), Kaminsky-Lizondo-Reinhart (1998)[14], the GS-WATCH model of Goldman-Sachs and Credit Suisse First Boston[15], the estimated model is quite successful as to the number of correctly estimated observations, the total number of false alarms, the likely non-signalled crises, the signalled crisis probability (37.55 % in comparison with 37.2 %, 29.7 %, 26 % and respectively 6.5 %).

The percentage of correctly estimated crises remains relatively around the values obtained by these models (60.54 % in comparison with 65.1 %, 59.8 %, 62.2 %, respectively 61.1%). However, the performance of the model is below the models estimated by Bussiere and Fratzscher (2002)[16]: the number of crises that are correctly estimated in their case is 73.7 %, the total number of false alarms is: 44.1 %, the signalled crisis probability is of: 55.9 %; the inclusion of countries that did not experience major crises might explain these results. Similarly, the performance of the model may be assessed in the graphical analysis of the estimated crisis probability established for each country and also by comparing the obtained results with the real data.

6. Simulating the crisis probability by using scenarios

As previously mentioned, the logit multinomial model consists in dividing the crisis period into two sub-periods: the pre- and post-crisis periods; this allows avoiding the post-crises bias effect, caused by the different evolution of indicators during the two sub-periods. Table 5 presents the medium values of the studied indicators. For example, the pre- crisis period is characterised by a high overestimation of the real effective exchange rate, while the post-crisis period incurs a devaluation of the real effective exchange rate. The normal periods

are the ones in which the real effective rate does not record significant deviations from the trend.

Intermediate values for the used indicators

Table 5

Variables	The whole period	The normal period	The pre-crisis period	The post-crisis period
Overestimation of the real exchange rate	1.04	0.45	13.77	-1.14
NGC/GDP *	5.02	4.87	7.69	6.39
CA/GDP *	-2.26	-2.50	-3.63	0.3
M2/Reserves	2.67	2.52	4.21	3.02
Export growth	12.01	14.06	4.97	0.16

*NGC = non-governmental credit; CA = Current account

Due to the impossibility to interpret the coefficients in a logit/probit regression as marginal effects, as a consequence of the non-normal distribution of the explained variable, the marginal effects must be calculated at a pre-established value for the explanatory variables.

Table 6 presents the effect of the estimated probability in relation to a set of scenarios. As a reference level, we chose the scenario in which all variables have a medium level during the normal period. In this scenario, the probability for a crisis to occur during the next 12 months is extremely low, i.e. 2.02 %. On the other hand, when all variables have a medium level during the crisis period, the probability for a crisis to occur is significantly higher in comparison with the normal period, amounting at 27.58 %.

The probability for a currency crisis to appear – scenarios

Table 6

Scenarios	Crisis Probability (%)	Modification of the probability (expressed as percentage points)
(1) All variables amount at the intermediate level for a normal period	2.02	-
(2) All variables amount at an intermediate level for the crisis period	27.58	+25.56
(3) All variables amount at the intermediate level for the normal period, except for:		
(a) The exchange rate +2%	2.51	+0.49
(b) The exchange rate +5%	3.48	+1.46
(c) The exchange rate +10%	5.92	+3.90
(d) M2/reserves+2.5%	7.33	+5.21
(e) CA/GDP: deterioration with 5%	2.53	+0.51
(f) NGC/GDP: growth with 5%	2.16	+0.14
(g) Decrease of the export exchange rate with 15%	2.22	+0.2

The table points out that, in order to establish the impact of the different variables on the probabilities estimated by the crisis, one considers that all variables amount at an average

level during a normal period, except for a variable which records a change as indicated in the table. One can notice that the highest impact is illustrated by the increase of the M2/reserves ratio, whose double value (illustrating the pre-crisis period) generates a modification in the crisis probability of 7.23 %, i.e. 5.21 percentage points in relation to the reference level and an overestimation of the real effective exchange rate of 10 %, which indicates a probability of almost 6 %, i.e. 3.9 percentage points higher than a normal period.

The presented analysis confirms the previous one, which is based on noise to signal ratio and in which M2/reserves and the increase in the real level of the currency exchange rate were the factors for which the ratio between the signalling of a false crisis related to periods that did not incur crises and the ratio between signalling a real crisis related to the period of crisis was the lowest one of all.

7. Conclusions

The present paper empirically tested two early warning systems for currency crisis on a sample of emerging countries. The approach, using the methodology proposed by Bussiere and Fratzscher (2002), more comprehensive in comparison with the one initiated by Kaminsky, Lizondo and Reinhart (1998), suggested the main indicators signalling currency crises: overestimation of the national currency (calculated as a deviation from the real effective rate in relation to a linear trend), the rhythm of increase of the non-governmental credit expressed as a percentage in relation to the GDP, the share of the current account deficit incurred by the GDP, M2/reserves and the rhythm of increase in exports.

Of the above mentioned indicators, M2/reserves and overestimation of the national currency have the most serious impact on triggering a potential crisis, caeterus parebus (although, in reality, defining factors may manifest simultaneously).

The performance degree of the logit multinomial model, in comparison with the models estimated by the International Monetary Fund (IMF-Developing Country Studies Division), Kaminsky-Lizondo-Reinhart (1998), GS-WATCH model of Goldman-Sach and Credit Suisse First Boston, is higher, but it is lower than the performance of the model developed by Bussiere and Fratzscher (2002); the inclusion of certain countries in the sample did not record significant crises, which may be regarded as a potential explanation of this fact.

References

- Kaminsky,G.L., Lizondo S., Reinhart C.M., "Leanding indicators of currency crises", International Monetary Fund, Staff Papers 45/1, 1998
- Frankel.A, Rose A.K., "Currency Crashes in Emerging Markets: An Empirical Treatment, Journal of International Economics, vol. 41 (nov. 1996), pp.351-66
- Bussiere M., Fratzscher M., "Towards a new early warning system of financial crises", European Central Bank, Working Paper 145, mai 2002
- Sachs,I., Tornel A, Velasco, A., "Financial Crises in Emerging Markets: The Lessons from 1995 ", Brookings Papers on Economic Activiti: 1, Brookings Institution, pp 147-215, 1996
- Ibidim, op. Cit. pct. 1
- Berg,A., Bosensztein E.,Milesi-Ferrenti G.M,Patelo C., "Anticipating Balance of Payment Crises. The Rol of Early Warning Systems", International Monetary Fund, Occasional Paper 186, 1999
- Ibidim, op. Cit. pct. 1
- Bussiere, M., Fatzscher,M., "Toward a new early warning system of financial crises", European Central Bank, Working Paper 145, mai 2002
- Pentru o imagine asupra variabilelor folosite în literatura economică: Lestana 1.1 şi Kuper., "Indicators of financial crises do work! An early-warning system for six Asian Countries", dec. 2003; - Caramazza. F., Aziz. J., Salgado. R, "Currency Crises: In search of Common Elements", International Monetary Fund, Working Paper 67, 2000
- Fratzscher,M.,"On currency Crises and Contagion", Institute for International Economics, dec. 2000
- Frantzscher. M., ibidim, op. cit. pct.9

- Edison. H. J., "Do Indicators of Financial Crises Work? An Evaluation of An Early Warning System", International Finance Discutsion Papers, Federal Rezerve Board of Guvernos, no. 675, 2000
- Mills.C., Omarova.E., "Predicting Currency Crises - a practical application for risk managers", Business Economics, The National Associoation for Business Economics, Gale Group
- Berg. A., Bosensztein. E., Milesi-Ferrenti,G.M., Pattello.C., "Assessing Early Warning System: How Have They Worked in Practice?", International Monetary Fund, Working Paper 53, martie 2004
- Ibidim, op. cit. pct. 1
- Vezi Berg, Bosensztein, Pattello (2004), op. cit. pct. 13
- Ibidim, op. cit. pct. 7

MACROECONOMIC IMPACT OF DECENTRALIZATION

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Abstract

The concept of decentralization has a variety of expressions, but the meaning generally accepted refers to the transfer of authority and responsibility of the public functions from central government to sub-national public entities or even to the private sector. Decentralization process is complex, affecting many aspects of social and economic life and public management, and its design and implementation cover several stages, depending on the cyclical and structural developments of the country. From an economic perspective, decentralization is seen as a means of primary importance in terms of improving the effectiveness and efficiency of public services and macroeconomic stability due to the redistribution of public finances while in a much closer logic of the government policy objectives. But the decentralization process behaves as well some risks, because it involves the implementation of appropriate mechanisms for the establishment of income and expenditure programming at the subnational level, which, if is not correlated with macroeconomic policy imperatives can lead to major imbalances, both financially as in termes of economic and social life. Equally, ensuring the balance of the budget at the local level is imperative to fulfill, this goal imposing a legal framework and specific procedures to size transfers of public funds, targeted or untargeted. Also, public and local authorities have to adopt appropriate laws and regulations such that sub-national public entities can access loans - such as bank loans or debentures from domestic or external market - in terms of a strict monitoring national financial stability.

In all aspects of decentralization - political, administrative, financial -, public authorities should develop and implement the most effective mechanisms to coordinate macroeconomic objectives and both sectoral and local interests and establish clear responsibilities - exclusive or shared - for all parties involved in the modernization process of the state.

Keywords: *decentralization, sub-national government, efficiency, impact, imbalances.*

1. Introduction

Reasons for decentralization

Reasons to brows an extensive decentralization process are multiple and concern the characteristics of countries that implement it. So, in the developing countries from Central and Eastern Europe, the former socialist countries, decentralization has proved necessary to modernize centralized administrative structure of the state and to provide adequate public services the entire population of civilized life, under the conditions of effectiveness and efficiency. Also, for a good public management it have to be applied the principle of subsidiarity, which is the passing of the responsibility to achieve and/or to monitor of some public services from the central level to the sub-national levels in terms of efficiency - ie with the lowest costs - and effectiveness - ie achieving objectives of meeting community needs în quantity and quality required.

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Decentralization is a vital part of the democratization process, because the autocratic regimes required especially by centralizing power, not only the political but also the economic and obviously administrative. Therefore, in countries such as Latin American countries, the decentralization is an accelerated process of modernization after removal of the military regimes, în terms of adoption of new and democratic constitution.

In other countries, the trend of decentralization - local municipalities or regional - is intended to maintain state unity, in terms of the existence of hard disparities between different geographical areas of the country. In this situation are many African countries, where economic and social balance between communities can be maintained only through intense concerted actions to avoid, thus, dismantling the country.

Although the situations are far from being similar, extending some form of regionalization în some developed European countries - such as Italy, with disputes between North and South; Great Britain, tensions often arise between its historic regions; Belgium, with the trends of separation between Walloons and Flemish etc. - has the same purpose, namely balancing the communities in terms of lifestyle, including economic development.

2. The economic logic of decentralization

The variety of forms that shows the decentralization covers a multitude of issues, presenting a significant impact on business efficiency, equity in the social field and macroeconomic stability.

The literature in this field, particularly rich and varied in the last decades, presents several approaches about the role of decentralization to modernize the civil society. The economists believe that decentralization allows redistribution of national resources - something that is one of the main functions of public finance - much more efficient and effective because decisions on public expenditure taken at subnational administrative levels reflect more accurately the necessary public services, thus avoiding the waste. In addition to that, due to better information for taking part in making decisions, people can better realize the priorities, therefore being willing to pay a fair price for the services managed by local authorities.

From the economic perspective, decentralization, which involves training local authorities în most problems lead to competitive between communities, but also to mutual aid of collectivities, with beneficial impact on the quality of governance at local and national level.

From this point of view, in the Act no.273/2006 on local public finances, with subsequently additions and modifications, are provided four new principles as follows:

- the principle of solidarity, whereby local authorities can help distressed municipalities or individuals by providing amounts from the reserve fund which was established in the local budget;
- the principle of local financial autonomy, under which local authorities are entitled to sufficient financial resources consisting of local taxes and the amounts and rates deducted from certain revenues of the state budget and general or targeted subsidies and transfers;
- the principle of proportionality, according to which local public resources must be consistent with the responsibilities of local authorities;
- the principle of consultation, which impose involving associative structures of local government - villages, towns, municipalities, county councils - the legal and regulatory framework on the allocation of financial resources from the state budget to local budgets.

3. Controversial aspects of decentralization

Decentralization can not be regarded as an universal panacea. There are a number of problems, both theoretical and practical, showing controversial economic decentralization as a strategy that can have negative effects regarding macroeconomic stabilization policy. In this respect, it is noted that the transition of power from the central decision by some subnational levels can produce local financial imbalances, if is not implemented a legal and consistent framework, unique for the whole country, mainly the rights to make decisions regarding public spending nd the possibility of contracting public debt.

Regarding the right of the local authorities to contract local government debt - direct or guaranteed –, they can access borrowed funds, as long as the service of the local public debt of the community - reimbursements plus costs of direct and guaranteed debt - not exceed 30% of the own revenues of the budget of the administrative-territorial unit (Article 63 paragraph (4) of the Act no.273/2006).

Also, issues of equity – both between communities and people - must be viewed carefully during the decentralization process as their resources, especially financial ones, differ considerably multiple reasons: geographic location, previous social and economic development, historical evolution, etc.. These disparities can be resolved only through appropriate mechanisms concrete situations, that ensure all citizens access to a minimum of public services that is done a decent level of living. Those mechanisms can be formed from a range of financial transfers between levels of government, their planning and implementation in a total transparency beeing a prerequisite for macroeconomic stability and equity between the citizens of the same country.

În this context, ensuring fairness and supervising the balance between administrative units shall be the responsibility of the central government, but it will have to involve all sub-national authorities on decision-making and/or the management of public affairs affecting local life: determination local taxes, redistribution expenditures to financial coverage of public services shared between central and sub-national levels or the public services under the sole responsibility of local authorities, etc.

In this respect, in Romania, in the Act no.195/2006 framework law on decentralization, it is stipulated that to provide necessary public services, local authorities exercised - under the law mentioned above, under the Act no.215/2001 local government and the Act no.273/2006 local public finance law, to remember only organic laws in the area - exclusive competences, shared and delegated as follows:

- according to exclusive powers, local authorities have the right of decisions and have the resources and means to achieve them, in compliance with legal requirements - for example, public and private administration of the village, town, county; transport infrastructure; local and county cultural institutions; public health units; social services with the primary purpose to protect children and for the elderly; for victims of domestic violence; and so on;

- according to shared competences, local authorities - villages, towns, cities - share their responsibilities of public authorities at central and county, and the county with the local and central level. Few examples of this: thermal power produced in a centralized system; the construction of social housing and youth pre-university education; public order and safety; social benefits for people in need; prevention and emergency management at the local level; medical and social assistance; social primary character, population registrar; road transport infrastructure of local interest, etc..

- delegated powers which local authorities exercise on behalf of the central government authorities regarding the pay of some allowances for children and adults with disabilities.

The responsibility of the central authorities result not only from the need to ensure fairness, but also the conduct monitoring of the decentralization process while in town a unified framework. So, as local economies are intrinsically open economy, where the resources, especially human ones can be very mobile, redistribution programs targeted to specific communities become ineffective, requiring correction mechanisms applied ad-hoc, but also placing a legal and regulatory general framework of the balancing mechanisms combined with specific situations of administrative units.

In Romania, balancing mechanism of local public finances is based on the establishment of a fund balance consisting of odds shared deducted from income tax – at present 7% the income tax collected from that community - and the amounts deducted from VAT. Accumulated amount in that account, which is located in the county treasury of the County General public finances is designed to balance local budgets in the county area, including the local budget of the county, and will be distributed first horizontally and then vertically.

From the vast range of public services, those to be decentralized, and the type of decentralization that will be implemented depend on expected economies of scale, mainly in terms of technical effectiveness and of the benefits which can be obtained outside the communities where products. Thus, the type and degree of decentralization does not have to be the same for all the decentralized services, the most advanced form of decentralization fron the economic point of view being considered privatization, which allows the consumer to choose their supplier and the product wants it. Nevertheless, because the nature of local public services, people see their option limited, and the best efficiency is obtained when there is the possibility of introducing competition between providers/operators of public services. Given the wide variety of public services placed in the responsibility of local public services and also of economic circumstances in which local communities are, decentralization takes various forms, from devolution to regulated competition and even privatization.

Decentralization is a deeply political action aiming to attract voters and citizens' participation in political actions of elected representatives of the community and its economic side acts in the same sense, its main purpose consisting efficient use of the public funds and increased tendency to pay for services provided. In this respect, at present is considered a successful program to achieve/extension decentraliz must fulfill several conditions:

- for decentralization to be effective and achieve their goals, public authorities decision makers on local public finance area must comply with commitments to service operators that have trained în development/distribution of public services for which they had been designated by law to take responsibility - by any of the legal forms in force of local public service management: delegation concession, Public Private Partnership (PPP) etc. - and local officials to bear the consequences of their decisions and to pay the costs to operators in accordance with contractual obligations which it assumed.

In this context, the local community should be informed about the expected costs and/or contracted public service managed directly or by delegation, as well as the financial resources available or accessible as possible - from grants or repayable sources and in this situation, about the costs of those financial sources - so the projection and multi-annual budget to be performed in compliance with the budgetary principles of organic law;

- in the framework legislation on local public finances must be provisions that subnational authorities are obliged to consult communities, their populations being stimulated to actively participate in decisions concerning the construction of the local budget;

- the responsibility of local authorities should be clearly defined by law - obligations, penalties - so that local government performance can be analyzed, compared with the provisions stipulated by law and with the policies and strategies that local officials have captured the electorate;

- for decentralization to be implemented it is necessary that the use of instruments, primarily financial ones, suitable for local public policy objectives to be met, which requires fair contractual relationships with operators providing local public services, generally by delegation mechanisms used by administrative units responsible leaders. A correct behavior, the spirit of the law, which is adopted by the local authorities is essential to achieve effective decentralization, targeted local benefits and also macroeconomic ones being a logical and predictable consequence.

4. The macroeconomic impact of decentralization

The implementation of decentralization - a concept that refers to a new approach to administrative decision-making power at all levels of government - can produce significant effects on the economic situation of a country, whether federal or unitary. Framework applied, also the cyclical conditions in that apply decentralization must be well researched, so that the process that takes several aspects that interact and can not be ignored, as: administrative, economic, social and so on, to be on line with the economic development, consumer inclination manifested by population, organization of local authorities and local public finance etc. However, the shift of responsibility of some public services from central to sub-national levels must be accompanied by providing the resources of any kind: material, human, financial, allowing continuation of services, în good condition of the services concerned. Otherwise, or those services are not provided to persons eligible to accepted standards or imbalances will occur, which can become major from the financial point of view, where territorial administrative units who took responsibility for carrying/distribution of the public service. Moreover, expanding the scope of analysis, the impact of inappropriate decentralization will propagate inappropriate macroeconomic, imbalances of the subnational budgets causing a general government deficit, which can be managed with significant costs for the entire national economy.

5. Causes of macroeconomic imbalances generated by sub-national

Unlike central government, subnational governments are not interested in the macroeconomic implications of the evolution of communities over which they preside, monitoring national central government is of concern that can be used for this purpose tools that can be used for this purpose tools and that are exclusively competent to, for example, the monetary policy. Through this policy, the government can influence - indirectly while in town a democratic state - the global demand on the domestic market and thereby national production, but things get complicated depending the socio-political context that is in the country.

If, according to the national legal framework, sub-national authorities can borrow unrestricted on domestic and/or international financial markets, local government debt may create segnificant negative issues to the financial stability of the entire state. Similarly, aggregate expenditure on all levels of government while in town a consolidated budget requires strict control of both current expenditures and those of capital for investment, as can be observed to macroeconomic stability criterion - expressed, at least în European Union member states as subnational balance (lower budget costs at most equal to the budget revenues) and at macroeconomic level, the negative balance of the central budget must fall within the limits of 3% of GDP.

Also, if the country is part of year association of states while in a common regional context, as countries joined the European Union Eurozone, the possibility of the central public

authorities to use monetary policy to Influence stability and/or national macroeconomic development is limited because this policy this is the responsibility of the supranational authority, that does not take into account the needs of each member state, but the whole community area.

6. Determinants of macroeconomic financial stability

Distribution function of public finance and tax sharing

The financial balance of administrative territorial units depends largely on stability of different categories of their income, according to the structure of subnational government budgets. This structure is fixed by national law on local public finances , which in the European Union Member States comply with the provisions of the European Charter of Local Autonomy. În accordance with the Charter, specific local government revenues - local taxes, prices and charges for certain public services produced and distributed by those authorities and residents enjoyed its etc. - represent about 20% of total local revenues, the rest being provided by a range of transfers and taxes shared between central authorities and the sub-central administrative level.

In this respect there are relevant amounts and odds shared in some central budget revenues, in most states that practice the income tax system - irrespective of the tax rate: flat rate or proportionality in installments - and value added tax (VAT), as main neutral tax on consumption, which constitutes for most developing countries the dominant source of revenues. Due to this situation, if the tax base of the shared taxes fluctuates from various causes, such as important changes in tax laws, significant change of macroeconomic indicators, such as gross domestic product, domestic consumption, etc., that underpin these taxes, the possibility of financial coverage of decentralized public services degrade, requiring the intervention of the central government to balance the financial deficit.

7. Responsibility for public spending

Responsibility for the financing of decentralized public services are moving from central to local authorities when it is decided, by law, to pass their administrative and financial management from the central to the subnational level, on compliance with legal requirements.

Decentralization of subnational public spending is the crucial issue of administrative reform of the state, since designated administrative level responsible for the established political and/or distributing a public service are the prerogative of a state policy. The general approach of this action seeks the democratic states that decentralized services require relatively stable public spending - such as budget expenditures financing expenditures for school education, compulsory while in town a modern state. Also, social services are influenced by macroeconomic developments that can be expected and consequently, sizing requirements are more predictable funded.

8. Subsidies and transfers from the central to the subnational

Although a share increasingly lower of the public spending falls under central government responsibility, for reasons of fairness and national tax administration, and having in mind the macroeconomic development, most public revenue is central. In this situation, to maintain and even improve the stability of the entire financial public sector, in any state

addressing decentralization as one of the main tools of public modernization management should be designed and implemented various forms of subsidies and transfers, aiming, however, the principles fairness and effectiveness of the approach to local public authorities about the services they are responsible.

For revenue administration and public expenditure management to achieve the lowest costs, subsidies and transfers should be provided in the draft budget before the start of that year before, as necessary allocation after the imbalances may be more expensive. Obviously, in this situation, the central authorities will be given some discretion to allow adjustment of amounts transferred, which means that in addition to transfers expressly provided în organic law of public finances, they can decide transfers and subsidies for specific projects and/or administrative units that provide such necessity.

In most cases, own revenues and transfers and subsidies from other budgets are not sufficient for local governments to finance all their respective services în responsibility, legal and administrative framework suitable to be applied while in town some time. To overcome this drawback, the law enables authorities administrative units to borrow, framing loan, establishing it between national boundaries, also the concrete form of achievement depending on specific conditions imposed by the local financial market. The developed countries that have the financial markets in which regulators have imposed a strict discipline – for exemple Germany, Switzerland, France, UK etc . - although allow a significant amount of municipal credit, its values capped at values that must enroll in general macroeconomic equilibrium, according to the Stability and Growth Pact.

Although the decentralization process is a variable percentage in sizing the entire public sector in each country, the financial stability of local governments is one of the major concerns of the national governments that adopt their methods of balancing it deems most appropriate from the point of view of the funds transferred from the central to sub-national levels, also regarding the management system best suited to local tax revenues and local loan.

Closely following the implementation of the decentralization process, central authorities try to limit and discourage local public finance imbalances, for the general government balance to be maintained. For this purpose, transparency is a key intergovernmental factor to determine the transfers, especially since the financial crisis - and its envelope, the economic crisis - primarily affects vulnerable collectives. For example, in Romania, the most affected communities, medium and long term, are the former monoindustrial ones, where public intervention is required to stimulate recovery, both economic, but especially on social issues, involving, alongside targeted transfers, the use of balancing mechanisms according to the needs communities - so-called vertical balancing mechanisms - financially covered by earnings and allowances deducted from certain revenues of the central budget.

9. Conclusions

Foreseeable effects of financial relations between levels of government

Financial relations between central and sub-national administrations occurs both at the macroeconomic and local level. If the financial relations produce significant imbalances to the good of the central authority, the negative effects can be subsequently repaid even if it will be neglected the funding of local public services through taxation and/or local indebtedness. Conversely, if relationships between public administration steps positive effect in favor of administrative units, it can create conditions conducive to poor financial discipline at the sub-national level, with serious consequences for countrywide.

In **conclusion**, each administrative level should have well-defined responsibilities, predictable funding sources and related responsibilities, and autonomy of each step of the

government has to be reflected only in a good management of resources, consistent with the needs of the community, also with the public policies promoted and approved at national level.

References

- Bernard Dafflon, Thiery Madiès, Decentralization: A Few Principles from the Theory of Fiscal Federalism, AFD, Paris, 2011, 47-64.
- Anwar Shah, Theresa Thomson, Heng-Fu Zou, The Impact od Decentralization on Service Delivery, Corruption, Fiscal Management and Growth in Developing and Emerging Market Economies: A Synthesis of Empirical Evidence, CE Sifo DICE Report 1/2004.
- Anwar Shah, Fiscal decentralization and macroeconomic management, Springer Science+Business Media LLC 2006, Int Tax Public Finan (2006) 13:437-462.
- Act no.273/2006, local public finances, with subsequent amendments and additions.
- Act no.195/2006 framework law on decentralization, with subsequent amendments and additions.

NEO-GRAMSCIAN APPROACH ON EUROPEANIZATION

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Abstract

This paper belongs to the area of critical studies in European Integration and I will try to demonstrate that the concept of Europeanization is not able to capture the nature of social change which occurs in member states. Nowadays, this concept is largely used by scholars to describe all of the economic, political and social changes that are taking place in national domestic policy under the influence of the European Union, understood as a distinct polity. In other words, this approach of Europeanization is limited only to the European geographical space and, as a consequence, it cannot capture the wider context in which the European Union exists – globalization and the nature of world order.

My aim is to analyse the concept of Europeanization through the neo-gramscian theoretical framework and to see if it can be overlapped with the process of European integration. I will do this by assuming a historical materialist view on the European integration process and international relations which will help me understand these changes through the Marxist perspective of structure and superstructure. Those concepts are mutually constructed in the neo-gramscian approach and they are represented by the agency of social forces and its superstructural dimension – the neoliberal ideology according to Baastian Van Apeldoorn, Andeas Bieler, Adam David Morton or Stephen Gill.

Keywords: *Neo-gramscianism; European integration; Europeanization; critical theory; social forces.*

1. Introduction – Overview on Europeanization

In this section I will try to figure out what are the theoretical approaches regarding Europeanization and to see how this concept is overlapping with the process of European Integration. Thus, is Europeanization a process unique in the world? Does it have any elements that make it different from other similar processes[1]? I will start my research with a historical view on Europeanization by considering Wolfgang Schmale's definition: "Processes resulting in the development of a single European culture can be bundled under the term Europeanization. The majority of these processes played out over the long-term, but accelerated since the second half of the 18th century[2]" (Schmale 2010). They create in this way a significant degree of cultural coherency on the continent. As an example, he identifies the spread of Greco-Roman culture to be the first source of Europeanization. Furthermore, which is more interesting for my research, is that Schmale tries to find a pattern of Europeanization identifiable over the course of time. Thus, "one particular interpretation

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[1] There are also other attempts to achieve a kind of regional integration outside the European Continent: Mercosur in Latin America, African Union (AU), Gulf Cooperation Council (GCC) and Association of South East Asian Nations (ASEAN).

[2] "This differentiation may well be simple, but is of inestimable importance to the purposes of orientation. The major processes of Europeanization often correspond to the core characteristics used to refer to epochs such as the Renaissance, the Baroque age, or the Enlightenment. Minor processes of Europeanization emerge in conjunction with a large number of cultural transfers, which hone a number of cultural assets through transfer, enabling them to fit into a number of different contexts" (Schmale 2010).

advanced by the literature is the common division onto an East-West schema. Such a model is certainly applicable to the process of industrialization and the Enlightenment, which first developed in England, Scotland and France" (Schmale 2010).

Consequently, those two components of Europeanization could be framed in Marxist terms of structure and superstructure as it follows. Regarding the economic structure, industrialization is about technological development and mass production and it represents the moment when the Western world (especially Europe) made a huge step forward. On the other side, the superstructural dimension could be discussed in terms of Enlightenment and emergence of the capitalist mode of production. I will put forward the ideas of Milan Zafirovski, who argues that the Enlightenment was a source of critical ideas, such as freedom or democracy, that strongly opposed to the legitimacy of the ruling kings. "Specifically, the Enlightenment intellectually destroys or discredits feudalism as the economic structure of the ancient regime as a total social system. In turn, it creates or envisions modern capitalism as a coherent theoretical concept[3]" (Zafirovski 2010, 12). Those ideas came out and were spread through society by some thinkers like Hume, Ferguson, Condorcet, Montesquieu, Saint Simon or even Adam Smith, who was the actual member of Enlightenment. All of those things mean that Europeanization was a concept confounded with the technological, economic, social and political supremacy of Europe comparing to the rest of the World, and with the action of the European states to implement their own way of life abroad, through the colonization process.

After this introduction, I need to come closely to the nowadays Europe, and to bring the discussion into the field of the European Union – the main tool of Europeanization. One of the most relevant scholars is Johan Olsen who believes that this term is useful for understanding the dynamics of the evolving European polity. He also includes here the relation between the European system of governance and similar national systems. But to clarify this perspective, Olsen defines the process of Europeanization through five different phenomena, which are also five possible uses of the term:

1. ***Changes in external boundaries***: "This involves the territorial reach of a system of governance and the degree to which Europe as a continent becomes a single political space" (Olsen 2002, 923). A good example of Europeanization here is the European Union enlargement and the changes that are taking place in those states that applied for membership.
2. ***Developing institutions at the European level***: "This signifies centre-building with a collective action capacity, providing some degree of co-ordination and coherence" (Olsen 2002, 923). It means that the institutions of governance and normative order can facilitate or constrain the ability to legislate and to enforce decisions, or even to sanction non-compliance.
3. ***Central penetration of national systems of governance***: "Europeanization here involves the division of responsibilities and powers between different levels of governance. All multilevel systems of governance need to work out a balance between unity and diversity, central co-ordination and local autonomy" (Olsen 2002, 923-924). Here Europeanization signifies the adapting national and sub-national systems of governance to the European polity.
4. ***Exporting forms of political organization***: "Europeanization as exporting forms of political organization and governance that are typical and distinct for Europe beyond the European territory, focuses on relations with non-European actors and

[3] "Generally, the Enlightenment directly as through Hume, Condorcet, Montesquieu, and Saint Simon, or indirectly via Smith's classical political economy is admittedly the primary intellectual source and theoretical formulation of the conception of economic freedom, including free markets, thus modern capitalism replacing feudal servitude, just as of political liberty and democracy superseding despotism and theocracy" (Zafirovski 2010, 13).

institutions and how Europe finds a place in a larger world order" (Olsen 2002, 924). Olsen is assuming here that non-European countries import more from Europe, than European countries import from outside.

5. ***A political unification project***: "The degree to which Europe is becoming a more unified and stronger political entity is related both to territorial space, centre-building, domestic adaptation, and how European developments impact and are impacted by systems of governance and events outside the European continent" (Olsen 2002, 924). The Europeanization process is measured by the impact of the European Union as an entity in the field of international relations and as a model of development.

Using those insights of Europeanization, I will discuss this concept under the neo-Marxist point of view (neo-gramscianism). The first point that needs a separate discussion is number four, *exporting forms of political organization*. I consider this to be the most important aspect of my research concept because it involves a level where Europeanization cannot overlap with European integration. But also, I will emphasise the main question that rises automatically: what are the elements of this Europeanization insight? To find a proper answer, I will bring out the example of the economic based relationship between the European Union and Mercosur[4].

The most important aspects of this relation are the *Interregional Framework Cooperation Agreement* signed in 1995, and the *2007-2013 Regional Programme* adopted in 2007. The former programme, and the most important one, provide 50 million euro for the next three priority areas: "Mercosur institutional strengthening; Supporting Mercosur in preparing for the implementation of the Association Agreement; Fostering the participation of civil society to Mercosur integration process[5]". Until now, the EU seems to export a model of regional integration. But why does Latin America need something like that? Was it just social and political willingness or are there other pressures coming from the economy? And also, what is the framework in which those interactions are taking place? Europeanization does not tell us anything about globalization and world order. Furthermore, for Patrick Messerlin, which made a deeper research into the economic relations between EU and Mercosur, non-trade topics often included in comprehensive economic and trade agreements are: Anti-corruption, civil protection, consumer protection, cultural cooperation, economic policy dialogue, education and training, human rights, innovation policies, labour market regulations, money laundering, public administration, regional cooperation, small and medium enterprises or social matters taxation (Messerlin 2013). All of those elements show that the European Union is exporting, or at least it is trying to, a model of capitalism, not an entire mode of production as it did before[6], during the age of industrialization and Enlightenment. It means that no big changes could happen with the Mercosur in this way – because the European Union is implementing some regional projects. The European type of capitalism has two main roots: historical processes of European States and national specificities on one hand, and the influence of the neoliberal ideology under the pressure of globalization, on the other hand. As it is obvious, the historical processes and national specificities are rather different in Mercosur compared to the European Union. And regarding globalization, it is a process that involved almost the entire planet, and it should not be overlapped with Europeanization. I will discuss more about the relation between globalization and European integration in the next chapter.

[4] Mercosur was founded in 1991 by Argentina, Brazil, Paraguay and Uruguay. In July 2012, Bolivia also joined this group of states. Moreover, Columbia, Ecuador, Peru and Chile are only associated states.
[5] http://eeas.europa.eu/mercosur/index_en.htm
[6] Not as a political entity, but through the most advanced European states, like Great Britain or France.

Turning back to the Europeanization insights, the other four are connected geographically with the European continent which means that they could be overlapped with European integration. The second and the fifth insight are referring to the building of supranational institutions and to a unified European political project. But are those elements not part of the integration process? Also, why is this Europeanization occurring? Which are its catalysts? Furthermore, if we look to the first and third insight, Europeanization through enlargement and through penetration of national systems of governance, we can say even more that those are the core elements of European integration. A relevant view on those issues belongs to Claudio Radaelli who defines Europeanization in terms of a process of "(a) construction, (b) diffusion, and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things', and shared beliefs and norms which are first defined and consolidated in the making of EU public policy and politics and then incorporated in the logic of domestic discourse, identities, political structures, and public policies[7]" (Radaelli 2003, 30). This perspective supports my point of view that Europeanization is, in its specific areas, overlapped with the process of integration. The main question here is why use Europeanization in those cases and not European integration? I will show in the next section that, by using neo-gramscianism, one could add to the integration process other variables like globalization or even world order, which through Europeanization they cannot be incorporated.

2. Content

2.1. Neo-gramscianism and European Integration

In this chapter I will present an alternative theory of European integration, the neo-gramscian approach. I have chosen this theory because it can provide a better understanding of social change by considering the economic structure (social forces agency) and superstructural dimension (impact of neoliberal ideology). Consequently, a neo-gramscian approach[8] is able to offer a critical perspective, focusing on hegemonic projects which have both succeeded and failed, and those which will constitute the framework of future hegemonic contestation.

The most important aspect of neo-gramscianism is represented by its focusing on social forces engendered by the production process and understood as the most important collective actor. „Consequently, various fractions of labour and capital may be identified in relation to their place in the production system. This makes structural changes such as globalisation accessible, since the emergence of new social forces engendered by the transnationalisation of production and finance can be incorporated" (Bieler, Andreas and Adam David Morton. *Introduction: Neo-Gramscian Perspectives in International Political Economy and the Relevance to European Integration* in Bieler and Morton 2001, 17). Those social forces, being engendered by the production process, are related with social classes in classical Marxist theory. Social classes are therefore regarded as social forces whose cohesion derives from its role in the production process. „Consequently, class is defined as a relation

[7] In each member state, the Europeanization process occurs on follow levels: "(1) Political structures (institutions, public administration, intergovernmental relations, legal structure); Structures of representation and cleavages (political parties, pressure groups, societal-cleavage structures); (2) Public policy (actors, policy problems, style, instruments, resources); (3) Cognitive and normative structures (discourse, norms and values, political legitimacy, identities, state traditions — understanding of governance, policy paradigms, frames, and narratives)" (Radaelli 2003, p. 35).

[8] This approach, as van Apeldoorn also affirms, has its roots in the "historical materialism that emphasizes the role of transnational social forces in the construction of the European socio-economic order" (van Apeldoorn 2002, 11).

and the various fractions of labour and capital can be identified by relating them to their place in the production system" (Bieler 2000, 10).

To further explore the nature of social forces, Bieler and Morton make the following distinctions: (1) national social forces - are derived from national production sectors; (2) transnational social forces – transnational forces of capital and labour engendered by the process of transnational production. Moreover, „the first group can be further sub-divided into nationally-oriented capital and labour, which stem from domestic production sectors which produce for the national market, and internationally-oriented capital and labour, engendered by domestic production sectors, which produce for the international market" (Bieler, Andreas and Adam David Morton. *Introduction: Neo-Gramscian Perspectives in International Political Economy and the Relevance to European Integration* in Bieler and Morton 2001, 17). I would like to state that, however, considering the economical characteristics of the XXI century, it becomes difficult to imagine an exclusively national type of capitalism which has absolutely no connection with global production. Thus, we cannot talk about an exclusively national capital, but we can talk instead about forms of capital interested by national protectionism, which are not able to compete on global market because they would not survive.

Furthermore, because this research belongs to a neo-gramscian approach, it will consequently emphasise the independent role of ideas. Firstly, those ideas are part of a social structure as intersubjective meanings and, as Robert Cox suggest, the individuals or groups of individuals become aware of their social condition and about possibilities of change. Secondly, „ideas may be used by actors as 'weapons' in order to legitimise particular policies and are important in that they form part of a hegemonic project by organic intellectuals" (Bieler 2000, 13). Thus, I will discuss further to what extent the concepts of historical bloc and hegemony will help me to explain the process of European integration.

One of the most important elements of the neo-gramscian theory is represented by the concept of historical bloc. „At a basic level of understanding, a historical bloc is an alliance of classes or fractions of classes, which attempts to establish a particular form of state and/or world order preferable to them. Nevertheless, a historical bloc is more than a simple alliance of social forces" (Bieler 2000, 14). This concept involves a unity between structure and superstructure forming a complex dynamic of social forces which include economic, political and cultural aspects. „Various social forces may attempt to do this by forming an historical bloc to establish preferable forms of governance at the national, European and/or international level" (Bieler, Andreas and Adam David Morton. *Introduction: Neo-Gramscian Perspectives in International Political Economy and the Relevance to European Integration* in Bieler and Morton 2001, 20).

Another important aspect of neo-gramscianism is the concept of hegemony[9]. This is a form of leadership which is more likely characterized by consent than coercion. „Additionally, a hegemonic order is based on a historical bloc that does not necessarily coincide with the boundaries of a state, but may be established at a transnational level" (Bieler 2000, 14). From another perspective, hegemony could be seen as a form of social leadership: „Ideas are essential for constituting political coalitions. They constitute or define interests of social groups. At the same time, they may also seek to legitimate these interests vis-à-vis other social groups. Thus ideational practice is an important element of constituting social leadership" (Drahokoupil, Jan, Bastiaan van Apeldoorn and Laura Horn. *Introduction: Towards a Critical Political Economy of European Governance* in van Apeldoorn, Drahokoupil and Horn 2009, 9). To achieve those things, the hegemony should not contain

[9] This concept should not be confounded with the neorealist version developed by Gilpin or Keohane, "in which a hegemonic state controls and dominates other states and the international order thanks to its superior amount of economic and military capabilities" (Bieler 2000, 14).

only the interests of the dominant social group, but it should also incorporate "other (opposing) interests into the hegemonic world view and thus transcending the narrow selfinterests of the leading group" (Drahokoupil, Jan, Bastiaan van Apeldoorn and Laura Horn. *Introduction: Towards a Critical Political Economy of European Governance* in van Apeldoorn, Drahokoupil and Horn 2009, 9).

Considering the situation of nowadays European Union, some scholars like Bastiaan van Apeldoorn, Stephen Gill[10] or Dorothee Bhole[11] are discussing the superstructural dimension of European Integration in terms of neoliberal hegemony. The most important here is van Apeldoorn who states that the European project is neoliberal because it "aimed at the restoration and expansion of capitalist class power through an ideological commitment to the freedom of market exchange and to the absolute exercise of capitalist property rights, it was particularly within the European context that the new neoliberal policy paradigm had to adjust to the persisting traditions of corporatist industrial relations ('social partnership')" (van Apeldoorn, Bastiaan. "The Contradictions of 'Embedded Neoliberalism' and Europe's Multi-level Legitimacy Crisis: The European Project and its Limits" in van Apeldoorn, Drahokoupil and Horn 2009, 9). Also, regarding the social and industrial protection offered by the state intervention, Apeldoorn uses the term 'embeddedness'. In consequence, embedded neoliberalism encompasses former neo-mercantilists, the European labour movement, and social-democratic political forces.

To conclude, European integration is seen and analysed from two perspectives: the first one is the social forces agency which can explain also the process of globalization by considering the lobby activity of transnational social forces; and the second one is analysing the ideological dimension of European integration – which is known today as the neoliberal project. Assuming those characteristics of integration process, I could say that Europeanization would be an empty process when we try to describe the external strategy of the European Union. The first element that it cannot conceive, as the neo-gramscian approach to European integration shows, is globalization. The second element will be discussed in the next chapter.

2.2. Robert Cox. Gramsci in International Relations

In this section I will try to show how the integration process is seen when I will analyse the European Union in the context of international relations. By doing this, I will try to show the limits of neo-gramscian approach of European Integration and to see also what other aspects are neglected by the concept of Europeanization.

In his works, Karl Marx has dealt with the problem of modern capitalist development, but he was focusing on social forces that were going to lead to the collapse of capitalism and the release of humanity from domination and exploitation. „Neo-Gramscian approaches work in the same spirit by focusing on the role of counter-hegemonic political forces in the global order – that is, on the various groups which are opposed to a world system which produces among other things massive global inequalities and damage to the natural environment" (Linklater, Andrew. *Marxism* in Burchill et al 2005, 128). The analysis of Robert Cox started also from the social forces, but it later expanded to the state and world order, containing the all three in a mutual relation of determination. „Cox claimed that production shapes other realms such as the nature of state power and strategic interaction to a far greater extent than

[10] Stephen Gill states that it is not the moment to talk about a neoliberal hegemony, but one can identify a supremacy of neoliberalism. For more details see Gill, S. (2003) "A Neo-Gramscian Approach to European Integration" in Cafruny, A.W. and Ryner M. "A Ruined Fortress? Neoliberal Hegemony and Transformation in Europe", Rowman & Littlefield Publishers, New York, p 47-71.

[11] For more details see Bohle, Dorothee, "Neoliberal Hegemony, Transnational Capital and the Terms of EU's Eastwards Expansion", *Capital and Class*, Issue 85, 2006, 57-86.

traditional international relations theory has realized but it is also shaped by them" (Linklater, Andrew. *Marxism* in Burchill et al 2005, 126). In this way, he was highlighting the internationalization of production relations which started to be clear since the second half of the XX century, and the forms of global governance which strive to perpetuate power and welfare inequalities. Developing the ideas of Antonio Gramsci, „Cox focused on the hegemonic nature of world order – that is, on how the political architecture of global capitalism helps to maintain material inequalities through a combination of coercion and efforts to win consent" (Linklater, Andrew. *Marxism* in Burchill et al 2005, 127).

For a better understanding of international relations, Robert Cox proposes the concept of *Framework of action*, known as historical structure[12]. This is no more than a picture of a particular configuration of forces which „does not determine actions in any direct, mechanical way but imposes pressure and constrains. Individual and groups may move with the pressure or resist and oppose them, but they cannot ignore them" (Cox, Robert. *Social Forces, States, and World Orders* in Keohane 1986, 217-218).

In the context of a historical structure, hegemony is achieved through three spheres of activity: „(1) organization of production, more particularly with regard to the ***social forces*** engendered by the production process; (2) ***forms of state***[13] as derived from a study of state/society complexes; and (3) ***world orders***[14], that is, the particular configuration of forces which successively define the problematic of war and peace for the ensemble of states" (Cox, Robert. *Social Forces, States, and World Orders* in Keohane 1986, 220)

Following Cox, those three levels are interconnected. „Changes in the organization of production generates new social forces which, in turn, bring about changes in the structure of states; and the generalization of changes in the structure of states alters the problematic of world order" (Cox, Robert. *Social Forces, States, and World Orders* in Keohane 1986, 220). For example, transnational social forces, which emerged as an answer to the globalization process, influence the structure of the state; or the understanding of Stalinism as an answer to the fact that the world order was threatening the soviet state (in this case world order determines the form of state); of the very existence of military industry which determines a conflicted world order.

"Within each of the three main spheres, it is argued that three further elements reciprocally combine to constitute a historical structure: ideas, understood as intersubjective meanings as well as collective images of world order; material capabilities, referring to accumulated resources; and institutions, which are amalgams of the previous two elements and are means of stabilising a particular order" (Morton 2007, 115). It means that every level (social forces, state and world order) could be understood separately by analysing material capabilities, ideas and institutions. Also, the relations between those three levels should be

[12] "The historical structure does not represent the whole world but rather a particular sphere of human activity in its historically located totality" (Cox, Robert. Social Forces, States, and World Orders in Keohane 1986, 220).

[13] The changes of social relations of productions engender a new configuration of social forces. "State power rests on these configurations. Therefore, rather than taking the state as a given or pre-constituted institutional category, consideration is given to the historical construction of various forms of state and the social context of political struggle" (Bieler, Andreeas and Adam David Morton. *A Critical Theory Route to Hegemony, World Order and Historical Change* in Bieler, Bonefeld, Burnham and Morton 2006, 14). In this way, opposing to many stato-centric approaches of international relations, one could elaborate a new theory of state starting from this theoretical framework. "Considering different forms of state as the expression of particular historical blocs and thus relations across state–civil society fulfils this objective. Overall, this relationship is referred to as the state–civil society complex that, clearly, owes an intellectual debt to Gramsci" (Bieler, Andreeas and Adam David Morton. *A Critical Theory Route to Hegemony, World Order and Historical Change* in Bieler, Bonefeld, Burnham and Morton 2006, 15).

[14] Once the hegemony was achieved on national level, it could be expanded to the global level being introduced by the world order. "By doing so it can connect social forces across different countries" (Bieler, Andreeas and Adam David Morton. *A Critical Theory Route to Hegemony, World Order and Historical Change* in Bieler, Bonefeld, Burnham and Morton 2006, 16).

understood as a mutual determinism (Cox, Robert. *Social Forces, States, and World Orders* in Keohane 1986, 218).

Material capabilities have a destructive and productive potential. „In their dynamic from these exist as technological and organizational capabilities, and in their accumulated forms as natural resources which technology can transform, stocks of equipment (for example, industries and armaments), and the wealth which can command these" (Cox, Robert. *Social Forces, States, and World Orders* in Keohane 1986, 218).

Ideas are of two kinds. "One kind consists of intersubjective meanings, or those shared notions of the nature of social relation which tend to perpetuate habits and expectations of behaviour" (Cox, Robert. *Social Forces, States, and World Orders* in Keohane 1986, 218). An example for the intersubjective meanings is the way people are organised and commanded by the state which has authority over a specific territory. The same thing applies for the relations between states which needs diplomats in order to ensure communication even in the war time. „The other kind of ideas relevant to a historical structure are collective images of social order held by different groups of people" (Cox, Robert. *Social Forces, States, and World Orders* in Keohane 1986, 218). Those represent different views on the nature and legitimacy of power, meaning of justice or public goods, etc. To clarify the distinction between those two types of ideas, Cox states that the intersubjective meanings are wider concepts and are shared by a larger part of the social structure, generating the framework of social discourse, while the collective images could be various and in contradiction. „The clash of rival collective images provides evidence of the potential for alternative paths of development and raises questions as to the possible material and institutional basis for the emergence of an alternative structure" (Cox, Robert. *Social Forces, States, and World Orders* in Keohane 1986, 219).

Institutionalization is a way of stabilizing and perpetuating a particular order. „Institutions reflect the power relations prevailing at their point of origin and tend, at least initially, to encourage collective images consistent with the power relations. Eventually, institutions take on their own life; they can become a battleground of opposing tendencies, or rival institutions may reflect different tendencies" (Cox, Robert. *Social Forces, States, and World Orders* in Keohane 1986, 219). Institutions can be understood also as an amalgam of material capabilities and ideas that, once they come alive, are able to influence themselves material capabilities and ideas[15].

The theoretical framework of Robert Cox will help me to analyse the historical structure in which the European Union has emerged and developed. Although those issues need a separate and deeper discussion, I am trying in this article only to make an initial frame of European Union's nature. Thus, considering the world order definition provided by Robert Cox, the European Union could be understood as a subsystem of the world system. Furthermore, any theory that tries to explain the European integration process should embed also the nature of world order.

3. Conclusions

In the first part of this article, I presented the main insights of the Europeanization concept and I tried to see to what extent it could overlap with the concept of European

[15] There is a close connection between institutionalization and the Gramsci concept of hegemony. Institution are dealing with conflict management and minimization of armed force. "Institutions may become the anchor for such a hegemonic strategy since they lend themselves both to the representation of diverse interests and to the universalization of policy" (Cox, Robert. *Social Forces, States, and World Orders* in Keohane 1986, 219). However, Cox argues, we must be able to distinguish between hegemonic and non-hegemonic structures, "that is to say between those in which the power basis of the structure tends to recede into the background of consciousness, and those in which the management of power relations is always in the forefront" (Cox, Robert. *Social Forces, States, and World Orders* in Keohane 1986, 219-220). Thus, the hegemony cannot be reduced to its institutional dimension.

integration. After this, I developed the concept of integration through the neo-gramscian approach to show that it can encompass variables like globalization or world order, which could influence transformations that are understood as Europeanization.

Consequently, Europeanization does look like an empty concept due the economic, social and political transformation of the XXI century. As I showed, when we speak about the Europeanization outside the potential borders of the European Union expansion, we do not know how much of this Europeanization is already influenced by the globalization process or by the nature of world order. Regarding the Europeanization inside the European Union borders and potential expansion borders, it is more adequate to talk about a European integration rather than Europeanization – as I demonstrated using the neo-gramscian approach. Thus the concept of integration could be understand and used in more ways than Europeanization and this makes it more useful for academic research.

This critic of Europeanization could be further used to analyse the European economic model – known as the Social Market Economy. The elements of the European Integration from a neo-gramscian perspective show that this process could not be understand out of a broader discussion on globalisation and world order. Thus, one could rise relevant questions on social dimension of the European economic model due the transnational social forces that hardly promote a neoliberal agenda at all levels of the decision making process. But this topic needs a separate and further research.

References

- van Apeldoorn, Bastiaan. Transnational Capitalism and the Struggle over European Integration. Routledge. New York: 2002.
- van Apeldoorn, Bastiaan, Jan Drahokoupil and Laura Horn. *Contradictions and Limits of Neoliberal European Governance. From Lisbon to Lisbon*. Palgrave Macmillan. New York: 2009.
- Bieler, Andreas. "Globalisation and Enlargement of the European Union: Austrian and Swedish social forces in the struggle over membership". Routledge. London: 2000.
- Bieler, Andreas and Adam David Morton. Social Forces in the Making of the New Europe. The Restructuring of European Social Relations in the Global Political Economy. Palgrave. New York: 2001.
- Bieler, Andreeas, Werner Bonefeld, Peter Burnham and Adam David Morton. *Global Restructuring, State, Capital and Labour. Contesting Neo-Gramscian Perspectives*. Palgrave MacMillan. New York: 2006.
- Bohle, Dorothee, "Neoliberal Hegemony, Transnational Capital and the Terms of EU's Eastwards Expansion", *Capital and Class*, Issue 85, 2006, 57-86.
- Burchill, Scott, Andrew Linklater, Richard Devetak, Jack Donnelly, Matthew Paterson, Christian Reus-Smit and Jacqui True. *Theories of International Relations*. Palgrave Macmillan. New York: 2005.
- Cafruny, A.W. and Ryner M. „A Ruined Fortress? Neoliberal Hegemony and Transformation in Europe", Rowman & Littlefield Publishers, New York. 2003
- Keohane, Robert. *Neorealism and its Critics*. Columbia University Press. New York: 1986.
- "Mercosur – (Common Market of the South)" Last modified February 11, 2014, http://eeas.europa.eu/mercosur/index_en.htm.
- Messerlin, Patrick. The Mercosur-EU Preferential Trade Agreement. A View from Europe. Last modified February 11, 2014, http://aei.pitt.edu/40233/1/WD_377_Messerlin_Mercosur-EU_Trade.pdf.
- Olsen, Johan. "The Many Faces of Europeanization". *JCMS*. Vol. 40. No. 5. (2002): pp. 921.
- Radaelli, Claudio. „The Europeanization of Public Policy". *The Politics of Europeanization*. pp. 27 – 56. Oxford: 2003.
- Schmale, Wolfgang. *Processes of Europeanization*. Last modified February 11, 2014, http://ieg-ego.eu/en/threads/backgrounds/europeanization.
- Zafirovski, Milan. The Enlightenment and Its Effects on Modern Society. Springer. New York: 2011.

EUROPEAN UNION AND THE PROCESS OF GLOBALIZATION

Mihail CARADAICĂ*

Abstract

What is the relation between globalization and the process of European integration? Does the European integration have its own way, or is it deeply dependent on globalization? Those are the main questions I will try to answer in this paper by using an alternative critical approach: neo-gramscianism. Neo-gramscianism is a historical materialist view on the European integration process and international political economy which offers a better understanding of the social changes in terms of social forces agency and super structural influence (the neoliberal ideology of globalization and European integration).

My aim is to analyze the globalization process through a neo-gramscian theoretical framework and to observe how its main components affect European Integration. I will do this by assuming the definition of globalization provided by Andreas Bieler, who understands this process through three main pillars: transnationalization of finance, transnationalization of production and ideological shift from Keynesianism to neoliberalism. Finally I will try to formulate some conclusions regarding the emergence of European Round Table of Industrialists – the first lobby group of big capital at the European Union level – and Economic and Monetary Union – the internal market program that symbolizes the shift to neo-liberalism.

Keywords*: Globalization, European Integration, Critical Theory, Neo-gramscianism, Social Forces.*

1. Introduction

Globalisation is one of the most used terms for the economic, social and political changes that are specific for the end of XX century and the beginning of the XXI. A very general definition of this concept refers "to a set of processes that have increased interconnectedness across the globe, and where, crucially, these connections in many respects transcend the narrow boundaries of the nation-state" (Kiely 2005, 1). In this way, globalisation gives rise to new challenges for the nation state that is more and more pressed to collaborate with others instead of choosing armed force[1].

My critical approach instead, will try to understand globalisation from both material and ideological point of view. The classical Marxist interpretation of this process is mainly based on the development of the relations of production. Paul Wetherly states that Karl Marx is one of the first theorists of globalisation because he observed in The Communist Manifesto the bourgeoisie's tendency to expand all over the world in the search for profit[2]. Thus capitalism appears like a global system which can overturn the cultural and physical borders

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[1] "This was linked not only to the end of the Cold War, but also to the idea that there are genuinely global problems that require cooperation between states, which saw the rise of various institutions of multilateral global governance, and the emergence of a transnational civil society, in which global, non-state actors could put pressure on nation-states and international institutions in order to facilitate 'global justice'" (Kiely 2005, 2).

[2] For more details see Wetherly, Paul. *Marxism and the State. An Analytical Approach*. Palgrave Macmillan. New York: 2005, p. 200.

through the price system: "The cheap prices of its commodities are the heavy artillery with which it batters down all Chinese walls, with which it forces the barbarians' intensely obstinate hatred of foreigners to capitulate. It compels all nations, on pain of extinction, to adopt the bourgeois mode of production; it compels them to introduce what it calls civilization into their midst, i.e., to become bourgeois themselves" (Marx and Engels 1948, 13). Consequently, capitalism has a progressive impact on the world because it develops the productive forces and increases the number of proletariat. In this way, "capitalism created its own gravedigger because the working class would, through its cooperative and unifying role in the process of production, eventually overthrow capitalism and create a society (socialism) in which everybody lived off the social surplus product. This process would occur globally, as what we would now call a transnational capitalist class exploited a transnational proletariat, and so nation-states and national differences would gradually be eroded by the dynamic, expansionary but exploitative nature of capitalism" (Kiely 2005, 58).

But the foreseen revolution didn't happen even after the death of Marx, and other thinkers started to look for theoretical gaps in Marxism, or to give an original interpretation to it. One of the most important thinkers is Antonio Gramsci who, analysing the Italian situation, believed that the revolution was delayed because of some ideological aspects. The working class consciousness was filled with bourgeois values until it was convinced that this reality is the only possible reality. Here is where I fit my research and my analysis of globalisation: between the mutual influence of base (social relation of production) and superstructure (ideological aspects). The Magnus Ryner definition captures this point of view focusing on ideology (crisis of Keynesian state) and on the relation of production (transnationalisation of production): "At the present the term globalization is often used, and the 'crisis of the welfare state' is almost as often associated with it.at the same time, the term is rarely defined, or it is used in a frustratingly vague way. On a descriptive level it is generally associated with the breakdown of communication bottlenecks and a transnationalisation of economic activities, such as trade, investment and production. In more systematic studies, the issue is often reduced to a quantitative one, where trans-border transactions are measured" (Ryner 2002, 100). Furthermore, I will develop this point of view to generate a more complex understanding of globalisation.

Until this, I will introduce the main concepts I am going to use, outlining the neo-gramscian approach[3] of explaining European Integration. Thus, the integration process is seen as the output of the activity of both structure (relations of production) and superstructure (impact of neoliberal ideology). Summarily, a neo-gramscian analysis will focus on the existence of a historical bloc that could achieve or not hegemonic level. Moreover, the engine of social changes is considered to be the agency of social forces and implicitly the class struggle.

The most important aspect of neo-gramscianism is represented by its focusing on social forces engendered by the production process and understood as the most important collective actor. „Consequently, various fractions of labour and capital may be identified in relation to their place in the production system. This makes structural changes such as **globalisation accessible**, since the emergence of new social forces engendered by the transnationalisation of production and finance can be incorporated" (Bieler, Andreas and Adam David Morton. *Introduction: Neo-Gramscian Perspectives in International Political Economy and the Relevance to European Integration* in Bieler and Morton 2001, 17). Those social forces, being engendered by the production process, are related with social classes in classical Marxist theory. Social classes are therefore regarded as social forces whose cohesion derives from its role in the production process. „Consequently, class is defined as a relation

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One of the most important elements of the neo-gramscian theory is represented by the concept of historical bloc. „At a basic level of understanding, a historical bloc is an alliance of classes or fractions of classes, which attempts to establish a particular form of state and/or world order preferable to them. Nevertheless, a historical bloc is more than a simple alliance of social forces" (Bieler 2000, 14). This concept involves a unity between structure and superstructure forming a complex dynamic of social forces which include economic, political and cultural aspects. „Various social forces may attempt to do this by forming an **historical bloc** to establish preferable forms of governance at the national, European and/or international level" (Bieler, Andreas and Adam David Morton. *Introduction: Neo-Gramscian Perspectives in International Political Economy and the Relevance to European Integration* in Bieler and Morton 2001, 20).

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[4] This concept should not be confounded with the neorealist version developed by Gilpin or Keohane, "in which a hegemonic state controls and dominates other states and the international order thanks to its superior amount of economic and military capabilities" (Bieler 2000, 14).

only the interests of the dominant social group, but it should also incorporate "other (opposing) interests into the hegemonic world view and thus transcending the narrow selfinterests of the leading group" (Drahokoupil, Jan, Bastiaan van Apeldoorn and Laura Horn. *Introduction: Towards a Critical Political Economy of European Governance* in van Apeldoorn, Drahokoupil and Horn 2009, 9).

Considering the situation of nowadays European Union, some scholars like Bastiaan van Apeldoorn, Stephen Gill[5] or Dorothee Bhole[6] are discussing the superstructural dimension of European Integration in terms of neoliberal hegemony. The most important here is van Apeldoorn who states that the European project is neoliberal because it "aimed at the restoration and expansion of capitalist class power through an ideological commitment to the freedom of market exchange and to the absolute exercise of capitalist property rights, it was particularly within the European context that the new neoliberal policy paradigm had to adjust to the persisting traditions of corporatist industrial relations ('social partnership')" (van Apeldoorn, Bastiaan. "The Contradictions of 'Embedded Neoliberalism' and Europe's Multi-level Legitimacy Crisis: The European Project and its Limits" in van Apeldoorn, Drahokoupil and Horn 2009, 9). Also, regarding the social and industrial protection offered by the state intervention, Apeldoorn uses the term 'embeddedness'. In consequence, embedded neoliberalism encompasses former neo-mercantilists, the European labour movement, and social-democratic political forces.

To conclude, European integration is seen and analysed from two perspectives: the first one is the social forces agency which can explain also the process of globalization by considering the lobby activity of transnational social forces; and the second one is analysing the ideological dimension of European integration – which is known today as the neoliberal project. Thus, using a neo-gramscian approach, globalisation is seen as a central pillar in understanding the integration process. To see how exactly it has affected European integration, in the next chapter I am going to provide a deep explanation of the components of globalisation.

2. Content

2.1. Neo-gramscian view on globalization

In this section I will understand globalization from a political economy perspective. Thus, I will follow Andreas Bieler who state that globalisation is "characterised by two interlinked processes, the transnationalisation of finance and production at the material level, and a shift from Keynesianism to neo-liberalism at the ideological level[7]" (Bieler 2000, 19). With an accent on both, economic and ideological processes (structural and super-structural in Marxist terms) this approach is encompassed in the neo-gramscian research area. The changes on material level could not take the shape of nowadays globalisation without a strong ideological principle like the free market or minimal state intervention.

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[5] Stephen Gill states that it is not the moment to talk about a neoliberal hegemony, but one can identify a supremacy of neoliberalism. For more details see Gill, S. (2003) "A Neo-Gramscian Approach to European Integration" in Cafruny, A.W. and Ryner M. "A Ruined Fortress? Neoliberal Hegemony and Transformation in Europe", Rowman & Littlefield Publishers, New York, p 47-71.

[6] For more details see Bohle, Dorothee, "Neoliberal Hegemony, Transnational Capital and the Terms of EU's Eastwards Expansion", *Capital and Class*, Issue 85, 2006, 57-86.

[7] Andreas Bieler's perspective on globalization is inspired from Robert Cox who refers to globalisation in two principal aspects: "(1) global organisations of production (complex transnational networks of pro duction which source the various components of the product in places offering the most advantage on costs, markets, taxes, and access to suitable labour, and also the advantages of political security and predictability); and (2) global finance (a very largely unregulated system of transactions in money, credit, and equities)" (Cox, Robert. *Structural Issues of Global Governance: Implications for Europe* in Gill 1993, 259-260).

2.1.1. Transnationalization of finance

The first characteristic of globalization, as it was defined by the Andreas Bieler and Robert Cox, is the transnationalisation of finance. The elements that constitute it are, on the one hand, the emergence of offshore markets and deregulation process, and on the other hand the emergence of Transnational Corporations. Regarding the first element, Andrea Bieler states that "the transnationalisation of finance has led to the emergence of a fully-fledged global financial market. The first component of this process was the rise of financial offshore markets" (Bieler 2000, 19)

The offshore markets could be understood in relation with the expansion of the banks' operations which depended on two types of innovation: technical[8] and structural[9]. "Structural innovation began with the creation of **offshore**, relatively unregulated Eurocurrency markets in the 1960s, as US banks searched for ways to get round irksome (and costly) domestic restrictions" (Stopford, Strange and Henley 1991, 43). To emphasise the real impact of the offshore markets, Bieler said that "between 1973 and 1984 there was a huge growth in offshore markets to $1,000 billion, from levels of only $3 billion and $75 billion in 1960 and 1970 respectively" (Bieler 2000, 20).

The other component of the transnationalisation of finance is deeply connected with the financial offshore markets. I am talking here about more deregulation of money markets and financial operators, policies introduced by the United States. Due to the competitive pressure, other major financial centres of the world followed: in 1979 the British government abolished the control of capitalism[10], Japan followed in 1980, and then entire European Union, New Zeeland, Australia and Scandinavian Countries (Helleiner 1994, 149–166). "Eventually, due to the deregulation of national financial markets, the differences between them and offshore markets disappeared and an integrated global financial market emerged" (Bieler 2000, 20). Also, Bieler adds that it was not an inevitable process, but it was the result of governmental decisions.

The other component of the transnationalization of finance is the emergence and development of Transnational Corporations: "the growth of transnational corporations (TNCs), in numbers and size, has driven the transnational organisation of production. Their increasing importance is expressed in the rise of foreign direct investment (FDI)" (Bieler, Andreas and Adam David Morton. *Introduction: Neo-Gramscian Perspectives in International Political Economy and the Relevance to European Integration* in Bieler and Morton 2001, 4). To make a better view on the impact of transnational corporations on global economy and finance, I will discuss few documents of the United Nations Conferences. The first one, World Investment Report 1992: Transnational Corporations as Engines of Growth, is dealing with the role of the Transnational Corporations on international economy and argues that the "increasing importance of transnational corporations in the growth process of developing countries arises not merely from the recent upsurge in the volume of foreign direct investment, but also from a number of major structural changes in the world economy which place transnational corporations in a central position as arbiters of the international division of labour" (UNCTAD 1992, 7). Those changes that the document is talking about are: the

[8] "Technical innovations have included the idea of arranging money transfers by issuing chequebooks, the use of plastic credit and cheque cards or the automatic, electronic transfer of funds and chequeclearing systems between banks" (Stopford, Strange and Henley 1991, 43).

[9] "Structural innovation means the introduction of new credit instruments or the development of new kinds of business by banks, such as the invention by Citibank of Certificates of Deposit in 1965 or the introduction of Money Market Funds and NOW accounts by Merrill Lynch in the mid-1970s" (Stopford, Strange and Henley 1991, 43).

[10] The Keynesianism break down.

increasing importance of the market forces, technological development, the globalization of industries, the emerging services world economy, the regionalization of the world economy[11].

The best way to describe the real dimension of the Transnational Corporations impact is to monitor the foreign direct investment[12] (FDI). Thus, "the upward trend in world FDI flows set a new record in 1997: inflows grew by 19 per cent, to $400 billion, while outflows, after a decline in 1996, rose by 27 per cent, to reach $424 billion, the first time that the $400 billion mark had been reached and passed. World FDI flows today are nearly twice what they had been in 1990, and some sevenfold their volume in 1980" (UNCTAD 1998, 8). The number of TNCs that were involved in this process since 1990 is around 35.000, as the United Nations Report suggest, and 150,000 foreign affiliates (UNCTAD 1992, 6). In this way, the process of globalisation led to the transnational restructuring of social relations. "The deregulation of national financial markets was institutionalised in the Internal Market programme, which stated that all remaining capital controls of member states had to be abolished by 1 July 1990. Only Greece and Portugal were given an extended period (until the end of 1995)" (Bieler, Andreas and Adam David Morton. *Introduction: Neo-Gramscian Perspectives in International Political Economy and the Relevance to European Integration* in Bieler and Morton 2001, 5). To conclude, the significance of the European companies and/or TNCs increased in the field of economy and employment year after year, putting the European Union in the situation to change itself or to be a less competitive entity in the world economy.

2.1.2. Transnationalization of production

Robert Cox was the first one studying the transnationalization of production from a neo-gramscian perspective. He argues that internationalization of production has a formative role in the field of international relations through generating changes in the state structure and world order. Also, "international production expands through direct investment, whereas the rentier imperialism, of which Hobson and Lenin wrote, primary took the form of portfolio investment. With portfolio investment, control over the productive resources financed by the transaction passed with ownership to the borrower" (Cox, Robert. *Social Forces, States, and World Orders* in Keohane 1986, 233). Thus, one could say that using direct investment it is possible to achieve control in the field of production.

In the core of this project stay, as I mentioned above, the growing number and size of Transnational Corporations[13]. Those market forces design a new dynamic of global economy understood as globalisation, a term which merely refers to the intensification of economic

[11] "1.The increasing importance of market forces-63 developing countries have liberalized their trade policy regimes since the beginning of the Uruguay Round and some 30 developing and Central and Eastern European countries liberalized their foreign direct investment regimes in 1991 alone. 2. Technology and the shrinking of economic space—in a number of industries, particularly service industries which have witnessed the most dramatic explosion in foreign direct investment during the decade of 1980s, access to powerful computer-communication networks, owned by single firms or a group of firms, is increasingly becoming the basis of international transactions. 3. The globalization of industries-several key industries (for example, automobiles, electron **7** ics) are becoming increasingly globalized, a process in which transnational corporations integrate, co-ordinate and control cross-border value-adding activities. 4. The emerging services world economy-the new world economy is increasingly a services economy and since services are largely non-tradable (though tradability has been increased in some cases due to technological changes), foreign direct investment is typically crucial for access to efficient services. 5. The regionalization of the world economy— transnational corporations are both reacting by way of developing strategic responses to regional integration arrangements and influencing the nature of such arrangements" (UNCTAD 1992, 7-8).

[12] FDI means an investment made by a company or entity based in one country in the field of production or business of another country through its companies or other economical entities.

[13] The difference between the multinational corporations and transnational corporations is that while the first "attempts to deconcentrate the production in several countries or regions, to avoid the negative impact of the trade barriers, transnational corporations deliberately tends towards a *division of labor* inside the company and expanded to the global level" (Dîrdală, Lucian-Dumitru. Actori în sistemul international in Miroiu and Ungureanu 2006, 53).

relations across the world. "To be sure, economics[14] were a big part of the globalization story, for gigantic compression of time and space would have been impossible without the worldwide expansion of markets, the rise of transnational corporations (TNCs), and the intensification of economic flows across the globe" (Stager and Roy 2010, 52).

On a similar manner, the rise of transnational corporations' importance is indicated by the growing rate of foreign direct investments[15]. "The significance of FDI demonstrates the close connection between the transnationalisation of production and finance. The deregulation of national currency control systems was a precondition for the free movement of capital, making an increased level of FDI possible" (Bieler 2000, 20-21).

Furthermore, Bieler states that the FDI increase on its own cannot indicate the overall importance of the TNCs in the world economy. The best way of doing this is to compare the FDIs with world exports and world output. Between 1983 and 1989, world foreign-direct-investment outflows had a 28.9% rate of annual growth, which represent three times more than world exports – 9.4% (UN 1991, 4). "This is further confirmed by the indicator of the global sales of foreign affiliates in host countries, which is better suited for the comparison with trade flows, since it includes the value of output of TNCs' activities in contrast to FDI" (Bieler 2000, 21).

2.1.3. Ideological shift from Keynesianism to neoliberalism

The last component of globalization is ideology. All of those changes on material level like commerce or technology occurred also because of some ideological assumptions that precisely steered the economy to liberalization and state minimization. Regarding technology, as I argued above using Andreas Bieler's ideas, it could also have been used by the state to increase its power, in the absence of neoliberal ideology. "The public interpretation of globalization as a mostly economic phenomenon driven by the irreversible dynamics of the free market and cutting edge technology was encouraged by executives of large transnational corporations, corporate lobbyists, prominent journalists and public-relations specialists, cultural elites and entertainment celebrities – and political leaders like Bill Clinton who articulated their neoliberal agenda within such a 'globalist' framework" (Stager and Roy 2010, 53). In this way, globalization is filled with neoliberal ideas which forge market globalism across all national and cultural borders[16].

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[14] Stager and Roy argue also that "these economic developments were facilitated by the rapid transformation of information, communication, and transportation technology – a 'digital revolution' epitomized by the proliferation of personal computers, the Internet, satellite TV, standardized containers, fibre-optic cables, electronic barcodes, and global supply chains" (Stager and Roy 2010, 52). But I will follow here Andreas Bieler argument that those technologies could also have been used by the states to prevent transnationalisation through strengthening national controls and regulations (Bieler 2000, 19). According to this, a very important role is shifted to the ideological dimension, as I will explain in the next section.

[15] "The decade of the 1990s promises to be one in which foreign direct investment will play a major role in shaping world economic development and the structure of the international economy. Since recovering from slow growth in the early 1980s, global flows of foreign direct investment have increased far more rapidly than world trade and output, reaching nearly $200 billion in 1989, for a total world stock of $1.5 trillion. Developing countries remain relatively marginalized in the rapid rise of global foreign-direct-investment flows: of total outflow in 1990, $163 billion were invested in developed countries and $30 billion in developing countries" (UN 1991, 83).

[16] To be more specific, one of the most important claims of neoliberalism regarding globalization "presents the creation of globally integrating markets as a rational process that furthers individual freedom and material progress in the world. The underlying assumption here is that markets and consumerist principles are universally applicable because they appeal to all (self-interested) human beings regardless of their social context. Not even stark cultural differences should be seen as obstacles in the establishment of a single global free market in goods, services, and capital. A related neoliberal claim states that the liberalization of trade and the global integration of markets will ultimately benefit all people materially" (Stager and Roy 2010, 53).

Another important neoliberal claim "portrays the liberalization and global integration of markets as inevitable and irreversible, almost like some natural force such as the weather or gravity. This assertion makes it easier for neoliberals to convince people that they must adapt to the inherent rules of the free market if they are to survive and prosper" (Stager and Roy 2010, 53).

Following Manfred Stager and Ravi Roy, there are five claims of the market globalism:

> "Claim 1: Globalization is about the liberalization and global integration of markets.
> Claim 2: Globalization is inevitable and irresistible.
> Claim 3: Nobody is in charge of globalization.
> Claim 4: Globalization benefits everyone (in the long run...).
> Claim 5: Globalization furthers the spread of democracy and freedom in the world" (Stager and Roy 2010, 54).

All of those claims have also an important impact at the policy level of globalisation. The consequent design illustrates "a world in which the actions of governments, as well as firms and workers, are internally and externally disciplined by market forces, or, to put it differently, by the power of capital" (Gill, Stephen. *Constitutionalising Capital: EMU and Disciplinary Neo-Liberalism* in Bieler and Morton 2001, 50). For example, financial integration is limiting the possibility of a country to adopt a policy that has a negative influence on the medium-term financial stability. "The disciplining effect of global financial and product markets applies not only to policymakers, via financial market pressures, but also to **7** the private sector, by making it more difficult to sustain unwarranted wage increases and price markups. Rather than acting as a constraint on the pursuit of appropriate policies, globalization can provide added leverage to such policies. It may also provide added flexibility" (Dailami and Haque 1998, 7-8). The point here is that, in the end, the pressure of globalisation will determine national states to apply the ideological assumption to their own policies that are in the benefit of the transnational capital.

The emergence of neoliberalism was a historical event that occured at the beginning of 1980s, due to the crisis of Keynesianism – the dominant economic and social model of capitalism since the end of the Second World War. This model, known as the middle way between capitalism and communism[17], was characterised by a high intervention of the state on market, capital regulations and the stress on full employment[18]. Neoliberalism re-launched the old principles of classical liberalism[19] and adapt them to the context of the global economy. Consequently, "this shift can be observed in all three major instances of regionalism: the EU, the North American Free Trade Area and the Asia Pacific Economic Co-operation" (Bieler 2000, 22).

Thus, in the next sections I will make a further discussion on how exactly the forces of globalization and neoliberal ideology worked together to shape the new face of European Union after Single European Act and the Treaty of Maastricht. But until then, I will bring into the analysis two more concepts that will help me to better understand the impact of globalisation: internationalization of the state and transnational historical bloc.

2.1.4. State under globalisation and transnational historical bloc

There are many perspectives on globalisation and also many perspectives on the nature of state. There are scholars talking about the twilight of state and scholars that argue for a process of internationalization rather than globalisation, and consequently putting the state in the middle of this process. In this research, I will assume that globalisation implies the reorganisation of the state-society relations. For example, neoliberalism implies the shift from

[17] See Harvey, David. *A Brief History of Neoliberalism*. Oxford University Press. New York: 2005, p. 10.
[18] See Harvey, David. *A Brief History of Neoliberalism*. Oxford University Press. New York: 2005, pp. 10-11.
[19] "Efficiency and price stability are the new priorities, the privatisation of the state-controlled enterprises and the liberalisation and deregulation of the economy at the national level are advocated, social peace is imposed rather than negotiated and there is no commitment to redistribution or social reform" (Bieler 2000, 22).

welfare state (the age of Keynesianism) to the night watchman state. "The institutions linked to the global economy have become dominant[20] within the 'political society' and transnational social forces dominate important parts of the 'civil society' such as political parties, trade unions and so on. Nationalised industry is privatised, the economy in general liberalised and deregulated, including the labour market, and the welfare system cut back. The goal of full employment is replaced by low inflation and price stability" (Bieler 2000, 24). But those theoretical assumptions cannot be applied for all states to the same extent. There are states that were not welfare, and there are states that did not totally become night-watchman. The reality is that neoliberal restructuring has a different face in every country, but the neoliberal night-watchman state is seen as an ideal type that would eventually indicate the direction of reforms.

Another important discussion here is about the existence of a transnational historical bloc, considering that Gramsci developed this concept only to be apply on a national level. The economic reality brought by globalisation through the internationalization of production rise the question if we can also talk about a historical bloc on a transnational level. Thus, Robert Cox identifies here two kinds of capitalist and labour organization. Regarding the definition of former bourgeoisie, Cox states that now we can talk about national capitalists and about a transnational class. The last one, that is the central point in my research, has its own ideology, strategy and institutions, and is also organised through Trilateral Commission, World Bank or International Monetary Fund[21]. On the other hand, the Canadian author argues that the stable workers from the international production sector are likely to be the ally of the transnational capitalist class[22]. Consequently, the nature of the transnational economy allows a broader discussion on the existence of a transnational historical bloc.

Following the research of Robert Cox, Stephen Gill argues that "a transnational historical bloc is outlined, with its nucleus largely comprising elements of the G-7 state apparatuses and transnational capital (in manufacturing, finance, and services), and associated privileged workers and smaller firms (e.g., small and middle-sized businesses linked as contractors or suppliers, import-export businesses, and service companies, such as stockbrokers, accountants, consultancies, lobbyists, educational entrepreneurs, architects, and designers)" (Gill 1995, 400-401). Furthermore, the existence of a transnational historical bloc automatically raises the question regarding its nature, if it is or not hegemonic. The most relevant research here was made also by Stephen Gill who states that the historical bloc did not reach the level of hegemony, and it is only in a position of supremacy[23]. A deep discussion on this topic is not, however, important for this article.

2.2. Globalization and its impact on European Union

Following Andreas Bieler definition of globalisation, one could observe that this is a relatively new process that characterise the structural changes the world has experienced since 1970/1980. It involves the restructuring of states and the reconfiguration of social forces. "Global in its nature, this structural change has not left the EU unaffected. As elsewhere, globalisation has led to a transnational restructuring of social relations. The deregulation of national financial markets was institutionalised in the Internal Market programme, which stated that all remaining capital controls of member states had to be abolished by 1 July 1990"

[20] The process of national policy harmonization on the behalf of globalization process appears to Cox in contradiction with the Keynesian model of development, specific to the previous era. "The internationalization of state gives precedence to certain state agencies – notably ministries of finance and prime ministers' offices – which are key points in the adjustment of domestic to international economic policy" (Cox, Robert. Social Forces, States, and World Orders in Keohane 1986, 231).

[21] For more information see Cox, Robert. Social Forces, States, and World Orders in Keohane 1986, 233.

[22] For more information see Cox, Robert. Social Forces, States, and World Orders in Keohane 1986, 235.

[23] For more details see Gill, Stephen. 'Globalisation, Market Civilisation and Disciplinary Neoliberalism', *Millennium*, 24: 1995, p. 400.

(Bieler 2000, 26). Thus, in this section I will focus on the configuration of social forces at European level, more exactly on the activity of the European Round Table of Industrialist, and on the Economic and Monetary Union, as a structural change generated by the globalisation process and the pressure of ERT.

2.2.1. European Round Table of Industrialists

I will discuss the configuration of social forces on European level in the context of an existing transnational historical bloc, constituted from the world's biggest transnational corporations, that has its representation in Europe through European Round Table of Industrialists. The transnational historical bloc could be observed in the context of the international policy-making apparatus that intensively collaborate with private agents: "for example, International Relations Councils such as the Trilateral Commission (which has a large EU membership, with elite political and economic interests represented), the World Economic Forum, the Group of Thirty (particularly important in money and finance), and think tanks such as the UK's Institute of Economic Affairs and the Adam Smith Institute, the American Brookings Institute and the American Enterprise Institute, as well as the fora for leaders of large corporations. It involves European fora associated with corporate influence on the making of public policy, such as the ERT which involves among its membership 20 of the top 100 firms in the world, according to the United Nations Conference on Trade and Development's World Investment Report of 1995" (Gill, Stephen. Constitutionalising Capital: EMU and Disciplinary Neo-Liberalism in Bieler and Morton 2001, 54). Due the globalisation process, and implicitly due the trasnationalisation of production and finance, the world biggest transnational corporations started to have more and more influence into the international policy-making process, steering it on a neoliberal road.

Going back to the transnational historical bloc basis in European Union, I should mention that it includes "state interests associated with the German-dominated unification project, large-scale finance and productive capital of global reach, as well as European companies, and associated privileged workers and smaller firms" (Gill, Stephen. Constitutionalising Capital: EMU and Disciplinary Neo-Liberalism in Bieler and Morton 2001, 54). The real impact of the big capital on European integration is going to be deeply discussed in the next section of the paper, when I will try to show that it was the result of the large firms' pressure and it is also constituted on a neoliberal logic. Furthermore, "the concept of historical bloc enables us to understand how the present political formations, based on the dominance of transnational capital, are also constituted by and incorporate a wider range of interests and identities, including many privileged workers, members of the professions and small business people" (Gill, Stephen. Constitutionalising Capital: EMU and Disciplinary Neo-Liberalism in Bieler and Morton 2001, 55). It is to say that transnational historical blocs include interests of both capital and labour, and they also strongly support the neoliberal restructuring of the European Union.

To show how all of those things became possible, I will present now the emergence and the influence of the European Round Table of Industrialists (ERT) which is considered to be the central point of the European reform process. Thus, "When integration was at a low-point in the early 1980s and growing global competition threatened the position of large section of European industry, leading members of Europe's business community such as Pehr Gyllenhammar of Volvo, Umberto Agnelli of Fiat and Wisse Dekker of Philips, began to perceive the need for a European-level political initiative to recover from this European decline" (van Apeldoorn 2002, 84). This period when Europe faced a stagnation of the integration process, known also as the "Eurosclerosis", was overlapping with the crisis of Keynesianism and has raised a lot of questions regarding the future of European Union.

"The trouble was that the European economy was floundering and political leaders did not seem to understand why. Business leaders, on the other hand, had clear and (as ever) simple ideas[24]" (Richardson 2000, 6). At that time, the European economy was similar in size to the one of the United States, but it was suffering from bad policies according to global economic realities and fragmentation[25]. The ERT came as an answer to those problems brought by globalisation and it "developed a number of major themes to support these ideas. One was the need for adequate infrastructure links (roads, high speed trains and a Channel Tunnel) between different European countries to match the growth in cross-frontier trade and movement" (Richardson 2000, 6). Another idea, which will be further discussed in this article, was the building of a single internal market – like in the United States – where goods, capital and services can freely travel through the former borders of the member states. "A third was to tackle the intolerable "black cloud" of unemployment by policy measures to strengthen and dynamise European industry, through freeing up labour markets, raising levels of skills, encouraging entrepreneurship and stimulating an economic growth rich in the creation of new jobs" (Richardson 2000, 6). This is going to be known as the neoliberal reform of the European Union.

In time, ERT has developed and became an independent and very influential organisation recognised by both European institutions and member states' national governments. Nowadays, the ERT has 52 members and its president is Leif Johansson, from the Ericsson. Since its beginnings, around 30 years ago, the number of members didn't grow too much which means that ERT is still a select club. "The membership of the ERT is personal, it is not companies that are members of the ERT but individuals leading companies – in practice always *men* (the ERT has not so far had any female members). The Roundtable is therefore not a conference of transnational corporation meeting to discuss possible forms of co-operation or common strategies, but a group of individual businessmen who, although they are heads of certain TNCs, do not necessarily represent those companies within the Roundtable discussions. Membership is by invitation only" (van Apeldoorn 2002, 89). Thus, to achieve membership in the ERT supposes strong personal relationships with wider networks of economic elites. The selection of the members should respect a set of informal criteria.

"A first criterion is that the company which the prospective members are drawn must be a European-based (industrial) TNC, preferably private. The prospective members should 'represent' their company at the highest level, that of chairman or chief executive officer (CEO). The company itself should also be independent and not a subsidiary" (van Apeldoorn 2002, 89). Besides this, the company should also have its headquarter somewhere in Europe, fact which makes the accession impossible for the leaders of many companies with the headquarter in Unites States. Another important criterion "is that the prospective member not only shares the (official) objectives of the Roundtable but can make a credible commitment that he will contribute to the achievement of those objectives. As the membership is personal, the choice is also made on a basis of personal characteristics, where personality, opinions [of the person], capabilities and vision, all play a role" (van Apeldoorn 2002, 90). Consequently, the political view of each candidate has a strong importance and it should be similar with the one of current members.

[24] The closure between big business and decision makers was coming from both sides. On the one hand the Europeans TNCs were seeing their profits threaten by the global economic realities (transnationalisation of production), and on the other hand, political decision makers wanted to listen to the preferences of the big companies regarding reform policies: *Who do we talk to when we want to talk to European industry?* This was the question raised by the two leading European Commissioners, Etienne Davignon and François–Xavier Ortoli (Richardson 2000, 6) which I consider very important for this research.

[25] "The European Union (to use its later title) did not function as a single economic unit, which was the fundamental advantage of the US, and its economic management was out of date and in many respects counterproductive" (Richardson 2000, 6).

Moving forward from the structural characteristics of the ERT, I will move now to the nature of this entity. "Many of the 500 or more Euro-organisations represent specific business interests. The overwhelming majority of these are sectoral of trade associations" (van Apeldoorn 2002, 102). Also, it must be said that in the sector of industry there are six big associations of business: UNICE; Eurochambres; the European Centre of Public Enterprises (CEEP); the European Community Services Group; the EC Committee of an American Chamber of Commerce (Amcham); and the ERT (van Apeldoorn 2002, 102). According to van Apeldoorn, "the ERT takes up a unique place within this group, and indeed within the whole system of business interest representation" (van Apeldoorn 2002, 102). If we look also on the European official web site, it indicates also that the "ERT has close contacts with BUSINESSEUROPE, the official representative body of European business and industry vis-à-vis the European institutions"[26]. Thereby, the European Roundtable forum is not a lobby group itself, but it is working through other lobby groups.

"The agency of the ERT, then, falls neither under the logic of pluralist lobbying nor under that of corporatist interest intermediation. Thus whereas for instance UNICE, as a peak association, has a public and formal – one might say 'corporatist' – role to play vis-à-vis the Commission and as a 'social partner' in the dialogue with the European Trade Union Confederation (ETUC), the ERT is not an interest association at all" (van Apeldoorn 2002, 104). To be more specific, the ERT has no members to represent or to discipline, but the ERT is its members. Thus, van Apeldoorn argues that it is "neither a lobby group nor an association, but rather a private forum for Europe's transnational capitalist class" (van Apeldoorn 2002, 101).

The main argument here is that "because the ERT is not a formal interest association, but rather a relatively informal elite club of Europe's most prominent business leaders, it can formulate and propagate a concept of the general (capitalist) interest, which […] is always formulated from the vantage point of a particular class *fraction*" (van Apeldoorn 2002, 106). It seems also very natural that capitalist interests are constructed through a business forum like ERT, where the leading capitalists come together and share ideas, trying to reach a common view on issues like labour or state (van Apeldoorn 2002, 106). Moreover, those ideas are gathered in some strategies that will become public and set the agenda of policy makers. Van Apeldoorn calls this a transnational class strategy.

The ERT has different ways to communicate their ideas. "It regularly publishes reports either on specific themes or of a more comprehensive nature, and frequently sends letters and communiques to individual politicians or to collective bodies such as the European Council" (van Apeldoorn 2002, 113). But the most usual end efficient way to communicate is face to face, during the meetings between CEO's of the ERT and decision and policy makers. The most important proposals regarding the European economic efficiency made by ERT were gathered under the issue of *Competitiveness*. "ERT staff worked in close liaison with the Commission, ERT ideas were evident in the Delors White Paper on Competitiveness, Growth and Employment, and also in the parallel Action Plan issued by the Brussels European Council in 1993, while the Essen European Council in 1994 formally endorsed the ERT proposal for a high level Competitiveness Advisory Group with powers to lay relevant issues directly before heads of government as well as the President of the Commission" (Richardson 2000, 8). Besides competitiveness, there are also other working groups that are meant to provide an integrated view on European economy: CFO Task Force[27], Competition Policy[28],

[26] For more details, see Erawatch - Platform on Research and Innovation policies and systems on: http://erawatch.jrc.ec.europa.eu[...].

[27] "The ERT CFO Task Force seeks to address matters particularly in the development of financial and regulatory reporting. They engage with regulators including the IASB, the European Commission and corporate groups, to address key concerns and to communicate to governments and regulators the positions that are in the interest of and agreed on behalf of ERT Members" (http://www.ert.eu/working_groups).

Energy & Climate Change[29], Societal Changes[30] and Trade and Market Access[31]. Moreover, the ERT members were involved in the "debate on the proposed European Company Statute and other social legislation, gave continuing support to Monetary Union, argued for the adoption of international accounting standards, helped to launch the Transatlantic Business Dialogue, pushed hard and in the end successfully for a world trade agreement" (Richardson 2000, 8).

Thus, following Sonia Mazey and Jeremy Richardson or many other scholars, one could say that the ERT "played a major role in the emergence of the Single European Act (SEA) and the creation of the 1992 single market programme" (Mazey and Richardson 2001). Those reforms remain some of the most important changes that the European Community managed to follow because of their impact in reforming an entire continent in the next twenty years. "While political pundits and journalists evaluate the achievements and shortcomings of the 1992 project, scholars continue to wage a considerable debate over the origins of the single market programme and the accompanying SEA. At the core of this academic dispute is the question of the role played by the leaders of big business and their influence on the policy-making process[32]" (Cowles 1995, 502).

On the other hand, van Apeldoorn interprets the re-launching of the European integration through the internal market programme, Single European Act and Treaty of Maastricht in terms of a struggle between two main contenting projects. "The struggle between the two most important of these projects – those of neoliberalism and neo-mercantilism – was partly manifested within the ranks of the European Roundtable, which at the same time also played a crucial role in shaping this struggle" (van Apeldoorn 2002, 115). Neo-mercantilism was specific for the Keynesian period of welfare state and national protectionism, while neoliberalism came, as I already argued, as a component of globalisation process (besides transnationalisation of production and finance) and involves the economic liberalisation and the minimisation of the state interventionism. "Van Apeldoorn shows how the ERT shifted from a perspective that sought to encourage the development of European champions (an inward-looking and defensive Euro-mercantilist strategy), to a more neo-liberal and global orientation during the 1990s. During the early 1980s, most firms that were the national and European 'champions' generally tended to perceive globalisation as a threat rather than as an opportunity and pressed for a relaunch of the European project on very different terms to neo-liberals" (Gill, Stephen. Constitutionalising Capital: EMU and Disciplinary Neo-Liberalism in Bieler and Morton 2001, 53). In this context, neoliberalism appears to be a project of globally-oriented finance and industrial capital that is certainly going to benefit from globalisation, rather than a project of the European companies who produce for the European markets.

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[28] "ERT believes that globalisation, rapid technological change and market dynamism are intensifying competition in EU markets and worldwide. EU competition policy, which is central to the proper functioning of the internal market, should therefore be adopted to the global economy, and made fit for dynamic markets" (http://www.ert.eu/working_groups).

[29] "The Energy and Climate Change Working Group seeks to create a holistic approach appropriate to the international context to address the significant challenges that Europe and the planet are confronting" (http://www.ert.eu/working_groups).

[30] "The Societal Changes Working Group is focused on issues that pertain to Europe's greatest resource: its people. The future of Europe and its industries depends on the workforce of today and tomorrow" (http://www.ert.eu/working_groups).

[31] "ERT believes that open international flows of trade and investment are a crucial component in ensuring European companies' competitiveness in a global economy; and necessary for achieving balanced global growth. The Trade and Market Access Working Group focuses on the prospect of a Transatlantic Trade and Investment Partnership" (http://www.ert.eu/working_groups).

[32] "Reshaping Europe had much to say on the details of the "competitive market place" and the infrastructure needed for business efficiency. It emphasised the two–way relationship: "Europe needs its industries...but industry also needs Europe", and it boldly mapped out a comprehensive timetable for Monetary Union at a time when decision makers were still hesitating" (Richardson 2000, 7).

2.2.2. European Monetary Union

European integration can neither be simply derived from structural developments nor from highly abstract concepts and ideas developed at the drawing table. Instead, it takes place as a 'succession of negotiated settlements' (Bieling 2003, 206). In this section I will try to argue that, considering the pressure of the ERT through lobby activity and policy initiatives, that Maastricht reforms and the Economic and Monetary Union are encompassed into the neoliberal discourse. It means that EMU is a result of the globalisation pressure on the one hand, and a specific political project developed by the decision makers in collaboration with representative of European big capital (ERT) on the other.

Moreover, Stephen Gill's suggestion is to see EMU in the context of economic global regionalisation which is a phenomena that can also be seen in North America or East Asia. "Thus it is important to place EMU (and other liberalization measures in the EU) in the context of global patterns of power and production, as aspects of the political economy of globalisation. The emerging accumulation patterns are linked to the rising power of internationally mobile capital" (Gill, Stephen. Constitutionalising Capital: EMU and Disciplinary Neo-Liberalism in Bieler and Morton 2001, 48-49). This is just a tendency of capitalism system to centralise and concentrate capital that has been observed and predicted even by Karl Marx in the second half of the nineteen century. Thus, the Maastricht reforms were a political reaction in front of all this developments. "They seek to institutionalise a new currency and mandate strict fiscal discipline as part of the new practices of economic governance that will give credibility to governments and confidence to investors. It is part of an expansion of state activity to provide greater legal and other protections for business, and to try to stabilise the investment climate in Europe[33]" (Gill, Stephen. Constitutionalising Capital: EMU and Disciplinary Neo-Liberalism in Bieler and Morton 2001, 49).

For Christoph Hermann, the EMU is one of the most obvious and clear manifestation of neoliberal reforms at the European level. "While the SEA guarantees "free" trade and capital mobility within Europe, the EMU fortifies the principles of monetary restraint and budgetary austerity by forcing EMU member states in to a tight fiscal corset. […] The budgetary constraints imposed by the convergence criteria also compel member states to introduce far-reaching reforms in labour and social policies as their ability to confront unemployment and social exclusion is severely limited by the lack of budgetary funds" (Hermann 2007, 14-15). Besides the national level, the European Commission is also promoting price stability and fiscal austerity in the name of economic growth.

The neoliberal design of EMU was well express by the Thomas Palley, who discusses it from a Keynesian point of view and states that the neoliberal reforms were the core of the nowadays European financial crisis. He argues that "the flawed European-wide policy concerns the neoliberal labour market and macroeconomic policy strategy that has been persistently promoted since the early 1980s. The flawed German policy concerns Germany's reliance on export-led growth based on domestic wage suppression. The combination of flawed policy plus flawed design explains how the crisis came about; why existing policy has been incapable of addressing the crisis; and why the future promises on-going economic crisis absent reform of the eurozone's economic policy configuration and monetary architecture" (Palley 2013, 31). Furthermore, the neoliberal dimension could be seen in the convergence criteria to the eurozeone, which are macroeconomic indicators measuring price stability (to see if the inflation is under control), soundness and sustainability of public finances (to check the limits on government borrowing and national debt to avoid excessive deficit), exchange-

[33] Also, "European governments have sought to expand the scope of free enterprise as the primary motor of accumulation, and to de-socialise risk provision. In this way they are changing the institutional balance between state and civil society (e.g., through privatisation in pensions, health, education)" (Gill, Stephen. Constitutionalising Capital: EMU and Disciplinary Neo-Liberalism in Bieler and Morton 2001, 49).

rate stability and long-term interest rates (to assess the durability of the convergence achieved by fulfilling the other criteria)[34]. Thus, "fiscal consolidation for the purpose of meeting the Maastricht convergence criteria was largely achieved through reduced interest payments, caused by reduced risk premiums that could be 'imported' to previous high inflation countries from the low inflation countries in the EMU core through the common currency backed by the credibility of the Stability and Growth Pact[35]" (Ryner, Magnus. *Neoliberal European Governance and the Politics of Welfare State Retrenchment: A Critique of the New Malthusians* in van Apeldoorn, Drahokoupil and Horn 2009, 50).

Turning back to Stephen Gill, he named the European political economy as an Achilles' heel due the effects of the neoliberal monetarist austerity policies: mass unemployment. "Concentrated heavily among younger and less skilled workers, it partly explains tough immigration and asylum policies and, at least for the movement of (most) people, a 'fortress Europe'. It contributes to a potent admixture of social and economic dislocation, physical risks, racism and xenophobia" (Gill, Stephen. Constitutionalising Capital: EMU and Disciplinary Neo-Liberalism in Bieler and Morton 2001, 48). Consequently, the EMU reforms designed a Europe for the TNCs, where the economic freedom stays in front of the social protection of the citizens.

3. Conclusions

What is the relation between globalization and the process of European integration? Does European integration have its own way, or it is deeply dependent on globalization? Those are the research questions that I tried to follow in this article, and I tried to answer them by discussing the European integration from a neo-gramscian perspective and then, by finding a proper definition for the concept of globalisation. What I found out was that the most important component of the neo-gramscian approach was their focus on the social forces agency. Social forces were no more than faction of the social classes that couldn't reach a high level of cohesion not even in nowadays society. Moreover, economic realities of the present, show a high degree a capital concentration on global level, so we can talk about transnational social forces, which are in fact Transnational Corporations that operate on a global scale. The fact that we can use social forces in analysing European integration means that we could encompass also the globalisation process.

Furthermore, I understood globalisation, following Andreas Bieler and Robert Cox, as a process of transnationalisation of production, transnationalisation of finance and the shift from Keynesianism to neoliberalism. Consequently, production and finance are deeply connected with the activity of the TNCs, while neoliberal ideology works at the hegemonic level. People begin to perceive the neoliberal economic reality as the only possible reality that works for the benefit of all. Thereby, those forces engendered by the globalisation process achieved a certain level of cohesion at the European level and form the European Round Table of Industrialists – a forum where the capitalist class strategy is formed. Going forward with my research, I found out that the ERT had a very important role in the reforming European Union through the Single European Act, Treaty of Maastricht and Economic and Monetary Union. In the end, I focused on the EMU and I showed how its institutional architecture and policies outputs were encompassed in the neoliberal perspective.

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[34]European Commission. Economic and Financial Affairs: .http://ec.europa.eu/economy_ finance/euro/adoption/who_can_join/index_en.htm.

[35] "This even had positive demand side-effects via decreasing interest rates. In addition, fiscal consolidation was largely secured on the revenue side. True, corporate taxation rates and employers' contributions were reduced. However, tighter writeoff rules for corporate taxes, and the switching from payroll surcharges to general taxation, increased the tax base" (Ryner, Magnus. *Neoliberal European Governance and the Politics of Welfare State Retrenchment: A Critique of the New Malthusians* in van Apeldoorn, Drahokoupil and Horn 2009, 50).

To conclude, the processes of globalisation and European Integration are deeply connected and represent, in neo-gramscian terms, both the tendency of capital concentration and the influence of the neoliberal ideology. Thus, due the economic and ideological reasons, European integration follows the same path as globalisation and seems to be, for the regular citizen, impossible to control through the representative democracy.

References

- van Apeldoorn, Bastiaan, Jan Drahokoupil and Laura Horn. *Contradictions and Limits of Neoliberal European Governance. From Lisbon to Lisbon*. Palgrave Macmillan. New York: 2009.
- van Apeldoorn, Bastiaan. Transnational Capitalism and the Struggle over European Integration. Routledge. New York: 2002.
- Bieler, Andreas and Adam David Morton. Social Forces in the Making of the New Europe. The Restructuring of European Social Relations in the Global Political Economy. Palgrave. New York: 2001.
- Bieler, Andreas. Globalisation and Enlargement of the European Union: Austrian and Swedish social forces in the struggle over membership. Routledge. London: 2000.
- Bieling, Hans-Jurgen. „Social Forces in the Making of the New European Economy: The Case of Financial Market Integration". *New Political Economy*, Vol. 8, No. 2, July 2003, pp. 203-224.
- Bohle, Dorothee, "Neoliberal Hegemony, Transnational Capital and the Terms of EU's Eastwards Expansion", *Capital and Class*, Issue 85, 2006, 57-86.
- Cafruny, A.W. and Ryner M. „A Ruined Fortress? Neoliberal Hegemony and Transformation in Europe", Rowman & Littlefield Publishers, New York. 2003
- Cowles, Maria Green. "Setting the Agenda for a New Europe: The ERT and EC 1992". *Journal of Common Market Studies*. Vol. 33, No. 4, 1995, pp. 501-526.
- Dailami, Mansoor and Nadeem ul Haque. *What Macroeconomic Policies Are "Sound?"*. International Monetary Fund Research Department. October 1998. Last modified February 27, 2014, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1998/11/17/000178830 _ 98111703524623/Rendered/PDF/multi_page.pdf.
- Erawatch - Platform on Research and Innovation policies and systems on. Last modified March 2, 2014, http://erawatch.jrc.ec.europa.eu/erawatch/opencms/information/country_pages/eu/euorganisation/europeanorg_mig_0021?matchesPerPage=5&orden=LastUpdate&searchType=advanced&intergov=all&tab=template&index=Erawatch+Online+EN&sort=&avan_other_prios=false&searchPage=9&subtab=&reverse=true&displayPages=10&query=&country=eu&action=search.
- European Commission. *Economic and Financial Affairs*. Last modified March 2, http://ec.europa.eu/economy_finance/euro/adoption/who_can_join/index_en.htm.
- European Round Table of Industrialists. Last modified March 2, http://www.ert.eu/working_groups.
- Gill, Stephen. 'Globalisation, Market Civilisation and Disciplinary Neoliberalism', *Millennium*, 24: 1995, pp. 399-423.
- Gill, Stephen. *Gramsci, Historical Materialism and International Relations*. Cambridge University Press. New York: 1993.
- Helleiner, Eric. State and the Reemergence of Global Finance. From Bretton Woods to the 1990s. Cornell University Press. London: 1994.
- Hermann, Christoph. "Neoliberalism in the European Union". *Studies in Political Economy*. Vol. 79, 2007, Last modified March 2, http://www.iaq.uni-due.de/aktuell/veroeff/2005/dynamo05.pdf.
- Keohane, Robert. Neorealism and its Critics. Columbia University Press. New York: 1986.
- Kiely, Ray. Empire in the Age of Globalisation US Hegemony and Neoliberal Disorder. Pluto Press. London: 2005.
- Marx, Karl and Frederick Engels. Manifesto of the Communist Party. International Publishers. New York: 1948.
- Mazey, Sonia and Jeremy Richardson. Interest Groups and EU Policy Making: Organizational Logic and Venue Shopping. Last modified March 2, 2014, http://www.nuffield.ox.ac.uk/People/backup/Richardson/Publication%20Files/INTEREST%20GROUPS%20AND%20EU%20POLICY%20MAKING%20ORGANIZATIONAL%20LOGIC%20AND%20VENUE%20SHOPPING.pdf.
- Miroiu, Andrei and Radu-Sebastian Ungureanu. Manual de Relații Internaționale. Polirom. Iași: 2006.

- Palley, Thomas. "Europe's Crisis without End: the Consequences of Neoliberalism". *Contributions to Political Economy*. No. 32, 2013, pp. 29-50.
- Richardson, Keith. *Big Business and the European Agenda*. Sussex European Institute. Brighton: 2000. Last modified March 2, 2014, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.201.46&rep=rep1&type=pdf.
- Ryner, Magnus. Capitalist Restructuring, Globalisation and the Third Way. Lessons from the Swedish model. Routledge. New York: 2002.
- Steger, Manfred and Ravi K. Roy. *Neoliberalism. A Very Short Introduction*. Oxford University Press. New York: 2010.
- Stopford, John, Susan Strange and John Henley. *Rival States, Rival Firms. Competition for the world market shares*. Cambridge University Press. New York: 1991.
- United Nation (UN). *World Investment Report 1991: The Triad in Foreign Direct Investment*. Last modified February 11, 2014, http://time.dufe.edu.cn/spti/shuju/wir91ove.en.pdf.
- United Nations Conference on Trade and Development (UNCTAD). *World Investment Report 1992: Transnational Corporations as Engines of Growth*. Last modified February 11, 2014, http://unctad.org/en/docs/wir1992overview_en.pdf.
- United Nations Conference on Trade and Development (UNCTAD). *World Investment Report 1998: Trends and Determinants* (Geneva: UN). Last modified February 11, 2014, http://unctad.org/en/docs/wir98_en.pdf.
- Wetherly, Paul. Marxism and the State. An Analythical Approach. Palgrave Macmillan. New York: 2005.

ARE THE CONDITIONS OF STATEHOOD SUFFICIENT? AN ARGUMENT IN FAVOUR OF POPULAR SOVEREIGNTY AS AN ADDITIONAL REQUIREMENT FOR STATEHOOD, ON THE GROUNDS OF JUSTICE AS A MORAL FOUNDATION OF INTERNATIONAL LAW

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Abstract

The Montevideo Convention of the Rights and Duties of States (1933) codified the declarative theory of statehood as accepted as part of customary international law and laid down the five requirements for statehood which are often summarized as 'the principle of effectivity': (a) permanent population, (b) defined territory, (c) organised power (government) and (d) ability to enter into relations with other states. The aim of this article is to discuss the possibility of an additional requirement: popular sovereignty in a specific historic sense. I will also discuss whether this requirement should be regarded as a necessary and/or sufficient condition for statehood. The importance of this additional condition will be explained in the light of the legitimacy of exercise of power. Furthermore, it will be argued that this additional requirement may help promote the suggested primary goal of international law, that being justice (instead of peace as easily inferred by the UN Charter) in the specific sense of the protection of basic human rights, as suggested by Buchanan in Justice, Legitimacy and Self-Determination. It has to be noted that both main points, namely Buchanan's suggested notion of justice as the primary goal of international law and my main argument of popular sovereignty in a specific historical sense as a requirement of statehood are not to be regarded as relating to any form of Natural Law Theory. It is not the case that I maintain that any international norm which violates justice as ethical foundation of international law is, because of that reason, legally invalid. Although the Legal Positivism vs Natural Law Theory is certainly not the focus of this paper, if one wishes to regard Legal Positivism and Natural Law Theory as mutually exclusive, my suggestion falls entirely under the umbrella of Legal Positivism for reasons that will be explained.

Keywords: *statehood, constitutive and declarative theory, popular sovereignty, goal of international law, human rights*

1. Introduction

This paper covers the matter of the conditions of statehood, based on moral foundations of international law. I agree with the distinction between the requirements for recognition of an entity *as* a state (the criteria for statehood) and the requirements for recognition *of* a state, that is, the preconditions for entering into optional or discretionary relations with it (the conditions for recognition)[1]. The former is a legal issue, specifically an issue of international law, whereas the latter is partly legal though mostly a political issue, since several states decide to recognize or not to recognize each other often on political considerations. This became very obvious during the Cold War where certain states would not recognize other states mostly, if not entirely, because of the difference in political regimes. This paper deals only with the criteria for statehood, not for the conditions for recognition. In

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[1] Stefan Talmon, 'The Constitutive Versus The Declaratory Theory of Recognition: Tertium Non Datur?' *British Yearbook of International Law* 75 (2004): 108.

particular, the argument made is a deontological argument: what is argued is not how the law is, but what the criteria of statehood ought to be, based on a moral/philosophical foundation of international law. The studied matter is important because although states and international organisations are still, despite the rise of transnational law, the main subjects of international law, the law regarding the creation of states is problematic. Whether an entity is a state is often a debatable and controversial issue. The Montevideo Convention (1933) has not been applied consistently while the International Law Commission, through, Crawford, its former Special Rapporteur on state responsibility, has taken up the issue advancing highly contestable criteria of legality as conditions for statehood[2]. Therefore, the debate regarding what the conditions of statehood remains contemporary and important for the future of states and the development of international law. I will try to answer this matter by explaining why both the constitutive and declarative theory are problematic, then by presenting popular sovereignty as a requirement for statehood and then by providing a moral basis of this requirement on justice, in the sense of realization of human rights, as what the primary goal of international law ought to be. Finally, the relation between the paper and the already existent literature -which is often drowned in elaborate analyses of state practice and de lege lata conditions- is that advanced criteria of statehood, like the criteria of legality mentioned above, have not been based on any moral/philosophical foundations of international law.

2. Content

2.1. The two competing theories of state recognition: Constitutive and Declarative theory

According to the Constitutive theory of statehood, a state is a subject of international law if, and only if, it is recognized as sovereign by other states[3]. Because of this, new states cannot immediately become part of the international community or be bound by international law, and recognized nations do not have to respect international law in their dealings with them[4].

By contrast, according to the declarative theory, an entity's statehood is independent of its recognition by other states. This is stated in the Article 2 of the Montevideo Convention on the Rights and Duties of States (1933). More specifically, the declarative theory, as stated in the Article 1 of the aforementioned Convention, identifies the state as a person in international law if it meets the following criteria: 1) a defined territory, 2) a permanent population, 3) a government and 4) a capacity to enter into relations with other states.

The declaratory theory concentrates on the internal factual situation and the constitutive theory concentrates on the external legal rights and duties. They both miss a portion of the analysis[5].

2.2. State practice

Although one might expect that the international realm would strictly follow the declarative theory of state recognition because of the fact that it is the one expressly stipulated in an international convention, state practice seems to be situated somewhat between the two

[2] See e.g. Stefan Talmon, 'The Constitutive Versus The Declaratory Theory of Recognition: Tertium Non Datur?' *British Yearbook of International Law* 75 (2004): 122.

[3] Lassa F.L. Oppenheim and Hersch Lauterpacht, *International Law: A Treatise* (D. McKay, 1955), 125.

[4] See, e.g. Tim Hillier, *Sourcebook on Public International Law*, (Routledge, 1998): 201–202.

[5] Worster, William *Sovereignty Two competing theories of state recognition* fhttp://www.exploringgeopolitics.org/Publication_Worster_Willliam_Sovereignty_Constitutive_Declatory_Statehood_Recognition_Legal_View_International_Law_Court_Justice_Montevideo_Genocide_Convention.html sixteenth paragraph.

theories[6]. In particular, both Croatia and Bosnia and Herzegovina were recognized as independent states by European Community member states and admitted to membership of the United Nations (which, according to article 4 of the UN Charter, is limited to states) in 1992 at a time where in both states non-governmental forces controlled substantial areas of the territories in question in civil war conditions. Also, recognition is often withheld when a new state is regarded as illegitimate or has come about in breach of international law. Almost universal non-recognition by the international community of Rhodesia and Northern Cyprus are good examples of this. In the former case, recognition was widely withheld when the white minority seized power and attempted to form a state along the lines of Apartheid South Africa, a move that the United Nations Security Council described as the creation of an "illegal racist minority régime"[7]. In the latter case, recognition was widely withheld from a regime created in Northern Cyprus on land illegally invaded by Turkey in 1974[8]. In general, it seems that Broms is right to observe that in actual practice, the criteria are mainly political rather legal[9].

2.3. Popular sovereignty as a requirement of statehood

I suggest that popular sovereignty in a specific historical sense be regarded as a necessary requirement for statehood. This is a clearly deontological statement, so I argue why it should be so, without making any ontological claims. The popular sovereignty requirement that I am advancing is as follows: a necessary requirement for a regime to be a state is that at one specific point in time, the majority of an identifiable number of people permanently living within an identifiable territory and having a government freely vote[10] for a constitution. For the action of voting to be free, voters must be exercising self-rule or in other words their individual autonomy, the standard requirements[11] of which are the following:

a) The action has to be intentional, i.e. the voters must intentionally be performing the action of expressing their opinion of whether they want to bring that specific constitution into effect. In a hypothetical imaginative scenario where voters vote for a constitution while intending to vote for inclusion to another state, then their action does not count as a free action.
b) The action has to be based on sufficient understanding. Several reasons can cause lack of understanding, two of which are lack of information and lack of mental capacities of understanding which should also exclude children. Adequate information requires that the people have been informed of the constitution well advance so that they had enough time to read it and hopefully reflect on it.
c) The action has to be free from external constraints. These include physical barriers deliberately imposed by others and different forms of coercion, including deliberate use of force or the threat of harm. The coercer's purpose is to get the person being coerced to do something that that person would not actually be willing to do.

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[6] Malcolm Shaw, *International Law* (Cambridge: Cambridge University Press, 2008), 197 'The relationship in this area between factual and legal criteria has been is a crucial shifting one.'
[7] United Nations Security Council Resolution 216.
[8] United Nations Security Council Resolution 541.
[9] '...one is led to the conclusion that the granting of recognition has become primarily a legal-political solution whereby the political element weighs heavier than the legal one.' in B. Broms 'IV Recognition of States', 47-48 in *International law: achievements and prospects*, UNESCO Series, Mohammed Bedjaoui (ed), Martinus Nijhoff Publishers, 1991.
[10] In this discussion, freedom and autonomy overlap and can be used interchangeably, as is usually the case. Some writers make a distinction between the two terms which is here not relevant because freedom/autonomy refer to one specific action, i.e. the voting of the constitution. Such writers are Dworkin who maintains that freedom concerns particular acts whereas autonomy is a more global notion. See Gerald Dworkin, *The Theory and Practice of Autonomy* (New York: Cambridge University Press, 1988), 13-15, 19-20.
[11] Regardless of the specific articulation and the specific content in which they function, I regard these to be the standard requirements of autonomy in philosophy. See, e.g. Thomas A. Mappes and David DeGrazia *Biomedical Ethics* (6th edition, McGraw-Hill Higher Education, 2006), 41-45.

Therefore, for example, if people are threatened that if they vote for the constitution the nearby state will invade, then the act of voting is not free.

d) The action has to be free from internal constraints. Examples of internal constraints are intense fears and acute pain as they influence people to make choices that represent departures from their stable values and usual priorities. Therefore, for example, voting which takes part right after a regime causes the emotion of extreme fear is not free.

2.4. Popular sovereignty: necessary and/or sufficient condition for statehood?

I suggest that a regime should not be able to obtain the status of statehood unless it satisfies the popular sovereignty requirement. Therefore, popular sovereignty is a necessary condition for statehood. Now I want to explore whether popular sovereignty is also a sufficient condition for statehood.

It would be hard to imagine a state that does not satisfy the first three requirements of the Montevideo Convention – territory, population and government. A regime that does not satisfy these criteria is a regime that would probably not be relevant to the discussion of statehood. Therefore, one could conclude, if the requirement of popular sovereignty is accepted, it can only be a necessary but not sufficient condition, because it being sufficient condition would entail that a regime can be a state without satisfying those three requirements, which sounds absurd.

If that's the case, then how does the constitutive theory make any sense? If the constitutive theory means that recognition by other states is necessary and sufficient condition for state recognition whereas the territory/population/government requirements are not necessary conditions and a regime can be a state without them as long as it is recognized by other states, then the constitutive theory would be equally absurd. Notably, the distinction between the two theories is not that these three requirements are regarded as necessary by the declarative theory alone whereas constitutive theory does not regard them as necessary, but the issue of recognition[12]. The difference between the two theories is that the constitutive theory makes statehood contingent on recognition from other states, whereas the declarative theory does not. Therefore, to make more sense of the constitutive theory, one would have to include the territory/population/government requirements in order to be able to talk about any kind of regime at the first place. Seen in this light, the constitutive theory implies the three aforementioned requirements. By the same token, popular sovereignty can be seen as implying, and thus necessarily including the territory/population/government requirements. This would mean that when referring to certain people freely voting for a constitution, we assume that we are referring to an identifiable group of people, permanently living within an identifiable territory and having a form of government which would allow the people to decide whether to vote for a constitution. This does not seem to me to be too much of a stretch.

The requirement that has been left out is the capacity to enter into relations with other states. According to the popular sovereignty theory I am proposing, it is not the case that capacity to enter into relations with other states is a necessary condition for statehood as the declarative theory suggests. By contrast, the popular sovereignty theory I am suggesting regards the capacity to enter into relations with other states as a consequence of statehood, so the existence of the capacity necessarily requires that the status of statehood has been obtained first.

A comment that many would feel ought to be made here is that states are not the only ones which enter into relations with states. International organisations and other non state

[12] William Worster, 'Sovereignty Two competing theories of state recognition' http://www.exploringgeopolitics.org/Publication_Worster_Willliam_Sovereignty_Constitutive_Declatory_Statehood_Recognition_Legal_View_International_Law_Court_Justice_Montevideo_Genocide_Convention.html fourth paragraph

entities enter into relations with other states. Therefore, it could be argued that entering into relations with states is not by itself a manifestation of statehood. This is entirely true and I have two comments to make here. Firstly, the issue of non state entities entering into relations with states leaves my argument entirely unaffected because I do not maintain that entering into relations with states is a characteristic of states alone. What I am suggesting is that in the case of state recognition in particular, we can see the capacity of entering into relations with other states as a consequence of statehood and not as a requirement. This position is neutral to whether non state entities can enter into relations with other states, though modern international law and the emergence of transnational law make it relatively easy to provide a straightforward answer. Besides, if one would want to entertain the grammatical stipulation of the theory, reliance on the word 'other' in the expression 'other states' suggests that the capacity of entering into relations with other states in the context of this discussion has to do with states alone, which is rather unsurprising since both the constitutive and the declarative theory are theories of statehood and should not be seen as making any claims regarding non state entities.

Therefore, if one wants to get on board with the popular sovereignty theory, he would be confronted with three choices. The first choice would be to regard the popular sovereignty requirement which necessarily encompasses the territory/population/government element as a necessary and sufficient condition for statehood. The second choice would be to keep the articulation of the declarative theory, at the same time enjoying the privilege of being closer to the letter of the theory laid down in codified international law, and merely add the popular sovereignty condition as another necessary but not sufficient condition. In this case, the popular sovereignty condition would be deprived of the territory/population/government element in order to avoid repetition and one would also require a capacity of entering into relations with other states. Finally, the last choice would be the same as the second one, but without the capacity of entering into relations with other states as that would be regarded as a consequence of statehood and not a requirement. I strongly believe that the important issue is whether one would accept the popular sovereignty in the historical sense as I presented it, namely the fact that at one specific point in time a group of people freely voted for a constitution, as a necessary condition of statehood. I regard the choice among the three aforementioned options as a minor issue. Personally, I opt for the first option for two main reasons. Firstly, presenting popular sovereignty in that rich sense as a necessary and sufficient condition makes it clear that in the discussion of statehood, the important component is the voting of a constitution. Besides, the territory and the population do not have to be exact, but merely identifiable. The government does not, officially at least, need to satisfy any internal/substantial criteria, i.e. it does not need to particularly democratic, observe human rights, or be a 'good' government in any substantial sense. Although many theorists advance the suggestion that governments must be democratic, it is not the case – fortunately or unfortunately - that international law requires democracy as a necessary condition for statehood. Therefore, some flexibility is allowed in these conditions. On the contrary, the voting of the constitution has to be free according to the requirements mentioned above. Besides, when there is a discussion about whether a regime should obtain statehood, it is usually the case that it enjoys the territory/population/government criteria, or else the discussion would not arise. The second and relevant reason is that popular sovereignty, being in the centre of this theory, is exactly what is justified by what I agree to be regarded as being the primary goal of international law, namely justice in the sense of a minimum protection of basic human rights.

Although the elements of territory/population/government/capacity to enter in relations with other states – when seen independently and irrelevant to the popular sovereignty requirement- are entirely factual circumstances that can be determined by force

and which may be resulting in gross injustices, there is a certain moral aspect in the right of a group to govern themselves with a constitution. This requirement is in line with the recognized notion of self-determination. (I am intentionally avoiding any reference to 'right' of self-determination, as it seems to me the case that self-determination can itself be broken sown in several other rights, but this is irrelevant to this discussion which about statehood, not self-determination).

2.5. Justice as the primary goal of international law

There are two compelling reasons for accepting the theory of popular sovereignty I stated above as the theory of statehood. Firstly, it is obviously more democratic, because it is based on the direct will of the people, or at least the majority of the people. Secondly, and in my opinion more importantly, it promotes what Buchanan in *Justice, Legitimacy and Self-Determination* rightly advances as a de lege ferenda primary goal of international law, namely justice, in the sense of protection of basic human rights. Justice is better served when human rights are observed.

I agree with Buchanan that it is reasonable to regard justice, meaning protection of basic human rights, as the primary goal of international law[13]. Justice largely subsumes peace. Justice requires the prohibition of wars of aggression because wars of aggression inherently violate human rights. To that extent, the pursuit of justice is the pursuit of peace. Sometimes, justice requires violating peace and the fight of the Allies in the Second World War when they fought to stop fascist aggression with all its massive violations of human rights meets out moral intuitions that in such cases justice is worth more than peace. In addition to this rationale, Buchanan also brings two arguments regarding why justice is morally imperative[14]. Although I find his two arguments very convincing, I feel I am not required to refer to them because they are not necessary for my argument, which is that popular sovereignty theory of statehood is preferable. All that is needed to support this argument is that justice is preferable to peace when it comes to being the primary goal of international law. The fact that in cases of conflict the weight goes to justice instead of peace is enough to make my point and I do not need to ground justice as a primary goal of international law any further, as this is not my main point.

Here I have to state that although I agree with Buchanan with justice being the primary goal of international law, the popular sovereignty theory I advance departs from Buchanan's theory on statehood, which disregards the issue of popular sovereignty, holding the position that statehood ought to be granted to entities that observe human rights. Although I find his theory very persuasive and much better grounded than either the constitutive or the declarative theory, I think the popular sovereignty theory has two simple advantages over Buchanan's theory. Firstly, the popular sovereignty theory is much more easily observed, and in this specific sense, much more realistic. Buchanan's suggestion requires the existence and impartial functioning of institutions that would observe whether the entity in question actually observes human rights. Although I am very sympathetic to this idea, I am very doubtful whether institutions will necessarily be unbiased simply because they are non state entities. Secondly, although protecting human rights is indeed in full accordance with the definition of justice, when it comes to statehood in particular, what must also be seriously considered is the issue of the will of the people. Let's suppose that within a given territory, entity A is striving for statehood. Entity A does refer to an identifiable population within identifiable territory and with a form of government. Let's suppose that this entity actually observes human rights and the protection of human rights is way above the minimum level of protection expected by the

[13] Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford: Oxford University Press, 2004), 74-82.
[14] Ibid, 83-97.

international community. However, for reasons irrelevant to human rights, people are not happy with that constitution. For example let's suppose that that constitution lays down processes which slow down the system and reduce dramatically the economic development of the country and that these processes are laid down in non amendable clauses of the constitution. Since there cannot be two entities A, let's suppose that there is a metaphysical world, exactly identical to this one, but in the respective entity, let's call it "A", which has the same population, territory and government, the system again observes and protects human rights, but the level of protection of human rights is insignificantly lower than the level of protection provided by entity A but of course, again, much higher than the minimum level of protection expected by the international community. However, the people in entity "A" are much happier with the constitution they freely voted and the economic development of their entity. It seems to me that it would not be unreasonable to hold that the entity the international community would preferably be granting statehood to is entity "A".

I do not wish to diminish Buchanan's view; on the contrary, I find it very convincing and a path of development of contemporary international law. I definitely regard it as a great progress in comparison to the constitutive and declarative theories. However, I believe that there can be reasonable alternatives that take into account other factors apart from the protection of human rights when it comes to an all-things-considered decision about which theory is most appropriate for statehood. That said, I totally agree with Buchanan as justice in the sense of protection of human rights as the primary goal of international law.

2.6. Stepping into Natural Law?

In short, no. Both main points, namely Buchanan's suggested notion of justice as the primary goal of international law and my main argument of popular sovereignty in a specific historical sense as a requirement of statehood are *not* to be regarded as relating to any kind of Natural Law Theory. It is *not* the case that I maintain that any international norm which violates justice as ethical foundation of international law is, because of that reason, legally invalid.

Regardless of the specific legal positivist position that different philosophers of law might take, e.g. Kelsen and Hart who are both legal positivists but greatly disagree in many points, I take the main proposition of Legal Positivism per se to be the following: In any legal system, whether a norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits[15]. Therefore, if one maintains that an international legal norm is valid because of its sources, or, in other words, that the reason of validity of an international legal norm is its sources, then this view would fall under the umbrella of positivist views. By contrast, if one regards that an international legal norm is valid because of its merits, or, in other words, that the merits of the law – e.g. whether the law if moral or immoral based on whatever theory – are the reason of validity of an international legal norm, then this view would fall under Natural Law Theory.

Although one may be mislead by the use of morality in the goals of international law, it is incorrect to assume that just because of the reference to a certain kind of moral value, this moral value is to be regarded as a criterion of validity of norms. That is most certainly not the case here. Neither Buchanan nor I make such claims. The claim that a norm is invalid because it is against justice is not made here. On the contrary, I hold that justice *is* not the goal of international law, but it *ought* to be. This is a deontological, not an ontological statement. As Buchanan puts it 'justice is a goal in the sense of an ideal state of affairs, a moral target that we aim at, and which we can strive to continue to approach more closely, even if it is not

[15] John Gardner, 'Legal Positivism: 51/2 Myths,' *American Journal of Jurisprudence* 46 (2001): 199.

possible ever to achieve it fully or perfectly'[16]. In practice, this goal has to do with many issues, e.g. how international law ought to develop, how international legal norms ought to be laid down, minimum requirements of the content of international legal norms, principles governing international institutions, what functions we ought to see international law as having, etc., but it is most certainly not to say that justice is a criterion of validity. We therefore accept that unjust laws are, sadly, legally valid because of their sources.

Similarly, I do not maintain that international legal norms according to which states have already obtained statehood or norms according to which entities will obtain statehood in the future are in any way invalid because they were or might be unjust. On the contrary, I recognize the declarative theory of statehood as the legally valid international norm regarding statehood (even though it has not always been applied with absolute consistency) and I am suggesting that it ought to change in the future.

Therefore, although Legal Positivism per se is not within the scope of this discussion, if one wishes to place these theories in the Legal Positivism vs Natural Law Theory discussion, then both Buchanan's theory of justice – with which I obviously agree- as the primary goal of international law and my theory of popular sovereignty as a requirement of statehood are both legal positivist and not natural law theories.

3. Conclusions

In conclusion, I have briefly referred to the two main competitive theories of statehood in international law and then advanced my theory of popular sovereignty as a necessary and/or sufficient condition of statehood. I stated that there are three ways one could follow using the popular sovereignty argument in relation to the territory/population/government requirements and the requirement of the capacity to enter relations with other states. I stated that I personally prefer the first version in which popular sovereignty is more robust and has a richer content, including the territory/population/government requirements. I then explained how my theory is justified by Buchanan's position – with which I agree- that justice, in the sense of protection of basic human rights, and not peace, ought to be the *primary* goal of international law. I then offered reasons why I depart from Buchanan's notion of statehood according to which requirement for statehood ought to be protection of basic human rights, excluding popular sovereignty. Lastly, I explained why neither Buchanan's theory nor my suggestion of popular sovereignty have to be confused with any Natural Law Theory, and that as regards the Legal Positivism vs Natural Law Theory debate, this discussion remains within the limits of the former. If the idea of popular sovereignty as a requirement for statehood based on justice as a primary goal of international law is adhered to, the discussion regarding conditions of statehood will be geared in a direction of justice which will satisfy peoples' moral and legal intuitions. Finally, further research must be done, especially in the detailed structure of the idea of popular sovereignty in the modern transnational world. Further questions should be answered, e.g. whether the idea of popular sovereignty as a requirement for statehood should remain in a narrow framework as conceived by Rousseau, i.e. delimitation of state sovereignty rested on a contract between people and government, or if the idea of popular sovereignty as a condition for statehood should lie within the more contemporary framework of procedural popular sovereignty.

References

- Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford: Oxford University Press, 2004).

[16] Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford: Oxford University Press, 2004), 78. See also 'By a moral goal of the international system I mean a goal the system ought to promote, not one it does promote or has up to the present been designed to promote.' at 77.

- Gerald Dworkin, *The Theory and Practice of Autonomy* (New York: Cambridge University Press, 1988).
- John Gardner, 'Legal Positivism: 51/2 Myths,' *American Journal of Jurisprudence* 46 (2001): 199-227.
- Tim Hillier, *Sourcebook on Public International Law* (Routledge, 1998).
- Thomas A. Mappes and David DeGrazia *Biomedical Ethics* (6th edition, McGraw-Hill Higher Education, 2006).
- Lassa F.L. Oppenheim and Hersch Lauterpacht, *International Law: A Treatise* (D. McKay, 1955).
- Malcolm Shaw, *International Law* (Cambridge: Cambridge University Press, 2008).
- Stefan Talmon, 'The Constitutive Versus The Declaratory Theory of Recognition: Tertium Non Datur?,' *British Yearbook of International Law* 75 (2004): 101-181.
- United Nations Security Council Resolution 216.
- United Nations Security Council Resolution 541.
- William Worster, 'Sovereignty Two competing theories of state recognition' http://www.exploringgeopolitics.org/Publication_Worster_Willliam_Sovereignty_Constitutive_Declatory_Statehood_Recognition_Legal_View_International_Law_Court_Justice_Montevideo_Genocide_Convention.html.

THEORIES OF EUROPEAN INTEGRATION: A META-THEORETICAL PERSPECTIVE

Oana – Andreea ION[*]

Abstract

The aim of the article is to demonstrate that the theories of European integration are political theories. In this respect, I will refer to (a) what theory means, (b) what is the difference between theories from the Humanities disciplines and those from the Sciences areas, (c) what political theory stands for and (d) what is the relation between political theories and theories of European Integration, in the specific context of European Union Studies.

Keywords: *political theory, theory of European Integration, European Union Studies*

> "Like Moliere's Monsieur Jourdain, who discovered late in the day that he had been speaking prose all his life, anybody who argues for any policy is taking a normative position, whether she realizes it or not" (Swift and White 2008, 50).

1. Introduction

The aim of the article is to demonstrate the fact that the theories of European Integration are political theories. The importance of this topic derives from the current debate in the political science literature regarding (a) the existence of an independent research field named *European Union Studies (EUS)* and (b) the complications caused by the overlap between this (new) category of EUS and the so-called *European Studies*, which are broader in goals and disciplinary areas covered. In this context, the article is tributary to those opinions that treat EUS as a research field in itself, distinct from international relations (IR) and comparative politics (CP). In addition, this article is not simply a bandwagon in this academic debate or an assumption of an opinion taken for granted, but a prototype of a solid line of argument in support of the character of political theory attributed to European integration theories. In this respect, I will refer to (a) what does theory mean, (b) what is the difference between theories from the Humanities disciplines and those from the Sciences areas, (c) what political theory stands for and (d) what is the relation between political theories and theories of European Integration. The necessity of such an approach is that the literature about the theories applicable to the European space either subsume them to the international relations theories, on the one hand, or to the comparative politics one, on the other, or – if they dealt with them separately – fail to satisfactorily support this option (see Rosamond 2000, Chryssochoou 2009, Diez and Wiener 2009, Hix 2011, Lelieveldt and Princen 2011), with a few exceptions (Warleigh 2006).

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2. Towards a Meta-Theoretical Perspective of the European Integration Theories

2.1. What does theory mean?

I argue here that theories of European integration should be acknowledged as political theories. But what is actually a political theory? A first – common sense induced – response could result from the motto of this section, which draws attention to the role – usually perceived as involuntary – that these political theories have in everyone's life. Another kind of answer to this question requires taking a step back in order to point some considerations firstly about *what theory means* and what would be (if applicable) the difference between the *theories from the Humanities* and those from the Sciences disciplines.

I start the analysis with the following argument: theories are "closely knit systems of ideas" or, in other words, they are "systems of hypotheses, (...) syntheses encompassing what is known, what is suspected, and what can be predicted concerning a given subject matter" (Bunge 2009, 433-434). A comment has to be added here: Bunge refers in his study to *scientific theories*, a phrase under which he usually understands theories developed within exact science-related disciplines, because he considers the Humanities too much oriented towards the empirical research side. Thus, "a set of scientific hypotheses is a scientific theory if and only if it refers to a given factual subject matter and every member of the set is either an initial assumption (axiom, subsidiary assumption, or datum) or a logical consequence of one or more initial assumptions" (Bunge 2009, 434) . I will return to this distinction between exact and Humanities disciplines later in the paper. First, however, I introduce the features - four central and two complementary - that "great scientific theories" should meet simultaneously:

> "(i) To *systematize knowledge* by establishing logical relations among previously disconnected items; in particular, to explain empirical generalizations by deriving them from higher-level hypotheses. (ii) To *explain facts* by means of systems of hypotheses entailing the propositions that express the facts concerned. (iii) To *increase knowledge* by deriving new propositions (e.g., predictions) from the premises in conjunction with relevant information. (iv) To *enhance the testability* of the hypotheses, by subjecting each of them to the control of the other hypotheses of the system. (...)(v) To *guide research* either (a) by posing or reformulating fruitful problems, or (b) by suggesting the gathering of new data which would be unthinkable without the theory, or (c) by suggesting entire newlines of investigation. (vi) To *offer a map of a chunk of reality*, i.e. are presentation or model (usually symbolic rather than iconic) of real objects and not just a summary of actual data and a device for producing new data (predictions)" (Bunge 2009, 436-437).

I will also present below other opinions related to the functions of a (political) theory and the possibility of identifying a rapprochement between the two points of view.

2.2. Humanities vs. Sciences

How can we connect the discussion from above to the subject of this paper? One possibility is to appeal to a text by Septimiu Chelcea (2004) where theory is explained as "a set of statements with truth value regarding the relations between phenomena", immediately underlining the particularity of "social and behavioural sciences [where] theories have different levels of generality", an openness *to middle-range theories* Robert K. Merton formulated in the 1950s. The evolution of conceptions concerning the meaning and role of theory in the social sciences (and not only) is clearly highlighted in an 1999 article written by Lars Mjøset; he identifies in this area four meanings of the concept of *theory*, where two are gradual variations of its (deductive - nomological) positivist meaning (see Bunge above) and the other two subscribe to Karl Popper's critical rationalism view:

Table 1. Four notions of theory in social science

	Law-oriented	Idealising	Constructivist	Critical theory
Committed to the deductive nomological ideal	+	+	÷	÷
Accepts that sciences studying human actions are distinct form generalizing natural sciences	÷	+	+	+
Accepts that ethical fundamentals matter for social science theory	÷	÷	÷	+
Source: Mjøset 1999.				

Considering Mjøset's explanations, the approach I develop is close to his first type of notions[1], in Merton's terms; however, as I argue below, some components of the framework I discuss here subscribe to considerations that would qualify it as constructivist, although the existing arguments are rather clearly related to the rationalist area. It seems, therefore, that also between theories of the Humanities disciplines there are still many differences on the intension of a concept; in this respect, I will further investigate the particular case of the political theory.

2.3. What does political theory stand for?

I turn therefore to the question: *what is political theory*? In an attempt to identify the defining features, useful for the present research, I refer to a Michael Oakeshott 's essay bearing the same title *What Is Political Theory?*, where the purpose is not to explicitly identify a definition for political theory, but rather "an enquiry about how such a question may be answered". The starting point is to appeal to the Greek origins of the concept of theory, insisting that *theoria* means "the act or procedure of seeking to understand what is going on, 'theorizing'"; on the other hand, *theorema* seen as "a conclusion (...), 'understanding' of what is going on". In this way, Oakeshott points out that (1) nowadays the concept of *political theory* ambiguously refers to both "an activity or a conclusion"; (2) one should not forget that theorizing refers to the process, not to the attempt to "validating or 'proving' a conclusion reached" (1961, 391-392).

To simplify the conceptual analysis, I will now refer to the definition of political theory mentioned in the *Blackwell Encyclopedia of Political Thought*; there, political theory is

[1] Mjøset's types of notions are:
The law-oriented notion of theory: according to Karl Popper, in social sciences one cannot identify laws with universal application, and the scientific approach should be geared towards identifying „regularities that apply only within specific contexts"; an example here is represented by Robert Merton's *middle range theories*, that „were legitimated by reference to the deductive-nomological ideal, but allowed contextual explanations unrelated to laws" (see Merton R. 1949. Social Theory and Social Structure. New York: Free Press);
The idealising notion of theory: following Max Weber and Georg Simmel, theory is regarded as referring to those „*ideal* situations" in which all variables can be controlled so that research - from the rational choice theory, for example - is carried out taking into account the fact that „«laws» in the social sciences are *ideal types*, idealizations of human motives";
The constructivist notion of theory: one draws attention here to the permeability of the area separating „science and everyday knowledge" the chosen example being Kuhn's explanation on normal science developed by research communities by virtue of paradigms commonly accepted at some point, a reason to often support the idea that „the most influential groups in the social system define what scientific theories are";
Critical theory: influenced by Jürgen Habermas, critical theory - less interested in the development of explanatory frameworks - approaches constructivism when it acknowledges that theories are socially influenced, nevertheless adjusting its relativistic inclination „by reference to an ethical foundation defined by communicative ethics". Thus, in social sciences, „lawlike regularities(…) are evaluated through collective reflection on their legitimacy" (Mjøset 1999).
The above mentioned arguments are summarized in Table 1.

defined as a „systematic reflection on the nature and purposes of government, characteristically involving both an understanding of existing political institutions and a view about how (if at all) they ought to be changed" (Miller 1991). Drawing attention to the rather recent acknowledgment as an independent academic discipline, the same encyclopedia operates a distinction between three types of statements present in modern science - empirical, formal and evaluative -, thus underlining the delimitation between political theory and science, on the one hand, and philosophy, on the other, through the focus it has on evaluative statements. In addition, four interpretations of political theory are summarized, that co-exist in contemporary approaches:

1. „Political theory as the history of political thought", a study of classic works;
2. „Political theory as conceptual clarification", an operationalization of key concepts used in political rhetoric;
3. „Political theory as formal model-building". Its role is to explain how a theory operates, or to indicate the final results and the implications of different political processes;
4. „Political theory as theoretical political science", an effort that „synthesizes particular observations and low-level empirical generalizations into a general explanatory framework", in this case without insisting on the normative input (Miller 1991).

A similar view is shared by Terence Ball and Richard Dagger (1995); the authors stress that both political theories and ideologies meet four similar functions, but the political theories perform them in a more objective manner. The four functions (of ideologies, but which – I underline – the authors see also applied, at a different level, to political theories) discussed are:

a. Explanatory function: it answers to the "why?" question, facilitating the understanding of the reasons for which current circumstances (either social, political or economic) exist. In Ball and Dagger's work, this definition stresses that it particularly applies in times of crises, but the end of the argument is an attribute more suitable for a function of ideology, not necessarily political theory;
b. Evaluative function: it provides measures to assess the social conditions. In this situation, I also believe one should make an addendum, inserting this time specifications such as "economic, political, etc." in order to properly adapt this function to the case of political theory;
c. Orientative function: it allows to define one's identity and to affirm it, both socially and territorially speaking. In this formulation, this function would be rather appropriate to ideologies, being quite difficult - but not impossible (see the case of standpoint theories) to be assumed by political theories;
d. Programmatic function: it provides a program of political action, answering to the questions regarding "what needs to be done?" and "with what means?". In the language of political theory, here one can find the *normative* dimension usually covered by any political theory (Ball and Dagger 1995, 22-24).

Summarizing previous arguments, the following ideas could be observed: I chose a line of research that understands political theory in the sense of conceptual clarification. This political theory should fulfil certain functions. I turn now to the functions of scientific theory listed by Bunge in order to show that there is a high degree of overlap between them and those identified by Ball and Dagger particularly for political theory; however, the comparison does not have the purpose of equating political theory with the theories from the exact disciplines:

Table 2. The functions of scientific and political theories. A comparative view

Functions of scientific theory (Bunge 2009)	Political theory as conceptual clarification (Miller 1991)	Functions of political theory and ideology (Ball and Dagger 1995)
Systematizing knowledge	X	Explanatory and evaluative functions
Explaining facts	X	Explanatory function
Increasing knowledge	X	Explanatory and evaluative functions
Enhancing the testability of the hypotheses	X	Explanatory and evaluative functions
Guiding research	X	Normative function
Offering a map of a chunk of reality	X	Evaluative function

One should have a deeper look into the relation between political theory and science, this time political science. In 2004, Stephen K. White and J. Donald Moon have edited a volume entitled suggestively with the same *What Is Political Theory?*; the assumed aim was, on the one hand, to identify the new features of political theory in the current socio-political context influenced to a considerable degree by globalization[2], and, on the other hand, to question the current relationship between political theory and political science. Thus, in the introductive section, Stephen K.White starts from a simple observation: the resurgence in the '70s (of the XXth century) - after decades of oblivion or minimized importance - of the academic interest towards political theory, despite the fact that in 1962 Isaiah Berlin had already published the essay "Does Political Theory Still Exist?" [3] where the discussions regarding the disappearance of political theory were explained as a temporary shortage of great theories, a situation believed to be, therefore, reversible. However, nowadays, political theory must confront new phenomena that act simultaneously, as well as a pluralism strengthen by globalization; for this reason, the object of political theory becomes complicated, yet durable, given the scale and unpredictability of these phenomena (White 2004, 1-4). In the same volume edited by White and Moon, Ruth Grant examines political theory in relation to political science, emphasizing older arguments existing in the literature, according to which "research in political theory resembles humanities research far more closely than it does scientific research" (Grant 2004, 175). Rejecting a *facts versus values* dichotomy in the relationship between a possible object of interest of the humanities and respectively of the sciences (social, mainly), Grant proposes an understanding of them as follows: the humanities area seeking "to explain meaning and significance, whereas the latter seeks to explain mechanisms of cause and effect". Thus, in humanities research, interest is on the meaning and importance of phenomena that depend heavily on context, so that methods commonly used are interpretative and historical, while there exist, of course, competing understandings of the same set of phenomena; an additional explanation is given here: "whereas the sciences are primarily concerned with knowledge of cause and effect, the humanities are primarily concerned with understanding of meaning and judgment of significance", so that in the latter case evolution of the field is assessed in terms such as „increasing depth, clarity, and comprehensiveness" (Grant 2004, 177-182).

[2] For Dryzek, Hohig and Phillips, the diversity in understandings of the term "political theory" leaves room for the same "commitment to theorize, critique, and diagnose the norms, practices, and organization of political action in the past and present, in our own places and elsewhere" (2006, 4).

[3] Berlin, Isaiah. 1999. Does Political Theory Still Exist. In *Concepts and Categories: Philosophical Essays*, ed. Henry Hardy. Princeton, NJ: Princeton University Press *apud* White, 2004.

Grant notes that politics has both scientific and humanistic goals, meaning that "the study of politics needs both to seek general laws to explain the causes of political behaviour and to develop interpretations of the meaning and significance of political events and conceptual regimes to inform evaluative judgments of them" (Grant 2004, 187). There are, therefore, two aspects – interconnected or that need to be interconnected in order to generate viable explanations – of the study of politics, both equally important: political science and political theory. For Ian Shapiro, the problems associated with political theory derive from the older "separation of normative from empirical political theory", a situation that led to the construction of a counterproductive dichotomy between political philosophy and political science; it resulted therefore a political science much too method-driven and less problem-driven, and researches were constrained by appealing to a few theories (theory - driven) - a situation that could be corrected by analyzing very particular issues through different theories (theory - laden), while explicitly assuming the implications of adopting one theory over another (Shapiro 2004, 193-195 , 198-200). The role of political theory would be to guide research towards different problems, leaving open the possibilities to analyze them theoretically and methodologically.

Dryzek, Hohig and Phillips do not contest neither the fact that political research has, for a considerable period of time, been strongly oriented towards "formal and quantitative", with theoretical models and methodologies influenced by the exact sciences, nor the fact that "qualitative and interpretive approaches" have recently started to recover lost ground; within these centrifugal tendencies, for them, political theory "is located at one remove from this quantitative vs. qualitative debate, sitting somewhere between the distanced universals of normative philosophy and the empirical world of politics" (Dryzek, Hohig and Phillips 2006, 4-5). For this reason, it takes real inquiries regarding the connections of political science with political theory (leaning, maybe too much, on empiricism), history (emphasizing the context of analyzed items), philosophy and the "real world" (in order to mitigate the normative character of different scenarios developed away from everyday life) (Dryzek, Hohig and Phillips 2006, 7-10)[4].

I will briefly apply the conceptual analysis to the role of political theory in the policymaking process. The relationship between political theory and contemporary political events should not be overlooked, as the danger is twofold: either a massive abstract theoretical discourse and a loss of touch with the social and political reality, or a pronounced regulatory interference of this speech, without taking into account differences that exists between a designed theory and the induced changes determined by its effective implementation. Adam Swift and Stuart White reconcile theory and "real politics" proposing a middle way solution where political theory has a place „crucial and fundamental, but (...) also modest and limited" in the policymaking process[5]; the authors believe that policymaking should take the form of a "collaborative division of labour" in which three parts cooperate: (a) the political theorist that „ clarifies concepts, interrogates claims about how the political community should organize its collective affairs (including claims about what should count as that community's 'collective affairs'), and argues for particular principles (or conceptions of values, or balances of competing values)"; (b) experts of various kinds that empirically test the possible impact of proposals coined by academics; and (c) politicians – considered as

[4] For more examples of the relationship between political theory and other disciplines or subdisciplines and the "continuous overlap and symbiosis of these terms in the European political vocabulary", see Vincent 2004, 8.

[5] Dryzek, Hohig and Phillips also largely investigate the relationship between comparative politics - with a well defined theoretical interest and methodological options that rarely include references to the influence they can have on outcomes – and political theory, insisting that public policies, which are at the "applied end of political science", should benefit from a normative input coming from political theory, especially in the stages of policy design and policy evaluation (2006, 28-29).

"practitioners" – which choose from the sets of policies they dispose of those that are accepted by the electorate, ensuring their political victory (Swift and White 2008, 49-51, 68)[6].

I turn now to the political theory in the context of European Union Studies.

2.4. What is the relation between political theories and theories of European Integration?

Before analyzing the relationship mentioned in the subtitle of this section, I think that it is necessary to have a discussion about the field of *European Union Studies (EUS)*, often identified as European Studies, although in this case the coverage is obviously wider and closer to an interdisciplinary dimension.

It is almost a truism to claim that theoretical development is influenced, on the one hand, by the academic context (synthesized by reference to paradigms in a Kuhnian perspective), and, on the other hand, by the socio-political context (Diez and Wiener 2009, 14). Regarding this latter aspect, there is a rich literature that emphasizes how much the EUS relate to the events that took place in the more than six decades of EU history[7]. Referring now primarily to the academic context, it must be said that the development of integration theories was influenced at the beginning by the theories of international relations (IR), considering that after the Second World War there was no academic interest for the European Union as such; this newcomer entity was broadly perceived as a large empirical field for testing the viability of prevalent theories, with a particular emphasis on specific issues relevant for the IR, such as: measures for granting peace in the new established international order, the viability of the Westphalian nation-state type to accomplish that purpose, etc. This is the context that determined the emergence of the first 'European' answers materialized in the federalist and neofunctionalist inputs.

EU's later development has led to a rapprochement between these IR-influenced studies and the instruments of CP, this shift being generated by the increased attention given by researchers to the EU treated as a *sui generis* political system. So, with a focus centred on the elements of the EU and not on the whole abstract entity, delimitations appeared, contrasting the classical general explanations and perspectives influenced by IR theories and major "problems" such as the preservation of peace, future of the state actors, etc. The central idea was now that the EU should become less examined in terms of IR theories, and more accordingly to the classical methodology of the analyses focused on polities interested in policy-taking and policy-making. In fact, the unique nature of the EU's institutional architecture can determine its equivalence with the political system (Hix 2011). Currently, some analysts argue for a reorientation towards the IR field; Ben Rosamond, for example, believes that the development of the IR theories has evolved towards a narrower relation with those of the comparative politics field, which is why he calls for the reintegration of IR theories within the EU studies, presenting two basic arguments: the influence of regional studies on the EU-related analyses in the context of globalization, and the position of this organization in the international political game (Rosamond 2007, 132).

In the same note, for Eising and Kohler-Koch (2005), the study of the originality of the European construction can be made either with the analytical tools of the IR or CP

[6] An example is the case of EU regional policy: starting from (i) its overall objectives of reducing different disparities between EU's regions, one should (ii) investigate through various studies what could be the impact coming from the supranational level (opportunities such as job creation, economic growth, etc., but also potential risks – e.g. inefficient or inadequate use of financial support) in order (iii) for the practitioners to be able to select from a list of possible activities those that are compatible with their political profile, with the local context, etc., and win voters to their side.

[7] Aiming to streamline my analysis, I use only the "European Union" collocation. However, its meaning varies in the context, and it may refer to (a) the European Communities from 1951 – 1993; (b) the European Union framework as provided by the pillar structured Maastricht Treaty; and (c) the European Union with legal personality as it is know after Lisbon Treaty's 2009 entering into force.

theories. In other words, the dispute between IR and CP also involves a third actor, this distinct (as more and more authors argue) field of *European Union Studies*. We may simplify the discussion saying that at a t_0 moment, they were perceived as two spheres which did not intersect. I think the new picture proposed by experts who believe that both types of studies can gain by establishing interdisciplinary dialogue could take – at t_1 – the form of a continuum defined by CP, and, respectively, IR theories. On this continuum, EUS lay somewhere in between[8].

In this view, the role of European integration theories would be of an undeniable importance, considering that „the highest educational purpose integration theory can serve is to understand the conditions of human association within the larger polity, the forces that shape the range and depth of its evolution, as well as the possibilities of improving the quality of the debate on such self-inquiring questions as 'where we are now, from where we have come and to where we might go'" (Chryssochoou 2009, 3). Basically, one can find here the previously discussed explanatory, evaluative and normative functions which integration theories would meet.

For Diez and Wiener, „European integration theory is thus the field of systematic reflection on the process of intensifying political cooperation in Europe and the development of common political institutions, as well as on its outcome. It also includes the theorization of changing constructions of identities and interests of social actors in the context of this process" (2009, 4). In fact, a systematic and extremely useful analysis of European integration theories can be found in the volume edited by Thomas Diez and Antje Wiener (2004 – first edition; 2009 – second edition) under the name of *European Integration Theory*. Here, a criterion used in the analysis of the theories refers to the functions that these theories have; in other words, it talks about the goals that guide the analytical approach. Hence, one can perceive:

1. Theory as explanation and understanding (it overlaps the explanatory characteristics present in Ball and Dagger's classification) of the causes or development of a phenomenon;
2. Theory as description and analysis (it overlaps the evaluative function and, partly, the explanatory one) which involves „the development of definitions and concepts (...), labels and classifications";
3. Theory as critique and normative intervention (i.e. the normative function earlier mentioned) which questions the existing realities questioning or provides „normative alternatives" (Diez and Wiener 2009, 18)[9].

To sum up, these arguments were aimed to show that European integration theories are political theories, considering that (a) they observe Ball and Dagger's criteria and (b) they offer, following Blackwell Encyclopedia's wording, various „systematic reflection[s] on the nature and purposes of government, characteristically involving both an understanding of existing political institutions and a view about how (if at all) they ought to be changed"

[8] If the discussion is extended beyond the realm of political studies, it should also be mentioned that the term "EU studies" is a much better defined area of research than "European studies", as well as an area more opened towards interdisciplinary (but rather with multidisciplinary results); it is widely recognized that overwhelmingly the political perspective dominates these studies where one can find contributions of legal sciences, the economics, sociology or history, for example (Bourne and Cini 2006), and this situation will persist for long enough, because I do not see at this point any serious competitor for political studies.

[9] Jupille (2006, 210-212) is the author of one of the few examples of analyses containing meta-theoretical considerations regarding EUS. From his point of view, there would be five „meta-theoretical dimensions" that structure this field: (a) the ontological dimension (EU as a material or subjective entity); (b) the epistemological dimension (positivist vs. post-positivist approaches); (c) social theoretical dimension (rationalism vs. constructivism in perceiving identities and interests of actors); (d) the disciplinary dimension (various explanations provided by different disciplines or different sub-disciplines influence the research design; the example shown here is a classic one in EU studies: IR vs. CP): (e) scholarly style dimension (general vs. particular in establishing research themes). These meta-theoretical dimensions are intersecting one another, and – even if certain combinations are impossible - they lead to different political theories within the EUS framework.

(Miller 1991). Moreover, EUS, in general, and theories of European integration[10], in particular, manage to create a link between political science and political theory considering that they both identify general explanations regarding "the causes of political behavior" and they "develop interpretations of the meaning and significance of political events and conceptual regimes to inform evaluative judgments of them" (see Grant 2004). In addition, the diversity of the theories of European integration represents a trump card that can help scholars avoid theory-driven or method driven researches in exchange for theory-laden approaches that would "guide research towards different problems, leaving open the possibilities to analyze them theoretically and methodologically" (Shapiro 2004). In this way, EUS present the opportunity to realize in a more undemanding manner the connection between theorists, experts and politicians in shaping the scope and form of the polity, political and policymaking processes.

3. Conclusions

The main argument of the article was that European integration theories are genuine political theories, according to the definition of theory in general and of political theory in particular, with emphasis on the functions any political theory should be able to perform. This demonstration is meant to consolidate the position of European Union Studies' field within the broad political science research. Future analyses on this subject could strengthen the EU studies position and their relation with International Relations and Comparative Politics - continuing, for example, Alex Warleigh's (2006) efforts - by investigating the existence of specific features regarding the methodology applied in both of these cases.

References

- Ball, Terence and Richard Dagger. 1995. *Political Ideologies and the Democratic Ideal*. Second edition. Harper Collins College Publishers.
- Bourne, Angela and Michelle Cini. 2006. "Introduction". In *Palgrave Advances in European Union Studies*, ed. Michelle Cini and Angela K. Bourne, 1-18. London: Palgrave Macmillan.
- Bunge, Mario. 2009. *Philosophy of Science: From Problem to Theory* (vol. I). Transaction Publishers, Fifth Printing.
- Chelcea, Septimiu. 2004. *Metodologia cercetării sociologice. Metode cantitative și calitative*. Second edition. Bucharest: Editura Economică.
- Chryssochoou, Dimitris N. 2009. *Theorizing European Integration*. Second edition. Sage Publications.
- Cini, Michelle and Nieves Perez-Solorzano Borragan eds. 2010. *European Union Politics*. Third edition. Oxford: Oxford University Press.
- Diez, Thomas and Antje Wiener. 2009. "Introducing the Mosaic of Integration Theory". In *European Integration Theory*, Antje Wiener and Thomas Diez eds., second edition, 1-22. Oxford: Oxford Univeristy Press.
- Dryzek, John S. Bonnie Honig and Anne Phillips. 2006. "Introduction". In *The Oxford Handbook of Political Theory*, John S. Dryzek, Bonnie Honig and Anne Phillips eds., 3-41. Oxford: Oxford University Press.
- Eising, Rainer and Beate Kohler-Koch. 2005. "Introduction: Network governance in the European Union". In *The Transformation of Governance in the European Union*, ed. Beate Kohler-Koch and Rainer Eising, 3-12. Routledge.
- Grant, Ruth W. 2004. "Political Theory, Political Science, and Politics". In *What Is Political Theory?*, Stephen K. White and J. Donald Moon eds., 174 – 192. Sage Publications.
- Hix, Simon. 2011. *The Political System of the European Union*. Third edition. New York: Palgrave Macmillan.
- Ion, Oana – Andreea. 2013. Guvernanța Uniunii Europene. Abordări actuale. Iași: Polirom.
- Jupille, Joseph. 2006. "Knowing Europe: Metatheory and Methodology in European Union Studies". In *Palgrave Advances in European Union Studies*, ed. Michelle Cini and Angela K. Bourne, 209-232. London: Palgrave Macmillan.

[10] For a complete list of the European integration theories I refer to, see Ion 2013.

- Lelieveldt, Herman and Sebastiaan Princen. 2011. *The Politics of the European Union*. Cambridge University Press.
- Miller, David (ed.). 1991. *The Blackwell Encyclopaedia of Political Thought*. Blackwell Publishers, version reprinted 2000. Electronic version.
- Mjøset, Lars. 1999. (Published in ARENA Working Paper: 11.01.2000). "Understanding of Theory in the Social Sciences". *ARENA Working Papers*. WP 99/33. Available online at http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers1999/wp99_33.htm, accessed on January 2014.
- Oakeshott, Michael. 1961. "What is Political Theory?" Republished in *What is history? and other essays*, Luke O'Sullivan ed., 391-402. Imprint Academic: 2004.
- Rosamond, Ben. 2000. *Theories of European Integration*. Palgrave Macmillan.
- Rosamond, Ben. 2007. "New Theories of European Integration". In *European Union Politics*, ed. Michelle, 117 – 136. Oxford: Oxford University Press.
- Shapiro, Ian. 2004. "Problems, methods, and theories: What's Wrong with Political Science and What to do about it". In *What Is Political Theory?*, Stephen K. White and J. Donald Moon eds., 193 - 216. Sage Publications.
- Swift, Adam and Stuart White. 2008. "Political theory, social science, and real politics". In *Political Theory Methods and Approaches*, ed. David Leopold and Marc Stears, 49-69. Oxford University Press.
- Vincent, Andrew. 2004. *The Nature of Political Theory*. Oxford University Press.
- Wallace, Hellen, Mark A. Pollack and Alasdair R. Young. 2010. *Policy-Making in the European Union*. Sixth edition. Oxford: Oxford University Press.
- Warleigh, Alex. 2006. "Learning from Europe? EU Studies and Re-thinking of 'International Relations'". *European Journal of International Relations*, vol. 12 (1), 31 - 51.
- White, Stephen K. 2004. "Pluralism, Platitudes and Paradoxes. Western Political Thought at the Beginning of a New Century". In *What Is Political Theory?*, Stephen K. White and J. Donald Moon eds., 1 – 11. Sage Publications.

THE ROLE OF THE EUROPEAN UNION AND OTHER INTERNATIONAL ORGANIZATIONS IN THE PROCESS OF THE REGIONALISATION OF THE PEACEKEEPING OPERATIONS

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Abstract

Due to the increase and complexity of conflicts with internal and international caracter the United Nations had to realize that their capacity to protect peace and international security have been surpassed by the caracteristics and dynamics of the conflicts that the international society has been confronted with. In this context the regional organizations had to assume a number of tasks on their own or in cooperation with the United Nations with the objective to contribute to maintaining international peace and security.

Keywords: *peacekeeping operations, regional organizations, United Nations, peace and international security.*

Introduction

The regionalization of the peacekeeping missions (PKM) is a process with which the regional organizations (RO), subregional organizations or similar agreements are involved in the initiative, constitution, dispersion and management of peacekeeping missions. They act either in an autonomous way or in a common action with the United Nations respecting the principle of cooperation and according to what is established in the Charter of the United Nations.

Without doubt this process of regionalization of the peacekeeping missions results from several historical events that in one way or another has contributed to its realization. Among the factors that led to the regionalization of the PKM we can destinguish: the end of the Cold War[1], since during this historical process the Security Council of the United Nations saw itself many times incapable of deciding upon a dispersion of a PKM. Either the United States of North America interfered or the Ex-USSR depending on the country in which the PKM was going to be dispersed.

It has to be mentioned that the Cold War was the main reason for the illegitimate application of the dispositions of the chapter VIII of the Charter of the United Nations since it limited the capacity to act for the regional organizations, in respect to the management of determined crisis that affected international peace and security. This situation resulted in the fact that United Nations capacity to act in internal conflicts got out of hands, as it happened in Somalia, Ruanda and Yugoslavia. This and the deep financial crisis in which this international organization was, drove the PKM[2] to a failure. Among other aspects for the failure was the absence of an own military body in the United Nations that would have permitted to exercise its functions and oblige to comply its resolutions, the reduction of cash money that the state

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[1] Inoue, Y. (1993). United Nations peace-keeping role in the post-cold war era: The conflict in Bosnia-Herzegovina. Loyola of los Angeles International and Comparative Law Journal, 16 (1), 245-274.

[2] Durch, W. (1993). The evolution of UN peacekeeping: case studies and comparative analysis. Washington, USA: Henry L.Stimson Center.

members aported for the realization of a PKM and the incapacity of the United Nations to move rapidly and effectively its cash, among other aspects[3].

With this investigation we are parting from the assumption that the process of regionalization of the PKM has permitted that the management of internal or international crisis that affect international peace and security could be deviated. This way the efforts to reach peace in certain areas have not been rejected by certain parties of the conflict, which had accused the United Nations not to be a valid interlocutor, since they had tolerated several decisions of its state members that had been on the outer margin of the Charter of the United Nations.

Regarding this it is the objective of this investigation to analyze the contribution of the process of regionalization of the PKM in order to achieve a pacific living together within the international community. The evolution of this process of regionalization will be studied, observing the different phases through which this process has gone. This way the leaving of the universal model of the PKM will be analyzed, the establishing of its process of regionalization and its reaching of perfect functioning. In the second part of this analysis the different forms will be regarded in which the PKM are implemented into the regional organizations (RO).

This investigation aims at: 1) contributing to the debate about the so called externalization or privatization of peacekeeping. 2) Reaffirm the importance of establishing a real and effective cooperation between the United Nations and the RO. 3) Establish that the actions taken by the RO in the area of peace and international security correspond to the norms of the Charter of the United Nations; 4) diffund the positive and negative experiences of the RO in this subject.

Finally we have to indicate that the present investigation uses a multidisciplinar method in which theory and practics are of the RO in maintaining peace and international security. Regarding the sources used, it was consulted the international doctrine as well as different norms that emanate from the United Nations and the regional organizations.

The following paragraph will study the process of regionalization of the PKM with several meetings and agreements that have been adapted by the United Nations and the RO.

1. Evolution of the process of regionalization of the PKM

The first efforts taken by the United Nations and the RO in order to reach an efficient cooperation in the area of peacekeeping began in 1991, when the General Assambly of the United Nations solicited one of its special comitees, in particular the one of the Charter of the United Nations and the of strengthening the role of the organization that they would concede priority to topic related to peacekeeping and international security with the objective to strengthen the role of the United Nations[4].

In this context in January 1992, the Security Council of the United Nations invited the General Secretary to do an analysis and to give a recommendation in respect to the capacity of the United Nations in the area of preventive diplomacy and in establishing and maintaining peace. Also the contribution should be studied that the RO could make to peace and international security.

In the framework of the United Nations a document with the title "Agenda for Peace" was emitted in which was tried to reach the participation of the RO together with the United

[3] Boutros-Ghali, B. (2000). À la recherche de la paix. Recueil des Cours: Collected Courses of the Hague Academy of International, 23-26. Sidhu, W. (2003).The United Nations and regional security: Europe and beyond. Boulder, USA: Lynne Rienner Publishers.

[4] United Nations. Resolution A/RES/46/58 of 9 December 199, "Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization".

Nations in all operations aiming to maintain peace. Considering that there was not established a precise definition of what an agreement or a regional organisation was, it was possible to enlarge the criterion in which was defined what entities could be regarded as RO. Nothing contrary could be extracted from what is written in the article 52 to 54 of the Charter of the United Nations and this way the criterion was changed dramatically which accepted until this date only three regional organizations: The Organization of the American States, The League of Arab States and the African Union as regional organisms or agreements, with effects from the chapter VIII of the Charter. Later, in January 1993 the President of the Security Council of the United Nations invited the RO, in order to study the means with which the cooperation between them and the United Nations could be improved in the area of peace and international security.

Now the different phases are going to be analyzed of the process of regionalization of the PKM. Among thes phases we can point out: the leaving of the universal model of the PKM, the establishing of a process of regionalization of the PKM and the perfectioning of the process of regionalization of the PKM.

1.1. Leaving behind the universal model of the PKM

After the publication of "Agenda for Peace" and with the new vision of what could be understood by a regional agreements a number of meetings took place with the General Secretary of the United Nations and the highest representatives and the main international organizations with regional caracter. The links of cooperation between these organizations in respect to maintaining peace should be strengthened. The first meeting between the representatives of the United Nations took place on the 1st of August of 1994 with the objective to establish the principles with which they would act, the areas where they would intervene mutually and the ways in which they would cooperate. In this meeting they came to the conclusion that it was necessary to adopt a flexible coming closer between the organization with universal caracter and the organizations with regional caracter. This coming closer would have to be pragmatic and decisions would have to be taken from case to case rather instead of adopting a universal model for cooperation, a way of acting which depended mainly on the fact that financial means were lacking for conducting peacekeeping operations. The interchange of information in regard to the crisis that were coming up became the main mechanism that surged from the first conference.

On the 17th of February 1995, the General Assemly of the United Nations established in the " Declaration about a better cooperation between the United Nations and the agreements and regional organisms of peacekeeping and international security", the need that the regional agreements, should begin to develop a more active role in the pacific solution of controversies, in the preventive diplomacy and in the establishment, maintaining and consolidating of peace, as long as they were conform with the principles and suggestions of the Charter of the United Nations and repected the souvereinity, territorial integrity and political independence of the States[5].

1.2. The establishment of the process of regionalization of the PKM

The process of cooperation between the United Nations and the RO, within the area of regionalization of the PKM, evolved more smoothly during the second meeting that took place between the representatives of the United Nations and the RO, which took place on the 12th of February of 1996 with the objective to analyze in more details topics such as the

[5] United Nations. (1995). Resolution A/RES/49/57 of 9 December 1994, "Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security" .

preventive diplomacy, the peacemaking and peacekeeping operations and the maintaining of peace. At the same time in this meeting aspects were taked about in respect to the forms in which such a cooperation should be developed, the principles that should inspire them and the mechanisms to improve the dialogue between them.

In this event participated with the United Nations thirteen international organizations with regional character. Among others participated the General Secretary of the Organization of American States, the representatives of the Presidency of the European Union, the Auxiliary General Secretary of the North Atlantic Treaty Organization and others. With the participation of these different RO in terms of their objectives and nature, the adoption of a wide criterion in regard to the definition of what could be considered a RO was consolidated finally and definitely.

Regarding the great number of internal conflicts that took place in Africa, the Security Council of the United Nations asked its General Secretary, to elaborate a report about the causes of the conflicts in Africa and about the ways in which the United Nations could cooperate with the RO and subregional organizations that took measures in this continent. In response to this pledge on the 13th of April, 1998, the General Secretary of the United Nations emitted a report titled "the causes of the conflicts and the foundation of long-lasting peace and a sustainable development in Africa[6].

In this report, it was admitted that the United Nations had committed some errors in certain cases, for example the fundamental rights had not been protected properly of the citizens of some African countries where PKMs had been carried out, so for example in Somalia and Ruanda. Considering this, the international community was asked to act and to explore new means to promote peace and security in this continent. Among this means the process of regionalization of the PKM was an important contribution since the RO had better military and financial resources in order to execute a PKM than the United Nations. Later, on the 28 of May 1998 the Security Council adopted the resolution S/RES/1170 (1998), that took up the report presented by the General Secretary and establish a working group that should analyze the recommendations of the report in regard to maintaining peace[7].

Considering the African situation, on the 29th of July 1998 a third meeting took place between the General Secretary of the United Nations and the representatives of the RO where it was suggested to increase the cooperation in preventive actions that these organizations carried out, in order to improve the interchange of information, train the staff in a common ws ay and to make the civil population aware of the importance of preventing conflicts. Following these suggestions within the process of regionalization of the PKM the Security Council adopted the declaration S/PRST/1998/28 on the 16th of September 1998, with the objective to recommend the strengthening of the RO and African subregional organizations to participate in the PKM that were carried out on this continent.

Later on the 6th of February of 2001 a forth meeting took place between the representatives of the RO and the General Secretary of the United Nations, in which the subject of the peace-building operations was talked about. In this meeting a number of directives could be established that guided the acting in such operations, whenever they were linked to a PKM. This way the cooperation between the United Nations and the RO can become an important aspect for negotiations to reach peace in certain areas and to promote security and stability there. The negotiations can also incentivate a good government,

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[6] United Nations, Report of the Secretary-General on the work of the Organization, The causes of conflics and the promotion of durable peace and sustainable development in Africa, 13 April 1998. Berman, E. & Sams, K. (1999). The limits of regional peacekeeping in Africa. Peacekeeping & International Relations, 28 (4), 1-2.

[7] With the report presented by the General Secretary Kofi Annan and the suggestions made by the work group the Security Council of the United Nations adopted several resolutions with respect to Africa. Among the main resolutions can be found: S/RES/ 1171 of 5 June 1998; S/RES/1196 of 15 September 1998; S/RES/1197 of 16 September 1998 and others.

democracy and the respect for the human rights and the promotion of justice, reconciliation and development[8].

1.3. The perfectioning of the regionalization of the PKM

The intention to continue with the perfectioning of the process of regionalization of the PKM could be seen when between the 29th and 30th of July 2003 a fifth meeting between the General of the United Nations and the representatives of the RO took place. The main challenges for peace and international security affecting the world at this moment should be analyzed. The participants of this meeting pointed out that there existed the need to have such meetings more frequently. By meeting more often a better interchange of strategical, operational and political could take place[9].

On the 24th of September 2003 the United Nations and the European Union emitted a common declaration about the cooperation between both organizations for the management of military crisis. According to their agreement they wanted to deepen the cooperation that had started during the Balcan conflict by transfering responsibilities of the United Nations` International Police Task Force to the European Union Police Mission in Bosnia and Herzegovina.

In the sixth meeting between the United Nations and the representatives of the RO, which took place from the 25th to the 26th of July of 2005 it was repeated that the prior responsibility for peace and international security corresponded to the United Nations. In this context the European Union recognized the primary role of the Security Council in the area of peace and international security. They accepted that it was a priority that the United Nations could return to act with complete power in this objective.[10] However, with this declaration it was also declared that the European Union could carry out their own PKM. But in regard to the PKM that the EU could carry out in cooperation with the United Nations a number of modalities were established. So, for example can be distinguished the Support Operations according to which the EU acted under the mandate of the United Nations as it happened in Bosnia and Herzegovina. At the same time it was possible that the EU could carry out operations in which it would take over political control and strategic management of a component of a mission of the United Nations. Also, it was considered the possibility to establish a PKM with a bridge model, according which the European Union would deploy a PKM in a provisional way until the United Nations would implement an operation or reorganize the existing one[11], just as it happened in the case of the Operation Artemis. Finally, another model of cooperation was contemplated which could be called reserve model, where the EU would put its military forces under the control of the United Nations. This model would be useful in the United Nations missions in Africa.

Finally, with respect to the process of regionalization of the PKO it can be said that after many summits organized between the United Nations and the RO, this process has been consolidated, thanks to the diplomatic forces that have tried to create appropriate mechanisms that allow these PKM (that do not form part of the structure of the United Nations and that for this reason are no subsidiary organs of the Security Council) contribute to maintain a pacific living together between the members of the international community. However, with the beginning of the process of regionalization of the PKM (also called process of externalization or privatization of maintaining peace), the United Nations slowed down its activities in the

[8] United Nations, Secretary-General, Press Release SG/SM/58958. (1996). Secretary General to convene first meeting between UN and Regional Organizations, 1996, p. 1.
[9] United Nations, Secretary-General, Press Release SG/2084. (2003). Secretary General to convene fifth meeting between UN and regional organizations. 2003, pp. 1-2.
[10] European Union, "Joint Declaration on UN-EU cooperation in crisis-management", 24th of September 2003, paragraph.
[11] Ibid., paragraph 9-12

area of maintaining peace and international security, and it limited its activity to simply authorize the RO to implement a PKM and to use force whenever it was necessary to defend its mandate. This way a convergence was produced between the universal centralization and the regional decentralization in the execution of the functions linked to maintaining peace and international security.

Due to the indifference of the United Nations in respect to the realization of the PKM, the RO and the subregional organizations conducted great forces with the objective to contribute to maintain peace and international security. They established a number of mechanisms to resolve conflicts and to realize PKM within the respective, constituted treaties and within the norms that should allow them development. They committed themselves to conduct their actions in the area of peace and international security in accordance with the Charter of the United Nations. However, the capacity of the RO to establish and to maintain peace varies quite a lot. Some RO have obtained a great experience in this area and others are learning rapidly. On the other hand there are still RO that do not have the capacity to realize a PKM. According to the international doctrine[12], which has pointed out the need that in the area of international security the decisions should be adopted and executed on a multilateral scale, that means by the United Nations (that would act like a "public police") and not by military or civil contingents that the states put under the dispostion of a RO (that would act like a private police), and that in respect to them would try to maintain exclusiv control.

Regarding this the participation of the RO in the realization of a PKM is fundamental, since fundamental rights still have been vulnerated in cruel internal conflicts, that even in the 21. century keep affecting humanity. For this reason, to avoid the risk that would cause the fact that a RO acts in contrary to the dispositions of the Charter of the United Nations, the United Nations have to exercise an effective control over the acts of the RO in the area of maintaining peace and international security. However, it has to be said, that in reality the United Nations have been more concerned with the analysis of the conformity of the constitutional treaties of the RO with the dispositions of the Charter than they have verified the compatibility between the acts that the regional organizations have carried out during the realization of the PKM and the dispositons of the Charter[13].

But the United Nations should continue to help the RO, to capacitate them in crisis management, as long as the recourses permit this and consider the circumstances of each case in concrete. The cooperation and coordination between these organizations must be carried out in a constant, clear, balanced and not discriminating way[14]. So, the global system that regulates the maintaining of peace and international security is a product of constant interaction between the general system implemented by the United Nations and the particular systems implemented by the RO or the States that lead multinational forces.

2. The practical implementation of the PKM of the RO

In the present paragraph it is analyzed how the PKM have been developed that the RO have conducted in the international scenario. This way it is studied how the PKM have been

[12] Cardona, J. (2005).La externalización/privatización del uso de la fuerza por las Naciones Unidas. In A. Salinas de Frías, & M. Vargas Gómez-Urrutia (Eds), Soberanía del Estado y Derecho Internacional. Homenaje al profesor Juan Antonio Carrillo Salcedo (pp. 317-342). Sevilla, España: Servicio de Publicaciones de las Universidades de Córdoba, Sevilla y Malaga.

[13] According to the opinion of the international doctrine, the Charter of the United Nations has tried to avoid to give a specific qualification of the organizational model of peacekeeping to avoid the complete identification with an ideal model of centralization or decentralization und this way an ambivalent position can be kept. Vid. Sánchez, V. (2005). La potestad coercitiva de las organizaciones regionales para el mantenimiento de la paz. Medidas que no implican el uso de la fuerza armada. Madrid, España: J.M.Bosch Editor.

[14] Marnika, M. (1996). Regional peacekeeping: The case for complementary efforts. Peacekeeping & International Relations, 25, (3), 9-11.

placed in areas of conflict with the cooperation of the United Nations. Also, the civil, military and or mixed-operations will be analyzed that the RO have carried out in order to contribute to peace and international security.

Now we are going to analyze each one of the suggestions of how to implement the PKM of the RO.

2.1. The implementation of the PKM with cooperation of the United Nations

Before the beginning of the process of the regionalisation of the PKM of the RO it became evident that the United Nations needed to count on the cooperation of the RO, since several PKM occured and due to their complexity and nature they needed the interaction between both organizations. With the beginning of the process of regionalization, the RO, carried out a number of PKM in cooperation with the United Nations that can be classified as PKM: integrated, coordinated, parallels and sequentials.

2.1.1. The implementation of the integrated PKMs

From the lessons learnt from the experiences of the United Nations and the RO in Haiti and Kosovo this type of PKM can be characterized as one in which the application of the principle of cooperation has developed a unique or joint chain of leadership with the objective to persecute, contain, moderate and terminate the hostalities that are being produced in a conflict of internal or international nature. This objective is reached with a strict distribution of functions between the United Nations and the RO that participate in them.

This way, the International Civilian Mission in Haití (MICIVIH), that was established under a joint leadership chain between the United Nations and the Organization of American States in February 1993 has made a great contribution to the development of the process of regionalization of the PKM since it allowed to demonstrate the need and importance of a cooperation between the general system and a particular system implemented by a RO, when it was tried to reach the maintaining of peace and international security. Also with this PKM, it could be promoted and protected the fundamental rights of the citizens of Haiti that had been injured systematically[15].

Also the role of the United Nations Interim Administration Mission in Kosovo (UNMIK)[16], shall be pointed out, that was established to contribute and to reestablish peace and security in this area. In contrary to the MICIVIH, it was established under the unique leadership of the United Nations. Among the main lessons that we have learnt from the UNMIK it can be mentioned that it became evident that there was a need for a strict division of the functions between the United Nations and the RO that participated in a multifunctional PKM in order to avoid duplicity of the efforts to achieve the mandate of the mission and over all, to avoid that conflicts surge between the organizations that integrate a PKM. Precisely to strengthen the confidence and cooperation, between the organizations that participate in a PKM, the United Nations and the RO that cooperate with them, should designate an official of contact that would assume functions of getting closer together in case that differences between these two organizations occur and this way a quick solution can be provided for every problem if it affects the normal development of the PKM.

[15] United Nations, Report of the Secretary-General, The situation of the democracy and human rights in Haiti of 18 Novembre 1997.

[16] The RO that participate in UNMIK are NATO (in the area of military security), la OSCE (in the area of reestablishing a rule of law) and the EU (in the area of general reconstruction in Kosovo).

2.1.2. The implementation of the coordinated PKM

The participation of international organizations of universal and regional character in the conflicts that took place in Abjasia (Georgia) and between Etiopia and Eritrea have allowed to obtain a number of lessons in terms of describing what the characteristics of this type of PKM are. This PKM always carry out a number of formal and regular enquiries between them, with the objective to distribute functions and interchange experiences, regardless of the fact that the United Nations and the RO have sent out autonomous contingents and manage their own chain of leadership.

Within this type of PKM the work of the Collective Peacekeeping Forces of the Community of Independent States in Abjasia and the United Nations Observer Mission in Georgia(UNOMIG)[17] shall be pointed out, that had been established with the objective to investigate and to prevent the violations of the agreement on cease-fire and the separation of forces that had been signed in Moscow on the 14th of May 1994. It has to be said that both PKM, although they had been autonomous in respect to their structure and leadership control, coexisted in a coordinated way since June 1994. The Security Council of the United Nations was informed by the Council of the leaders of the State of the Community of Independent States, that in conformity with the dispositions of the chapter VIII of the Charter of the United Nations, they had decided to deploy a peacekeeping force in Abjasia (Georgia). In this context, the collective peacekeeping forces of the Community of Independent States in Abjasia and the UNOMIG had realized within a smooth cooperation common patrols in the Valley of Kodori with the objective to observe the situation with regularity and independence.[18]

The main lesson that we have learnt from this type of operation exists in the fact that with a coordination between the United Nations and the regional organizations in regard to the management of their peacekeeping operations the international organization with universal character can exercise a real and effective control over the activities that the regional organizations carries out in the area of maintaining peace and international security. Also it can be evaluated if the activities of the regional organizations are adequate and correspond to the dispositions in the Charter of the United Nations. For example in the conflict of Abjasia such a case took place when the Community of Independant States informed the Security Council of the United Nations about the force level and number of military staff that had been deployed in Abjasia and the activities that had been realized by this Euro-western regional organization, a situation that would problably not have happened that easily if the coordination mentioned before had not existed. This way the coordination between the peacekeeping operations deployed in a certain territory, have made it easier to fulfill the disposition in Article 54 of the Charter of the United Nations and at the same time allowed that from the side of the United Nations a control could take place of the activities that a regional organization conducted in an area and this way it could be contributed to in an efficient way to the stabilization of an area in conflict and it could also be prevented that armed conflicts would re-occur.

Also, the works have to been mentioned that have been done in a simultaneous and coordinated way by the United Nations Mission in Ethiopia and Eritrea (UNMEE) that was deployed by the United Nations and the African Union Liaison Mission for Ethiopia/Eritrea

[17] The United Nations Observer Mission in Georgia (UNOMIG) was established by the resolution S/RES/881(1993, 4 of November).

[18] Because of the veto of Russia that hindered the Security Council to prolongate the mandate, the United Nations Observer Mission in Georgia (UNOMIG) stopped its activities on the 15 of June 2009. (European Union, 2009, Declaration of the Presidency of the EU about the end of the Mission of the United Nations in Georgia, Brussels 19 of June 2009).

(OLMEE)[19], that was deployed by the African Union. As a main lesson that has left us the acting of these two international organization is the fact that they had institutionalized the coordination that took place between them. It was a common commission established between them and there could be faced all the aspects that made it difficult for each one of them to carry out their activities in the area of maintaining peace and where the United Nations were allowed to supervise the activities of a regional organization. This way the United Nations could control if the activities of a regional organization were apt with the dispositions of the Charter of the United Nations.

2.1.3. The implementation of the parallel PKM

Learning from the lessons taken by the experiences of the PKM that the United Nations and the Organization for an African Union carried out in Ruanda, this type of peacekeeping operation can be characterized as one where an organization of universal caracter and one of regional character limit their coordinations and use them only in an informal and sporadic way. Neither suitable mechanisms are established nor a stable coordination between the peacekeeping operations that have been deployed regardless of the geographic proximity of both.

In the empiric case the inconvenience to carry out this type of action in the area of peacekeeping and international security was demonstrated in the action taken by the United Nations and the African Union organization in Ruanda, when they deployed, in parallel and without any coordination the contingents of the Second Group of Neutral Military Observation of the African Union Organization (in order to supervise the fulfilling of the agreement of Arusha from June 1993)[20] and the Observation Mission of the United Nations in the frontier of both countries[21] (UNO, resolution 846 from 1993, 1993). This way an innecessary duplicity of forces was produced and the utilization of human resources and logistics. Finally this had to be remedied with the deployment of the Help Mission for Ruanda[22] that ended up absorbing the two PKM mentioned before helped to supervise the fulfilling of the Agreement of Arusha and the repatriation of the refugees, and objective that could not be reached before due to the constant dis-coordination that existed between the United Nations and the African Union Organization (at the moment African Union)[23]. The main lesson learnt from these experiences is, that the lack of coordination between the organizations involved in a certain territory can slow down or even interfere with the efforts for peacekeeping and international security. Also during this time of bad management it can be favored a environment in which the fundamental rights of the people affected in this conflict can be harmed.

2.1.4. The implementaion of the sequential PKM

The participation of the international organizations with universal and regional caracter that in the conflicts that occured in Burundi have taught us a number of lessions from which this type of PKM can be characterized, as those where the United Nations deploys

[19] With the resolution S/RES/1430 (2002) of 14 August the Security Council reaffirmed its support for the mission of the African Union and urged in continuing to support this peace process.

[20] The organization for the African Union (at the moment African Union), has deployed in Ruanda two neutral Military Observer Groups (NMGO I). The first group was deployed in July 1991 and the second group (NMGO II) was deployed between August and October 1993.

[21] United Nations. Resolution S/RES/846 of 22 June 1993.

[22] United Nations. Resolution S/RES/872 of 5 October 1993.

[23] Vid. Bruce, J. (1999). Military intervention in Ruanda's, two wars: Partnership and indifference. In B. Walter, & J. Snyder (Eds.), Civil wars, insecurity and intervention, (pp. 116-145) New York, USA: Columbia University Press. Walter, B. & Snyder. (1999). Civil wars, insecurity and intervention. New York, USA: Columbia University Press.

before of after a RO a PKM, resulting in a sort of replacement in crisis management in those areas where their military or civil contingents have been relocated.
The main lesson that we learn from this type of operations is that it has been demonstrated that due to the urgency with which it is required to deploy the contingents of a PKM in a certain place and with the incapacity to react operationally in an immediate way (in same cases) it can be useful to deploy the military and civil contingents provisionally. And this contribution can be realized between the United Nations and the RO assuring during this time period that the victims of the conflicts do not find themselves in a state of helplessness.

So the substitution and later absorption that took place in the Mission of the African Union in Burundi (AMIB) (Executive Council of the African Union, 2003) by the operation of the United Nations in Burundi (ONUB)[24] constitutes a typical case of sequential peacekeeping operation, that also permitted in a successful way to guarantee the respect for the cease-fire agreement, promote the reestablishing of trust between forces in Burundi, realize activities of disarmament and demobilization of troops, contribute to the finalization of the electoral process, etc.

2.2. The implementation of civil, military and/or mixed PKM

The different functions that have been assumed by the PKM of the RO have caused the need of not only deploying military forces in the PKM but also civil contingents or contingents with mixed composition that can carry out tasks such as humanitarian assistance or assistance in electorial processes. Considering this and according to this criterion the PKM can be: civil, military and/or mixed.

2.2.1. The implementation of the civil operations

This type of peacekeeping operation is characterized by the fact that it is only composed of civil members, whose main function is to supervise the respect for the fundamental rights, verifying the legitimity of the electoral processes, educate and make the civil population aware of the topic of pacification, among other aspects.

Within this type of PKM the acting of the International Civil Mission in Haiti has to be pointed out which was only composed of civil observers, that had the mandate to evaluate the situation of the human rights in Haiti. In regard to the number of observers that had been sent during the seven years of duration of this PKM it can be shown that the MICIVIH could deploy according to its mandate un contingent of up to 240 observers in the territory of Haiti. This way in October 1993 the mission had deployed 230 observers with 45 nationalities that operated in thirteen offices distributed everywhere in the territory of Haiti. Then in 1995 the number of civil observers that stayed in Haiti declined to a number of 193 observers[25], (89 sent by the OAS and 104 provided by the United Nations). However, during the electoral process for the legislative power and municipality which took place in 1995 in Haiti, the MICIVIH sent 120 observers[26]. Later, the presence of observers was reduced till 1996 to 64 observers (32 from the OAS and 32 from the United Nations) a number which remained on average till the end of the PKM in March 2000[27].

Also another case of this type of operation, the Observation Mission of the European Union in Georgia was approved by the Ministers of Foreign Affairs of the European Union on the 15th of September of 2008. With this operation a civil mission of 200 civil observers sent

[24] The United Nations Operation in Burundi (ONUB), was established with the resolution S/RES/1545 of 21 May 2004.
[25] United Nations. Resolution A/RES/49/57 of 17 February1995.
[26] Organization of the American States. (February 1996). Final report about the Election Observation Mission of the OAS about the legislativ and municipal elections in Haití.
[27] Daudet, Y. (1992). L'ONU et L'OEA en Haïti et le Droit international. Annuaire Français de Droit International, XXXVIII, 89-111.

to areas of security situated in Georgian territory around South Osetia and Abjasia with the objetctive to maintain peace and security in this area that has been convulsed by a conflict that contains a number of very complex aspects. This way the European Union supervised the draw-back of the Russion troops situated on Georgian ground beyond the two secessionist regions.[28]

2.2.2. The implementation of the military operations

The peacekeeping operations of this type are characterized by deploying military troops in the area that used to be in conflict with the objective to guarantee the peace process. They can even use force when they are authorized by the Security Council of the United Nations. In regard to the duration of the deployment of the military contingents in a certain state, it can be said that this can be for a short or long time. The first actual situation takes place when the peacekeeping operation is only constituted to serve a military back up which goes ahead the relocation of another peacekeeping operation.

The collective forces of peacekeeping of the Community of Independent States deployed in the area of Transnistria (Moldavia) constitute such a type of peacekeeping operation. With respect to this it has to be said that in regard to the conflicts in this area of Transnistria the Council of the leaders of state of the Community of the Independent States and the President of Moldavia decided to relocate these collective forces, that, before had been accused of not acting in an impartial way and to be extremely oriented to a military behaviour during the fulfillment of their mandate. So they had been the objective of several notifications and constant violations of the human rights and the International Humanitarian Law.

It has to be said that the PKM composed of military staff should consider that a military success is not possible by itself. During their activities in this peacekeeping operations they are not soldates of war but they are soldates of peace.

2.2.3. The implementation of the mixed operations

The present type of peacekeeping operation is characterized by the fact that it is deployed in a common way in the area where the mission is going to realize its activities with civil and military members and this way it shall be reached that continuing conflicts are avoided. It is the question if mixing civil and military agents in a PKM could generate a number of problems depending on the fact whether the actions that they are taking are carried out by these two parties in a mutual way or in case that they are not carried out in a mutual way if the differencies of their mandates, perspectives and means really lead to undermine the positive aspects of the PKM.

Considering this question it can be said that in the case of the Mission of the African Union in Burundi (AMIB) that was established in April 2003 the fact that it had been established by military contingents from South Africa, Ethiopia and Mozambique and also by civil observers from Burkina Faso, Gabon, Mali and Tunesia did not create any barriers that would have prevented a completion of the mandate, and due to its actions a adventagious environment could be created to establish the United Nations Operation in Burundi that it was finally substituted by.[29] Also the interaction that took place between the Kosovo Force and the United Nations Interim Administration Mission in Kosovo has marked an important milestone

[28] Manrique de Luna, A. (2009).The observation mission of the European Union in Georgia: Functions assumed by this peacekeeping operation. Journal of International Law of Peace and Armed Conflict, 22, (1), 41-43. Manrique de Luna, A. (2013) Las operaciones de mantenimiento de la paz de las organizaciones internacionales de carácter regional. Ed. Dykinson, Madrid.

[29] United Nations. Resolution S/RES/1545 of 21 May 2004.

in regard to distributing functions related to peacekeeping and international security between different organizations and considering advantages.

The European Union has also carried out a PKM with mixed composition with the deployment of the EU Support Mission for the Mission of the African Union in the Sudanese area of Darfur which was established with the Joint Action 2005/557/PESC of the Council from the 18th of July 2005 and it successfully contributed to the capacitation of the police componente of the Mission AMIS II which was deployed by the African Union in Darfur. For example it contributed by supporting with technical assistance, the sending of military observers and the instruction of troops.

Considering what was analyzed before it can be shown that the success of the PKM with mixed caracter results from the fact that it avoids that military forces that integrate the PKM start to assume functions that can be considered civil functions[30].This way and thanks to the great efforts between civilians and military troops it can be possible to reach long-lasting peace that can be improved with deeper links between both components that are involved in a peacekeeping operation[31].

Conclusions

Since the last century, the RO have started to assume a preponderante role in peacekeeping and international security. The criterion of what can be considered a RO that can carry out a PKM has become more open. This way the organizations with general, economic and/or defensive objectives have adopted a number of mechanisms that allow them to manage an internal or international crisis that puts in danger peace and international security. However it is necessary that the it has to be continued to improve the cooperation between the United Nations and the RO, so that the RO can improve the mechanisms to stabilize peace and international security and that they can count more and more on the acceptance of the parties that are confronted in a conflict. At every moment they have to respect and consider the dispositions of sthe Chapter VIII of the Charter of the United Nations during their activities.

The activities carried out by the PKM of the RO – with exeption of some not well received acts of the Community of the Independent States – can count with a major acceptance by the parties involved in internal or international conflicts, since there are less doubts about the legality of their actions and since it is easier for them to deploy en a certain territory in comparision with the United Nations, which could not overcome their difficulties in carrying out peacekeeping operations.

In the area of Europe the military activities have mainly been assumed by the North Atlantic Treaty Organization and the Community of Independent States. However, the European Union has developed new military capacities that have allowed her to deploy its peacekeeping operations with military character autonomously or using the capacities of NATO (Berlin Plus Agreement). The PKM that are realizing activities with civil caracter have mainly been developed by the Organization for Securtiy and Cooperation in Europe and by the European Union with the sending out of observation missions and policial missions.

References

- Berman, E. & Sams, K. (1999). The limits of regional peacekeeping in Africa. Peacekeeping & International Relations, 28 (4),1-2.
- Boutros-Ghali, B. (2000). À la recherche de la paix. Recueil des Cours: Collected Courses of the Hague Academy of International, 23-26.

[30] Eide, E. (2001). Las operaciones de mantenimiento de la paz: Pasado y presente. Revista de la OTAN, Verano, 6-8.

[31] Fleco, D. (2001). Civil and military administrations in internacional peacekeeping operations- focus on Kosovo. International Peacekeeping, the Yearbook of International Peace Operations, 7, 409-415.

- Bruce, J. (1999). Military intervention in Rwanda's, two wars: Partnership and indifference. En B. Walter, & J. Snyder (Eds.), Civil wars, insecurity and intervention, (pp. 116-145) New York, USA: Columbia University Press.
- Bruce, J. (2001). Peacemaking in Rwanda: Dynamics of failure. Boulder, USA: Lynne Rienner Publishers. Capotorti, F. (1994). Les Nations Unies et le maintien de la paix. Recueil des Cours: Collected Courses of the Hague Academy of International, 1994, 315-321.
- Cardona, J. (2005).La externalización/privatización del uso de la fuerza por las Naciones Unidas. En A. Salinas de Frías, & M. Vargas Gómez-Urrutia (Eds), Soberanía del Estado y Derecho Internacional. Homenaje al profesor Juan Antonio Carrillo Salcedo (pp. 317-342). Sevilla, España: Servicio de Publicaciones de las Universidades de Córdoba, Sevilla y Malaga.
- Daudet, Y. (1992). L'ONU et L'OEA en Haïti et le Droit international. Annuaire Français de Droit International, XXXVIII, 89-111.
- Durch, W. (1993). The evolution of UN peacekeeping: case studies and comparative analysis. Washington, USA: Henry L.Stimson Center.
- Eide, E. (2001). Las operaciones de mantenimiento de la paz: Pasado y presente. Revista de la OTAN,Verano, 6-8.
- Fleco, D. (2001). Civil and military administrations in internacional peacekeeping operations-focus on Kosovo. International Peacekeeping, the Yearbook of International Peace Operations, 7, 409-415.
- Iglesias, A. (2003).Los problemas del mantenimiento internacional de la paz. Madrid, España: Ministerio de Defensa.
- Inoue, Y. (1993). United Nations peace-keeping role in the post-cold war era: The conflict in Bosnia-Herzegovina. Loyola of los Angeles International and Comparative Law Journal, 16 (1), 245-274.
- Manrique de Luna, A. (2008). Der Konflikt in der Separatistenregion von Südossetien (Georgien). BOFAXE, 325D, 1-2.
- Manrique de Luna, A. (2009).The observation mission of the European Union in Georgia: Functions assumed by this peacekeeping operation. Journal of International Law of Peace and Armed Conflict, 22, (1), 41-43.
- Manrique de Luna, A. (2013). Las operaciones de mantenimiento de la paz de las organizaciones internacionales de carácter regional. Ed. Dykinson, Madrid 2013.
- Marnika, M. (1996). Regional peacekeeping: The case for complementary efforts. Peacekeeping & International Relations, 25, (3), 9-11.
- Organización de los Estados Americanos (Junio de 1994). Informe del Secretario General S/1994/725.
- Organización de los Estados Americanos. (Febrero de1996). Informe final de la Misión de Observación Electoral de la OEA sobre las elecciones legislativas y municipales en Haití.
- Pugh, M. & Sidhu, W. (2003). The United Nations and regional security: Europe and beyond. Boulder, USA: Lynne Rienner Publishers.
- Salinas de Frías, A & Vargas Gómez-Urrutia, M. Soberanía del Estado y Derecho Internacional. Homenaje al profesor Juan Antonio Carrillo Salcedo (pp. 317-342). Sevilla, España: Servicio de Publicaciones de las Universidades de Córdoba, Sevilla y Malaga.
- Sánchez, V. (2005). La potestad coercitiva de las organizaciones regionales para el mantenimiento de la paz. Medidas que no implican el uso de la fuerza armada. Madrid, España: J.M.Bosch Editor.
- Sidhu, W. (2003).The United Nations and regional security: Europe and beyond. Boulder, USA: Lynne Rienner Publishers.

Normative dispositions

- AU. Executive Council (2003) Decision EX/CL/Dec.39 (III) of 4-8 July 2003.
- EU. Declaración de la Presidencia de la UE sobre el fin de la Misión de las Naciones Unidas en Georgia, Bruselas 19 de junio de 2009.
- UN. Resolution A/RES/46/58 of 9 December1991.
- UN. Resolution A/RES/49/57 of 17 February1995.
- UN. Resolution S/RES/846 of 22 June 1993.
- UN. Resolution S/RES/872 of 5 October 1993.
- UN. Resolution S/RES/88 of 4 November1993.
- UN. Resolution S/RES/ 1171 of 5 June 1998.
- UN. Resolution S/RES/1196 of 15 September 1998.
- UN. Resolution S/RES/1197 of 16 September 1998.

- UN. Resolution S/RES/1244 of 10 June 1999.
- UN. Resolution S/RES/1545 of 21 May 2004.
- UN. Resolution S/RES/1631 of 17 October 2005.
- UN. Press Release SG/SM/58958. (1996). Secretary General to convene first meeting between UN and Regional Organizations, 1996, p. 1.
- UN. Press Release SG/2020. (1996). Secretary General to convene second meeting between UN and Regional Organizations. 1996, pp. 1-2.
- ONU, Secretario General (Noviembre 1997). Situación de la democracia y los derechos humanos en Haití.
- UN. Report of the Secretary-General on the work of the Organization, The causes of conflicto and the promotion of durable peace and sustainable development in Africa, 13 April 1998.
- UN. Press Release SG/SM/7706. (2001). Secretary General to convene fourth meeting between UN and Regional Organizations. 2001, pp. 1-2.
- UN. Press Release SG/2084. (2003). Secretary General to convene fifth meeting between UN and regional organizations. 2003, pp. 1-2.
- UN. (1995). MICIVIH and its mandate. MICIVIH News, 1(1)1-11.
- Walter, B. & Snyder. (1999). Civil wars, insecurity and intervention. New York, USA: Columbia University Press.

EU DIPLOMACY AFTER LISBON: INSTITUTIONAL INNOVATION, DIPLOMATIC PRACTICES AND INTERNATIONAL STRATEGY

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Abstract

This paper analyses the institutional changes to European Union diplomacy constituted by the Lisbon Treaty and the creation of the European External Action Service. These changes were meant to solve serious problems of horizontal and vertical incoherence in EU diplomacy that were caused by the network organization of EU diplomacy and the divide between supranational and intergovernmental policy areas.

The approach is based on three separate analytical dimensions. The first focuses on the reorganisation of the decision-making and policy-planning structures in Brussels, where particularly the new double-hatted post of High Representative and Vice-president of the Commission represents a watershed in EU internal coordination. Secondly, the constitution of the network of EU actors that act internationally is analysed, with special attention given to the now even more central role of the EU Delegations to third states, around which EU diplomatic representation has been streamlined. The picture is more muddied with respect to the EU's participation in international organisations, with the main obstacles to a more coherent EU diplomacy remains: The clash between the EU's non-state nature and the internal law of international organizations. Thirdly, it is argued that the recent institutional changes are indicative of a strategic shift in EU diplomacy, away from traditional transformative objectives of a structural nature and towards the consolidation of a more traditional Westphalian paradigm of the defence of interests in competition with other actors.

Keywords: *European Union, European External Action Service, Diplomacy, Lisbon Treaty*

1. Introduction

Although political disagreement among Member States continues to be the key restriction to an effective EU international role and, in consequence, to its diplomacy towards third states, it is necessary to distinguish disagreement over the political content of EU foreign policy from disagreement over the organization of the EU as a diplomatic actor and the decision-making procedures in different policy areas. When there is no agreement on the political content of EU foreign policy, the organization of diplomacy matters little, since there is no common political position to represent. In contrast, when in the EU there is an increasing political agreement on foreign policy content, including an ever stronger perception that the EU should be acting on behalf of its Member States, the organization of its diplomacy becomes vital to effectively represent the existing political agreement. With the acceleration of the integration process after the 1980s, the increasing political agreement within the EU could not be translated into effective international agency because there was no clarity about who should act in which areas, a fact which has led to bureaucratic turf wars and

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unproductive internal ideological debates.[1] This way, the establishment of the EEAS and the associated institutional innovation contained in the Lisbon Treaty can be seen as a logical consequence of increased political agreement within the EU over foreign policy substance, in particular the necessity making the EU an effective international actor.

Furthermore, the recent institutional innovations contain the provisions for the establishment of a feedback loop, in the sense that intensified cooperation in the new structures will imply a socialization of EU officials and Member State representatives that will contribute to strengthening and generalising the perception of the necessity for EU action as well as general political agreement. To the extent that the EEAS is perceived as successful and a good representative by the Member States, whether in negotiations with Iran over its nuclear programme or in the daily management of relationships with Russia and China, this will in itself also contribute to a greater consensus on the necessity for concerted EU action. The question of the reorganisation of EU diplomacy is therefore also about the identity and nature of the EU as a political entity as well as the status of its Member States as sovereign states.

The question of EU diplomacy is this way also relevant to broader questions about the contemporary transformation of diplomacy and the sovereign nature of the states. As a *sui generis* post-modern political form[2] characterised by flexibility and uncertainty,[3] the EU is a non-state and non-sovereign international actor, radically different from the Westphalian state, which means that EU diplomacy cannot be assumed to share important characteristics with state diplomacy. With the Lisbon Treaty and the establishment of the European External Action Service (EEAS), the EU has arguably undertaken the most significant reorganisation of its diplomacy since the beginning of the process of European integration. Apart from the direct impact of institutional changes, another important question thus becomes whether the institutional innovations mean that the EU is adapting its international strategy to become more state-like as an international actor, or whether its diplomacy retains its unique post-sovereign and networked nature.

This paper starts out by briefly considering the state of EU diplomacy before the Lisbon Treaty, to identify the problems inadequate performance that motivated the changes culminating with the creation of the EEAS. The third section will consider the central administration of EU diplomacy by the institutions in Brussels, whereas the fourth will consider EU diplomacy on the ground in third states and in international organisation. The fifth section will contain an interpretation of EU diplomacy and the changes that the Lisbon Treaty and the EEAS represent in the EU's overall international strategy. The final section 6 contains the conclusions of this study.

2. EU diplomacy before Lisbon: The need for reform

To understand the present configuration and functioning of the European Union as a diplomatic actor it is important to note that this the phenomenon of the EU diplomacy is by no means new but can be understood as the result of the political process that has developed over several decades and the gradual change in the attitudes of the Member States towards the

[1] P. Andrés Sáenz de Santamaría, "Proceso de decisión y equilibrio institucional en la acción exterior europea", in F. M. Mariño Méndez (ed.), *Acción exterior de la Unión Europea y Comunidad Internacional*, Madrid, Universidad Carlos III de Madrid and Boletín Oficial del Estado, 1998, pp. 85-112.

[2] Expression of Ruggie analysed in more detail by B. Rosamond, *Theories of European integration*, Basingstoke, Macmillan, 2000, p. 111.

[3] According to Heartfield, the EU can be characterised as a process without a subject. J. Heartfield, "European Union: A process without subject", in C. J. Bickerton *et al.* (eds.), *Politics without sovereignty: A critique of contemporary international relations*, New York, UCL Press, 2007, p. 131.

global actorness of the EU.[4] Probably the most important event prior to the formal establishment of the EEAS occurred when the project to create a European Defence Community was finally abandoned in 1954. This nodal point in the history of European integration effectively excluded security and defence matters from the agenda of European integration until the end of the Cold War and meant that bifurcation of the foreign policy of the EU and its institutional predecessors, where economic matters fell under community competence, whereas 'political' matters and those with defence implications were excluded from community action institutionalised as the first and second pillars of EU, respectively, with the Maastricht Treaty in 1993. This bifurcation means that the EU institutions have different roles and make decisions by different procedures depending on the policy area, with the second pillar continuing to be based on consensus. This bifurcation continues to be the most notable characteristic of the EU as an international actor, together with the coexistence of EU foreign policy and diplomacy with parallel activities of the individual Member States.

The persistence of this differentiated integration across policy areas means that EU foreign policy and diplomatic representation is inherently complex and that the roles and forms of interaction among the different EU institutions vary with the political issue area. This has given rise to serious problems of horizontal coherence in EU foreign policy (between the activities of different institutions and between different policy areas), as rivalry between especially the Commission and the Council Secretariat has been inevitable.[5] Furthermore, this lack of coherence has not been helped by the lack of precision in the EU treaties on the precise competences of each institution as for foreign policy and diplomatic representation.

Apart from the problems of horizontal coherence that have always plagued EU diplomacy to the extent of constituting a serious impediment to the impact of its foreign policy, another principal obstacle to achieving global influence is undoubtedly the combination of a lack of wide-spread agreement on foreign policy issues, coupled with a decision-making procedure in the area of the second-pillar issue areas of the CFSP and CSDP based on consensus. As the individual EU Member States retain full competences in traditional foreign policy and security matters. This means that any EU foreign policy coexists with the 28 individual foreign policies of the Member States, and the scene has thus also been set for serious problems of vertical coherence, i.e. between EU-level policies and those of individual Member States. Furthermore, when consensus is the decision-making procedure, the EU can only formulate and implement a foreign policy if there is agreement among all Member States, which has resulted in many instances of EU inaction on the ground and only vague political statements with which it is nearly impossible not to agree, particularly on some of the most controversial topics.

All the actors involved in the formulation of EU foreign policy and its execution through diplomatic activities, both EU institutions and Member States, are obliged to cooperate, consult and coordinate their activities. Still, this has not been enough to avoid that, taken as a whole, EU diplomacy has been characterised by both horizontal and vertical incoherence with the effect of generating internal power struggles and confusion on the part of third states. According to the Commission, this organization of EU diplomacy has meant a significant loss of visibility of EU action as well as of direct political influence,[6] and good personal relations between the High Representative (representing the Council in matters of the

[4] Keukeleire et al. convincingly argues the necessity of understanding EU diplomacy in this context, S. Keukeleire *et al.*, *The emerging EU system of diplomacy: how fit for the purpose?*, Policy Paper, nº 1, Jean Monnet Multilateral Research Network on 'The Diplomatic System of the European Union', 2010.

[5] G. Edwards and D. Rijks, "Boundary problems in EU external representation", in Swedish Institute for European Policy Studies (ed.), *Institutional competences in the EU external action: Actors and boundaries in CFSP and ESDP*, Stockholm, Swedish Institute for European Policy Studies, 2008, p. 30.

[6] European Commission, Europe in the world - some practical proposals for greater coherence, effectiveness and visibility, 2006, COM (2006) 278.

Common Foreign and Security Policy (CFSP) and the Relex Commissioner (representing the Commission and the foreign policy areas of its competence) have been central in avoiding even greater problems of incoherence.[7]

Apart from these general problems of political coherence, the sui generis construction of the EU as an international actor has also had a negative impact through the representation of the EU in third states and in international organizations. The rotating Presidency of the Council meant that every six months, a different EU Member State would represent the EU in the exterior in areas of the CFSP, whereas the Commission Delegation would represent the EU in other areas, a problem identified both the EU and third states.[8] This has given rise to several problems, the first of which being the lack of clarity on which person legitimately represents the EU in a third state: The Commission or the Presidency? Of course, a third state cannot be expected to understand the intricacies of the international distribution of competences between EU institutions and Member States. Another problem was caused by the rotating nature of the Presidency of the Council. In this case, the EU was represented by a new Member State every six months, with the negative effect that this has on political continuity and the creation of personal relationship with officials of the host state. A partial solution to the problem of continuity was found with the troika formula of the previous, present and future presidencies. Nevertheless, this did not solve the related problem of the EU position being represented sometimes by Member States with very little political weight. An important aspect of diplomatic communication has to do with the rank of the representative sent, and for some third states it was perceived as a lack of interest or a negative message that the EU would send small Member States to represent the Union, as occurred during crisis in Yugoslavia in 1991, where the EU presidency troika was constituted by the Netherlands, Luxemburg and Portugal.[9] This is probably one of the clearest example of where EU external action suffered not by a lack of political agreement and complex internal organization, but because of its diplomacy. The deception and anger cause by the diplomatic mission of the EU was not caused by the content of its proposals, but by the perceived lack of respect shown by the EU by sending persons considered to be low level and without political weight. To offset the negative effects of the rotating Presidency, the post of High Representative was created and occupied by former Spanish Foreign Minister and NATO Secretary-General Javier Solana. This only solved the problem partially, since in many cases, representatives of third states would still prefer to speak directly to the ambassadors of the United Kingdom, Germany or France. The reality remains that any EU representative can only represent a common EU position when this exists, and that while it is being negotiated, or if the Member States can only agree vague political statements, the relevant interlocutors for third states will continue to be the representatives of the EU Member States with the political determination and economic, military and diplomatic capabilities to act decisively and forcefully. If the new EEAS and the increased powers of High Representative Catherine Ashton will ultimately solve the problem thus also comes back to the ability to create a real policy behind the diplomatic activities, if not the High Representative will continue to fall victim to the lack of convergence of EU Member State interests.

To sum up, due to the nature of the EU as a non-state actor and its complex organization in a network of actors characterised by diffuse structures of authority and a lack of clarity, EU diplomacy has been characterised by a number of problems, to which only partial solutions had been created. So with respect to the diplomatic representation of the EU, an ever stronger perception gradually arose among academic analysts and EU officials that the

[7] N. Fernández Sola, *El Servicio de Acción Exterior de la Unión Europea*, Working Paper 46/2008, Madrid, Real Instituto Elcano, 2008, p. 3.
[8] N. Fernández Sola, *op. cit.*, p. 2.
[9] N. Fernández Sola, *op. cit.*, p. 2.

system had functioned poorly for years and that to continue along the same path was ever less feasible.[10] The phrase that come to dominate the discourses of the Council and the Commission[11] was the "need to speak with a one voice" in the world, a concern that has also been reflected in the academic doctrine. The confusion of third states due to the multiple representation[12] seemed to suggest that the requirements to coordinate and cooperate established in the Treaties was no enough to ensure coherence and that it was necessary to reduce the complexity in terms of the number of different actors involved in EU diplomacy.

Furthermore, due to more general processes of economic, political and social globalisation, ever more issue areas are the topic of diplomatic interchange and these are ever more interlinked, a fact which in itself had made the complex network organization of EU diplomacy less adequate and thus created an isomorphic pressure upon the EU to adapt more conventional forms of diplomatic representation in an international system that, although undergoing transformation, at its core remains based on the Westphalian state as a form of political organization. Also, the internal development of the EU as a polity has constituted a source of the isomorphic pressure to create a diplomacy that resembles the classical Westphalian state diplomacy to a greater extent. The EU has competences in ever more issue areas, and decisions are increasingly made by intervention of the European Parliament and majority voting in the Council. With more competences and more decision-making capacity, a more efficient form of diplomatic representation also seemed in order. These isomorphic pressures can also be conceptualised in terms of a gap between the expectations placed upon EU external action and its ability to deliver results, a phenomenon that is widespread among EU officials, third states and academic analysts.[13]

In the rest of the paper, I shall examine the answer of the EU to these perceived problems and weaknesses, i.e. the institutional innovation in the Lisbon Treaty and, particularly, the creation of the EEAS.

3. Institutional innovation: The reorganisation in Brussels

The Lisbon Treaty affirms that the EU is a political entity with legal personality.[14] This reduces considerably the legal complexity of entering into international agreements. The Treaty explicitly states that the international agreements to which the EU is party creates obligations for both the EU institutions and its Member States.[15] Whereas such a unilateral declaration does not itself change the nature of the agreements that the EU has with third states and international organizations, the disappearance of the European Communities as a legal subject differentiated from the EU and its Member States undoubtedly also increases the political visibility of the EU. In effect, the EU can now enter into international agreements spanning all the issue areas of the former three pillars, and the previously used formula of signing international agreements as "The European Communities and its Member States" could be scrapped. The practical implications of the changes should not be overestimated, since the principal limitation on the EU's ability to conclude international agreements, before

[10] S. Duke, "Providing for European-level diplomacy after Lisbon: The case of the European External Action Service", *Hague Journal of Diplomacy*, vol. 4, no. 2, 2009, p. 213.
[11] C. Portela, "El Servicio Europeo de Acción Exterior: un instrumento para reforzar la política exterior", in A. Sorroza Blanco (ed.), *Presidencia Española: retos en una nueva Europa*, Madrid, Elcano, 2010, p. 122.
[12] S. Duke, "Providing for European-level diplomacy…", *op. cit.*, p. 212.
[13] B. Becerril, "Un paso más hacia una diplomacia común europea", in A. Sorroza Blanco (ed.), *Presidencia Española…, op. cit*, p. 149. The concept of a gap between the capabilities and expectation was introduced by Christopher Hill, see C. Hill, "Closing the Capabilities-Expectations Gap?", in J. Peterson y H. Sjursen (eds.), *A Common Foreign Policy for Europe: Competing Visions of the CFSP*, London, Routledge, 1998; C. Hill, "The Capabilities-Expectations Gap, or Conceptualising Europe's International Role", *Journal of Common Market Studies*, vol. 31, no. 3, 1993, pp. 305-328.
[14] TEU (Lisbon), art. 47.
[15] TFEU (Lisbon), art. 216.

and after the Lisbon Treaty, derives from the need for internal political agreement among EU institutions, including approval by the European Parliament, and consensus among Member States, depending on the nature of the agreement and the political issue area.[16] Still, the subject status of the EU in the international system is consolidated and on the symbolic level further contributes to strengthening the identity of the EU as an influential international actor. The fact that the European Atomic Energy Community (Euratom) continues to exist as a separate legal subject means that also with the Lisbon Treaty the EU has two distinct international legal personalities, which reduces clarity as for the precise definition of the EU as an international actor. Nevertheless, due to the low visibility and level of international activity of Euratom, the conclusion remains that the Lisbon Treaty significantly simplifies the existence of the EU as an actor in the international system from a formal point of view, with the practical political implications being more difficult to estimate.

Another important aspect of the EU's legal personality is the transformation of the Delegations of the Commission in the exterior into European Union Delegations, representing the EU across all policy areas, with a European External Action Service being not only responsibly for the representation of the EU through the Delegations, but also the hub of EU foreign policy decision-making in Brussels. Rather than the change in the legal status of the Union, the impact of this institutional revolution will probably be much greater, since it streamlines not only the diplomatic representation of the Union, but also creates new structures of interaction between diplomats and policy-makers that allows for the intensification of socialization processes to occur, thereby helping the gradual emergence of greater convergence among EU officials and Member State diplomats and policy-makers with respect not only to the specific political content of EU diplomacy in narrowly defined issue areas, but also more generally with respect to the identity of the EU and the causal ideas upon which its international agency is based. The rest of the paper will therefore focus on the organizational changes and their impact on EU diplomacy more generally, rather than the legal issues.

An important motivation behind the Lisbon Treaty was to offset the problems of horizontal and vertical coherence in EU diplomacy and thereby strengthen the EU as an international actor. In this vein, the Treaty sought to eliminate the pillar structure, an important source of the EU's coherence problems, but although the pillars formally disappear, the exercise was not entirely successful.[17] The Lisbon Treaty creates a single institutional framework for EU external action, with important consequences for its diplomacy, but with respect to the decision making in the CFSP area, the former second pillar of the Union remains differentiated from the rest. It also modifies the general equilibrium between the EU institutions, generally expanding the influence of the European Parliament through the extension of the decision-making procedure formerly know as co-decision, which has now been renamed the ordinary procedure, where it is equal to the Council when approving the proposals of the Commission.[18] Another important factor representing another advancement in the integration process is the extension of Council majority voting to more issue areas, fundamentally leaving consensus-based decision making to foreign and security policy. Whereas these general changes should not be disregarded, a principal conclusion is that the bifurcation of EU external action continues to exist as for the decision making, although it has been substantially modified with respect to the diplomatic representation of the EU in the exterior, as will be analysed in section 4 of this paper.

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[16] TFEU (Lisbon), art. 218.

[17] W. Wessels and F. Bopp, *The institutional architecture of CFSP after the Lisbon Treaty - Constitutional breakthrough or challenges ahead?*, Challenge Research Papers, no. 10, Brussels, Centre for European Policy Studies, 2008, pp. 2-3 y p. 10.

[18] C. Gutiérrez Espada and M. J. Cervell Hortal, "El Tratado de Lisboa y las instituciones (no jurisdiccionales) de la Unión", in C. R. Fernández Liesa and C. M. Díaz Barrado (eds.), *El Tratado de Lisboa. Análisis y perspectivas*, Madrid, Dykinson, 2008, p. 171.

Interestingly, the Lisbon Treaty contains only a few general notions on the organization and functioning of its main institutional innovation, namely the creation of the European External Action Service as an autonomous body of the EU, leaving the details to be worked out in later negotiations and decisions by the European Council. In the following sub-sections, the focus will be on the changes in the individual EU institutions that are most relevant for assessing the changes in EU diplomacy.

3.1 The European Council

The Lisbon Treaty contains a number of innovations with respect to the European Council. It is formally made an Institution of the EU, but more importantly, the High Representative participates in its meetings. This creates a direct link between the institution where the Member States are represented at the highest level with the head of the EEAS. As such, the strategic direction that the European Council is to provide counts with the input both of the High Representative and the President of the European Commission, although neither votes, and there is an opportunity for a formal exchange of ideas between Member States and the EU representative. More importantly for EU diplomacy, the Lisbon Treaty creates the post of a permanent President of the European Council, with a mandate of two and a half years and occupied by Herman van Rompuy. Although an important effect of the permanent President is undoubtedly internal with respect to the management of the functioning of the European Council,[19] there is also an impact on EU diplomacy.

With a permanent President setting the agenda and drafting policy statements, the European Council is less likely to be biased towards the foreign policy interests of the Member State holding the rotating presidency, and as such the institutional innovation should provide greater continuity. This effect is of course relative, since the European Council makes decisions by consensus.

Of more importance is probably the visibility effect of having a permanent President, even if van Rompuy has been frequently criticised for his lack of charisma. Nevertheless, the EU now has a continuous representation of the CFSP policy area at the highest political level in the form of the President of the European Council. Here, the Lisbon Treaty falls short of establishing a precise division of labour between the President of the European Council and the High Representative, since both of them has functions of representing the Union in the CFSP policy area.[20] This creates ample scope for conflict and differences of opinion and diplomatic style,[21] which makes good personal relations vital for a smooth functioning of EU diplomatic representation at the highest level.

In practice, van Rompuy seems to have centred his activity on representing the Union at the highest level of Heads of State or Government in bilateral relations, as well as participation in multilateral summits in the same function. This indicates an informal division of labour also identified by Duke,[22] where the President of the European Council does not enter into the detailed foreign policy content or specific negotiations with third states, but leaves this to the High Representative and her EEAS. The parallel to the division of labour between a Head of State or Government and the foreign minister of any given state is rather straightforward, which makes the division of labour beneficial not only for the coherence of EU diplomacy, but also for reducing confusion on the part of third states, in the sense that the EU diplomatic set-up in this case resembles a well-know model. This of course depends on

[19] C. Closa, *Institutional innovation in the EU: The Presidency of the European Council*, ARI, no. 47/2010, Madrid, Real Instituto Elcano, 2010, p. 4.
[20] TEU (Lisbon), art. 15.
[21] B. Crowe, *The European External Action Service. Roadmap for success*, London, Royal Institute of International Affairs (Chatham House), 2008, p. 19; C. Gutiérrez Espada and M. J. Cervell Hortal, "El Tratado de Lisboa y las instituciones…", *op. cit.*, p. 172.
[22] S. Duke, "Providing for European-level diplomacy after Lisbon…", *op. cit.*, p. 216.

whether the relatively smooth functioning of this division of labour is the result of the personal relationship between van Rompuy and Ashton, or whether they by their activities have created precedents and customs that their successors will also follow.

3.2. The Council of the European Union

With respect to the organization of the Council, the General Affairs Council is separated from the Foreign Affairs Council. The General Affairs Council is responsible for coordinating the work of the other Council formations and preparing the meetings of the European Council, thus making it a kind of Super-council. [23] In this respect, the Council must cooperate with the President of the European Council as well as the Commission, but since it continues to be presided by a new Member State every six months as the rest of the formations of the Council (with the exception of the Foreign Affairs Council), [24] there are also obstacles to continuity and coordination present in the construction.

The Foreign Affairs Council is presided by the High Representative, which provides for greater continuity and coherence, and by means of the agenda-setting power of a presidency changes the equilibrium between Member States and Union. Of course, that fact of having the Foreign Affairs Council segregated from the General Affairs Council and brought under the leadership of the High Representative does not prevent the Member States from discussing issues with foreign policy implications in the General Affairs Council, this way keeping the High Representative and the EEAS out of the loop. Still, for EU diplomacy, the fact of now having both the European Council and the Foreign Affairs Council of the EU presided by permanent presidencies held by EU officials is of paramount importance. By reducing the number of representatives involved in EU diplomacy, for third states it is now much easier to put a face on the EU, and due to the division of labour between the van Rompuy and Ashton, the role of each representative is also relatively clear. A remaining complicating factor is the representative role of the President of the European Commission, which considerably muddies the picture. In the last sub-section, the role of the High Representative will be expressly analysed, but first attention turns to the division of labour among the different institutional bureaucracies in Brussels, the role of the new EEAS and its relationship with the Commission.

3.3. The creation of the European External Action Service

The Lisbon Treaty establishes the European External Action Service as the main institutional innovation, although apart from its role as an organ to service the High Representative, the Treaty text does not provide any specific indications of its functioning or objectives.[25] The internal organization and precise role was left to a future Council decision that came about in July 2010[26] on the bases of a proposal made by the High Representative the previous March.[27]

In general, and contrary to what could be deduced from the *impasse* in the process of European integration after the failure of the Constitutional Treaty, the Decision of the Council establishes a configuration that is close to what has been denominated by Duke the "maximalist" version of the EEAS, among the variety of proposals for its competences and

[23] C. Gutiérrez Espada and M. J. Cervell Hortal, La adaptación al tratado de Lisboa (2007) del sistema institucional decisorio de la Unión, su acción exterior y personalidad jurídica, Granada, Comares, 2010, p. 22.
[24] TUE (Lisbon), art. 16.
[25] TUE (Lisbon), art. 27.
[26] Council of the European Union, Council decision establishing the organisation and functioning of the European External Action Service, 2010, 11665/1/10 REV 1.
[27] C. Ashton, Proposal for a Council decision establishing the organisation and functioning of the European External Action Service, 2010, unnumbered document, available at: http://eeas.europa.eu/docs/eeas_draft_decision_250310_en.pdf

size in the previous debate.[28] Even so, according to the Decision, and contrary to the wishes of the European Parliament,[29] the EEAS is established as an autonomous organ of the EU[30] and not incorporated into the Commission, a model that was initially defended by both the Parliament and the Commission itself,[31] and which would seem to make the most sense, if analysed from a strictly functional point of view, where the Commission exercises the executive function in the European polity. This would have been the EU equivalent of establishing a Foreign Ministry within the Federal government. Due to Member State reluctance, the compromise was that of a large EEAS with extensive competences, but separated from the Commission, so as to reflect the double role of the EEAS as the diplomatic representation of the CFSP as well as the policy areas under the Commissions authority.

The EEAS consists of two main functional areas, the Delegations to third states and international organizations, analysed in the following section 4 of this paper, and a central administration in Brussels. This way, it is important to note that the EEAS is not only an organization for the diplomatic representation of the EU, but also a forum for the analysis, planning and formulation of EU foreign policy, drafting Council Conclusions, policy papers and negotiating mandates to be decided upon.[32] As for the diplomatic representation of the EU, the EEAS is thus central to the EU's efforts to increase its coherence on the international scene, since one single organization represents the EU's point of view across all policy areas, with the usual exception being areas without political agreement among Member States, in which case the EU will not have a common position, but 28 different opinions represented by 28 diplomatic services.

Also, the Lisbon Treaty formulates the values and objectives of EU foreign policy generally and without prejudice to specific policy areas,[33] which should in help the coherence of EU diplomacy, at least in principle, and the legal basis becomes clearer. Nevertheless, this increased coherence is of course with respects to goals that are compatible, in the sense that the same EU policies towards a specific third state will further them all, some which cannot be simply assumed is the case, e.g. with respect to the liberalisation of world trade, eradication of poverty in the world and the sustainable development of developing countries.[34]

With the creation of the EEAS we therefore have a good structure for reducing the problems of horizontal coherence in EU diplomacy that stem from the multitude of actors previously involved in representing the EU. The Lisbon Treaty does not change the nature of EU diplomacy as coexisting with Member State diplomacy, so the problem of vertical coherence does not change directly as a function of the institutional innovation, although a denser institutional environment with the EEAS will probably enhance the 'coordination reflex' of the Member States broadly speaking, in the sense that the EU dimension of Member State foreign policy is present at all stages of the policy process and coordination in the EU framework is not simply an option at the last phase of implementing the specific foreign

[28] S. Duke, "Providing for European-level diplomacy after Lisbon…", *op. cit.*, pp. 218-221; S. Duke, "The Lisbon Treaty and external relations", *Eipascope*, vol. 2008, no. 1, 2008, pp. 15-16.

[29] On the EU European Parliament, see S. Medel Gálvez, "La posición del Parlamento Europeo en torno a la diplomacia común, con especial referencia al Informe Brok," in J. M. Sobrino Heredia (dir.), *Innovación y conocimiento. IV Jornadas Iberoamericanas de Estudios Internacionales*, Madrid, Marcial Pons, 2010; R. Jáuregui Atondo, *El Parlamento Europeo: un actor decisivo en las negociaciones sobre la creación del Servicio Europeo de Acción Exterior* ARI, no, 147, Madrid, Real Instituto Elcano, 2010.

[30] Council decision…, op. cit., art. 1.

[31] S. Duke, "Providing for European-level diplomacy after Lisbon…", *op. cit.*, p. 217.

[32] EEAS, "EEAS Review", 2013, unnumbered document, available at: http://eeas.europa.eu/library/publications/2013/3/2013_eeas_review_en.pdf, p. 9

[33] TEU (Lisbon), art. 21.

[34] Some of the objectives defined in article 21.

policy initiative. This socialization effect on Member State diplomatic practice should prove a fruitful path for further studies.

3.4. Diplomatic competences and the division of labour in Brussels

The EEAS is not simply the Foreign Ministry of the EU, nor its diplomatic service. It is *sui generis* and can be characterised as an interstitial organization, emerging in the interstices between different organizational field and draws upon the legitimacy, physical, informational, financial and legal resources of these other fields, here Member States and EU institutions and bureaucratic structures.[35]

The main tasks of the EEAS is to function as support to the High Representative in her mandate to implement the CFSP, preside the Foreign Affairs Council and coordinate and implement the external relations of the Commission, in her capacity of Vice-president of the Commission. In this sense, the EEAS is primarily the secretariat of the High Representative, although it also assists the President of the Commission and the President of the European Council in their function as representatives of the EU.[36] This way, the secretariat function of the EEAS transcends the division of representative competences among the three mains persons, which should provide greater continuity and coherence to the representation.

With respect to policy making, the EEAS has taken over from the Council Secretariat the tasks of preparing the meetings of the Foreign Affairs Council presided by the High Representative, as well as preparing the activities and presiding the meetings of the foreign affairs-relevant working groups and committees, including the Political and Security Committee (PSC), central to EU policy-making in the CFSP area.[37]

The central administration of the EEAS is headed by what the press has dubbed a 'French spider', in reference to the fact that the administrative structure of the EEAS is largely modelled on the French administration of its diplomacy. In fact, the Corporate Board of the EEAS consists of a powerful Executive Secretary General and a Chief Operating Officer, who in turn have two deputies to help coordinate the Directorate Generals, the EU delegations and represent the EEAS.[38] Below this administrative level, the EEAS is organised into a number of Managing Directorates, which contain both geographically defined desks, as well as multilateral and thematic units. Each of the Directorates must coordinate its activities with the "relevant services" of the Commission and the Council Secretariat. Apart from these structures, specialised departments are responsible for human resources, finance, legal counselling and parliamentary affairs. Interestingly, a service as vital as public diplomacy was maintained within the Commission, although it reports directly to the HR/VP.[39]

Although the EEAS is a new organ of the European Union, it is based on the transfer of functions and staff from the Commission and the Council Secretariat that took place for the launch of the EEAS in January 2011. From the Council Secretariat the units transferred were basically those working in the area of the CFSP in the DG External and Politico-Military Affairs, but also including the intelligence centre and the EU military staff. From the Commission was transferred the DG Relex, entrusted with the external relations of the Commission, both the Brussels staff and that of the Delegations, together constituting two thirds of the staff initially transferred. Also, part of the DG Development was transferred, so that the EEAS has geographical desks covering the whole globe, whereas the rest of the DG

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[35] J. Batora, "The 'Mitrailleuse Effect': The EEAS as an Interstitial Organization and the Dynamics of Innovation in Diplomacy",in Journal of Common Market Studies, vol. 51, no. 4, 2013, pp. 598-613, p. 601.

[36] *Council decision…, op. cit.,* art. 2. In fact, in 2012, the briefings for the HR/VP constituted less than a third of the total amount elaborated by the EEAS. EEAS, "EEAS Review", *op. cit.*, p. 8

[37] Council Decision, art. 4.

[38] EEAS, "EEAS Review", *op. cit.,* p. 6

[39] The organization chart of the EEAS is available at:
http://eeas.europa.eu/background/docs/organisation_en.pdf (March 2014).

was fused with the DG AIDCO. Although the Commission thus continues to work within the area of development cooperation, the EEAS "contributes" to the programming and management of the instruments with which development policy is executed, such as the European Development Fund and the European Instrument for Democracy and Human Rights. With the EEAS being "responsible for preparing (...) the decisions of the Commission" in this respect, this means basically that the EEAS is involved with the multiannual programming and geographically determined work of the new DG DEVCO in the form of elaboration of national and regional strategies. Thus, the EEAS implies an important reorganization of the EU with respect to its international activities directed at developing countries.

In its strive for increased horizontal coherence, the EU has thus effectively fused development cooperation with the CFSP. This has of course been criticised by numerous NGO's that fear that the assistance of the EU to developing countries would be increasingly subordinated to the geopolitical concerns of the CFSP, instead of being based on politically neutral criteria aiming to help societies develop and alleviate human suffering. But the inverse could also be argued with CFSP initiatives being obliged to pursue the article 21 objectives of poverty reduction and sustainable development. Whatever is the case, coherence means thinking development and geopolitics together, and in my opinion the discussion should be understood in the general evolution of the EU towards more a more assertive international strategy based on the defence of interests and the lesser priority given to previously primary objectives of democracy promotion, dissemination of human rights values and exporting the EU model of peaceful coexistence among states.[40]

With respect to areas of the European Neighbourhood Policy and Enlargement, these are also divided between the Commission and the EEAS, although of course under the supervision of the High Representative.[41] The enlargement Commissioner still has international projection, although with the new structures of coordination, clearly subordinate to the High Representative. Also other Directorate Generals of the European Commission inevitably has an international dimension in their work, most notable DG Trade and DG Humanitarian Aid and Civil Protection but also Energy and Climate Change, which nevertheless are not mentioned in the Council Decision.[42] Here it should be noted that this complexity is by no means unique for the EU. The EEAS identifies the close cooperation with the Commission as vital,[43] but it should also be noted that this problem of coordination repeats itself also with respect to any Foreign Ministry, whose role is changing from that of a gatekeeper to a boundary spanner,[44] in the sense that in a globalised world, most sectoral ministries will have an international dimension in their work that should be coordinated through the Foreign Ministry. The EU is in this sense mimicking the state, abovementioned institutional differences aside, with respect to the organization of its diplomacy, since the states are also moving away from a centralised model to one based on the horizontal and

[40] In this sense, studies indicate that the EU prioritises political stability over democracy and human rights for geopolitical reasons, imposing few, if any sanctions in the framework of the conditionality included in the EU's international agreements with third states. See R. Youngs, *The end of democratic conditionality: good riddance?*, Madrid, Fundación para las Relaciones Internacionales y el Diálogo Exterior (FRIDE), 2010. Also, sanctions imposed generally reflect the relationship of the EU with the state and the interests of that specific Member States may have, see C. Portela, *European Union sanctions and foreign policy*, London, Routledge, 2010, p. 163.

[41] Council decision…, op. cit., art. 9.

[42] For details of the relationship of the EEAS with each Commission DG, see N. Helwig, P. Ivan and H. Kostanyan, *The new EU foreign policy architecture: Reviewing the first two years of the EEAS, Brussels,* Centre for European Policy Studies, 2013, pp. 38-49.

[43] EEAS, "EEAS Review", *op. cit.*, pp. 6-9

[44] B. Hocking, "Introduction: gatekeepers and boundary-spanners - Thinking about foreign ministries in the European Union", in B. Hocking y D. Spence (eds.), *Foreign ministries in the European Union: Integrating diplomats*, Basingstoke, Palgrave, 2002.

vertical coordination of the external activities of the different branches of the central, regional and local administrations of the state.

With respect to the vertical coherence and coordination, the Lisbon Treaty imposes clear obligations on the diplomatic services of the Member States to coordinate and cooperate with the EEAS, although it falls short of establishing procedures for how to implement this cooperation, not even clarifying if it refers to the central administration of the EEAS, where the Member States are directly involved in the CFSP structures through their representatives in key fora such as the Political and Security Committee, or whether it refers to cooperation by the diplomatic missions on the ground in third states and international organizations.[45] Still, the Council Decision reiterates the obligation of consulting and cooperating of EEAS, the Commission the Council Secretariat and the diplomatic services of the Member States,[46] so that in practice there is little doubt that the intention not is to establish a strict division of labour among the different actors, but rather seeking a maximum coordination in the network of actors involved in EU diplomacy. In the absence of established procedures, the vertical coherence of EU diplomacy ultimately falls back on the political will of the Member States to coordinate their foreign policies generally, and on the enthusiasm of the individual ambassadors in a given third state.

With respect to the horizontal coordination, the Commission previously coordinated the interaction of the DGs of the RELEX family (those with external activities) through frequent meetings in specialised coordination committee. The Lisbon Treaty builds on this method for horizontal coordination but substantially changes it, since it creates a hierarchy within the college of Commissioners, giving the Vice-president (and High Representative) the authority to coordinate the activities of the other Commissioners. The Vice-president is thus responsible for the overall coordination of the external activities, not only of the Commission, but by virtue of her competences as High Representative, of the entire European Union. This greatly improves the formal basis for coordinating EU foreign policy across policy areas.

With respect to the Brussels-based diplomatic activities, in contrast, the picture is less clear-cut. The President of the European Commission remains the maximum representative of the Commission, also in the exterior. So apart from the relatively simple division of labour between the President of the European Council and the HR/VP in terms of diplomatic representation, the presence of the Commission President complicates the picture, since his role is much less clear with respect to the President of the European Council and the HR/VP. The delimitation of the representative function of the President and Vice-president of the Commission is not clear, and the scene is thus set for potential conflict between the two,[47] and may create confusion unnecessary confusion in third states as to the roles and competences of each EU representative. In this regard, it is questionable if the current diplomatic troika of the President of the European Council, the President of the Commission and the HR/VP significantly reduces the complexity and possible confusion in the diplomatic representation of the EU when compared to the previous troika of the rotating Presidency, the Commission President and the High Representative. Although the creation of the EEAS undoubtedly dramatically increases the scope for political coordination, the actual reduction of complexity in its diplomatic representation is not to be found so much in the high-level representation of the EU by its top political personalities in Brussels, but in the diplomatic missions of the EEAS, topic of the next section of the paper.

Also, even if the new structures significantly increase the scope for a more efficient horizontal coordination, there are also elements that seem to suggest certain continuity with

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[45] TEU, (Lisbon), art. 27.
[46] Council decision…, op. cit., art. 3.
[47] B. Sánchez Ramos, "La representación exterior de la Unión Europea tras el Tratado de Lisboa: en busca de la unidad, eficacia y coherencia," in J. M. Sobrino Heredia (dir.), *Innovación y conocimiento..., op. cit.*, p. 486.

respect to possible competitive dynamics among the actors involved in EU diplomacy. Some analysts stress that uniting the staff of different units of the Commission, the Council and diplomats delegated from Member States diplomatic services in the same EEAS bureaucracy does not necessarily mean that the political infighting and competition among these factions should not continue within the new structures of the EEAS.[48] This will depend on the leadership abilities of the HR/VP and the general support that the new structures will have among Member States. In any case, it is also likely that a corporate identity will emerge within the EEAS, with the staff and units gradually losing their previous identity linked to their institutional origin.

This corporate identity and general support of the Member State will depend on the ability of the EEAS to gain legitimacy and credibility as an institution,[49] which in turns depends on the EEAS's ability to carry out its mandate and manage the EUs international relations. It should be noted that the Member States have with the Lisbon Treaty and the creation of the EEAS not renounced any competence in foreign policy and diplomacy. The long-term scope for the EEAS to represent the EU in its entirety of course depends on whether the Member States will increasingly let themselves be represented by the EEAS instead of their national diplomatic services, which again boils down to the main source of incoherence in EU foreign policy and diplomacy: the degree of convergence among Member States' interests and foreign policy goals.

3.5 The centre of coordination of EU diplomacy: The HR/VP

The Lisbon treaty centres the coordination of EU external action in the post of High Representative of the Union for Foreign Affairs and Security Policy and Vice-president of the European Commission (HR/VP), occupied by Catherine Ashton. Thereby, three previous posts are merged into one: The President of the Foreign Affairs Council (rotating every six months), the High Representative of the CFSP (occupied by Javier Solana since its creation) and the European Commissioner responsible for External Relations. This construction was initially opposed by Javier Solana[50] as well as Member States such as the United Kingdom, Sweden and Belgium,[51] and obviously falls short of the ideal option (for the purposes of coordination) of simply integrating foreign policy issue areas into the first-pillar working method of the Union (the ordinary decision-making procedure) and making the EEAS a Directorate General of the European Commission. Still, it is a notable advance with respect to coordination between the CFSP and other foreign policy issue areas, since the same person now heads all the relevant bureaucratic structures. One of the specific objectives of the Lisbon Treaty was to generate more coherence and continuity in the foreign policy and diplomatic representation of the EU, and largely accomplishes this by making the HR/VP responsible for the totality of EU foreign policy and diplomacy. Of particular relevance is here the leadership and political direction that the HR/VP can give to EU diplomacy, now that she has can present global initiatives and policy proposals by having this privilege both in the Council, as for the CFSP, and in the Commission, as for other policy areas. This way, the HR/VP coordinates not only the initiatives of the various DGs of the Commission with external implications to their work, but also relations with the Council, the Commission and the Parliament, with central focus on coordination with the Commission DG's with external implications in their work.[52]

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[48] B. Crowe, *op. cit.*, p. 14; G. Edwards and D. Rijks, *op. cit.*, pp. 73-75.
[49] N. Fernández Sola, *op. cit.*, p. 12.
[50] M. E. Smith, Europe's foreign and security policy: The institutionalization of cooperation, Cambridge, Cambridge University Press, 2004, p. 230.
[51] N. Fernández Sola, *op. cit.*, p. 8.
[52] EEAS, "EEAS review", *op. cit.*, pp. 7-10.

In sum, the scope for horizontal coherence of the EU foreign policy that its diplomatic structures execute is thus greatly increased with the institutional innovation that the new HR/VP represents. Furthermore, this innovation also has a more direct impact on the diplomatic representation of the Union. The HR/VP heads the EEAS,[53] including both its central administration and policy-formulating bureaucracy in Brussels and the diplomatic corps of the EU, centred on the Union Delegations in third states and international organizations that are responsible for EU representation abroad across policy areas.[54] This unified representation of the EU[55], described in the following section in more detail, has arguably contributed to EU visibility, as has the fact of having a single HR/VP representing the Union continuously and across policy areas.

4. Diplomatic practices: European Union representation in third states and international organizations

4.1 EU diplomatic representation in third states

EU diplomacy is executed by a network of actors, where overall efficiency and impact depends to a large degree on coordination and cooperation. The inevitable context of the diplomatic practices of the EEAS is therefore that they coexist with those of each EU Member States that continue engaging in diplomatic relationships alongside the EEAS as independent sovereign states, although the positions they defend are in many cases the result of discussions in Brussels,[56] and when no political agreement was possible, substitute a common EU position.

The Lisbon Treaty and Council Decision on the establishment of the EEAS do not contain provisions with a direct impact on Member State diplomacy. Rather, the Treaty clearly specifies[57] that the EEAS dos not affect the responsibility of each sovereign Member State to formulate and execute its foreign policy, nor its diplomatic representation in third states and international organizations. There is no intention to substitute Member State diplomacy, and the EEAS should therefore be understood not as a change of the networked nature of EU diplomacy, executed by Member States and EEAS, but a change within the network that allow its it to coordinate more efficiently and achieve a more unified representation in its diplomatic relationships.

Although in a given third state, EU diplomacy thus consists of the activities of both the EEAS and the Member States that cooperate and coordinate, the institutional centrepiece is clearly the European Union Delegations. The previous Commission Delegations represented only the European Commission, whereas the Lisbon Treaty explicitly establishes that the new EU delegations represent the entire EU.[58]

The functions of the Delegations have thereby change in two ways: Firstly, they are now under the authority of the HR/VP, with the Head of Mission being from the EEAS. Although Commission staff continues to work in the Delegations, they are nevertheless placed within the EEAS structure and as such institutionally separated from the Commission. Secondly, the competences of the EEAS in CFSP matters mean that the EU Delegations

[53] TUE (Lisbon), art. 27.
[54] TFEU (Lisbon), art. 221.
[55] Exceptions remain, in that the Presidency or another Member State represents the EU in third states without an EU Delegation, and the Member State holding the Presidency hosts multilateral summits held in the EU (whereas bilateral summits are hosted by the EU in Brussels. N. Helwig, P. Ivan and H. Kostanyan, *The new EU foreign policy architecture*, *op. cit.*, p. 28.
[56] S. Riordan, *The new diplomacy*, Cambridge, Polity Press, 2003, pp. 71-72.
[57] S. Duke, "Providing for European-level diplomacy…", *op. cit.*, p. 224.
[58] TFEU (Lisbon), art. 221.

assumes the functions that were previously exercised by the embassy of the Member State holding the Presidency of the Council. There is no longer a special role for the diplomatic mission of the Presidency, which comes to have a role in the EU network similar to that of other Member State representations. The Delegations now represent the EU across all policy areas and come to functionally resemble the classical Westphalian state embassies, although of course with respect to content they continue to be subject to the constraint of political consensus among Member States. The innovations thus greatly reduce previously existing problems of continuity and complexity.

The problem of continuity in EU diplomacy was largely a function of the construction of being represented in CFSP areas by the rotating Presidency. This meant a change in political priorities every six months, which in itself is a complicating factor. But the task of diplomats to create stable relations with host state interlocutors was also problematic, since the task fell to new persons every six months. To third states, diplomatic complexity is also reduces, since each state diplomat now represent only the accrediting state and not in some cases also the EU. This makes things simpler, and host state representatives tasked with EU relations do not have to deal with new people every six months.

Complexity is also reduced with respect to policy areas. The host state now interacts with the EU Delegation irrespective of the issue area, whereas before the relevant EU representative was either the working in the Commission Delegation or the in embassy of the Member State holding the Presidency. This is of course particularly relevant with issues that span the internal division of competences in previous pillar structure of the EU, where the EU can now speak with one voice.

But the creation of the EEAS has not only reduced complexity in the EU interaction with the host states, but also had different implications for the internal cooperative dynamics in the EU network of actors executing its diplomacy. First of all, the Delegations needed more human resources to deal with new policy areas, which also made obvious that new physical facilities would be necessary in some cases.[59] Secondly, the Delegation has assumed the function of coordinating the activities of all the EU actors with diplomatic missions to a third state (EU and Member States) and it now presides over the coordination meetings, instead of this task being performed by the rotating Presidency. This strengthens the role of the EU Head of Mission within the EU network, but also gives her a clearer profile in the negotiations with the host state, since she now coordinates the EU position communicated by all actors across policy areas, and not only in first pillar issue areas. [60]

A first conclusion to be drawn with respect to EU representation in bilateral relationships is therefore that the EEAS greatly simplifies diplomatic interaction, increases the scope for vertical coherence, by moving the balance towards the EU Head of Mission, as well as horizontal coherence, since the EU Delegation now speaks for the Union in all policy areas. A second conclusion is that these diplomatic advantages have come at the price of a greater internal complexity within the EU Delegations, since the divide between supranational and intergovernmental policy areas has now simply been internalised within the EEAS in Brussels and in the Delegations.[61]

Whereas before the EU Delegations only worked for the Commission, they now work for different Brussels bureaucracies. First and foremost, they work for the EEAS, which has the coordination role also in Brussels, with the Head of Mission being in all cases an EEAS official. But as mentioned in the previous section, only the DG Relex of the Commission was

[59] S. Duke, "Providing for European-level diplomacy…", *op. cit.*, p. 229.
[60] N. Fernández Sola, *op. cit.*, p. 21
[61] E. Hayes, "EU delegations: Europe's link to the world", in K. E. Jørgensen and K. V. Laatikainen (eds.), *Routledge Handbook on the European Union and International Institutions: Performance, policy, power*, New York, Routledge, 2013, pp. 27-41, p. 36.

incorporated into the new EEAS structure. This also means the other DGs of the EU Commission with important external dimensions to their work, such as Enlargement, Development and Trade, continue to exist outside the structures of the EEAS. As such, the EU Delegations work with more issue areas than the central administration of the EEAS in Brussels, and therefore the Delegations have staff not only from the EEAS, but also from the relevant Commission DGs. This state of affairs is obviously the expression of the division of labour in Brussels, where the DGs of the Commission with external implications of their work continue to exist independently of the EEAS. In Brussels, the HR/VP spans the institutions and coordinates the policy content, whereas in the Delegations this task is performed by the Head of Mission, responsible for the totality of Delegation activities and the coordination and coherence of these.[62]

The issue of the staff of the Delegations was not clarified by the Lisbon Treaty, but left the question to be decided by the posterior Council Decision.[63] The general formula is that the Delegation staff comes from the EEAS, and from specific Commission DGs when relevant. The staff of the specific EU Delegation thus largely depends on the third state in question, for instance there will be a predominance of Commission staff working with the implementation of specific projects when the host state is a developing country, whereas there will be more EEAS staff when the host state is one with which the EU maintains more 'political' relations, such as Russia.

A general problem with respect to the staff of the Delegations that has only been partially resolved with the creation of the EEAS is the fact that the persons are in most cases not career diplomats and that they therefore do not feel adequately prepared for representing the EU in diplomatic relationships.[64] Former Commission or Council officials need traditional diplomatic training and the Member State diplomats that now form part of the EEAS need training in the intricacies of the functioning of the EU, particularly its external relations.

Even without a diplomatic academy for the training of Member State diplomats as well as Commission and Council officials, it is vital that training programmes facilitate the socialisation of the participants, so that the persons working both in the EEAS central administration and in the Delegations abroad come to share an EU identity and common EU outlook, with a primary professional loyalty towards the EEAS and a "European attitude."[65] This socialisation is already helped by the daily functioning of the EEAS, where staff with different institutional origins work side by side.[66] Evidence from EU voting in the UN General Assembly shows that over the decades, there is increasing political coherence among EU Member States,[67] a sign that socialisation and coordination dynamics are functioning.

What must be created is an EU level epistemic community of foreign policy professionals that is compatible with, but distinct from, the epistemic communities existing in the foreign services of each EU Member State and the EU Commission.[68] This is an on-going process of socialisation, which will determine whether the EEAS becomes a battle ground and tool for other actors where each will struggle to impose its views on the EEAS in its totality or

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[62] Council decision…, op. cit, art. 5.
[63] TEU (Lisbon), art. 27.
[64] B. Sánchez Ramos, *op. cit.*, pp. 150-151.
[65] N. Fernández Sola, "El Servicio Europeo de Acción Exterior y la nueva gobernanza de los asuntos exteriores europeos", in A. Sorroza Blanco (ed.), *Presidencia Española: retos en una nueva Europa*, Madrid, Elcano, 2010, p. 156.
[66] C. Pérez Bernárdez, "Un órgano *in statu nascendi*: el Servicio Europeo de Acción Exterior (SEAE) post-Lisboa," en J. M. Sobrino Heredia (dir.), *Innovación y conocimiento. IV Jornadas Iberoamericanas de Estudios Internacionales*, Madrid, Marcial Pons, 2010, p. 462.
[67] C. Bouchard and E. Drieskens, "The European Union in UN politics", in K. E. Jørgensen and K. V. Laatikainen (eds.), *Routledge Handbook on the European Union and International Institutions: Performance, policy, power*, New York, Routledge, 2013, pp. 115-127, p. 119
[68] D. Spence, "Taking stock: 50 years of European diplomacy", *Hague Journal of Diplomacy*, vol. 4, no. 2, 2009, pp. 235-259.

whether it will evolve into an EU diplomatic service. An important factor is here that the Member States stop sending problematic or close-to-retirement-age officials, which was previously the norm.[69] The outcome of this socialisation process will then again feedback into the EU identity as an international actor,[70] and its nature as a political entity in the international system; a collection of sovereign states that cooperate or a polity and international actor that exists beyond state sovereignty and Westphalian diplomatic culture and structures.

4.2 EU participation in international organizations

Whereas the establishment of the EEAS do not cause great problems in the bilateral diplomatic relationships of the EU, but rather improves the coordination in the EU network, the situation is quite different with respect to the participation of the EU in international organizations. Due to the internal distribution of competences, it was previously the Commission that generally represented the EU in first pillar issue areas; whereas the rotating Presidency of the Council represented the EU in CFSP matters. Therefore, in the many areas of mixed competences and pillar-crossing issue areas, the EU was represented jointly by the Commission and the Presidency. With the establishment of the EEAS, the representations accredited to international organizations are now EU representations, as are the two offices that the Council maintained in Geneva and New York.[71]

From the outset, it was not clear whether the Commission or the EEAS should represent the EU and its Member States in international organizations, and at which political level,[72] although according to the Lisbon Treaty, the Union Delegations should perform the task of representing the EU,[73] made possible by the legal personality that the Treaty creates for the EU.[74] After a struggle over who could and should represent the EU and its Member States outside of the area of specific EU competences, that lead to a crisis in the autumn of 2011 with blocked statements and demarches,[75] the Council adopted a set of General Arrangements for EU Statements in multilateral organisations.[76] This gives the right of the Member States to decide on a case-by-case basis whether and how to be jointly represented, by the rotating Presidency, EU Delegation, European Council President or the Commission. Once there is an agreement on who should represent the EU position, there is the question of who is being represented. In this sense, there exist three different kinds of statements of the EU network in international organisations, according to the division of competences between the EU and the Member States in the specific case: On behalf of the EU (EU competences, including actions in the framework of the CFSP when there is consensus in the Council), on behalf of the EU and its Member States (shared competences when there is agreement among Member States) and on behalf of the Member States (state competences when there is agreement among Member States). As such, the diplomatic representation of the EU varies depending on the international organization and also the specific issue being discussed.

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[69] A. Missiroli, "Introduction: A tale of two pillars - and an arch", in G. Avery (ed.), *The EU foreign service: How to build a more effective common policy*, Brussels, European Policy Centre, 2007, p. 15.

[70] A dimension stressed by Catherina Carta, see: C. Carta, "The EU's diplomatic machinery" in K. E. Jørgensen and K. V. Laatikainen (eds.), *Routledge Handbook on the European Union and International Institutions: Performance, policy, power*, New York, Routledge, 2013, pp. 41-52, p. 45; C. Carta,*The European Union Diplomatic Service: Ideas, Preferences and Identities*, London, Routledge, 2011.

[71] B. Crowe, *op. cit.*, p. 13.

[72] M. Emerson and P. M. Kaczynski, *Looking afresh at the external representation of the EU in the international area, post-Lisbon*, CEPS Policy Brief, no. 212, Brussels, Centre for European Policy Studies, 2010, p. 3.

[73] TFUE (Lisbon) art. 221.

[74] TUE (Lisbon) art. 47.

[75] N. Helwig, P. Ivan and H. Kostanyan, The new EU foreign policy architecture, op. cit., p. 64.

[76] Council of the European Union, "EU statements in multilateral organisations – general arrangements", doc 15901/11, 24th October 2011.

Continued confusion of third states' representatives is the consequence, since these are rarely experts on EU law and the division of competences among the actors in the network.

Whereas the non-state nature of the EU in bilateral relationships is not a formal problem, with mutual consent and reciprocity being the guiding norms of bilateral diplomacy, as expressed in diplomatic law.[77] In the case of international organizations, however, there is a potential clash between the law of the Organization and the nature of the EU that for instance impedes the EU Delegation from speaking.

The cases of the WTO and the UN system illustrate well the general problem field. The EU is a member of the WTO alongside the Member States and within this organization, the Commission has acted like any other foreign policy actor.[78] DG Trade continues to exist separately from the EEAS, and it is the Trade Commissioner who represents the EU in the WTO ministerial conference, the highest authority within the WTO, whereas it is the EU representation under the EEAS that manages the daily interaction with third states and is formally accredited as a diplomatic mission. Since the EU is a member of the WTO, there are few legal obstacles to EU activities within the organization, the challenge being mainly one of vertical coordination with the Member States and internal coordination between the EEAS and DG Trade. The practice is that the Member States generally refrain from speaking in the trade negotiations and instead focus on supervising and controlling what the EU mission does.[79] Therefore, thecoordination meetings among EU actors are mainly chaired by the rotating Presidency.[80] The opposite is more or less the case in the UN system, where the EU is not a member. Examples include the Human Rights Council, the ILO and the WHO, where the rotating Presidency speaks on behalf of the EU, but the EU Delegation chairs most of the coordination meetings.[81] The sheer volume of coordination meetings among the actors involved in EU representation indicates the intense effort of coordination, but also the fragmentation of the EU as an actor, with 1300 coordinating meetings taking place in New York and 1000 in Geneva every year.[82]

With respect to the UN, it should be notes that the EU, in the form of its Member States, is the largest financial contributor to the UN, and that the EU has a special preference for participating in the EU system, given the EU's multilateralist ideology.[83] Yet, given its non-state nature, the EU cannot be a member of the UN (with the exception of the FAO, as a separate international organization). UNGA assembly 65/276 gave the EU an enhanced observer status in the Assembly, with the right to speak, although not vote, to have access to all UN meetings, although with seating among the observers, and have its written proposals circulated through the official channels,[84] and has solved the main problem that the EU previously had in the UN, namely the lack of formal access of its representatives.[85] Nevertheless, the resolution also means that to vote, co-sponsor draft resolutions and propose candidates is strictly a matter for the UN member states, so in these cases, the rotating Presidency will continue to represent a common EU position, should it exist.[86] In the case of

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[77] See the Vienna Convention on Diplomatic Relations.

[78] J. Ladefoged Mortensen, "World Trade Organization and the European Union", in K. E. Jørgensen (ed.), *The European Union and international organizations*, New York, Routledge, 2009, p. 80.

[79] C. Carta, "The EU in Geneva: The diplomatic representation of a system of governance", *Journal of Contemporary European Research*, vol. 9. no. 2, 2013, p. 417.

[80] C. Carta, "The EU in Geneva...", *op. cit.*, p. 417.

[81] C. Carta, "The EU in Geneva...", *op. cit.*, p. 417.

[82] S. Gstöhl, "EU diplomacy after Lisbon: More effective multilateralism", *Brown Journal of World Affairs*, Spring/Summer 2011, no. 11, 2011.

[83] S. Duke, "Form and substance in the EU's multilateral diplomacy", in K. E. Jørgensen and K. V. Laatikainen (eds.), *Routledge Handbook on the European Union and International Institutions: Performance, policy, power*, New York, Routledge, 2013, p. 16.

[84] UN General Assembly Resolution 65/276, of 10th of May 2011.

[85] S. Duke, "Form and substance...", *op cit.*, p. 23.

[86] E. Hayes, "EU delegations...", *op. cit.*, p. 36

the UN Security Council, the HR/VP has represented EU positions in case of agreement, but this remains a mainly symbolic aspect of EU actorness, that does not encroach upon the French and UK status as permanent members. There is thus no role for the EU in the previous negotiations that is the basis of the UNSC's work, and the EU as an organization is largely on the receiving end of the UNSC's work.[87]

This situation also reveals that in international organizations where the EU is not a member, the situation is not straightforward, since any representation of the EU by a diplomat that does not represent a Member State of the international organization is highly problematic. The problem is not that the Member States do not authorise the EEAS to speak on the behalf of the entire EU, but that the constitution of the international organization does not allow it. There is a basic clash between the establishment of the EU as an international actor by its Member States and represented by the EEAS and the reality of international organizations, which must be resolved through legal innovation, before there can be a coherent EU participation in international organizations through the EEAS.

The general impression is that Lisbon Treaty and the creation of the EEAS do not clarify the matter of the diplomatic representation of the EU in international organizations, but leaves the issue to loose informal arrangements and the flexibility of the actors involved,[88] as was the case before the Lisbon Treaty.

5. Institutional innovation and the EU's international strategy[89]

The Lisbon Treaty and the creation of the EEAS represent a small revolution in EU diplomacy. The intention was clearly to increase the efficiency of EU diplomacy and make the EU more 'state-like' as a diplomatic actor, thereby allowing it to defend its interests more effectively. Still, the main obstacle to a coherent and unitary diplomatic representation has not been removed with the Lisbon Treaty: The *sui generis* nature of the EU between federal state and international organization and the resulting network organisation of its diplomacy, where the EEAS continue to coexist with the diplomatic services of the 28 sovereign Member States. What has changed is the coordination mechanisms within the network and a less complex and more clear-cut and visible international representation, which undoubtedly helps the EU reconstruct its image as a more Westphalian-state-like actor. With this reservation made, it is nevertheless clear that the Lisbon Treaty and the EEAS constitute a strategic shift in EU diplomacy.

The main identity of the EU as a diplomatic actor is that of existing as a post-sovereign solution to the dilemmas and problems of the Westphalian international system,[90] in contrast to Westphalian norms of territoriality and sovereignty.[91] The basic construction is that the historical experiences of European countries have shown the limited capacity of Westphalian diplomacy to solve the problems caused by the competitive coexistence of sovereign states.

Until recently, it can therefore be argued, the main impact of EU diplomacy has been structural in nature. Keukeleire's concept of structural diplomacy relates mainly to the EU strategic objective of transforming the internal structures of other states in the international system, particularly the neighbouring states, so that they resemble the Member States of the

[87] C. Bouchard and E. Drieskens, "The European Union in UN politics", *op. cit.*, pp. 121-122.
[88] C. Carta, "The EU in Geneva...", , *op. cit.*, p. 415.
[89] This section is based on a paper present to the ECPR-SGIR/EISA "8th Pan-European Conference on International Relations in Warsaw, in September 2013.
[90] This is also what the EU seeks to communicate about itself. See S. B. Rasmussen., "The messages and practices of the European Union's public diplomacy", *Hague Journal of Diplomacy*, vol. 5, no. 3, 2010, pp. 263-287.
[91] I. Manners and R. G. Whitman, "The 'difference engine': constructing and representing the international identity of the European Union", *Journal of European Public Policy*, vol. 10, no. 3, 2003, pp. 382 and 399.

EU.[92] However, European Union diplomacy is based on a further causal idea of a structural nature: not only the need for the transformation of the internal structures of other states, but also the need for the transformation of the dominant social structures of diplomacy in the international system towards the institutionalisation and legalisation of interaction. This way, major political changes are achieved through changing the basic structures of the international system, in stark contrast to the dominant idea in Westphalian diplomacy, which assumes the inevitable existence of the structural condition of anarchy and which considers a balance of power among sovereigns a source of peace and stability. The logic of EU diplomacy points to both structural transformations being necessary in order to overcome the alienation that characterises the Westphalian system and its inadequate models for coexistence; hegemony or balancing. The creation of an international order based on effective international institutions is an explicit objective of the 2003 European Security Strategy and constructed as the only source of EU peace and prosperity. And the objectives of norm diffusion and structural transformation remain in the Lisbon Treaty.[93]

As such, the main impact of EU international agency was hitherto not to be found in the content of its interaction, but in its form, i.e. in its diplomacy,[94] in that it worked to recreate the foundations of the EU model of peaceful coexistence in its relations with other states and regions. Whether the EU will ultimately be successful in exporting its model is of course highly doubtful, although the increased interdependence and shared destiny of all states in an increasingly interconnected and ecologically fragile world seem to resemble ever more the intra-European conditions when the model was first created.[95]

The organization of the EU as a network actor and the internal distribution of competences among the various actors is not a great obstacle in this respect, since the foreign policy content that the EU transmits through its diplomatic practices is primarily universal values and only to a lesser extent specific material interests (for the defence of which the network organization *is* a great problem). This is again the simple result of the lack of internal agreement about which interests to defend. This lack of strong material interests to be defended internationally in relations with third states, has allowed the structural network diplomacy to function, since it has allowed for the form of interaction to be more important than the specific content in relations with third states, i.e. its diplomacy to be more important than its foreign policy.

As a new kind of actor in the international system, it is very significant that the EU does not break with Westphalian micro-practices, but instead tries to copy them to the greatest extent possible and adapt its network organisation to function more efficiently within the framework constituted by existing international diplomatic law. The 1961 Vienna Convention on Diplomatic Relations[96] and the related customary law associated with the classical Westphalian states system remain the legal basis for diplomatic interaction in the international system. This suggests that a fundamental condition in the international system for a political entity is the lack of alternatives to Westphalian diplomatic practices, at least for if unwilling to use violence.

Particularly the EU's difficult participation in international organizations reveals the isomorphic pressure and problems that the current functioning of the international system and

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[92] For his notion of structural diplomacy, see: S. Keukeleire *et al.*, "Reappraising diplomacy: Structural diplomacy and the case of the European Union", *Hague Journal of Diplomacy*, vol. 4, nº 2, 2009; S. Keukeleire *et al.*, *The emerging EU system of diplomacy..., op. cit.*; S. Keukeleire, "The European Union as a diplomatic actor: Internal, structural, and traditional diplomacy", *Diplomacy and Statecraft*, vol. 14, no. 3, 2003.

[93] TEU (Lisbon), art. 21.

[94] Conclusion also reached by Keukeleire, see above references.

[95] It is beyond the scope of this paper to consider the impact of the EU on the future of diplomacy and diplomatic theory in detail. For a thought-provoking discussion of this theme, see J. Batora, "Does the European Union transform the institution of diplomacy?", *Journal of European Public Policy*, vol. 12, no. 1, 2005, pp. 44-66.

[96] Vienna Convention on Diplomatic Relations.

international diplomatic law exercises upon the EU. If the EU were more Westphalian in terms of organization and of being more coherent and consistent, it could participate on a more equal footing with other powerful actors, and it would gain greater influence in the world. This alternative 'euro-nationalist' construction sees the ideal European Union as a unitary actor speaking with one voice and being able to effectively defend the material interests of the Union. This line of reasoning is evident in many current policy debates, not least those relating to the functioning of the EEAS, where the content is clearly more important than the form, in a reversal of earlier logics.

In this sense, the necessity for institutional innovation in EU diplomacy can be seen as a result of an ideological shift with respect to the EU's global role. It is still too early to clearly estimate the impact of the establishment of the EEAS in this respect, but it seems clear that it is motivated by a perception of the content (interests) being more important than the form (structural impact of diplomacy), meaning that the EU is in a process of downplaying the element of *raison de système* which has been a key characteristic of its diplomacy so far, to the benefit of an EU-level *raison "d'union."* This tendency is also reflected in the sanctions policy as referred to above, where geopolitical concerns tend to triumph the normative objectives of promoting democracy and human rights, as argued above.

6. Conclusion

EU diplomacy before the Treaty of Lisbon was plagued by horizontal and vertical incoherence stemming from the distribution of competences between the Union and Member States that led to supranational and intergovernmental forms of diplomatic representation by a multitude of actors organised in a network characterised by its diffuse structures of authority and legitimacy and an extensive lack of legal clarity.

The Lisbon Treaty and the EEAS alleviates some of these problems, whereas others remain. The main obstacle to a coherent and unitary diplomatic representation has not been removed with the Lisbon Treaty: The *sui generis* nature of the EU between federal state and international organization and the resulting network organisation of its diplomacy, where the EEAS continue to coexist with the diplomatic services of the 28 sovereign Member States. What has changed is the coordination mechanisms within the network and a less complex and more clear-cut and visible international representation, which undoubtedly helps the EU reconstruct its image as a more Westphalian-state-like actor. Also, the non-state nature of the EU continues to present serious problems to a coherent representation in international organizations, even when political agreement exists within the EU.

In Brussels, the central administration of the EEAS now coordinates all policy areas, and even though the Commission still does internationally relevant work, the HR/VP is at the pinnacle of all bureaucratic structures, thereby having the potential to greatly improve the horizontal coherence of EU diplomacy. Abroad, what has fundamentally changed with the Lisbon Treaty and the EEAS is the simplification of the network, with the disappearance of the role of the Presidency diplomatic mission in CFSP areas. Now the Delegations represent the Union as a whole and across policy areas, so that the divide between supranational and intergovernmental policy areas is now internal to the EEAS. The real impact of the institutional innovation still remains to be seen, because it will depend not only on the changed formal set-up, but of how the actors involved adopt new coordination practices that will allow the EU to have a unified representation as an actor. This again depends on the socialisation dynamics between staff coming from the Commission, the Council Secretariat and, not least, the diplomatic services of the Member States.

Another main finding of the paper is that the institutional innovations indicate the consolidation of a strategic shift in EU diplomacy that has been on-going several years. The changes are for EU diplomacy to be more efficient and coherent, thereby enabling a more

assertive defence of EU interests on the international scene. This nevertheless represents a break with previous structural notions of diplomacy and a return to more Westphalian modes of conceiving international relations. This strategic shift towards the paradigm of the defence of interest in a competitive logic with other actors, as evidenced by the EU's efforts to become more state-like as a diplomatic actor is not unproblematic. If the Westphalian state as an organizational form was and is a problem for the peaceful coexistence of peoples, the recreation of the state at the European level cannot be a solution.[97] Of course, a more positive interpretation of the strategic shift is also possible. In a different perspective, thus, the institutional innovations analysed in this paper simple mean that the EU is successfully adapting to the isomorphic pressures exercised by existing diplomatic culture and practices in the international system generally and as such is advancing in the process coming to terms with the realities of international relations. In effect, the institutional innovations are mere indicators that the EU is 'maturing' as an international actor.

References

- Andrés Sáenz de Santamaría, P., "Proceso de decisión y equilibrio institucional en la acción exterior europea", in F. M. Mariño Méndez (ed.), Acción exterior de la Unión Europea y Comunidad Internacional, Madrid, Universidad Carlos III de Madrid and Boletín Oficial del Estado, 1998, pp. 85-112.
- Ashton, C., Proposal for a Council decision establishing the organisation and functioning of the European External Action Service, 2010, unnumbered document, available at: http://eeas.europa.eu/docs/eeas_draft_decision_250310_en.pdf.
- Batora, J., "Does the European Union transform the institution of diplomacy?", Journal of European Public Policy, vol. 12, no. 1, 2005, pp. 44-66.
- Batora, J., "The 'Mitrailleuse Effect': The EEAS as an Interstitial Organization and the Dynamics of Innovation in Diplomacy",in Journal of Common Market Studies, vol. 51, no. 4, 2013.
- Becerril, B, "Un paso más hacia una diplomacia común europea", in A. Sorroza Blanco (ed.), Presidencia Española: retos en una nueva Europa, Madrid, Elcano, 2010.
- Bouchard, C. and E. Drieskens, "The European Union in UN politics", in K. E. Jørgensen and K. V. Laatikainen (eds.), Routledge Handbook on the European Union and International Institutions: Performance, policy, power, New York, Routledge, 2013
- Carta, C., "The EU in Geneva: The diplomatic representation of a system of governance", Journal of Contemporary European Research, vol. 9. no. 2, 2013.
- Carta, C., The European Union Diplomatic Service: Ideas, Preferences and Identities, London, Routledge, 2011.
- Carta, C., "The EU's diplomatic machinery" in K. E. Jørgensen and K. V. Laatikainen (eds.), Routledge Handbook on the European Union and International Institutions: Performance, policy, power, New York, Routledge, 2013, pp. 41-52.
- Closa, C., Institutional innovation in the EU: The Presidency of the European Council, ARI, no. 47/2010, Madrid, Real Instituto Elcano, 2010.
- Cooper, R., The breaking of nations. Order and chaos in the twenty-first century, London, Atlantic Books, 2003, p. 37.
- Council of the European Union, Council decision establishing the organisation and functioning of the European External Action Service, 2010, 11665/1/10 REV 1.
- Council of the European Union, "EU statements in multilateral organisations – general arrangements", doc 15901/11, 24th October 2011.
- Crowe, B., The European External Action Service. Roadmap for success, London, Royal Institute of International Affairs (Chatham House), 2008.
- Duke, S., "Form and substance in the EU's multilateral diplomacy", in K. E. Jørgensen and K. V. Laatikainen (eds.), Routledge Handbook on the European Union and International Institutions: Performance, policy, power, New York, Routledge, 2013.
- Duke, S., "Providing for European-level diplomacy after Lisbon: The case of the European External Action Service", Hague Journal of Diplomacy, vol. 4, no. 2, 2009.
- Duke, S., "The Lisbon Treaty and external relations", Eipascope, vol. 2008, no. 1, 2008.

[97] R. Cooper, The breaking of nations. Order and chaos in the twenty-first century, London, Atlantic Books, 2003, p. 37.

- EEAS, ”EEAS Review”, 2013, unnumbered document, available at: http://eeas.europa.eu/library/publications/2013/3/2013_eeas_review_en.pdf.
- Edwards, G. and D. Rijks, "Boundary problems in EU external representation", in Swedish Institute for European Policy Studies (ed.), Institutional competences in the EU external action: Actors and boundaries in CFSP and ESDP, Stockholm, Swedish Institute for European Policy Studies, 2008.
- Emerson, M. and P. M. Kaczynski, Looking afresh at the external representation of the EU in the international area, post-Lisbon, CEPS Policy Brief, no. 212, Brussels, Centre for European Policy Studies, 2010.
- European Commission, Europe in the world - some practical proposals for greater coherence, effectiveness and visibility, 2006, COM(2006) 278.
- Fernández Sola, N., El Servicio de Acción Exterior de la Unión Europea, Working Paper 46/2008, Madrid, Real Instituto Elcano, 2008.
- Fernández Sola, N., "El Servicio Europeo de Acción Exterior y la nueva gobernanza de los asuntos exteriores europeos", in A. Sorroza Blanco (ed.), Presidencia Española: retos en una nueva Europa, Madrid, Elcano, 2010.
- Gstöhl, S., ”EU diplomacy after Lisbon: More effective multilateralism”, Brown Journal of World Affairs, Spring/Summer 2011, no. 11, 2011.
- Gutiérrez Espada, C. and M. J. Cervell Hortal, "El Tratado de Lisboa y las instituciones (no jurisdiccionales) de la Unión", in C. R. Fernández Liesa and C. M. Díaz Barrado (eds.), El Tratado de Lisboa. Análisis y perspectivas, Madrid, Dykinson, 2008.
- Gutiérrez Espada, C. and M. J. Cervell Hortal, La adaptación al tratado de Lisboa (2007) del sistema institucional decisorio de la Unión, su acción exterior y personalidad jurídica, Granada, Comares, 2010.
- Hayes, E., ”EU delegations: Europe’s link to the world”, in K. E. Jørgensen and K. V. Laatikainen (eds.), Routledge Handbook on the European Union and International Institutions: Performance, policy, power, New York, Routledge, 2013.
- Heartfield, J., "European Union: A process without subject", in C. J. Bickerton et al. (eds.), Politics without sovereignty: A critique of contemporary international relations, New York, UCL Press, 2007.
- Helwig, N., P. Ivan and H. Kostanyan, The new EU foreign policy architecture: Reviewing the first two years of the EEAS, Brussels, Centre for European Policy Studies, 2013.
- Hill, C., "Closing the Capabilities-Expectations Gap?", in J. Peterson y H. Sjursen (eds.), A Common Foreign Policy for Europe: Competing Visions of the CFSP, London, Routledge, 1998.
- Hill, C., "The Capabilities-Expectations Gap, or Conceptualising Europe's International Role", Journal of Common Market Studies, vol. 31, no. 3, 1993, pp. 305-328.
- Hocking, B., "Introduction: gatekeepers and boundary-spanners - Thinking about foreign ministries in the European Union", en B. Hocking y D. Spence (eds.), Foreign ministries in the European Union: Integrating diplomats, Basingstoke, Palgrave, 2002.
- Jáuregui Atondo, R., El Parlamento Europeo: un actor decisivo en las negociaciones sobre la creación del Servicio Europeo de Acción Exterior ARI, no, 147, Madrid, Real Instituto Elcano, 2010.
- Jönsson, C. and M. Hall, Essence of Diplomacy, Houndsmills, Palgrave, 2005.
- Keukeleire, S. et al., "Reappraising diplomacy: Structural diplomacy and the case of the European Union", Hague Journal of Diplomacy, vol. 4, nº 2, 2009.
- Keukeleire, S. et al., The emerging EU system of diplomacy: how fit for the purpose?, Policy Paper, nº 1, Jean Monnet Multilateral Research Network on 'The Diplomatic System of the European Union', 2010.
- Keukeleire, S., "The European Union as a diplomatic actor: Internal, structural, and traditional diplomacy", Diplomacy and Statecraft, vol. 14, no. 3, 2003.
- Ladefoged Mortensen, J., "World Trade Organization and the European Union", in K. E. Jørgensen (ed.), The European Union and international organizations, New York, Routledge, 2009.
- Manners, I. and R. G. Whitman, "The 'difference engine': constructing and representing the international identity of the European Union", Journal of European Public Policy, vol. 10, no. 3, 2003.
- Medel Gálvez, S., “La posición del Parlamento Europeo en torno a la diplomacia común, con especial referencia al Informe Brok,” in J. M. Sobrino Heredia (dir.), Innovación y conocimiento. IV Jornadas Iberoamericanas de Estudios Internacionales, Madrid, Marcial Pons, 2010.

- Missiroli, A., "Introduction: A tale of two pillars - and an arch", in G. Avery (ed.), The EU foreign service: How to build a more effective common policy, Brussels, European Policy Centre, 2007.
- Pérez Bernárdez, C., "Un órgano in statu nascendi: el Servicio Europeo de Acción Exterior (SEAE) post-Lisboa," en J. M. Sobrino Heredia (dir.), Innovación y conocimiento. IV Jornadas Iberoamericanas de Estudios Internacionales, Madrid, Marcial Pons, 2010.
- Portela, C., "El Servicio Europeo de Acción Exterior: un instrumento para reforzar la política exterior", in A. Sorroza Blanco (ed.), Presidencia Española: retos en una nueva Europa, Madrid, Elcano, 2010.
- Portela, C., European Union sanctions and foreign policy, London, Routledge, 2010.
- Riordan, S., The new diplomacy, Cambridge, Polity Press, 2003.
- Rasmussen, S. B., "The messages and practices of the European Union's public diplomacy", Hague Journal of Diplomacy, vol. 5, no. 3, 2010.
- Rosamond, B, Theories of European integration, Basingstoke, Macmillan, 2000.
- Sánchez Ramos, B., "La representación exterior de la Unión Europea tras el Tratado de Lisboa: en busca de la unidad, eficacia y coherencia," in J. M. Sobrino Heredia (dir.), Innovación y conocimiento. IV Jornadas Iberoamericanas de Estudios Internacionales, Madrid, Marcial Pons, 2010.
- Spence, D., "Taking stock: 50 years of European diplomacy", Hague Journal of Diplomacy, vol. 4, no. 2, 2009, pp. 235-259.
- Treaty on European Union (TUE (Lisbon)).
- Treaty on the Functioning of the European Union (TFEU (Lisbon)).
- UN General Assembly Resolution 65/276, of 10th of May 2011.
- Vienna Convention on Diplomatic Relations.
- Wendt, A., Social theory of international politics, Cambridge, Cambridge University Press, 1999.
- Wessels, W. and F. Bopp, The institutional architecture of CFSP after the Lisbon Treaty - Constitutional breakthrough or challenges ahead?, Challenge Research Papers, no. 10, Brussels, Centre for European Policy Studies, 2008.
- Youngs, R., The end of democratic conditionality: good riddance?, Madrid, Fundación para las Relaciones Internacionales y el Diálogo Exterior (FRIDE), 2010.

FOREIGN POLICY SOVIET CONSTRUCT. LESSONS LEARNT

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Abstract

Soviet foreign policy is a field where theories abund. Most of these theories contend that one or more factors are extremely important determinant factors for Soviet behaviour in all or most situations. Soviet foreign policy has usually been analysed in terms of the leaderâ□™s objectives, their perceptions and iniatives in the outer environment of the world politics, and their response to development abroad. The main purpose of this article is to briefly examine the internal and external factors that shape Soviet foreign policy and behavior, and to analyse the forces that shape Soviet international behaviour, focusing on the national interest issue. Why Soviet foreign policy? Because we consider that even a brief look into the Soviet foreign policy may represent the key to understanding Russiaâ□™s current behaviour on the world stage. The first step in constructing viable security strategies is to understand the surrounding political world, as well as what Russia was, is and could be.

Keywords: *soviet foreign policy, decision-maker, country behaviour, imperialist mindset.*

1. Introduction

Our analysis tackles Soviet Russia's foreign policy behaviour, starting from the premises that thoroughly knowing the past is a useful means of understanding the present and, especially, predicting the future. It is no longer a secret that now, more than ever in the past 20 years, we are witnessing a deep change in forces and geopolitical interests and, for this reason, we need proper tools that may help us grasp and assess the behaviour of the "other".

Our analysis aimed at both critical analysing a vast literature on the topic, and at profiling a country's behaviour; certain analysts have so far considered this profile antiquated, but now, given the vicinity, they are under pressure to adapt it. Our approach is an argument in favour of the analyses of the recent evolutions embedded in the course of history.

For a better understanding of our analytical approach we will present the most relevant – in our opinion – aspects referring to the main topic – Russia.

Maybe the best wording to start any material on Russia, be it journalistic or scientific, is Winston Churcill's quote, "a riddle wrapped in mystery inside an enigma."

Russia has always represented a fascination for unknown, vast territories; the mystery that surrounded Russia a few hundred years is due to both vast lands and to foreigners' inability to understand the Russian spirit. Russia's most important weapon (and its greatest vulnerability has been and still is space[1]. Tendencies of territorial nationalism and expansionism, a common trait for most European states, have gained unique nuances in Russia's history. "The historic mission" of the Russian nation as a representative and

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[1] Adam B. Ulam, Expansion and Coexistence, Praeger Publishers, New York, 1968.

advocate of Eastern Christendom against Catholicism and Islam dates back to Ivan the Terrible or Peter the Great's political visions.

The Russian peasant, the white aristocrat, the Cossack general, the almighty tsar, the Bolshevik, the Trotskyist, the communist, the collectivized peasant, the Russian intellectual converted to communism, the Soviet commissar, the Soviet soldier and especially the leaders of the communist Soviet elite represent for Westerners as many riddles wrapped in mysteries inside enigmas.

From our point of view, one of the major driving forces for crisis periods during the Cold War is the inability or the refusal to "solve" these "riddles."

2. Paper Content

Russian's foreign policy

Russian foreign policy has proven a vast field for Western researchers. The Party, the ideology, in-fighting, the organisation of the state apparatus, have been studied; models of the Soviet decision-making process have been drawn up; Soviet secret services became the key to solving unsolvable equations. The inability to predict Soviet actions in foreign policy, or the inability to establish an analysis model able to predict on a long or short term the Soviet foreign policy decisions were explained through the enigmatic nature of the space in which the Soviet political life developed.

At the end of the forth decade of the last century specialists considered that although Soviet foreign policy objectives are clear and coherent on a long term, every day diplomatic actions and gestures are whimsical, incoherent and enigmatic.[2]

Studies on the Soviet foreign policy of the Cold War's last decade launch the hypothesis that long term foreign policy objectives increased and became ambivalent once with Westerners' growing ability to understand every day diplomacy, which still remains contradictory and whimsical even after four decades.

An increasingly complex foreign policy decisional process is not a characteristic pf USSR; it was highlighted in the foreign policy analysis of the great powers.

Increased academic interest in Soviet foreign policy decision analysis and the need to understand, predict, and correctly analyse a certain kind of behaviour on the international arena have had to overcome several hindrances such as: reduced amount of materials coming right from the source, an insignificant number of monographs and Western analytical studies on the fundaments of Soviet foreign policy, an intricate interpretation of available documents.

At first sight, interpreting available documents may seem a minor issue. In the history of the Cold War, disinformation, manipulation and propaganda represented both parts' favourite methods in their attempt to win people's "hearts and minds." Acknowledging the constant, frequent use of these methods often led to mistrust and superficial treatment of documents or information. To be more specific, we need to say that, especially during crises or in moments when quick decisions needed to be taken, politicians, intelligence analysts, military strategists treated clear data and documents with mistrust and superficiality, labelling them as results of propaganda and disinformation. The fear of falling for the other's lies represented, in our opinion, the main hindrance in analysing and increasing the ability to predict the "foe's" behaviour in the international political game specific to the Cold War period.

It is extremely difficult to analyse available documents. What information do they reveal? Is this information the official standpoint? Can this information shape Soviet Union's

[2] Edward Crankshaw, New York Times Book Review, July 3, 1949, p.4.

true behaviour or is it merely a projection of a desired but difficult to achieve behaviour? How can we establish the extent to which the dissemination method, the source of declarations, their target, is representative form the perspective of international relations study?

During the Cold War period, to establish foreign policy objectives meant to analyse territorial acquisitions, military bases, alliances, distribution of power and influence, as well as their usefulness in increasing power, prestige and security. Ideology, power and fear of the other's power, messianism and suspicion shaped the national interests of the two big international actors USA and USSR; the concepts of independence, territorial integrity, power and prestige were interpreted in different manner.

Hartman (1978) said that hardly ever can the interests of two states be totally opposed or can they completely overlap. There will always be a third state and time will change motivations, attitudes and behaviours. The fluidity of the process does have certain limits, but major changes are possible in defining the national interest, changes that are deeper than the public opinion is ready to understand.

One of the most appreciated Russian geopoliticians, Alexandr Dughin, created in his book, Fundamentals of Geopolitics, possible scenarios to relaunch "the Russian empire." Although more than 20 years have passed since the end of the Cold War and Russia's road has had its ups and downs, today's geopolitical, political, and economic reality urge us to present some of Dughin's ideas. We need to mention that these ideas are not at all unique, or of current importance for that matter, but they are nevertheless typical of the Russian imperialist mindset, they are typical of the manner in which Russian personalities, be they tsarist, Soviet or post-Soviet, understood Russia's long-term future: "the Russian people is so tied to the geopolitical reality, that space itself, its internalization, its spiritual perception, has given shape to people's psychology, becoming one of the main determiners for its identity and essence… to give up on the function of creator of the empire means the end of the Russian people's existence as a historical reality, as a civilising factor, it means national suicide."

The solution to the enigma, mystery, riddle that Russia represents is given by the great politician Winston Churchill. The key to decoding the Russian behaviour is its national interest. From our point of view (tsarist, Soviet, today's), Russia's national interest is conquering and dominating the Euro-Asian space.

Western studies on Soviet foreign policy

The vast Russian space has always raised the interest of scientists, diplomats or simple travellers. The Russian revolution and the dramatic change of the existent social order, with its deep implications upon the international system led to an increased interest in research on social organisation, ideology, the Communist Party's organisational structure, elites' development and their action in the decision-making process, the army's organisational model and Soviet military doctrines, the hierarchical structure and the psychosocial models of Soviet intelligence services.

In the aftermath of the Second World War, Western publications are characterized by a high number of papers referring to USSR foreign policy. Aware of the fact the ally will turn into an enemy and the global game of power will be waged between the United States and the Soviet Union, the Westerners tried to find the proper ways and means to analyse and especially to predict the Soviet behaviour in the international arena.

We will try to briefly present the papers that are representative for the reference period.

Volumes, articles, studies in those days are characterised by a various approaches on Soviet politics in the world arena, on USSR's ties within the international state system, including its bilateral and trilateral ties.

Part of the authors belonging to that period put emphasis on the effects that the changes in the Russian social and political system had on an international level. Coates W.P. (1939), Fisher (1930), Harper ed. (1935), Marques-Riviere (1935), Gruliow ed. (1953)[3] are merely a few names of authors whose works represented the basis for further research.

Other authors (some of whom we already mentioned) studied the specific aspects of Soviet foreign policy: Coates (1943), Dulles (1944), Fisher (1946), Konovalov (1945), Sloves (1935) or Taracouzio (1938).[4]

One of the most cited authors, Max Beloff, published in 1949 *The Foreign Policy of Soviet Russia*, tackling the issue of Soviet foreign policy from an historical and analytical point of view. His study offers the possibility to analyse the Soviet behaviour on the world stage from various perspectives. The important chronological benchmarks are intertwined with geographic analyses, which represent a synthesis of the works presented before. The second volume of this work, it treats Russia's foreign policy during 1936-1941, starting with the events that triggered the disappearance of collective security (Russia and the civil war in Spain, Russia and Turkey, AntiComintern Pact, Nyon Conference, Munich, Russia and the Far and Middle East) and ending the period of reference with a detailed analysis of the political and historical benchmarks at the beginning of the Second World War.

Another reference work but of a different approach, containing official documents of importance to the analysis of the first years of Cold War, as well as personal comments, is *The Cold War, A Book of Documents*, printed by H.L.Trefousse in 1965.[5]

Decades seven and eight of the past century are considered the most prolific from the point of view of studies dedicated to the Soviet Union and its foreign policy. Studies of those years are mandatory literature: Dallin (1960), Brzezinski (1967), Barrington Moore Jr. (1963), Aspaturian (1960, 1966, 1971), Horelick and Rush (1966), Zimmerman (1960), Hoffman and Fleron ed. (1971), Ulam (1968), Triska and Finley (1969), Laqueur (1959).[6]

Besides the works of the above mentioned authors, works that are thorough studies, analytical approaches on Soviet foreign policy and its relations with other states during the "fight" for supremacy, we need to mention other important works and authors who treated topics specific to Soviet policy, such as the influence of internal factors upon the foreign political decision-making: Bialer (1981), Schwartz (1975)[7], the military component in

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[3] Coates W.P., World Affairs and the USSR, Lawrence and Wishart, 1939; Fisher, L., The Soviets in World Affairs Cape, 1930; Harper ed., The Soviet Union and World Problems, Chicago University Press, 1935; Marques-Riviere, L'URSS dans le Monde, Paris, Payot, 1935; Leo Gruliow ed., Current Soviet Policies, New York, 1953, apud Beloff, The Foreign Policy in Soviet Russian, 1966.

[4] Coates W.P., A History of Anglo-Soviet Relations, Lawrence and Wishart and Pilot Press, 1943; Dulles, F.R., The Road to Tehran – Relations with the USA, Princeton University Press, 1944; Fisher, H.H., America and Russia in the World Community, California, Claremont College, 1946; Konovalov, Russo-Polish Relations, Cresset Press, 1945; Sloves, H., La France et L'Union Sovietique, Paris, Rieder, 1935; Taracouzio, T.A., The Soviets in the Arctics, New York, Macmillan, 1938.

[5] Trefousse, H.L., The Cold War, A Book of Documents, G.P.Putnam's Sons, New York, 1965.

[6] Dallin Alexander ed., Soviet Conduct in World Affairs, NY, Columbia University Press, 1960; Brzenzinski Zbigniew, The Soviet Bloc, Cambridge Mass, Harvard University Press, 1967; Barrington Moore Jr., Soviet Politics: The Dilemma of Power. The Role of Idealism in Social Change, New York, 1963; Aspaturian Vernon, The Union Republics in Soviet Diplomacy, Paris, Librarie Droz, 1960, The Soviet Union in the International Communist System, Stanford, California Hoover Institution Studies, 1966, Process and Power in Soviet Foreign Policy, Boston Little Brown, 1971; Horelick Arnold and Myron Rush, Strategic Power and Soviet Foreign Policy, Chicago, Chicago University Press, 1966; Zimmerman William, Soviet Perspectives on International Relations, Princeton, Princeton University Press, 1960; Hoffmann Erik and Fleron Frederic ed., The Conduct of Soviet Foreign Policy, Aldine de Gruyeter, New York, 1971; Adam Ulam, Expansion and Coexistence, The History of Soviet Foreign Policy 1917-1967, Praeger, 1968; Triska Jan and David D. Finley, Soviet Foreign Policy, New York, Macmillan, 1969, Walter Laqueur, The Soviet Union and the Middle East, New York.

[7] Bialer Seweryn, The Domestic Context of Soviet Foreign Policy, Boulder, Columbia Westview Press, 1981; Schwartz Morton, The Foreign Policy of USSR: Domestic Factors, Encino Calif: Dickenson, 1975.

defining the Soviet Union's super-power character: Holloway (1983), Dinerstein (1963), Bell (1962), Wolfe (1979, 1977), Leebaert (1981), Sokolovsky (1975)[8].

Another topic of interest for Western studies and research is Kremlin, with all that it represents: mysterious centre of Soviet power, hub of the communist elite's political games, of the conduct of Soviet foreign policy, of manifestation of Soviet leaders' various behaviours. Among authors preoccupied with Kremlinology we mention: Crankshaw (1966), Leonhard (1962), Shulman (1963), Laites (1964), Whitney (1963), Bertram (1957), Brzezinsky (1967), Linden (1966), Nove (1975).[9]

Soviet foreign policy decision, the way it was understood or predicted by American leaders and the effects certain Soviet decisions had on American foreign policy agenda were analysed in all the volumes dedicated to analyses of American administrations or to the lives of American presidents.

The tight link between the foreign policies of the two super-powers, most of the time in a cause-effect relationship, led to deeper analyses of the images and perceptions they had towards each other: Schwartz (1977), Welch (1970), Tucker (1963), Finlay, Faget and Holsti ed. (1967), De George (1966), Kennan (1961), Macintosh (1962), Hollander (1973).[10]

The literature includes official documents or even fiction that help the general public better understand the functioning of the Soviet state apparatus, the use of its interference mechanisms in influence spheres, and the link between the Soviet secret services and the political power, including the decision-making power in the foreign policy sphere: Amarlik (1970), Kaiser (1974, 1976)[11], De Mille, Le Carre, Colin Forbes, J. Archer.

The Soviet Union, actor of the international system

The first step in attempting to understand the Soviet foreign policy is to clearly establish USSR's place and role as an actor in the international system.

Paradoxically, USSR's characteristics on the world stage were similar to its competitors', the USA and China. The Soviet Union presented all the characteristics of a global power, the same way the USA had the same socio-political system as China. Nevertheless, these two important characteristics should not prevent us from considering the Soviet Union's unique character. To reduce the analysis of the Soviet Union to the hypothesis that the Soviet state was a dual entity may lead to misinterpretations; moreover, it cannot provide fundaments for further predictions.

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[8] Bell Coral, Negotiation from Strength, London, 1962; Holloway David, The Soviet Union and the Arms Race, New Haven Yale University Oress, 1983; Dinerstein Herbert, War and the Soviet Union, ed. New York Praeger, 1963; Leebaert Derek ed., Soviet Military Thinking, London, George Allen and Unwin, 1981; Sokolovsky V.D., Soviet Military Strategy, London MacDonald and Janes, 1975; Wolfe Thomas, The SALT Experience, The RAND Corporation, SantaMonica, 1979; The Military Dimension in Making of Soviet Foreign and Defense Policy, The RAND Corporation, SantaMonica, P/6024, 1977.

[9] Edward Krankshaw, Khrushchev: A Career, NY, London, 1966; Wolfgang Leonhard, The Kremlin since Stalin, NY, 1962; Marshall Shulman, Stalin's Foreign Policy Reappraised, Cambridge Mass and Harvard University Press, 1963; Laites, Kremlin Moods, The RAND Corporation RM-3535-ISA, 1964; Thomas Whitneyed, Khrushchev Speaks, Ann Arbor University of Michigan Press, 1963; Wolfe Bertram, Khrushchev and Stalin Ghost, NY, 1957; Brzezinsky Z., Ideology and Power in Soviet Politics, NY, Praeger 1967; Carl Linden, Khrushchev and the Soviet Leadership 1957-1964, Baltimore John Hopkins Press, 1966; Alec Nove, Stalinism and after, London, George Allen and Unwin Ltd., 1975.

[10] Schwartz Morton, Soviet Perceptions of the United States, Berkley University of California Press, 1977; Welch William, American Images of Soviet Foreign Policy, New Haven, Yale University Press, 1970; Robert Tucker, The Soviet Political Mind, Studies in Stalinism and Post Stalinism, Chanege, NY, 1963; Finlay D.J. and Holsti O.R., Fagen R., Enemies in Policy, Chicago, Rand McNally, 1967; Robert De George, Patterns of Soviet Thought, Ann Arbor University of Michigan Press, 1966; Geroge Kennan, Russia and the West under Lenin and Stalin, Boston, 1961; J.M. Macintosh, Strategz and Tactics in Soviet Foreign Policy, London, Oxford University Press, 1962; Paul Hollander, Soviet and American Society; A Comparison, NY, Oxford University Press, 1973.

[11] Amarlik Andrei, Will the Soviet Union Survive until 1984, NY, Harper and Row Publishers, 1970; Kaiser Robert, Russia – The People and the Power, NY, Atheneum, 1976; Cold Winter, Cold War, NY, Atheneum, 1974.

The Soviet Union was in fact a multiple entity whose components were often in a conflicting, competitive situation. "Separate interests of these components intermingled, were in conflict, sometimes overlapped, and were inspired by a multitude of reasons."[12]

From a theoretical point of view, the Soviet Union represents the only multiple actor on the world stage. According to Aspaturian (1971), we can identify five "distinct institutional personalities": the state, the party, the Russian nation, non-Russian nations, and the multinational federation.

The foreign policy analyst's misunderstanding might come, according to the quoted author, from certain responsibilities and obligations that sometimes led to an erosion of the central role undertaken by the Soviets in politics, i.e. that of a hub of revolutionary movements.

As a world revolutionary hub, the Soviet Union undertook the following roles: ideological guardian of the existent socio-political order – the socialist society, initiator and architect of its further development – the communist society, ideological and organisational leader of all communist parties, a source of inspiration and logistic support of the communist movements worldwide.

The history of role intermingling between the party and the state has always been characterized by controversies and rivalry, since each of these "identities had a different manner of inspiring, attracting and responding to internal or foreign components."[13]

The mission of the party structures was to transform certain characteristics of the international organisation system in order to facilitate the Soviet state's functioning at its best. Paradoxically, the Soviet state adapted to the international organisation system becoming part of it, moreover, becoming a global power, therefore the main viable functioning coordinate of the system. Consequently, "the fight for the victory of communism" on an international level not only did it jeopardize the very existence of the international system, but also undermined the global power of the Soviet state.

The Russian nation is another cause for confusion in the Soviet foreign policy analysis. As a historical and juridical successor of the Russian Empire, the Soviet Union functioned as a heir to the Russian nation's interests (53% of the USSR's population was of Russian nationality), thus preserved and extended Russian values, interests and historical objectives. Not only were the Russian values and traditions transmitted over, but they also acquired new dimensions through their assimilation by the Marxist ideology, by internationalization. The exclusivist national feeling in the Russian tradition has taken several forms throughout history: from considering Moscow as "the third Rome" and Mother Russia as the place of true orthodox belief, to labelling foreigners as dangerous or subversive; all these translated into continuing the state authority's behaviour from the Tsarist Russia to the Bolshevik Russia. In the years 40-50, much of the legislation that regulated Soviet citizens' life was borrowed from the Tsarist period. Peasants couldn't establish in cities if they didn't have a passport, a citizen of Russian nationality could not establish in Moscow or Leningrad without a residence permit, there were travel restrictions for foreign citizens on the Soviet-Russian territory and severe restrictions regarding the free flow of Soviet-Russian citizens in the West.[14]

Foreign Soviet policy radically changed after adopting the 1936 Stalinist constitution. The need to present the world a Soviet Union as viable discussion partner for Western democracies, the change of foreign policy discourse due to frequent use of the concepts of free security, common and indivisible peace represented only intermediary stages in achieving the short term goal – to reach the status of world power.

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[12] Vernon Aspaturian, Soviet Foreign Policy, in Macridis ed., Foreign Policy in World Politics, 1985, p.174.
[13] Ibidem, p.178.
[14] Alec Nove, Stalinism and After, London, George Allen and Unwin Ltd, 1975, p.15-16.

Stalin's heritage

The Soviet leader Iosif Visarionovici Stalin (Djugashvili), of Georgian origin, raised and educated in a religious seminar in the spirit of maintaining and respecting Mother Russia's traditions, was the one who imposed the first guiding lines of political reconstruction in the Soviet Union.

Imposing severe restrictions and humiliating peasants as a social group, the fear of intelligentsia and eliminating all liberal elements from the cultural life (writers, composers, directors, ballet dancers, professors, researchers, historians, painters[15]), promoting Russian nationality in the state apparatus and party elite, blocking any informational contacts with the West, incarcerations and assassinations of heads of the "glorious" Soviet army – are all benchmarks of the internal terror started under Stalin's rule.

Some authors[16] consider it possible that Stalin's governing concept, the despotic power he had always desired, the repression and terror that characterized the Soviet society, the paranoia and suspicions which had become "characteristics of the state" represent only the effects of a hostile foreign environment.

The foreign policy construct was largely due to the manner in which Stalin perceived the outer world and the Soviet Union's position in it. Suspicious by nature, paranoid, an adept of the conspiracy theory and of the permanent existence of possible imperialist plots, Stalin had adopted a tough position in the international arena in order to cover what he considered Union's weaknesses.

Russia's physical security (analysis of security from a geopolitical point of view) has always been linked to the characteristics and size of the territory, the same way psychological security was obtained through political centralization.

On the occasion of the 800th anniversary of Moscow, Stalin himself declared[17]: "The importance of Moscow resides in the fact that it became the fundament for unifying a torn Russia in a single state having a single government and a single leader. Only a centralized state can be able to manifest its independence and force, can achieve spectacular cultural and economic progress."

Soviet foreign policy, even during the Stalinist period, was characterized by two conflicting traits: voluntariness and determinism.

The literature offers us countless controversies linked to the aspects of the changes or continuity of Soviet foreign policy in the Stalinist and post-Stalinist period, and the impact of internal or external factors upon the Soviet behaviour abroad. Researchers of the Soviet society, advocates of the saying "those who ignore the mistakes of the past will repeat them," have tried to identify the elements of continuity and change in the Soviet foreign policy.

Charles Gati, comparing the Stalinist period with the post-Stalinist one concluded that elements of continuity are more significant than those of change. The author admits that the changes of the international system in the aftermath of the Second World War triggered deep changes both in establishing foreign policy objectives and in the means of achieving them; nevertheless, he considers as USSR's constant trait the consolidation of a pragmatic and cautious kind of power, preoccupied preponderantly with competition and cooperation in a international environment based on peaceful coexistence. "If there was indeed a behaviour model in the Soviet foreign policy from Lenin to Brejnev, it was characterized by the persistent yet cautious pursuit of the opportunities offered by the functioning of the

[15] The effects of the campaign of ensuring total obedience of Russian intelligentsia towards the party could be seen in the scientific life as well. Studies in genetics, cybernetics, mathematical economy, modern scientific theories and ideas, from the theory of resonance to cybernetics, were ignored and banned, since they represented "bourgeoisie's reactionary nonsense."

[16] Nove, Stalinism and After, London, George Allen and Unwin Ltd, 1975; Zimmerman, Soviet Perspectives on International Relations 1956-1967, Princeton University Press, 1969.

[17] 11 September, Pravda, 1947.

international system; persistent, since the major objectives of increasing the Soviet influence in the world haven't changed, and cautious, since the Soviet leaders adopted the tactics of gradual and sometimes subtle increase of this influence, such as, more often than not, forcefully counteracting this influence by the West seemed unjustified."[18]

Gati's main argument in favour of the continuity in the Soviet foreign policy hypothesis is that of the differences between the de-Stalinization period criticism on internal issues and external policy between the years 1928-1953. The Soviet foreign policy construct in the Stalinist period, construct based on circumspection, pragmatism, expansionism, preventive behaviour, revolutionary tendencies, or peaceful coexistence, proved to be a useful tool for the Soviet interest for such a long period, that it became embedded in the Soviet thinking even after Stalin's death.

Gati mentions that Russia's relationship with the West generally remained unchanged compared to the Stalinist period; it gained new aspects, the Union's interests diversified (Soviet foreign policies in the Third World), but its refusal to make decisions that could have jeopardized its super-power status or the Union's security on a longer or medium term was clearly stated in the Soviet foreign policy even in the post-Stalinist period. Khrushcev used to say: "Imperialists consider us Stalinists. Yes, when we speak of the fight against imperialists, we are Stalinisits."[19]

Gati considers that the general opinion that the Soviet foreign policy was characterized by changes is mainly due to the Soviet behaviour during World War II and its aftermath. The expansion and unprecedented aggression era in the Soviet foreign policy construct began with imposing its domination in the Eastern Europe, causing the Berlin crisis, the tensions linked to imposing the Marshall plan; all these coordinates are completed with harsh discourses and international political behaviour that could hardly be called diplomatic.

We can conclude at the end of our presentation that Stalin was an adept of *Realpolitik*; his perception upon the international reality was not that affected by ideology as one could expect. Personal experience and psycho-biographical traits, the characteristics of a new reconfiguration of the international system and the heritage of the great Russian empire – all these were imprinted upon his perception of the international environment reality and of the place the Soviet Union had or could have on the world stage. From the point of view of actions taken, Stalin had always represented a cautious guard of Russia's interests; and when we say cautious, we mainly think of those diplomatic compromises, of the ability to sacrifice certain ideological interests for the much more valuable national interest.

Stalin's foreign policy movements were many a time contradictory (from his relationship with Chaing Kai-shek Kuomingang and the organisation of multiparty free elections in Bulgaria and Hungary, up to supporting the Sionist movement during an anti-Semite internal campaign). Paradoxically, Stalin is the one who offered a new interpretation to the older concept of "antagonistic contradictions", according to which communism and capitalism will never coexist without conflict.

According to Adam Ulam,[20] during his last years, Stalin "created a tension that not only did it represent a potential threat, but it also proved useless." In other words, during his last years, sickness, age, paranoia and a permanent psychic tension typical of Kremlin, made Stalin abandon his pragmatism and compromise less in international relations.

Soviet foreign policy aggression in the aftermath of World War II is partly due to new geopolitical opportunities. The expansionist foreign policy, which at the time meant achieving national interest objectives, proved inefficient on a medium and long term. The aggressive

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[18] N. Khrushcev, in Thomas Whitney, ed. Khrushcev, Ann Arbor, University of Michigan Press, 1963, p.2.
[19] N. Khrushcev, in Thomas Whitney, ed. Khrushcev, Ann Arbor, University of Michigan Press, 1963, p.2.
[20] Adam B. Ulam, Expansion and Coexistence, NY, Praeger, 1968, p.543.

expansionism for the control of influence areas was nothing but the trigger of the sceptical, even paranoid behaviour that would lead to a wrong perception of the other.[21]

The term that can best characterize the way Stalin perceived international policy is "mobilization", a term which has both political and military connotations.[22] William Zimmerman, who often polemicized with advocates of the continuity and inflexibility of the Soviet foreign policy, considered that this idea of continuity only leads to denying the moderate character of the Soviet foreign policy after the 50s and its effect was maintaining a tough line in its policy of confining the USA.

Along years, analysts of Soviet foreign policy were split between sceptics and believers, with respect to USSR's structural ability to adapt under the influence of other international actors. Zimmerman considered that one of the main changes in the Soviet foreign policy in the 70s is triggered by a redefining of the Soviet elites' perception on the international environment.[23] The author considers that this change in perspective and in the Soviet foreign policy is due to its ability to influence the West, especially the United States, a sign of structural adaptability of the Soviet behaviour.

3. Conclusions

This comparative analysis of the works dedicated to understanding the Soviet behaviour in the Cold War era leads us to conclude that at the time – today as well – the West was/is unable to grasp the intimate drives of the functioning of the Russian "soul", it was unable to understand the intrinsic motivations of Soviet foreign policy decision. This gap in our understanding wouldn't be so dangerous if we hadn't been speaking today of a new cold war, a much more dangerous one, since we are witnesses to new instability hotbeds, to history wounds which have been opened once again, to an escalation of extremism and nationalism, to new ideological conflicts.

References

- Adam B. Ulam, Expansion and Coexistence, NY, Praeger, 1968
- Edward Crankshaw, New York Times Book Review, July 3, 1949
- Coates W.P., World Affairs and the USSR, Lawrence and Wishart, 1939
- Coates W.P., A History of Anglo-Soviet Relations, Lawrence and Wishart and Pilot Press, 1943 Trefousse, H.L., The Cold War, A Book of Documents, G.P.Putnam's Sons, New York, 1965
- Bialer Seweryn, The Domestic Context of Soviet Foreign Policy, Boulder, Columbia Westview Press, 1981
- Bell Coral, Negotiation from Strength, London, 1962
- Edward Krankshaw, Khrushchev: A Career, NY, London, 1966
- Schwartz Morton, Soviet Perceptions of the United States, Berkley University of California Press, 1977
- Amarlik Andrei, Will the Soviet Union Survive until 1984, NY, Harper and Row Publishers, 1970
- Kaiser Robert, Russia – The People and the Power, NY, Atheneum, 1976
- Vernon Aspaturian, Soviet Foreign Policy, in Macridis ed., Foreign Policy in World Politics, 1985
- Alec Nove, Stalinism and After, London, George Allen and Unwin Ltd, 1975
- 11 September, Pravda, 1947
- N. Khrushcev, in Thomas Whitney, ed. Khrushcev Speaks, Ann Arbor, University of Michigan Press, 1963
- Adam B. Ulam, Expansion and Coexistence, NY, Praeger, 1968

[21] For further data and studies referring to the aspects of creating an own image about „the other", the Russian-American perceptions and how they were constructed and influenced, see The Other Side, How Soviets and Americans Perceive Each Other, Beyond the Kremlin Collection, 1991.

[22] William Zimmerman, The Soviet Union and The West, The Conduct of Soviet Foreign Policy, ed. Hoffman, Fleron, NY, Aldinede Gruyter, 1980, p.664.

[23] William Zimmerman, Soviet Perspectives on International Relations 1956-1967, Priceton University Press, 1969.

- William Zimmerman, Soviet Perspectives on International Relations 1956-1967, Priceton University Press, 1969
- William Zimmerman, The Soviet Union and The West, The Conduct of Soviet Foreign Policy, ed. Hoffman, Fleron, NY, Aldinede Gruyter, 1980
- William Zimmerman, Soviet Perspectives on International Relations 1956-1967, Princeton University Press, 1969

ROMANIAN PEASANTRY AND BULGARIAN AGRARIANISM IN THE INTERWAR PERIOD: BENCHMARKS FOR A COMPARATIVE ANALYSIS

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Abstract

This article is a comparative study that attempts to highlight the similarities and differences between Bulgarian agrarianism and Romanian peasants during the Interwar period, the Second World War and period of transition towards the Leninist-Stalinist totalitarian regimes. The objectives of our approach are integrated within the boundaries of the main research directions and concrete levels, namely: the general context from the two countries, early agrarian/peasants' movements, the political program, election results, the promotion of certain legislative measures, and the relationship with other political and institutional entities. Without trying to offer an exhaustive view or reveal new aspects in the strict sense of the term, our contribution confronts, in a coherent whole, a series of data and information on the basis of which one could make value judgments. These judgments might help to shape a global, comparative image. Among the main sources of the article we included the monographic works signed by Ioan Scurtu, Pamfil Șeicaru, Apostol Stan, Dimitrina Petrova, John D. Bell, R.J. Crampton, supplemented by data from several other publications (encyclopedias, syntheses etc.).

One can identify several distinct stages within the period under review (1918-1947).

The broad picture is that the Bulgarian agrarian group was more popular and better organized than its Romanian counterpart, but more inclined towards Leftism and authoritarianism, which led to its political isolation in 1923 and subsequent fragmentation, whilst the Romanian peasants' movement managed, after 1924, to remain at the forefront of the political scene, showing an interest for dialogue and sometimes for compromise, first with The National Party, then with the authoritarian monarchy, but also with the Antonescu regime and, to a lesser extent, with the communist regime.

Keywords: *general framework, program, elections, legislative measures, external relations.*

1. Introduction

During Interwar years, the agrarian parties (peasants' parties) were by no means a negligible political reality in Central and Southeastern Europe. In itself, agrarianism (peasants' parties) did not achieve a similar degree of systematization and coherence as other doctrines and political orientations: liberalism, conservatism, socialism etc. Without being an exhaustive analysis, this article intends to draw up a comparison between the evolution of Romanian Peasants' parties and Bulgarian Agrarians for nearly three decades, from the end of the First World War until the establishment of totalitarian Leninist-Stalinist regimes.

In one of his monographs, dedicated to The National Peasants' Party, written before 1989 and later republished without major changes, Romanian historian Ioan Scurtu included

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some references regarding Romanian peasants' relations with Bulgarian agrarians and some sporadic comparative considerations about the two movements (1). Previously, another study on The National Party, The Peasants' Party and The National Peasants' Party had been published in exile by the great journalist Pamfil Șeicaru and then republished in Romania, in 2002 (2). Also after 1989, Apostol Stan published his monograph on the peasants' leader Ion Mihalache (1882-1963) (3). Among the many Bulgarian contributions about the agrarian movement or its dominant personality, Aleksandar Stamboliiski (1879-1923), the paper published in 1988 by Dimitrina Petrova (4) stands out. However, her approach is hindered by a double category of limitations: the fact that she only dealt with three years of agrarian government and the ideological constraints specific to the period when she wrote her study. Nevertheless, John D. Bell (5)'s study eliminated these shortcomings. Although it's not as extensive in length as the previous, it is very well documented and also analyzes the period 1899-1919. R.J. Crampton (6)'s study, published in 2009, deals with an even longer period since it also refers to the political and ideological legacy of Stamboliiski.

In our view, this microanalysis will focus on the following issues: the overall context from the two countries, the genesis of the agrarian/peasants' movements, the political program, the elections results, governmental activities and external relations.

2. Contents

In the fall of 1918 both Bulgaria (defeated in the war) and Romania (allied of the victors) were faced with a precarious economic situation and an explosive socio-political context. Thus, Bulgaria's human losses amounted to 155,000 deaths in battle, almost the same number deaths because of diseases, and 400,000 wounded, in a country of 5-6 million inhabitants. A fifth of men aged between 20 and 50 had lost their lives (7) and the country had to bear the burden of more than 250,000 refugees (8).Romania's losses at the end of the war included 339,000 deaths, 200,000 seriously injured and 116,000 prisoners and missing, with additional civilian sufferings and immense damage to the national economy because of invading countries (railways, buildings, factories etc.) (9).

In such a context, this led to an increased popularity of Leftist forces. Thus, we can remark not only the rise of Socialists in Romania and an impetuous entrance of the Bulgarian Communists on the political scene (1919), but also, the spectacular revival of The Bulgarian Agrarian National Union (BZNS), led by Aleksandăr Stamboliiski, and the creation of The Peasants' Party in Romania, on $5^{th}/18^{th}$ December 1918, which quickly became, under the leadership of Ion Mihalache, one of the most important political forces.

Besides some general, easy to notice, similarities between Bulgarian Agrarians and their counterparts, north of the Danube, there were, since 1918, major differences arising from different political contexts, socio-economic and cultural conditions separating the two Southeastern European constitutional monarchies, both with German dynasties on the throne.

The 1866 Constitution, amended in 1879 and 1883, included a series of civil rights and liberties but it left many responsabilities for the monarch (a king from 1881), and the suffrage was censitary, organised on the basis of colleges (initially three, then four) (10). In rural areas, the main issue was the blatant inequality between the large and the small landowners, worsened by the leaseholders' conduct (the majority of whom were non-Romanian), who only wanted to maximize their profits. The inequalities between the categories of landowners continued to rise, reaching a climax in the first decade of the 20th century. Thus, in the eve of the 1907 revolt, almost a quarter of all Romanian peasants had no arable lands and one third owned less than three hectares per family (11). According to the 1912 Population Census, two thirds of those living in the countryside were illiterate, as opposed to a "mere" one third of illiterate city dwellers. The nationwide illiteracy rate was of 60.7% (12).

In these circumstances, the trends and attempts to organize the Romanian peasants in a political party were spread over four decades (1878-1918) and shaped by numerous obstacles and setbacks. For 20 years (1878-1899), the teacher Constantin Dobrescu Arges (1856-1903) (13) was at the center of these efforts, followed by his brother-in-law, Alexandru Valescu, and Vasile M. Kogălniceanu until 1907, and, after 1913, by Ion Mihalache (14). Seemingly paradoxical, most of those who promoted Romanian peasants' parties originated from the northern and hilly regions of Oltenia and Wallachia (the counties Arges, Muscel and Gorj), regions with a large rural middle class, where the violent peasant movements that shook Romania between 1888 and 1907 were somewhat milder.

The Turnovo Constitution, enacted in 1879, was profoundly democratic but this fact did not stave off authoritarian governments or violent internal political confruntations. The land distribution was quite equitable but the excessive taxation, the agricultural ineffectiveness of small lots, the technological backwardeness, the lack of capital and the activity of extortioners, the low productivity, they all made a difference (15). Nonetheless, the cultural and literacy levels were higher in Bulgaria as the primary and secondary school systems were unmatched elsewhere in Southeastern Europe (16).

The genesis of The Bulgarian Agrarian Union (1899; since 1901 The Bulgarian Agrarian National Union-BZNS), transformed into a political party in 1906, consisted in merging several groups that were acting independently during the last years of the 19th century, under the leadership of Jordan Pekarev in the Varna area, Dimităr Dragiev in the Stara Zagora area, of Janko Zabunov in the Pleven area etc (17).

Also, the two movements did not achieve similar political results at this stage. The Romanian Peasants were never able to win more than four seats in the lower house of the Parliament and after 1899 they didn't have any representatives there (18). On the other hand, BZNS was in 1908 the largest opposition party in Bulgaria, with 100,000 votes and 23 parliamentary seats (19).

Furthermore, the Romanian Peasants' ideology displayed a greater openness towards the Right of the political spectrum, which manifested as a respectful attitude in regards to the monarchy and the importance given to religion and the Church. Subsequently, some Peasants' leaders even joined The National Liberal Party (e.g. Al. Valescu) or, after 1918, The People's Party (V. M. Kogălniceanu).

The bloody events of 1913-1918 would favor the coagulation of the Peasants' Party in Romania and of BZNS's rise to power in Bulgaria. The Second Balkan War disrupted the public opinion in both countries. For Bulgaria, it was a serious warning, unfortunately ignored, concerning an aggressive and offensive foreign policy in the Balkans, whilst for the great mass of Romanian peasant soldiers, the contact with Bulgarian rural realities, devoid of blatant social inequality, was a real shock, which prompted the Liberals, who were in the opposition, to relaunch in October 1913, the idea of agrarian and electoral reforms, and when in power in January 1914, to initiate the proceedings related to these reforms (20).

Ion Mihalache, elected as president of the National Coucil of Teachers in the December 1913 (21), viewed Bulgaria as a model in terms of the land tenure system and agrarian relations, but did not ignore the adventurous policy pursued by the Sofia government (22), openly and strongly criticized by Al. Stamboliiski (BZNS leader, since 1911) who, after the outbreak of the First World War, advocated the granting of territorial advantages in Macedonia and Southern Dobrudja by means of a favorable neutrality towards the Entente, not by an alliance with the Central Powers (23). King Ferdinand and the Vasil Radoslavov government would choose, after a year of deliberations exactly the opposite path; following a savory, casual and well-known exchange of words with the sovereign (24), Stamboliiski was sent to prison, his life being in permanent danger for three years. In the years 1916-1918, Ion Mihalache was also in imminent danger as a young, junior-ranking Romanian officer on the

battlefield, convinced by the justice of his country's war, but also by the necessity of establishing a peasants' party (25).Moreover, even during the war, in the summer of 1917, the Romanian Parliament, which took refuge in Iassy, adopted the constitutional amendments that made possible major social and political reforms, namely the introduction of universal suffrage and land reform for peasants-soldiers, paving the way for the direct participation of peasantry in politics (26).

A few days before the armistice of Thessaloniki (September 29th 1918), Stamboliiski was released from prison, which meant that BZNS was *de facto* a legal movement again. He did not conceal his republican aspirations and was involved, shortly after his release from prison, in the military uprising from Radomir, whose main goal was the proclamation of the republic by overthrowing the entire dynasty, not only Ferdinand, considered however, by most Bulgarians, an ill-fated victim (27). On October 17th 1918, the Agrarians were included in the Al. Malinov government, as Ts. Tserkovski became the Minister of Public Works, then in the Teodor Teodorov government (November 28th 1918 – October 6th 1919), a conservative russophile, they would be better represented as Al Stamboliiski himself (Public Works), D. Dragiev (Agriculture and Public Domains) and Ts. Tserkovski (Transport and Communications) also became ministers (28).

The demobilized reservist, Lieutenant Ion Mihalache was able to resume his political activity, in an expanded country after the union of Bessarabia (27th March/April 9th), Bukovina (15th/28th November) and Transylvania (18th November/1st December) with the mother country during 1918. On December 5th/18th 1918, in Bucharest, there was the constituent congress of the Peasants' Party (a strong provincial peasants' party already existed in Bessarabia). On this occasion, an 11 points program-declaration was adopted, related exclusively to peasantry's issues such as the full ownership of all lands by peasants and, in return, reasonable compensations, or the restoration of ancient rights to use forests and pastures. Other claims were related to local and provincial autonomy, the enlightenment of villages, proportional taxation, the decentralization of cooperatives, Church autonomy, replacing the Gendarmerie, health service reforms and the punishment of those enriched during the war (29). The preamble of the document, highlighted the social importance of the peasantry, the workers and intellectuals were called to cooperate with the peasants "against the rule of the boyars and Bolshevism" (30). For a while, in 1919, the name "Peasants' and Workers' Party" was also used, informally, as propaganda; the party's electoral symbol was the sickle (31).

This direction was re-affirmed at the General Congress from 20-21 November 1921, when the merger with The Peasants' Party of Bessarabia, Pantelimon Halippa - C. Stere wing was validated and a more coherent program was adopted. The document criticized the "capitalist imperialism", "class struggle" was considered a reality, and the general view was that given the particular conditions from Romania, it was the great mass of peasants' task to eliminate this social system, which, together with the urban working class, would advance on a "third path", namely "the cooperative peasantry" (32), subsequently theorized by Virgil Madgearu (1887-1940). Referring to the slogan of "class struggle" Stamboliiski also disassociated himself from communists, accusing them of narrow-mindedness and superficiality. According to the Bulgarian Agrarian leader, antagonisms between occupational groups were stronger than differences in wealth, at least in his country, where, he argued, large landowners were scarce, unable to endanger the homogeneity of peasantry (33). Therefore, Romanian Peasants' movement members treated the industrialization and industrial workers problems rather differently, whereas Bulgarian Agrarians, led by Stamboliiski, were reluctant towards the workers' "occupational group".

In a historical coincidence, at the end of 1919, both the Romanian Peasants' movement and the Bulgarian Agrarians were part of ephemeral coalition governments, which

had the urgent task of signing unpopular international treaties in the eyes of public opinion, namely The Minorities Treaty for Romania and the Treaty of Neuilly-sur-Seine for Bulgaria. Having obtained the relative majority at the August 1919 elections, the Bulgarian Agrarians were the core of the coalition government between October 6th 1919- April 21st1920, and Stamboliiski became the P.M., who after new elections and post-election maneuvering, formed a monochromatic agrarian government, which was in power for the next three years (34). At the November 1919 elections in Romania, The Peasants Party obtained 61 deputies and 28 senators, being defeated by The Romanian National Party (P.N.R), based in Transylvania (169 deputies and 76 senators), P.N.L. (103 deputies and 54 senators) and The Peasants' Party from Bessarabia, which hadn't yet disbanded (72 deputies and 35 senators) (35). A governmental coalition was formed, called "The Parliamentary Block", dominated by P.N.R, which also included The Peasants' Party from Bessarabia, the similar party from Old Kingdom, N. Iorga's National Democratic Party, The Democratic Union Party from Bukovina and The Labour Party (Dr. Nicolae Lupu); the government leadership went to Al. Vaida Voivod, The Peasants' Party obtained two portfolios (Agriculture with Ion Mihalache and Public Instruction, with the zoologist Ion Borcea) and The Bessarabian Peasants' Party, three, namely the Ministry of Justice, with Ion Pelivan, and two posts of Minister of State for Bessarabia, with P. Halippa and Ion Inculeț (36).

The government was in power between December 1st 1919 and March 12th 1920. It's dismissal was due to King Ferdinand' dissatisfaction (1914-1927) towards a series of legislative initiatives (the Mihalache project for land reform and N. Lupu's proposals for the mandatory rental of vacant houses and reducing the responsailities and numbers of the Gendarmerie) considered as Leftist by the sovereign; some suspicions were also stirred by establishing diplomatic contacts with the Soviets (37).

Mihalache's project for agrarian reform was halfway between the plans of past and future governmental leaders from Bucharest, on the one hand, and the ideological vision of the Bulgarian Agrarians, on the other hand, and was inspired by legislation adopted in Poland and Czechoslovakia. In essence, Ion Mihalache's project, remained in draft form (except for Bessarabia), provided that large estates would be limited to 100 hectares, except for those where modernizing investments had been made. For these, the maximum limit was of 250 hectares in populated areas, and 500 hectares in settlement areas. In order to promote efficient agriculture, it also proposed to encourage the establishment of cooperatives and model allotments, managed by industrious peasants (38). On the eve of the fall of the government, the land reform was enacted in Bessarabia and this sanctioned, *post factum*, the liquidation of big land properties in the province, which happened *de facto*, in the years 1917-1918; before the Russian Revolution, in Bessarabia, 95% of the villagers were totally or almost totally deprived of land, while 0.35% of them had a third of the total agricultural area, and 4.5% around 60% (39). After the revolutionary turmoil of 1917-1918, the situation now became legal.

One of the causes that led to the fall of the first Al. Vaida Voevod government was the fact that it no longer had the king's support. The king's new attitude toward the party was influenced by a radical law project, initiated by dr. N. Lupu, which sought to make it compulsory for urban house owners to rent extra rooms, at prices considered reasonable (40). In this respect, the Stambolyiski government went even further, adopting, *de jure*, in June 1920, the Turlakov law, which stipulated, right from its title, the possibility of expropriating some dwellings for public interest, in emergency situations; still, the law itself and its implementation were not as radical as its title (41).

In March 1920, the Romanian government was entrusted by the king to The People's Party, whose founder, General Al. Averescu (1859-1938), became president of the Council of Ministers, a position he would hold until December 1921; V.M. Kogălniceanu, now member

in this new party, was appointed in July 1921 to read before The Assembly of Deputies, elected in May 1920, the agrarian reform project, which would also be adopted. The act, designed by Constantin Garoflid, set a 500 hectares limit for large estates and a 5 hectares minimum area for a viable farm (42). Thus, the most significant land reform in Southeastern Europe was enacted, which allotted six million hectares of arable land to 1.4 million peasant families. However, the law enforcement was slow and incomplete, and 600,000 families of the 2,005,477 entitled to allotment, did not benefit of their legal rights (43).

On May 12th 1921, a land reform was enacted in Bulgaria too, on a smaller scale (there wasn't much land available anyway), and about 330,000 hectares, belonging to the state, local authorities and monastic establishments, were distributed to a total of 64,000 families from within the country and 28,500 families of refugees from Macedonia, Thrace and Dobrudja (44). As a result of these measures, in Bulgaria, in the mid-1920s, 57% of Bulgarian agricultural holdings were smaller than 5 hectares and 28%, between 5 and 10 hectares (45).

Comparing Ion Mihalache's and Stamboliiski's views on the agrarian reform, we notice a different attitude toward the Church and clergy. I. Mihalache, a devout Orthodox Christian, believed that churches would become future micro-farms, where faith in God might spur work and good management (46). Thus, according to the reform of March 1920, in Bessarabia each monastery had 50 hectares of arable land, vineyards and gardens in addition to those already in their possession, and the churches, had "full allotment" (6-8 hectares) for each cleric (priest, parish clerk or deacon) (47). Al. Stamboliiski more skeptical about religion and prone to pragmatic and worldly things, made monastic areas the main targets of his program of expropriation; he acknowledged the positive historical role of the Bulgarian Orthodox clergy for the Bulgarian revival, but probably influenced by Ernest Renan, he accused contemporary priests of undermining the authority of the teaching staff and lack of interest in people's concrete problems (48).

Compared to the Romanian Peasants' movement in first third of 1920's Stamboliiski was more preoccupied by the issue of agricultural land consolidation, strongly supporting the cooperative movement. As a result of this conduct, at the end of 1920, the cooperative associations membership reached 398,000, of which about 274,000 were conscripted into urban cooperative (trade, credit, handicraft production, services, etc.), and 124,000 into rural ones (agricultural, forestry, vineyards and wine etc.). In 1923, there were about 2,300 cooperatives, grouped by specialization (49).

Other important measures of the Stamboliiski government targeted the legal system, which became more accessible to ordinary people, taxation (progressive income tax was a reality) and especially education (50). Schools were subordinated to local authorities, and the school curriculum promoted practical activities and refuted chauvinistic elements. About 300 primary schools and 800 secondary schools were built, since secondary education was now compulsory in Bulgaria (51).

A goal of the Leftist forces in the twentieth century was the promotion of women in public life. For Stamboliiskist Bulgaria the best known example is the rise of Nadeždei Stančova, the daughter of Dimităr Stančov (52), a diplomat, promoted as the official translator of the P.M. and the first female diplomat, similar to Alexandra Kollontay's case. In Romania, a similar policy consisted in granting conditional right to vote and to go to the polls for women in local and regional elections during the Iuliu Maniu government on the basis of the administrative law from August 3rd 1929, proposed by Ion Mihalache (53).

Military restrictions imposed on Bulgaria by the Treaty of Neuilly-sur-Seine facilitated the imposition of measures targeting the replacement of regular army troops with a popular militia (a long-time agrarian goal), by creating working troops *trudovacii* (54). In Romania, at the 1921 and 1922 congresses, where the left wing was underrepresented, Romanian

Peasants' supporters were not that vocal with their demands for the "democratization" of the army and of the Gendarmerie (55).

A goal of both movements, from Bulgaria and Romania, was the administrative decentralization. Curiously, Romanian agrarians also considered provincial autonomy (also on the basis of the law promoted by Mihalache on August 3rd 1929 that would set up seven directorates: Muntenia, Oltenia, Moldavia, Bessarabia, Transylvania, Bukovina, Banat) (56), whilst Bulgarian agrarians only thought of local and regional autonomy. In Greater Romania, granting substantial autonomy could favor segregating, separatist and even hegemonic provincial attitudes and plans of national minorities in the newly united provinces of the country, groups that had acquired, due to foreign domination, a superior material and cultural situation compared to that of the Romanian majority: the Hungarians in Transylvania, Russians in Bessarabia and Germans in Bukovina and Banat. Bulgaria, as a country defeated in war, did not face the problem of integrating new territories, the Turkish minority was in a precarious state, Jews and Greeks were few in number and dissipated, thus being unable to endanger the unity of the state.

In foreign policy, we can identify, for the period 1919-1923, some similarities between Romanian and Bulgarian Agrarians. The former sought to promote Romania's relations with former war allies and a policy of collaboration and, if possible, reconciliation with bordering states and the latter aimed to improve Bulgaria's situation by winning the goodwill of the victorious states and promoting a peaceful policy towards her neighbors. The attitude toward Soviet Russia suggested a slight difference, while Stamboliiski restored *de facto* Bulgarian-Soviet trade relations in 1921 (57), the "Parliamentary Block" government, led by Al. Vaida Voevod (November 1919 - March 1920) undertook negotiations with the Soviets, in order to settle the territorial *statu quo* on the river Dniester (Nistru) (58).

In essence, Stamboliiski's government inaugurated a policy of so-called "peaceful revisionism", which would be a feature of Bulgaria's diplomatic conduct throughout the interwar period, with some slight changes influenced by the European context (59). The head of the Bulgarian government made no secret of his desire to revise the Treaty of Neuilly, but he opposed the irredentist and militaristic trends and, especially Macedonian organizations (60), as he wanted to reconcile with the Yugoslav state, and his main territorial claim was related to access to the Aegean Sea, won in 1913 and lost in 1919.

World War I had not made the BZNS leader abandon his pacifist vision and Balkan-type federalist and internationalist aspirations. He supported the initiative of his Czech Agrarian counterpart, Antonin Švehla, of setting up an "A Green International", encompassing all agrarian parties from Eastern Europe. The project, launched in early 1921, failed because of the divergent positions of potential participants in national-territorial issues. For example, Croats wanted support for separation from the hegemony of Belgrade, and Romanians were suspicious, fearing Slavic domination (61).

The Romanian peasants' promoted an open doors policy in the face of foreign capital and Stamboliiski too, a convinced anti-industrialist, had no objections to the idea of systematic trade with industrialized Western European states (62).

The direct relationship between the two party leaders peasant was neither constant nor fruitful. In January 1921, during his visit in Bucharest, Al. Stamboliiski discussed with V. Madgearu and I. Mihalache about the collaboration between the two parties. Upon returning home, the Bulgarian Agrarian leader stated, at Rusciuk, that he had reached an agreement with the two Romanian Peasants' leaders concerning the return of Southern Dobrudja to Bulgaria. Although he later denied this statement, which, in all likelihood, was false, it led to serious accusations against The Peasants' Party from political opponents. It was suggested the Bulgarian leader, had bribbed the two peasants' leaders whom he had met (63). These allegations were essentially fantasies, but, during the interwar years, The Peasants' Party and,

after 1926, The National Peasants' Party (PNȚ), by its Leftist wing, were, among the major Romanian parties, the most receptive to claims from Southern Dobrudjan Bulgarians (64).

As a result of the negative campaign initiated after the Mihalache-Madgearu-Stamboliiski discussions and the unexpected statements of the latter, The Peasants' Party adopted a more reserved attitude towards BZNS and its international initiatives. At the Bulgarian Agrarians Congress in June 1922, The Peasants' Party just sent a telegram, not a delegation (65). A few months later, the head of the Bulgarian government visited Romania for the second time (from 4th until 8th November 1922), but this time he did not meet with any peasants' leaders (66).

In domestic politics, Stamboliiski's attitudes, speeches and deeds were more aggressive towards left and right wing political opponents, compared with Romanian Peasants. Even if the general policy of the Bulgarian Agrarian government was not anti-urban, as one would be tempted to believe, judging solely by Stamboliiski's statements, more categorical than those of his Romanian and Serbian counterparts, it is still true that BZNS's popularity was reduced in cities where there were cores of communist parties and of traditional center or right wing parties.

A symptom of BZNS's aggressive policy (otherwise, Bulgarian politics did not excel in tolerance) was the establishment of "The Orange Guard", made up of peasants armed with clubs during street riots in the summer of 1919 as a shock force against communists, who made their impetuous entrance on the Bulgarian political scene (67).

Al. Stamboliiski's relationship with The Bulgarian Communist Party (BKP) was quite changing and ambivalent. In the period October 1919 - May 1920, the Bulgarian agrarian leader preferred to seek an alliance with elements of the former regime (M. Madžarov, A. Burov, St. Danev), not with the Bolsheviks, and in spring 1920 he obtained an absolute majority in Parliament only after invalidating several BKP deputies, but a year later, after Lenin softened his attitude towards farmers, adopting NEP, the BZNS praised the Bolshevik revolution and talked about "the democratization" of Soviet Russia (68). In 1922, the communists backed the authorities' campaign against elements of the former government, but relations again worsen with the spring elections of 1923, when the Agrarians got 54% of the votes and a clear majority in *Săbranje*, as a result of the distribution of votes system (69).

In Romania, although some serious social inequities persisted after enactment and implementation of the major reforms, the socialists only asserted an ephemeral political influence during the period 1919-1921, after which they divided into communists and social democrats, the former being outlawed in 1924 due to their position in the national issue.

In 1921 and 1922, when the communists' anti-national deviations were less obvious, Romanian agrarians condemned the measures of force adopted by Al. Averescu and Ion I. C. Brătianu governments, directed at them, fearing that they themselves might be the victims of such unconstitutional practices, in terms of guarantees of civil rights and liberties, especially since they were constantly accused of "Bolshevism" (70). "The Peasants' are, for now, with us in the fight against capitalist oligarchy", wrote in February 1922, Romanian communist leader Petre Constantinescu-Iaşi (71); otherwise, in Leninist theory and practice, "fellow travelers" (*paputniki*) had important roles, but then followed marginalization and elimination, and most Romanian Peasants' did not choose such a path.

Monarchy was also regarded differently by agrarians from the two banks of the Danube. For Stamboliiski, it represented a foreign institution, parasitic and resource consuming, whose influence should be minimum, waiting the right time for the proclamation of the republic. Romanian Peasants' saw in monarchy, not necessarily in King Ferdinand, clearly dominated by the Liberal leader Ion I.C. Brătianu, a possible counterweight to PNL.

In June 1923, following a bloody coup d'etat, which was planned by right-wing political forces, regular army officers, Bulgarian-Macedonian irredentists, with the complicity

of King Boris III (1918-1943) and the total neutrality of the communists, Stamboliiski government was overthrown and its leader killed. The sympathy of peasant masses did not prove sufficient to overcome political isolation.

In view of the available data, it seems very likely that irredentist Bulgarian-Dobrudjan groups were involved in the events of June 1923 (72). The researcher Blagovest Njagulov states that, in 1921, the Stamboliiski government did not express its protests concerning the confiscation of lands belonging to ethnic Bulgarians in the Quadrilateral, as a part of the Romanian agrarian reform, because these measures affected a social category that was doomed even according to the rhetoric of Bulgarian agrarians (73).

In June 1923, the classic Agrarian period ended in Bulgaria and was near the end in Romania. A period of about a quarter of a century of slow decline, punctuated by some moments of partial or apparent revitalization, would follow. Despite the persistence of a solid popularity among the peasantry, and its collective memory, from a historical perspective the political fragmentation and the ideological change were dominant for Bulgarian and Romanian Agrarians during this period, in a general context that did not lack changes, some peaceful, others, the consequences of the Second World War and its outcome.

During the interwar years, Romania and Bulgaria were the least urbanized countries in Europe, with a rural population of about 80% in both countries around 1930 (74), but the potential and trends for industrialization and urbanization were more relevant for Romania, especially after the union with Transylvania, where the economic importance of Hungarians and Germans was superior to their demographic significance.

A number of statistical indicators of this period reveal the inferiority of agriculture in both countries, not only in relation to the domestic industry but also with Western European agriculture. Thus, in terms of statistics, a Balkan farmer produced food for only 1.5 individuals, while in the West the ratio was 1 to 4 (75).

In Romania, the implementation of the agrarian reform, enacted in 1921 had significantly improved the lives of many peasant families, contributing, consequently, to broaden the cultural horizon and increasing the interest in social and political life, but the fragmentation of land lots led to a considerable decrease of agricultural exports, the proportion of plant and animal elements in Romanian exports plummeted sharply between 1922 and 1934, from 80% to 46%, reaching 56% in 1938 (76).

Meanwhile, the trend of polarization of land holdings and the (re)-expansion of large farms restarted, at the expense of smaller farms, a phenomenon facilitated by a law issued in 1929, initiated by Ion Mihalache. Towards the end of the 1930's, the Romanian agriculture included 3,280,000 holdings, totaling 19.75 million hectares. Three quarters of these farms (2,460,000) were less than five hectares, the minimum area set in 1921. They amounted to 5,350,000 hectares, or 28% of arable land, as much as 12,200 farms that exceeded 100 hectares each, of which 2,700 were more than 500 hectares each; 610,000 agricultural properties, or 18.6% of the total, were less than one hectare (77).

In Bulgaria, the Stamboliiski reform and further developments, until 1946, suggest a continuing trend of fragmentation and of polarization, the latter manifested in the form of cooperatives. The number, total area and the proportion of properties less than 10 hectares steadily increased between 1926 and 1946 in parallel with the decrease of these indicators for properties larger than 10 hectares. For example, in 1926, there were 800 farms larger than 50 hectares, with a total of 85,000 hectares, which represented 2% of total arable land. By 1934, this number had dropped to 500 holdings, with a total of 69,000 hectares or 1.6% of the total arable land and, until 1946, these indicators had reached 200, 29,000 and 0.7% (78). The cooperative movement also showed a rebound between 1934 and 1944 from 4,888 units with 836,742 members to 4,114, with 625,000 members, but the share of rural cooperatives remained constant at 77%, most of which dealt with trade (79).

While Romania, Bulgaria and Yugoslavia had a rate of 70-80% of the population employed in agriculture, in Hungary this indicator was 53% and in Czechoslovakia 38%. In 1920 just 31% of Germany's population and 42% of France's were concentrated in agriculture; since the mid-19th century more than half of England's working population was engaged in non-agricultural activities (80). Agricultural overpopulation led to the phenomenon of labor surplus in rural areas, and, given the low level of mechanization, this situation revealed, *ipso facto*, the utopian character of visions and projects of a "Peasants' state". Half of Bulgarian and Romanian peasantry was used under its normal working capacity in the 1930's (81). Even in these conditions, between 1920 and 1940, Bulgaria's and Romania's productions of grain and potatoes have increased more, in terms of percentage, than their populations. For Bulgaria, these indicators were 53%, 187% and 25%, for Romania, the figures were 32%, 49% and 23% (82). Agricultural labor productivity was higher in Bulgaria (110$ compared to 90$ in Romania) (83).

The literacy rate in Greater Romania, in 1930, was 57.6%, whilst in 1934, in Bulgaria, the illiteracy rate was below 32%, and this phenomenon was more present among the Turkish-Muslim minority (84). During the period 1920-1934, both in Romania and in Bulgaria, the infant mortality decreased from 207 to 179 and from 160 to 144, for every one thousand newborns. Still, during 1935-1939 this indicator showed a slight increase in both countries, reaching 181 and 146 cases (85).

In these internal conditions, the evolution or involution of agrarian movements from both countries had several stages. A first stage starts with the fall of Stamboliiski in Bulgaria (June 1923) and ends with PNŢ's rise to power (November 1928), and is characterized for Bulgarian Agrarians by political fragmentation after the violent demise of the founder (and other leaders), and for the Romanian by ideological concessions under the leadership of Ion Mihalache, resulting in certain manifestations of dissent and political fragmentation.

The anti-agrarian repression from Bulgaria triggered on June 9th 1923, caused an atmosphere of almost civil war in the country. Not only Al. Stamboliiski and his brother, Vasil, were among the victims, both martyred on June 14th, but many other activists and their supporters, including over 20 MP's (Spas Duparinov, Krum Popov, Dimităr Kemalov, Stojan Kolučev etc.) (86). The beheaded Bulgarian Agrarian movement split into three wings: "moderates" willing to cooperate with the Al. Tsankov government, "centrists" (Tsanko Tserkovski, Petăr Janev and Petko Petkov, who was assassinated, in April 1924), and "left" wing, inclined to cooperate with the communists (Dimităr Grančarov and Rajko Daskalov, who was assassinated in Prague in August, by a Macedonian agent) (87).

In September 1923 the agrarian-communist rebellion, with the epicenter in northwest, triggered new reprisals and violence, the death toll reaching 20,000, of which 4,200 were Macedonian activists (88). Under the Andrej Ljapčev government (1926-1931), there was a gradual normalization of the political life that allowed the emergence of several agrarian groups, of which the most important were *Pladne* ("Noon", in English), which published the gazette with the same name and *Vrabča1* ("Sparrow"), named after the street in Sofia where it had his headquarters. The first group, with a left-wing orientation, included G. Vălkov and Georgi M. Dimitrov, in connection with Al. Obbov şi Kosta Todorov, pro-Yugoslavians. The second group, with a slight right-wing orientation, was headed by Dimitar Gičev, with a B.A. in Theology, and the jurist Kosta Muraviev, Al. Stamboliiski's nephew (89).

The events from Bulgaria did not go unnoticed north of the Danube. Initially, the Romanian Peasants' movement condemned the coup d'etat from June 1923, criticizing the National Liberal government's attitude, considered to be favorable to the coup (89), but on the long term they reflected upon the issue of leaving aside radical slogans and claims to avoid the perspective of political isolation (90). Coincidentally or not, I. Mihalache's personality was going through a process of elevation/refinement. The Peasants' leader, who had a certain

complex related to culturally refined politicians, wanted to assimilate everything that was new, and started, among other things, to learn French, German and English, which he was finally able to speak quite good (91). Still, he did not give up the traditional peasant's clothing, not even in official occasions, like the Polish agrarian leader, Wincenty Witos; Al. Stamboliiski, without excelling in elegance, preffered the modern Western suit, including a tie.

In 1924, the Romanian Peasants made a clear choice. They finally responded negatively in March to a communist proposal of setting up a "Workers' and Peasants' Block", when Comintern was preparing an extensive destabilizing action throughout Southeastern Europe (92). The Romanian leaders claimed they did not want an internal revolution, nor did they desire a war with the capitalist Great Powers (93) and turned their attention toward the former government partners in 1919-1920, namely PNR, with which they reached an agreement in June on the basis of a ten points joint program: constitutional monarchy, a national solidarity centered around peasantry, national sovereignty, a foreign policy of friendship with former allies and peace with its neighbors, a constitutional regime, fair elections, administrative decentralization, "a special concern for the army". The economic policy would be based on: the promotion of cooperatives, the strengthening of industries complementary to agriculture, opening to foreign capital and developing labor laws (94). Based on this compromise, in October 1926, the two parties would merge, forming the PNȚ, with Iuliu Maniu as president. The compromise was disliked by some right-wing members from PNR, Stelian Popescu, Nicolae Iorga and Constantin Argetoianu leaving the party when the merger was imminent. The more radical elements from The Peasants' Party also did not agree with the compromise, the most notorious case being that of Dr. Nicolae Lupu, who in 1927 formed a distinct Peasants' Leftist party.

The Great Depression of 1929-1933 affected the Romanian and Bulgarian peasantry, because of the rapid collapse of crop prices and, to a somewhat lesser extent, of animal-based products. In these unfavorable international economic conditions, both in Romania and in Bulgaria, the Peasants, and the Agrarian faction *Vrabča1*, were part of government coalitions within heterogeneous entities, namely PNȚ and the "Popular Block", which reached power when people's expectations were high. Thus, PNȚ, where a certain fault line persisted between former nationals and peasants, with additional rivalries between Maniu and Vaida, rose to government in November 1928 and won the elections held next month with an overwhelming score of 77%, impossible to explain just by the fact that the party organized the elections (95). In Bulgaria, the "People's Block", a coalition of democrats, radicals, the liberal group Petrov, and *Vrabča1* won the parliamentary elections of June 18th 1931, defeating the ruling party, which organized them (96). Instead, at the elections held in Romania in July 1932 by the government VaidaVoevod after the Argetoianu-Iorga government (April 1931-May 1932), PNȚ only won 40.3% of the votes, almost not reaching the 40 percent threshold needed to get the "majority bonus" prescribed by the electoral law of March 1926 (97).

If we analyze the composition of various national-peasants' governments that were in power during November 1928-April 1931, it appears that the Peasants came second, despite having an equal number of portfolios as the nationals, but never holding the Presidency of the Council of Ministers, a position entrusted to I. Maniu, Al. Vaida Voevod and G. Mironescu, nor the Foreign Affaires Ministry (98). In Bulgaria, although *Vrabča* was the most important force in the "People's Block", gaining 69 seats in *Sǎbranje* (the Democrats had 43, the National Liberals 32 and the Radicals 8 out of 272), the Democratic Party had the main government role. It acted as the head of government, and Al. Malinov, then Nikola Mušanov were P.M.'s and they also had key ministries (Internal, Foreign Affairs, and Finance) and the Public Health ministry. The agrarians got only three ministries: Agriculture with Gičev, Education with Muraviev and Public Domains with G. Jordanov (99).

Interestingly, during November 1928-April 1931, the National Peasants' governments did not even declaratively adopt a law on the conversion of agricultural debts (100), a first regulatory law in this regard being issued by the Iorga-Argetoianu government, followed by the Vaida government in 1933, and then by the Gh. Tătărescu government in 1934 (101). In Bulgaria too, "The People's Block" government issued such a law (102). In March 28th 1929 the cooperative law was issued, which reorganized the Chamber of Agriculture, the Rural House and other institutions (103), and on August 20th, the so-called "Mihalache law" on the selling of lands facilitated land transactions; an effect of this law was that between 1930 and 1941, the percentage of households with an area between 10 and 100 hectares fell from 7.6% to 6.4%, but their proportion from the total area increased significantly from 14 to 24% (104).

In the educational field, the P.N.Ț. government only managed to transform the Herăstrău and Cluj-Napoca Higher Schools of Agriculture into Academies for Advanced Economic Studies (105), so its performance was far from Stamboliiski's.

In the context of the economic crisis, both agrarian governments faced challenges from the monarchy and the communists.

The return of Charles II (b. 1894 -d. 1953) in the country, the cancellation of the January 4th 1926 decision concerning his removal from dynastic succession, and, finally, his proclamation as king by dethroning his under-aged son, Michael I (b. 1921) were conducted with the help of many personalities and groups, hostile to PNL, especially among PNȚ. However, one can identify a difference in attitude since Mihalache clearly expressed his view for a "restoration", while Maniu was rather elusive, trying to keep the impression of legality, but without opposing the coup d'etat in any way (106). Meanwhile, the monarch manifested his authoritarian and hedonist nature and the attitudes towards him and his plans would lead the divisions, dissident groups within political parties, including in the PNȚ, where the Maniu - Vaida rivalry was speculated. Although N. Lupu, C. Stere and Grigore Iunian were all Leftist Peasants', they did not form a compact group, but, in February 1933, Stere's Democratic Peasants' Party, emerged from the PNȚ in 1930, merged with The Radical Peasants' Party, emerged from PNȚ in 1931, forming The Radical Peasants' Party under the leadership of Iunian, with pro-Charles II views, while N. Lupu, vehemently anti-Charles II, returned to PNȚ in March 1934 (107). The December 1933 elections revealed, on one hand, the "classic" fraud of the government party organizing the elections (PNL) and, on the other, the fragmentation of Romanian agrarianism. Thus, P.N.Ț. obtained 14% of votes and 29 mandates, PȚ - Lupu, 5.11 % and 11 mandates, and PRȚ, 2.78 % and 6 mandates; in the Assembly of Deputies there were also two agrarian parties, at least in name, but with right wing programs, both created in 1932: The National Agrarian Party, led by Octavian Goga, with 4.1% and 9 mandates, and the Agrarian Union, led by Constantin Argetoianu with 2.46% and 5 mandates (108).

In order to halt the communists' rise in the years 1931-1932, the Bulgarian government resorted to acts of authority, such as invalidating 15 of the 29 deputies from Bulgarian Workers' Party, or the dissolution of the Sofia Municipal Council, where the party won the majority of mandates (109).

In Romania, the communist threat only meant the fact that the "Workers' and Peasants' Block" achieved the 2% threshold in the 1931 elections, organized by the Iorga-Argetoianu government, but the governing National Peasants' used the Bolshevik threat to justify the repression of strikes from Lupeni (August 1929) and Griviţa (15 to 16 February 1933).

In Stamboliiski's Bulgaria, public manifestations of opposition forces were often thwarted by The Orange Guard, made up of peasants armed with clubs, but in Romania, Ion Mihalache had the initiative of forming self-defense groups of the PNȚ, "the hefty ones", consisting of young inhabitants of the villages, in the late 1920s, but they would not become a

symbol of violence, which was more and more present in Romanian politics. The "Iuliu Maniu" guards, established around 1934, would gain quite a reputation in the fall of 1944.

A key feature of Stamboliiski's government, also noticeable in The Romanian National Peasants' party, was the lack of specialized and experienced individuals and this was solved by appointment in leadership positions of less qualified people, but considered loyal, often selected on the basis of family ("nepotism" or "intercessors") (110).

Al. Vaida Voivod government's resignation in November 1933, requested by King Charles II (1930-1940) and the coup d'etat from Bulgaria on May 19th 1934, marked the entry into opposition of the National Peasants' Party, and of the *Vrabča 1* group. Since the bloody (counter) coup d'etat of January 22nd 1935, King Boris became dominant in the Bulgarian political life in the second half of the 1930s, and both the Romanian Peasants and the Bulgarian Agrarians would be in opposition to royal authoritarian governments that benefited, at least until 1938-1939, from a favorable economic context.

Within PNȚ, the main fault line was no longer between nationals and Peasants, but between the supporters and opponents of the sovereign. As the president of the party between November 1933 and November 1937, Ion Mihalache proved to be an element of balance both within it and in the relationship with the king, more and more disliked by Maniu and admired by Vaida, who left PNȚ in 1935 and created The Romanian Front, a nationalist party (111). After the institution of the authoritarian regime and the creation of The National Renaissance Front, as a single party, in February and March, and respectively, December 16th 1938, some of PNȚ's leaders, including former Peasants, joined this organization, the best known example being Armand Călinescu, head of the government

In Bulgaria there was not a unique royal party, but in the local elections from between March and September 1939 (112).January 1937 and the parliamentary elections of March 1938 and December1939 candidates had to go to the polls in a uninominal system, not representing a specific party, although the reality was different, and *Săbranje* only had an advisory role (113). Thus, in March 1938, among the 160 elected deputies, there were 32 agrarians, 8 Social Democrats and 5 communist, but the mandates of the communists, as some of the agrarians', were not validated (114). In the following elections, the opposition could not muster more than one eighth of the mandates (20 of 160) (115).

Like their Bulgarian counterparts, before the Molotov-Ribbentrop Pact, Romanian communists sought to approach the Peasants, under the policy of a "popular front", imposed by the Comintern. Thus, at the parliamentary elections of 1936 (116), as in the general elections, at the end of next year, observing the line imposed by Moscow, the Communist Party of Romania (illegal) supported PNȚ's candidates, even if the latter, again led by Maniu, signed a non-aggression pact with the party "Everything for the Country", the political wing of the Legionary Movement, an extremist right-wing group (116).

The dramatic events in the period September 1940-April 1941 when both Romania, territorially reduced and threatened the USSR, and Boris III's Bulgaria, territorially enlarged and courted by the same USSR, entered Nazi Germany's alliance system, have changed the political actions of agrarian groups in the two states.

In 1941, Ion Mihalache had a more positive attitude than Maniu to general (from August 21st 1941 a Marshal) Ion Antonescu's (b.1882-d.1946, "leader of the Romanian state" between September 5th 1940 and August 23rd 1944) decision to join Hitler's Germany in the anti-Soviet war effort (117). He even enlisted in the army as a volunteer, at almost 60 years old, an initiative, which, after the establishment of the pro-communist Petru Groza government in March 1945, would result in the confiscation of his farm from Dobreşti-Muscel. Moreover, on December 15th 1936, Mihalache made a memorable statement in the Parliament, namely that Romania, in a possible new general war, should join the group that would better safeguard its borders (118).

Agrarians in both countries did not agree, generally, with the pro-German governments, in particular with declaring the state of war with Great Britain and the United States at the end of 1941, but this opposition was expressed differently, in Romania through letters and memos addressed to Antonescu, and in Bulgaria, including by organizing resistance movements. Thus, in 1941, at the outbreak of the German-Soviet war, in which Bulgaria did not take part, Leftist agrarians, *Pladne*, joined the communists, Social Democrats and the organization *Zveno* ("The Link"), forming "The Fatherland Front", a more and more active and credible movement as the Red Army approached the state borders. They rose to power on September 9th 1944, after the leader of the other agrarian party, K. Muraviev, appointed P.M. on September 2nd 1944, had failed to conclude a truce with the U.S. and UK and avoid the entry of Soviet troops in the country (119).

In Romania, where the communists were very weak, and the leaders of the "historical" parties (primarily Maniu) were hesitant, the removal of Antonescu was achieved on August 23rd 1944 by King Michael I and a group of loyal officers. This act meant, at least chronologically, the start of the seizure of political power by the communists, carried slower than in Bulgaria, where they were stronger.

Considering that the modern, Western structures, institutions and attitudes (bourgeois liberal) were weak, the agrarian/peasants' current proved, in both countries, the most powerful obstacle to the total communization, as expressing the aspirations and the individualist or communitarian mentality of a large part of the population, which were, on a short or long term, in conflict with the standardizing and depersonalized plans of the communists. The tactics used by the communist parties was that of *divide et imp era*, political fragmentation of the agrarians, followed by the liquidation or subordination of the various wings.

Among the first Bulgarian Agrarians to be marginalized, from September 9th 1944, were members of the Muraviev-Gičev group. Then, differences emerged within the agrarian group that that was part of the "Fatherland Front". G.M. Dimitrov, back from London, and Nikola Petkov (brother of Petko Petkov) opposed the trends and Communization and Sovietization of the country, but not the plans to abolish the monarchy. After the mysterious and untimely death of Boris III in 1943, the position of king returned his minor son, Simeon, born on June 16th 1937; on September 15th 1946, after a referendum, Bulgaria was proclaimed a People's Republic. Subsequently, "Gemeto" again took refuge in the West, which Maniu and Mihalache would fail to do, and N. Petkov remained in the country, where he founded BZNS-N. Petkov, as the official title of BZNS was reserved for the pro-communist faction, led in May 1945 by Al. Obbov. Despite all the prohibitions, Petkov's faction won 1.2 million votes at the elections of October 27th 1946 and 99 mandates in Parliament, compared to the 354 of the "Fatherland Front" (277 Communists, 69 leftist Agrarians, 9 Social Democrats, 8 *Zveno* and one for the Radicals) (120). Arrested in June 1947, right in the *Săbranje*, N. Petkov was sentenced to death and hanged in September. He was even denied the right to a last communion (he was one of the few Bulgarian politicians with strong religious beliefs) (120).

In Romania, the communists tried to approach the Peasants especially through "The Plowmen's Front", a small party created in January 1933 and led by Petru Groza, a large landowner in Transylvania, who had been a member of PNR, and after 1920 he joined General Averescu, but this did not stop him from becoming the first head of a Romanian communist-controlled government on March 6th 1945. Only two factions were drawn from P.N.Ţ., one led by Anton Alexandrescu, and the other by N. Lupu, but only first joined the communists and the core of the party, led by Maniu and Ion Mihalache was, in all likelihood, the true winner of the November 19th 1946 elections grossly falsified in favor of the communists and their allies at the time (121). After the dissolution of the PNŢ and the sentencing of its leaders to many years in prison, in July-November 1947, the forced abdication of King Michael I followed, on December 30th 1947, and the Romanian People's

Republic was proclaimed (122), without any ad-hoc referendum. In January 1948, the Alexandrescu faction was swallowed up in "The Plowmen's Front", which disbanded in February 1953. Through a twist of fate, in the same year Iuliu Maniu died in the Sighet prison; Ion Mihalache also died in prison, namely in Râmnicu-Sărat, in March 1963 (123).

Unlike Romania, in Bulgaria, the faction BZNS, which collaborated with the communists, was allowed to operate formally, as a satellite of the BCP. Thus, of the 400 mandates in Parliament (institution with a decorative role), a quarter (99 or 100) were reserved to the agrarian party, and the rest to BCP, "the leading force of the society". Between 1964 and 1971, the Agrarians held the presidency of the Assembly, in theory, that of the state, represented by Georgi Traikov. In fact, Bulgaria was the first Eastern European socialist state that introduced pensions and social security for cooperative peasants in 1957.

Gičev D. and K. Muraviev were finally released from prison in 1959 and in 1961 (124) and Al. Stamboliiski would increasingly be eulogized as a progressive and democratic leader, a precursor of egalitarian and collectivist socialism in rural areas. During the national and nationalist stage of Romanian communism after 1964 there were some historiographical reevaluations of historical figures. Maniu and Mihalache's actions, victims of communist terror, were valued as socially and nationally progressive, especially until 1918, or 1924. However, their activities during 1944-1947 were criticized, which was inevitable, and so were their attitudes toward the issue of industrialization, which was at least partially justified in the light of the actual economic developments worldwide (125).

The techno-scientific revolution and the energy crisis was a blow to the Leninist model of economic development based on heavy industry, energy consumption, and a hyper-centralized decision mechanism, but it did not represent a historical validation of agrarianism. Technologically and economically advanced countries headed towards the post-industrial age, they did not return to the agrarian economy. Several of these (U.S., Canada, UK, Australia, and New Zealand etc.) are major exporters of food and agriculture products, but with only a few percents of the workforce being involved in this economic sector, because of modernization and mechanization.

After the events of November and December 1989, both in Bulgaria and Romania there have been attempts to resuscitate agrarian parties, given the return to political pluralism and a persistent cleavage communism-anticommunism. In both countries, in the early 1990s, there were both anti-communist agrarians and "left" agrarians with a more nuanced attitude toward the old regime. The anti-communist agrarian groups have claimed affinities with Christian democracy, an ideology born in the Catholic Western European area, which resembled interwar agrarianism if we consider their purpose of representing a middle way between the individualist liberalism and the collectivist socialism, cultivating the idea of balance between competition and solidarity and functional autonomy of small communities (subsidiarity). In Romania, this affiliation, achieved clandestinely by Corneliu Coposu (b.1914-d.1995) in 1987, was based on the favorable attitude towards the Orthodox Church, both in PȚ and then in PNȚ, but especially on the fact that a significant part of Transylvanian Romanians were part of the Romanian Church United with Rome (Greek-Catholic), outlawed in 1948.

The political development of the The National Peasants' Christian and Democratic Party from Romania was more spectacular and dramatic than that of Bulgarian anti-communist Agrarians, who, in 1989, had re-established BZNS-Nikola Petkov, as part of the Union of Democratic Forces (UDF), the name "BZNS" being used by the party which survived during communism. Thus, in the 1990 elections it won only 2.4% of the votes, but on June 24th 1992 PNȚCD became the most important party in The Democratic Convention of Romania (alliance created on November 26th 1991, from which PNL had retired on April 22nd 1992), and after the parliamentary elections of September 27th 1992, it was the strongest

opposition parliamentary party. Following the elections of November 1996, it rose to be the leading government party in a heterogeneous coalition, but a rapid collapse in the polls followed and it failed to obtain mandates in the Parliament in the November 2000 elections. After this, the party was in a scission process (126). The name "Peasants" was perhaps the least fit for the party since it got most of its votes from the Transylvanian towns and was very poorly represented in rural areas, south and east of the Carpathians.

Through its level of popularity (basically a few percents), the secondary role in the UDF and the ambiguous, sinuous, relationship that generated internal divisions, with the coalition and its successor, BZNS-Nikola Petkov and the anti-communist agrarian formations are very similar, during the entire period since 1989, with the Romanian liberals during 1992-1996. Anastasia Moser, "Gemeto" Dimitrov's daughter, born in 1937 and returned home in 1992, played an important role in the unification and split of the post-1989 Bulgarian agrarian formations, especially for the right-wing ones (127).

After the identity crisis and electoral failures in the early 1990s, "leftist" Bulgarian Agrarians regrouped in 1993, forming BZNS-Al. Stambiliiski, a satellite formation of the Bulgarian Socialist Party, a status that ensured a minimal representation in *Săbranje*. În Romania, "leftist" agrarianism was represented by The Democratic Agrarian Party, created on January 29th 1990, with Nicolae Ştefan (128) as honorary president, a former communist official. It won 1.8% of votes in 1990 and 3% in 1992 (129), but was dismantled in the mid-1990s, after it declared its opposition towards the N. Văcăroiu government.

It's interesting to note, from a terminological perspective, that in pre-communist Romania the term 'agrarians' had been used by Right-winged political forces (Argetoianu's, Goga's parties etc.) (130), whilst the word 'peasants' was adopted by political forces situated further to the Left political spectrum (The National Peasants' Party and Leftist groups within or independent from this party); after almost 50 years of communist rule (131), the situation had changed, PNȚCD became a Right-winged party and PDAR a Leftist party!

3. Conclusions

Looking from a historical perspective, we can say that during this period, beyond some general and easy to notice similarities between Bulgarian agrarians and Romanian peasants, there were also some differences that had already been shaped at the turn of the century, in terms of doctrine, organization and political action. Thus, the Bulgarian agrarians laid a greater emphasis on Leftist values (egalitarianism, collectivism, hostile attitude towards the monarchy, skepticism towards the Church etc.) and displayed a radical attitude when dealing with political opponents. Thus, the Stamboliiski regime was more of a populist dictatorship than a rural democracy. On the other hand, the Romanian peasants' adapted to the politics and mentalities of their country, and were respectful towards the monarchy and the Church. They gradually renounced some radical ideas and finally accepted, with the exception of some marginal groups, to merge with The National Party (1924-1926). The climax of these differences in attitude towards the monarchy and the far Leftist forces was reached in the periods 1923-1924 and 1945-1947.

In terms of political/elections and governmental success, the Bulgarian agrarians' huge advantage when compared with Romanian peasants is due, largely, to the different statuses of Romania and Bulgaria at the end of the First World War.

Once again, the results of our investigation reveal the importance of the political, institutional, socio-economic, and imagological context for the concrete forms of agrarian political phenomenon. Also, they can be used as a starting point for further analyses on agrarianism/peasants, but mostly for studies focused on the early stages of Bulgarian agrarianism and Romanian peasants during 1878-1918 and their concrete and

historiographical evolutions after 1947 and (why not?) the attempts to revitalize them after 1989.

References

- Ioan Scurtu, "Istoria Partidului Național Țărănesc, 1918-1926", Bucharest: Encyclopaedical Publishing House, 2002, 248.
- Pamfil Șeicaru, "Istoria partidelor național, țărănesc și național-țărănesc", Bucharest:Victor Ioan Frunză, 2000, 467.
- Apostol Stan, "Ion Mihalache-destinul unei vieți", Bucharest: Saeculum I.O, 1999, 302.
- Dimitrina Petrova, "Samostojatelnoto upravlenie na BZNS (1920-1923)", Sofia: National Publishing House for Sciences and Arts, 1988, 413.
- John D. Bell, "Peasants in Power. Alexander Stamboliiski and the Bulgarian Agrarian National Union 1899-1923", New Jersey: Princeton University Press,1977, 271.
- Richard J. Crampton, "Aleksandur Stamboliiski. Bulgaria", London:Haus Histories, 2009, 193.
- Joseph Rotschild, "East central Europe betwen Two Worl Wars", Seattle-London:Washington University Press, 1974, 325.
- Georges Castellan, "Histoire des Balkans pendant XIV-XX siécles", Paris:Fayard,1991, 406; Daniel Vachkov, "Des essais de rétablissment des refugiés macedoines, doubroudjanes et trques". "Bulgarian Historical Review", Sofia, 28, no 3-4/2002, 79 .
- Ioan Scurtu, Gheorghe Buzatu, "Istoria Românilor în secolul XX (1918-1948)", Bucharest:Paideia 1999, 22 p.
- Keith Hitchins, "România (1866-1947)", translated by George G. Potra and Delia Răzdolescu, third edition, Bucharest: Humanitas , 2004, 30-36, 112-113.
- "Istoria României în date", coord. Dinu C. Giurescu, Bucharest: Encyclopaedical Publishing House, 2003, 304-305.
- Gh. Ionescu-Şişeşti, "Agricultura României", Enciclopedia României, publisher : Gh. Buzatu, first edition 1938, vol. III, "Economia României", Iassy: Tipo-Moldova, 2010, 299-300.
- Romus Dima, "Constantin Dobrescu Argeș întemeietorul țărănismului",Bucharest:Gheorghe Marin Speteanu Cultural Foundation, 2001, passim.
- Romus Dima, "Organizarea politică a țărănimii : sfîrşitul sec. XIX - începutul sec. XX", Bucharest: Scientific and Encyclopedical Publishing House, 1985, passim.
- "Stopanska istorija na Bălgarija 681-1981", Sofia: National Publishing House for Science and Art, 1981, 217-235.
- Stevan K. Pavlowitch, "Istoria Balcanilor (1804-1945)", translated by Andreea Doica, Iassy:Polirom, 2002, 178.
- J. D. Bell, *Peasants*, 27-31, R. J. Crampton, Aleksandur Stamboliisk, 26-28.
- K. Hitchins, Romania.., 130-135.
- Barbara Jelavich, "Istoria Balcanilor-secolul XX (1887-1982)", translation by Eugen Mihai Avădanei, Iassy: European Institute,2000, 44; St. K. Pavlowitch, *Balcanilor*, 174.
- K. Hitchins, Romania, 144.
- Ibidem, 134.
- A. Stan, Mihalache, 43-44.
- J. Crampton, Aleksandur Stamboliiski..., 54.
- L.S Stavrianos, "The Balkans since 1453", New York:Holt, Rinehart and Winston, 1963, 560-561.
- A. Stan, Mihalache, 56-60.
- Istoria României în date..., 340.
- Guy Gauthier, "Acvile şi lei. O istorie a monarhiilor balcanice (1817-1974)", translated by Ludovic Skultéty, Bucharest:Humanitas, 2004, 248; an amplified image on the Radomir events, at Krăstjo Măncev, "Istorija na balkanskite narodi, (1918-1945)", Sofia:Paradigma, 2008, 41-42.
- Taso V. Tašev, "Ministrite na Bălgarija (1879-1999)", Sofia: Academic Publishing House, 1999, 572-573.
- I. Scurtu, National Taranesc, 31-32.
- Ibidem.
- P. Şeicaru, National Taranesc, 222-223
- I. Scurtu, National Taranesc, 80-87.
- J. D. Bell, Peasants, 69-70; D. Petrova, Samostojatelnoto , passim.
- B. Jelavich, Balcanilor, 156.
- Istoria României în date..., 360.

- I. Scurtu, I. Mamina, ”Guverne şi guvernanţi (1916-1938)”, Bucharest: Silex, 1996, 34-35.
- *Ibidem*, pp. 34-35.
- A. Stan, Mihalache, 89-91.
- Codruţa Bugarin, Ion Pavelescu, Ioan Scurtu, ”Economia Basarabiei (1918-1940)”, I. Scurtu (coord.), ”Istoria Basarabiei”, Bucharest: Semne, 1998, 141.
- I. Scurtu, I. Mamina, ”Guverne”, 34-35.
- D. Petrova, Samostojatelnoto, 119-121.
- K. Hitchins, Romania, 387-391.
- Victor Axenciuc, Vasile Bozga, ”Agricultura sub semnul transformărilor sociale, în Istoria românilor (academic treatise)”, VIII, ”România întregită(1918-1940)”, coord. : I. Scurtu, Bucharest: Encyclopaedical Publishing House, 2003, 103.
- St. K. Pavlowitch, ., 231.
- Romanian National Archives-Bucharest, fonds Societatea Naţiunilor (S.N.), dossier 50/1925, leaf 196.
- A. Stan, Mihalache, 90.
- C. Bugarin, I. Pavelescu, I. Scurtu, Basarabiei, 141.
- J. D. Bell, Peasants, 58.
- Zlatko Zlatev, ”Kooperativnoto dviženje, în Bălgarija XX vek”, coord.: Filip Panajotov, Sofia:ABV KOOP, 2000, 442-443.
- L. S. Stavrianos, Balkans, 648.
- R. J. Crampton, Aleksandur Stamboliiski..., 115.
- About Stančovs' role for the Bulgarian national culture and diplomacy, see George Ungureanu, Mari A. Firkatian, ”Diplomati, mečtateli, patrioti. Bălgarija i Evropa prez pogleda na semeistvo Stančov*”,* Sofia, Paradigma, 2009, 464 review in „Revue des études sud-est européenes”, Bucharest, L, no.1-4/2012, 393-394.
- I. Scurtu, I. Mamina, Guverne, 74.
- Plamen Pavlov, Iordan Ianev, Daniei Cain, Istoria Bulgariei, Bucharest:Corint, 2002, 137.
- I. Scurtu, National Taranesc, 121-122.
- I. Scurtu, I. Mamina, Guverne., 74.
- Constantin Iordan, ”România şi relaţiile internaţionale din sud-estul european : probleme ale păcii, securităţii şi cooperării, 1919-1924”, Bucharest: All, 1999, 123.
- Valeriu Florin Dobrinescu, ”Bătălia pentru Basarabia”, Iassy: Junimea, 1991, 83-85.
- About the concept of ”peaceful revisionism ”, see: C. Iordan, *România și relațiile internaționale...*,, 145, G. Ungureanu, ”Problema Cadrilaterului în contextul relaţiilor româno-bulgare (1919-1940)”, Brăila: Istros, 2009, 229-235 şi următoarele.
- ”BZNS, Aleksandăr Stamboliiski i VMRO. Nepoznatata vojna”, publishing, introduction and adnotations by Tsotso Biljarski, Sofia:Aniko, 2009, passim.
- R. J. Crampton, Aleksandur Stamboliiski..., 93-94.
- Daniel Chirot, ”Ideology, Reality and Competing Models of Development in Eastern Europe between the Two Worlds Wars”, in "East European Politics and Societis,", 3,1989, 396-397.
- I. Scurtu, National Taranesc, 195-197.
- G. Ungureanu, Problema Cadrilaterului..., 119-166.
- I. Scurtu, National Taranesc, 146.
- C. Iordan, România şi relaţiile internaţionale..., 44.
- B. Jelavich, Balcanilor, 156; D. Petrova, Samostojatelnoto , 58-63; R. J. Crampton, Aleksandur Stamboliiski..., 87, 119.
- J. D. Bell, Peasants, p. 195; R. J. Crampton, Aleksandur Stamboliiski.., 124.
- B. Jelavich, Balcanilor , 158.
- Ion Bitoleanu, ”Din istoria modernă a României(1922-1926)”, Bucharest, Scientifical Publishing House, 1981, 248-250.
- Apud I. Scurtu, National Taranesc, 88-89.
- Stefan Ančev, Dobrudžanskijat văpros v politiceskijat život na Bălgarija (1918-1923), Veliko Turnovo:no P.H.,1994, 288; G. Ungureanu, Problema Cadrilaterului.., 177.
- Blagovest Njagulov, ’’Ot Njoi do Krajova. Văprosăt na Južna Dobrudža v meždunarodnite otnošenija (1919-1940)’’ ot Antonina Kuzmanova, Dăržavno Izdatelstvo za naukite i izkustvo, Sofija, 1989,306s. review, in "Bulgarian Historical Review", Sofia, 19, no 1/1991, 94.
- Robert Lee Wolf, ”The Balkans in our time”, New York:Nortom, 1978, 159
- B. Jelavich, Balcanilor, 219.
- V. Axenciuc, V. Bozga, ”Evoluţia economiei naţionale”, in ”Istoria românilor”, VIII, 117.

- Ioan C. Vasiliu, ”Structura economică a agriculturii româneşti”, in ”Enciclopedia României”i, III, 304.
- Stopanska istorija na Bălgarija…, 373.
- Z. Zlatev, Kooperativnoto dviženje, 443-444.
- D. Chirot, Ideology, 385.
- L.S. Stavrianos, Balkans, 595.
- D. Chirot, Ideology, 386.
- V. Axenciuc, V. Bozga, *Evoluţia economiei naţionale…*, 123.
- L.S. Stavrianos, Balkans, 658, 707.
- D. Chirot, Ideology., 387.
- J. D. Bell, Peasants, 242.
- Ibidem.
- Albert Londres, Les comitadjis ou le terrorisme dans les Balkans, Paris:Albin Michel, 1932, 15.
- R. J. Crampton, Aleksandur Stamboliiski..., 130-132.
- G. Ungureanu, Problema Cadrilaterului.., 256-257.
- I. Scurtu, National Taranesc, 124 şi următoarele.
- Henri Prost, ”Destinul României (1918-1954)”, publisher: Valer Moga, Bucharest: Compania, 2006, 42.
- C. Iordan, ”Comunism, naţionalism, minorităţi. Spre un front anticomunist în Balcani?”, C. Iordan, ”Minorităţi etnice în sud-estul european după Primul Război Mondial”, Bucharest: Curtea Veche, 2002, 126-134.
- I. Scurtu, National Taranesc, 147-150.
- *Ibidem*, 151-153.
- A se vedea P. Şeicaru, National Taranesc, 235-240.
- Ivan Ilchev, ”The Rose of the Balkans. A short history of Bulgaria”, translated from Bulgarian by Bistra Roushkova,Sofia: Colibri, 2005, 321.
- I. Scurtu, Gh. Buzatu, Istoria României, 250.
- I. Scurtu, I. Mamina, Guverne, passim.
- K. Măncev, Istorija na balkanskite, 144; J.D. Bell, Peasants, 245.
- P. Şeicaru, National Taranesc, 338-342.
- I. Scurtu, I. Mamina, Guverne, passim.
- R. J. Crampton, Aleksandur Stamboliiski..., p. 134.
- I. Scurtu, I. Mamina, Guverne, 72.
- K. Hitchins, Romania, 391.
- I. Scurtu, I. Mamina, Guverne, 75.
- Aurelian Chistol, ”România în anii guvernării liberale Gheorghe Tătărescu (1934-1937)”, Târgovişte: Cetatea de Scaun, 2007, 29.
- Istoria României în date..., 412, 418, 425;
- A. Chistol, Gheorghe Tatarescu, 107.
- R. J. Crampton, Aleksandur Stamboliiski..., 134.
- P. Şeicaru, National Taranesc, 246; J. D. Bell, Peasants, 157-158.
- A. Chistol, Gheorghe Tatarescu, 396-415
- Istoria României în date…, 441-443
- I. Ilchev, The Rose of the Balkans. , 350-353.
- B. Jelavich, Balcanilor, 191.
- St. K. Pavlowitch, Istoria Balcanilor, 269.
- A. Chistol, Gheorghe Tatarescu, 474-475
- Fl. Constantiniu, ”O istorie sinceră a poporului român”, third edition, Bucharest: Univers Enciclopedic, 2002, 326.
- Aurică Simion, ”Preliminarii politico-diplomatice ale insurecţiei române de la 23 august 1944”, Cluj-Napoca: Dacia, 1979, 207.
- Rebecca Haynes, ”Politica României faţă de Germania (1936-1940)”, translated by Cristina Aboboaie, Iassy:Polirom, 2003, 33.
- P. Pavlov, I. Ianev, D. Cain, Istoria Bulgariei, 148-150.
- B. Jelavich, Balcanilor, 265-267; P. Pavlov, I. Ianev, D. Cain,Istoria Bulgariei , 151-152, I. Ilchev, The Rose of the Balkans. , 382-384.
- R. J. Crampton,. ”A Concise History of Bulgaria”, Cambridge :University Press, 2005, 186.
- Petre Ţurlea, ”Alegerile parlamentare din noiembrie 1946”, "Dosarele Istoriei", Bucharest, V, no. 11(51)/2000, 35-36.
- Istoria României în date…, 498-502.

- Victor Ioan Frunză, ”Istoria stalinismului în România”, Bucharest: Humanitas, 1990, 306.
- T. V. Tašev, Ministrite na Bălgarija, 122
- See, for example: Mircea Muşat, Ion Ardeleanu, ”România după Marea Unire” , vol. II, parts I and II, Bucharest:Scientifical and Encyclopedical Publishing House,1986-1988, passim.
- Istoria României în date…, 746-811.
- Bulgaria 1996. Almanac, Sofia Press Agency, editor: Petar Panov, 53;
- ”Enciclopedia istoriei politice a României 1859-2002”, coord. Stelian Neagoe, Bucharest: Institute for Political Sciences and International Relations, 2003, 559-572.
- Istoria României în date…, 752-762.

THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE: A theoretical analyse of the proposed regulation for establishment of a European Public Prosecutor's Office

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Abstract

Establishing a new European body, namely, European Public Prosecutor's Office, could be described as one of the sensitive issues currently under discussion within the European Union, especially in the context of the serious economic crisis that hit in the last 5 years both the European Union and the national economies, as well as their difficult recovery.

The author's intention is to describe the events proceedings the discussions to regulate the possibility to establish this concept in the Treaty of Lisbon, including a theoretical analysis of the regulation proposed by the European Commission in accordance with Article 86 TFEU to establish this new body of the European Union having as main goal to investigate, prosecute and bring to justice those who commit criminal offences affecting the Union's financial interests.

The author's conviction is that if agreed to be establish, this new body could change Europe's judicial landscape, from various reasons. One of these reasons is that this new European Public Prosecutor's Office will constitute a network of around 100 prosecutors in charge to investigate and prosecute suspects for defrauding EU funding programs.

Keywords: *Treaty of Lisbon, Article 86 TFEU, European Public Prosecutor's Office, European institutions, Eurojust*

I. Introduction

The necessity to help the candidates states from the Central and Eastern Europe[1], during the 2000s, to get the membership of the European Union by achieving the accession conditions (especially the Copenhagen criteria, 1993), implied on the one hand ensuring an adequate pre-accession financial assistance to these candidates as one of the key factors in the Union's pre-accession strategy, and on the other hand ensuring considerable investments helping in aligning their economies with the European economy.

In this context, the officials of the European Commission established three pre-accession financial instruments, as follows: PHARE (Council Regulation no.3906/89)[2], focused on two main priorities: Institution Building and acquis-related Investment; ISPA[3] (Council Regulation no.1267/99), supporting large-scale infrastructure projects in the fields of transport and environment, in a 50% - 50% proportion; SAPARD[4] (Council Regulation

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[1] Bulgaria, Czech Republic, Hungary, Estonia, Latvia, Lithuania, Romania, Slovakia and Slovenia.

[2] PHARE means "Poland Hungary Aid for Reconstruction of the Economy"; It was published in Official Journal L 375 of 23.12.1989, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989R3906:EN:NOT (last accessed 03.04.2014).

[3] ISPA represents "Instrument for Structural Policies for Pre-Accession". It was published in Official Journal L 161 of 26.06.1999, available at: http://www.mrrfeu.hr/UserDocsImages/EU fondovi/Uredba_Vijeca_1267_1999_1.pdf (last accessed 03.04.2014).

[4] SAPARD means "Special Accession Programme for Agriculture and Rural Development". It was published in Official Journal L 161 of 26.06.1999, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:161:0087:0093:EN:PDF (last accessed 03.04.2014).

no.1268/99) helping to prepare the countries for taking on the acquis in the fields of agriculture and rural development, to which the special pre-accession instrument for Turkey[5] was added, all of these instruments being in force between 2000 and 2006 and involving billions of Euros. Much more, according to the European Commission[6], the financial aid ensured through these instruments to the tenth countries in the Central and Eastern Europe, that joined EU in two waves of accession, in May 2004 and January 2007, plus Turkey, as candidate state, have been up to € 3,351 million, annually.

Starting with 2007 onwards, a new instrument is applied by the officials in Brussels, namely the Instrument for Pre-accession Assistance (IPA), replacing the pre-accession instruments, the special pre-accession instrument for Turkey and, finally, the CARDS programme created for the Western Balkan countries[7]. Thus, the European Union through the IPA financial program[8] supports reforms in the "enlargement countries" with financial and technical help and funds, which only for the period 2007-2013 have been 11.5 billion €. In addition, the IPA program is made up of five components: support for transition and institution-building; cross-border cooperation; regional development; human resources development and rural development.

Once a former candidate member join the Union, it receives a temporary post-accession financial assistance, called the Transitional Facility, provided for by the Treaty of Accession to the EU, as it was the case of the countries that joined the EU in 2004, 2007, and 2013. In other words, this financial assistance is meant to strengthen the new Member States' administrative capacity to implement the European legislation and to encourage exchange of the best practices among peers. The temporary financial assistance addresses the need for strengthening institutional capacity in certain areas through actions which could not be financed by the Structural Funds[9].

Bearing in mind the short presentation of the main pre and post – accession financial assistance programs few questions arise, namely: at the European level exists an official body in charge in investigating the correctness of using the European funds, prosecuting and bringing to judgment the perpetrators of offences affecting the Union's financial interests, and to what extent such body is useful for the European society, filling thus the institutional gap existed at the European level, but without interfering with the attributions of other EU bodies, such as: European Anti-Fraud Office (OLAF), Eurojust and Europol?

In this paper, we will try to give a general overview of the newest instrument proposed by the European Commission in July 2013, based on Article 86 TFEU.

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[5] This financial instrument was established by Council Regulation (EC) no.2500/2001 of 17 December 2001 concerning pre-accession financial assistance for Turkey and amending Regulations (EEC) no.3906/89, (EC) no.1267/1999, (EC) no.1268/1999 and (EC) no.555/2000, published in Official Journal L 342 / 27.12.2001, available at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=EN&numdoc=32001R2500 (last accessed 03.04.2014). The said regulation reiterated the Commission's objective to establish pre-accession financial assistance, on average, at an annual level of 177 million Euros.

[6] General Report on Pre-Accession Assistance (Phare – Ispa – Sapard), Report from the Commission, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0844:FIN:EN:PDF (last accessed 03.04.2014).

[7] The intention of the CARDS program was to provide Community assistance to the countries of South-Eastern Europe with a view to their participation in the stabilisation and association process with the European Union, available at: http://europa.eu/legislation_summaries/enlargement/western_balkans/r18002_en.htm (last accessed 03.04.2014).

[8] The beneficiary countries are: Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Iceland, Kosovo, Montenegro, Serbia, and Turkey, available at: http://ec.europa.eu/enlargement/instruments/overview/index_en.htm (last accessed 03.04.2014).

[9] Available at: http://ec.europa.eu/enlargement/policy/glossary/terms/transition-facility_en.htm (last accessed 03.04.2014).

II. Historical approach in designing the concept of a European Public Prosecutor's Office

The fraud and the high rate of criminal misapplication of the European money affects, generally speaking, all the citizens of the European Union, especially nowadays, when the Europe is passing through one of the most serious economic crisis and budgetary restriction of its history where the need to investigate, prosecute and bring to justice of those who commit criminal offences affecting the Union's financial interests it is more important than ever[10].

In this context, the establishment of a European body in charge with investigating, prosecuting and bringing to judgment the perpetrators of such offences, namely the European Public Prosecutor's Office (EPPO), represents rather an obligation than a possibility as it was stipulated in Article 86 TFEU. Furthermore, this issue represents one of the most debated topics in the European Union, mainly due to the adoption of the Lisbon Treaty, which regulates the concept of such body at the level of primary EU law, offering two modalities to create it, namely: "a special legislative procedure" and the consolidate or enhanced cooperation when a draft regulation initiated by *"a group of at least nine Member States"* can be *"referred to the European Council"*, which is the institution in charge to define the general political direction and the main priorities of the European Union, in order to adopt it.

Historically, the discussions on the need to explain the role, competences, structure and other technical aspects related to a proper operation of EPPO, started long time ago, more precisely at the middle of 1990s, when the European Commission tasked a group of experts to draft a *Corpus Juris* having as clear objective to provide for the basic principles for the protection of the financial interests of the European Union[11].

Following a hard working of several years, in 1997 the *Corpus Juris* was published[12] and included in Article 18 the proposal to introduce a European Public Prosecutor as *"an authority of the European* [Union], *responsible for investigation, prosecution, committal to trial the offences defined* [in the proposal], [...] *being independent as regards both national authorities and* [European] *institutions*", meaning that this office will not receive any legal or political dispositions coming from the officials of the nationals authorities or the European institutions.

The provisions of the *Corpus Juris* have been amended later, in 199,9 following a conference held in May of the same year in Florence at the European University Institute (Florence - Fiesole), which provoked since then a significant response determined by its enormous interest for practitioners, experts, scholars and professional public in the field[13].

Briefly, the *Corpus Juris* is characterised as a simplified approach of criminal law and criminal procedures, which was drawn up exclusively for the area of protecting the financial interests of the European Union[14]. This project do not have a binding nature; the provisions are recommendations to be taken into account by the European legislator, and the proposals *de lege ferenda* have as main goal the creation of a European judicial area, ensuring more effective cooperation in relation to protecting the financial interests of the European Union[15].

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[10] Available at: http://ec.europa.eu/justice/criminal/judicial-cooperation/public-prosecutor/index_en.htm (last accessed 03.04.2014).

[11] Available at: http://eurojust.europa.eu/doclibrary/corporate/newsletter/Eurojust%20News%20Issue%208%20%28May%202013%29%20on%20the%20creation%20of%20a%20European%20Public%20Prosecutor%20Office/EurojustNews_Issue8_2013-05-EN.pdf (last accessed 03.04.2014).

[12] Available at: http://ec.europa.eu/anti_fraud/documents/fwk-green-paper-corpus/corpus_juris_en.pdf (last accessed 03.04.2014).

[13] Ladislav Hamran and Eva Szabova, 'European Public Prosecutor's Office – Cui Bono?', *New Journal of European Criminal Law*, Vol. 4, Issue 1–2, 2013, p. 40-41.

[14] Available at: http://ec.europa.eu/justice/criminal/judicial-cooperation/public-prosecutor/index_en.htm (last accessed 09.04.2014).

[15] Norel Neagu, 'The European Public Prosecutor's Office – Necessary Instrument Or Political Compromise?', Law Review, vol. III, issue 2, July-December 2013, p. 55.

Finally, the *Corpus Juris* comprises 35 articles arranged into two main sections, namely the substantive law (articles 1–17) and the procedural law (articles 18–35). The project managed to incorporate into one, all the sections of the criminal law protection of the financial interests of the European Union, though legally non-binding document, and to overcome the apparently insurmountable differences between the three main judicial systems in the European Union (Anglo-Saxon, Continental and Mixed Scandinavian)[16].

As the main aim of the *Corpus Juris* was to be achieved through the establishment of the EPPO, the provisions on the European Public Prosecutor are accorded the greatest importance, being contained in the procedural section, specifically from Articles 18 to 24, which are dealing with the status and structure of the EPPO, the start of proceedings, the performance of investigations, the conduct of prosecutions and the tasks of a European Public Prosecutor when making decisions[17].

Despite the fact that at the beginning Member States have been reluctant to the ideas contained in the *Corpus Juris*, yet the project won the full political and legal supporting from the European Parliament and the European Commission. Much more, the project stipulated very clear that the European Commission shall provide a legal basis for the creation of the EPPO.

In this context, through its specialised service, Legal Service, the European Commission presented a proposal at a meeting within the Intergovernmental Conference in Nice (2000), with the aim of making the relevant amendment to the founding Treaty on the European Union. The proposal was not adopted by the European Council due to the lack of time to analyse it, the need for a more detailed examination of the practical consequences of creating a European Public Prosecutor[18], and the lack of Member States' support[19] which for the moment rejected the concept of a European 'supranational' *parquet,* given the sensitivity of the issues raised in the proposal from the political and institutional viewpoints[20].

The European Commission in accordance with its action plan for 2001– 2003 on protecting the Communities' financial interests adopted a Green Paper on Criminal Law Protection of the Financial Interests of the European Community and the Establishment of a European Prosecutor[21], where the principle goal was to offer an in-depth presentation of the European Public Prosecutor proposal to the professional public, and to define realistic conditions for the implementation of this instrument, especially when the *Corpus Juris* provided a direct impulse for drafting this document.

Describing summarily the form of the Green Paper, one can notice that it was very specific and it took the form of a questionnaire, in which the European Commission raised specific questions related to various issues, such as: the status of the European Public Prosecutor; appointment and dismissal, responsibility for serious errors in the performance of the role; the organisation structure of the EPPO and the basic principles of its operation; the method of investigation, detention of persons or items; the relations between the European Public Prosecutor and the national public prosecutors and with other EU bodies and offices,

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[16] Ladislav Hamran and Eva Szabova, op.cit., p. 42.
[17] Ibid.
[18] Report Outline for a conference assessing the Commission proposal to establish a European Public Prosecution Office (EPPO) - Criminal Law protection of European financial interests: a shared constitutional responsibility of the EU and its Member States?, T.M.C. ASSER Institute, Centre for International and European Law, May 2013, p.2, available at: http://www.asser.nl/upload/documents/20130614T041004-Asser%20EPPO%20Conf%20%20Outline%20May%202013.pdf (last accessed 09.04.2014).
[19] Fifteenth Report of Session 2013–14 called "European Public Prosecutor's Office: Reasoned Opinion Reform of Eurojust European Anti-Fraud Office", The House of Commons, London, 2013, p.8.
[20] Katalin Ligeti and Michele Simonato, 'The European Public Prosecutor's Office: Towards A Truly European Prosecution Service?', *New Journal of European Criminal Law*, Vol. 4, Issue 1–2, 2013, p.8.
[21] Green Paper on Criminal Law Protection of the Financial Interests of the European Community and the Establishment of a European Prosecutor, Brussels, 11 December 2001, COM (2001) 715 final, available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0715en01.pdf (last accessed 03.04.2014).

questionnaire to which commentaries, analyses and opinions[22] have been made and sent to the European Commission.

Therefore, the European Commission's efforts to create a European Public Prosecutor, as a stand-alone body, officially recognised in a treaty, either by means of an amendment to Article 280 of the Treaty establishing the European Community (TEC), or as a new supplementary Article 280A to the TEC were not approved by the Intergovernmental Conference in Nice, which instead adopted a decision on the incorporation of Eurojust into the Treaty Establishing the European Union, as one of the first body in charge in fight against serious organised crime at the level of the European Union[23].

Once the Treaty of Lisbon was signed on 13 December 2007 and entered into force on 1 December 2009, the efforts to enshrine an EPPO into the EU primary law, finally succeed, having as source of inspiration former Article III-274 of the proposed EU Constitution. In addition, through the Lisbon Treaty, the EU Area of Freedom, Security and Justice provided for development of several fields, where improvements of the legal and institutional framework aimed at combating in a more effective way the offences affecting trafficking of human beings, organised crime, including the EU's financial interests, by taking into consideration the possibility of establishing a European Public Prosecutor's Office from Eurojust, as one of the major challenges for the modern Europe[24].

Bearing in mind the lack of any explanatory provisions in the Treaty of Lisbon as concern the modality to create a European Public Prosecutor's Office, we share the opinion[25] that the Treaty of Lisbon envisaged a progressive transformation of Eurojust into a European Public Prosecutor's Office. If accepting this idea, another question arises: what are the forms to transform Eurojust, by merging the existing institution of Eurojust and the newly-established EPPO, or by transferring the former powers of Eurojust defined under the Council Decision on Eurojust to the EPPO?

In this context, the future debates on the proposal for a Regulation on the establishment of a European Public Prosecutor's Office will indicate us which of the forms will be choose, as well as the tasks, responsibilities and other issues that will be given to the European Public Prosecutor's Office.

III. Establishing a European Public Prosecutor's Office in the context of Article 86 TFEU and of the European Commission's proposed regulation

Based on the problems existed at the European level concerning the hundred million of Euros coming from the European funds that are fraudulently diverted from their intended purpose every year by the corrupt players[26], we should underline that only a small part of this amount is effectively recovered through judicial techniques, taking in account its significant potential damage caused to the European financial interests[27]. For this reason, the drafters of the Treaty of Lisbon adopted specific provisions, particularly Article 325 TFEU, to determine the Union and Member States *"to counter fraud and other illegal activities affecting the*

[22] Ladislav Hamran and Eva Szabova, op. cit., p.43.
[23] More information about Eurojust is available at: http://eurojust.europa.eu/Pages/home.aspx (last accessed 03.04.2014).
[24] Carlos Zeyen, Conference « The Challenges of Transnational Investigation » Birmingham, 21-23 March 2013, 'The Role Of Eurojust in a European Public Prosecutor's Office', p.1, available at: http://www.birmingham.ac.uk/Documents/college-artslaw/ija/transnational/(6b)CarlosZeyenwrittenpresentationUniversityofBirmingham.pdf (last accessed 03.04.2014).
[25] Ladislav Hamran and Eva Szabova, op. cit., p.47.
[26] Study *Deterrence of fraud with EU funds through investigative journalism in EU-27*, Policy Department D: Budgetary Affairs, Directorate General for Internal Policies, 13.09.2012, p.96, available at: www.europarl.europa.eu/document/activities/cont/201210/20121002ATT52809/20121002ATT52809EN.pdf (last accessed 04.04.2014).
[27] Report, Initial appraisal of a European Commission Impact Assessment European Commission proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, December 2013, p.1.

financial interests of the Union" and *"to afford effective protection to those interests"*, inserting in the same time a new article, namely Article 86 para.1 TFEU which incorporates the issue of establishing a European Public Prosecutor *"from Eurojust"*, *"*[...] *by means of regulations adopted in accordance with a special legislative procedure* [...]*"* by the Council, with the aim *"to combat crimes affecting the financial interests of the Union"*.

Immediately after the adoption of the TFEU, discussions started as regards the meaning of the term *"from Eurojust"* [28], which so far has been interpreted in many ways, due to the lack of a common consensus on its meaning and subsequent practical implementation between the parties involved in taking this decision, among which we mention few of them, as follows:

- EPPO will be created as a specialised unit within Eurojust;
- EPPO will be merged with Eurojust in order to create one body, with separate tasks and responsibilities in the field of organised crime;
- EPPO will become an additional member of Eurojust, and an EPPO representative will participate in the meetings of the College of Eurojust, whenever the criminal cases affecting the financial interests of the European Union will be discussed;
- EPPO will be established as an independent body that will stand outside the Eurojust structure, but will make use of Eurojust's professional experience and knowledge;
- EPPO will be created as an independent body supported by a small team and secretariat provided by Eurojust etc.

Since the term "Eurojust" have been mentioned several times, we should highlight that according to Article 85 para.1 TFEU, Eurojust is a body, with legal personality, established by the Council Decision 2002/187/JHA of 28 February 2002[29] setting up Eurojust with a view to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious cross-border crimes, while its objectives arises from Article 3 of the said decision.

On the other side, the said article makes no mention of how a future EPPO will look in terms of its structure or organisation, responsibilities, tasks to fulfil, relations with other European and international bodies.

After long negotiations and based on Article 86 TFEU, on 17 July 2013 the European Commission proposed a Regulation on the establishment of a European Public Prosecutor's Office (EPPO), in charge with combating crimes affecting the financial interests of the Union by means of investigation, prosecution and bringing to judgment the perpetrators of such offences[30], which in the eyes of the President of the European Commission, José Manuel Durão Barroso this proposal *"confirms the Commission commitment to upholding the rule of law* [and] *it will decisively enhance the protection of taxpayers' money and the effective tackling of fraud involving EU funds* [...][31]*"*. Furthermore, we consider that this proposal is an important step towards a more efficient fight against this phenomenon affecting more and more the Union's budget, as well as to improve the trust of citizens in the institutions, especially when Europe is passing a difficult period of economic crisis. Another reason for establishing body is that the existing European bodies (OLAF, Eurojust and Europol) do not have and cannot be given the mandate to conduct criminal investigations[32].

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[28] Marianne L. Wade, 'A European public prosecutor: potential and pitfalls', Crime, Law and Social Change, Volume 59, Issue 4, May 2013, p.441.

[29] It was published in Official Journal L 063 of 06/03/2002, as amended by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Council Decision 2002/187/JHA, published in Official Journal L 138 of 04.06.2009.

[30] Available at: http://ec.europa.eu/anti_fraud/policy/european_public_prosecutor/index_en.htm (last accessed 03.04.2014).

[31] Available at: http://europa.eu/rapid/press-release_IP-13-709_en.htm (last accessed 03.04.2014).

[32] Available at: http://ec.europa.eu/justice/criminal/judicial-cooperation/public-prosecutor/index_en.htm (last accessed 03.04.2014).

"With today's proposal the European Commission is delivering on its promise to apply a zero tolerance policy towards fraud against the EU budget [....][33]", concluded Vice-President Viviane Reding, while the principles envisaged by the proposed regulation are: effectiveness, independence and accountability.

As regards the key features[34] of the proposed regulation on EPPO, in the following we will mention only few, since the topic is still under debate and these features can change:

a. EPPO would be an independent office, subject to democratic oversight and accountable before the European Parliament, Council and the national Parliaments;
b. EPPO would be a decentralised body of the European Union, composed of European Public Prosecutor and Delegated European Prosecutors located in the Member States and embedded in the national judiciary, carrying out in the same time investigations and prosecutions using national staff and would generally apply national law;
c. EPPO would generally apply national law for the execution of its tasks, relying on in the same time on a limited body of essential EU wide rules for uniform powers and protection of procedural rights;
d. Finally, EPPO would respect the rule of law and the Charter of Fundamental Rights of the European Union in achieving its investigations and prosecutions, while investigation measures that touch mostly on fundamental rights as e.g. telephone interception and other means of interception, will need a prior authorisation by a national Court. Much more, the EPPO's investigations will be subject to judicial review by the national courts.

Describing briefly the regulation[35], we can see that the objectives envisaged are, as follows:

- To strengthen the protection of the Union's financial interests and further development of an area of justice, and, implicitly, to enhance the trust of EU businesses and citizens in the Union's institutions;
- To establish a coherent European system for investigation and prosecution of perpetrators of offences affecting the EU's financial interests;
- To enhance deterrence of committing offences affecting the EU's financial interests;
- To increase the number of prosecutions, leading to more convictions and recovery of fraudulently obtained Union funds;
- To ensure close cooperation and effective information exchange between the European and national competent authorities.

Bearing in mind the above mentioned, it is worth mentioning the added value of the EPPO, namely to be a genuine European prosecution policy that will investigate and prosecute all EU fraud cases and complex cross-border cases, ensuring in the same time a uniform, consistent and systematic approach while linking in with Member States' judicial systems.

The European Commission's proposal for a Regulation on the establishment of the European Public Prosecutor's Office has been discussed in the COPEN working group[36] since October 2013, while a report containing a summary of the developments on the file and the conclusions of the former Lithuanian Presidency on 20 December 2013 have been presented in the first meetings of the Working Group under the Hellenic Presidency of the Council which took place between January and March 2014, where the negations on the instrument continued, taking into account also the point of views expressed by the national parliaments.

[33] Available at: http://europa.eu/rapid/press-release_IP-13-709_en.htm (last accessed 03.04.2014).
[34] Available at: http://ec.europa.eu/anti_fraud/policy/european_public_prosecutor/index_en.htm (last accessed 03.04.2014).
[35] Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0534:FIN:EN:PDF (last accessed 03.04.2014).
[36] Working Party on Cooperation in Criminal Matters.

Much more, the proposal has also been discussed in CATS[37] committee of the Council, in February 2014, in particular regarding the appropriate level of decision-making within the EPPO, where the idea was to settle down a clear delimitation of powers of decision between the Central Office of the EPPO and the European Delegated Prosecutors based in the Member States.

As concern the further steps in this dossier, both the Hellenic Presidency and the Italian Presidency[38] will continue to work on the most relevant issues of the proposal, such as: institutional and procedural relations with Eurojust, procedural safeguards, judicial review, admissibility of evidence, jurisdiction of EPPO, exercise of competence etc., while the specialised ministries of the 28 Member States will be invited, within a well-established procedure, to give their own opinions and to make comments on these issues.

IV. Conclusions

Although a useful instrument in prosecution and judging the perpetrators who commit criminal offences affecting the Union's financial interests, we share the opinion of André Klip[39], who said that Article 86 TFEU instead giving all the necessary answers, provides more questions to which the European institutions and the Member States should respond, especially when have been designed at least four models for establishing EPPO, all of them involving another European body, namely Eurojust, especially when the European Commission justified the necessity to create a European Public Prosecutor's Office by the fact that the Member States' action to tackle *"fraud and illegal activities affecting the EU"* financial interests was not uniform and effective.

Many another questions relating to this body remain unanswered for the moment, despite more than a decade of continuous discussion and negotiations, if we take into account also those occurred during the meetings of the European working groups involved in analyzing this issue.

Establishing of a European Public Prosecutor's Office has been also analysed in the doctrine from a European constitutional viewpoint[40], although from our perspective it represents an interesting approach especially when we believe that the drafters of this regulation never thought to deal with the constitutional aspects of this issue, and the proposed regulation seems to be a very technical instrument offering in a way or another "a helping hand" in fight against organised crime, in general, and against the offences affecting the EU's financial interests, in particular.

Therefore, in this paper, the aim was to present briefly the main features of the proposed regulation in order to have a general idea of what means EPPO, while an in-depth analyse of this instrument, including the relations of EPPO with Eurojust and OLAF, the delegated representatives of EPPO, the EPPO's structure and organization, tasks and responsibilities and other aspects will be the subject of a separate study.

References

Authors:

- Carlos Zeyen, Conference « The Challenges of Transnational Investigation » Birmingham, 'The Role Of Eurojust in a European Public Prosecutor's Office', 21-23 March 2013

[37] Co-ordinating Committee on the area of Police and Judicial Cooperation in Criminal Matters.
[38] Between 1 July and 31 December 2014.
[39] Klip André, *European Criminal Law*, Antwerp, Intersentia, 2009, p. 410.
[40] Simone White, 'Towards a decentralised European Public Prosecutor's Office', *New Journal of European Criminal Law*, Vol. 4, Issue 1–2, 2013, p.22.

- Katalin Ligeti and Michele Simonato, 'The European Public Prosecutor's Office: Towards A Truly European Prosecution Service?', *New Journal of European Criminal Law*, Vol. 4, Issue 1–2, 2013
- Ladislav Hamran and Eva Szabova, 'European Public Prosecutor's Office – Cui Bono?', *New Journal of European Criminal Law*, Vol. 4, Issue 1–2, 2013
- Marianne L. Wade, 'A European public prosecutor: potential and pitfalls', Crime, Law and Social Change, , Volume 59, Issue 4, May 2013
- Norel Neagu, 'The European Public Prosecutor's Office – Necessary Instrument Or Political Compromise?', Law Review, vol. III, issue 2, July-December 2013
- Simone White, 'Towards a decentralised European Public Prosecutor's Office', *New Journal of European Criminal Law*, Vol. 4, Issue 1–2, 2013

European legislation:

- Council Decision 2002/187/JHA of 28 February 2002, published in Official Journal L 063 of 06/03/2002, as amended by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Council Decision 2002/187/JHA, published in Official Journal L 138 of 04.06.2009
- Council Regulation (EC) no.2500/2001 of 17 December 2001 concerning pre-accession financial assistance for Turkey and amending Regulations (EEC) no.3906/89, (EC) no.1267/1999, (EC) no.1268/1999 and (EC) no.555/2000, published in OJ L 342 / 27.12.2001
- Council Regulation no.1267/99 published in Official Journal L 161 of 26.06.1999
- Council Regulation no.1268/99 published in Official Journal L 161 of 26.06.1999
- Council Regulation no.3906/89 published Official Journal L 375 of 23.12.1989
- Fifteenth Report of Session 2013–14 called "European Public Prosecutor's Office: Reasoned Opinion Reform of Eurojust European Anti-Fraud Office", The House of Commons, London, 2013
- General Report on Pre-Accession Assistance (Phare – Ispa – Sapard), Report from the Commission, 2004
- Green Paper on Criminal Law Protection of the Financial Interests of the European Community and the Establishment of a European Prosecutor, Brussels, 11 December 2001, COM (2001) 715 final
- Report Outline for a conference assessing the Commission proposal to establish a European Public Prosecution Office (EPPO) - Criminal Law protection of European financial interests: a shared constitutional responsibility of the EU and its Member States?, T.M.C. ASSER Institute, Centre for International and European Law, May 2013
- Report, Initial appraisal of a European Commission Impact Assessment European Commission proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, December 2013
- Study *Deterrence of fraud with EU funds through investigative journalism in EU-27*, Policy Department D: Budgetary Affairs, Directorate General for Internal Policies, 13.09.2012

Websites:

- eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0844:FIN:EN:PDF
- eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:161:0087:0093:EN:PDF
- http://ec.europa.eu/anti_fraud/documents/fwk-green-paper-corpus/corpus_juris_en.pdf
- http://ec.europa.eu/anti_fraud/policy/european_public_prosecutor/index_en.htm
- http://ec.europa.eu/enlargement/instruments/overview/index_en.htm
- http://ec.europa.eu/enlargement/policy/glossary/terms/transition-facility_en.htm
- http://ec.europa.eu/justice/criminal/judicial-cooperation/public-prosecutor/index_en.htm
- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989R3906:EN:NOT
- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0534:FIN:EN:PDF
- http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0715en01.pdf
- http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=EN&numdoc=32001R2500
- http://eurojust.europa.eu/doclibrary/corporate/newsletter/Eurojust News Issue 8 (May 2013) on the creation of a European Public Prosecutor Office/EurojustNews_Issue8_2013-05-EN.pdf
- http://eurojust.europa.eu/Pages/home.aspx
- http://europa.eu/legislation_summaries/enlargement/western_balkans/r18002_en.htm

- http://europa.eu/rapid/press-release_IP-13-709_en.htm
- http://www.asser.nl/upload/documents/20130614T041004-Asser%20EPPO%20Conf%20%20Outline%20May%202013.pdf
- http://www.birmingham.ac.uk/Documents/college-artslaw/ija/transnational/%286b%29CarlosZeyenwrittenpresentationUniversityofBirmingham.pdf
- http://www.mrrfeu.hr/UserDocsImages/EU fondovi/Uredba_Vijeca_1267_1999_1.pdf
- www.europarl.europa.eu/document/activities/cont/201210/20121002ATT52809/20121002ATT52809EN.pdf

THE 2012 FINANCIAL REGULATION: BUILDING THE CATHEDRAL OF EU LEGITIMACY?

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Abstract

The quest for enhanced financial accountability is a by-product of the financial crisis that hits Europe since 2008. Attention to sound financial management and its links to overall EU legitimacy has skyrocketed from the vocabulary of clerks and auditors up to top-level strategic documents, including recent Conclusions of the European Council. This trend evidences that the focus on democratic legitimacy in the European Union should shift away from the traditional input-output legitimacy dilemma and towards the so-called throughput or systemic legitimacy. Systemic legitimacy provides the citizen with assurances that the system (s)he is requested to trust is well-functioning and answerable to the people; however, the definition of its scope proves ellusive among scholars. This paper takes account of the relevant literature and concludes that financial accountability remains at the core of systemic legitimacy.

From a legal perspective, financial accountability in the EU is incidentally mentioned in the Treaties, and further ensured by secondary legislation. The EU Financial Regulation, also known as the "EU Financial Bible" stands out from the legal framework governing financial management of the EU budget. Since its adoption in 1977, the EU Financial Regulation has been subject to two major revisions. The first one led to the adoption of Council Regulation 1605/2002 and represented then an attempt to regain citizens' trust on financial accountability after the serious backlash brought about by the resignation of the Santer Commission in 1999. More recently, the Financial Regulation has been revamped through Regulation 966/2012 of the European Parliament and the Council. Following a qualitative and comparative approach, this paper highlights the main changes that have been introduced in the legal framework on financial management, with a view to assessing their potential contribution to improvement in financial accountability and, by ricochet, in the EU's systemic legitimacy.

Keywords: *European Union, systemic legitimacy, financial accountability, public policy management, multilevel governance*

1. Financial accountability as a pillar in the cathedral of EU legitimacy

An old story about how the magnificent Salisbury Cathedral was built tells us that a "traveller came across three stone-cutters and asked them about the nature of their work. Whereas the first and the second provided him with rather down-to-earth answers, the third one paused and, looking skyward, replied *"I am a mason and I am building a cathedral". "I have spent many months away from my family and I miss them dearly. However, I have learnt through the Bishop how people would come from all parts to worship here. He also told that the Cathedral would not be completed in our days but that the future depends on our hard work".*[1]

This inspiring story nicely shows that there is room, even in the most technical and mechanical jobs, for considering the broader picture and design to which such function

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[1] Old story, adapted from John P. Girard and Sandra Lambert "The Story of Knowledge: Writing Stories that Guide Organisations into the Future" *Electronic Journal of Knowledge Management* 5 (2007): 161.

contributes. If we focus in what will represent the core topic of this paper, namely, financial management and accountability in the European Union, some financial managers, clerks and auditors in the European Union (EU) and in the Member States would play the part of the first masons of the story, in the sens that they would present their respective tasks as merely linked to authorizing payments, managing grants or auditing expenditure. Nevertheless, there will possibly be some who will look skywards and affirm that they are stone-cutting financial accountability and, by doing so, building the cathedral of EU legitimacy. A few might even look back on the traveller's eyes and mouther that the future depends on their hard work.

The link between financial accountability and EU legitimacy has not been evident in the scholarly literature for decades. This paper conceptualizes first *accountability* and *financial* accountability, with a view to establishing a link between financial accountability and legitimacy through what has been labelled *systemic legitimacy*. In doing so, the way should be paved to analyze the contribution of the EU Financial Regulation to overall EU legitimacy.

Originally, accountability had an utterly different meaning and referred, in the Anglo-Saxon world to the way in which property holders rendered a count of their possessions to the king, whose results were enshrined in a book. Conversely, the current relationship of accountability involves the citizens holding their authorities to account in the broadest sense. Current accountability is a conceptual umbrella linked to good governance. Accountability involves various processes and institutions: political control, transparent access to documents and open government dynamics, improvements in policy-making and implementation, and even integrity (ethics in public administration). As a result, the very concept proves elusive. Nevertheless, the mainstream has embraced the seminal definition by Bovens and focuses on the *relationship* between the accountability holder and holdee:[2] *"a relationship between an actor and a forum in which the actor is obliged to explain and justify his conduct, the forum can pose questions and pass judgment, and the actor may face consequences".*[3] Three pillars thus prevent abuses of power and arbitrariness in the conduct of public policies: openness, justification and sanction (the latter representing the "sword of Damocles", or as Papadopoulos puts it, "the shadow of" a sanction)[4]. Along that line, significant attention has been devoted in European studies to expose the performance of accountability holders, the existing gaps in the legal framework and practice of various accountability mechanisms, and whether specific agents and actors can be sufficiently held to account *by others*.

Under the majoritarian approach to accountability, maintaining an acceptable level of accountability hinges on control/sanction mechanisms which are well-performing and accountability holders who are interested enough to live up to their tasks. Little attention is devoted to the role played by the *context* that bounds accountability holdees to carry out their tasks in an accountable way, regardless of any link to the accountability holder. Among the few authors that have stepped over that boundary, Laffan argues that *"[t]he reconfiguration of systems of accountability involves institution building, changes in systems of regulation, shifts in inter-institutional relations, and modifications in the norms that guide the behaviour of institutional actors. New systems of regulation and control may well be contested and resisted by actors whose interests are not served by a reconfiguration of accountability and control".*[5] We agree with her in that studies on EU accountability might largely benefit from

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[2] Mark Bovens, "Analysing and Assessing Accountability: A Conceptual Framework," *European Law Journal* 13 (2007): 446. Adrienne Héritier and Dirk Lehmkuhl, "New Modes of Governance and Democratic Accountability," *Government and Opposition* 46 (2011): 126. Deirdre Curtin and Andreas Nollkaemper, "Conceptualizing Accountability in International and European Law," *Netherlands Yearbook of International Law* 36 (2005), 3.

[3] Bovens, "Analysing," 450

[4] Yannis Papadopoulos, "Problems of Democratic Accountability in Network and Multilevel Governance," *Eur. L. J.* 13 (2007): 470.

[5] Brigid Laffan, "Auditing and Accountability in the European Union," *JEPP* 10 (2003): 763.

sociological aproaches that propose a context responsive to accountability, focusing specifically on the behaviour of public servants. Legal scholars might cooperate through translating such underlying philosophy into the legal framework. The stress on processes and institutions should thus be complemented with a reference to the socialization of public ethics among the actors involved in accountability relations. As March and Olsen put it, "[p]ublic officials are expected to act *in anticipation of having to account* for their actions"[6]. Both staff policies and ethic management policies can contribute to creating an 'organizational culture' in which civil servants are responsive to accountability concerns not because they take orders from the representatives of the vested interests, or because they fear punishment, but because they themselves think in a similar manner[7]. The importance of ethics in the 'organizational structure' of EU institutions has been highlighted by some authors, having in mind the ultimate goal to further[8] or else to preserve[9] EU legitimacy.

A taxonomy of accountability mechanisms encompasses various criteria; among others, the field in which the relationship between the actor and the forum unfolds, the nature and degree of the sanction, and the degree of effectiveness in creating a protective environment against arbitrariness and corruption[10]. Adding the adjective 'financial' to accountability would only precise the prism through which the conduct will be held to account, namely, the legal, regular and sound financial management of the budget. However, other types of accountability exist (legal, political and judicial; collective and individual), and giving preminence to one above the rest will largely depend on the context[11]. Second, the nature of the sanction may be legal, political, economical, administrative, and its impact on the status of the agent or institution involved swings from a 'soft' degree, in the case of informal mechanisms (eg. disregarding the deviated behaviour in a private fashion), to a 'hard' degree, in the case of some formal mechanisms (eg. motion of censure). The effectiveness of the accountability mechanism is not so much determined by the degree of the sanction as by the frequent resort to the mechanism that creates an accountability-friendly atmosphere[12]. This said, this paper focuses primarily on formal accountability mechanisms that are enshrined in EU legislation, in the field of budgetary management and control.

A large share of the EU budget is implemented at the domestic level;[13] however, it is doubtful that effective accountability mechanisms are translated to national authorities, not only top-down but also across Member States. Domestic approaches to accountability suffer a deep geographical breach: Anglo-Saxon countries (United Kingdom) extrapolated to public accountability various political tools of accountability that had been developed in the private

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[6] James March and Johan Olsen, *Democratic Governance* (New York: Free Press, 1995).

[7] Adapted from John Donald Kingsley, "Representative Bureaucracy," (1944), as cited by Magali Gravier, "Challenging or Enhancing the EU's Legitimacy? The Evolution of Representative Bureaucracy in the Commission's Staff Policies," *Journal of Public Administration Research and Theory* 23 (2013): 819.

[8] Michelle Cini, "Ethics Management in the European Commission," in *Institutional Dynamics and the Transformation of Executive Politics in Europe*, ed Morten Egeberg (Connex, 2007) 122. Myrto Tsakatika, "Claims to Legitimacy: The European Commission between Continuity and Change," *Journal of Common Market Studies* 43 (2005): 201. Andreea Năstase, "Managing Ethics in the European Commission Services: From Rules to Values?" *Public Management Review* 15 (2013): 65. Carolyn Ban, "Reforming the Staffing Process in the European Union Institutions: Moving the Sacred Cow Out of the Road," *International Review of Administrative Sciences* 76 (2010): 16. Gravier, "Challenging," 822

[9] Cris Shore, "Culture and Corruption in the EU: Reflections on Fraud, Nepotism, and Cronyism in the European Commission," in *Corruption: Anthropological Perspectives,* ed. D. Haller and C. Shore (Ann Arbor / London: Pluto, 2005), 135.

[10] Susana del Río and María-Luisa Sánchez-Barrueco, "Responsabilización Institucional y Comunicación en la Unión Europea," *Cuadernos Europeos de Deusto* 46 (2012): 118.

[11] Anthony Arnull and Daniel Wincott. *Accountability and Legitimacy in the European Union* (Oxford: OUP, 2002), 3. Ruth Grant and Robert Keohane, "Accountability and Abuses of Power in World Politics," *American Political Science Review* 99 (2005): 32.

[12] Del Río and Sánchez-Barrueco, "Responsabilización Institucional", 120

[13] Gabriele Cipriani, *The EU Budget: Responsibility without Accountability?* (Brussels:CEPS, 2010), http://www.ceps.eu/book/eu-budget-responsibility-without-accountability

management sector, countries with a strong tradition of administrative law were more reluctant to such dynamics (France, Germany, Italy, Spain), and Nordic countries remained half-way[14]. This is but a reflection of the different European approaches to public administration, which reflect in turn different conceptions of the relationship between the state and the society, and therefore affect the effectiveness of potential administrative reform initiatives[15].

Finally, conceptualizing financial accountability requires asserting a link between accountability and legitimacy, for this paper will argue that mechanisms reinforcing financial accountability in the EU lead to a stronger legitimacy of the system as a whole. The definition of 'financial accountability' is not unchallenged in scholarly literature; however, it essentially remains an obligation of the executive power in Western democracies to ensure the citizens that their money is well spent. This said, some authors embrace a restrictive scope of the concept, focused on "the control and elimination of waste and corruption and involves compliance with legal procedures, as well as the use of external audit mechanisms",[16] whereas others include as well the evaluation of policy performance, namely the adequacy of the measures taken to the political objectives stated in the regulatory framework.

The link between accountability and legitimacy draws on the assumption that the latter stems from a varying array of sources, which gather around the labels of *input*, *output* and *systemic* legitimacy. Input and output legitimacies were coined by Scharpf[17] and quickly rooted in European literature. *Input* legitimacy would refer to the government *by* the people and legitimize the government according to the level of citizen participation in the definition and implementation of policies. Conversely, *output* legitimacy would put the stress on policy performance and the degree to which the outcome of public policies brings about an increase in citizens' welfare, a government *for* the people, for that matter. EU's legitimacy long time lay in its ability to govern "for the people", namely, to provide citizens with solutions to problems related to the economy and the internal market; alas, the impact of output legitimacy started fading away back in the eighties as accusations about democratic deficit spread and is seemingly not enough any longer. Filling the gap has proven difficult. The European Union soon resorted to deliberative democracy, through initiatives aimed at enhancing people's government (input legitimacy) such as citizens' initiative at the European level or toughening requirements as regards transparency. Advocates of *systemic legitimacy*, a more recent trend in European studies,[18] focus on the structures, rules and processes governing the public management and analyze whether their legal framework and practice is optimal as regards performance (managerial style) or accountability (constitutional style). Their main assumption is that an optimal shaping of structures, rules and processes applicable to public management increases citizens' trust in the system, thus reinforcing its legitimacy.[19]

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[14] Mark Bovens, "Public Accountability: A Framework for the Analysis and Assessment of Accountability Arrangements in the Public Domain," *Unpublished Paper* (2005)
http://www.qub.ac.uk/polproj/reneg/contested_meanings/Bovens_Public%20Accountability.connex2.doc. Guy Peters, "Four Main Administrative Traditions" World Bank, 2000
http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPUBLICSECTORANDGOVERNANCE/0,,contentMDK:20134002~pagePK:210058~piPK:210062~theSitePK:286305,00.html.

[15] Peters, *Ibid.*; Susan Rose-Ackerman and Peter Lindseth, *Comparative Administrative* Law (Chentelham:Edward Elgar Publishing, 2010).

[16] Sara Davies and Laura Polverari, "Financial Accountability and European Union Cohesion Policy," *Regional Studies* 45 (2011): 701.

[17] Fritz Scharpf, *Problem-Solving Effectiveness and Democratic Accountability in the EU* (MPIfG Working Paper, 2003). http://www.mpifg.de/pu/workpap/wp03-1/wp03-1.html

[18] Laffan, "Auditing", 763.

[19] Victor Bekkers and Arthur Edwards, "Legitimacy and Democracy: A Conceptual Framework for Assessing Governance Practices," in *Governance and the Democratic Deficit. Assessing the Democratic Legitimacy of Governance Practices*, ed. Victor Bekkers et al. (Aldershot/Burlington: Ashgate, 2007), 44. Mark Bovens, Thomas Schillemans and Paul 't Hart, "Does Public Accountability Work? an Assessment Tool," *Public Administration* 86 (2008): 239. Deirdre Curtin, Paul 't Hart and Mark Bovens, "The quest for legitimacy and accountability in EU governance" in *The Real World of Accountability, what*

The European Commission attached significant importance to accountability in the 2001 White Paper on European Governance. Accountability was identified as one of the five core principles to ensure good governance. The Commission then stated that *"[e]ach of the EU institutions must explain and take responsibility for what it does in Europe. But there is also a need for greater clarity and responsibility from Member States and all those involved in developing and implementing EU policy at whatever level".*[20] The scope of this paper being limited to the legal framework at the EU level, it is necessary again to warn of the undeniable role the Member States level plays in it. Two perspectives can be identified. On one side, own national preferences as regards systemic legitimacy will directly affect Member States negotiating positions within the EU Council of Ministers and the European Parliament, in a fashion that will make fluid (or else hamper) administrative reform at the EU level itself. On the other, financial accountability in the European Union can simply not be divorced from Member States own approach to compliance with European legislation, given the fact that nearly 80% of the expenditure enshrined in EU budget is implemented under shared management with national administrations.[21] The diversity among administrative cultures and paradigms in the 28 Member States is wide; therefore, the trap of analyzing the domestic salience of systemic legitimacy (and financial accountability in particular) as a coherent set of national preferences should be avoided. In the coming paragraphs, we will draw on the four administrative traditions referred by Peters[22] to illustrate further the different weight attached to accountability as part of systemic legitimacy across Member States.

Countries with a strong Napoleonic tradition invested centuries in nation-building through government; and government was conceptualized as part of a highly centralized state structure which imposed its authority over citizens. Civil servants were assigned a constitutional role linked to nation-building and national sovereignty. As a result, citizens were left bereft of the capacity to hold institutions to account on a regular basis. They remained subjects, never to become actors. Accountability mechanisms were traditionally devoid of any sense of due to the citizen, but an expression of the power of the Administration towards the individual civil servant.

Countries in the Germanic tradition share with the Napoleonic tradition an organic conception of the State, in the sense that government may be divided into ministries and agencies but the authority of the state is not divisible. In both administrative traditions the "citizen is not an atomistic individual but rather a member of an essentially organic society" [23]. Accordingly, the underlying philosophy in civil service is to serve the state, and not the civilians. Interestingly, the Germanic tradition appraise civil servants as the channels to convey the power and centrality of the state, therefore, they must display a firm moral and legal foundation. Hence the importance attached to recruitment and training processes.

In Anglo-Saxon societies, the state arises from a contract among citizens who delegate power to civil servants and remain conscious of their capacity to hold the latter to account. A step forward, states under the Nordic administrative tradition are grounded on extensive commitments to provide their citizens with social and economic well-being, accordingly, "there is a strong participative ethic in the society and government".[24]

Deficit?, eds. Deirdre Curtin, Paul 't Hart and Mark Bovens (Oxford: OUP, 2010) 27-29. Andreas Føllesdal, "The Legitimacy Challenges for New Modes of Governance: Trustworthy Responsiveness," *Government and Opposition* 46 (2011), 81-100. Héritier and Lehmkuhl, "Modes", 138; Vivien Schmidt, "Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput," *Political Studies* 61 (2013), 5. Laffan, "Auditing", 764.

[20] Commission, White Paper on European Governance, COM (2001) 428, July, 25, 2001.

[21] 76%, according to the Commission (DG Budget), http://ec.europa.eu/budget/explained/management/managt_who/who_en.cfm.

[22] Peters, "Traditions"

[23] Peters, "Traditions"

[24] Ibid.

Finally, links between accountability and systemic legitimacy are young in Central and Eastern European Member States. The heavy burden left by their long communist past is twofold: low capacity and over-politization. The communist state carried out tasks linked primarily to government, since state administration was intertwinned with party bureaucracy. The government was weakly endowed in terms of policy-making capacity. Rule of law was generally disregarded in the event of a collision with party decisions. Besides, state employees (the term civil servant is just not applicable to that paradigm) were chosen and promoted drawing on their political reliability and loyalty to the communist party: partisanship prevailed over technical and police expertise. The sole room left to accountability in those societies was answering before the party bureaucracy, and creating such space proved a central challenge in post-communist administrative reform.[25] The lengthy process of passing administrative reform legislation in post-communist countries illustrates the extent to which national paradigms may potentially impact on overall European accountability. Drawing on a comparative analysis on Civil Service Laws, Goetz concludes that the process has been uneven.[26] The performance of new administrative laws as catalyst for real administrative reform in post-communist countries is low: analysts have underlined that, the most often, legislation has been considered an end in itself to answer EU conditionality before accession. Therefore, a relaxation in compliance with accountability mechanisms can be observed once accession is completed.[27]

The uneven balance at the domestic level may help understand the reasons why accountability in general and financial accountability in particular do not usually top the EU agenda, which tends to bow to issues of policy efficiency or policy development. Steps forward towards improvement, modernization, or reform, would rarely originate under 'normal' circumstances, but happen instead as an outcome of periods of crisis. Timescape is thus important in the analysis of financial accountability. Historical institutionalists have resorted to the expression 'critical junctures' to explain significant reorientations in policy-making and this theoretical framework may help explaining bumps in the salience of systemic legitimacy in the European Union, and by extension, the salience of financial accountability.[28] Following their understanding, a 'critical juncture' represents a key event whose perceived impact on established collective identities and values is so substantial that leads (or forces) relevant actors to turn previous institutional arrangements upside down and trigger a readjustment in policy orientation which then cristallizes into a long-lasting legacy. Improvements in EU financial accountability are largely indebted to these critical junctures.

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[25] Klaus Goetz and Hellmut Wollmann, "Governmentalizing Central Executives in Post-Communist Europe: A Four-Country Comparison," *Journal of European Public Policy* 8 (2001): 883.; Klaus Goetz, "Making Sense of Post-Communist Central Administration: Modernization, Europeanization Or Latinization?," *Journal of European Public Policy* 8 (2001): 1035.

[26] Goetz, "Making sense," 1036.

[27];Rachel Epstein and Ulrich Sedelmeier, "Beyond Conditionality: International Institutions in Postcommunist Europe After Enlargement," *Journal of European Public Policy* 15 (2008): 806. Tanja Börzel et al., "Obstinate and Inefficient: Why Member States do Not Comply with European Law," *Comparative Political Studies* 43 (2010), 1387-8. Ulrich Sedelmeier, "Europeanisation in New Member and Candidate States," *Living Reviews in European Governance* 6 (2011): 25. Jan-Hinrik Meyer-Sahling, "The Durability of EU Civil Service Policy in Central and Eastern Europe After Accession," *Governance* 24 (2011): 255.

[28] For a state of the art from a historical institutionalist perspective see Giovanni Capoccia and Daniel Kelemen, "The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism," *World Politics* 59 (2007); whereas among European scholars, see Petya Alexandrova, Marcello Carammia, and Arco Timmermans, "Policy Punctuations and Issue Diversity on the European Council Agenda," *Political Studies Journal* 40 (2012); Simon Bulmer, "Theorizing Europeanization," in *Europeanization: New Research Agendas* ed. Paolo Graziano and Maarten Vink (New York: Palgrave MacMillan, 2007), 50; Thomas Risse and Antje Wiener, "'Something Rotten'and the Social Construction of Social Constructivism: A Comment on Comments," *Journal of European Public Policy* 6 (1999); and in the specific field of financial accountability Paul Stephenson, "60 Years of Auditing Europe: A Historical Institutionalist Analysis" (Paper Presented at the JMCE Conference, University of York, September, 13, 2012); Carlos Mendez and John Bachtler, "Administrative Reform and Unintended Consequences: An Assessment of the EU Cohesion Policy 'audit Explosion'," *Journal of European Public Policy* 18 (2011).

The collective resignation of the European Commission in 1999 is certainly one of them, to the extent that it sowed the seeds of the most comprehensive reform in the EU administration to date.[29]

The economic and financial crisis that haunts the European Union since 2008 has been characterized as a critical juncture for the EU and its Member States.[30] Financial accountability and its advocates could have emerged as beneficiaries of the economic crisis; however, as empirical analysis of European Council conclusions shows, this has only happened with regard to systemic legitimacy in the field of national economic policies to the extent to which they impact on the overall Eurozone. The salience of issues linked to systemic legitimacy within the EU system has been limited, throughout the financial crisis, to democratic accountability of the European Council, the European Central Bank and the new institutions on financial supervision. European institutions have thus arguably missed an opportunity to seize the problems of financial accountability of the EU budget itself. We find a single reference to this topic in the European Council Conclusions of February 2013 Conclusions, following a meeting devoted to the EU Multiannual Financial Framework (the so-called 'financial perspectives'): "*The EU has the responsibility,* through certain conditionalities, robust controls and effective performance measurement, *to ensure that funds are better spent*. […] All sectoral legislation relating to the next Multiannual Financial Framework as well as the new Financial Regulation and the Interinstitutional Agreement on cooperation in budgetary matters and on sound financial management should therefore contain substantial elements contributing to simplification and *improving accountability and effective spending of EU funds*".

The return of financial accountability to EU political agenda is thus to be welcome, but defenders of EU systemic legitimacy are warned not to count the chickens before they are hatched. The meager attention devoted by the highest EU institution to systemic legitimacy can be explained as follows: although institutional and financial crisis find their grass-roots in gaps in financial management and accountability; legal improvements in these issues cannot be expected to produce a seizeable outcome in the short term. Accordingly, actors in the vortex of a crisis lack incentives to push accountability upwards in the political agenda more than issues linked to restoring trust or improving performance (output legitimacy). Issues of financial accountability and systemic legitimacy are more likely to arise in post-crisis scenarios, provided that the momentum for institutional improvement –administrative reform- lasts enough. Throughout the worst moments in the Euro crisis, the core narrative tried to convey Member States agreement around the survival of the EU single currency,[31] and not wiser expenditure at the EU level.

The abovementioned theoretical debates provide the backdrop against which the rest of this paper will unfold. Financial accountability in the European Union is primarily enshrined in the so-called Financial Regulation, which is the basic (and throrough) legal

[29] María Luisa Sánchez Barrueco, *El Tribunal De Cuentas Europeo: La Superación De Sus Limitaciones Mediante La Colaboración Institucional* (Madrid: Dykinson, 2008): 205-223; Hussein Kassim, "'Mission Impossible', but Mission Accomplished: The Kinnock Reforms and the European Commission," *Journal of European Public Policy* 15 (2008); Michelle Cini, *From Integration to Integrity: Administrative Ethics and Reform in the European Commission* (Manchester University Press, 2007); Michael Bauer, "Impact of Administrative Reform of the European Commission: Results from a Survey of Heads of Unit in Policy-Making Directorates," *International Review of Administrative Sciences* 75 (2009); Tim Balint, Michael Bauer, and Christoph Knill, "Bureaucratic Change in the European Administrative Space: The Case of the European Commission," *West European Politics* 31 (2008). Emmanuelle Schön-Quinlivan, "Administrative Reform in the European Commission," in *Management Reforms in International Organizations*, ed. Michael Bauer (Baden-Baden: Nomos, 2007), 25.

[30] Dermot Hogdson and Uwe Puetter, "The European Union and the Economic Crisis," in *European Union Politics*, eds. Michelle Cini and Nieves Pérez-Solórzano (Oxford: Oxford University Press, 2013), 367; Benjamin Braun, "Preparedness, Crisis Management and Policy Change: The Euro Area at the Critical Juncture of 2008–2013," *The British Journal of Politics & International Relations* (2013) doi:10.1111/1467-856X.12026.

[31] eg. Statement by the Heads of State or Government of the Euro Area and EU institutions, 21 July 2011

instrument which governs budgetary implementation in the EU. The stress will be put first on financial accountability as enshrined in EU primary and secondary law, from a general perspective (section 2) and then drawn to the Financial Regulation, whose latest revision has been in force since 2012 (section 3).

2. A general legal framework on EU financial accountability.

Financial accountability is a part of EU financial management which represents the control of the way in which the EU budget is implemented. Rules on financial management are enshrined in EU primary law, although their concrete legislative development is made possible through secondary law.

There are scattered references to issues of systemic legitimacy in the Treaty on the European Union (TEU) but no clear mention of financial accountability. The Preamble of the Treaty on the European Union states the willingness to "enhance further the […] *eficient functioning of the institutions* so as to enable them better to carry out […] the tasks entrusted to them" (para. 7). Beyond the references to 'the rule of law', too vague, the TEU ignores systemic legitimacy when listing the values (article 2 TEU) and objectives (article 3 TEU) of the EU. Likewise, issues linked to input and output legitimacy are mentioned among the principles of the EU in articles 9-12 TEU, but systemic legitimacy is clearly side-lined.

The same applies largely to the initial provisions of the Treaty on the Functioning of the European Union (TFEU). Surprisingly enough, systemic legitimacy has been denied a place in Title II TFEU (Provisions having general application, articles 7 to 17) beyond open government considerations (article 15). It is not until the Treaty has regulated the whole set of EU policies (Part III), the status of overseas countries and territories (Part IV), the Union's external action (Part V) and the institutional framework (Part VI, Title I) that attention is drawn to the rules governing budgetary implementation and control in Title II of Part VI, headed "Financial Provisions". That part of the Treaty deals, one after another, with the EU's own resources (Chapter 1), the Multiannual Financial Framework (Chapter 2), the Annual Budget (Chapter 3), budgetary implementation and control (Chapter 4), common provisions (Chapter 5) and the protection of EU's financial interest and the fight against fraud (Chapter 6). For the sake of a better comprehension of forthcoming reflections, it seems necessary to explain the nuts and bolts of the EU budgetary cycle.

The EU budgetary cycle starts when the annual budget is adopted by the Parliament and the Council, and the fundamental grounds have remained unchanged from the origins of the European integration process. However, the EU budget essentially differs from national budgets in that it is balanced by constitutional design (article 310 TFEU). Starting in 1988, Member States adopted the political decision to prevent any budgetary deficit from arising at the EU level, by means of an interinstitutional agreement that would set annual expenditure ceilings throughout a seven-year timeframe. That document was known as the 'financial perspectives' or the Multiannual Financial Framework. Following the Lisbon Treaty, and under article 312 TFEU, the original interinstitutional agreement became a Council Regulation, which is adopted by the Council on a unanimity basis following European Parliament's assent (internally reached through absolute majority). The European Council might change this procedure to qualified majority in the future. The first Multiannual Financial Framework in the post-Lisbon era was adopted in December 2013 and covers the 2014-2020 period.[32]

[32] Council Regulation (EU, EURATOM) N. 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020, OJ L 347/2013, December, 20, 2013.

As a result, European institutions, notably the Commission and the European Parliament, are constrained by the limits enshrined in the Multiannual Financial Framework when it comes to adopting the EU annual budget year after year. The complexities of the budgetary procedure (established in articles 314-316 TFEU) are irrelevant for the purpose of this work, we will thus jump straight into the details of budgetary implementation.

Article 310 (5) TFEU states that the EU general budget must "be implemented in accordance with the principle of sound financial management. Member States shall cooperate with the Union to ensure that the appropriations entered in the budget are used in accordance with this principle." Here, the Treaty refers to the revenue side of the budget.

Some lines below, article 317 TFEU commands the Commission to "implement the budget in cooperation with the Member States", "on its own responsibility and within the limits of the appropiations, having regard to the principles of sound financial management". In doing so, it must act "in accordance with the provisions of the regulations made pursuant to Article 322." This expression essentially refers to the so-called Financial Regulation, as we will develop later on. Then again, article 317 TFEU includes a specific reference to the participation of national authorities in the expenditure wing of the EU budget. They "shall cooperate with the Commission to ensure that the appropriations are used in accordance with the principles of sound financial management."

Interestingly enough, a clear asymmetry as regards respective rights and obligations of the Commission and Member States is enshrined in the Treaty. To put it bluntly, the Commission executes directly only a meagre 22% but it remains responsible for the sound financial management of the EU budget as a whole.[33] Member States' authorities are required to cooperate in both the collection of revenues (article 310 TFEU) and a financially sound implementation of expenditure (article 317 TFEU), as two specific manifestations of the general obligation to cooperate with EU authorities under the principle of sincere cooperation, as enshrined in article 4 (3) TEU. The relevant case-law issued by the European Court of Justice (ECJ) might be applicable to national administrations taking part in the implementation of EU budget; however, cases dealing with this matter are rare.[34]

The control of budgetary implementation opens the door to the intervention of the European Court of Auditors (ECA), the European Parliament (EP) and the Council. According to article 318 TFEU, the Commission must submit annually to the EP and the Council the accounts of the previous years, together with a financial statement of the assets and liabilities of the EU. Drawing on the results of the audits carried out by the Court of Auditors, both at the EU and national levels, and reflected in the annual and special reports issued by this institution, the Budgetary Authority (that is, the European Parliament and the Council) will issue a decision on the discharge of the Commission in respect of the implementation of the budget, under article 319 TFEU. The Treaty does not ellaborate on the choices and effects of the discharge decision beyond the fact that it brings the budgetary cycle to an end. Interinstitutional practices have shaped the discharge decision as a highly political decision. The EP has gone to great lengths to turn its power to issue the discharge decision into a permanent oversight on EU policy-management. Three are the possible outcomes of the discharge decision: positive, negative and conditioned. Whereas positive and conditioned discharge decisions close the budget cycle with a (generally) favourable assessment on the Commission's activity, a negative discharge would have a similar impact to that of an atomic bomb in the interinstitutional relations, and therefore must be used carefully to maintain its threatening power before the Commission.[35] However, the power of the discharge decision

[33] Cipriani, *EU Budget*, 16

[34] Among the very few of them, see Case *Commission vs Germany*, November, 15, 2011, C-539/09.

[35] Francis Jacobs, Richard Corbett and Michael Shackleton, *The European Parliament*, 7th ed. (Boulder: Westview Press, 2007), 128; Sean Van Raepenbusch, *Droit Institutionnel De l'Union* Européenne (Brussels: Larcier, 2005), 307.

should not be overestimated, given the fact that it is issued nearly two years after the moment in which the funds were spent.[36] Opting for one or another largely reflects the EP's own opinion on the capacity and willingness of the Commission to embrace financial soundness when it spends EU funds, as well as the likelihood to obtain specific concessions from the Commission in a related policy field.[37]

A detailed account of provisions on financial accountability in the EU primary law would be incomplete if it ignored article 325 on *"combating fraud."* The second paragraph of this provision obliges Member States to *"take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests."*

3. The "Financial Regulation": old wine in new wineskins?

A. A European bible almost as old as the Bible

The Financial Regulation represents the 'financial bible' of EU budget management.[38] It develops the Treaty provisions as regards types of management and basic requirements on the use of public funds, among other important fields. Following Craig, it can be affirmed that the Financial Regulation enjoys constitutional nature from a twofold perspective. From a vertical perspective, the Financial Regulation raises above the rest of EU legal acts in spite of being secondary EU law. From a horizontal perspective, the Financial Regulation contributes to the constitutionalization of EU administrative law through a core of structural norms governing policy-implementation across EU fields of competence which are administered in an essentially different way[39]. Financial rules enshrined in the Financial Regulation bind all European and national authorities that implement EU funds, and even private actors acting as beneficiaries of EU programmes. As a fundamental criterion, public or private subjects will be bound by the Financial Regulation to the extent that they are linked in any way to public management of revenue or expenditure enshrined in the EU general budget.

The first Financial Regulation was adopted in 1977[40], following the Treaty of Luxembourg on certain financial provisions[41]. From that moment on, that legal instrument was subject to a neverending series of specific reforms that would render it, throughout decades, likelier to a patchwork bedspread than to the financial backbone of EU policy management that European institutions assumed it was.

Redressing this situation was a by-product of the severe institutional crisis brought about by the resignation of the Santer Commission in 1999. A complete revamping of the Financial Regulation crystallized in Regulation 1605/2002[42] as part of administrative reforms launched by Commissioner Kinnock under the lead of Commission President Prodi. Regulation 1605/2002 was groundbreaking in many ways, but perhaps two features qualify as its main contributions. The one was establishing a classification of the types of public management: centralized by the Commission's services, decentralized through agencies,

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[36] Jean-Paul Jacqué, *Droit Institutionnel De l'Union Européenne*, 4th ed. (Paris: Dalloz, 2006).
[37] Sánchez-Barrueco, *El Tribunal de Cuentas Europeo*, 205-223.
[38] European Commission, "Un nouveau règlement financier pour l'Europe" IP/02/929, 26 June 2002
[39] Paul Craig, "A new Framework for EU Administration: The 2002 Financial Regulation" *Law and Contemporary Problems* 68 (2004), 107.
[40] Financial Regulation of 21 December 1977 applicable to the General Budget of the European Communities, 1977 OJ L 356.
[41] Traité portant modification de certaines dispositions budgétaires des traités instituant les Communautés européennes et du traité instituant un Conseil unique et une Commission unique des Communautés européennes, OJ L 2/1971, January, 2, 1971
[42] Council Regulation (EC, Euratom) 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 248, September, 16, 2002.

outsourced to private operators, shared with national authorities and through international bodies. The goal was not only linked to transparency purposes (ie. enhancing their visibility) but mainly to set constrains on the Commission's resort to certain management modalities proner to financial irregularities. The other was to affirm the responsibility of managers, and therefore to remove stages in the financial audit procedure that had proved useless in the past; we refer to the former *ex ante* visa that was granted (in practice, automatically and without any substantial revision of the contents) by the "authorising officer".

After the entry into force of the Lisbon Treaty (December 1, 2009), the implementation of specific financial provisions of the new treaty required further reform of the Financial Regulation, which led to the adoption of Regulation 966/2012, in force since 1 January 2013[43]. The reader's eye is first caught by the European Parliament as a newcomer to the adoption procedure of the Financial Regulation. In fact, Regulation 966/2012 is the first Financial Regulation adopted following codecision between the Council and the Parliament, under the revised article 322 TFEU. The Parliament's involvement has certainly lengthened the legislative procedure and probably affected the actual outcome of the Financial Regulation.

B. Interinstitutional politics behind the Financial Regulation: the legislative procedure leading to the adoption of Regulation 966/2012

The legislative procedure that led to the adoption of Regulation 966/2012 was lengthy and complex, partly because it coincided in time with the worst moments of the financial crisis in Europe, and with harsh negotiations among Member States on the renewal of the Multiannual Financial Framework that was to expire on 31 December 2013. It should be noted that the Multiannual Financial Framework affects all financial programmes run under the EU budget. A belated adoption of the Financial Regulation would thus have a negative impact on the management of new programmes under the 2014-2020 financial perspectives. Anyway, the fact that projects are financed by EU budgetary lines over a span of years has made an instantaneous shift to the new regime simply not possible. Current programmes, which are managed under regulation 966/2012, coexist with the remains of old programmes, run under the old regime of Regulation 1605/2002: this may become a source of confusion for financial actors other than the Commission officers.

Within the Commission (Barroso II), drafting the proposal for a Financial Regulation corresponded to Directorate-General for Budget, under the supervision of the Commissioner for Financial Programming and Budget, the Polish Janusz Lewandowski, although close cooperation is expected with the Commissioner for Budgetary Discharge, the Lithuanian Algirdas Šemeta. The Commission eventually merged under a single proposal[44] for revision two on-going proposals[45], although it acknowledged that no substantial change had been made in the final version. This feature may explain why the ECA, which must be consulted under article 322 (1) TFEU, did not issue an opinion this time. However, it does not seem adequate from a formal perspective, and it dangerously borders the limits of the ECJ

[43] Regulation (EU, Euratom) 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) 1605/2002. OJ L 298, October, 26, 2012

[44] Commission. Proposal for a Regulation of the European Parliament and of the Council on the financial rules applicable to the annual budget of the Union. COM (2010) 815. December, 22, 2010.

[45] Commission's Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, COM (2010) 71, March, 3, 2010. That proposal aimed at adapting the Financial Regulation to the Lisbon Treaty. Furthermore, Commission's Proposal for a Regulation of the European Parliament and of the Council on the Financial Regulation applicable to the general budget of the European Union. COM (2010) 260, May, 28, 2010. This second proposal involved the triennial revision of the Financial Regulation and took special account of budgetary implementation under economic crisis.

traditional case-law on the prerogatives of consultative organs[46]. The ECA's views are however reflected in Opinion 6/2010, issued on an earlier proposal[47], which the Court updated in January 2011 of its own initiative[48]. The ECA managed to assert its disagreement with the Council's proceeding, although in a soft way, by including a separate paragraph to its Opinion 4/2013.[49]

The Commission Proposal on the Financial Regulation was then subject to exam by the European Parliament, for the first time ever, and thanks to the innovations made by the Lisbon Treaty as of 1 December 2009. Two Parliament committees are involved in financial management and accountability matters on a regular basis, namely, the Committee on Budgets and the Committee on Budgetary Control. These two committees joined their forces together under rule 51 of the European Parliament's Rules of Procedure[50] and delivered a single opinion in first lecture (the Gräβle/Rivellini Report),[51] including the amendmends proposed by the Committees on Foreign Affairs (AFET), on Industry, Research and Energy (ITRE), and on Regional Development (REGI).

The European Parliament adopted its position on the Commission proposal and assorted it with no less than 308 amendments on 26 October 2011, in plenary session[52].

The political trialogue then opened between the European Parliament, the Council and the Commission, with a view to reaching agreement at an early stage of the legislative procedure. Divergences arose between the Council and the EP, and the early agreement was jeopardized at several moments. Representatives within the European Parliament were concerned about ensuring effective scrutiny and a clear chain of responsibility regarding the domestic management of EU funds under shared management, the special provisions on financial instruments, EU trust funds, among others[53]. After more than 15 trialogue meetings throughout nine months, both institutions seemingly agreed on a 'package deal' between the key budgetary rules that were at stake at the same moment: the Financial Regulation and the

[46] The European Court of Justice has accepted the legal standing of the European Parliament in annulment if the final text, assessed in its entirety, differs from the proposal that served as a basis for consultation to the EP, in Case 41/69 *Chemiefarma/Commission*, 1970 ECR 661 and Case 817/79 *Buyl/Commission* 1982 ECR 245. Despite a favourable view of the legal service of the European Court of Auditors towards invoking such case-law (Court of Auditors, Doc.Ref 10/83), a dominant trend within the institution itself baulk at claiming authority through judicial channels. This is a topical issue, given the fact that the Council did not consult the European Court of Auditors on the Commission's proposal for a Regulation establishing the rules on the Multiannual Financial Framework, COM (2011) 398, which laid down the basis for the adoption of Council Regulation (EU, Euratom) No 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020, OJ L 347/2013 of 20 December.

[47] Court of Auditors, Opinion No 6/2010 on a proposal for a regulation of the European Parliament and of the Council on the Financial Regulation applicable to the general budget of the European Union, OJ C334/2010 of 10 October 2010.

[48] Interestingly enough, the update proposed by the Court of Auditors is not featured in the EU Pre-Lex database because the ECA's opinion was neither asked for by the Commission nor by the Council. However, it resorts from the Grassle/Rivellini Report, see *infra* fn 51.

[49] ECA's Opinion 4/2013 concerning a proposal for a regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, OJ C 4/2013 of 8 January 2014, para. 2.

[50] The most recent version of these being European Parliament, Rules of Procedure, 7th parliamentary term, March 2014, available at http://www.europarl.europa.eu/sides/getLastRules.do?language=EN&reference=TOC (last accessed 21 march 2014)

[51] European Parliament. Report on the proposal for a regulation of the European Parliament and of the Council on the financial rules applicable to the annual budget of the Union, delivered by the Committee on Budgets and the Committee on Budgetary Control (Rapporteurs Gräβle and Rivellini), A7-0325/2011, of 4 October 2011.

[52] European Parliament, amendments adopted on 26 October 2011, P7_TA(2011)0465, OJ C 131/2013 of 8 May 2013, p.158

[53] For instance, regulations on expenditure linked to the purchase of EU buildings through loans, mostly associated with the funds earmarked for building projects by the European Parliament (See the statement by the European Parliament annexed to the formal adoption of the legislative act by the Council, 23 October 2012, available at http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%2014800%202012%20ADD%203 (last accesed 21 March 2014).

Multiannual Financial Framework[54]. This made possible a political agreement in September 2012.

Herman Van Rompuy, President of the European Council and an external observer to this procedure although indirectly involved in it, put it this way: *"[w]e have seen Parliament's new confidence in the discussions on […] Financial Regulation […;] there were quite intense debates, in which Parliament made its voice heard. But in the end a compromise was found – and it is the result which counts."*[55] The position of the European Parliament was strengthened by the Member States' need (in the framework of the Council) to count on its assent as regards the Multiannual Financial Framework, as Van Rompuy did not cease to highlight: *"The European budget needs to take off on 1 January 2014, but months of preparation will still be required to set all the pieces. Finding a compromise is a political challenge. […]To conclude it, we all need to be very flexible."*[56]; *"Let's be honest. Finding a compromise next week is not a small political challenge. It needs the unanimous agreement of every Member State and the consent of the European Parliament. But we badly need the agreement. We need an agreement to have the right framework for growth and jobs for the rest of this decade. We need an agreement to demonstrate our continued ability to take difficult decisions even in difficult times. And we need an agreement because the consequences of no agreement would be negative for everybody."*[57] Such scenario benefitted the relative position of the European Parliament.

Since the Financial Regulation was adopted before the Multiannual Financial Framework, both institutions agreed to modify the Financial Regulation afterwards, in a joint statement accompanying Regulation 966/2012. The revision process took most part of the year 2013 and was completed.

A last point should be made with regard to the nature of the Financial Regulation as a delegating act. Numerous are the provisions in that Regulation which bestow power on the Commission to define concepts or to detail the way in which they must be applied, under article 290 TFEU. Delegation resulted in a general delegated regulation on re rules of application of the Financial Regulation and a several specific ones.[58]

C. A comprehensive approach to financial management? Provisions inside (and outside) the Financial Regulation

Regulation 966/2012 follows a comprehensive approach to financial management, in the sense that it aims at regulating the whole budget implementing cycle across all policy areas. It is therefore a complex and thorough regulation. For the sake of better understanding its scope and the extent of the reforms that have been introduced, we will provide next a descriptive account of the main structure of this legal act.

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[54] Council of the European Union. Note from the General Secretariat of the Council to delegations. Summary of the meeting of the European Parliament Committee on Budgetary control (CONT) held in Brussels on 29-30 May 2012, Doc. Ref. 10916/12 of 6 May 2012, available at http://www.parlament.gv.at/PAKT/EU/XXIV/EU/08/38/EU_83869/imfname_10031874.pdf (last accessed on 21 March 2014).

[55] Herman Van Rompuy, "Visions, determination, results" Address to the EPC breakfast. PCE 265/10, Brussels, 16 November 2010.

[56] Herman Van Rompuy, Remarks at the official visit to Latvia, EUCO 160/13 of 2 July 2013

[57] Herman Van Rompuy, Remarks following the President's meeting with the Prime Minister of Austria, EUCO 220/12 of 16 November 2012

[58] Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union, OJ L 362, 31 December 2012. The specific delegated regulations are Commission Delegated Regulation (EU) No 1271/2013 of 30 September 2013 on the framework financial regulation for the bodies referred to in Article 208 FR, OJ L 328, 7 December 2013 and Commission Delegated Regulation (EU) No 110/2014 of 30 September 2013 on the model financial regulation for public-private partnership bodies referred to in Article 209 FR, OJ L 38, 7 February 2014.

The Financial Regulation is structured around three parts. Part One includes the "Common provisions", Part Two refers to "Special Provisions" and Part Three covers the final and transitional provisions.

The "common provisions" establish basic principles in European Budgetary Law, which apply, in principle, to all operations linked in any way to the Union's budget. Article 1 is crystal clear in this regard: the Financial Regulation "lays down the rules for the establishment and the implementation of the general budget of the EU and the presentation and auditing of the accounts". The Financial Regulation occupies a privileged place in the European legal order, in-between primary and secondary law, in accordance with article 3 ("Compliance of secondary legislation with this Regulation", paragraph 1, which states that "[p]rovisions concerning the implementation of the revenue and expenditure of the budget and contained in a basic act shall respect the budgetary principles set out" by this regulation.

Title II of Part One establishes the core budgetary principles applicable in the European Union. As a general rule, European budgetary principles are heir to their national counterparts, eg. principles of unity, budgetary accuracy, annuality, unit of account, universality, specification, and transparency. However, the principles of equilibrium and sound financial management have been traditionally absent from national legislations, for various reasons. Taking the case of Spain, the General Law on the Budget is the equivalent of the EU Financial Regulation. This core legal act has been modified several times as a result of Spanish membership of the European Economic and Monetary Union, and of the guidelines agreed by Member States within the European Council in the aftermath of the financial crisis[59]. Spain has *downloaded* several principles from the EU and onto the Spanish domestic legal order. Three are the main ones, namely, those of equilibrium (the balance between revenue and payment appropriations becomes compulsory under the label of 'fiscal stability'), multiannuality (establishing an annual ceiling to the expenditure by public authorities, with a view to pushing them towards better planning and spending), and efficiency[60]. The last principle refers to what is labelled "sound financial management" at the EU level, a cryptic expression lacking a consistent meaning across Member States. The Anglo-Saxon financial culture resorts to the expression of 'value for money', whereas the Mediterranean cultures use the term 'efficiency' in the allocation of resources (to cover in turn economy, efficiency, efficacy and quality of the results). The lack of a consistent definition and the divergences in interpretation stemming thereof might potentially give rise to disagreements between the European authorities involved in budgetary implementation and control, on the one hand, and national authorities, on the other.

Title III of Part One contains the provisions relevant to the adoption of the EU general budget and its basic structure.

Title IV importantly governs its implementation. After specific provisions on sound financial management, delegation of budget implementation powers and conflict of interests, Chapter 2 defines and regulates the various methods whereby the Union's budget is implemented. These include centralized management (by the Commission's services and agencies), shared management (by national authorities), indirect management (outsourcing to private contractors). Chapter 3 revolves around the actors playing a role in the budgetary implementation cycle (mainly, the authorising and accounting officers). Chapter 4 establishes the liability of financial actors. Chapters 5 and 6 regulate revenue and expenditure operations respectively. Chapter 7 deals with IT systems and e-Government. Chapter 8 establishes two specific administrative principles with regard to public procurement. Finally, Chapter 9 is

[59] Spanish General Budget Law, Law 47/2003, November, 26, 2003 OJ 284 of 27 November. Consolidated version of 26 December 2013, available (Spanish) at http://www.minhap.gob.es/Documentacion/Publico/NormativaDoctrina/Presupuestos/LeyGeneralPresupuestaria.pdf.

[60] Article 26 of the General Budget Law, further referred to in articles 29, 69 (1).

devoted to the role of internal auditor in each European institution, its appointment procedure, its powers and duties and its independence.

Thenceforward, several titles successively regulate the main instruments for budgetary implementation: public procurement (Title V), grants (Title VI), prizes (Title VII) and other financial instruments (Title VIII). Title IX creates obligations regarding the presentation of the accounts and accounting. Finally, Title X closes the budgetary cycle by developing the Treaty provisions on external audit and discharge.

As mentioned before, Part Two of the Financial Regulation contains special provisions. These regard the specificities of budget implementation in the fields of agriculture (Title I) and structural policies (Title II), research (Title III), external actions (Title IV), European offices (Title V), administrative appropriations (Title VI) and the position and responsibilities of external experts that have been hired by European institutions (Title VII).

Final and transitional provisions are enshrined in Part Three.

The abovementioned paragraphs have presented the structure of the Financial Regulation, which aims at providing a comprehensive regulation of issues linked to financial management and accountability in the European Union. The Financial Regulation does not fully succeed in this goal, though, due to three main reasons.

First, the Financial Regulation does not cover the specificities of financial management in all EU policies, which are in turn governed by sectorial regulations. The most striking cases are the Common Agricultural Policy, Structural Policy and Cohesion Policy. EU secondary law in these fields must adapt to their particularities, and therefore financial management features significant differences with regard to the general regime of the Financial Regulation.

Besides, not all EU activities are enshrined in the Union's general budget. The European Development Fund, the important financial policy tool of the privileged partnership between the EU and countries of Africa, the Caribbean and the Pacific remains outside the general budget for the time being, although its budgetisation is one of the Commission headline goals for the post-2020 period. Likewise, neither the borrowing and lending operations carried out through the European Investment Bank nor the administrative budget of the European Central Bank are included in the general budget. Finally, in the field of military operations launched under the European common defence policy, operational expenditure not strictly linked to military issues falls beyond the remit of the general budget when the Council does not decide otherwise by unanimity, following article 41 (2) TEU.

These two reasons highlight the fact that the general budget does not cover the *whole* scope of EU activities, since there are some specific expenses which are not covered by the general budget. Yet an important point is missed here: *even the Financial Regulation itself* does not clamp down on the *whole* implementation of the general budget. Multilevel governance as regards financial management is very present. 76% of the general budget is implemented through national bodies and therefore subject to domestic rules on financial management. This affects not only the implementation stage of the budgetary cycle, but also the accountability one. In fact, divergences arising from the respective scope of the European and national audit bodies may result in duplications and gaps in the financial control of the implementation of EU funds down to the final beneficiary. All in all, building the cathedral of EU legitimacy through financial accountability might take more than adopting a detailed Financial Regulation. It would imply the harmonization of a common set of rules governing financial management when it comes to the national level. This has not happened so far, although some steps have been given, as will be developed later on.

D. An account of the main reforms introduced by Regulation 966/2012

From a legal perspective, the Financial Regulation has been affected by the new balance between legislative and non legislative acts brought about by the Lisbon Treaty. Before, the articulation between the Financial Regulation and the implementation rules answered the willingness to present financial rules in an understandable way: the Financial Regulation stated general principles and rules but detailed provisions were to be found in the implementing rules. According to the new framework established by article 290 TFEU, the Financial Regulation becomes a legislative act which is also a delegating act in itself; therefore, numerous Financial Regulation provisions delegate powers to the Commission to either supplement concepts or provide detailed provisions. However, article 290 TFEU expressly forbids delegated acts to decide upon essential elements of the legislation. Accordingly, certain provisions formerly included in the implementation rules have been shifted to the Financial Regulation itself. As a result, the new Financial Regulation is less synthetic and more comprehensive than Regulation 1605/2002.

Progress has been made in some key areas of budgetary management. Several former challenges deserve further attention.

First, the Financial Regulation now allows for a certain harmonization among the Member States' accounting systems and the EU's own accounting systems. This change had been sought by the ECA in several annual and special reports, because the different approaches to accounting increased the probability of errors.

Secondly, financial corrections and recoveries. A definition was introduced for the first time. On a particular note, no interinstitutional agreement was reached on the treatment of funds resulting from the agreements on the fight against the illegal traffic in tobacco products, as the Court of Auditors has noted.[61]

Thirdly, the Financial Regulation represents a major breakthrough in terms of transparency. Chapter 8 of Title II on the 'Principle of transparency' added important provisions in this regard. Article 35 (2) FR now requires the Commission to make available *"information on recipients, as well as the nature and purpose of the measure financed from the budget."* Likewise, greater transparency is sought as regards the so-called "external assigned revenue", that is, funds provided by governments or other organizations for earmarked projects are not merged into the mainstream of the general budget any longer, and can now be more easily traceable throughout implementation.

Fourth, improvements in reducing waste through better spending. The Court of Auditors had complained repeatedly that rules on reimbursements should not put the stress merely on cost claims (that is, the beneficiary, be it a national authority or an individual, had already spent the money and asked to be reimbursed) but shift to a focus on the quality of the results delivered. The Commission acknowledged that reimbursements built on a share of the actual costs incurred by the beneficiary is time consuming *"both for the beneficiary, who must itemise all expenditure, and the Commission, which then has to check the project not only against the delivery of the results, but also against the eligibility of all the costs claimed."*[62] Therefore, alternatives to actual costs have been introduced: lump sums as payments against delivery; flat rates, as percentages of certain categories of costs, and unit's costs (applicable to cases in which it is impossible to ascertain the exact amount of the cost, eg. project staff who does not receive a salary because they are self-employed).

Progress has also been made as regards the responsibility of the national authorities for the implementation of EU funds. Cross-fertilization among EU policies has allowed for

[61] ECA's Opinion 4/2013 *op.cit.* para. 3. Opinion 3/2012 on the Hercule III programme to promote activities in the field of the protection of the EU's financial interests. OJ C 201 of 7 July 2012.

[62] Commission, "Why was it necessary to change the budgetary and spending rules in the Financial Regulation?" MEMO 12/795, October, 29, 2012.

good accountability practices to spread beyond the specific boundaries of a specific policy into other domains. That is the case of the Common Agricultural Policy. Under the previous scenario, national paying agencies offer the EU with a formal statement of assurance, that is, a document in which they state they have respected financial soundness in their implementation of agricultural funds, and support their statements with facts and figures. Under the new Financial Regulation, this good practice is extended to structural and other EU funds under shared management, therefore, national authorizing officers will have to issue annual declarations which will be subject to independent audit by the ECA.

The new Financial Regulation contains as well improved provisions on conflict of interest (article 57) which prevent financial actors from getting involved in actions that might conflict with the Union's financial interests, offers a definition of conflict and puts forward a procedure when such a situation arise. However, the actual definition of 'conflict of interest' is left to the Commission's discretion in article 32 of the implementation rules (Commission Delegated Regulation 1268/2012).

4. Conclusions: to what extent does the new Financial Regulation help building the cathedral of EU systemic legitimacy?

The reforms introduced by the 2002 Financial Regulation gave a boost to financial accountability, and overall legitimacy of the EU administration, following the worst institutional crisis in the European Union that led to the collective resignation of the Santer Commission. Important norms were then introduced on the different ways of implementing EU policies (centralized, decentralized, shared, outsourced) and the boundaries that could not be overstepped so as to preserve a reasonable level of accountability.

Following the adoption of the Lisbon Treaty, further innovations have been included in the Financial Regulation through Regulation 966/2012. The main improvements refer, as a general rule, to transparency, better definition of the responsibilities of both parties under shared management and better quality of expenditure. These reforms provide the ground to assert that the revised Financial Regulation is yet a further step in the quest for financial accountability in the European Union. Nevertheless, it would be too ambitious to consider Regulation 966/2012 as a milestone in the path towards financial accountability, or even the cathedral of EU legitimacy in itself. Financial accountability in the European Union still displays core gaps. Suffice it to highlight the lack of ownership of national authorities as regards the financial soundness of EU budgetary implementation. For the time being, the current system does not answer such concerns in a comprehensive way.

Against this backdrop, further empirical, comparative and qualitative research is deemed necessary to ascertain the extent to which the provisions enshrined in the Financial Regulation stick to high standards in their performance, down to the final recipient and back upwards towards the Budgetary Authority for discharge. Were the answer to be negative, it would mean that the provisions of the Financial Regulation would be watered down in practice.

References

Books and Articles

- Alexandrova, Petya, Marcello Carammia, and Arco Timmermans. "Policy Punctuations and Issue Diversity on the European Council Agenda." *Policy Studies Journal* 40, no. 1 (2012): 69-88.
- Arnull, Anthony and Daniel Wincott. *Accountability and Legitimacy in the European Union.* Oxford: Oxford University Press, 2002.

- Balint, Tim, Michael W. Bauer, and Christoph Knill. "Bureaucratic Change in the European Administrative Space: The Case of the European Commission." *West European Politics* 31, no. 4 (2008): 677-700.
- Ban, Carolyn. "Reforming the Staffing Process in the European Union Institutions: Moving the Sacred Cow Out of the Road." *International Review of Administrative Sciences* 76, no. 1 (2010): 5-24.
- Bauer, Michael W. "Impact of Administrative Reform of the European Commission: Results from a Survey of Heads of Unit in Policy-Making Directorates." *International Review of Administrative Sciences* 75, no. 3 (2009): 459-472.
- Bekkers, Victor and Arthur Edwards. "Legitimacy and Democracy: A Conceptual Framework for Assessing Governance Practices." In *Governance and the Democratic Deficit. Assessing the Democratic Legitimacy of Governance Practices,* edited by Victor Bekkers, Geske Dijkstra, Arthur Edwards and Menno Fenger (Aldershot/Burlington: Ashgate, 2007): 35-60.
- Börzel, Tanja A., Tobias Hofmann, Diana Panke, and Carina Sprungk. "Obstinate and Inefficient: Why Member States do Not Comply with European Law." *Comparative Political Studies* 43 (2010): 1363-1390.
- Bovens, Mark. "Public Accountability: A Framework for the Analysis and Assessment of Accountability Arrangements in the Public Domain." Unpublished Paper. http://www.qub.ac.uk/polproj/reneg/contested_meanings/Bovens_Public%20Accountability.connex2.doc Accessed March, 21, 2014
- Bovens, Mark. "Analysing and Assessing Accountability: A Conceptual Framework," *European Law Journal* 13 (2007): 447-468.
- Bovens, Mark, Thomas Schillemans, and Paul 't Hart. "Does Public Accountability Work? an Assessment Tool." *Public Administration* 86 (2008): 225-242.
- Braun, Benjamin. "Preparedness, Crisis Management and Policy Change: The Euro Area at the Critical Juncture of 2008–2013." *The British Journal of Politics & International Relations* (2013) doi: 10.1111/1467-856X.12026.
- Bulmer, Simon. "Theorizing Europeanization." In *Europeanization: New Research Agendas,* edited by Paolo Graziano and Maarten Vink, 46-58. New York: Palgrave MacMillan, 2007.
- Capoccia, Giovanni and R. Daniel Kelemen. "The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism." *World Politics* 59, no. 03 (2007): 341-369.
- Cini, Michelle. "Ethics Management in the European Commission." *Institutional Dynamics and the Transformation of Executive Politics in Europe* (2007): 120-147.
- Cini, Michelle. From Integration to Integrity: Administrative Ethics and Reform in the European Commission Manchester University Press, 2007.
- Cipriani, Gabriele. The EU Budget: Responsibility without Accountability? CEPS Paperbacks. 2010.
- Craig, Paul. "A New Framework for EU Administration: The Financial Regulation 2002." *Law and Contemporary Problems.* 68, (2004): 107.
- Curtin, Deirdre. and Andreas Nollkaemper. "Conceptualizing Accountability in International and European Law." *Netherlands Yearbook of International Law* 36, (2005): 3.
- Curtin, Deirdre, Paul 't Hart, and Mark Bovens. "The quest for legitimacy and accountability in EU governance" In *The Real World of Accountability, what Deficit?,* edited by Curtin, Deirdre, Paul 't Hart and Mark Bovens, 9-30. Oxford: Oxford University Press, 2010.
- Davies, Sara and Laura Polverari. "Financial Accountability and European Union Cohesion Policy." *Regional Studies* 45 (2011): 695-706.
- Del Río Villar, Susana and María-Luisa Sánchez-Barrueco. "Responsabilización Institucional y Comunicación en la Unión Europea." *Cuadernos Europeos de Deusto* 46 (2012): 113-146.
- Epstein, Rachel and Ulrich Sedelmeier. "Beyond Conditionality: International Institutions in Postcommunist Europe After Enlargement." *Journal of European Public Policy* 15, no. 6 (2008): 795-805.
- Føllesdal, Andreas. "The Legitimacy Challenges for New Modes of Governance: Trustworthy Responsiveness." *Government and Opposition* 46, no. 1 (2011): 81-100.
- Goetz, Klaus. "Making Sense of Post-Communist Central Administration: Modernization, Europeanization Or Latinization?" *Journal of European Public Policy* 8 (2001): 1032-1051.
- Goetz, Klaus and Hellmut Wollmann. "Governmentalizing Central Executives in Post-Communist Europe: A Four-Country Comparison." *Journal of European Public Policy* 8 (2001): 864-887.
- Grant, Ruth and Robert Keohane. "Accountability and Abuses of Power in World Politics." *American Political Science Review* 99 (2005): 29-43.

- Gravier, Magali. "Challenging Or Enhancing the EU's Legitimacy? the Evolution of Representative Bureaucracy in the Commission's Staff Policies." *Journal of Public Administration Research and Theory* 23, no. 4 (2013): 817-838.
- Héritier, Adrienne and Dirk Lehmkuhl. "New Modes of Governance and Democratic Accountability." *Government and Opposition* 46, no. 1 (2011): 126-144.
- Hogdson, Dermot and Uwe Puetter. "The European Union and the Economic Crisis." In *European Union Politics*, edited by Cini, Michelle and Nieves Pérez-Solórzano, 367. Oxford: Oxford University Press, 2013.
- Jacobs, Francis, Richard Corbett, and Michael Shackleton. *The European Parliament*. 7th ed. Boulder: Westview Press, 2007.
- Jacqué, Jean-Paul. *Droit Institutionnel de l'Union européenne*. 4th ed. Paris: Dalloz, 2006.
- Kassim, Hussein. "'Mission Impossible', but Mission Accomplished: The Kinnock Reforms and the European Commission." *Journal of European Public Policy* 15 (2008): 648-668.
- Laffan, Brigid. "Auditing and Accountability in the European Union." *Journal of European Public Policy* 10 (2003): 762-777.
- March, James and Johan Olsen. *Democratic Governance.* New York: Free Press, 1995.
- Mendez, Carlos and John Bachtler. "Administrative Reform and Unintended Consequences: An Assessment of the EU Cohesion Policy 'audit Explosion'." *Journal of European Public Policy* 18, (2011): 746-765.
- Meyer-Sahling, Jan-Hinrik. "The Durability of EU Civil Service Policy in Central and Eastern Europe After Accession." *Governance* 24 (2011): 231-260.
- Năstase, Andreea. "Managing Ethics in the European Commission Services: From Rules to Values?" *Public Management Review* 15 (2013): 63-81.
- Papadopoulos, Yannis. "Problems of Democratic Accountability in Network and Multilevel Governance." *European Law Journal* 13 (2007): 469-486.
- Peters, Guy. "Four Main Administrative Traditions." World Bank, 2000. http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPUBLICSECTORANDGOVERNANCE/0,,contentMDK:20134002~pagePK:210058~piPK:210062~theSitePK:286305,00.html
- Risse, Thomas and Antje Wiener. "Something Rotten'and the Social Construction of Social Constructivism: A Comment on Comments." *Journal of European Public Policy* 6 (1999): 775-782.
- Rose-Ackerman, Susan and Peter Lindseth. *Comparative Administrative Law.* Chentelham: Edward Elgar Publishing, 2010.
- Sánchez-Barrueco, María-Luisa. El Tribunal De Cuentas Europeo: La Superación De Sus Limitaciones Mediante La Colaboración Institucional. Madrid: Dykinson, 2008.
- Scharpf, Fritz *Problem-Solving Effectiveness and Democratic Accountability in the EU.* MPIfG Working Paper, 2003. http://www.mpifg.de/pu/workpap/wp03-1/wp03-1.html
- Schmidt, Vivien. "Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput." *Political Studies* 61 (2013): 2-22.
- Schön-Quinlivan, Emmanuelle. "Administrative Reform in the European Commission: From Rhetoric to Relegitimization." In *Management Reforms in International Organizations*, edited by Michael Bauer, 25-36. Baden-Baden: Nomos, 2007.
- Sedelmeier, Ulrich. "Europeanisation in New Member and Candidate States." *Living Reviews in European Governance* 6 (2011).
- Shore, Cris. "Culture and Corruption in the EU: Reflections on Fraud, Nepotism, and Cronyism in the European Commission." In *Corruption: Anthropological Perspectives*, edited by D. Haller and C. Shore, 131-155. Ann Arbor/London: Pluto, 2005
- Stephenson, Paul. "60 Years of Auditing Europe: A Historical Institutionalist Analysis." *Unpublished paper presented at the York JMCE Conference on 13 September 2012.*
- Tsakatika, Myrto. "Claims to Legitimacy: The European Commission between Continuity and Change." *Journal of Common Market Studies* 43 (2005): 193-220.
- Van Raepenbusch, Sean. *Droit Institutionnel de l'Union Européenne* Brussels: Larcier, 2005.
- Verheijen, Tony. Politico-Administrative Relations: Who Rules? Bratislava: NISPAcee, 2001.

All electronic references were last accessed March, 21, 2014

HUMAN RESOURCES IN THE CONTEXT OF ECONOMIC CRISIS

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Abstract

The said paper is meant to be an extension of the studies published last year under the title "Food Crisis Overlapping the Economic Crisis" and "The Demographic Crisis and its Consequences", studies which were meant to seek some answers regarding the existing causality between the economic, financial, demographic and food crisis. In the said article we place the human resource, in its sense of labor force and demographic potential as well, in the middle of the economic, financial, demographic and even the food crisis. Provided that in the previous case we demonstrated the hypothesis according to which a food crisis can be caused as well as lead to the migration of the active population to other countries (especially from the rural area) and the agglomeration of underprivileged population in certain geographical areas, we are currently resuming to the mutations recorded by the human resource, as part of the active population, under the aspect of social and economic disequilibrium.

Keywords: *human resources, total population, active population, usually active population, unemployed persons, public policies, public expenses.*

1. Introduction

In 19th century England, the renowned mathematician and demography specialist, Thomas Robert Malthus, made some predictions regarding the intensification of the economic crisis caused by overpopulation. In his paper, "An Essay on the Principle of Population" from 1798, Malthus foresees mankind's collapse through the fact that "the population's force surpasses so much the earth's capacity to insure the resources required for man's sustenance, that, (…) our vices are active and able agents of depopulation[1]. If the vices are not sufficient, than diseases, wars or extreme meteorological conditions arise and ultimately lead to hunger, which will put the equality sign between the ever-evolving population and the diminishing resources. Whilst for that matter, we can also find in the previous article entitled "Food Crisis Overlapping the Economic Crisis" that we are presently facing o lack of food supplies due to the excessive consumption imposed by the multitude of economic agents.

The population's law specifies the hypothesis according to which as long as an income improvement exists, as an effect of the economic development, the population tends to increase in a geometrical progression[2]. Simultaneously, the food supplies offer is increasing more slowly, in an arithmetic progression. The consequence is inevitably the incomes' decrease and the domination of generalized poverty. Unfortunately, Malthus' theory has been confirmed by some developing countries which in the post-war have assisted to causing the

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[1] R. Malthus (translation by Victor Vasiloiu and Elena Angelescu), *Essay on the principle of population*, Bucharest, Scientific Publishing House, 1992.
[2] Economy dictionary, 2nd edition, Economic Publishing House, Bucharest, 2001.

"demographic explosion" simultaneously with the decrease of incomes per inhabitant. The fact that an increasingly acute lack of specialized labor force emerges in the given circumstances of an increasing population worldwide, in situations of economic recession, is paradoxical. From the beginning of history humanity required 2 thousand years to reach the number of one billion people. Afterwards, only one hundred years were needed to double the number, thus arriving at two billion people in the year 1920. Following this interval only 50 years were required to double it again and reach four billion, and according to statistics we will be nine billion people in the year 2050.

Demographic growth and growth rate recorded in the 1950-2011 interval and the tendency for 2050

Year	Population (mil. inhab.)	Annual medium rhythm of growth (%)
1750	600-900	0,4
1820	1000	0,5
1927	2000	0,65
1960	3000	1,4
1974	4000	1,9
1987	5000	1,7
1999	6000	1,3
2011	7000	1,2
Estimation: 2050	9500	0,51

Source: *The World Factbook*, July, 2011, Central Intelligence Agency,

*** World Demographic Estimated and Projections, United Nations, New York, 2011

The population's growth in a geometrical progression between the years 1900 and 2000 has also drawn the same rhythm for the increase of some indicators such as: carbon dioxide emissions, forests' destruction rate, extinction of some species of plants and animals, consumption of water and paper, fishing and ozone layer's destruction. The indicators are, on one hand, in correlation with the population's growth but with the development of technical progress as well and, on the other hand, with the growing number of motorized vehicles, enhancement of foreign investments or increases on a macroeconomic level. This period of economic growth was anticipated by researchers to last until 2005, hypothesis confirmed as a matter of fact when it reached a peak in 2006-2007 and that followed in 2008. In the economic growth phase effects are being produced at the level of combining production factors, production structure but also consumption, changes which are concretized in an economic leap. Through the profit expectations generated by the economic growth, investments are increasing, fabrication structures along with professional qualification and management are being modified, simultaneously with the development of the old ones. All these transformations are produced until a saturation point that marks a structural crisis.

2.Content

Theoretical background

Humanity's evolution has a certain rhythm and constancy: people generate consumption, consumption indicates production, production attracts financial funds and these funds are used for consumption, investments and speculations. Ultimately the speculations inevitably lead to unjustified earnings or massive losses. Translated on a global level, the equation determines that certain countries will win for a short term while others will lose. That is to say the rich will be richer and the poor will have something more than the liberty to

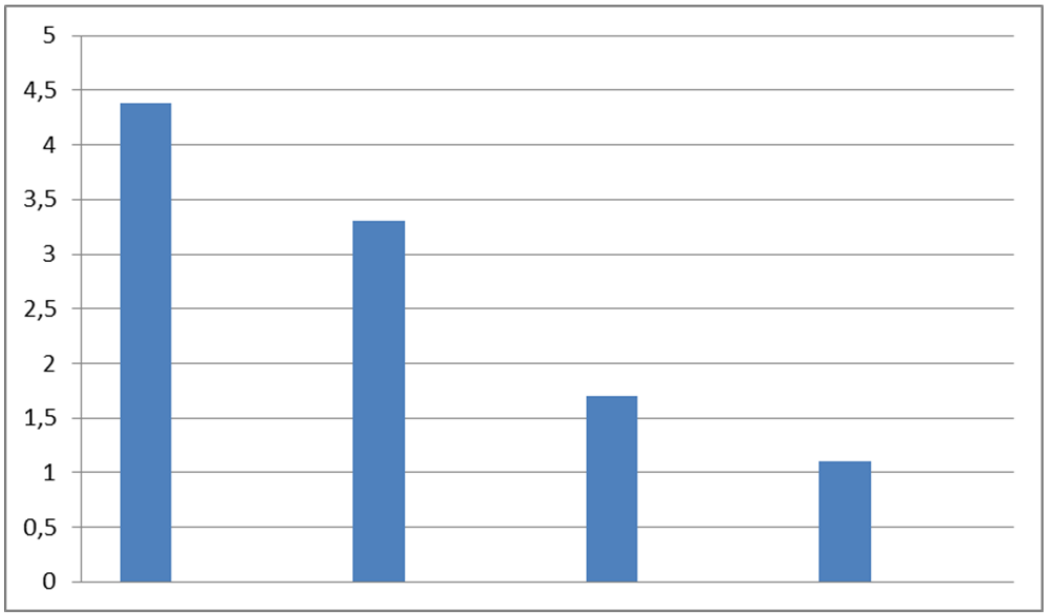
die of hunger, as economists Paul and Ronald Wonnacott[3] figuratively estimated. In this context, the emergence of an economic crisis becomes almost predictable, as the Russian economist Nikolai Kondratieff appreciated, but are the people ready to face them? Here is a question for which the answer can be found in our opinion by studying the human resource. We are presently in an era full of knowledge, in which technology, innovations and the complex structure of production factors impose the rethinking of the human resource's place and role, of its behavior and actions.

The capital is subjected in time to physical and moral usage but does not the human capital pass through the same process of effeteness? In time the human resource is physically and especially morally eroded. The moral usage appears due to the faster development of technique and technology in rapport with the evolution of labor resources. If man requires 15, 20 years of continuous study in order to specialize, in the moment when he is ready to work in the field for which he has prepared he will notice he has insufficient knowledge for the job's maximum exploitation. Perhaps this explains the fact that the European Union is currently facing an acute lack of specialists in the information technology. Although it is one of the most required specializations among young people, the domain imposes a highly advanced level of knowledge and abilities, which makes it more useful for those who wish to work from home. Unfortunately, the specialists in the information technology are not the only specialists who are not willing to respect the strict laws of a working place.

Here is why the analyses presented in the rapport entitled "An agenda for a Growing Europe" and presented in 2003 by a group of specialists from the European Commission, which was coordinated by Professor André Sapir (European Center Ad.Research in Economics and Statistics) are undoubtedly real. According to the theories presented in 2003 „a system built around the assimilation of existing technologies, the mass production that generates large economies and an industrial structure dominated by large and very large firms with stable markets and long term employment of personnel schemes, is no longer efficient in today's world characterized through economic globalization and powerful external competition. Nowadays we require more opportunities for the market noobs ☺), more mobility inside the firm and between firms for employees, more requalification, a stronger dependency on financial markets and more investments in research development as well as in education. All these ask for an urgent and massive change in Europe's economic politics." The Sapir Rapport was published in 2003 and the authors came back in 2005 with "Globalization and the reform of European Social Models (ECOFIN Informal Meeting in Manchester)[4]. In 2005 the unemployment rate at the European Union's level recorded a decreased level and maintained itself in a decreasing trend, but with a great distribution difference between the four country categories (Anglo-Saxon, continental, Nordic and Mediterranean). In the presented rapports the authors made a series of predictions regarding the future of the European Union confronting the wave of adhering, trying to somehow delimitate the Union's old members from the new labor force that arrived with another mentality, training, level of culture and civilization.

[3] Paul Wonnacott, Ronald Wonnacott, Economics, 3rd edition, McGraw – Hill Book Co., 1986, pages 67-68
[4] André Sapir, Globalisation and the reform of European Social Models, JCMS 2006 Volume 44. Number 2. pp. 369–90

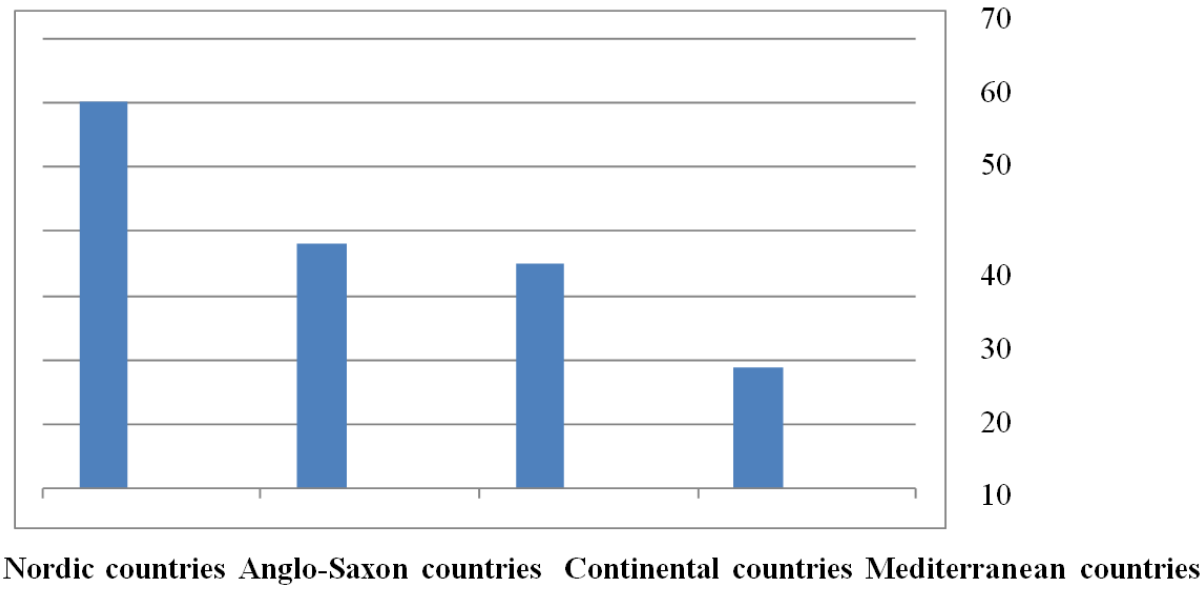
Figure 1: Long-term unemployment level in different categories of European countries



Source: Eurostat 2005

In the graphic published by the Eurostat in 2005 we can notice that the countries with an Anglo-Saxon origin have a long-term level of unemployment (over 12 months) that is little over 1%, while the European Continental countries have a rate of almost 4.5%. The same source also publishes how the poverty reduction level is distributed (measured as a mass of the people with an available income under 60% of the national average income) in the above mentioned countries.

Figure 2: Poverty reduction level in different categories of European countries (EU-15)



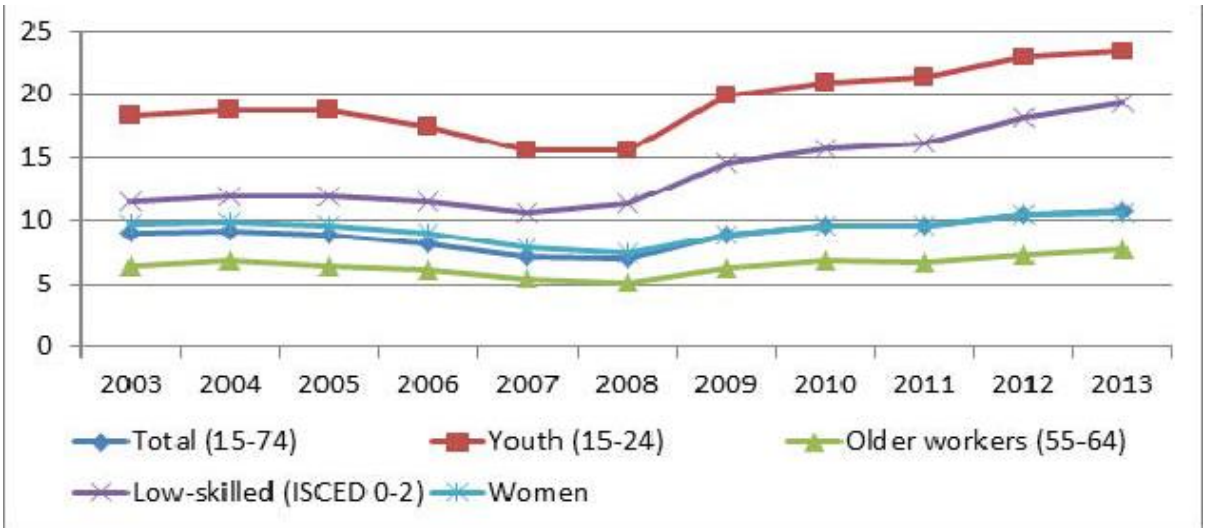
Source: Eurostat 2005

The graphic reveals the fact that the richest countries before the beginning of the economic crisis were the Nordic countries, while the poorest were the Mediterranean ones. Otherwise said, between countries such as Sweden or Denmark and Italy or especially Greece, a discrepancy of 50% exists between the available incomes. In addition, studies demonstrate

that an indissoluble connection exists between the level of poverty, level of education and mass of expenditures with social protection.

In 2007 the unemployment rate recorded the lowest level, furthermore being a year of economic boom as we have shown. As it can be observed in figure 4, in 2008 the crisis and unemployment suddenly grow.

Figure 3: Unemployment level in the EU by categories of people



Source:"EU Employment and Social Situation, Quarterly Review", March 2013

The graphic shows a distribution of the unemployment on the following categories: working population (between 15 and 74 years old), young people (between 15 and 24), elderly (between 55 and 64), population with a low level of qualification and women. A reduced rate of unemployment can be observed among the elderly and women, rate that follows the working total population's trend. On the other hand the rate of unemployment is emphasized among young people and the population with a low level of qualification.

If the unemployment rate has dropped between 2003 and 2008 with more than two percentage points, we can observe that after the outbreak of the economic crisis the unemployment begins to rapidly grow. Therefore, in five years, from the middle of the year 2008 up to the second trimester of the year 2013, the unemployment rate is growing from 7,1% to 10,9%. The unemployment's further evolutions along the crisis period have been more or less similar for different categories of people in the labor force market, with a couple of exceptions. First of all, unemployment among young people is much more receptive to the business cycle in general. Furthermore, unemployment among men is higher in the sectors of activities which are dominated by them, as a matter of fact between 2008 and 2009 unemployment rises almost insignificantly among women, remaining under the general level.

As far as structural differences are concerned, young people and workers with a medium level of training have the highest risen rate due to the similarities regarding the specialization degree. At 24 years old a young person finishes the complete studies (bachelor's and master's degree) which only imply a theoretical qualification and very few practical skills.

Unemployment stops from rising at the middle of the year 2013 and somewhat remains constant at the beginning of 2014, reaching a number of nearly 27 million people in the European Union. Interesting in this sense is also the distribution of unemployment on different countries members of the union. In comparison to 2012 the unemployment rate has very much increased in Greece, Cyprus, Italy and Holland and has recorded a regression in Ireland and Hungary. These variations are also caused by the GDP's recorded level in that

period. Per ensemble, long term unemployment continues to grow on account of the long duration of economic crisis. At the end of the previous year long term unemployment reached the record of 12,5 million which represents 5% of the active population in the European Union.

If we relate to the year 2008 long term unemployment almost doubled, with the exception of Germany where unemployment rate drops from 4% to 2,5% between 2008 and 2012 and Luxembourg where it maintains relatively constant around 1,5%.

Unemployment presents great divergences especially between countries members of the euro zone[5] as well. From the economic crisis' debut we can notice a massive rise of unemployment in the countries situated in the south and periphery of the euro zone as opposed to the rest of the member countries. Thus, the variations are between approximately 5% in Austria, Germany and Luxembourg and over 25% in Greece and Spain. Also, the unemployment with rates of over 16% recorded in Portugal, Cyprus and newly joined Croatia, is considered to be above average. As a matter of fact, Cyprus has the largest accession recorded from one year to another (September 2012, September 2013) of over 4,4 percentage points.

Unemployment among young people remains very high, of 23,5% at the EU level but with surprising variations between states, from 7 or 8% in Germany and Austria to 56 or 57% in Spain and Greece.

In spite of the economic crisis we can detect an improvement of the activity rates in several member states. These improvements were possible on account of the increased activity rates among the population with ages between 55 and 64 years old but also of women, which led to a general growth of the activity rates on a European level from 70,7% to 71,9%. There have obviously existed here as well high variations between member states. The highest growth rate recorded the Czech Republic, Malta and Latvia, and at the opposite pole the lowest rate was recorded in Denmark (but from a very high level), Ireland and Croatia. Although women's rate of employment has continuously improved, a large gap still exists in opposition to the masculine population. The difference is the working schedule, women preferring a part-time schedule (Holland 77,3% or Germany and Austria with over 45%) as opposed to men who normally wish for a full norm. As far as financial wins or loses are concerned, no great differences have existed between the genders. Big differences appear in the labor force's distribution on branches and sectors of activity. The highest losses are in the constructions domain (-4,5%), agriculture (-1,5%) and processing industry (-1,2%). The highest increases of the occupied population are in the information's technology domain (+2,5%) but here also without a permanent contract. In this domain the temporary or non-renewable jobs had a priority. As we showed, although attractive from a financial point of view, working places in the IT domain are appreciated by young people and women that have other activities in parallel.

Still on the European Union's level, per ensemble, the vacant working places' rate has not recorded great modifications although, as we showed, unemployment has increased pretty much, in different regions and states. This fact can also be explained by the lack of interest that either the vacant jobs present, or their remuneration, either the employing firm's perspectives. Here is why a highlighted increase of qualification and professional training can also mean a lack of attractiveness of the opportunities in the labor force market, and this fact associated with the manifestations prolonged by the economic crisis can induce a state of depression among the available active population. This fact can be countered through serious investments in the human capital.

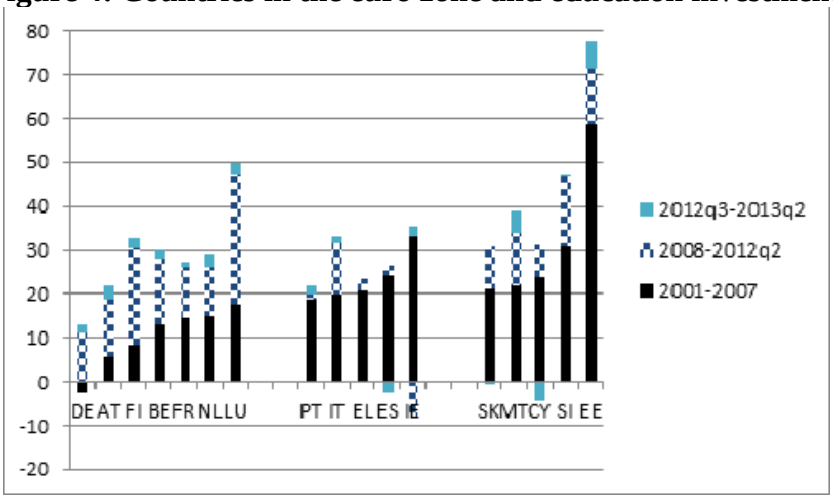
[5] *Quarterly Report on the Euro Area*, European Commission, Volume 12, No. 3, 2013

The economic crisis has produced significant mutations on the population's migration fluxes as well. Thus three levels are differentiated:

1. migration from the third countries to the EU is reduced with 3,7% between 2010 2011;
2. migration from the EU to the third countries is increased by 14% in the same interval. Here we can notice that the majority of those who wish to leave from inside the union come from Spain, England, France, Ireland, Portugal and the Czech Republic;
3. migration of those returning home.

We are thus assisting, in consequence of the economic crisis' effects, to the change of models regarding migration in the European Union. The economic crisis triggers a lack of trust in the opportunities that the EU has left to offer. Numerous individuals categorized as currently active population either choose to return to their country of origin or leave from inside the Union to other countries. Those who wish to leave also originate from countries such as England and France, where the perspectives of overcoming the crisis' effects seem to be farfetched. Unfortunately, recent[6] studies show that in the European Union there is a lack of competitiveness regarding the currently active population's abilities. Truthfully the human resource is increasingly more literate, possesses a large amount of knowledge, but with a deficit of practical experience. Therefore approximately 20 percentages of the population that is able to work do not possess the abilities required to occupy a working place. Unfortunately this percentage is higher in Italy and Spain, as opposed to countries that insist upon learning practical skills such as the Nordic countries. Nonetheless, not even countries such as Finland, Holland or Norway can rise to the level of countries from outside of Europe, such as Japan and Australia. Unfortunately, the dates confirm the fact that Europe was unable of efficiently investing in education and professional competences. It is dramatic that this state of fact continues to worsen through the fact that no less than 10 European states have reduced the expenditures for education in absolute terms (Denmark, Ireland, Greece, Spain, Italy, Cyprus, Hungary, Portugal, Czechoslovakia and the UK) and 20 other members are reducing the mass of education expenditures from the gross domestic product.

Figure 4: Countries in the euro zone and education investments



Source: EUROSTAT

A great difference can be observed between Germany, which has reduced expenditures for education between 2001 and 2007 and raised them between 2008 and 2012, on one hand

[6] DRAFT JOINT EMPLOYMENT REPORT accompanying the Communication from the Commission on Annual Growth Survey 2014

and countries such as Luxembourg, Slovenia and Estonia, whose expenditures have and continue to increase.

Reducing expenditures for education is overlapping in the European Union with the early school leaving phenomenon (ESL), which was of 12,7% in 2012. In this context it is not surprising that average costs and earnings are reduced but the prices for finished products are rising due to the increased indirect taxes and administrative prices. Reducing labor's unit costs as opposed to the sustained growth of prices leads in time to increased profit margins which unfortunately are not accompanied by a rise of investments. At the same time the fiscal burden remains elevated in many member states and implicitly causes the population with low incomes to reach the sustenance limit, in the context in which income taxes have been reduced in the two years following the crisis outbreak.

The economic crisis has substantially modified the inequality between the states members of the European Union. These inequalities are reflected in the slow development of the union's southern countries – Spain, Greece, Italy and Cyprus but also in the discrepancy of distributing the human resources' incomes in countries such as Bulgaria, Latvia and Romania. Furthermore, the access to medical assistance is more difficult to gain in countries with reduced incomes, due to the decreased expenditures for health.

4. Conclusions

As we have already estimated, a system built around the assimilation of existing technologies is no longer efficient in a world dominated by a powerful external competition. Presently, the globalization phenomenon leads to the economy being managed by large and very large firms, with traditional and stable market outlets and with human resources that are both prepared and loyal to the company. Nowadays we require more opportunities for the investors and initiative entrepreneurs, a higher mobility inside the firm and between firms for employees (based on the model of switching the favored personnel especially by French companies). But on top of everything we require more requalification through branch operational programs and more investments in research development and education as well. All these require an urgent and massive change in Europe's economic politics and especially in Romania.

The low income countries inside the European Union will feel the economic crisis' effects more strongly. The population's growth in these countries will determine a powerful unemployment increase on a European level.

Very large companies such as Microsoft, Webhelp, Evoline, Google, TeamNet etc. create thousands of working places in countries marked by an almost record level of unemployment, but then again the number of qualified people for those certain jobs is insufficient. The disparity between the candidates' preparation and the type of qualification required by the employer is increasingly worse on the economic crisis background and is changing into one of Europe's most important problems. One of the solutions found by companies is to employ qualified personnel from outside the said country.

In this context, people who have lost their jobs as well as young people in search for a starting point in their career are discovering they do not possess the necessary training for the existing working places. Glenda Quintini, economist from the OECD, affirms that "we are assisting to an alarming lack of adequate aptitudes, which means that a significant number of unemployed people are not ready for the new working places." In consequence, the majority of young people need to try, in this case, to reorient from a professional point of view towards other domains.

Paradoxical is the fact that more than 2 million jobs remain unoccupied in the conditions in which Europe is facing unemployment rates that are maintained at over 12%. A

study[7] published in November 2013 by the Eurofound, the EU's research division, indicates that in spite of the recession, approximately 40% of the companies are facing difficulties in finding employees with suitable aptitudes, in comparison to 37% in 2008 and 35% in 2005. The European Commission has recently warned that approximately 900.000 working places in the IT and communications technology domains may remain unoccupied until 2015 in the EU[8].

The unemployment rate in Romania at the end of last year (2013) was of 5,60%, namely 507607 people, with 0,20 more percentage points in rapport to the same period of the year 2012. As the genre repartition is concerned, the male unemployment rate is of 6,01% and the female unemployment rate has risen from 4,98% to 5,14%. The number of unemployed women at the end of last year was of 219288 people. Represented by age groups, 93639 unemployed people were under 25 years old, 37504 people had the ages between 25 and 30, 109.124 were of ages between 30 and 40 and 133.392 were included in the 40-50 years old category. At the same time, 60.489 unemployed people were of ages between 50 and 55 and 73.459 surpassed 55 years old. From the total of unemployed people recorded in the ANOFM (National Agency of Occupying the Labor Force), those with no studies or only with a primary level of training, grade school and technical school, represented 69,02%, those with a high-school and post high-school education level – 23,75%, and the ones with university studies – 7,23%.

The European Commission has already allocated Romania funds of approximately 100 million Euros through the Youth Employment Initiative program with the purpose of combating unemployment especially among young people. At the same time, our country needs to allocate the European Social Fund at least 30,8%, which implies 4,77 billion Euros from the cohesion funds, in the 2014-2020 budgetary practice. The money from the European Social Fund is allocated for programs dedicated to increasing the occupation degree in the member states.

References

- R. Malthus (1992), translation by Victor Vasiloiu and Elena Angelescu). Essay on the principle of population, Bucharest, Scientific Publishing House
- André Sapir, Globalisation and the reform of European Social Models, JCMS 2006 Volume 44. Number 2. pp. 369–90
- Paul Wonnacott, Ronald Wonnacott (1986), Economics, 3rd edition, McGraw – Hill Book Co.
- Summit of the Millenium, "The role of the United Nations Organization (UNO) in the XXIst century", The Millennium declaration adopted by the United Nation's General Assembly. World Population Ageing 1950-2050"- United Nations –Economic and Social Affairs, New York 2002
- United Nations Development Programme (September 2005). Human Development Report 2005: International Cooperation at a Crossroads-Aid, Trade and Security in an Unequal World. United Nations Development Programme. ISBN 978-0-19-530511-1
- Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat (2005). World Population Prospects: The 2004 Revision, Highlights. New York, United Nationation, www.un.org.
- The World Factbook, July, 2011, Central Inteligence Agency, World Demographic Estimated and Projections, United Nations, New York, 2011
- ***"EU Employment and Social Situation, Quarterly Review", March 2013
- DRAFT JOINT EMPLOYMENT REPORT accompanying the Communication from the Commission on Annual Growth Survey 2014Quarterly Report on the Euro Area, European Commission, Volume 12, No. 3, 2013
- *** "World Population Prospects : The 2000 Revision ", United Nations, New York, 2002
- *** Economy dictionary, 2nd edition, Economic Publishing House, Bucharest, 2001
- *** Eurostat

[7] Quality of employment conditions and employment relations in Europe.
[8] http://www.eurofound.europa.eu/pubdocs/2013/67/en/1/EF1367EN.pdf

PUBLIC POLITICS REGARDING THE PENSION SYSTEM

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Carmen RADU[**]

Abstract

The said paper proposes to seak some answers regarding the long term sustainability of the pension system. Romania's pension system originates from the invalidity insurances and pension system designed by the German cancellor Otto Eduard Leopold von Bismark in 1889. From a European perspective, Romania has to fill an obvious gap regarding the reformation of the national public pension system. International experience, particularly of the last 130 years, indicates that, in actuality, multiple pension systems have been put into function in most of the world's countries and which are diferenciated by some elements (organizing and managing the system, defyning pension rights, method of forming the resources, the pension's level rapported to the average income etc.) and after the eficacity degree dependent on internal influences, social, economic and demographic environment, and last but not least by the political factor.

Keywords: *public pensions system, social securities, public politics, economic sustainability, public expenditures.*

1. Introduction

An increasing number of people are taking into consideration the probability of not being able to enjoy the advantages of a sufficient pension following a live's work. The affirmation: "I won't live to see any pension" is often encountered in Romania. The people's fear towards the pension period originates from two equally dark perspectives: on one hand the pension's age limit seems to gradually increase and, on the other hand, many consider the pension will be insufficient to fulfil the consumption requirements. For those directly involved in studying, calculating and awarding the pensions (National House of Public Pensions, Ministry of Public Finance, Ministry of Labor, Family and Social Protection, The National Prognosis Comission and even the Presidential Comission for the Social and Demographical Risks' Analysis) – the pension system implies a huge volume of material, technical and humanly-trained resources. In addition, the pensions are always a favorite topic in the political campaigns in which the politicians' continously promise higher pensions to an electorate that they reward or buy. Although everywhere in the world the pension problem and especially that of the high number of pensioners scares the authorities, in Romania the situation is really dramatic due to the multiple conditions that fragment the population that is able to work. Unfortunately, the politics' intervention in the economy's life and structure decisively influences this fragmentation of the population. Due to the precarious life conditions, the lack of working places and the diminished wages, many young people able to work prefer to leave the country and work abroad. Not all Romanians that leave contribute to the pension's system and social securities, although the incomes earned abroad enter the Romanian banks. Once every four years, the politicians speculate this fact by manipulating

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the electorate through modifying the pensions in accordance with their own interest. Consequently, the following have been modified: the retirement age, the age differences between men and women, the pension point size and the pension's taxing level. It is very difficult in these conditions to have an equitable and sustainable pension's reform in Romania. Such a reform is a sensitive subject for politicians (especially when only think as far as electoral cycles and we need politics that produce their effects after 3-5 electoral cycles) as well as for society. The pension-regarding public politics need to reconcile the interest for reducing expenditures with pensions from the public budget with the right of a decent pension for citizens.

Let us instead begin with defyning the fact that the pensions represent[1] a certain monetary sum (a financial product), and obtaining it and paying the beneficiaries (pensioners) imposes the organization of a specific system which would allow procurement.

2. Content

Theoretical background

Romania's "step by step" pension system, similar to those in the majority of European countries, is a type that originates in the system designed by Bismarck approximately 125 years ago.

The most important observation for this system is that it has a mandatory character, associated to the individual labor contracts. The system is supported by three parts: employer, employee and state.

Western Europe has taken on Bismarck's system, thus becoming the model alternative for the beveridgean or anglo-saxon insurance system. It is used in many countries members of the EU, such as France, Germany, Austria, Belgium, Holland and Romania.

The characteristics of this model are:

- the financial resources are mainly represented by the mandatory contributions payed by employees and employers;
- there are also resources originating from the state budget's subventions (local or national) or other types of subventions;
- the institutions that administrate the insurance funds are nonprofit; managing and using the insurance funds are realized on a national level and trough local fiscal administration directions.

A short historic of Romania's social insurances reveals[2] the fact that the pension system originates as far back as 1895, when the mines law and legalization of the first social assistance norms appeared. The workers' rights were awarded in a first phase by mutual support between them. However, mandatory social insurances were instituted for miners and workers in the petroleum industry when the mine laws emerged. With this occasion the pension right as well as the one to obtain compensation in case of work accidents were institutionalized, assistance and pension house was established, having their funds assured by the equal contribution of patrons and workers. Later on, in 1902 and due to the jobs' organization, a system of social insurances is established through the Missir law for several categories of workmen. Subsequently, the Nitescu law places on legal grounds the principle of mandatory insurances for accidents, diseases and eldereness for all employees of a corporation. The first private social security systems emerge in the interbleci period and

[1] Reform politics in pensions domain, Ion Marginean, Life quality, XVIII, no. 3-4, 2007, p. 321-338

[2] www.filbuc-caa.ro Short history of social securities in Romania, The emergence of the social security sytem in Romania. The end of the XIXth century – The first world war.

function in parallel with the mandatory state social securities. While the state system belonged only to the labor contracts' titulars and to the workers, the private system attracts different social categories such as the Romanian Orthodox Church and the creation union's members. Following the great crisis from 1929-1933, the Ioanitescu law unifies social securities on the entire national territory. The law brings the principle of contribution and solidarity, establishes the contribution rate of 6% of the salary and guarantess the pension system by the state. Before the Second World War world outburst, in 1938, a new law is adopted that aims at supervising the insured people.

From a legislative point of view, the communist system concentrated on modifying the previous law, through the 409 decree from 1945 that stipulated the increase and indexing of pensions. The last law from the social security domain that was adopted by the communist power in 1977 imposed restrictions for the insurants' rights.

After 1989 a hard and troublesome period of legislative modifications started in the social securities domain, among which we remind:

- The no. 70/08.02.1990 Law Decreet – through which modifications were brought to the age pensions regyme;
- The modified and republished no. 118/1190 Law Decreet – regarding the award of rights to the people persecuted out of political motivs by the dictatorship that began to be installed on March, the 6th 1945, as well as to those deported or imprisoned;
- The no. 42/1990 law – for honouring the martire-heroes and awarding some right to their followers, to the injured as well as to those that faught for the December 1989 Revolution's victory;
- The no. 73/1991 Law – regarding the establishment of some social security rights, as well as modifying and completing some regulations from the social security and pensions legilastion;
- The modified and republsished no. 1/1991 Law – regarding the social protection of unemployed people and their professional reintegration.

  The effects of all these contradictory evolutions can be sintetized in this manner:
  - the total number of pensioners increased from 3,58 million in 1990 to 5,401 million in November 2013 (+50,8%) under the condiions of a decreased number of employees from 8,156 million in 1990 to 4,378 million employees in September 2013 (- 46,32%);
  - the dependency rate[3] has decreased from 3.43 in 1990 to 0,92 in 2001 and 0,93 in 2013;
  - effective retiremenet ages well under the standard retirement age: in 2009 the differences were between 5 and 7 years[4];
  - the dramatic decrease of real net average pension (1990 – 100%) for the 1990-2000 period (minimum of 44,3% in 2000), its slow increase for the 2001-2006 period (57-58% in 2006), followed by the spectacular rise from the years 2007-2009 (the maximum point of 123,8% being reached in 2010) and the relative stabilization in the years 2011-2012 situated around the value of 117%;
  - the replacement rate[5] calculated on the base of average pension for an age limit and the average net income evolved from 48,6% in 2000, to 65,3% in 2010 and 58,2% in 2013 (based on the ground of the year's first 9 months average net income).

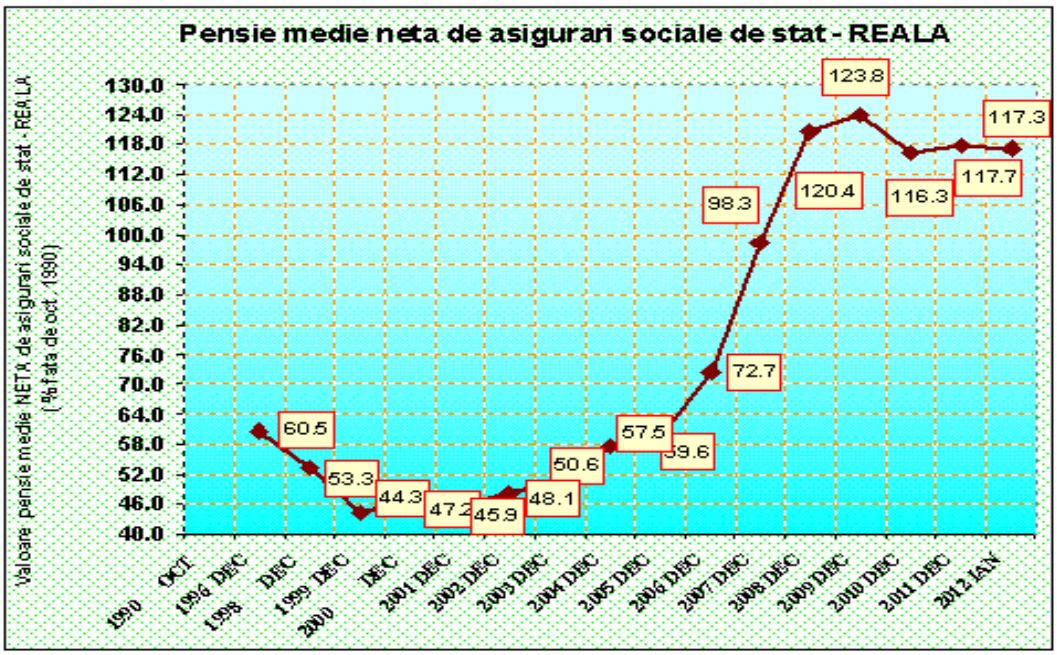
[3] The rate of dependency is the rapport between the medium number of employees and the medium number of pensioners.

[4] Mihai Şeitan, Mihaela Arteni, Adriana Nedu, Long term demographic evolution and the pension system's sustainability, Economic Publishing House Bucharest, 2012, page 28

[5] The replacement rate represents the rapport between the pension's value (simple values, values for age limit and complete period of subscription) and the average income value (gross or net), in other words how much of the average net/gross income is replaced by the average pension

Figure 1 Net pension evolution

Average net pension of state social securities - REAL



Source: National House of Public Pensions

In spite of this we can consider that the real reform of state social securities begins with the no. 19 law from 2000, which determines the possibility of the social security system being accesed by all people who produce income, without only limiting to the labor contracts titulars.

At EuropeanUnion level, including in countries situated in Central and Eastern Europe, the pensions systems are mainly organized[6] as state pensions systems, financed and sustained by the state budget, organization mode which has special implications on the public finances. Simoultaneously, when we speak of the method of organizing and financing different types of public pensions systems that exist at the level of European Union's member states but especially whenwe speak of their financial sustainability, we need to take into account the more accentuated tendency of the population to age along with being consolidated with the financial constraints. Determined elements such as the ones below must be taken into account in order to classify the pension systems:

1. Firstly after the financing mode we distinguish a) pay as to go type systems (PAYG)
2. which function on the principle of social solidarity, meaning that the employee pays, as long as he is active, a contribution that will become the future generations' pension and b) systems privately financed or administrated by the employee or employer's contribution;
3. Based on legal ground and method of establishment, there are systems established by law or by collective labor contract;
4. Based on the mode of participating to the system they can be mandatory or volunteer;
5. After the type of benefits there are systems in which the obtained benefits vary in accordance with the results of investing the participants' fund actions and systems in

[6] PROJECT Improving institutional capacity of evaluating and formulating macroeconomic politics in the economic divergente domain with the European Union's National Prognosis Comission, codde SMIS 27153
BENEFICIARY Prognosis National Comission Demographic evolution on a long term and the pension's system sustainability Authors: MIHAI ŞEITAN, MIHAELA ARTENI, ADRIANA NEDU.

which a certain benefit is being established and the contributions are being calculated in order to reach that cetain benefit. Most of the majority of European countries is included in this last type of defined benefits, with the exception of Germany, Slovakia and Romania which have a point's system[8].

The pension system is sustained in the European Union by three pillars: the first pillar belongs to the pensions regulated by law, totally financed by third shares – social security contributions from participants to the public pensions system. It is a pay as to go (PAYG) type of system in which countries such as Bulgaria, Estonia, Latvia, Livonia, Hungary, Poland, Slovakia and Romania. The second pillar is formed by pensions established by the labor contract (through collective or individual stipulations) named occupational pensions, strictly connected to the working place in countries such as Bulgaria, Polland, Hungary, Romania or Slovenia. The third pillar of individual stipulations, unrelated to the occupation. The members are mainly, and not mandatory, employees with the possibility of collectively adhering (through sindicates or associations). The participation is not required by law, the employers or state can contribute to this system.

Comparison between the private pension systems in Poland, Hungary and Romania (at the second pillon level)

<table>
<tr><th colspan="3">POLAND</th></tr>
<tr><th>PRIVATE PENSION'S SYSTEM ORGANIZATION</th><th>THE SYSTEM'S GUARANTEES</th><th>DEVELOPING THE MARKET ON THE 2ND PILLAR LEVEL*</th></tr>
<tr><td rowspan="2"><u>Pilon I</u>- <u>Mandatory</u>
• Pay as You Go, Definite contributions, virtual accounts - conturi virtuale -reformed in 1999
•Ocupational public pensions schemes
<u>Pillar II</u> - <u>Mandatory</u>
Defined contributions, individual accounts,
7,3% from the gross income contributions
Mandatory for those under 30 years
Optional for those with ages between 31 and 50
Introduced in 1999
<u>Pillar III</u>-<u>Optional</u>
•Definite contributions, optional ocupational plans introduced in 1999
•Personal optional schemes introduced in 2004
•Rezerve fund, on demographic grounds
•RETIREMENT 65 men / 60 woman</td><td rowspan="2">Performance minimum relative assurance
Minimum rate of productivity – the smallest value between:
--the market's average capacity for the last 3 years minus 4 percentage points and
-50% of the balanced capacity rate annualized for the last 3 years
The administrator's funds must cover any potential deficits
The national guarantee fund's resources are used in case the administrator enters bankrupcy
That which cannot be covered by this fund is assured by the state's treasury.</td><td>14,36 mil. participants - Pillar II
14 administrators
43,76 active gross billion euros
14,11% balance in the GDP</td></tr>
<tr><td>MAXIMUM LIMITS FOR PLACEMENTS
40 % actions
40% mortgage, municipal or corporate obligations,
20% depozited
Statistically – 31 % of assets are placed in actions
MAXIMUM PERMITED COMISSIONS
3,5% of contributions, in 2010
Comissions in terms of fund size. 0,54%/year of the small funds actives and 0,06%/year of the net actives, in terms of capacity
Transfer of 23 – 42 de euros (<2 years)</td></tr>
<tr><th colspan="3">HUNGARY</th></tr>
<tr><th>THE PRIVATE PENSION'S SYSTEM ORGANIZATION</th><th>SYSTEM GUARANTEES</th><th></th></tr>
<tr><td><u>Pillar I- Mandotary</u>
•Pay as You Go, reformed in 1995
<u>Pillar II</u> - <u>Mandatory 1998</u></td><td>•No performance guarantees, only indirect guarantees
•Hungary has a special fund</td><td>3,02 mil. participants – Pillar II
19 administrators</td></tr>
</table>

Defined contributions, individual accounts, Contributions of 8% out of the gross income (possibility of an additional 2%) Mandatory for those under the age of 35 Optional for the rest of employees **Pillar III**- Optional 1994 •Defined contributions, individual accounts **Pillar IV**- Optional 2007 Launched for occupational pensions •**RETIREMENT** 62 men / 62 women	for protecting the capital ccumulation, financed through mandatory trimestrial contributions, between 0,3 and 0,5% of contributions •The special fund protects the retirements' total benefit and the contributors' accumulated capital in case of insolvency. Capacity objectives need to be established, however failure has no consequences.	Gross assets of 9,63 billion euros 10, **DEVELOPING THE MARKET ON THE 2ND PILLAR LEVEL** 34 % of the GDP **MAXIMUM LIMITS FOR PLACEMENTS** 50 % stocks, 30% obligations, 25% mortgage obligations, 10% in mortgage funds, 5 % in hedging funds **MAXIMUM PERMITED COMISSIONS** 4,5% of contributions 0,,66% a month for gross stocks – management comission
ROMANIA		
THE PRIVATE PENSION'S SYSTEM ORGANIZATION	**SYSTEM GUARANTEES**	**DEVELOPING THE MARKET ON THE 2ND PILLAR* LEVEL**
Pillar I PAYG type – the pension points system **Pillar II-**Mandatory/Optional 2007 Defined contributions, individual acoounts, Contributions of 2,5 % (10,5% out of the gross income) – 6% since 2016 Mandatory for those under the age of 35 Optional pentru employees with ages between 35 -45 Separation exist between administrator and fund. **Pillar III**-Optional •Optional pensions, contributions of max 15% from income, individual accounts •**RETIREMENT** 65 men / 60 women (2015)	**Relative guarantee of performance** **Minimum level of profitability,** calculated on risk **Absolute guarantee** The total rightful sum for the private pension cannot be smaller the value of payed contributions, diminished with transfer penalties and legal comissions. **Other safety elements** Romania disposes of the largest range of risk control instruments: assets separation, actuarial funds, revision through depositary, guarantee fund, audit, minimum profitable rate. **The guarantee fund** is destined for covering some risks that are umpredictable and are not covered by technical commission.	4,57 mil. participants - Pillar II 12 administrators 0,56 billion euros gross assets 0,49 % balance in the GDP **MAXIMUM LIMITS FOR PLACEMENTS** 20% in instruments monetary market 70% state titles 30% titles emited by local administrations 50% actions 5% corporative obligations 5% mutual funds **MAXIMUM PERMITED COMISSIONS** Max. 2,5% of contributions Max. 0,05% / month of the active gross

Source: Adaptation by Dan Zăvoianu – Comparison between private pensions system of type pillar II and the world's states markets – Communication Direction – CSSPP, Bucharest, july 2010

* at the level of December 2009

In spite of these, in the evaluation of different pension plans we must also take into account what goes on in practice, since it has been observed that the sum saved by the population is relatively constant in a certain period. If a certain saving system is imposed, the sums saved through other methods will drop[7].Therefore, the economic growth shouldn't be related to the specific methods of composing the pension systems, of the existence or lack of

[7] Atkinson, A.B., Rein, M. Age, Work and Social Security, Macmillan, Houndmills, 1993

acumulation funds, even if they constitute important sources for investments. On the other hand[8], the largest part of pension funds is placed, in order to avoid investment risk, in state titles, thus in the public duty. Indeed it is expected for the private pensions' fund managemenet to be prudential and to, thus, avoid faiure but relatively small acumulations of contributions for the system will result. The Global Bank's and European Union's notice of the differences of approaching the pensions reform is very important to us, since in the treatment applied to the Global Bank (also sustained by the International Monetary Fund as the low level of incomes is generally concerned, and that of the pensions, as a method of controlling inflation by reducing cosumption). Obviously, Romania was not the only one to suffer such an influence, but other ex-socialist european countries. We should keep in mind that the differences mentioned here between the EU and Global Bank are not disputed directly, but rather by reciprocal ignorance of the projects between each side. Therefore, in the Global Bank's studies, the public pensions schemes are considered to be inadequate, hard to reform, represent a blocage for the economic growth and are recomended for the governments of coutnries assisted to not repeat the „expensive mistakes of industrialized countries"[9]

On the other hand, in the EU, the pensions' system reform is aimed at not being realized in the detriment of actual beneficiaries, so not through diminishing the public system's role, which is the most expanded and will remain the main system, but which, however, does not represent the only solution. An equitable inter-generational balance, a satisfying level of pensions, sustainability and modernims[10] could be reached through reform measures that could also imply discounts of public pensions' quantity (which are in fact very generous in other countries).

Consequently, a pensioner can have one or more pensions, with financing from one source or many such sources. Theoretically, the more the pension sources multiply, the more the chance of covering in a larger area the requirements for an acceptable life standard is expected to grow. However, this fact does not happen automatically if the pensions' cuantum is small from each source and per total the optimum level of financial resources may not be reached.

The most disadvantaged and highly improbable situations would be those through which the target-population could not be covered, although many sources and types of pensions exist, and/or the added quantum of pensions which would have been insured by a single system/single pension could not be supplied. Natural it would be to aim at obtaining high performances of supplying incomes to the beneficiaries, within every system/source/pension. If two or several systems do not exceed the accumulated performance which could be obtained through a single one, introducing them would be unjustified if we consider the fact that this would also imply a high level of administration costs in comparison to the function of a single one.

The danger of the pension system collapsing has left Romania, for a medium and long term, but its sustainability is still discussed. On the background of occupying the labor force with negative tendencies, the population's rapid aging and that of demographic involution which is announced to be disastreous (The National Statistics Institute foresees that the population will drop until 2060 with approximately seven million people), the pensions system will not manage to offer the necessary social protection to future pensioners and will become a death rock on economy's neck (affecting investments in productive sectors and increasing fiscality). After recalculating the pension system for the year 2010, it has become

[8] Ioan Marginean SOCIAL AND FISCAL POLITCS. REFORM POLITICS IN THE PENSIONS DOMAIN
[9] Averting the Old Age Crisis Policies to Protect the Old and Promote Growth, A World Bank Policy Report 1994, p. XIII and the album's 4th cover
[10] Adequate and Sustainable Pensions. Synthesis report 2006, European Commission, 2006

more equitable, being relatively simple to apply and easier to understand. In this context, last year's measures have favorited sustainability.

In our country the actual pension system has three pillars, similar to other European Union's countries, such as:

Pillar I public pay as you go pensions budget with defined benefits, reglementat by the law 263 from 2010 according to which the employee's contribution is of 10,5% of the gross income salary and the employer's contribution is of 20,8% in rapport with the employee's gross salary.

Pillar II the mandatory pensions fund, reglemented by the law 411 from 2004 and characterized by:

- Mandatory participation for employees under 35 years and optional for those with ages between 35 and 45;
- The contribution (in 2013) of 4% out of the employer's gross income is in fact a part of the contribution owned in Pillar I;
- Minimum investing guarantees – the real sum of all contributions from which administration comissions are deducted.

Pilonul III optional pensions fund, reglemented by the 204 law of 2006, in which participating is optional, it is privately admnistrated and the profit cannot guaranteed. In this pillar the contribution is of 15% maximum in rapport to the gross income, it is a contribution unitively suported by the employee and employer and is encouraged through fiscal deductability.

Several studies came out in the last years with detailed refferance to the alternatives of public politics in the pensions domain. Therefore, in 2012, Expert Forum published Working Paper 3 entitled „Who will pay the pensions of the „decree people" in 2030? Romania's situation in the context comparative to the EU and 7 scenarios of evolution of the public pensions system".

Thus, according to the most plausible scenario, the pensions fund's deficit will be of max. 2,5% of the GDP in 2019 provided that the legislation will be kept in the actual form. In 2042 the fund wil reach a deficit of aproximately 1,2% of the GDP. The pension as a percentage of the gross average income, which is presently of 37% will decrease to 24% in 2031. The study's conclusion is that depending on the alternance of political parties with left or right ideology, an accent will either be put on the social component or on reducing the deficit from the GDP. In the case of social component the levels grow from contributions directed towards the 2nd pillar at 10%, the GDP deficit can grow with 0,62% as oposed to the initial scenary, but the rate of replacing incomes with pension is improving by 2%. In case the GDP's deficit reducement is required, the retirement age will grow up to 65 years and after a deficit of maximum 2% of the GDP in the year 2019, the fund will equilibrate. However, the pension system will represent the trial point of any government even 50 years from now, which is the conclusion entitled „Social risks and inequities in Romania", published in 2009 by the Presidential Comission for Social and Demographic Risks Analysis[11].

According to the said study, the retired population (with ages of 65 and higher) is in a continous growth while the number of employees is decreasing dramatically:

- a few gemerations have started to enter the labor market from 2008, and the number of employees will not rise very much even in the eventuality of a constant economic growth. As a reuslt, resorting to imigrants will become a necessitty in the next five-six years, when the labor force youth entries will be very little and reduced by the rising share of students in each cohort and by the already too few young people that will leave the country for better payed jobs in the West;

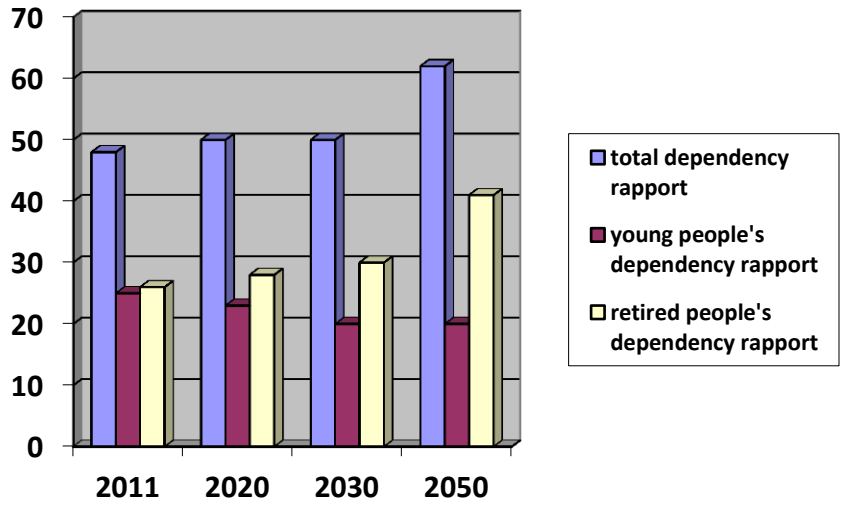
[11] The Presidential Commission's rapport for the Analysis of Social and Demographic Risks, lead by Prof. dr. Marian Preda, entitled "Social risks and inequities in Romania", published in September 2009.

- starting with 2030-2035 the new-born children, which will probably be less numerous, of the transaction generation will enter the labor market. Only a redression of the fertility rate (which should reach from 1,3 the EU medium term average of at least 1,5 and on a long term 1,7 – 1,8), corelated with an adjustmenet of migrational inflows would reduce this process;
- the problem of elderly people that lack pension and health insurance will especially be noticeable after 2025 when the people that are curently unemployed or working on the black market will reach advanced ages without beneficiating of pensions or health insurances, and the costs of minimal services for them will have to be supported by the social assistance system.

3. Conclusions

As we have previosuly shown, the tendencies of evolution for the population's structure are negative and will be followed by its accelerated aging. Presently, the population that surpasses the age of 65 is of 3,3 million people which means 16% of the total population. In 2020 the pensioners will represent 3,6 million, namely 17% of the country's total population and if it will follow the same ascending trend, by the middle of the century the pensioners will represent 30% of the total. Simoultaneous with the population's aging we are assisting to a decreasing natality and the increase of the elderly's dependecy raport. In graphic 2 we can notice the dependcy level of youth and elderly in the total of dependent people. As it can be observed, the total number of dependents tends to reach half of the country's population since imigrants and uninsured people are added to the youth and elderly. This data does not take into account the disabled population.

Fig. 2 Dependency rapport between active and retired people



Source: INS, Projecting the active population on the 2050 – 2013 horizon

We must not forget that after the year 1990 the process of gradual decrease of population began, and from 2008 a smaler number of young people started to enter the labor market. As a matter of fact the predictions regarding the country's total population are allready known. Presently we are aproximatenly 20 million people, followed in 2020 by little over 18,2 million and in 2060 we will reach aproximately 13 million inhabitants.

The public system in Romania is similar in many aspects to the one in most of the European Union's member states, which are type Bismarck systems. In this case, the

financing method is, as we have previously shown, a „pay as you go" type, which impplies that the system is based on redistribution (pensioners are payed from the actual wage earners' contribution), thus creating a dependency between retired people and active population (measured through the dependecy rapport).

Pension systems in the EU's coutnries as well as the one in Romania are influenced by the changes of demographic indicators. The population's aging is one of the most important burdens of this system, being a phenomen which leads the dependency rate's growth.

Taking in consideration this situation, we can observe that the actual level of social contributions is unsustainable on a long term. Context in which Romania proposes the folowing for the 2014-2020 period, according to the European Comission's partnership agreement: „70% of the population with ages between 20 and 64 should be employed" – in regard to the rate of occupying the labor force, a ground element in sustaining a viable pensions system; and „the number of people exposed to the poverty or exclusion risk should be 580 000 less (in comparison to the 2008 levels).[12]"

In conformity with these objectives, our country considers as oppourtune the following measures:

- combating illegal labor;
- promoting the employment of elderly workers;
- improving the participation on the labor market, as well as the level of occupancy and labor force productivity by reviewing and consolidating the active politics regarding the labor market;
- assuring training and individualized services and promoting life-long studying;
- increasing the capacity of the National Agency for Labor Force Occupation to improve the quality and degree of coverage of their services;
- combating unemployment among young people, rapidly implementing the National Plan for Young People's Employment.

Reforming the pension system is mandatory and it must represent a priority for the public politics of any government.

References

- Ion Mărginean, Reform politics in the pensions domain, Life Quality, no. 3-4, 2007;
- Mihai Şeitan, Mihaela Arteni, Adriana Nedu, Long-term demographic evolution and the sustaintabilityof the pension system, Economic Publishing House, Bucharest, 2012;
- Mihai Şeitan, Mihaela Arteni, Adriana Nedu, Project - Improving institutional capacity of evaluating and formulating macroeconomic politics in the economic divergente domain with the European Union's National Prognosis Comission, code SMIS 27153 - BENEFICIARY Prognosis National Comission Demographic evolution on a long term and the pension's system sustainability
- Dan Zăvoianu –Comparison between the private pensions system type pillar 2 and the world markets – Communication Direction - CSSPP, Bucharest, July 2010;
- Atkinson, A. B., Rein, M. Age, Work and Social Security, Macmillan, Houndmills, 1993;
- ***www.filbuc-caa.ro Short history on social securitites in Romania. The emergence of social security system in Romania. The end of the XIXth century – The first world war.
- The rapport regarding the population's aging, 2012, European Economy, no. 4/2011, European Comission
- *** Adequate and Sustainable Pensions. Synthesis report 2006, European Commission, 2006;
- *** Averting the Old Age Crisis Policies to Protect the Old and Promote Growth, A World Bank Policy Report 1994;
- *** The Presidential Commission's rapport for the Analysis of Social and Demographic Risks, lead by Prof. dr. Marian Preda, entitled "Social risks and inequities in Romania", published in September 2009.

[12] Partnership Agreement proposed by Romania afert the programming period 2014-2020, 2013.

REGULATORY IMPACT ASSESSMENT IN THE REPUBLIC OF CROATIA- SITUATION AND PERSPECTIVE

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Abstract

The fundamental approach of modern, open public administration is the inclusion of the public in government, in the process of adopting regulations relevant to the fulfillment of their rights. In the process of adjustment of Croatian legislation for the full membership in the European Union significant reforms of the legal system have been made , in aim of achieving this ideal . In order to actively involve public in the process of adopting regulations there has been accepted a set of regulations that makes it possible. This paper presents a brief overview of these regulations and those we will also serve as an introduction to the main theme of our work.

The purpose of this paper is to present the current situation and possibilities for the participation of public in the process of adopting regulations and to identify deficiencies that have already appeared in the short-term practice. We have set operational objectives on which the research was conducted. The main objective of this study is to determine the method of implementation of obligations as prescribed, particularly obligations of public discussion, public announcement and accessibility of information.

With the aim of making this paper, we reviewed websites of the 20 ministries. We did a questionnaire which identified the essential elements of the publication and implementation of public discussion in the process of Regulatory impact assessment. The results were compared with publicly available Plan of normative activities. In data processing, we used descriptive and comparative method, and other classic statistical methods.

Keywords: *Regulatory impact assessment, the participation, the inclusion oft he public, access to the information, openness of Administration*

1. Introduction

By involving citizens in administration and processes of regulation adoptions, proclaimed principles are realized for the work of public administration: the principle of openness, the transparency principle and the principle of efficiency and cost effectiveness of public administration. Regulations brought in the proceedings involving all interested parties, both governmental bodies, all legal and physical entities, associations and other forms of organized public should be permanent, efficient and ultimately cheaper for the economy and citizens. One of the key features of legislation brought in such a procedure is a high level of regulation acceptance by citizens.

Considering that citizens are, individually or through their representatives, actively involved in the process of adopting regulations from very beginning to its formal adoption, such regulations citizens experience as their and do not consider them imposed. They are willing to undergo full impact that regulation will have on them. Regulatory impact

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assessment is an excellent mechanism for encouraging citizen participation in the adoption of regulations and a more active and coordinated role of the authorities in this process.

In the last ten years in the Republic of Croatia has been observed trend of serious non-compliance with legal regulations. Citizens are finding ways to avoid all the positive achievements of legislation, from the very moment when a regulation adopted seeks to prevent its implementation.

Even bigger problem is that even government bodies often do not apply or disregard the application of certain legal obligations. For all these reasons the Republic of Croatia has introduced a Regulatory Impact Assessment (hereinafter RIA).

The purpose of this paper is to present a system for assessing the effects of RIA and explore how, in practice, implement the obligations prescribed by the Regulatory Impact Assessment Act (Official Gazette, 90/11).

In order to estimate the effects of RIA in high quality, it is necessary to involve citizens, for which Croatian citizens so far did not show too much interest. In our research, we want to determine whether the government adheres to obligations prescribed by the laws of the body, while the issues of civil participation will only be partially processed.

In foreign literature effects of the RIA has been extensively treated, both in theory and practice. In Croatia, this topic has not been the subject of significant technical and/or scientific research or discussion. There are only a few authors who have dealt with this topic and the work is also referenced.

2. Regulatory Impact Assessment in general

The most commonly used definition of RIA is the one given by SIGMA (Support for Improvement in Governance and Management): "RIA is informational based analytical approach to assess the possible costs, consequences and side effects of certain political instrument. It can, also, be used to evaluate the real costs and consequences of instruments that are already in use. In both cases the results are used to improve the quality of political decisions and instruments such as laws, regulations and various development programs"(SIGMA, 2001;10). RIA can positively affect both dimensions of the regulatory system, the outcome of the regulation and the regulation of the procedure itself. RIA affects the selection of appropriate instruments that are looking to achieve certain effects because it defines the root of the problem being solved. The second dimension is procedural, assessment refers to the process in which these instruments are formulated and implemented, particularly on the introduction of participation of interested groups and individuals in the decision-making process (Kirkpatrick, 2006).

2.1. The emergence of Regulation Impact Assessment

The origin of this instrument is found in the United States that have adopted RIA in 1974 due to excessive regulatory burden that threatened the economy. Initially the focus was only on reducing the costs incurred by the adoption of regulations, but over time the system is developed so that now the main emphasis on the immeasurable benefits and costs, especially risk assessment and quality information flow. The activities of RIA are performed by the Office of Management and Budget.

In the United Kingdom a systematic approach to assessing the effects of RIA is introduced in 1985 as part deregulatory initiatives that occurred because of the fear that too much government intervention in the economy may hinder its growth. System is continually refined and in mid-90's of last century was introduced the risk assessment. Activities related

to the assessment of the effects of regulation are entrusted to a special office within the Office of the Cabinet.

Canada has introduced the effects of the RIA relatively early (in 1978), and its specificity is that there is a special Department for regulation, as well as central and independent agency responsible for the revision of the draft legislation, which would make a special effort to change attitudes, and the development of regulatory culture. Among the leaders there is still Germany (1984), Australia and the Netherlands (1985) and Hungary in 1987. (Kirkpatrick, 2006)

Because of their specificity, European Union is faced with problems of introducing high-quality regulatory framework. For this purpose a number of documents have been brought and RIA was introduced as a fundamental requirement for better management and improving the quality of legislative drafting. These are: A European Union Strategy for Sustainable Development, the White Paper on European Governance, Action Plan for simplifying and improving the regulatory environment and the Communication on better law-making. Regulatory impact assessment introduces the Communication of the European Commission's Impact Assessment (2002) and quickly accepted and extended to all the proposals of the European Commission (Banic, 2006).

In the order to ease, consolidating the application, the exchange of good practice and achieving the best results of the RIA effects is common to issue guidelines for the assessment of impacts. Such a guide issued by the European Commission, the last version is from the 2009th. The guide describes the major concepts and objectives of RIA procedures, scope and level of assessment (where the process of drafting regulations include the interested parties), and key steps in the implementation of impact assessment (EC Impact Assessment Guidelines, 2009).

Although the meaning of RIA is in the evaluation of the benefits and costs of regulations, the main contribution of the process of impact assessment to development of better management is to improve the process by which potential risks are assessed, and the promotion of consultation and involvement of those who will directly affect the regulation before its adoption (Parker 2006, 2). Assessment of effects aims to encourage the makers or regulation proponents to consider whether the specific problem needs to be resolved by regulation (prescribing) or the same objectives and desired effects can be achieved some other instruments. There are so-called nonnormative solutions such as self-regulation, information and education, fiscal incentives or simply do nothing. In addition, the RIA can be used as a tool to evaluate the performance of already existing regulations, particularly their impact on key areas such as environmental protection, social security, etc., as required, for example, in Australia, Germany, the Netherlands and the UK.

2.2. Actions that preceded the introduction of Regulatory Impact Assessment in the Croatian legal system

The first signs of action that resemble those of the RIA can be found in the Rules of Procedure of the Croatian Parliament (Official Gazette No. 71/00, 129/00, 117/01, 6/02 - consolidated text, 41/02, 91/03, 58/04, 39/08 , 86/08, 81/12, 113/12) that the contents of the draft law seeks assessment of necessary resources, and the old Rules of the Croatian Government (hereinafter Government, Official Gazette No. 140/09 - consolidated text), which stipulates the obligation of showing impact assessment for certain areas, and they are provided by the relevant ministries. In 2009 the government adopted a Code of consultations with the public interest in procedures of adopting laws, other regulations and acts (hereinafter the Code, Official Gazette No. 140/09). The purpose of the adoption of the Code is to provide guidance for quality decision rules based on the general principles, standards and measures for the consultation of all stakeholders, and the main objective of the Code is the active

participation of citizens in public life, which is facilitated by the Code of interaction with state bodies. The need for such act stems from a desire to respect the fundamental principles of EU law, particularly the principles of good governance. Code and Guidelines for the implementation of the Code are made by the Office for Associations in cooperation with the Council for Civil Society Development. Most of the work in preparing and implementing the impact assessment was done by the Government Office for Legislation under IPA 2007 twinning project "Development of Regulatory Impact Assessment ". Within the project was developed and established the legislative framework and strengthened administrative capacity to assess the impact of regulations. One of the activities was the establishment of a special office for the coordination of the RIA. This office lifted in public quite a stir since was founded, it had few employees and no one knew how to explain what these people do. In the media were coming out pretty negativistic connotations articles, public received half information's, but the error was truly in the national authorities. Neither they, obviously, did not understand what the office is supposed to do, so did not know the public benefit and the need to present the RIA. After these beginner mistakes the impact assessment is legally regulated and placed in the jurisdiction of the Government Office for Legislation. Government in its program for the period of 2011 to 2015 year is focused on the realization of the vision - a new hierarchy of social values which rests on the protection of the individual against the omnipotence of government and state. In this sense, committed to strengthening the partnership for open government, whereby the emphasis should be on the involvement of citizens and civil society in the process of adoption and implementation of public policies.

In addition, public administration reform aims to establish a new system of public administration to become a real service for citizens and that, among other things, must carry out the following tasks:

- Show a greater ability to propose, Regulatory Impact Assessment and implementation of legislative decisions and administrative procedures at the national level.
- An open, transparent and timely communication with users of administrative services (Government Programme, 2011, available at www.vlada.hr).

All of this was preceded by the establishment of a completely new system of Regulatory Impact Assessment in the Republic of Croatia.

2.3. The right of access to information's as a prerequisite for the successful implementation of Regulation Impact Assessment

Even though the RIA is covered by special regulations, additional guarantees for citizens that they will be informed about the activities of public law bodies is regulated by the Constitutional right of access to information. The right to access information of public sector is a law of a new generation (although in Swedish legislation known since the late 18th century). In Croatian legal system is regulated firstly by Act on the right to access information from the 2003 (hereinafter: Act, Official Gazette No. 172/03, 144/10 and 77/11) and further reinforced by modifications of the Croatian Constitution from 2010 when the constitutional text was explicitly listed as a constitutional right of the citizens. In this way was laid the foundation for successful application and interpretation of the law and its implementation because it avoids the possibilities of inconsistencies that may occur due to the regulation of these substances in many different laws. Proclaiming the right of access to information as constitutional law and precise regulating its scope and possible limitations, strengthens transparency, responsiveness and legitimacy of an act of public authority, and control over it (Rajko, 2010, 639). Despite the well set legislative framework, the exercise of citizens' rights, especially the right to participate in the governance and access to information held by public authorities so far has been flawed and failed. In the new Act on the right of access information (Official Gazette No. 25/13) the right of access to information quality has maintained, while

the authority vested in the Commissioner for Information to contribute to a better realization of this right, both because of their prevention, as well as the repressive of effects.

Legal provisions strongly emphasized the autonomy and independence of the Commissioner. Thus, the Commissioner is defined as an independent and autonomous state authority to protect the rights of access to information (Article 5, item 10). Commissioner protects monitors and promotes the Croatian Constitution guarantees to the right of access to information. He is elected by Croatian Parliament for a period of five years, responsible to Croatian Parliament which submits regular annual and, when necessary, special reports. Article 35 of the Act thoroughly regulates the operations carried out by the Information Commissioner.

These operations can be divided into three basic groups:

-The activities of the second-instance body;

- Monitoring of the Act and inspection of the implementation of the Act;

- Monitoring, reporting and improving the exercise of rights of access to information.

For efficient implementation of the RIA significant provisions are of Articles 10 and 11 of Act. Article 10, paragraph 1, item 3 prescribes the obligation of public authorities to publish on the website, in an easily searchable way of draft laws and other regulations and general acts passed by. Article 11 (paragraphs 1, 2 and 3) prescribes the obligation for public authorities which are responsible for passing laws and regulations, that on the website must publish:

- Annual Plan of normative activities;
- Plan of consultation on draft laws and other regulations;
- Drafts of laws and other regulations which implement counseling;
- Report on the implementation of counseling.

As it will be evident in the sequel, this provision is almost identical and is found in the Act of RIA. It is therefore necessary provisions on RIA fully considered through the prism of the right of citizens to information held by public authorities. Act has gone a step forward in relation to the legal regulation of RIA that as obligators application contains only entities involved in the legislative process. Article 11, paragraph 4 of Act stipulates the application of paragraphs 1, 2 and 3 appropriately in the process of adoption of bylaws of local (regional) government and legal persons with public authorities, which regulate matters within its scope, and that directly address the needs of citizens and legal persons in their area, or the area of their activities. This provision raises a number of questions. First of all, what is sought to be achieved by that provision? Is it intended to introduce a system of RIA in making general acts of local and territorial (regional) government and legal persons with public authorities? Proper application could be taken so that the bodies of local and territorial (regional) self-government and legal persons with public authority shall publish an annual Plan of normative activities from their scope and accordingly plan the planned consultation on draft legislation. It is possible to carry out those acts for which the need for the adoption of the public authorities know (such as the annual budget, some planned investment projects, etc.). The problem will occur when the material changes in regulations governing the local (regional) government or activity of certain public institutions. These entities impose numerous obligations to various regulations; they cannot be predicted or put in a Plan of normative activities and Plan consulting. At the same time, special rules determine the terms for adjustment and alignment with their provisions. Most often those are relatively short periods, especially if we take into account paragraph 2 the article in question. Specifically, this paragraph prescribes the obligation of draft regulations on which conducts public consultation, typically for a period of 30 days. The question is whether it will be possible to carry out the process of making laws, and adjustments within the deadlines. Particular problems can occur for bodies of local and territorial (regional) self-government and legal persons with public authorities in monitoring

procedures. In the process of monitoring the Office of the Commissioner inspector supervise the obligation of publishing information pursuant to Article 10 and the obligatory submitting of reports on the published data about counseling.

Therefore, many local and regional authorities and legal entities with public authority could find in an unenviable situation, in cases of administrative supervision. In these cases should be reasonably determined that it was not at all, or within the prescribed period of published information on the consultation and drafting of general acts (Romic, 2013).

3. Legal Framework Regulation Impact Assessment in Croatia

Adoption of the Act of RIA (Official Gazette No. 90/11) is the result of many years of effort, but wandering of the Government in its efforts to introduce the Croatian legal system of effects assessment. Funding for this in the framework of various projects of modernization and strengthening openness and transparency of Croatian administration were ensured in the CARDS and IPA projects. Under the Act of RIA, the decision making process of legislation based on the evidence collected and relevant data that serves as guidelines for choosing the best solution, whether it's about passing legislation or taking nonnormative measures and activities. In the process of collecting evidence and relevant data are analyzed positive and negative economic, social, financial and fiscal impacts, and impacts on the environment, all at the same time the inclusion of the interested public (Article 2). The detailed provisions on the implementation of the RIA contains Regulation implementing RIA (hereinafter Regulation, Official Gazette No. 66/12). For consistent implementation of the Regulation also contains all the necessary forms to be used in the assessment process. The Act lays down the basic documents RIA that must be made. These are the RIA Strategy, the Action Plan and the Report on the Implementation of RIA. Strategy and Action Plan are adopted for a period of three years. First Strategy and Action Plan for the period from the year 2013 to 2015 the government has adopted on 20th of December 2012 (Official Gazette No. 146/12). In order to ensure the best possible basis for decision-making, improve the quality of legislation and improve public management, the Croatian government has established a system of RIA. The continuous development of the RIA is essential for restructuring, adaptation decision-making processes at all levels and to achieve the highest possible degree of legal certainty. The strategy has a dual purpose, to introduce RIA tool (why established system of RIA is and why it will be used), and set the strategic direction of the development of this system in the three-year period through a set of strategic goals and achieve them through the Action Plan for RIA for period from 2013 to 2015 (Strategy, 2). In addition to the above regulations, for the process of evaluating the effects regulations the following documents are relevant, prepared and adopted by the Office of Government Legislation. These are: Communication Strategy and Action Plan for the period from 2013 to 2015, Guidelines for civil servants, Guidelines for stakeholders and Guidelines for the Office of Legislation (all available at www.vlada.hr).

4. A short description of the Regulation Impact Assessment in Croatia

The process of evaluating of effects regulation is complex and time-consuming, and requires careful planning and adherence to deadlines. In this work the most important role is played by competent authorities in drafting regulations - central administrative authorities and all other bodies that are prescribed by their authorized scope of the Croatian government regulation in order to make its adoption (Article 3 of the Act of RIA). To ensure the proper implementation of all competent authorities in drafting regulations are required to appoint a professional person (coordinator tasks related to the implementation of the RIA), or as needed

for those jobs set up a separate organizational unit. RIA is carried out compulsory for all regulations that are predicted by annual Plan of normative activities, while there can be carried out on the basis of the conclusion of the Croatian Parliament, or based on a decision or conclusion of the Croatian Government in accordance with the prescribed conditions (Article 10, in relation to Article 13 of the Act of RIA). All competent authorities in drafting regulations are required to determine the Proposed Plan regulations that will be in the legislative procedure next year, so in June or July begins with the necessary activities. Proposal of the plan regulations is based on the performed previous estimate. Such a proposal plan regulations is submitted to the Office of Legislation which drafts and proposes annual Plan of normative activities. The annual plan is adopted by the Croatian Government in the last quarter of next year and will be published in the Official Gazette.

Initial activities that are related to the creation of Thesis containing the name of the regulations, a brief definition of the problem and the objectives to be achieved. After thesis has been made, professional bearer approaches to making previous estimates. Preliminary evaluation of the possible effects of regulation is implemented to the draft plan regulations. The procedure is carried out for all the regulations that will be proposed in the Plan of normative activities and to all laws that are being proposed in the Plan of harmonization of Croatian legislation with the EU acquis communautaire. Preliminary evaluation is conducted on the basis of the criteria laid down by the Act of RIA and Regulation. In short, these criteria are: a financial threshold, the expected impact on individual economic area, or the economy as a whole, the expected effects on socially sensitive and other groups with special interests, and the expected effects on the environment and sustainable development (Article 11, paragraph 5 Act of RIA). An integral part of the regulation is a form from the previous estimate, which contains detailed instructions for filling. Such a proposal plan for regulations must be published on the website of professional bearer for the purpose of informing the public. Such a notice must be on the website at least fifteen days in the period from 1st to 30th September of the current year to the next.

The assessment process begins with the activities related to drafting the proposed testimony. These are the various analyzes of the existing and desired state, access to theses, drafting proposals nonnormative solutions, identification of desirable and undesirable of effects, conduct consultations with inter-ministerial bodies and interested stakeholders. The draft proposal of the statement then goes to consultation with the public. After consideration of all comments and suggestions from the consultation draft of the proposal coordinator completes with the statement and submits it to the competent authorities, which shall give its opinion. After obtaining the opinion of the competent authorities, the draft statements is the ultimate professional and carrier access to the drafting of regulations and the proposed testimony.

Proposal testimony arises after the consultation and obtained opinions of relevant authorities. In proposed testimony, in addition to what was stated in the draft statements, provides detailed information on the implementation of counseling (accepted and rejected objections and suggestions), view of the chosen solutions to defined objectives and basic indicators for monitoring the implementation of the selected solution. Along with creating, the draft expert testimony carrier prepares a regulation to which it relates proposal testimony. Law stipulates that holders of expert put a testimony proposal together with the regulation to a public hearing and interested public. Having obtained the proposals and comments from the public and of the interested public, the regulation proposal and testimony is submitted to the competent authorities of the opinion, and after their agreed opinion to Legislation Office for approval.

The result of the whole procedure is specified statement about RIA, an act which contains the results of the procedure. Explicit legal provisions no regulation cannot be sent to

the Croatian Government in the decision, nor can it be included in the sessions of the working bodies of the Croatian Government if Statement Impact Assessment is not final (Article 23, paragraph 2 of the Act of RIA). The statement on the assessment of effects is final after being on the proposal testimony obtaining a positive opinion of the competent authorities and eventually the consent of the Office of Legislation. Regulation may be referred to the Government in the decision when the statement was not definitive only in special cases prescribed (emergency procedures to protect the interests of Croatian or eliminate hazards).

Finally, we will just state that the public can participate in the proceedings of the RIA on the two "mildest" mode, information and advice. A prerequisite for successful involvement of citizens is being informed about the planned procedures. Therefore, under the priority objective C2 of Strategy (providing timely information and participation of stakeholders and of the interested public in the system of RIA) planned activities are focused on timely information to the public, of the interested public and stakeholders on planning legislation and procedures of the RIA. Information to interested stakeholders to participate in the process is achieved by conducting these activities. In achieving this goal are provided even the risks (tardiness in releasing information), and corrective measures are regularly updating web pages, and regularly informing professional organizations and stakeholders on planning legislation and initiated proceedings about RIA. We see therefore that all activities are focused only on online advertising and possibly informing stakeholders, while lacking intense and aggressive advertising to the general public (especially the media campaign) (Romic, 2013c).

5. Assumptions for the successful implementation of Regulation Impact Assessment

The basic prerequisite for the implementation of the RIA, at least as it is in other countries, is a complete change of mindset. This tool requires full civil engagement, both individuals and various interested groups, and overcoming the fear and discomfort of state bodies and their officials. The aim is to find out the needs, opinions and desires of the citizens, and thus reach the optimal solution for the addressees of norm which is in the process of impact assessment. In our country, the culture of participation is almost completely unusual and neglected. The reasons for such behavior can be found in discomfort which citizens feel when communicating with government bodies and their officials, often present even fear of a vengeful retaliation and official activities. Another reason is the passivity of citizens who expect someone else to solve their problems, at the same time thus freeing the guilt from the consequences of their actions, because they could not nor had the opportunity to participate.

A similar issue marks the other side, only government body (specifically the central government bodies), which consists of people of the same and/or similar securities attitudes and characteristics. In the process of assessing of effects the national authorities may be professional carriers drafting regulations, may give opinions (or estimates) of its area of operation or can be coordinators activities related to the assessment of effects regulation (Legislative Office). In any case, the key is the human factor of the state body. In the process of implementation of impact assessments are required certain specific knowledge and time, as the civil servants requires new, additional obligations on already existing. If we add the relatively low wages, bad reputation that the public servants have, slow promotion system and the excessive influence of politics, it is clear that even in the case of public servants appears certain resistance to the introduction of additional obligations and tasks. Of course, that's no excuse and it is unacceptable that the law or regulation, adopted and accepted by the prescribed procedure is not respected and implemented by the very government bodies. That

any failure to comply with legal obligations related to the process of evaluating the effects government's evidence and conclusion (Conclusions concerning the implementation of the RIA procedure adopted at the 43rd session of the Government on 26th July 2012) that central government bodies - professional carriers making regulations undertake to accede without delay executing the tasks relating to the preliminary assessment for the purpose of making regulations for the draft plan from 2013 and the adoption of the annual Plan of normative activities within the prescribed time limits (Romic, 2013b).

6. The first year of application of Regulation Impact Assessment

It the first year of validity and application of the Act of RIA (2012,) competent authorities in drafting regulations (which are central government bodies - ministries, government offices and state administrative organizations) are generally treated by him, and on their official website can find data that are obliged to publish under the Act of RIA (calls for public debate and information conducted counseling). However, crawling Website of expert holders there is a notable disparity in the practice of publishing information related to the assessment of impacts. Of the twenty ministries, the two do not have any data on the assessment of effects; thirteen of them have a direct link on the front page, while five have information but are classified under another link. It is our opinion that this practice should be uniform and all entities should have a direct link ("consultation with the interested public") on the front page. Of the remaining twelve central government bodies only five can, with a lot of passion, find sketchy information about RIA. Moreover, some of them have a direct link with a very uneven way of displaying information. Some have only general information on the assessment of the effects with an indication of the legal framework; others have data on closed and open consultation processes, only a few reports have conducted consultations with comments and observations. Although the law provides for precise patterns and their content, practice has, at least for now, not supported. It is obvious that RIA in our country is slowly becoming a regular and acceptable way to implement certain policies (Romic, 2013b). However, there are ways in which we want to bypass the system. For instance, the Ministry of Labor and Pension System attempted on 2012 to bypass procedure estimates during the enactment of the Occupational Safety and Health, which caused a lot of negative reactions from the interested public and at the end of the draft of the law withdrawn from the legislative procedure (Šokčević, 2012).

7. Methodology, the results of research and analysis of results

For the purpose of this research, it was made a short questionnaire (13 questions), which was administered reviewing websites of twenty central government bodies - ministries responsible for making laws. We can say that the sample is representative because more than other government bodies which are responsible for drafting the proposal never act alone. Their work is always accompanied by the work of some twenty ministries. Therefore, the survey covered the entire target group of subjects. The study was conducted on the February 24, 2014. Because the research data that are uneven (some comparable and the other numeric data), a questionnaire was formed of questions of different forms. Some questions were measurable scales and most of the questions were related to the numerical indicators. The results showed that the questionnaire was inappropriate for the data that could be obtained by searching the websites of these bodies.

How the Act of RIA and the Freedom of information Act are "public announcement on easily searchable manner on the web sites of" the first group of questions focused precisely

on that. The first question was related to the availability of information about counseling with the interested public. Starting with clear legal requirements all bodies should have a direct link on the front page. Results are listed in the scale of readily available (on the cover), less accessible (not another link on the front page), hardly available (elsewhere) and no data. Results are as follows: 14 bodies (70%) have readily available information, 4 (20%) less available and 2 (10%) difficult to access information. By comparing results from 2012 it is seen progress because now all the bodies still have data about counseling with the interested public, and one body has a more direct link. We conclude that on this issue reflected little progress.

Two questions were related to the obligation to publish a plan for legislation next year. By searched pages only seven bodies (35%) had a plan regulation for 2013, while data was not found in 13 bodies (65%). In contrast, the plan regulations for 2014 was found in 16 bodies (80%), only in four (20%) was not found. We can conclude that in the segment of publishing plans is a reflected significant shift for the better. Here we have to note that these plans are often very difficult to access, even in the body that has direct links.

Pursuant to the Act on access to information, all of the public law body shall designate a special person who will handle the procedures of access to information (information officer) and inform the public with official data on it. As we have previously noted the close connection of this Act with the RIA, one of the questions referred to the existence of data on the information officer. Results are listed in the scale of readily available (direct link on the front page), hard (data are available but must be searching for the other, and a variety of links) and no data. It is striking that even 2 (10%) government bodies (the body responsible for the immediate implementation of laws and other regulations) has no data on the information officer. Direct link has 11 bodies (55%) while seven (35%) has data but you must look for the other connections.

Another group of nine questions was to show how to implement the plan of normative activities, compared to numerical indicators planned and committed, to determine whether they publish all stages of the procedure prescribed by law and are quantifiable citizen participation in the decision rules. Unfortunately, the planned level of research could not reach the quality of results due to many factors. However, the search was not useless. We have come to some conclusions that is going to be useful for future and more comprehensive research. Reasons that prevented the implementation of this (simple) research have been detected as the greatest weakness of the system.

First of all, there is a too big disparity of websites of ministries. Since the ministries, as a rule, do the same or very similar tasks, each within its administrative area, the logic of their websites should be very similar if not identical. The meaning of the publication of these data is just the easy availability of data, clarity and speed of finding the required information. Therefore, it is unacceptable that, for example, data on the information officer for some bodies are under the link "contacts" with other link under "Documents", somewhere to direct link, somewhere on a very distant third.

Further, information on public hearings and consultations is published each in their own way, although Act prescribes in detail what and when should be published. Sometime data is displayed in the sequence of events by the book (has the closest state as it should be), elsewhere in one place without public debate publish sequence of the draft regulations and other, completely unrelated, and even at six of ministries (30%) have no data public hearings or draft legislation. The form of published documents is quite uneven, with different terminology and content.

According to the plan of normative activities Ministries, in 2013, were supposed to publicly discuss the 128 laws. The results show that since the plan was done only 52 laws, therefore 40.63% has been discussed. Although the plan did not materialize, the ministry had

additional activities (public hearings) outside the plan (it was a discussion about the various strategies, then the laws that are not in the plan of normative activity because it brought order to harmonize Croatian legislation with the European Union).

What is observed from published reports on the conducted consultations is very small interest, and responsiveness to the public. In a large part of the Report which is published by the fact that no one (or individual citizens or organizations interested citizens, often even national authorities) did not have any comments. For example, the Ministry of Culture issued a report on the implementation of consultation with the interested public in the decision of the Media Act. It is unbelievable, but true according to a published report, that no one submitted any comments or suggestions. We have to mention that, in a small number of cases in which attractive law was significant involvement of the public, the ministry seriously considered the comments received and largely accepted them.

It is a known fact that Croatian citizens rather sluggish, however, the vastness and lack of transparency in the publication of calls and other acts further motivates citizens to more intense engagement. Moreover, the whole procedure about RIA is very complex, difficult to understand and therefore difficult to accept. According to searched Website it is obvious that this practice is difficult and unclear for the officers themselves.

8. Conclusion

At the end of this paper we can undoubtedly conclude that the RIA in the Republic of Croatia is adopted as mandatory in the process of adopting regulations. The facts show that the system is complicated, officials unprepared in the implementation where there is a lot of difficulty. In comparison to 2012, it is perceived as positive steps towards greater transparency and a better representation of the data on the websites of ministries. It is alarming that some ministries generally do not fulfill their legal obligations (public disclosure of information on the consultations on the web site). The fact that only 40% of planned procedures have passed at least one stage of the RIA is also a concern.

The data that are available indicate very uneven implementation and enforcement of legal obligations. Although Act of RIA contains clear names and precise instructions for a particular action procedure, in the application there were found significant discrepancies, as in the names of acts, as well as in the content, mode of system data and their publication. Time limits given in the plan of normative activities are often not respected, whether they are late with the actions or they did not take actions.

We have noted that the reasons for such action are numerous and are not caused only by an unprepared, reluctant and irresponsibility officers or officials. The problem is much more complex and has its roots in insufficiently preparation for the new requirements for institutions that globalization and the European Union brought. It is expected to achieve more significant results in this year in terms of complete implementation of the legal obligations relating to public disclosure, public consultation and RIA. It is necessary to continue to monitor at least basic indicators of their implementation, and detailed research to try to find answers to questions about why the public response is so small and find way better motivation of citizens and various forms of organized citizen action. We believe that the inclusion of citizens in this system flawed in this area because it did not provide for diverse and demanding forms of publicity and encourage citizens to actively participate.

RIA in the Republic of Croatia is a new and still poorly developed system. As such, it opens a wide space for detailed technical and scientific analysis and discussion. This work and this simple research, which indicated the basic weaknesses of the system, can serve as a basis for a future research, the author or other interested professionals.

References:

- Banić, Slavica 2006. *Regulatory Impact Assessment as a means of improving the quality of regulations*, Croatian and Comparative Public Administration, Year 6., no. 4., p. 7 – 18.
- Kirkpatrick, Colin 2006. *Regulatory impact assessment*, in: Crew, M., D. Parker: International Handbook on Economic Regulation, Edward Elgar Publishing Limited
- Parker, D. 2006. *Regulatory Impact Assessment*, available on :https://dspace.lib.cranfield.ac.uk/handle/1826/2247, January 30, 2013
- Rajko, Alen. 2010. The implications of the inclusion of the right to access to public sector information in the Croatian Constitution, Croatian and Comparative Public Administration, Year 10., no. 3., p. 629 - 649.
- Romić, Danijela. 2013a. Article 11 of the Freedom of Information Act and its implications on local (regional) self-government and legal entities with public authorities, Audit, accounting and finance, supplement Budget users, no. 5, p. 23 - 25.
- Romić, Danijela. 2013b. *Regulatory Impact Assesment*, Book of proceedings, III, International Conference „Development of Public Administration", Vukovar, p. 696 - 707.
- Romić, Danijela. 2013c. *System of Regulatory Impact Assessment*, Book of proceedings of College of Šibenik, Year.7., no. 2-3, p.153 - 160.
- Šokčević, Svjetlana. 2012. *Regulatory Impact Assessment, rule of law and messages from European Courts*, available on http://www.zakon-znr.com, January 30, 2013.
- European Commission. „*Impact Assessment Guidelines*." 2009. Available on http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_en.pdf, September 6, 2011.
- Code of consultations with the interested public in procedures of adopting laws, other regulations and acts, Official Gazette No. 140/09
- Rules of the Croatian Parliament, Official Gazette No. 71/00, 129/00, 117/01, 6/02 - consolidated text, 41/02, 91/03, 58/04, 39/08, 86/08, 81/12, 113/12
- Rules of the Croatian Government, Official Gazette No. 140/09 - consolidated text
- Government Programme, 2011, available at www.vlada.hr
- Strategy and Action Plan for the period from 2013 to 2015. Official Gazette No. 146/12
- Regulation on the implementation of the Regulation Impact Assessment Procedure, Official Gazette No. 66/12
- Freedom of Information Act, Official Gazette No. 172/03, 144/10 and 77/11
- Freedom of Information Act, Official Gazette No. 25/13
- Regulation Impact Assessment Act, Official Gazette No. 90/11

ADMINISTRATIVE POLICE ISSUES AT EUROPEAN LEVEL

Dana VULPAȘU[*]

Abstract

Administrative police, fundamental form of public administration, which aims to ensure public order and the protection of human rights, through prevention, knows no uniform conceptualization in the European states. However, it appears in various forms in national systems and is sustained and strengthened by EU policies whose objectives aim at the establishment of an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States and to ensure a high level of security through measures of preventing crime, racism and xenophobia. This article aims to show how the concept of administrative police is reflected in the European Union, the complementary and coordinating role of the latter, and the need for a uniform legal framework in European national systems which can allow the shaping of a European model.

Keywords: *Public order, human rights, prevention, administrative police, European Union*

1. Introduction

This article highlights a comparative analysis at the European states level of the administrative police as fundamental form of public administration activity and the incidence of the European law on it.

The overall goal of administrative police is to maintain public order, having a preventive character and being governed by the rules of administrative law. Although it does not appear in each analysed state under the name of administrative police, its manifestations can be found in the practice of public authorities.

I believe that the importance of this study is related to the need of uniform conceptualization of this notion at European level and to promote public disorder prevention practices because the modernism of public administration activity lies in overcoming the actions of the individuals that may affect public liberties, which would reduce human and psychological damage caused by these acts, that are often irreparable.

Depending on the proposed indicators, such as the content of the administrative police concept, preventive nature versus repressive character, general and special administrative police, which were the basis for comparative analysis, we could identify some common elements, the present state of research in this field and the premises which could be the foundation of a European model.

Finally, the European Union has a coordinating role in internal security, it aims, through its strategy of Homeland Security, the prevention and anticipation of crime, as well as natural and manmade disasters and to mitigate their potential impact.

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2. Content

Etymologically, the word police comes from the Latin word "politia" and from the Greek "politeia", which refers to the administration of the city (polis). Therefore, the origin of "police" means, in a general way, the action of government.

Currently, its historical meaning is lost, and its present one can be approached from two perspectives:

a) In a material sense, denoting an activity, one that is to maintain public order through legal and material measures;
b) In an organic sense, referring to the group of persons or authorities entrusted with the power to enact constraining rules which must be respected by the administered ones to maintain public order.

John Alderson in Policing freedom[1] has identified the following "police styles":

- Informal police (social control);
- Passive police (non-active police, except in cases of very serious disorders);
- Punitive police (applying severe punishment for discouragement and example);
- Preventive Police ("higher" form of the police, which is manifested by "continuous and systematic islanding").

Based on this typology, we propose in this article to address preventive police, which will play in the position of administrative police.

To have a clearer understanding of the concept of administrative police we will begin by listing a series of definitions found in the literature[2]. In this regard, we mention a first definition proposed by Charles-Édouard Minet[3], in a simplistic manner, according to which it is the activity consisting in fixing various rules that must be complied by individuals so that the exercising of their freedom does not interfere with the harmony of community life or with the freedoms of others.

In another opinion[4], by administrative police we understand "all public administration interventions that require to the action of individuals the discipline demanded by life in society", being completed by Jean Castagné[5], who states that "administrative police power is the prerogative recognized to the administrative authority to enact, in order to ensure public order, enforceable legal acts and to perform material acts required of their enforcement."

So, from these definitions, we conclude that the administrative police activity seems to have a simple nature, in connection with the facts. We can ask what is the link with EU law, given on the one hand that the police legal activities are not economic activities and, on the other hand, the EU has no direct competence in the field of administrative police. A first and possible answer lies in the fact that the treaty provisions on free movement of persons, goods and services, competition and so on, are required by national police authorities in taking police measures which fall within the scope of EU law.

In our approach, we will start from the provision of Article 67, Title V „Area of freedom, security and justice" from the Treaty on the functioning of the European Union, which stipulates that:

- The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States;

[1] John Alderson, *Policing freedom* (Plymouth: McDonald & Evans, 1979), 35.
[2] Dana Vulpașu, „Administrative police – fundamental form of public administration activity," *Research and Science Today* 1(5) (2013): 245, accessed March 2, 2014. http://mpra.ub.uni-muenchen.de/45887/1/MPRA_paper_45887.pdf
[3] Charles-Édouard Minet, *Droit de la police administrative* (Paris : Vuibert, 2007), 5.
[4] Jean Rivero and Jean Waline, *Droit administratif* (Paris: Dalloz, 2004), 347.
[5] Jean Castagné, Le controle juridictionnel de la légalité des actes de police administrative (Paris: LGDJ, 1964), 22.

- The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws;
- The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

European Union institutions and its Member States promote and provide freedom and security. Europe guarantees respect for human rights, rule of law and solidarity.

Through the Internal Security Strategy of the European Union, it demonstrates a firm commitment to continuing to make progress in the area of justice, freedom and security through a European security model which faces the following challenges: protecting rights and freedoms; improving cooperation and solidarity between Member States; addressing the causes of insecurity and not just the effects; prioritizing prevention and anticipation; involving all sectors with a role to play in public protection (political, economic, social, etc.); communicating security policies to the citizens; and, finally, recognising the interdependence between internal and external security in establishing a "global security" approach with third countries[6].

In the following we observe that, at EU level, the purpose of the national administrative police to prevent public disorders and to enforce of human rights respect is identified in the above mentioned expressions such as "ensuring a high level of security" "prevention", "human rights" and "prevention of crime, racism and xenophobia".

According to European constant jurisprudence, states "remain solely responsible for maintaining public order and safeguarding internal security," European law recognizing thus the administration discretion to choose the preventive or repressive means to implement, since EU institutions are not substitute of Member States to prescribe what measures should be taken[7].

Member States must continually make efforts to develop tools so that national borders, different laws, different languages and ways of working do not impede progress in preventing cross-border crime.

In this article I will analyse the following countries according to certain indicators: France, Germany and the United Kingdom of Great Britain and Northern Ireland.

They will allow the identification of a part of the common elements found in each analysed state and the verification of the European model of administrative police hypothesis.

a) The content of the administrative police notion

- **France**

The theory of "administrative police" is amply analysed and can be considered to have been born in France, European State in which it finds its applicability explicitly.

In this sense, an attempt to define this concept can be found in the General Code of Local Authorities, art. L. 2212-2, which reproduces the old formula of the Law of 1884, and states that "the municipal police is to ensure good order, safety, security and public sanitation", followed by an enumeration, without being exhaustive, of 8 points[8].

Regarding the phrase "good order" we must make some remarks. This is less accurate and it results that the definition of the legitimate administrative could and may know some

[6]http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%207120%202010%20INIT accessed February 27, 2014.
[7] Judgment of the Court of 9 December 1997, Commission of the European Communities v French Republic, case C- 265/95.
[8]http://www.legifrance.gouv.fr/affichCode.do;jsessionid=EDE1997A47EFD02BFC95FAF04C8688EF.tpdjo15v_1?idSectionTA=LEGISCTA000006164555&cidTexte=LEGITEXT000006070633&dateTexte=20131004 accessed February 28, 2014.

variations: it may correspond, for example, to morality, aesthetics, and the protection of individuals from themselves[9].

The issue on preventing immorality as legitimate goal of the administrative police at first was resolved in a negative way: administrative police ban of activities deemed likely to affect morality is not permitted unless the moral disorder itself is likely to generate a material disorder (C. E. 7 Nov. 1924, Club sportif chalonais on banning boxing fights by the mayor because they have a brutal character, and sometimes wild, contrary to "moral hygiene"[10]).

Currently, the jurisprudence recognizes that concerns for morality can be a legitimate police purpose, at least in field of mayor ban, through municipal police, of the immoral films projection already covered by state censorship.

Equally, it is an extension that marks the possibility available to the general administrative police, to take into account concerns about aesthetics (P. Duez, *Police et estéthique de la rue*, D. H. 1927, 17). Apart from the aesthetic special police organized by specific texts (eg those relating to advertising contained in the Environmental Code [11]), the jurisprudence recognizes that general administrative police measures, particularly those that the mayor disposes, are not vitiated by abuse of power for the simple fact that they were inspired on aesthetic considerations.

Regarding the possibility of administrative police to protect individuals from themselves by imposing, according to the Decree of 28 June 1973, to wear a headset the drivers and passengers of two-wheeled vehicles, or the seat belt drivers and other occupants of private cars. Repressive judicial courts are divided. The Court of Cassation ruled legality of the decree (Crim. 20 March 1980[12]). From his perspective, the State Council held in the same sense, considering that the requirement was intended "to reduce the consequences of road accidents" (CE 22 Jan 1982, Ass. Auto défense[13]).

Regarding the components of the concept of public order, we consider the Decree of October 7, 1995[14], by which the State Council considers that human dignity should be seen as an integral part of public order. The Mayor of Morsang sur Orge banned performances "Lancer de nains - throwing dwarfs" that should take place in the discos of that city because it believed that they affect human dignity.

In exercising municipal police, mayors are obliged to take measures to maintain public order, which is consisted of security, tranquillity and public sanitation. However, the jurisprudence has already accepted that public order can be understood beyond the traditional trilogy, taking into account, in some circumstances, issues of public morality.

By its decision of 27 October 1995, the State Council, for the first time explicitly recognized that respect for human dignity is one of the components of public order. Protecting human dignity against all forms of slavery or degradation has already been elevated to constitutional status by the Constitutional Council (Décision n° 94-343/344 DC, 27 juillet 1994[15]). It has also been provided in article 3 of the Convention for the Protection of Human

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[9] Andre de Laubadère, Jean-Claude Venezia and Yves Gaudement, *Traite de droit administrative* (Paris: L. G. D. J., 1999), 788 – 806.

[10] http://archiv.jura.uni-saarland.de/france/saja/ja/1924_11_07_ce.htm accessed February 28, 2014.

[11] http://www.legifrance.gouv.fr/affichCode.do?idArticle=LEGIARTI000006834682&idSectionTA=LEGISCTA000006176663&cidTexte=LEGITEXT000006074220&dateTexte=20130401 accessed February 28, 2014.

[12] http://www.easydroit.fr/jurisprudence/Cour-de-Cassation-Chambre-criminelle-du-20-mars-1980-79-93-104-Publie-au-bulletin/C73090/ accessed February 28, 2014.

[13] http://www.easydroit.fr/jurisprudence/Conseil-d-Etat-3-5-SSR-du-22-janvier-1982-20758-20966-21002-21030-21185-21194-21221-inedit-au/J143316/ accessed February 28, 2014.

[14] http://www.conseil-etat.fr/fr/presentation-des-grands-arrets/27-octobre-1995-commune-de-morsang-sur-orge.html accessed February 28, 2014.

[15] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/1994/94-343/344-dc/decision-n-94-343-344-dc-du-27-juillet-1994.10566.html accessed March 1, 2014.

Rights and Fundamental Freedoms[16] according to which "No one shall be subjected to torture or to inhuman or degrading punishment or treatment".

State Council decided, therefore, that respect for the human being is a part of the public order and the authority vested with the municipal police power may, even in the absence of specific local circumstances, prohibit an activity which affects it.

Judging from the present case, the Contentious Assembly considered that the attraction "Lancer de nains", consisting of a dwarf throwing by spectators led to use as projectile a physically handicapped person and presented as such. This attraction has been found as violating, by its own object, human dignity. Therefore, this prohibition was legal, even in the absence of particular local circumstances.

For a municipal authority to be accorded powers to ban performances likely to disrupt consciousness because they can undermine human dignity, the State Council has shown that public order can only be defined as "material and exterior," but it should cover the concept of "human" that public power should make it respected.

- **Germany**

In Germany, the Lander prevents the danger and the federation holds the prosecution. Police and public security laws aim to provide police jurisdiction the competency rules that regulates the issue of preventive measures[17].

Order maintaining or combating public danger authorities take over police materials functions. They become active to protect the community or the individual of the danger threatening public order and safety.

Public safety and police are the legislative competence of the Landers, not mentioned in Article 73 of the Constitution[18]. This power is expressly clarified by Article 70 of the Constitution. All Landers have issued, therefore, its own regulations on public security and police. German Federation has, however, a number of legislative powers of a special nature in police matter[19].

- **United Kingdom of Great Britain and Northern Ireland**

United Kingdom is the state in which we find the fewest elements administrative police.

Metropolitan Police institution defines police more generally, as the set of measures taken in all civilized countries to ensure that the inhabitants keep the peace and obey the law. Also, it is the force of peace (or police) officers used for this purpose[20].

In terms of the public order, the Act of 1986 is based on the abolishment of the common law offences of riot, rout, unlawful assembly and affray and certain statutory offences relating to public order; to create new offences relating to public order; to control public processions and assemblies; to control the stirring up of racial hatred; to provide for the exclusion of certain offenders from sporting events; to create a new offence relating to the contamination of or interference with goods; to confer power to direct certain trespassers to leave land[21].

b) The preventive nature versus repressive nature

- **France**

[16] http://www.echr.coe.int/Documents/Convention_RON.pdf accessed March 1, 2014.
[17] Monica Vlad and Gilbert Gorning, *Drept poliţienesc român şi german* (Bucureşti: C. H. Beck, 2012), 24.
[18] https://www.btg-bestellservice.de/pdf/80201000.pdf accessed March 1, 2014.
[19] Monica Vlad and Gilbert Gorning, *Drept poliţienesc român şi german* (Bucureşti: C. H. Beck, 2012), p. 28.
[20] http://content.met.police.uk/Site/history accessed March 2, 2014.
[21] http://www.legislation.gov.uk/ukpga/1986/64 accessed March 2, 2014.

The definition of administrative police is completed by a very important distinction, that between administrative police and judicial police.

More generally, administrative police is distinguished by the judicial police in that the first is preventive and the second is repressive. Administrative police aims to avoid disorders taking in advance necessary measures; judicial police [22] seeks to investigate and bring to justice the perpetrators of crimes already committed.

The importance of the distinction is presented in the following aspects:

In the litigious competence field, administrative police contentious is settled by administrative jurisdictions, while judicial police contentious work belongs judicial justice.

Regarding liability, damages caused by acts of administrative police are likely to engage the administration responsibility with at least a greater certainty than those resulting from acts of judicial police.

For example, we meet authorities and officials cumulating the two skills and sometimes they act as administrative police authorities (prefects, mayors, state police inspectors). Therefore, it is essential to determine a criterion for distinguishing the judicial police from the administrative police.

However, if this criterion is always true in most cases, it does not always allow us to distinguish between the two types of polices. In general, we talk about judicial police when we are in the presence of research or arrest operations of the perpetrators of a defined crime, while administrative police covers general control and surveillance missions.

Applying this principle, however, is sensitive to the extent that the crimes are often committed when an operation of administrative police is taking place or when the latter was unable to prevent it, or even to discover it.

- **Germany**

To decide if public safety laws or police law are applicable, or if it has to be chosen the path of administrative or judicial itself, it is relevant if the police got involved to fight the danger or to pursue criminal acts.

According to Article 14 of Prussian police administration law by public safety we understand:

- Protection of public law order;
- Establishment and functioning of the state and its institutions;
- Inviolability of life, health, liberty, property and honour of citizens.
    - Police preventive actions

On the action to combat hazards, police have the power to fight against the dangers that threaten public order and security. In this framework, the police must:

- Prevent the commission of offenses;;
- Ensure the prosecution of criminal offenses;
- Make necessary preparations to grant support and action in situations of danger.

Among the standard measures of safety and police legislation, are:

- Collecting information:
    - Establishing the identity;
    - Checking special permits;
    - Recognition measures;
    - Summons and interrogation;
    - Hearing;
    - Observation;
    - Data collection and processing;

[22] http://www.legifrance.gouv.fr/affichCode.do;jsessionid=F1858763D97C5EA4F832799413472DBF.tpdjo06v_2?idSectionTA=LEGISCTA000006167411&cidTexte=LEGITEXT000006071154&dateTexte=20130329 accessed March 2, 2014.

- Correction and deletion of unlawfully data recorded.
- Prohibition to be in certain localities;
- Search, seizure, insurance, storage, recovery, restitution;
- Retention as an interim measure.

- Repressive police actions

On the other hand, the police have the prosecution duty and the jurisdiction to take measures pertaining to it, in accordance with the criminal law. These rules serve almost exclusively the purpose of prosecution, thereby having repressive character.

➢ **United Kingdom of Great Britain and Northern Ireland**

In this state it could not be identified a clear separation of the preventive measures against repressive ones, namely of administrative police against the judicial police, as it was found in the examples of France and Germany.

c) General administrative police and special administrative police

➢ **France**

General administrative police is entrusted to various administrative bodies and exercised in a general way in relation to any activity of individuals.

In parallel with this police, there are numerous special police. The particularity of these police in relation to the general police is that their subject is other than security, tranquillity, sanitation: special police in hunting, fishing, advertising, which are subject to a legal regime distinct from the general police. This specific character relate either to the competent police authority to exercise police power (railway police assigned to the prefect) or the procedures of implementing the power of the police: the police of classified installations for environmental protection.

➢ **Germany**

All legal norms may contain rules that serve to combat threats to public order or safety. Here we meet Lander rules and federal rules, regulating the functions of competent authorities in the field. Different Lander competence coincide in their general appearance, despite significant differences details. Only when not present rules establishing the powers at this level, there can be raised the rules of public safety or the police ones. In these laws are found numerous rules for awarding powers and one general clause, the latter becoming applicable only where there are no specific rules on regulating competences. If the person concerned does not comply with the authority requests, the facts may include a violation of public order[23].

Regarding specific areas of the law on combating hazards in the field of public safety law at the federal level, we include:

- Road traffic;
- Soil protection;
- Protection against atomic energy and the harmful action of ionic radii;
- Exercise lucrative activities;
- Combat public hazards in pensions field;
- Exercising trades or professions;
- Combating public health hazard;
- Consumer protection;

[23] Monica Vlad and Gilbert Gorning, *Drept polițienesc român și german* (București: C. H. Beck, 2012), 56.

- Weapons and explosives;
- Status of foreigners.

Regarding specific areas of combating hazards in the field of public safety at the Lander level, we find:

- Constructions;
- Water management;
- Protection against fire and disasters.

➢ **United Kingdom of Great Britain and Northern Ireland**[24]

In this case there are general police forces in England and Wales, of which there are counties forces, merged forces (such as forces of Thames Valley and West Mercia covering two or more counties), metropolitan forces (covering areas of former councils of the metropolitan county) and London forces.

There are also various specialized police forces with limited jurisdiction, including the Port of London Police, Airport Police, British Transport Police, United Kingdom Atomic Energy Police, Royal Parks Police and Ministry of Defense Police. In addition, officers may be appointed by the justices of the peace (to act as harbor, dock or pier police) and the Rector or Vice-Rector of Oxford or Cambridge University (to act as university police in the subordination of the proctor).

3. Conclusions

As a result of the study on EU states we may find that we cannot talk about a European model of administrative police. .

Moreover, there are very few common elements in the national systems that reinforce the unitary conceptualization of the European administrative police idea.

However, the three analyzed countries - France, Germany and the United Kingdom of Great Britain and Northern Ireland - carry some similarities, the most relevant being in the general police and special police organization. However, we found that the State which presented the fewest elements of administrative police is the United Kingdom of Great Britain and Northern Ireland, and the opposite is France.

Regarding the relationship between the analyzed Member States and EU, it may be considered to be one of complementarity, as the latter comes to complement the efforts of states to prevent public disorder, to ensure respect for human rights and a secure environment.

In this regard, we note that, at EU level, the administrative police purpose at national level of public disorder prevention and enforcement of human rights is identified in expressions such as "ensuring a high level of security" "action prevention "," human rights "and" prevent crime, racism and xenophobia ".

Because of the seriousness of the pursued objectives, we conclude that there are requirements which mark the administrative police measures:

a) Administrative police action always takes the form of unilateral prescription.
b) Police measure is never creative of rights and may therefore be subject to restriction.

In conclusion, I support the idea of a European model of administrative police as well as strengthening the cooperation between Member States to prevent public disorders and ensure human rights.

References

- Alderson, John. *Policing freedom*, Plymouth: McDonald & Evans, 1979

[24] For more information, see William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 2000), 149-160

- Castagné, Jean. Le controle juridictionnel de la légalité des actes de police administrative, Paris: LGDJ, 1964
- Laubadère, Andre de, Venezia, Jean-Claude and Gaudement, Yves. *Traite de droit administrative* , Paris: L. G. D. J., 1999
- Minet, Charles-Édouard. *Droit de la police administrative*,Paris : Vuibert, 2007
- Rivero, Jean and Waline, Jean. *Droit administratif* , Paris: Dalloz, 2004
- Vlad, Monica and Gorning, Gilbert. *Drept polițienesc român și german*, București: C. H. Beck, 2012
- Vulpașu, Dana. „Administrative police – fundamental form of public administration activity," *Research and Science Today* 1(5) (2013), 245-254
- Wade, William and Forsyth, Christopher. *Administrative Law*, Oxford University Press, 2000

IS HONORARIUM REQUIRED? REMOVING IRREGULARITIES IN STUDENT CREATIVITY PROGRAM IN INDONESIA

Agustin ANGGRIANI*

Abstract

Student Creativity Program or Program Kreativitas Mahasiswa (PKM) is a prestigious annual scientific program for undergraduate students in Indonesia. The program runs since 2001 and held by DP2M Dikti, Ministry of Education and Culture. In 2013, over 7000 program proposals are funded on a maximum budget of IDR 12,500,000 each. This program aims to improve the quality of undergraduate students in order to become a part of community who have the academic and/ or professionals ability, who can implement, develop and disseminate science, technology and/ or the arts and enrich the national culture.[1] Unfortunately, there is the corruption risk in the program. This study aims to investigate irregularities by students in PKM, revealing the root causes and offering solutions for policy reform in PKM. This study uses triangulation method (interview-observation-documentation) for data gathering. Interviews were conducted to 30 students from 10 different universities in Indonesia. The study findings show that there are irregularities in PKM, such as marking up budget funds, futhermore, a lot of the remaining funds being used for private purposes. These occur because evaluators never ask about the remaining funds at the time of monitoring and evaluation (monev). Still, the budget does not include honorarium as a reward for the student's hard work. In fact, the misuse of budget allocation for private purpose is not appropriate because it is contrary to Article 2 of Law No. 31/ 1999. A total of 26 out of 30 students agreed if there is honorarium in PKM, so there will be a giving back for their energy, time and thought. This study is very potential for removing irregularities and reforming policy of PKM in Indonesia, so the program is no longer contaminated by the corruption risk.

Keywords: *Student Creativity Program in Indonesia, undergraduate students, removing irregularities, corruption risk, honorarium*

1. Introduction

Indonesia is a country in Southeast Asia which is actively fighting against corruption. The preventive efforts begin from the formulation of curriculum and character education since education is a strategic way to embed good characters. As a strategic way, the implementation of anti-corruption curriculum in education can become an alternative answer. The next generation would have a view of corruption as a lowly deed. More than that, the Indonesian education should bring its citizens to be aware of applicable laws and obey him, and no less important is the role of education to instill strong religious knowledge to every student. According to Bibit S. Rianto, this effort will actually uproot corruption to the core, to the most basic layer of the iceberg[2].

Behind all of that, in Indonesia there is an unnatural thing about corruption in initial level early on. Worse yet, students who are coveted as agent of change in the community

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[1] DP2M Dikti, *Panduan PKM 2013*, (Jakarta: Kemdikbud, 2013).

[2] Irfan Awaluddin. "Korupsi sebagai Permasalahan Teologis: Mengurai Anatomi Pemberantasan Korupsi dalam Al-Qur'an." (paper presented at the International Conference of Islamic Scholars Jakarta).

participated in the comfort zone of corruption learning. It was seen at the *Program Kreativitas Mahasiswa* (PKM). *Program Kreativitas Mahasiswa* or Student Creativity Program is a prestigious annual scientific program for undergraduate students in Indonesia. The program runs since 2001 and held by DP2M Dikti, Ministry of Education and Culture. In 2013, over 7000 proposals are funded program on a maximum budget of IDR 12,500,000 each. This program aims to improve the quality of undergraduate students in order to become a part of the community who have the academic and/ or abilities professionals, who can implement, develop and disseminate science, technology and/ or the arts and enrich the national culture. This program is geared as an attempt to facilitate the creativity of students in the field of research, creative works, entrepreneurship, and community service. It is undeniable that through this program the government has good intentions, namely to facilitate students to inflame social sensitivity, learn entrepreneurship, technological innovations, and embedded equally important concern for society. However, there are some things that need to be re-examined in the implementation of PKM regulation that potentially grows the seeds of corruption amongst students.

This study becomes an extremely important because it will reveal any irregularities that have being done by students, what are the causes, so we can find the solution to solve the problems. For this reason, it will be revealed about the facts of phenomena that occur, through triangulation data collection, represented by 30 students from 10 different universities[3] in Indonesia. This study is also relevant to the present times which the corruption is seen as something that is very avoidable and combated by any country in the world. Therefore, all forms of corruption need to be solved by looking for the root causes and solutions, so those are not getting worse.

2. Content

Problem of Corruption in Indonesia

Corruption comes from the Latin word *corruptio* or *corruptus*, which literally means decay, ugliness, depravity, dishonesty. In general, corruption is defined as the abuse of public[4]. Since the mid-1990s, countless initiatives against corruption have emerged at the country and international levels. This has been largely due to the fact that the international community recognized the devastating effects of corruption on sustainable development, on political stability and, since 2001, on global security[5]. How dissatisfied with the behavior of the corrupt officials who stole public money. Experience has shown that every country in the world faces the challenges and risks associated with the phenomenon of corruption. However, the ways in which corruption creeps into and reproduces itself in a given society vary widely and depend on a set of historical, political, economic, social and cultural factors[6].

Corruption does not only affects to one aspect of life. Corruption poses a domino effect that extends to the existence of the nation and the state. The widespread practice of corruption in a country will exacerbate the nation's economic condition, for example, the price of the goods to be expensive with poor quality, people's access to education and health becomes difficult, a country's security is threatened, environmental damage, and the image of poor governance at the international level so it could destabilize joints confidence of foreign

[3] 10 universities in this study are Unnes, ITS, ITB, IPB, Unpad, UI, UGM, Unair, Unhas, Undip.
[4] Andi Hamzah, Korupsi di Indonesia: Masalah dan Pemecahannya (Jakarta: Gramedia, 1991), 7.
[5] Karen Hussmann, Anti-corruption policy making in practice: what we can learn for the implementation of article 5 of UNCAC? (Norway: U-4 Anti-Corruption Resource Centre, 2007), 16.
[6] Karen Hussmann, Anti-corruption policy making in practice, 16.

capital owners, prolonged economic crisis, and the country become increasingly mired in poverty.

Damage to roads, collapsing bridges, the overthrow of the train, cheap rice that is not worth eating, exploding gas canister, unfit and uncomfortable public transport, the collapse of school buildings, those are series of fact the poor quality of goods and services as a result of corruption. Corruption causes chaos in the public sector by diverting public investment into other projects where bribes and wages are more readily available. The corrupt officials would add the complexity of the project to hide the corruption practices. At the end, the corruption results in lower quality of goods and services to the public by way of reducing the compliance of building safety requirements, material requirements and production, health and environmental terms, and other regulations. Corruption also reduces the quality of government services and infrastructure and adding pressure on the government budget[7].

Based on the World Bank report, Indonesia is categorized as a country with severe debt, low income (*severely indebted low income country*) and included in the category of the poorest countries in the world such as Mali and Ethiopia. Indonesia is often claimed to be a religious nation, placing religion as important in life[8]. As a religious nation, Indonesia is certainly strongly against corruption. However, Transparency International survey on the ”Global Corruption Barometer”, put political parties in Indonesia as the most corrupt institutions with the value of 4.2 (with a valuation range 1-5, 5 for the most corrupt). Still from the data, in Asia, Indonesia ranked as the most corrupt achievement with a score of 9.25, over India (8.9), Vietnam (8.67), Philippines (8.33) and Thailand (7.33)[9]. Efforts to eradicate corruption in Indonesia have being existed since the nation's independence flag waving[10]. In Indonesia, the awareness of the importance of fighting against corruption becomes the main agenda in the state and nation. *Komisi Pemberantasan Korupsi* (KPK) or Corruption Eradication Commission, is a government agency that tackles corruption cases in Indonesia. The remarkable story of the KPK shows that state capture and grand corruption can be seriously tackled by an anti-corruption agency in a relatively short span of time. In just under five years, the KPK has made tremendous and unprecedented strides in the investigation and prosecution of corruption cases against high-level officials in all branches and sectors of the Indonesian government. It has also made extensive efforts in planting seeds for corruption prevention and education. It has successfully recovered sizable amounts of stolen assets and arguably prevented the theft of many more[11].

Corruption should be viewed as an extraordinary crime which requires extraordinary efforts to eradicate it anyway. Efforts to combat corruption - which consists of two major parts, namely (1) the prosecution, and (2) prevention - would never work optimally if it is only done by government alone without involving community participation. Therefore, this is not excessive if we say that Indonesian students are the important part of the society which is the future heir-expected to be actively involved in efforts to eradicate corruption in Indonesia[12].

Corruption in the land of the country, like the ”unlawful legacy” without a will. He remains sustainable even prohibited by applicable law in any order that came and went. Almost all aspects of life affected by corruption. The causes of corruption include two factors: internal factors and external factors. Internal factors are the corruption causes that come from inside, while external factors are the corruption causes from outside.

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[7] Nanang T. Puspito *et al.*, Pendidikan Anti-Korupsi, (Jakarta: Kemendikbud RI, 2011), 37.
[8] Awaluddin, “Korupsi sebagai Permasalahan Teologis.”
[9] Puspito et al., Pendidikan Anti-Korupsi, 28.
[10] Awaluddin, “Korupsi sebagai Permasalahan Teologis.”
[11] Emil P. Bolongaita, An Exception to the Rule?: Why Indonesia’s Anti-Corruption Commission Succeeds Where Others Don’t – a Comparison with the Philippines’ Ombudsman (Norway: U-4 Anti-Corruption Resource Centre, 2010), 23.
[12] Puspito et al., Pendidikan Anti-Korupsi, v.

Internal factors consist of the moral aspect, for example lack of faith, honesty, shame, attitude or behavioral aspects e.g. consumptive lifestyle and social aspects like family to encourage a person to behave corrupt. External factors can be traced to the economic aspects such as income or salary is not sufficient for, political aspects e.g. political instability, political interests, achieve and maintain power, management and organizational aspects, namely the lack of accountability and transparency, legal aspects, seen in the form of bad legislation and weak law enforcement and social aspects of the environment or society that is less supportive of anti-corruption behavior[13].

Nur Syam gives the view that corruption is caused by a person who tempted to the material world or assets that are not capable of holding. When the urge to be rich can not be hold on while the access to reach it can be obtained through graft, it will be one of corruption. Thus, if the point of view of corruption cause that way, so the causes of corruption is the perception of wealth. The perspective of the richness would lead to a wrong way to access the wealth[14].

Student involvement in efforts to fight against corruption is certainly not the enforcement effort under the authority of law enforcement agencies. The active role of students is expected to be more focused on anti-corruption to help build a culture of anti-corruption in the society. Students are expected to act as an agent of change and driving force of the anti-corruption movement in society. To be able to play an active role, students need to be equipped with enough knowledge about the ins and outs of corruption and its eradication. No less important, to be able to play an active role, students should be able to understand and implement anti-corruption values in everyday life.

PKM and Corruption in Initial Level

In Indonesia, there is a prestigious annual scientific event for higher students named Student Creativity Program or *Program Kreativitas Mahasiswa* (PKM). Thousands of proposals have been received by DP2M Dikti[15] every year and every proposal to get maximum funding of IDR 12.5 millions each. National Students Science Week or *Pekan Ilmiah Mahasiswa Nasional* (PIMNAS)[16] is the peak of PKM activity, held at the college set by Dikti for the willingness and agreement of all university leaders. PIMNAS as a forum for student scientific meetings and communication about creation and product, followed by a student or group of students selected through the PKM and non-PKM ways. PIMNAS also serves as a forum for discussion and dialogue on issues of national development and other current issues. PIMNAS involves public and private universities across the country[17].

PKM demonstrates good purposes of government to develop research activities amongst students. PKM is a manifestation of Entrepreneurship Cultural Development Program in Higher Education or *Program Pengembangan Budaya Kewirausahaan di Perguruan Tinggi* (PBKPT) which is launched by DP2M Dikti. This is the only program that can be accessed and implemented by students as other programs such as Entrepreneurship Lecture or *Kuliah Kewirausahaan* (KWU), Work Effort Lecture or *Kuliah Kerja Usaha* (KKU), Entrepreneurship Internship or *Magang Kewirausahaan* (MKU), Business Consulting and Employment or *Konsultasi Bisnis dan Penempatan Kerja* (KBPK), and the New

[13] Puspito et al., Pendidikan Anti-Korupsi, 39.
[14] Puspito et al., Pendidikan Anti-Korupsi, 40.
[15] Direktorat Penelitian dan Pengabdian kepada Masyarakat (DP2M) Dikti (Direktorat Jenderal Pendidikan Tinggi), is a government agency which supports and stimulates the growth of research activities, community service, and creativity amongst college students, it has orientation to improve the quality of higher education, the nation's competitiveness and welfare in a sustainable manner. See: http://dp2m.dikti.go.id/
[16] In PIMNAS over 400 teams from all over Indonesia compete annually to grab the medals as an honor for their PKM.
[17] See: http://pimnas26.unram.ac.id/

Entrepreneurial Incubator or *Inkubator Wirausaha Baru* (Inwub) is reserved for lecturers only[18].

Unfortunately, there is always a gap between concept and application. As the theories are difficult to apply, many obstacles that make PKM achieve the goals set. Precisely PKM inadvertently teachs students perform acts of corruption. According to the 30 respondents from 10 different universities in Indonesia, the data shows that in their opinion, the mechanism of PKM issued by DP2M Dikti is unrealistic and demanding students involved in breaking the rules. To see the potential for corruption, need to see three things, namely regulators, parenting, and the students themselves. All three led to a corrupt act.

First, as a regulator, DP2M Dikti sets the unrealistic rules that almost impossible to do. For example, in a guidance which is published by DP2M Dikti, the cost of the program will be launched up to IDR 12.5 millions for a proposal. This makes the determination of the student filed a nominal maximum budget even though the program does not need cost that much. If then the proposal is funded, the remaining cost of the program would be used for other purposes. In this context, students are trained to mark up the budget to enrich themselves, which in Article 2 of Law No. 31 of 1999 is threatened with a fine of between IDR 20 millions to IDR 1 billion.

In practice, the cost of the program is not issued by DP2M in one step. In some colleges, the cost of the program was issued in three steps, in early, the middle of the program, and after the report is completed. It is a strange reality because it makes the students reported their actual funds have not been used. The submitted report is a fictitious report tampered with so that will spend the entire cost of the program. A report should be prepared after the program has been completed as a form of accountability. However, in PKM, the report into a file that is formal, just to fulfill the obligation because the report is made before the issuing of the third steps of funds, so these funds are not detected in the using. Very likely the students to use for other personal purposes. Using the budget on things that are not necessarily is belong to corrupt behavior. In addition to reform the regulation, the potential of corruption is fertile due to improper parenting. DP2M Dikti as the organizer did not prepare a proper assistance, monitoring, and evaluation mechanism so that the program is not well controlled.

It must be recognized there are the limitations of DP2M Dikti in controlling all student in the program. As the programs that run in the thousands of amount, DP2M Dikti may not supervise them one by one. Therefore, DP2M Dikti handed assistance to lecturers in each college. Unfortunately, they are also not doing well as assistance. Moreover, they are also occupied in lecturing, community service programs, as well as research.

Although mentoring escapes, those irregularities in PKM should read by DP2M Dikti on monitoring and evaluation session (monev). However, once again to be unfortunate because the monev of DP2M Dikti only performed twice during the program. During this time, the monev is only done with the interviews and only occasionally do the review so that students can make progress reports at will. Expended funds and the rest was never asked.

The potential of corruption also occurs when students notice the final report of the program. Because the report should be submitted even before the fund of the program issued, the report only contains a variety of possibilities. Report on the use of funds tampered with so entire of cost runs out. It means, students are accustomed to make fictitious reports that potentially harm the state.

The fact is unfortunate because PKM is organized and funded by the government. PKM is able to develop scientific treasures, but if the mechanism is not changed it will familiarize students with corruption. Because refer to Article 2 of the Law of Corruption,

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18 "Belajar Korupsi di Program Kreativitas Mahasiswa," Surahmat, accessed February 2, 2014, http://edukasi.kompas.com/read/2009/11/09/17042321/Belajar.Korupsi.di.Program.Kreativitas.Mahasiswa.

corruption is not merely acts of corruption, but also in the form of potential. The participation of corruption in national life must be in clear because corruption violating the rules of Pancasila[19].

The United Nations Convention against Corruption (UNCAC) recognises that corruption is a multifaceted phenomenon that results, among others, from weak governance systems and institutions failing with multiple interactions among each other[20]. Accordingly, if there is corruption, there is actually a weak policy, especially the lack of supervision. These are things that should be fixed in the form of better supervision.

In some countries, such as Georgia, Indonesia, and Tanzania, governments and development partners believe that (good) governance reforms will be more effective in eventually reducing corruption than anti-corruption strategies[21]. The fact should pave the steps to reform the PKM policy or its mechanism.

From 26 of the 30 respondents believe that there are some things that need to be re-examined in the implementing of PKM regulation, because it potentially grows the seeds of corruption amongst students. First, in the PKM budgeting rules, DP2M Dikti does not allow students to include honorium to their proposal. They say that research activity is a professional activity that its quality is measured through track record performance, ranging from needs analysis, proposal writing, drafting instruments, data retrieval, report preparation and continuing until the evaluation. Is professional activity was not eligible for an honorarium? To get around the policies that do not favor, students seek to maximize the budget in PKM proposals. This is done solely to obtain the honor of which have been cultivated. Therefore, the PKM rule should be changed, i.e. in proposing a PKM program, students should be given space to ask honorium in allocation, of course within reasonable limits. If this is enforced, corruption learning opportunities will be closed.

Second, the issuance of PKM funds is not issued in one step, but as in previous years the distribution of funds is issued in three steps, namely at the beginning, middle of program, and after the report is completed. This is strange because the students prepared a report of budget that actually they have not used the budget. This is clearly an opportunity to learn corruption. The report is a fictitious report submitted tampered with in such a way, so as to run out the entire cost of the proposed program. In fact, a report should be prepared after the program has been completed as a form of accountability. That is why there needs to be a strict supervision with tough sanctions, for example students must return the entire grant if proven doing the corruption. DP2M Dikti should ask the rest of the funds when monev session.

Honorarium will make their mindset changed, that the budget surplus in the proposal will be focused on PKM areas, no longer on a personal interest in this case each participant fees. Most students thought indeed diverse. Start of want to add to the experience as the initial provision to hold a link to the community, or the first step of a dedication. Actually, this program is a proper choice that helps students to develop their creativity, or invite students to develop an idea. But with better monitoring and evaluation from DP2M Dikti as the organizer, it can at least minimize irregularities in PKM.

[19] Pancasila is the official philosophical foundation of the Indonesian state. Pancasila consists of two Old Javanese words (originally from Sanskrit), "pañca" meaning five, and "sīla" meaning principles. It comprises five principles held to be inseparable and interrelated: belief in the divinity of God; just and civilized humanity; the unity of Indonesia; democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives; and social justice for all of the people of Indonesia.
See:http://en.wikipedia.org/ wiki/Pancasila_%28politics%29 – accessed March 5, 2014

[20] Karen Hussmann, Anti-Corruption Policy Making in Practice: What We Can Learn for the Implementation of Article 5 of UNCAC? (Norway: U-4 Anti-Corruption Resource Centre, 2007), 12.

[21] Hussmann, Anti-Corruption Policy Making, 30.

3. Conclusions

Indonesian students as agents of change should be actively in the fight against corruption because the students are the generation that will receive the baton of leadership in the coming era. It is time for PKM as a venue for the prestigious scientific event for Indonesian students to be reformed because it has been found many irregularities so far. One of the most important cases is the manipulation of budget funds in order to get the fee, since implementing program in PKM needs extra hard struggle. The allowing of honorarium inclusion in the program proposal would make their mindset changed, that the budget surplus in the proposal will be focused on program areas, so no longer run on a personal interest (in this case, as illegal honorarium). The fact mentioned above need to be followed by DP2M Dikti as the creator of PKM policy. The noble goal must be reached by a process that is well too. There needs a change to create a realistic mechanism. Do not let the government's effort to develop the scientific treasures defiled by potential of corruption. The study about the corruption risk in PKM must be done in the future as this study is a pioneer that still revealing the surface of the problem.

References

- Awaluddin, Irfan. "Korupsi sebagai Permasalahan Teologis: Mengurai Anatomi Pemberantasan Korupsi dalam Al-Qur'an." Paper presented at the ICIS (International Conference Of Islamic Scholars) Jakarta. Accessed January 10, 2014. http://www.academia.edu/2399970/Korupsi_Sebagai_Permasalahan_Teologis_Mengurai_ Anatomi_Pemberantasan_Korupsi_dalam_Al-Quran.
- Bolongaita, Emil P. An Exception to the Rule?: Why Indonesia's Anti-Corruption Commission Succeeds Where Others Don't – a Comparison with the Philippines' Ombudsman. Norway: U-4 Anti-Corruption Resource Centre, 2010. Accessed January 7, 2014. http://www.u4.no/publications/an-exception-to-the-rule-why-indonesia-s-anti-corruption-commission-succeeds-where-others-don-t-a-comparison-with-the-philippines-ombudsman/downloadasset/190.
- DP2M Dikti. *Panduan PKM 2013*. Jakarta: Kemdikbud, 2013.
- Hamzah, Andi. Korupsi di Indonesia: Masalah dan Pemecahannya. Jakarta: Gramedia,1991.
- http://en.wikipedia.org/wiki/Pancasila_%28politics%29 – accessed March 5, 2014
- http://pimnas26.unram.ac.id/ - accessed March 5, 2014.
- Hussmann, Karen. *Anti-Corruption Policy Making in Practice: What We Can Learn for the Implementation of Article 5 of UNCAC?*. Norway: U-4 Anti-Corruption Resource Centre, 2007. Accessed January 7, 2014. http://www.cmi.no/publications/file/2915-anti-corruption-policy-making-in-practice.pdf accessed 7th January 2014.
- Puspito, Nanang T., Marcella Elwina S., Indah Sri Utari, Yusuf Kurniadi, Asriana Issa Sofia, Agus Mulya Karsona, Gandjar Laksmana B., Romie O. Bura, Aryo P. Wibowo. *Pendidikan Anti-Korupsi untuk Perguruan Tinggi*. Jakarta: Kemendikbud RI, 2011. Accessed January 9, 2014. http://baa.unas.ac.id/download/buku%20panduan/Master -Buku-Pendidikan-Anti-Korupsi-untuk-Perguruan-Tinggi-2012_1-1.pdf.
- Surahmat. "Belajar Korupsi di Program Kreativitas Mahasiswa." Last modified November 9, 2009. Accessed February 2, 2014. http://edukasi.kompas.com/read/2009/11/09/17042321/Belajar.Korupsi.di.Program.Kreativitas.Mahasiswa.

SOME CONSIDERATIONS ON FOREIGN LANGUAGE SYLLABUS DESIGN

Norica-Felicia BUCUR*

Abstract

Studies and articles that focus on describing and classifying foreign language syllabuses are dominated by the product / process dichotomy. Nevertheless, this is not always the case, as there are authors who, apparently, use other criteria to produce their own taxonomy. Thus, this paper attempts to provide a brief chronological outline of the various descriptions found in the syllabus design literature, so that the principles underlying the proposed taxonomies could be identified and critical comparisons could be performed.

Keywords*: foreign language, syllabus design, taxonomy, content, methodology, objectives*

1. Introduction

Envisaging curriculum as either product or process has led to characterizing foreign language syllabuses in terms of these two possible models. Foreign language syllabus design literature is indebted to this dichotomy, as many authors (among others Breen 1987a, b; White 1988; Nunan 1988, Johnson 2009) choose this approach when performing their analysis.

Nevertheless, the terminology used by various authors dealing with this topic might differ to a certain extent, and this could cause ambiguity for foreign language teachers less familiar with educational concepts. Moreover, there are authors who do not start their foreign language syllabus description from the product vs process dichotomy, but from other criteria, such as the operations required of the learners (Wilkins, 1976), or content (Krahnke, 1987), as, traditionally, language learning has been seen as a linguistic, rather than an educational matter.

Therefore, a chronological literature review of foreign language syllabus design classifications might prove useful as, in this manner, one could spot out the relation between educational theory and foreign language syllabus design, on the one hand, and, on the other hand, one could sketch the evolution of foreign language syllabus design. Wilkins's *Notional Syllabuses* (1976) will represent the starting point for this paper as it is generally acknowledged as one of the first studies focusing on foreign language syllabus design (Breen 1987a, Krahnke 1987, Yalden 1987, Nunan 1988, White 1988, Widdowson 1990, Long and Crookes 1992, Johnson 2009).

2. Synthetic vs. Analytic Syllabuses

Wilkins's classification of syllabus design into synthetic and analytic is directly related to the operations required of the learner in the acquisition process. Thus, the synthetic syllabus divides the target language into discrete linguistic elements which are gradually

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introduced to the learner, so that the language acquisition process is as smooth as possible. The learner's aim is to resynthesize the language, step by step, until structural diversity is achieved; the grammatical syllabus is considered the best example of the synthetic approach to syllabus design (Wilkins 1976:7). In contrast, analytic syllabuses focus on the learner and his needs and on the kinds of linguistic performance necessary to achieve those goals (Wilkins, 1976:13-14). Situational and notional syllabuses fall under this category, with Wilkins outlining the superiority of the analytic approach.

Though foreign language syllabus design could be labelled as either synthetic or analytic, Wilkins (1976) considers that, in practice, these two options are difficult to meet in *pure* form, as they are rather the extreme points of a continuum. Thus, any actual syllabus, while being designed stemming from the principles defending one of the two approaches, will, in fact, exhibit a certain degree of ambivalence. As for the influence of the educational theory on Wilkins's dichotomy, there is little evidence, the syllabus types included in his analysis being described more from a linguistic point of view.

3. Propositional and Process Plans

Taking into consideration the way in which language knowledge and the capabilities of language use are represented in existing syllabuses, Breen (1987a,b) distinguishes between two main abstract categories that are in an antithetical relation – propositional plans versus process plans, which is in fact a recoinage of the product-process dichotomy. Propositional plans aim to represent what is to be achieved through teaching and learning as formal statements, the expected outcomes being systematically organised and presented in these syllabus types as logical formulae, structures, networks, rules or schemes (Breen, 1987a:85). Process plans, on the other hand, focus on how correctness, appropriacy and meaningfulness can be simultaneously achieved during communication within events and situations (Breen, 1987b:160). Therefore, process plans represent an alternative paradigm, which emerged as views on language, teaching methodology, learner contributions and planning for language teaching underwent dramatic changes.

Formal and functional syllabuses exemplify propositional plans and, although they both strongly rely upon descriptive linguistics and upon language learners' being cognitively able to approach learning in an orderly manner, they differ in what each of them selects as appropriate content and in how they subdivide and sequence this content. Thus, the formal syllabus – known also as the structural or grammatical syllabus – represents the traditional type of syllabus used in foreign language teaching and learning. The selection and subdivision of its content is based on the language descriptions given by academic linguists to various subsystems and their rules (pronunciation, grammar, vocabulary, morphology and the structural features of discourse). Receptive skills receive special treatment as the purpose of the teaching-learning process is for the learner to achieve accuracy by gradual accumulation and synthesis. Unlike the formal syllabus, the functional syllabus explicitly addresses the pedagogic priority of offering learners a semantic and interpersonal framework within which language code or text may be located. The functional or notional syllabus is directly indebted to pragmatics and sociolinguistics, as it is closely connected with the concept of communicative competence[1], being less influenced by the practicalities of classroom experience (Breen, 1987a:88). Thus, this kind of syllabus, using functions, notions or topics, or even situations as the frame for subdivision of content, focuses on acquiring an appropriate

[1] Communicative competence represents how we relate our linguistic competence to our social use competence. (Hymes, 1972)

language behaviour, suitable for particular social activities or events, gradually developing first receptive skills and then productive skills, in a re-cycling and accumulative way.

Task-based and process syllabuses are categorized as process plans, as they both explore the relationship between content and method within a syllabus (Breen, 1987b:158-160). The task-based syllabus organises and presents what is to be achieved through teaching and learning in terms of how a learner may engage his or her communicative competence in undertaking a range of tasks. Two main task types (communication tasks and learning tasks) are incorporated in the syllabus, sharing a mutually supportive role, facilitating learning and generating genuine communication. The process syllabus goes further in relation to procedures for learning, being a representation of how communication and learning to communicate might be variously undertaken in the specific situation of the language classroom. Thus, the process syllabus aims at the teacher and learners' jointly creating and implementing the syllabus. Nevertheless, the process syllabus is an extension of the task-based syllabus and it therefore rests also upon the justifications for the existence of the latter (Breen, 1987b:169).

Breen acknowledges the tensions that exist at theoretical level between the foreign language syllabus prototypes that he included in his analysis. Nevertheless, in his opinion, process plans cannot be thought of in complete isolation from propositional plans. Thus, although process plans obviously stand out due to new alternative features, they also incorporate 'the proven beneficial features of earlier plans' (Breen, 1987b:172). As for the relation between educational theory and foreign language syllabus design, Breen's analysis outlines the importance of assimilating educational concepts when dealing with foreign language syllabus design.

4. Language content, process and product in syllabus design

Dubin and Olshtain (1987) consider that foreign language syllabus design evolved in close connection with the shifting views on the nature of language and the nature of language learning. Thus, in their opinion, foreign language syllabuses vary according to whether they stress language content (the specific matter to be included), process (the manner in which language content is learned) or product (outcomes, such as the language skills learners are expected to master), even if, ideally, syllabus designers should try to give equal weight to all three dimensions (Dubin and Olshtain, 1987:45).

Under the language content dimension, Dubin and Olshtain place the structural-grammatical syllabus, the semantico-notional syllabus, the functional syllabus and the situational syllabus which, in their view, could be organized in linear, modular, cyclical, matrix and story-line format, depending on the objectives that have to be achieved. On the other hand, the process dimension involves (1) the organisation of the language content which brings about certain activities; (2) the roles that teachers and learners take on during the learning process and (3) the types of activities and tasks in which learners are engaged, thus, Dubin and Olshtain (1987:46-48) equating process with methodology. As for the product dimension, Dubin and Olshtain (1987:49) outline the importance of establishing clear syllabus outcomes based on learners' needs, under the form of explicit knowledge and skills to be acquired.

To a certain extent, Dubin and Olshtain's characterisation of syllabus design is less in line with the product-process dichotomy as it appears with authors such as Breen (1987), Nunan (1988) or White (1988). The process and the product dimensions put forth by Dubin and Olshtain could actually represent stages in curriculum design viewed from a utilitarian perspective. This could be explained by the fact that the curriculum and syllabus concepts are

often used interchangeably, and thus overlap in educational literature (see also Yalden, 1987; White, 1988; Rodgers, 1989; Kumaravadivelu, 2006; Thornbury, 2006).

5. Syllabus design: form vs. meaning

Krahnke (1987) analyses foreign language syllabus design assuming that content plays the major part in the entire developing process. Theory of language and theory of learning both influence foreign language syllabus design, as content is made up of subject matter (what to talk about) and linguistic matter (how to talk about it). Therefore, according to Krahnke (1987:4), designing a syllabus means deciding what to teach in what order and in what manner.

Depending on the emphasis given to either form or meaning, Krahnke identifies six archetypes of foreign language syllabus: the structural syllabus, the notional functional syllabus, the situational syllabus, the skill-based syllabus, the task-based syllabus and the content-based syllabus. Krahnke points to the fact that, in practice, these different types rarely occur independently of each other and that any actual syllabus represents a combination of two or more syllabus types, more or less integrated, with one type as the organizing basis around which the others are arranged and related.

Even if the product-process dichotomy is not explicitly used to differentiate between the six types of syllabuses, the other parallelisms used by Krahnke (subject matter vs. linguistic matter; form vs. meaning; language structure vs. language use) are in fact possible terminological equivalents, from the narrower point of view of linguistics literature. Krahnke's detailed description of the strengths and weaknesses of these syllabus types, as well as the well-documented analysis of the possibilities of combining and integrating these syllabus types represent a step forward in foreign language design literature, though approaching this matter from an educational perspective might have proved beneficial.

6. Proportional Syllabus

Apart from the influence exerted by applied linguistics on foreign language teaching, Yalden (1987:7, 59, 61, 77) also acknowledges the relatively new role played by educational theory on foreign language teaching, particularly in the form of curriculum development in institutional settings. In Yalden's *Principles of Course Design for Language Teachers* (1987), the importance of educational thought on foreign language teaching is outlined, though, at times, from a terminological point of view, this is quite difficult to grasp.

According to Yalden, syllabuses fall into two main categories: traditional and contemporary. The former is focused on teaching the grammar or structure of the language, whereas the latter has many variations due to theoretical developments[2] in second language pedagogy, more exactly to communicative teaching methodology, as this was the watchword in that decade. Thus, considering that that a syllabus is the result of the interplay between theory and practice[3], Yalden identifies and briefly introduces five syllabus models: the functional syllabus, the negotiated syllabus, the natural syllabus, the subject matter syllabus and the task-based syllabus. They are all circumscribed to communicative language teaching and they differ in point of the roles assigned to and the relationships built between the linguist/psycholinguist, the teacher and the learner; one could even envisage particular groups of learners who could productively benefit from each type of syllabus (Yalden, 1987:61-68).

[2] According to Yalden (1987:59), the disciplines that constitute the foundations of second language pedagogy are: theoretical and descriptive linguistics, psycholinguistics and sociolinguistics.
[3] In Yalden's words 'between the linguist and the teacher' (Yalden, 1987:61).

Even if, explicitly, the analysis grid for the five contemporary syllabuses was not conceived based on the product-process dichotomy, the discussion that follows it is developed in terms of the product-process divide[4]. Yalden (1987:74) stresses out the benefits of the communicative approach to language teaching and, hence, designing the foreign language syllabus focusing on the process dimension: 'teachers and course designers ought to be much more concerned with the way learners may act upon and interact with linguistic data than with the prior selection and organisation of the data'. Nevertheless, Yalden is in favour of a combined approach to syllabus design – the proportional syllabus. Developed in two phases[5], this type of syllabus 'can achieve a certain coincidence between the needs and aims of the learner and the activities that will take place in the classroom' (Yalden, 1987:86).

7. Product-oriented syllabuses and process-oriented syllabuses

In Nunan's view there is a broad and a narrow approach to syllabus design. According to the narrow view, syllabus design represents the selection and grading of content, whereas the broad view advocates the importance of including methodology (selection of learning tasks and activities) in the syllabus design process (Nunan, 1988:5). These opposing views to syllabus design are in fact instances of the product-process dichotomy, which Nunan reduces to 'the knowledge and skills which learners should gain as result of instruction' versus 'the learning experiences themselves' (Nunan, 1988:27).

As far as content is concerned, it could comprise all or at least some of the following elements: grammatical structures, functions, notions, topics, themes, situations, activities and tasks. According to Nunan (1988:12), 'each of these elements is either product or process oriented, and the inclusion of each will be justified taking into consideration the beliefs about the nature of language, the needs of the learners or the nature of learning'. Thus, these variables will dictate the design of the required syllabus.

Though starting from the analytic-synthetic distinction proposed by Wilkins (1976), Nunan (1988) goes further in his analysis of the product-oriented syllabuses, suggesting that the term 'synthetic' may be applied to any syllabus in which the content is product-oriented. Thus, the grammatical (or structural) syllabus and the functional-notional syllabus exemplify this type of syllabus, as they focus on the end products or results of the teaching/learning process.

As for process-oriented syllabuses, Nunan distinguishes between two main categories: procedural syllabuses and task-based syllabuses. Relying on the classroom processes which stimulate learning, both types of syllabuses specify the tasks and activities that learners will engage in class. Nevertheless, they are different in practice: the procedural syllabus exclusively focus on learning processes and there is little or no attempt to relate these processes to outcomes, whereas with the task-based syllabus, the designer conducts a needs analysis which yields a list of the target tasks that the targeted learners will need to carry out in the 'real-world' outside the classroom (Nunan, 1988:44-48).

8. Type A Syllabuses and Type B Syllabuses

White (1988:45) uses a new terminology to distinguish between existing syllabuses: Type A Syllabuses and Type B Syllabuses, defining the former in terms of an interventionist approach, which gives priority to the pre-specification of linguistic or other content or skill

[4] Yalden (1987:74) uses the phrase 'process-oriented' to label the natural syllabus and the subject matter syllabus
[5] Phase 1 = preparing the 'protosyllabus'; Phase 2 = designing and implementing the pedagogical syllabus.

objectives and the latter in terms of a non-interventionist, experiential, natural growth approach. Thus, despite employing a different terminology, in White's study, we have the same dichotomy – product versus process (relabelled as A=what vs B=how), reiterated: Type A Syllabuses focus on the goals to be attained and the content to be taught; with Type B Syllabuses, the content is subordinated to the learning process and methodology.

In type A tradition, White (1988) includes 5 syllabuses, which differ in point of content selection and organisation: (1) the structural syllabus; (2) the functional syllabus; (3) the situational syllabus; (4) the topic-based syllabus and (5) the skill-based syllabus. Going on the same lines as Krahnke, White (1988) stresses the difficulty of identifying these syllabuses in pure form, suggesting that, in practice, hybrid syllabuses are most common, as they represent possible combinations of type A syllabuses, aiming to reach a balance between form and function.

According to White (1988:94-95), there are two syllabuses which belong to type B tradition: the process syllabus and the procedural syllabus. Both syllabuses focus on methodology, but the former is learner-led, being impossible to predict in advance what route the syllabus will follow, whereas the latter is teacher-led, the selection and the organisation of the tasks being controlled by the teacher. Moreover, each of the two Type B syllabuses approaches learning differently: the process syllabus is indebted to cognitive theories of information processing and learning; the procedural syllabus shows more direct influence from Second Language Acquisition theory and research.

Thus, with White (1988), just like with Breen (1987a,b), developments in educational theory are fully assimilated into the discussion of foreign language syllabus design. Educational concepts are used to distinguish between types of syllabus referred to in the foreign language teaching literature, marking a new stage in the field.

9. Three approaches to task-based syllabus

After performing a brief critical review on syllabus design literature (by mainly referring to Wilkins's and White's descriptions), Long and Crookes (1992) focus on process syllabuses, considering their potential and contrasting their features. Therefore, Long and Crookes (1992) are not concerned with reinforcing the product-process dichotomy or devising a new foreign language syllabus classification, but rather with describing Type B syllabuses in point of strengths and weaknesses and with providing arguments for approaching foreign language syllabus design from this perspective.

For Long and Crookes (1992), there are three possible alternatives for the process dimension of foreign language syllabus design: procedural, process and task syllabuses. As far as the procedural and the process syllabuses are concerned, Long and Crookes' descriptions are similar to White's (shortly presented in the previous section of this paper). Nevertheless, Long and Crookes go further, pointing to existing flaws in the conception of both procedural and process syllabuses. Thus, for the procedural syllabus, Long and Crookes (1992:37) point to three problems: there is no needs analysis that could lead to task selection; task grading and sequencing are arbitrary processes; the importance of form in foreign language teaching is disconsidered. As for the process syllabus, criticisms go along the same lines: no needs identification; no clear indication for task selection and grading; no reference to form; no relation with theory or research in Second Language Acquisition (Long and Crookes, 1992:41).

Overcoming the weaknesses of procedural and process syllabus, the task-based syllabus could represent 'a viable unit around which to organize language teaching and learning opportunities' (Long and Crookes, 1992:27). Thus, according to Long and Crookes (1992:41), this type of syllabus is an improved formula as it well-grounded on (1) the findings

about the processes involved in second language learning; (2) the findings of second language classroom research; (3) principles of course design made explicit in the 1970s, chiefly in EFL contexts, for the teaching of languages for specific purposes. And yet, the task-based syllabus also evinces some problems: there are limits with second language acquisition and classroom research because of inconsistent methodology; little empirical support available for parameters of task classification and grading; the difficulty of defining the concept of 'task'; decreased learner autonomy due to preplanning and guidance; no complete implementation and evaluation of this type of syllabus. Therefore, Long and Crookes (1992: 47) suggest that further classroom research is needed, as this could provide the badly necessary support especially for task-based syllabus.

10. The Integrated Syllabus

Richards' approach to foreign language syllabus design is not stemming from the product-process dichotomy. In his study, Richards enumerates the various syllabus frameworks available in the literature, explaining their organizing principles, making no reference to either the product or the process dimension. Thus, according to Richards (2001: 153-165), the options in foreign language syllabus design are: the grammatical or structural syllabus, the lexical syllabus, the functional syllabus, the situational syllabus, the topical or content-based syllabus, the competency-based syllabus, the skills syllabus, the task-based syllabus, the text-based syllabus. By pointing to the strengths and weaknesses of each syllabus, Richards' description is meant to provide a documented analysis of possible options, informing those involved in foreign language syllabus design of the micro and macrolevels characterizing any syllabus planning. Thus, sharing Krahnke's view, Richards (2001:164) advocates the necessity of approaching the syllabus in an integrated manner, as in practice 'all syllabuses reflect some degree of integration.'

11. The Multidimensional Syllabus

In labelling existing syllabuses, Johnson uses the product-process dichotomy, as well as the synthetic-analytic and type A and type B distinctions pointed earlier in this paper. The seven syllabus types identified by Johnson (2009:309-333) are: the 'traditional' structural syllabus, the lexical syllabus and the notional/functional syllabus, which belong to the product tradition and the process syllabus, the procedural syllabus, the task-based syllabus and the content-based syllabus which are circumscribed to the process dimension. Similarly with previously mentioned studies, Johnson critically analyses each syllabus starting from the learning and teaching theories that lie behind the syllabuses.

Acknowledging the gap between theory and practice in syllabus design, Johnson (2009: 330) considers that the seven syllabus models are not 'mutually exclusive', as 'different syllabus specifications may be combined to create what is sometimes referred to as the *multidimensional syllabus*'. Even if it is difficult to find a balance among the parameters that could be used to project a multidimensional syllabus, Johnson (2009: 330-331) suggests two possibilities: (1) choosing one main unit of organisation, whereas the others revolves round it; (2) shifting the unit of organisation at different points in the course for as wide a coverage as possible. Thus, even if, in theory, syllabus models could favour *part or whole*, *form or meaning*, *control or freedom*, in practice, one could combine them by means of the multidimensional syllabus.

12. Conclusions

This brief literature review on foreign language syllabus design was mainly meant to function as a starting point for those interested in this topic. This paper also aimed to critically compare the descriptions provided by some of the most influential authors in the field, so that each author's contribution could stand out and the evolution of foreign language syllabus design in the last four decades could be approached by those who are less familiar with the theoretical aspects of foreign language syllabus design.

Chronologically, literature on foreign language syllabus design has little by little become indebted to the product-process dichotomy. Gradually assimilating findings and developments in linguistics, educational psychology, sociolinguistics and education, foreign language syllabus design is now a complex task and it is important for both syllabus designers and teachers to be familiar with the existing options. Even if, as a teacher, one could rely on previous experience to foreign language teaching and learning when making decisions on what and how to teach, it might be sensible to consider that better results are more easily achieved and, moreover, the teaching-learning process perceptibly improves if intuition is accompanied by theoretical knowledge tested in practical circumstances.

References

- Breen, Michael P. [1987a]. "Contemporary Paradigms in Syllabus Design. Part I", Language Teaching, 20, pp.81-92, Cambridge: Cambridge University Press.
- Breen, Michael P. [1987b]. "Contemporary Paradigms in Syllabus Design. Part II", Language Teaching, 21, pp.157-174, Cambridge: Cambridge University Press.
- Dubin, Fraida; Olshtain, Elite. [1986]. Course Design: Developing Programs and Materials for Language Learning. Cambridge: Cambridge University Press.
- Johnson, Robert Keith [2009]. Foreign Language Syllabus Design, în K. Knapp & B Seidlhofer (eds), Handbook of Foreign Language Communication and Learning (pp. 309-340). Berlin: Mouton de Gruyter
- Krahnke, K. [1987]. Approaches to Syllabus Design for Foreign Language Teaching. Englewood Cliffs: Pretice Hall
- Kumaravadivelu, B. [2006] Understanding language teaching : from method to postmethod, New Jersey: Lawrence Erlbaum Associates, Inc., Publishers
- Long, M., & Crookes, G. [1992]. Three approaches to task-based syllabus design. Tesol Quarterly, 26, pp. 27-56.
- Nunan, David. [1988]. Syllabus Design. Oxford: Oxford University Press
- Richards, Jack C. [2001]. Curriculum Development in Language Teaching. Cambridge: Cambridge University Press
- Thornbury, Scott. [2006]. An A-Z of ELT. A dictionary of terms and concepts used in English Language Teaching. Oxford: Macmillan
- White. Ronald V. [1988]. The ELT Curriculum – Design. Innovation. Management. Oxford: Blackwell Publishing
- Widdowson, H. G. [1990]. Aspects of Language Teaching. Oxford: Oxford University Press
- Wilkins, D. A. [1976]. Chapter One. Introduction: synthesis and analysis, în Notional Syllabuses, Oxford: Oxford University Press
- Yalden, Janice [1987]. Principles of Course Design for Language Teaching. Cambridge: Cambridge University Press

A PRACTICAL APPROACH TO THE METHODOLOGY OF ESP TEACHING

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Abstract

The ability to master specialized terminology in English plays an ever increasing role in the selection of candidates for employment due to the internalization of the labour market and of the research activity exchanges.

Subsequent to Romania's joining the EU, the vacancies available on the European labour market, including in the academic area, represent the major factor that has determined an increase in the interest paid in the acquisition of specialized terminology. This interest is shared by trainees, trainers, authors of textbooks and ESP (English for Specific Purposes) specialists.

In the present paper, we intend to outline some of the main directions, methods and strategies that an ESP course should follow for providing high-quality and up-to-date information to the trainees interested in acquiring specialized vocabulary for their future workplaces.

Finally, we intend to anticipate trends that the evolution of specialized foreign language teaching methodology will follow in the near future.

Keywords: *ESP teaching methodology, ESP task-oriented documentation, disambiguation strategies for specialized vocabulary acquisition, the use of official on-line resources, technological dimension of ESP methodology.*

1. Introduction

Language teaching methodology has benefited, like many other areas of study, from the advantages which IT technology offers to trainers and trainees and which have influenced the manner of devising the presentation of the studied information, as well as its dissemination and evaluation with the result that, at present, ESP methodology is substantially influenced by the computer-based learning strategies.

The modern computer-based tools of teaching and studying a foreign language have considerably improved the methodology of ESP. Thus, the observation made by Jack C. Richards[1], according to whom, "language teaching can be conceived in many different ways – for example, as a science, a technology, a craft or an art" – has been interpreted and exploited in the present paper as illustrating a new dimension of teaching: the technological one. From this perspective, this article stresses the importance that should be laid on ESP task-oriented documentation and the guiding of trainees to perform high-quality task-oriented documentation in an attempt to help them accomplish future work tasks and surpass linguistic difficulties which are inherent in a multinational company.

By task-oriented documentation work, we refer to the assignment of ordinary professional tasks to the trainees while also providing them the necessary sources for documentation: both the printed resources provided by libraries and the on-line available official ones. From this point of view, the facilities offered by free on-line official

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[1] *Methodology in Language Teaching. An Anthology of Current Practice*, edited by Jack C. Richards, Willy A. Renandya, Cambridge University Press, 2002, p. 19.

documentation that is available in more than one foreign language are numerous: there are many on-line official documentation sources[2], which also provide the phonetic transcript and recording of the native pronunciation of the searched word(s), while the contextualization of the terms prevents ambiguous or inaccurate translations.

2. Content

In the last few years in Romania, ESP trainers have noticed a more and more intense concern for acquiring an ILEC certificate, as well as a certificate in medical English (sTANDEM); the latter case is determined by the fact that medical school graduates are eager to obtain a medical position in the European Union countries, especially in the Western ones, hence a particular interest in mastering English for medical purposes. As to the use of English for economic purposes, this has been one of the most common trends in Romania after December, 1989, under the influence of Romania's transition towards a free market economy.

In consequence, the services providing specialized language in English are more numerous both in public and private higher education institutions, as well as in language schools.

2.1. The main difficulties encountered by ESP trainers and trainees

When trying to identify the best teaching methodology and resources for ESP acquisition, trainers face a series of difficulties: the undergraduates and graduates often have a low proficient level that does not allow them to get involved in an ESP course with success[3]; the teaching methodology that they use should be less theoretical and more student-oriented (thus, trainers must use textbooks that promote tasks which help trainees develop their linguistic skills in general; trainers must also consider the professional tasks that trainees might be assigned in the future; in this respect, exercises which are meant to ensure the accuracy of a translation work have to be doubled by the development of the students' reading, speaking, writing and listening skills). In this respect, the present article aims to present a methodology that relies on the advantages which on-line official documentation provides to trainees. Basically, a special interest is paid in on-line sources of information. Finally, the paper emphasizes the idea that the students' training period must be concluded with a simulation of a specialized certificate examination in the area of specialization in which that student is enrolled (from this perspective, university curricula should include at least training courses for developing the students' skills that are necessary for obtaining a BEC/ILEC/TOLES/sTANDEM[4] certificate).

When conceiving an ESP teaching methodology, trainers must consider whether their target group is made up of students / employees, respectively whether their target groups have a low/intermediate/advanced level of knowledge. Hence trainers must decide what resources they need to use, the manner in which they should organize the studied notions for trainees, the skills that they have to develop more or most (e.g. for a nurse / doctor, speaking skills are fundamental, as well as reading skills; for an accountant, reading and writing skills are crucial, whereas, for a lawyer: speaking, reading and writing skills are equally important; finally, for a paralegal, writing and reading skills are the most important ones).

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[2] We strongly encourage and recommend students to consulted official documents that are available on line as parallel texts in order to identify alone unknown specialized vocabulary.

[3] This situation is not rare in Romanian universities (hence the necessity to evaluate the students' general level of knowledge first of all, and only then to decide whether students should attend an ESP course or not).

[4] sTANDEM stands for Standardised Language Certificate for Medical Purposes; this test has been introduced thanks to a project supported by the European Commission under the Lifelong Learning Programme for 2011-2014. Nowadays this test may be passed by Romanian students in Medicine, as well.

Besides the inherent difficulties of creating valuable ESP resources for students and trainees in general, ESP trainers face another difficulty: the *marginal* position occupied by ESP in academic curricula and at workplace, as Marjatta Huta, Karin Vogt, Esko Johnson and Heikki Tulkki suggest: "One of the dilemmas of language teaching, in both academic and workplace contexts, is that resources are often limited and LSP [Language for Specific Purposes – my explanation] becomes marginalized as an activity separate from the rest of daily workplace interaction. Teachers are only peripheral participants in the workplace community, with limited access to the practices and values of the professions they are dealing with."[5] The authors quoted above appreciate that for enhancing the quality of teaching a foreign language for specific purposes it is necessary to integrate the trainees within a language environment that is professionally-oriented[6]. Thus, the trainer should consider the needs that the trainees are going to have in the future: individually, at the workplace or in society. In this respect, the present article suggests including in ESP courses on-line documentation, besides the classical one.

2.2. Preliminary, on-going and final assessment

However, any teaching methodology should rely on preliminary, on-going and final assessments, which, in their turn, should be adapted to the needs of the trainees: job interview, the accomplishment of specific professional tasks.

Preliminary assessment is crucial for it informs the student if he/she may keep up with the group of trainees in the accomplishment of the assigned tasks. For students who pass the preliminary assessment it is of crucial importance to continue the evaluation all through the course period and, finally, at the end of the teaching process in order to monitor the trainees' progress.

The present approach to ESP teaching relies on developing the student's documentation skills so that, at the end of the training period, those who attended to ESP course are able to manage alone in deciphering or translating a specialized text. Thus, the present article is structured in such a way that it reveals the steps that ESP trainers must follow in selecting resources, assigning tasks, guiding trainees and monitoring their progress. The final goal of this attempt is to train students for facing specialized language in everyday professional contexts.

2.3. Documentation

The documentation strategies mentioned above must insist on the contextualization of terms so that students could disambiguate words or pairs of words that they often misunderstand.

Another important task that trainers must deal with is represented by the sources of documentation that they recommend to trainees and the use of these documentation sources in the process of teaching. Thus, basically, students tend to resort to dictionaries or glossaries when dealing with a specialized text and they find it difficult to identify certain specialty terms and phrases in the 'printed' sources of information. However, today, given the large number of official documents that are posted on-line for the general access of the public, students should be guided and encouraged towards making reference to these sources and resources as often as necessary, in parallel with the printed books.

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[5] Marjatta Huta, Karin Vogt, Esko Johnson, Heikki Tulkki, *Needs Analysis for Language Course Design. A Holistic Approach to ESP*, Cambridge: Cambridge University Press, 2013, p. 8.
[6] Idem.

The present paper focuses on the use of a multiple-source set of documents, including the official on-line documentation (including of visual dictionaries, especially for medicine) together with the classical sources of reference: encyclopaedias, dictionaries and glossaries.

Thus, a Romanian student at the faculty of accounting who is assigned the task of dealing with the chart of accounts and the balance sheet in Romanian and English, if guided properly at the practical course of ESP, will resort to the chart of accounts posted on-line by famous audit firms, for example. Similarly, a law student should be guided to use on-line sources, like European case-law, which facilitates the fast identification of judicial terms in European languages so much the more jurisprudence is uploaded as parallel texts most of the time. Finally, a student in medicine should be encouraged to use anatomical visual dictionaries.

After this initial stage of learning how to search for the translation of unknown specialized terms and phrases, students should be motivated to start speaking, reading, translation and writing skills tests that are, basically, provided by the practical courses used at the university. Tests assigned to students should be progressive as to their level of difficulty. Once terminology is introduced in matching type exercises, fill in the gaps tests could be used, as well as multiple choice tests, to finally ask students solve reading and translation exercises and to draw up writing homework tasks.

2.4. Disambiguation

Disambiguation strategies should insist on contextualization through combinations of verbs and nouns, nouns and adjectives, adjectives and adverbs, respectively verbs and adverbs in order to help the student study the terms in concrete professional contexts, while avoiding to make grammar mistakes.

2.4.1. Disambiguation through visual recognition and contextualization

A method that students appreciate when searching for unknown specialized terms and phrases is to use visual dictionaries[7] (especially for medicine and mechanical engineering) and parallel texts (for the area of social sciences, in general), as well as glossaries that adapted to a distinct branch of an area of study (e.g. the use of technical terms on the economics and finance of health services[8]).

The advantages of using parallel texts are largely exploited by ESP trainers and trainees, as well. Thus, consider the following two tables given below to spot the bolded terms both in Romanian and in English.

Table 1

RO	**EN**
La data de 27 februarie 2003, Curtea Suprema de Justitie a respins o cerere (…) introdusă de procurorul general, la solicitarea reclamanților, **pentru casarea hotărârii din 14 mai 2001**, cu motivarea că era contrară prevederilor art. 1 din Protocolul nr. 1 la Convenție și principiului securității raporturilor juridice. Instanța a considerat că vânzarea fusese realizată **cu buna-credință** și a observat că principiul securității raporturilor juridice nu fusese încălcat, deoarece	On 27 February 2003 the Supreme Court of Justice dismissed an application (...) by the General Prosecutor, acting at the instance of the applicants, **to have the judgment of 14 May 2001 quashed** on the grounds that it was contrary to the provisions of Article 1 of Protocol No. 1 of the Convention and to the principle of legal certainty. The court considered that the sale had been made **in**

[7] See the Free Anatomic Atlas on: http://www.ikonet.com/en/health/virtual-human-body/virtualhumanbody.php - accessed on 3rd February 2014.

[8] J. L. Roberts ,Consultant for Health Economics ,WHO Regional Office for Europe, *A glossary of technical terms on the economics and finance of health services*, World Health Organization Regional Office for Europe, Copenhagen, 1998.

vânzarea a precedat hotărârea definitiva prin care s-a dispus restitutio in integrum și, chiar mai mult, foștii chiriași nu fuseseră părți în procedura respectivă, astfel încât hotărârea definitivă respectivă nu le era opozabilă."[9]	**good faith** and observed that the principle of legal certainty had not been infringed, as the sale had preceded the final judgment which ordered *restitutio in integrum* and, moreover, the former tenants had not been parties in that set of proceedings, therefore the final judgment was not opposable by them."[10]

The use of multi-lingual parallel texts (see the above table and the one below, ***Plan contabil / Charts of accounts / Plan comptable***), which is drawn up by KPMG in 3 foreign languages, facilitates the fast identification of unknown specialized terms/phrases in these languages:

Table 2[11]

RO	EN	FR
Clasa 1 – Conturi de capitaluri	**Class 1 – Capital accounts**	**Classe 1 – Comptes de capitaux**
10 Capital şi rezerve	**10 Capital and reserves**	**10 Capital et réserves**
101 Capital	101 Capital	101 Capital
1011 Capital subscris nevărsat	1011 Subscribed and not paid in share capital	1011 Capital souscrit non versé
1012 Capital subscris vărsat	1012 Subscribed and paid in share capital	1012 Capital souscrit - versé
1015 Patrimoniul regiei	1015 Patrimony (autonomous companies)	1015 Patrimoine des régies
1016 Patrimoniul public	1016 Public patrimony	1016 Patrimoine public
104 Prime de capital	104 Premium related to capital	104 Primes liées au capital social
1041 Prime de emisiune	1041 Share premium	1041 Primes d'émission
1042 Prime de fuziune/divizare	1042 Merger premium	1042 Primes de fusion
1043 Prime de aport	1043 Share premium contribution in kind	1043 Primes d'apport
1044 Prime de conversie a obligaţiunilor în acţiuni	1044 Debenture conversion premium	1044 Primes de conversion d' obligations en actions
105 Rezerve din reevaluare	105 Revaluation reserve	105 Réserves de réévaluation
106 Rezerve	106 Reserves	106 Réserves
1061 Rezerve legale	1061 Legal reserve	1061 Réserve légale
1063 Rezerve statutare sau contractuale	1063 Statutory or contractual capital reserve	1063 Réserves statutaires ou contractuelles
1064 Rezerve de valoare justă	1064 Fair value reserve	1064 Réserves de valeur juste
1065 Rezerve reprezentând surplusul realizat din rezerve din reevaluare	1065 Reserve representing the revaluation reserve surplus	1065 Réserves représentant l'excédent de
1067 Rezerve din diferenţe de curs valutar in relaţie cu investiţia neta intr-o entitate străina		

[9] For the full versions (English and Romanian) of the judgment use the following links: http://www.scj.ro/strasbourg%5Cgrigoras%20romania%20EN.html – accessed on 12th March 2013, as well as: http://www.euroavocatura.ro/legislatie/581/Hotararea_CEDO_in_Cauza_Grigoras_impotriva_Romaniei– accessed on 12th March 2013.

[10] Idem.

[11] http://www.kpmg.com/ro/ro/editie-speciala/pagini/planul-conturi-2013.aspx - accessed on 1st March 2014.

1068 Alte rezerve 107 Rezerve din conversie4 108 Interese care nu controlează 1081Interese care nu controlează – rezultatul exerciţiului financiar.	1067 Reserves from foreign exchange differences in respect to a net investment in a foreign entity 1068 Other reserves 107 Conversion reserve 108 Minority interest 1081 Minority interest - profit (loss) for the period.	réserves de réévaluation 1067 Réserves provenant des différences de taux de change correlés a l'investissement nette dans une entité étrangère 1068 Autres réserves 107 Réserves de conversion 108 Intérêt minoritaire 1081 Intérêt minoritaire – résultat de l'exercice financier.

2.4.2. Disambiguation through synonymy and its application in short contexts

Using synonymy (including Romanian translations) and afterwards contextualization for the specialized terms that are studied could be of great help for trainees who are eager to develop vocabulary skills. For synonymy exercises to be efficient, students should also be encouraged to keep record of the new word usage in short contexts, like:

- Verbs + nouns:

To foresee = to anticipate, to predict (a prevedea = a anticipa). E.g.: A person who intends to commit a certain act can **foresee** the result of this act.

To provide = to set forth (a prevedea = a stipula). E.g.: The clause **provides** that any litigation shall be settled through arbitration.

- Nouns + adjectives:

Mandatory provisions = compulsory provisions (= prevederi obligatorii). E.g.: The contract contains **mandatory provisions** for each party.

Lenient penalty = a non-grievous penalty (= pedeapsă lipsită de severitate). E.g.: The judge passed a **lenient penalty** for the accessory to the fact.

Biased juror (= jurat părtinitor) = a juror who lacks impartiality. E.g.: The **biased juror** was replaced with an impartial one.

- Adjectives + adverbs:

Allegedly guilty = supposedly guilty (= presupus vinovat). E.g.: The **allegedly guilty** driver is being tried at the Tribunal.

Grievously harmed = seriously injured (= grav vătămat). E.g.: The **grievously harmed** citizen crossed the street when the traffic lights were red.

Deliberately perpetrated = intentionally committed (= comis în mod deliberat). E.g.: A **deliberately perpetrated** criminal act is punished at least with imprisonment.

- Verbs + adverbs:

to debate intensely = to discuss (= a dezbate intens). The MPs are intensely **debating** the bill / the MPs are debating the bill **intensely**.

to secure entirely (= a securiza în totalitate). E.g.: The role of the guards **is to entirely secure** the building / the role of the guards is **to secure** the building **entirely**.

to deter efficiently = a preveni în mod eficient. E.g.: The Government uses many instruments that **deter** fiscal evasion **efficiently** / that **efficiently deter** fiscal evasion.

3. Conclusions

Specialists in foreign language acquisition and academics who deliver practical courses of foreign languages in colleges and universities must maintain an updated data basis

of both printed and on-line resources of texts and documents that are fundamental for the areas of study for which they provide foreign teaching courses, alongside with the textbooks they are using at seminars and courses. In this way, ESP trainers keep up with the latest terminology that is used in the domain for which they provide practical courses and are able to advise trainees how to use on-line documentation in order to manage individually to translate unknown terms even in the absence of a printed dictionary.

References:

- Huta, Marjatta, Vogt, Karin, Johnson, Esko, Tulkki, Heikki, *Needs Analysis for Language Course Design. A Holistic Approach to ESP*, Cambridge: Cambridge University Press, 2013, p. 8
- *Methodology in Language Teaching. An Anthology of Current Practice*, edited by Jack C. Richards, Willy A. Renandya, Cambridge University Press, 2002, p. 19
- Roberts, J. L., Consultant for Health Economics ,WHO Regional Office for Europe, *A glossary of technical terms on the economics and finance of health services*, World Health Organization Regional Office for Europe, Copenhagen, 1998
- http://www.ikonet.com/en/health/virtual-human-body/virtualhumanbody.php - accessed on 3rd February 2014
- http://www.scj.ro/strasbourg%5Cgrigoras%20romania%20EN.html – accessed on 12th March 2013
- http://www.euroavocatura.ro/legislatie/581/Hotararea_CEDO_in_Cauza_Grigoras_impotriva_Romaniei– accessed on 12th March 2013
- http://www.kpmg.com/ro/ro/editie-speciala/pagini/planul-conturi-2013.aspx - accessed on 1st March 2014.

GLORIOUS DISCOURSES AND COMPLETE IGNORANCE: STUDENT PERCEPTION ON CANTEMIR'S WORK

Maria CERNAT*

Abstract

Although the works of Dimitrie Cantemir and his son Antiloh are consideed among the most important in the fields of history and litterature, nowadays it is hard to find a research initiative or a research program specialized in the study of Dimitrie Cantemir's work. It is the indisputable merit of a Romanian born historian like Stefan Lemny to offer a very complex and profound account on the life and work of Dimitrie and Antioh Cantemir. But, like other remarkable efforts, this is an individual research. It is my intention to focus on the recent works regarding the life and work of Dimitrie Cantemir in order to prove that beside the moments of celebration there is little or no interest in the work of this remarkable Romanian intellectual. I parallel this situation with the information students have on Dimitrie Cantemir. In the first section of my article I shall focus on how much information on Cantemir do our students rely have. Thus I shall make an empirical research questioning the students of the first year on the most common facts about Cantemir's work and life. In the second section of my article, I shall try to answer questions like how many volumes having as main subject matter the works of Cantemir have been published recently. In what branches of science the works of Cantemir have been mostly analyzed? What is the ratio between the works concerning his personality and those concerning specific topics in specific works of Dimitrie Cantemir.

Keywords: *Dimitrie Cantemir, Antiloh Cantemir, recent works on Cantemir, information on Cantemir*

Introduction

This year we are celebrating 340 years since the birth of one of the most famous Romanian intellectuals, Dimitrie Cantemir. Usually, on such occasions it is accustomed to make positive remarks on the distinguished personality and work of that personality. In the Romanian academic tradition those are moments where researchers gather together in the joined effort to remember important things about important persons. It is not my intention to take a separate path by trying to diminish in some way this effort of celebration. Still I must discuss a very provocative event taking place recently. What I am taking about is the "countermovement" in the critical reception of important Romanian cultural personalities. The most important one was the 265th number of the Romanian journal *Dilema* where a set of literary critics tried to "temper" or to "de-mistify" the personality of our national poet *Mihai Eminescu* by trying to liberate him form the "mortifying eulogies". This started a vivid and sometimes passionate debate in the cultural Romanian media but the results were not those anticipated by the initiators of this debate. Suddenly to fight camps appeared in the cultural Romanian arena: those trying to defend the Dilema's literary critics[1] and those trying to defend our national poet and myth. There is no need to say that this soon fueled vicious personal attacks and it all mounted to a trivial fight that took the otherwise truly remarkable

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[1] http://dilemaveche.ro/sectiune/tema-saptamanii/articol/ilustra-victima-comploturi-impotriva-lui-eminescu, *online* document accessed at 08.11.2013.

personality as a pretext for expressing their anger and frustration. Antisemitism, ultra-nationalism, and delusional affirmations were addressed to those signing the (in)famous 265 number of Dilema. This is the main reason that I must clearly state that it is not my intention to transfer this kind of debate form the case of Eminescu to the case of Cantemir. Still, I cannot ignore the fact that there is always a temptation to write exaggerated apologetic discourses in such occasions. It is not the main objective of this article to further analyze the case of the so-called attacks on Eminescu but I believe that this offered a more clear view on the way Romanian nationalism is transforming important cultural personalities in simple means to an ideological end that can be easily summarized like that: our nation is great since we have such important personalities. In the attempt of gaining the independence form URSS, Nicolae Ceaușescu, turn on the nationalist "protochronist"[2] discourses in a total contrast with the ideals of the socialist revolution[3].

I do not agree with some of the "strategies" used to "de- mistify" the personality of Eminescu. If so many articles are written only to praise the poet's personality as if it was the Holy Grail the countermovement should not base its strategy on the defamation of the personality. This type of discourse could only be fought by writing well documented critical perspectives on specific topics in the author's work. The key is not to criticize the personality but the people using the indisputable merits of that personality to match their ideological agenda. And this is a very important objective since I believe it is exactly this type of transforming a remarkable personality into a political myth that creates a gap between the works of the cultural personality, Dimitrie Cantemir, in our case, and the students. Although many would feel it is a shameful thing to admit that our students know little or nothing on Cantemir it consider it is now the time to truly acknowledge just how ignorant our students rely are when it comes to Cantemir's work and personality. This is exactly why in the first part of my paper I present the results of an empirical research regarding the level of information on Cantemir our students have. Than in the second part of my article I shall make an analysis of the works on the famous Romanian intellectual that can be found in one of the biggest academic libraries opened to students: The Central University Library. As one can already anticipate there is little of no interest in bringing the personality of Dimitrie Cantemir closer to the students. It is not my intention to prove that the "festivist discourses" are the only reason for the ignorance of our students. This is only one of the many factors contributing to the lack of interest and information in Cantemir's work and personality. Yet I consider it is very important to oppose the grandiose festive discourses on one hand with our student's almost complete lack of information on Dimitrie Cantemir.

1. Student perception on Dimitrie Cantemir's work and personality

This year I conducted an empirical research having as subjects the first year students enrolled in an academic program in the field of social studies[4]. It was a quantitative research having as main objective to offer a clear perspective on the level of information our students have on the personality and intellectual contributions of Dimitrie Cantemir.

The research was based on a four questions questionnaire that students were invited to answer. The questions were the following:

[2] In 1974 the litterary critic Edgar Papu published in the mainstream cultural journal *Secolul XX* the article *The Romanian Protocronism* arguing that Romanians had priority on some European achievements. This became the line encouraged by the former Romanian dictator Nicolae Ceaușescu.

[3] As we all know the proletarian revolution was closely related to a quite obvious idea: proletarians do not belong to any particular nation. Their solidarity was formed on the basis of class struggle not on national ideals. The nationalist path Ceaușescu took was somehow strange in this context.

[4] I shall not reveal the name of the institution the students of my study where enrolled in due to the fact that image damages can result from that.

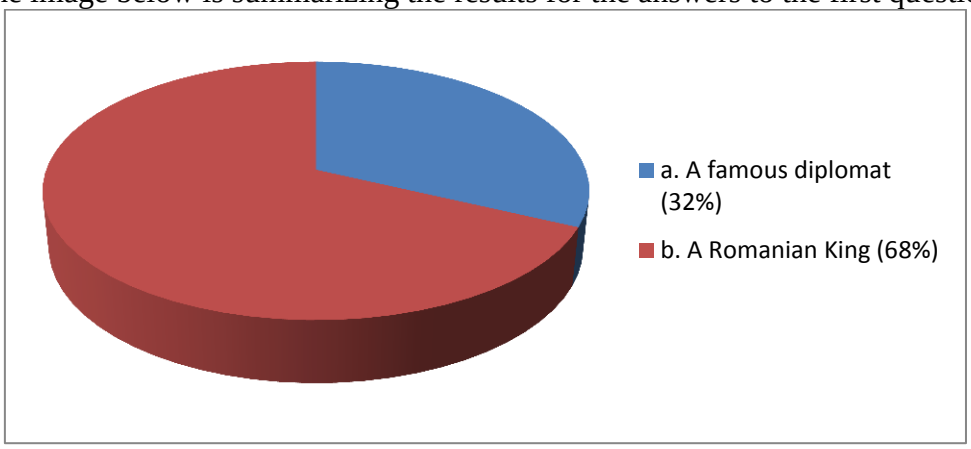
1. Dimitrie Cantemir was:
   a. a famous diplomat
   b. a Romanian king

2. Dimitrie Cantemir ruled:
   a. in Tara Românească
   b. in Moldova
   c. in Transilvania[5]

3. Dimitrie Cantemir was born:
   a. In the XVth century
   b. In the XVIth century
   c. In the XVII th century

4. State the name of one of the works of Dimitrie Cantemir

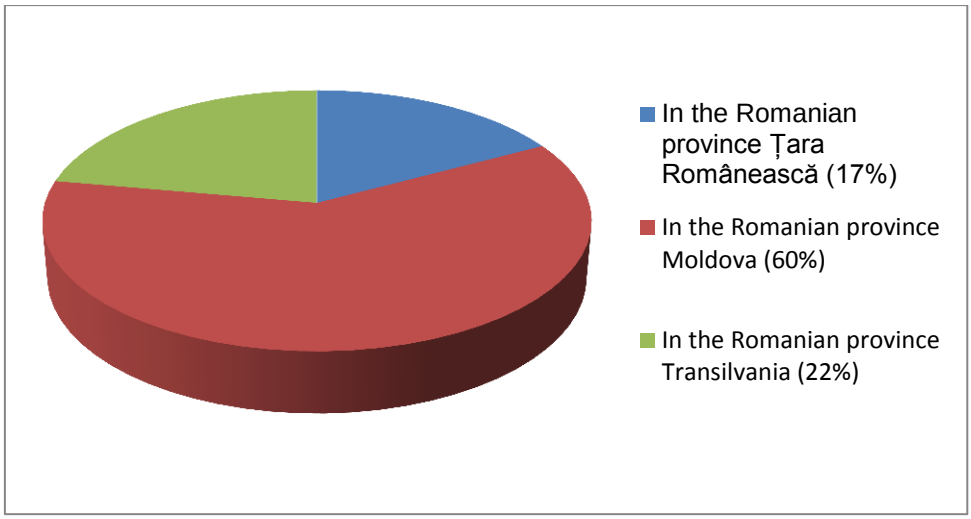
The image below is summarizing the results for the answers to the first question:



The results of this research were the following. From the 58 students 19 responded that Dimitrie Cantemir was a famous diplomat and 39 that he was a Romanian king. None of the students recognized the fact that Dimitrie Cantemir was both a famous diplomat[6] and also a Romanian king although they were instructed that it is possible to have to strait answers to a question.

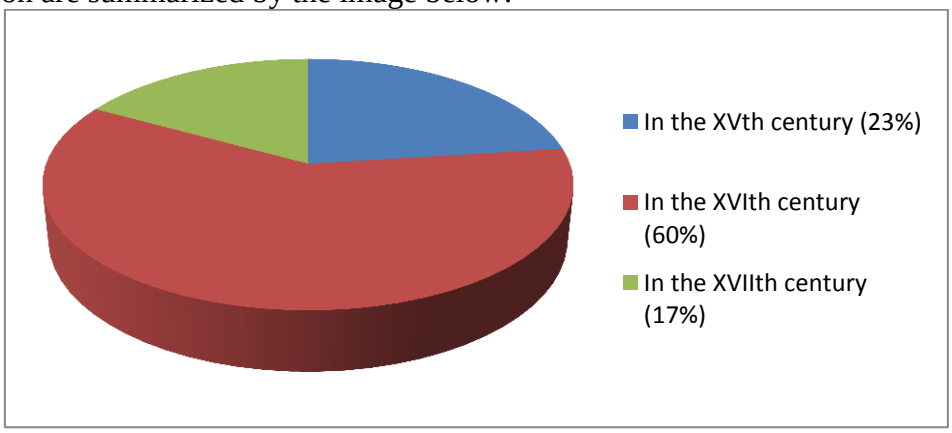
The second question concerned the Romanian province where Dimitrie Cantemir was king for a short while[7]. The image below summarizes the results of this research:

[5] Those were the Romanian provinces before the creation of the Romanian national state.
[6] He served as personal adviser of the Russian king Peter the Great (1672-1725).
[7] Dimitrie Cantemir was the king of Moldau for two short periods: March-April 1693; 1710-1711.



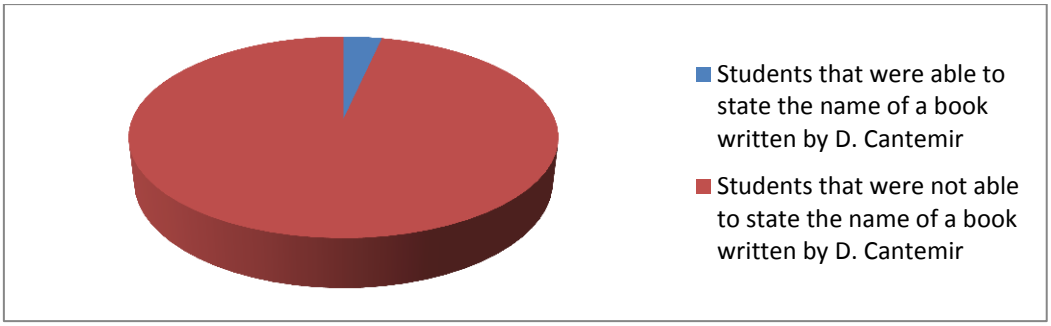
As the image shows 17% of the 58 students participating in the study responded that Dimitrie Cantemir lived in the Romanian province Țara Românească, 23% said that he lived in Transilvania and 60% said he lived in Moldova. This is in fact considered common sense knowledge. Yet, 40% of our students failed to answer correctly to this question.

The next question regarded the century Dimitrie Cantemir was born in. The students were asked to place its year of birth in the XVth, the XVIth, or XVIIth century. The results to this question are summarized by the image below:



As the image is showing only 17% of the students participating in this study answered correctly to the question. Indeed Dimitrie Cantemir was born in 1673. The vast majority, 60% of the students participating in the research, placed his birth in the XVIth century. There is a somehow bizarre explanation to this mistake. As I was observing the students I couldn't help to notice that some of them used their IPhones or other modern technological devices to rapidly search the information on the Internet. As they found out the birth date they assumed it was the XVIth century, since the date is one thousand *six hundred* seventy three (1673) This reveals that modern technology only got them so far: they have not acquired proper knowledge of the way the centuries are numbered.

The last question regarded the student's ability to identify and state the name of an important work of Dimitrie Cantemir. From the image bellow we can easily see that only a very small number of students (3.4%) were indeed able to offer a name of an work of Dimitrie Cantemir:

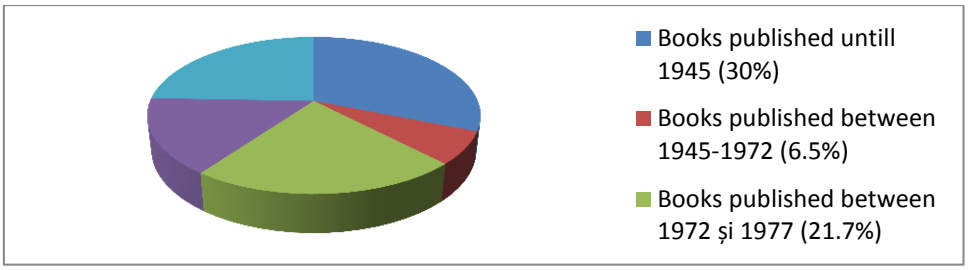


As this research proves there is very little interest and information at the level of first year students in our department. It is my intention to parallel this data with the kind of works to be found in the most prestigious academic library, Central University Library in Bucharest. To achieve this goal I conducted a research focusing on the type of works having as main subject the life and intellectual contributions of Dimitrie Cantemir. I tried to find out what is the ratio between "celebrating" works written on festive occasions and more applied researches focused on specific topics in Cantemir's work. I also tried to reveal if there is a continuous sustained and systematic research effort (academic journals, research programs, post-doctoral research scholarships, etc.) or only individual researches. I shall present the results of this research in the following section of this article.

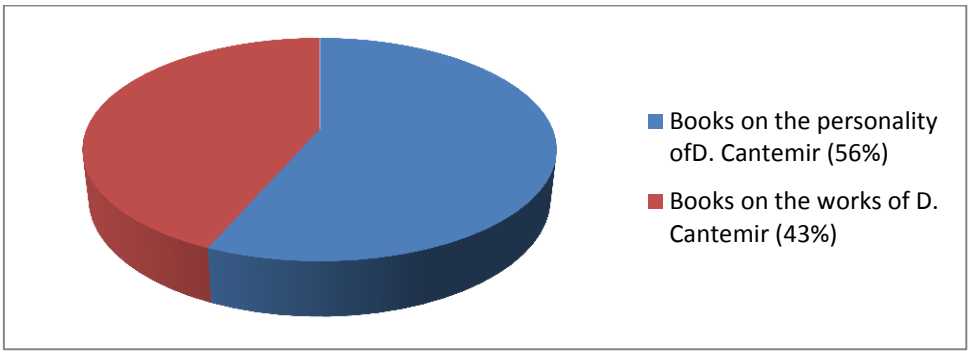
2. The academic reception of Cantemir's work – published books and articles indexed in the Central University Library catalogue

This first issue that I tried to address in my research concerns a historical aspect. I tried to find if the works concerning the personality of Dimitrie Cantemir appeared regularly of if there was a sudden rise of interest in this field in historical occasions like the celebration of 300 years form his birth, for example. The image below shows us how many books and collected papers on Cantemir appeared in different historical periods.

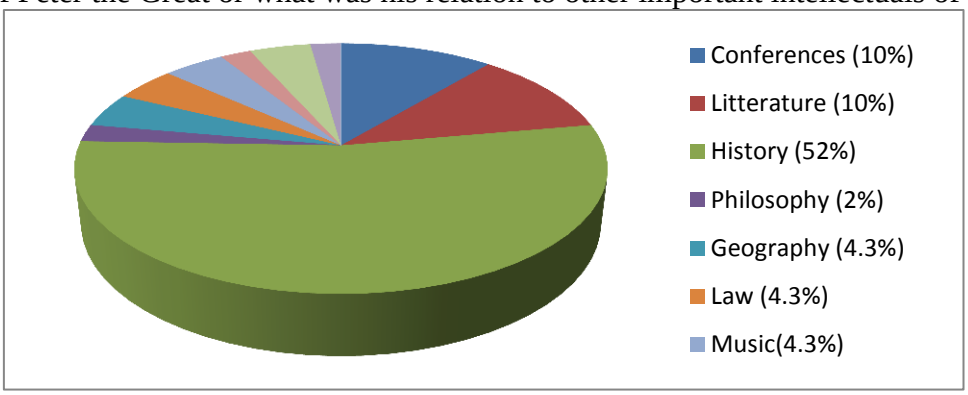
As the bellow image shows us there is no continuous effort in researching the various aspects of Cantemir's work. As expected, the year 1973 was a fertile one in terms of published books in this field. The reason is a transparent one: the Romanian academics were celebrating 300 years from the birth of Dimitrie Cantemir. On this occasion the Romanian Academy hosted a conference in his honor. The fact that Dimitrie Cantemir was a declared Christian made the communist regime have a reserved reaction towards him especially in the post war period. The historical context became favorable to important Romanian cultural figures once Nicolae Ceausescu came into power. It was not for the expected reason: the Romanian dictator was not rely interested in Romanian culture, but, as it was his desire to gain some independence from the Soviet Union, he took the nationalist path. It was in this context that several important Romanian cultural personalities including our *national* poet Mihai Eminescu began being exploited ideologically. They were the most important elements used to building or national identity in the dominant ideological discourse during the two decades preceding the 1989 Revolution. This was the context that gave birth to grandiose discourses using the so called "wooden – language" to describe our national cultural personalities. As the image is showing the historical occasions generate a vivid interest in Cantemir's work. The celebration of 300 years and of 340 years form his birth is related to a rise in Romanian academics interest in this field.



The next subject of interest in my research was the ratio between books having as main subject the life of Dimitrie Cantemir and the books concerning his work. The image below is showing that the dominant interest is in the biographical aspects regarding the life of Dimitrie Cantemir. Thus, there are les books on the works of Dimitrie Cantemir than books analyzing his life and personality. There is also another important aspect: there are no books treating specific topics in one of the many works of Dimitrie Cantemir. All the researches applied on his word treat general issues such as literary style in his work in general, or his philosophy as it appears throughout his entire work. It is also important to mention that there are no introductory works that could make the ideas of Dimitrie Cantemir more familiar. There is no book called "Introduction to Dimitrie Cantemir Philosophy", or "A Compagnon to Dimitrie Cantemir" in the Central University Library. The students cannot find any kind of introduction to the ideas expressed in the various works of Dimitrie Cantemir.



The next task in my research was to classify the books on Cantemir indexed in the Central University Library using the criterion of the scientific perspective they were written form. Thus, I could find an important number of books in the history field of investigation. Although Dimitrie Cantemir was also an important philosopher, writer and even musician, the main interest of the works that I could find in the Central University Library focus on historical aspects of his life: how and when he came to power, what was his role as a secret advisor of Peter the Great or what was his relation to other important intellectuals of his time.



This part of the research reveals several aspects:

- First of all there are no introductory works to Dimitrie Cantemir life and work
- There are many books written on his personality and less on his works
- There are many books on historical aspects (52%) and a small procentage on other aspects (his philosophy, his political or religious views, etc.)
- There is no systematic or continuous effort to analyze specific topics in specific works of Dimitrie Cantemir
- There are little or no critical approaches to Dimitrie Cantemir's work (what are the strengths and weaknesses of his perspectives, what are the influences, etc.)
- There are many books written on festive occasion that treat only general aspects about Dimitrie Cantemir

Conclusions

It is not my intention to make a causal connection between the situation of the books in Central University Library and the almost complete ignorance of the students in our department on central issues regarding Dimitrie Cantemir. Still, I believe it is time to be more careful about the growing gap between our "festivist" discourses and student's complete ignorance regarding one of our most important intellectuals. It seems that the greater the academics admiration for Dimitrie Cantemir, the greater the student's indifference toward him. It is not my intention to offer definitive solutions to this problem that has many causes, some of them beyond our ability to solve them. Instead I sincerely consider that this article must be a warning sign that we must find new ways of communicating if we want our students to be more informed and interested in the life and work of Dimitrie Cantemir.

References:

- Lemny, Ștefan (2010) *Cantemireștii*, București, Polirom.
- http://dilemaveche.ro/sectiune/tema-saptamanii/articol/ilustra-victima-comploturi-impotriva-lui-eminescu, *online* document, 08.11.2013
- http://cacheprod.bcub.ro/webopac/List.csp?SearchT1=cantemir&Index1
- *online* document, 02.10.2013

AESTHETIC EXPERIENCES OF OUR EVERYDAY LIFE

Andra NEDELCU[*]

Abstract

The everyday aesthetics represents a relatively new branch in the field of philosophy which brings into question the way some of our mundane habits, ordinary experiences and objects can be incorporated into the aesthetic area or can become a part of an aesthetic experience.

While Yuriko Saito, author of "Everyday Aesthetics", speaks about the Japanese tea ceremony as an aesthetic experience, while Paulina Rautio suggests hanging laundry as an aesthetic experience too.

This paper attempts to make a quick review of the controversies related to the above mentioned subject matter and to bring forward some criteria upon which some of our everyday ordinary experiences, events or even objects can or cannot be translated as aesthetic. On what level can the acknowledgment of an ordinary experience be perceived as aesthetic and, thus, lead to the improvement of the quality of our life, is another aspect presented in this paper.

Keywords: *everyday aesthetics, aesthetic experience, ordinary experience.*

1. Introduction

"(…) I began to think more carefully about the works' sensuous qualities like size, shape, colour, texture, sound, sometimes smell, and the arrangement of parts. After all, it is these sensuous qualities with which we interact and our daily basis that, along with the natural elements, make up the world in which we live."[1]

The aesthetics of everyday life, a relatively recent new branch in the field of philosophy, has been approached from multiple perspectives; on the one hand, one of the main approaches regards the affinity degree that one has for art, which is seen as a criterion confirming or discrediting the aesthetic nature of an object/an experience; on the other hand, there is a latter approach which opposes the former one in the sense that it refuses to see art as a model of everyday life aesthetic objects and experiences; when concluding his article[2], Dan Eugen Rațiu suggests reconsidering everyday aesthetic as a practical philosophy - its "object is also practice, praxis, i.e. the human behaviour and the ways in which human beings organize their lives in common."[3]

Kevin Melchione - in *The Definition of Everyday Aesthetics* - states the importance of clarifying the concept of *everyday aesthetics*; since there is no definition, says this author, one cannot establish a criterion according to which an activity acquires aesthetic value and we doubt whether it has sense to talk about *everyday aesthetics* on its own terms. Thus, Melchione suggests a few defining features for the usually aesthetic object or for the aesthetic of everyday experience. In consequence, the key words that Melchione suggests are: *ongoing, common, activity*. The term *ongoing* refers to the aesthetic elements that are specific to everyday life activities and not to certain particular, episodic events; "everyday life is marked

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[1] Yuriko Saito, *Everyday Aesthetics*, Oxford: Oxford University Press, 2007, p.8.

[2] Dan Eugen Ratiu, "Remapping the Realm of Aesthetics: On Recent Controversies about the Aesthetic and the Aesthetic Experience in Everyday Life", in *Proceedings of the European Society for Aesthetics*, vol. 4, 2012.

[3] Ibid., p. 408-409.

by an economy of effort, a minimum of planning, and the easy integration of the aesthetic into routines with amendments and variations along the way." [4] By *common* Melchione meant that an everyday activity lacks an exotic and esoteric nature, it is accessible and general (and not necessarily practised universally). In this respect, the author brings a counterexample, i.e. the ceremony of tea, which is not an aesthetical daily activity thanks to the fact that it is different from everyday patterns; however, this ceremony may illustrate the aesthetical dimension of mundane life since it makes participants in the ceremony appreciate and become aware of the implements used for this ritual, of the manner in which water is boiled or poured into the pot. When using the term *activity*, Melchione meant, in this context, that *everyday aesthetics* rather refers to the accomplishment of a thing and not to the output itself. What matters is the role of the object in everyday life and not its form or design. The example offered by the author is that of a window that looks out on a scenery; in the absence of a human being or if the shades are pulled down, the window no longer has an aesthetic value. "However, if the light, the view, and the bench beside it contribute to the aesthetic character of some daily moment, then we may speak of the window in terms of everyday aesthetics. It is the regular morning coffee, the acknowledgement of the evening sunset, or the mere raising of a blind after waking that imparts everyday aesthetic value to the window."[5] In other words, Melchione emphasises the manner in which we interact with an object, with an element included in our everyday life and the effect of this interaction, which may generate an aesthetic appreciation of a moment from everyday life.

2. Content

One of the possible ways of sharing a different perspective over an ordinary object, which we frequently use in our daily/current activities, could be approaching that object in a detached manner with regard to its usefulness. Yuriko Saito approaches this topic in her book "Everyday Aesthetics" in relation to the theory of Immanuel Kant, according to whom the appreciation of the free beauty of a useful object is more legitimate/sensible or purer than the appreciation of its beauty in relation to the usefulness that it has been designed for. Yuriko Saito considers that such a perspective is, however, "unusual, odd and artificially induced"[6] for the experience we undergo in relation to the useful object combines its practical and aesthetic dimensions; moreover, according to Saito, we risk losing a part of the aesthetic dimension of the object "if we surgically remove its functional value".[7] Saito, similarly to Melchione, stresses the active dimension of life; besides the contemplating attitude that a person may have in relation to an object, Saito points out those aesthetic reactions which urge us to act and which may include – cleaning, discarding, shopping etc.

As we previously mentioned, one of the perspectives adopted by some theoreticians of Everyday Aesthetics (like Yuriko Saito) is to reject the idea that art is a pattern for establishing the aesthetic value of daily used objects or of mundane experiences. These theoreticians do not consider that the aesthetic status of artistic things is due to the degree of affinity which they have with art. "As long as art is conceived as something different from our daily affairs, even if it is meant to illuminate or emulate some aspects of our everyday life, art has already acquired a special status, not shared by our everyday life itself."[8] However, the ordinary, daily life, the domestic, routine are subjects that are frequently dealt with by contemporary art. The representation of daily life, of the ordinary, of repetitiveness, of

[4] Kevin Melchione, "The Definition of Everyday Aesthetics", in *Contemporary Aesthetics Journal*, 2013.
[5] Kevin Melchione, "The Definition of Everyday Aesthetics", *Contemporary Aesthetics Journal*, 2013.
[6] Yuriko Saito, *Everyday Aesthetics*, Oxford: Oxford University Press, 2007, p.38.
[7] Ibid.
[8] Yuriko Saito, *Everyday Aesthetics*, Oxford: Oxford University Press, 2007, p.35.

insignificant facts may, in fact, reflect the essential for a person's nature or for a family or even for an entire community. "Although daily life starts by being individual, it is basically social because most people live within a community in which relationships between people are to be found in all social life activities (work, family, relaxation)."[9] The article entitled "Structures of interior design" by Jean Baudrillard reveals instances of inter-dependence between modifications incurred at individual level or in the family / society, as well as the preference for a certain style adopted when decorating a space. "Things are bent / folded up, hidden and they appear only when they are necessary."[10] These innovations do not represent the effect of a free experiment: to most people, mobility, flexibility and comfort are ways of adapting to a small dwelling space.[11]

The essay entitled "Plastic" by Roland Barthes may be regarded as a real source of inspiration as to the significance it identifies and the approach it suggests in relation to the material used for producing objects; the material is regarded – thanks to its versatility – as being subject to an on-going transformation and, thus, as being "not exactly a thing" but rather "the track of a movement".[12] Another observation made by Barthes in this article refers to the relation between plastic and artificial materials. This reference may be used for understanding the social context in which the object is perceived: artificial materials "used to belong to a world interested in form simulation", "they were meant to cheaply imitate certain rare materials, such as diamonds, silk, feathers, furs, silver, all the sumptuous/luxurious brightness of the world".[13]

In her book – *Everyday Aesthetics: Prosaic, the Play of Culture and Social identities* – Katya Mandoki underlines the link existing between art and society, while comparing the manner in which the modifications incurred in the sphere of social life generate modification in other spheres, such as: art, according to the butterfly effect rule.[14] In the same book, the author considers that the idealization of aesthetics (art above reality) is a position adopted by romantics, idealist and Marxist philosophy and that the distinction between life and art, art and society, aesthetics and everyday life pertains to the category of myths - *Art, however, no matter how elitist it may be, is and always has been a social product and is linked to society. (...) art and reality, like aesthetics and the everyday, are totally entwined, not thanks to the explicit will of the artist, but because there is nothing further, beneath or beyond reality.*[15]

Moreover, in her study "Everyday Aesthetics", Yuriko Saito upholds Paul Duncum's idea, according to which an artistic education based on everyday life experiences would be a useful one. Saito considers that the creation of personal identity and the perspective that a person has over the world are determined to a larger extent by aesthetic experiences of everyday life rather than the high art experiences.

I have finally chosen to enumerate a few artists who deal with the topic of the everyday object or the concept of ordinariness in their works. The usual object is, thus, transformed into an artistic object or into an object that becomes part of an artistic work.

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[9] Gabriela Farias, "Everyday Aesthetics in Contemporary Art", in *Rupkatha Journal on Interdisciplinary Studies in Humanities*, Vol. 3, No. 3, 2011, p. 440 (my translation); the original text is: „Deşi viaţa cotidiană începe prin a fi individuală, este la bază socială deoarece cei mai mulţi oameni trăiesc în interiorul unei comunităţi unde relaţiile dintre oameni se desfăşoară în toate aspectele sociale (muncă, familie, recreaţie)."

[10] Jean Baudrillard, "Structures of interior design"(1968), in *The Everyday Life Reader*, Ben Highmore, 2002, p.310 (my translation); the original text is: „Lucrurile se rabatează/pliază, sunt ascunse, apar numai atunci când sunt necesare."

[11] Ibidem.

[12] Roland Barthes, "Plastic" (1957), in *The Everyday Life Reader*, Ben Highmore, 2002, p. 306.

[13] Roland Barthes, "Plastic" (1957), in *The Everyday Life Reader*, Ben Highmore, 2002, p.307 (my translation); the original text is: „aparţineau unei lumi a aparenţelor", "vizau reproducerea ieftină a unor materiale rare precum diamante, mătase, pene, blănuri, argint, toată strălucirea somptuoasă/luxurious a lumii."

[14] Katya Mandoki, Everyday Aesthetics: Prosaics, the Play of Culture and Social identities, Ashgate Publishing Limited, 2007, pp. 16-17.

[15] *Ibidem*, p. 15.

Felix Gonzales – Torres uses in his photos objects from domestic life, which are re-contextualized. The photo of a bed that is not made is displayed on a hoarding. The bed as an expression of an intimate space, in which the sheets preserve the impressions left by a couple, whose former presence is self-understood, is placed into a completely different context, i.e. the public space.[16]

In his photographs, *Nigel Shafran* transforms objects and the forms he meets in everyday life into observations as to the manner in which we spend our lives through the unconscious way in which we order, place and arrange things that surround us.[17]

Manfred Willmann, in his project "Das Land", depicts aspects characteristic of rural life as still nature, landscapes and portraits. His photos become a diary of that community without entering the sphere of ultimately subjective "intimate" photography.

A recurrent topic in *Wolfgang Tillmans'* photography is represented by washed clothes which are hung for drying or by hung clothes or by clothes that are cast negligently. Clothes preserve the body form of the person who wore them like the barked animal skin while also adding an intimate and sensual dimension to the image thanks to the self-understood meaning of stripping.

Jeff Wall discusses about the formal strictness that lies behind the transformation of useful objects into a subject which gains conceptual substances and visual intrigue.

An example from the area of photography in which ordinary daily situations are incorporated into the work of art is the one of the performance accomplished by Rirkrit Tiravanija in 1992, in a gallery from New York. In his performance he invites spectators to take part in a cooking session within the gallery.[18]

Artists who make use of functional daily objects in their works invest them with a different meaning and re-contextualize them; an older but famous example is the paper written by Marcel Duchamp „Fântâna" [The Well] (1959, Paris, Musée National d'Art Moderne, Centre Georges Pompidou)[19]. "The object exists on one's own and the artist behaves as if he were on the beach walking, discovering conches or pebbles that are abraded by the sea waves and that he takes home and puts on the table regarding them as artistic objects that reveal an unexpected Beauty. This is the manner in which a rack used for drying bottles, a bike wheel, a bismuth crystal, a geometric body used for teaching, a glass that was bent by heat, a mannequin and even a urinal were *chosen* as sculptures. [...] Ever since they were identified and isolated, *labelled* and subjected to our examination, these objects have acquired an aesthetic significance as if they had been the creation of an author."[20]

Apart from Umberto Eco, who stresses the author's option and authority, which he regards as key factors for the aesthetics that the object acquires, Yuriko Saito states that once artistic objects are separated from the conditions, origin and their usage, they start being surrounded by a wall and their general significance becomes obscure, a fact which is necessary in the aesthetic theory. Another idea presented in the work of M. Duchamp is that by converting mundane life into the new territory of artistic investigation, the idea of transcendental beauty has acquired a relative significance.[21]

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[16] Charlotte Cotton, *The Photograph as Contemporary Art*, 2004, Thames & Hudson world of art, p. 118.
[17] Charlotte Cotton, *The Photograph as Contemporary Art*, 2004, Thames & Hudson world of art, p. 121.
[18] Gabriela Farias, „Everyday Aesthetics in Contemporary Art", *Rupkatha Journal on Interdisciplinary Studies in Humanities*, Vol. 3, No. 3, 2011, p. 441.
[19] Umberto Eco, *Istoria Frumuseții*, Bucharest: Enciclopedia Rao Publishing House, 2006, p. 406.
[20] *Ibidem* (my translation); original text: "Obiectul există pe cont propriu, iar artistul se comportă ca unul care, plimbându-se pe plajă, descoperă cochilii sau pietre șlefuite de valul mării, pe care le aduce acasă și le pune pe o măsuță ca pe niște obiecte de artă ce își dezvăluie o neașteptată Frumusețe. În acest fel au fost *alese* ca sculpturi un stativ pentru scurgerea sticlelor, o roată de bicicletă, un cristal de bismut, un corp geometric de uz didactic, un pahar deformat de căldură, un manechin și chiar un pisoar. [...] Din clipa în care au fost identificate și izolate, *încadrate* și oferite examinării noastre, aceste obiecte se încarcă de o semnificație estetică, întocmai ca și cum ar fi fost prelucrate de mâna unui autor."
[21] Élisabeth Couturier, *L'art contemporain, mode d'emploi*, Filipacchi Publishing House: 2004, p. 28.

Finally, I am going to present a personal project that I created in 2012 and that was a video work entitled "Déjeuner du matin", in whose accomplishment I had as a starting point the idea that objects may be perceived as the memory of a past action. The object bears the impression of the one that used it and cannot exist outside a subject that perceives and understand it as the object which has a specific function and shape. From this perspective I have made use of all the objects enumerated in Jacques Prevert's poem "Déjeuner du matin" with a view to creating a "still nature" that represents the mark of a past action, as it was recorded by the poem. The coffee cup, the ash tray, the tea spoon and the sugar placed on the table in the front of a fixed framework suggest a subject that is self-understood. The passing of time is suggested by placing "still nature" into a garden; the movement of leaves, trees, insects and the on-going change of the light intensity become witnesses of time passage.

3. Conclusion

The present text does not aim at suggesting rigid, immutable criteria but it rather merely comes up with a set of perspectives whereby the usual objects or moments of mundane life could acquire an aesthetic value. Similarly, the present text underlines the role and influence which this new branch of philosophy might have in the interwoven spheres of society and art.

References

- Barthes, Roland, "Plastic" (1957), in *The Everyday Life Reader*, Ben Highmore, 2002
- Baudrillard, Jean, "Structures of interior design"(1968), in *The Everyday Life Reader*, Ben Highmore, 2002
- Cotton, Charlotte, *The Photograph as Contemporary Art*, Thames & Hudson world of art, 2004
- Couturier, Élisabeth, *L'art contemporain, mode d'emploi*, Filipacchi Publishing House : 2004
- Eco, Umberto, *Istoria Frumuseții*, Bucharest: Enciclopedia Rao Publishing House, 2006
- Farias, Gabriela, „Everyday Aesthetics in Contemporary Art", *Rupkatha Journal on Interdisciplinary Studies in Humanities*, Vol. 3, No. 3, 2011
- Mandoki, Katya, Everyday Aesthetics: Prosaics, the Play of Culture and Social identities, Ashgate Publishing Limited: 2007
- Melchione, Kevin, "The Definition of Everyday Aesthetics", in *Contemporary Aesthetics Journal*, 2013
- Ratiu, Dan Eugen "Remapping the Realm of Aesthetics: On Recent Controversies about the Aesthetic and the Aesthetic Experience in Everyday Life", in *Proceedings of the European Society for Aesthetics*, vol. 4, 2012
- Saito, Yuriko, *Everyday Aesthetics*, Oxford: Oxford University Press, 2007

PARTICIPATION CULTURE BETWEEN IDEAL AND REALITY: THE CASE OF ROMANIA

Elena NEDELCU[*]

Abstract

The present paper attempts to answer the question whether the predominance of non-participation culture is a characteristic of the present Romanian society. Considering that Romanians praise the democratic political model as valuable, the speculative denial of participation culture in the present Romanian society seems to be ungrounded. In fact, the real issue of Romanian political life is represented by the gap existing between the culture of participation, seen as an ideal, and the culture of participation, seen as a fact. Does this distance tend to be less significant as regards the young people? Is the Romanian young people's involvement in democratic life similar to the European participation trend or it is different from it?

Keywords: *contemplation, participation culture, political participation, the young people.*

1. Introduction: Romanians between the culture of contemplation and the culture of participation

The 1848 generation upheld that the dimension of Romanian existence is similar to a sleep from which Romanians should awake in order to face the present reality. This critical reaction of the 1848 generation was determined by the ease with which Romanians dealt with life issues in general, as well as by their detachments and inertia which they used to manifest much too often.

Constantin Noica shares the same opinion while underlining - in his essay *Superarea românească* - that in a self-revealed Faustian Europe there is a people which lacks a Faustian dimension: the Romanian people". Considering that the word "Faustian" means "knowledge with any risk" and, similarly, "thirst for power with any risk", the great philosopher concludes that "we have neither been, nor seem to be ready to become Faustian". In conclusion, Romanians are not interested in relating to historicity but to eternity.

"The careless, abstracted, uncalculated, smiling, God trusting Romanian acts not when one can, but rather when one is no longer able to; it is only despair before the nothingness which determines him to act. <<Be what it may be! >> the Romanian says somehow resigned: the imperative saying <<now or never>> that infuriated the Romanian is the symptom of a one-moment fever which, once over, the man feels released from the burden imposed on him by time and one can restart the dialogue with eternity".[1]

The Romanian peasant, somehow detached from the earthly ones, feels oneself solidary with the eternal nature and lives in accord with God's laws and the law governing

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[1] Mircea Vulcănescu, *Dimensiunea românească a existenţei, Izvoare de filosofie*, Bucharest: Bucovina Publishing House, 1943 (my translation); original text: "Românul nepăsător, neatent, necalculat, surâzător, încrezător în Dumnezeu trece la fapte nu când poate, ci când nu mai poate; numai deznădejdea în faţa neantului duce la acţiune. <<Fie ce-o fi!>>, spune românul oarecum resemnat : imperativul, <<acum ori niciodată>>, care-l scoate din fire pe român, este simptomul unei febre de-o clipă, apoi, omul ieşit de sub vremi îşi reia dialogul cu veşnicia".

human life in general. The Romanian "lives in the cosmic horizon and in the consciousness of a destiny that originates in eternity".[2]

Is the portrait of the Romanian, as it was depicted by the great philosophers quoted above, still valid today? Can we talk today about the meditating Romanian who is in a dialogue with the eternal? Is this the true nature of the Romanian, a nature in which one has been trapped and from which one cannot be separated even despite of the present times?

If the answer is yes, then could we talk today about a predominating non-participation culture that is specific to Romanians? Are there significant differences that could be identified in relation to various age categories when it comes to defining participation vs. non-participation culture? Do young people have a participation culture that is more developed in comparison with the elderly people?

We can notice that Romanian young people, as well as the elderly ones, no matter if they are governed or governing (we also refer to the political group representing the opposition), tend to complain about the Romanian democratic life, which they regard as a failure, and tend to put the blame on the other one(s). At least in words, everyone manifests lack of satisfaction as to the evolution of democracy and the quality of the citizens' involvement in Romanian political life after 1989. In other words, Romanians do not clap their hands; they do not appreciate non-participation, inactivity, political apathy or lack of political initiative etc. Romanians deny and depart from all forms of political non-participation. Under these circumstances, the statement according to which Romanian society lacks a participation culture is ungrounded. The real issue of Romanian political life is different, i.e. the distance between participation understood as an ideal and participation culture understood as a fact.

2. The participation deficit and participation culture incurred in the case of Romanians

Participation democracy is an on-going process which implies that human beings and social groups are involved in the decision-making and resource management processes. Within this process citizens are active subjects and are involved in the development of political projects and programs. Participation democracy implies mechanisms whereby decision-making processes are made with and through the citizens' involvement. The citizens' suggestions and protests must be taken into consideration by the political decision-making agent no matter if the latter agrees or not with the content thereof and no matter if these suggestions/protests aggrieve or not the latter's personal interest. We can notice that the participation model of democracy manifests a maximalist position, while suggesting that democratic legitimacy may be enhanced only if individuals have real chances to effectively get involved into the decision-making process that influences their lives. The participation model is not easily implemented in young democracies. From this perspective, the Romanian society is not an exception. Sociological studies[3] prove that in the Romanian society the dominating pattern of political culture is the so-called dependent one, which is characterized by: insufficient political information and communication, low levels of subjective civic competence, attachment to the political system, cooperation, solidarity, organizational participation – in general, and political and civic participation – in particular.

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[2] Lucian Blaga, "Spaţiul mioritic", in *Opere filosofice*, Bucharest: Minerva Publishing House, 1985, p. 340 (my translation); original text: „trăieste în zarişte cosmică şi în conştiinţa unui destin emanat din veşnicie".

[3] C. Barzea, Cecchini,Michaela; Harrison,Cameron; Krek, Janez; Spajic-Vrkas,Vedrana Manual pentru asigurarea calitatii educatiei pentru cetatenie activa in scoala , edited by UNESCO, Council of Europe, Centre for Educational policy Studies© TEHNE - Centrul pentru Dezvoltare şi Inovare în Educaţie, 2005 (pentru versiunea în limba română), E.Nedelcu, Romanian Political Culture and European Political Culture: Similitudes and Differences, in Lex et Scientia, Bucharest, 2005, p.254.

Although more than a half of the Romanians understand the importance of political participation and know and appreciate democratic values and principles, it is only a low percentage of them that declares to be directly involved in our societies political activities or to be members of political organizations or to take part in protests etc. *Most Romanian citizens prefer passive civic obligations, as they prefer to conform to the political and legislative system without aiming to participate in the elaboration or modification of laws or to monitor the manner in which public money is spent / in which those entitled to govern the state do their duty. Only 8.6% of those interviewed considered that active-participation is a citizen obligation, as well. (E. Nedelcu, 2010)*

Romanians – in a significantly large percentage – do not expect the governing team and the police to treat them correctly and respectfully, an aspect which explains the citizens' non-involvement in political life, *their acceptance of a dependent role in relationship with the political system, their incapacity to assimilate the role of subjects in the relationship they have with authorities. One can notice that Romanians, no matter their educational level, sex, profession, age, manifest a non-favourable attitude towards the government and the police.* On the other hand, in old European democracies, 88% of the citizens who have higher education expect to be treated equally and to be respected by the government. As regards political communication, although *most of the population declares that it talks politics* (85.6%) either frequently or sometimes, an important percentage (54.5%) declares that it talks politics *only with persons who may be trusted*, i.e. family and friends[4]. If 14.5% of the interviewed ones do not talk politics and 54.5% talk politics with the close friends and family, it means that the situation of political communication is still unsatisfactory in Romanian society. Today there is *an important percentage of subjects who feel limited when it comes to political communication*. The feeling that there is insufficient freedom in communication may be explained through several factors, such as: a perpetual state of suspicion, which was characteristic of the former regime, the effect generated by the political control in institutions, the individual's personality.

In conclusion, we cannot deny that a participation culture exists in Romanian society since most citizens appreciate political and democratic models from other countries, since they know and appreciate the values and principles of democracies and understand the importance of reinforcing the EU project, a process which they perceive optimistically[5]. Similarly, we cannot deny the low concern for initiatives, political and civic affiliation and cooperation that are specific to the dependent political system that is characterized by a low number of citizens who participate in political life.

3. The evolution of the Romanian young people's participation in democratic life

The present paper is going to analyse two important aspects regarding the Romanian young people's participation in democratic life, i.e.: participation at elections and their organizational affiliation. The present paper is going to point out the similar and different attitudes, as well as the political behaviour that are specific to the Romanian youth and to the EU young people. As to the participation in political elections, in conformity with Euro-barometer 2013, most Romanian respondents (63%) have voted in a political election in the past three years. On the other hand, only 37% of the Romanian young people declared that they did not vote during that period.

In comparison with 2011, Euro-barometer 2013 points out a 3 % decrease of the Romanian young people's participation in elections and an increase with 4 % of their non-

[4] Elena Nedelcu, *Democraţia şi cultura civică*, Bucharest: Paideia Publishing House, 2000.
[5] Eurobarometru, 2013.

participation. As regards participation in elections, according to the data comprised by the above mentioned document, Romanian young people follow the same general trend as the other young people from the UE. "Over half of those surveyed have voted in a political election at the local, regional or national level in the past three years (56%). Of the 44% of respondents who did not vote, only a fifth (21%) did so out of choice and a further 23% were not eligible to vote because of their age. These findings represent a decrease in participation since 2011, when 62% of respondents said that they had voted and 37% had not. (…). Participation in political elections has decreased the most in Hungary, from 67% in 2011 to 39% - a drop of 28 percentage points. Respondents in Sweden are also considerably less likely to vote in 2013 (49%) than they were in 2011 (74%). In Poland there was also a significant decrease in voting, from 74% in 2011 to 52% in 2013, (…) in Austria, from 83% in 2011 to 62% in 2013."[6]

As to the probability of voting in the European elections in 2014, according to the Euro-barometer 2013, approximately two thirds of all respondents (64%) say that they are 'likely' to vote in the next European elections in 2014. Almost three in 10 are certain that they will vote in the next election (28%). Just over a third (35%) says they are 'unlikely' to vote. Approximately two thirds of all Romanian respondents (63%) also say that they are 'likely' to vote in the next European elections in 2014, and 32% of those interviewed are certain that they will vote in the next election. We may conclude that Romanian young people follow the same trend as the other young people from the EU.

As regards the country-level analysis, the Euro-barometer indicates that there is a difference of 33 percentage points between the countries with the lowest and highest levels of respondents indicating that they are 'likely' to vote in the European elections in 2014. "In Belgium, where voting in the European elections is normally compulsory, four in five (80%) of respondents say they are likely to vote. There are six other countries with high proportions of respondents showing positive intentions towards voting in the next European elections: the Netherlands (76%), Sweden (76%), Italy (76%), Ireland (76%), Luxembourg (75%) and Malta (75%). The countries with the lowest level of respondents indicating they are likely to vote are: Slovenia (47%), Estonia (48%) and the Czech Republic (48%)"[7].

The second aspect regarding Romanian young people's participation in democratic life – which is being subjected to analysis – is represented by their organizational affiliation. As to the Romanian young people's belonging to an organization, according to the data from Euro-barometer 2013, the situation is as follows: sports clubs participation: 16%; a youth club, leisure-time club or any kind of youth organization: 12%; a local organization aimed at improving your local community: 8%; a cultural organization: 8%; any other non-governmental organization: 5 %; an organization promoting human rights or global development: *5%;* an organization active in the domain of climate change/environmental issues: *5%;* a political organization or a political party: 8%; none of these: 60%.

At EU level, the young people's belonging to an organization is as follows:
"Over a third of respondents say that they have been active in a sports club within the past year (35%). The next most popular activity is being involved in a youth club, leisure-time club or any kind of youth organization (22%). 15% of respondents are involved in a local organization aiming to improve the local community, while 14% are active in a cultural organization. Fewer than one in 10 respondents say that they are part of other types of organizations: 8% participate in an organization promoting human rights or global development; 7% are part of an organization involved in climate change/environmental issues and 5% are involved in a political organization or political party. In addition, one in eight

[6] Flash Euro-barometer 375. European Youth: Participation in Democratic Life, Survey coordinated by the European Commission, May 2013.
[7] Idem.

respondents (12%) says that he/she is involved in another non-governmental organization. (….) Despite the fact that the majority of respondents have participated in an activity of one of the organizations enumerated above, a significant proportion has not taken part in any of the organizations at all (44%)."[8]

We can notice that, as regards the young people's affiliation to sport clubs, Romanians occupy a much lower position in comparison with the European average: 16% in comparison with 35%. A similar situation exists as regards young people's affiliation to youth organizations: 12% in comparison with 22%. In fact, except for political organizations, Romanian young people's affiliation to all the other categories of organizations is much lower than the European average. The percentage of Romanian young people who do not belong to any organization (60%) significantly surpasses the European average (44%).

However, a positive aspect is represented by the fact that, in comparison with 2011, the degree of organizational affiliation calculated for EU young people has increased, as revealed by the data recorded in the Euro-barometer 2013: "There has been an increase in participation of four percentage points in each of the following groups and clubs: youth clubs or leisure-time clubs or any kind of youth organization (22%), local organizations aiming to improve the local community (15%), organizations involved in climate change/environmental issues (7%) and other non-governmental organizations (12%). There has also been an increase in the participation in organizations promoting human rights or global development (8%, +3 pp) and in sports clubs (35%, +1 pp)."[1]

Conclusion

If the percentage of Romanians who declared that they participate in elections (63%) is above the European average (56%), organizational affiliation reveals the opposite. Organizational affiliation, especially the political and civic one, is a much more eloquent index for measuring effective participation of Romanians in political life. Unfortunately, it is this aspect which disadvantages Romanian young people in relation to the other EU young people coming from countries which have a long democratic tradition; Romanian young people record low levels of organizational affiliation in all areas: from sport organizations to the civic ones that promote human rights. Organization inactivity is for Romanians significantly higher (60%) in comparison with the European average (of 44%).

The feeble implication of young people in political life, which is also true for states that have a long democratic tradition, is not a comfort, however. The effects of this deficit are even more dangerous in younger democracies than in traditional democracies which have acquired implicit mechanisms of correction for the democratic dysfunctional issues that they are facing.

References

- Mircea Vulcănescu, *Dimensiunea românească a existenţei, Izvoare de filosofie*, Bucharest: Bucovina Publishing House, 1943
- Lucian Blaga, "Spaţiul mioritic", in *Opere filosofice*, Bucureşti: Minerva Publishing House, 1985, p. 340 (my translation); original text: „trăieste în zarişte a cosmică şi în conştiinţa unui destin emanat din veşnicie."
- C. Barzea, Cecchini,Michaela; Harrison,Cameron; Krek, Janez; Spajic-Vrkas,Vedrana Manual pentru asigurarea calitatii educatiei pentru cetatenie activa in scoala , edited by UNESCO, Council of Europe, Centre for Educational policy Studies© TEHNE - Centrul pentru Dezvoltare şi Inovare în Educaţie, 2005 (pentru versiunea în limba română)
- E.Nedelcu, Romanian Political Culture and european political Culture: Similitudes and Differences, in Lex et Scientia, Bucharest, 2005, p.254
- Elena Nedelcu, *Democraţia şi cultura civică*, Bucharest: Paideia Publishing House, 2000

[8] Flash Euro-barometer 375. European Youth: Participation in Democratic Life, Survey coordinated by the European Commission, May 2013

- Eurobarometru, 2013
- Flash Eurobarometer 375. European Youth: Participation in Democratic Life, Survey coordinated by the European Commission, May 2013

THE SOCIAL DIVISION OF LABOR BY THE FOURTH WAVE OF SOCIAL CHANGE

Mirela Cristiana NILĂ STRATONE*

Abstract

The social division of labor is an objective historical and continuous process that accompanied the evolution of human society from the appearance. Hence the idea that the work is the specific activity of human. However, we should mention that also other species work and they do it even at group level through cooperation. For example, spiders and bees. But what makes the difference exclusively on human work is its human social character. The moral dimension of social division of labor was formed in time, starting with the natural division period of labor which had a purely physiological basis. After the collapse of the primitive commune, the appearance and then the development of productive forces have determined the formation of social character of the division labor. It's the time of the appearance social-economic criteria as a new foundation for the development of society. The division of labor has been gradually achieved by the waves of social change. Thus the first phase of social division of labor took place with the separation of the tribes of shepherds from other tribes that later to achieve separation of agriculture crafts in the second phase. The separation of the dealers from other workers, the exchange of merchandise, the market and commodity production are the defining elements at the third phase of the social division of labor.

Regarding the productive forces, it should be noted that each stage of their development has led to a higher and complex division of the social labor, which resulted the character of the relations of production, rellations par excellence social-economics.

Keywords: *the social division of labor, the waves of change, social solidarity, economic functions, socioarchie.*

1. Introduction

The theme of the study is part of a comprehensive cognitive initiative oriented by the global purpose of the social labor. The reference field it is the social action which is in the interdependence with the social change, which triggers new social needs and thus new views on their satisfaction. This study aims to analyze the evolution of the social division of labor along with *The Waves* of social change. To achieve this target, we propose a foray into the weather studies. Thus, *Ferguson* gives a fatalistic view to the social division of labor by showing the danger of separation of those who hold power weapons and not only, of civilians. In this case, *Ferguson* sees a caste of the people who own force of arms against each other, so a threat from the specialist who can decide and act on behalf of non-experts. **This happens in fact, in present.**

Ernest André Gellner sees in his study „*Conditions of freedom. Civil society and her rivals*“[1], only the positive side of social division of labor and disagree with the *Ferguson*'s predictions. He presents a number of reasons why the *Ferguson'*s fears would not become reality: the scientific and industrial revolution which lead to strong growth of productive forces; the production can become a tool of prosperity so powerful, that can defeat any

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[1] Gellner, E.A., Condițiile libertății. Societatea civilă și rivalii ei, Ed. Polirom, București, 1998, op. cit.

harmful domination; the superiority of the civil society; the separation of activities causes professional mobility, which leads to the creation of professions and not the castes; political self-government arises from social order founded by individuals, so that everyone can choose to lead the society or to practice a profession.

Émile Durkheim considered social division of labor as the fundamental element of the social solidarity, with a strong moral character.

Alvin Toffler[2] describes *The Waves of social change* under the influence of social labor. Social division of labor is present in *Toffler*'s futuristic concept as being the dynamic element of the configuration society, causing the change and accompanying it at the same time. *Alvin Toffler*'s opinion is that *The Fourth Wave* of social change transforms the social work in a tool of creation and sculpts new corporate model. In this regard, *H.B. Maynard* and *S. E. Mehrtens* presents „a vision of the future diseangaged from the future"[3] in which we will work to create the visions for the business world. **In future we are one and we choose to create together, actually to cocreate.**[4]

Thus, the work will accompany the fundamental mutation which will shall be subjected to the corporations in order to serve the individual and social needs. Essentially, the problem is that in the future we do not need more and the same, but a something new, a value that will be the main objective of the work in its quality of human activity. Is shaping stronger the need for creating new value systems founded on environmental and economic justice.

2. Content

In the modern societies, one of the most important traits is the existence of division of labor. This aspect is particularly complex and he supports comparisons, depending on the type of the society.

Thus, in traditional societies, non-agricultural work required mastery of a single skill. The craftsmen work involved learning the profession, consisting of a series of activities they lifelong learners, but each executing all stages of the production process.

Given the fact that largest traditional societies encompassed dozens of major crafts in modern industrial system there are thousands of distinct occupations.

In traditional society the people worked especially on farms, and individuals, through complex activities that you executed were enough to satisfy all their economic needs. Comparative, this type of society contrasts sharply with the modern economic aspect: economic self-sufficiency is replaced by the economic interdependence.

The social division of labor is a social fact that on the one hand makes essentially economic gap between traditional and modern society, on the other hand represent an important segment of the genetic baggage of social solidarity.

This social phenomenon represents from a particular point of view a differentiation who concentrating the vital forces.

- the rupture of organic solidarity as an effect of deviant character of the labor

Like any normally social phenomenon, the social division of labor shows pathological states. These states lead towards ruptures of the organic solidarity.

One of the advantages of division of labor deviated forms study is to determine exactly how close to normality conditions of this social phenomenon.

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[2] Alvin Toffler, *Al Treilea Val*, Ed. Politică, Bucureşti, 1983, *op. cit.*
[3] Maynard, H.B., Mehrtens,S.E., *Al Patrulea Val – afacerile în secolul XXI*, Ed. Antet, Bucureşti, 1997, p. 9.
[4] *Ibidem*, p. 18.

The abnormal forms of the division of social labor is manifested as partial ruptures of organic solidarity, social division of labor through coercion, or uncoordinated running of the specialized parties of the economic social action.

The industrial or commercial crises, the bankruptcies, are examples of situations in which is manifested ruptures of the organic solidarity, which is an abnormal form of division of labor.

Another example of organic solidarity rupture takes the form of antagonism between labor and capital. Between the diversification of industrial functions and organic solidarity is manifested an inverse correlation. As an example, we can analyze the relationship between worker and craftsman in the *Middle Ages*, which was one of equality, which rarely lead to social conflicts. Over time, however, appear separators hierarchical order, class, between individuals which perform involving joint work. With the the delimitation of these differences, conflicts have multiplied. However to keep a balance, meaning that the labor disputes are not extended beyond subject matter of ammending. Once the workers' demands were met, the conflict turns off, course to return at another time, but the involved parties did not remain permanently in opposition.

Final opposition is stabilizing and begins to solidify given that *big industry takes its momentum.* Now the division of labor is deepening, so progressing. Each individual in the workforce has its function is specialized to perform certain operations, for the future each performing a single operation as well. It is time when the manufacturing workshops are separated, the differentiation based on specific the work done: rotating, tailoring, weaving, dyeing, etc. On this occasion we find that the smallest reason for complaint was enough to stop the activity of a whole workshop and thus all production stagnate, other workshops being directly related to the revolt that arise. Further, conflicts are becoming increasingly violent. Underlying these disputes they were unsatisfactory conditions in which laborers workers, but that they accepted this constraint by needs, the lack of an alternative.

Another aspect of rupture organic solidarity refers to *science.*

When the level of knowledge in science was inferior, science was very divided.

The human individual has the ability to penetrate spiritual the whole of it low. Hence results the unity.

Extending cognitive area, deepening existing knowledge led to the division of the sub-branches of science, which led the amplification of a separate and private studies and thus breaking the unity, solidarity conferred by unit, by division of the intellectual labor. Also, „this universal human potential for social change has a biological basis. It is rooted in the flexibility and adaptability of the human species—the near absence of biologically fixed action patterns (instincts) on the one hand and the enormous capacity for learning, symbolizing, and creating on the other hand.“[5]

- the disintegrator character of the division of labor

Whenever the social division of labor exceeds a certain level and proceed to the next higher, it determines disintegration.

The accentuation of the division of labor is a disintegrator factor in that it determines amplification of individual divergences, intellectual and moral, which leads at the same time to the need to build a permanent discipline, able to prevent and combat the effects of deepening specialization equally.

In other words, we can say that separation of social functions is essential to the developement of knowledge, but also prevents the maintaining of the social, economic, organizational unit.

[5] http://www.britannica.com/EBchecked/topic/550924/social-change

Returning to the beginning stage of generality, is not a viable solution but rather requires philosophy, the science of sciences, to rebuild the unit. Just as "the brain does not create the body unit, but express a crowning"[6], is likewise expected that philosophy to express the unity of science, which under the division of labor increases and thus determines the disintegration of the unit.

However, it is clear that philosophy will fail completely to provide an overview of the knowledge of every science discipline or sub-branch. The developing and the deepening each discipline by the division of labor or the specialization of functions, will not only lead to the providing from the philosophy a general overview of the results achieved in various sciences. For example, no spirit can not penetrate the knowledge in depth and a whole to the level of sec. XXI.

The negative effects of the division of labor is inevitable. They manifest against a background of anomic manifestations, which is inter-relationship.

A. Comte demonstrates the existence of social need to return to the primary generalization, with the aim of maintaining unity. The return, as the method of achieving a state which coincides with the starting point. The instrument would be represented by an independent body (state / government) to fulfill a particular function. Under these circumstances, the society would present as a whole, as a whole, homogeneous, but indefinitely. In its composition would remain and would function, in its own way, like integrated whole and yet independent, without the posibility full to directing them, all the social elements. The influence in this case is directed from the particular to the general, and what looks the general is only a result which is reached by a spontaneous consensus of the parties, translated into a special form of internal solidarity.

- the relationship between the specialization of the economic functions and the social cohesion

Excessive specialization was at one time the explanation for threatening social cohesion, by causing of incoordination: organic solidarity is not what it should be, it is not owed a weakenings of the mechanical solidarity, but that they are not achieved all the conditions of the existence of organic solidarity.

The economists addresses the problem in terms of self-regulation: they focus on the element *price*, which increases or decreases as exacerbate or decrease in production. However, this process requires partial rupture of organic solidarity.

The organization is more complex, the more specialized *functions* and thus appears as the *need for adjustments*. These three factors are in an inter-relationship and mutual determination triggering the operation in terms of feedback loops.

From *the socio-human point of view* can say that from the moment of its appearance and establishment, each discipline in an attempt to assert by delimiting to the research area, to the object of study, to the theories and own distinct research methods, she tried a separating from the other. This is especially if we consider that these disciplines have disputed the primacy.

From here comes the *anarchy*. It takes the form of an ensemble consisting of separate parts between whom there is interrelation, so no unity. This is due to lack of organization because it the purpose of all cognitive demarches is represented the happiness and the welfare of the human factor.

Today, thanks to this ultimate common purpose, the sciences, their interlocking gave birth to the others, of intersection: interdisciplinary sciences.

[6] E. Durkheim – *Diviziunea muncii sociale*, Ed. Albatros, Bucureşti, 2001, p. 376.

Under these circumstances, degree of complexity of science is amplified, resulting in continue to accentuation of the division of labor, but also the correlation of activities. These actions are determined mutually. It is a condition of returning to normal the division of labor. This state is characterized in that the individual is not defined by a specific task, closed, but can achieve what happens beyond it, may charge a condition overall. For this, the worker shall not include social cognitive the vastness , but proximity its function, the importance and the ultimate goal of their own actions. It is the moment in which is achieved the combination between deepening and enlargement, by effect the actions to enhance research in a particular direction known to man. It does not act mechanically, robotically. He acts consciously, even if his action is marked by uniformity.

- the division of social labor through coercion

This uniformity often leads to an abnormal form of the division of labor and is represented by compulsion. Coercion is presented here as a result of regulation, in a certain stage and located in the ratio of inconsistency with the nature of things.

It can be said that the division of labor through coercion is not a form of anomic human activity, as long as it is directed by rules. The fact that those rules no longer correspond at some point to a regulatory requirement can be viewed as a lack which in this context refers to a different set of rules that don't exist yet, or at least to a form of regulation that doesn't exist yet. This being said we come also in one form / state of anomy.

This stage of the social division of labor is found mainly in the class struggles.

The organization of division of labor within social classes is strictly regulated, but usually leads to conflicts of class. „Lower classes, not being satisfied with the role they deserve by custom or by law, aspire to functions that are prohibited and tries to take over from those who exercise them. From here the internal struggles who is due to the manner in which labor is distributed."[7]

Therefore, the rightful role of lower classes due by rigid rule, leads to disharmony between the individual and its function. He bear this function by coercion. Is exactly the cause of the outbreak of the conflict, of a class struggle embodied in the weakening of increasingly strong organic solidarity.

Another important element in this diagram refers to the external conditions of class struggle. The equality or inequality report where is these conditions constitute the basis of the appearance of a particular problematic. This problematic is materializez in the need for equalization of opportunities for individuals to access the desired social functions, regardless of social class membership.

Along with the deepening of the social division of labor arises the need to develop contractual relationships. It also requires harmonization of contractual relations in order to achieve contractual solidarity. When the economic and social contracts are respected by force, the contractual solidarity is disturbed. In order to counteraction this issue is imposed the location of the involved (parts) in the contract, in equal external conditions.

In terms of external constraint - which comes from the inside of social forces – deviates the social life, from its natural direction.

It is necessary here to mention the emergence of a form of inconsistency. This consistency is very visible in the industry and beyond. But for clarification, we will stop at this area: the entrepreneur, the investor, any of they, depend largely on the amount and quality of work of laborers. With how they act jointly, consciously, direct interest, the production will increase, revenue will increase and hence increase the investor will be in advantage.

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[7] *Ibidem*, p. 389.

Reverse, when the labor is quantitave and qualitative ineffective, the results will be at the opposite pole. In this case we are talking about a weakening of solidarity in the labor process, amid the weakening of the relations between the economic functions performed by workers. On the background of such a weakening is found that the activity of each worker is below normal, there are discontinuities in the relationship between the functions assigned to each one.

That being said have just described how it looks the incoherence born from the disturbance appeared between social need and social labor solidarity.

An increased specialization of the functions in a complex structure must completed by a sufficient quantity of labor. Thus, the whole process of work doubled by a optimal regulatory between the above elements will represented the framework of organic solidarity in labor.

Of course, do not should be ignored that at social needs grown and of increasingly diversified, the social division of labor is accentuated, and automatically triggers an growth of the economic activity and continuity of the economic functions.

The main function of the social division of labor consists in increase productive labor and the ability of worker. This phenomenon is based on the following:

1) before change the individual labor activity in social activity, one and the same person was forced to move from one occupation to another, so to perform activities in different areas. We speak of course about the period by beginning of mankind, even before the onset of the first wave of development of human society. The workforce was an individual action, so not involved the group and depended on the needs of each man.

The undivided work is a unspecialized work, even though many assert that satisfaction of human needs of all kinds involves a complex specialization. As an example we have the hunter that meets the needs of food for him and his family. But, in addition to hunted , he has need also of vegetables and grain, so it was required to supply agricultural activities too. At one point there was a need for clothing, the human individual therefore added another job in existing activities, namely the clothing tailor. The same guy has needed shelter, and for this reason why he deals with this too, so that late in history to find, among others, the builder of their own homes. All these activities are present simultaneously in human life before shaping of social dimension of work because each individual was placed in the position to solve alone all basic needs (in the beginning there were not different needs) and there is no exchange of goods. With the appearance of trade in goods this stage is exceeded, human needs are diversifying and appear the economic relationships. But about the example described here, all human activities related to work, from the simplest to the most complex, require a greater physical and intellectual effort, time and energy consuming. Also equally important aspect is the unspecialization of economic functions in the undivided work, lead to poor results qualitatively: a person can not successfully perform several functions, hence more social roles. Along with the shape of this gender issues has been status desintegration occurred.

As a result of those mentioned here it is clear that the division of labor is the key to solving social problems.

2) The social division of labor leads besides saving labor time given for the recreation and leisure time to the increase of the worker skills and the sustained cultivating of his talent because of the specialization of economic functions. At the same time it is found that any unsuccessful attempts, hesitations are reduced progressively. So, more the division of labor is emphasized, the more precisely each worker knows exactly what to do in his work and especially how to act in work to serve the social need.

We can say that the evolution of division of labor has individual and psychological causes. The need of fortunately, forces the individual to specialize increasingly more, wich implies simultaneously collaboration in societal framework. But here it should be mentioned

that the individual happiness requires a balance between undivided work and overly specialized work. In the over specializated work we have a large lack of creativity, so the functional activity is reduced. In the over specializated labor, the functional activity is increased excessively, which is inconsistent with the optimal level of human happiness.

„The pain occurs when the functional activity is insufficient, and when the same activity is excessive."[8]

The specialization of functions must not lead us to the idea that individuals tend at individualization, separation. The economics functions they need cohesion, and the cohesion in this case necessarily involves partnership. The partnership leads to continuity in complexity, all against the background the division at level at sub-branches economics.

By the limiting of the activity of each individual is achieved on the one hand the specialization in the respective activity (which lead to the increase at worker performances and the quality at labor product), and on the other hand to the care for person (time of labor limited and saving of physical effort, which means more rest and recreation).

Due to this limitation, the individuals in their activity are becoming increasingly dependent on each other, and their actions limited but put together give rise to further action. It aims at the solution to the social need which generated the triggering of all limited actions . As an example, we can appeal to ancestral human need, the need for shelter. To build a apartment building is need by the limited actions on different specializations of the builders. Thus, some are blacksmiths-benders and building the foundation and the structural frame. Others are bricklayers, they are only dealing with the brickwork. Certainly not lacking the carpenters, parquet layers, etc.. Each of these categories has a limited field of action of their own specialization or training. Well, these actions also limited and various, placed end to end, gives rise blocks of apartments that will meet the social need for housing, as shelter. Of course we must not forget that all these actions are actually pieces of a whole, and for this all to be done, as materialization of divided labor is necessary, as I have just explained, the continuity, the cooperation, the association and the adjustment.

Resulting indisputable that the division of labor limited and also develop the individuals work. This gives them solidarity. A solidarity in the complexity of the limited manifestations, differentiated and situated in relation of continuity.

So we can say that the social division of labor is a source of solidarity evolving.

- the future evolution of the social division of labor

It is very important to show where they are going this process of social division of labor. Because labor is the engine of human society both from point of view physical and moral, we need to find wich is the path them in the future.

The futurologists[9] not remain indifferent to the evolution of the social phenomenon generated by work. They sought to anticipate the forms and effects of this evolution.

We still try to capture the features of social work, comparing its essential elements from one stage to another in the development of human society. More exactly, we start with *The First Wave*, marked by agriculture and individual work, then we pass *The Second Wave* of the massive industrialization, which requires a strong differentiation of the social and economic functions as shown by the father of french sociology *Emille Durkheim*, in his „*The social division of labor*"[10].Farther to *The Third Wave*, we intersect with the informatics era in which the large corporations exists. By explaining the mechanisms of social change from the *Third Wave*, *Alvin Toffler* makes references to the transition to *The Fourth Wave* of social development.

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[8] Herbert Spencer, *The Principles Of Psychology*, Ed. Longman, Brown, Green and Longmans, London, 1855, p.283.
[9] With the publication of the paper *The Future Shock* in 1970, *Alvin Toffler* has created the futurology as discipline.
[10] Emille Durkheim, Diviziunea muncii sociale, op. cit.

Each form of work is directed towards a goal. The goal of social labor from *The Second Wave* is geared towards maximum profits and is directed of motivations exclusively targeted by monetary gain. Thus, the dominant element of the social labor is the *quantity*. Typical values of *The Second Wave* of human development are characterized by profit, development and control, natural consequence of the monetary gain increasingly higher. These values are strongly supported by the owners of the companies, shareholders. The main purpose of divided labor on specializations is the business. The businesses are dynamic element of economic relations, the main way of making a living. For every investor, business owner or shareholder, actually interested persons, the perspective is resumed to self-preservation. All the social divided labor activates social and economic life and dynamized the business but is limited to the local area, at most national. The Results of the work, its social effects are predicted for a period of no more than 5-10 years. Only so could be provided the future in economy, in the dominated period by the Industrial Revolution.

The Third Wave of social change is characterized by quality-oriented purposes. The economic functions of social labor have like finality to creating values. If in *The Second Wave* the corporations were functioning after the model derived from the army model, where the success reflects the amount, now the social norms are redefined. This causes a fracture of large companies into smaller units. Appear new values, such as *diversity* and *differentiation*. In *The Third Wave*, as shown *Toffler,* the motivations social labor in companies are diversifying, going from the earning money to the awareness and the resolving of social problems.

„In addition to de-massification, the contemporary corporation is made more and more responsible for providing of solutions for the social problems.“[11]

In *The Third Wave*, the social labor come to produce moral effects. It pass from profit, development and control, to the creation of values as a teaching or education. Also note that in addition to business owners, the incentives include now also the employees, their families, the service providers and products that goes into the social labor, the clients businesses, the community, even the government.

As a perspective, appears as the dominant the cooperation. The business, where until recently represented the primary way of making a living, tend to the development of society and the serving of people.

„Strategic thinking is redirected to anticipate the future independent needs of the corporation, and the business are seen (...) as a vehicle through which the people can grow and to serve the others.“[12]

In these circumstances the prospects it widen, meaning that the labor effects are anticipated and planned for the time intervals for decades, the corporations plan their activities and elaborates development plans in the existing terms by the international level, all these was reactions to the rules of the new world economic order.

In *The Fourth Wave* of the social change, the social labor will build the purpose, within the corporations, on the global service. The caring toward mankind would rise around the new values and social issues. The goal of social labor will be motivated by the heritage that it will receive the future. As *Hermann Maynard* and *Susan Mehrtens* anticipates, the dominant values will take the form of responsibility for the entire human society. A heightened attention will be directed to services, and the personal happiness and satisfaction of the individual will confirm the ability of the social labor to create the moral values.

Regarding the joint interest in the labor process in *The Fourth Wave* we find *the ecosystems* and *Gaia*, in addition to the previous wave, where everything is stopped at the national government level. The global interest will be felt by involving ecology in the

[11] Fowler Elizabeth, *Să accentuăm calificarea în ecologie*, The New York Times, 17 martie, 1992.
[12] Maynard, H.B., Mehrtens,S.E., *Al Patrulea Val – afacerile în secolul XXI*, Ed. Antet, București, 1997, p. 56.

individual's life. The perspective economy will take the form of the unit and will be based on the social division of labor combined with the joint management of the local , national and global activities. The economic forecast will follow the quality of life for periods of generations or centuries in the future.

„The temporal horizon of the corporation from *The Fourth Wave* will feature generations or even centuries corresponding with the role of global servant.“[13]

The social labor in *The Fourth Wave* will run in a climate much different from the previous one. The workplace will benefit from facilities like: health clubs, recreation centers, meditation rooms, etc..

The workplace policies will be focused on:

1 - the prevention of diseases, which requires an environment free of tobacco consumption, incentives to quit the smoking practices, the rehab clinics, meditation courses and also a healthy eating at the workplace;

2 - the holistic attitude will be concretized in the organization of some seminars on corporate money, of reducing stress for workers who will benefit from mental health clinics, encouraging the use of techniques of integration between mind, body and soul;

3 - active support against drug addiction and workaholism.

So, *Emile Durkheim*'s assertion according to wich the social division of labor produces moral values resonate in the minds of *Alvin Toffler*: the first thing you need to do to evolve mankind is to exceed the level of desire to beat the competition and reach at the level of desire to serve the world. Once this transfer will be done purely intellectual, will be achieved the moral purpose who characterizing *The Fourth Wave.*

While the economies of *The Fourth Wave* takes shape in the overdeveloped countries, occurring new paradigms related to the future corporation. In an attempt to define the social model from *The Fourth Wave*, *Maynard and Mehrtens* predicted that the new corporation will think globally, will act locally and will become a model of ambiental preoccupation.

3. Conclusions

The social division of labor has evolved in direct proportion to the normative socialization. „The social norms, as foundation of the normative theories are found as components of terms: *sociabilis* (all that can merged), *socialism* (to become a society), *societas* (on trade association).“[14]

The institutionalization of the sociality rules determined the normative socialization in the *socioarchie*[15], the phenomenon of individual integration of the regulatory system in the through socialization that supporting specific influences in time.

The basis of commodity economy is the social division of labour.

References

- Durkheim Emille, *Diviziunea muncii sociale*, Ed. Albatros, Bucureşti, 2001
- Fowler Elizabeth, *Să accentuăm calificarea în ecologie*, The New York Times, 17 martie, 1992
- Gane Milke, *French Social Theory*, Sage Publications Ltd, London, 2003
- Gellner E.A., Condițiile libertății. Societatea civilă și rivalii ei, Ed. Polirom, București, 1998
- Herbert Spencer, *The Principles Of Psychology*, Ed. Longman, Brown, Green and Longmans, London, 1855
- Maynard H.B., Mehrtens S.E., *Al Patrulea Val – afacerile în secolul XXI*, Ed. Antet, București, 1997
- Parlagi A., *Fenomenologia politică a dreptului*, Volumul I, Ed. C.H.Beck, București, 2013
- Toffler A., *Al Treilea Val*, Ed. Politică, București, 1983

[13] *Ibidem,* p. 58.
[14] Parlagi A., *Fenomenologia politică a dreptului, Volumul I*, Ed. C.H.Beck, București, 2013, p. 28.
[15] Gane Milke, *French Social Theory*, Sage Publications Ltd, London, 2003, p. 39.

- http://books.google.ro/books?id=CDsj0AW3F2AC&pg=PR7&lpg=PR7&dq=french+social+theory&source=bl&ots=L24Lh6JXuH&sig=HZAtxGk0AjY2yayYjEbPZd3UyVw&hl=en&sa=X&ei=FzdFU5uNMIqGywPomYL4Bg&ved=0CFIQ6AEwBg#v=onepage&q=french%20social%20theory&f=false
- http://theory.routledgesoc.com/profile/pierre-bourdieu
- http://www.britannica.com/EBchecked/topic/550924/social-change

THE JAIL AND ITS METHODS, FACE TO FACE WITH THE DELINQUENT

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Abstract

The Jail has evolved over time thanks to various critics brought to the address of the two purposes: custody and reeducation. Of course, the custody and the reeducation have functioned on the basis of specific methods. In their turn, these methods have suffered critics, which led to change in penitentiary system.

The prison's methods have evolved in the sense of respecting the human rights, of positive moral values as well in the culturalization purpose of those in detention. The prison conditions change at the same time with the society and social values are projected on prison life.

The current study refers to the issues related to setting up of prisons in Romania and at the seven optimal conditions of the prison life, as a first step towards a more complex work, about a analysis of costs between detention and alternatives to the sentence with imprisonment.

Keywords*: prisoner, delinquents, penitentiary life, deprivation of liberty, social risks*

1. Introduction

Increasingly more and more people learn about the high costs for maintenance offenders in penitentiaries. The media contribute greatly to our knowledge to this issue. The economic crisis has triggered great conflicts in human society and for this reason the people are wondering if during the period of prison custody is achieved social goal established: the reeducation of prisoners.

The cost required for the maintenance and the reeducation of a prisoner often compares to the necessary costs for husbandry and care of a child, the necessary costs to protect the health of an adult who has produced consumer goods, or the cost of care necessary of an old man who has made a positive contribution along the his life to the social progress. After this comparison, the result is revolting: a delinquent costs the society more than a child. The child? Represents the future. The prisoner? He risks to come out of prison as a far greater danger for society than it was at the start of detention.

In this case the deprivation of liberty still represents the rehabilitation solution or not? It needs of change for this issue? Perhaps an alternative to the sentence with imprisonment gives more efficient solutions and definitely reduced expenses.

But how did it get here? It is very important to analyze the reasons that led to the current situation and which have created dissatisfactions entire society.

For this, we can see how it evolved the penitentiary system from Romania and which were the specific methods of penitentiary activity that have formed his base.

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2. Content

In his work "*Penitentiary psychology*"[1], the psychologist *George Florian* takes over the idea at *Beccaria,* such that the society bears the main blame regarding unlawful action of the individual. Under these conditions appeared contradictory discussions about prison treatment policy applied to the offender, he can not be tried for the society's fault, in her place.

In "*Discipline and Punish. The Birth of the Prison*"[2], *M. Foucault* explains the functionality of penitentiary treatment, which is always based on the abuse of power. From legal point of view, detention can be considered deprivation of liberty.

Of course, it should be mentioned that the transition from the grotesque spectacle dominated by supplicants specific defined of rituals, all dressed in a ceremonial of suffering, "to the punishment with the closing in prison buried in massive architectures and guarded by the administrations secrets, is not the passing to the undifferentiated penalty, abstract and confusing, is the transition from one art of punishing to another, with nothing less scholarly than the first. Technical change."[3]

- the historian of the penitentiary system from ROMANIA

After the wars of 101-102 and 105-106 which marked the conquest of *Dacia by the Roman Empire, the Emperor Traian* has imposed the Roman law application. This measure remained in force after the withdrawal troops from 274.

Relations between the *Roman Empire* and *Dacia* have continued under the effect of social change of the epoch, through the Byzantine world. This situation continued until 1453, when the *Ottoman Empire* conquered *Byzantium.*

Until on the 14th century, the legislation from the Romanian voivodeships has functioned under the name at *"Romanian law."*

In 1380 – there appear dates about Ocna Trotuşului where the labor was done by the prisoners, those convicted of robbery, murder etc. The prisoners were down into jail, wherefrom they was taken out only at the end of the detention period.

The high ranking criminals were imprisoned in the monastery. The oldest monastery who owned such criminals appears to have been *Monastery Snagov* near Bucharest, built by *Vlad Tepes* in the 14th century.

From the 15th century, in Transylvania this law has acquired a specific characteristic, namely "Hungarian right for judgment and punishment of those responsible, once with reinforcing of the power of the Hungarians feudals"[4].

Starting with the 17th century, we have information on the condition of the custodial units in Wallachia and Moldavia: cellars of royal courts, abandoned houses, salines, where can not speak about a differentiated detention regime or hygiene.

In the late of 18th century and early of 19th century Hungarian nobles demanded building of prisons in the capitals of Transylvania counties. In the work *"Deprivations of liberty in feudality in Hungary"* - as referred in Penology, 2004 by the authors Bălan, Stănişor, Mincă - we find information about the beginnings and the organization of prisons in Ardeal.

1788 - In Transylvania, led by the Austro-Hungarians were in force the provisions of paragraph 61 of the criminal proceeding. This law was promulgated *by Emperor Joseph the Second,* which strictly refers to the cleanliness on each prison, its natural illumination, in order to protect the health of prisoners.

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[1] Gheorghe Florian, Psihologie penitenciară, Ed. Oscar Print, Bucureşti, 2001, *(op. cit.)*

[2] Foucault M., A supraveghea şi a pedepsi. Naşterea închisorii, (french: Surveiller et punir: Naissance de la Prison),Ed. Humanitas, Bucureşti, 1975, op. cit.

[3] *Ibidem,* p. 377.

[4] Bălan A, Stănişor E.,Mincă M., *Penologie,* Ed. Oscar Print, Bucureşti, 2002, p.24.

Under Austro-Hungarian domination, in Transylvanian towns were built special buildings for penitentiary custody. These benefited of the *Mary Theresa* support (1740-1780), also of her son *Joseph the Second*, who comes on the throne since 1765.

1790 - In the Romanian Countries, *Prince Nicholas Mavrogheni* (1786-1790) separating the prisoners by grounds of gender.

1802 - At the beginning of the 19th century we witness to the extension, consolidation and modernization of prisons. Occurring new buildings, especially infirmaries near each prison. *Prince Michael Șuțu* (Romanian State and Moldova - 1783-1802) asks weekly reports on: number of prisoners, crimes, convictions. An important novelty is the use of prisoners in the public works in order to increase food quality.

1831 - The Organics Regulations arise in Romanian Country and Moldova. They foresee the enforcement regime of punishment.

An important document in that it speaks about prison regime at that time is *"The Organic Rules"* of 1834, which describes a revolution in the penitentiary system of time, namely it comes to safety, hygiene, food, and other requirements, of course at the lower limit.

It is time when appears the necessity of takeover the European model of penitentiary custody, which will require an adaptation to Romanian social conditions. For the first time, according to this model, is applied the separation rule by sex, degree of guilt, prevention and final conviction.

1851 - Appears *The Prison Regulation from Iași* - the first provision in Romanian law system, in which stops the insult and beating of the prisoners. Appears also *The Prison Regulation from Tg.Ocna*, important milestone in modern law on execution of custodial sentences by implementing detention regime *"Auburian"* and the first regulations on the moral education of prisoners. Appears, therefore, the first step for reeducation. It was oriented in two directions: one religious and one of the trades. Both forms were compulsory.

-1 October 1862 - under the reign of Al. I. Cuza was dissolved the prisons administration and was approved *The Regulation for organizing the service of penitentiary establishments and charity in Romania*.

-1 February 1874 - *The King Carol I* has promulgated the *Prison's Law* . Here arises the separation between the mixed cellular system and the juvenile prisons, set up on this occasion.

The Regulation on the prison's regime that has governed the execution regime of prison sentences until 1930, imposed in prisons a regime of solitary confinement on the night and work together on the day. The emphasis on reeducation was remained, the possibilities are diversifying. It is considered that a more rough punishment, lead to a lower chance of recidivism.

The Regulation on prison's regime was compared at the time and later with the *Belgian Law of 1870* and the *French Law of 1875*.

The Law of 1874 decided the classification of the prisons on the prevention's criterion and conviction: prisons of prevention and jails of doom (correctional, forced labor, imprisonment and reclusion).

- 1929 - occured the Law for the penitentiary's organization and of institutions of prevention.

The Congress of International Criminal and Penitentiary Commission which was held in Prague in 1930 has assimilated the same principles for execution that Romania adopted the year before, and some of them are found in *the Standard Minimum Rules for the prisoner's treatment*, adopted by the O.N.U. in 1955.

After August 23, 1944, was addopted *the Royal Decree by general amnesty*, accompanied by *the Decree Law 442*, which provided for the abolition of all the detention camps.

- 1944 -1 of November - has appeared *the Regulation for the establishment and operation of internment centers* which foresees among others a payment to for the purchase of the bed and lingerie, which remains the property of the center after the internees left the center.

The Colonies of work, the compulsory domicile and labor battalions they came in the composition of *Decision Council of Ministers no. 1554/1952*. Thus, to achieve the gigantic projects of national interest, the inmates had the opportunity and the obligation to work on the Danube - Black Sea channel, the hidropower complex Bicaz etc.

1969-18 of November - *the Law no. 23 about the execution of the sentences* and *the Regulation of the execution of sentences* that are also present today. The regulations contained herein refer to: organize places of detention, the regime of the convicted persons, their rights and duties, and the penalties who may apply. The normative acts of the time they put a special emphasis on the prisoner's re-socialization under various forms: participation in productive activities, the completing of the general education and literacy, qualification in a trade, cultural and educational activities, contact with family and rewards for the conformist behavior. Another measure was taken regarding the personality, skills and dignity of the prisoners, in order to increase their self-esteem on their part. All these normative acts were at that time in line with European regulations at the level of prison system and has ensured the work basis in prison for about 25 years.

1989 - December - until to revolution, the prison system has functioned under the leadership of socialist ideology, with all the shortcomings and negative consequences.

1990 - the prison system leaves behind the communist reeducation model and passes from *the Ministry of Interior* to *the Ministry of Justice.*

1994 - the ratification by Romania *by the Law no. 30/18.05.1994*, of *Convention for the Protection of Human Rights and Fundamental Freedoms,* has led at raising standards on conditions of detainees detention's at the international level.

The prison system reform has aimed mainly: humanizing detention regime, increasing the quality and quantity of food, the supplementation the rights granted to detainees at packages, visits, cigarettes and shopping, access to information and media.

2003 - O.U.G no. 56 / 25.06.2003 on: certain rights of persons in execution of custodial sentences, the repealing of *Regulation of execution of some punishments and the measure preventive arrest of 1969,* the prison practice alignment to european standards.

2004 - 28 September - *The Law no. 293/2004 on the Statute of civil servants in National Administration of the Penitentiaries*. It took the demilitarization of the prison staff. Those placed in the reserves have acquired the quality of public servant, with special status.

2006 - *The Law no. 275/2006 on execution of punishments and measures ordered by the judiciary authorities.* This introduces new elements such as: the judge's institution for the execution of sentences and the personalization of the custodial sentences.

- the critique of prison and of her methods

M. Foucault describes in *"Discipline and Punish. The Birth of the Prison" (op. cit.)* the occurrence of the prison's critics and its method's from 1820 -1845. Also today, this criticism has kept some formulations[5] who even in regarding of figures underwent minor changes:

- the prisons do not contribute to the decrease in crime, despite the modernization detention units, and the diversification of education programs from carceral area: does not decrease the number of crimes and increase the number of relapses;

- in most cases, the detention provokes recidive: most of those released have relapsed;

[5]In the work *"Discipline and Punish. The Birth of Prison", (op. cit),* 1977 p.378 ... Foucault M. insists on the aspects who have not undergone almost no changes during the transition from one society to another.

- the prison does not succeed in to reinstate in freedom the individuals brought on track, but rather spread in society people with great potential for crime – a number of people played back annually in society are same number of criminal risk factors, of murder and corruption, spread in the social mind and body;

- the prison doesn't succeeds to not produce criminals: they "make them" even by their lifestyle mode which is imposed on them - isolation in cells, the performance an unnecessary work for them, meaning they will not have where to apply what they learned in prison (the reference is make at the positive skills); in *The Report of the General Council of the Society of Prisons,* 1819, *F.Bigot Preameneu*, mentions: "The feeling of injustice that him trying a prisoner is one of the main reasons that him can stiffen .... he falls into a state of aggressiveness towards everything that surrounds him; he sees executioners only, in what is representative of the authorities: does not believe in his guilt, he accuses the justice itself."[6] Not the least the corruption, the fear and the inability of guards, is a factor of "production" of delinquency. This is because the guards, for the personal security, resorted to the corruption which implemented themselves. Regarding to work in detention, that in conditions imposed by the prison regulation can not have educational character, in 1842, the newspaper *L'Atelier*, publish a protest of the imprisoned worker for association: "Is protesting against the treatment applied of the blacks. The prisoners are not sold it in the same way by entrepreneurs and are buying of manufacturers? ... have received the prisoners in this regard lessons of honor? Are not they demoralized even worse by these examples of the appalling exploitation? "[7]

- the prison creates conditions for the development and organization of a criminal environment, hierarchically and compact from point of view of solidarity's of its members regarding complicity; is the place in which the young delinquent acquiesces to the culture of the penitentiary.

- the liberation time is expected with great joy and impatience during the entire period of detention, by majority of prisoners, especially the women prisoners; so seen from the outside, but the reality is different: At this moment, as the closer, the more powerful generate disorientation, fear of the unknown, due to rupture of the society, with the moment of accession to the penitentiary regime; "Beyond" for the majority of women that is running custodial sentence, no longer exists anything they let: husband divorced or is in prison (in some cases to another penitentiary than the wife), the children grew up without maternal emotional support, parents have died, the social relations existing prior to detention were adversely altered or have simply disappeared, and the examples could continue.

Worth noting that these women no more have that back, nothing binds them free civil society, and to this is added of course, the impossibility to satisfy the requirements of living that were commonplace in penitentiary: from where until liberation much of women prisoners longer doing regarding food (by fraudulent means in relations with other at cell level, department, or illegal relationships with prison staff) regarding personal hygiene, there are mouse free means of solving problems; about medical care, things are resolved or resolved more than before the penalty start, the accommodation is provided free; from the liberation, she was in a situation that more or less anticipated and taking overshadowed the joy of liberation, namely: does not have home, does not have livelihood, most likely its own family disintegrated, and the family of provenance (where fitted) is not capable to satisfy the demands of living.

In the same context, we can also speak of lack of own income, as well as the impossibility of finding a job.

- the conditions that awaits them out of prison unquestionably condemns them these women to relapse: the impossibility to find a job in view to obtaining of income necessary

[6] ***The Report of the General Council of the Society of Prisons, 1819.
[7] Foucault M., p. 389.

daily living, the lack of shelter, the vagrancy and prostitution - one of the most convenient solutions for acquiring income in such situations, are among the most common causes of relapse.

- the penitentiary produced delinquents not only in prisons, as noted above, also indirectly, condemning to rupture the prisoner's family: a family without mother, so without emotional binder, remains a group that will divide, because father may not, in most cases to fill the mother role.

Moreover, he left without life partner will seek refuge in various relationships fleeting. This is not constructive for minor children who will lose direction in everyday life most easily; in families with adult children at home, they will be involved without much discernment in shady business and relationships; of most times these will take the penitentiary's way.

In cases where the mother runs a custodial sentence, implicitly leaving the family home for reasons of delinquency, the children who remain at home they usually come in groups of alcoholics, addicts and other similar categories.

In 1945, was perfected the penitentiary reform, which included seven principles, called the seven universal precepts best prison conditions. Today they constitute yet the foundation of reeducation of persons deprived of liberty, in view of their social recovery.

1. *The principle of correction* - the essential function of criminal detention is the correction (re-socialization) and social reintegration of the convicted person.

2. *The principle of classification* - in terms of prisoners' accommodation, is necessary to make a difference by sex, gravity of punishment, the type of offense, age, their transforming stages: in the choice of methods used, it is necessary to be taken into account the physic differences, moral, unequal chances of straightening, etc.

3. *The principle of the punishment modulation* - the guilty would be desirable to be released once it is found its moral recovery, so the punishment would not be executed in its entirety, but does not specify what happens when the detention period expires and the guilty not trusted a guarantee of moral regeneration after the treatments applied; in this case shall be extended the detention period up to correction, re-internalization of the moral and social values, or the prisoner is released as a real danger into society? (This is not specified).

4. *Principle of the labor viewed as obligation and law* - the labor is the main method in the re-socialization process of prisoners. The penal labor is considered both compulsory and useful, offering the opportunities to learn a trade (nowadays, prisoners both men and women, benefit from training courses, practice in penitentiaries, as well as the release of acts of study recognized by the Ministry of Education and Research).

5. *The principle of educating in penitentiary* - the penitentiary has an obligation both towards society and towards prisoner to educate him. The education is the penitentiary instrument through which is realized the correction, the information, the learning by delinquent of norms and social values.

6. *The principle of the technical control of detention* - appears the necessity of activation in the team of penitentiary staff, to the specialized personnel. It is about the medical and socio-educational services.

7. *The principle of the appendices institutions* - since that period is raised "the tracking problem" of the prisoners after release and supporting their social reintegration. This means involving other institutions to complete the effort for rehabilitation and social reintegration.

3. Conclusions

The deprivation of liberty tends to become a increasing inefficient rule. On the one hand we have high social costs for the maintenance of a prisoner and, on the other hand, the high social costs due to the reduced opportunities for the reintegration of prisoners into

society after release. The alteration of social relations of the prisoners by separating them of the free social environment, especially their altered family relationships, all lead to the need to choose an alternative to the sentence with imprisonment.

It outlines the importance of the institutions appendices of penitentiary, and the cooperation of society to achieve social reintegration.

References

- Bălan A, Stănişor E.,Mincă M., *Penologie*, Ed. Oscar Print, Bucureşti, 2002
- Foucault M., A supraveghea şi a pedepsi. Naşterea închisorii,,Ed. Humanitas, Bucureşti, 1975
- Gheorghe F., *Dinamică penitenciară*, Ed. Oscar Print, Bucureşti, 1999
- Gheorghe Florian, *Psihologie penitenciară*, Ed. Oscar Print, Bucureşti, 2001
- Gonsa H., *Organizarea detenţiei*, Revista de Ştiinţă Penitenciară nr. 3-4, 1991
- Haslam, S. A. & Reicher, S. D., When prisoners take over the prison: A social psychology of resistance. Personality and Social Psychology, Review 154–179, 2012
- Haslam, S. A. & Reicher, S. D., When prisoners take over the prison: A social psychology of resistance. Personality and Social Psychology Review 154–179, 2012
- Hedwig Lee, Lauren C. Porter, Megan Comfort, *Consequences of Family Member Incarceration. Impacts on Civic Participation and Perceptions of the Legitimacy and Fairness of Government,* in The Annals of American Academy of Political and social sciences, January, 2014, vol. 651, nr.1
- Herman F., *The emancipation of prisoners*, Edinburgh Univ.Press Ltd, 1995
- ***The Report of the General Council of the Society of Prisons, 1819
- http://jama.jamanetwork.com/article.aspx?articleid=325254
- http://cjb.sagepub.com/content/39/9/1131
- http://archpsyc.jamanetwork.com/article.aspx?articleid=497592
- http://ann.sagepub.com/content/651/1/44

A CONCISE PRESENTATION OF THE FIRST LITERARY MAGANIZES PUBLISHED BY WOMEN WRITERS IN ROMANIA BETWEEN 1878 - 1947

Carmen D. CARAIMAN[*]

Abstract

In its early days Romanian feminine writing was influenced by the ideals of emancipation that animated the female population of our country. These ideals were shared and spread not only by feminist supporters, though this happened to a large extent, but also by outstanding men of letters (Eugen Lovinescu, Garabet-Ibraileanu and Tudor Vianu and others), who were receptive to the changing status of women in their contemporary society and encouraged it as such.

The present paper focuses on what we are going to call "early feminine writing in Romania", whereby we understand the early days of literature created by women in this country.

Our goal is to identify the literary publications that gathered for the first time in Romania women writers who paid a particular interest in literature. Thus, our paper has a documentary value: it presents the main Romanian literary publications edited by the first women writers in our country, the aesthetic ideals promoted and shared by these magazines and the contribution brought by female authors to the wakening and shaping of the taste for writing and for literature amidst Romanian women in general.

Keywords: *Romanian feminine writing, the first feminine Romanian literary magazines, feminist propaganda, aesthetic value, cultural emancipation of Romanian women.*

1. Introduction

If one intended to label the first literary publications edited by women in Romania, the phrase *literary creation and emancipation* would synthetize their initiative to open a new direction in our country's culture, i.e. *feminine writing*.

In the present paper, we are going to use the phrase *feminine writing* to refer to *literature created by women* in general and to the literary publications edited by women and for women, refer, in particular. The reason for which we do not use the phrase *feminist writing* for depicting this new literary trend is that not all women writers who published for the first time in Romania were animated by feminist ideals and, vice versa, not all feminist supporters manifested an interest in literature. In consequence, out of the long list of publications edited by women in Romania, we have selected only the magazines that exclusively contained literary columns.

When discussing about feminine writing, one has to underline the importance which the feminist ideology had in our country in the intellectual affirmation of females, including in the realm of letters. Thus, it was this ideology which awoke in women their long-time yearned aspirations towards self-improvement and personal development and which could not be fulfilled due to the faulty legislative system that did not provide rights and freedoms whereby women could have access to their emancipation. From this point of view, the echoes

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of the French Revolution, of the First Wave of Feminism[1], of the socialist ideology had a serious impact on the Romanian feminine population's wish to enhance its social and political status. The wish to be enfranchised, better educated, socially and politically involved had the effect of a "revolution", as Estelle B. Freedman points out: "In the past two centuries, a revolution has transformed women's lives. Unlike national revolutions, this social upheaval crosses continents, decades and ideologies. In place of armed struggle it gradually sows seeds of change, infiltrating our consciousness with the simple premise that women are as capable and valuable as men."[2]

2. Content

The feminine aspiration towards emancipation was doubled and encouraged by the actual implication of women in various areas of activity ranging from the hard physical work performed by female citizens for the army during the war time to the subtle activity of writing. In fact, the wish to emancipate characterising Romanian women gradually determined them to set up their own organizations, associations and councils, as well as their own literary, social, educational, cultural and political magazines in an attempt to present, support and enforce their ideals and to illustrate their active participation in key sectors of social life. Of the large number of feminist organizations set up by women, we mention: "Liga Femeilor Române de la Iaşi" (1894) [*The Romanian Women's League from Iaşi*], "Unirea Educatoarelor Române" (1908) [*The Union of Romanian Educators*], "Uniunea Femeilor Române" (1913) [*The Union of Romanian Women*], "Asociaţia pentru Emanciparea Civilă şi Politică a Femeilor din România" (1918) [*The Association for Civil and Political Emancipation of Women in Romania*], "Consiliul Naţional al Femeilor Române" (1918) [*The National Council of Romanian Women*], "Societatea Scriitoarelor Române" (1926) [*The Romanian Women Writers' Society*]. A part of these organizations had their own publications, e.g., *The Union of Romanian Educators* (1908; President: Emilia Humpel) edited the magazine: *Unirea Femeilor Române [The Union of Romanian Women]* in Iaşi, between: 1909-1916, while *The Romanian Women Writers' Society* edited the most important literary feminine magazine: *Revista Scriitoarei* [*The Woman Writer's Magazine*] between: 1926-1943.

When referring to the birth of feminine writing in our country we cannot fail to mention the contribution brought by two women writers, Mărgărita Miller-Verghy and Ecaterina Săndulescu, who, in their book *Evoluţia scrisului feminin în România*[3] *[The Evolution of Feminine Writing in Romania]*, depicted the first wave of Romanian female authors. This was a singular attempt in the history of Romanian literature. In fact, the two authors engaged in an original literary approach by systematically presenting the literary activity performed in Romania by women writers from the second half of the 19th century up to 1935[4].

As one could expect, literary critics did not remain silent to this new phenomenon. Naturally, their reactions were different. Thus, in the opinion of Tudor Vianu, the birth of Romanian *feminine writing* was a consequence of her improved social condition, which he

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[1] See feminists of the First Wave: Mary Wollstoncraft, *A Vindication of the Rights of Women*, Dover Publication Inc., 1996; John Stuart Mill, *The Subjection of Women*, New Jersey: Transaction Publishers, 2001; Harriett Taylor Mill, *Enfranchisment of Woman*, London: Trübner and Co., 1868 a.o.

[2] Estelle B. Freedman, *No Turning Back. The History of Feminism and the Future of Women*, New York: The Random House Publishing Books, 2002, p.1.

[3] Mărgărita Miller-Verghy, Ecaterina Săndulescu – *Evoluţia scrisului feminin în România*, Bucharest: Bucovina Publishing House, 1935.

[4] Some of the most important names included in this book were: Sofia Nădejde, Hortensia Papadat-Bengescu, Elena Văcărescu and Matilda Cugler-Poni.

praised as a new stage in the evolution of women and which he regarded as being different from the concept of feminism (depicted by the famous critic in a negative way).[5] Other important literary critics who supported feminine writing in Romania were Garabet Ibrăileanu and, primarily, Eugen Lovinescu.

We appreciate that the appearance of gifted women writers owed a lot to the publication of the first literary magazines and newspapers which were edited by and for women. Thus, the first wave of Romanian women writers was offered the chance to publish in a large number of magazines[6], of which we enumerate two: *Revista noastră [Our Magazine]* and *Revista scriitoarei [The Woman Writer's Magazine]* as being the most important literary magazines; in their columns there published writers who enjoyed considerable appreciation at the time (Elena Văcărescu, Iulia Haşdeu, Agatha Grigorescu-Bacovia, Coca Farago, Claudia Millian, Adela Xenopol, Sofia Nădejde, Maria Baiulescu, Maria Cunţan, Elena Farago and others) and who actively supported women writers and women's emancipation in general.

However, one has to underline the fact that the birth of feminine writing was from an aesthetical point of view a feeble beginning that did not produce significantly valuable works of art. Thus, the importance of these first magazines lies in creating and preparing the proper ground in which the seeds of creative writing were to grow and flourish during the 20th century, especially starting with the interwar period.

In Romania the number of feminist magazines[7] is much higher in comparison with literary magazines which supported feminine literary creativity. Nevertheless, both categories of publications were in general much indebted to the socialist ideals, as Ștefania Mihăilescu also noticed: "The large number of documents published at the time ascertains the role which the socialist movement played in helping women reunions and associations reach maturity in the last decades of the 20th century."[8] (my translation)

However, most of the feminist magazines had a short existence. From 1878 to 1947, feminist literary magazines brought together authors like: Sofia Nădejde, Constanţa Hodoş, Matilda Cugler-Poni, Hortensia Papadat-Bengescu, Ticu Archip, Lucia Demetrius, Claudia Millian, Lucreţia Petrescu and others.

The role played by *Sburătorul* Literary Society, coordinated by the outstanding literary critic, Eugen Lovinescu (who managed to gather the most important women writers at the time), in discovering and promoting young gifted writers, including women writers, was fundamental.[9]

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[5] Tudor Vianu, „O ideologie feminină – Noua feminitate", in *Sburătorul*, Year I, no. 3, 3rd May 1919, p. 68.

[6] *Amicul familiei. Litere-ştiinţă-arte-pedagogie-industrie*, Bucharest, published twice a month: 15th March 1863 – 31st 0ctober 1865, published once a month (1st January – mai 1868), editor-in-chief: Constanţa Dunca-Schiau; *Rândunica*, 1893-1894, editor-in-chief: Elena D. Sevastos; *Dochia*, 1896-1898, editor-in-chief: Adela Xenopol; *Revista noastră*, 1905-1907, editor-in-chief: Constanţa Hodoş; *Românca*, 1905-1906, editor-in-chief: Adela Xenopol; *Revista scriitoarei*, 1926-1943, editor-in-chief: Adela Xenopol until 1928 and Aida Vrioni until 1943.

[7] See, for example, the following feminist propaganda publications: *Munca* [*The Labour*], *Drepturile Omului* [*Human Rights*], *Lumea nouă* [*The New World*], *"Femeia Magazin: Revistă a Familiei"[The Woman Magazine: Family Magazine] (1868, Bucharest; new issue: 1993, Bucharest), "Buletinul Ligii Femeilor" [The Newsletter of Women's League] (Iaşi, 1895-1896), "Acţiunea Feministă: Organ de Propagandă pentru Emanciparea Civilă şi Politică a Femeii" [The Feminist Action: Propaganda Organ for the Civil and Political Emancipation of Women] (Piatra-Neamţ, 1919 – Decembere 1921/January 1922), "Buletinul Secţiei Juridice" [The Legal Section Newsletter] (Bucharest, 1920), "Cuvântul femeilor" [The Women's Word] (Bucharest, 1933), "Femeia satelor" [The Village Woman] (1935), "Almanachul nostru" [Our Almanach] (Bucharest, 1936), "Mariana: revistă feminină" [Mariana: A Feminine Magazine] (Bucharest, 1943) etc.*). Similarly, many see the conferences organized by Constanţa Dunca-Schiau for a period of almost 50 years: *Femeia Femeii [The Woman's Women], 1863, Femeia în famillia [sic!] [The Woman in the Family]. Conferinţă publică, Feminismul în România. Conferinţă, 1904 [Public Conference, Feminism in Romania. Conference], Educaţiunea copilului nostru. Conferinţă, 1906 [The Education of Our Child. Conference], Fiicele poporului [The People's Daughters]*.

[8] Ștefania Mihăilescu, *Din istoria feminismului românesc. Antologie de texte*, Iași: Polirom Publishing House, 2002, p. 26-27; original text:„Numeroase documente ale vremii certifică rolul mișcării socialiste în maturizarea reuniunilor și asociațiilor de femei în ultimele două decenii ale secolului al XIX-lea."

[9] In Romania, literary criticisms - during the 19th century and in the first half of the 20th century - was still the creation of men; of the most representative Romanian literary societies that were active at the end of the 19th century and during the first

As Constantin Ciopraga[10] pointed out, the beginning of the 20th century was a prolific literary period thanks to the coexistence of various aesthetic directions revealed by the large number of literary publications printed at the time. Most of these publications followed three key directions: a classical one (see "Convorbiri literare" and "Convorbiri critice" magazines), a modern one (see "Literatorul" magazines) and a populist direction (see "Viaţa românească" and 'Sămănătorul' magazines). Adriana Iliescu (*Reviste literare la sfârşitul secolului al XIX-lea*) completes the three above mentioned literary directions with the socialist Magazine "Contemporanul", edited by Constantin Dobrogeanu-Gherea. We suggest that the above classification can be completed with literary feminist magazines, coordinated by: Adela Xenopol, Matilda Cugler-Poni, Constanţa Dunca, Ana Ciupagea, Sofia Nădejde, Maria Flechtenmacher, Smaranda Andronescu, Aida Vrioni, Mărgărita Miller-Verghy, Constanţa Hodoş and others.

According to Adriana Iliescu, at the beginning of the 20th century, the largest category of readers was represented by women, a fact which, according to this literary critic, was due to their education (women who had a thorough education could speak French and were eager to read in this language) and to their longer time spent within the household space.[11]

In the next lines we are going to chronologically enumerate literary publications edited in Romania from 1878 to 1947 by women and basically with a view to encouraging feminine writing, in general:

1. Femeia Română. Ziar social, literar şi casnic [The Romanian Woman. Social, Literary and Household Newspaper]

This is the first publication edited in our country. The newspaper was published in Bucharest (between 1878 and 1881) by a woman who reserved a special place for a literary column in the pages of her publication; the editor-in-chief of this newspaper was Maria Flechtenmacher. Literary columns were signed both by female and male writers: Vasile Alecsandri, Ronetti-Roman, A. Macedonski, I. Vulcan, C.C. Bacalbaşa, Sofia Nădejde, C. Mille etc.

2. *Rândunica [The Sparrow]*

This magazine was published by Elena D. Sevastos in Iaşi from January 1893 – December 1894. Elena D. Sevastos was one of the most active feminist authors in Romania. Of the collaborators to this magazine we mention: Matilda Cugler-Poni, Ada Culianu, Emilia Sevastos, Constanţa Dimitriadi, Maria Angelian, Adela Xenopol, Stanca Fulger, Virginia Micle Gruber.

The first issue of this publication focuses on its goal, i.e. the promotion of *feminine intelligence* and gifted writers: "…this magazine is basically meant to encourage feminine intelligence while providing in its columns space for any talented writer /.../."[12] (my translation)

3. *Dochia*

This eclectic publication was edited by Adela Xenopol from 1896 to 1898 and it was meant to promote feminine writing and feminist propaganda: "The *Dochia* Magazine is meant to defend, support and to observe women's rights. I am going to firstly deal with women's economic emancipation, which they need so much today. /…/ The Romanian woman is going to play the key role in this publication. First of all, I am going to refer to the role played by women in Romanians' history to prove that they have been active at all times, no matter their

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half of the 20th century, we mention: *Junimea, Literatorul, Sburătorul, Cercul literar de la Sibiu* and *Convorbiri literare*. *Sburătorul* was the publication that brought together the most talented women writers at the time (Hortensia Papadat-Bengescu, Ticu Archip, Lucia Demetrius).

[10] Constantin Ciopraga, *Literatura română între 1900 şi 1918*, Iaşi: Junimea Publishing House, 1970.

[11] Adriana Iliescu, *Reviste literare la sfârşitul secolului al XIX-lea*, Bucharest: Minerva Publishing House, 1992.

[12] *Rândunica*, Year I, 1893, no.1, January . Original text: „…scopul acestei reviste este mai cu osebire de a încuraja inteligenţa femeiască, punând la dispoziţie coloanele revistei oricărui talent/.../."

social statute, i.e. the higher or lower one. Then I am going to refer to the fields of literature, music, theatre, science /.../."[13] (my translation)

The *Dochia* Magazine had poetry columns (signed by Smara, Maria Cunţanu, D. Karr, Stanca, Teodor L., Virginia Micle-Gruber, Cincinat Pavelescu), prose columns (signed by Yna Bucov, Oscar V., D'Elgard) and proverb columns (signed by Smara). The magazine also published French translations from feminist French magazines and feminist propaganda articles (signed by Valeriu Hulubei, V.A. Ureche, Adela Xenopol, Sylvia M. Drăgoescu). This magazine had a modest literary value. It was mainly a propaganda publication, as Ion Hangiu also outlined in "Dicţionarul Presei Literare Româneşti" [*The Dictionary of Romanian Literary Magazines*].[14 7]

4. *Revista noastră [Our Magazine]*

This is one of the most important Romanian feminist literary magazines. It was edited in Bucharest in two series: March 1905 – April 1907, respectively from April 1914 – June 1916. The editor-in-chief of this publication was Constanţa Hodoş. This magazine gathered active Romanian women writers, like: Sofia Nădejde, Elena Văcărescu, Maria Baiulescu, Maria Cunţan, Elena Farago, Ana Conta-Kernbach, Iulia Haşdeu etc. However, well-known male authors also published literary texts in this magazine: George Coşbuc, Ion Minulescu, G. Topârceanu, B. Fundoianu and V. Eftimiu.

Literary criticism articles (signed by Nely Cornea and Ion Gorun) are rare and have a modest value.

Feminist articles are signed by Constanţa Hodoş and Sofia Nădejde; they are written in a concise style and in a balanced way. The first issue of this publication explains the main goal of this magazine in the article entitled *Primul cuvânt [The First Word]*[15], signed by Constanţa Hodoş: "*Revista noastră [Our Magazine]* is /…/ basically aimed at women readers. We do hope that this publication will not confine itself to this goal, but we trust that our special mission is to endeavour to address the feminine soul first of all and to trigger in women's mind and heart the love and appreciation for spiritually higher concerns, besides their special ordinary occupations that are linked to her human condition. /…/ First of all, what we wish and try to achieve is for our publication *Revista noastră* to become a faithful mirror of feminine intellectual contribution to our common national cultural patrimony." (my translation)

Some remarks made by Sofia Nădejde[16] in the columns of the magazine illustrate that Romania must "fill in" the forms of civilization that it borrows from the Western world reminds us of Titu Maiorescu's theory regarding forms deprived of substance: "But the hundred-year long humiliation to which our country was subjected to had consequences that are hard to eradicate and with every step we make we feel that, while preserving the good

[13] Adela Xenopol, *Dochia*, no.1, July, 1896, p 1. Original text: „Revista Dochia e menită să apere, să susţie şi să cerceteze drepturile femeii. Mă voi ocupa în întâiul pas de emanciparea sa economică, de care e atâta nevoie astăzi /…/ Femeia română va avea rolul principal în această foaie. Încep cu femeia în istoria românilor, pentru a dovedi că a fost vrednică în toate timpurile şi în toate treptele sociale de la doamnă la opincă. Voi păşi apoi în literatură, muzică, teatru, ştiinţă, şi, pentru a împlini întregul acestui cadru, voi da luminei rând pe rând, toate frumuseţile din trecut şi actuale."

[14] See Ion Hangiu, *Dicţionarul Presei Literare Româneşti*, *1790-1990*, Bucharest: the Publishing House of the Romanian Cultural Foudations, 1996.

[15] Constanţa Hodoş, „Primul cuvânt", in *Revista noastră*, Year I, no. 1, 15th March 1905. Original text: "*Revista noastră* se va adresa /…/ mai ales publicului cititor femeiesc. Sperăm negreşit că interesul pentru această încercare nu se va mărgini aici, dar avem încredinţarea că misiunea noastră deosebită trebuie să fie a căuta să ne adresăm în primul rând sufletului femeiesc, să ne dăm silinţa a aprinde mai ales în mintea şi inima femeii dragostea şi preţuirea îndeletnicirilor mai înalte ale spiritului, pe lângă interesarea pentru cele mai strâns legate de menirea ei specială în viaţa omenească. /…/ În primul rând însă, ceea ce dorim şi vom urmări este ca *Revista noastră* să devină o oglindă credincioasă a colaborării intelectualităţii femeieşti la patrimoniul comun cultural naţional."

[16] Sofia Nădejde was an important collaborator of *Contemporanul*, where she wrote feminist texts: "Către femei" (1881) [*To Women*], "Despre egalitatea celor două sexe" (1881) [*On the Equality of the Two Sexes*], "Emanciparea femeii" (1881) [*Women Emancipation*] and "Educaţiunea femeii" (1881) [*Women Education*].

features that our people have, we must work harder every day so that, besides the form of civilization, we may also acquire its substance, i.e. the mentality, the manner of feeling and working that are characteristic of the advanced countries." (my translation)

5. *Românca [The Romanian Woman]*

Monthly literary magazine, published in Bucharest, from November 1905 to October 1906. Adela Xenopol was the editor-in-chief of the magazine.

6. *Revista scriitoarei [The Woman Writer's Magazine]*

This is the most important literary magazine published by women and for women writers, but, however, not restrictively; the activity of this publication was constant and consistent, a fact which was due to the large number of authors with whom it collaborated. The magazine was set up in Bucharest, in November 1926; its editor-in-chief was Adela Xenopol until 1928 and later on the new editor-in-chief became Aida Vrioni (up to December 1943). In 1929, the magazine modified its name, which became: *Revista scriitoarelor şi scriitorilor români [The Magazine of Romanian Female and Male Writers]*. Its domain of interest covered the following areas: *literature, art* (1934-1935), respectively: *literature, ideology, literary criticism* (1936). This publication was supported by the Romanian Women Writers' Society, as Adela Xenopol underlined in the first issue of this magazine: "This magazine is not, however, my property; it belongs to the *Romanian Women Writers Society*, which I founded on 19t^{h} February 1924 and it became a legal entity on 31st March 1926."[17] (my translation)

The poems columns of this magazine were signed by women writers (Agatha Grigorescu-Bacovia, Lucia Demetrius, Coca Farago, Maria Cunţan, Adela Xenopol, Aida Vrioni, Cornelia Buzdugan, Ana Conta-Kernbach, Claudia Millian), as well as by famous male writers (George Bacovia, Tudor Arghezi, Ion Minulescu, Ion Pillat).

The prose columns gathered short stories (signed by: Ticu Archip, Lucia Demetrius, Bucura Dumbravă, Hortensia Papadat-Bengescu, Aida Vrioni, as well as by the famous writer Tudor Arghezi) and novel excerpts (of Camil Petrescu and Panait Istrati), as well as fragments of plays (by Ticu Archip, Adrian Maniu, Claudia Millian).

Book reviews were numerous and were signed by: Teodor Scarlat, Agatha Grigorescu-Bacovia, Mărgărita Miller-Verghy, Aida Vrioni and Claudia Millian.

In the pages of this magazine, Adela Xenopol militated for setting up a feminist literary movement that was supposed to grant its supporters a feeling of belongingness; hence her conviction that by no longer being considered 'a woman', but rather 'an intellectual', it would be simpler for any woman to be accepted as a natural voice in the realm of creative writing:

"A woman writer needs a centre of activity of her own, she depends on all the others' collaboration for widening the path which leads to a more fruitful work; she should no longer be regarded as a women, but rather as an intellectual /…/ In all her intellectual manifestations, a woman is in *a state of siege*, being confined and secluded like in a circle, no matter how capable she is. Our wish is for this obstacle to fall, we yearn for freedom, not a relative one, but an absolute form of freedom with all the superior rights that it may ensure."[18] (my translation)

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[17] Adela Xenopol, *Revista scriitoarei*, Year I, no. 1, November, 1926, p. 1. Original text: "Această revistă, însă, nu e proprietatea mea, ci organul *Societăţii Scriitoarelor Române*, pe care am înfiinţat-o la 19 februarie 1924 şi a fost recunoscută persoană juridică la 31 martie 1926."

[18] Adela Xenopol, *Revista scriitoarei*, Year I, no. 1, November, 1926, p. 1. Original text: "Scriitoarea are nevoie de un centru al ei de activitate, are nevoie de colaborarea tuturora pentru a putea deschide mai larg drumul către o muncă rodnică; are nevoie să nu mai fie privită ca femeie, ci considerată ca intelectuală /…/În toate manifetările ei intelectuale, femeia se află de-a pururi în *stare de asediu*, limitată, închisă într-o orbită, oricât de capabilă ar fi. Dorim să cadă această stavilă, vroim libertatea, nu realtivă, ci absolută cu toate drepturile superioare."

3. Conclusion

The first feminine literary publications edited in Romania are seriously impregnated by feminist and socialist ideology and maintain this direction throughout the 19th century, as well as during the first half of the 20th century.

Only one of the literary magazines that we enumerated in the present study has literary value, *Revista scriitoarei [The Woman Writer's Magazine]*, which later became *Revista scriitoarelor şi scriitorilor români [The Magazine of Romanian Female and Male Writers]*.

However, none of the magazines that we have consulted for drawing up the present paper has a purely artistic value due to the propaganda texts that it included alongside with the literary ones. Similarly, the aesthetic value of the literary creations published by women in these magazines is modest in comparison with the consecrated male writers. Yet, the collaboration between the two 'categories' of writers (women and men) announced, in fact, the acquiring of a natural state of balance as regards the mutual contribution of males and females to the development of literature as a universal realm of creation.

References

- Acţiunea Feministă. Organ de Propagandă pentru Emanciparea Civilă şi Politică a Femeii, Piatra-Neamţ, 1919
- Ion Hangiu, Dicţionarul Presei Literare Româneşti, 1790-1990, Bucharest: the Publishing House of the Romanian Cultural Foundations, 1996
- Constanţa Hodoş, „Primul cuvânt", in Revista noastră, Year I, no. 1, 15th March 1905
- Adriana Iliescu, Reviste literare la sfârşitul secolului al XIX-lea, Bucharest: Minerva Publishing House, 1992
- Ştefania Mihăilescu, Din istoria feminismului românesc. Antologie de texte, Iaşi : Polirom Publishing House, 2002
- John Stuart Mill, The Subjection of Women, New Jersey: Transaction Publishers, 2001;
- Harriett Taylor Mill, Enfranchisment of Woman, London: Trübner and Co., 1868
- Sofia Nădejde, „Ce voim", in Revista Noastră, Year I, 15th March 1905
- Rândunica, Year I, 1893, no.1, January
- Adela Xenopol, Dochia, no.1, July, 1896, p 1
- Adela Xenopol, Revista scriitoarei, Year I, no. 1, November, 1926, p. 1
- Mary Wollstoncraft, A Vindication of the Rights of Women, Dover Publication Inc., 1996

POLITICAL PARTICIPATION OF WOMEN IN ROMANIA - A BOTTOM-UP APPROACH

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Abstract

In Romania the access of women to political decision making remains very low (around 10% women in Parliament). The main arguments used to explain this state of affairs are the following: the communist feminism (a contradiction in terms) which impose total obedience towards the state and a completely false and forced political empowerment of women which led to an arduous reverse after 1989 (Miroiu 2004;Vinkze 2006); the transition anti-socialist speech that militated in favor of the return to normality, understood as traditional patriarchy (Rueschemeyer, 1994), the gender-developed inequities of transition (Vincze 2006; Miroiu 2004, 2007); the lack of time as a citizenship resource (the double burden) (Lister, 2003). Even tough, what meanings do women attach to their status of citizens and how do they take part at political actions, in the context in which compelling structures, like patriarchy, the communist legacy and post-communist transition are overlapping their daily experiences, remains under studied in Romania. In order to fill this gap, in my paper I will present the result of a field work research (qualitative method interviews and focus-groups) focused on the way in which women live and experience citizenship, with accent on the perception and signification of their political participation. My arguments will be developed based on a constructivist approach which underline the relations and dependencies between agents (that give meaning to the social roles they play in my paper women from a region in Romania, Hunedoara county) and structures (mainly the patriarchal one).

Keywords: *women, political participation, România, constructivst approach*

1. Introduction

In the following paper, I want to point out aspects that shape women's political participation, while aiming to identify those elements which may generate their successful substantial implication in politics, a domain that is steel deeply **masculinized.** In order to do so I will present the results of a research that was conducted as part of *Gender and citizenship in Romania*, my PHD Thesis, and it focused on the way in which women live and experience citizenship. The main research question of my PHD paper was: what meanings do women attach to their status of citizens and how do they, based on the latter, choose to perform citizenship, in the context in which compelling structures, like patriarchy, the communist legacy and post-communist transition**,** overlap their daily experiences? In order to answer this question, besides the presentation and assumption of a theoretical framework, I also conducted fieldwork and the operationalization of citizenship that resulted from the latter conducted me towards the idea of political participation. While focusing on citizenship as practice, as an institution that generates rights and obligations, one that is under a permanent process of construction and reconstruction, participation (civic, political, inside the family, on the labor market, etc.) became the core of my thesis. In line with the goals of this paper, I will focus in the following part on the results concerning the political participation of women.

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In the first part of my paper, I will present the sociological framework used for my analysis and the methodologies applied for the two researches. I will then present the conceptual framework used in the analysis and interpretation of the data, followed by a short presentation of the context that individualizes the political participation experience of local women. The final part of the paper is dedicated to the results and conclusions of the research.

2. Approach

As for the sociological framework, my arguments are developed based on social constructivism, a paradigm that may be summarized by the tradition of interpretive epistemology and by a dynamic view over the social universe that solves the agent-structure dilemma by treating the latter as interdependent[1]. The analyses will be based on the relations and dependencies between agents (that give meaning to the social roles they play) and structures (mainly the patriarchal one, which imposes gender normativity and everyday normality). The individuals are treated as actors, as subjects that are capable of acting autonomously and responsibly, capable of evolving, of challenging and changing structures, depending on the meanings which they attach to the latter. A social constructionist approach focuses on individuals, who are seen as being able to construct social reality by attaching meanings to it, but this construction process is not isolated or independent from the reality hat transgresses the individuals, a reality that becomes stable, institutionalized and which generates determinations. Complementary to this framework, I also have a feminist stand, when analyzing the data, one that is based on the liberating potential of feminism and resulting from the deconstruction of gender differences and the challenging of the latter, which are seen as creating illegitimate hierarchies in a democratic society.

3. Methodology

In order to grasp the thinking and experiences of regular women (*the first dimension of the research – bottom-up analysis)*, in terms of political participation, the findings of the fieldwork were analyzed through a complex process that included documentation and becoming familiar with the environment in which meaning was created by the subjects and also individual and group interviews. As for the sample of the research, the subjects were recruited using theoretical sampling, in line with the qualitative methodology of the research, which had an ethno-methodological nature, and in line with the research tools chosen for the study (96 semi-structured interviews and 3 focus groups). The subjects were chosen based on theoretical considerations, in order to compare the data and to test the research questions[2]. We used gender (women), age and area of residence (urban) as the main sampling criteria. Age was introduced as a sampling criteria as the goals of the research required information coming from fully mature respondents, from the perspective of gender experiences (division of labor, gender roles, care, autonomy or dependency inside the family) and of political participation. We should point out that the sample of this research was by no means representative, from the point of view of quantitative research, because our qualitative study aimed for a deeper understanding than that provided by statistical data. The research took place in Hunedoara, Deva and Simeria, three cities from Hunedoara County, Romania. This region is characterized

[1] See Peter Berger; Thomas Luckmann, *Construirea socială a realităţii (The social construction of reality)*, (Bucureşti: Art, 2008, first edition 1966); Brent G. Wilson, "Reflection on Constructivism and Instructional Design", in Charles L. Dills, Alexander J. Romiszowski ed., *Instructional Development Paradigms,* (New Jersey: Educational Technology Publication, 1997), 63 – 67;

[2] Petru Iluţ, Abordarea calitativă a socioumanului – concepte şi metode, (Iaşi: Polirom, 1997), 54 - 55;

by the intensive industrial development that took place during communism the effects of which are still making their way into the present lives of its residents.

The data analysis method that I will use is one that follows the guidelines of interpretativsm, while avoiding methods that require the coding of information and promoting dynamic analyses and the interactivity between researcher and the subject of the research, thus aiming to reveal the meanings and representations resulted from such interactions[3].

4. Conceptual clarifications

Before moving on to the presentation and analysis of the data, we should first of all define several fundamental concepts, the first of which is patriarchy. Patriarchy is defined by most as the manifestation and institutionalization of male domination over the women and children of a family and extending this domination over women in general[4]. While talking about patriarchy from the perspective of intensity, Allan Johnson states that a society is patriarchal if it *privileges men* – being *dominated by men*[5], *identified by men*[6] and *centered on men*[7]) – and that is organized around *men's obsession of being in control*[8]. Therefore, patriarchal communities support sexist attitudes and behaviors, while sexism and patriarchy support each other in the same way in which slavery enhances discriminatory attitudes and behaviors[9].

In this paper, patriarchy will be treated mainly from the perspective of the two dimensions proposed by Mihaela Miroiu: the descriptive one (reveals the prevalent organization of public and private relations based on a widely supported paradigm, by church and state alike: man rules over the woman) and the normative one (indicates the way in which these relations should be configured: man should rule over the woman)[10]. Starting with the observation and presentation of the elements that are related to patriarchal constructs, my fieldwork focused on the way in which the later regulate the everyday lives of Romanian women.

Another concept that I will use in the paper is represented by gender roles. The latter may be described from a systemic point of view, as restrictive elements that reflect a universe of social preferences that deliver shortcuts for what is *normal* (seen as distinct from normative). This view treats gender roles as if they were forces transmitted along the line of social status, but also as indicators of the preferences typically associated with a social position[11]. On the other hand, we may develop the content of the concept of role by viewing agents as active actors, as agents of change, while maintaining in the subsidiary the position of sentient and complete conformism in relation to a position associated to a particular social structure.

Starting from such a dual configuration, I will present the way in which women assume and perform certain roles, most of which having to do with political participation, as well as the meanings associated with such social performances. Obviously, the normality prescribed by the patriarchal configuration of gender roles and the tensions resulting from this

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[3] Matthew Miles, Michael Huberman, *Qualitative Data Analysis,* (California: Sage Publication, 1994), 8;
[4] Gerda Lerner, *The Creation of Patriarchy,* (Oxford: Oxford University Press, 1986), 239;
[5] The political, legal, religious, economic, educational, military and domestic authority belongs to men.
[6] The hard cultural nucleus on what is good, desirable, preferable or normal is associated with what we think about men and masculinity.
[7] Attention is focused on men and on what they do.
[8] Allan G. Johnson, *The Gender Knot. Unrevealing Our Patriarchal Legacy,* ediţia a doua, (Philadelphia: Temple University Press, 2005), 19 - 20;
[9] Gerda Lerner , *The Creation of Patriarchy.*(Oxford: Oxford University Press, 1986), 240;
[10] Mihaela Miroiu, Prefaţă, în Maria Bucur, Mihaela Miroiu, *Patriarhat şi emancipare în istoria gândirii politice româneşti,* (Iaşi: Polirom, 2002), 12;
[11] Martin Hollis, *Introducere în filosofia ştiinţelor sociale,* (Bucureşti: Trei, 2001), 158;

relation will be granted special attention. Gender will be treated as a multidimensional social construct (*status*[12], *identity assumption*[13] and *manifestation formula*[14] that can be identified from everyday performance – gender as practice[15].

More than that, in line with the constructionist framework applied to the concepts used by this research, the definitions of gender, identity and identity construct take on specific meanings. Avigal Eisenberg talks about identity as covering "the attachments and activities that are important to the 'self-conception' or 'self-understanding' of an individual group"[16]. In the terms of Berger and of Luckman, identity represents the product of the interiorization that follows continuous socialization, when this process is accompanied by identification[17] . I will try to cover the way in which self-concept is constructed, in relation to political participation, in the following pages.

Political participation is also a key concept of the paper and it is defined in report to the classic distinction between civic participation and political participation. The distinction between the two types of participation is based on Locke's tradition of the social contract that distinguishes between civil society and political society[18] and on the distinction between interest and pressure made by Dominico Fisichela[19] and Samuel Finer[20]. Civil participation means to promote one's interest using alternate channels which aren't tied directly to the influence of the political sphere and it is constructed mainly around the interactions between citizens. Civil interaction has a high potential of becoming political participation, but it doesn't necessarily aim to change, maintain or obtain political power, nor does it aim to assume the responsibility of governance. As for political participation, it promotes and defends interests by influencing decision makers and/ or elections and it may involve the use of legal or illegal sanctions. It includes the range of acts and attitudes, visible or invisible, that tend to influence (more or less directly, more or less legally) the decisions of those holding the power in the political system or in the political organizations, understood as independent entities, as well as their election, in the perspective of preserving or modifying the structure of the system of dominant interests[21].

5. Context

While describing the Romanian context of the political participation of women, we cannot overlook the communist heritage and the post-communist transition. During communism, the emancipation of men, but mostly that of women, was related directly to work. That is why in that period we see a massive number of women entering the labor market, doubled by the constraints of the communist regime, in which traditional patriarchy was replaced by a state-institutionalized patriarchy characterize by imposing devotion to the

[12] The position of dominator or dominated that is associated to gender.
[13] The way in which each individual identifies himself in report to gender, depending on the embraced lifestyle.
[14] The way in which the attached behaviors are closer or further from the performance "standards" of gender roles and relations – see Judith Lorber, "Embattled Terrain: Gender and Sexuality", in Myra Marx Ferree, Judith Lorber, Beth B Hess,. ed., *Revisioning Gender. The Gender Lens,* (Oxford: Rowman and Littlefield Publisher, 2000), 417;
[15] H. Don Zimmerman, „Doing Gender", *Gender and Society,* vol.1, nr. 2, 125 – 151; Vezi şi Mary Holmes, *Gender and Everyday Life,* (Oxon: Routledge, 2009), 37 – 43;
[16] Avigal Eisenberg, Reasons of Identity. A Normative guide to the political al legal Assessment of Identity Calims, (Londra: Oxford University Press, 2009), 18;
[17] Peter Berger; Thomas Luckmann, *Construirea socială a realităţii (The social construction of reality)*, (Bucureşti: Art, 2008, first edition 1966), 238;
[18] John Locke, Al doilea tratat despre cârmuire. Scrisoare despre toleranţă, (Bucureşti: Nemira, 1999), 104 – 106;
[19] Domenico Fisichella, *Ştiinţa Politică. Probleme, concepte, teorii,* (Iaşi: Polirom, 2007), (2004), 171 -177;
[20] Samuel E, Finer, „Interest Groups and then Political Process in Great Britain", in Hanry Walter Ehrmann, *Interest Groups in Four Continents*,(Pittsburg: University of Pittsburg Press, 1958);
[21] Gianfranco Pasquino, *Curs de ştiinţă politică,* (Iaşi: Institutul European, 2002), 53;

party, in order to support the construction of the communist society22. As for the political sphere, starting with the '70s, we see a massive promotion of women, based on a minimum representation quota of 25%, in workers, communal, city and county committees, as well as in the party bureaus of the factories, institutions and farming units. One should point out that women's access to the political organizations was inversely proportional with the decision power of those organizations and that Elena Ceausescu was the only woman to have ever reached the top of communist decisional making ladder23. To be more exact, in 1974, CC-PCR's CePex included two women (9%), while in 1979 it included 5 (20%) and in 1984 it included 3 (14%). As for the Central Committee, the evolution was the following:

- Fully pledged members - 1965 – 5% women; 1979 – 20%; 1989 – 24%;
- Substitute members – 1965 – 7%; 1979 – 32%; 1989 – 39%. [24]

Eastern Europe is still seeing an ongoing debate about the tie between communism and the emancipation of women, but we will follow in the footsteps of Mihaela Miroiu, who states that "communist feminism" is a contradiction in terms, since the emancipation of women that took place during communism meant in fact total obedience towards the state[25].

Post-communist transition developed particularities that have to do with a symbolic patriarchal order, understood as women recognizing the full authority of men in all respects, overlapped by the effects of la left-wing conservatism that took its toll on gender policies. Gender-developed inequities never made the formal agenda or the public agenda of the Romanian governments during post-communist rule[26]. There are various causes that have led to such gender policies after 1989, among which: the anti-socialist speech that was militated in favor of the return to "normality", understood as traditional patriarchy[27] (men belong to the public sphere, while women to the private one); the fact that the political participation of communist women was perceived as being the sole result of the communist policies and as having little if any to do with competence and righteousness – something also called the Elena Ceauşescu[28] Syndrome; last, but not least, the fact that any attempt of introducing the issue of women on the public agenda immediately after the revolution was associated by the public with the egalitarian socialist ideology, which may explain the aversion for feminism and feminists seen in the Romanian society nowadays[29].

The statistical data on the political representation of women is as follows:

Mandate	**Total MPs**	**Of which women**	**% women**
1990 – 1992	486	24	4.93

[22] See Mihaela Miroiu, *Drumul către autonomie,* (Iaşi : Polirom, 2004), 188 and Mihaela Miroiu, "Communism was a State Patriarchy, not a State Feminism", *Aspasia*, vol. 1; See Enikö Magyari-Vincze, „Romanian Gender Regimes ans Women's Citizenship", Jasmina Lukić, Joanna Regulska, Darja Zaviršek, *Women and Citizenship in Central and Eastern Europe,* (Hampshire: Ashgate Publishing Limited, 2006), 28 – 30;

[23] Cristina Liana Olteanu, Elena-Simona Gheoanea, Valentin Gheoanea, *Femeile în România Comunistă,* (Bucureşti: Politeia-SNSPA, 2003), 32;

[24] Cristina Liana Olteanu, Elena-Simona Gheoanea, Valentin Gheoanea, *Femeile în România Comunistă,* (Bucureşti: Politeia-SNSPA, 2003), 37;

[25] See Mihaela Miroiu, "Communism was a State Patriarchy, not a State Feminism", *Aspasia,* vol. 1;

[26] See Enikö Magyari-Vincze, „Romanian Gender Regimes ans Women's Citizenship", în Lukić Jasmina, Regulska Joanna, Zaviršek Darja, *Women and Citizenship in Central and Eastern Europe,* (Hampshire: Ashgate Publishing Limited, 2006), 30 – 35;

[27] Vezi şi Mary Ellen Fischer, "From Tradition and Ideology to Election and Competition. The Changing Status of Women in Romanian Politics", în Marilyn Rueschemeyer (ed.), *Women in poltics of postcomunist Eastern Europe,* (Londra: ME Sharpe, 1994), 177;

[28] See Cristina Liana Olteanu, Elena-Simona Gheoanea, Valentin Gheoanea, *Femeile în România Comunistă,* (Bucureşti: Politeia-SNSPA, 2003), 42 – 55; see Mary Ellen Fischer, „Women in Romanian Politics: Elena Ceauşescu, Pronatalism and the Promotion of Women", in Sharon L. Wolchik, Alfred G. Meyer (ed.), *Women, State and Party in Estern Europe,* (Durham: Duke University Press, 1995), 121 – 137;

[29] Enikö Magyari-Vincze, „Romanian Gender Regimes ans Women's Citizenship" in Regulska, Darja Zaviršek, *Women and Citizenship in Central and Eastern Europe,* (Hampshire: Ashgate Publishing Limited, 2006), 30 – 31;

1992 – 1996	481	18	3.74
1996 - 2000	483	23	4.76
2000 – 2004	481	52	10.81
2004 - 2008	460	47	10.21
2008 - present	471	46	9.76

Source: Tudorina Mihai, *Gender quota and their application in Romania*, dissertation thesis, 2001, pg 32, accessed on June 7, 2012 at: http://media1.webgarden.ro/files/media1:4f869b1f10e27.pdf.upl/Tudorina_Mihai__Cotele_de_gen_si_aplicarea_lor_in_Romania.pdf

As for the representation of women in other political decision making positions, Tudorina Mihai presents a snapshot of the Romanian context. Romania didn't see a woman minister until 1996.

According to the National Agency for the Equality Between Men and Women, in 2008, women had 12.6% of the total county council positions and 10.7% of the local councilor seats. Until 2012 Romania has not seen a woman mayor in any of its large cities (now it has one – Olguta Vasilescu), nor has the country seen a woman Prime Minister or President. Pieced together, the data ranks Romania among the last countries in the world, in terms of the political empowerment of women: 109th out of 134 countries.[30]

6. The results of the research

In the following section I will focus on several elements of interests for the paper, elements like: political organizations and public office – involvement, evaluation and candidature. Political participation will be analyzed in relation to the membership of political organizations, but also while taking an evaluative stand towards the latter. The issue of public office is another element included in the analysis and it will be followed from the perspective of running for public office and from the perspective of the interactions between women voters and those in office, while aiming to identify the factors contributing to becoming a candidate, the significations associated with such a position, in terms of public responsibility, and the attributions that should be included in the formal or informal job description. More than that, the issue of public office will also be analyzed according to the relation between citizens, the main beneficiaries of the responsible exercise of the powers associated with each office, and those who are elected in office.

Besides the above mentioned guidelines, I will analyze separately the answers to a set of questions that included the gender variable and that focus on aspects related to the political involvement of women, while presenting ways of interpreting and attaching meaning to reality. (Why do you think that there are so few women in Romanian politics? Would you vote for a woman president?), but also projections on the possible effects of women's involvement in politics (Do you believe that things would be different if more women were involved in politics? Why? How?)

Participation, in relation to structures and political organizations

The implication in organizations and political structures represents political activism, meaning access to positions of power that involve decision making or influencing the process of decision making. I will present the way in which the respondents attach meaning to this

[30] Tudorina Mihai, *Gender quota and their application in Romania*, dissertation thesis, 2001, 32 - 33, accessed on June 7, 2012 at: http://media1.webgarden.ro/files/media1:4f869b1f10e27.pdf.upl/Tudorina_Mihai__Cotele_de_gen_si_aplicarea_lor_in_Romania.pdf

type of participation in the following part of the paper, while stressing out effective membership to political organizations (parties) and the latter's evaluation, since this may prove to be the main argument in favor or against active involvement[31]. Also, in order to evaluate the governance process, public office representatives and the decision making positions themselves, one has to first analyze the membership to political organizations and the way the respondents relate to this form of participation, as being efficient or not in relation to their interests and resources.

The negative attitude towards real political practice in general

Is very frequent, despite the wide range of descriptive and explanatory versions presented by the respondents, and a general hostility transpires from all the interviews, a hostility aimed *against political parties, politicians and politics in general.* This attitude is supported by first hand experience (membership to various parties), but also by a generalized assessment that politicians are irresponsible, thus making political involvement irrelevant compared to the pragmatism of everyday life. Political involvement is also seen as a form of support, of complicity with a well-defined category, one that includes the demagogues and the opportunists. What should be mentioned here is that the negative attitude manifested by the respondents is aimed not at politics in general, rather at the way in which politics is being enacted in Romanian society. Political involvement is perceived as *a means of contributing to welfare, an approach similar to the one of the republican and communitarian paradigms on citizenship and women seem to be willing to support such an involvement.* Although the experiences strictly related to gender differences, of the restrictions imposed by gender roles, but also the various experiences with which the women are confronted with come to shape various moments, means or contexts in which these women would become politically involved, there is clearly availability towards this way of involvement.

This suggests that *the political* is part of the everyday lives of these women[32] and that *the political is identified by these women as a means of pursuing various interests,* according to their availability towards involvement and to the involvement of some of the respondents.

Nevertheless, there are some issues in terms of the congruence, or should we say incongruence, between "theory" and "practice", between doctrines, ideologies, programs, promises and political practice. In this case, we may talk about a general negative attitude towards the real, practiced politics[33]. At the same time, the arguments supporting such an attitude are difficult to challenge, especially since they are supported by the experiences resulted from active involvement and not just by opinions or preconceptions towards "an uncharted territory" – "*My dear, three or four years ago I decided to join the party. Well, I was very excited by this […] until I realized that it was all a bluff. (Meaning?) I was very, very disappointed. I saw only lies*."[34]

What is political is not personal. The populism and the demagogy invoked when describing interactions with the political sphere are overlapped with dismissing the political as a means of achieving practical objectives, while the political offer is depicted as abstract, confusing and associated with lies and manipulation. Women are confronted with the difficulties of the double burden, with the lack of alternatives dedicated to the care of children

[31] *Active participation,* which involves effective and conscious involvement of the individuals and of the groups in the governance process that affects their lives. *Passive participation* involves the fact that lack of action is a way of responding to or a form of assessment of the social contract, but also a form of acceptance of the status quo.

[32] Before voting they access information using television shows (main source), but also using the Internet, reading newspapers, by talking to colleagues or to family members or by attending electoral meetings. Even more, they sometimes know the local representatives personally, they know their family or professional background. Quite frequently, in our interviews, we saw genuine analyses of compared politics, especially from those women who had never traveled abroad.

[33] Hollis' distinction between normal and normative is of help again here.

[34] Interview 30 (L.P.), Hunedoara, 47 years old;

or to other members of the family, with the lack of jobs, with the tensions between their careers and their family lives, with the burden of managing a family budget that is insufficient, most of the times, for the current spending of the family. In order to solve such issues they need solutions that are as concrete and objective as fatigue, stress, family tensions, issues which they face on an everyday basis, and politicians don't seem to provide them with solutions or answers that go beyond the declarative.

We are thus being confronted with an even wider gap between the political and the social, between the governed and the governors, between citizens and the representatives of the political community, but also with the fact that the social contract is stripped of all meaning, since its substantiality is being reduced to the fulfillment of certain obligations and to the confinement of the private sphere of interests. In this context, civil rights and the exertion of such rights may receive a symbolical meaning at most, one that may remind us of the original and instrumental functionality which guarantees the substantial exertion of citizenship, while having little, if any to do with the latter.

Such a representation of reality is a dangerous one, since women are affected by the patriarchal restraints that traditionally assign them further away from the political sphere. The effects make themselves felt in what we could call **"what is political is not personal"** or rather in the lack of awareness of the effects that politics has on their daily lives, while being only aware of personal survival strategies[35].

Privateness and a personal approach to the understanding of the relations with the political can also be understood and explained using the criteria based on which political representatives are voted for, but also by observing the information channels regarding such representatives and their political platforms. Our interviews reveal that, in fact, it is not the policy or program proposals made by candidates that are important, rather the qualities of the candidate: modesty, professional training, family background, interactions with the other candidates. The public policies proposed by the candidates have no real substance for the interviewed women and they are associated with populism, lies and demagogy.

We can associate these representations with a damage control calculus based on the principle: politics is a dirty business and all those who become decision makers have to compromise, but some will compromise less than others, so we will vote for them. In this social representation puzzle, programs, policies and ideologies are associated with the structure, while representing the compromises themselves (fake promises made by the candidates in order to become decision makers), a mask that uses the shape, but not the consistency of democratic institutions and such a way of understanding social reality leads to elective preferences that are counterintuitive, meaning that the candidates compete in fact as persons against each other and not as the institutionalized representatives of policy drafts and proposals – *the one who promises more, lies more and we won't vote for he or she*[36] *or the message has nothing to do with reality [...] Geoana says „come back to the country and we will give you EUR 20,000". And you call that a politician? How so? He drops a bomb like that and he thinks he impresses everyone.*[37]

Politics is part of the everyday life of these women; they have a political way of understanding the world. Still we can't rule out the fact that the above mentioned comments could be criticized and that they need context, on order to gain consistency. Any of the following questions could be raised: what are the political expectations of these women or their expectations related to political representatives? Are they in line with the way in which we understand the organization and functioning of political parties and of the political sphere

[35] Strategies that rely on, as mentioned in the previous chapter, mainly on the help of family members, friends and of members of the community.
[36] Interview 22 (M.C.), Hunedoara, 41 years old;
[37] Interview 58 (M.B.), Hunedoara, 57 years old;

in general? Is their negative attitude directed towards politics, politicians or towards a representation of the latter that has nothing to do with the way in which we understand democratic political organization – and then is it that we have fallen into the trap of comparing two radically different political representations?

The answer to these questions is based on the data obtained when asking the respondents to mention the qualities that a political leader should have and to mention what issues had the local politicians solved for the community. We also asked the respondents to mention the main actions that they would do if they could manage the budget of their community.

The main qualities of a politician should be:

- a good speaker, a good communicator. A political leader should know how to transmit the message to the citizens, should be capable of making the latter understand the need of certain measures and to make them supporters of his or her agenda;

- honest, responsible, consistent - honesty is probably the most frequently mentioned quality and it is almost always mentioned as the counterpart of lies and false promises. Moreover, honesty is associated with responsibility, so those who don't sugarcoat reality are responsible people who understand the consequences of their words and actions;

- close to the voters – politicians should go out on the street and they should talk to citizens, thus becoming aware of their problems, instead of isolating themselves in their offices and making uninformed decisions. They should also be open-minded, patience and capable of talking to all the members of a community, irrespective of the latter's gender, education or status;

- a professional – in this case as well we will be talking mainly about the quality of generating the efficient management of resources. It is interesting that this quality has been cited more as a complement to the others. The talks revealed that the respondents believe it to be very important for any political candidate to be a true professional in any domain, in order to better understand the problems of a community and the people that they represent.

When considering the issues that were solved by local political representatives, the general impression is that we are dealing with the transfer of the gender distribution of chores and the overvaluation of the contribution of men to the latter, based on the principle that the more rare the good, the more praised it will be. To be more exact, local politicians and authorities have only solved a small part of the community's problems and their implication is overrated. This way of representing reality is very dangerous, since it decreases the expectations projected by the citizens onto their political representatives, thus making room for abuse, in terms of broken rights and freedoms, on one hand, and in terms of poor governance that is not sanctioned by the voters, on the other.

Perceptions on the political participation of women

The main questions of this subchapter were: How do the respondents perceive the political participation of women – do they value it, do they find it relevant; what are the main obstacles preventing women from being more politically involved.

"I've got nothing but respect for the women who are involved in politics. If they have the time and the nerves they should go ahead and do it!". Such general statements synthesize the essence of the women's stand on political participation. We find no reluctance from the respondents when it comes to the participation of women to a domain that is dominated by men, but also see that our respondents characterize women politicians with attributes that are culturally associated with men. We are thus seeing what Simone de Beauvoir argued in favor of in *The second sex* (1949), while trying to offer a key to understanding the absence of effective gender equality, although the formal one was guaranteed by the state: women have

to become men, in order to be equal to men[38]. And to become a man means to have time, on one hand, and to be brave and to own resources (most of which financial). Both aspects transpose the paper to the core of gender studies. The references to time, understood by the respondents as a catalyst of active political involvement is directly directed to a central issue of gender studies, the fact that women have to constantly deal with the double burden. Therefore, women have less free time in general, time that could be dedicated to political involvement, since they value and practice paid labor, while also being responsible for unpaid domestic labor based on the general norms of the patriarchal society in which they live. At the same time, characterizing women politicians as having to be strong and brave clearly points out the association of politics with a sphere dominated by men, one that is shaped in the face of men so, therefore, one should act as a man in order to survive.

Besides these two aspects, the interviews also reveal other elements that define the political participation of women even better, among which:

- *the way in which women politicians are presented by the media* – the respondents mention the shallowness with which the media covers the political actions of women, the way in which such politicians are rather presented through the lens of sexuality, of sexual scandals and of the ties and support of various influential male politicians, rather than in relation to their actions and merits. In fact we are dealing with a genuine critique brought to mass-media's objectification of women[39]. Mass-media reinforces the prejudices tied to women's political involvement, since it presents them as exotic presences that do nothing more but animate the political scene and not as being the legitimate representatives of the citizens. Even worse, women are sometimes depicted as being incapable of such serious actions;

- *men being identified as rivals* – this is yet another element that stands out from the interviews. Men being those in power, they aren't willing to share it with women, who are seen as part of their area of domination. Even more, they transfer the relations of power that take shape inside the household to the political arena, where the women that should become their colleagues and partners are seen from the perspective of gender roles and of the gender division of labor. This is why the political skills of women are highly and constantly challenged, since this field of action is seen as being separate from the "*frivolities of the everyday lives"*[40] of the citizens that it represents and whose administration if handled mainly by women. We should point out that the respondents identify men as a clearly shaped distinct group which acts as a barrier to political involvement[41] - "(*Why do you think that there are so few women and so many men?) Well, they can't become involved because of them. Because men do what they have to do to kick them out"*[42].

The differences that matter. Although women haven't been valued or criticized based on certain essences that would identify them as women[43], the talk surrounding their political involvement brought references to the differences (most of which constructed) between men and women that could contribute to the improvement of political representation and to the implicit improvement of the quality of representation. Such differences originate in the social construction that describes women as being closer to household management, but also to people as well, thus supporting a possible political career. Even more, such references are

[38]Simone de Beauvoir, Diana Bolcu şi Delia Verdeş (trad.), *Al doilea sex,* (Bucureşti: Univers, 1998), 289 – 290;

[39] Also see the feminist criticism on the transformation of women into sex objects and the mass-media's role in the promotion of antifeminism and of post-feminism. For more details see Mihalea Miroiu, *Drumul către autonomie (The road to authonomy),* (Iaşi: Polirom, 2004), 73 – 79;

[40] I'm talking here mainly about the invisibility of domestic labor.

[41] Unlike the findings of Alain Touraine, trad. Magda Jeanrenaud, *Lumea femeilor (Women's world),* (Bucureşti: Art, 2007), 119;

[42] Interview 22 (M.C.), Hunedoara, 41 years old;

[43] It is interesting that many speeches have developed around the concept of autonomy, of choice – women should be what they chose to be: mothers, career women, army women, women politicians, wives, etc. Also, the simple fact of being a woman is not valued per se, rather performances and competences are what counts.

connected to the problem of women's representation and interests being included on the pubic agenda, but mostly to the issue of gender representation. The weak representation of women's interest by men is implicitly adopted from such a stand on the issue, since men are incapable of managing public funding because they don't have the experience of managing their own households, something women do frequently. But the potentiality of such an understanding of reality, in terms of understanding actions meant to counterbalance the above mentioned disadvantages is defused by the poorly associated image of action in the public sphere. This translates to the adoption of an observer position and in the continuation of exploiting "the paths already taken" when talking about the representation of interest, such as using the help of family or friends, meaning becoming isolated in the apolitical domestic sphere.

7. Conclusions – the paradox of the differences that matter

The women interviewed in Hunedoara give minute details about their difficulties, while talking with the pragmatism of everyday life and starting from the assumption that politics cannot help them satisfy their needs and strongly believe that politics is still a field dominated by men, this being the cause for their lack of representation, by using the simple logic of presence – that formula through which experiences become relevant and through which one is attempting to harmonize ideas, the experiential construct of differences and the representation of the thus generated interests[44].

In the end, we are talking about women who don't go into politics mainly because of the pragmatism with which they have to balance everyday life and career, traditional gender roles and the difficulties of everyday life, but who want their interests to be represented, who believe in their political representation and who believe that their peers could do a great job at this.

References

- Berger Peter, Luckmann Thomas, *Construirea socială a realităţii (The social construction of reality)*, (Bucureşti: Art, 2008, first edition 1966);
- Bucur Maria, Miroiu Mihaela, Patriarhat şi emancipare în istoria gândirii politice româneşti,(Patriarchy and Emancipation in Romanian History of Thought) (Iaşi: Polirom, 2002);
- Burnheim John, *Is democracy possible,* (California: University of California Press, 1985);
- De Beauvoir Simone, Diana Bolcu şi Delia Verdeş (trad.), *Al doilea sex (The second sex),* (Bucureşti: Univers, 1998);
- Dills Charles L., Romiszowski Alexander J. ed., *Instructional Development Paradigms,* (New Jersey: Educational Technology Publication, 1997);
- Ehrmann Walter Hanry, *Interest Groups in Four Continents,*(Pittsburg: University of Pittsburg Press, 1958);
- Eisenberg Avigal, Reasons of Identity. A Normative guide to the political al legal Assessment of Identity Calims, (Londra: Oxford University Press, 2009), 18;
- Fisichella Domenico, Ştiinţa Politică. Probleme, concepte, teorii (Political Science. Problems, Concepts, Theories), (Iaşi: Polirom, 2007), (2004);
- G. Johnson Allan, *The Gender Knot. Unrevealing Our Patriarchal Legacy,* ediţia a doua, (Philadelphia: Temple University Press, 2005);
- Hollis Martin, Introducere în filosofia ştiinţelor sociale (Introduction to Social Science Philosophy), (Bucureşti: Trei, 2001);
- Holmes Mary, *Gender and Everyday Life,* (Oxon: Routledge, 2009);
- http://media1.webgarden.ro/files/media1:4f869b1f10e27.pdf.upl/Tudorina_Mihai__Cotele_de_gen_si_aplicarea_lor_in_Romania.pdf
- Iluţ Petru, Abordarea calitativă a socioumanului – concepte şi metode (A Qualitative Approach of the Social – concepts and methods), (Iaşi: Polirom, 1997);
- Lerner Gerda, *The Creation of Patriarchy,* (Oxford: Oxford University Press, 1986);
- Lukić Jasmina, Regulska Joanna, Zaviršek Darja, *Women and Citizenship in Central and Eastern Europe,* (Hampshire: Ashgate Publishing Limited, 2006);

44Anne Philips, *Feminism and Politics, (*Oxford: Oxford University Press: 1998), pg 7.

- Marx Ferree Myra, Lorber Judith, Hess Beth B,. ed., *Revisioning Gender. The Gender Lens,* (Oxford: Rowman and Littlefield Publisher, 2000);
- Mihai Tudorina, *Gender quota and their application in Romania,* dissertation thesis, 2001, pg 32, accessed on June 7, 2012 at:
- Miles Matthew, Huberman Michael, *Qualitative Data Analysis,* (California: Sage Publication, 1994);
- Miroiu Mihaela, "Communism was a State Patriarchy, not a State Feminism", *Aspasia,* vol. 1;
- Miroiu Mihaela, Drumul către autonomie (The Road to Autonomy), (Iaşi : Polirom, 2004);
- Moss Kanter Rosabeth, „Some effects of proportinon on group life: skewed sex ratios and responses to Token Women", *The American Journal of Sociology*, Vol. 82, No. 5. (Mar., 1977), pp. 965-990;
- Olteanu Cristina Liana, Gheoanea Elena-Simona, Gheoanea Valentin, *Femeile în România Comunistă (Women in Communist Romania),* (Bucureşti: Politeia-SNSPA, 2003);
- Pasquino Gianfranco, *Curs de ştiinţă politică (Political Science Classe)*, (Iaşi: Institutul European, 2002);
- Philips Anne, *Feminism and Politics, (*Oxford: Oxford University Press: 1998);
- Rueschemeyer Marilyn (ed.), *Women in poltics of postcomunist Eastern Europe,* (Londra: ME Sharpe, 1994);
- Touraine Alain, trad. Magda Jeanrenaud, *Lumea femeilor (Women's world),* (Bucureşti: Art, 2007);
- Wolchik Sharon L., Meyer Alfred G. (ed.), *Women, State and Party in Estern Europe,* (Durham: Duke University Press, 1995);
- Young Iris Marion, *Justice and the Politics of Diference,* (New Jersey: Princeton University Press, 1990);
- Zimmerman Don H., „Doing Gender", *Gender and Society*, vol.1, nr. 2, 125 – 151.

MAIN CONTRIBUTORS TO GDP IN TRANSITION COUNTRIES

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Abstract

The main objective of this paper is to present and analyze the evolution of the main contributors to GDP in the transition countries: Republic of Macedonia, Republic of Moldova and to compare them with the main contributors to GDP in the developed country of Austria.

We will take a look at the Gross Domestic Product and its main contributors (agriculture, industry and services). Following the analysis of the statistical data, conclusions will be drawn regarding the situation of the economy in each country.

Computer software tool R is used in the study.

Keywords*: transition countries, macroeconomic stability, growth, statistical analysis, GDP.*

1. Introduction

It is well known that transition is a long and difficult process, which changes many aspects of a country's economy and influences the society as a whole. There are many factors behind growth and there are no patterns that can characterize the growth experience of the transition economies[1].

In this article, the evolution of GDP and its main contributors will be analyzed. The initial conditions of a country in transition are very important and based on them a country can grow more or less. In countries in transition agriculture and industry in the first years usually bring great contributions to the GDP and later on the services sectors starts to develop.

For a brief review of the literature we can consider the study of (Hussin, 2012), in which the contribution of economic sectors to economic growth in China and India is discussed. In this article an overview of both China's and India's economies is done and a regression model is developed based on major contributors to GDP. Another study is of (Andrei, 2008), in which tendencies in the regional industry and specialization in Romania during the transition period are presented and an econometric model is developed.

As for the IT in macroeconometric models, the study of (Oancea, 2010) is of interest. In this article, numerical parallel algorithms for large scale macroeconometric models are implemented using a software package.

2. Data used in the study

This paper adopts a country-specific time series data from 1990 to 2012. The data source is *The World Bank* - http://data.worldbank.org.[2] Also, some of the data were calculated

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[1] Oleh Havrylyshyn, Thomas Wolf (1999). Determinants of Growth in Transition Countries. Finance & Development, International Monetary Fund, Vol. 36, No. 2.

[2] Consulted on 16 January 2014.

by the author. An analysis just between the years 1990 and 2012 is done because data for other years, for some indicators, is unavailable.

Year	GDP (current US$)	Agriculture, value added (% of GDP)	Industry, value added (% of GDP)	Services, etc., value added (% of GDP)
1990	4.471.828.622	9	44	47
1991	4.694.744.807	14	36	51
1992	2.316.618.515	17	39	44
1993	2.550.194.959	12	35	53
1994	3.381.270.267	13	30	56
1995	4.449.375.526	13	30	57
1996	4.422.159.849	13	30	57
1997	3.735.312.201	13	35	53
1998	3.571.043.202	13	34	53
1999	3.673.288.166	13	33	54
2000	3.586.883.989	12	34	54
2001	3.436.961.385	12	32	56
2002	3.791.306.758	12	30	57
2003	4.756.221.629	13	29	58
2004	5.514.253.043	13	28	59
2005	5.985.809.060	12	28	60
2006	6.560.546.900	12	29	59
2007	8.159.825.620	11	31	58
2008	9.834.038.367	12	30	59
2009	9.313.573.965	11	27	61
2010	9.338.665.631	11	28	61
2011	10.439.099.881	11	28	61
2012	9.612.518.136	11	26	63

Table 1. Data for the Republic of Macedonia

Year	GDP (current US$)	Agriculture, value added (% of GDP)	Industry, value added (% of GDP)	Services, etc., value added (% of GDP)
1990	3.592.856.080	36	37	27
1991	3.094.567.110	43	33	24
1992	2.319.243.407	51	31	18
1993	2.371.812.924	33	44	23
1994	1.702.314.353	29	38	32
1995	1.752.995.314	33	32	35
1996	1.695.130.484	31	31	38
1997	1.930.071.445	30	29	41
1998	1.639.497.207	32	24	44
1999	1.170.785.048	28	19	53
2000	1.288.420.223	29	22	49
2001	1.480.656.884	26	24	50
2002	1.661.818.168	24	23	53
2003	1.980.901.554	22	25	54
2004	2.598.231.467	20	17	62
2005	2.988.172.424	20	16	64
2006	3.408.454.198	17	16	67
2007	4.402.495.921	12	15	73
2008	6.054.806.101	11	14	75
2009	5.439.422.031	10	13	77
2010	5.811.622.394	14	13	72
2011	7.015.201.446	15	17	68
2012	7.252.769.934	13	17	70

Table 2. Data for the *Republic of Moldova*

In the above table we have:

- GDP (current US$)[3] - GDP at purchaser's prices is the sum of gross value added by all resident producers in the economy plus any product taxes and minus any subsidies not included in the value of the products. It is calculated without making deductions for depreciation of fabricated assets or for depletion and degradation of natural resources. Data are in current U.S. dollars. Dollar figures for GDP are converted from domestic currencies using single year official exchange rates. For a few countries where the official exchange rate does not reflect the rate effectively applied to actual foreign exchange transactions, an alternative conversion factor is used.

- Agriculture, value added (% of GDP)[4] - Agriculture corresponds to ISIC divisions 1-5 and includes forestry, hunting, and fishing, as well as cultivation of crops and livestock production. Value added is the net output of a sector after adding up all outputs and subtracting intermediate inputs. It is calculated without making deductions for depreciation of fabricated assets or depletion and degradation of natural resources. The origin of value added is determined by the International Standard Industrial Classification (ISIC), revision 3. Note: For VAB countries, gross value added at factor cost is used as the denominator.

- **Industry, value added (% of GDP)[5]** - Industry corresponds to ISIC divisions 10-45 and includes manufacturing (ISIC divisions 15-37). It comprises value added in mining, manufacturing (also reported as a separate subgroup), construction, electricity, water, and gas. Value added is the net output of a sector after adding up all outputs and subtracting intermediate inputs. It is calculated without making deductions for depreciation of fabricated assets or depletion and degradation of natural resources. The origin of value added is determined by the International Standard Industrial Classification (ISIC), revision 3. Note: For VAB countries, gross value added at factor cost is used as the denominator.

- **Services, etc., value added (% of GDP)[6]** - Services correspond to ISIC divisions 50-99 and they include value added in wholesale and retail trade (including hotels and restaurants), transport, and government, financial, professional, and personal services such as education, health care, and real estate services. Also included are imputed bank service charges, import duties, and any statistical discrepancies noted by national compilers as well as discrepancies arising from rescaling. Value added is the net output of a sector after adding up all outputs and subtracting intermediate inputs. It is calculated without making deductions for depreciation of fabricated assets or depletion and degradation of natural resources. The industrial origin of value added is determined by the International Standard Industrial Classification (ISIC), revision 3. Note: For VAB countries, gross value added at factor cost is used as the denominator.

3. Brief overview of the economy of the Republic of Macedonia

The breakup of Yugoslavia in 1991 marks the beginning year of the transition process. Like in most of the countries that started the transition process, a major drop in the GDP value can be observed in the first years. Macedonia was one of the least developed of the republics of Yugoslavia, with a low production level and an absence of infrastructure.

[3] http://data.worldbank.org/indicator/NY.GDP.MKTP.CD
[4] http://data.worldbank.org/indicator/NV.AGR.TOTL.ZS
[5] http://data.worldbank.org/indicator/NV.IND.TOTL.ZS
[6] http://data.worldbank.org/indicator/NV.SRV.TETC.ZS

The first years after the breakup were the most difficult mostly due to high inflation, large fiscal deficits and almost no foreign investment.

In 1993-1994 new economic reforms were initiated by the Government with the goal of reaching economic stabilization (also money assistance from international donors like the World Bank and the International Monetary Fund were obtained).

From data of the World Bank website, it can be seen that since 1996, Macedonia, had a low inflation and tried to maintain macroeconomic stability.

Many privatizations were done in 2000, due to which the economy's reserves were boosted to over $700 million[7].

In the article of (Shukarov, 2012), an analysis of people's perceptions about the effects of transition process is done. Also, the consequences of the 2008 crisis and the overall political context are presented.

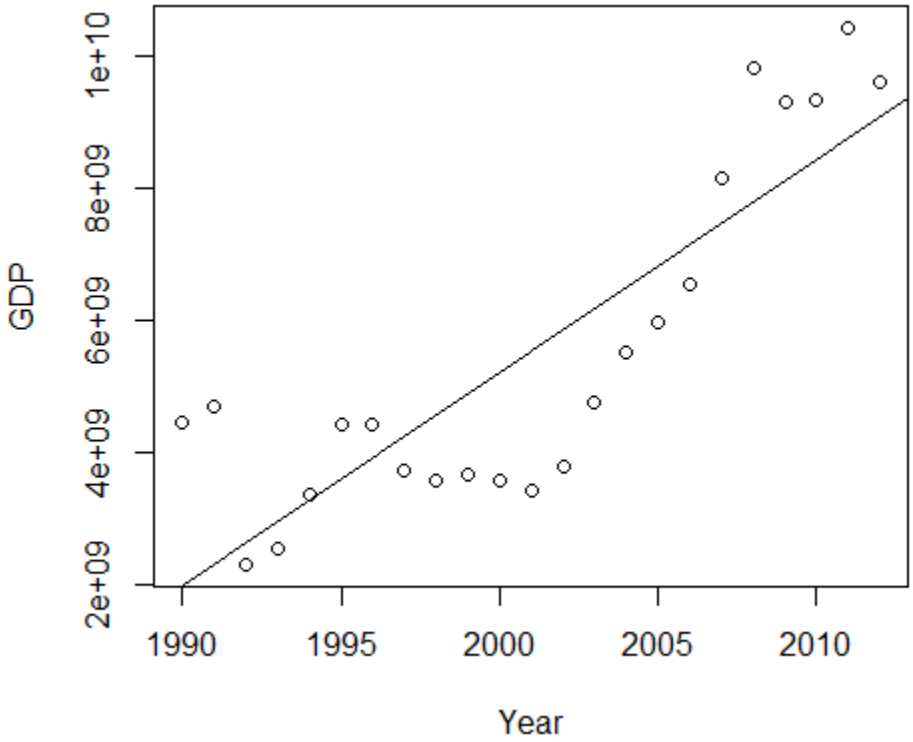

Figure 1. Plot of GDP over years in Macedonia

In figure 1, the GDP value over the 1990-2012 time period has been plotted in R software, with a line of best fit.

Analyzing the GDP data, it can be seen that it grew yearly, after 2001, by an average of 6%, until in 2008 when the economic crisis affected the economy.

In the first years of transition, agriculture was a big contributor to the GDP, but since 2002 the contributions to GDP are continuing to drop. In the article of (Kjosev, 2009), the agriculture sector in the Republic of Macedonia is analyzed with the situation at that moment and development perspectives. In 2012, the agricultural land of Macedonia was about 44.3% of land area, according to data from the World Bank website[8]. Macedonia has good climate conditions for agriculture and fertile soils. Other interesting works about the agricultural status and productivity in Macedonia are the studies of (Melmed-Sanjak, 1998) and of (Ericson, 2009).

[7] http://en.wikipedia.org/wiki/Economy_of_the_Republic_of_Macedonia
[8] http://data.worldbank.org/indicator/AG.LND.AGRI.ZS

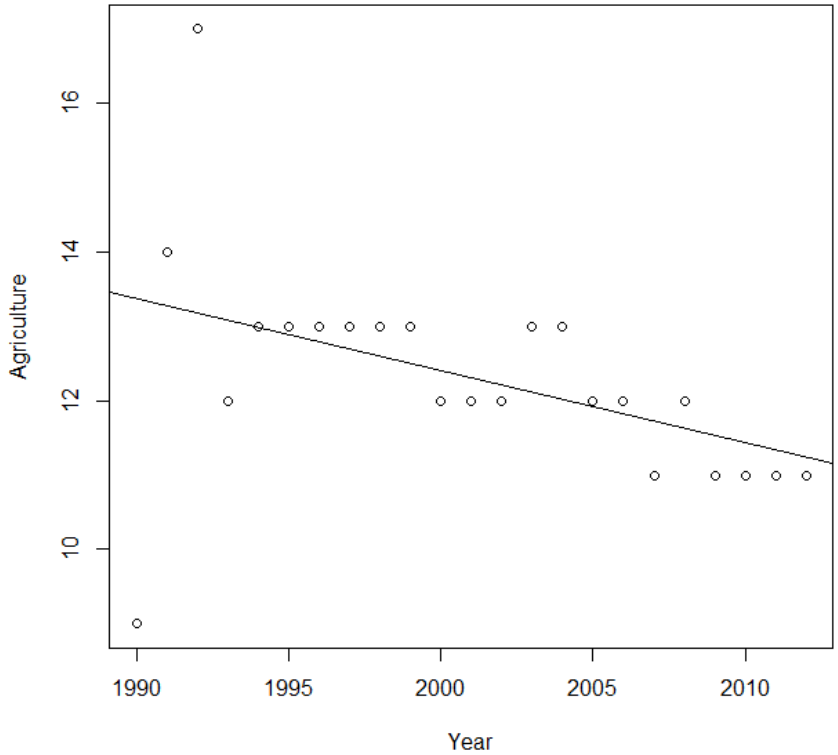

Figure 2. Plot of agriculture, value added (% of GDP) over years in Macedonia

From Figure 2 it can be seen that the value added to the GDP by agriculture tends to decrease.

In this transition period the services sector has a notable growth. With a new economy plan, tourism becomes an attractive sector for investments and development. In the article of (Petrevska, 2012), the economic impacts of tourism in Macedonia is treated. Also, in another article of (Petrevska, 2012), an attempt to provide a forecast of foreign tourism demand in 2014, by investigating the case of Macedonia is done.

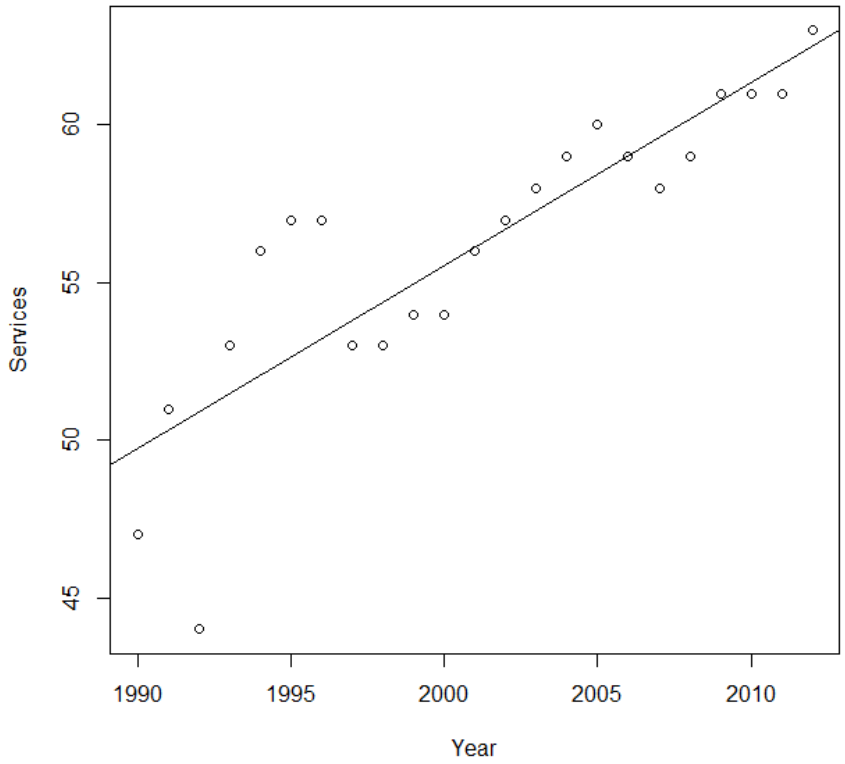

Figure 3. Plot of services, etc., value added (% of GDP) over years in Macedonia

From Figure 3 it can be observed that the services sector is under development and it is contributing more and more to the GDP each year. From the Economy Watch website it can be noted that the services sector in Macedonia provides employment to almost 50% of the total employed labor force[9].

The main industries in Macedonia are food processing, beverages, textiles, chemicals, iron, steel, cement, energy and pharmaceuticals. The food processing industry is no wonder due to quality fruits and vegetables obtained on the agricultural land. As for the textiles produced in Macedonia, they are mostly exported. The chemical industry is a large sector that produces basic chemicals and detergents. As for the rest of the industries, they all contribute to the country's GDP. It is well known that Macedonia has natural resources that can be used in metallurgy.

As for studies about the industry of Macedonia, only a little of them can be mentioned. For example, the study of (Brininstool, 2012) about the mineral industry of Macedonia. Also, the study of (SIPPO, the Swiss Import Promotion Programme, 2012), in which the textile industry in the Republic of Macedonia is presented.

[9] http://www.economywatch.com/world_economy/macedonia

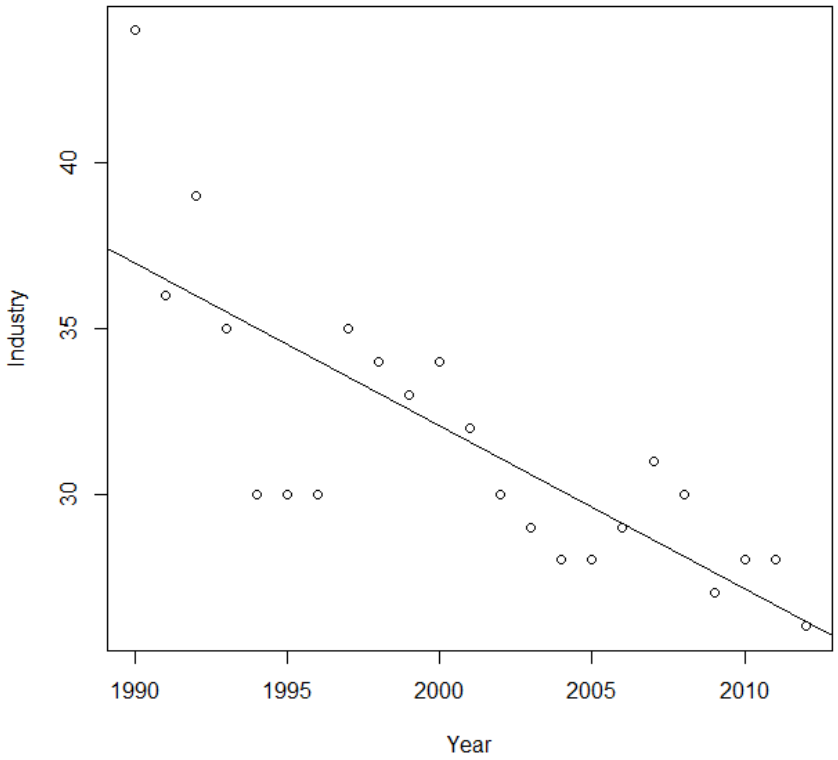

Figure 4. Plot of industry, value added (% of GDP) over years in Macedonia

For the time being, from the overview of the World Bank on the Republic of Macedonia, it can be noted that Macedonia is at the end of a Country Partnership Strategy 2011-2014 designed to integrate the country's EU accession goals into all development interventions. It has a strategy based on faster growth by improving competitiveness, more inclusive growth by strengthening employability and social protection and greener growth through more sustainable resource use.

4. Brief overview of the economy of Republic of Moldova

The transition process started in 1991, when the political independence of the republic was declared. Also, in 1991, some economic reforms were started in order to reboot the economy.

In 1992, Republic of Moldova introduced a market economy, liberalizing prices and in 1993, the Soviet ruble was replaced by the Moldovan leu.

After these first steps, it can be noticed, from the data (table 2), that in 1994 the GDP was about half of the GDP in 1990, so there was work to be done.

From 1994 to 2000, no important economic growth can be noticed, and the GDP value is not stable. The country struggled to bring down the inflation from over 105% in 1994 to 11% in 1997 and made numerous privatizations. Also, various reforms and economic experiments were done in this period. From 2000-2001 the economic growth has been steady. The main exports consists of foodstuffs, wine and agricultural products, contributing significantly to the GDP.

From the World Bank's overview of Republic of Moldova [7], it can be noted that the economy recovered from the 2008-09 global economic crisis, but the growth has been volatile. Even so, despite of the economic growth, it remains one of the poorest countries in Europe.

Republic of Moldova has a National Development Strategy (NDS) Moldova 2020 which consists of seven priorities: justice and fight against corruption; national education system aligned with labor market requirements; pensions; business environment; roads infrastructure; accessible and inexpensive finance; and energy efficiency.

From the World Bank website[10] it can be noted that: "the World Bank Group (WBG) Country Partnership Strategy (CPS) for FY14–17, discussed by the Board on September 5, 2013, will provide Moldova with US$570 million over the next four years (US$450 million on IBRD&IDA [International Bank for Reconstruction and Development & International Development Association, together known as the World Bank] terms, plus US$120 million IFC [International Finance Corporation] commitments). It will support Moldova in reducing poverty and boosting shared prosperity by capturing the full benefits of openness and integration with the European Union and the broader global economy." This program will hopefully boost up the economy of Republic of Moldova.

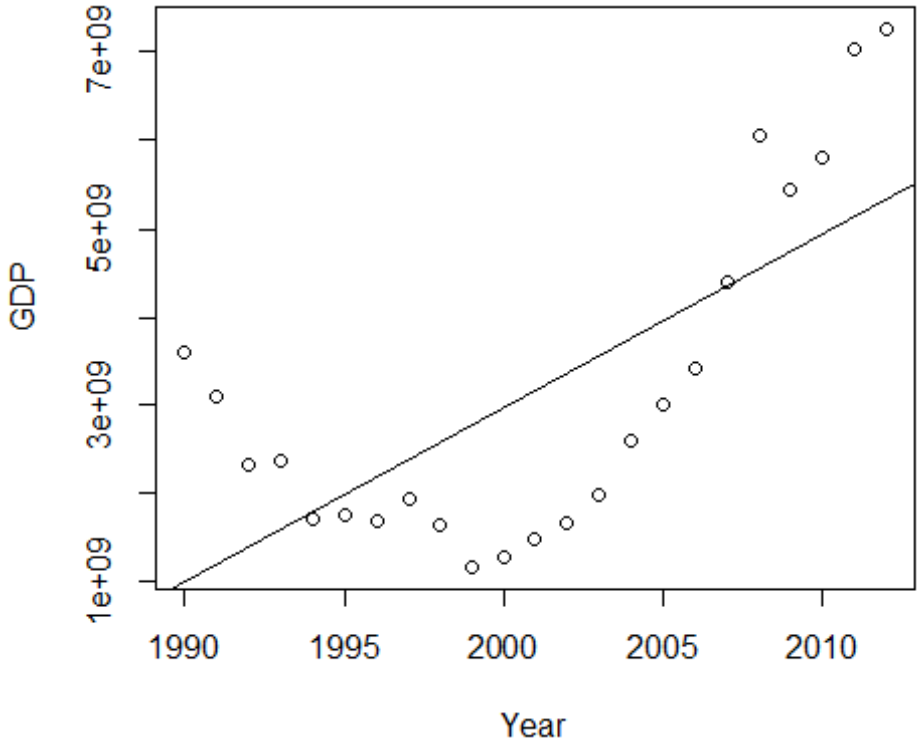

Figure 5. Plot of GDP over years in Republic of Moldova

In figure 5, the GDP value over the 1990-2012 time period has been plotted in R software, with a line of best fit. Republic of Moldova had an impressive economic growth between 2000 and 2008, but the global financial crisis of 2008-2009 has a massive impact on the economy. In 2009, the GDP dropped in the first three quarters by 7.7%.

The article of (Spânu, 2004) about the poor and volatile economy of Republic of Moldova is of interest. In this article, the level of development is presented in detail and also the main causes of economic volatility are described.

As for the agriculture land, the privatization of nearly all of it, from state to private ownership was a success, as a result of an American assistance program, "Pamînt" ("land"), completed in 2000. The agriculture still has a significant role in the economy, but it is vulnerable to climatic conditions, so some of the drop in the value added to the GDP in the recent years can be explained (due to draught and frost). In 2012, the agricultural land of Republic of Moldova was about 74.8% of land area, also according to data from the World

[10] http://www.worldbank.org

Bank website. In spite of this agricultural potential, the agricultural products for export are decreasing.

The successful development of agriculture in Republic of Moldova is discussed in the article of (Lerman, 2005), in which aspects like land consolidation and changing farm structure and fragmentation of holdings are treated.

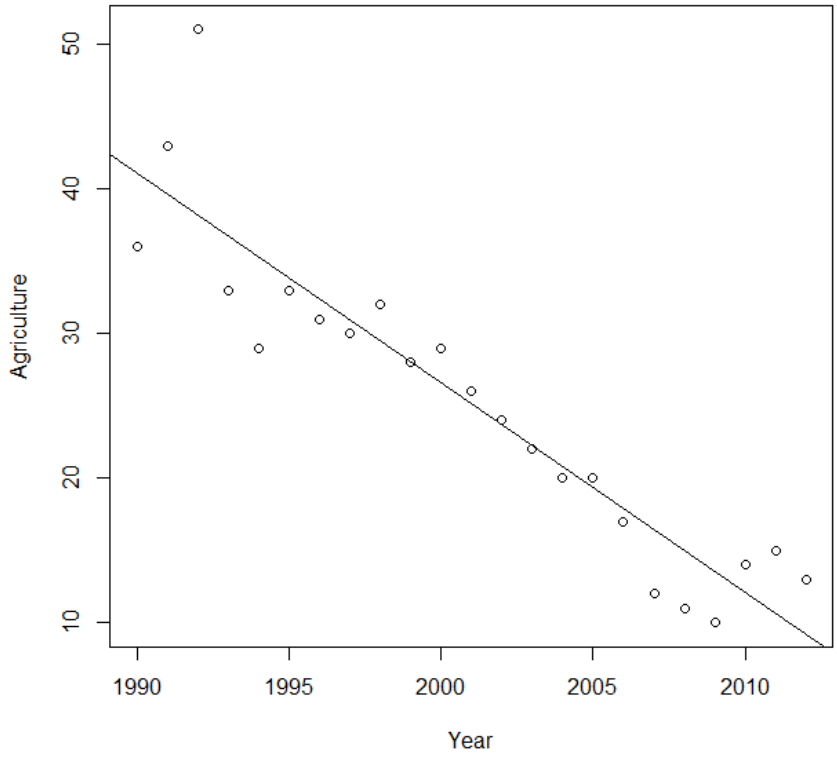

Figure 6. Plot of agriculture values over years in Republic of Moldova

A complete analysis of the industry potential in the Republic of Moldova can be read in (Bugaian, 2010). In this article the sectors of the economy that have potential to economic growth are analyzed in detail. The most important sectors are: textile and apparel sector, wine sector, ITC sector, construction materials sector and footwear sector.

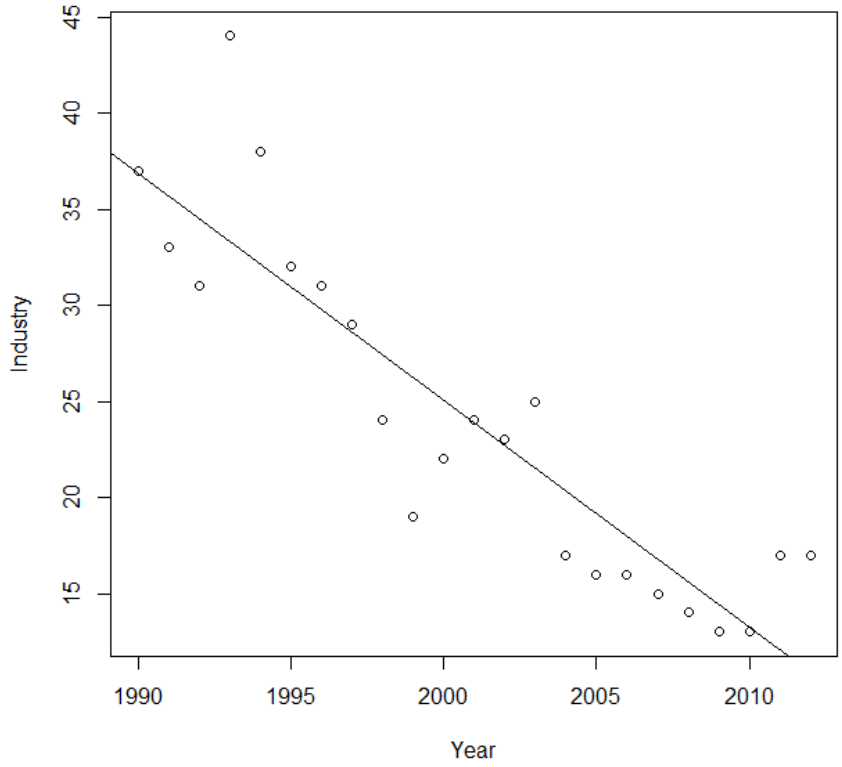

Figure 7. Plot of industry values over years in Republic of Moldova

From the data in table 2, it can be noticed that the industry sector tends to bring less value to the GDP, but it seems to be stable.

The main industries in the Republic of Moldova are: sugar, vegetable oil, food processing, agricultural machinery; foundry equipment, refrigerators and freezers, washing machines; hosiery, shoes and textiles.

All these transition years, the industry has been restructured. A very important work about the restructuring of the industry and the industrial policies is (Caraganciu, 1997). Also, the article of (Condraticova, 2010), is of interest, in which some problems concerning formation of the jewelry industry in the Republic of Moldova are treated. The oil industry in Republic of Moldova is treated by (Green, 2007), underlining the potential of this industry.

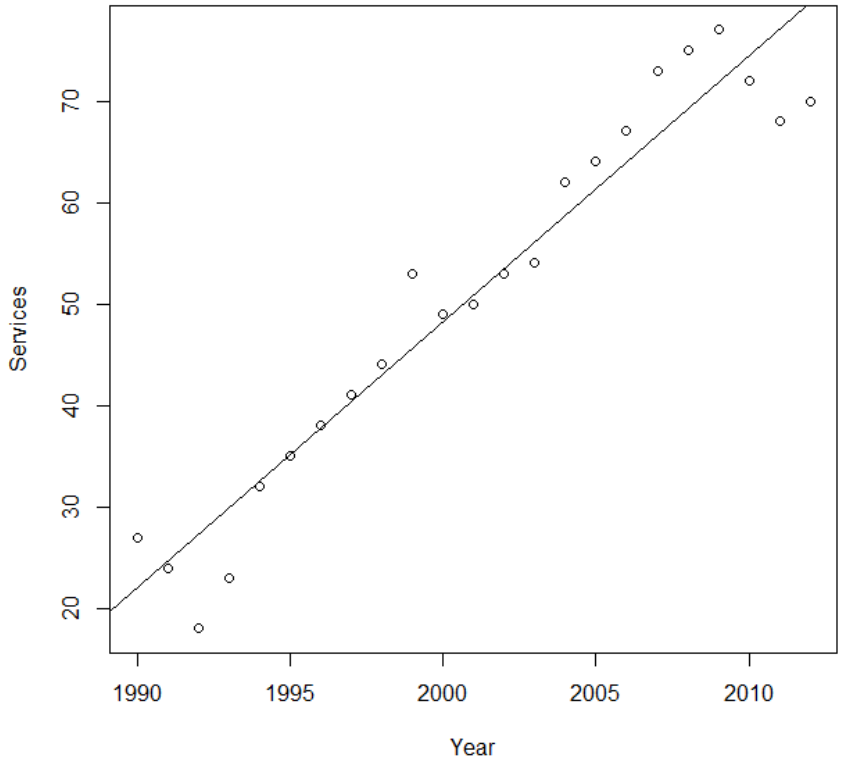

Figure 8. Plot of services values over years in Republic of Moldova

The services value added to the GDP, from 1990 to 2012, has increased significantly, mostly due to tourism. From National Bureau of Statistics[11], most of the tourists are from Romania, Russia, Ukraine, Germany, USA and Turkey.

5. From a developing economy to a developed economy

According to the IMF 35 economies are classified as "advanced economies" (developed economies)[12]. From Europe: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, Netherlands, Norway, Portugal, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom.

Analyzing the data (from the World Bank website) for all of these countries of Europe (previous paragraph), it can be seen that the value added by agriculture to GDP it is usually under 10% and in some cases under 5% (for each country).

In the case of Republic of Moldova, the value added by agriculture to GDP is much higher, but this value tends to decrease. Republic of Moldova, before the transition period, had a high level of agriculture. The fact that the agriculture sector is losing ground is not a good thing. Macedonia has a lower value added by agriculture to GDP than Republic of Moldova, but still a higher value than the developed countries of Europe. Having a country whose economy is based on agriculture is not a bad thing.

Next we will take a quick look on the data about the agricultural, industrial and services sectors of Austria (table 3).

Looking at the data for Austria, it can be noticed that the values added to GDP by each sector is more stable than in Republic of Moldova and Republic of Macedonia. The

[11] http://www.statistica.md/
[12] IMF Advanced Economies List. World Economic Outlook, October 2012, p. 180

agriculture sector in Austria adds a little value to the GDP, but Austria is based more on the services (it is well known that international tourism is the most important part of the national economy) and industry sectors (the main industries are construction, machinery, vehicles and parts, food, metals, chemicals, lumber and wood processing, paper and paperboard, communications equipment).

Year	GDP (current US$)	Agriculture, value added (% of GDP)	Industry, value added (% of GDP)	Services, etc., value added (% of GDP)
1990	164,753,092,097	4	32	64
1991	172,008,564,526	3	32	65
1992	193,073,835,462	3	31	66
1993	188,423,702,827	3	30	67
1994	201,444,060,957	3	31	67
1995	238,561,783,813	3	31	67
1996	234,676,456,979	2	31	67
1997	207,826,098,771	2	31	67
1998	213,329,585,371	2	31	67
1999	212,301,777,115	2	31	67
2000	192,070,749,954	2	31	67
2001	191,678,678,300	2	30	68
2002	207,537,336,721	2	29	69
2003	253,945,776,524	2	29	69
2004	291,430,382,497	2	29	69
2005	304,983,601,950	2	29	69
2006	324,954,402,044	2	29	69
2007	375,041,784,030	2	30	68
2008	414,171,069,689	2	30	68
2009	383,733,743,330	2	29	70
2010	375,217,439,474	2	29	69

Table 3. Data for *Austria*[13]

The small contribution the GDP of agriculture is mostly due to the fact that Austria is a mountainous country, with small farms, that are fragmented.

According to the IMF, Austria is one of the richest countries in the world in terms of GDP per capita.

6. The use of IT software in statistics and econometrics

Computer software in statistics and econometrics is more and more used by specialists in order to ease the work. This part of the article is to demonstrate the power of IT software in data analysis. R software will be used. R is a **free software programming language and software environment for statistical computing and graphics**[14].

We will only use the data for Republic of Macedonia in this part of the article and run some functions and commands.

The first step is importing the data into R from a file, then after importing the data into R, a summary of the data is of interest.

[13] Data for 2011 and 2012 is unavailable on the World Bank website
[14] http://en.wikipedia.org/wiki/R_%28programming_language%29

```
> summary(analysis)
      GDP               Agriculture       Industry        Services
 Min.   :2.317e+09   Min.   : 9.0   Min.   :26.00   Min.   :44.00
 1st Qu.:3.630e+09   1st Qu.:11.5   1st Qu.:28.50   1st Qu.:53.50
 Median :4.472e+09   Median :12.0   Median :30.00   Median :57.00
 Mean   :5.548e+09   Mean   :12.3   Mean   :31.57   Mean   :56.13
 3rd Qu.:7.360e+09   3rd Qu.:13.0   3rd Qu.:34.00   3rd Qu.:59.00
 Max.   :1.044e+10   Max.   :17.0   Max.   :44.00   Max.   :63.00
```

Figure 9. Data summary in R for Macedonia

This summary, for each variable displays the min., max., median, mean and 1st and 3rd quantiles.

When dealing with time series one of the things to know is the correlation between the data. For example, we will take a look at the GDP data.

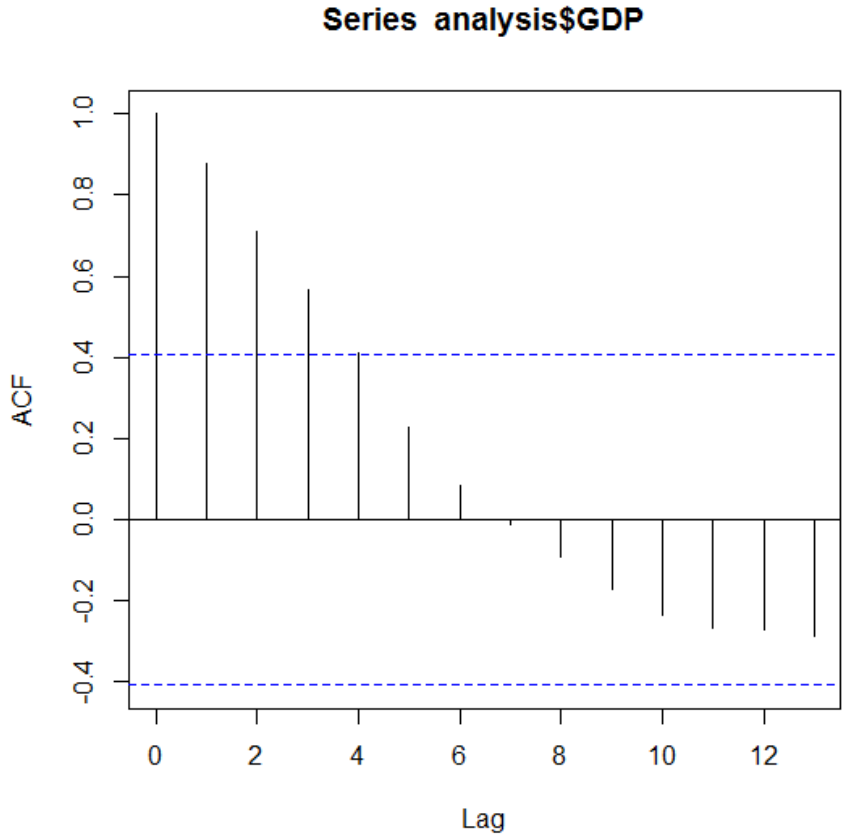

Figure 10. Correlation plot for GDP in the Republic of Macedonia

We can see that there is not a lot of persistence from one period to the next. The blue and dotted lines are confidence intervals, where anything outside these boundaries is a significant relationship. The data seems to be correlated.

Next, for the GDP of the Republic of Macedonia, an exponential smoothing will be done using the Holt Winters method. This method has three parameters in order to tweak the model (alpha, beta and gamma). We are only interested in alpha and beta, alpha being the smoothing factor, and beta controlling how the trend adapts.

In figure 12, is the plot of the Holt-Winters fit of the model, after tweaking the parameters. Black is the actual data and red is the Hold Winters fitting of the data. It is our best fitting of the data, it is not very close, but it is following the data. If more data was available, a better fit could have been done. Also, usually if the data has a more regular and larger seasonal component, than this type of analysis works better.

```
> summary (ts.fit.pred)
             Length Class  Mode
fitted       63     mts    numeric
x            23     ts     numeric
alpha         1     -none- numeric
beta          1     -none- numeric
gamma         1     -none- logical
coefficients  2     -none- numeric
seasonal      1     -none- character
SSE           1     -none- numeric
call          3     -none- call
```

Figure 11. Summary of the Holt-Winters

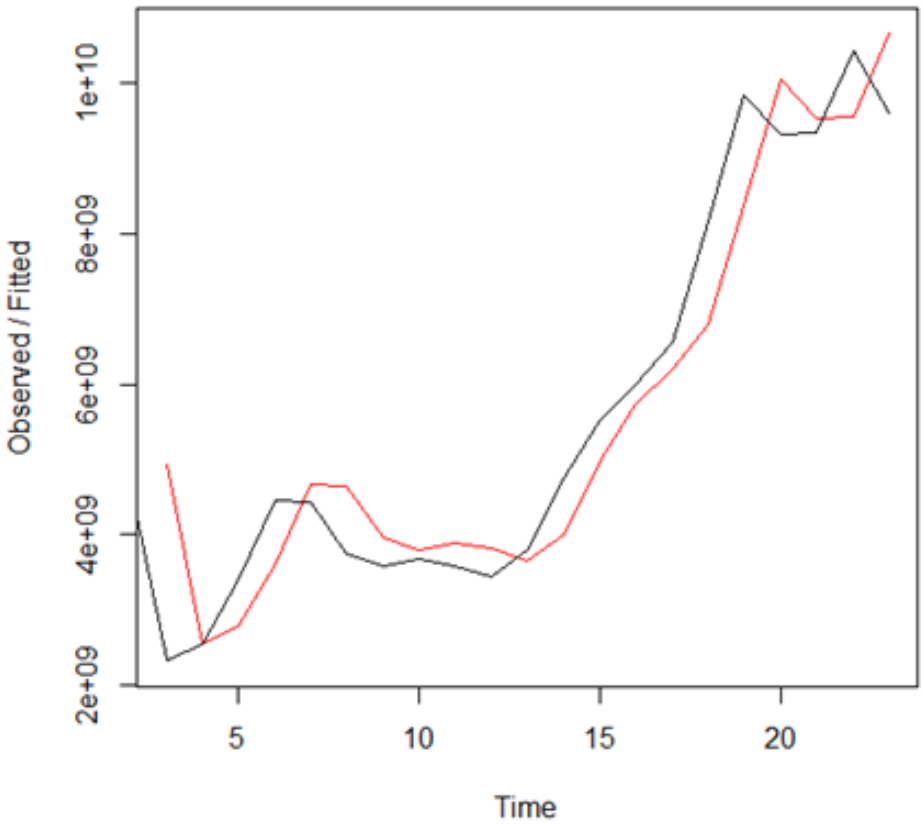

Figure 12. Plot of the Holt-Winters fit of the model

After fitting the data using Holt-Winters, predictions can be done. For example, using some functions in R software and based on Holt-Winters, ten future GDP values can be predicted, also with prediction intervals (figure 13).

```
> ts.predict
Time Series:
Start = 24
End = 33
Frequency = 1
           fit         upr        lwr
24  9835434321 11623203214 8047665428
25 10058350506 12586637521 7530063491
26 10281266691 13377773246 7184760136
27 10504182876 14079720663 6928645089
28 10727099061 14724671834 6729526288
29 10950015246 15329136813 6570893679
30 11172931431 15902923324 6442939538
31 11395847616 16452421647 6339273585
32 11618763801 16982070481 6255457121
33 11841679986 17495101619 6188258353
```

Figure 13. Plot of the Holt-Winters fit of the model

The prediction has large prediction intervals, mostly due to the fact that we have a few data into the model.

3. Conclusions

For a country in transition the initial conditions are very important. When the data about each sector (agriculture, industry and services) is analyzed, it should be taken into account that each country has its own specific. All of the references in the sections 3 and 4 provide more details about the economy of each country. Most of the countries in the Eastern Europe that are now under transition were agricultural or industrial countries.

In my opinion both of the countries (Republic of Moldova and Republic of Macedonia) should try to keep the level of agriculture high and also to develop the other sectors. Also, usually in transition countries the services sector can be more and more developed.

The most important fact in a country economy is stability. Both of the country should try to keep the sectors that contribute to GDP more stable, like in Austria's case.

Analyzing the GDP per capita and the sectors that contribute to GDP is not enough for understanding the quality of life and the level of development. There are many other factors that influence the quality of life.

As for IT in economics, there are many software tools that are suitable for data analysis. In this case, the R software has the main benefit of being a free software, that can respond to a lot of necessities.

References

- Oleh Havrylyshyn, Thomas Wolf (1999). Determinants of Growth in Transition Countries. Finance & Development, International Monetary Fund, Vol. 36, No. 2.
- Fauzi Hussin, Soo Yoke Yik, The Contribution of Economic Sectors to Economic Growth: The Cases of China and India, Research in Applied Economics, Vol. 4, No. 4, 2012.
- Andrei, Tudorel, Vlad, Liviu Bogdan, Nedelcu, Monica, Tendencies in the Regional Industry and Specialisation in Romania during the Transition Period, Theoretical and Applied Economics, Volume 3(520), 2008.
- Oancea, Bogdan, Andrei, Tudorel, Stancu, Stelian, Iacob, Andreea Iluzia, Numerical Parallel Algorithms For Large Scale Macroeconometric Models, Analele Stiintifice ale Universitatii "Alexandru Ioan Cuza" din Iasi, Issue (Month): (july), Pages: 341-356, 2010.
- Bugaian, Larisa, Gheorghita, Maria, Nistor, Doina, Analysis of the Industry Potential in Republic of Moldova, Annals of "Dunarea de Jos" University of Galati, Fascicle I, Economics and Applied Informatics. Years XVI – 2010.
- http://www.worldbank.org/en/country/moldova/overview

- Spânu, Vlad, Why is Moldova Poor and Economically Volatile?, a chapter of the book "The EU and Moldova: on a Fault-line of Europe", published by the Federal Trust Fund, London, 2004
- Shukarov, Miroljub, Perceptions of Transition and the Crisis in Macedonia, Croatian Economic Survey: Vol. 14: No. 1, pp. 107-131. 2012.
- Kjosev, Sasho, Agriculture Sector In The Republic Of Macedonia – Current Situation And Development Perspectives, Revista Tinerior Economisti (The Young Economists Journal), Volume: 1, Issue (Month): 12 (April), Pages**:** 117-124, Year: 2009.
- Melmed-Sanjak, J., Bloch, P., Hanson, R., Project for the analysis of land tenure and agricultural productivity in the Republic of Macedonia, working paper, no. 19, Land Tenure Center, University of Wisconsin–Madison, 1998.
- Petrevska, Biljana, Economic Impacts Of Tourism: The Evidence Of Macedonia, Revista Tinerior Economisti(The Young Economists Journal), Issue (Month): 18 (April), Pages: 174-181, Volume: 1, Year: 2012.
- Petrevska, Biljana, Forecasting International Tourism Demand: The Evidence Of Macedonia, UTMS Journal of Economics, Issue: 1, Pages**:** 45-55, Volume**:** 3, Year**:** 2012.
- Ericson, T., Pelling, E., Surry, Y., Support to Agriculture in FYR Macedonia - - An Exploratory Assessment (1999-2004), Swedish University of Agricultural Sciences, Department of Economics in its series Working Papers with number 53839, 2009.
- Brininstool, Mark, The Mineral Industry of Macedonia, USGS, Minerals Yearbook, MACEDONIA [ADVANCE RELEASE], 2011.
- SIPPO, the Swiss Import Promotion Programme, New Markets, New Opportunities. The Textile Industry in the Republic of Macedonia, 2012.
- Lerman, Z., Cimpoies, D., Land Consolidation As A Factor For Successful Development Of Agriculture In Moldova, Hebrew University of Jerusalem, Department of Agricultural Economics and Management in its series Discussion Papers with number 7171, 2005.
- Caraganciu, A., Industrial Restructuring and Policy Issues in the Republic of Moldova, Centre for Economic Reform and Transformation, Heriot Watt University in its series CERT Discussion Papers with number 9723, 1997.
- Condraticova, Liliana, Modern Jewelry Art of Moldova, Revista Romaneasca pentru Educatie Multidimensionala - Romanian Journal for Multidimensional Education, Pages: 73-78, Issue (Month): (August), Volume: 4, 2010.
- Green, Nathalie, The Essential Oils Industry In Moldova, Paper presented at the IFEAT International Conference in Budapest, Hungary, 23 - 27 Sept. 'Developments in the Global Aroma Chemicals and Essential Oils Industries'. Pages 103-112 in the printed Conference Proceedings, 2007.

ANALYSIS OF THE GDP IN THE REPUBLIC OF MOLDOVA BASED ON MAJOR MACROECONOMIC INDICATORS

Ştefan Cristian CIUCU*

Abstract

The Republic of Moldova is listed by the International Monetary Fund (IMF) and by the World Bank as a country with a transitional economy and studies of the evolution of the economy are of interest. Data has been gathered for a quantitative analysis of the economy using a multiple regression model (with the aid of computer software tools: Microsoft Excel with the Analysis ToolPak add-in and MathWorks - MATLAB), in order to determine if there is a significant importance of some major macroeconomic indicators to the GDP.

The indicators used in the study are GDP, exports of goods and services (% of GDP), inflation - GDP deflator (annual %), central government debt (% of GDP) and unemployment (% of total labor force).

Keywords: *regression, Moldova, GDP, macroeconomic indicators, transition.*

1. Introduction

The main purpose of this paper will be to determine the importance of the indicators from Table 1 (columns 3 to 5 – explanatory variables) to the GDP (column 1 – dependent variable). This will be done using a multiple regression model in Microsoft Excel, with the Analysis ToolPak add-in.

The export of goods and services indicator reflects growth potential, while the inflation and central government debt indicators represent the macroeconomic stability of a country. It is well known that if the inflation or the central government debt is high, then there might be a problem with the country economy.

Computer-aided analysis of macroeconomic indicators is used in many research articles. An interesting topic is the analysis of the informal economy, which in (Tudorel, Iacob, 2010) is treated. In this study the parameter estimation for the applied regression models was done using EViews software.

Another interesting study, in which reggresion is applied, is (Stancu, 2009), in which an overview of the relationship between economic growth and money laundering is done, rendering a linear regression model (for USA, Russia, Romania and other eleven European countries). Model parameters were obtained using the Excel software.

In (Agalega, 2013), the authors investigate the effect that changes in the inflation and interest rates have on the Gross Domestic Product (GDP) in Ghana over a period of thirty one (31) years from 1980-2010. The SPSS software has been used to analyze data.

There are also other studies based on major macroeconomic indicators, which are of value to the literature. The possibility of determining the Romanian Gross Domestic Product on the basis of a linear model, based on macroeconomic indicators such as unemployment, inflation, exchange rate is analyzed in (Iordache, 2011). Also EViews software is used in this study.

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The relationship between sectorial structure and economic growth, analyzing the factors underlying the process of deep structural change in regional employment in Romania is developed in the paper of (Jula, 2013).

Another macroeconomic indicator of great importance to a country economy is education. A study on the evolution of some indicators characterizing higher education in Romania between 1971 and 2011 is done in the paper of (Dragoescu, 2013), with the aid of GRETL computer software.

Other IT in social sciences articles that have an impact on literature are: (Coutinho, 2013), (Cretan, 2012), in which computer software tool Maple is used and (Kadar, 2013), in which JESS economic applications are implemented.

Most of these studies use computer software tools in order to bring new ideas and interpretations of macroeconomic concepts to the scientifically literature.

2. Data used in the study

This paper adopts a country-specific time series data from 1999 to 2012. The data source is *The World Bank* - http://data.worldbank.org.[1] Also, some of the data were calculated by the author. An analysis just between the years 1999 and 2012 is done because data for other years, for some indicators, is unavailable.

Year	GDP (current US$)	Exports of goods and services (% of GDP)	Inflation, GDP deflator (annual %)	Central government debt, total (% of GDP)	Unemployment (% of total labor force)
1999	1.170.785.048	52	44,9	77,9	11,1
2000	1.288.420.223	50	27,3	73	8,5
2001	1.480.656.884	50	12,1	60,8	7,3
2002	1.661.818.168	53	9,8	59,6	6,8
2003	1.980.901.554	53	14,9	52,5	7,9
2004	2.598.231.467	51	8	52	8,1
2005	2.988.172.424	51	9,3	32,4	7,3
2006	3.408.454.198	45	13,4	29,2	7,4
2007	4.402.495.921	47	15,8	23,2	5,1
2008	6.054.806.101	41	9,3	18,4	4
2009	5.439.422.031	37	2,2	27,6	6,4
2010	5.811.622.394	39	11,1	26,3	7,4
2011	7.015.201.446	45	7,7	23,7	6,7
2012	7.252.769.934	44	7,5	37,6	5,6

Table 1. Macroeconomic indicators for the Republic of Moldova

In the above table we have:

- GDP (current US$)[2] - GDP at purchaser's prices is the sum of gross value added by all resident producers in the economy plus any product taxes and minus any subsidies not included in the value of the products. It is calculated without making deductions for depreciation of fabricated assets or for depletion and degradation of natural resources. Data are in current U.S. dollars. Dollar figures for GDP are converted from domestic currencies using single year official exchange rates. For a few countries where the official exchange rate

[1] Consulted on 16 January 2014.
[2] http://data.worldbank.org/indicator/NY.GDP.MKTP.CD

does not reflect the rate effectively applied to actual foreign exchange transactions, an alternative conversion factor is used.

- Exports of goods and services (% of GDP)[3] - represent the value of all goods and other market services provided to the rest of the world. They include the value of merchandise, freight, insurance, transport, travel, royalties, license fees, and other services, such as communication, construction, financial, information, business, personal, and government services. They exclude compensation of employees and investment income (formerly called factor services) and transfer payments.

- Inflation, GDP deflator (annual %)[4] - as measured by the annual growth rate of the GDP implicit deflator shows the rate of price change in the economy as a whole. The GDP implicit deflator is the ratio of GDP in current local currency to GDP in constant local currency.

- Central government debt, total (% of GDP)[5] - debt is the entire stock of direct government fixed-term contractual obligations to others outstanding on a particular date. It includes domestic and foreign liabilities such as currency and money deposits, securities other than shares, and loans. It is the gross amount of government liabilities reduced by the amount of equity and financial derivatives held by the government. Because debt is a stock rather than a flow, it is measured as of a given date, usually the last day of the fiscal year.

- Unemployment, total (% of total labor force)[6] **-** Unemployment refers to the share of the labor force that is without work but available for and seeking employment. Definitions of labor force and unemployment differ by country.

3. Methodology

For the study, the multiple regression model used is:

$$y = \beta_0 + \beta_1 x_1 + \beta_2 x_2 + \cdots + \beta_k x_k + \epsilon$$

The conditional mean function:

$$E(y|x) = \beta_0 + \beta_1 x_1 + \beta_2 x_2 + \cdots + \beta_k x_k$$

The estimated multiple regression equation:

$$\hat{y} = b_0 + b_1 x_1 + b_2 x_2 + \cdots + b_k x_k$$

where:
b_0 = estimate of β_0;
b_1 = estimate of β_1;
b_k = estimate of β_k;
y = GDP (current US$);
x_1 = exports of goods and services (% of GDP);
x_2 = inflation, GDP deflator (annual %);
x_3 = central government debt, total (% of GDP);
x_4 = unemployment (% of total labor force);
ϵ = random variable.

We come up with good estimates using the least squares criterion and we will choose $b_0, b_1, \ldots, b_k$ so as to $min \sum_i (y_i - \hat{y}_i)^2$ (minimize the sum of square errors).

b_1 is the relationship between y and x_1, so if it is positive then that means that y and x_1 are positively related and if it is negative then that means that they are negatively related.

[3] http://data.worldbank.org/indicator/NE.EXP.GNFS.ZS
[4] http://data.worldbank.org/indicator/NY.GDP.DEFL.KD.ZG?page=4
[5] http://data.worldbank.org/indicator/GC.DOD.TOTL.GD.ZS
[6] http://data.worldbank.org/indicator/SL.UEM.TOTL.ZS

Multiple coefficient of determination $R^2 = \frac{SSR}{SST} = 1 - \left(\frac{SSE}{SST}\right)$, where SST = SSR + SSE.

The adjusted R^2, noted $R_a^2 = 1 - (1 - R^2)\left(\frac{n-1}{n-k-1}\right)$.

4. Basic data interpretation

In this section of the article we will take a look at the plots of the indicators and analyze them. Also, in the second part of this section, a descriptive statistics will be made.

In figure 1 we can observe the evolution of GDP (current US$) over the 1999-2012 time period.

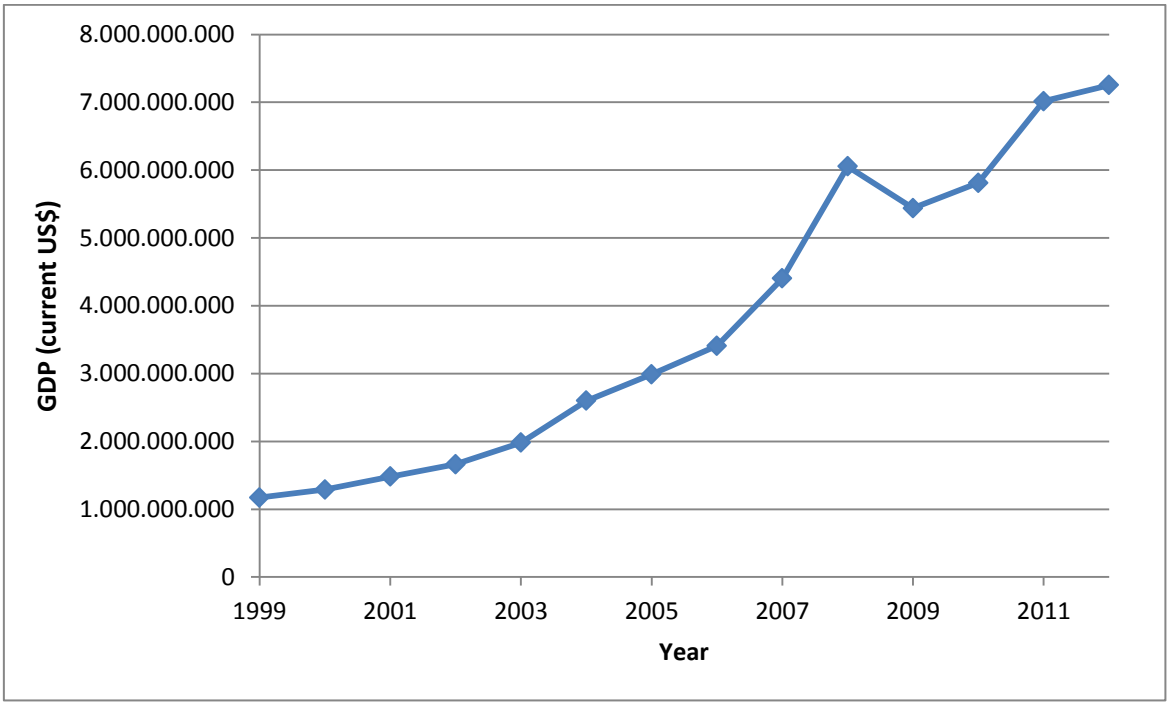

Figure 1. The evolution of GDP over 1995-2012 time period

Analyzing the plot, we can see that the GDP in the Republic of Moldova is on a good path, even though the financial crisis that started in 2007 was a major step back for the economy. In 2011 the GDP reached a value of over 7 billion US$, which is a first in the Republic of Moldova.

The exports of goods and services is a very important factor to any country economy. From figure 2, we can observe that overall evolution of the exports of goods and services (% of GDP) over 1999-2012 time period is not so good. This indicator doesn't have major drops in its value, but for a an economy the exports play an important role. Growth in exports of goods and services involves better employment rate and economic growth. The Republic of Moldova must improve the quality and value of the exports in order to increase the exports rate.

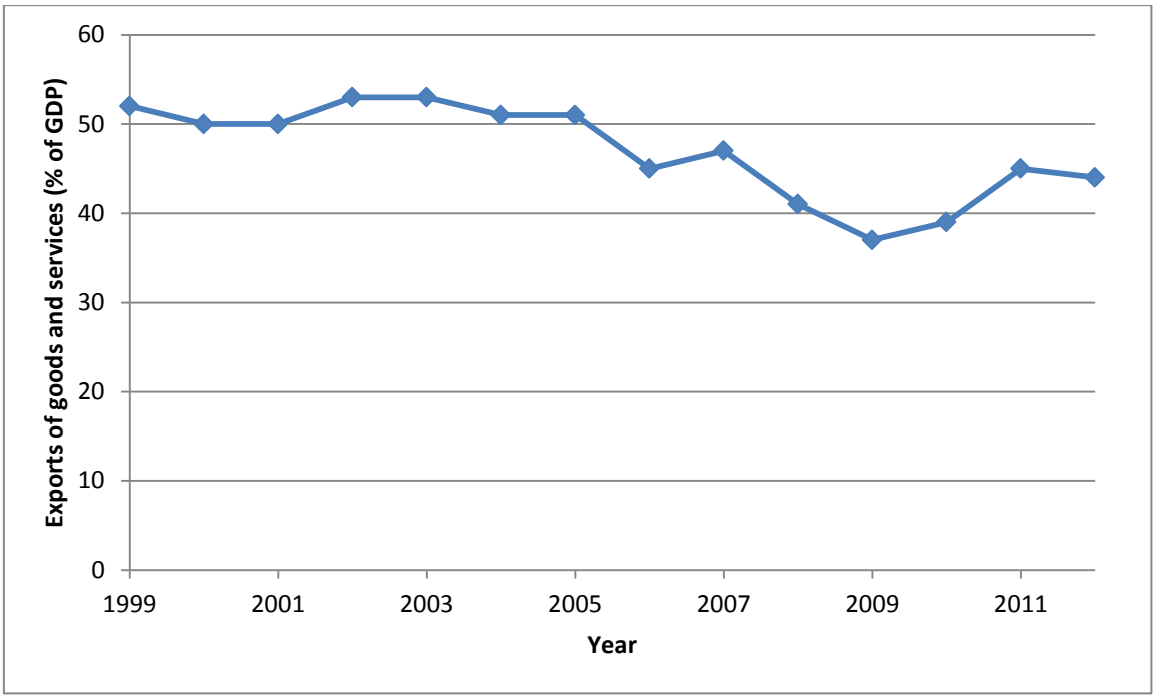

Figure 2. The evolution of the exports of goods and services (% of GDP) over 1999-2012 time period

In figure 3, the evolution of the inflation, GDP deflator (annual %) over 1999-2012 time period is plotted. It can be noticed that this indicator dropped significantly from 1999 to 2002. After 2002, it is rather unstable, increasing and dropping depending on the period of time.

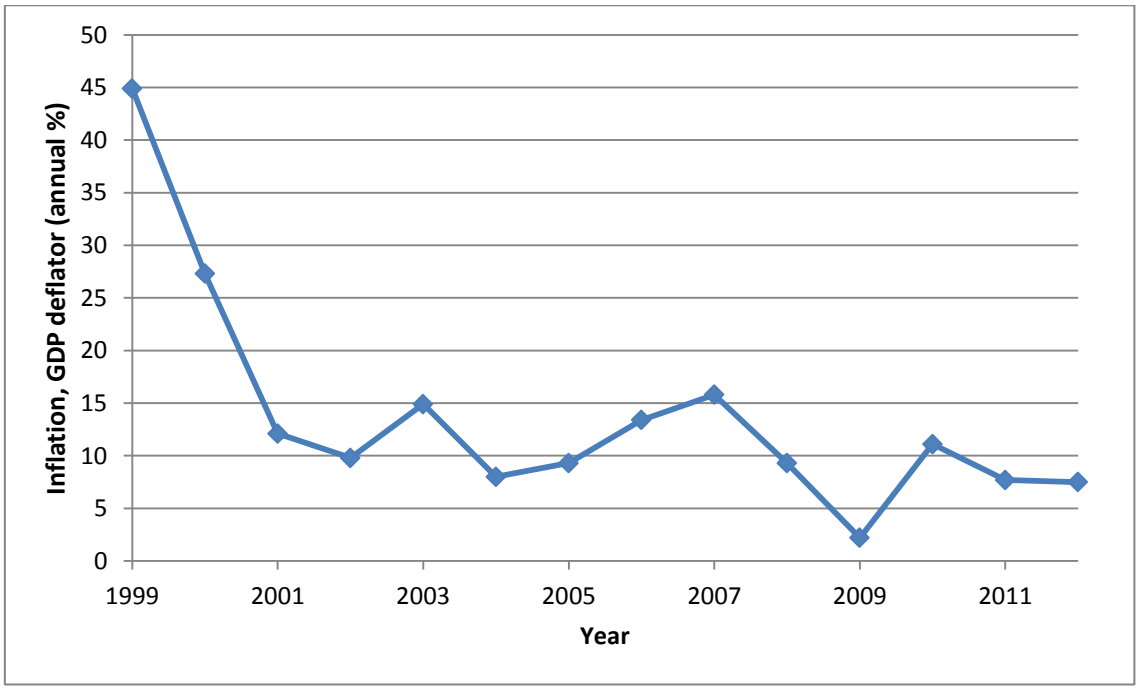

Figure 3. The evolution of the inflation, GDP deflator (annual %) over 1999-2012 time period

The evolution of the central government debt, total (% of GDP) is a major macroeconomic indicator. In the Republic of Moldova the government debt had a decreasing

trend until 2009 and in 2011 started again to grow. In 2012 it reached a level higher than in 2005.

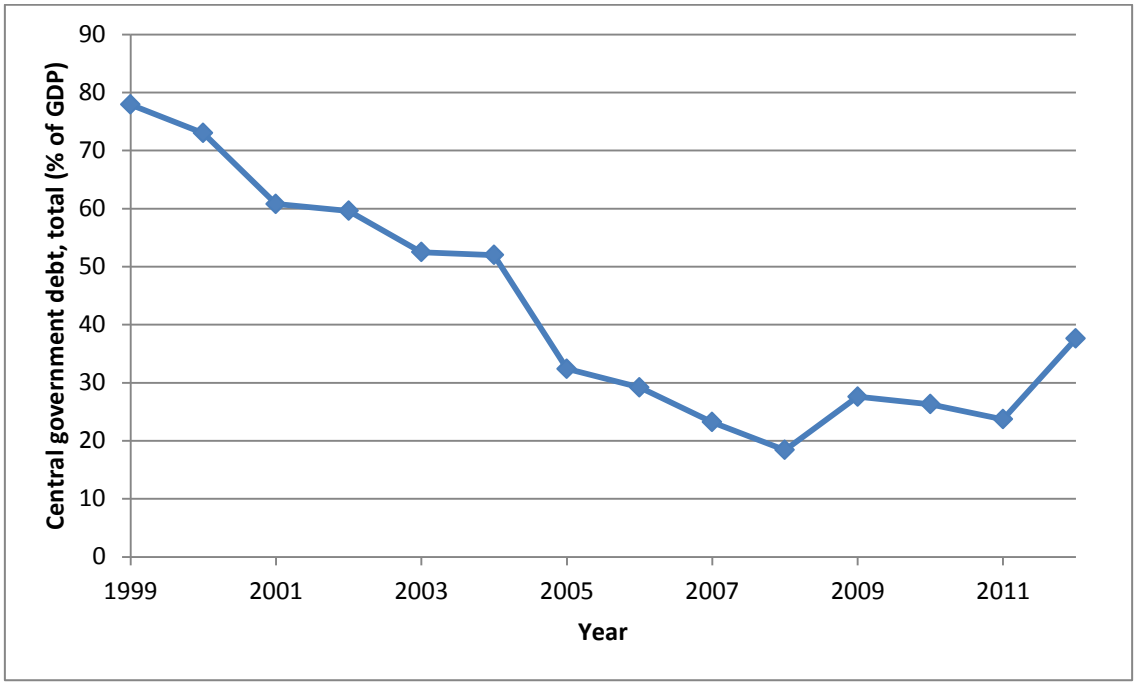

Figure 4. The evolution of the central government debt, total (% of GDP) over 1999-2012 time period

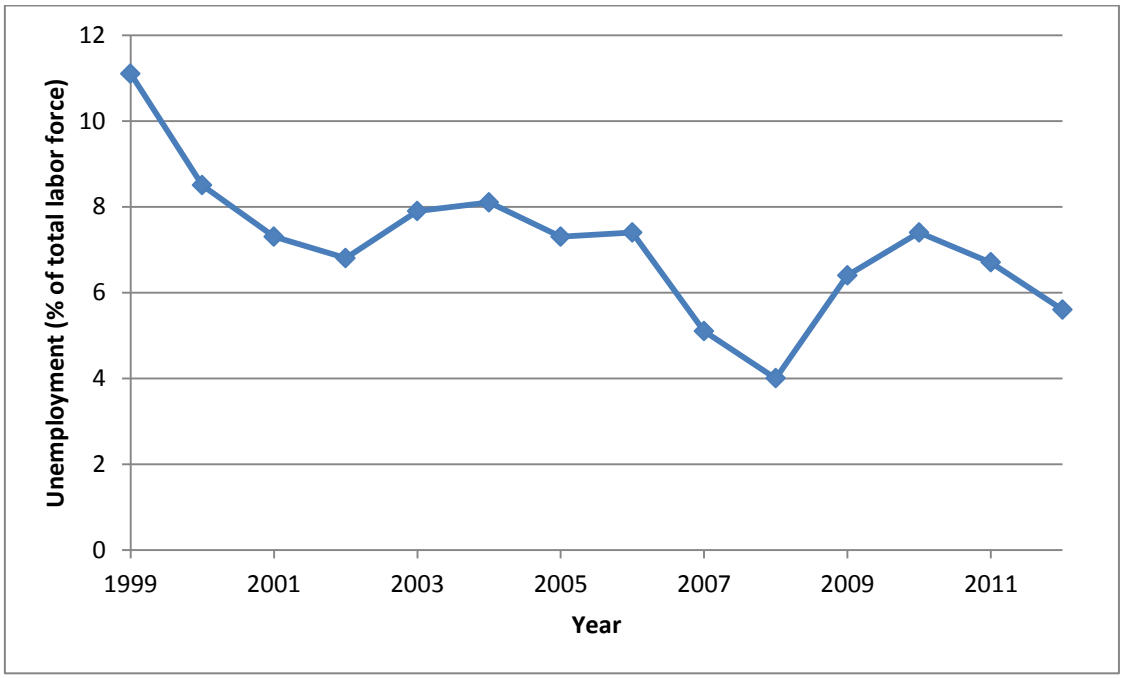

Figure 5. The evolution of unemployment (% of total labor force) over 1999-2012 time period

Employment is a major factor of a country economy. For a country to prosper, the unemployment rate must be low. In 1999 the unemployment was high is the Republic of Moldova and it dropped until 2002. The best unemployment rate was in 2008, when also the country's GDP was high. Between 2008 and 2010, the unemployment rate increased once

more, but from 2010 to 2012 it started to decrease, reaching a level a little higher than in 2007.

In table 2, a descriptive statistics is shown for our data:

	GDP	*Exports of goods and services (% of GDP)*	*Inflation, GDP deflator (annual %)*	*Central government debt, total (% of GDP)*	*Unemployment (% of total labor force)*
Mean	3753839842,3571	47	13,8071	42,4429	7,1143
St. Dev.	2203991278,4432	5,2915	10,6215	19,7971	1,6746
Min.	1170785048	37	2,2	18,4	4
Max.	7252769934	53	44,9	77,9	11,1
Count	14	14	14	14	14

Table 2. Descriptive statistics

5. Data analysis

We will start our analysis with **the correlation matrix** of the variables involved in the model, then we will take a look at the **ANOVA table** for these variables and at last a **multiple regression model** will be developed.

Indicator	*GDP*	*Exports of goods and services (% of GDP)*	*Inflation, GDP deflator (annual %)*	*Central government debt, total (% of GDP)*
Exports of goods and services (% of GDP)	-0,801116935			
Inflation, GDP deflator (annual %)	-0,555822373	0,4500118		
Central government debt, total (% of GDP)	-0,820260388	0,723804638	0,677442653	
Unemployment (% of total labor force)	-0,666661851	0,525186275	0,723811333	0,761233039

Table 3. Correlation matrix

From table 3, the correlation matrix, the relationship between the variables can be seen. For example, between central government debt, total (% of GDP) and exports of goods and services (% of GDP) we have a moderate positive relationship.

From the ANOVA table (table 4), we can establish the overall significance of the model (it is well known that the ANOVA table splits the sum of squares into its components)[7].

	df	*SS*	*MS*	*F*	*Significance F*
Regression	4	48635507006418500000	12158876751604600000	7,54012	0,00597272325
Residual	9	14513001214478400000	1612555690497590000		
Total	13	63148508220896800000			

Table 4. Analysis of variance (ANOVA)

In the fifth column - labeled F - we have the overall F-test of:

[7] http://cameron.econ.ucdavis.edu/excel/ex61multipleregression.html

$$H_0: \beta_1 = \beta_2 = \beta_3 = \beta_4 = \beta_5 = 0$$

Versus

$$H_A: at\ least\ one\ \beta_i\ not\ equal\ to\ 0$$

The p-value for the F-test is equal to 0,00597272325, this indicates rejection of the null hypothesis.

After we run the regression analysis in Microsoft Excel (with the Analysis ToolPak add-in), the multiple regression equation can be written:

$$\hat{y} = 15559306679{,}47 - 183853731{,}52x_1 + 4075541{,}924x_2 - 45597448{,}06x_3 - 180668463{,}85x_4$$

Multiple R	0,8775971
R Square	0,7701767
Adjusted R Square	0,6680330
Standard Error	1269864437,84272
Observations	14

Table 5. Regression statistics

	Coefficients	*Standard Error*	*t Stat*	*P-value*	*Lower 95%*	*Upper 95%*
Intercept	15559306679,47	4202842265,56	3,702091512	0,004904653	6051816944,33	25066796414,61
Exports of goods and services (% of GDP)	-183853731,52	96799289,9	-1,899329341	0,089984529	-402828938,52	35121475,48
Inflation, GDP deflator (annual %)	4075541,924	50190567,29	0,081201352	0,937058928	-109463409,39	117614493,23
Central government debt, total (% of GDP)	-45597448,06	35144357,17	-1,29743298	0,226750352	-125099507,37	33904611,25
Unemployment (% of total labor force)	-180668463,85	360551903,96	-0,501088642	0,628334818	-996293535,95	634956608,25

Table 6. Regression output

The multiple correlation coefficient (Multiple R) is equal to 0,8775971. So, the correlation among the independent and dependent variables is positive.

The coefficient of determination, $R^2 = 0{,}7701767$, meaning that 77,01% of the variability of the GDP is explained by exports of goods and services (% of GDP), Inflation, GDP deflator (annual %), central government debt, total (% of GDP) and unemployment (% of total labor force).

The standard error, $SE = 1269864437{,}84272$, that means that the typical deviation between the actual GDP and what the model says that it should be it is equal to about 1.269.864.437,84272 units.

Also, from table 6, looking at the coefficients column, we can see that we have a negative relationship with the exports of goods and services (% of GDP), central government debt, total (% of GDP) and unemployment (% of total labor force) and a positive relationship with inflation, GDP deflator (annual %).

The t Stat column gives the computed t-statistic for:

$$H_0: \beta_j = 0$$

against

$$H_a: \beta_j \neq 0$$

The p-values from table 6, gives the p-value for test of:

$$H_0: \beta_j = 0$$

against

$$H_a: \beta_j \neq 0$$

From the p-value for each indicator, we can say that the indicators are significant.

The last two columns of table 6, tells us that there is a 95% confidence that the actual impact of an indicator is between the lower and the upper value.

6. Detecting multicollinearity using variance inflation factors

In this section we will take a look at the multicollinearity using variance inflation factors. If there is multicollinearity, then the estimated coefficients are inflated.
For a good regression model, the correlation between the independent variables must be none or weak. The VIF is equal to 1 when there is no collinearity.
We will use:

$$VIF_j = \frac{S_{x_j}^2 (n-1) SE_{b_j}^2}{S^2}$$

So, for each indicator, the VIF is equal to:

Indicator	VIF
Exports of goods and services (% of GDP)	2,115
Inflation, GDP deflator (annual %)	2,291
Central government debt, total (% of GDP)	3,902
Unemployment (% of total labor force)	2,939

Table 7. Variance inflation factors

Even through our results are between 2 and 3, we can say that our variables are well chosen. If there was a VIF value greater or close to 5, than we would definitely had to remove it from the model.

7. Residual Analysis - Checking the Independence Assumption

In order to have confidence that the model is good, in this section we check the residuals for any pattern.

In table 8, for each observation we have a predicted GDP, residuals and standard residuals.

Observation	*Predicted GDP*	*Residuals*	*Standard Residuals*
1	624443320,6	546341727,4	0,517079633
2	1613586747	-325166524,2	-0,307750586
3	2324729533	-844072648,9	-0,798864069
4	1908845762	-247027593,5	-0,233796781
5	2054637596	-73736042,29	-0,069786736
6	2380888851	217342615,7	0,205701733
7	3424431809	-436259384,8	-0,412893307
8	4672108907	-1263654709	-1,19597329
9	5003304900	-600808979	-0,568629615
10	6497539328	-442733226,5	-0,419020409
11	6350917071	-911495039,5	-0,862675313
12	5898090149	-86467755,26	-0,081836537
13	5026132207	1989069239	1,882534575
14	4774101613	2478668321	2,345910703

Table 8. Residual Output

First we plot the residuals over time (figure 6).

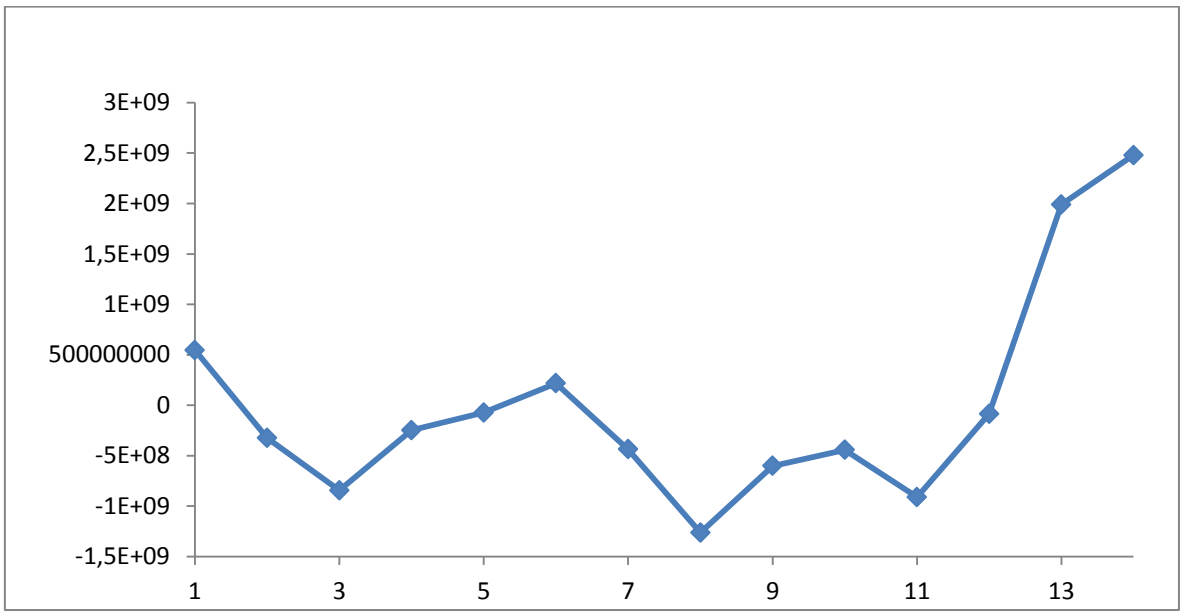

Figure 6. Residuals plot over time

Second, we plot the residuals vs. each of the x-variables in the model.

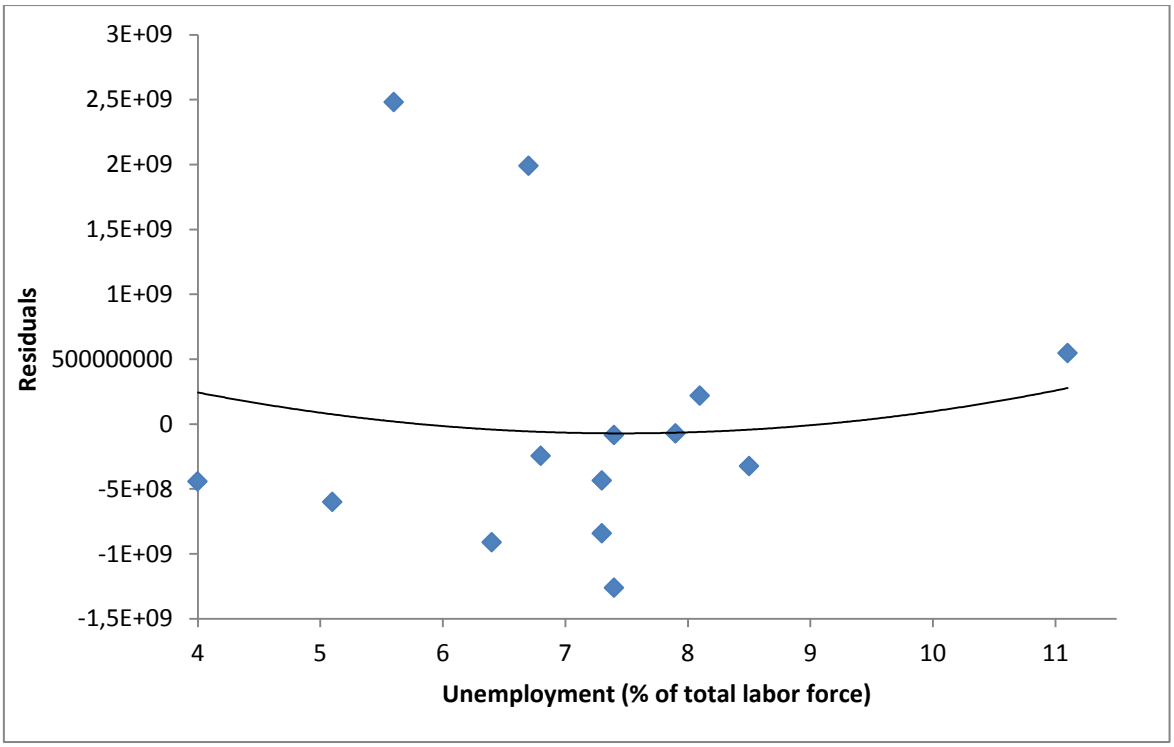

Figure 7. Unemployment (% of total labor force) Residual Plot

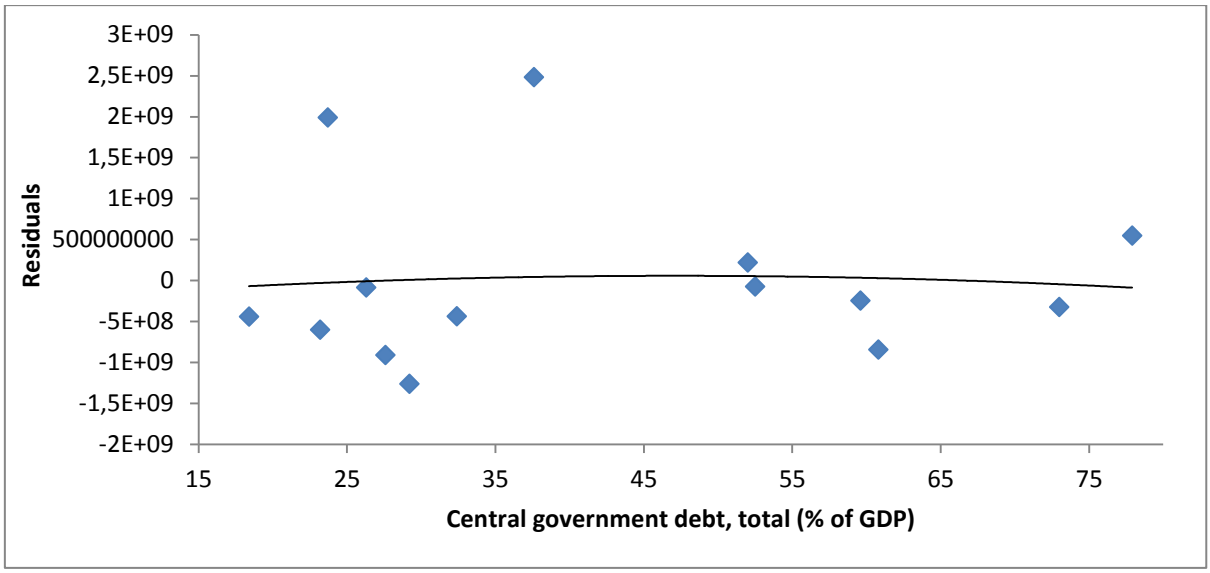

Figure 8. Central government debt, total (% of GDP) Residual Plot

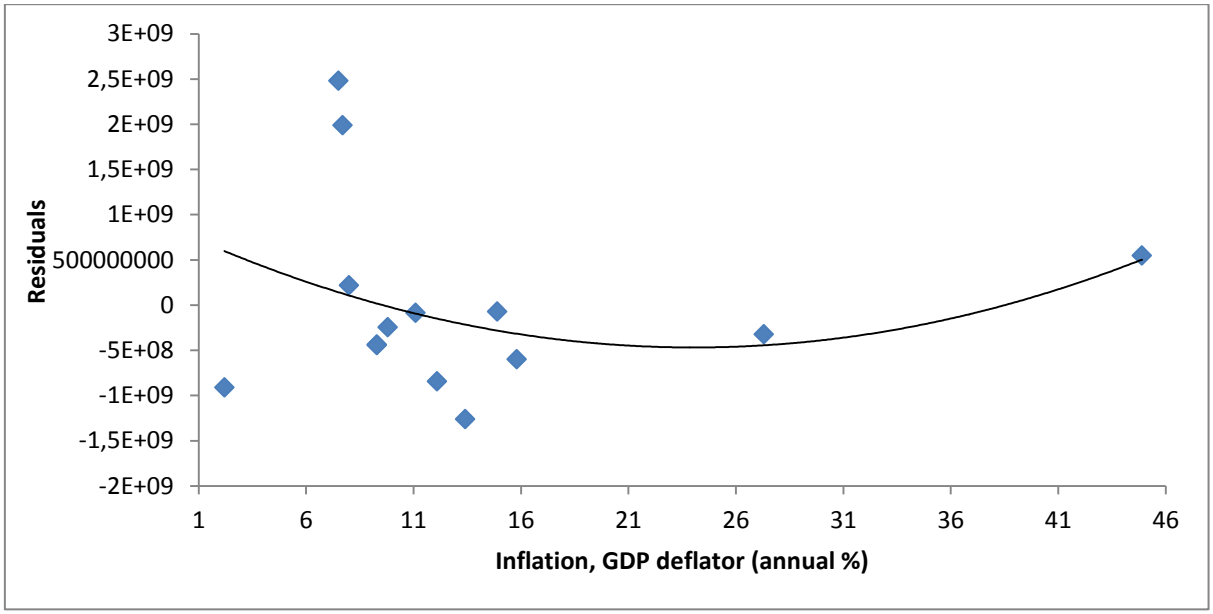

Figure 9. Inflation, GDP deflator (annual %) Residual Plot

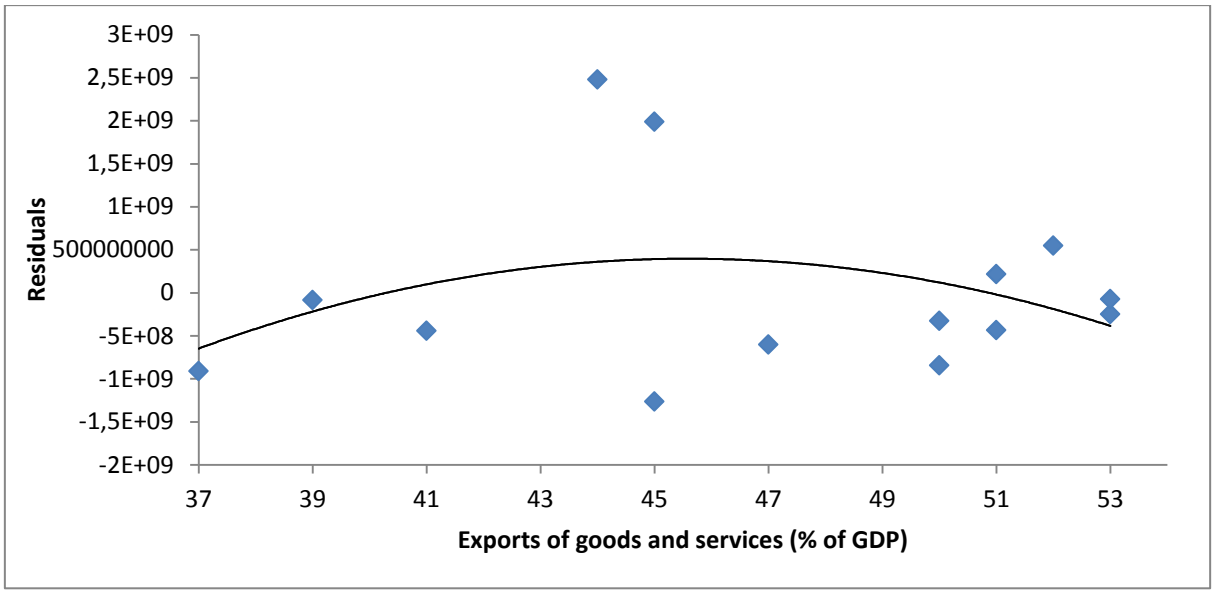

Figure 10. Exports of goods and services (% of GDP) Residual Plot

Independence would be violated over time if the plot shows significant curvature.

By looking at the plots (figures 7, 8, 9 and 10) we can not notice any major pattern. A polynomial trendline has been added to each plot in order to easier check for curvature. We can notice some curvature mostly in figures 9 and 10, but it is not that significant.

8. Checking the Constant Variance Assumption

By plotting residuals vs. fitted values, we can check the regression assumption of independence. The residuals should be randomly scattered.

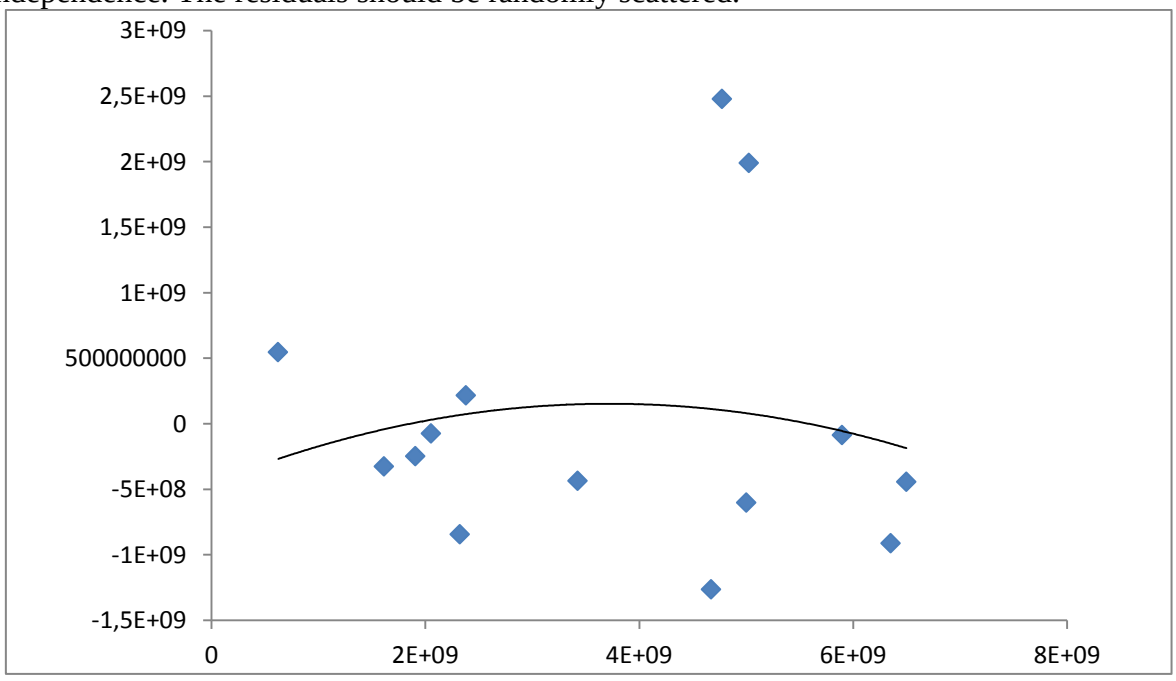

Figure 11. Residuals vs. predicted GDP plot

From figure 11, we can see that the residuals are randomly scattered. If a cone shape or inverse cone shape would be the shape of the scatter, then we would have a violation of constant variance (also called homoscedasticity).

Also, there is a little bit of curvature, but is not so significant to have a violation of independence.

9. Conclusions

The GDP is influenced by a lot of macroeconomic indicators. In this study, a multiregression model based on five major macroeconomic indicators has been proposed.

As seen 77,01% of the variability of the GDP is explained by exports of goods and services (% of GDP), inflation, GDP deflator (annual %), central government debt, total (% of GDP) and unemployment (% of total labor force).

IT software like Excel or Matlab (and many others) are great tools in analyzing data and developing models. These kind of software helps the user in mathematics and data management.

This article has achieved two major goals: developing of a multiregression model and showing the power of IT in social sciences. In the future, it can be developed by running more tests to the data, also using software tools: the *Jarque–Bera test, Durbin-Watson test* or *Goldfeld–Quandt test.*

References

- Andrei, Tudorel, Iacob, Andreea Iluzia, Stancu, Stelian, Oancea, Bogdan, Quantitative Techniques used for the Informal Economy Analysis at National and Regional Level, Informatica Economica, vol. 14, issue 3, pages 153-164, 2010.
- Stancu, Ion, Rece, Daniel, The Relationship between Economic Growth and Money Laundering – a Linear Regression Model, Theoretical and Applied Economics Journal, Vol**.** 09(538), Issue (Month): 09 (538), pages**:** 3-8, 2009.
- Agalega, Evans, Antwi, Samuel, The Impact of Macroeconomic Variables on Gross Domestic Product: Empirical Evidence from Ghana, International Business Research; Vol. 6, No. 5; 2013.
- Iordache, Ana Maria Mihaela, Tudorache, Ionela Catalina, Iordache, Mihai Tiberiu, An Econometrical Model for Calculating the Romanian Gross Domestic Product, Journal of information systems & operations management, Vol. 5.2.1 – special issue, 2011.
- Jula, Dorin, Jula, Nicolae Marius, Economic Growth and Structural Changes in Regional Employment, Journal for Economic Forecasting, issue 2, pages 52-69, 2013.
- Dragoescu, Raluca Mariana, Changes in Romanian higher education after 1990, Romanian Statistical Review nr. 3, pages 28-36, 2013.
- http://cameron.econ.ucdavis.edu/excel/ex61multipleregression.html [consulted on 07.02.2014]
- Coutinho, C., Creţan, A., Jardim-Goncalves, R., Sustainable Interoperability on Space Mission Feasibility Studies. Computers in Industry Journal, special issue on "Interoperable Enterprises" (ISI Thomson Reuters Journal - http://scientific.thomson.com/cgi-bin/linksj/search.cgi), ISSN: 0166-3615, EISSN: 1872-6194, Publisher: ELSEVIER, Volume 63, Issue 8, 2013, pp. 925–937.
- Creţan, A., Coutinho, C., Bratu, B., Jardim-Goncalves, R., NEGOSEIO: A framework for negotiations toward Sustainable Enterprise Interoperability. Annual Reviews in Control – A Journal of IFAC, the International Federation of Automatic Control, ISSN: 1367-5788, Publisher: ELSEVIER, Volume 36 (2), pp. 291–299, 2012, DOI information: 10.1016/j.arcontrol.2012.09.010.
- Kadar, M., Muntean, M., Cretan, A., Jardim-Goncalves, R. - A Multi-Agent Based Negotiation System for Re-establishing Enterprise Interoperability in Collaborative Networked Environments. Proceedings of the 15th International Conference on Computer Modelling and Simulation (UKSim 2013), Cambridge, United Kingdom, 10-12 April 2013, pp. 190-195, DOI: 10.1109/UKSim.2013.66, ISBN 978-0-7695-4994-1, Print ISBN: 978-1-4673-6421-8.

AGENT-BASED NEGOTIATION PLATFORM IN COLLABORATIVE NETWORKED ENVIRONMENT

Adina-Georgeta CREȚAN*

Abstract

This paper proposes an agent-based platform to model and support parallel and concurrent negotiations among organizations acting in the same industrial market. The underlying complexity is to model the dynamic environment where multi-attribute and multi-participant negotiations are racing over a set of heterogeneous resources. The metaphor Interaction Abstract Machines (IAMs) is used to model the parallelism and the non-deterministic aspects of the negotiation processes that occur in Collaborative Networked Environment.

Keywords: *Negotiation model, Web Services, Collaborative Networked Environment, computing platform, multi-agent systems.*

1. Introduction

The advent of the Internet and of the cloud-computing trend have led to the development of various forms of virtual collaboration in which the organizations are trying to exploit the facilities of the network to achieve higher utilization of their resources. In this collaborative networked environment, enterprises are developing business areas dedicated to the purpose of finding and complying with the best set of partners and suppliers for solutions that are aligned with the enterprise's strategy.

The concept of "Virtual Enterprise (VE)" or "Network of Enterprises" has emerged to identify the situation when several independent companies decided to collaborate and establish a virtual organization with the goal of increasing their profits. Camarinha-Matos[1] defines the concept of VE as follows: "A *Virtual Enterprise (VE)* is a temporary alliance of enterprises that come together to share skills and resources in order to better respond to business opportunities and whose cooperation is supported by computer networks".

Given this general context, the objective of this paper is to develop a software platform that facilitates the collaboration activities and, in particular, the negotiations among independent organizations that participate in a Network Environment.

The negotiation process was exemplified by scenarios tight together by a virtual alliance of the autonomous gas stations. Typically, these are competing companies. However, to satisfy the demands that go beyond the vicinity of a single gas station and to better accommodate the market requirements, they must enter in an alliance and must cooperate to achieve common tasks. The manager of a gas station wants to have a complete decision-making power over the administration of his contracts, resources, budget and clients. At the same time, the manager attempts to cooperate with other gas stations to accomplish the global task at hand only through a minimal exchange of information. This exchange is minimal in the sense that the manager is in charge and has the ability to select the information exchanged.

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[1] Camarinha-Matos L.M. and Afsarmanesh H.,(2004), *Collaborative Networked Organizations,* Kluwer Academic Publisher Boston

When a purchasing request reaches a gas station, the manager analyses it to understand if it can be accepted, taking into account job schedules and resources availability. If the manager accepts the purchasing request, he may decide to perform the job locally or to partially subcontract it, given the gas station resource availability and technical capabilities. If the manager decides to subcontract a job, he starts a negotiation within the collaborative infrastructure with selected participants. In case that the negotiation results in an agreement, a contract is settled between the subcontractor and the contractor gas station, which defines the business process outsourcing jobs and a set of obligation relations among participants[2].

The gas station alliance scenario shows a typical example of the SME virtual alliances where partner organizations may be in competition with each other, but may want to cooperate in order to be globally more responsive to market demand.

The collaborative infrastructure, that we describe, should flexibly support negotiation processes respecting the autonomy of the partners.

In this respect, we present in Section 2 the theoretical background of this topic. Then, we are briefly describing in Section 3 the architecture of the collaboration system in which the interactions take place[3].

The main objective of this paper is to propose an IT collaboration platform in a dynamical system with autonomous organizations. In Section 4 we define the Coordination Services that manage different negotiations which may take place simultaneously.

In Sections 5 and 6 we present the model of the negotiation process that can be used by describing a particular case of negotiation, and the negotiation algorithm. Finally, Section 7 concludes this paper.

2. Theoretical background

Ensuring sustainable interoperability among organizations in a networked environment is a crucial factor in order to successfully manage collaborations at all levels: abstract (business); concrete (technology), including informational (information vs. data); functional (activity vs. service); and behavioral (process vs. workflow). Outlining the crucial position of information systems (IS) inside an organisation, Benaben et al. (Benaben et al.,2012) state that the main issue is to ensure that IS of the partners involved in the collaboration are able to work together to constitute a coherent and homogeneous set of IS - the IS of the collaborative situation. To address this issue, Benaben et al. (Benaben et al. 2012) and Benaben and Pingaud (Benaben and Pingaud, 2010) propose the Mediation Information System Engineering Project (MISE Project) which aims at providing collaborating organizations with a mediation information system (MIS) able to support the interoperability of a collaborative network. The project takes a model-driven approach to develop a complete MIS design method, taking into account the semantic reconciliation between business and technical levels.

In the same area, Coutinho et al. (Coutinho et al., 2012) define a framework to support Sustainable Interoperability using Model-Driven Architectures (MDA), Model-Driven Interoperability (MDI), Service-Oriented Architectures (SOA) and Ontologies. The framework allows businesses to build higher inter-knowledge to achieve stronger interoperability. Agostinho et al. (Agostinho et al., 2011) propose a framework which applies MDA transformations to data models to maintain an interoperable peer-to-peer (P2P) connection between two applications. According to Panetto (Panetto, 2007) the Model Driven

[2] Singh M.P., (1997) *Commitments among autonomous agents in information-rich environments*. In Proceedings of the 8th European Workshop on Modelling Autonomous Agents in a Multi-Agent World (MAAMAW), pp. 141–155

[3] Cretan, A., Coutinho, C., Bratu, B., and Jardim-Goncalves, R., NEGOSEIO: A Framework for Negotiations toward Sustainable Enterprise Interoperability. Annual Reviews in Control, 36(2): 291–299, Elsevier, ISSN 1367-5788, 2012, http://dx.doi.org/10.1016/j.arcontrol.2012.09.010

Interoperability (MDI) is considered a major methodology for achieving Enterprise Interoperability (EI), adopting the MDA layers for the development of a model-morphims that implements the transformations among different enterprise models in the deployment of interoperable enterprise systems.

Jardim-Goncalves et al. (Jardim-Goncalves et al., 2012) state that interoperability issues have arisen when using instances of meta-models from different sources, and identify semantic annotation, ontology harmonization, and merging as examples of important methods for the Enterprise Interoperability Science Base (EISB).

An enterprise information system is generally composed of a multitude of applications able to answer certain enterprise needs. Izza (Izza, 2009) considers the integration of enterprise information systems a crucial problem due to the applications composing the information systems of the companies that increasingly require working together. The author states that the heterogeneity of enterprise applications is the major challenge of the integration problem due to the multiple technical, syntactical and semantic conflicts that concern these applications. This requires a mediation process to deal with these differences.

Many research papers (Dutra et al., 2010) take the approach of using ontologies to address the semantic integration and interoperability issues, to deal with the se-mantic heterogeneity of such an environment. Zdravkovic et al. (Zdravkovic et al., 2011) takes the approach of semantic enrichment of the Supply Chain Operations Reference (SCOR) model using Web Ontology Language (OWL), enabling effective knowledge management in supply chain networks and facilitating the semantic interoperability of systems.

To support the continuous evolution of ontologies, Khattak et al. (Khattak et al., 2011) propose to reestablish the mappings among dynamic ontologies by using the changing history of ontology. This has the benefit of reducing the time required for reconciling mappings among ontologies, compared to already existing systems that completely reinitiate the process.

Also, ontologies play an important role in the development of Multi-Agent Sys-tems (MAS) for the semantic web due to the heterogeneity of agents. Thus, Laclavík et al. (Laclavík et al., 2012) state that the lack of the interconnection with semantic web standards such as OWL is the main disadvantage of MAS. In this respect, the authors develop a semantic knowledge agent model that can be used in an agent-based application where such interconnection is needed.

The issue of using a common ontology has been approached in many works, such as the one of Torres and Wijnands (Torres and Wijnands, 2011). Although benefi-cial in many ways, the use of a common ontology becomes much more complex when it deals with multiple application fields in what regards creation, updates and efficient structure. In this respect, Sarraipa et al. (Sarraipa et al., 2010a) present MENTOR methodology based on the mediator ontology concept which assists the semantic transformation among each organization's ontology and the referential one. Additionally, the authors (Sarraipa et al., 2010b) propose to use MENTOR as the collaborative ontology-building methodology, enriched with Qualitative Information Collection Methods (QICM), in order to improve the approach to elicit knowledge from business domain experts.

The increasing exchange of knowledge, resources and expertise among virtual organisations in a collaborative environment has led to many conflicting situations. For solving the conflicts, different kinds of research approaches have been applied, from automatic resolution (Haya et al. 2006) to mediated resolution approach (Shin et al. 2007). Later works (Shin et al. 2008, 2010) combine automatic resolution with social mediation for resolving conflicts among users. According to the authors, the automatic resolution approach is used when the decision is simple or close to what all users expects, while the social mediation involves negotiating a resolution, and is performed by recommending possible

candidates. It is used when the decision is complex or different from what at least one of the users expects.

The negotiation approach plays a key role in solving the conflicts that may occur in a collaborative dynamic environment (Oliveira and Camarinha-Matos, 2012). However, the inadaptability of agents to evolving negotiation protocols, and the ambiguity of the agents' negotiation term are the main issues that can arise during agent interactions (Dong et al., 2008), (Mazuel and Sabouret, 2009). Thus, semantic interoperability is an important issue in a networked enterprise (Jeon et al., 2011). The same idea of using of ontologies technology in order to settle the knowledge conflicts and to solve semantic ambiguity has been extended into the field of automated negotiation research (Chen et al., 2012). In this regard, Wang et al. (Wang et al., 2011) propose an ontology-based knowledge representation approach to provide a semantic interoperable environment to realize automatic negotiations in a virtual collaborative environment.

The final goal of the negotiation process consists in reaching a common agreement among parties in order to support possible collaborations. In this respect, Oliva et al. (Oliva et al., 2010) propose a framework, called SANA (Supporting Artifacts for Negotiation with Argumentation), that incorporates intelligent components able to mediate the agents participating in negotiation to reach an agreement by inferring mutually–acceptable proposals. This solution of using an artificial intelligent mediator can be found in other researches on argumentation based-negotiation, particularly in systems designed for public deliberation (Ahmadi and Charkari, 2010), (Tolchinsky et al., 2011). Although beneficial in many ways, the approach of using an intelligent mediator for guiding the participating agents in the decision-making process would limit the autonomy of participants while increasing the power of the mediator. In the later work, (Ahmadi et al., 2011) the proposed e-negotiation system solves the problem of multi-issue negotiations. In addition, the system is based on the multi-agent systems approach in which agents can make autonomous negotiation decisions.

Many recent papers (Jazayeriy et al., 2011), (Oancea et al., 2011), (Ciucu et al., 2013), (Oancea et al., 2013a), (Oancea et al., 2013b) provide a review on the progress of soft-computing (SC) techniques used in e-negotiation. Their approach is based on the idea that using a combination of soft computing techniques, such as: Fuzzy Logic (FL), Neural networks (NN), Genetic algorithm (GA) and Probabilistic reasoning (PR) can decrease the complexity of negotiation making it closer to real world negotiation.

3. The IT Collaborative Platform

The main objective of this software platform is to support collaborating activities in virtual enterprises. In VE partners are autonomous companies with the same object of activity, geographically distributed.

Taking into consideration, the constraints imposed by the autonomy of participants within VE, the only way to share information and resources is the negotiation process.

Figure 1 shows the architecture of the collaborative system:

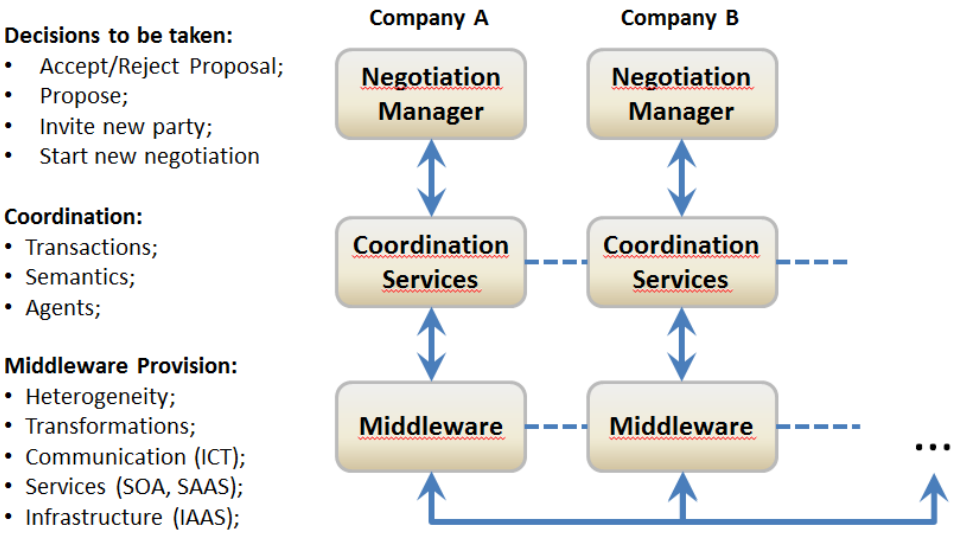

Figure 1. The architecture of the collaborative system

This architecture is structured in three main layers: Negotiation Agent and Manager, Coordination Services and Middleware. A first layer is dedicated to the Negotiation Agent who assists its gas station Manager at a global level (negotiations with different participants on different jobs) and at a specific level (negotiation on the same job with different participants) by coordinating itself with the Negotiation Agents of the other partners through the third layer, Middleware[4]. The second layer, Coordination Services, manages the coordination constraints among different negotiations which take place simultaneously.

A Collaborative Negotiation Agent aims at managing the negotiations in which its own gas station is involved (e.g. as initiator or participant) with different partners of the alliance.

Each negotiation is organized in three main steps: initialization; refinement of the job under negotiation and closing[5]. The initialization step allows to define what has to be negotiated (Negotiation Object) and how (Negotiation Framework)[6]. A selection of negotiation participants can be made using history on passed negotiation, available locally or provided by the negotiation infrastructure (Zhang and Lesser, 2002). In the refinement step, participants exchange proposals on the negotiation object trying to satisfy their constraints (Barbuceanu and Wai-Kau, 2003). The manager may participate in the definition and evolution of negotiation frameworks and objects (Keeny and Raiffa, 1976). Decisions are taken by the manager, assisted by his Collaborative Agent (Bui and Kowalczyk, 2003). For each negotiation, a Collaborative Agent manages one or more negotiation objects, one framework and the negotiation status. A manager can specify some global parameters: duration; maximum number of messages to be exchanged; maximum number of candidates to be considered in the negotiation and involved in the contract; tactics; protocols for the Collaborative Agent interactions with the manager and with the other Collaborative Agents (Faratin, 2000).

[4] Bamford J.D., Gomes-Casseres B., and Robinson M.S., Mastering Alliance Strategy: A Comprehensive Guide to Design, Management and Organization. San Francisco: Jossey-Bass, 2003

[5] Sycara K., *Problem restructuring in negotiation*, in Management Science, 37(10), 1991

[6] Smith R., and Davis R., *Framework for cooperation in distributed problem solving*. IEEE Transactions on Systems, Man and Cybernetics, SMC-11, 1981.

4. Coordination Services

In order to handle the complex types of negotiation scenarios, we propose different services[7]:

- *Subcontracting* (resp. *Contracting*) for subcontracting jobs by exchanging proposals among participants known from the beginning;
- *Block* service for assuring that a task is entirely subcontracted by the single partner;
- *Broker*: a service automating the process of selection of possible partners to start the negotiation;
- *Split:* a service manages the propagation of constraints among several slots, negotiated in parallel and issued from the split of a single job.

These services are able to evaluate the received proposals and, further, if these are valid, the services will be able to reply with new proposals constructed based on their particular coordination constraints[8].

From our point of view the coordination problems managing the constraints between several negotiations can be divided into two distinct classes of services:

- Coordination Services in closed environment**:** services that build their images on the negotiation in progress and manage the coordination constraints according to information extracted only from their current negotiation graph (*Subcontracting, Contracting, Block, Split)*;
- Coordination Services in opened environment: services that also build their images on the negotiation in progress but they manage the coordination constraints according to available information in data structures representing certain characteristics of other negotiations currently ongoing into the system (*Broker).*

Following the descriptions of these services we can state that unlike the services in closed environment (*Subcontracting, Contracting, Block, Split)* that manage the coordination constraints of a single negotiation at a time, the services in opened environment (*Broker)* allow the coordination of constraints among several different negotiations in parallel[9].

The novelty degree of this software architecture resides in the fact that it is structured on four levels, each level approaching a particular aspect of the negotiation process. Thus, as opposed to classical architectures which achieve only a limited coordination of proposal exchanges which take place during the same negotiation, the proposed architecture allows approaching complex cases of negotiation coordination. This aspect has been accomplished through the introduction of Coordination Services level, which allows administrating all simultaneous negotiations in which an alliance partner can be involved.

The Coordination Services have two main functions such as: i) they mediate the transition between the negotiation image at the Collaboration Agent level and the image at the Middleware level; ii) they allow implementing various types of appropriate behavior in particular cases of negotiation. Thus we can say that each component corresponding to a particular negotiation type.

Following the descriptions of this infrastructure we can state that we developed a framework to describe a negotiation among the participants to a virtual enterprise. To achieve a generic coordination framework, nonselective and flexible, we found necessary to first develop the structure of the negotiation process that helps us to describe the negotiation in order to establish the general environment where the participants may negotiate. To develop this structure, we proposed a succession of phases that are specific to different stages of

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[7] Cretan A., Coutinho C., Bratu B. and Jardim-Goncalves R., *A Framework for Sustainable Interoperability of Negotiation Processes.* In INCOM'12 14th IFAC Symposium on Information Control Problems in Manufacturing, 2011

[8] Vercouter, L., *A distributed approach to design open multi-agent system*. In 2nd Int. Workshop Engineering Societies in the Agents' World (ESAW), 2000

[9] Muller H., *Negotiation principles.* Foundations of Distributed Artificial Intelligence, 1996.

negotiation (initialization, negotiation, contract adoption) that provided a formal description of the negotiation process.

The advantage of this structure of the negotiation process consists on the fact that it allows a proper identification of the elements that constitute the object of coordination, of the dependencies that are possible among the existing negotiations within the VE, as well as the modality to manage these negotiations at the level of the Coordination Services.

5. The Negotiation Coordination Model

This section proposes a formal model to settle and manage the coordination rules of one or more negotiations which can take place in parallel, by describing the basic concepts underlying the model, and the negotiation model using the metaphor of Interaction Abstract Machines (IAMs). The Program Formula is described to define the methods used to manage the parallel evolution of multiple negotiations.

Basic concepts

In this setup, at a local level, the model requires a formal description of the rules of coordination that manage the behavior of the agent in a negotiation; at a global level, the model must provide a global coordination of all negotiations of an agent.

The fundamentals of the negotiation model are given by the following basic concepts:

A *Negotiation Model* is defined as a quintuple M = <T, P, N, R, O> where:

- T denotes the *time of the system*, assumed to be discrete, linear, and uniform[10];
- P denotes the *set of participants* in the negotiation framework. The participants may be involved in one or many negotiations;
- N denotes the *set of negotiations* that take place within the negotiation framework;
- R denotes the *set of policies of coordination* of the negotiations that take place within the negotiation framework;
- O denotes the *common ontology* that consists of the set of definitions of the attributes that are used in a negotiation.

A *negotiation* is described at a time instance through a set of negotiation sequences.

Let Sq = {si | i $\in \mathbb{N}$} denote the set of *negotiation sequences*, such that $\forall$si ,sj $\in$ Sq, i $\neq$ j implies si $\neq$ sj. A *negotiation sequence* si $\in$ Sq such that si $\in$ N(t) is a succession of negotiation graphs that describe the negotiation N from the moment of its initiation and up to the time instance *t*. The negotiation graph created at a given time instance is an oriented graph in which the nodes describe the negotiation phases that are present at that time instance (i.e., the negotiation proposals sent up to that moment in terms of status and of attributes negotiated) and the edges express the precedence relationship between the negotiation phases.

The *negotiation phase* (*ph*) indicates a particular stage of the negotiation under consideration.

The *Status* is the possible state of a negotiation. This state takes one of the following values (*Status* $\in${*initiated, undefined, success, failure*}):

initiated – the negotiation, described in a sequence, has just been initiated;

undefined – the negotiation process for the sequence under consideration is ongoing;

success – in the negotiation process, modeled through the sequence under consideration, an agreement has been reached;

[10] Hurwitz, S.M., Interoperable Infrastructures for Distributed Electronic Commerce. 1998, http://www.atp.nist.gov/atp/98wpecc.htm

failure – the negotiation process, modeled through the sequence under consideration, resulted in a denial.

Issues is the set of attributes with associated values that describe the proposals made in a negotiation phase.

Snapshot is the set of combinations between a negotiation aspect (*Status*) and the information that is negotiated (*Issues*).

The functions *status* and *issues* return, respectively, the state (status) of a negotiation instance and the set of the attributes negotiated (issues) within a negotiation instance.

Metaphor Interaction Abstract Machines (IAMs)

The metaphor Interaction Abstract Machines (IAMs) will be used to facilitate modelling of the evolution of a *multi-attribute, multi-participant, multi-phase negotiation*. In IAMs, a system consists of different *entities* and each entity is characterized by a state that is represented as a set of *resources*. It may evolve according to different laws of the following form, also called "*methods*":

A1@…@An <>- B1@…@Bm

A method is executed if the state of the entity contains all resources from the left side (called the "*head*") and, in this case, the entity may perform a transition to a new state where the old resources *(A1,…,An)* are replaced by the resources *(B1,…,Bm)* on the right side (called the "*body*"). All other resources of the entity that do not participate in the execution of the method are present in the new state.

The operators used in a method are:

- the operator @ assembles together resources that are present in the same state of an entity;
- the operator <>- indicates the transition to a new state of an entity;
- the operator & is used in the body of a method to connect several sets of resources;
- the symbol "T" is used to indicate an empty body.
- In IAMs, an entity has the following characteristics:
- if there are two methods whose heads consist of two sets of distinct resources, then the methods may be executed in parallel;
- if two methods share common resources, then a single method may be executed and the selection procedure is made in a non-deterministic manner.

In IAMs, the methods may model four types of transition that may occur to an entity: *transformation*, *cloning*, *destruction* and *communication*. Through the methods of type *transformation* the state of an entity is simply transformed in a new state. If the state of the entity contains all the resources of the head of a transformation method, the entity performs a transition to a new state where the head resources are replaced by the body resources of the method. Through the methods of type *cloning* an entity is cloned in a finite number of entities that have the same state. If the state of the entity contains all the resources of a head of a cloning method and if the body of the method contains several sets of distinct resources, then the entity is cloned several times, as determined by the number of distinct sets, and each of the resulting clones suffers a transformation by replacing the head of the method with the corresponding body. In the case of a *destruction* of the state, the entity disappears. If the state of the entity contains all the resources of the head of a transformation method and, if the body of the method is the resource T, then the entity disappears.

In IAMs, the *communication* among various entities is of type broadcasting and it is represented by the symbol "^". This symbol is used to the heads of the methods to predefine the resources involved in the broadcasting. These resources are inserted in the current entity and broadcasted to all the entities existent in the system, with the exception of the current entity. This mechanism of communication thus executes two synchronous operations:

- *transformation*: if all resources that are not predefined at the head of the method enter in collision, then the predefined resources are inserted in the entity and are immediately consumed through the application of the method;
- *communication*: insertion of the copies of the predefined resources in all entities that are present in the system at that time instance.

6. The Negotiation Scenario

In the proposed scenario, a conflict occurs in a network of enterprises, threatening to jeopardize the interoperability of the entire system. According to our proposal regarding the negotiation, the participants to a negotiation may propose offers and each participant may decide in an autonomous manner to stop a negotiation either by accepting or by rejecting the offer received. Also, depending on its role in a negotiation, a participant may invite new participants to the negotiation. In order to illustrate this approach, we present a schematic example of a negotiation process (Figure 2).

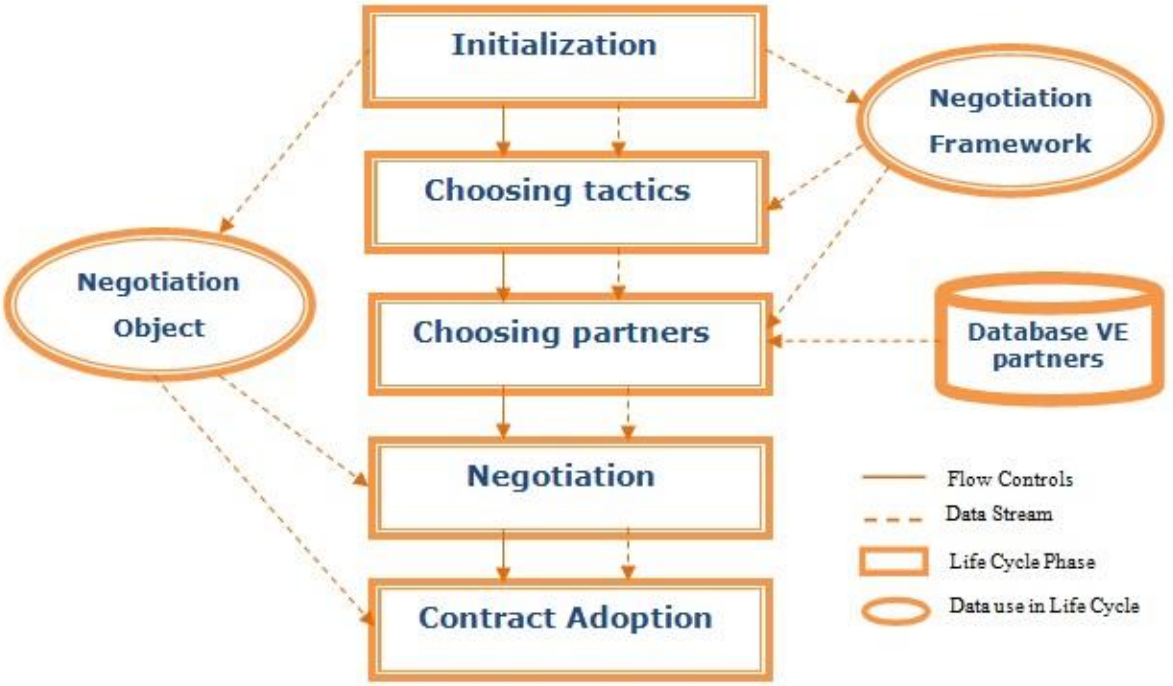

Figure 2. The structure of the negotiation process

The negotiation process is divided into five parts (initialization, choice of tactics, choice of partners, negotiation and contract adoption).

Initialization. The Manager initiates a subcontracting of a task, defining and communicating to the Collaborative Agent the properties and the constraints of the negotiation object and the negotiation framework. The negotiation process begins by creating an instance of the component Subcontracting. This instance will initiate other stages of negotiation, based on constraints provided by the Manager: the invitation of the coordination components (*Contracting*, *Broker*, etc.). Moreover, this instance will conduct negotiations in terms of construction and evaluation of proposals for subcontracting proposed task;

Choosing tactics: Using the negotiation tactics specified in the framework, the coordination is decomposed into several coordination schemes. Two tactics correspond to two coordination schemes: Block and Split;

Choosing partners: The possible choices of partners are: i) Among known partners:

The Chief Negotiator initiating the outsourcing can specify any constraints on the set of possible contractors. To do this, the Chief Negotiator uses the description of the job to be outsourced and also the database partners within the collaborative networked environment and/or the different adhesion contracts they signed; ii) Among unknown partners: in this case, the entire research activity of the potential partners is managed by the infrastructure through the Broker component;

Negotiation: At this stage, during the exchange of proposals, the negotiation object evolves according to the constraints imposed by the Chief Negotiator on the negotiated attributes of the outsourcing task. The objective of the negotiation stage is to build an Instantiated Negotiation Object (e.g., a negotiation object whose attributes have been accepted by all partners) from the initial specification of the negotiation object. After that, this object will be used to establish a contract;

Contract Adoption: In this final stage, the negotiation object has fixed values. The Chief Negotiator validates the result of negotiation and makes contact with other partners within the Negotiation Environment. Thus, the Chief Negotiator may decide: i) To restart or to suspend negotiations; ii) To enable the contracting process that will state an agreement.

The negotiation process involves several parties (for several bilateral negotiations), each having different criteria, constraints and preferences that determine their individual areas of interest. Criteria, constraints and preferences of a participant are partially or totally unknown to the other participants. The job under negotiation is described as a multi-attribute object. Each attribute is related to local constraints and evaluation criteria, but also to global constraints drawing dependencies with other attributes.

In conclusion, the proposed architecture manages in a decentralized manner the coordination of multi-phase negotiations on a multi-attribute object and among several participants, featuring:

- The definition of the negotiation process structure: participants, interaction protocol, negotiation protocol, tactics and coordination services, the negotiation object and the negotiation strategies;
- Modeling of all negotiations in which a participant may be involved in the form of a set of bilateral negotiations.

Thus, we can say, that we have proposed an infrastructure that manages, in a decentralized manner, the coordination of multi-phase negotiations on a multi-attribute object and among a lot of participants.

7. Conclusions

The functioning of this kind of alliance suppose task achievement, which cannot be individual treated, by a single participant for better adjustment of the clients requirements.

The proposed platform aims to help the different enterprises to fulfill their entire objectives by mediating the collaboration among the several organizations gathered into a virtual enterprise.

A specific feature that distinguishes the negotiation structure proposed in this work from the negotiations with imposed options (acceptance or denial) is that it allows the modification of the proposals through the addition of new information (new attributes) or through the modification of the initial values of certain attributes (for example, in the case of gas stations the gasoline price may be changed).

The business-to-business interaction context in which our activities take place forces us to model the unexpected and the dynamic aspects of this environment. An organization may participate in several parallel negotiations. Each negotiation may end with the acceptance of a contract that will automatically reduce the available resources and it will modify the context for the remaining negotiations.

In the current work we've described in our collaboration platform only the interactions with the goal to subcontract or contract a task. A negotiation process may end with a contract and in that case the supply schedule management and the well going of the contracted task are both parts of the outsourcing process.

In order to illustrate our approach we have used a sample scenario where distributed gas stations have been united into virtual enterprise. Take into consideration this scenario, one of the principal objectives was related to the generic case and means that this proposed infrastructure can be used in other activity domains.

Regarding research perspective continuation, one first direction which can be mentioned is the negotiation process and the coordination process taking into consideration the contracts management process. In this way the coordination can administrate not only the dependence between the negotiations and the contracts which are formed and with execution dependences of those contracts.

Another perspective is to deliver to the user one instrument which allows him negotiation protocol definition according with the restrained negotiation interactions possibilities. Consequent, this will be a problem of coordination on which the infrastructure must solve on negotiation protocol administration and protocol build perspective.

References

- Camarinha-Matos L.M. and Afsarmanesh H., *Collaborative Networked Organizations,* 2004 Kluwer Academic Publisher Boston.
- Singh M.P., *Commitments among autonomous agents in information-rich environments*. In Proceedings of the 8th European Workshop on Modelling Autonomous Agents in a Multi-Agent World (MAAMAW), pages 141–155, May 1997.
- Cretan, A., Coutinho, C., Bratu, B., and Jardim-Goncalves, R., *NEGOSEIO: A Framework for Negotiations toward Sustainable Enterprise Interoperability.* Annual Reviews in Control, 36(2): 291–299, Elsevier, ISSN 1367-5788, 2012. http://dx.doi.org/10.1016/j.arcontrol.2012.09.010.
- Benaben, F., Boissel-Dalliera, N., Pingaud, H. and Lorre, J.P. (2012). *Semantic issues in model-driven management of information system interoperability*. International Journal of Computer Integrated Manufacturing, 2012, Volume 0, Issue 0, pages 1–12.
- Benaben, F., & Pingaud, H. (2010). *The MISE Project: A first experience in mediation information system engineering.* Information systems: People, organizations, institutions, and technologies (pp. 399–406), A. D'Atri & D. Saccà (Eds.), Heidelberg: Physica-Verlag HD. doi:10.1007/978-3-7908-2148-2_46.
- Coutinho, C., Cretan, A., and Jardim-Goncalves, R. (2012). *Cloud-based negotiation for sustainable Enterprise Interoperability*. The 18th International ICE Conference on Engineering, Technology and Innovation, Munich, Germany, 18-20 June, 2012 (ICE'12).
- Agostinho, C., Correia, F., & Jardim-Goncalves, R. (2011). *Interoperability of complex business networks by language independent information models.* In Newworld situation: Newdirections in concurrent engineering–Proceedings of the 17th ISPE international conference on concurrent engineering (CE 2010), Part 2 (pp. 111–124).
- Panetto H. (2007). Towards a classification framework for interoperability of enterprise applications, International Journal of CIM 20 (8), pp. 727-740.
- Jardim-Goncalves, R., Grilo, A., Agostinho, C., Lampathaki, F., Charalabidis, Y., 2012. *Systematisation of Interoperability Body of Knowledge: The foundation for EI as a science*. Enterprise Information Systems Journal (EIS).
- Izza, S. (2009): Integration of industrial information systems: from syntactic to semantic integration approaches, Enterprise Information Systems, 3:1, 1-57
- Dutra, M., Ghodous, P., & Kuhn, O. (2010). *A generic and synchronous ontology-based architecture for collaborative design*. Concurrent Engineering, 18, 65–74.
- Zdravkovi´c, M., Panetto, H., Trajanovi´c, M., & Aubry, A. (2011). *An approach for formalizing the supply chain operations*. Enterprise Information Systems, 5, 401–421.
- Khattak, A. M., Pervez, Z., Latif, K., Sarkar, A. M. J., Lee, S., & Lee, Y.-K. (2011). *Reconciliation of ontology mappings to support robust service interoperability.* In 2011 IEEE international conference on services computing (IEEE) (pp. 298–305).

- Laclavík M., Balogh, Z., Babík,M., & Hluchý, L. (2006). *Agent OWL: Semantic knowledge model and agent architecture*. Computing and Informatics, 25, 421–439.
- Torres, J.M., and Wijnands, Q., 2011. *Distributed Agents for Multi-Rover Autonomy*. IEEE International Workshops on Enabling Technologies: Infrastructure for Collaborative Enterprises, pp. 53-58.
- Sarraipa, J., Jardim-Goncalves, R., Gaspar, T., & Steiger-Garcao, A. (2010a). *Collaborative ontology building using qualitative information collection methods.* In 5th IEEE international conference on intelligent systems (IS 2010) (pp. 61–66).
- Sarraipa, J., Jardim-Goncalves, R., and Steiger-Garcao, A. (2010b). *MENTOR: an enabler for interoperable intelligent systems*. International Journal of General Systems 39, 557–573.
- Shin, C., Yoon, H., and Woo,W. 2007. User-centric conflict management for media services by using personal companions. ETRI Journal 29(3): 311–320.
- Shin, C., Anind, K. Dey, and Woo, W. 2008. Mixed-initiative conflict resolution for context-aware applications. In Proc. of the 10th International Conference on Ubiquitous Computing (UbiComp '08), pp. 262–271.
- Shin, C., Anind, K. Dey, and Woo, W. 2010. Toward combining automatic resolution with social mediation for resolving multiuser conflicts. International Journal Cybernetics and Systems - Volume 41, Issue 2, April 2010, pages 146-166
- Haya, P. A., Montoro, G., Esquivel, A., García-Herranz, M., and Alamán, X. 2006. *A mechanism for solving conflicts in ambient intelligent environments*. Journal of Universal Computer Science 12(3): 284–296.
- Oliveira, A. I., & Camarinha-Matos, L. M. (2012). Electronic negotiation support environment in collaborative networks. Advances in Information and Communication Technology, 372/2012, 21–32.
- Dong, H., Hussain, F. K., & Chang, E. (2008). *State of the art in negotiation ontologies for multi-agent systems*. International Journal of Web Services Practices, 3, 157–163.
- Mazuel, L., & Sabouret, N. (2009). *A communication protocol for semantic heterogeneity with incomplete ontology alignment.* In Proceedings of the 8th international conference on autonomous agents and multiagent systems (AAMAS '09), pp. 1187–1188.
- Jeon, P. B., Kim, J., Lee, S., Lee, C., & Baik, D.-K. (2011). *Semantic negotiation-based service framework in an M2M environment*. In 2011 IEEE/WIC/ACMinternational conferences on web intelligence and intelligent agent technology (IEEE) (pp. 337–340).
- Chen, T.-Y., Chen, Y.-M., & Cai, H.-Y. (2012). Design of knowledge trading negotiation model for accelerating acquirement of knowledge. International Journal of Computer Integrated Manufacturing, 25, 1085–1101.
- Wang, X. H.,Wong, T. N.,&Wang, G. (2011b). *Knowledge representation for multi-agent negotiations in virtual enterprises*. International Journal of Production Research, 49, 4275–4297.
- Oliva, E., McBurney, P., Omicini, A., & Viroli, M. (2010). *Argumentation and artifacts for negotiation support*. International Journal of Artificial Intelligence, 4, 90–117.
- Ahmadi, K.D., and Charkari, N.M. (2010). *Multi agent based interactive recommendation and automated negotiation system in E-commerce*. Advanced Information Management and Service (IMS),6th International Conference, pp. 279 – 284.
- Tolchinsky, P., Modgil, S., Atkinson, K., McBurney, P., & Cortés, U. (2011). Deliberation dialogues for reasoning about safety critical actions. Autonomous Agents and Multi-Agent Systems, 25(2), 209– 259. doi:10.1007/s10458-011-9174-5.
- Ahmadi, K.D., Charkari, N.M., Enami, N. (2011). *E-Negotiation System Based on Intelligent Agents in B2C E-Commerce*. Advances on Information Sciences and Service Sciences, Volume 3, Number 2, pp. 60-70.
- Jazayeriy, H., Azmi-Murad, M., Sulaiman, N., and Udzir, N.I., (2011). *A review on soft computing techniques in automated negotiation*. Scientific Research and Essays Vol. 6(24), pp. 5100-5106.
- Oancea B., Andrei T., Rosca Ion Gh., Iacob A., *Parallel algorithms for large scale econometric models*. 1st World Conference on Information Technology 2010, published in Procedia Computer Science, volume 3, pp. 479-483, 2011.
- Ciucu Ș.C., Rebenciuc M., Petre I.A., *Addenda to Weibull distribution in MATLAB - definitions, code sources for functions, applications*. Journal of Applied Quantitative Methods (JAQM), Volume 8, Issue 4 - December 30, 2013, ISSN 1842–4562, http://jaqm.ro/issues/volume-8,issue-4/pdfs/4_ciucu_rebenciuc_petre.pdf

- Oancea B., Ciucu Ș.C., (2013a). *Time series forecasting using neural networks*. The 7th International Conference, "Challenges of the Knowledge Society" (CKS 2013), May 17 – 18, 2013, Bucharest, ISSN 2068-7796.
- Oancea B., Dragoescu R., Ciucu Ș.C., (2013b). *Predicting students' results in higher education using neural networks*. The 6-th Conference Applied Information and Communication Technology, Faculty of Information Technology, Latvia University of Agriculture, Jelgava, Latvia, 25-26 April 2013, pp. 190-194, ISSN 2255-8586.
- Bamford J.D., Gomes-Casseres B., and Robinson M.S., Mastering Alliance Strategy: A Comprehensive Guide to Design, Management and Organization. San Francisco: Jossey-Bass, 2003.
- Sycara K., *Problem restructuring in negotiation*, in Management Science, 37(10), 1991.
- Smith R., and Davis R., *Framework for cooperation in distributed problem solving*. IEEE Transactions on Systems, Man and Cybernetics, SMC-11, 1981.
- Zhang X. and Lesser V., *Multi-linked negotiation in multi-agent systems*. In Proc. of AAMAS 2002 July, Bologna, pg. 1207 – 1214.
- Barbuceanu M. and Wai-Kau Lo, Multi-attribute Utility Theoretic Negotiation for Electronic Commerce. In AMEC III, LNAI 2003, pg. 15-30.
- Keeny R. and Raiffa H., Decisions with Multiple Objectives: Preferences and Value Tradeoffs. JohnWilley & Sons, 1976.
- Bui V. and Kowalczyk R., *On constraint-based reasoning in e-negotiation agents*. In AMEC III, LNAI 2003, pp. 31-46.
- Faratin P., *Automated service negotiation between autonomous computational agent*. Ph.D. Thesis, Department of Electronic Engineering Queen Mary & West-field College, 2000.
- Cretan A., Coutinho C., Bratu B. and Jardim-Goncalves R., *A Framework for Sustainable Interoperability of Negotiation Processes.* In INCOM'12 14th IFAC Symposium on Information Control Problems in Manufacturing, 2011
- Vercouter, L., *A distributed approach to design open multi-agent system*. In 2nd Int. Workshop Engineering Societies in the Agents' World (ESAW), 2000
- Muller H., *Negotiation principles.* Foundations of Distributed Artificial Intelligence, 1996.
- Hurwitz, S.M., Interoperable Infrastructures for Distributed Electronic Commerce. 1998, http://www.atp.nist.gov/atp/98wpecc.htm

ECONOMETRIC SOFTWARE - FREE VS. PAID SOLUTIONS

Nicolae-Marius JULA*

Abstract

Using software in econometric analysis empower the researches to find the answer to the problems faster than ever. The use of commercial software is very wide-spread, but the costs are always a barrier for a lot of researchers. Using free alternatives like R combines the power processing with affordability. We analyze in this paper some aspects related to main differences between commercial econometric software and free alternatives.

Keywords: *Econometric software, open source, E-Views, R, Bai-Perron*

1. Introduction

As Samuelson et al. stated in the paper[1], econometrics is "the quantitative analysis of actual economic phenomena based on the concurrent development of theory and observation, related by appropriate methods of inference". There are a lot of practical applications of econometric methods, like forecasting macroeconomic indicators, analyzing firm's factors, analyzing the relation between management techniques and results, analyzing the effect of dividend announcements and investors' behavior, predicting the results in political campaigns, predicting the results of a marketing campaign and so on.

The methods used are in a continuous process of adapting, improving and getting more and more complex. The equations involved in the models trend to be more complex than ever and the data needed for estimations imply a huge computational power.

The estimations cannot be done in modern times without the help of complex software, doubled by complex processing power. On the market, the analysts have two options: to use paid software or free (open source) alternatives. In this paper, we shall present two examples of econometric software – the paid software – Econometric Views and the open source – R.

This article will identify the similarities and, mostly, the differences between open source software and proprietary software in econometric analysis.

2. Content

We start this comparison from the description presented by both of the software.

The latest version of Econometric Software is EViews8. Citing the website of the product, Eviews8 "offers academic researchers, corporations, government agencies and students access to powerful statistical, forecasting, and modeling tools through an innovative, easy-to-use object-oriented interface. EViews blends the best of modern software technology with cutting edge features. The result is a state-of-the art program that offers unprecedented power within a flexible, easy-to-use interface."
(http://www.eviews.com/EViews8/ev8main.html)

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[1] P. A. Samuelson, T. C. Koopmans, and J. R. N. Stone (1954). "Report of the Evaluative Committee for Econometrica," Econometrica 22(2), p. 142.

From the homepage of R software, we learn that "R is a language and environment for statistical computing and graphics(…) R provides a wide variety of statistical (linear and nonlinear modelling, classical statistical tests, time-series analysis, classification, clustering, ...) and graphical techniques, and is highly extensible. The S language is often the vehicle of choice for research in statistical methodology, and R provides an Open Source route to participation in that activity. " (http://www.r-project.org/)

Both software solutions are highly appreciated among users and both have strengths and weaknesses.

Open source solution vs. proprietary solution

According to Opensource.org, many people prefer open source software because they have more control over that kind of software.

There are two kind users: the advanced users, with programming skills, who can analyze the code and verify the integrity and consistency and the regular users, who aren't programmers, but also benefit from open source software, because they can use this software for many different purposes and, with some professional help, they can also adapt the solution to their needs.

Some analysts prefer to write their own code, to learn by manual writing formulas. They can learn from following the packages written by others. They can also share their work, their functions or packages with others, inviting comment, critique and also improvement.

Opensource.org suggest that some people prefer open source software because they consider it is more secure and stable than proprietary software. And this is because anyone can view and modify open source software errors or omissions can be easily identified and corrected. Because of the community and many programmers working on a particular open source software package, without any specific requirements for permission from original authors, open source software is generally fixed and updated with a higher rate than proprietary software.

Being open source, the source code is usually highly distributed and there are no concerns about sudden interruption of support. This is particularly important for long time projects.

Platform support

When using specialized software for analysis, one should consider the main operating system before acquiring a license.

The results when comparing the two products are:

Product	Windows	Mac OS	Linux	BSD	Unix
EViews	Yes	Yes	No	No	No
R	Yes	Yes	Yes	Yes	Yes

Table 1 – Comparison between supporting OS

If you are a UNIX user, the answer is already found. The high portability of R is one of the biggest engines that drive the popularity up.

User preferences

There were polls conducted among users for Top Analytics, Data Mining, Big Data software used (http://www.kdnuggets.com/2012/05/top-analytics-data-mining-big-data-software.html) and for the first time, the number of users of free/open source software exceeded the number of users of commercial software (according to the results from 2013): R

obtained 30.7% (increase from 23.3% in 2012) and Excel was second with 29.8% (increase from 21.8% in 2012). The study involved 798 voters and, according to the source, there were specific tools for removing unnatural votes.

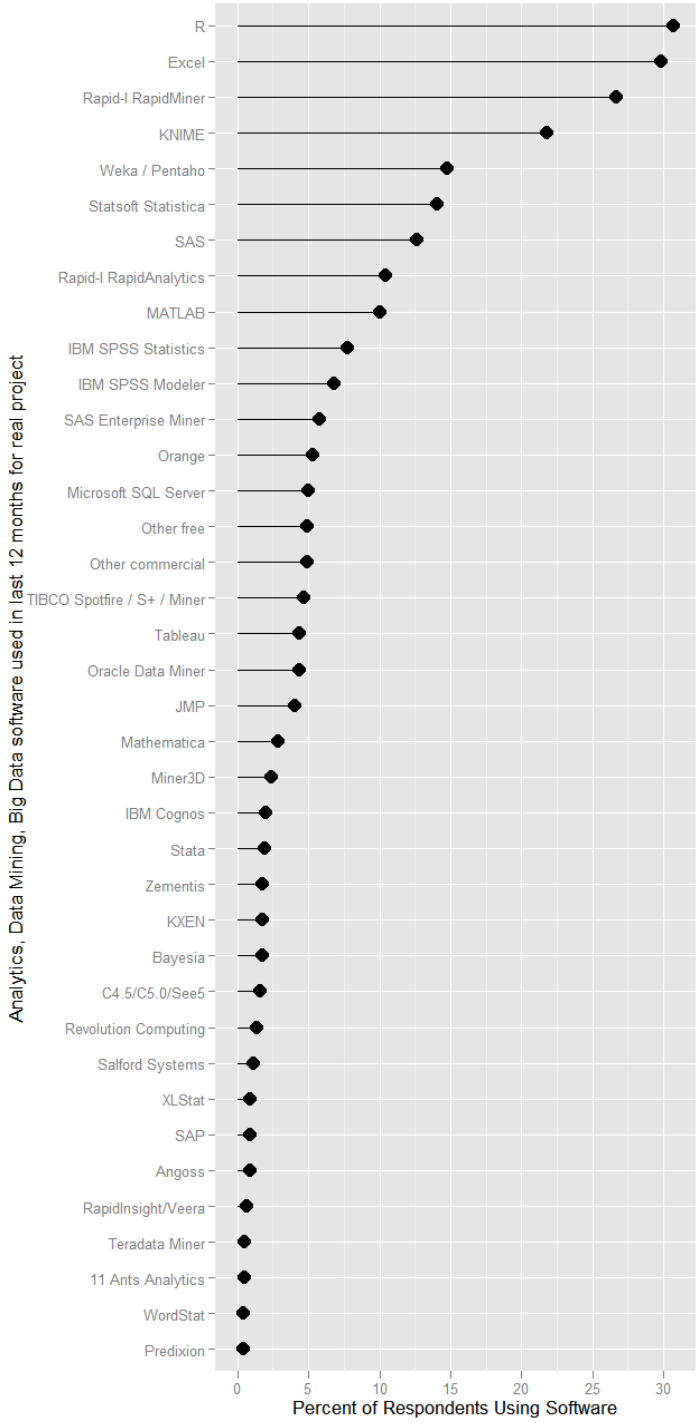

Figure 1 – Analytics, Data Mining, Big Data Software used in last 12 Month

Source: http://www.kdnuggets.com/2012/05/top-analytics-data-mining-big-data-software.html

Popularity evolution

In an article from www.r4stats.com, Robert A. Muenchen analyzed the popularity of data analysis software. The author started the paper with simple but important questions that

every user of data analysis software should ask before choosing the tool to work with. Questions like:

- Does it run natively on your computer?
- Does the software provide all the methods you use? If not, how extensible is it?
- Does that extensibility use its own language, or an external one (e.g. Python, R) that is commonly accessible from many packages?
- Does it fully support the style (programming vs. point-and-click) that you like?
- Are its visualization options (e.g. static vs. interactive) adequate for your problems?
- Does it provide output in the form you prefer (e.g. cut & paste into a word processor vs. LaTeX integration)?
- Does it handle large enough data sets?
- Do your colleagues use it so you can easily share data and programs?
- Can you afford it?

To answer these questions and to measure the popularity or market share for different analytic software, the author recommends some interesting approaches:

- job advertisements – considered one of the best tool to observe the trends
- scholarly articles – the young generation will represent the next wave of users
- books – the number and the quality may represent the current interest for a particular software
- website popularity and blogs – the effort to maintain up-to-date online content and the community is a good indicator
- other indicators: survey of use, discussion forum activity, programming activity, popularity measures, IT research firms reports, sales or downloads measures, competition use and growth in capability.

Regarding the last aspect, the author updated his research, and included the growth in R packages (more than 5000 available only on the official site), which is following a rapid parabolic arc.

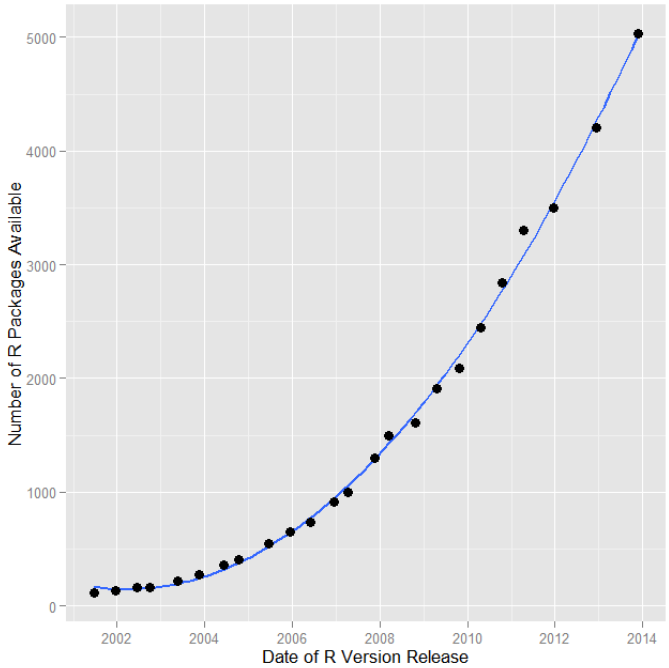

Figure 2 – Number of R Packages Available

Source: http://www.r-bloggers.com/r-continues-its-rapid-growth/

Eviews has most of the functions integrated in the main package. But, there are also add-ins available for download. As at the time of the writing of this paper, there were available around 60 add-ins. The interesting aspect is that for running some of them, one should have R installed on the computer. These packages, like TVAR (for estimating a threshold VAR), Mcontrol (A command line tool for solving model objects when there are multiple control and target variables, with or without inequality constraints), ExpSmooth (Performs an expanded set of exponential smoothing and forecasting techniques, including automatic model selection), BVAR (Performs a Litterman / Minnesota / Ko-Ko or Sims-Zha (1998) Bayesian VAR estimation), BMA (Computes different Bayesian Model Averaging methods including LM, GLM and Multinomial Logit models), aim_solve(Provides a way to simulate DSGE models within EViews) or BaiPerron (this add-in performs the Bai-Perron (1998) breakpoints test, as implemented in the R package "struccchange"), should work properly only when in R instance is installed on the computer. One can admit that there is a good opportunity for an analyst used to Eviews to have the opportunity to expend the research by including these new tools from other software.

Pricing

The users are highly influenced not only by the capabilities of the software, but also by the acquisition price. The pricing options for E-Views as the writing date of this paper are:

Single Copy Price

Version	Commercial	Academic
EViews Standard Edition 8	$1,275	$510
EViews Enterprise Edition 8	$1,625	$650

(http://www.eviews.com/general/prices/prices.html)

The difference between the two versions are, according the website: “The Enterprise Edition has all the features of the Standard Edition plus support for ODBC and support for proprietary data formats of commercial data and database vendors. Specifically support for ODBC (including Oracle, SQL Server and DB2), Datastream, EcoWin, FactSet, FAME (local and server), Global Insight DRIBase, Haver Analytics, and Moody’s Economy.com databases, is only provided in EViews Enterprise Edition.”

There is also a student version, for 40$, aimed to help students learning the econometric analysis, forecasting and statistics.
(http://www.eviews.com/EViews8/EViews8Student/evstud8.html)

R is available as Free Software under the terms of the Free Software Foundation's GNU General Public License in source code form.

Differences in model approach

An analyst should always carefully read the “vignette” of a new package before using the functions in production. We found different approaches for some indicators and these differences were not only among different econometric software implementations, but inside the same software.

For example, in R, for the same statistic indicator, you can obtain different results when using different packages. You have to use functions within official CRAN repository and, even so, to read the way of the author decided to implement some indicators.

When using for research different software, you may have to compare the results. For example, the Akaike and Schwartz Specification Criterion (AIC and BIC) are different in R vs. EViews:

	R	Obs.	E-Views	Obs.
AIC	*-2l+k*npar*	K = 2; Npar=degrees of freedom (ex., for univariate model: npar=3)	$AIC = -\frac{2l}{n} + \frac{2(k+1)}{n}$	K – number of explicative variables
BIC	*-2l+k*npar*	K=log(n); Npar= degrees of freedom (ex., for univariate model: npar=3)	$SIC = -\frac{2l}{n} + \frac{(k+1)}{n}\ln(n)$	
Log-Likelihood function	$l = -\frac{n}{2}\left(1 + \ln(2\pi) + \ln\frac{\sum u_t^2}{n}\right)$			

Table 2 – AIC and BIC – R vs. EViews

Software Solution for Econometric Tests: Bai-Perron Breakpoints

In many applications it is useful to know when the structural change occurred. Treating the date of structural change—the breakdate—as an unknown parameter, the issues are how to estimate the breakpoint and how to obtain confidence intervals for the breakpoint.

A Highly possible breakpoint estimate is the date that yields the largest value of the Chow test sequence. Usually this is known to be a good estimate only in one special case—in linear regressions when the Chow test is constructed with the "homoskedastic" form of the covariance matrix.

In regression models, a suitable method to estimate the parameters—including the breakpoint—is least squares. Operationally, the sample is split at each possible breakpoint, the other parameters assessed by ordinary least squares and the sum of squared errors calculated and stored. The least squares breakpoints estimate is the date that minimizes the full-sample sum of squared errors (equivalently, minimizes the residual variance).

A theory of least squares estimation has been developed in a sequence of papers by Jushan Bai (alone or with coauthors). Bai (1994, 1997a) derives the asymptotic distribution of the breakpoint estimator and shows how to construct confidence intervals for the breakpoint.8 These confidence intervals are easy to calculate and hence are very useful in applications, as they indicate the degree of estimation accuracy. Bai, Lumsdaine and Stock (1998) extend this analysis to multiple time series with simultaneous structural breaks. They show that using multiple time series improves estimation precision. Bai and Perron (1998) discuss simultaneous estimation of multiple breakpoints.

Chong (1995) and Bai (1997b) show how to estimate multiple breakpoints sequentially. The key insight is that when there are multiple structural breaks, the sum of squared errors (as a function of the breakpoint) can have a local minimum near each breakpoint. Thus, the global minimum can be used as a breakpoint estimator, and the other local minima can be viewed (cautiously) as candidate breakpoint estimators. The sample is then split at the breakpoint estimate, and analysis continues on the subsamples. Bai (1997b) shows that important improvements are obtained by iterative refinements: re-estimation of breakpoints based on refined samples.

Hansen B., in his article from 2001, *The New Econometrics of Structural Change: Dating Breaks in U.S. Labor Productivity*, considers that "as yet, there have been few rigorous applications of the methodology described here. An important exception is Bai,

Lumsdaine and Stock (1998), who attempt to date the alleged slowdown of the early 1970s. Using U.S. quarterly data for 1959 through 1995 on real output, consumption and investment, they find no evidence of structural change when examining the individual series with univariate models, but find strong evidence in a joint vector autoregression, in which the output, consumption and investment variables are regressed on lagged values of output, consumption and investment. Their estimate of the breakpoint is the first quarter of 1969, and their 90 percent confidence interval puts the breakpoint between the second quarter of 1966 and the fourth quarter of 1971. An interesting common feature of our breakpoint estimates for labor productivity and the Bai, Lumsdaine and Stock (1998) estimate for real output is that they are both quite different than the widely accepted breakpoint of 1973. (Neither set of confidence intervals include 1973.) Another common feature is that both sets of estimates are consistent with a structural break in the late 1960s".

Let's suppose we have to find the breakpoints in regression relationships. From the description found in R help: "The foundation for estimating breaks in time series regression models was given by Bai (1994) and was extended to multiple breaks by Bai (1997ab) and Bai & Perron (1998). "breakpoints" implements the algorithm described in Bai & Perron (2003) for simultaneous estimation of multiple breakpoints. The distribution function used for the confidence intervals for the breakpoints is given in Bai (1997b). The ideas behind this implementation are described in Zeileis et al. (2003)."

Let a series of 150 records, created in Microsoft Excel. We define a function Y_t as following:

$$Y_t = \begin{cases} 2 + 3X_t + e_t, & for\ t = 1...50 \\ 300 - 3X_t + e_t, & for\ t = 51...100 \\ -100 + X_t + e_t, & for\ t = 101...150 \end{cases}$$

If we want to compute the breakpoints for this, we can use the following code in R:

```
#reading data from MS Excel  - copy from Clipboard
read.excel <- function(header=TRUE,...)
{
 read.table("clipboard",sep="\t",header=header,...)
}

#loding data into variable "dat"
bp=read.excel()

#displaying first 6 records
head(bp)

a<-lm(V1~seq(1,dim(bp)[1],by=1), data=bp)
summary(a)
#creating a time variable equal with series dimension
time<-seq(1,dim(bp)[1],by=1)

#loading library "strucchange"
require(strucchange)

#computing breakpoints
```

breakpoints(V1~1+time, data=bp, h=0.1)

The results indicate:

```
Breakpoints at observation number:
52 97
```

In EViews, the procedure is:

- we estimate an equation like: V1 = C(1) + C(2)*@TREND
- From View -> Stability Diagnostics -> Multiple Breakpoint Test

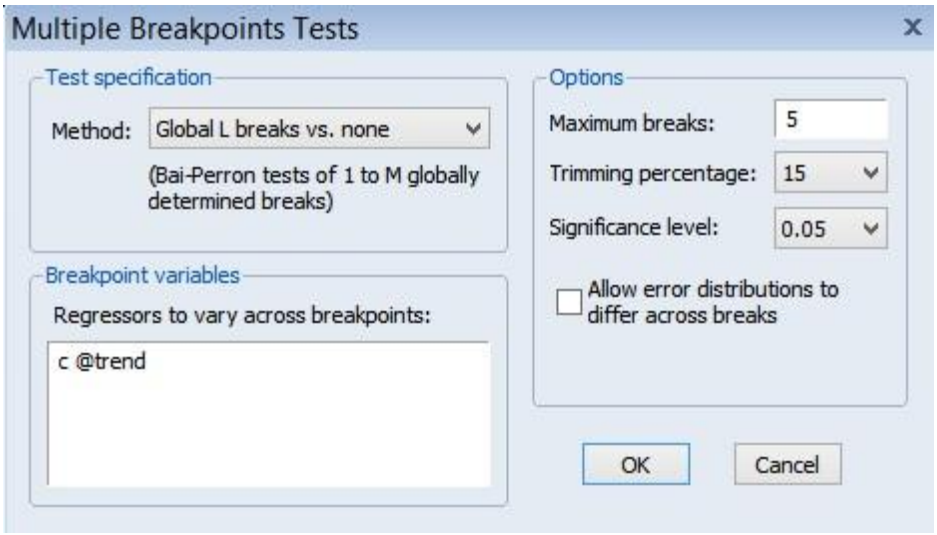

Figure 3 – Breakpoints in Eviews8

- The obtained results are:

Equation: EQ01 Workfile: BAI_PERRON::Untitled\

View | Proc | Object | Print | Name | Freeze | Estimate | Forecast | Stats | Resids

Included observations: 150
Breakpoint variables: C @TREND
Break test options: Trimming 0.15, Max. breaks 5, Sig. level 0.05

Sequential F-statistic determined breaks:	5
Significant F-statistic largest breaks:	5
UDmax determined breaks:	2
WDmax determined breaks:	2

Breaks	F-statistic	Scaled F-statistic	Weighted F-statistic	Critical Value
1 *	168.7513	337.5026	337.5026	11.47
2 *	2549.436	5098.872	5998.365	9.75
3 *	1742.416	3484.831	4781.222	8.36
4 *	1320.860	2641.721	4214.261	7.19
5 *	1054.144	2108.287	4133.685	5.85

UDMax statistic*	5098.872	UDMax critical value**	11.70
WDMax statistic*	5998.365	WDMax critical value**	12.81

* Significant at the 0.05 level.
** Bai-Perron (Econometric Journal, 2003) critical values.

Estimated break dates:
1: 60
2: 53, 98

Figure 4 – Breakpoints in Eviews8 – Results

Source: Author's calculations

We have to emphasis the slight differences between the two software, regarding the results. In R, the breakpoints are the number of observations that are the last in one segment. In Eviews, as the help section stated: "results follow the EViews convention in defining breakdates to be the first date of the subsequent regime"

3. Conclusions

Companies and individual researchers are considered rational in their economic behavior, so they will tend to go for that particular software which delivers best results with minimum costs. When we refer to cost, we should consider not only acquisition, maintaining and updating costs for the software, but also training and supporting materials, user community and online/offline support. Also the time spent from data input to outputs should be considered. The diversity of supported data and the output customization options can weight in the choosing process.

With the R environment becoming more and more divers, the solution for commercial software should be either to adopt a better pricing strategy or to come with other services, like a plus on support system, free training courses or outstanding computing performance that should justify the invested money.

If in the past there were reservations in using open source software because of the lack of support, there are companies that can provide the requested help for adopting or creating a suitable software solution, for a fee.

The threat is not only for software like E-Views, but for all commercial software which share a common pool of users. The competition in even stronger in a field like data analysis because of the reduced number of total possible users, compared with other domains.

References

- Bai J., 1994. "Least Squares Estimation of a Shift in Linear Processes." Journal of Time Series Analysis. 15:5, pp. 453–72.
- Bai J., Lumsdaine R., Stock J.H., 1998. "Testing for and Dating Common Breaks in Multivariate Time Series." Review of Economic Studies. July, 64:3, pp. 395–432.
- Bai J., Perron P., 1998. "Estimating and Testing Linear Models with Multiple Structural Changes." Econometrica. January, 66:1, pp. 47–78.
- Bai J., 1997a. "Estimation of a Change Point in Multiple Regression Models." Review of Economics and Statistics. November, 79:4, pp. 551– 63.
- Bai J., 1997b. "Estimating Multiple Breaks One at a Time." Econometric Theory. June, 13:3, pp. 315–52.
- Goldstein, H. (1995), Multilevel Statistical Models, 2nd edition. London: Edward Arnold.
- Hansen B.E. (2001), "The New Econometrics of Structural Change: Dating Breaks in U.S. Labor Productivity", Journal of Economic Perspectives—Volume 15, Number 4, p.117-128
- Muenchen R.A. (2013), The Popularity of Data Analysis Software, http://r4stats.com/articles/popularity/
- Perron, P., 1989. "The Great Crash, the Oil-Price Shock, and the Unit-Root Hypothesis." Econometrica. November, 57:6, pp. 1361–401.
- Perron, P., 1997. "Further Evidence on Breaking Trend Functions in Macroeconomic Variables." Journal of Econometrics. October, 80:2, pp. 355–85.
- Perron, P., Vogelsang T.J.,. 1992. "Nonstationarity and Level Shifts with an Application to Purchasing Power Parity." Journal of Business and Economic Statistics. July, 10:3, pp. 301–20.
- Rabe-Hesketh, Sophia and Anders Skrondal (2012), Multilevel and Longitudinal Modeling Using Stata. 3nd edition. Volume I: Continuous Responses. College Station, Texas: Stata Press.
- Raudenbush, S.W. and Bryk, A.S. (2002), Hierarchical Linear Models. Applications and Data Analysis Methods, 2nd edition. Sage: Thousand Oaks. http://www.kdnuggets.com/2012/05/top-analytics-data-mining-big-data-software.html
- Samuelson P. A., Koopmans T. C., Stone J. R. N. (1954). "Report of the Evaluative Committee for Econometrica," Econometrica 22(2), p. 142
- www.eviews.com
- www.opensource.com/resources/what-open-source
- www.r4stats.com
- www.r-project.org

Annex

Eviews – Equation Estimation

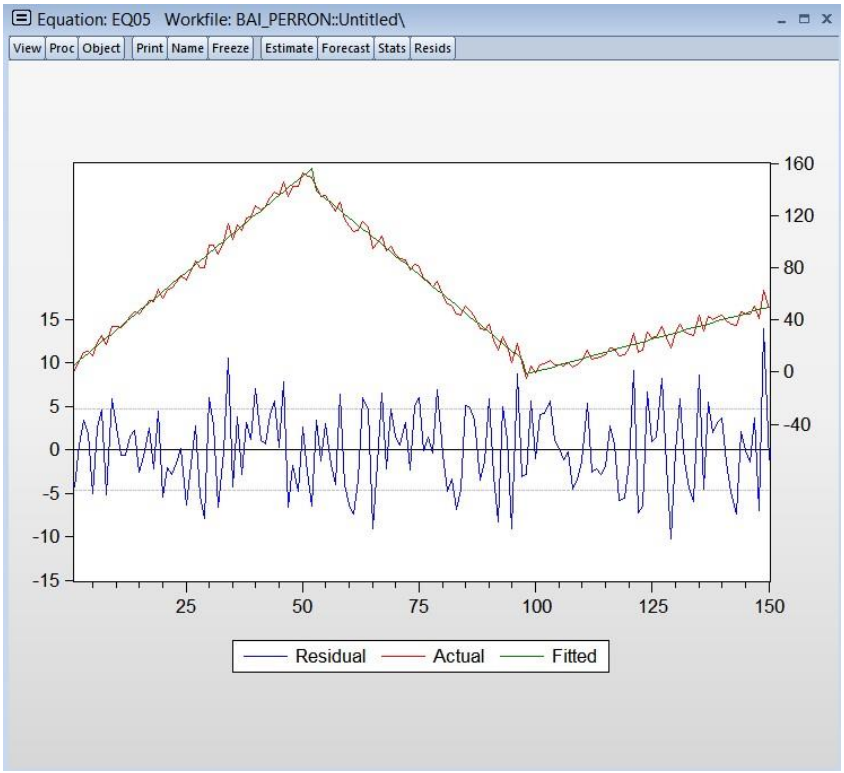

Figure 5 – Estimation in Eviews8

Source: Author's calculations

R source code for breakpoints

```
> #reading data from MS Excel  - copy from Clipboard
> read.excel <- function(header=TRUE,...)
+ {
+ read.table("clipboard",sep="\t",header=header,...)
+ }
> #loding data into variable "dat"
> bp=read.excel()
> #displaying first 6 records
> head(bp)
         V1
1  1.329643
2  9.071669
3 14.984144
4 16.271895
5 12.382279
6 22.829745
> a<-lm(V1~seq(1,dim(bp)[1],by=1), data=bp)
> summary(a)

Call:
lm(formula = V1 ~ seq(1, dim(bp)[1], by = 1), data = bp)

Residuals:
   Min     1Q Median     3Q    Max
-89.54 -28.74  -4.44  25.92  82.85

Coefficients:
```

```
                            Estimate Std. Error t value Pr(>|t|)
(Intercept)                 91.30382    6.46533  14.122  < 2e-16 ***
seq(1, dim(bp)[1], by = 1) -0.43080    0.07428  -5.799 3.89e-08 ***
---
Signif. codes:  0 ‘***’ 0.001 ‘**’ 0.01 ‘*’ 0.05 ‘.’ 0.1 ‘ ’ 1

Residual standard error: 39.39 on 148 degrees of freedom
Multiple R-squared:  0.1852,   Adjusted R-squared:  0.1797
F-statistic: 33.63 on 1 and 148 DF,  p-value: 3.886e-08

> #creating a time variable equal with series dimension
> time<-seq(1,dim(bp)[1],by=1)
> #time
> #loading library "strucchange"
> require(strucchange)
> #computing breakpoints
> breakpoints(V1~1+time, data=bp, h=0.1)

         Optimal 3-segment partition:

Call:
breakpoints.formula(formula = V1 ~ 1 + time, h = 0.1, data = bp)

Breakpoints at observation number:
52 97

Corresponding to breakdates:
0.3466667 0.6466667
```

PARALLEL COMPUTING IN ECONOMICS - AN OVERVIEW OF THE SOFTWARE FRAMEWORKS

Bogdan OANCEA*

Abstract

This paper discusses problems related to parallel computing applied in economics. It introduces the paradigms of parallel computing and emphasizes the new trends in this field - a combination between GPU computing, multicore computing and distributed computing. It also gives examples of problems arising from economics where these parallel methods can be used to speed up the computations.

Keywords: *Parallel Computing, GPU Computing, MPI, OpenMP, CUDA, computational economics.*

1. Introduction

Although parallel computers have existed for over 40 years and parallel computing offer a great advantage in terms of performance for a wide range of applications in different areas like engineering, physics, chemistry, biology, computer vision, in the economic research field they were very rarely used until recent years. Economists have been accustomed to only use desktop computers that have enough computing power for most of the problems encountered in economics because nowadays off-the-shelves desktops have FLOP rates greater than a supercomputer in late 80's.

The nature of parallel computing has changed since the first supercomputers in early '70s and new opportunities and challenges have appeared over the time including for economists. While 35 years ago computer scientists used massively parallel processors like the Goodyear MPP (Batcher, 1980), Connection Machine (Tucker & Robertson, 1988), Ultracomputer (Gottlieb et al., 1982), machines using Transputers (Baron, 1978) or dedicated parallel vector computers, like Cray computer series, now we are used to work on cluster of workstations with multicore processors and GPU cards that allows general programming. If Cray 1 had a peak performance of 80 Megaflops and CRAY X-MP had a peak performance of 200 MFLOPS a multicore Intel processor like I7-990X has more than 90 GFLOPS, Intel i7-3960X has a theoretical peak performance of 158 GFLOPs and Intel Xeon Phi reaches 1200 GFLOP for double precision operations (Intel, 2014).

One way of improving the processors speed and complexity was to increase the clock frequency and the number of transistors. The clock frequency has increased by almost four orders of magnitudes between the first 8086/8088 Intel processor used in a PC and actual Intel processors. The number of transistors also rose from 29.000 in Intel 8086 to approximately 730 million for an Intel Core i7-920 processor or 5000 million for a 62-Core Xeon Phi processor (INTEL, 2014). More transistors on a chip means that an operation can be executed in fewer cycles and a higher clock frequency means that more operations can be executed in a time unit. The increased clock frequency has an important side effect, namely the increased heat dissipated by processors. To overcome this problem, instead of increasing the clock

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frequency, the processor designers come with a new model – multicore processors. Major microprocessors' producers like INTEL and AMD both offer multicore processors that are now common for desktop computers. Multicore processors turn normal desktops into truly parallel computers. These facts emphasize a major shift in processors and computer design: further improvements in performance will add multiple cores on the same chip, and many processors that share the same memory. Having high performance multicore processors rise a new problem: how to write the software to fully exploit the capabilities of the processors in a manner that the complexity of the underlying software not to be exposed to the programmer.

As graphical cards has become more and more complicated to support the requirements of the entertainment industry, they were developed as many-core multiprocessors that can perform identical operations on different data (implementing the SIMD model of parallel computing). In 2003, Mark Harris (Harris, 2003) recognized the potential of using graphical processing units (GPU) for general purpose applications. GPUs are high performance many-core processors that can achieve very high FLOP rates. Since the first time GPU was used for general purpose computing, GPU programming models have evolved and there are several approaches to GPU programming now: CUDA (Compute Unified Device Architecture) from NVIDIA and APP (Stream) from AMD. A great number of applications were ported to use the GPU and they obtain speedups of few orders of magnitude comparing to optimized multicore CPU implementations. We can mention here molecular dynamics applications (Stone, 2007) or bioinformatics (Charalambous, 2005).

GPGPU (general-purpose computing on graphics processing units) is used nowadays to speed up parts of applications that require intensive numerical computations. Traditionally, these parts of applications are handled by the CPUs but GPUs have now MFLOPs rates much better than CPUs (NVIDIA, 2014). The reason why GPUs have floating point operations rates much better even than multicore CPUs is that the GPUs are specialized for highly parallel intensive computations and they are designed with much more transistors allocated to data processing rather than flow control or data caching as is the case for multicore processors (NVIDIA, 2014).

As network technology advanced, the ability to connect computers together has become easier. This leads to another development in parallel computing - the appearance of grids and clusters of computers. In such environments, processors access the local memory and send messages (data) between them making a number of connected desktops a truly shared memory computer.

2. Software frameworks for developing parallel applications

The software tools for developing numerical intensive high performance applications depend on the parallelism that the users want to exploit. We will present four approaches to obtain high performance:

- Optimizing the serial programs, without taking into account multiple cores/processors;
- Using multiple cores in a shared memory environment;
- Using grids/clusters or clusters of computers, i.e. programming a distributed memory computer;
- Using GPU for general purpose computations;

A fifth approach combines distributed processing in a grid/cluster of computers with local GPU processing.

The first approach tries to obtain the maximum performance without using more than one core or CPU. Carefully writing the code can bring huge benefits yielding generous

returns. Code optimizations should consider using the cache memory as much as it can or avoid unnecessary branches in programs. (Oancea, 2011b) shows few techniques that can greatly improve the performance of numerical intensive programs:

Loop Unrolling: replace the body of a loop with several copies, such that the body of the new loop executes the exactly the same instructions as the initial loop. This will reduce the proportion of execution time spent on evaluating the control instruction.

Loop Unfolding: remove a number of the first iterations of a loop and place them before the main body. This will allow the earlier iterations of the loop to execute without requiring the processor to follow jump instructions back to the beginning of the loop, improving the ability of the code to be pipelined.

Loop Invariant Code Motion: move out of the loop the code within the loop that does not change on each iteration of the loop.

Other Optimizations: inline expansion of subroutines, strength reduction, factoring out of invariants.

The hot spots of a program could be identified using performance analyzer tools (profilers) and the effort of optimizing the code should be focused on these parts of the program. This could greatly improve the performance of a numerically intensive program (Oancea, 2011b).

The shared memory environment supposes that many processors can access the same memory on an equal basis. Nowadays every PC is a shared memory parallel computer since the CPU has multiple cores. One of the most used software framework to develop parallel programs for such architecture is the **OpenMP** library available for C/C++ or Fortran programming languages (www.openmp.org).

The OpenMP facilities can be accessed in three ways: by compiler directives (that appears as comments for compilers that do not support OpenMP), by library routines or by environment variables (Creel, 2008). OpenMP uses a "fork-join" model where a master thread starts and executes serially until reaches a directive that branches execution into many parallel threads (fork) that eventually are collapsed back (joined) into the master thread (Kiessling, 2009).

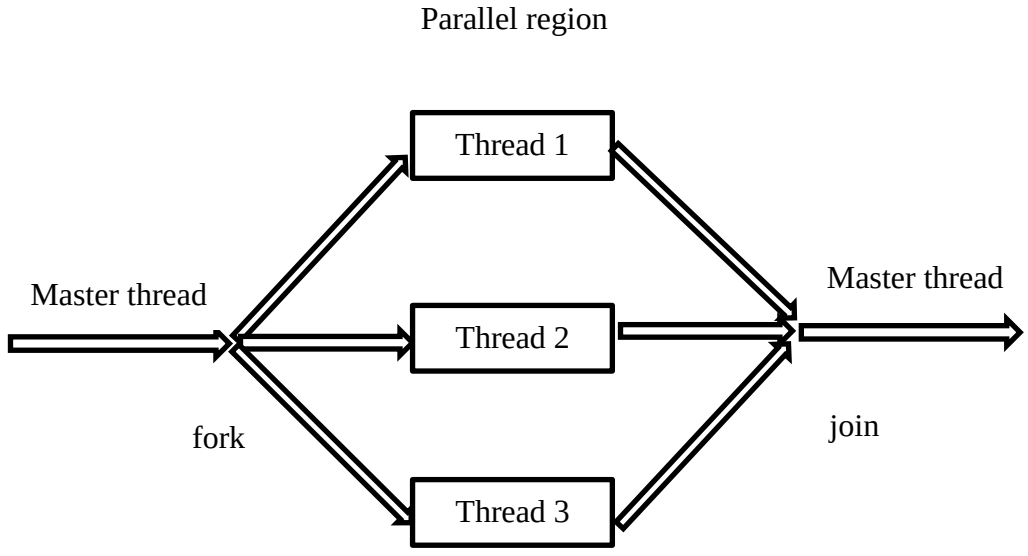

Figure 1. The execution path of OpenMP programs

A basic C program that uses OpenMP looks like this:

```
#include <stdio.h>
#include <omp.h>
int main(void) {
  #pragma omp parallel
    printf("Hello world!\n");

  return 0;
}
```

Figure 2. A basic C code that uses OpenMP

#pragma omp parallel specifies that the following code should be executed in parallel. On a 4-core processor the program output could look like:

```
Hello world!
Hello world!
Hello world!
Hello world!
```

Figure 3. The output of the C code

The general structure of a simple OpenMP program looks like this:

```
#include <omp.h>
main () {
        int nthreads, thread_id;
        printf("Here the code is executed serially");

      /* Fork a number of threads, each thread having a private thread_id variable */

        #pragma omp parallel private(thread_id){
        /* Get and print the thread ID. This portion is executed in parallel by each thread */
                thread_id = omp_get_thread_num();
                printf("Hello from thread = %d\n", thread_id);
                /* Only master thread enter here */
                if (thread_id == 0) {
                        nthreads = omp_get_num_threads();
                        printf("Number of threads = %d\n", nthreads);
                }
        }  /*All threads join the master thread */
        printf("Here the code is executed serially");
}
```

Figure 3. The general structure of an OpenMP code

The program starts in a serial manner and declares a variable thread_id.
#pragma omp parallel private(thread_id)forks a number of threads, each having a private thread_id variable. Inside the parallel portion on code, each thread receives its id by calling omp_get_thread_num()and prints it on the standard output. The master thread (having id=0) calls omp_get_num_threads()which returns the number of threads. After printing the number of threads, all threads are joined and the execution continues serially to the end of the

program. In this code snippet we exemplified how to use private variables that are available within each thread but OpenMP allows declaring shared variables too, that are available for all threads. When shared variables are used the same memory location is accessed by all threads. This poses some problems when many threads try to modify the same shared variable and special care must be taken by programmers.

Below is a list of most used OpenMP C functions (OpenMP ARB, 2011):

int omp_get_num_threads(void);
- Returns the number of threads in the parallel region when it is called;

void omp_set_num_threads(int num_threads);
- Sets the number of threds for the parallel region that will follow;

int omp_get_max_threads(void);
- Returns the maximum number of threads;

int omp_get_thread_num(void);
- Returns the current thread id;

int omp_get_num_procs(void);
- Returns the number of available processors;

int omp_in_parallel(void);
- Returns true if the call to the routine is enclosed by an active parallel region, false otherwise;

Programming distributed memory computer takes another approach – the message passing paradigm. In this model a processor can access its own local memory but when it want to communicate with other processors it send a message. The most widely used library for message passing programming is MPI. MPI provides portability, flexibility and efficiency. In fact MPI is a standard that has many implementations: MPICH (Gropp, 1996), OpenMPI (Open MPI: Open Source High Performance Computing, 2014), LAM/MPI (LAM/MPI Parallel Computing, 2014). In is available as a library for C or Fortran but many software packages like R, Matlab, Octave or Ox have extensions that allows use of MPI.

A number of processes that communicates between them are called a communicator and each process is identified by a “rank” (or ID).

The general structure of an MPI program is depicted in figure 4.

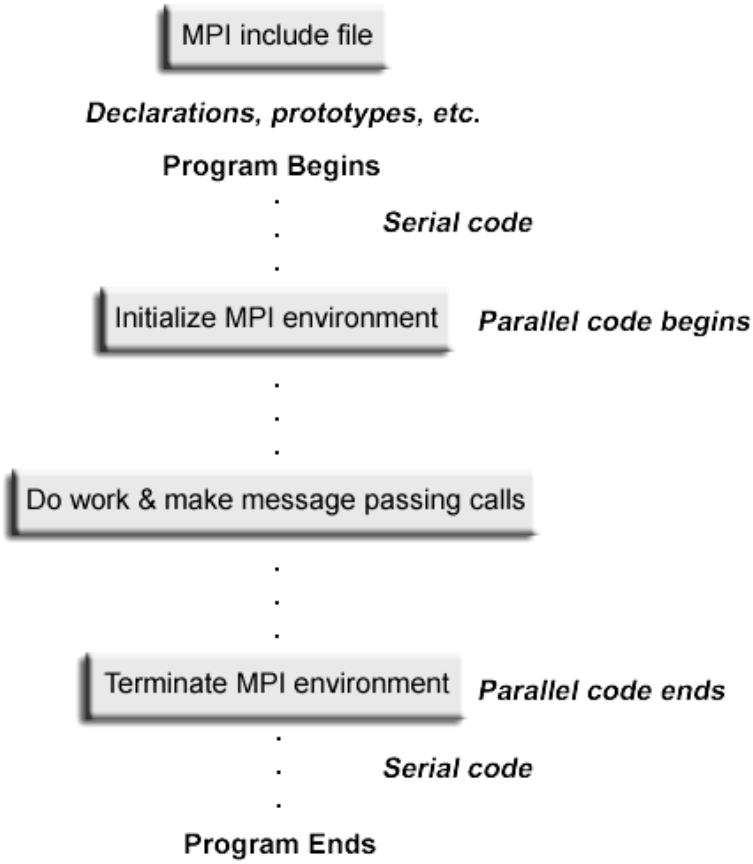

Figure 4. The structure of a MPI program

Image source: https://computing.llnl.gov/tutorials/mpi/

The program begins with a serial code, and then the MPI environment is initialized. After initialization follows the parallel code and in the end the MPI environment is terminated and some serial code could follow. Below are some of the most used MPI functions:

MPI_Init (&argc,&argv)
- Initializes the MPI environment.

MPI_Comm_size (comm,&size)
- This function determines how many processes are in a communicator.

MPI_Comm_rank (comm,&rank)
- Gives the rank of the process that called the function.

MPI_Send (&buf,count,datatype,dest,tag,comm)
- Sends a message to a given rank (process).

MPI_Recv (&buf,count,datatype,source,tag,comm,&status)
- Receives a message from a given rank (process).

MPI_Bcast (&buffer,count,datatype,root,comm)
- Sends a message from the root process (the one with rank=0) to all the other ranks (processes) in the communicator.

MPI_Finalize ()

- Terminates the MPI environment.

A simple MPI program that follows a master-slave paradigm is shown in figure 5.

```
#include "mpi.h"
#include <stdio.h>
int main(int argc, char *argv[]) {
        int numtasks, rank, r;
        r = MPI_Init(&argc,&argv);
        if (r != MPI_SUCCESS) {
                printf ("Error in MPI_Init()!\n");
                MPI_Abort(MPI_COMM_WORLD, r);
        }
        MPI_Comm_size(MPI_COMM_WORLD,&numtasks);
        MPI_Comm_rank(MPI_COMM_WORLD,&rank);
        printf ("Number of tasks= %d rank= %d\n", numtasks,rank);
        if( rank == 0){
                // master code here
        } else {
                // slave code here
        }
MPI_Finalize();
// serial code
}
```

Figure 5. An MPI code snippet

The program starts by initialization of the MPI environment by calling MPI_Init, checks if the initialization succeeded, determines the number of MPI processes started, retrieves the process rank, and writes these information to the standard output, then executes some code in the master process (the one with rank=0) and other code in the slave process(es). Finally, the MPI environment is terminated and some serial code could follow.

Building a cluster of computers for MPI parallel computing is could not be easy to achieve. For high performance computing we usually need a specialized network topology like Infiniband or Myrinet but for most of the economics problems an Ethernet network should be enough. There are easy to install packages the builds up a cluster in few minutes. One of them is described in (Creel, 2008) and it consists in a bootable CD (called Knopix) that allows building a cluster of computers running Linux operating system. It only uses the RAM memory of the computers in the cluster leaving the hard disks unmodified, such that, when the computers are restarted they are in the initial state with the operating system that had been install on them. This is a limitation of the Knopix approach because saving the work done between two sessions requires some special attention.

The fourth approach mention previously is the use GPU for speeding up computations. GPGPU (general-purpose computing on graphics processing units) is used widely nowadays to speed up numerical intensive applications. Traditionally, these parts of applications are handled by the CPUs but now GPUs have FLOP rates much better than CPUs (NVIDIA, 2014) because GPUs are specialized for highly parallel intensive computations and they are designed with much more transistors allocated to data processing rather than flow control or data caching.

Figures 6 and 7 (NVIDIA, 2014) shows the advances of the current GPUs that become highly parallel, many-core processors with an enormous computational power and very high memory bandwidth. Figure 6 shows the FLOP rates of NVIDIA GPUs in comparison with Intel multicore processors while figure 7 shows the memory bandwidth of the NVIDIA GPUs.

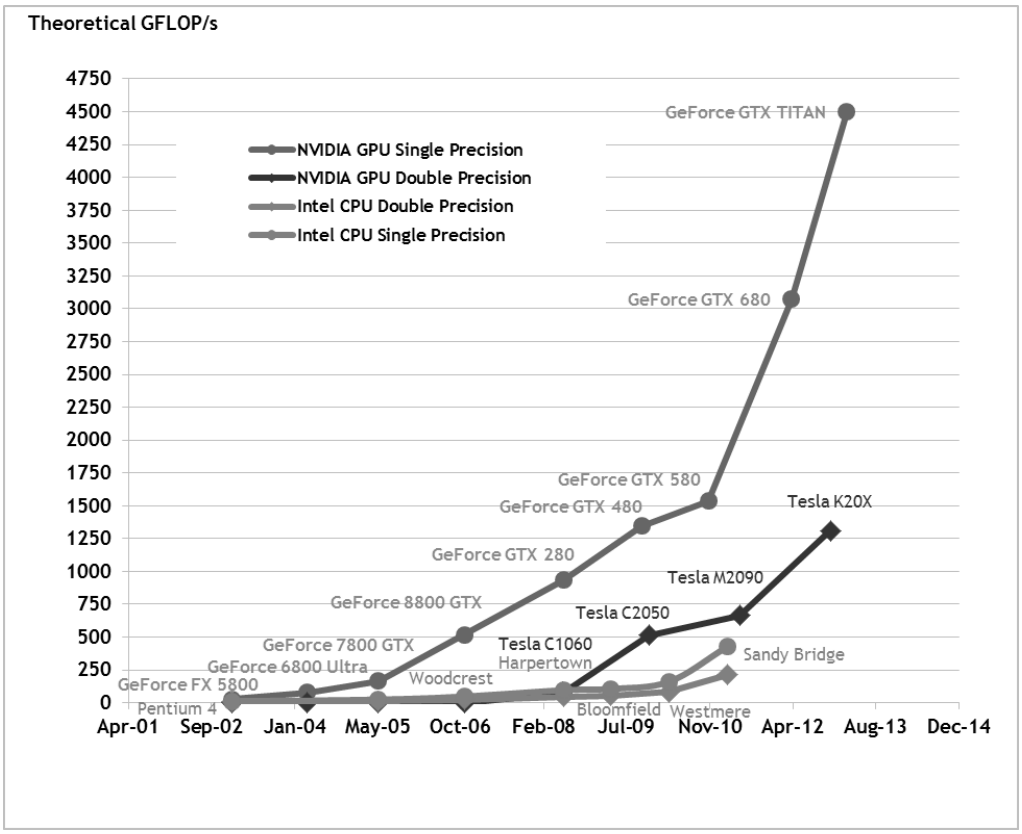

Figure 6. Theoretical FLOP rates of NVIDIA GPU and INTEL CPU

Source: http://docs.nvidia.com/cuda/cuda-c-programming-guide/

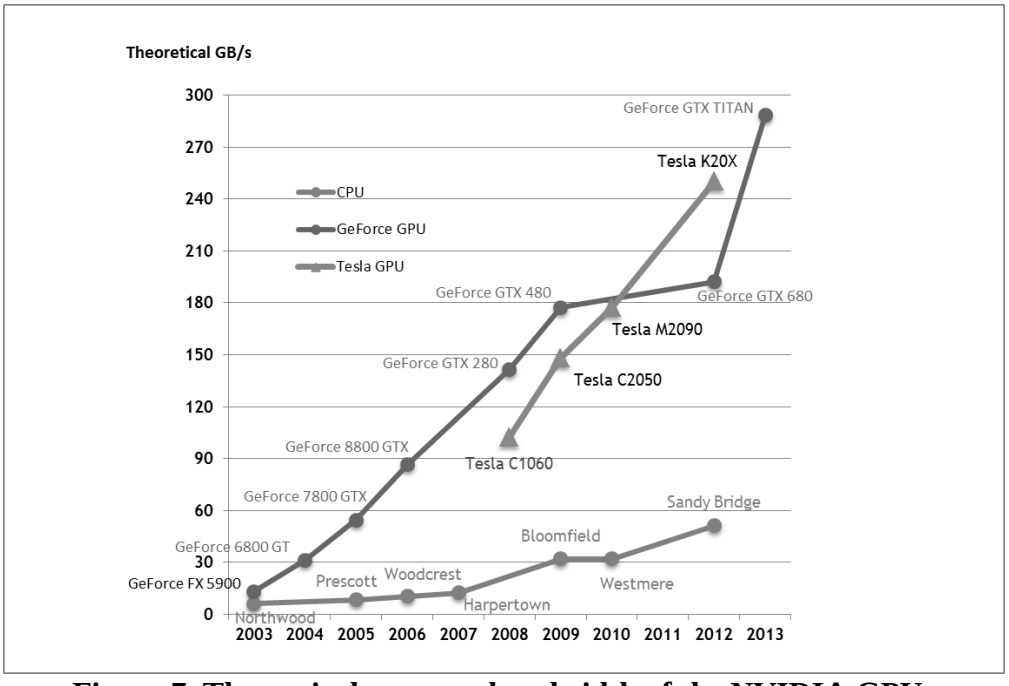

Figure 7. Theoretical memory bandwidth of the NVIDIA GPUs

Source: http://docs.nvidia.com/cuda/cuda-c-programming-guide/

GPUs obtain high FLOP rates because they are specialized for highly parallel computations and they have more transistors dedicated to data processing rather than flow

control or data caching as in the case of a CPU. Figure 8 (NVIDIA, 2014) shows this design paradigm for GPU compared with CPU.

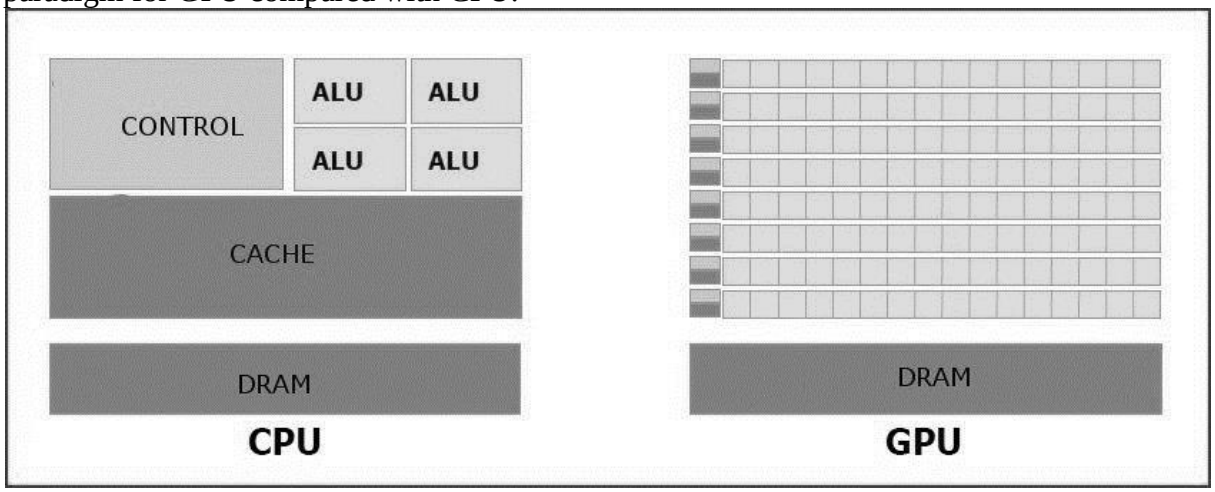

Figure 8. Design differences between GPU and CPU

Source: http://docs.nvidia.com/cuda/cuda-c-programming-guide/

GPUs are designed to solve problems that can be formulated as data-parallel computations – the same instructions are executed in parallel on many data elements with a high ratio between arithmetic operations and memory accesses similar with the SIMD approach of the parallel computers taxonomy.

CUDA (Compute Unified Device Architecture) was introduced in 2006 by NVIDIA and is a general purpose parallel programming architecture that uses the parallel compute engine in NVIDIA GPUs to solve numerical intensive problems in a more efficient way than a CPU does. It supports programming languages like FORTRAN, C/C++, Java, Python, etc.

The CUDA parallel programming framework works with three important abstractions: a hierarchy of thread groups, shared memories, and barrier synchronization exposed to the programmer as language extensions. The CUDA parallel programming paradigm requires programmers to partition the problem into coarse tasks that can be run in parallel by blocks of threads and to divide each task into finer groups of instructions that can be executed cooperatively in parallel by the threads within on block. Figure 9 (NVIDIA, 2014) shows how a program is partitioned into blocks of threads each block being executed independently from each other.

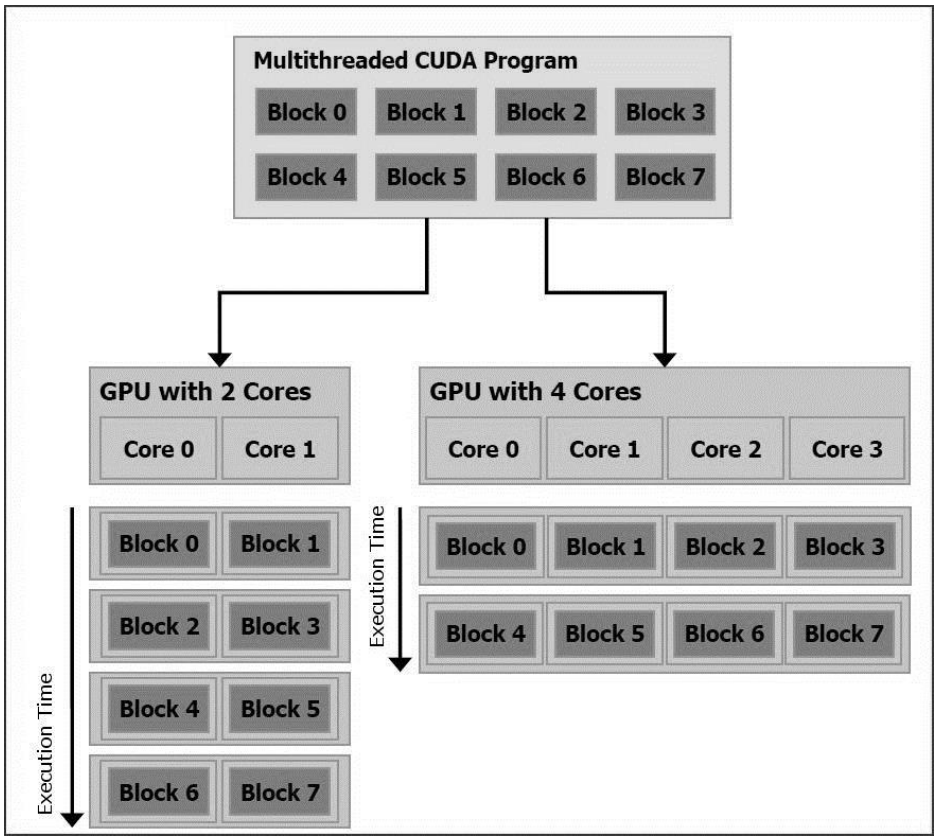

Figure 9. A multithreaded program splitted into blocks that are allocated on 2 or 4 cores of the GPU

Source: http://docs.nvidia.com/cuda/cuda-c-programming-guide/

The C language extension of the CUDA programming framework allows the programmer to define special C functions, called kernels, that are executed in parallel by different CUDA threads. Each thread is identified by a unique thread ID. The IDs of the threads are accessible within the kernel through the built-in threadIdx variable. ThreadIdx is a 3-component vector, so that each thread can be identified using a one-dimensional, two-dimensional, or three-dimensional index.

CUDA threads are executed on a physically separate *device* that operates like a coprocessor to the *host* processor running the C program. The device is located on the GPU while the host is the CPU. The CUDA programming model presumes that the host and the device maintain their own separate memory spaces respectively *host memory* and *device memory*. Using CUDA programming model a matrix multiplication code $C = A \times B$ can be structured like in the following example (Oancea, 2012):

```
/* allocate memory for the matrices A, B, C in the host memory, A,B,C, being N x N matrices*/
host_matrix_A = (float*)malloc(N * N * sizeof(host_matrix_A[0]));
host_matrix_B = (float*)malloc(N * N * sizeof(host_matrix_B[0]));
host_matrix_C = (float*)malloc(N * N * sizeof(host_matrix_C[0]));
/* generate random test data */
randomTestData(host_matrix_A, host_matrix_B, host_matrix_C)

/* allocate memory for the matrices in the device memory space*/
cudaAlloc(N*N, sizeof(device_matrix_A[0]), (void**)&device_matrix_A);
cudaAlloc(N*N, sizeof(device_matrix_B[0]), (void**)&device_matrix_B);
cudaAlloc(N*N, sizeof(device_matrix_C[0]), (void**)&device_matrix_C);

/* copy the values from the host matrices to the device matrices */
```

```
cudaSetVector(N*N, sizeof(host_matrix_A[0]), host_matrix_A, 1, device_matrix_A, 1);
cudaSetVector(N*N, sizeof(host_matrix_B[0]), host_matrix_B, 1, device_matrix_B, 1);
cudaSetVector(N*N, sizeof(host_matrix_C[0]), host_matrix_C, 1, device_matrix_C, 1);

/* call the matrix multiplication routine*/
cudaMatMul(device_matrix_A, N, device_matrix_B, N, beta, device_matrix_C, N);

/* Copy the result from the device memory back to the host memory */
cudaGetVector(N*N, sizeof(host_matrix_C[0]), device_matrix_C, 1, host_matrix_C, 1)
```

Figure 10. CUDA C code for matrix multiplication.

Besides CUDA there are other frameworks that allow GPU programming. AMD Accelerated Parallel Processing (former ATI Stream technology) is a set that enable AMD graphics processors, working in together with the central processor (CPU) to accelerate applications (AMD, 2013). AMD Accelerated Parallel Processing implements the OpenCL (Open Computing Language) standard (Khronos OpenCL Working Group, 2009) which is the first open standard for general-purpose parallel programming of heterogeneous systems. It tries to provide a unique programming environment for software developers to write portable code for servers, laptops, desktop computer systems and handheld devices using a both multi-core CPUs and GPUs. OpenCL programs are divided in two parts: one that executes on the device (the GPU) and other that executes on the host (the CPU). OpenCL uses a SIMT (SINGLE INSTRUCTION MULTIPLE THREAD) model of execution that reflects how instructions are executed in the host. This means that the same code is executed in parallel by a different thread, and each thread executes the code with different data.

The fifth approach combines GPU computing with a distributed cluster of computers. The simplified structure of the computing architecture is presented in Figure 7.

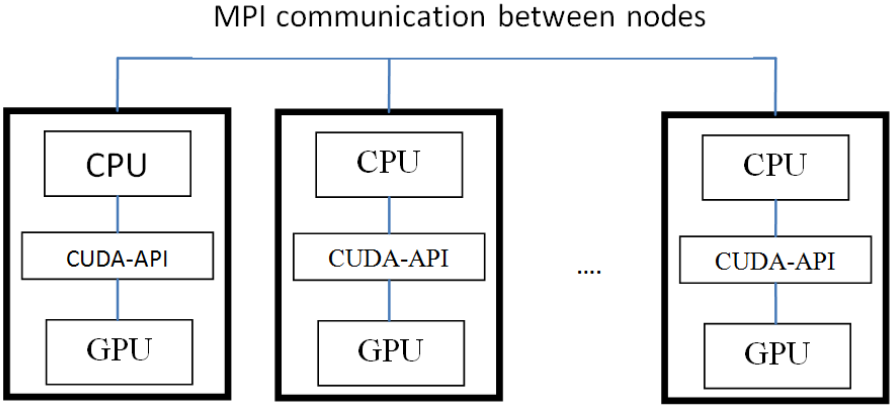

Figure 11. MPI – CUDA hybrid architecture

MPI is used to facilitate the communication between nodes and exploit coarse grained parallelism of the applications and CUDA accelerates local computations on each node exploiting the fine grained parallelism.

3. Parallel computing in economics

Parallel computing has been employed in solving economics problems in the last two decades.

One of the fields that require high computing power is macroeconometric modelling with forward-looking variables because it involves very large systems of equations, macroeconometric models with rational expectations described in (Fischer, 1992) being one

of them. They contain variables that forecast the economic system state for the future periods t + 1, t + 2, ... , t + T, where T is the forecast time horizon and could result in systems with tens or hundreds of thousands of equations. Such models are described in literature (Oancea, 2011a): MULTIMOD, QPM (Quarterly Projection Model), FRB/US. Solving these models involves solving systems of equations with or hundreds of thousands of equation that can be done using parallel processing (Oancea, 2011a).

(Fragniere, 1998) presents a procedure to solve big stochastic financial models with 1,111,112 constraints and 2,555,556 variables. Using a cluster of PCs with MPI this problem was solved in less than 3 hours.

(Gondzio, 2000) presents asset liability management problem solved with a stochastic model that resulted in 4,826,809 scenarios, the corresponding stochastic linear program having 12,469,250 constrains and 24,938,502 variables. At that time, this was the largest linear optimization problem in economics. The problem was solved on a PARSYTEC machine with 13 using 13 processors in less than 5 hours.

(Aldrich, 2011a, 2011b, 2014) shows how GPU computing can be used to solve economic problems. He presents a canonical real business cycle (RBC) model solved with value function iteration using a single threaded C++ program, an OpenMP program executed on 4 cores and CUDA on a Tesla C2075 device. He obtains a speed-up of 2500 between C++ serial implementation and CUDA version. In (Aldrich, 2011a) the author investigates an asset exchange within a general equilibrium model with heterogeneous beliefs about the evolution of aggregate uncertainty, reporting the computational benefits of GPU parallelism.

(Creel, 2005, 2007, 2012a, 2012b) describes a GPU algorithm for an estimator based on an indirect likelihood inference method. The estimation application arises in various domains such as econometrics and finance, when the model is fully specified, but too complex for estimation by maximum likelihood. The author compare the GPU algorithm run on a four NVIDIA M2090 GPU devices with a serial implementation executed on two 2.67GHz Intel Xeon X5650 processor showing a speed up factor of 242.

(Dziubinski, 2014) describes the same RBC model as (Aldrich, 2011a) but solved with C++ AMP technology introduced by Microsoft that allows exploiting the parallelism of the GPU in a manner transparent to the programmer.

4. Conclusions

This paper shows how the hardware and software environments have changed over the last decades and how parallel computing could be used even one can have only commodity hardware at his/her disposal. Multicore processors, GPU computing, MPI clusters have become available to economists for solving large problems that require high performance computing. In the future, parallel processing tools will become more and more accessible to programmers, allowing writing programs for multicore processors or GPU without knowing much details about the underlying hardware.

References

- AMD, (2013), AMD Accelerated Parallel Processing. OpenCL Programming Guide.
- Aldrich, E. M. (2011a), “Trading Volume in General Equilibrium with Complete Markets," Working Paper.
- Aldrich, E. M., Fernandez-Villaverde, J., Gallant, A. R., and Rubio-Ramirez, J. F. (2011b), “Tapping the supercomputer under your desk: Solving dynamic equilibrium models with graphics processors," Journal of Economic Dynamics and Control, 35, pp. 386-393.
- Aldrich, Eric M. (2104), "GPU Computing in Economics", Handbook of Computational Economics, Vol. 3, eds. Judd, Kenneth L. and Schmedders, Karl, Elsevier, chap. 10.
- Barron, I. M. (1978), The Microprocessor and its Application: an Advanced Course, in D. Aspinall. ed. "The Transputer", Cambridge University Press.

- Batcher, K. E. (1980), Design of a Massively Parallel Processor, IEEE Transactions on Computers, Vol. C29, September, pp. 836–840.
- Creel, M., and Zubair, M., (2012a), High Performance Implementation of an Econometrics and Financial Application on GPUs, Proceeding SCC '12 Proceedings of the 2012 SC Companion: High Performance Computing, Networking Storage and Analysis, pp. 1147-1153.
- Creel, M., Mandal, S., and Zubair, M., (2012b), Econometrics on GPUs, working paper No 669, Barcelona Graduate School of Economics, 2012.
- Creel, M., Goffe, W. (2008), Multi-core CPUs, Clusters, and Grid Computing: A Tutorial, Computational Economics, 32, (4), pp. 353-382.
- Creel, M., (2005), User-Friendly Parallel Computations with Econometric Examples, Computational Economics, 26, (2), pp. 107-128.
- Creel, M., (2007), I ran four million probits last night. HPC Clustering with ParallelKnoppix, Journal of Applied Econometrics, 22(1), pp. 215-223.
- Charalambous, M., Trancoso, P., and Stamatakis, A. (2005), "Initial Experiences Porting a Bioinformatics Application to a Graphics Processor," in Vol. 3746 of Lecture Notes in Computer Science, eds. Bozanis, P. and Houstis, E. N., New York, USA: Springer-Verlag, pp. 415-425.
- Dziubinski, M. P., and Grassi, S. (2014),"Heterogeneous Computing in Economics: A Simplied Approach," Computational Economics, 43, pp. 485:495.
- Fisher, P., (1992): *Rational Expectations in Macroeconomic Models*. Kluwer Academic Publishers, Dordrecht.
- Fragniere, E., Gondzio, J., Vial, J.P., (1998), "Building and Solving Large-Scale Stochastic Programs on an Affordable Distributed Computing System", Logiclab Technical Report 11, June, 1998.
- Kiessling, A., (2009), An Introduction to Parallel Programming with OpenMP, The University of Ediburgh.
- Gondzio, J., Kouwenberg, R., (2000), "High Performance Computing for Asset Liability Management",Technical Report MS-99-004,University of Edinburgh, March, 2000.
- Gropp, W., Lusk, E., Doss, N., and Skjellum, A., (1996), "A High-Performance, Portable Implementation of the MPI Message Passing Interface Standard", Parallel Computing, 22, pp. 789–828.
- Gottlieb, A., Grishman, R., Kruskal, C. P., McAuliffe, K. P., Rudolph, L., Snir, M., (1982), The NYU Ultracomputer - designing a MIMD, shared-memory parallel machine, ISCA '82 Proceedings of the 9th annual symposium on Computer Architecture, pp. 27 – 42.
- Harris, M. J., Baxter III, W. V., Scheuermann, T., and Lastra, A., (2003), Simulation of Cloud Dynamics on Graphics Hardware. In Proceedings of the IGGRAPH/Eurographics Workshop on Graphics Hardware, pp. 92-101.
- Khronos OpenCL Working Group (2009), The OpenCL Specification - Version 1.0. The Khronos Group, Tech. Rep.
- Intel, (2014), Intel® Xeon Phi™ Product Family Performance Rev 1.412/30/13.
- LAM/MPI Parallel Computing, <http://www.lam-mpi.org> 2014.
- NVIDIA, (2014), NVIDIA CUDA C Programming Guide, version 5.5
- OpenMP ARB (2011), OpenMP API 3.1 C/C++ Directives.
- Open MPI: Open Source High Performance Computing, <http://www.open-mpi.org/>, 2014.
- Oancea, B, Andrei, T., Rosca, I. Gh., Iacob, A. I. (2011a), "Parallel algorithms for large scale econometric models", Procedia Computer Science, Vol. 3, pp. 479-483.
- Oancea, B., Rosca, I. G., Andrei, T., Iacob, A. I., (2011b), Evaluating Java performance for linear algebra numerical computations , Procedia Computer Science, vol. 3, pp. 474-478.
- Oancea, B., Andrei, T., Dragoescu, R. M., (2012), GPGPU COMPUTING, Proceedings of the "Challenges for the Knowledge Society", pp. 2026-2035.
- Tucker, L. W., Robertson, G., (1988), Architecture and Applications of the Connection Machine, Computer, vol. 21, no. 8, pp. 26–38.

CLOUD COMPUTING AND BIG DATA AS CONVERGENT TECHNOLOGIES FOR RETAIL PRICING STRATEGIES OF SMEs

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Abstract

Most retailers know that technology has played an increasingly important role in helping retailers set prices. Online business decision systems are at the core point of an SMEs management and reporting activities. But, until recently, these efforts have been rooted in advances in computing technology, such as cloud computing and big data mining, rather than in newfound applications of scientific principles. In addition, in previous approaches big data mining solutions were implemented locally on private clouds and no SME could aggregate and analyze the information that consumers are exchanging with each other. Real science is a powerful, pervasive force in retail today, particularly so for addressing the complex challenge of retail pricing. Cloud Computing comes in to provide access to entirely new business capabilities through sharing resources and services and managing and assigning resources effectively. Done right, the application of scientific principles to the creation of a true price optimization strategy can lead to significant sales, margin, and profit lift for retailers. In this paper we describe a method to provide the mobile retail consumers with reviews, brand ratings and detailed product information at the point of sale. Furthermore, we present how we use Exalead CloudView platform to search for weak signals in big data by analyzing multimedia data (text, voice, picture, video) and mining online social networks. The analysis makes not only customer profiling possible, but also brand promotion in the form of coupons, discounts or upselling to generate more sales, thus providing the opportunity for retailer SMEs to connect directly to its customers in real time. The paper explains why retailers can no longer thrive without a science-based pricing system, defines and illustrates the right science-based approach, and calls out the key features and functionalities of leading science-based price optimization systems. In particular, given a cloud application, we propose to leverage trivial and non-trivial connections between different sensor signals and data from online social networks, in order to find patterns that are likely to provide innovative solutions to existing retail problems. The aggregation of such weak signals will provide evidence of connections between environment and consumer related behavior faster and better than trivial mining of sensor data. As a consequence, the software has a significant potential for matching environmental applications and business challenges that are related in non-obvious ways.

Keywords: *Cloud Computing, Big Data, Retail Pricing Strategies, Small and Medium Enterprise;*

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1. Introduction

The price setting process represents one of the key processes in a company and the aim of this process is to provide the mechanism to translate the longer term strategy of the company in terms of price positioning, market share goals, and product or service differentiation into the prices which are set or changed on a day-to-day basis within the competitive environment of the firm[1]. The key elements for short-term pricing decision making within the longer term strategic constraints of price positioning, volume goals, and product and service differentiation include costs, sales volume and its variation with the price, the impact of competitor price, and interaction between prices of certain products within the company's product portfolio.

Customer price knowledge has been the object of considerable research in the past decades[2]. Monroe and Lee[3] cite over sixteen previous studies, most of which focus on measuring customers' short-term price knowledge of consumer packaged goods. In a typical study, customers are interviewed either at the point-of-purchase or in their home and asked to recall the price of a product, or alternatively, to recall the price they last paid for an item. In perhaps the most frequently cited study, Dickson and Sawyer[4] asked supermarket shoppers to recall the price of an item shortly after they placed it into their shopping cart. Surprisingly, fewer than 50% of consumers accurately recall the price. Thus, despite the immediate recency of the purchase decision there is no improvement in the accuracy of the responses.

In another paper, Anderson, Cho, Harlam and Simester[5] combine survey data and a field experiment to investigate this prediction. In their study, they survey 14 customers and collect price recall measures for approximately two hundred products. They then conduct a field experiment in which they randomly assign the same items to one of three conditions. In the control condition, items are offered at the regular retail price. In the price cue condition, a shelf tag with the words "LOW prices" is used on an item. In the discount condition, the price is offered at a 12% discount from the regular price.

The authors show that both price cues and price discounts increase demand. But, consistent with theoretical predictions, the authors find that price cues are more effective on products for which customers have poor price knowledge. In contrast, price discounts are more effective when customers have better price knowledge. Together these results highlight the importance that price knowledge serves in determining the effectiveness of price changes and price cues.

2. Cloud Computing and Big Data Converging Technologies

The customers usually express their personal opinions regarding the products and services they purchase, this activity becoming a habit for many people nowadays. The online communities' continuous development, such as websites, blogs and social networks facilitate the exchange of information for the benefit of a growing number of users, increasing the social ties.

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[1] Cassaigne, N., & Singh, M. G. (2001). "Intelligent decision support for the pricing of products and services in competitive consumer markets." IEEE Transactions on Systems, Man and Cybernetics, Part C (Applications and Reviews), 31(1), 96–106. doi:10.1109/5326.923272.

[2] A. Apostu, "Price conditions and price calculation in nowadays retail systems. Price knowledge extracted from Big Data," in Emerging Markets Queries in Finance and Business, 2014, unpublished.

[3] K. B. Monroe and A. Y. Lee, "Remembering versus knowing: issues in buyers' processing of price information," Journal of the Academy of Marketing Science, vol. 27, no. 2, pp. 207-225, 1999.

[4] P. R. Dickson and A. G. Sawyer, "The price knowledge and search of supermarket shoppers," The Journal of Marketing, pp. 42-53, 1990.

[5] E. T. Anderson, E. K. Cho, B. A. Harlam and D. Simester, "Using Price Cues," MIT, Cambridge MA, 2007.

On a growing market, the companies are forced to follow closely the needs and requests of consumers, but also their suggestions, in order to develop a more clear vision regarding the quality of products and services. The customer satisfaction has become a significant factor which affects the size and market segment profitability. In response to this problem, companies are forced to regularly survey the satisfaction levels of customers, wanting to focus on feedback from them and effecting improvements in work practices and processes used in the company[6].

Influencing consumers depends not so much the brand (although in the case of this tradition is a very important), but depends heavily on user reviews, opinions left by them on various specialized websites. Life cycle of a product on the market is influenced by the information about this product coming from consumers. This information can be a process because in a first phase, after the product is launched user reviews will appear, and these are always changing. Following these opinions, the most trusted and secure analyses are selected.

The amount of information available online is very large and grows exponentially with the development of social networks and virtual communities, in this way much of consumer feedback and ratings provided can be found online. Investing in IT solutions for the analysis of these large data volumes can be an optimal method to develop business environment[7].

2.1. Cloud Computing

The term cloud computing has been established relatively recent, in order to capture a particular use of IT resources, both software and hardware. There have been proposed a couple of definitions of this term, but the most relevant is that cloud computing refers to the use of computing resources as a service, over a network.

The cloud computing characteristics correspond to technologies or concepts which have been discussed individually since quite some time: virtualization, elasticity, and utility computing[8]. Virtualization means that an additional component within the software stack isolates the resource user from its concrete particularity. Elasticity means that a resource is always available to the user and that the resource grows or decreases when more or less of the resource is needed by the user.

There exist three service models for cloud computing, as infrastructure, platform and software and also four development models, as private, shared, public and hybrid, that together define the ways to deliver cloud services. The definition is intended to serve as a means for comparing cloud services and development strategies and to provide a basis for discussions about what is cloud computing and how it is more convenient to be used.

2.2. Big Data

Big data refers to the process of collecting and processing of very large data sets and to the associated systems and algorithms used to analyze these massive data sets. Architectures for big data usually range across multiple machines and clusters, and they commonly consist of multiple special purpose sub-systems. Coupled with the knowledge discovery process, big data movement offers many unique opportunities for organizations to benefit (with respect to new insights, business optimizations, etc.). Due to the difficulty of

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[6] . Suciu, V. A. Poenaru, C. G. Cernat, G. Todoran and T. L. Militaru, "ERP and e-business application deployment in open source distributed cloud systems," in The 11th International Conference on Informatics in Economy (IE 2012), Bucharest, 2012.

[7] R. Eckstein, Interactive search processes in complex work situations: a retrieval framework (Vol. 10), University of Bamberg Press, 2011.

[8] G. Suciu, O. Fratu, S. Halunga, C. G. Cernat, V. A. Poenaru and V. Suciu, "Cloud Consulting: ERP and Communication Application Integration in Open Source Cloud Systems," in 19th Telecommunications Forum - TELFOR 2011, IEEE, Belgrade, 2011.

analyzing such large datasets, big data presents unique systems engineering and architectural challenges.

Currently, on the market there are many solutions for the search and analysis of large volumes of information solutions[9] which are usually focused on semantic technologies for aggregating and collating both structured and unstructured data[10]. Besides the well-known Google, there have been developed and are under development solutions for Enterprise Business Applications[11] such as CRM (Customer Relationship Management), ERP (Enterprise Resource Planning) and BI (Business Intelligence) and web applications, such as applications B2B (Business to Business), B2C (Business to Customer), using data from various sources (databases, web content, user generated content, etc.)[12].

Ontopica, a software company that uses the advantages of semantic technologies and the ontology development, in order to organize volumes of unstructured data, has released Dito[13], a software that provides a platform for online participation and browser-based search. Knime[14] is a platform for performing statistical data analysis and data mining the data for trend analysis and prediction of potential outcomes. RapidMiner[15] combines machine learning, data mining and predictive analytics being used more in research, education, development of applications.

2.3. Resulting Architecture for Big Data and Cloud Convergence

Exalead CloudView[16] represents a search platform which offers wide access to information on the infrastructure level and it is used for SBA (Search Based Applications) for both online and enterprise level. The application combines several semantic technologies for the applications development, but also analysis technologies (qualitative and quantitative), used on the data presentation level, aiming to provide the right information to the user.

CloudView represents a tool that combines search technologies with Business Intelligence, and it is a platform for the Exalead search engine, which was designed to implement semantic processing and selective navigation for the data volumes from online environments, facilitating processes such as searching and analysis, and also enabling organizations to improve their knowledge and resources exploitation.

Basically, CloudView represents an instrument that allows the exploitation of huge data volumes, both structured and unstructured. There are developed several connectors for these data sources, making them available for their presentation in an intuitive search interface. There is also used a modular index that combines structures, terminologies and semantic technology platform formats, providing a continuous access and unceasingly use of resources, through server distribution techniques and data redundancy[17]. The manner in which Exalead CloudView processes and offers access to information is illustrated in Figure 1.

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[9] W. Li, Y. Zhong, X. Wang and Y. Cao, "Resource virtualization and service selection in cloud logistics," Journal of Network and Computer Applications, vol.36, no.6, pp. 1696–1704, 2013.

[10] T. Seymour, D. Frantsvog and S. Kumar, "History of search engines," International Journal of Management & Information Systems (IJMIS), vol. 15, no. 4, pp. 47-58, 2011.

[11] S. C. Yeh, M. Y. Su, H. H. Chen and C. Y. Lin, "An Efficient and Secure Approach for a Cloud Collaborative Editing," of Network and Computer Applications, vol. 36, no. 6, p. 1632–1641, 2013.

[12] M. Balazinska, B. Howe and D. Suciu, "Data markets in the cloud: An opportunity for the database community," in Proc. of the VLDB Endowment, 2011.

[13] Ontopica GmbH, "Dito," [Online]. Available: http://www.ontopica.de. [Accessed March 2014].

[14] R. Berthold, N. Cebron, F. Dill, T. R. Gabriel, T. Kötter and T. Meinl, "KNIME-the Konstanz information miner: version 2.0 and beyond," SIGKDD Explorations Newsletter, vol. 11, no. 1, pp. 26-31, 2009.

[15] F. Jungermann, "Information extraction with rapidminer," in Proceedings of the GSCL Symposium'Sprachtechnologie und eHumanities, 2009.

[16] 3DS - Dassault Systèmes, "Exalead - Information Intelligence," [Online]. Available: http://www.exalead.com. [Accessed March 2014].

[17] G. Grefenstette and L. Wilber, "Search-based Applications: At the Confluence of Search and Database Technologies," in Synthesis Lectures on Information Concepts, Retrieval, and Services 2.1, 2010, pp. 1-141.

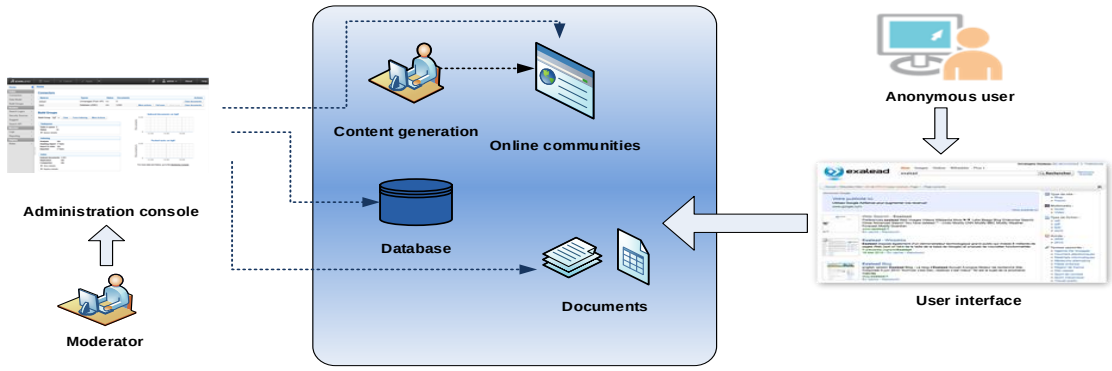

Figure 1. Processing and accessing big data via Exalead CloudView

CloudView accesses data from different sources using the so-called connectors. Each connector uses the data source protocol to connect its own information source and access the documents which will indexed. Through connectors, there can be indexed several data types by adding new documents, updating or deleting existing documents, extracting current list of indexed documents and managing data security.

CloudView provides multiple interfaces for data management and application configuration itself. These interfaces are represented by several APIs (Application Programming Interface), including a Push API for creating custom connectors, a Search API used for the development of other applications, Search and Management API for configuring and managing the indexing and search processes. Push API allows the indexing of any type of data, coming from any source, and supports basic operations required for the development of new connectors, both managed and unmanaged. A managed connector is part of the code that runs in CloudView, code that can be developed in Java. An unmanaged connector can be developed in any language, through CloudView's APIS, either Push APIs (in Java, C # and PHP) or through HTTP API.

Figure 2 provides a simplified view of the indexing process. The functionality can be described as follows: the connectors access the data sources and convert files into documents; these documents are sent to the Push Server and further are divided into groups, in the Analysis phase.

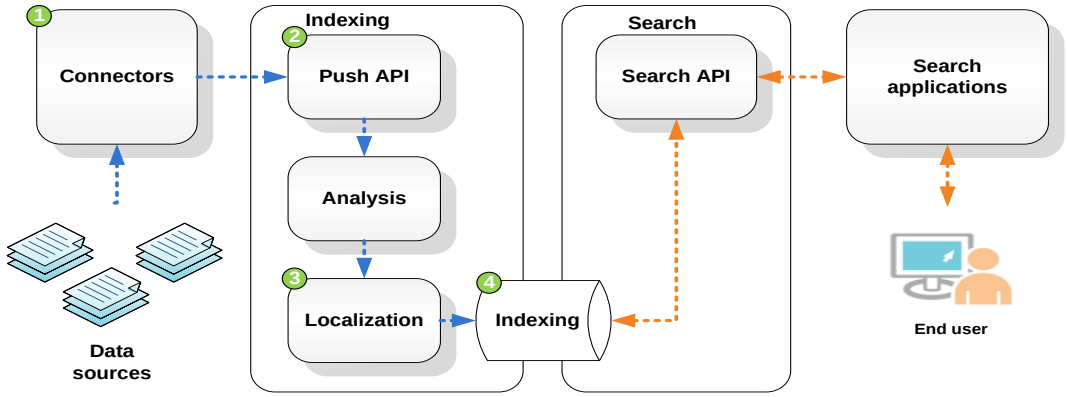

Figure 2. Simplified view of the indexing process

The analysis is performed sequentially, each document being processed, making retrieval of text, semantic processing, and other custom operations and location. The analysis also calculates the data to update the index. Once indexing is done and updated, the new documents are available for searching.

Connectors operate early in the CloudView indexing process, sending documents from different sources to a Push API server through the PAPI protocol. If the connector server is already existing, all new connectors will be automatically associated with it.

2.4. Configuration Methodology for CloudView

The CloudView configuration methodology is based on the connector's development, especially in the indexing process. This methodology is performed within the Administration Console, where the user can perform various configurations for the connectors, such as deleting all documents and restoring the connector's state, synchronizing indexed documents, or stopping the synchronization update for a specific type of connector (procedure that does not delete documents already processed). Standard connectors of CloudView include files, databases, HTTP, XML etc.

File type connectors are used for crawling local file systems or remote systems that are shared within the network. The search path configuration depends on the operating system on which CloudView runs In order to create a file type connector, it is necessary to ensure for the search system the access rights for the file system, i.e. file system rights to access the user account that is configured on CloudView. There also can be used regular expressions in order to specify a certain path (select *regexp*).

The JDBC database connector allows indexing of SQL database content, by using configurable queries for extracting data records. These records are then processed to compose the documents to be indexed. Documents are built by selecting the columns in the list returned by the synchronization queries. For indexing the database, a connector can be set to do a full synchronization, which indexes the entire database or set to one of the incremental modes for indexing only a part of the database. Incremental modes can be used when the table contains a timestamp representing the time of insertion or a unique serial number. When using incremental synchronizing, the connector takes the timestamp or the serial number from the column and assigns it to a variable in the query to retrieve new rows in the database.

HTTP connectors can load any URL address, provided that it is accessible from the server where CloudView is installed. The URL is taken, transmitted sequentially and then the links are extracted from that sequence. The main components of the CloudView system are the Crawler Server, Crawler Manager and Push Server. All other connectors, except those, that are hosted on the HTTP Server Connector, are installed on the Crawler Server. In the URL field, the site address is entered and some rules for indexing are set, for example reloading behaviour. Smart Refresh reloads URLs in the list and adds them to the queue, except for the recent uploads. URLs added by the reloading loop have a lower priority than newly discovered ones, so the reload does not slow the discovery of new pages.

2.5. The Data Model for the Price Optimization

The development of any search application in Exalead CloudView requires defining what data to include in the index schema, and then configuring one or more search logics to control how the documents are presented to users as search results. Index fields are used for searching and to display data in hit content in the results that are returned[18].

Categories store static facet values. These values display in the Refinements panel of the search results as well as in hit content. Static facets allow users to narrow their search results by focusing on a certain aspect of the results, such as a particular country or product line, price value within a range etc.[19]

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[18] Shen Bin; Liu Yuan; Wang Xiaoyi, "Research on data mining models for the internet of things," Image Analysis and Signal Processing (IASP), 2010 International Conference on , vol., no., pp.127,132, 9-11 April 2010.

[19] Haesun Park; Van Huffel, S.; Elden, L., "Fast algorithms for exponential data modeling," Acoustics, Speech, and Signal Processing, 1994. ICASSP-94., 1994 IEEE International Conference on , vol.iv, no., pp.IV/25,IV/28 vol.4, 19-22 Apr 1994.

The data model represents a starting point for configuring the index and the search processes. Through a data model[20], it is allowed the management of different types of data according their purpose and their nature.

There can be created a set of property types like alphanumeric, numeric, geographic. After scanning the data sources, the settings which have been defined for the properties generate new index fields and categories inside the index schema and also several meta elements or prefix handlers according to the data logic.

When a configuration is applied, the high-level view provided by the Data Model is expanded into the multiple index and search elements. A common challenge when creating properties is to know which metas belong to the corpus. There are several ways in which the available metas can be explored using the CloudView data model.

When creating a data model property, it can be chosen one of the following field types: either an index field or a category facet only, or both. The most common indexing method is to assign a dedicatedIndexfield attribute in XML configuration to the property, represented in Figure 3. The property can then be made searchable (user queries can be applied to this field) and retrievable (the field can display in the search results).

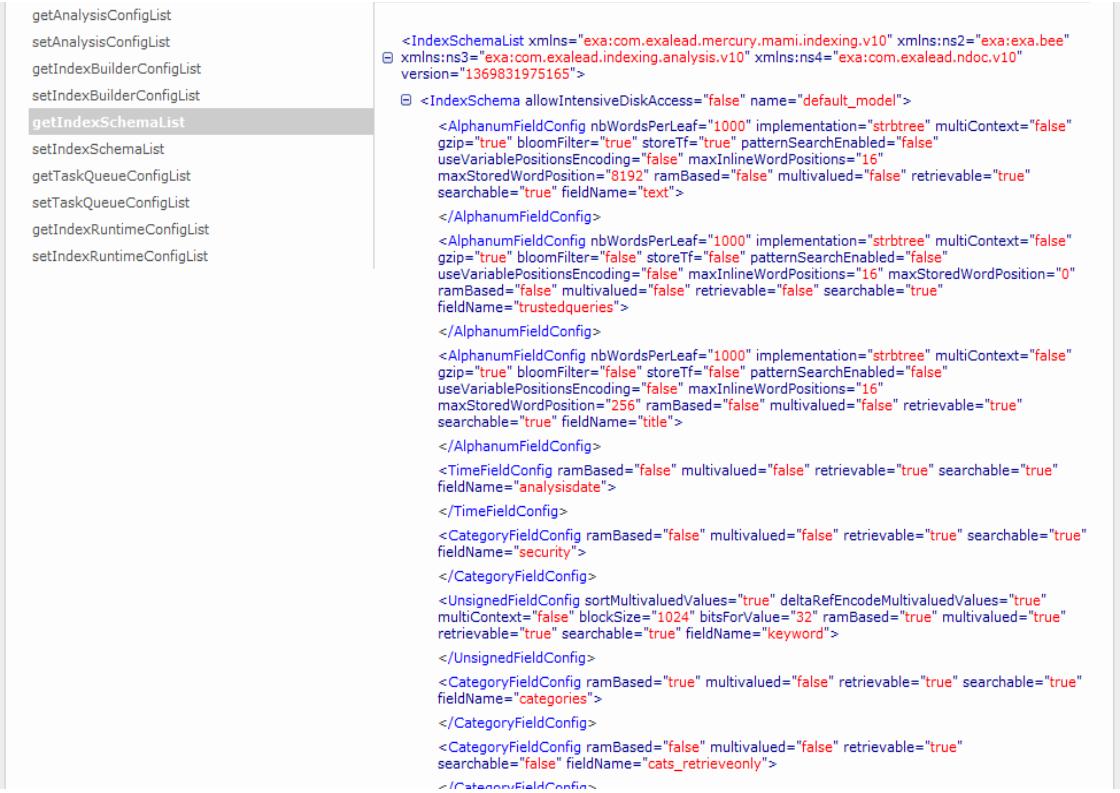

Figure 3. XML configuration of the property

The property can also be stored as a facet and a category will be created with the value of the property. Faceted navigation will automatically be created for this property. In that case, it is possible to search for the value of the property. If the property belongs to the default class, the property can be searched with a prefix format of *property:value field*. Otherwise, it can be searched with a prefix format of *classname_property:value*.

[20] Shahriar, M.S.; Anam, S., "Quality Data for Data Mining and Data Mining for Quality Data: A Constraint Based Approach in XML," Future Generation Communication and Networking Symposia, 2008. FGCNS '08. Second International Conference on , vol.2, no., pp.46,49, 13-15 Dec. 2008.

The property can be made searchable without prefix, which means in addition to the indexing determined by other options, the property is indexed as searchable in the field called text. This allows users to search this property without specifying a prefix in the query.

When storing a numerical property as a facet, only equality search is possible. Range search is only possible in a dedicated index field. On numerical properties with a dedicated index field, searchable with prefix includes searching using the range operators.

While the data model simplifies the set up of the most common features for index fields and category facets, sometimes the user may need to customize indexing or search behavior. You can customize elements generated by data model expansion. For example, the user can modify the default clipping options for the data model-generated facets on a facet-by-facet basis.

3. Conclusions

In this paper we analyzed several existing solutions used for search and analysis of large volumes of data, with applicability in the retail field. Assessment of retail prices and product reviews can be developed using a search engine, by using semantic processing, which provides relevant results to the search query in case of incomplete or inaccurate results.

In order to create a model for the price evaluation, we developed several connectors and a data model based on properties and patterns which are likely to provide innovative solutions to existing problems. An evaluation can be based on classification opinions and calculation of notes, depending on the positive or negative reviews of their number, etc. Accessing this information can be made either online or by importing and compiling various formats (database, XML file).

References

- Cassaigne, N., & Singh, M. G. (2001). “Intelligent decision support for the pricing of products and services in competitive consumer markets.” IEEE Transactions on Systems, Man and Cybernetics, Part C (Applications and Reviews), 31(1), 96–106. doi:10.1109/5326.923272
- A. Apostu, "Price conditions and price calculation in nowadays retail systems. Price knowledge extracted from Big Data," in Emerging Markets Queries in Finance and Business, 2014, unpublished.
- K. B. Monroe and A. Y. Lee, "Remembering versus knowing: issues in buyers’ processing of price information," Journal of the Academy of Marketing Science, vol. 27, no. 2, pp. 207-225, 1999.
- P. R. Dickson and A. G. Sawyer, "The price knowledge and search of supermarket shoppers," The Journal of Marketing, pp. 42-53, 1990.
- E. T. Anderson, E. K. Cho, B. A. Harlam and D. Simester, "Using Price Cues," MIT, Cambridge MA, 2007.
- G. Suciu, V. A. Poenaru, C. G. Cernat, G. Todoran and T. L. Militaru, "ERP and e-business application deployment in open source distributed cloud systems," in The 11th International Conference on Informatics in Economy (IE 2012), Bucharest, 2012.
- R. Eckstein, Interactive search processes in complex work situations: a retrieval framework (Vol. 10), University of Bamberg Press, 2011.
- G. Suciu, O. Fratu, S. Halunga, C. G. Cernat, V. A. Poenaru and V. Suciu, "Cloud Consulting: ERP and Communication Application Integration in Open Source Cloud Systems," in 19th Telecommunications Forum - TELFOR 2011, IEEE, Belgrade, 2011.
- W. Li, Y. Zhong, X. Wang and Y. Cao, "Resource virtualization and service selection in cloud logistics," Journal of Network and Computer Applications, vol.36, no.6, pp. 1696–1704, 2013.
- T. Seymour, D. Frantsvog and S. Kumar, "History of search engines," International Journal of Management & Information Systems (IJMIS), vol. 15, no. 4, pp. 47-58, 2011.
- S. C. Yeh, M. Y. Su, H. H. Chen and C. Y. Lin, "An Efficient and Secure Approach for a Cloud Collaborative Editing," of Network and Computer Applications, vol. 36, no. 6, p. 1632–1641, 2013.
- M. Balazinska, B. Howe and D. Suciu, "Data markets in the cloud: An opportunity for the database community," in Proc. of the VLDB Endowment, 2011.

- Ontopica GmbH, "Dito," [Online]. Available: http://www.ontopica.de. [Accessed March 2014].
- M. R. Berthold, N. Cebron, F. Dill, T. R. Gabriel, T. Kötter and T. Meinl, "KNIME-the Konstanz information miner: version 2.0 and beyond," SIGKDD Explorations Newsletter, vol. 11, no. 1, pp. 26-31, 2009.
- F. Jungermann, "Information extraction with rapidminer," in Proceedings of the GSCL Symposium'Sprachtechnologie und eHumanities, 2009.
- 3DS - Dassault Systèmes, "Exalead - Information Intelligence," [Online]. Available: http://www.exalead.com. [Accessed March 2014].
- G. Grefenstette and L. Wilber, "Search-based Applications: At the Confluence of Search and Database Technologies," in Synthesis Lectures on Information Concepts, Retrieval, and Services 2.1, 2010, pp. 1-141.
- Shen Bin; Liu Yuan; Wang Xiaoyi, "Research on data mining models for the internet of things," Image Analysis and Signal Processing (IASP), 2010 International Conference on , vol., no., pp.127,132, 9-11 April 2010
- Haesun Park; Van Huffel, S.; Elden, L., "Fast algorithms for exponential data modeling," Acoustics, Speech, and Signal Processing, 1994. ICASSP-94., 1994 IEEE International Conference on , vol.iv, no., pp.IV/25,IV/28 vol.4, 19-22 Apr 1994
- Shahriar, M.S.; Anam, S., "Quality Data for Data Mining and Data Mining for Quality Data: A Constraint Based Approach in XML," Future Generation Communication and Networking Symposia, 2008. FGCNS '08. Second International Conference on , vol.2, no., pp.46,49, 13-15 Dec. 2008

Table of Contents